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Washington State Supreme Court

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Ronald R. Carpenter  
Clerk

No. 71068-1-I

SUPREME COURT OF THE STATE OF WASHINGTON

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SCOTT WALTER MAZIAR,

Respondent,

v.

THE WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Appellants.

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**ANSWER TO CROSS-PETITION FOR REVIEW**

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ORIGINAL

**TABLE OF CONTENTS**

A. Introduction.....1

B. Counterstatement Of The Issues On Cross Appeal.....1

C. Review Should Be Denied .....2

    1. The Court Of Appeals Decision Is Consistent With  
    Well-Settled Case Law That Prejudgment Interest Is  
    Awarded At The Trial Court’s Discretion.....2

    2. The Court Of Appeals Decision Is Consistent With  
    Well-Settled Case Law That Bars Recovery When  
    Plaintiff Fails To Mitigate His Damages By Earning  
    Whatever He Could At Another Occupation.....6

D. Conclusion .....6

**TABLE OF AUTHORITIES**

**Cases**

*Endicott v. Icicle Seafoods, Inc.*,  
167 Wn.2d 873, 224 P.3d 761 (2010)..... 2, 5

*Foster v. Dep't. of Trans.*,  
128 Wn. App. 275, 115 P.3d 1029 (2005)..... 4

*Hogland v. Klein*,  
49 Wn.2d 216, 298 P.2d 1099 (1956)..... 6

*Kubista v. Romaine*,  
87 Wn.2d 62, 549 P.2d 491 (1976)..... 6

*Norris v. State*,  
46 Wn. App. 822, 733 P.2d 231 (1987)..... 3, 4

**Rules**

RAP 13.4(b)..... 1, 7

**Statutes**

RCW 4.45.115 ..... 4

RCW 4.92.090 ..... 3

**A. Introduction**

Plaintiff Scott Maziar filed a cross petition for review seeking review of two issues, (1) the denial of prejudgment interest, and (2) the denial of lost wages. Here, Maziar fails to meet the criteria for review under Rules of Appellate Procedure (RAP) 13.4(b), and the State Department of Corrections (DOC) asks this Court to deny review of Maziar's cross petition for review. Further, if the Court grants DOC's petition for review then the Court does not need to reach the issues raised here.

**B. Counterstatement Of The Issues On Cross Appeal**

1. Whether the trial court abused its discretion in denying prejudgment interest and whether the decision of the Court of Appeals upholding that decision conflicts with well-established decisions of this Court.

2. Whether the trial court abused its discretion in denying lost wages and whether the decision of the Court of Appeals conflicts with well-established decisions of this Court.

**C. Review Should Be Denied**

**1. The Court Of Appeals Decision Is Consistent With Well-Settled Case Law That Prejudgment Interest Is Awarded At The Trial Court's Discretion**

Prejudgment interest may be awarded in general maritime claims. *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 886, 224 P.3d 761 (2010). Although “prejudgment interest in maritime cases is substantive and is controlled by federal law,” whether the case is before a judge or a jury controls whether it is awarded. *Endicott*, 167 Wn.2d at 886 (citing *Militello v. Ann & Grace, Inc.*, 411 Mass. 22, 576 N.E.2d 675, 678 (1991)). This Court in *Endicott* reviewed outcomes from several other jurisdictions and explained:

State courts, which hear such suits only at law, have interpreted this dichotomy to mean the following: if the trial is to the jury, the case is analogous to a federal suit at law and prejudgment interest is unavailable. If tried to the bench, the case is analogous to a federal suit in admiralty and prejudgment interest may be awarded.

*Endicott*, 167 Wn.2d at 887 (internal citations omitted).

In *Endicott*, this Court ultimately held that the “trial court did not abuse its discretion in awarding prejudgment interest to Endicott.” *Id.* at 887. The Court reasoned because the case was tried to the bench the trial court had discretion in making the award. *Id.*

Here, just like in *Endicott*, the bench trial of a general maritime claim filed in state court entitled the judge to use discretion in awarding prejudgment interest. Maziar's reliance on *Endicott* improperly conflates the issue of whether prejudgment interest should be awarded with the State's waiver of sovereign immunity. *Cross-Petition* at 16-17. *Nowhere* in *Endicott* does this Court discuss the role nor analyzes the State's waiver of sovereign immunity. Rather, the *Endicott* decision analyzes and concludes what law governs the award of prejudgment interest in a maritime case.

The terms under which prejudgment interest may be awarded are well-settled. There is no conflict with another decision of this Court or the Court of Appeals, there is no constitutional question of significance, nor is there an issue of substantial public interest. Maziar has failed to establish any basis for this Court to consider the trial court's denial of prejudgment interest.

Regarding Maziar's sovereign immunity argument pertaining to the statutory liability for damages for tortious conduct of the State under RCW 4.92.090, Maziar omits the established principle from *Norris v. State*, 46 Wn. App. 822, 733 P.2d 231 (1987). Prejudgment interest does not extend to tort claims against the State. *Id.* This maxim of law has been clear for the past twenty-five years since *Norris* was

decided. In *Norris*, the Court of Appeals held that when the Legislature enacted the post-judgment interest statute (RCW 4.45.115) it had expressly waived sovereign immunity for post-judgment interest on tort claims. *Norris*, 46 Wn. App. at 825. The Court also held the State did not waive sovereign immunity from prejudgment interest on tort claims. *Id.* The Court therefore affirmed the trial court's denial of prejudgment interest. *Id.* at 824.

Further, even in cases involving mixed issues of federal admiralty law and state law claims, there is no prejudgment award on tort claims against the State. *Foster v. Dep't. of Trans.*, 128 Wn. App. 275, 279, 115 P.3d 1029 (2005). In *Foster*, the Court of Appeals reversed the trial court's award of prejudgment interest and ruled "the State has not waived sovereign immunity with respect to prejudgment interest, we remand with directions to strike the prejudgment interest award."

*Foster*, 128 Wn. App. at 280. The court explicitly stated:

In 1987, this court declined in *Norris v. State*, to extend *Architectural Woods*' reasoning to tort claims. We held that when the legislature enacted RCW 4.56.115, it had expressly waived sovereign immunity from *post* judgment interest on tort claims, while at the same time, by necessary implication, *not* waiving immunity from *pre* judgment interest on tort claims. Since 1987, the legislature has met many times without abrogating or altering *Norris*.

*Id.* at 279 (emphasis in original).

This Court fine-tuned when prejudgment interest is granted in “mixed” cases involving both Jones Act and other admiralty claims in *Endicott*. *Endicott* held that “in a mixed Jones Act and general maritime suit, prejudgment interest is available on any damages awarded under the general maritime claim, even if apportioned between the Jones Act claims and the maritime claims.” *Endicott*, 167 Wn.2d at 888-89. This holding and its analysis does not affect the analysis in *Foster* that the State has not waived sovereign immunity with respect to prejudgment interest. *Endicott* also indicated that prejudgment interest is granted “when a seaman prevails on his maritime claim of unseaworthiness . . . .” *Id.* at 887. Here, Mr. Maziar abandoned his claim of unseaworthiness at the onset of trial. CP at 118, 138-40.

Prejudgment interest does not extend to tort claims against the State because the State has not waived sovereign immunity for prejudgment interest. Maziar’s cross-petition ignores *Norris* and, more recently in 2005, *Foster*. Because the law is clear, Maziar fails to establish any basis for this Court to grant review.

**2. The Court Of Appeals Decision Is Consistent With Well-Settled Case Law That Bars Recovery When Plaintiff Fails To Mitigate His Damages By Earning Whatever He Could At Another Occupation**

Lost wages are not recoverable when a plaintiff fails to mitigate his damages by earning whatever he could at another occupation. *Kubista v. Romaine*, 87 Wn.2d 62, 67, 549 P.2d 491 (1976). This decision from the Court has been in force for nearly 40 years and is routinely cited for this proposition.

Maziar cites and relies upon *Hogland v. Klein*, 49 Wn.2d 216, 298 P.2d 1099 (1956), for the premise that Maziar “used ordinary diligence to both work and not suffer further injuries.” However, that case is inapposite. *Hogland* dealt with the standard of care exercised by the carrier of goods in an action by a house mover against the owner of a building to recover in contract. *Hogland*, 49 Wn.2d at 217. *Hogland* provides no basis for this Court to review the issue of mitigation of lost wages.

**D. Conclusion**

The decision of the Court of Appeals affirming the denial of prejudgment interest and the failure to mitigate lost wages are both consistent with existing precedent from the Court of Appeals and this Court. Further, both issues are devoid of significant questions of

Constitutional law and substantial public policy. Maziar has failed to satisfy any of the criteria for review under RAP 13.4(b). For these reasons, Maziar's cross-petition for review should be denied. The State's petition for review of the jury trial issue should be granted which would eliminate any need to reach the issues raised in the cross-petition.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of July, 2014.



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Clerk

I, Amanda Trittin, hereby certify that on July 18, 2014, I caused to be postmarked and sent for service a copy of the ANSWER TO CROSS PETITION FOR REVIEW on the attorney for Appellant, as set forth below:

Attorney for Plaintiff:

Eric Dickman  
P.O. Box 66793  
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United States Mail

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 18<sup>th</sup> day of July, 2014, at Tumwater, Washington.

  
AMANDA TRITTIN, Legal Assistant