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 REPLY BRIEF & RESPONSE BRIEF TO CROSS APPEAL

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I. REPLY ARGUMENT

A. Mr. Maziar's Decision To Proceed With An In Personam Maritime Claim Under The "Savings To Suitor's" Clause Entitled The State To A Jury Trial

1. State Procedural Law Applies In Cases Of Maritime Jurisdiction Filed In State Court

Mr. Maziar's brief asserts twenty-four times that "passengers general maritime claims are tried without a jury." Such reprise does not make it true. Mr. Maziar fails to acknowledge the distinction between maritime claims that are brought under federal admiralty jurisdiction in federal court, for which there is no right to jury trial, and maritime claims brought under the "savings to suitors" clause in state court, which are governed by state procedural rules. Under Washington's procedural rules, the parties in a lawsuit seeking damages on a theory of negligence are entitled, both by statute and under the Washington State Constitution, to a jury trial." *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 884, 224 P.3d 761, *cert. denied,* 130 S. Ct. 3482 (2010).

In *Maziar*, this Court clearly explained "Maziar's claim falls within maritime jurisdiction"[1] in its analysis of "Maritime vs. State Remedies." *Maziar v. State, Dept. of Corr.*, 151 Wn. App. 850, 854, 216

[1] This Court, in the explanation of general maritime law applying to Mr. Maziar's claims, cited cases where the parties had a right to a trial by jury—*Exxon* and *Edmonds*. *Maziar*, 151 Wn. App. at 854 n. 2.

P.3d 430 (2009). Further, this Court pointed out that "maritime jurisdiction does not necessarily exclude state law." *Maziar,* 151 Wn. App. at 855 (citing *Yamaha Motor Corp. v. Calhoun,* 516 U.S. 199, 206, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996)). The treatise the Court cites contains an applicable footnote that states, "[a]pplication of state procedural law does not adversely affect the characteristic features or uniformity of the general maritime law." *Maziar*, 151 Wn. App. at 854 (Robert Force, *Choice of Law in Admiralty Cases: "National Interests" & the Admiralty Clause*, 75 Tul. L.Rev. 1421 n. 152 (2001)).

The holdings in *Maziar* are entirely consistent with *Endicott.* Although, *Endicott* analyzed the right to a jury trial in a Jones Act Case, *Endicott's* analysis is instructive.[2] The court explained the "two-step approach" in determining "whether the Washington Constitution confers a right to a jury trial in a particular case of action . . . ." *Endicott,* 167 Wn.2d at 884 (citing Const. art. I, § 21; *Sofie v. Fibreboard Corp.,* 112 Wn.2d 636, 771 P.2d 711 (1989)). The conjunctive steps include determining "the scope of the jury trial right as it existed at the State Constitution's adoption in 1889. The second step is to determine the

[2] Interestingly, in *Endicott* the parties did not address whether a right to a jury trial exists in a general maritime case or in a case involving both general maritime claims and Jones Act claims. *Endicott*, 167 Wn.2d at 884 n. 3. However, the court explained, "Because the issue is not disputed we simply assume without deciding that the jury will resolve both claims on remand." *Id.*

causes of action to which the right attaches." *Endicott,* 167 Wn.2d at 884 (citing *Sofie,* 112 Wn.2d at 636). "As to the latter, the inquiry is not whether the specific cause of action existed in 1889, but rather whether the type of action is analogous to one available at that time." *Id.*

First, in 1889 the right to a jury trial applied in negligence cases which required the determination of damages. *Id.* The second step requires analyzing whether the type of action is analogous to one at the time of statehood. Specifically, "an action 'centered on negligence' is analogous to the 'basic tort theories' that existed when the constitution was adopted, and the constitutional jury trial right applies." *Endicott,* 167 Wn.2d at 884-85 (internal citations omitted). *Endicott* explicitly states that, "reported Washington case law reveals in personam negligence claims by seamen against shipmasters in 1899, and there is no indication that similar claims would not have been tried to a jury 10 years earlier." *Id.* at 885 (footnote and internal citations omitted). The *Endicott* court then held that the right to a jury trial exists pursuant to the Washington Constitution in a Jones Act case filed in state court. *Id.* The court reasoned that the "Jones Act is rooted in negligence and so fits within the jury trial right's 1889 purview." *Id.*

Here, under *Maziar,* this Court has already found Mr. Maziar's claim is one of maritime jurisdiction brought under the "savings to suitor"

clause. Respondent claims the "State mistakes Mr. Maziar's general maritime claim for a Jones Act claim." *Respondent's Br.* at 10-11 (footnote and internal citations omitted). Respondent's claim is wrong. The State is fully aware, as is this Court, that Mr. Mazair's claim is a maritime claim and not a Jones Act claim. Further, there is no dispute that Mr. Maziar is not a seaman and, therefore, would not be entitled to bring a Jones Act claim. The parties agree that Mr. Maziar is an employee with a negligence claim against his employer.

Mr. Maziar's in personam claim is clearly rooted in basic tort theories as a negligence claim. Consequently his choice to file in state court triggered state procedural laws. State procedural law allows a party to demand a jury trial. Respondent is correct in citing "the Seventh Amendment to the United State Constitution does not apply to civil cases in state courts" from *Bird*. *Respondent's Br.* at 13 (quoting *Bird v. Best Plumbing Group, LLC*, 175 Wn.2d 756, 768, 287 P.3d 551 (2012)). However, it is the Washington State Constitution's right to a trial by jury that controls in state court where Mr. Maziar's claim was filed. In this case, a jury demand was actually made by Mr. Maziar. CP at 12-13. Therefore, consistent with *Maziar*, *Endicott*, and the Washington State Constitution, the judgment should be reversed and the case remanded for a new trial before a jury.

2. Where Common Law Is Competent To Provide The Remedy It Shall Apply

The "savings to suitor" clause affords parties remedies under state law. The remedy at issue here is a right to a jury trial. It bears repeating from the opening brief that:

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

2 Am. Jur. 2d *Admiralty* § 217 (internal citations omitted).

In short, the right to a jury trial in state court is procedural and does not interfere with uniformity inherent in the application of maritime law.

Mr. Maziar primarily relies upon *Phelps* for the premise that there is no right to a jury trial in a passenger's general maritime claim. In *Phelps*, plaintiff chose to proceed in admiralty in 1877 in the Supreme Court of the Territory of Washington. In 1877, when Washington State existed as a territory, "[l]aw maritime and admiralty was in this Territory as a part of the law of the locality, when our Territorial government was erected, and was to be classed among the 'laws of the Territory,' as the same existed throughout the States of the Union, to be administered in the

federal courts, and classed among 'the laws of the United States.' " *Phelps v. The City of Panama*, 1 Wn. Terr. 518, 535-36 (1877). Filing an admiralty case in the Supreme Court of the Territory of Washington was akin to filing the case in federal court because state common law remedies did not exist and federal law controlled. Further, the plaintiff in *Phelps* brought his claim under the laws of the United States. *Phelps*, 1 Wn. Terr. at 529.

Here, Mr. Maziar chose to file his negligence claim under state law in state court via the "savings to suitor's" clause. Therefore, the parties are entitled to remedies under state law. The right to a trial by jury in our state predates statehood. In fact, in 1854 and 1869 the territorial statues Revised Code of Washington, chapters 4.40.060 and 4.44.090, provided issues and questions of fact shall be tried by a jury. The framers recognized the necessity of an orderly transition from territorial to state government. In Const. art. XXVII, § 2, they provided:

> All laws now in force in the Territory of Washington, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature[.]

Section 2 has been interpreted as giving special constitutional status to territorial statutes. *Gerberding v. Munro*, 134 Wn.2d 188, 208-09, 949 P.2d 1366 (1998). RCW 4.40.060 and 4.44.090 are territorial statutes

garnering special constitutional status. In summary, Washington State law entitles the right to a trial by jury pursuant to the state constitution, *Endicott*, and *Maziar*. Mr. Maziar's reliance on *Phelps* is misplaced.

The majority of the cases cited by Mr. Maziar are either admiralty cases brought under federal admiralty jurisdiction or federal statutory causes of action under the Longshore and Harbor Worker's Compensation Act (LHWCA). Federal procedural rules do not provide for a right to jury trial in these cases. However, that point is inapposite because this case is in state court and governed by state procedural rules, which include a right to trial by jury. The following chart lists the sixteen federal cases cited by Mr. Maziar to support the faulty premise that because there was no right to a jury trial in federal court there should be no right to a jury trial in state court.

Case	**Type of federal case**
Anuszewski v. Dynamic Mariners Corp., Panama (4th Cir.)	LHWCA case filed in federal court
Beiswenger Enterprises Corp. v. Carletta (11th Cir.)	Admiralty case filed in federal court
Buchanan v. Stanships, Inc. (5th Cir.)	Plead as a Jones Act case filed in federal court
Doughty v. Nebel Towing Co. (E.D. Louisana)	Admiralty case filed in federal court
Duty v. East Coast Tender Service Inc. (4th Cir.)	LHWCA case filed in federal court

Kermarec v. Compagnie Generale Transatlantique (2nd Cir.)	Admiralty case filed in federal court
The Laura Madsen (District Court, Western Division, Washington)	Admiralty case filed in federal court
Leathers v. Blessing (Circuit Court for the District Of Louisiana)	Admiralty case appealed in federal court
Monteleone v. Bahama Cruise Line, Inc. (2nd Cir.)	Admiralty case filed in federal court
Naglieri v. Bay (D.C. Conn.)	Maritime case filed in federal court
Panama Railroad Co. v. Johnson (District Court of the U.S. N.Y.)	Maritime case filed in federal court
Rainey v. Paquet Cruises, Inc. (2nd Cir.)	Maritime case filed in federal court
Riddle v. Exxon Transp. Co. (4th Cir.)	LHWCA case filed in federal court
United States v. La Vengeance (Circuit Court for the District of NY)	Admiralty case removed to federal
Ward v. Norfolk Shipbuilding and Drydock Corp. (United States District court, E.D. Virginia)	LHWCA case filed in federal court
Waring v. Clarke (Circuit Court for the District for E. Louisiana)	Admiralty case filed in federal court

It is without dispute that if this case was filed, in federal court, in admiralty, there would be no right a jury trial. That is not the case here. Here, Mr. Maziar filed in state court. He brought his in personam suit based upon general maritime law under the "savings to suitor's" clause which in turn triggered the state law remedy—a jury trial. The

Washington Constitution provides that the right of a trial by jury shall remain inviolate. Const. art. I, § 21. Therefore, the trial court erred when it struck the jury trial and this case should be reversed and remanded for a jury trial.

The remaining six state court cases Mr. Maziar cites for the proposition that there is no right to a jury trial are distinguishable because in each case either a statute explicitly states the matter shall be tried by the court or the law of equity provides the court with discretion whether to grant a jury trial. *State ex. rel. Goodner v. Speed,* 96 Wn.2d 838, 843, 640 P.2d 13, 16 (1982) (paternity statute requires case shall be tried by the court); *State ex. rel. Mullen v. Doherty,* 16 Wn. 382, 47 P. 958 (1897) (quo warranto statute requires case shall be tried by the court); *Bird,* 175 Wash.2d. at 756 (settlement agreement statute requires case shall be tried by the court); *Wheeler v. Ralph*, 4 Wn. 617, 30 P. 709 (1892) (foreclosure liens triable in equity provide the court with discretion whether to grant a jury trial); *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 617 P.2d 704 (1980) (breach of lease triable in equity provides the court with discretion whether to grant a jury trial); *Spokane Co-op. Min. Co. v. Pearson*, 28 Wn. 118, 68 P. 165 (1902) (default judgment rendered in a construction dispute is a suit in equity and provides the court with discretion whether to grant a jury trial).

Here, two statutes explicitly provide for a jury trial to determine damages and issues of fact. *See* RCW 4.40.060 and 4.44.090. These originally territorial statutes have remained in force and have not been materially altered or repealed by the legislature for over 150 years.

3. Department of Corrections Was Entitled To Have A Jury Determine Questions Of Fact, Credibility And Damages

Respondent's claim that the State has invited error by accepting the Findings of Fact without objection is incorrect. *Respondent's Br.* at 25. DOC specifically assigned error to the Findings of Fact 1-40. *Appellant's Br.* at 2. Respondent's Brief also erroneously contends the State cannot simply say all the Findings of Fact are in error. *Respondent's Br.* at 26. All of the Findings of Fact are a nullity because they were improperly rendered by a judge rather than a jury, as the constitution requires for an action centered on theories of negligence. *Endicott*, 167 Wn.2d at 884. This case should be remanded to comport with the Constitution in order for a jury to determine all questions of fact.

A jury is also necessary to determine the credibility of witnesses and to establish damages, if any. Here, a jury should decide the credibility of Mr. Maziar and the highly disputed claims of total physical disability in light of evidence of his extensive travel, strenuous activities, and physical labor. It is squarely within the jury's purview to determine the weight of

the evidence to decide whether Mr. Mazair was cheating the system by feigning serious injury.

II. RESTATEMENT OF ISSUES ON CROSS APPEAL

1. **Did the trial court properly deny prejudgment interest?**

2. **Did the trial court have sufficient evidence to find that Mr. Maziar failed to mitigate his wage loss based on Mr. Maziar rejecting the State's job offer?**

III. STANDARD OF REVIEW ON CROSS APPEAL

This Court in *Endicott* indicated that prejudgment interest is reviewed for abuse of discretion. *Endicott,* 167 Wn.2d at 886 (citing *Scoccolo Constr., Inc. v. City of Renton*, 158 Wn.2d 506, 519, 145 P.3d 371 (2006)).

Mr. Maziar also claims that failure to mitigate future wage loss is also governed by the *Endicott* analysis of prejudgment interest; however, that is incorrect. The correct standard of review is whether substantial evidence supports the trial court's findings of fact and conclusions of law. *Saviano v. Westport Amusements, Inc.* 144 Wn. App. 72, 78, 180 P.3d 874 (2008). Evidence is substantial if it is sufficient to persuade a fair-minded person that the declared premise is true. *Saviano,* 144 Wn. App. at 78.

IV. ASSIGNMENT OF ERROR ON CROSS APPEAL

A. The Trial Court Appropriately Denied Prejudgment Interest

B. The Trial Court Had Sufficient Evidence To Find That Mr. Maziar Failed To Mitigate His Wage Loss

V. ARGUMENT ON CROSS APPEAL

A. The Trial Court Appropriately Denied Prejudgment Interest

1. Relevant Facts The Trial Court Considered In Denying Prejudgment Interest

Mr. Maziar's recitation of this issue omits critical facts. Mr. Maziar failed to mention that the trial court held a hearing on June 15, 2012, regarding prejudgment interest prior to denying prejudgment interest on June 22, 2012.[3] *Report of Proceedings* (June 15, 2012) (hereinafter RP 6/15/12) at 26-31. Mr. Maziar also failed to include that the trial court considered briefing by each parties addressing prejudgment interest before denying an award of prejudgment interest. CP at 336-43.

At the June 15, 2012 hearing, the court considered the particular circumstances of Mr. Maziar's case that merit no award of prejudgment interest. RP 6/15/12 at 28-27. Those circumstances are: seven trial continuances, four judicial department reassignments, one appeal to this Court, and Plaintiff filing the lawsuit two years post incident. RP 6/15/12 at 28-29. Those circumstances amount to eight and half years from the

[3] The hearing Mr. Maziar refers to on June 22 occurred in 2012, and any reference to the year 2011 is a scrivener's error.

date of injury to the trial. RP 6/15/12 at 28-29. The State also argued how sovereign immunity is also a basis to deny prejudgment interest in a tort against the state. The court heard argument from both parties and indicated a need to revisit the issue. RP 6/15/12 at 31. Then the parties each filed briefs regarding their respective positions. CP at 336-43.

On June 22, 2012, the court heard the remainder of the argument regarding prejudgment interest and then ruled that no prejudgment interest will be granted in this case. RP (June 22, 2012) (hereinafter RP 6/22/12) at 11. The two hearings must be considered together because the trial court made its intention known by referring to the prior hearing when it stated, "[w]e are trying to finish up the findings of fact and conclusions of law, in addition the issue of prejudgment interest." RP 6/22/12 at 3. In summary, the court heard argument from both parties in two separate hearings, reviewed briefing by both parties, and then denied the request for prejudgment interest as it pertains to Mr. Maziar. This is contrary to Mr. Maziar's assertion that the court did not decide that Mr. Maziar should be not be awarded prejudgment interest.

2. The Trial Court Has Discretion Whether To Award Prejudgment Interest

Prejudgment interest may be awarded in general maritime claims. *Endicott,* 167 Wn.2d at 886 (citing *Marine Solution Serv.s, Inc. v. Horton*,

70 P.3d 393, 412 n. 88 (Alaska 2003); *Millstead v. Diamond M Offshore, Inc.*, 676 So.2d 89, 96-97 (La. 1996)). Although "prejudgment interest in maritime cases is substantive and so is controlled by federal law," whether the case is before a judge or a jury controls whether it is awarded. *Endicott*, 167 Wn.2d at 886 (citing *Militello v. Ann & Grace, Inc.*, 411 Mass. 22, 576 N.E.2d 675, 678 (1991)). The *Endicott* court reviewed outcomes from several other jurisdictions and explained:

> State courts, which hear suits only at law, have interpreted this dichotomy to mean the following: if the trial is to the jury, the case is analogous to a federal suit at law and prejudgment interest is unavailable. If tried to the bench, the case is analogous to a federal suit in admiralty and prejudgment interest may be awarded.

Endicott, 167 Wn.2d at 887 (internal citations omitted).

In *Endicott*, the court ultimately held that the "trial court did not abuse its discretion in awarding prejudgment interest to Endicott." *Id.* at 887. The court reasoned because the case was tried to the bench the trial court had discretion in making the award. *Id.*

Here, just like in *Endicott*, the bench trial of a general maritime claim filed in state court entitled the judge to use discretion in awarding prejudgment interest. In this case, the trial court heard two days of argument about the issue and reviewed briefing from each party. The

court then determined within its discretion to deny prejudgment interest in Mr. Maziar's case. That decision should be affirmed.

3. Prejudgment Interest Does Not Extend To Tort Claims Against The State Because The State Has Not Waived Sovereign Immunity For Prejudgment Interest

Prejudgment interest does not extend to tort claims against the State. *Norris v. State*, 46 Wn. App. 822, 733 P.2d 231 (1987). This maxim of law has been clear for the past twenty-five years when *Norris* was decided. In *Norris*, the court held that when the legislature enacted the post judgment interest statute (RCW 4.45.115), it had expressly waived sovereign immunity for post judgment interest on tort claims. *Norris,* 46 Wn. App. at 825. The court also held the State did not waive sovereign immunity from prejudgment interest on tort claims. *Id.* In *Norris*, the trial court denied prejudgment interest and this Court affirmed the trial court's denial of prejudgment interest. *Id.* at 824.

Further, even in cases involving mixed issues of federal admiralty law and state law claims, there is no prejudgment award on tort claims against the State. *Foster v. Dept. of Transp.*, 128 Wn. App. 275, 279, 115 P.3d 1029 (2005). In *Foster*, this Court reversed the trial court's award of prejudgment interest and ruled "the State has not waived sovereign immunity with respect to prejudgment interest, we remand with directions

to strike the prejudgment interest award." *Foster*, 128 Wn. App. at 280. This Court explicitly stated:

> In 1987, this court declined in *Norris v. State*, to extend *Architectural Woods'* reasoning to tort claims. We held that when the legislature enacted RCW 4.56.115, it had expressly waived sovereign immunity from *post* judgment interest on tort claims, while at the same time, by necessary implication, *not* waiving immunity from *pre* judgment interest on tort claims. Since 1987, the legislature has met many times without abrogating or altering *Norris.*

Id. at 279 (emphasis in original).

Endicott fine tuned when prejudgment interest is granted in "mixed" cases involving both Jones Act and other admiralty claims. *Endicott* held that "in a mixed Jones Act and general maritime suit, prejudgment interest is available on any damages awarded under the general maritime claim, even if apportioned between the Jones Act claims and the maritime claims." *Endicott*, 167 Wn.2d at 888-89. This holding and its analysis does not affect the analysis in *Foster* that the State has not waived sovereign immunity with respect to prejudgment interest. *Endicott* also indicated that prejudgment interest is granted "when a seaman prevails on his maritime claim of unseaworthiness . . . ." *Id.* at 887. Here, Mr. Maziar abandoned his claim of unseaworthiness at the onset of trial. CP at 118, 138-40.

Prejudgment interest does not extend to tort claims against the State because the State has not waived sovereign immunity for prejudgment interest. Therefore, the decision to deny Mr. Maziar prejudgment interest should be affirmed.

4. Federal Courts Also Possess The Discretion Whether To Award Prejudgment Interest

Just like Washington State courts possess the discretion whether to award prejudgment interest, so does the federal court. "The decision to grant prejudgment interest rests with the discretion of the trial court." *Vance v. American Hawaii Cruises, Inc.*, 789 F.2d 790 (1986) (citing *U.S. Dominator, Inc. v. Factory Ship Robert E. Resoff*, 768 F.2d 1099, 1106 (9th Cir. 1985)). The *Vance* court expressed the specific rule and rationale in awarding prejudgment interest in admiralty cases. "The rationale behind awarding prejudgment interest in admiralty cases is to compensate the wronged party for being deprived of the monetary value of the loss from the time of the loss to the payment of the judgment. *Vance*, 789 F.2d at 794 (internal citations omitted). The rationale is furthered by the specific nature of special damages because the time loss is "easily ascertainable." *Id.* Special damages include "lost earnings, hospital expenses, and the like." *Id.*

The court noted general damages are treated differently because pain and suffering are "not easily ascertainable," and instead, those damages may be compensated for by inclusion of some amount in the damage award itself. *Vance*, 789 F.2d (citing *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1300 n. 28 (9th Cir. 1984), *cert. denied,* 469 U.S. 1190, 105 S. Ct. 963, 83 L. Ed. 2d 968 (1985)). Although, the denial of prejudgment interest requires peculiar circumstances, in the federal context that analysis is irrelevant in Mr. Maziar's case for two reasons.

First, Mr. Maziar's case is not an admiralty case filed in federal court; so the *Vance* analysis does not apply. This Court has ruled Mr. Maziar's claim is a general maritime claim filed in state court under the "savings to suitor's" clause. *Maziar,* 151 Wn. App. at 850. Secondly, even if this federal analysis did apply, Mr. Maziar never established any special damages to which prejudgment interest could be awarded. CP at 140. Further, Mr. Maziar would not be able to establish any special damages because the Department of Labor and Industries paid for his wage loss and medical care. CP at 132, ¶ 14. In addition, the trial court found Mr. Maziar failed his duty to mitigate any lost wages. CP at 140, ¶ 51. This is just another reason that Mr. Maziar's reliance on federal case law is unpersuasive. In this case, the trial court possessed discretion

whether to award prejudgment interest and did so after a thorough review of arguments based on *Norris* and *Foster*.

B. The Trial Court Had Sufficient Evidence To Find That Mr. Maziar Failed To Mitigate His Wage Loss

1. Facts Regarding Mr. Maziar's Failure To Mitigate His Wage Loss

There is more to this story then Mr. Maziar's brief reveals. First, on direct, Mr. Maziar testified that his doctor "looked over the requirements, and decided that job did not meet the requirements of my capabilities." RP (October 18, 2011) (hereinafter RP 10/18/11) at 109. However, on cross-examination, he admitted that his doctor thought he could do the mail room job absent the need to take a ferry to McNeil Island. RP 10/18/11 at 109. The doctor testified that Mr. Maziar told him that passengers had to be seat belted to ride the ferry which could become problematic in rough seas. RP 10/18/11 at 110. Mr. Maziar, testified he never told his doctor about use of seat belts but he did tell his doctor about the rough seas. RP 10/18/11 at 52-53. There are no seat belts on the ferry to McNeil Island. Admitted Trial Exhibit 3A and 3I.

Also on direct, Mr. Maziar testified why he believed he could not perform the mailroom job duties stating because, "mail bags were 50 pounds, and virtually there was not actually anything to do. There was (sic) three ladies that worked there." RP 10/18/11 at 109. He

elaborated his baseless conclusion revealing he really did not know the job requirements when he testified, "Well, that means I would be lifting bags or just standing there, I don't know." RP 10/18/11 at 110. Then, on cross-examination, Mr. Maziar admitted he had no first hand knowledge of how much a mail bag weighs. RP (October 19, 2011) (hereinafter RP 10/19/11) at 53. Then brazenly Mr. Maziar responded to the question, "Leaving aside any concerns with the ferry, would you have taken that mailroom job?" with a single word answer, "No." RP 10/19/11 at 58.

2. Sufficient Evidence In The Record Supports The Trial Court's Decision That Mr. Maziar Failed To Mitigate His Wage Loss Damages

Mr. Maziar's argument is essentially that the trial court was too harsh in finding he failed his duty to mitigate his wage loss. Lost wages are not recoverable when plaintiff fails 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).

Here, the trial court found, "Plaintiff had a duty to mitigate his wage loss and other damages. Plaintiff did not mitigate his wage loss." CP at 385. The trial court considered testimony that Mr. Maziar was offered the mailroom job, he was physically capable of doing the mailroom job, and he refused to attempt the job. The trial court heard evidence that the doctor testified that Mr. Maziar told him seat belts were

required on the ferry and that was the only concern the doctor had about the job. The trial court reviewed pictures and heard testimony establishing there were no seat belts on the ferry.

Further, when the court asked Mr. Maziar why he did not take the mailroom job, he provided a laundry list of excuses, including its tedious nature, heavy lifting, and his perception of the lack of permanency. RP 10/19/11 at 58. These excuses were unsupported by any admissible facts. The evidence established Mr. Maziar was offered the job, he was qualified to perform the job, and he refused the job. The myriad of subsequent applications, trainings, and attempts Mr. Maziar made to seek other employment opportunities came too late. Mr. Maziar failed to mitigate his damages once he refused to take the mailroom job he was both offered and qualified to perform. The trial court's decision is supported by sufficient evidence because a fair minded person would conclude that refusing to attempt a job a person is qualified to perform amounts to failure to mitigate wage loss. Therefore, the trial court's decision should be affirmed.

VI. CONCLUSION

Mr. Maziar's claim is a negligence claim filed in state court where the Washington Constitution entitles the State to a jury trial. This analysis is supported by statutes enacted prior to statehood, this court's decision in

Maziar, and the State Supreme Court's decision in *Endicott*. Mr. Maziar's claim is not a federal claim filed in admiralty where no right to a jury trial is afforded. The cases Respondent cites are inapposite and unpersuasive. A jury is required to decide the issues of fact regarding the highly disputed injury and whether any damages should be awarded. This case should be remanded for a jury trial.

RESPECTFULLY SUBMITTED this 6th day of May, 2013.

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PROOF OF SERVICE

I, Amanda Trittin, hereby certify that on May 6, 2013, I caused to be served a copy of the following document:

APPELLANT'S REPLY BRIEF & RESPONSE BRIEF TO CROSS APPEAL

to the attorney for Respondent, as set forth below:

Attorney for Plaintiff:

Eric Dickmant
PO Box 66793
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[x] United States Mail
[ ] Hand Delivered by Legal Messenger
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[ ] Fax

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 6th day of May 2013, at Tumwater, Washington.

AMANDA TRITTIN