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STATE OF WASHINGTON

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COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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CARA STINSON,

Appellant / Plaintiff

v.

The STATE OF WASHINGTON and  
the DEPARTMENT OF CORRECTIONS

Appellees / Defendants

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**APPELLANT'S REPLY BRIEF**

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## Introduction

Respondents, the State of Washington and the Department of Corrections, hereafter "State," attempt to diminish the application of Federal maritime law to this appeal by using common law tests for causation that are not applicable.

This appeal arises from the grant of defendants' (respondents') motion for summary judgment. Appellant, Ms. Cara Stinson, presented evidence that she was working on the ferry between Steilacoom and the McNeil Island penitentiary, where she was at a high risk of being exposed to MRSA. She was required to clean restrooms, work with prisoners and the public without access to gloves, water, bleach or other disinfectants. Ms. Stinson was also required to use the prisoners' filthy SaniCan on many occasions or use a SaniCan that was not regularly cleaned and did not have soap or water in it. (See pages 4 and 5 for more complete listing.)

Ms. Stinson's treating physician, Dr. Luteyn, after looking at the facts and treating Ms. Stinson, opined on a more probable than not basis that Ms. Stinson contracted MRSA while working as a seaman due to the greatly increased risk of infection and complete lack of any available amelioration of that risk, like hand washing or anti-bacterial gels. CP 181-83, 184-85, 187-88.

The trial court, in error, granted summary judgment against Ms. Stinson, saying there was insufficient evidence to put Ms. Stinson's maritime claims for relief before a jury. CP 214-16.

### **The State's Restatement of the Case**

The State attempts to restate the case by casting the facts in a light most favorable to it, the moving party in the summary judgment motion. (See State's brief at pages 3 through 8.)

However,

[i]n ruling on a motion for judgment as a matter of law, the [ ] court must view the evidence in the light most favorable to the nonmoving party. If there is any justifiable evidence from which reasonable minds might find for the nonmoving party, the issue must go to the jury.

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

For example, the State says there were rubber gloves and hand sanitizer on all of the State's boats. That and the other claims made by the State are contradicted by evidence. (Compare the State's "facts" with Ms. Stinson's "Statement of the Case." Opening Brief at 6-16. The State's version of the facts demonstrates clearly that there are numerous issues of material fact in the State's motion for summary judgment.

The question of causation is for the jury: "[I]t is only when

the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that it may be a question of law for the court.” *Attwood v. Albertson’s Food Center, Inc.*, 92 Wn.App. 326, 331, 966 P.2d 351, 353 (1998)(quoting *Bernethy v. Walt Failor’s Inc.*, 97 Wn.2d 929, 935, 653 P.2d 280 (1982)).

The trial court’s decision not to let a jury decide this case was in error and this matter should be remanded for further proceedings.

## ARGUMENT

### 1. The Trial Court Erred in Granting Summary Judgment on Appellant’s Unseaworthiness Claim

First, the State argues that it need not provide a perfectly seaworthy vessel. While perfection is not required, a shipowner has an absolute duty to furnish a seaworthy ship, one reasonably fit for its intended use. *Ribitzki v. Canmar Reading & Bates, Ltd. Partnership*, 111 F.3d 658, 664 (9th Cir. 1997).

The character of the duty, said the Court, is ‘absolute.’ ‘It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. \* \*

\* It is a form of absolute duty owing to all within the range of its humanitarian policy.’

*Mitchell v. Trawler Racer, Inc.*, 362 US 539, 549, 80 S.Ct. 926, 4 L.Ed.2d 941, 1960 AMC 1503 (1960)(quoting *Seas Shipping v. Sieracki*, 328 US 85, 94-95, 66 S.Ct. 872, 90 L.Ed 1099 (1946)).

A condition which endangers but one member of the crew, whether the ship is on the high seas or tied up to a wharf, can make the vessel unseaworthy so far as the obligation to indemnify a seaman for injuries sustained is concerned.

*Williams v. Steamship Mutual Underwriting Ass'n*, 45 Wn.2d 209, 217, 273 P.2d 803, 808, 1954 AMC 2006 (1954). The shipowner must provide the worker reasonably safe conditions for work. *Id.*

MRSA was present in the prison, CP 169 and 127 ¶¶ 8-9, and one of the line handlers working with Ms. Stinson even had MRSA. CP 168. A prison is an especially high-risk environment for the spread of MRSA. CP 179-81. Hand washing (sanitizing) is the number one way to prevent the spread of MRSA. CP 174-75. So, it was unreasonable for the State to:

- \* Have Ms. Stinson clean the restrooms when the prisoners failed to clean them properly, CP 151;
- \* Remove all of the cleaning products for the bathroom and replace them with ones that would not sanitize, CP 143-44;
- \* Refuse to allow bleach, a strong disinfectant, on the vessels, CP 144;
- \* Remove and not replace the cleaning agent Vionex, CP 146, with any other antibacterial cleaning agent, CP 148-49;

- \* Not have water on the ferry so that Ms. Stinson could wash her hands, CP 127, ¶ 10;
- \* Remove all of the rubber gloves from the vessel and not allow Ms. Stinson to use any or bring her own supply, CP 146-49 (the gloves were completely removed from the vessel, not simply placed under lock and key, CP 147);
- \* Remove even the captain's private supply of bleach to wipe down the wheelhouse, CP 149;
- \* Fail to have cleaning products, including solvents or disinfectants, in the engine room, CP 152-53;
- \* Fail to repair or bring in a temporary substitute for the restroom the guards and crew used at the end of the causeway on the dock on the McNeil Island side during the significant period that restroom was unusable, CP 153;
- \* Require Ms. Stinson to use the inmates' SaniCan, CP 153-55;
- \* Fail to heed Ms. Stinson's request to Mr. Little, the operations chief, for another SaniCan to be placed where Ms. Stinson could use it, because the inmates' SaniCan was "despicable" (Mr. Little said, "No," and Ms. Stinson had to continue to share the SaniCan with the inmates), CP 154-55;
- \* When a second SaniCan was finally added, it rarely had any soap or water in it and it was not cleaned regularly, CP 155-56; there was urine on the floor and toilet paper everywhere. Regardless, Ms. Stinson was forced to use it. CP 156;
- \* Even where there was a restroom, on the Steilacoom side of the run, for the period up through Ms. Stinson contracting MRSA, the bathroom had no running water and there was no way to wash or sanitize her hands, CP 157, and the State did not provide Ms. Stinson with another sanitary option.

Despite the State's argument that it need not have a perfectly seaworthy vessel, the State allowed an unseaworthy condition to exist. Because a seaman is a ward of admiralty, *Vaughn v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 1000, 8 L.Ed. 2d 88 (1962); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 59 S.Ct. 262, 83 L.Ed. 265 (1939), a ship owner's duty of care is more extensive than that of an employer on land. *Ross v. F/V Melanie*, 1996 AMC 1628, 1631 (W.D. Wash. 1996). The State failed to meet its standard of care and Ms. Stinson was infected with MRSA while at work.

The State next argues that "[e]xpert testimony is generally required to establish evidence of medical diagnosis and causation." (State's brief at 10.) The State then attempts to set up a battle of the experts, arguing that the State's doctors are board certified in infectious diseases, while Ms. Stinson's treating doctor, Dr. Luteyn, is a medical doctor. However, the State never explains why Dr. Luteyn, a licensed physician, is unable to give a medical opinion.<sup>1</sup>

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<sup>1</sup> On appeal, the State questions for the first time Dr. Luteyn's medical training and her licensing. Since the issue of Dr. Luteyn's credentials was not raised below, it should not be questioned on appeal. (Dr. Luteyn set out her credentials at her deposition, and they have never, before now, been questioned.)

The State argues that the doctors it paid to testify had board certifications, and the certifications make them better experts. However, the State's doctor's opinions are open to question. For example, the State's doctor, Dr. Marsh, says MRSA is spread from person to person "by direct skin-to-skin contact." CP 89, ¶ 9.

The State's other doctor, Dr. Ayars, also opined that although the "drug addicts and institutional settings" of Ms. Stinson's workplace have a higher rate of MRSA (agreeing with Dr. Luteyn's opinion that MRSA infection rates are much higher in prison, CP 180), it is "likely" Ms. Stinson did not become infected at work:

Again, because there was no trauma and it was in an area (the buttocks) where Ms. Stinson should not have had direct contact with an inmate, I would say it was more likely naturally acquired, rather than work related.

CP 97.

Yet, even the State in its brief correctly says that surfaces like doors and faucet handles (and toilet seats see CP 174), among other things, on which there is MRSA can spread that infection to a person. State's brief at 11-12. The State's brief is consistent with Dr. Luteyn's testimony<sup>2</sup> that MRSA is spread by

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<sup>2</sup> Becoming infected with MRSA from infected physical objects, as opposed to just skin-to-skin contact, is one of the

either skin-to-skin contact or touching an item with MRSA on it and transferring the MRSA to an open wound. CP 173-75. However, touching an item with MRSA and then spreading the MRSA to an open wound is a method of infection that directly conflicts with the State's own 'board certified' doctors' testimony that skin-to-skin contact is necessary to spread MRSA. CP 89 and 97.<sup>3</sup>

Applying the State's doctors' testimony, Ms. Stinson would have been required to have skin-to-skin contact of her buttocks with someone who was infected with MRSA to become infected. But Ms. Stinson was not intimate with her partner during this time, CP 159; she had no guests, except her brother, come to her house for about a year prior to Ms. Stinson contracting MRSA, CP 160; Ms. Stinson worked and slept and did little else, CP 161; she did not shop for groceries, CP 158; she did not go to the mall, CP 164-65; she did not go to a sporting event or public event, CP

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reasons why Dr. Luteyn was "appalled" that Ms. Stinson was left without a way for Ms. Stinson to wash her hands, because there was no water and the alcohol-based hand sanitizers were removed from the vessel. CP 181-82.

<sup>3</sup> If the State's argument that differing opinions between a treating physician and a doctor hired by defendants to give an opinion could always be resolved by simply comparing broad certifications and not the content of the doctor's opinions, there would be a race to the most credentialed expert and juries would be stripped of their constitutional duty to decide civil cases. Wash. Const. Art I, § 21.

165; and although she would occasionally brush up against an inmate in the wheelhouse she had no physical contact with any of her neighbors near her house. CP 166.

It was for the jury, and not the trial court on a motion for summary judgment, to decide which expert to believe on the issue of causation.

Next, the State argues Dr. Lutyen had no factual basis for her opinions. That is false.

All elements of a negligence action including proximate cause may be established by inferences based upon circumstantial evidence. *Raybell v. State*, 6 Wn.App. 795, 801, 496 P.2d 599, 563 (1972)(no witnesses to car leaving the road, "The precise reason why Raybell's vehicle left the highway was unknown." at 6 Wn.App. 797).

The county contends that the record is devoid of evidence on how the accident occurred, and there can only be speculation or conjecture to connect the condition of the road with the cause of death. Precise knowledge of how an accident occurred, however, is not required to prove negligence and all elements, including proximate cause, can be proved by inferences arising from circumstantial evidence. *Raybell v. State*, 6 Wn.App. 795, 496 P.2d 559 (1972). The question of whether or not the defendant's conduct caused plaintiff's harm is generally a question of fact. *Moyer v. Clark*, 75 Wn.2d 800, 804, 545 P.2d 374 (1969). It is only when the inferences are plain that proximate cause is a question of law. *Leach v. Weiss*, 2

Wn.App. 437, 440, 467 P.2d 894 (1970).

*Klossner v. San Juan County*, 21 Wn.App. 689, 692, 586 P.2d 899 (1978); also Appellant's Opening Brief at 18-30.

Dr. Luteyn unequivocally testified that the conditions Ms. Stinson worked in were more probably than not the cause of Ms. Stinson contracting MRSA. CP 181, 184-85, 187-88. That opinion was based on the fact that MRSA is transmitted by human contact with someone infected or by touching something that has the MRSA bacteria on it. CP 174. Once on the skin, the bacteria is transferred to an open wound and into the body. CP 173. The key to prevention is to wash one's hands to prevent the spread of the bacteria into an open wound. CP 175. Washing the hands removes the bacteria and prevents infection. CP 174-75. Add to that the fact MRSA is more prevalent in places where people live closely and share bathrooms and the like, such as nursing homes, or any institution with a lot of people who come into contact frequently. CP 177-78. Prisons are especially high risk. CP 179-81.

Washing hands is the number one thing to do to prevent the spread of infection. CP 175. Dr. Luteyn was "appalled" that Ms. Stinson was left without a way for Ms. Stinson to wash her hands, as the alcohol-based hand sanitizers were removed from

the vessel and the workplace. CP 181-82. Dr. Luteyn thought it was "incredible" that Ms. Stinson had to work in a prison setting and was unable to wash her hands. CP 182-83.

When asked about causation, Dr. Luteyn testified:

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

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

Later:

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

Q. Is on the boat?

A. Yes.

CP 187 (emphasis added).

And on re-direct by the State:

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

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

CP 188 (emphasis added).

Like the car leaving the roadway without any surviving eyewitnesses, there could have been many reasons for the car to leave the highway: driver suicide, mechanical failure, swerving to avoid an animal or even another car. Nevertheless, it was proper for an expert to look at the facts, like Dr. Luteyn did in Ms. Stinson's case, and based on those facts and the expert's training to provide evidence to a jury as to the cause of the accident. *Raybell v. State*, 6 Wn.App. at 801, and other cases cited in Ms. Stinson's briefing.

The State says Dr. Luteyn's testimony is "speculation" because she cannot say with certainty how Ms. Stinson was infected with MRSA. The *Raybell* Court said, "The precise reason why Raybell's vehicle left the highway was unknown." *Id.*, 6 Wn.App. at 797, but that did not prevent the Court from holding that precise knowledge of the cause is not required to prove causation.

Working in a high risk environment for infection, where MRSA is known to be present - combined with the State's failure to provide gloves, bleach, water, any antiseptic, and clean restrooms, while making Ms. Stinson clean the restrooms on the vessel - are objective facts that support Dr. Luteyn's medical

opinion that on a more-probable-than-not-basis Ms. Stinson was infected with MRSA working as a seaman for the State. CP 181-183, 184-85, 187-88.

The evidence is sufficient to prove causation if, from the facts and circumstances and the medical testimony given, a reasonable person can infer that a causal connection exists.

*Lewis v. Stinson Timber Co.*, 145 Wn.App. 302, ¶ 31 (319-20), 189 P.3d 178, 188-89 (2008).

The State argues that Dr. Luteyn used “magic words” and did not base her medical opinion on facts. However, that, as seen, is not true.

Therefore, the trial court erred when it granted summary judgment on Ms. Stinson’s unseaworthiness claim for relief.

## **2. The Trial Court Erred in Granting Summary Judgment on Appellant’s Jones Act Claim**

The State begins its argument saying it waived its sovereign immunity to allow Washington State Ferry (WSF) employees, who are seamen, to sue the State for negligence. State’s brief at 14. The State cites to and quotes RCW 47.60.210, which addresses suits against the Washington Department of Transportation. However, Ms. Stinson was not a WSF employee and the Department of Transportation is not a party to this lawsuit.

It is actually under RCW 4.92.090 that Ms. Stinson can sue the Washington Department of Corrections and the State of Washington.

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 v. State*, 151 Wn.App. 850, ¶ 22 (860), 216 P.3d 430, 435 (2009).<sup>4</sup>

The *Maziar* Court expressly rejected the claim that RCW 47.60.200 et al. prevented a Department of Corrections employee from bringing maritime claims against the State. *Id.* at ¶ 23, 151 Wn.App. at 860.

Next, the State argues that the elements necessary to prove a Jones Act case are the same as those to prove common law negligence. That is not exactly true. The Jones Act is statutory, 46 USC § 30104. The Jones Act, and the Federal Employer's Liability Act (FELA, 45 USC §51 et seq.) upon which it is based,

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<sup>4</sup> Mr. Maziar's case is on appeal a second time, *State v. Maziar*, Case No. No. 43698-1-II (Div. II), but that appeal is not related to standing, sovereign immunity or authority to bring suit against the Department of Corrections or the State.

has a “featherweight” requirement for causation.

Congress sought to “supplan[t] that duty with [FELA's] far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence.” *Rogers [v. Missouri Pacific R. Co.]*, 352 US [500,] at 507, 77 S.Ct. 443 [1 L.Ed.2d 493 (1957)]. Yet, *Rogers* observed, the Missouri court and other lower courts continued to ignore FELA's “significan[t]” departures from the “ordinary common-law negligence” scheme, to reinsert common-law formulations of causation involving “probabilities,” and consequently to “deprive litigants of their right to a jury determination.” *Id.*, at 507, 509-10, 77 S.Ct. 443. Aiming to end lower court disregard of congressional purpose, the *Rogers* Court repeatedly called the “any part” test the “single” inquiry determining causation in FELA cases. *Id.*, at 507, 508, 77 S.Ct. 443 (emphasis added).

*CSX Transportation, Inc. v. McBride*, 564 U.S. \_\_\_, 131 S.Ct. 2630, 2638-39, 180 L.Ed.2d 637, 2011 AMC 1521 (2011)(emphasis in original).<sup>5</sup>

So, unlike the pre-*McBride* and common law negligence cases cited by the State, causation is much broader under the Jones Act than anywhere at common law.

FELA's [hence the Jones Act's] language on causation, however, “is as broad as could be framed.” *Urie v. Thompson*, 337 US 163, 181, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949). Given the breadth of the phrase “resulting in whole or in part from the [railroad's] negligence,” and Congress' “humanitarian” and “remedial goal[s],” we have recognized that, in comparison to tort litigation at common law, “a relaxed standard of causation applies under FELA.” [*Consolidated Rail Corporation v. Gottshall*, 512 US [532] at

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<sup>5</sup> *CSX Transportation, Inc.*, was a FELA case. However, FELA rulings apply to Jones Act cases.

542-543, 114 S.Ct. 2396[, 129 L.Ed.2d 427 (1994)]. In our 1957 decision in *Rogers*, we described that relaxed standard as follows:

“Under [FELA and the Jones Act] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.” 352 US, at 506, 77 S.Ct. 443.

*McBride*, 564 U.S. \_\_\_, 131 S.Ct. at 2636.

If [causation is] taken to mean the plaintiff's injury must *probably* (“more likely than not”) follow from the railroad's negligent conduct, then the force of FELA's “resulting in whole or in part” language would be blunted. Railroad negligence would “probably” cause a worker's injury only if that negligence was a dominant contributor to the injury, not merely a contributor in any part.

\* \* \*

Juries in such cases are properly instructed that a defendant railroad “caused or contributed to” a railroad worker's injury “if [the railroad's] negligence played a part—no matter how small—in bringing about the injury.”

*McBride*, 564 U.S. \_\_\_, 131 S.Ct. at 2644.

The test for causation in a Jones Act case, like Ms. Stinson's, is not common law proximate cause, but whether the “proofs justify with reason” that the employer's negligence played any part, even the slightest, in causing the injury or illness. Ms. Stinson presented evidence that she was working in a prison setting where she was at a high risk of being exposed to

MRSA. She was required to clean restrooms, work with prisoners and the public without access to gloves, water, bleach or other disinfectants. Ms. Stinson was also required to use the prisoners' filthy SaniCan on many occasions or use a SaniCan that was not regularly cleaned and did not have soap or water in it. (See pages 4 and 5 for more complete listing.)

Although the doctors hired by the State say it is not "likely" that Ms. Stinson was infected with MRSA while working as a seaman, they do not say the State's negligence did not play any part, not even the slightest, in causing Ms. Stinson's MRSA infection.

On the other hand, Ms. Stinson's treating physician, Dr. Luteyn, after looking at the facts and treating Ms. Stinson, opined on a more probable than not basis that Ms. Stinson contracted MRSA while working as a seaman because of the greatly increased risk of infection and the complete lack of any available amelioration of that risk, like hand washing or anti-bacterial gels. CP 181-83, 184-85, 187-88.

When facts and reasonable inferences from the facts are considered in favor of the nonmoving party, *Goad v. Hambridge*, 85 Wn. App. 98, 102, 931 P.2d 200 *review denied* 132 Wn.2d

1010, 940 P.2d 654 (1997), Ms. Stinson's Jones Act claims should be allowed to go to the jury.

**3. The Trial Court Erred in Granting Summary Judgment on Appellant's Maintenance and Cure Claim**

Maintenance and cure is an ancient maritime remedy and, in keeping with its humanitarian principles, the proofs needed for it are de minimis.

A seaman establishes her right to maintenance and cure by alleging and proving by a preponderance of the evidence (1) her engagement as a seaman; (2) her illness or injury occurred, manifested, or was aggravated while in the ship's service; (3) the wages to which she is entitled; and (4) the expenditures for medicines, medical treatment, board, and lodging. Notably, a seaman need not present any proof of negligence or fault on the part of her employer nor must she prove a causal nexus between employment and injury to establish her entitlement to maintenance and cure.

*Mai v. American Seafoods Company, LLC*, 160 Wn.App. 528, ¶ 22 (538-39), 249 P.3d 1030, 1035 (2011)(emphasis added).

"A claim for maintenance and cure concerns the vessel owner's obligation to provide food, lodging, and medical services to a seaman injured while serving the ship." *Lewis v. Lewis & Clark Marine, Inc.*, 531 US 438, 441, 121 S.Ct. 993, 148 L.Ed.2d 931 (2001). The doctrine entitles an injured seaman to three distinct remedies—maintenance, cure, and wages. See *Rodriguez Alvarez v. Bahama Cruise Line, Inc.*, 898 F.2d 312, 315-16 (2nd Cir. 1990). "Maintenance" compensates the injured seaman for food and lodging expenses during his medical treatment. *Id.* at

316 "Cure" refers to the reasonable medical expenses incurred in the treatment of the seaman's condition. See *Reardon v. Cal. Tanker Co.*, 260 F.2d 369, 371-71 (2nd Cir. 1958). And lost wages are provided in addition to maintenance, on the rationale that "maintenance compensates the injured seaman for food and lodging, which the seaman otherwise receives free while on the ship." *Rodriguez Alvarez*, 898 F.2d at 316.

\* \* \*

Maintenance and cure is an "ancient duty," *Calmar Steamship Corp. v. Taylor*, 303 US 525, 527, 58 S.Ct. 651, 82 L.Ed. 993 (1938), which traces its origin to medieval sea codes, "and is undoubtedly of earlier origin," 1 Thomas J. Shoenbaum, *Admiralty and Maritime Law* § 6-28 (5th ed. 2011)<sup>6</sup>. See generally John B. Shields, *Seamen's Rights to Recover Maintenance and Cure Benefits*, 55 Tul. L.Rev. 1046, 1046 (1981) (describing how the doctrine was codified as early as 1338 in the Black Book of the Admiralty). The duty "arises from the contract of employment" and "does not rest upon negligence or culpability on the part of the owner or master." *Taylor*, 303 US at 527, 58 S.Ct. 651. In that respect, maintenance and cure has been called "a kind of nonstatutory workmen's compensation." *Weiss v. Cent. R.R. Co. of N.J.*, 235 F.2d 309, 311 (2nd Cir. 1956)[, also *Brown v. State of Alaska*, 816 P.2d 1368 (Alaska 1991)].

The analogy to workers' compensation, however, can be misleading, because maintenance and cure is a far more expansive remedy. First, although it is limited to "the seaman who becomes ill or is injured *while in the service*

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<sup>6</sup> For more on the history of maintenance and cure see *Mitchell v. Trawler Racer, Inc.*, 362 US 539, 543, 80 S.Ct. 926, 4 L.Ed.2d 941, 1960 AMC 1503 (1960).

of the ship," *Vella [v. Ford Motor Co.]*, 421 US [1,] at 3, 95 S.Ct. 1381[, 43 L.Ed.2d 682 (1975)](emphasis added), it is not "restricted to those cases where the seaman's employment is the cause of the injury or illness," *Taylor*, 303 US at 527, 38 S.Ct. 651. "[T]he obligation can arise out of a medical condition such as a heart problem, a prior illness that recurs during the seaman's employment, or an injury suffered on shore." Schoenbaum, *supra*, at § 6-28. Second, the doctrine is "so broad" that "negligence or acts short of culpable misconduct on the seaman's part will not relieve the shipowner of the responsibility." *Vella*, 421 US at 4, 95 S.Ct. 1381 (alterations and quotation marks omitted). Third, the doctrine may apply even if a seaman is injured or falls ill off-duty—for example, while on shore leave, see *Warren .v United States*, 340 US 523, 530, 71 S.Ct. 432, 95 L.Ed. 503 (1951)—so long as the seaman is "in the service of the ship," which means he is "generally answerable to its call to duty rather than actually in performance of routine tasks or specific orders." *Farrell [v. United States]*, 336 US [511] at 516, 69 S.Ct. 707[, 93 L.Ed. 850 (1949)](quotation marks omitted). Fourth, a seaman may be entitled to maintenance and cure even for a preexisting medical condition that recurs or becomes aggravated during his service. See *Sammon v. Cent. Gulf S.S. Corp.*, 442 F.2d 1028, 1029 (2nd Cir. 1971); compare *Brahms v. Moore-McCormick Lines, Inc.*, 133 F.Supp. 283, 286 (S.D.N.Y. 1955)(denying maintenance and cure when seaman submitted evidence showing his injury preexisted his service and recurred afterward, but did not submit any evidence showing that illness existed during his service).

The policy underlying a broad maintenance and cure doctrine is "the almost paternalistic duty" admiralty law imposes on a shipowner toward the crew. *Garay v. Carnival Cruise Line, Inc.*, 904 F.2d 1527, 1530 (11th Cir. 1990).

*Messier v. Bouchard Transportation*, 688 F.3d 78, 81-82, 2012 AMC 2370 (2nd Cir. 2012), cert. denied \_\_ US \_\_, 2013 WL 1091790, 81 USLW 3395, 81 USLW 3511, 81 USLW 3512 (March 18, 2013)(holding maintenance and cure is due a seaman who suffered lymphoma during his service on the vessel where the illness did not “manifest” itself during his service on the vessel).

The State argues that Ms. Stinson’s claim for maintenance and cure fails because she did not discover she had become infected with MRSA while she was actually on the State’s vessel. However, the State’s “manifestation rule” has been soundly rejected. Rather, the “occurrence rule” is used in maintenance and cure cases. *Messier*, 688 F.3d at 83-84.

The rule of maintenance and cure is simple and broad: a seaman is entitled to maintenance and cure for *any* injury or illness that occurs or becomes aggravated while he is serving the ship. *Vaughan*, 369 US at 531, 82 S.Ct. 997 (“Maintenance and cure is designed to provide a seaman with food and lodging when he *becomes sick or injured* in the ship’s service.” (emphasis added)) . . . It does not matter whether the injury or illness was related to the seaman’s employment. *Taylor*, 303 US at 527, 58 S.Ct. 651. It does not even matter, absent active concealment, if the illness or injury is merely an aggravation or recurrence of a preexisting condition. See *Sammon*, 442 F.2d at 1029. This well-established rule does not permit an exception for asymptomatic diseases—so long as the illness occurred or became aggravated during the seaman’s service, he is entitled to maintenance and cure.

*Messier*, 688 F.3d at 83-84 (underling added).

Even if not infected with MRSA while in the service of the vessel, which she was,<sup>7</sup> Ms. Stinson's MRSA infection occurred, manifested or was aggravated while she was in the service of the vessel. Ms. Stinson was carried off the ferry due to the pain she was suffering from the MRSA. CP 168-69.

Maintenance and cure may seem like an extraordinary remedy in a non-maritime setting, but as its long pedigree shows, maintenance and cure is a fundamental seaman remedy.

At bottom, the district court's discomfort with the occurrence rule is, perhaps, understandable. After all, a rule imposing liability on an employer for an injury that was known neither to the employer nor the employee during the period of employment seems odd—at least outside the admiralty context. But admiralty is different, and maintenance and cure is a unique remedy. It is “broad.” *Vella*, 421 US at 4, 95 S.Ct. 1381. We are to be “liberal in interpreting” it “for the benefit and protection of seamen.” *Vaughan*, 369 US 531, 82 S.Ct. 997 (quotation marks omitted). We are instructed to resolve “ambiguities or doubts ... in favor of the seaman.” *Id.* at 532, 82 S.Ct. 997. The general rule is that maintenance and cure is available for *any* injury or illness that occurs during a seaman's service. The only way to establish a manifestation exception is to construe the remedy narrowly rather than broadly, which the Supreme Court has explicitly told us not to do.

*Messier*, 688 F.3d at 88.

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<sup>7</sup> Dr. Luteyn opined on a more probable than not basis that Ms. Stinson contracted MRSA while working as a seaman. CP 181-83, 184-85, 187-88.

The record shows that Ms. Stinson was at work and became so ill with MRSA that she had to be carried off the vessel. CP 168-69. At the very least there was sufficient evidence for a jury to decide if Ms. Stinson's MRSA infection occurred, manifested or was aggravated while Ms. Stinson was in the ship's service. Ms. Stinson's claim for maintenance and cure should not be dismissed on summary judgment.

### **CONCLUSION**

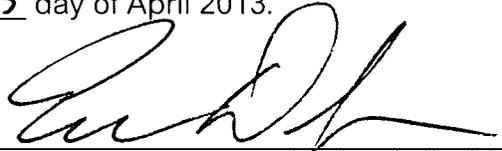
In a motion for summary judgment all facts and inferences must be read in favor of the non-moving party, in this case, Ms. Stinson. Contrary to what the State argues there are material facts in dispute and Ms. Stinson presented meaningful medical testimony, based upon facts, from Dr. Luteyn that on a more probable than not basis Ms. Stinson was infected with MRSA while working as a seaman for the State.

Although each of Ms. Stinson's maritime claims for relief have different standards of causation for her to prove: proximate cause for her unseaworthiness claim; any cause, even the slightest, for her Jones Act claim; and any occurrence, manifestation or aggravation while in the ship's service for her

maintenance and cure claim, Ms. Stinson met each burden of proof.

Therefore, Ms. Stinson respectfully requests that the Order Granting Defendant's Motion for Summary Judgment, CP 214-16, and the judgment dismissing this case be reversed and this matter be remanded for additional proceedings.

DATED this 15 day of April 2013.



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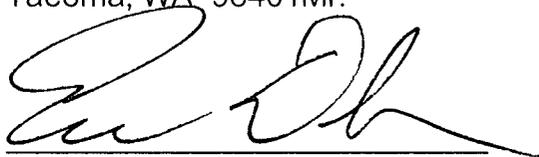
Eric Dickman, LLC,  
attorney for appellant Ms. Cara Stinson  
Alaska Bar Number 9406019  
Oregon Bar Number 02194  
Washington Bar Number 14317  
Also admitted in New York

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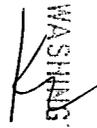
**CERTIFICATE OF DELIVERY**

I, the undersigned, certify under the penalty of perjury in the State of Washington that on the 15 day of April 2013, I had a copy of this document mailed to the attorney of record for the appellee/defendant, first class postage pre-paid to:

Mr. Garth Ahearn  
Office of the Attorney General  
Torts Division  
1250 Pacific Avenue  
Suite 105  
P.O. Box 2317  
Tacoma, WA 98401Mr.



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

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