

No. 44004-1-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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CARA STINSON,  
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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## TABLE OF CONTENTS

Table of Cases.....	ii
Table of Statutes.....	vii
Table of Federal Statutes.....	vii
Table of Court Rules.....	vii
Introduction.....	1
Standard of Review.....	4
Assignment of Error.....	5
Issues Pertaining to Assignment of Error.....	6
Statement of the Case.....	6
Argument.....	17
Causation in Seaman's Claims.....	30
Jones Act Negligence.....	33
Unseaworthiness.....	36
Maintenance and Cure.....	38
Conclusion.....	41

**Table of cases:**

*Atherton Condo. Apartment-Owners Ass'n Bd. v. Blume Dev. Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990)..... 4

*Attwood v. Albertson's Food Center, Inc.*, 92 Wn.App. 326, 966 P.2d 351 (1998)..... 5, 6,19, 21, 22

*Bennett v. Department of Labor and Industries*, 95 Wn.2d 531, 627 P.2d 104 (1981)..... 28

*Bernethy v. Walt Failor's Inc.*, 97 Wn.2d 929, 653 P.2d 280 (1982)..... 5

*Calmar Steamship Corp. v. Taylor*, 303 U.S. 525, 1938 AMC 341 (1938)..... 38

*Cambro Co. v. Snook*, 43 Wn.2d 609, 292 P.2d 767 ..... 27

*Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 42 S.Ct. 475, 66 L.Ed. 927 (1922).... 2, 31

*Ceja v. Mike Hooks, Inc.*, 690 F.2d 1191, 1985 AMC 2941 (5th Cir. 1982)..... 35, 36

*Cline v. Price*, 39 Wn.2d 816, 239 P.2d 322 (1951)..... 4

*Collins v. State of Alaska*, 823 F.2d 329 (9th Cir. 1982)..... 4

*Costa Crociere, S.p.A v. Rose*, 939 F.Supp. 1538 (S.D. Fla. 1996)..... 38

*CSX Transportation, Inc. v. McBride*, 564 U.S. \_\_\_, 131 S.Ct. 2630, 2635, \_\_\_ L.Ed.3d \_\_\_ (2011)..... 34

*Dennis v. Department of Labor and Industries*, 109 Wn.2d 467, 745 P.2d 1295 (1987)..... 27

<i>Douglas v. Bussabarger</i> , 73 Wn.2d 476, 438 P.2d 829 (1968).....	25, 26
<i>Douglas v. Freeman</i> , 117 Wn.2d 242, 814 P.2d 1160 (1991).....	18
<i>Endicott v. Icicle Seafoods, Inc.</i> , 167 Wn.2d 873, 224 P.3d 761, cert. denied __ US __, 130 S.Ct. 3482, 177 L.Ed.2d 1059 (2010).....	3, 32
<i>Frank and Willie</i> , 45 F. 494 (D.C. 1891).....	37
<i>Gardiner v. Sea-Land Serv., Inc.</i> , 786 F.2d 943, 1986 AMC 1521 (9th Cir. 1986).....	38
<i>Grimes v. Lakeside Indus.</i> , 78 Wn.App. 554, 897 P.2d 431 (1995).....	23
<i>Goad v. Hambridge</i> , 85 Wn. App. 98, 931 P.2d 200 <i>review denied</i> 132 Wn.2d 1010, 940 P.2d 654 (1997).....	5
<i>Havens v. F/T Polar Mist</i> , 996 F.2d 215, 1994 AMC 605 (9th Cir. 1993).....	33, 36
<i>Hernandez v. Western Farmers Ass'n.</i> , 76 Wn.2d 422, 456 P.2d 1020 (1969).....	27
<i>Herskovits v. Group Health Coop.</i> , 99 Wn.2d 609, 664 P.2d 474 (1983).....	27
<i>Hoddevik v. Arctic Alaska Fisheries Corp.</i> , 94 Wn.App. 268, 970 P.2d 828 (1999).....	3, 31
<i>Intalco Aluminum</i> , 66 Wn.App 644, 833 P.2d 390 (1992).....	23
<i>Jarvis v. Daggertt</i> , 87 Wash. 253, 151 Pac. 648 (1915).....	3, 32

<i>Johnson v. Cenac Towing, Inc.</i> , 468 F.Supp.2d 815 (E.D. La. 2006), <i>vacated on other grounds</i> , 544 F.3d 296 (5th Cir. 2008).....	39
<i>Johnson v. Griffiths S.S. Co.</i> , 150 F.2d 224 (9th Cir. 1945).....	33
<i>Johnson v. Marline Drilling Co.</i> , 873 F.2d 77, 1990 AMC 2460 (5th Cir. 1990).....	39
<i>Johnson v. Offshore Express, Inc.</i> , 845 F.2d 1347, 1990 AMC 1214 (5th Cir. 1988).....	38
<i>Kasprik v. United States</i> , 87 F.3d 462 (11th Cir. 1996).....	38
<i>Lee v. Pacific Far East Line, Inc.</i> , 556 F.2d 65 (9th Cir. 1977).....	33
<i>Lewis v. Stinson Timber Co.</i> , 145 Wn.App. 302, 189 P.3d 178 (2008).....	23, 24
<i>Loe v. Goldstein</i> , 101 F.2d 967, 1939 AMC 627 (9th Cir. 1939).....	35
<i>Mahnich v. Southern S.S. Co.</i> , 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561, 1944 AMC 96 (1944).....	37
<i>Mai v. American Seafoods Company, Inc.</i> , 160 Wn.App. 528, 249 P.3d 1030 (2011).....	32, 39
<i>Mason v. Tuner</i> , 48 Wn.2d 145, 291 P.2d 1023 (1956).....	27
<i>Maziar v. State of Washington</i> , 151 Wn.App. 850, 216 P.3d 430 (2009).....	4
<i>McLaughlin v. Cooke</i> , 112 Wn.2d 829, 774 P.2d 1171 (1989).....	18, 28
<i>Merchant v. Ruhle</i> , 740 F.2d 86 (1st Cir. 1984).....	38

<i>Merriman v. Toothaker</i> , 9 Wn.App. 810, 515 P.2d 509 (1973).....	19
<i>Miller v. Arctic Alaska Fisheries</i> , 133 Wn.2d 250, 944 P.2d 1005 (1997).....	5, 6, 17
<i>Mitchell v. Trawler Racer, Inc.</i> , 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960).....	36, 37
<i>New York v. Northern Pac. R. Co.</i> , 18 Wn.2d 798, 140 P.2d 507, 147 ALR 849.....	27
<i>O'Donoghue v. Riggs</i> , 73 Wn.2d 814, 440 P.2d 823 (1968).....	27, 28, 29, 30
<i>Our Lady of Lourdes Hosp. v. Franklin County</i> , 120 Wn.2d 439, 842 P.2d 956 (1993).....	4
<i>Pope &amp; Talbot, Inc. v. Hawn</i> , 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed 143 (1953).....	3, 32
<i>Potter v. Dep't. Labor and Indus.</i> , ___ Wn.App. ___, 289 P.3d 727 (2012).....	28, 29
<i>Rasmussen v. Bendotti</i> , 107 Wn.App. 947, 29 P.3d 56 (2001).....	18
<i>Reese v. Stroh</i> , 128 Wn.2d 300, 309 P.2d 282 (1995).....	18
<i>Rogers v. Missouri Pacific R. Co.</i> , 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957).....	34
<i>Ross v. F/V Melanie</i> , 1996 AMC 1628, 1631 (W.D. Wash. 1996).....	33
<i>Sana v. Hawaiian Cruises, Ltd.</i> , 181 F.3d 1041 (9th Cir. 1999) .....	39
<i>Savoie v. Otto Candies, Inc.</i> , 692 F.2d 363 (5th Cir. 1982).....	35

<i>St. Germain v. Potlatch Lbr. Co.</i> , 76 Wn 102, 135 P.804 (1913).....	27
<i>Schooley v. Pinch's Deli Market, Inc.</i> , 134 Wn.2d 468, 951 P.2d 749 (1998).....	5
<i>Scudero v. Todd Shipyards Corp.</i> , 63 Wn.2d 46,385 P.2d 551 (1963).....	4
<i>Sing v. John L. Scott, Inc.</i> 134 Wn.2d 24, 948 P.2d 816 (1997).....	24
<i>Socony-Vacuum Oil Co. v. Smith</i> , 305 U.S. 424, 59 S.Ct. 262, 83 L.Ed. 265 (1939).....	33
<i>Teig v. St. John's Hosp.</i> , 63 Wn.2d 369, 387 P.2d 527 (1963).....	18, 26
<i>Trundle v. Sonat Marine</i> , 1990 AMC 867 (U.S.Dist Penn. 1990).....	36
<i>Vance v. American Hawaii Cruise Lines, Inc.</i> , 789 F.2d 790 (9th Cir. 1986).....	37
<i>Vaughn v. Atkinson</i> , 369 U.S. 527, 82 S.Ct. 997, 1000, 8 L.Ed. 2d 88 (1962).....	33
<i>Vella v. Ford Motor Company</i> , 421 U.S. 1, 95 S.Ct. 1381, 43 L.Ed.2d 682, 1975 AMC 563 (1975).....	39
<i>Waco [The]</i> , 3 F.2d 476 (D.C. 1925).....	37
<i>Wenatchee Sportsmen Ass'n</i> , 141 Wn.2d 169, 4 P.3d 123 (2000).....	24
<i>Williams v. Steamship Mutual Underwriting Ass'n</i> , 45 Wn.2d 209, 273 P.2d 803, 1954 AMC 2006 (1954).....	37, 39

<i>Williamson v. Western Pacific Dredge Corp.</i> , 441 F.2d 65, 1971 AMC 2356 (9th Cir. 1971).....	39
<i>Workman v. New York City</i> , 179 U.S. 552.....	32
<i>Zipp v. Seattle Sch. Dist. No. 1</i> , 36 Wn.App. 598, 679 P.2d 538 (1984).....	23

**Table of statutes:**

RCW 51.12.100(1).....	3, 32
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**Table of federal statutes:**

46 USC § 30104.....	2, 31, 33, 35
46 USC § 688.....	2
28 USC § 1333(1).....	3
45 USC §51 et seq.....	34

**Table of court rules:**

CR 56(c).....	4
---------------	---

## Introduction

Appellant, Ms. Stinson, was a seaman<sup>1</sup> working on board a ferry that crossed Puget Sound from Steilacoom, Washington, to the McNeil Island penitentiary on McNeil Island. The ferry was owned and operated by the appellees, Washington State Department of Corrections and the State of Washington. (Herein after State.) CP 1-17 (complaint & answer).

The ferry carries passengers, prisoners, prison workers and those who live on the island. CP 142. Ms. Stinson was working 12-hour days with no real days off. She was working a lot of overtime. CP 159. She had little contact with anyone other than those on the ferry or the docks at either end of the run. CP 158-61, 164-67. During this time all rubber gloves were removed from the vessel. CP 146-49. All bleach was removed. CP 144. The hand sanitizers and any product that Ms. Stinson could use to sanitize her hands were all removed from the vessel. CP 128, ¶ 11. And Ms. Stinson was required to share a SaniCan with the prisoners, one of whom told her he had MRSA. CP 154-57, 168-69.

While working as a seaman, Ms. Stinson developed MRSA and was hospitalized for 10 days. CP 170. Ms. Stinson's treating

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<sup>1</sup> See answer to complaint where Respondents admit Ms. Stinson's seaman status, CP at 12, ¶ 2.1.

physician, Dr. Joyce Luteyn, testified that on a more probable than not basis Ms. Stinson became infected with MRSA while working for the State as a seaman. CP 180-81.

On September 21, 2012, at a motion for summary judgment before the Honorable Susan K. Serko, the trial court held:

This does not turn on whether you need certainty. It turns on whether or not a judge would ever allow this opinion to go to the jury as beyond mere speculation given that MRSA is prevalent in our environment even with the higher risk.

I think summary judgment is appropriate in this case and I'm going to grant it.

RP 10.

Ms. Stinson appealed on September 27, 2012. CP 211-216.

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

Ms. Stinson as a crewmember on the ferry is a seaman. Her status as a seaman requires her personal injury claim to be covered by the Jones Act (46 USC § 30104, previously 46 USC § 688) and general maritime law (admiralty), and not state law. The Jones Act is an Act of Congress and general maritime law is a uniform body of federal substantive law that is to be applied even in State Court. *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 259, 42 S.Ct. 475, 477, 66 L.Ed. 927, 930 (1922)(an appeal

from the Washington State Supreme Court); *Hoddevik v. Arctic Alaska Fisheries Corp.*, 94 Wn.App. 268, 970 P.2d 828 (Div. I, 1999); *see also Mai v. American Seafoods Company, Inc.*, 160 Wn.App. 528, fn 6 on 538, 249 P.3d 1030, 1035 (2011) (“Such suits are governed by substantive maritime law.” *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 879, 224 P.3d 761 cert. denied \_\_ US \_\_, 130 S.Ct. 3482, 177 L.Ed.2d 1059 (2010)(citing *Pope & Talbot, Inc. v. Hawn*, 346 US 406, 409-10, 74 S.Ct. 202, 98 L.Ed.2d 143 (1953)).

On the other the hand, Washington State Workers’ Compensation Act does not apply to seamen, like Ms. Stinson. *Jarvis v. Daggertt*, 87 Wash. 253, 257, 151 Pac. 648 (1915); also 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.

(Emphasis added.)

In a maritime case, like Ms. Stinson’s, state courts must follow substantive maritime law. *Supra*. This includes the amount and nature of evidence to prove her claims for relief.

Ms. Stinson’s use of the savings to suitors clause of 28 USC § 1333(1) to bring her Jones Act and maritime claims in

State Court does not change the substantive law to be applied to her case.<sup>2</sup> *Scudero v. Todd Shipyards, Corp.*, 63 Wn.2d 46, 48, 385 P.2d 551, 552 (1963)("the substantive rules of the maritime law apply to the action whether the proceeding be instituted in an admiralty or in a common law or state court"); *Cline v. Price*, 39 Wn.2d 816, 822-23, 239 P.2d 322, 326 (1951).

### 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).

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<sup>2</sup> Because Ms. Stinson is suing the State of Washington, the 11th Amendment to the United States Constitution does not allow her to sue the State in federal court. *Collins v. State of Alaska*, 823 F.2d 329 (9th Cir. 1982). So Ms. Stinson was required to file suit in State Court.

*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. Arctic Alaska Fisheries*, 133 Wn.2d 250, 265, 944 P.2d 1005 (1997).

Generally, the issue of proximate causation is a question for the jury. *Bernethy v. Walt Failor's Inc.*, 97 Wn.2d 929, 935, 653 P.2d 280 (1982). A proximate cause is one that in natural and continuous sequence, unbroken by an independent cause, produces the injury complained of and without which the ultimate injury would not have occurred. *Bernethy*, 97 Wn.2d at 935, 653 P.2d 280; see also, *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 951 P.2d 749 (1998). Because the question of proximate cause is for the jury, "it is only when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that it may be a question of law for the court." *Bernethy*, 97 Wn.2d at 935, 653 P.2d 280 (citations omitted).

*Attwood v. Albertson's Food Center, Inc.*, 92 Wn.App. 326, 331, 966 P.2d 351, 353 (1998).

### **Assignment of Error**

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

### **Issue Pertaining to Assignment of Error**

Did the trial court commit reversible error when it ruled as a matter of law that the evidence Ms. Stinson presented to support her claims for relief did not go beyond mere speculation, given that MRSA is prevalent in our environment?

### **Statement of the Case**

For the purpose of a summary judgment motion the evidence is to be read in the light most favorable to the nonmoving party, here Ms. Stinson. 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. Arctic Alaska Fisheries*, 133 Wn.2d 250, 265, 944 P.2d 1005 (1997). Because the question of proximate cause is for the jury, "it is only when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that it may be a question of law for the court." (citations omitted). *Attwood v. Albertson's Food Center, Inc.*, 92 Wn.App. 326, 331, 966 P.2d 351, 353 (1998)(quoting *Bernethy v. Walt Failor's Inc.*, 97 Wn.2d 929, 935, 653 P.2d 280 (1982)).

The trial court incorrectly held that reasonable minds could not find for Ms. Stinson. RP 10.

Ms. Stinson was a deckhand / engineer on board the ferry. CP 135. The crew of the ferry was made up of the captain, the deckhand (Ms. Stinson) and two prisoners who were line handlers. CP 142. During the period she contracted MRSA while working as a seaman she was working from 5:15 a.m. to 4:15 p.m. CP 137.

The ferry would carry the crew, the staff from the prison, prisoners, visitors, police, work-release prisoners, prison medical transports (that is ill prisoners on their way to and from medical care), and island residents. CP 142.

Ms. Stinson supervised the inmates on the vessel, operated the vessel from time to time, assisted passengers with loading and offloading, maintained the engine room, cleaned the bathrooms, vacuumed the carpets, and did security checks of the vessel. CP 135-36, 137-39 and 141. Although the prisoners were to clean the bathrooms, they did not do it well and sometimes Ms. Stinson would have to clean them herself. CP 151.

When it came to cleaning products on the vessel, prior to Ms. Stinson contracting MRSA, the cleaning products for the bathroom were changed to ones that would not sanitize. CP 143-44. Bleach, a strong disinfectant, was not allowed on the

vessels. CP 144. Before Ms. Stinson contracted MRSA while working as a seaman, the State removed the cleaning agent Vionex. CP 146. Vionex was an antibacterial cleaning agent. It was not replaced with any other antibacterial cleaning agent. CP 148-49. There was also no water on the ferry to wash her hands. CP 127, ¶ 10.

Before Ms. Stinson contracted MRSA the State also removed all rubber gloves. CP 146-49. The gloves were completely removed from the vessel, not simply placed under lock and key. CP 147. Ms. Stinson was not allowed to bring her own supply of rubber gloves to protect herself from infection. CP 148.

Even the captain's private supply of bleach to wipe down the wheelhouse was removed before Ms. Stinson contracted MRSA. CP 149. In the engine room where Ms. Stinson also worked, there were no cleaning products. Oil and the like were cleaned up by wiping up with plain "red rags" without a solvent or disinfectant. There was no disinfectant in the engine room. CP 152-53.

The State asserted there was "Soapopular," an alleged cleaning agent on board, but Ms. Stinson had never heard of it. CP 162. The State also asserted there was X3 on board, another

cleaning product, but again Ms. Stinson had never heard of it. CP 162-63. The fact the State alleges these products were available on the ferry, but Ms. Stinson knew nothing about them, is an issue of fact that for the purposes of this appeal must be read in the light most favorable to Ms. Stinson. If these alleged cleaning products were on board and Ms. Stinson was not told about them, that would amount to Jones Act negligence and it would also make the ferry unseaworthy, that is, unfit for its intended purpose.

There was a restroom for the guards and crew at the end of the causeway on the dock on the McNeil Island side that Ms. Stinson could use when she first started working as a seaman for the State. While she was working as a seaman, the restroom broke, and it was not useable when she contracted MRSA. There was also an inmate outhouse or SaniCan there. CP 153. Because the guards' and crews' restroom was broken and closed, Ms. Stinson could only use the inmates' SaniCan. CP 153-55. Ms. Stinson asked Mr. Little, the operations chief, if another SaniCan could be placed there because the inmates' SaniCan was "despicable." Mr. Little said, "No," and Ms. Stinson had to share the SaniCan with the inmates. CP 154-55. Eventually, a second SaniCan was added, but it rarely had any

soap or water in it and it was not cleaned regularly. CP 155-56.

There was urine on the floor and toilet paper everywhere.

Nevertheless, Ms. Stinson was forced to use it. CP 156.

There was also a bathroom on the Steilacoom side, but for the period up through Ms. Stinson contracting MRSA the bathroom had no running water and there was no way to wash or sanitize her hands. CP 157.

Ms. Stinson does not know exactly how she contracted MRSA. CP 158. She did not know anyone who had MRSA, other than inmates at the prison. CP 127, ¶ 8. Typically, MRSA is contracted by the bacteria getting onto a person's skin through contact with the bacteria and then by spreading the bacteria into an open wound. CP 173. The bacteria can be on door handles, faucet handles, and toilet seats. CP 174-75. Once on Ms. Stinson's hands it was transferred to a wound on her buttocks. However, if she could wash her hands the bacteria would have been washed off. CP 174-75. Hand washing is the number one thing doctors in hospitals use to avoid the spread of the bacteria. CP 175.

Likely no one could ever say exactly what Ms. Stinson touched or sat on that caused her to contracted MRSA, but she was working six days a weeks, and had no social life at the time.

She was at home, in her car, or at work. CP 158. She did not even go to the grocery, as that was done by her partner. CP 158.

Ms. Stinson was exhausted on her day off. Her partner would do the shopping and cooking. CP 159. She was not intimate with her partner during this time. CP 159. No guests, except her brother, came to her house for about a year prior to Ms. Stinson contracting MRSA. CP 160. Ms. Stinson worked and slept and did little else. CP 161. She did not go to the mall. CP 164-65. She did not go to a sporting event or public event. CP 165. Although she would occasionally brush up against an inmate in the wheelhouse she had no physical contact with any of her neighbors near her house. CP 166.

Prior to contracting MRSA while working as a seaman for the State, Ms. Stinson graduated from an EMT program. She was thinking about becoming a firefighter. CP 127, ¶ 5.

Ms. Stinson had always been keenly aware of sanitation, using sanitation wipes to wipe down shopping carts in stores, and using hand sanitation gel to clean off bacteria picked up from being in the public. Well prior to her contracting MRSA while working as a seaman, at home Ms. Stinson had sanitary

dispensers in her kitchen and bathroom and she used them consistently. CP 127, ¶¶ 6-7.

Up through the point Ms. Stinson contracted MRSA, she did not know anyone who had ever had MRSA, other than the inmate population at McNeil Island. CP 127, ¶ 8. Despite the known MRSA outbreak in the general prison population, Ms. Stinson was required to use a SaniCan (porta potty) that was also used by inmates. The MRSA infection she contracted first appeared on her buttocks. CP, ¶ 9.

The vessel Ms. Stinson worked on did not have any running water or soap to keep her hands clean of any germs. Just prior to Ms. Stinson contracting MRSA, the sanitation wipes and gel were removed from the vessel. Her requests to bring her own sanitation products were denied. She was left with no way to prevent any infection, MRSA or otherwise. CP 127-28, ¶¶ 10-11.

Ms. Dolores Stinson, Ms. Stinson's mother, was familiar with her daughter's habits regarding cleanliness and how she paid attention to sanitation. Cara Stinson has always been a very clean person, but it is Dolores Stinson's opinion that when Cara Stinson took her EMT training to become a firefighter (before contracting MRSA), that sense of cleanliness was heightened. CP 130, ¶ 5. If Delores and Cara Stinson went somewhere, Cara

Stinson wiped down the shopping carts with sanitary wipes. CP 130, ¶ 6. If they went into a building and there was alcohol based sanitizer gel, Cara Stinson would tell Dolores Stinson to use it. CP 130, ¶ 6. Dolores Stinson has personal experience that Cara Stinson has/had multiple sanitation dispensers in her house including both the kitchen and bathroom and that even before contracting MRSA Cara Stinson used them consistently. CP 130, ¶ 7.

It is Ms. Cara Stinson's opinion that she contracted MRSA while working as a seaman, either on the vessel or in the uncleaned bathrooms she was required to use. CP 163-64. Ms. Stinson's treating doctor, Dr. Joyce Luteyn, agrees. The doctor is of the opinion that Ms. Stinson contracted MRSA while working as a seaman. CP 181-83, 184-85, 187-88.

One of the line handlers Ms. Stinson worked with, an inmate, told Ms. Stinson that he had MRSA. CP 168. The inmate, told Ms. Stinson he had MRSA on the day Ms. Stinson was carried off the ferry due to the pain she was suffering from the MRSA. CP 168-69. It was a known fact that some of the inmates had MRSA. CP 169 and 127 ¶¶ 8-9.

Dr. Luteyn testified that MRSA is transmitted by human contact with someone infected or by touching something that

has the MRSA bacteria on it. CP 174. Once on the skin, the bacteria is transferred to an open wound and into the body. CP 173. The key to prevention is to wash one's hands to prevent to spread of the bacteria into an open wound. CP 175. Washing the hands removes the bacteria and prevents infection. CP 174-75. MRSA is more likely in places where people live closely and share bathrooms and the like, such as nursing homes, or any institution with a lot of people who come into contact frequently. CP 177-78. Prisons are especially high risk. CP 179-81.

Dr. Luteyn's opined on a more probable than not basis that Ms. Stinson contracted MRSA while working as a seaman. CP 180-81.

Q. Can you say on a more-probable-than-not-basis that she [Ms. Stinson] more likely got it [MRSA] in the prison than through some other contact?

A. That would be my opinion, yes.

CP 181.

Dr. Luteyn was "appalled" that Ms. Stinson was left without a way for Ms. Stinson to wash her hands, as the alcohol-based hand sanitizers were removed from the vessel. CP 181-82. Once MRSA enters the body through an open wound, you cannot unring the bell. CP 175. That is why hand washing, especially in high risk situations, like prisons, is so important. CP 175. Dr.

Luteyn thought that it was “incredible” that Ms. Stinson had to work in a prison setting and not be able to wash her hands. CP 182-83.

When asked about causation, Dr. Luteyn testified:

I cannot render a statement that that’s how she got it, but my opinion is that since she – the ferry – she’s not in the general population for a job, as far as I understood. The prisoners are transported on that boat. She works on the boat all the time. The prisoners are high risk and she has no way to prevent herself from getting infected. So it seems like a much higher risk than the average person would have in their lives.

CP 184-85 (question and answer, only answer quoted).

Later:

A. I think the exposure on the boat to prisoners and to potentially unclean situations and the lack of access to clean, puts her at – I would give a greater than – more likely than not that that’s where she would become infected.

Q. Is on the boat?

A. Yes.

CP 187.

And on re-direct by the State:

Q Okay. And so just to be sure, the only basis you have to conclude that she got it at work, is that it’s a higher-risk environment than other environments?

A Significantly higher risk, and, again, with no amelioration available to her for that higher risk.

CP 188.

As noted, Dr. Luteyn testified:

Q. Can you say on a more-probable-than-not-basis that she [Ms. Stinson] more likely got it [MRSA] in the prison than through some other contact?

A. That would be my opinion, yes.

CP 181.

The Trial Court found under these facts and Dr. Luteyn's expert opinion that no reasonable mind could find for Ms. Stinson on her Jones Act, unseaworthiness, and maintenance and cure claims for relief. RP 10.

Ms. Stinson filed her complaint for maritime personal injuries on March 3, 2011. CP 1-10. In her complaint she brought claims of relief for Jones Act negligence, unseaworthiness, and maintenance and cure.<sup>3</sup>

On July 13, 2012, the State filed a motion for summary judgment. The Order granting the State's motion was filed on September 21, 2012. CP 214-16. Ms Stinson filed her Notice of Appeal of that Order on September 27, 2012. CP 211-12.

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<sup>3</sup> Ms. Stinson also brought a claim for general maritime negligence. However, that claim was pled in the alternative, as a seaman cannot bring a negligence claim for relief against his or her employer except under the Jones Act.

## Argument

This appeal follows the grant of a motion for summary judgment. In a motion for summary judgment all facts and inferences should be read in favor of the non-moving party.

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

In Ms. Stinson's case the Trial Court said:

THE COURT: The issue is proximate cause and whether or not she [Dr. Luteyn] can give an opinion more probably than not that she [Ms. Stinson] contracted it [MRSA] while on the ferry.

MR. DICKMAN: Well, she [Dr. Luteyn] does, and if you read what she said –

THE COURT: Well, she tries to, but the question is, Is that an opinion that a Trial Judge would ever allow to go to a jury given all of the other circumstances and all of her other opinions?

RP at 5-6.

Ms. Stinson's attorney responded at TR 6-7. The Trial

Court then continued:

THE COURT: I disagree. I handled an E. coli case as a practitioner, and what we did in that case was to hire an expert to analyze the DNA and have the DNA match the, in that case, Odwalla drink that that little girl had drunk, and that is exactly the key, I think, Mr. Dickman.

I absolutely agree with you that you have to tie the expert's opinion to the particular strain or whatever it is in the E. coli case, and that's exactly what I thought of when I was reading your materials was can you give an opinion if you

don't have that DNA or some kind of scientific evidence to tie it directly?

Can you give just an opinion that says, "A prison environment is a riskier environment. There's more MRSA. There's more people coming into contact with one another, and, therefore, more probably than not"? I struggle with that. Can you allow that kind of an opinion go to the jury?

RP 7-8.

Ms. Stinson's attorney argued that there was more to Dr. Luteyn's opinion than what the Trial Court had characterized. See RP 8-10. These arguments are also set out in this brief.

To allow a case to go to the jury, the evidence presented must be more than mere speculation and conjecture.

Proof of a cause of action may be said to be speculative when, from a consideration of all of the facts, it is just as likely that it happened from one cause as another. *Rasmussen v. Bendotti*, 107 Wn.App. 947, 959, 29 P.3d 56 (2001).

Specifically, in cases involving alleged medical negligence, if a reasonable person could infer, from the facts, circumstances, and medical testimony, that a causal connection exists, the evidence is sufficient to survive summary judgment. *Douglas v. Freeman*, 117 Wn.2d 242, 252, 814 P.2d 1160 (1991); *McLaughlin v. Cooke*, 112 Wn.2d 829, 837, 774 P.2d 1171 (1989). The plaintiff need not establish causation by direct and positive evidence, but only by a chain of circumstances from which the ultimate fact required is reasonably and naturally inferable. *Teig v. St. John's Hosp.*, 63 Wn.2d 369, 381, 387 P.2d 527 (1963). But evidence establishing proximate cause must rise above speculation, conjecture, or mere possibility. *Reese v. Stroh*, 128 Wn.2d 300, 309 P.2d 282

(1995). Thus, medical testimony must demonstrate that the alleged negligence “more likely than not” caused the later harmful condition leading to injury; that the defendant's actions “might have,” “could have,” or “possibly did” cause the subsequent condition is insufficient. *Merriman v. Toothaker*, 9 Wn.App. 810, 814, 515 P.2d 509 (1973).

*Attwood v. Albertson's Food Center, Inc.*, 92 Wn.App. 326, 331-32, 966 P.2d 351, 353 (1998).

In *Attwood*, *id.*, like in Ms. Stinson's case, there was conflicting expert testimony. In Ms. Stinson's case the medical experts hired by the State, Dr. Peter Marsh, who did not see Ms. Stinson, and Dr. Garrison Ayers testified that a MRSA infection required an abrasion and direct skin-to-skin contact, and that MRSA was everywhere. Hence it could not be said that Ms. Stinson became infected while in the service of the State's vessel. CP 87-98.

However, Ms. Stinson's treating physician, Dr. Lutyen testified on a more probable than not basis that Ms. Stinson contracted MRSA while working for the State. CP 181, 184-85, 187-88. While Drs. Marsh and Ayers limited their opinion to spreading MSRA through only direct skin-to-skin contact, Dr. Lutyen pointed out that MRSA can and is spread into a lesion or wound through contact with an item touched by someone with the MRSA bacteria on their hands. CP 174. And the best

protection from contracting MRSA is through hand washing. CP 175.

The number one thing doctors in hospitals, a high risk environment, do to avoid the spread of MRSA is to wash their hands frequently. CP 175. The inability of Ms. Stinson to wash or disinfect her hands while working in the high risk environment of prison is more probably than not the cause of Ms. Stinson contracting MRSA. CP 181, 184-85, 187-88.

The doctors hired by the State ignored a major avenue of the spread of MRSA by limiting their opinion to only direct skin-to-skin infection.

The argument of the doctors hired by the State is like a situation where a person does repeated heavy lifting at work. The person is not in any pain at the time. The person goes home does nothing out of the ordinary and wakes up with a debilitating back injury. A doctor hired by the defendants could say, with some medical support, that a person can injure his or her back in any number of ways, for example carrying groceries, sneezing or getting in or out of a car. Therefore, the doctor, by ignoring the most likely cause of the injury, says it would be speculation to say the person was injured while doing the heavy lifting.

However, if another doctor, like the person's treating physician,<sup>4</sup> says that on a more probable than not basis the injury occurred during the heavy lifting, the claim should be allowed to go to the jury. The same should be true with Ms. Stinson's claims.

Conflicting medical opinions between the doctors hired by the State and Ms. Stinson's treating physician should not keep this case from the jury. Ms. Stinson produced enough evidence that reasonable minds could find for her without resorting to mere speculation or conjecture, so her claims should go to the jury.

In *Attwood v. Albertson's Food Center, Inc.* supra (a case where a pharmacist provided an inadequate dose and mislabeled the prescription), on appeal from a grant of summary judgment, the Court of Appeals looked at the evidence in the light most favorable to the non-moving party and found that, when taken as a whole, the medical evidence presented for Attwood was sufficient to send the case to the jury. There was contradictory medical evidence in *Attwood*, but one of Attwood's medical experts, Dr. Henry, testified that a decreased dosage of the drug in question could lead to Attwood's congestive heart

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<sup>4</sup> In Ms. Stinson's case it is her treating physician who says on a more probable than not basis that Ms. Stinson contracted MRSA while at work. CP 181, 184-85, 187-88.

failure and the risk of heart rhythm problems. Attwood's doctor said "could" lead to congestive heart failure and the risk of heart rhythm problems. Standing alone, that testimony was not enough to establish causation. *Attwood*, 92 Wn.App. at 333, 966 P.2d at 354.

But Dr. Johnson, another of Attwood's medical experts, concluded that the decrease in Mr. Attwood's intake of the drug in question was one of the causes of Mr. Attwood's "cardiac arrest ... [and] the most immediate cause in fact of his ... heart failure was the damage ... sustained during his ... cardiac arrest." *Attwood*, *id.*

By looking at the doctors' testimony in the light most favorable to Attwood, the Court of Appeals reversed the decision of the Trial Court that the evidence presented was mere speculation and conjecture. *Id.*

In Ms. Stinson's case, the evidence presented by Ms. Stinson - including Dr. Luteyn's opinion on a more probable than not basis that Ms. Stinson contracted MRSA while working for the State, and that working in the conditions in which Ms. Stinson was required to work was more probably than not the cause of Ms. Stinson's contracting MRSA (CP 181, 184-85, 187-88) - was more than enough evidence to remove Ms. Stinson's case from

the realm of speculation and conjecture. Therefore, the decision of the Trial Court should be reversed.

In *Lewis v. Stinson Timber Co.*, 145 Wn.App. 302, 189 P.3d 178 (2008), a workers compensation case about whether an occupational disease was caused by exposure to workplace chemicals, Division II of the Washington Court of Appeals said:

“For [Lewis] to prove causation, the testimony of medical experts ‘must establish that it is more probable than not that the [exposure to chemicals at the workplace] caused the subsequent disability.’ ” *Grimes v. Lakeside Indus.*, 78 Wn.App. 554, 561, 897 P.2d 431 (1995)(quoting *Zipp v. Seattle Sch. Dist. No. 1*, 36 Wn.App. 598, 601, 679 P.2d 538 (1984)). And Division One of this court held that, under the IIA, “the claimant [is not required] to identify the precise chemical in the workplace that caused his or her disease” because we liberally construe the IIA and because “the claimant is only required to demonstrate that conditions in the workplace more probably than not caused his or her disease or disability.” *Intalco Aluminum*, 66 Wn.App [644,] at 658, 833 P.2d 390 [(1992)]. In addressing the sufficiency of the evidence, it held:

A physician's opinion as to the cause of the claimant's disease is sufficient when it is based on reasonable medical certainty even though the doctor cannot rule out all other possible causes without resort to delicate brain surgery. The evidence is sufficient to prove causation if, from the facts and circumstances and the medical testimony given, a reasonable person can infer that a causal connection exists.

*Intalco Aluminum*, 66 Wn.App at 654-55, 833 P.2d 390 (citation omitted).

*Lewis v. Stinson Timber Co.*, 145 Wn.App. at ¶ 31 (319-20), 189 P.3d at 188-89.

In *Lewis*, there was contradictory evidence as to what chemicals Lewis was exposed to. *Lewis*, 145 Wn.App. at ¶¶ 39-41 (323-325), 198 P.3d at 190-191. There was also contradictory evidence as to what effect, if any, that the exposure had on Lewis. *Lewis*, 145 Wn.App. at ¶¶ 42-45 (325-327), 198 P.3d at 191-192. Even though the medical experts could not say what chemicals Lewis was exposed to, or even what chemicals were present in the workplace, or the length of the exposure, or the concentration of chemicals, nevertheless, the medical experts did testify that on a more probable than not basis Lewis' health problems were caused by exposure to toxic chemicals in the workplace. *Id.*

This was sufficient evidence to remove Lewis' claims from speculation and conjecture.

When viewing the evidence in the light most favorable to Lewis, the nonmoving party, we cannot say, as a matter of law, that the evidence is not substantial or that there is no reasonable inference to sustain the verdict for Lewis. See *Sing v. John L. Scott, Inc.* 134 Wn.2d [24,] at 29, 948 P.2d 816 [(1997)]. Lee's, Ranheim's, and Buscher's testimony provides sufficient evidence to persuade a fair-minded rational person that a combination of toxic chemicals was present in Lewis's workplace and that those chemicals caused her medical symptoms based on her individual reaction to them. See *Wenatchee Sportsmen Ass'n*, 141 Wn.2d [169,] at 176, 4 P.3d 123 [(2000)]. Therefore, the trial court's denial of Simpson's motions for judgment as a matter of law was not erroneous.

*Lewis*, 145 Wn.App. at ¶ 46 (327), 198 P.3d at 192.

In *Lewis*, to determine there was substantial evidence it was key that the medical experts testified on a more probable than not bases that Lewis' health problems were caused by exposure to toxic chemicals in the workplace. In Ms. Stinson's case, Dr. Luteyn testified that the conditions Ms. Stinson worked in were more probably than not the cause of Ms. Stinson contracting MRSA. CP 181, 184-85, 187-88. This together with the facts Ms. Stinson testified to about the lack of water to wash her hands, no antibacterial gel, no gloves, no bleach, being required to share Sani-Cans (porta potties) with inmates, and the poor to no cleaning of the bathroom facilities, plus the known MRSA infections in the prison population, including one of the prisoners Ms. Stinson worked with on the vessel, provides more than sufficient evidence to persuade a fair-minded rational person that Ms. Stinson's working conditions were the cause of Ms. Stinson contracting MRSA. Therefore, the Trial Court's grant of summary judgment should be reversed and this matter remanded for further proceedings.

It has long been the law in Washington that a plaintiff in a tort case, whether suing a health care provider or not, need not disprove all other possible causes of injury. See *Douglas v.*

*Bussabarger*, 73 Wn.2d 476, 438 P.2d 829 (1968), a medical negligence case. In *Douglas*, the Court held at 486:

The plaintiff is not required to eliminate with certainty all other possible causes or inferences. . . , which would mean that he must prove a civil case beyond a reasonable doubt. All that is needed is evidence from which reasonable men can say that on the whole it is more likely that there was negligence associated with the cause of the event than there was not.

*Douglas* is in accord with another medical negligence case, *Teig v. St. John's Hospital*, 62 Wn.2d 369, 387 P.2d 527 (1963) where the Court stated at 381:

The appellant was not required to prove his case beyond a reasonable doubt, nor by direct and positive evidence. It was necessary only that he show a chain of circumstances from which the ultimate fact required to be established is reasonably and naturally inferable.

Thus, while plaintiff must prove damages by medical probability, there is no requirement plaintiff prove injuries were caused by defendants' negligence beyond a reasonable doubt.

Likewise in a wrongful death case, where there were no witnesses as to whether the deceased was on the employer's vessel at the time of his death, the State Supreme Court said:

At the same time, the one having the affirmative of an issue does not have to make proof to an absolute certainty. It is sufficient if his evidence affords room for men of reasonable minds to conclude that there is a greater probability that the matter in question happened in such a way as to fix liability upon the person charged therewith than it is that it happened in a way for which a person charged would not be liable. *Home Ins. Co. of*

*New York v. Northern Pac. R. Co.*, 18 Wn.2d 798, 140 P.2d 507, 147 ALR 849; *Cambro Co. v. Snook*, [43 Wn.2d 609, 292 P.2d 767] *supra*.

*Mason v. Tuner*, 48 Wn.2d 145, 149, 291 P.2d 1023, 1025 (1956).

Additionally, negligence may be proved by circumstantial evidence.

Negligence may be proved by circumstantial evidence. Circumstantial evidence is sufficient to establish a prima facie case of negligence, it affords room for men of reasonable minds to conclude that there is greater probability than the conduct relied upon was the proximate cause of the injury that there is that it is not. *Mason v. Tuner*, 48 Wn.2d 145, 291 P.2d 1023 (1956); *St. Germain v. Potlatch Lbr. Co.*, 76 Wn 102, 135 P.804 (1913). In this regard, the respondent's evidence met the above test of evidentiary sufficiency.

*Hernandez v. Western Farmers Ass'n.*, 76 Wn.2d 422, 426, 456 P.2d 1020, 1022 (1969)(failure to properly arrange for crop spaying a field led to crop damage).

Further in a case where medical testimony is required to establish a causal relationship between the liability-producing situation and the claimed physical disability resulting from it, the evidence will be considered insufficient to support the trial verdict if it can be said that, considering all of the medical testimony presented at the trial, the jury must resort to speculation or conjecture in determining the causal relationship. *O'Donoghue [v. Riggs]*, 73 Wn.2d [814,] at 824[, 440 P.2d 823 (1968)]. See also *Dennis v. Department of Labor and Industries*, 109 Wn.2d 467, 745 P.2d 1295 (1987)(plaintiff's claim supported by the requisite medical testimony that more probably than not osteoarthritis in the plaintiff's wrists were made symptomatic and disabling by 38 years of repetitive tin snipping). See also *Herskovits v. Group Health Coop.*, 99 Wn.2d 609, 623, 664 P.2d 474 (1983)(Pearson, J. concurring)(whether plaintiff's medical

experts' testimony satisfied the *O'Donoghue* standard of establishing that the act complained of – alleged delay in diagnosis – “probably” or “more likely than not” caused the patient’s subsequent disability leading to his death from cancer)(emphasis added).

It is not always necessary to prove every element of causation by medical testimony. If, from the facts and circumstances and the medical testimony given, a reasonable person can infer that the causal connection exists, the evidence is sufficient. *Bennett v. Department of Labor and Industries*, 95 Wn.2d 531, 533, 627 P.2d 104 (1981).

*McLaughlin v. Cooke*, 112 Wn.2d 829, 837-38, 774 P.2d 1171, 1176 (1989)(medical malpractice case).

In Ms. Stinson’s case, there is sufficient testimony, both factual and medical, on the issue of proximate cause that a finder of fact can decide the causation issue without speculation or conjecture.

Ms. Stinson’s case is like those where it was found the evidence presented was sufficient so that a jury would not be required to speculate or conjecture as to the cause of the injury. However, Ms. Stinson’s case is likewise distinguishable from cases where the evidence was insufficient, for example, *Potter v. Dep’t. Labor and Indus.*, \_\_\_ Wn.App. \_\_\_, 289 P.3d 727 (2012)(the appeal from a denial of a workers’ compensation claim by the Board of Industrial Appeals). In *Potter* the claimant’s medical expert could not say that the exposure to

multiple unknown chemicals from an office remodel were the cause of Potter's illness on a more probable than not basis. See *Potter*, \_\_\_ Wn.App. at ¶ 23, 289 P.3d at 732-33. The most the claimant's experts could say is that claimant's chemical sensitivity could have been cause by off gassing of the new materials use in the office remodel.

In Ms. Stinson's case, her treating physician, Dr. Luteyn, opined on a more probable than not basis that Ms. Stinson contracted MRSA while working for the State as a seaman. CP 181, 184-85, 187-88. This should be sufficient to get Ms. Stinson's case to the jury.

Ms. Stinson's appeal is also distinguishable from *O'Donoghue v. Riggs*, 73 Wn.2d 814, 440 P.2d 823 (1968). In *O'Donoghue*, the injured party's medical expert testified as to three possible causes of the injury. On that basis the Court of Appeals found the jury would have to speculate as to the cause of the injured party's injuries. *O'Donoghue v. Riggs*, 73 Wn.2d 824-25, 440 P.2d 830. That is not the case in Ms. Stinson's appeal. Ms. Stinson's medical expert, Dr. Lutyen testified affirmatively that there was a single cause of Ms. Stinson's contracting MRSA, the working conditions on the State's vessel. CP 181, 184-85, 187-88.

*O'Donoghue* says:

In a case such as this, medical testimony must be relied upon to establish the causal relationship between the liability-producing situation and the claimed physical disability resulting therefrom. The evidence will be deemed insufficient to support the jury's verdict, if it can be said that considering the whole of the medical testimony the jury must resort to speculation or conjecture in determining such causal relationship. In many recent decisions of this court we have held that such determination is deemed based on speculation and conjecture if the medical testimony does not go beyond the expression of an opinion that the physical disability 'might have' or 'possibly did' result from the hypothesized cause. To remove the issue from the realm of speculation, the medical testimony must at least be sufficiently definite to establish that the act complained of 'probably' or 'more likely than not' caused the subsequent disability. [Seven case citation deleted.]

*O'Donoghue v. Riggs*, 73 Wn.2d 824, 440 P.2d 830.

In Ms. Stinson's case, Dr. Luteyn unequivocally testified that the conditions Ms. Stinson worked in were more probably than not the cause of Ms. Stinson contracting MRSA. CP 181, 184-85, 187-88. Dr. Luteyn met the requirements to take the cause of Ms. Stinson's contracting MRSA out of the realm of speculation and conjecture. Therefore, the Trial Court should be reversed and this matter remanded for trial.

### **CAUSATION IN SEAMAN'S CLAIMS**

By any applicable standard, Ms. Stinson proved her claims for relief such that the claims should have been presented to the

jury. However, it is critical to note Ms. Stinson's claims are distinguishable from run-of-the-mill negligence claims for relief. Ms. Stinson was a seaman and as such she brought claims unique to her calling. These included claims for relief under the Jones Act (46 USC § 30104), breach of the warranty of seaworthiness, and maintenance and cure. CP 1-10.

Each of these claims has a different level of proof. This is significant in Ms. Stinson's appeal. While Ms. Stinson met each level of proof, for claims for relief like Jones Act negligence the level of proof for causation is "feather light." For maintenance and cure, all Ms. Stinson must prove is that the MRSA arose while she was in the service of the vessel; there is no need for the illness to be work related.

Ms. Stinson as a crewmember on the ferry is a seaman. Her status as a seaman requires her personal injury claim to be covered by the Jones Act (46 USC § 30104) and general maritime law (admiralty), and not state law. The Jones Act is an Act of Congress and general maritime law is a uniform body of federal substantive law that is to be applied even in State Court. *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 259, 42 S.Ct. 475, 477, 66 L.Ed. 927, 930 (1922)(an appeal from the Washington State Supreme Court); *Hoddevik v. Arctic Alaska*

*Fisheries Corp.*, 94 Wn.App. 268, 970 P.2d 828 (Div. I, 1999); *Mai v. American Seafoods Company, Inc.*, 160 Wn.App. 528, fn 6 on 538, 249 P.3d 1030, 1035 (2011) (“Such suits are governed by substantive maritime law.” *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 879, 224 P.3d 761 cert. denied \_\_ US \_\_, 130 S.Ct. 3482, 177 L.Ed.2d 1059 (2010)(citing *Pope & Talbot, Inc. v. Hawn*, 346 US 406, 409-10, 74 S.Ct. 202, 98 L.Ed.2d 143 (1953)).

On the other hand, the Washington State Workers’ Compensation Act does not apply to seamen, like Ms. Stinson.

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. It follows, therefore, that that the legislature in passing the [workers’] compensation act could not take from a workman the right which he had under the maritime law of the United States. The petitioner here still has his right to pursue his remedy in admiralty.

*Jarvis v. Daggertt*, 87 Wn. 253, 257, 151 Pac. 648 (1915); also 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.

(Emphasis added.)

So substantive maritime law as to causation applies to Ms. Stinson’s case.

As a seaman Ms. Stinson has three maritime causes of action: Jones Act negligence (46 USC § 30104); breach of the warranty of seaworthiness (sometimes call unseaworthiness); and maintenance and cure. The unseaworthiness and maintenance and cure claims are general maritime claims and the Jones Act is statutory.

### **Jones Act Negligence**

Because a seaman is a ward of admiralty, *Vaughn v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 1000, 8 L.Ed. 2d 88 (1962); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 59 S.Ct. 262, 83 L.Ed. 265 (1939), a ship owner's duty of care is more extensive than that of an employer on land. *Ross v. F/V Melanie*, 1996 AMC 1628, 1631 (W.D. Wash. 1996). A ship owner owes a duty to every seaman employed on board the ship to provide a safe place to work, *Johnson v. Griffiths S.S. Co.*, 150 F.2d 224 (9th Cir. 1945), and to furnish a vessel and its appurtenances that are reasonably fit for their intended use. *Lee v. Pacific Far East Line, Inc.*, 556 F.2d 65, 67 (9th Cir. 1977). A ship owner will be liable if it either knew, or in the exercise of due care, should have known, of the unsafe condition. *Havens v. F/T Polar Mist*, 996 F.2d 215, 218, 1994 AMC 605 (9th Cir. 1993).

The United States Supreme Court recently made clear “proximate cause” as used in non-statutory common law torts does not apply to Jones Act cases. The test for causation is much much lower in a Jones Act case. If the employer’s negligence played any part in bringing about the injury there is the necessary causation. *CSX Transportation, Inc. v. McBride*, 564 U.S. \_\_\_, 131 S.Ct. 2630, 2635, \_\_\_ L.Ed.3d \_\_\_ (2011), states:

This case concerns the standard of causation applicable in cases arising under the Federal Employers' Liability Act (FELA), 45 USC §51 et seq. FELA renders railroads liable for employees' injuries or deaths "resulting in whole or in part from [carrier] negligence." §51. In accord with the text and purpose of the Act, this Court's decision in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957), and the uniform view of federal appellate courts, we conclude that the Act does not incorporate "proximate cause" standards developed in nonstatutory common-law tort actions. The charge proper in FELA cases, we hold, simply tracks the language Congress employed, informing juries that a defendant railroad caused or contributed to a plaintiff employee's injury if the railroad's negligence played any part in bringing about the injury.

*CSX Transportation, Inc. v. McBride*, at 564 U.S. \_\_\_, 131 S.Ct. at 2635 (emphasis added).

*CSX Transportation, Inc.*, was a Federal Employees' Liability Act (FELA) case. However, FELA rulings apply to Jones Act cases. In 1908, the U.S. Congress passed what came to be known as the FELA. This legislation removed three nearly insurmountable barriers long faced by workmen seeking to

recover damages for injuries sustained in the workplace. No longer would assumption of risk, fellow servant doctrine and contributory negligence bar recovery by workers employed in the railroads. The Jones Act adopted FELA by reference for seamen, and expressly grants to seamen the rights and remedies available to railroad workers under FELA. 46 USC § 30104 states:

A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

(Emphasis added.)

Additionally, Ms. Stinson was under no duty to exercise care to discover extraordinary dangers that might arise from the negligence of the employer or those for whose conduct the employer was responsible, and Ms. Stinson could assume that her employer or its agents had exercised proper care for her safety until notified to the contrary. *Loe v. Goldstein*, 101 F.2d 967, 1939 AMC 627, 638 (9th Cir. 1939).

A seaman's duty to protect him/herself is slight, and she need not use the safest way to perform her work. *Savoie v. Otto Candies, Inc.*, 692 F.2d 363 (5th Cir. 1982); *Ceja v. Mike Hooks*,

*Inc.*, 690 F.2d 1191, 1195, 1985 AMC 2941, 2946 (5th Cir. 1982).

A seaman cannot be found contributorily negligent for her unsafe use of tools or appliances absent a showing that a safer means was available to the seaman which she knew or should have known about at the time of her injury. *Trundle v. Sonat Marine*, 1990 AMC 867, 874, (U.S. Dist Penn. 1990); *Ceja v. Mike Hooks, Inc.*, 690 F.2d 1191, 1195, 1985 AMC 2941, 2946 (5th Cir. 1982).

### **Unseaworthiness**

The warranty of seaworthiness is a doctrine of liability without fault. To find liability for unseaworthiness the shipowner need not have had knowledge that the unseaworthy condition existed or have had an opportunity to correct it. Liability for unseaworthiness is not limited by the concepts of negligence. It is a form of strict liability.

A shipowner has an absolute duty to 'furnish a vessel and appurtenances reasonably fit for their intended use.' *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550, 80 S.Ct. 926, 933, 4 L.Ed.2d 941 (1960); [further citations].

*Havens v. F/T Polar Mist*, 996 F.2d 215, 217-18 (9th Cir. 1993).

It will be helpful if we bear in mind the wide range of circumstances that are encompassed in the connotation of the word "unseaworthiness." The term covers a wide variety of situations affecting the work and risks of seamen. A condition which endangers but one member of the crew, whether the ship is on the high seas or tied up to a wharf, can make the vessel unseaworthy so far as the

obligation to indemnify a seaman for injuries sustained is concerned. The basis of a finding of unseaworthiness has in many instances been the breach of "the equivalent of the common law duty of providing a servant or employee with a safe place to work," *The Waco*, 3 F.2d 476, 478 (D.C. 1925), or, as stated in the *Frank and Willie*, 45 F. 494, 496 (D.C. 1891), a breach of the duty

... to provide workmen with reasonably safe conditions for work, according to the nature of the business, and to the customary provisions for the safety of life and limb.

*Williams v. Steamship Mutual Underwriting Ass'n*, 45 Wn.2d 209, 217, 273 P.2d 803, 808, 1954 AMC 2006 (1954).

If an unseaworthy condition is the proximate cause of an injury, the exercise of due diligence or of reasonable care does not relieve the shipowner of its obligation. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561, 1944 AMC 96 (1944).

A vessel is unseaworthy where a temporary hazard exists. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 1960 AMC 1503, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960)(the presence of fish slime on a fishing vessel); *Vance v. American Hawaii Cruise Lines, Inc.*, 789 F.2d 790 (9th Cir. 1986)(broken bedboard). The vessel owner is liable even if it had no notice of the dangerous condition. *Id.*

If the seaman is assigned to use equipment, or directed to follow a method of operation that is dangerous, that is not fit for its intended purpose (unseaworthy), a seaman is not obligated to

protest against the method of operation or devise a safer method, nor is he obligated to call for additional or different equipment. *Merchant v. Ruhle*, 740 F.2d 86, 88 (1st Cir. 1984).

To prove causation, the seaman must show that the unseaworthy condition played a substantial part in bringing about or actually causing the injury and that the injury was either the direct result or a reasonably probable consequence of the unseaworthiness. *Johnson v. Offshore Express, Inc.*, 845 F.2d 1347, 1990 AMC 1214 (5th Cir. 1988).

### **Maintenance and Cure**

A vessel owner has an absolute duty to provide maintenance and cure for a seaman who falls ill or becomes injured while in the service of the ship. *Calmar Steamship Corp. v. Taylor*, 303 U.S. 525, 527, 1938 AMC 341, 343 (1938); *Gardiner v. Sea-Land Serv., Inc.*, 786 F.2d 943, 945, 1986 AMC 1521, 1523 (9th Cir. 1986).

Maritime common law requires that a shipowner pay a seaman a daily subsistence allowance (maintenance) and medical treatment (cure) when the seaman becomes ill or injured in the service of a vessel. [*Kasprik v. United States*, 87 F.3d 462, 464 (11th Cir. 1996); *Costa Crociere, S.p.A v. Rose*, 939 F.Supp. 1538, 1548 (S.D. Fla. 1996).] A seaman establishes her right to maintenance and cure by alleging and proving by a preponderance of the evidence (1) her engagement as a seaman; (2) her illness or injury occurred, manifested, or was aggravated while in the

ship's service; (3) the wages to which she is entitled; and (4) the expenditures for medicines, medical treatment, board, and lodging. [*Johnson v. Cenac Towing, Inc.*, 468 F.Supp.2d 815, 832, (E.D. La. 2006), *vacated on other grounds*, 544 F.3d 296 (5th Cir. 2008).] Notably, a seaman need not present any proof of negligence or fault on the part of her employer nor must she prove a causal nexus between employment and injury to establish her entitlement to maintenance and cure. [*Sana v. Hawaiian Cruises, Ltd.*, 181 F.3d 1041, 1044 (9th Cir. 1999)(vessel owner's obligation to furnish maintenance and cure "does not depend on the fault or negligence of the shipowner, nor is it limited to cases in which the seaman's employment caused the illness.")]

*Mai v. American Seafoods Company, LLC.*, 160 Wn.App. 528, ¶ 22 (538-39), 249 P.3d 1030 (2011)(footnotes inserted)(emphasis added).

Any doubts as to entitlement, necessity of medical treatment, and the attainment of maximum medical cure must be resolved in favor of the seaman and in favor of the payment of maintenance and cure. *Vella v. Ford Motor Company*, 421 U.S. 1, 95 S.Ct. 1381, 43 L.Ed.2d 682, 1975 AMC 563 (1975); *Johnson v. Marline Drilling Co.*, 873 F.2d 77, 1990 AMC 2460 (5th Cir. 1990).

A seaman who was not allowed to live on board but had to commute home and back to the vessel daily is covered by maintenance and cure for injuries suffered during his "daily shore leave" as they are part of the "hazards of service" to the vessel. *Williamson v. Western Pacific Dredge Corp.*, 441 F.2d 65, 1971 AMC 2356 (9th Cir. 1971).

In essence, if a seaman is injured or becomes ill while in the service of a vessel, the vessel owner must pay maintenance and cure without regard to fault or causation. Ms. Stinson was in the service of the vessel when she contracted MRSA.

As seen, each of Ms. Stinson's claims has a different test for causation. Under the Jones Act, if the defendants' actions played any part, no matter how slight, in causing the injury or illness, there is causation. For unseaworthiness, the test is one of proximate cause. Under maintenance and cure, the sole question is did the injury or illness arise while the seaman was in the service of the vessel, and causation does not matter.

Because Ms. Stinson meets the test for proximate cause enough to put the issue to the jury, she meets all of the other tests for causation. But should the Court find Ms. Stinson did not meet the test for proximate cause (unseaworthiness) sufficiently to put that issue before the jury, Ms. Stinson's testimony and that of Dr. Luteyn demonstrates enough evidence, that a reasonable person could find that the State's negligence played any part, however slight, in causing Ms. Stinson to contract MRSA, and therefore to put that issue before the jury. (The test under the Jones Act.)

For maintenance and cure, all Ms. Stinson is required to



show is enough evidence to put the issue before a jury as to whether she contracted MRSA while in the service of the vessel. She need not have contracted MRSA on the vessel or at work, but simply while in the service of the vessel.

Ms. Stinson meets and exceeds each of these tests for causation, at least enough to put the issue before the jury. Therefore, the granting of summary judgment by the Trial Court should be reversed, and this matter remanded for further proceedings.

### **CONCLUSION**

Dr. Luteyn was rightfully “appalled” that Ms. Stinson was left without a way for Ms. Stinson to wash her hands, and the alcohol-based hand sanitizers were removed from the vessel. CP 181-82. Because Ms. Stinson could prevent the spread of MRSA from her hands to any open wound Ms. Stinson had. Dr. Luteyn found it “incredible” that Ms. Stinson had to work in a high risk prison setting and not be able to wash her hands. CP 182-83.

Dr. Luteyn’s opined on a more probable than not basis that Ms. Stinson contracted MRSA while working as a seaman. CP 181-183, 184-85, 187-88.

The doctors hired by the State, who not did consider that Ms. Stinson could contract MRSA through contact with an item recently touched by someone infected with MRSA and then spread that infection to an open wound, and Ms. Stinson's treating physician, who did consider this form of spreading MRSA, disagree as to causation. By ignoring the possibility of the spread of MRSA though contacting an item touched by someone else who is infected, the doctors hired by the State say that Ms. Stinson contracted MRSA anywhere but while working as a seaman (CP 87-98) because she did not have physical contact with the inmates. On the other hand, Ms. Stinson's treating physician Dr. Luteyn opined on a more probable than not basis that Ms. Stinson contracted MRSA while working as a seaman because of the greatly increased risk of infection and the complete lack of any available amelioration of that risk, like hand washing or anti-bacterial gels. CP 181-83, 184-85, 187-88. In light of the facts and Dr. Luteyn's opinion, a jury would not be left to mere speculation and conjecture in this case. There is sufficient evidence for a reasonable person to find for Ms. Stinson.

Therefore, Ms. Stinson respectfully requests that the Order Granting Defendant's Motion for Summary Judgment, CP

208-210, and the judgment dismissing this case be reversed and  
this matter be remanded for additional proceedings.

DATED this <sup>30</sup> day of January 2013.



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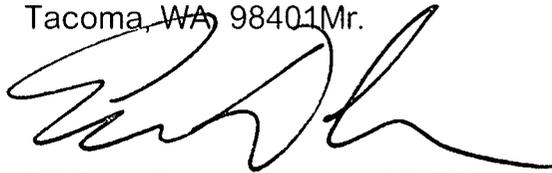
Eric Dickman, LLC,  
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Alaska Bar Number 9406019  
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Also admitted in New York

**PROOF OF SERVICE**

**CERTIFICATE OF DELIVERY**

I, the undersigned, certify under the penalty of perjury in the State of Washington that on the 30 day of January 2013, 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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Tacoma, WA 98401Mr.



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

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