

TABLE OF CONTENTS

Table of Cases.....	iii
Table of Statutes.....	vi
Table of Federal Statutes.....	vii
Introduction.....	1
The State’s Restatement of the Case.....	3
The State’s Summary of its Argument.....	3
Argument.....	4
1. RCW 51.04.010 Does <u>Not</u> Apply.....	4
2. Mr. Maziar’s Job Status and His Form of Transportation Removes Him from Coverage Under Workers’ Compensation Laws.....	11
3. Federal Maritime Law Preempts Washington State Law.....	16
4. The State Waived Sovereign Immunity for Maritime Tort Claims.....	19
Conclusion.....	23

Table of cases:

Carey v. Bahama Cruise Lines, 864 F.2d 201
(1st Cir. 1988)..... 7

Chan v. Society Expeditions, Inc.,
39 F.3d 1398 (9th Cir. 1994)..... 5, 7, 8, 9, 10,
17, 19

Cochran v. Nelson, 26 Wn.2d 82,
173 P.2d 769 (1946)..... 10

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)..... 5

Dolphine ODA v. State, 111 Wn.App. 79,
44 P.3d 8, 11 (2002) *review denied*,
147 Wn.2d 1018, 56 P.3d 992 (2002)..... 19

*E.P. Paup Co. v. Director, Office of
Workers' Compensation Programs*,
999 F.2d 1341 (9th Cir 1993)..... 8

*Garrisey v. Westshore Marina
Associates*, 2 Wn. App. 718,
469 P.2d 590 (1970)..... 17, 18

Gross v. Washington State Ferries,
59 Wn.2d 241, 367 P.2d 600 (1961)..... 19, 20

Gutierrez v. Waterman S.S. Corp.,
373 U.S. 206, 83 S.Ct. 1185, 10 L.Ed.2d 297,
rehearing denied 374 U.S. 858,
83 S.Ct. 1863, 10 L.Ed.2d 1082..... 8

*Kermarec v. Compagnie Generale
Transatlantique*, 358 U.S. 625, 79 S.Ct. 406,
3 L.Ed.2d 550 (1959)..... 1, 7

Miller v. Artic Alaska Fisheries, 133
Wn.2d 250, 944 P.2d 1005 (1997)..... 3

<i>Offshore Logistics, Inc. v. Tallentire</i> , 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986).....	1, 16
<i>Oltman v. Holland America Line USA</i> , 163 Wn.2d 236, 178 P.3d 981 (2008).....	1, 16, 19
<i>Rambo v. Puget Sound Navigation Company</i> , 12 Wn.2d 637, 123 P.2d 355 (1942).....	5
<i>Sandona v. City of Cle Elum</i> , 37 Wn.2d 831, 226 P.2d 889 (1951).....	10
<i>Savage v. State</i> , 127 Wn.2d 434, 899 P.2d 1270 (1995).....	19
<i>State v. Ashby</i> , 141 Wn.App. 549, 170 P.3d 596 (2007).....	10
<i>State v. Fisher</i> , 139 Wn.App. 578, 161 P.3d 1054 (2007).....	2
<i>State v. Houck</i> , 32 Wn.2d 681, 203 P.2d 693 (1949).....	10
<i>State v. Keller</i> , 143 Wn.2d 267, 19 P.3d 1030 (2001).....	2, 10
<i>Zorotovich v. Washington Toll Bridge Authority</i> , 80 Wn.2d 106, 491 P.2d 1295 (1971).....	4
<i>Zukowsky v. Brown</i> , 79 Wn.2d 586, 488 P.2d 269, 272 (1971).....	5

Table of statutes:

RCW 4.92.090.....	2, 5, 20, 21, 22, 23
RCW 47.60.....	20, 21, 22
RCW 47.60.200.....	21

RCW 47.60.210.....	20, 21
RCW 47.60.230.....	21
RCW 47.60.260.....	20
RCW 51.04.010.....	5
RCW 51.08.013.....	11, 15, 16, 23, 24
RCW 51.08.013(1).....	11
RCW 51.08.013(2).....	13
RCW 51.08.013(2)(a).....	15
RCW 51.08.013(3).....	2, 12, 13
RCW 51.12.100.....	4, 16, 23, 24
RCW 51.12.100(1).....	2, 4, 5, 6, 8, 9, 10, 11, 16
RCW 51.12.100(4).....	8
RCW 51.24.020.....	23, 24
RCW 51.32.015.....	11
RCW 51.36.040.....	11

Table of federal statutes:

28 U.S.C. § 1333.....	1, 20
46 U.S.C. § 740.....	8

Table Of Other Authority:

50 Am.Jur. 204, § 225.....	10
----------------------------	----

Introduction

Respondents, the State of Washington and the Department of Corrections, hereafter “State,” argue this case involves the interplay of the state workers’ compensation scheme and federal maritime law. However, the State fails to appreciate that for a passenger injured by a crewmember of a vessel that is on navigable waters substantive federal maritime law applies even in state court.

The savings to suitors clause, 28 U.S.C. § 1333, states that “[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.” This provision enables a plaintiff to bring an admiralty or maritime claim in state court, i.e., the state and federal courts have concurrent jurisdiction. ... Federal maritime law applies in state court, however. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 628, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959). “[T]he ‘saving to suitors’ clause allows state courts to entertain in personam maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called ‘reverse-Erie’ doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards.” *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-23, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986).

Oltman v. Holland America Line USA, 163 Wn.2d 236, 259-60, ¶ 51, 178 P.3d 981 (2008).

Application of this reverse-Erie doctrine means Mr. Maziar cannot be denied his maritime tort remedies by Washington State workers' compensation laws.

To make its arguments to the contrary the State twists the rules of statutory construction. The State argues that the Courts should look to the legislative history to see what a statute means, however, the prime rule of statutory construction is that:

The plain meaning of the words of the statute determines its construction. Only if the statute is ambiguous do [the Courts] resort to aids of construction, such as legislative history.

State v. Fisher, 139 Wn.App. 578, ¶ 9, 161 P.3d 1054 (2007)

(footnotes omitted).

Courts should assume the Legislature means exactly what it says. Plain words do not require construction.

State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001)

(footnote omitted).

Under the plain reading of RCW 4.92.090 the State of Washington waived its sovereign immunity as to maritime torts. Under the plain reading of RCW 51.12.100(1) Mr. Maziar is statutorily excluded from the state workers' compensation scheme. And under the plain reading of RCW 51.08.013(3) Mr. Maziar was engaged in an alternative commute mode commuting

which also statutorily excludes him from the state workers' compensation scheme.

The State's Restatement of the Case

The State attempts to restate the case by putting the facts in a light most favorable to it, the moving party in the summary judgment motion below. However,

[i]n ruling on a motion for judgment as a matter of law, the 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).

For example, the State says one must be "authorized" to ride the McNeil Island ferry. In fact, the ferry is open to the public. The public is "authorized" to ride the ferry if they are visiting anyone living on McNeil Island. CP page 31. The "requirement" to be "authorized" to commute on the ferry is not onerous and does not keep the public from riding the ferry to and from McNeil Island.

The State's Summary of its Argument

The State says Mr. Maziar was not employed as a maritime worker. Mr. Maziar never claimed to have been a maritime

worker. However, he was a passenger injured by a member of the crew of a vessel that was on navigable waters.

Mr. Maziar's status was that of a passenger, not a worker. Like the plaintiff in *Zorotovich v. Washington Toll Bridge Authority*, 80 Wn.2d 106, 491 P.2d 1295 (1971), Mr. Maziar meets the five-part test to be a passenger: (1) The McNeil Island ferry, which Mr. Maziar was onboard when injured, was under the control of the State, CP page 31; (2) He was there a reasonable time before the vessel left, CP page 31; (3) He had the intention to be a passenger, CP page 31; (4) The ferry was under the control of the State; And (5) the State had knowledge that passengers were going to use the ferry. *See Zorotovich*, 80 Wn.2d at 108-09. As a passenger injured by the actions of crew of a vessel while on navigable waters, Mr. Maziar has a general maritime tort claim.

Next the State misreads RCW 51.12.100(1) to be limited only to maritime workers. However, as explained below, the plain wording of RCW 51.12.100(1) includes Mr. Maziar as he has a general maritime tort remedy. *See Chan v. Society Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994)(applying RCW 51.12.100).

The State argues that when the crew of a vessel injures a passenger while the vessel is on navigable waters, that

“implicate[s] no general maritime considerations.” However, the well-being of passengers on ferries and other vessels is one of the primary considerations of maritime law. *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); *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1403 (9th Cir. 1994); *Zukowsky v. Brown*, 79 Wn.2d 586, 590 n.1, 488 P.2d 269, 272 (1971); *Rambo v. Puget Sound Navigation Company*, 12 Wn.2d 637, 123 P.2d 355 (1942).

The State also argues that RCW 4.92.090 does not apply to the Department of Corrections. However, the plain language of RCW 4.92.090 makes no such exception.

ARGUMENT

1. RCW 51.04.010 Does Not Apply

The State says there is “no dispute” that the exclusive remedy provision of the State’s workers’ compensation laws (RCW 51.04.010) applies to Mr. Maziar. But that is not true.

RCW 51.12.100(1) expressly excludes Mr. Maziar’s claim from the application of RCW 51.04.010.

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 plain reading of the statute is, the provisions of this title shall not apply to employers and workers for whom a right or obligation exists under the maritime laws. Mr. Maziar is just such a worker and the State is such an employer.

As explained in Mr. Maziar's Opening Brief he has a claim under general maritime law for injuries caused by the tortious activities of the skipper while Mr. Maziar was a passenger on board the ferry.

By using the words "or" and by using a coma in RCW 51.12.100(1) the Legislature stated their intention to exclude employers and workers for whom a right or obligation exists under the maritime laws from the state workers' compensation scheme. The Legislature did not use limiting language such as "maritime employer" or "maritime worker" when it wrote RCW 51.12.100(1).

In a case that is on all fours with Mr. Maziar's claim, the Ninth Circuit Court of Appeals found the plain reading of RCW 51.12.100(1) expressly excludes employers, like the State, and passengers, like Mr. Maziar, for whom a right or obligation exists under the maritime laws, from Washington state workers'

compensation laws. *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1402-03 (9th Cir. 1994).

In *Chan* the employer made the very argument the State makes here, that RCW 51.12.100(1) did not apply to its land-based worker injured while a passenger on one of the employer's vessels because the land-based worker was not a seaman, longshore or harbor worker. *Chan*, 39 F.3d at 1403.

The Ninth Circuit responded:

Nothing in the plain reading of statute limits the exception in any such way. We decline to do so here.

....

Benny Chan has a federal maritime right to sue Society Expeditions and the operators to 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, 409, 3 L.Ed.2d 550 (1958); *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 203 (1st Cir. 1988).

Chan, 39 F.3d at 1403 (footnotes omitted).

The State tries to distinguish *Chan* by claiming that its holding is limited to cases on the "high seas." However, nothing in maritime law, or in *Chan* would limit the holding in that way. Admiralty and maritime jurisdiction encompasses all navigable waters.

The admiralty and maritime jurisdiction of the United States shall extend to an 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.

46 U.S.C. § 740 (emphasis added).

Further, there is no distinction in admiralty between torts committed by a ship itself and by the ship's personnel while operating it. *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 83 S.Ct. 1185, 10 L.Ed.2d 297, *rehearing denied* 374 U.S. 858, 83 S.Ct. 1863, 10 L.Ed.2d 1082.

The State also tries to distinguish *Chan* because the case does not decide if Mr. Chan was a “worker” or not. The Court was not required to decide that issue, because, the issue in *Chan*, and in Mr. Maizar's case, is not whether he is a worker or not, but whether he has a general claim in admiralty for negligence that he may pursue.

If Mr. Maziar has a general maritime claim falling within RCW 51.12.100(1), he can pursue that claim, whether he was an employee or not. Of course if he can pursue his maritime claim, under RCW 51.12.100(4) Mr. Maziar must also pay back all of the workers' compensation benefits he has been paid. *Chan*, 39 F.3d at 1403; *E.P. Paup Co. v. Director, Office of Workers' Compensation Programs*, 999 F.2d 1341, 1348 n3 (9th Cir. 1993).

The State notes that Mr. Maziar points out that *Chan* is not binding authority on this Court. That is true. *Chan* was not decided by either the Washington Supreme Court or the United States Supreme Court. (Not even a case decided by another Division of the Washington State Court of Appeals is binding authority on this Court.) Nevertheless, the Ninth Circuit Court of Appeals is a well-respected Court that often addresses admiralty and maritime issues. It also often addresses issues arising under Washington State law. Therefore, the Court may freely look at the reasoning in *Chan* as the opinion of another well-respected court of appeals with experience resolving issues of maritime and Washington law. The reasoning of the Ninth Circuit should be persuasive.

To avoid the plain language of RCW 51.12.100(1), which was followed in *Chan*, the State argues there is some legislative history that suggests the Legislature may have not meant what it put into law. The State argues that the Legislature intended to limit RCW 51.12.100(1) to just maritime workers and to exclude all other types of workers. However, that is not what the Legislature said. The Legislature did not place any limitation on the type of employers or workers covered by RCW 51.12.100(1).

The State's argument to change the plain reading of RCW 51.12.100(1) through a review of portions of the legislative history fails because it requires the Court to abandon the longstanding rules for statutory interpretation.

A statute [] which is not ambiguous must be interpreted according to the plain and ordinary meaning of the language used. 50 Am.Jur. 204, § 225; *Cochran v. Nelson*, 26 Wn.2d 82, 173 P.2d 769 [(1946)]; *State v. Houck*, 32 Wn.2d 681, 203 P.2d 693 [(1949)].

Sandona v. City of Cle Elum, 37 Wn.2d 831, 837, 226 P.2d 889, 892 (1951); *State v. Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030, 1035 (2001)(“When the language of a statute is clear and unambiguous the meaning is derived from the words of the statute itself”); *State v. Ashby*, 141 Wn.App. 549, 555-56, 170 P.3d 596, 599 (Div. II, 2007)(“We apply unambiguous statutes according to their plain meaning”).

There is no need to look behind the plain language of the statute. So, the State's argument based upon legislative history is lost when compared to the plain meaning of the words used by the Legislature. As the Ninth Circuit Court of Appeals found, the plain reading of RCW 51.12.100(1) would have it apply to cases like Mr. Maziar's general maritime claim for relief. *Chan*, 39 F.3d at 1403. This Court should adopt the reasoning in *Chan* and find

that RCW 51.12.100(1) removes Mr. Maziar's claim from the exclusive remedy provision of RCW 51.04.010.

2. Mr. Maziar's Job Status and His Form of Transportation Removes Him from Coverage Under Workers' Compensation Laws

The trial court found that because the ferry was the only way Mr. Maziar could get to and from McNeil Island the trial court would not apply maritime law or RCW 51.08.013. RP page 17. The State argues that was correct because the "coming and going rule" applies to Mr. Maziar while riding on a ferry.

Contrary to what the State argues, not all commuting is covered under the "coming and going rule." RCW 51.08.013(1) from which the "coming and going rule" arises says:

"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.

(RCW 51.32.015 and 51.36.040 discuss lunch breaks which do not apply in this case.)

While on the ferry Mr. Maziar was not a "worker acting at his [] employer's direction or in the furtherance of his [] employer's business." As required in his collective bargaining agreement Mr. Maziar had 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. On the ferry he was free to change out of his uniform, something he was never allowed to do while working. CP page 31. In all meaningful ways, Mr. Maziar was not acting at his employer's direction or in the furtherance of his employer's business while on the ferry.

The State tries to make much of the fact the Department of Corrections operated the ferry from McNeil Island to Steilacoom. But this ferry was not a "private" ferry operated just to transport prison workers. The ferry was public transportation open to anyone who wanted to see anyone on McNeil Island, whether the person on the island was an inmate or not. (CP page 31.) The State cites no authority supporting the application of the "coming and going rule" to public transportation.

Additionally, Mr. Maziar was injured during an alternative commute mode. RCW 51.08.013(3). He was riding on a ferry.

RCW 51.08.13(3) defines an "alternative commute mode" to include a "ferry." No one disputes Mr. Maziar was injured on a ferry when the skipper of that ferry kicked a chair out from under Mr. Maziar. However, the State argues that the "ferry"

referenced in RCW 51.08.13(3) must be “public transportation.” The statute itself does not place that limitation on the word “ferry.” Nevertheless, the ferry from McNeil Island to Steilacoom is public transportation. It is not a private vessel. Many passengers, not just employees of the State, ride it daily.

So, even if the statute did limit the word “ferry” to a form of public transportation, the McNeil Island ferry would still be an alternative commute mode.

Dictionary.com¹ defines “public transportation” as:

any form of transportation that charge set fares, run fixed routes, and are available to the public such as buses, subways, ferries, and trains

The McNeil Island ferry runs a fixed route, from Steilacoom to McNeil island and back. It is available to the public. It does not charge a set fare, as all costs are paid by the Department of Corrections. However, pursuant to RCW 51.08.013(2) the employer can incur all of those costs and still not remove the ferry from the definition of an alternative commute mode.

The State argues that the McNeil Island ferry is not public transportation because access to McNeil Island is limited. However, anyone wanting to visit anyone on McNeil Island can ride the ferry. CP page 31. That requirement may be called “a

¹ <http://dictionary.reference.com/browse/public%20transportation>

restriction,” but anyone who knows anyone on McNeil Island is still a very large cross section of the public. The ferry to and from McNeil Island is very different from a private vessel where access is limited to employees only, and where everyone else is a trespasser. None of the non-State employees riding the McNeil Island ferry are trespassers. They are passengers, like Mr. Maziar was at the time of his injury.

The State next argues the McNeil Island ferry is not public transportation because all people riding the ferry must be cleared through security. The same is true of those riding on an airplane, or taking a Washington State Ferry, or even those entering the Courthouse. Yet, those airplanes and ferries are public transport and the Courthouse is a public space.

The State argues there is no fee to use the ferry. But there is no fee to enter the Courthouse and it is a public space with tight security. There is a free ferry in Ketchikan Alaska,² the only way to get to get to the airport, but no one would argue it is less than public transportation. There is no fee to ride Metro Buses in downtown Seattle (the free zone), but those buses do not stop being public transportation when they do not charge a fare.

Next the State argues that the ferry to McNeil Island is

² http://www.borough.ketchikan.ak.us/airport/airport_ferry.htm

operated by the Department of Corrections. However, nothing in RCW 51.08.013 limits an alternative commute mode based upon who owns or operates the method of commuting. In fact, it is still a form of alternative commute mode if:

the employer (i) paid directly ... in whole ... the ... 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).

That statutory language is broad enough to allow the Department of Correction to operate the ferry to and from McNeil Island and still have that ferry qualify as an alternative commute mode.

Finally the State argues that the McNeil Island ferry is not a public ferry comparable to the Washington State or other public ferries. However, RCW 51.08.13 does not limit the ferries it refers to only those comparable to one of the Washington State Ferries. Nor does the statute place a limit on how "public" a ferry must be. It simply says a "ferry." The plain words are clear.

RCW 51.08.13 covers Mr. Maziar who was on a ferry, that other members of the public also ride, as he commuted home. CP page 31. If the facts are read most favorably to Mr. Maziar, he was on a ferry, an alternative commute mode, and as such he is excepted from the workers' compensation scheme pursuant to

RCW 51.08.013.

3. Federal Maritime Law Preempts Washington State Law

The State argues that Washington State workers' compensation laws are not preempt by federal maritime law.

This is incorrect.

“[T]he 'saving to suitors' clause allows state courts to entertain in personam maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called 'reverse-Erie' doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards.” *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-23, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986).

Oltman v. Holland America Line USA, 163 Wn.2d 236, 259-60, ¶ 51, 178 P.3d 981 (2008).

However, the Court need not reach the issue of preemption if it applies RCW 51.12.100(1) to exclude Mr. Maziar from Washington State workers' compensation scheme. Simply by applying the plain language of RCW 51.12.100, Mr. Maziar is excluded from the workers' compensation scheme so there is no conflict between that scheme and federal maritime law.

Nevertheless, because the State argues for a less than plain reading of RCW 51.12.100, the State must argue that State law preempts federal maritime law even in the face of a very recent Washington State Supreme Court case to the contrary.

The State relies on *Garrisey v. Westshore Marina Associates*, 2 Wn.App. 718, 469 P.2d 590 (1970) to argue state workers' compensation laws are not preempted when the matter is of "local concern."³ However, *Garrisey* presented a very unique set of facts and is inapplicable to the facts of Mr. Maziar's case.

In *Garrisey* the worker's employer was building a marina in Lake Union. The worker was an assistant to two carpenters working on the project. During the construction phase, before any vessels were present in the marina, the worker was to move some lumber a very short distance. The raft he was to use sank with him on board. *Garrisey*, 2 Wn.App. at 719-20, 469 P.2d at 591-92.

The *Garrisey* Court found that "[a] marina was not a vessel. Its moorage function is similar to that of a dock or pier which is considered an extension of the land." *Garrisey*, 2 Wn.App. at 726, 469 P.2d at 596 (citations omitted). So, *Garrisey* unlike Mr. Maziar's case did not involve a vessel.

The worker in *Garrisey* was not performing maritime activities.

³ *Garrisey* was decided by Division I of the Washington State Court of Appeals. As such, *Garrisey* is no more binding authority on this Court than is *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1402-03 (9th Cir. 1994), discussed above.

The activity was analogous to that of a laborer or carpenter who moves timber from a stockpile on land to a nearby construction site on land where the timber is to be incorporated into a structure. We do not think of such a movement of timber as an end in itself or as “transportation.” It is merely an activity incident in the course of construction.

Garrisey, 2 Wn.App. at 726, 469 P.2d at 596.

Mr. Maziar, on the other hand, was engaged in maritime transportation at the time of his injury. He was a passenger on a ferry in Puget Sound.

The *Garrisey* Court continued, “The nature of the workman’s activity rather than the place where the accident occurs determines into which class the workman’s relief falls.” *Id.*

To be a passenger on a vessel is a quintessential maritime activity. Mr. Maziar was injured by the actions of the crew of the ferry he was on board. When Mr. Maziar was injured he was not doing any type of work that could be done on land. He was solely involved in the transportation function of the ferry and covered exclusively by general maritime law. So, the local concern doctrine does not apply.

Next, the State argues that Mr. Maziar was a prison guard so the local doctrine applies. However, he was not working when he was injured. He was a passenger sitting on a ferry.

Passenger status is not controlled by whether the person

has a land-based job, even one with the company that owns the vessel the passenger is injured upon. In the case of a passenger injury on a vessel, state workers' compensation law does not apply. *E.g. Chan v. Society Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994).

4. The State Waived Sovereign Immunity for Maritime Tort Claims

As Mr. Maziar explains in his Opening Brief at pages 13 through 18, the State waived its sovereign immunity for its tortious conduct, including general maritime torts when it enacted RCW 4.92.090.⁴ RCW 4.92.090 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)).

Nevertheless, the State argues that *Gross v. Washington State Ferries*, 59 Wn.2d 241, 367 P.2d 600 (1961), sets out the

⁴ In a footnote the State says the Eleventh Amendment to the United States Constitution prevents Mr. Maziar from bringing his claim in federal court. This is correct, but under the "saving to suitors" clause of 28 U.S.C. § 1333 state court may entertain in personam maritime causes of action. *Oltman v. Holland America Line USA*, 163 Wn.2d 236, 259-60, ¶ 51, 178 P.3d 981 (2008). So, state court has subject matter jurisdiction to hear Mr. Maziar's claims.

only acceptable way to bring an admiralty case against the State. However, *Gross* does not address RCW 4.92.090.

In *Gross* a Jones Act seaman brought suit against the Washington State Ferries. The seaman did not follow the procedures found in RCW 47.60.260 to bring his Jones Act claim under the Department of Transportation's limited waiver of immunity for Jones Act claims found at RCW 47.60.210. The *Gross* Court held that for Jones Act Seamen asserting a claim against the Washington State Ferries the requirements of RCW 47.60.260 are mandatory. *Gross*, 59 Wn.2d at 250.

The State's argument to apply *Gross* to Mr. Maziar fails. Mr. Maziar is not bringing a claim against the Washington State Ferries. He is not a Jones Act seaman. There is no claim that Mr. Maziar failed to meet the notice requirements to bring his general maritime tort claim against the Department of Corrections.

Additionally, nothing in RCW 47.60 applies to Mr. Maziar.

For example:

RCW 47.60.210 says in part:

The state consents to suits against the department [of Transportation] by seamen for injuries occurring upon vessels of the department

RCW 47.60.210 does not apply to Mr. Maziar, because he is not a seaman, nor did his injury occur upon a vessel of the Department of Transportation.

RCW 47.60.230 says, in part:

In case of loss or damage or personal injuries or death resulting from the operation of any ferry or terminal by the department [of Transportation)

Again this cannot apply to Mr. Maziar. The operation of the Department of Transportations' ferries or terminals had nothing whatsoever to do with Mr. Maziar's injuries.

RCW 47.60.200 says:

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

By its very terms nothing in Chapter 47.60 could create any liability for the State or for any Department other than the Department of Transportation, and the Department of Transportation is not a party to this action.

On the other hand, RCW 4.92.090 does create liability for the State "for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation." This does apply to Mr. Maziar's claim.

The State's argument that RCW 47.60, which expressly does not create any general liability for the state, overrules or

somehow limits RCW 4.92.090, which expressly does create general liability for the State, is without merit.

The State's argument that the legislative history relating to amendments to RCW 47.60 somehow changes the plain meaning of RCW 4.92.090 is also without merit. The Department of Corrections is not mentioned anywhere in RCW 47.60, nor is there any limitation anywhere in RCW 47.60 prohibiting any claims of any type, maritime or otherwise, against the Department of Corrections. In fact, RCW 47.60 expressly limits its own subject matter to the Department of Transportation.

Had the Legislature wanted to limit all maritime claims against the State to only those that could be brought against the Department of Transportation the Legislature could have done so, but the opposite is true. In RCW 4.92.090 the Legislature waived the state's sovereign immunity to "be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation." This language is more than broad enough to encompass Mr. Maziar's general maritime tort claim.

CONCLUSION

Mr. Maziar was injured while he was a passenger on a ferry operated by the Department of Corrections. The Department of Transportation had nothing to do with Mr. Maziar's injuries.

Mr. Maziar asserts a maritime claim against the Department of Corrections and the State of Washington. The State waived its sovereign immunity as to Mr. Maziar's claim when it enacted RCW 4.92.090, so his general maritime tort claim should be allowed to go forward.

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 so his general maritime tort claim should be allowed to go forward.

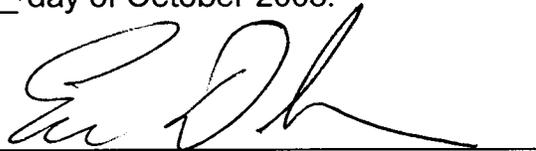
The trial court erred when it did not apply maritime law to Mr. Maziar's claim, and when it did not apply RCW 51.12.100, 51.08.013 and 51.24.020, as written. The trial court also erred when it found the state workers' compensation law could prevent Mr. Maziar from asserting his federal maritime rights.

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 general 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 27 day of October 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 reply 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 47.60.210:

The state consents to suits against the department by seamen for injuries occurring upon vessels of the department in accordance with the provisions of section 688, title 46, of the United States code. The venue of such actions may be in the superior court for Thurston county or the county where the injury occurred.

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 reply 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:

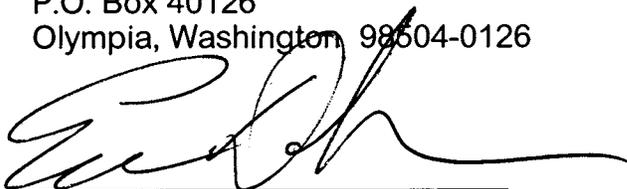
The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

PROOF OF SERVICE

CERTIFICATE OF DELIVERY

I, the undersigned, certify under the penalty of perjury in the State of Washington that on the 27 day of October 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.

FILED
COURT OF APPEALS
DIVISION II
00 OCT 27 PM 1:48
STATE OF WASHINGTON
BY _____
DEPUTY