No. 43698-1-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

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The STATE OF WASHINGTON and
the DEPARTMENT OF CORRECTIONS

Appellant / Defendants

v.

SCOTT WALTER MAZIAR,

Respondent / Appellee / Plaintiff

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# RESPONDENT'S BRIEF INCLUDING CROSS APPEAL

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## Introduction

At a bench trial Mr. Maziar (respondent) was awarded $585,000.00 for the injuries he suffered when the captain of the ferry Mr. Maziar was riding on yanked a chair out from underneath Mr. Maziar. CP 128-42. When injured, Mr. Maziar was a prison guard on his way back from McNeil Island Penitentiary on a ferry. CP 130 ¶¶ 5-7. The ferry was owned and operated by the Washington State Department of Corrections and the State of Washington (hereinafter State). The captain was a State employee. CP 130 ¶ 5.

When Mr. Maziar first brought his general maritime claim for relief, he asked for a jury trial. CP 186-191. However, following the decision in *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 224 P.3d 761, *cert. denied* __ US __, 130 S.Ct. 3482, 177 L.Ed.2d 1059 (2010), where the Supreme Court pointed out the distinction between common law and general maritime claims, and noted the latter had no right to a jury trial, it became clear that Mr. Maziar's general maritime claim should be tried to the bench. The trial court agreed. CP 238. Therefore, Mr. Maziar's case was tried to the bench.

Following the bench trial, the State appealed. This current appeal is the second appeal in Mr. Maziar's case. The first is

reported at *Maziar v. Department of Corrections (Maziar I)*, 151 Wn.App. 850, 216 P.3d 430, 2009 AMC 1999 (2009).

The State's appeal (this appeal) is entirely predicated on Mr. Maziar not being able to try his general maritime claim to the bench. If, as is the case, the trial court properly struck the jury, then all of the State's arguments fail.

The State mistakenly argues Mr. Maziar could not try his case to the bench because of the "right" to a jury trial listed in article 1, section 21 of the Washington State constitution. In Washington State the "basic rule in interpreting article 1, section 21 [of the State constitution's right to a jury trial] is to look to the right as it existed at the time of the constitution's adoption in 1889." *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 645, 771 P.2d 711, 716 (1989). In 1889, a passenger injured on a vessel, as Mr. Maziar was, had no right to a jury trial for the passenger's general maritime law claim for relief. *Phelps v. The City of Panama*, 1 Wash.Terr 518, 535-36 (1877). Therefore, the trial court was correct to strike the jury in Mr. Maziar's case, and all of the State's arguments fail.

## Introduction to Cross Appeal

On the other hand, the trial court erred in not awarding Mr. Maziar prejudgment interest on his general maritime claim for relief. The trial court did not find prejudgment interest should not be awarded, rather that prejudgment interest could not be awarded against the State. RP 6-22-11 at 11 and CP 140 ¶ 50 and CP 141 ¶ 54. This was in error because the State waived sovereign immunity as to any and all remedies for the State's tortious conduct. *Maziar I*, 151 Wn.App. at ¶ 22 (860), 216 P.3d at 435. Prejudgment interest is a remedy in general maritime claims, which is to be awarded for tortious conduct. *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d at ¶ 31 (888), 224 P.3d at 769. Therefore, Mr. Maziar should have been awarded prejudgment interest for the State's tortious conduct, and this matter should be remanded for an award of prejudgment interest to Mr. Maziar.

Additionally, the trial court erred in finding Mr. Maziar did not mitigate his damages when Mr. Maziar applied for and followed up on light duty jobs with the State that were open and for which he was qualified. RP 10-18-2011 at 111-12; RP 10-19-2011 at 56-57. Mr. Maziar also tried other jobs and schooling that were outside the Department of Corrections. RP 10-18-2011 at 83; RP 10-18-2011 at 113-15; RP 10-18-2011 at 115-16.

Nevertheless, the trial court found Mr. Maziar did not mitigate his lost future wages and denied Mr. Maziar lost future wages after November 2003. CP 140 ¶ 51.

Mr. Maziar should have been awarded lost future wages from November 2003 (CP 132-33 ¶ 19) into the future, and this matter should be remanded for an award of future wages to Mr. Maziar.

## STANDARD OF REVIEW

### Standard of Review on State's Appeal

The standard of review for striking the jury, a question of law, is de novo. *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d at ¶ 11 (880), 224 P.3d at 765.

Factual determinations will not be disturbed on appeal when supported by substantial evidence. *Bird v. Best Plumbing Group, LLC*, 175 Wn.2d 756, ¶ 40 (775), 287 P.3d 551, 561 (2013) (*citing Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 158, 795 P.2d 1143 (1990)); *Water's Edge Homeowners Ass'n*, 152 Wn.App 572, 584, 216 P.3d 1110 (2009).

## Standard of Review on Cross Appeal

The standard of review for failure to award prejudgment is abuse of discretion. *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d at ¶ 24 (879), 224 P.3d at 768. *Endicott* elaborates further:

> However, a ruling based on an erroneous legal interpretation is necessarily an abuse of discretion. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

*Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d at ¶ 24 (879), 224 P.3d at 768.

The standard of review for the failure to award future wages is abuse of discretion. *Endicott*, id. However, a ruling based on an erroneous legal interpretation is necessarily an abuse of discretion. *Endicott,* id.

## Assignment of Error

The trial court was correct to strike the jury in Mr. Maziar's case. The State's appeal is unfounded.

## Assignments of Error on Cross Appeal

A. The trial court erred in not awarding prejudgment interest to Mr. Maziar.

B. The trial court erred in finding that Mr. Maziar had failed to mitigate his damages by not returning to work with the State in the mailroom.

**Issues Pertaining to Assignment of Error on Cross Appeal**

1. Where the State waived its sovereign immunity as to all remedies under maritime law, did the trial court err in failing to award Mr. Maziar prejudgment interest?

2. Where Mr. Maziar applied for light duty jobs with the State and tried other jobs and schooling that were not within the Department of Corrections, did the trial court err in finding Mr. Maziar had failed to mitigate his damages and therefore denying Mr. Maziar lost wages from November 2003 into the future?

**Statement of the Case**

This appeal follows a bench trial where Mr. Maziar was awarded $585,000.00 for the injuries he suffered when the captain of the ferry on which Mr. Maziar was riding yanked a chair out from underneath Mr. Maziar. CP 128-42. When injured, Mr. Maziar was a prison guard riding the State's ferry back from McNeil Island Penitentiary. CP 130 ¶¶ 5-7. The ferry was

owned and operated by the State, and the captain who yanked the chair out was a State employee. CP 130 ¶ 5.

Mr. Maziar was seated on the upper deck almost asleep, when the captain yanked the chair out from Mr. Maziar's feet causing Mr. Maziar to fall to the deck. CP 130-31 ¶¶ 6-10. Mr. Maziar suffered serious injuries in the fall. CP 131 ¶ 12; CP 132 ¶ 17 ("Dr. Becker and all of Mr. Maziar's treating physicians say that Mr. Maziar cannot go back to work as a prison guard"), CP 133 ¶¶ 20-25; CP 134-37 ¶¶ 26-36.

Prior to the first appeal in Mr. Maziar's case, the trial court granted summary judgment against Mr. Maziar. On March 6, 2008, Mr. Maziar appealed. CP 192-96. This Court found the trial court erred, and Mr. Maziar's case was remanded for further proceedings. *Maziar v. State (Maziar I)*, 151 Wn.App. 850, 216 P.3d 430, 433, 2009 AMC 1999 (2009); CP 197-208 (mandate).

Mr. Maziar's claim went to trial on October 18, 2011. RP 10-18-11 at 1; CP 128. The trial court found for Mr. Maziar on his general maritime personal injury claim. CP 128-142. The trial court entered Findings of Fact and Conclusions of Law on June 25, 2012. CP at 128-42. The trial court awarded $585,000.00 in damages to Mr. Maziar. CP 133 ¶ 25; 140 ¶ 53. Judgment was entered on June 25, 2012. CP 143-46.

On July 18, 2012, the State appealed. CP 147-69. On July 27, 2013, Mr. Maziar cross appealed. CP 388-404.

## ARGUMENT

### The Trial Court was Correct to Strike the Jury

First[1], to dispel the State's claim that Mr. Maziar "chose" to file in state court: As a citizen of the State of Washington, the 11th Amendment to the United States Constitution bars Mr. Maziar from suing the State of Washington in federal court. *Welch v. Department of Highways & Public Transportation*, 483 US 468, 17 S.Ct 2941, 97 L.Ed.2d 389 (1987); *Collins v. State of Alaska*, 823 F.2d 329 (9th Cir. 1987). Therefore Mr. Maziar did not have the option of bringing his passenger injury general maritime claim for relief "in admiralty" in federal court.

Next, the State repeatedly says that "the right to a jury is inviolate" under article 1, sec. 21 of the Washington State constitution and therefore Mr. Maziar's case had to be tried to a jury. However,

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[1] The State also claims Mr. Maziar's motion to strike the jury was not timely; however, the motion was filed more than 5 days before the trial, CP at 209, but even if was made at trial it could be granted. *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 364, 617 P.2d 704, 707 (1980). (The motion was filed on September 15, 2011, CP at 209-217, the motion was decided on October 6, 2011, CP 238, and trial did not begin until October 18, 2011. RP 10-18-11 at 1; CP 128.)

> [t]the general rule as to state constitutional provisions protecting the right to a jury trial is that they preserve the right in substance as it existed when the provision was adopted in the various states. 47 Am.Jur.2d *Jury* § 17 (2969); 50 C.J.S. *Juries* § 10 (1947); *State ex rel. Mullen v. Doherty*, 16 Wash 382, 47 P. 958 (1897).

*State ex rel. Speed*, 96 Wn.2d 838, 640 P.2d. 13 (1982), *cert. denied* 459 US 863 (1982).

> Our basic rule in interpreting article 1, section 21 is to look to the right as it existed at the time of the constitution's adoption in 1889. [Citations deleted.] We have used this historical standard to determine the scope of the right as well as the causes of action to which it applies.

*Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 645, 771 P.2d 711, 716 (1989).[2]

Looking to 1889, there was no right then to a jury trial for a passenger's general maritime claim. *Phelps v. The City of Panama*, 1 Wash.Terr 518, 535-36 (1877). No statute has expressly changed that fact. Therefore, Mr. Maziar's general maritime claim should have been tried without a jury.

Not having a jury trial is not unique to general maritime claims. There are many types of Washington cases where there is no right to a jury trial. For example:

> proceedings in *quo warranto*, prohibition and the like are special and extraordinary proceedings and they do not fall

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[2] Contrary to one of the State's arguments, only state jurisprudence applies to the question of whether a matter is tried without a jury in Washington courts. *Bird v. Best Plumbing Group, LLC*, 175 Wn.2d 756, ¶ 25 (768), 287 P.3d 551, 557 (2013).

> within the purview of § 248, supra. which restricted the right of trial by jury to actions denominated as actions at law.

*In re Mullen v. Doherty*, 16 Wash. 382, 385, 47 P. 958, 959 (1897). Also, actions regarding filiation are tried without a jury. *State ex rel Goodner v. Speed*, 97 Wn.2d 838, 640 P.2d 13 (1982) *cert. denied* 459 US 863 (1982). Actions in equity are tried without a jury. *Osgood & Co. v. Ralph*, 4 Wash. 617, 30 P. 709 (1892); *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 368, 617 P.2d 704, 709 (1980). Actions for an injunction are tried without a jury. *Spokane Co-op Mining v. Pearson*, 28 Wash. 118, 68 P. 165 (1902). Reasonable hearings of proposed settlements are heard without a jury. *Bird v. Best Plumbing Group, LLC*, 175 Wn.2d 756, ¶ 35 (773), 287 P.3d 551, 560 (2013). And, as noted, passenger's general maritime claims are tried without a jury. *Phelps v. The City of Panama*, 1 Wash.Terr 518, 535-36 (1877); *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d at fn.3 (886), 224 P.3d at 767.

In its brief, the State misreads the discussion in *Endicott v. Icicle Seafoods, Inc.* about jury trials in Jones Act cases. The State mistakes Mr. Maziar's general maritime claim for a Jones

Act claim.[3] General maritime claims are tried without a jury, but in a Jones Act claim the parties may ask for a jury trial. The Jones Act (46 USC § 30104, previously 46 USC § 688) created a new negligence claim "at law" which is not part of the general maritime law. The ability of the parties to a Jones Act claim to ask for a jury is created solely by the express terms of the Jones Act. However, Jones Act claims are by the express terms of the statute only available to seamen. *See generally, Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d at ¶¶ 5-11 (879-80), 224 P.3d at 764-65.

> By its terms, the Jones Act allows seamen to sue at law, but not in admiralty, to recover for their employers' negligence.

*Endicott*, 167 Wn.2d at ¶ 10 (879-80), 224 P.3d at 764.

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[3] The Jones Act says in part:

> A seaman injured in the course of employment ... 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 ... a railway employee apply to an action under this section.

46 USC § 30104(a). The railway-employee law referred to is the Federal Employers' Liability Act (FELA), 45 USC §§ 51-60, which allows recovery for negligence.

*Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d at ¶ 5 (879), 224 P.3d at 764 (emphasis added).

Under Washington law, the parties to a Jones Act claim have a right to ask for a jury trial. *Endicott*, 167 Wn.2d at ¶ 23 (885), 224 P.3d at 767.

But Mr. Maziar was not a seaman. He was a passenger injured on board a ferry owned and operated by the State. CP 130-31 ¶¶ 6-9. Mr. Maziar did not bring a Jones Act claim. Mr. Maziar's claims for relief were for general maritime negligence. CP 186-191. As this Court explained:

> [Mr.] Maziar's claims fall under the 'general maritime law,' which is an ancient set of judge-made laws that the federal courts have adopted and developed.

*Maziar I*, 151 Wn.App. at fn 2 (854), 216 P.3d at 433.

> Here, Maziar was on the ferry for the sole purpose of being transported from work. This fits directly within the pure maritime activities described in [*Spencer Kellogg & Sons* (] *The Linseed King* [), 285 US 502, 52 S.Ct. 450, 76 L.Ed. 903 (1932),] and *Thibodaux [v. Richffield Co.*, 580 F.2d 841 (5th Cir. 1978)].

*Maziar I*, 151 Wn.App. at ¶ 20 (859-60), 216 P.3d 435.

As an injured passenger bringing a general maritime claim, Mr. Maziar's claim should have been, as it was, tried to the bench. *Phelps v. The City of Panama*, 1 Wash.Terr at 535-36; *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d at fn.3 (886), 224 P.3d at 767.

Because the ability to ask for a jury in a Jones Act case arises "at law" under the Jones Act and not under general

maritime law, and because Mr. Maziar could not bring a Jones Act claim, as he was not a seaman, the Jones Act and the cases cited by the State that discuss the right to a jury in a Jones Act case are not applicable to Mr. Maziar's appeal.[4]

The State also cites a number of Longshore and Harbor Workers Compensation Act (LHWCA - 33 USC §§ 901-950) cases in its faulty argument for a jury trial. These cases, like Jones Act cases, allow for a jury trial as part of a statutory scheme, making them inapplicable to the issues in this appeal.

After the 1972 amendments to the LHWCA, § 905(b) applies common law negligence and not general maritime negligence in an LHWCA negligence claim. (Prior to the 1972 amendments a longshoreman had a general maritime unseaworthiness claim under § 905(b).)

> By the 1972 amendment, a LHWCA cause of action under § 905(b), while clearly remaining "maritime" in a jurisdictional sense since the accident occurred on navigable waters, was divested of all special maritime claim characteristics. *Anuszewski v. Dynamic Mariners*

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[4] The State also cites to federal cases in its misplaced argument. Federal court cases are not binding authority on Washington courts regarding procedural issues (even in a maritime case). The Washington Supreme Court recently said, "Only our state jurisprudence applies [when deciding if there should be a jury], as the Seventh Amendment to the United States Constitution does not apply to civil cases in state courts." *Bird v. Best Plumbing Group, LLC*, 175 Wn.2d 756, ¶ 25 (768), 287 P.3d 551, 557 (2013).

> *Corp., Panama*, 540 F.2d 757, 759 (4th Cir. 1976), *cert. denied*, 429 US 1098, 97 S.Ct. 1116, 51 L.Ed.2d 545 (1977) ("It is equally clear ... that while longshoremen retain the right to recover damages against a vessel, in such an action they occupy the same position as their land-based counterparts"); *Riddle v. Exxon Transportation Co.*, 563 F.2d 1103, 1110 (4th Cir. 1977)("the Amendments ... declared that ... liability ... was governed by 'land-based' negligence principles and not by 'maritime negligence concepts'").

*Duty v. East Coast Tender Service, Inc.*, 660 F.2d 933, 1982 AMC 2892 (4th Cir. 1981).

A jury may be permissible under the common law negligence claim for relief allowed by § 905(b) of the LHWCA. However, a jury is not permissible under general maritime negligence claims, such as the one brought by Mr. Maziar, an injured passenger.[5]

Unlike claims under common law, the Jones Act or the LHWCA, Mr. Maziar's general maritime law claims are governed by an ancient set of judge-made laws that the federal courts

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[5] 'The District Court was in error in ruling that the governing law in this case was that of the State of New York. Kermarec was injured aboard a ship upon navigable waters. It was there that the conduct of which he complained occurred. The legal rights and liabilites arising from that conduct were therefore within the full reach of the admiralty jurisdiction and measurable by the standards of maritime law.'

*Scudero v. Todd Shipyards Corp.*, 63 Wn.2d 46, 52, 385 P.2d 551, 555, 1964 AMC 403 (1963)(quoting Kermarc v. Compagne Generale Transatlantique, 358 US 625, 629, 79 S.Ct. 406, 408, 3 L.Ed.2d 550 (1959)).

have adopted and developed. *Maziar I*, 151 Wn.App. at fn 2 (854), 216 P.3d at 433. These laws do not provide for a jury trial in a passenger's general maritime claim. *Phelps v. The City of Panama*, 1 Wash.Terr 518, 535-36 (1877); *United States v. La Vengeance*, 3 US 297, 301, 3 Dall. 297, 1 L.Ed 610 (1796); *Waring v. Clarke*, 46 US 44, 466, 5 How. 441, 12 L.Ed 266, 2006 AMC 2646 (1847).

Since the founding of our Republic, there have been no juries in straight general maritime claims for relief. *Beiswenger Enterprises Corp. v. Carletta*, 86 F.3d 1032, 1037, 1996 AMC 2734 (11th Cir. 1995); *Doughty v. Nebel Towing Co.*, F.Supp. 957, 958 (ED La. 1967)("There is of course no right to a trial by jury in an admiralty proceeding"); *Phelps v. The City of Panama*, 1 Wash.Terr 518, 535-36 (1877). Trial of general maritime law cases without a jury continues today.

If Mr. Maziar's case was tried under federal law there would be no right to a jury trial either by statute or under the Seventh Amendment to the United States Constitution.

This is also true under Washington law. *Phelps v. The City of Panama*, 1 Wash.Terr at 535-36; *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d at fn.3 (886), 224 P.3d at 767.

*Endicott* provides a means to analyze whether there is a right to a jury trial for a general maritime civil claim under Washington law. The *Endicott* court says, "The first step is to determine the scope of the jury trial as it existed at the State constitution's adoption in 1889." *Endicott* at ¶ 21 (884).

To apply the test, a determination is made by looking back to the formation of the State constitution. When the constitution was adopted, there was no intention of expanding the right to a jury trial. The constitutional provision was only intended to preserve the right to a jury trial as it already existed. *State ex rel. Goodner v. Speed*, 96 Wn.2d at 840-41.

> The historical nature of the test as to what "right" to a jury must remain inviolate is well stated in *People v. One 1941 Cheverolet Coupe*, 37 Cal.2d 283, 287, 231 P.2d 823 (1951).
>
> > It is the right to trial by jury as it existed at common law which is preserved; and what that right is, is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact. The right is the historical right enjoyed at the time it was guaranteed by the Constitution.

*State ex rel. Goodner v. Speed*, 96 Wn.2d at 841; *State ex rel. Mullen v. Doherty*, 16 Wash. 382, 385, 47 P. 958, 959 (1897)(the constitution "set out to provide that the right of trial by jury as it existed in the territory at the time when the Constitution was adopted should be continued unimpaired and inviolate"); *Sofie v.*

*Fibreboard Corp.*, 112 Wn.2d at 645, 771 P.2d at 716 ("Our basic rule in interpreting article 1, section 21 is to look to the right as it existed at the time of the constitution's adoption in 1889").

In 1889, when the Washington State constitution was adopted, there was no right to a jury trial for a passenger's general maritime claim for relief. *Phelps v. The City of Panama*, 1 Wash.Terr at 535-36; *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d at fn.3 (886), 224 P.3d at 767.

*Phelps* was a passenger injury general maritime case. As the Supreme Court of the Territory of Washington explained in 1877:

> The sixth question to be decided may be very summarily dismissed. This is a case, in the absence of any controlling legislation to the contrary, to be tried according to the procedure of the civil law and the United States admiralty rules. Trial by jury is unknown to the civil law. It is not adopted by statute nor by the [territorial] rules.
>
> The sixth and seventh amendments to the constitution are relied on by respondents to oppose this. These amendments are, unquestionably, under an extenditory statute, or otherwise, in force in this territory, but in reference to them it will be seen that the former relates only to "criminal prosecution," and the latter to suits at "common law."
>
> The constitution recognizes, in the language it employs, a triple distribution of jurisdiction into law, equity and admiralty. Const., Art. 3, Section 2.
>
> A suit in one of these jurisdictions is not a suit in another.

> A suit in equity or admiralty is not a suit at "common law." *McCord vs. Steamboat Tiber*, 6 Bis., 409, 411.
>
> Neither in the court below nor in in this court, could this cause be tried by a jury. Ben. Adm. Pr., Sections 193, 203.

*Phelps v. The City of Panama*, 1 Wash.Terr 518, 535-36 (1877) (emphasis added).

The *Phelps* court explains, contrary to what the State argues, a general maritime claim is not a common law claim for relief and so the passenger's general maritime claim is tried without a jury. There was no right to a jury trial in a passenger injury general maritime civil case in Washington at the time the State constitution was adopted in 1889, and there has been no controlling legislation to change the fact that a passenger's general maritime personal injury claim is tried without a jury. Therefore, there was no right to a jury trial in Mr. Maziar's passenger injury general maritime claim for relief.

"The second step is to determine the causes of action to which the right attaches." *Endicott* at ¶ 21 (884). Here the very type of claim in Mr. Maziar case, a passenger's general maritime

claim, existed in 1889.[6] See *Phelps,* 1 Wash.Terr at 535-36; also *Leathers v. Blessing*, 105 US 626, 629-30, 26 L.Ed 1192 (1881)(injuries to one who boarded the vessel at a wharf to determine if expected consignment of cotton seed arrived). The very type of claim for relief Mr. Maziar brought did not/does not allow for a jury trial. *Phelps*, id.; *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d at fn.3 (886), 224 P.3d at 767.

A passenger's general maritime claim for personal injury tried without a jury existed at the formation of the United States, and at the adoption of the Washington State constitution. A passenger's general maritime law claim has it roots in English Admiralty Law that preexisted the Colonies themselves. *Phelps*, 1 Wash.Terr at 535-36. Under British law, maritime and admiralty general maritime claims were tried to the bench and not to a jury. *Id.* Trial without a jury for general maritime claims for relief was continued when Washington adopted its constitution.

A general maritime passenger claim is not a claim at common law, and was not therefore included in the common law

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[6] In *Endicott* the fact that a Jones Act negligence claim did not exist in 1889 caused the *Endicott* Court to find a similar type of claim that did exist in 1889. In Mr. Maziar's case, an injured passenger general maritime claim predated the adoption of the Washington constitution and existed in 1889 and continues to exist into the present.

claims where the right to a jury trial was preserved. General maritime law, which is an ancient set of judge-made laws that the federal courts have adopted and developed, is a distinct and unique claim for relief completely separate from a common law negligence claim for relief. *Ward v. Norfolk Shipbuilding and Drydock Corp.*, 770 F.Supp. 1118, 1122 (E.D. Va. 1991)("General maritime law is the law of the United States, not the law of the several states. *See Panama Railroad Co. v. Johnson*, 264 US 375, 386, 44 S.Ct. 391, 393, 68 L.Ed 748 (1924)").

There are stark legal differences between general maritime negligence and common law negligence. For example, under general maritime law negligence there are only two classes of passengers: passengers, who are provided with reasonable care,[7] and stowaways, who are owed only a duty of

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[7] Under general maritime law, it is a settled principle that "the owner of a ship in navigable waters owes to all who are on board ... the duty of exercising reasonable care under the circumstances of each case." *Kernarec v. Compagnie Generale Transatlantique*, 358 US 625, 632, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959); *accord Moteleoone v. Bahama Crusie Lin. Inc.*, 838 F.2d 63, 64-65 (2nd Cir. 1988)("[I]t is now clear in this Circuit that the appropriate standard is one of reasonable care under the circumstances."). "In some instances reasonable care under the circumstances may be a very high degree of care; in other instances, it may be something less." *Rainey v. Paquet Cruises, Inc.*, 709 F.2d 169, 170 (2nd Cir. 1983). "The extent to which the circumstances surrounding maritime travel are different from those encountered in

humane treatment. *The Laura Madsen*, 112 F. 72, 73 (D.C. Wa. 1901)("neither the vessel, her owners, nor master owed him any duty, except to give him humane treatment while he necessarily remained on board"); *Buchanan v. Stanships, Inc.*, 744 F.2d 1070, 1074 (5th Cir. 1984)(citing *The Laura Madsen*). At common law there are invitees, trespassers, guests, etc., each with their own unique standard of care. Additionally, an attack by a crewmember leaves the vessel owner strictly liable under general maritime law negligence for the injuries caused to the passenger. This is not true at common law.

Therefore, under both tests set out in *Endicott* for whether a claim in Washington courts should be tried to a jury or not, Mr. Maziar's claim for relief under general maritime law does not have a right to a jury trial, and all of the State's arguments fail. The trial court made the correct ruling when it struck the jury in Mr. Maziar's case. CP 238. The trial court's decision to strike the jury should be affirmed.

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> daily life and involve more danger to the passenger, will determine how high a degree of care is reasonable in each case." *Monteleone*, 838 F.2d at 65 (quoting *Rainey*, 709 F.2d at 172).

*Naglieri v. Bay*, 93 F.Supp.2d 170, 175, 2000 AMC 136 (D.C. Conn. 1999).

In essence each of the State's arguments regarding whether there should be a jury in a general maritime claim are the same. Each fails because either the State does not properly apply the test from *Endicott* to determine if there should be the right to a jury trial in a general maritime claim for relief, or the argument is factually wrong by claiming there was a right to a jury trial in a general maritime claim for relief in 1889.

Briefly:

The State's section entitled "The Parties to a Maritime Case Brought in Washington State Court That is Based Upon a Theory of Negligence Have a Right to Trial by Jury" (State's opening brief at 15) fails because a general maritime negligence case is not the same as common law negligence. *Ward v. Norfolk Shipbuilding and Drydock Corp.*, 770 F.Supp. 1118, 1122 (E.D. Va. 1991); *Phelps v. The City of Panama*, 1 Wash.Terr at 535-36; *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d at fn.3 (886), 224 P.3d at 767. Under *Phelps* and *Endicott,* there is no right under State law to a jury trial for a general maritime claim.

The State's section entitled "Washington State Constitution Gives Defendants a Right to a Jury Trial" (State's opening brief at 17) fails to apply the longstanding test to determine if the right to a jury trial attaches to a claim for relief in Washington: looking

back to whether the claim had a right to a jury trial when the State constitution was adopted. *State ex rel. Goodner v. Speed*, 96 Wn.2d at 840-41. In 1889, under Washington law there was no right to a jury trial in a general maritime civil claim. *Phelps v. The City of Panama*, 1 Wash.Terr at 535-36. No legislation has changed that fact.

The State's argument in the section entitled "The Right to Trial by Jury Predates the Constitution. RCW 4.40.060 and 4.44.090 Embody Washington's Long Tradition of Having Juries Decide Issues of Damages, Credibility, and Questions of Fact" (State's Opening Brief at 19) is factually incorrect and therefore fails. The State claims there was a right to a jury trial in all negligence claims at the adoption of the State constitution. That is factually incorrect. The Territorial Supreme Court held, prior to adoption of the State constitution, general maritime passenger injury claims in Washington are tried without a jury. *Phelps v. The City of Panama*, 1 Wash.Terr at 535-36. So the right to a jury trial in a general maritime negligence claim did not exist at the adoption of the State constitution. The statutes cited did not create, specifically or otherwise, the right to a jury trial where one did not already exist.

The State's argument in the section entitled "DOC had a Right to have a Jury Determine the Amount of Damages Pursuant to RCW 4.40.060" (State's opening brief at 20) also fails. Again, under Washington law there is not and has not been a right to a jury trial in a passenger's general maritime negligence claim for relief. *Phelps*, 1 Wash.Terr at 535-36; *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d at fn.3 (886), 224 P.3d at 767. Therefore, the State did not have a right to a jury trial on the amount of damages to be awarded to Mr. Maziar, RCW 4.40.06 notwithstanding.

Next, the State's section entitled "DOC was Entitled to Have All Questions of Fact, Including Witness Credibility Determined by a Jury Under the Mantle of RCW 4.44.090" (State's opening brief at 21) fails. Again, because there is no right to a jury trial for a passenger's general maritime claim for relief, there is no right to have all questions of fact including witness credibility determined by a jury. There was no right to a jury in a passenger's general maritime claim for relief when the State constitution was adopted, and RCW 4.44.090 does not create, specifically or otherwise, the right to a jury trial where none previously existed.

The State's argument in the section entitled "The Trial Court Erred in Usurping the Role of the Jury and Entering Findings of Fact 1 thru 40" fails for three reasons. First, again, there is no right to a jury trial in a passenger's general maritime claim for relief. *State ex rel. Goodner v. Speed*, 96 Wn.2d at 840-41; *Phelps*, 1 Wash.Terr at 535-36; *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d at fn.3 (886), 224 P.3d at 767.

Second, this is invited error. The State accepted many of the Findings of Fact without objection, and these Findings are accepted as verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992). Those Findings to which the State did object were argued and almost all changes sought by the State were included in the Findings of Fact. (See particularly CP 137-38 ¶¶ 37-40 under the label "Defendant.") Paragraphs 37-40 were added to the Findings over plaintiff's objection, added by the State, setting up an error in the trial court that the State now complains of on appeal.

> "The invited error doctrine prohibits a party from setting up an error in the trial court, then complaining of it on appeal." *In re Pers. Restraint of Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606, *cert. denied*, 540 US 875, 124 S.Ct. 223, 157 L.Ed.2d 137 (2003).

*Humbert/Birch Construction v. Walla Walla County*, 145 Wn.App. 185, ¶ 13 (192), 185 P.3d 663 (2008). The State cannot argue to

have Findings inserted into the trial court's Findings and Conclusions only to argue those Findings create an error.

Third, the State cannot simply say all of the Findings in the Findings of Fact are in error without identifying each Finding and explaining what is improper about it. (The State even contests Findings for which it argued.)

The State's final argument contained in the section entitled "The Trial Court Erred in Allowing Mr. Maziar to Withdraw His Jury Demand Without the Consent of DOC" fails too. Again, the State's argument is predicated on the right to a jury trial in an injured passenger's general maritime claim for relief. There is no such right under Washington law, so the State's arguments based upon CR 38 fail. CR 38 says in part:

> (a) Right of Jury Trial Preserved. The right of trial by jury as declared by article 1, section 21 of the constitution or as given by a statute shall be preserved to the parties inviolate.

CR 38 does not create a new right to a jury trial, rather it preserves the right to a jury trial under article 1, section 21 of the Washington State constitution. To see if such a right exists look at the right at the time the constitution was adopted. *State ex rel. Goodner v. Speed*, 96 Wn.2d at 840-41. At the adoption of the constitution there was no right to a jury trial for a general maritime civil claim for relief by an injured passenger. *Phelps v.*

*The City of Panama*, 1 Wash.Terr at 535-36; *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d at fn.3 (886), 224 P.3d at 767. So, the State's argument fails.

CR 38 continues:

> (b) Demand for Jury. At or prior to the time the case is called to be set for trial, any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing, by filing the demand with the clerk, and by paying the jury fee required by law.

(emphasis added)

Since there was/is no right to a jury trial for an injured passenger's claims for general maritime claim for relief, such a claim for relief, and the issues related to it, are not "triable of right by a jury," and the State's argument fails.

## CROSS APPEAL

### Argument on Cross Appeal

**Prejudgment Interest**

Mr. Maziar asked for prejudgment interest in his complaint CP 186-191. Mr. Maziar also asked for prejudgment interest at the trial level. CP 340-343. A hearing was held on the issue. RP 6-22-2011 at 1-30. Nevertheless, the trial court denied Mr. Maziar prejudgment interest. CP 141 ¶ 54; RP 6-22-2011 at 11.

The trial court did not decide that Mr. Maziar should not be awarded prejudgment interest. Rather, the trial court decided that it could not award prejudgment interest against the State. The Court said:

> All right. For now I am not going to grant the prejudgment interest on this. One or both of you are going to take the matter up on appeal anyway, so you can just tack this on the other issues. Okay.

RP 6-22-2011 at 11.

Failure to award prejudgment interest in a general maritime claim is an erroneous legal interpretation. *Endicott*, 167 Wn.2d at ¶ 27 (887), 224 P.3d at 768.

> [A] ruling based on an erroneous legal interpretation is necessarily an abuse of discretion. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

*Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d at ¶ 24 (879), 224 P.3d at 768.

Therefore, the trial court abused its discretion and this matter should be remanded for an award of prejudgment interest against the State.

Unlike the right to a jury trial, which the Washington Supreme Court found to be procedural, *Endicott,* 167 Wn.2d at ¶ 20 (884), 224 P.3d at 767 ("state procedural law determines whether the parties have a right to a jury trial"):

> [p]rejudgment interest in maritime cases is substantive and so is controlled by federal law. *See, e.g., Militello v. Ann & Grace, Inc.*, 411 Mass. 22, 576 N.E.2d 675, 678 (1991) (collecting cases).

*Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d at ¶ 25 (886), 224 P.3d at 767; *Maziar I*, 151 Wn.App. at ¶ 9 (854), 216 P.3d at 433 (maritime substantive law set by federal law).

Under general maritime law, prejudgment interest is applied not only to the fixed costs, but also to the amount awarded for pain and suffering, and any other intangible losses. Prejudgment interest must be awarded unless peculiar circumstances justify its denial. *Vance v. American Hawaii Cruise Lines, Inc.*, 789 F.2d 790, 794-95 (9th Cir. 1986); *Moore v. SALLY J*, 27 F.Supp.2d 1255, 1262, 1998 AMC 1707, 1714 (W.D. Wash. 1998)(see also CP 140 ¶ 50).

> The fundamental purpose of Art. III, § 2, of the Federal Constitution was to "preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal government." *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834 [(1920)]. The savings clause (28 USC § 1333(1)) was never intended as a device whereby litigants could escape the uniform application of established principles of admiralty law, as contemplated by the Constitution.

*Cline v. Price*, 39 Wn.2d 816, 822-23, 239 P.2d 322, 326 (1951); *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").

For all of Mr. Maziar's damages, the prejudgment interest began to run from the date of his injury, that is, January 16, 2003. CP 130-31 ¶¶ 6-10; 134-37 ¶¶ 26-36; *Vance v. American Hawaii Cruise Lines, Inc.*, 789 F.2d 790, 794-95 (9th Cir. 1986); *Moore v. SALLY J,* 27 F.Supp.2d 1255, 1262, 1998 AMC 1707, 1714 (W.D. Wash. 1998).

The Washington Supreme Court held that prejudgment interest was due in cases that were based on general maritime law. In *Endicott*, the general maritime claim for relief was for unseaworthiness.[8] *Endicott*, 167 Wn.2d at ¶ 27 (887), 224 P.3d at 768 (*also*, there is "the long tradition of awarding prejudgment interest in admiralty cases." *Id*, 167 Wn.2d at fn. 5 (887), 224 P.3d at 768).[9]

As explained in *Endicott*, a private person or corporation is liable for prejudgment interest as a damage arising out of its

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[8] Because Maziar's case was properly tried to the bench, an award of prejudgment interest was appropriate. *Endicott*, 167 Wn.2d at ¶ 27 (887), 224 P.3d at 768.

[9] Prejudgment interest would also be awarded if there were mixed claims for relief including general maritime claims and common law claims. *Endicott*, 167 Wn.2d at ¶¶ 31-32 (888-89), 224 P.3d at 769.

tortious conduct in a maritime claim. (In *Endicott,* the corporation was Icicle Seafoods, Inc.) In Mr. Maziar's case, the State argued that the State had not waived its sovereign immunity as to prejudgment interest claims. However, the State had, in fact, waived its sovereign immunity as to any and all damages arising out of maritime claims. *Maziar I*, 151 Wn.App. at ¶ 23 (860), 216 P.3d at 435.

> RCW 4.92.090 provides that "[t]he state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation." This statute makes the State presumptively liable for its tortious conduct in all instances for which the legislature has not stated otherwise. *Savage v. State*, 127 Wn.2d 434, 445, 899 P.2d 1270 (1995). The statute does not limit the State's liability to a particular area of law; rather, it covers any remedy for the State's tortious conduct.

*Maziar I*, 151 Wn.App. at ¶ 22 (860), 216 P.3d at 435 (emphasis in original).

Prejudgment interest is a remedy arising out of the State's tortious conduct and the legislature has not expressly said the State is exempt from paying prejudgment interest.

> [B]ecause a private person or corporation would have been subject to liability under the general maritime law had it operated the ferry involved in this case and engaged in the same allegedly tortious conduct, e.g., *The Linseed King*, 285 U.S. at 512-13, 52 S.Ct. 450, the State is subject to such liability as well. RCW 4.92.090.

*Maziar I*, 151 Wn.App. at ¶ 23 (861), 216 P.3d at 435.

Prejudgment interest should be awarded if a maritime case is tried to the bench or to a jury. *Endicott*, 167 Wn.2d at ¶ 33 (888-89), 224 P.3d at 769. Therefore, the trial court should have awarded Mr. Maziar prejudgment interest. So, the trial court's denial of prejudgment interest should be reversed and this matter remanded for the award of prejudgment interest to Mr. Maziar.

At the trial level, the State cited to two cases in its mistaken argument against prejudgment interest, but they are not applicable to Mr. Maziar's general maritime claim for relief.

The first case the State cited was *Norris v. State of Washington*, 46 Wn.App. 822, 733 P.2d 231 (1987), a non-maritime case. In *Norris,* the Court found that the damages were not segregated by the jury, so prejudgment interest could not be awarded. The damages in *Norris* had to be segregated between fixed and general damages before prejudgment interest could be awarded. Because of *Endicott*, the distinction in *Norris* between the types of damages is not applicable to Mr. Maziar's general maritime claim. *Endicott*, 167 Wn.2d at ¶ 33 (888-89), 224 P.3d at 769; *Vance v. American Hawaii Cruise Lines, Inc.*, 789 F.2d 790, 794-95 (9th Cir. 1986); *Moore v. SALLY J,* 27 F.Supp.2d 1255, 1262, 1998 AMC 1707, 1714 (W.D. Wash. 1998).

In *Norris,* the Court also failed to discuss the application of RCW 4.92.090. Under RCW 4.92.090, the State is treated like any private person or corporation when it comes to damages arising out of the States' tortious conduct. RCW 4.92.090; *Maziar I*, 151 Wn.App. at ¶ 23 (861), 216 P.3d at 435. And a private person or corporation would be required to pay prejudgment interest in a general maritime claim for relief. *Endicott*, 167 Wn.2d at ¶ 27 and fn. 5 (887), 224 P.3d at 768. Therefore, the State should have been ordered to pay prejudgment interest on Mr. Maziar's award.

The second case cited by the State was *Foster v. State of Washington Dept. of Transp.*, 128 Wn. App. 275, 115 P.3d 1029 (2005). In *Foster* the Court held prejudgment interest cannot be awarded in mixed cases involving both the Jones Act (common law) and unseaworthiness (general maritime) claims where the damages for the respective claims cannot be apportioned between the two types of claims for relief. *Foster*, 128 Wn. App. at 279. However, that holding was overruled. *Endicott*, 167 Wn.2d at ¶ 33 (888-89), 224 P.3d at 769 (prejudgment interest should be awarded in cases of mixed common law and general maritime claims for relief being tried to the bench or to a jury whether there is apportionment or not).

Even if *Foster* was not overruled by *Endicott*, which it was, *Foster* would still not apply to Mr. Maziar's general maritime claim for relief, because Mr. Maziar did not bring a Jones Act (common law) claim with his general maritime claim. Mr. Maziar brought only a general maritime claim for relief, so there is no apportionment between the common law claim and the general maritime law claim. In Mr. Maziar's case, damages arise out of general maritime law, where an award of prejudgment interest is the norm. *Foster v. State of Washington Dept. of Transp.*, 128 Wn. App. 275, 115 P.3d 1029 (2005), is not applicable to Mr. Maziar's claim.

The trial court based its denial of prejudgment interest on an erroneous legal interpretation of the court's ability to award prejudgment interest against the State, which is necessarily an abuse of discretion. *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d at ¶ 24 (879), 224 P.3d at 768. Therefore, prejudgment interest should have been awarded on Mr. Maziar's general maritime claim for relief. This matter should be remanded for an award of prejudgment interest to Mr. Maziar.

**Mr. Maziar Mitigated His Damages**

Mr. Maziar tried to return to work as a prison guard, but could not keep performing that job. CP 131-32 ¶ 13. For some months, Mr. Maziar worked light duty for the State. RP 10-18-2011 at 82; 10-18-2011 at 110-12. There were also other open light duty jobs with the State that Mr. Maziar felt he could perform, and that he applied for. RP 10-18-2011 at 111-12.

In November 2003, the State offered Mr. Maziar a job in the mailroom, back on McNeil Island. Mr. Maziar did not feel it was safe to attempt that job. RP 10-18-2011 at 109-10. Mr. Maziar believed the mailbags he would be required to move weighed 50 pounds and there was no equipment to help him move them. Id.

> THE COURT: Just so we don't get too far down the road since this is being tried to me. Mr. Maziar, why not [take the job in the mailroom]?
>
> THE WITNESS: Ma'am, it's a permanent position that was only three or four people. There was heavy lifting in that job. I watched them as I sat there as an officer. They do lift very heavy bags. There is tedious amounts of sorting. The three people that I saw there had been there over 20 years, and there was no positions that I could see that were permanent at any time while I worked there at McNeil Island. I didn't see any permanency there.

RP 10-19-2011 at 58.

Mr. Maziar applied for jobs as a hearings officer and a records specialist with the Department of Corrections (State).

RP 10-19-2011 at 56. These were light duty jobs. And he repeatedly followed up on those job applications with the State. RP 10-19-2011 at 57.

After being terminated by the State, Mr. Maziar worked in the County Assessor's Office as part of his vocational training through Labor and Industries (L&I). RP 10-18-2011 at 83. He worked at the assessor's office for 6 months, when he injured his right arm in a fall. RP 10-18-2011 at 113-15. As a result of the fall, Mr. Maziar was terminated from the assessor's office as part of L&I rules for vocational training. RP 10-18-2011 at 115. After one of his surgeries for injuries suffered on the ferry, Mr. Maziar also attempted to go to school to learn to be a paralegal. RP 10-18-2011 at 115-16. However, Mr. Maziar could not afford to finish that training program. RP 10-18-2011 at 116.

Despite Mr. Maziar's multiple attempts to mitigate his lost wages, the trial court found that because Mr. Maziar did not try the mailroom job Mr. Maziar could not collect lost future wages. CP 140 at ¶ 51.

> THE COURT: This is where I disagree with you. The case law says he at least has to try. I think your argument I would be in agreement, I would be in agreement with you if he had actually gone in even for 10 or 15 minutes and said, 'I can't do this.' He just can't look or state 'Employer I need an accommodation. Is there anything else in this mailroom or under the job title of mailroom clerk that I can do that does not require lifting of weight or lifting of heavy

> bags?' And at that point in time if there was no accommodation by the state, which Mr. Maziar felt that he could not perform the duties of the job, then you would be in a better stance. But I don't think his mere saying, 'I know, I looked, and I said no.' I don't think he can do that without trying to do something, even if it's for five minutes.

RP 1-13-2012 at 12; again at 1-13-2012 at 26.

The trial court was too harsh. Mr. Maziar returned to work for the State in the clerk's office of the Department of Corrections, a job he was praised for doing well. However, he was still terminated from the clerk's office job once his doctor said he could never return to work as a prison guard. RP 10-18-2011 at 82; 10-18-2011 at 111-12. He applied for other light duty jobs with the State and followed up on those applications. RP 10-19-2011 at 56-57. With the help of L&I, Mr. Maziar worked at the assessor's office, but was terminated from that job when he suffered another injury. RP 10-18-2011 at 83; RP 10-18-2011 at 113-15. Mr. Maziar also went to school for training to become a paralegal until he could no longer afford it. RP 10-18-2011 at 115-16.

Although he did not take the job in the mailroom, a job he thought was too physical for him (RP 10-19-2011 at 58), Mr. Maziar applied for other jobs with the State that were open and for which he was qualified. RP 10-18-2011 at 111-12; RP 10-19-2011 at 56-57.

Therefore the trial court erred when it found Mr. Maziar had not mitigated his wage loss. CP 140 ¶ 51.

> The doctrine of avoidable consequences, also known as mitigation of damages, prevents recovery for damages the injured party could have avoided through reasonable efforts. *Kloss v. Honeywell, Inc.*, 77 Wn.App. 294, 301, 890 P.2d 480 (1995). The injured party's duty is to "use such means as are reasonable under the circumstances to avoid or minimize the damages." *Young v. Whidbey Island Bd. Of Realtors*, 96 Wn.2d 729, 732, 638 P.2d 1235 (1982). The party whose wrongful conduct caused the damages, here the County, has the burden of proving the failure to mitigate. *Bernsen v. Big Bend Electric Coop.*, 68 Wn.App. 427, 435, 842 P.2d 1047 (1993).

*Cobb v. Snohomish County*, 86 Wn.App. 223, 230, 235 P.2d 1384, 1398 (1997).

However:

> It must be remembered that the respondent was forced into the dilemma by the negligence of the appellant. After the accident, respondent had the choice of two courses of conduct. He chose the one which seemed the more reasonable to him at the time. The wrongdoer cannot now complain that one alternative rather than the other was chosen. The applicable principles of law are adequately stated in the following texts:
>
> > 'While it is economically desirable that personal injuries and business losses be avoided or minimized as far as possible by persons against whom wrongs have been committed, yet we must not in the application of the present doctrine lose sight of the fact that it is always a conceded wrongdoer who seeks its protection. Obviously, there must be strict limits to the doctrine. A wide latitude of discretion must be allowed to the person who by another's wrong has been forced into a predicament where he is faced with a probability of injury or loss. Only the conduct of a reasonable

> man is required of him. If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen. * * *' (Emphasis supplied.) McCormick on Damages 133 (Hornbook Series), § 35.
>
> '* * * the party injured is not under any obligation to use more than ordinary diligence. Prudent action is required, but 'not that action which the defendant, upon afterthought, may be able to show would have been more advantageous to him.' The amount of care required is not to be measured by 'ex post facto wisdom'; and the plaintiff is not bound at his peril to know the best thing to do.' 1 Sedgwick on Damages 415, 9th Ed., § 221.

*Hogland v. Klein*, 49 Wn.2d 216, 221, 298 P.2d 1099, 1102 (1956) (emphasis in original).

Mr. Maziar did not take the mailroom job, because he believed it was too physical for him. RP 10-19-2011 at 58. But Mr. Maziar applied for other light duty jobs with the State that were open and for which he was qualified, and he followed up on those applications. RP 10-18-2011 at 111-12; RP 10-19-2011 at 56-57. Mr. Maziar also tried other jobs and schooling that were not in the Department of Corrections. RP 10-18-2011 at 83; RP 10-18-2011 at 113-15; RP 10-18-2011 at 115-16. Mr. Maziar did what he could to mitigate his lost wages. He should not be punished for not taking a job he did not believe he could safely perform.

Therefore, the trial court's failure to award Mr. Maziar future wages after November 2003 should be reversed and this matter remanded for an award of future wages after November 2003.

**State's Argument on Witness Credibility**

The State in the section of its brief entitled "DOC was Entitled to have All Questions of Fact, Including Witness Credibility Determined by a Jury Under the Mantle of RCW 4.44.090," (State's Opening brief at 21) argues that a jury should have determined the credibility of the witnesses at Mr. Maziar's trial. As seen above, the State's argument for a jury is unfounded. Mr. Maziar's case was correctly tried to the bench, so the State's argument fails.

The State does not appear to be arguing that the trial court's factual findings are in error, but the State writes "[t]he nature and extent of Mr. Maziar's injuries were highly contested." That is not true. The testimony was very strong in favor of the nature and extent of Mr. Maziar's injuries. The "contradictory" evidence was comprised mostly of speculation, not eyewitness or believable testimony. The trial court, who could see the demeanor of the witnesses, and who saw and heard all of the

witnesses, had no trouble finding for Mr. Maziar. "I am very comfortable with the award to Mr. Maziar." RP 6-22-2011 at 17.

Regardless of who weighed the credibility of the witnesses, there is substantial evidence to support the trial court's findings. *Bird v. Best Plumbing Group, LLC*, 175 Wn.2d 756, ¶ 40 (775), 287 P.3d 551, 561 (2013).

Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 712, 732 P.2d 974 (1987). A challenged finding of fact may be supported by substantial evidence even if the evidence is in conflict or is susceptible to differing interpretations. *Sherrell v. Selfors*, 73 Wn.App. 596, 600-01, 891 P.2d 168, *review denied,* 125 Wn.2d 1002 (1994). Unchallenged findings are verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

The State alleges that Mr. Maziar's injuries were in question. Not so. The State claims one of Mr. Maziar's roommates witnessed Mr. Maziar "hunching over car engines, wielding car repair tools, hoisting an engine out of a car, digging landscaping holes, unloading shovels full of gravel and utilizing a paint roller to paint a ceiling." That witness was Mr. Warner, one

of Mr. Maziar's caregivers. When shown a sworn affidavit Mr. Warner completed as part of Mr. Maziar's application for Social Security, Mr. Warner clarified his testimony and testified Mr. Maziar was afraid he would fall, slip or hurt himself. RP 10-26-2011 at 66. Mr. Warner would help Mr. Maziar dress because Mr. Maziar had difficulty bending. RP 10-26-2011 at 66. Mr. Maziar was in a lot of pain. Id. Mr. Warner would help Mr. Maziar put on shoes because Mr. Maziar could not put them on. RP 10-26-2011 at 67. Mr. Warner helped Mr. Maziar change positions because Mr. Maziar was in pain. RP 10-26-2011 at 67-68. Mr. Warner did the cooking for Mr. Maziar. Id. He also did the yard work for Mr. Maziar. RP 10-26-2011 at 69. Mr. Warner did the household chores like mopping, sweeping, cleaning the kitchen, vacuuming, and shopping, because Mr. Maziar could not do those tasks of daily living. RP 10-26-2011 at 69. Mr. Warner saw Mr. Maziar in "significant pain." RP 10-26-2011 at 70-71. Mr. Warner saw Mr. Maziar struggle with back and shoulder problems. RP 10-26-2011 at 72. Mr. Warner saw that after Mr. Maziar was injured Mr. Maziar had difficulties holding objects and the objects would often drop out of Mr. Maziar's hands. RP 10-26-2011 at 72. Mr. Warner also saw Mr. Maziar appearing extremely stressed and anxious a significant portion of the time. RP 10-26-2011 at 73.

The State talks about Mr. Maziar doing house painting, but that is not true. Mr. Warner, who was there, testified Mr. Warner and his girlfriend did the painting. RP 10-26-2011 at 73. Mr. Warner also sprayed and rolled a protector on the driveway, and it was not, as the State claims done by Mr. Maziar. RP 10-26-2011 at 77. Mr. Maziar just stood by. Id.

The State says Ms. Anne Maziar, Mr. Maziar's ex-wife, testified she had "personal knowledge" of Mr. Maziar shoveling, installing irrigation systems, painting, fishing and traveling (without her). That testimony is inaccurate. Ms. Maziar saw Mr. Maziar about once or twice a month as part of taking care of their children. RP 10-26-2011 at 6. Contrary to what the State insinuates, Ms. Maziar admitted she never saw Mr. Maziar do any digging at all. RP 10-26-2011 at 8; RP 10-26-2011 at 33. Mr. Maziar hired a crew to do that work. RP 10-18-2011 at 135.

Ms. Maziar confirmed she just "assumed" he was doing the work. Id. Ms. Maziar did not know if Mr. Maziar was running a crew to do the work or not. RP 10-26-2011 at 19-20. The same with the cabinet work: It just seemed to Ms. Maziar like Mr. Maziar was doing the work. RP 10-26-2011 at 9; RP 10-26-2011 at 29. Again, she did not see Mr. Maziar do any of that kind of work.

Ms. Maziar never saw Mr. Maziar rip up carpets or do any house painting anywhere. RP 10-26-2011 at 29-30; RP 10-26-2011 at 34. Ms. Maziar never saw Mr. Maziar work on a car. She just saw that work was being done and assumed Mr. Maziar was doing it. RP 10-26-2011 at 21-22. Ms. Maziar assumed a lot, but had no personal knowledge, because it did not happen.

Mr. Maziar cannot work on cars. He would go into his garage to give advice to those who were working on their cars. RP 10-18-2011 at 131. Mr. Maziar would "tinker" when he could stand the pain. RP 10-18-2011 at 133-34.

The State has argued from day one that Mr. Maziar has a side auto repair business. No one has believed the State. The truth is Mr. Maziar did not/does not have a car repair business. RP 10-18-2011 at 128. The State continues to try to make something out of nothing on appeal, where there is just a cold record and the demeanor of the witnesses is lost. Mr. Maziar does not have a side business. He lived on L&I payments and then Social Security once the latter was awarded to him. RP 10-18-2011 at 127.

One of the witnesses who the State cites to support its claim of a side repair business, Mr. Postawa, who has since become a police officer, recalled Mr. Maziar "could have, sure"

worked on a car before Mr. Maziar was injured as a passenger on the State's ferry. RP 10-24-2011 at 13. Mr. Postawa did not ever see Mr. Maziar work on a car after Mr. Maziar was injured on the State's ferry. RP 10-24-2011 at 14. Mr. Maziar "could easily have had someone else do the work." RP 10-24-2011 at 15.

Contrary to what the State suggests, Mr. Maziar did not do any work helping a friend move. RP 10-18-2011 at 139.

The State continues to grasp for straws when it overstates Mr. Maziar's inability to remember the name of one of the many physical therapists Mr. Maziar has had to see because of the injuries Mr. Maziar suffered when the State's employee yanked a chair out from under Mr. Maziar. There was nothing sinister there. "I have had so many therapists. I do not know all of the names." RP 10-19-2011 at 34.

The State also claims that none of Mr. Maziar's doctors could relate their treatment to the injuries Mr. Maziar suffered as a passenger on board the State's vessel. This matter was the subject of motion practice. CP 265-269. The State's claim is simply false. CP 134-37 ¶¶ 26-36. Some examples: ¶ 29, Dr. Settle believes the injuries Mr. Maziar suffered were related to Mr. Mazair's fall on January 16, 2003, with citation to the record; ¶ 30, Dr. Peterson believes on a more probable than not basis that Mr.

Maziar's left shoulder injury was related to Mr. Maziar's fall on the vessel, with citation to the record; later in ¶ 30, Dr. Settle testified on a more probable than not basis that Mr. Maziar's left shoulder injury was related to Mr. Maziar's injury on the State's vessel, with citation to the record; ¶ 31, Dr. Schoenfelder believes Mr. Maziar's injury on the vessel most likely was the cause of Mr. Maziar's symptoms, with citation to the record; later in ¶ 31, Dr. Schoenfelder agrees with Dr. Settle about causation, with citation to the record; ¶ 32, Dr. Krumins said the injury on the vessel was the cause of Mr. Maziar's foot/ankle injury if there was a consistent history of problems with it since the injury, which Dr. Settle confirmed (as Dr. Settle had treated Mr. Maziar since shortly after Mr. Maziar's injury as a passenger on board the State's ferry, ¶¶ 26 and 28), with citations to the record.

The State invited error regarding causation by arguing for Findings ¶¶ 37-40 (CP 137-38) and now using those to claim error in the trial court. This is an unacceptable breach of the invited error doctrine. *Humbert/Birch Construction v. Walla Walla County*, 145 Wn.App. 185, ¶ 13 (192), 185 P.3d 663 (2008).

The State also tries to raise irrelevant issues in this appeal. E.g. the State claims Mr. Maziar did not pay sales tax on auto parts other people bought on an account at an auto parts store.

The State claims that Mr. Maziar's reseller permit was false. However, the citation to the record that the State makes is not to such testimony. Regardless, the validity of a reseller permit has simply nothing to do with having a chair yanked out from under Mr. Maziar while he was a passenger on a ferry owned and operated by the State.

The State even stretches to claim Mr. Maziar must be a liar because an insurance company did an investigation on a claim he made. It was completely irrelevant to Mr. Maziar's passenger personal injury claim. The State did not tie it back to anything. RP 10-19-2011 at 71.

Additionally, as can be seen by a reading of the Findings of Fact and Conclusions of Law as a whole the trial court Findings and Conclusions are sufficiently consistent to be upheld.

## CONCLUSION

Mr. Maziar was injured when the ferry captain yanked a chair out from under Mr. Maziar. Mr. Maziar was a passenger on a ferry owned and operated by the State when the tortious conduct occurred. CP 130-31 ¶¶ 5-10.

Mr. Maziar brought a general maritime civil negligence claim against the State. CP 186-191. Following the decision in *Endicott*, it became clear that Mr. Maziar's general maritime civil claim should be tried to the bench, because it is a general maritime claim, not a common law claim. The trial court agreed. CP 238. Therefore, Mr. Maziar's case was correctly tried to the bench.

The State's argument that the trial court erred fails. The right to a jury trial in Washington is determined by looking back at the facts as they existed at the time of the adoption of the Washington constitution. *Sofie v. Fibreboard Corp.*, 112 Wn.2d at 645, 771 P.2d at 716. This is a factual question, a question of history. In 1889, when the Washington constitution was adopted, an injured passenger bringing a general maritime claim for damages did not have the right to a jury trial. *Phelps v. The City of Panama*, 1 Wash.Terr 518, 535-36 (1877). And no statute specifies otherwise. This very claim for relief, an injured passenger's general maritime claim, existed and was tried without a jury prior to the adoption of the Washington constitution. Therefore, the trial court was correct to waive the jury in Mr. Maziar's case.

However, the trial court did err when it failed to award

prejudgment interest on Mr. Maziar's claims. Compare CP 140 ¶ 50 and CP 141 ¶ 54.

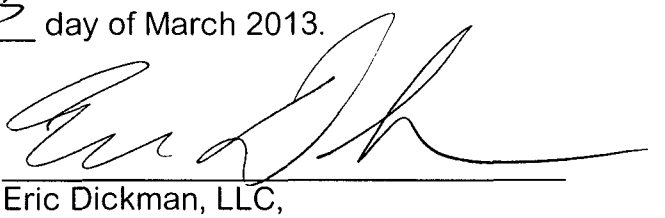
The State waived its sovereign immunity to all damages arising out of maritime claims. *Maziar I*, 151 Wn.App. at ¶ 23 (861), 216 P.3d at 435. Prejudgment interest is a damage to be awarded in general maritime claims. *Endicott*, 167 Wn.2d at ¶ 27 (887), 224 P.3d at 768. Therefore, the trial court abused its discretion by making a ruling based on an erroneous legal interpretation. *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d at ¶ 24 (879), 224 P.3d at 768. The issue of prejudgment interest should be remanded for an award of prejudgment interest to Mr. Maziar.

The trial court also incorrectly found that Mr. Maziar had failed to mitigate his future wage loss. CP 140 ¶ 51. Mr. Maziar applied for light duty jobs with the State that were open and for which he was qualified, and he followed up on those applications. RP 10-18-2011 at 111-12; RP 10-19-2011 at 56-57. Mr. Maziar also tried other jobs and schooling that were not within the Department of Corrections. RP 10-18-2011 at 83; RP 10-18-2011 at 113-15; RP 10-18-2011 at 115-16. But Mr. Maziar did not feel it was safe for him to work in the mailroom, a job offered to him by the State. RP 10-19-2011 at 58.

The trial court abused its discretion by finding Mr. Maziar had to try the mailroom job, a job he felt he could not do given its physical requirements and his injury, or lose all of his future wages from that date forward. RP 1-13-2012 at 12; again at 1-13-2012 at 26. So the issue of future wages for Mr. Maziar should be remanded for an award to Mr. Maziar of wages from November 2003 into the future.

Therefore, Mr. Maziar respectfully requests that the decision of the trial court, with the exception of the trial court's failure to award Mr. Maziar prejudgment interest (CP 141 ¶ 54) and the failure to award Mr. Maziar future wages after November 2003 (CP 140 ¶ 51), be affirmed. Mr. Maziar further requests the failure of the trial court to award Mr. Maziar prejudgment interest and future wages after November 2003 be reversed and only those two issues (prejudgment interest and future wage loss) be remanded for additional proceedings.

DATED this 5 day of March 2013.



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## PROOF OF SERVICE

CERTIFICATE OF DELIVERY

I, the undersigned, certify under the penalty of perjury in the State of Washington that on the 5 day of March 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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No Notary was readily available.