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No. 37431-5-II

STATE OF WASHINGTON
BY  DEPUTY

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

SCOTT WALTER MAZIAR,

Appellant / Plaintiff

v.

The STATE OF WASHINGTON and
the DEPARTMENT OF CORRECTIONS

Appellees / Defendants

APPELLANT'S OPENING BRIEF

Eric Dickman
WSBA # 14317
Attorney for Appellant

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

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Introduction

Appellant, Mr. Maziar, a prison guard at the McNeil Island penitentiary, was riding a ferry from McNeil Island to Steilacoom, Washington. The ferry was owned and operated by the appellees, Washington State Department of Corrections and the State of Washington. (Herein after State.) Mr. Maziar was seated on the upper deck almost asleep, when the ferry the captain, a department of corrections employee, knocked the chair out from Mr. Maziar's feet causing Mr. Maziar to fall to the deck. Mr. Maziar suffered serious injuries in the fall.

The parties agreed to facts to resolve the issues of whether the State of Washington had waived its sovereign immunity as to maritime torts under RCW 4.92.090 and whether the exclusive remedy provision of the Labor and Industries Act, RCW 51.04.010 barred Mr. Maziar's claims for relief under maritime law.

Mr. Maziar argued that: (1) the State waived its

sovereign immunity as to maritime claims under RCW 4.92.090; (2) the exclusive remedy provision of the Labor and Industries Act did not bar his maritime claims; (3) because of his right under maritime law, Mr. Maziar is statutorily excluded from the state workers' compensation scheme under RCW 51.12.100(1); (4) Mr. Maziar was engaged in an alternative commute mode commuting which excluded him from workers' compensation under RCW 51.08.013; (5) he was not working while he was injured; (6) his maritime claim could not be limited by state law; and (7) the assault was intentional excluding him from workers' compensation law under RCW 51.24.020. Additionally, Mr. Maziar argued that his acceptance of voluntary workers' compensation payments was not an "election" of remedies. (See CP pages 38-50)

Nevertheless, the Trial Court granted the State's motion for summary judgment saying:

I do not think that maritime law applies in this case. I think the policy behind workers'

compensation makes sense. That's what happened. He was in a – it is different on that ferry. There is no other way for him to get to work. So, while he was not actually paid, workers' compensation applies, in my opinion.

RP page 17.

The trial court's decision was in error and should be reversed.

Standard of Review

The standard of review for the grant of summary judgment is de novo.

In reviewing a summary judgment order, this court engages in the same inquiry as did the superior court. *Atherton Condo. Apartment-Owners Ass'n Bd. v. Blume Dev. Co.*, 115 Wn.2d 506, 515-16, 799 P.2d 250 (1990). Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' CR 56(c). The burden is on the moving party to establish its right to judgment as a matter of law, and facts and reasonable inferences from the facts are considered in favor of the nonmoving party. *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 452, 842 P.2d 956 (1993).

Goad v. Hambridge, 85 Wn. App. 98, 102, 931 P.2d 200
review denied 132 Wn.2d 1010, 940 P.2d 654 (1997).

In ruling on a motion for judgment as a matter of law, the trial court must view the evidence in the light most favorable to the nonmoving party. If there is any justifiable evidence from which reasonable minds might find for the nonmoving party, the issue must go to the jury.

Miller v. Artic Alaska Fisheries, 133 Wn.2d 250, 265, 944
P.2d 1005 (1997).

Assignment of Error

The trial court erred in granting the State's motion for summary judgment dismissing Mr. Maziar's complaint.

Issues Pertaining to Assignment of Error

- (1) Did the trial court commit reversible error when it ruled as a matter of law that the State had not waived its sovereign immunity as to Mr. Maziar's maritime claim under RCW 4.92.090?
- (2) Did the trial court commit reversible error when it ruled as a matter of law that the exclusive remedy provision of the Labor and

Industries Act, RCW 51.04.010, barred Mr. Maziar's maritime claims despite the following:

- (a) the workers' compensation act expressly excludes workers, like Mr. Maziar, "for whom a right ... exists under the maritime laws" - RCW 51.12.100(1);
- (b) the workers' compensation act expressly excludes workers like Mr. Maziar from coverage because he was using an "alternative commute mode" (riding a ferry) - RCW 51.08.013;
- (c) State workers' compensations laws cannot limit Mr. Maziar's recovery under federal maritime law;
- (d) Mr. Maziar was not working when he was injured; and
- (e) Mr. Maziar was injured by an intentional act - RCW 51.24.020?

Statement of the Case

At the trial level, for the purpose of the summary judgment motion that is at issue in this appeal, the parties agreed to most of the facts. See RP page 13.

The ferry to and from McNeil Island is open to the public. The public may ride the ferry if they are visiting anyone living on McNeil Island. CP page 31. Both inmates and non-inmates (the latter are typically prison workers and their families) live on McNeil Island. CP page 31. To visit either the inmates or the non-inmates the public rides the ferry to McNeil Island. CP page 31.

The ferry is operated by the Department of Corrections. CP page 31.

Mr. Maziar was employed as a correctional officer at McNeil Island Corrections Center (the State's prison).

On January 16, 2003, while leaving McNeil Island headed toward Steilacoom, Mr. Maziar was injured while he was a passenger on board the State's ferry. CP pages 26 and 30.

Before boarding the ferry Mr. Maziar completed his job as a prison guard at the state's prison on McNeil Island. As required in his collective bargaining agreement with the State, he clocked out before

leaving the prison grounds and was off work. CP at pages 30-31.

As Mr. Maziar left the prison grounds, he crossed a public street, which is not part of the prison, and headed to the ferry landing. He then boarded a ferry to go to Steilacoom. CP page 31.

Mr. Maziar was off work and not being paid at anytime after he left the prison. Additionally, He was free to change out of his uniform, something he was never allowed to do while working (on the clock). CP page 31.

Mr. Maziar was not paid as he walked across a public street headed toward the ferry landing. He was not paid as he waited for the public ferry. He was not paid when he boarded the ferry. CP page 31. Mr. Maziar was not paid during the crossings from McNeil Island to Steilacoom or from Steilacoom to McNeil Island. CP pages 31 and 34-37.

On January 16, 2003, while Mr. Maziar was resting on the ferry after the end of his work day, the captain of the ferry came by and kicked a chair out from Mr. Maziar's feet. Mr. Maziar fell to the deck. This caused serious permanent injuries that have kept Mr. Maziar off work since January of 2003. CP page 31

Mr. Maziar filed his complaint for maritime personal injuries on June 30, 2005. CP pages 1-7. Mr. Maziar continued to treat for sometime after the complaint was filed.

On January 14, 2008, the State filed a motion for summary judgment. The Order granting the State's motion was filed on February 22, 2008. CP pages 78-80. Mr. Maziar filed his Notice of Appeal of that Order on March 6, 2008. CP pages 81-85.

Argument

Mr. Maziar was injured when a chair he was resting his feet on was pulled out from under him. CP

pages 26 and 31. This event occurred on board a ferry, while the ferry was in navigable waters. Mr. Maziar suffered injuries due to the tortious actions of a member of the crew of the ferry. A passenger being injured by the actions of the crewmember makes this a maritime tort. *E.g. Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891 (11th Cir. 2004), *cert. denied* 546 U.S. 998; 126 S. Ct. 548; 163 L. Ed. 2d 499 (2005); *Zorotovich v. Washington Toll Bridge Authority*, 80 Wn.2d 106, 491 P.2d 1295 (1971); *Rambo v. Puget Sound Navigation Company*, 12 Wn.2d 637, 123 P.2d 355 (1942).

The trial court said, “I do not think this is a maritime case.” RP page 17. However, Mr. Maziar was injured over navigable waters. Meeting the situs requirement for maritime law.

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water.... 46 U.S.C. § 740.

Chan v. Society Expeditions, Inc., 39 F.3d 1398, 1403, n.6 (9th Cir. 1994)(applying RCW 51.12.100).

Mr. Maziar was injured by the tortious actions of the ferry captain. Injuries to passengers caused by the crew of a vessel are uniquely maritime. E.g. *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891 (11th Cir. 2004), *cert. denied* 546 U.S. 998; 126 S. Ct. 548; 163 L. Ed. 2d 499 (2005); *Zorotovich v. Washington Toll Bridge Authority*, 80 Wn.2d 106, 491 P.2d 1295 (1971); *Rambo v. Puget Sound Navigation Company*, 12 Wn.2d 637, 123 P.2d 355 (1942).

Maritime jurisdiction is appropriate when a potential hazard to maritime commerce arises out of an activity that bears a substantial relationship to traditional maritime activity. *Sisson v. Ruby*, 497 U.S. 358, 362, 110 S.Ct. 2892, 111 L.Ed.2d 292 (1989); *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 673, 102 S.Ct. 2654, 73 L.Ed.2d 2654 (1982).

Chan v. Society Expeditions, Inc., 39 F.3d at 1403, n.7.

When a member of the crew of a ferry causes a personal injury to a passenger, it is clearly a potential hazard to maritime commerce. The carriage of

passengers over water is the lifeblood of maritime commerce. Additionally, the carriage of passengers is an activity that bears a substantial relationship to a traditional maritime activity. In fact, the most basic maritime activity is the carriage of passengers and cargo over water.

As the accident occurred in the waters of Puget Sound, the substantive law to be applied is that which would have been applicable had the action been brought in the admiralty court. 28 U.S.C. § 1333, *Scudero v. Todd Shipyards Corp.*, 63 Wn.2d 46,385 P.2d 551 (1963). ... Under federal maritime law, no distinction between invitees and licensees is applied in personal injury actions. The applicable standard of care is set forth in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959):

We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case.

Zukowsky v. Brown, 79 Wn.2d 586, 590 n.1, 488 P.2d 269, 272 (1971)(a passenger injury claim).

In *New Jersey Steam-Boat Co. v. Brockett*, 121

U.S. 637, 7 S.Ct. 1039 L.Ed 1049 (1887), the rule of *respondent superior* in holding that misconduct or negligence of a carrier's servants while transacting the company's business, and when acting within the general scope of their employment, is of necessity to be imputed to the corporation was established for maritime cases.

In *New Orleans & N.E.R. Co. v. Jopes*, 142 U.S. 18, 12 S.Ct. 109, 35 L.Ed 919 (1891), a railroad case, the Supreme Court made clear that a passenger carrier is liable for an assault on a passenger by its employees irrespective whether the assault within the scope of employment:

[B]ut owing to the particular circumstances which surround the carrying of passengers, as stated, a more stringent rule of liability has been cast upon the employer; and he has been held liable although the assault was wanton and willful, and outside the scope of employment.

Id., 142 U.S. at 27.

So, whether the captain's actions were negligent or intentional the Department of Corrections and the

State are liable for the captain's actions.

Further, where the tortious conduct of the captain occurred on a vessel over navigable waters, there can be no doubt that Mr. Maziar has a right to bring a maritime claim against the Department of Corrections and the State. There can also be no doubt that admiralty jurisdiction attaches to this claim.

(1) The State waived its sovereign immunity as to Mr. Maziar's maritime claim under RCW 4.92.090;

Before the State can be sued for its, or its agent's, tortious conduct, the State must have waived its sovereign immunity. The State waived its sovereign immunity for this type of claim in 1961 when it enacted RCW 4.92.090.

RCW 4.92.090 is the State's general waiver of sovereign immunity for its tortious conduct. RCW 4.92.090 says:

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.

This is the broadest waiver of sovereign immunity for a state's tortious conduct adopted by any state.

Dolphine ODA v. State, 111 Wn. App. 79, 84, 44 P.3d 8, 11 (2002) *review denied*, 147 Wn.2d 1018, 56 P.3d 992 (2002)(quoting *Savage v. State*, 127 Wn.2d 434, 445, 899 P.2d 1270 (1995)).

Clearly, a private person or corporation can be sued for personal injuries to a passenger caused by the tortious conduct of a member of the crew of a vessel the person or corporation owns or operates. E.g. *Kermarec v. Compagnie Generale*, 358 U.S. 625, 629, 79 S.Ct. 406, 3 L.Ed.2d 550 (1958); *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891 (11th Cir. 2004), *cert. denied* 546 U.S. 998; 126 S. Ct. 548; 163 L. Ed. 2d 499 (2005); *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 203 (1st Cir. 1988). So, it follows that after the passage of RCW 4.92.090 in 1961 the State can be sued for injuries to a

passenger caused by the tortious actions of a member of the crew of a vessel it owns or operates.

[RCW 4.92.090] makes the State presumptively liable for its alleged tortious conduct "in all instances in which the Legislature has not indicated otherwise." *Savage v. State*, 127 Wn.2d at 445, 899 P.2d 1270.

Dolphine ODA v. State, 111 Wn. App. at 84 (emphasis in original).

Nowhere has the Legislature indicated that the State or the Department of Correction has immunity from maritime tort liability.

Clearly, a private person or corporation can be sued for passenger injuries that occur on board a vessel they own. *See Zukowsky v. Brown*, 79 Wn.2d 586, 488 P.2d 269, 272 (1971). So, it follows that since the passage of RCW 4.92.090 in 1961 the State can be sued for passenger injuries on the vessels it owns too.

After 1961 and the adoption of RCW 4.92.090, sovereign immunity would not bar Mr. Maziar's claim.

At the trial level, the State argued *Gross v. Washington State Ferries*, 59 Wn.2d 241, 367 P.2d 600 (1961), supported the claim that the Department of Corrections and State had not waived its sovereign immunity to be sued for its tortious conduct.

However, *Gross* is not dispositive of that issue. The court in *Gross* limited its discussion to the application of RCW 47.60.230, which only applies to claims against what is now the Washington State Department of Transportation.

RCW 47.60.230 does not apply to the facts of this case. It says:

Any consent to liability given under this act [RCW 47.60.200-270] shall create liability of the authority [now called the Department of Transportation] only and shall not create any general liability of the state.

RCW 47.60.200.

By its express terms RCW 47.60.230 does not apply to the Department of Corrections or the State of Washington.

RCW 47.60.230, which deals solely with the sovereign immunity of Department of Transportation, was enacted in 1951. However, in 1961 the State adopted RCW 4.92.090.

This statute [RCW 4.92.090] is "one of the broadest waivers of sovereign immunity in the country." *Savage v. State*, 127 Wn.2d 434, 444, 899 P.2d 1270 (1995). It makes the State presumptively liable for its alleged tortious conduct "in all instances in which the Legislature has not indicated otherwise." *Savage v. State*, 127 Wn.2d at 445, 899 P.2d 1270.

Dolphine ODA v. State, 111 Wn. App. at 84 (emphasis in original).

There is no legislation indicating the Department of Correction cannot be sued for a maritime tort. So, after 1961 and the enactment of RCW 4.92.090, sovereign immunity would not bar Mr. Maziar's claim.¹

Second, *Gross* addresses the failure to timely file a specialized claim form with the Department of Transportation that was a prerequisite to bringing a tort

¹ It is unclear if *Gross* was decided prior to the application of RCW 4.92.090 (both occurred in 1961). However, RCW 4.92.090 was not discussed anywhere in *Gross*.

claim against what is now the Department of Transportation. Mr. Maziar did not bring a tort claim against the Department of Transportation.

Mr. Maziar brought a tort claim against the Department of Corrections. He met all requirements to give notice to the State of a claim against the Department of Corrections. So, *Gross* is not dispositive of any issue in Mr. Maziar's claim.

(2) The exclusive remedy provision of the Labor and Industries Act, RCW 51.04.010, do not bar Mr. Maziar's maritime claims because:

(a) The workers' compensation act expressly excludes workers, like Mr. Maziar, "for whom a right ... exists under the maritime laws" - RCW 51.12.100(1).

Generally, a worker who accepts state workers' compensation benefits is barred from suing the employer in tort for the same injuries. *Abraham v. Department of Labor & Industries*, 178 Wash. 160, 34 P.2d 457 (1934); RCW 51.04.010. However, this bar is

not absolute. For example, this bar does not apply to a worker who has a right under federal maritime law.

Chan v. Society Expeditions, Inc., 39 F.3d 1398, 1402-03 (9th Cir. 1994)(applying RCW 51.12.100).²

RCW 51.12.100 says, in part,

Except as otherwise provided in this section, the provisions of this title shall not apply to a master or member of a crew of any vessel, or to employers and workers for whom a right or obligation exists under the maritime laws or federal employees' compensation act for personal injuries or death of such workers.

RCW 51.12.100(1)(emphasis added).

The statute continues:

In the event payments are made both under this title and under the maritime laws or federal employees' compensation act, such benefits paid under this title shall be repaid by the worker or beneficiary.

RCW 51.12.100(4).

In *Chan v. Society Expeditions, Inc.*, Mr. Chan was a shore-based worker for Society Expeditions. (He

² A Ninth Circuit Court of Appeals case is, of course, not binding authority on this Court. However, the analysis of RCW 51.12.100 contained in *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, is correct.

worked in the office and not on board ship.) He took a vacation on board one of Society Expeditions' vessels. While on board he was injured. At first, Society Expeditions paid Mr. Chan Washington State workers' compensation benefits. However, Mr. Chan later sued under federal maritime law for Society Expeditions' tortious conduct.

The Ninth Circuit explained:

The Washington Supreme Court has held that, under this statute [RCW 51.12.100], a worker who accepts workers compensation benefits may nonetheless sue for his injuries under federal maritime law. *Rhodes v. Department of Labor & Industries*, 103 Wn.2d 895, 700 P.2d 729, 731 (Wash. 1985); *see also Western Boat Building Co. O'Leary*, 198 F.2d 409, 411 (9th Cir. 1952)(holding that receipt of state workers' compensation benefits cannot bar a claimant's rights under federal maritime law). [RCW] 51.12.100(4) requires a worker to repay state benefits if the worker recovers under federal maritime law. *E.P. Paup Co. v. Director, Office of Workers' Compensation Programs*, 999 F.2d 1341, 1348 n.3 (9th Cir 1993).

Chan v. Society Expeditions, Inc., 39 F.3d at 1403.

The court continued:

Society Expeditions contends this statutory

exception does not apply to Benny Chan because he is not a seaman, longshoreman, or harbor worker. It also argues that [RCW] 51.12.100 applies only in the case of a conflict between federal and state *no-fault* compensations remedies. Society Expedition cites no authority to support these arguments. Nothing in the plain language of the statute limits the exception in any way. We decline to do so here.

Accordingly, we assume for the purposes of this case that because Benny Chan recovered under the workers' compensation system as a "worker," he remains a "worker" for purposes of [RCW] 51.12.100. We express no opinion whether he was injured in the scope of his employment, but the point is irrelevant on the narrow question in this case. Benny Chan has a federal maritime right to sue Society Expeditions and the operators of the vessel as a passenger, visitor, or vacationing employee on the WORLD DISCOVERER. Whether or not he is deemed to be an employee for some purposes, he still has a general claim in admiralty for negligence and adjudication of that claim is governed by federal common law. See *Kermarec v. Compagnie Generale*, 358 U.S. 625, 629, 79 S.Ct. 406, 3 L.Ed.2d 550 (1958); *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 203 (1st Cir. 1988).

Chan v. Society Expeditions, Inc., 39 F.3d at 1403

(emphasis in original)(footnotes omitted).

Like Mr. Chan, Mr. Maziar was a shore based worker, a prison guard, who was also either a

passenger, visitor, or other employee who was injured while on a ferry owned by his employer while the vessel was on navigable waters. Like Mr. Chan, “[w]hether or not he is deemed to be an employee for some purposes, he still has a general claim in admiralty for negligence and adjudication of that claim is governed by federal common law.” *Id.* As such, under the express language of RCW 51.12.100(1) the state workers’ compensation Act does not apply to Mr. Maziar’s claim against the Department of Corrections and the State:

[T]he provisions of this title shall not apply to ... workers for whom a right or obligation exists under the maritime laws

RCW 51.12.100(1)(emphasis added).

Mr. Maziar is asserting a general maritime tort claim. Therefore, Washington Workers’ Compensation Act expressly excludes Mr. Maziar from its coverage, because he is a worker for whom a right or obligation exists under the maritime laws.

- (b) the workers' compensation act expressly excludes workers like Mr. Maziar from coverage because he was using an "alternative commute mode" (riding a ferry) - RCW 51.08.013;**

The Washington Workers' Compensation Act contains a second provision that excludes Mr. Maziar from coverage under the Act. To be covered by the Act the employee must be acting in the course of employment.

RCW 51.08.013 defines what is and what is not "acting in the course of employment." RCW 51.08.013(3) expressly excludes Mr. Maziar's time spent going to or coming from the employer's place of business on the ferry from "acting in the course of employment," because going to or coming from the employer's place of business on a ferry is an "alternative commute mode."

(1) "Acting in the course of employment" means the worker acting at his or her employer's direction or in the furtherance of his or her

employer's business which shall include time spent going to and from work on the jobsite, as defined in RCW 51.32.015 and 51.36.040, insofar as such time is immediate to the actual time that the worker is engaged in the work process in areas controlled by his or her employer, except parking area. It is not necessary that at the time an injury is sustained by a worker he or she is doing the work on which his or her compensation is based or that the event is within the time limits on which industrial insurance or medical aid premiums or assessments are paid.

(2) "Acting in the course of employment" does not include:

(a) Time spent going to or coming from the employer's place of business in an alternative commute mode, notwithstanding that the employer (i) paid directly or indirectly, in whole or in part, the cost of a fare, pass, or other expense associated with the alternative commute mode; ... or (iii) otherwise participated in the provision of the alternative commute mode.

...

(3) "Alternative commute mode" means ... (b) a ... ferry,....

RCW 51.08.013.

Mr. Maziar was riding on a ferry when he was injured due to the tortious acts of an employee of the Department of Corrections. CP 26, 30-31. RCW

51.08.013(3)(b) defines an alternative commute mode to include riding a “ferry.”

Mr. Maziar suffered an injury while going to or from his employer’s place of business on a ferry. So, he was in alternative commute mode, and not in the course of employment. Therefore, he is expressly not covered by the state’s Workers’ Compensation Act.

However, the trial court said:

[Mr. Maziar] was in a – it is different on that ferry. There’s no other way for him to get to work.

RP at page 17.

RCW 51.08.013(2) excludes going to or coming from the employer's place of business in an alternative commute mode from "[a]cting in the course of employment," hence from coverage under the Workers’ Compensation Act. RCW 51.08.013(3)(b) defines "Alternative commute mode" to include riding on a ferry. There is no exception to the exclusion from coverage if “[t]here’s no other way for him to get to work.”

It would appear that most times an employee

rides a ferry to and from the employer's place of business, there would be no other way to get to work. However, whether there is another way to get to and from the employers' place of business is not a matter of concern under the statute. The statute is not limited to only situations where there are multiple means to get to and from the employers place of business.

The court should not insert exceptions into RCW 51.08.013 that the Legislature did not create. The court should be bound by the plain reading the statute as enacted by the Legislature.

Additionally, the fact that the Department of Corrections owned and crewed the ferry does not change the fact it was an alternative commute mode. RCW 51.08.013 says that the “[t]ime spent going to or coming from the employer's place of business in an alternative commute mode” is excluded from “acting in the course of employment:”

notwithstanding that the employer (i) paid directly or indirectly, in whole or in part, the cost of a fare,

pass, or other expense associated with the alternative commute mode; ... or (iii) otherwise participated in the provision of the alternative commute mode.

RCW 51.08.013(2)(a).

The plain reading of this statute covers where an employer, like the Department of Corrections, pays directly or indirectly the cost of a fare or other expenses associated with the ferry, or otherwise participated in the provision of the alternative commute mode. This language is more than broad enough to cover the Department of Corrections providing a ferry for Mr. Maziar to go to or come from his job on McNeil Island.

Additionally, anyone can ride the ferry to McNeil Island that Mr. Maziar was injured on. By using the ferry, the public can visit both inmates and non-inmates who live on island. CP page 31.

Therefore, the plain reading of RCW 51.08.013 excludes Mr. Maziar's claim arising from the injuries he suffered on board the ferry going to and from McNeil

Island from coverage under the Workers' Compensation Act.

(c) State workers' compensation laws cannot limit Mr. Maziar's recovery under federal maritime law.

Because Mr. Maziar is asserting a claim under federal maritime law, even if he was covered by the states' workers' compensation scheme, which he is not, he could still pursue his federal maritime claims. See *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1403 (9th Cir. 1994). The Washington Supreme Court has said:

The maritime law being part of the law of the United States, the legislature of a state has no power to modify or abrogate it. *Workman v. New York City*, 179 U.S. 552[, 179 U.S. 552, 21 S.Ct. 212, 45 L.Ed. 314 (1900)]. It follows, therefore, that the legislature in passing the [worker's] compensation act could not take away from a workman any right which he had under the maritime law of the United States.

State v. Daggett, 87 Wash. 253, 257, 151 P. 648

(1915)(emphasis added). This case is old case, but it

has never been overruled.

The Alaska Supreme Court explained this jurisdictional issue concisely:

“While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretive decisions of this Court.” [*Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406] 409-10 [74 S.Ct. 202, 98 L.Ed 143 (1953)(footnote omitted)]. To hold otherwise would undermine the uniformity of maritime law “which the [Federal] Constitution has placed under national purview to control in ‘its substantial as well as procedural features.’” *Id.* at 409 (quoting *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 378, 44 S.Ct. 391, 68 L.Ed 748 (1924)). These precedents compel the conclusion that the exclusive remedy provisions of the Alaska Workers’ Compensation Act cannot deprive [plaintiff] of his federal Jones Act claim against the state.

State of Alaska v. Brown, 794 P.2d 108, 110-11 (Alaska 1990)(worker allowed to pursue both statutory and common law maritime claims after receiving state workers’ compensation benefits).

As the Ninth Circuit Court of Appeals explains it:

Accordingly, we assume for the purposes of this case that because Benny Chan recovered under the workers’ compensation system as a “worker,”

he remains a “worker” for purposes of section 51.12.100. ... Benny Chan has a federal maritime right to sue Society Expeditions and the operators of the vessel as a passenger, visitor, or vacationing employee on the WORLD DISCOVERER. Whether or not he is deemed to be an employee for some purposes, he still has a general claim in admiralty for negligence and adjudication of that claim is governed by federal common law. See *Kermarec v. Compagnie Generale*, 358 U.S. 625, 629, 79 S.Ct. 406, 3 L.Ed.2d 550 (1958); *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 203 (1st Cir. 1988).

Chan v. Society Expeditions, Inc., 39 F.3d at 1403
(footnotes omitted).

When the State Legislature enacted the States’ workers’ compensation scheme, it had no power to modify or abrogate the right of a person injured on board a vessel, including a ferry, from asserting a maritime claim for personal injury.

[T]he legislature in passing the [worker’s] compensation act could not take away from a workman any right which he had under the maritime law of the United States.

State v. Daggett, 87 Wash. 253, 257, 151 P. 648 (1915).

So, even if RCW 51.12.100 and 51.08.013 did not exclude Mr. Maziar from coverage under the state’s

workers' compensation scheme, the Legislature when passing the state's Workers' Compensation Act could not take away any right from a claimant to assert his or her claims under the maritime law of the United States. *See State v. Daggett*, supra. To allow state law to strip Mr. Maziar of his federal maritime claims would deprive Mr. Maziar of his "substantive maritime rights, and undermine the uniformity of maritime law." *Pope & Talbot, Inc. v. Hawn*, supra.

(d) Mr. Maziar was not working when he was injured.

To be covered by the state's workers' compensation scheme, Mr. Maziar had to be acting within the course of his employment.

"Acting in the course of employment" means the worker acting at his or her employer's direction or in the furtherance of his or her employer's business which shall include time spent going to and from work on the jobsite, as defined in RCW 51.32.015 and 51.36.040, insofar as such time is immediate to the actual time that the worker is engaged in the work process in areas controlled by his or her employer, except parking area. It is

not necessary that at the time an injury is sustained by a worker he or she is doing the work on which his or her compensation is based or that the event is within the time limits on which industrial insurance or medical aid premiums or assessments are paid.

RCW 51.08.013(1).

Mr. Maziar's workday ended while he was still in the prison. At the end of his shift he clocked out and left his employer's property. CP pages 30-31. He crossed a public road used by the (non-prisoner) residents of McNeil Island. CP page 31. He went to the ferry dock. He had left the area controlled by his employer and boarded a public ferry. CP pages 30-31.

Mr. Maziar's claim does not fall within RCW 51.32.015 or RCW 51.36.040, as he was not at lunch. He had finished his work-day and was off-work.

Mr. Maziar was no longer being paid. CP page 31. He was not paid once he left the prison. He was not paid when he crossed the public roadway outside the prison walls. He was not paid while he waited for the ferry. He was not paid while he was on the ferry.

Pursuant to his union contract, he was off the clock. CP pages 31 and 34-37. So, he was no longer acting within the course of employment as the term is used in RCW 51.08.013. To hold otherwise would mean that those employees who work at the prison and live on McNeil Island are always acting within the course of their employment while on the island, in that they had not left the island. Mr. Maziar was not acting in the course of his employment when he was on the ferry. So, Mr. Maziar should be allowed to bring his maritime claims against the State.

(e) Mr. Maziar was injured by an intentional act - RCW 51.24.020.

In the case of an intentional tort, Washington workers' compensation laws allow the injured worker to recover both workers' compensation benefits and to bring a claim against the employer.

If injury results to a worker from the deliberate intention of his or her employer to produce such injury, the worker or beneficiary of the worker

shall have the privilege to take under this title and also have cause of action against the employer as if this title had not been enacted, for any damages in excess of compensation and benefits paid or payable under this title.

RCW 51.24.020.

RCW 51.24.020 includes cases of assault and battery. *Birklid v. Boeing Company*, 127 Wn.2d 853, 862, 127 P.2d 278, 284 (1995).

We find it unreasonable to interpret the statute[, RCW 51.24.020,] to allow recovery for intentional torts caused by employers but to disallow actions by co-workers. No basis exists for such distinction.

Further, allowing suit for co-employee's intentional torts is not inconsistent with the policy expressed in RCW 51.04.010: to remove from the courts costly, uncertain and time-consuming employer-employee suits. The Legislature intended that different factors predominate when the employer commits an intentional tort. Those are compensation and deterrence. See RCW 51.24.020.

Newby v. Gerry, 38 Wn. App. 812, 819, 690 P.2d 603, 607 (1984).

Mr. Maziar brought a claim for the intentional tort that occurred when the captain kicked the chair out

from Mr. Maziar's feet. Under maritime law the State is vicariously liable for assaults committed by its employees on passengers. *Mortin v. Joaquin Martins De Oliveira*, 984 F.2d 289 (9th Cir. 1993) *cert. denied*, 510 U.S. 907, 114 S. Ct. 289, 126 L. Ed. 2d 238 (1993).

Therefore, Mr. Maziar should be allowed to bring his claim against the Department of Corrections and the State.

MR. MAZIAR DID NOT "ELECT" A REMEDY

In the trial court, the State argued that by accepting workers' compensation benefits, Mr. Maziar had "elected" a remedy. The trial court did not address this issue, but because it was raised below, and the State may try to raise it again here, Mr. Maziar will address the issue and demonstrate why the State's argument fails.

As the Ninth Circuit Court of Appeals explained:

Accordingly, we assume for the purposes of this case that because Benny Chan recovered under

the workers' compensation system as a "worker," he remains a "worker" for purposes of section 51.12.100. We express no opinion whether he was injured in the scope of his employment, but the point is irrelevant on the narrow question in this case. Benny Chan has a federal maritime right to sue Society Expeditions and the operators of the vessel as a passenger, visitor, or vacationing employee on the WORLD DISCOVERER. Whether or not he is deemed to be an employee for some purposes, he still has a general claim in admiralty for negligence and adjudication of that claim is governed by federal common law. See *Kermarec v. Compagnie Generale*, 358 U.S. 625, 629, 79 S.Ct. 406, 3 L.Ed.2d 550 (1958); *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 203 (1st Cir. 1988).

Chan v. Society Expeditions, Inc., 39 F.3d 1398, 1403 (9th Cir. 1994) (footnotes omitted).

Despite having collected state workers' compensation benefits, Mr. Chan was allowed to bring his maritime claims against his employer. The same should be true for Mr. Maziar.

The Washington Supreme Court has also held that a worker who accepts state workers' compensation benefits may nonetheless sue for his injuries under federal maritime law. *Rhodes v. Department of Labor &*

Industries, 103 Wn.2d 895, 700 P.2d 729, 731 (Wash. 1985)(federal claim under the Longshore and Harbor Workers' Compensation Act); *see also Western Boat Building Co. O'Leary*, 198 F.2d 409, 411 (9th Cir. 1952)(holding that receipt of state workers' compensation benefits cannot bar a claimant's rights under federal maritime law).

In the trial court, the State argued *Garrisey v. Westshore Marina Associates*, 2 Wn. App. 718, 469 P.2d 590 (1970) stands for the proposition that a worker may elect to accept workers' compensation and thereby be barred from maritime remedies. That is not the law. It is just the opposite. A worker may collect workers' compensation and still file for maritime benefits. *Rhodes v. Department of Labor & Industries*, 103 Wn.2d 895, 700 P.2d 729, 731 (1985); *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1403 (9th Cir. 1994).

Garrisey was a case about the "local concern" doctrine. The *Garrisey* court found that a raft being

used to move timber a short distance from a dock to a marina structure under construction was not connected to navigation so there was no maritime jurisdiction.

Garrisey did not reach the question of an election of remedies in a truly maritime setting.

Mr. Maziar was a passenger on ferry that sailed Puget Sound. His claims involve the very essence of maritime law. The “local concern” doctrine does not apply. So, *Garrisey* does not apply.

Additionally, there was never an adjudication of Mr. Maziar’s right to workers’ compensation benefits. So, there is no estoppel.

Finally, RCW 51.12.100(4) provides:

[I]n the event payments are made both under this title and under the maritime laws ..., such benefits paid under this title shall be repaid by the worker or beneficiary.

If the acceptance of workers’ compensation benefits constituted an election of remedies, this statute would be meaningless. However, the existence of RCW 52.12.100(4) is proof the Legislature intended that a

person could collect workers' compensation benefits and then recover under maritime law. However, the person cannot receive a double recovery. They must repay the benefits paid under the state workers' compensation law.

If the State's argument was the law, which it is not, then by filing a workers' compensation claim of anyone it injured, an employer could defeat every maritime claim. This would surely undermine the uniformity of maritime law. That is unacceptable. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409-10, 74 S.Ct. 202, 98 L.Ed 143 (1953)(quoting *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 378, 44 S.Ct. 391, 68 L.Ed 748 (1924)).

Mr. Maziar has not elected his remedies, and he should be allowed to pursue his maritime remedies.

CONCLUSION

Mr. Maziar was injured by the tortious conduct of an employee of the Department of Corrections. Mr.

Maziar was on a ferry going from his employer's place of business when the tortious conduct occurred. Mr. Maziar asserts a maritime claim against the Department of Corrections and the State of Washington. The State waived its sovereign immunity to Mr. Maziar's claim when it enacted RCW 4.92.090.

Mr. Maziar was paid workers' compensation benefits. However, RCW 51.12.100, 51.08.013 and 51.24.020 each exclude Mr. Maziar's claims from the state workers' compensation scheme. Additionally, because Mr. Maziar is asserting a maritime claim, the state legislature did not have the authority to limit Mr. Maziar's maritime claim through the state workers' compensation law. Finally, Mr. Maziar was not working at the time he was injured on board the ferry, so his claim is not covered by the state's workers' compensation scheme.

The trial court erred when it did not apply maritime law to Mr. Maziar's claim, and when it did not

apply RCW 51.12.100, 51.08.013 and 51.24.020, as written. The trial court also erred when it found the state workers' compensation law could limit Mr. Maziar's federal maritime rights, and that Mr. Maziar was working at the time of his injury.

Mr. Maziar has a maritime tort claim arising out the tortious conduct of the captain of a ferry operated by the Department of corrections. Mr. Maziar has suffered severe and permanent injuries, which have kept him from working since 2003. Under the laws of the State of Washington and federal law, Mr. Maziar should be allowed to bring his maritime claim.

Therefore, Mr. Maziar respectfully requests that the Order Granting Defendant's Motion for Summary Judgment, CP 78-80, and the judgment dismissing this case be reversed and this matter be remanded for

additional proceedings.

DATED this 5 day of August 2008.

A handwritten signature in black ink, appearing to read "Eric Dickman", written over a horizontal line.

Eric Dickman, LLC,
attorney for appellant Mr. Scott Maziar
Alaska Bar Number 9406019
Oregon Bar Number 02194
Washington Bar Number 14317
Also admitted in New York

APPENDIX

Text of statutes cited in Appellant's opening brief:

RCW 4.92.090(2):

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.

RCW 47.60.200:

Any consent to liability given under the provisions of this chapter creates liability of the department only and does not create any general liability of the state.

RCW 47.60.230:

In case of property loss or damage or personal injuries or death resulting from the operation of any ferry or terminal by the department, any person or the personal representative of any person, subject to and to the extent hereinafter provided, has a right of action against the department for the damage, loss, injury, or death.

RCW 51.04.010:

The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial

conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.

RCW 51.08.013(1):

"Acting in the course of employment" means the worker acting at his or her employer's direction or in the furtherance of his or her employer's business which shall include time spent going to and from work on the jobsite, as defined in RCW 51.32.015 and 51.36.040, insofar as such time is immediate to the actual time that the worker is engaged in the work process in areas controlled by his or her employer, except parking area. It is not necessary that at the time an injury is

sustained by a worker he or she is doing the work on which his or her compensation is based or that the event is within the time limits on which industrial insurance or medical aid premiums or assessments are paid.

RCW 51.08.013(2)(a):

"Acting in the course of employment" does not include:

(a) Time spent going to or coming from the employer's place of business in an alternative commute mode, notwithstanding that the employer (i) paid directly or indirectly, in whole or in part, the cost of a fare, pass, or other expense associated with the alternative commute mode; (ii) promoted and encouraged employee use of one or more alternative commute modes; or (iii) otherwise participated in the provision of the alternative commute mode.

RCW 51.08.013(3):

"Alternative commute mode" means (a) a carpool or vanpool arrangement whereby a group of at least two but not more than fifteen persons including passengers and driver, is transported between their places of abode or termini near those places, and their places of employment or educational or other institutions, where the driver is also on the way to or from his or her place of employment or educational or other institution; (b) a bus, ferry, or other public transportation service;

or (c) a nonmotorized means of commuting such as bicycling or walking.

RCW 51.12.100(1):

Except as otherwise provided in this section, the provisions of this title shall not apply to a master or member of a crew of any vessel, or to employers and workers for whom a right or obligation exists under the maritime laws or federal employees' compensation act for personal injuries or death of such workers.

RCW 51.12.100(4):

In the event payments are made both under this title and under the maritime laws or federal employees' compensation act, such benefits paid under this title shall be repaid by the worker or beneficiary. For any claims made under the Jones Act, the employer is deemed a third party, and the injured worker's cause of action is subject to RCW 51.24.030 through 51.24.120.

RCW 51.24.020:

If injury results to a worker from the deliberate intention of his or her employer to produce such injury, the worker or beneficiary of the worker shall have the privilege to take under this title and also have cause of action against the employer as if this title had not been enacted, for any damages in excess of compensation and benefits paid or payable under this title.

RCW 51.32.015:

The benefits of Title 51 RCW shall be provided to each worker receiving an injury, as defined therein, during the course of his or her employment and also during his or her lunch period as established by the employer while on the jobsite. The jobsite shall consist of the premises as are occupied, used or contracted for by the employer for the business or work process in which the employer is then engaged: PROVIDED, That if a worker by reason of his or her employment leaves such jobsite under the direction, control or request of the employer and if such worker is injured during his or her lunch period while so away from the jobsite, the worker shall receive the benefits as provided herein: AND PROVIDED FURTHER, That the employer need not consider the lunch period in his or her payroll for the purpose of reporting to the department unless the worker is actually paid for such period of time.

RCW 51.36.040:

The benefits of Title 51 RCW shall be provided to each worker receiving an injury, as defined therein, during the course of his or her employment and also during his or her lunch period as established by the employer while on the jobsite. The jobsite shall consist of the premises as are occupied, used or contracted for by the employer for the business of work process in which the employer is then engaged: PROVIDED, That if a worker by reason of his or her employment leaves such jobsite under the

direction, control or request of the employer and if such worker is injured during his or her lunch period while so away from the jobsite, the worker shall receive the benefits as provided herein: AND PROVIDED FURTHER, That the employer need not consider the lunch period in worker hours for the purpose of reporting to the department unless the worker is actually paid for such period of time.

Text of federal statues cited in Appellant's opening brief:

28 U.S.C. § 1333:

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.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

46 U.S.C. § 740:

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

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STATE OF WASHINGTON

BY _____
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PROOF OF SERVICE

CERTIFICATE OF DELIVERY

I, the undersigned, certify under the penalty of perjury in the State of Washington that on the 6 day of August 2008, I had a copy of this document mailed to the attorney of record for the appellee/defendant, first class postage pre-paid to:

Mr. John C. Dittman
Assistant Attorney General
Torts Division
7141 Clearwater Drive S.W.
P.O. Box 40126
Olympia, Washington 98504-0126



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