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JUSTIN ENDICOTT,

Respondent,

vs.

ICICLE SEAFOODS, INC.,

Appellant.

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SUPREME COURT  
STATE OF WASHINGTON  
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BRIEF OF AMICUS CURIAE  
INLANDBOATMEN'S UNION OF THE PACIFIC

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Robert M. Kraft, WSBA #11096  
Richard J. Davies, WSBA #25365  
Kraft Palmer Davies PLLC  
720 3<sup>rd</sup> Avenue, Suite 1510  
Seattle, WA 98104-1825  
(206) 624-8844  
Attorneys for Amicus Curiae  
Inlandboatmen's Union of the Pacific

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A. IDENTITY AND INTEREST OF AMICUS

Amicus Inlandboatmen's Union of Pacific ("IBU") has articulated in its motion for leave to submit an amicus brief its identity, and its interest in this case.

B. STATEMENT OF THE CASE

Amicus IBU relies on the statements of the case set forth in the briefing of the parties.

C. ARGUMENT

(1) Any Right to a Jury Trial under the Jones Act Is a Substantive Right of the Injured Seaman, Not the Defendant Shipowner

(a) Background to Jones Act Claims<sup>1</sup>

Prior to 1920, claims by seamen against shipowners for injuries sustained on the job were addressed under federal admiralty jurisdiction.

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<sup>1</sup> Endicott also recovered because the vessel was unseaworthy. In addition to a Jones Act claim, an injured seaman may claim that a vessel is not seaworthy. *Mohn v. Maria Marie, Inc.*, 625 F.2d 900, 901 (9<sup>th</sup> Cir. 1980). Such a claim arises from a breach by the shipowner of the absolute duty to furnish a seaworthy vessel; that is, a vessel that is reasonably fit for its intended use. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549-50, 80 S. Ct. 926, 4 L.Ed.2d 941 (1960). A shipowner has a nondelegable duty to furnish a seaworthy vessel and is strictly liable if it does not. *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 208, 116 S. Ct. 619, 133 L.Ed.2d 578 (1996) (citing *Mitchell*, 362 U.S. at 550). A seaman is entitled to recover if the employer's negligence played any part, even the slightest, in producing the injury. *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5<sup>th</sup> Cir. 1997). This duty is absolute. Failure to supply a safe ship results in liability 'irrespective of fault and irrespective of the intervening negligence of crew members.' *Yamaha*, 516 U.S. at 208. To establish liability against the ship's owner, a plaintiff must prove by a preponderance of the evidence that the ship was unseaworthy and that the unseaworthy condition caused the injury. *Johnson v. Offshore Express, Inc.*, 845 F.2d 1347, 1354 (5<sup>th</sup> Cir. 1987), *cert. denied*, 488 U.S. 968 (1988).

The jury trial right guaranteed by the Seventh Amendment to the United States Constitution was inapplicable to suits invoking federal admiralty jurisdiction. *Waring v. Clarke*, 46 U.S. (5 How.) 441, 460, 12 L.Ed.2d 226 (1847). More specifically, prior to 1920, an injured seaman did not have a cause of action in negligence against the shipowner employer. *The Osceola*, 189 U.S. 158, 172, 23 S. Ct. 483, 47 L.Ed. 760 (1902). This was confirmed again in *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 384, 38 S. Ct. 501, 62 L.Ed. 1171 (1918).

In 1908, Congress passed what came to be known as the Federal Employees Liability Act (hereinafter "FELA"). This legislation removed significant barriers for workers seeking to recover damages for injuries sustained in the work place. No longer would assumption of risk, fellow servant doctrine and contributory negligence bar recovery by workers employed by the railroads.

In 1920, Congress passed the Jones Act, 46 U.S.C. § 30104,<sup>2</sup> which adopted FELA by reference for seamen, expressly granting to seamen the rights and remedies available to railroad workers under FELA. *Kernan v. American Dredging Co.*, 355 U.S. 426, 439, 78 S. Ct. 394, 2 L.Ed.2d 382 (1958); *Fuszek v. Royal King Fisheries, Inc.*, 98 F.3d 514, 516 (9<sup>th</sup> Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997); *Evich v. Connelly*, 759 F.2d 1432, 1433 (9<sup>th</sup> Cir. 1985). As a consequence of this legislation, a seaman who is injured on the job may sue the shipowner for personal injury damages.

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<sup>2</sup> It is well established that the Jones Act is remedial in nature and must be construed liberally in favor of seaman employee. Seamen do not have the benefit of no-fault worker compensation systems. RCW 51.12.100(1); *More v. Dep't of Ret. Sys.*, 133 Wn. App. 581, 587, 137 P.3d 73 (2006). The Jones Act is their relief for on-the-job injuries. *More*, 133 Wn. App. at 74 n.1. The United States Supreme Court in *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 782, 72 S. Ct. 1011, 96 L.Ed. 1294 (1952), held, with respect to the Jones Act claim:

Whenever congressional legislation in aid of seamen has been considered here since 1972, this Court has emphasized that such legislation is largely remedial and calls for liberal interpretation in favor of the seamen. The history and scope of the legislation is reviewed in *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 727-35, and notes. "Our historic national policy, both legislative and judicial, points the other way [from burdening seamen]. Congress has generally sought to safeguard seamen's rights." *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 246. "[T]he maritime law by inveterate tradition has made the ordinary seaman a member of a favored class. He is a 'ward of the admiralty,' often ignorant and helpless, and so in need of protection against himself as well as others.

The Ninth Circuit follows this tradition of liberal construction in dealing with injury claims by a seaman. *See, e.g., Davis v. Bender Shipbuilding & Repair Co., Inc.*, 27 F.3d 426, 429, *cert. denied*, 513 U.S. 1000 (9<sup>th</sup> Cir. 1994); *Williams v. Tide Water Associated Oil Co.*, 227 F.2d 791, 794 (9<sup>th</sup> Cir. 1955), *cert. denied*, 350 U.S. 960 (1956).

A shipowner owes a duty to every seaman employed on board a ship to provide a safe place in which to work, *Johnson v. Griffiths S.S. Co.*, 150 F.2d 224, 226 (9<sup>th</sup> 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.*, 566 F.2d 65, 67 (9<sup>th</sup> Cir. 1977). A shipowner is liable if it either knew, or in the exercise of due care, should have known, of the unsafe condition on board the vessel that injured the seaman. *Havens v. F/T Polar Mist*, 996 F.2d 215, 218 (9<sup>th</sup> Cir. 1993).

Although an injured seaman suing under the Jones Act must prove all the elements of negligence, i.e., the existence of a duty of care, breach of the duty by the defendant, causation, and injury, the elements of duty and causation are more relaxed in the Jones Act context than in ordinary negligence cases. For example, negligence under the Jones Act is to be construed liberally in favor of the seaman. *Sundberg v. Washington Fish & Oyster Co.*, 138 F.2d 801, 803 (9<sup>th</sup> Cir. 1943). The quantum of evidence necessary to support a finding of Jones Act negligence is less than that required for common law negligence, and, even *the slightest negligence* is sufficient to sustain liability. *Ribitzki v. Canmar Reading & Bates Ltd. P'ship*, 111 F.3d 658, 662 (9<sup>th</sup> Cir. 1997); *Havens v. F/T Polar Mist*, 996 F.2d 215, 218 (9<sup>th</sup> Cir. 1993). Because a seaman is a ward of admiralty, *Vaughan 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.

(b) A Shipowner Has No Federal Right To a Jury Trial

A seaman suing under the Jones Act has a statutory right to elect to have his or her case tried by a judge or a jury. This right has been frequently recognized in the United States Supreme Court and lower federal courts.

It is undisputed that there is no right to a jury trial in admiralty claims. *5 Morris Fed. Practice*, § 35-38, (Supp. 1980). A seaman's claim for damages caused by unseaworthiness of the vessel is founded solely on maritime law. It constitutes a claim in admiralty and, absent diversity, there is no right to a jury trial. *Russell v. Atlantic & Gulf Stevedores*, 625 F.2d 71, 72 (5<sup>th</sup> Cir. 1980); *William P. Brooks Construction Co. Inc. v. Guthrie*, 614 F.2d 509, 511 (5<sup>th</sup> Cir. 1980).

In some narrow circumstances, a defendant may have the right to demand a jury in a maritime case. If the parties invoke federal diversity jurisdiction, both a plaintiff and a defendant have a Seventh Amendment right to a jury. *Wilmington Trust v. U.S. Dist. Court*, 934 F.2d 1026 (9<sup>th</sup> Cir. 1991), *cert denied*, 503 U.S. 966 (1992); *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480, 1489, n.16 (5<sup>th</sup> Cir.) *cert. denied*, 506

U.S. 975 (1992). However, the Seventh Amendment does not apply to state court actions. *Id.* Moreover, diversity jurisdiction is not at issue in this case.

A plaintiff's Jones Act claim is a creature of statute. 46 U.S.C. § 30104. The Jones Act creates the right to a jury trial for plaintiff, and plaintiff only. The Ninth Circuit has addressed the issue of a defendant's right to demand a jury trial in a Jones Act case, concluding that *only* a plaintiff possesses this right. In *Craig v. Atlantic Richfield Co.*, 19 F.3d 472, 475-76 (9<sup>th</sup> Cir.), *cert. denied*, 513 U.S. 875 (1994), the Ninth Circuit stated:

The plain language of the Jones Act gives a plaintiff the option of maintaining an action at law with the accompanying right to a jury trial. The Act makes no mention of a defendant.

*Id.* at 476. *See also*, *Linton*, 964 F.2d at 1489 n.16; *Rachal v. Ingram Corp.*, 795 F.2d 1210, 1215 (5<sup>th</sup> Cir. 1986) (“the Jones Act gives only the seaman-plaintiff the right to choose a jury trial.”); *Hughes v. Cape Caution*, 2003 A.M.C. 1150 (W.D. Wash. 2003).

Icicle is not entitled to invoke a right to a jury in a Jones Act case under federal law.

(c) The Right to a Bench Trial Is a Substantive, Not Procedural, Right

The right to a jury trial brought under the Jones Act and maritime law is a matter of substance rather than procedure, and matters of substance are governed by federal law, while matters of procedure are governed by state law. Because state courts derive *in personam* admiralty jurisdiction from 28 U.S.C.A. § 1333(1), commonly referred to as the “savings to suitors” clause, *Panama R. Co. v. Vasquez*, 271 U.S. 557, 560, 70 L.Ed. 1085, 46 S. Ct. 596 (1926), the substantive rules of federal maritime law apply to a seaman’s personal injuries action even where the proceeding is instituted in state court. *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 66 L.Ed. 927, 42 S. Ct. 475 (1922); *Scudero v. Todd Shipyards Corp.*, 63 Wn.2d 46, 48, 385 P.2d 551 (1963); *Cline v. Price*, 39 Wn.2d 816, 239 P.2d 322 (1951).<sup>3</sup>

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<sup>3</sup> The United States Supreme Court in *American Dredging Co. v. Miller*, 510 U.S. 443, 447, 114 S. Ct. 981, 127 L.Ed.2d 285 (1994) made it clear that in state court actions permitted under the savings to suitors clause, state courts must not disrupt general maritime law:

In exercising in personam jurisdiction, however, a state court may “adopt such remedies, and . . . attach to them such incidents, as it sees fit” so long as it does not attempt to make changes in the ‘substantive maritime law.’” *Madruga v. Superior Court of Cal., County of San Diego*, 346 U.S. 556, 561, 98 L.Ed. 290, 74 S. Ct. 298 (1954) (quoting *Red Cross Line, supra*, at 124). That proviso is violated when the state remedy “works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.” *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216, 61 L. Ed. 1086, 37 S. Ct. 524 (1917).

The Jones Act provides to seamen injured through negligence the same rights as are afforded railroad employees under FELA. *Evich*, 759 F.2d at 1433. The right to elect a non-jury trial is a *substantive* part of the rights accorded seamen and railroad workers by FELA, and the Jones Act, (which adopted FELA by reference for seamen):

We have previously held that “The right to trial by jury is ‘a basic and fundamental feature of our system of federal jurisprudence’” and that it is “part and parcel of the remedy afforded railroad workers under the Employers Liability Act.” *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 354. We also recognize in that case that to deprive railroad workers of the benefit of a jury trial where there is evidence to support negligence “is to take away a good portion of the relief which Congress has afforded them.” It follows that the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere “local rule of procedure” for denial in the manner that Ohio has here used. *Brown v. Western R. Co.*, 338 U.S. 294.

*Dice v. Akron C. & Y. R. Co.*, 342 U.S. 359, 363, 72 S. Ct. 312, 96 L.Ed. 398 (1952). Since it is not a procedural matter, the right is not subject to state law. In matters of substance, the federal statute controls.

The Court of Appeals in *Hoddevik v. Arctic Alaska Fisheries Corp.*, 94 Wn. App. 268, 970 P.2d 828, 830, *review denied*, 138 Wn.2d 1016 (1999), *cert. denied*, 528 U.S. 1155 (2000) held that the State may

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In other words, on matters of substantive maritime law, state law must give way. A jury right is one of those substantive federal maritime issues.

not make changes in “substantive maritime law” when a case is brought in state court:

For cases that can be brought in state court under the “saving the suitors” clause, a state may ‘adopt such remedies, and . . . attach to them such incidents, as it seems fit’ so long as it does not attempt to make changes in the ‘substantive maritime law.’

*Id.* at 273 (citing *American Dredging Co.*). The *Hoddevik* court went on to state that “state courts must follow substantive maritime law in such cases.” *Id.* at 273 (citing *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-23, 106 S. Ct. 2485, 91 L.Ed.2d 174 (1986)).

This Court has held that substantive maritime law applies when the events giving rise to the lawsuit occur on navigable waters and the activity has the potential to affect maritime commerce. *Stanton v. Bayliner Marine Corp.*, 123 Wn.2d 64, 74, 866 P.2d 15 (1993), *cert. denied*, 513 U.S. 819 (1994). The federal interest in uniform substantive maritime law preempts any conflicting state law. Thus, the *Hoddevik* court held that a state court may not provide a remedy which “works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.” *Id.* at 273, citing *Miller, supra*, 510 U.S. 447 (quoting *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216, 37 S. Ct. 524, 529, 61 L.Ed. 1086 (1917)) (remaining citation omitted).

Icicle relies principally upon two authorities for its argument that it is entitled to a jury trial here—an Illinois Supreme Court case and a law review article.

The Illinois Supreme Court in *Bowman v. American River Transportation Co.*, 217 Ill.2d 75, 838 N.E.2d 949 (2005), *cert. denied*, 547 U.S. 1040 (2006), held that a defendant in a state court Jones Act case has a right to trial by jury. That court was flawed in its analysis and should not be accepted by Washington courts. The *Bowman* court 1) failed to apply federal substantive maritime law, as the Washington courts are required to do in a Jones Act case; 2) incorrectly determined that it need not follow the rule set forth in *Dice* that the right to a jury trial in a FELA case is substantive, and not procedural, and 3) incorrectly employed the last antecedent doctrine and the doctrine of ejusdem generis to reach a construction of statutory language that had never been necessary or employed in the federal cases that addressed the question of a plaintiff having the sole right to demand a jury. Had the *Bowman* court applied substantive federal maritime law as required by cases like *Craig*, *Linton*, and *Rachal*, and followed the Supreme Court's holding in *Dice*, the Illinois court could not have reached its holding that “the availability of a

jury trial in Jones Act cases is a question that is properly controlled by the normal laws of the forum.” *Id.* at 959.<sup>4</sup>

Other state courts have arrived at a different conclusion than the *Bowman* court. In *Peters v. San Francisco*, 1995 AMC 788, 791 (Cal. App. 1995), the plaintiff sued the City of San Francisco for damages under the Jones Act. Holding that the defendant was not entitled to a jury trial in an admiralty case, the court explained that the seaman is not obligated to try his Jones Act claim to a jury:

The Jones Act does not compel the plaintiff to have a jury trial of his claims. If he chooses to try his claim in a civil action, it is simply a right that he possesses.

...

Peters had the right to waive jury trial in that matter. He did so. The City has no right – dependent or independent – to a jury trial in this matter. Thus, the trial court did not err when it conducted a court trial in this matter.

*Peters*, 1995 AMC at 792. Like *Peters*, defendant here has no independent right to a jury trial.

As Washington courts are required to apply federal substantive maritime law in a Jones Act case, and as federal courts have held that the

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<sup>4</sup> The *Bowman* court rejected the decision of the Illinois Court of Appeals in *Allen v. Norman Bros.*, 286 Ill. App.3d 1091, 678 N.E.2d 317, 319-20 (1997) in which that court (contrary to what was done in *Bowman*), applied federal law. See also, *Gibbs v. Lewis & Clark Marine, Inc.*, 298 Ill. App.3d 743, 700 N.E.2d 227 (1998); *Hearn v. Amer. River Transp. Co.*, 303 Ill. App.3d 619, 707 N.E.2d 1283 (1999); *Hanks v. Luhr Bros. Inc.*, 303 Ill. App.3d 661, 707 N.E.2d 1266, cert. denied, 528 U.S. 966 (1999);

question of the right to a jury trial a FELA case is a substantive right and only a plaintiff in a Jones Act case may demand a jury, this Court should reject the reasoning of the *Bowman* court.

In addition to *Bowman*, Icicle invokes law review articles written by Professors Robertson and Sturley to support its argument that it has a right to a jury trial. Br. of Appellant at 10 n.3.<sup>5</sup> These articles are hardly the last word on this issue. The analysis there has been criticized as containing numerous analytical flaws. Roy Dripps, *The Seaman's "Election" under the Jones Act: A Reply to Professors Robertson and Sturley*, 14 U.S.F. Mar. L. J. 127 (2001-02). Given the flawed analysis of the Jones Act and unseaworthiness claims in the Robertson/Sturley article, it is hardly a strong foundation for Icicle's argument. Icicle's misreading of federal law should be rejected by this Court.

Icicle's mantra in this case is that a "Jones Act plaintiff's election of a bench trial rests on his choice of forum." Reply br. at 1. Icicle is wrong, ignoring the fact that *only* a Jones Act plaintiff may decide if a jury is appropriate and that is a *substantive* right of that plaintiff under federal maritime law. Icicle misstates federal law in its brief. *Id.* at 1-2. Merely

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*Hendricks v. Riverway Harbor Service St. Louis, Inc.*, 314 Ill. App.3d 800, 732 N.E.2d 757 (2000) (all following *Allen*).

choosing to litigate in state court does not alter the fact that under federal substantive maritime law, which must be applied in state court, Endicott's choice of whether to have a jury or not *controls*. Under federal maritime law, Endicott's election not to proceed with a jury trial prevails.

(d) Icicle Has No State Constitutional Right to A Jury Trial

Icicle argues that Article 1, Section 21 of the Washington Constitution allows a right to a jury trial for a shipowner, notwithstanding substantive federal maritime law. Br. of Appellant at 20-24; reply br. at 8-10. Icicle is wrong. As the jury election is a *substantive* right under federal maritime law, only Endicott had the right to make such an election.

Even if this issue were analyzed solely under Washington law, which this Court should not do, the Washington State Constitution protects only those rights to trial by jury which existed at the time of the adoption of the Constitution in 1889. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 645, 771 P.2d 711, 780 P.2d 260 (1989); *Nielson v. Spanaway General Medical Clinic, Inc.*, 135 Wn.2d 255, 266, 956 P.2d 312 (1998).

Although the Seventh Amendment does not apply to state court actions, the reasoning of the Ninth Circuit in *Linton* is instructive. There,

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<sup>5</sup> Icicle principally relies on David W. Robertson & Michael F. Sturley, *The Right to a Jury Trial in Jones Act Cases: Choosing the Forum Versus Choosing the Procedure*, 30 J. Mar. I. & Com: 649 (1999). Br. of Appellant at 11, 13, 14.

a plaintiff, who had failed to properly demand a jury in a Jones Act case, tried to invoke the Seventh Amendment. The court rejected that argument holding that there was no common law right to a jury trial in admiralty cases when the Constitution was ratified. 19 F.3d at 475.

Just as the argument of the plaintiff in *Craig* on the Seventh Amendment fails, Icicle's argument here must fail. In 1889, no right to a jury trial for an admiralty case existed at common law. In fact, federal maritime law did not even recognize that a seaman had a cause of action for negligence. The Washington Constitution does not "preserve" a right to a jury where the right never existed for admiralty claims.<sup>6</sup> Even if this Court were to attempt to analogize an injured seaman's personal injuries action to what existed in 1889, the apt analogy remains an admiralty action for which no jury right applied. *Schmidt v. Cornerstone Investments, Inc.*, 115 Wn.2d 148, 160-61, 795 P.2d 1143 (1990) (statutory offset for reasonable settlement under RCW 4.22.060 was equitable issue to which jury right did not apply). *See also, State ex rel. Evergreen Freedom Foundation v. Wash. Ed. Ass'n*, 111 Wn. App. 586, 610-11, 49 P.3d 894 (2002), *review denied*, 148 Wn.2d 1020 (2003)

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<sup>6</sup> Icicle claims that *Larson v. Alaska S.S. Co.*, 96 Wash. 665, 165 P. 880 (1917) supports its position that pre-Jones Act Washington law afforded a jury right to seamen in personal injuries claims. *Larson* was effectively overruled by the United States Supreme Court in *Chelentis, supra*.

(Public Records Act action has no historical analogue, but, if it did, its analogue would be an action in equity to which no jury right applied); *State v. State Credit Ass'n*, 33 Wn. App. 617, 621, 657 P.2d 327 (1983), *rev'd on other grounds*, 102 Wn.2d 1022, 689 P.2d 403 (1984) (no historical analogue to Consumer Protection Act case).

No jury right is afforded Icicle under the Washington Constitution article I, § 21.

(2) An Injured Seaman Is Entitled to Recover Prejudgment Interest in a Case Involving both Jones Act and Unseaworthiness Claims

The trial court in this case awarded Endicott prejudgment interest on his Jones Act and vessel unseaworthiness recovery of \$143,611. CP 123-24.<sup>7</sup> Icicle contends that Endicott should not recover prejudgment interest because the Jones Act does not allow for such interest or, alternatively, because Washington law controls and, under that law, Endicott's claim was not liquidated so that prejudgment interest was not available to him. Br. of Appellant at 25-42; Reply br. at 10-16. By contrast, Endicott argues that the issue of prejudgment interest is a substantive, not procedural, issue and federal law controls; in mixed Jones

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<sup>7</sup> The trial court allowed interest at 12%. CP 118. Icicle did not assign error to the interest rate employed by the trial court. Br. of Appellant at 2-3.

Act and seaworthiness claims, an injured seaman is entitled to recover prejudgment interest. Br. of Respondent at 13-17.

The issue of prejudgment interest in Jones Act claims is not a picture of clarity. See J. Noelle Hicks, *Clearing Murky Waters: Recovering Prejudgment Interest under the Jones Act*, 16 U.S.F. Mar. L. J. 83 (2003-04) (hereinafter "Hicks"). However, under the better reasoned federal and Washington authorities, the trial court's decision here was entirely correct.

Before discussing federal and Washington authorities on interest specifically, it is important for the Court to consider key issues regarding maritime law. First, seaman are "wards of admiralty." *Harden v. Gordon*, 11 F. Cas. 480, 485 (C.C.D. Me. 1823); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 431, 59 S. Ct. 262, 83 L.Ed. 265 (1939). They are entitled to special treatment, in particular special solicitude by the courts in connection with remedies for personal injuries arising out of their maritime employment. *The Harrisburg*, 119 U.S. 199, 206-07, 7 S. Ct. 140, 30 L.Ed. 358 (1886).

Second, the standard of review for interest decisions is a procedural issue for Washington courts. The trial court's decision on interest is reviewed for an abuse of discretion. *Scoccolo Constr. Co. v. City of Renton*, 158 Wn.2d 506, 519, 145 P.3d 371 (2006).

The trial court here did not abuse its discretion. The question of prejudgment interest is again a substantive question resolved by federal maritime law. In *In re Exxon Valdez*, 484 F.3d 1098, 1101 (9<sup>th</sup> Cir. 2007), the Ninth Circuit indicated that it is “well settled” that prejudgment interest is a *substantive*, not procedural, aspect of a plaintiff’s claim. As noted in *Paul v. All Alaskan Seafoods, Inc.*, 106 Wn. App. 406, 24 P.3d 447 (2001), *review granted*, 145 Wn.2d 1015 (2002), a case in which a seaman sued to recover unpaid wages, federal maritime law controls on the issue of prejudgment interest, rejecting Icicle’s argument here that Washington prejudgment interest law with its liquidated/unliquidated distinction should apply:

General maritime law is traditionally hospitable to prejudgment interest, because full compensation is a basic principle of admiralty law. Interest should be awarded absent peculiar or exceptional circumstances justifying denial. The Washington rule governing prejudgment interest thus conflicts with the maritime rule, and its application is preempted.

*Id.* at 427.<sup>8</sup>

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<sup>8</sup> The Washington Court of Appeals decision in *Foster v. State of Wash. Dep’t of Transportation, Div. of Wash. State Ferries*, 128 Wn. App. 275, 115 P.3d 1029 (2005) only addresses the interest issue in dicta as the case was resolved on sovereign immunity grounds. It does not cite *Paul*, and erroneously claims that a majority of federal courts do not award prejudgment interest in mixed cases. *Id.* at 279. It does not even cite *Magee v. U.S. Lines, Inc.*, 976 F.2d 821 (2<sup>nd</sup> Cir. 1992), a key contrary decision, or *Hicks*.

The better analyzed decision on prejudgment interest in mixed Jones Act/unseaworthiness cases is *Magee*. Where a seaman recovers under separate Jones Act and seaworthiness theories but a single award of damages is rendered, an award of prejudgment interest is merited. “[T]he preferable rule, we think, is that the successful plaintiff be paid under the theory of liability that provides the most complete recovery.” 976 F.2d at 822. As the Second Circuit noted, while prejudgment interest is invariably the rule for unseaworthiness claims, and such interest is ordinarily not recoverable under the Jones Act, the two claims are “Siamese twins” as the recovery is the same under either theory so that there “is little reason, therefore, for denying plaintiff recovery of interest on his maritime claim.” *Id.* at 823. See also, *Public Administrator of the County of N.Y. v. United States Lines, Inc.*, 603 N.Y.S.2d 20 (N.Y. App. Div. 1993), *cert. denied*, 511 U.S. 1085 (1994). Endicott’s recovery here was not differentiated between his Jones Act and unseaworthiness claims by the trial court. CP 114-21.

As Hicks notes, applying prejudgment interest to Jones Act/unseaworthiness recoveries more broadly better effectuates the principle that the award of prejudgment interest is “well-nigh automatic,” absent exceptional or peculiar circumstances in maritime law, *id.* at 106,

and the principle that prejudgment interest, as a substantive right, should be applied uniformly in federal maritime law. *Id.* at 117-18.

Even if state law on prejudgment interest were to apply, which IBU believes it should not, Endicott would be entitled to prejudgment on all or substantial parts of his claims against Icicle. Washington law generally favors the award of prejudgment interest, *Pierce County v. State*, 144 Wn. App. 783, 855, 185 P.3d 594 (2008), and makes special provision for the award of prejudgment interest to injured workers. For example, in cases under Washington's Industrial Insurance Act, an injured worker is entitled to prejudgment interest when the employer appeals and the injured worker prevails, or when the injured worker both appeals and prevails on a time loss claim. RCW 51.52.135; *Shum v. Dep't of Labor & Indus.*, 63 Wn. App. 405, 409, 819 P.2d 399 (1991). That statute provides for recovery of interest at 12% per annum in such instances.

Similarly, in wage-related claims a worker may recover prejudgment interest. For example, in *Hansen v. Rothaus*, 107 Wn.2d 468, 730 P.2d 662 (1986), this Court rejected the idea that merely because a tort claim was involved, the claim was unliquidated. The Court noted that prejudgment interest was recoverable where another had the "use value" of a person's money. *Id.* at 473.

Commonly, in cases arising under RCW 49.48.030 for unpaid wages, for example, prejudgment interest is awarded. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 723, 153 P.3d 846, *cert. denied*, 128 S. Ct. 661 (2007); *Dautel v. Heritage Home Center, Inc.*, 89 Wn. App. 148, 155, 948 P.2d 317 (1997), *review denied*, 135 Wn.2d 1003 (1998).

The trial court here did not abuse its discretion in awarding prejudgment interest to Endicott.

D. CONCLUSION

The trial court here correctly discerned that Icicle had no right to a trial by jury in this Jones Act/unseaworthiness case in state court under controlling federal law principles. The trial court was also correct in awarding Endicott prejudgment interest on his Jones Act/unseaworthiness recoveries.

DATED this 11<sup>th</sup> day of August, 2009.

Respectfully submitted,

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Robert M. Kraft, WSBA #11096  
Richard J. Davies, WSBA #25365  
Kraft Palmer Davies PLLC  
720 3<sup>rd</sup> Avenue, Suite 1510  
Seattle, WA 98104-1825  
(206) 624-8844  
Attorneys for Amicus Curiae  
Inlandboatmen's Union of the Pacific

# APPENDIX

46 U.S.C. § 30104:

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.

RCW 51.52.135:

(1) When a worker or beneficiary prevails in an appeal by the employer to the board or in an appeal by the employer to the court from the decision and order of the board, the worker or beneficiary shall be entitled to interest at the rate of twelve percent per annum on the unpaid amount of the award after deducting the amount of attorney fees.

(2) When a worker or beneficiary prevails in an appeal by the worker or beneficiary to the board or the court regarding a claim for temporary total disability, the worker or beneficiary shall be entitled to interest at the rate of twelve percent per annum on the unpaid amount of the award after deducting the amount of attorney fees.

(3) The interest provided for in subsections (1) and (2) of this section shall accrue from the date of the department's order granting the award or denying payment of the award. The interest shall be paid by the party having the obligation to pay the award. The amount of interest to be paid shall be fixed by the board or court, as the case may be.