No. 43698-1-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

The STATE OF WASHINGTON and
the DEPARTMENT OF CORRECTIONS

Appellant / Defendants

v.

SCOTT WALTER MAZIAR,

Respondent / Appellee / Plaintiff

RESPONDENT'S CROSS APPEAL REPLY BRIEF

Eric Dickman
WSBA # 14317
Attorney for Appellant

Eric Dickman
E. Dickman Law Firm
P.O. Box 66793
Seattle, Washington 98166
(206) 242-3742

TABLE OF CONTENTS

Table of cases (Washington):

Table of cases (other):

Constitutional Provisions:

Table of statutes (Washington):

Table of federal statutes:

Introduction

This brief is limited to a reply to the response of appellants, the Washington State Department of Corrections and the State of Washington (hereinafter State), to Mr. Maziar's cross appeal. However, limiting the scope of this brief is not an acceptance of any of the arguments the State raised in its briefing in this appeal. As laid out in Mr. Maziar's Respondent's Brief Including Cross Appeal, the State's appeal is not well founded and should fail.

REPLY TO STANDARD OF REVIEW

As both Mr. Maziar and the State have stated, the standard of review for failure to award prejudgment interest is abuse of discretion. *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, ¶ 24 (879), 224 P.3d 761, 768, *cert. denied* __ US __, 130 S.Ct. 3482, 177 L.Ed.2d 1059 (2010). *Endicott* elaborates further on what constitutes abuse of discretion:

> 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 also abuse of discretion. *Endicott*, id. A ruling based on an erroneous legal interpretation is necessarily an abuse of discretion. *Endicott,* id.

REPLY TO STATE'S ARGUMENT ON PREJUDGMENT INTEREST

A. Mr. Maziar Should Have Been Awarded Prejudgment Interest

The State argues that the trial court made a ruling on prejudgment interest at the post-trial hearing on June 15, 2012. However, that is not correct. At the end of an argument where Mr. Maziar twice brought up that in a maritime case, such as this, prejudgment interest should be awarded unless there is a good reason not to award prejudgment interest (RP 28 and 30-31[1]), the

---

[1] MR. DICKMAN: Your Honor, this [*Norris v. State*, 46 Wn.App. 822, 733 P.2d 231 (1987)] is a State of Washington case which is wonderful except this is a maritime action. In maritime law prejudgment interest is awarded almost always unless there is a reason not to award it. In this case, as you saw as the Maziar appeal pointed out, the State has made the largest waiver that it could as to it's sovereignty. And since maritime law would apply in this case –

THE COURT: That's great –

MR. DICKMAN: -- unless there's a reason no[t] to. And in this case the Captain was way overboard by not asking Mr. Maziar to move his chair but did pull it and yank it out.

trial court ended the argument without making a decision, stating, "All right. I'll come back to that." The trial court did not return to the issue of prejudgment interest until June 22, 2012, when the trial court made its ruling:

> 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 6-22-2012 at 11.

i. Mr. Maziar did not cause delay in the prosecution of his claim

The State tries to argue the trial court based its decision not to award prejudgment interest on "seven trial continuances, four judicial department reassignments, one appeal to this Court and Plaintiff filing the lawsuit two years post incident." (State's Response Brief at page 12.) This argument is unfounded.

RP 6-15-12 at 28, and again:

> MR. DICKMAN: Again, in a maritime case prejudgment interest is awarded as a matter of course. Mr. Maziar on his first appeal the Court of Appeals was very clear that the State has made the largest waiver of any State ever to its sovereign immunity. It seems if you apply maritime law, you apply maritime law and would award prejudgment interest in this case.

RP 6-15-12 at 30-31.

As seen in the transcript from June 22, 2012, the trial court did not mention any of these factors. They were not part of the trial court's decision. RP 6-22-2012 at 11. And none of these factors are listing in the Findings of Fact and Conclusions of Law. CP 346-60.

Contrary to the State's position, the fact the trial took so long to occur actually supports the award of prejudgment interest.

> The rationale behind awarding prejudgment interest in admiralty cases is to compensate the wronged party for being deprived of the monetary value of the loss from the time of the loss to the payment of judgment.

Vance v. American Hawaii Cruises Lines, Inc., 789 F.2d 790, 794 (9th Cir. 1986); accord, *Seattle-First Nat. Bank v. Washington Ins. Guar. Ass'n*, 94 Wn.App. 744, 758, 972 P.2d 1282, 1290 (1999) (prejudgment interest permitted because it compensates wronged party for the loss of use of money and promotes settlement).

Looking at the factors listed by the State it is plain why they would not be valid reasons to deny prejudgment interest. The first element, "[s]even trial continuances," (State's Response Brief at 12) does not cite to the record, so there is some question about what motions the State is referring to. However, no continuance sought was opposed by any party. Each

continuance was stipulated to (or was unopposed) and was granted by a trial judge.

If the State had any reason to object to a continuance, even those it sought, those objections should have been made at the trial level, not in the Court of Appeals. The State cites no authority supporting its claim that agreed or unopposed continuances should have any bearing on denying an award of prejudgment interest. In fact, the opposite is true because it was the State's negligence that caused the wronged party, Mr. Maziar, such serious injuries that continuances were necessary to allow him to undergo multiple surgeries.

> Pulling a chair out from under someone who is sleeping is obvious negligence, and was an attack. Whether the captain's actions were negligent and/or intentional the Department of Corrections and the State are liable for the captain's actions.

Findings of Fact and Conclusions of Law, CP 356 at ¶ 46.

Agreed or unopposed continuances are not a reason to deny prejudgment interest. Mr. Maziar should not be punished because the injuries he suffered due to the State's negligence were so severe that it required multiple surgeries over multiple years before his condition was stable enough for damages to be reasonably assessed.

Next the State argues prejudgment interest should be denied because there were "four judicial department reassignments." State's Response Brief at 12. Mr. Maziar had no hand in the reassignments. The inner workings of the court system should not be used as a weapon to punish Mr. Maziar.

The State further argues Mr. Maziar should be denied prejudgment interest because he was successful in an "appeal to this Court," which caused delay. State's Response Brief at 12. The appeal the State claims should cause Mr. Maziar to lose an award of prejudgment interest is reported at *Maziar v. Department of Corrections*, 151 Wn.App. 850, 216 P.3d 430, 2009 AMC 1999 (2009)(*Maziar I*). Mr. Maziar should be punished because this Court found his appeal had merit? If anything, Mr. Maziar should be rewarded for pursuing his claim, not punished.

Finally, the State argues Mr. Maziar should be punished because of the "Plaintiff filing the lawsuit two years post incident." State's Response Brief at 12. Maritime claims have a 3-year statute of limitations. 46 USC § 30106.[2] RCW 4.16.080(2)

---

[2] Except as otherwise provided by law, a civil action for damages for personal injury or death arising out of a maritime tort must be brought within 3 years after the cause of action arose.

46 USC § 30106.

makes it perfectly clear that same 3-year statute of limitations applies to a maritime claim in State Court.[3] The State's argument is essentially that Mr. Maziar should be punished because he filed his lawsuit when only 2/3 of the statute of limitations had expired. That argument is without merit. Mr. Maziar had a legal right to file his claim up until the statute of limitations had expired without being punished by being denied prejudgment interest.

Nowhere in the transcript or in the Findings of Fact and Conclusions of Law (CP 346-360) does the trial court allude to any of the factors raised by the State as a reason to deny Mr. Maziar prejudgment interest. In fact, the trial court punted, and did not make a decision on the merits, leaving the question of whether to award prejudgment interest to the Court of Appeals when it said:

---

[3] The following actions shall be commenced within three years:

. . .

(2) An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated.

RCW 4.16.080(2).

> 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 6-22-2012 at 11.

ii. An award of prejudgment interest is a substantive maritime right.

As Mr. Maziar argued at the trial level and on appeal, the award of prejudgment interest is a substantive maritime right and therefore federal maritime law awarding prejudgment interest should be applied.

The State argues Mr. Maziar should not be awarded prejudgment interest because Mr. Maziar's maritime claim was filed, under the "saving to suitors clause," in State Court, so federal maritime law is not applied. However, the fact that Mr. Maziar filed in State Court, something he was required to do[4], does not stop substantive federal maritime law from applying to his claim.

---

[4] Mr. Maziar did not "choose" 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 suing in federal court.

> 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").

In Washington State Courts, and other state courts, federal maritime law, not state law, applies to the award of prejudgment interest in a maritime claim for relief.

> Prejudgment 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 873, ¶ 25 (886), 224 P.3d 761, 767, *cert. denied,* __ US __, 130 S.Ct. 3482, 177 L.Ed.2d 1059 (2010).

Prejudgment interest is due in cases based on general maritime law. In *Endicott*, the general maritime claim for relief was for unseaworthiness. *Endicott*, 167 Wn.2d at ¶ 27 (887), 224

P.3d at 768. In Mr. Maziar's case, the general maritime claim, the only claim brought, was for general maritime negligence.

> 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 854 n.2, 216 P.3d at 432.

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).

Applying federal maritime law, in Mr. Maziar's case, the trial court abused its discretion when it failed to award prejudgment interest to Mr. Maziar. Therefore Mr. Maziar should have been awarded prejudgment interest on his general maritime claim and this matter should be remanded for an award of prejudgment interest.

B. Sovereign Immunity Does Not Apply to the State on the Issue of Prejudgment Interest in a General Maritime Claim

The State claims that it has not waived its sovereign immunity as to prejudgment interest in a general maritime claim for relief. While that may be true in land-based claims that apply Washington State substantive law, the same is not true in general maritime claims. As a matter of substantive law, prejudgment interest is governed by federal maritime law and should be awarded in a general maritime claim like Mr. Maziar's, even when filed in a Washington State Court.

> Prejudgment 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, 167 Wn.2d at ¶ 25 (886), 224 P.3d at 767.

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).

The State relies upon a case overruled by *Endicott*, *Foster v. State of Washington Dept. of Transp.*, 128 Wn. App. 275, 115 P.3d 1029 (2005). Foster joined a general maritime claim with a

Jones Act (46 USC § 30104, previously 46 USC § 688) claim for relief.

In *Foster* it was argued that federal maritime law superseded Washington State law and that prejudgment interest should be awarded. The Court never reached the issue of federal law trumping State law, holding instead that in a "mixed" case prejudgment interest could not be awarded.

> Foster argues that federal admiralty law supersedes state law, and that it permits prejudgment interest on tort claims against the state ferry system. But according to the majority of federal courts, prejudgment interest is not awarded in "mixed" cases, i.e., in cases involving both Jones Act and other admiralty law claims. This case is "mixed," in that Foster brought a Jones Act claim as well as claims for unseaworthiness, maintenance and cure.

Foster, 128 Wn. App. at ¶ 13 (279), 115 P.3d 1030-31 (footnote omitted)(adopting the majority rule on awarding prejudgment interest in "mixed" maritime cases, which was subsequently rejected in *Endicott*.)

That portion of *Foster* was overruled five years later in *Endicott*. *Endicott*, 167 Wn.2d at ¶ 30-33 (888-89), 224 P.3d at 769 (prejudgment interest should be awarded in "mixed" maritime claims for relief being tried either to the bench or to a jury, regardless of whether or not there is apportionment between the general maritime damages, where prejudgment interest is available, and the Jones Act damages, where

prejudgment interest is not generally available). So, *Foster* is not controlling, and whether to award prejudgment interest against the State in a general maritime claim is a matter of first impression.

The State was operating the ferry to and from McNeil Island just like any person or corporation would.[5]

> And because 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 US [502] at 512-13, 52 S.Ct 450[, 76 L.Ed. 903 (1932)] the State is subject to such liability as well. RCW 4.92.090.

Maziar I, 151 Wn.App. ¶ 23 (860-61), 216 P.3d 435.

A private person or corporation would be required to pay prejudgment interest as part of the substantive maritime law, e.g. Icicle Seafoods, Inc. in *Endicott*. Therefore the State should, as a matter of general maritime law, be required to pay prejudgment interest.

---

[5] Unlike the Department of Transportation operating the Washington State Ferries under RCW 47.60.005 et seq. (see Maziar I, 151 Wn.App. ¶ 23 (860-61), 216 P.3d 435), the Department of Corrections has no statutory scheme controlling its ferry operation. With the ferry to and from McNeil Island, the State was in exactly the same position as any person or corporation operating a vessel.

When a plaintiff prevails on a general maritime claim, the plaintiff is entitled to recover damages plus prejudgment interest. *Endicott*, 167 Wn.2d at ¶ 31 (888), 224 P.3d at 769.

Since prejudgment interest is a substantive right under general maritime law, failure to award prejudgment interest against the State while awarding it against other defendants upsets the required uniformity of maritime law. *Kickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160-61, 30 S.Ct. 438, 64 L.Ed 834 (1920); *Cline v. Price*, 39 Wn.2d 816, 822-23, 239 P.2d 322, 326 (1951).

> The maritime law being part of the law of the United States, the legislature of a state has no power to modify or abrogate it. *Workman v. New York City*, 179 U.S. 552[, 179 U.S. 552, 21 S.Ct. 212, 45 L.Ed. 314 (1900)].

State v. Daggett, 87 Wash. 253, 257, 151 P. 648 (1915)(emphasis added).

The Alaska Supreme Court explained this issue:

> "While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretive decisions of this Court." [*Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406,] 409-10 [, 74 S.Ct. 202, 98 L.Ed 143 (1953)(footnote omitted)]. To hold otherwise would undermine the uniformity of maritime law "which the [Federal] Constitution has placed under national purview to control in 'its substantial as well as procedural features.'" *Id.* at 409 (quoting *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 378, 44 S.Ct. 391, 68 L.Ed 748 (1924)).

State of Alaska v. Brown, 794 P.2d 108, 110-11 (Alaska 1990).

Therefore, as a matter of substantive maritime law the State should be required to pay prejudgment interest in a general maritime claim. RCW 4.56.115, which sets the rate of post judgment interest for non-general maritime claims, does not control, because federal maritime law supersedes state law on this issue.

The State in RCW 4.92.090[6] specifically waived its sovereign immunity to all remedies. "[RCW 4.92.090] 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. ¶ 22 (860), 216 P.3d 435 (emphasis added).

Under general maritime law, prejudgment interest is a remedy, not just an add-on. *Vance v. American Hawaii Cruise*

---

[6] The State's general waiver of sovereign immunity is one of the broadest in the country, and should control on the issue of prejudgment interest in a general maritime claim.

> This statute [RCW 4.92.090] is "one of the broadest waivers of sovereign immunity in the country." *Savage v. State*, 127 Wn.2d 434, 444, 899 P.2d 1270 (1995). It makes the State presumptively liable for its alleged tortious conduct "in all instances in which the Legislature has not indicated otherwise." *Savage v. State*, 127 Wn.2d at 445, 899 P.2d 1270 [(1995)].

Dolphine ODA v. State, 111 Wn. App. 79, 84, 44 P.3d 8, 11 (2002) *review denied*, 147 Wn.2d 1018, 56 P.3d 992 (2002)(emphasis in original).

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).

Therefore, prejudgment interest should be awarded against the State on Mr. Maziar's general maritime claim for relief, and the matter should be remanded for an award of prejudgment interest.

REPLY TO STATE'S ARGUMENT ON MR. MAZIAR'S MITIGATING HIS WAGE LOSS

The trial court's denial of future wages was based on the fact Mr. Maziar did not try a mailroom job on McNeil Island that his doctor had told him he should not take. RP 10/18/11 at 109. The doctor also said Mr. Maziar should not ride the ferry to and from the Island, the only way to get to the job, because a rough ride could further injure Mr. Maziar. Settle Deposition at 65-67. The trial court said that "if he had actually gone in for 10 or 15 minutes and said, 'I can't do this,'" he would be eligible for an award of past and future wages. RP 1-13-2012 at 12; again at 1-13-2012 at 26.

This would put Mr. Maziar in a position of either not following his doctor's advice or risking further injury, pain and possible greater disability to ride the ferry to try to work a job his

doctor advised him not to take and one he did not believe he was physically able to perform.

Requiring that Mr. Maziar either ignore his doctor's advice or lose lost past and future wages was an abuse of discretion.

As the State notes, Dr. Settle, Mr. Maziar's treating physician, told Mr. Maziar he could not perform the mailroom job. Dr. Settle did not think Mr. Maziar could perform the mailroom job because it was located on McNeil Island and Mr. Maziar was not physically capable of riding the ferry to and from that job.

Mr. Maziar testified:

> Q. Did you ever try to do the mailroom job?
>
> A. No. Dr. Settle looked over the requirements, and decided that job did not meet the requirements of my capabilities.

RP 10/18/11 at 109.

As it turns out, Dr. Settle was under the impression Mr. Maziar had to wear seat belts on the ferry to McNeil Island to perform the mailroom job on McNeil Island.[7] Settle Deposition at 64.

---

[7] Mr. Maziar did not tell Dr. Settle that wearing seatbelts was required on the ferry to and from McNeil Island.

> Q. Dr. Settle in his deposition talks about a job on McNeil Island, says that you told him you had to be belted in to ride the ferry. Do you remember that?

Nevertheless, independent of the question of seat belts, Dr. Settle also opined that a rough ride on the ferry to or from McNeil Island to perform the mailroom job would cause further injury to Mr. Maziar. Settle Deposition at 65-66.

Q. Okay. And is that sort of like the airplane example where you might have a bit of turbulence?

A. Yes.

Q. Now, that's going to potentially cause an individual like Mr. Maziar discomfort. But would you believe that it would lead him to actual injury?

A. It could.

Q. Be a rough boat ride?

A. Yes.

Q. On a more probable than not basis, are you able to say whether a rough boat ride would cause Mr. Maziar additional injury?

A. If he were caught off guard and he wasn't ready for some kind of compression, you know, it could cause him injury.

A. I don't remember why anyone would be belted in.

Q. When you ride on the ferry there aren't seatbelts?

A. No, there are no seatbelts?

Q. Do you remember telling Dr. Settle there were seatbelts?

A. No. I never told Dr. Settle about seatbelts.

RP 10-18-11 at 110.

Settle Deposition at 65-66.

So, on the advice of his doctor, Mr. Maziar did not attempt the mailroom job. Nevertheless, the trial court said:

> 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.

It was an abuse of discretion to expect Mr. Maziar to act contrary to his treating doctor's advice to work a job for "even for 10 or 15 minutes" when a rough ride on the required transportation to and from that job could, on a more probable than not basis, cause Mr. Maziar further injuries. Settle Deposition at 65-67.

Because Mr. Maziar did not ignore the advice of his doctor, Mr. Maziar was denied past and future wages after the date the mailroom job was offered to him in November 2003. CP 140 at ¶ 51. That is not just, and should not be allowed to stand. It was not reasonable to require Mr. Maziar to gamble his

personal health against being fully compensated for the State's negligence.

Had Mr. Maziar taken the mailroom job and been re-injured on the ferry during rough seas (Settle Deposition at 65-66), Mr. Maziar could easily have been accused of working in the mailroom in violation of his doctor's orders, possibly suffered even more injuries, and then been denied a recovery on his new injuries because he violated his doctor's advice.

Additionally, Mr. Maziar personally believed the mailroom job was too physical for him to safely perform. The job required him to lift heavy bags of mail, something Mr. Maziar did not believe he could safely perform. RP 10-18-11 at 109-10. So, not only did Mr. Maziar's doctor say the only transportation to the mailroom job was not suitable for Mr. Maziar, Mr. Maziar believed he could not perform the job without a substantial risk of further injury.

At trial the burden was on the State to show Mr. Maziar failed to mitigate his damages.

> The burden of proof was on the defendant to show plaintiff unreasonably failed to mitigate his damages. *Burr v, Clark*, 30 Wn.2d 149, 159, 190 P.2d 769 (1948)

Kubista v. Romaine, 87 Wn.2d 62, 68 n.4, 549 P.2d 491, 495 (1976).

The State provided no evidence to overcome Mr. Maziar's doctor's medical opinion that Mr. Maziar should not ride the ferry to and from the mailroom job. So, the State failed to meet its burden of proof.

> 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).

It was not reasonable for Mr. Maziar to work a job his doctor would not approve him for and that he believed was too physical for him to perform safely.

Mr. Maziar tried to mitigate his losses the best he could. 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 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 wages and denied Mr. Maziar lost past and future wages after November 2003 due to Mr. Maziar not attempting the mailroom job. CP 140 ¶ 51.

That decision was in error and should be reversed, and the case remanded for an award of lost past and future wages after November 2003.

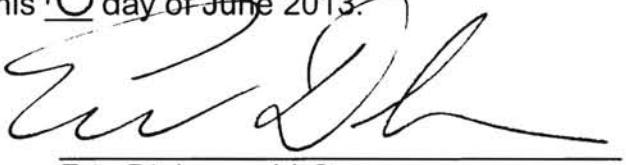
CONCLUSION

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.

The trial court found the State liable for its negligent action. CP 358, ¶¶ 44-47. But the trial court abused its discretion by failing to award prejudgment interest in Mr. Maziar's general maritime claim. Compare CP 140 ¶ 50 and CP 141 ¶ 54. The trial court further abused its discretion by denying Mr. Maziar his past and future wages after November 2003 (CP 140 ¶ 51), simply because Mr. Maziar chose to follow the advice of his treating physician (Settle Deposition at 65-66), and his own belief that the job was too physical for him to perform safely (RP 10-18-11 at 109-10), and not try the mailroom job. CP 140 ¶ 51.

Therefore, Mr. Maziar respectfully requests 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 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 (CP 141 ¶ 54) and the denial of wages after November 2003 (CP 140 ¶ 51) be reversed and only those two issues (prejudgment interest and future wage loss) be remanded for additional proceedings.

DATED this 6 day of June 2013.



Eric Dickman, LLC,
attorney for appellant Mr. Scott Maziar
Alaska Bar Number 9406019
Oregon Bar Number 02194
Washington Bar Number 14317
Also admitted in New York

PROOF OF SERVICE

CERTIFICATE OF DELIVERY

I, the undersigned, certify under the penalty of perjury in the State of Washington that on the 10 day of June 2013, I had a copy of this document mailed to the attorney of record for the appellee/defendant, first class postage pre-paid to:

Ms. Patricia D. Todd
Mr. John C. Dittman
Michael P. Lunch
Assistant Attorney Generals
Torts Division
P.O. Box 40126
Olympia, Washington 98504-0126

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