

No. 43647-7-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

DOUGLAS S. JONES,

Appellant / Plaintiff

v.

The STATE OF WASHINGTON and
the DEPARTMENT OF CORRECTIONS

Appellees / Defendants

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APPELLANT'S OPENING BRIEF

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Introduction

Appellant, Mr. Jones, a prison guard at the McNeil Island penitentiary, was riding a ferry from McNeil Island to Steilacoom, Washington. CP pages 17-18. The ferry was owned and operated by the appellees, Washington State Department of Corrections and the State of Washington (herein after State). CP page 18. Mr. Jones was seated in the seats on the main deck. As the ferry came in for a landing it hit the dock very hard, causing Mr. Jones to fall out of his seat. He suffered severe back injuries that have kept him off work since the hard landing. CP page 18.

The injury took place on April 19, 2002. CP page 44. At the time, Mr. Jones completed the workers' compensation form he was given and directed to fill out. CP pages 28, lines 3-8; 92-94; 97-98; and 108-110. It was the State's policy to cover all of its employees' injuries under the workers' compensation scheme, even though it knew about the existence of maritime claims

for those injured on board the State's vessels. CP pages 92-94; 97-98 and 108-110. The State had a number of safety meetings where Mr. Jones was told about when and how to file a workers' compensation claim, but he was never told that he might have a maritime claim if injured on board the State's vessels. CP pages 39-40; 93-96; and 88. This was true even though the State knew about possible maritime claims, but they would not voluntarily disclose those types of claims. CP pages 93 line 14 through page 94 line 16.

By taking on the role of educating its employees regarding the employees' possible personal injury claims if injured on-the-job, the State was obligated to at least mention that there were possible claims other than workers' compensation available to an employee injured on the State's ferry. The ferry is the only way on and off McNeil Island.

The State never told Mr. Jones about his maritime claim if he was injured on one of the State's vessels.

CP pages 39-40. However, once the case *Maziar v. State of Washington*, 151 Wn.App 850, 216 P.3d 430 (2009), was decided, Mr. Jones learned of his possible maritime claim. CP pages 39 line 22 through page 40 line 12. He then filed a maritime claim. CP pages 28 lines 3-8. However, by then the statute of limitations had passed on Mr. Jones' claim. CP page 21.

The State brought a summary judgment motion in this case based on the running of the statute of limitations. Mr. Jones argued for tolling the statute of limitations because the State had told him at meetings about only one possible remedy (workers' compensation), but did not tell him about his second remedy (maritime). CP pages 39-40; 93-96 and 88. The State's actions can be analogized to the actions of a good Samaritan prior to any statutory protections. By telling Mr. Jones of only one of his remedies and keeping the other remedy, that the State knew about, hidden, the State should be estopped from using the

statute of limitations to defeat Mr. Jones' maritime claim. The State knew but did not disclose to Mr. Jones the existence of his maritime claim, yet the State detailed Mr. Jones' possible workers' compensation remedy. CP pages 39-40; 93-96 and 88.

Nevertheless, the trial court granted the State's motion for summary judgment saying:

I think that the fundamental difference – or the fundamental claim here that the plaintiff is making is that there's some sort of an affirmative duty on the part of the state to state that you should go see a lawyer I guess in all L&I cases. There simply isn't a statutory duty to do that, and I'm not going to find one by common law; or, in the alternative, to talk about specific remedies. Again, I don't see any statutory authority for doing that, and I don't see any in the common law to do that.

RP pages 9-10.

Mr. Jones does not assert that there is a statutory duty to inform him of both of his possible remedies should he be injured on-the-job. However, once the State undertook to inform him of his rights should he be injured on-the-job, the State has, at the very least, a

common law duty to inform Mr. Jones that he had two possible remedies and not just the one under the workers' compensation scheme.

This case can be likened to someone who goes to help someone in distress. There is no duty to help someone in need, but once help is undertaken the helper must do what a reasonable person would do. *Dubroca v. La Salle*, 194 S.2d 120, 124 (La. 1957) (failure to keep a cat indoors while waiting to see if it was rabid); *Union Pac. R. Co. v. Cappier*, 72 P. 281, 69 L.R.A. 513 (Kansas 1913)(train running over a trespasser). It is unreasonable for an employer who knows the employee has two possible claims for his on-the-job injury to only inform the employee of the least expensive remedy. As my father used to say, "Half a truth is a lie." Therefore the State should be estopped from asserting the statute of limitations against Mr. Jones for the claim it did not tell him existed: Mr. Jones' maritime claim.

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. *Maziar v. State of Washington*, 151 Wn.App 850, ¶ 7, 216 P.3d 430 (2009).

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. Jones' complaint.

Issues Pertaining to Assignment of Error

- (1) Is there a special relationship between employer and employee when it comes to tort law? If there is a special relationship between employer and employee when it comes to tort law, is that relationship such that the employer cannot mislead the employee as to the employee's remedies following a personal injury, where the employer knows of multiple remedies?
- (2) Is there a beneficial relationship between an employer and an employee when it comes to tort law? If there is a beneficial relationship between employer and employee when it comes to tort law, is that relationship such that the employer cannot mislead the employee as to the employee's remedies following a personal injury, where the employer knows of multiple remedies?
- (3) Did the State's action of telling Mr. Jones of

his workers' compensation remedy, but not telling Mr. Jones about his maritime remedy, toll the statute of limitations for Mr. Jones' maritime remedy?

Statement of the Case

Mr. Jones was injured on board the State's vessel on April 19, 2002. CP page 44. He filed his Complaint on March 17, 2011.¹ CP pages 16-22.

Defendants (appellees / State) moved for summary judgment on the basis of the running of the statute of limitations; that motion was heard on June 1, 2012. RP page 1.

The order granting the defendants' motion for summary judgment was filed on June 1, 2012. CP pages 141-142. The notice of appeal was filed on June 28, 2012.

¹ In the Complaint at page 6 (CP page 21), Mr. Jones admits that the statute of limitations had run, and cites to the reasoning of *Abbott v. State of Alaska*, 797 P.2d 994, 1999 AMC 2212 (Alaska 1999), as to why the statute of limitations should be tolled. CP 21.

There is little dispute as to the facts key to this appeal. The State held safety meetings where the remedy for the on-the-job injury provided by workers' compensation was discussed. CP page 88. At none of these meetings or at any other times were the possible remedies provided by maritime law discussed for injuries occurring on the State's vessels going to and from McNeil Island. CP pages 39-40, 92-94, and 88.

Mr. Jones was never told about possible maritime remedies. CP pages 39-40.

As Mr. John Little, the State's recently retired maritime operation manager for the McNeil Island Prison (CP at page 89), summarized:

- Q. Now, if you were a passenger, would it also be true at that time that you expect the DOC employee to fill out an L&I claim rather than any kind of maritime claim?
- A. Well, if – I mean they can – that would be up to them if they wanted to do that, but this right here was policy. They had to fill out the accident report for the workers' compensation claim for L&I rather than just

go seek compensation under the Jones Act or anything. This was a state policy.

.....

Q. Right.

A. It was just this was – especially if they were an employee, and this was policy, they were to fill out the workmen’s compensation claim.

Q. Which they got ---

A. Which was the accident report.

Q. Right. And again, no one at the Department would also tell them that they had the possibility of any other kind of claims; is that true?

A. We wouldn’t – we wouldn’t tell them. We wouldn’t volunteer that information, no.

.....

Q. What about general maritime claims for a passenger, did anyone discuss that at these safety meetings.

A. No.

CP pages 93 line 14 through page 94 line 16, emphasis added.

It was the State’s policy to tell injured workers, and those who might become injured, about possible

workers' compensation remedies, but it was also State policy not to tell the injured workers, and those who might become injured, about possible maritime remedies. "We would not volunteer that information, no." *Id.* This should toll the statute of limitations as to the possible maritime claims.

Argument

Mr. Jones was injured while a passenger on board a vessel owned by the State. That makes his claim a maritime claim. *Maziar v. State*, 151 Wn.App. 850, ¶ 20 (859-60), 216 P.3d 430 (2009) and *Id.*, 151 Wn.App at ¶ 23 (860-61).²

It remains an open question in Washington whether Mr. Jones might also be covered by state workers' compensation laws. *Maziar v. State*, 151 Wn.App. at ¶ 7 (853):

² *Maziar v. State*, 151 Wn.App. 850, 216 P.3d 430 (2009), concerned another prison guard on the ferry owned and operated by the State going from Steilacoom to McNeil Island. In essence, Mr. Maziar was in the same legal position as is Mr. Jones, so there is no dispute that this is a maritime claim and that the State has waived its sovereign immunity as to this claim.

Because we hold that Maziar's federal maritime claim against DOC survives even if he is also covered under the IIA, we need not decide whether the legislature intended to exclude him from IIA coverage.

As a prison guard injured on the State's ferry going to and from McNeil Island, Mr. Jones' personal injury claim falls within maritime tort jurisdiction.

Maziar, 151 Wn.App. at ¶ 10 (854).

Federal maritime law applies to Mr. Jones' claim.

Maziar, 151 Wn.App. at ¶ 9 (854).

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, 7 L.Ed 1049 (1887), the rule of *respondeat superior* was established for maritime cases 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.

This appeal centers around the effect, if any, of the State's action of telling Mr. Jones he had a workers' compensation claim and holding safety meetings about workers' compensation claims, but never mentioning that Mr. Jones might well have a maritime claim too, even though the State knew that if injured on a vessel Mr. Jones would have a maritime claim. Did the State's action move from passive inaction, a failure to take

positive steps to benefit others, or to protect them from harm, into active misconduct working positive injury to others?³

The common law does not require the giving of help to another. An example is *Union Pac. R. Co. v. Cappier*, 72 P. 281, 69 L.R.A. 513 (Kansas 1913). In that case a train ran over a trespasser due to no fault of the train or its employees. The injured person was left. By the time aid arrived the injured person had bled so much he could not be saved. The Court found the defendants were not at fault for not helping the injured person.

However, even the *Cappier* Court says while distinguishing *Northern Central Railway Co. v. State*, 29 Md. 450, 96 Am.Dec. 545:

After the trespasser on the track of a railway company has been injured in collision with a train, and the servants of the company have assumed to take charge of him, the duty, no doubt, arises to

³ In the law this distinction is sometimes referred to as non-feasance and misfeasance.

exercise such care in his treatment as the circumstances will allow.

Said another way:

It is a well-recognized principle of law that:

'One who sees another in peril, for which he is in no way responsible and which is entirely disconnected from any agency or instrumentality with whose control he is concerned, is not under any legal obligation to attempt to rescue such person,' 65 C.J.S., Negligence, s 57, p 550.

Dubroca v. La Salle, 194 S.2d 120, 124 (La. 1957)

(failure to keep a cat indoors while waiting to see if it was rabid).

But there is a rule of law which is just as well recognized:

'[T]hat one who voluntarily undertakes to care for, or to afford relief or assistance to, an ill, injured, or helpless person is under a legal obligation to use reasonable care and prudence in what he does. In such case the measure of the duty assumed is to exercise ordinary or common humanity, or to exercise with reasonable care such competence and skill as he possesses, or to exercise such care in the treatment of the injured person as the circumstances will allow; and the person who undertakes the care is liable if the existing injuries are aggravated or other injuries are caused by a lack of this measure of care.' 65 C.J.S., Negligence, s 58, p 551.

Dubroca v. La Salle, 194 S.2d at 125.

In Mr. Jones' case, the State assumed, in part, to "care for, or afford relief or assistance to" Mr. Jones by taking charge of explaining Mr. Jones' remedies to him should Mr. Jones be injured on-the-job. CP pages 93-96 and 88. The State only told Mr. Jones about the least costly remedy from the State's perspective, the remedy under the workers' compensation scheme. The State, following its policy, did not tell Mr. Jones about his possible maritime remedies. CP pages 39-40 and 93-96.

The State's actions of telling Mr. Jones about only one of his remedies did not lead to further personal injury. However, the State's action did keep Mr. Jones from recovering for the personal injury he suffered at the hands of the State. The State's action is the same as actually causing the injury because a tort without a remedy affords no relief. Mr. Jones' injury was compounded in that he was denied full and fair

compensation for the injuries caused him while on-the-job by the actions of his employer.

The common law rule that one is not typically obligated to help another in need is not followed in three types of cases. First, where there is a special relationship between the defendant and a third person. Restatement (Second) of Torts § 315(a)(1965). Second, where there is a special relationship between the plaintiff and defendant and the defendant possesses knowledge that the plaintiff does not. See, W. Page Keeton, et al., Prosser and Keeton on the Law of Torts, § note 5, at 374 (5th ed. 1984). Third, where the defendant enjoys an economic benefit from the defendant's relationship with the plaintiff. See, Keeton et al., id. note 5, at 374. This latter case is sometimes referred to as the benefit principle. The benefit principle holds that the law should impose a duty on a defendant to act affirmatively when the defendant receives a benefit from the defendant's interaction with

the plaintiff. The first type of case does not apply here, but the latter two types do apply to this case.

- (1) **Is there a special relationship between employer and employee when it comes to tort law? If there is a special relationship between employer and employee when it comes to tort law, is that relationship such that the employer cannot mislead the employee as to the employee's remedies following a personal injury, where the employer knows of multiple remedies?**

There are any number of cases that demonstrate the many affirmative duties that arise from the master-servant relationship. For example, the master has a duty to provide a safe place to work, *Siragus v. Swedish Hospital*, 373 Wn.2d 310, 319, 373 P.2d 767 (1962); *Burns v. Delaware & A. Telegraph & Telephone Co.*, 70 N.J.L. 745, 59 Atl. 220 (1904); safe appliances, *Siragus v. Swedish Hospital*, 373 Wn.2d at 320; also satisfactory tools to use, *Chicago Union Traction Co. v. Sawusch*, 218 Ill. 130, 75 N.E. 797 (1905); and competent co-workers, *Louisville & N.R.R. v. Davis*, 91

Ala. 487, 8 So. 552 (1890).⁴

As a practical matter, claims for the breach of these common-law actions against employers have all but disappeared with the adoption of workers' compensation laws, except in maritime cases under the Jones Act (46 USC § 30104 previously 46 USC § 688) and general maritime law (admiralty) claims, particularly a breach of the warranty of seaworthiness.

⁴ In a different setting, that of preventing injuries to third parties, the Court gave the following examples of special relationships that give rise to affirmative duties to aid and protect a third party:

Special relations which give rise to a duty to aid or protect another include that between a common carrier and passenger, *e.g.*, *Zorotovich v. Washinton Toll Bridge Auth.*, 80 Wash.2d 106, 491 P.2d 1295 (1971); tavern keeper and patron, *e.g.*, *Waldron v. Hammond*, 71 Wash.2d 361, 428 P.2d 589 (1967); and landowner and invitee, *e.g.*, *McKinnon v. Washington Fed. Sav. & Loan Ass'n.*, 68 Wash.2d 644, 650, 414 P.2d 773 (1966). See Restatement (Second) of Torts § 314A. In *Petersen v. State, supra*, a special relationship was found between a state psychiatrist and a patient at a state mental hospital, imposing upon the State a duty to protect foreseeable victims against injury stemming from the patient's mental problems, where the State had full control over the patient at the hospital and wrongfully released him. *Hartley v. State, supra* 103 Wash.2d at 788, 698 P.2d 77.

Youngblood v. Schireman, 53 Wash.App. 95, 100, 765 P.2d 1312, 25 A.L.R.5th 807 (1988).

Nevertheless, the employers' duties remain.⁵ The duty is exemplified in *Harris v. Pennsylvania R.R.*, 50 F.2d 866 (4th Cir. 1931), a maritime case. In *Harris* the seaman fell overboard without negligence on the part of the captain or crew of the vessel. It was solely because of the seaman's negligence. However, the Court found liability on the part of the vessel and owners for failure to take reasonable steps to save the seaman. Because of the employment relationship the captain and crew should have acted, even though the plaintiff ended up in need through no fault of the captain or crew.

In this appeal, Mr. Jones was a Correctional Sergeant, an employee of the State. CP page 15. He worked as a prison guard and was told by his employer repeatedly at safety meetings that should he be injured

⁵ On the theory and effect of the Workmen's Compensation statutes, see Bohlen, A Problem in the Drafting of Workmen's Compensation Acts, 25 Harv.L.Rev. 328 (1912); Wambaugh, Workmen's Compensation Acts; Their Theory and Their Constitutionality, 25 Harv.L.Rev. 129 (1911); Mechem, Employer's Liability, 44 Am.L.Rev. 221 (1910).

his remedy was under the State workers' compensation scheme. CP pages 39-40; 93-96, and 88. Not only was Mr. Jones told that at safety meetings, his fellow officers repeated it to him. CP pages 31-33.

It was also the State's policy to only discuss remedies under the workers' compensation scheme. CP pages 93-96. The State's policy was to cover injured workers who were passengers under the workers' compensation laws rather than under the maritime law. CP pages 39-40; 93-96, and 88. Workers' compensation, without the right to pursue a claim in Court - the right to compensation for pain and suffering, the loss of life's enjoyment, disfigurement, and full compensation for past and future wage loss - is significantly less expensive to the employer than claims made under general maritime law which includes all of those types of damages.

The State knew that it could be liable to its employees under general maritime law for those injured

on board its vessels. CP page 93-96. But the State would not share that information with its workers. CP pages 93 line 14 through page 94 line 16.

Employees, because of the uneven relationship master/servant, come to trust their employer. If the employee is told something as part of their employment, there is no reason for the employee to question that information. In fact, employees routinely questioning what they are told by their employer could lead to a breakdown of the master/servant relationship.

Another case demonstrating this idea is *Abbott v. State of Alaska*, 979 P.2d 994 (Alaska 1999). In that case the collective bargaining agreement between Ms. Abbott's union and her employer, the State of Alaska, said that Ms. Abbott's remedies, should she be injured on-the-job, were under the State's workers' compensation scheme. Following a decision, *Brown v. State of Alaska*, 816 P.2d 1368 (Alaska 1991), holding that employees in her situation were covered by

maritime law, Ms. Abbott brought her claim nearly 5 years after the statute of limitations had run on her would-be claims. The *Abbott* Court held that Ms. Abbott had been misinformed about her remedies and that the misinformation tolled the statute of limitations. Ms. Abbott had relied upon what was in her collective bargaining agreement until the claims adjuster for the State of Alaska let Ms. Abbott know that she might have a maritime remedy up until then undisclosed to Ms. Abbott. After she knew of that possible remedy Ms. Abbott started looking for an attorney to represent her in her maritime claim.⁶

Abbott's CBA provided that injured employees were entitled to workers' compensation benefits in lieu of traditional maritime remedies. In her declaration, Abbott stated that until she received the adjuster's letter she "relied on what the State told [her], that is, that [her] only remedy or claim against the State was under Alaska Workers'

⁶ Mr. Jones had no legal training and does not have a family member with any legal experience to assist him. CP page 121 lines 6-18. Mr. Jones had an attorney representing him on his workers' compensation claim, but that attorney never mentioned that Mr. Jones might have a maritime claim against the State. CP page 34.

Compensation." She asserted that the letter gave her the first notice that she had any other possible remedy, and that, after receiving the letter, she spoke with her union, which referred her to Washington attorney Brad Doyle, who first informed her of the *Brown* opinion.

Abbott v. State of Alaska, 979 P.2d at 998.

There is little difference between a notation in a collective bargaining agreement and a formal policy by an employer that is enforced through safety meetings as in Mr. Jones' case. In both cases the employee should be allowed to rely upon the information provided by his or her employer and the employer should be estopped from asserting the statute of limitations as a defense to a claim the employer did not disclose.

Central to what distinguishes the *Abbott* case from *Huseman v. Icicle Seafoods, Inc.*, 471 F.3d 1116 (9th Cir. 2006), a case that the defendants will likely rely upon, is that in *Huseman* the plaintiff claimed he did not remember seeing a notice in his employment contract which said if injured he would be paid workers'

compensation and his employer would coordinate his federal maritime benefits.

As Justice Reinhardt says in his dissent:

The majority allows a maritime employer to exploit the ignorance of an injured seaman and avoid paying him the compensation to which he is entitled under federal law, although for untold years it has been the policy of admiralty law to protect all seamen against this very type of willful exploitation. Icicle Seafoods advised Huseman and other seamen, in their Terms of Employment and in the Employee Handbook, that if they were to be injured, their benefits would be paid by Alaska Workers' Compensation, and Icicle would coordinate any other benefits to which they were entitled under federal maritime law. It did this knowing that under federal maritime law it is responsible for paying maintenance and cure to its injured employees and is liable to suit under the Jones Act and under the doctrine of unseaworthiness. Then, when Huseman was injured, Icicle filled out Alaska Workers' Compensation paperwork for him and gave him the names and phone numbers of people to contact regarding the Alaska Workers' Compensation claim. It did not mention, however, that it was required to provide more generous compensation under federal law and certainly did nothing to coordinate the federal benefits or protect Huseman's legal rights. Icicle Seafood's whole pattern of behavior was designed to lull Huseman into a false sense of security, making him believe that, as his employer, it was looking out for him because it was taking care of all of his

claims, a belief that Icicle hoped would last until the statute of limitations ran on the federal claims. Then, when Huseman came to Icicle a few months after the statute of limitations ran, and asked it to pay him what he was due, as it had promised to do in his Terms of Employment, Icicle, having succeeded in its objective, refused, relying on the statute of limitations and the doctrine of laches as defenses.

Such conduct by an employer should disturb jurists in any context.

Huseman v. Icicle Seafoods, Inc., 471 F.3d at 1127

(Reinhardt dissenting)(emphasis added).

Justice Reinhardt's dissent continues:

The majority also asserts that Huseman cannot establish that he reasonably relied on Icicle. It argues that he could not have relied on its misrepresentations in the Terms of Employment because he did not remember the terms of the clause in the Terms of Employment that was relevant to his claim. It concludes that he cannot show reasonable reliance without the Terms of Employment since Icicle's assistance with the workers' compensation claim was not, by itself, enough to make reliance on Icicle reasonable. However, as explained above, the fact that Huseman did not remember the clause does not mean that he did not rely on it. See *supra*, p. 1133. Nor is there any doubt that Huseman relied on Icicle. There is ample evidence in the record, some quoted by the majority, demonstrating Huseman's actual reliance on Icicle's general

conduct. Huseman testified that Icicle "said they'd fix it all up for me, so I had no reason not to trust them" He also explained that "[e]verything Icicle did was tell me I had a workmen's comp claim and here's the forms and here's the people to call . . . Now I think it's misleading, and I was trusting them."

In sum, Huseman has established the elements necessary for equitable estoppel. He reasonably relied on Icicle, and Icicle's conduct lulled him into a false sense of security. Icicle promised to take care of all of his potential claims, and appeared to him to be doing so, causing him not to pursue his legal entitlements on his own and file a lawsuit earlier. The evidence strongly suggests that Icicle's conduct was intentional, but even if it had not been, its statements were so obviously misleading that it should, unquestionably, have been aware of their deceptive nature. For these reasons, Icicle is estopped from relying on the statute of limitations as a defense against Huseman's Jones Act and unseaworthiness claims.

Huseman v. Icicle Seafoods, Inc., 471 F.3d at 1134-35
(Reinhardt dissenting)(emphasis added).

Mr. Jones' employer told Mr. Jones about his possible workers' compensation remedies. But it was part of the State's policy not to tell its employees about their maritime remedies should they be injured on

board one of the State's vessels. CP pages 93-96 and 88. Mr. Jones reasonably relied upon what his employer told him.

Because of the special relationship the defendants had with the plaintiff - the employer/employee (master/servant) relationship in this case - Mr. Jones could reasonable rely upon what he as told by his employer. In addition, his employer had an affirmative obligation, once it took on the task of informing its employees of their possible claims should they be injured, to fully disclose to its employees what the State knew to be the would-be-injured employee's remedies: that is, a possible workers' compensation claim if the worker was injured on land and possible maritime claims if the worker was injured on board one of the State's vessels going to and from work. Failure to disclose at least the basics of what the State knew to those with whom it was in a special relationship (master/servant) and to whom the State undertook to

explain possible remedies, should toll the statute of limitations for Mr. Jones' maritime claim.

- (2) Is there a beneficial relationship between an employer and an employee when it comes to tort law? If there is a beneficial relationship between employer and employees when it comes to tort law, is that relationship such that the employer cannot mislead the employee as to the employee's remedies following a personal injury, where the employer knows of multiple remedies?**

As a well know treatise on tort law explains:

On the other hand, an affirmative duty may be imposed upon persons who are in no sense creating risks by their activities. The duty here goes further and comprehends protection against additional risks which are not brought into existence by the defendant. This duty is not general, but is confined only to persons occupying certain relations to others which are of such a character that the decencies of society require the affirmative duty for its orderly regulation. The law fastens upon certain social relationships certain corresponding responsibilities, and when the relationship is important enough to require its safeguarding by legal rights and liabilities, legal duties are attached thereto. Perhaps one of the most significant factors which has affected the development of the law here is the element of advantage in the relationship for the person upon whom affirmative obligations are imposed. No

such duty is imposed except in cases wherein the relationship is presumably of an advantageous or beneficial nature.

Harper, Torts: A Treatise on the Law of Torts, 197
(1933)(emphasis added).

In the case of master/servant relationships, the economic well-being of the master is presumably enhanced by the employment of the servant. In Mr. Jones' case, as a Correctional Sergeant in the prison, the master could not carry on its public service role of incarcerating inmates without the aid of employees (servants) like Mr. Jones. From this beneficial relationship for the master (employer), there flow certain responsibilities to the servant. Some of these have been listed above: the master has a duty to provide a safe place to work, safe appliances, satisfactory tools to use, and competent co-workers. Additionally, because of this beneficial relationship, with the employer getting needed work from the employee, the employer should not be allowed to only

tell the employee about just part of the employee's remedies should the employee be injured on-the-job. Further, once the employer takes it upon itself to inform the employee about the employee's post-injury rights and remedies it should be required to disclose all of the injured workers' remedies (that the employer knows about) or at the very least be denied asserting the statute of limitations as a defense to the undisclosed claim.

In the *Abbott* case, supra, when an appellate decision was issued laying out the injured workers' rights to pursue a maritime claim, the employer's own claims adjuster notified the workers. *Abbott v. State of Alaska*, 979 P.2d at 998. In Mr. Jones' case, following the decision in *Maziar v. State*, 151 Wn.App. 850, 216 P.3d 430 (2009), the State took no steps to notify its employees, and Mr. Jones learned of his rights for the first time from a fellow officer who recommended Mr.

Jones see the attorney who had represented Mr. Maziar in *Maziar v. State*, supra. CP pages 39-40.

In Mr. Jones' case it was the State's policy not to tell its employees about the employees' maritime rights, even though it knew of those rights. "We wouldn't volunteer that information, no." And the State never told Mr. Jones about his right to bring a maritime claim. CP pages 93 line 14 through Page 94 line 16, and pages 39-40. Of course, this saved the State money on the claims against it, but it harmed its employees by preventing them from asserting their full legal rights.

Liability should be imposed as a "price" for the benefit conferred to the master from the servant. This is especially true where, as here, the State told the employee of only the right that would have the smallest financial impact on the State but would also prevent Mr. Jones from being fully compensated for his injuries. Therefore, the statute of limitations should be tolled as to the claim the State did not tell Mr. Jones he had; Mr.

Jones' maritime claim.

- (3) Did the State's action of telling Mr. Jones of his workers' compensation remedy, but not telling Mr. Jones about his maritime remedy, toll the statute of limitations for Mr. Jones' maritime remedy?**

Mr. Jones' case is similar to *Abbott v. State of Alaska*, 979 P.2d 994 (Alaska 1999), in that in both cases the employee relied upon the words and actions of the employer to not pursue more than a workers' compensation claim, until after an appellate decision made it clear to the plaintiffs that their employer had misled the plaintiffs as to the full scope of the remedies available to the plaintiffs as an employee injured on board ship. The distinction is that in *Abbott* the misinformation was in a collective bargaining agreement and in Mr. Jones' case he was told about only his possible workers' compensation claim at safety meetings held by his employer. That distinction should not change the outcome. In both cases the employee

had a right to rely upon what his or her employer was telling them. Therefore, in both cases the employer should not be allowed to assert the statute of limitations as a defense to a claim that the employee was not told about.

The State will argue that it is key that Mr. Jones did not ask anyone representing the State if Mr. Jones had a maritime claim. This is irrelevant for three reasons. First, Mr. Little said that if asked the State would not volunteer an answer to that question. CP page 94.

Second, whether Mr. Jones asked or not does not really matter. In *Abbott*, the plaintiff did not ask. She was only told by the adjuster for her employer after the appellate court held ferry workers like her had a maritime claim regardless of what her employer had said in her collective bargaining agreement. *Abbott v. State of Alaska*, 979 P.2d at 998. The State did not do that for Mr. Jones. See CP pages 39-40.

Because of Mr. Jones' special relationship with the State, as an employee, and because his relationship with the State gave an economic benefit to the State, the burden was on the State to tell Mr. Jones about both of his possible remedies should he be injured on-the-job. This is true because the State knew of both remedies. Since the State did not tell Mr. Jones about both the remedies the State knew about, disclosing only the least costly remedy for the State, the State should not be allowed to assert the statute of limitations against Mr. Jones' maritime claim.

Third, State took it upon itself to educate its employees, including Mr. Jones, at safety meetings about their rights should the employees be injured on-the-job. However, the State, applying its policy, only told the employees about one-half of their possible claims should they be injured on-the-job. The State withheld from its employees that if injured on land the employees may have a workers' compensation claim,

but if injured on board one of the State's vessels as a passenger the employees may also have a maritime claim against the State for the injury. To only disclose one of the two remedies the State knew Mr. Jones might have should prevent the State from asserting the statute of limitations against Mr. Jones' maritime claim.

CONCLUSION

In Mr. Jones' case he relied upon what his employer repeatedly told him. If injured on-the-job he had a workers' compensation claim. He did not know he had a maritime claim. CP pages 34, and 39-40. And the State would not voluntarily tell him about his maritime claim because to do so would violate the State's policy in that regard. CP page 93 line 14 through page 94 line 16.

The equities of this case can best be summarized by a slightly edited version of a portion of Justice Reinhardt's dissenting opinion in *Huseman v. Icicle Seafoods*:

[The State]'s whole pattern of behavior was designed to lull [Mr. Jones] into a false sense of security, making him believe that, as his employer, it was looking out for him because it was taking care of all of his claims, a belief that [the State] hoped would last until the statute of limitations ran on the federal claims. Then, when [Mr. Jones] came to [the State ...] after the statute of limitations ran, and asked it to pay him what he was due, [... the State] having succeeded in its objective, refused, relying on the statute of limitations and the doctrine of laches as defenses.

Such conduct by an employer should disturb jurists in any context.

Huseman v. Icicle Seafoods, Inc., 471 F.3d at 1127

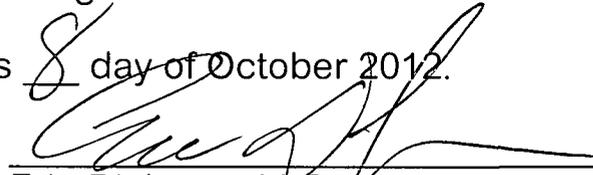
(Reinhardt dissenting).

The State's actions with Mr. Jones should likewise disturb jurists in any context.

Therefore, Mr. Jones respectfully requests that the Order Granting Defendants' Motion for Summary Judgment, CP 141-142, and the judgment dismissing this case be reversed and this matter be remanded for

additional proceedings.

DATED this 8 day of October 2012.



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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 8th day of October 2012, I had a copy of this document mailed to the attorney of record for the appellee/defendant, first class postage pre-paid to:

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[Signature]
Kathleen Roney
Signed at Seattle, Washington.
No Notary was readily available.