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**SUPREME COURT OF THE STATE OF WASHINGTON**

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JUSTIN ENDICOTT,

Respondent,

v.

ICICLE SEAFOODS, INC.,

Appellant.

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APPELLANT'S ANSWER TO BRIEF OF *AMICUS CURIAE*  
INLANDBOATMEN'S UNION OF THE PACIFIC

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## I. INTRODUCTION

Icicle Seafoods, Inc. seeks precisely the same rights afforded a Jones Act defendant by federal law and the same rights afforded any other defendant in this forum: the right to a jury trial protected “inviolable” under the Washington Constitution. When a Jones Act plaintiff proceeds at law in state courts, where there is no admiralty jurisdiction, the rights of the defendant are determined by state constitutional and procedural laws. Washington law strongly supports the defendant’s right to a jury in this circumstance.

When a Jones Act plaintiff brings a maritime case in state court, the right to prejudgment interest is similarly limited because state courts cannot sit in admiralty. A state court hearing a mixed Jones Act and unseaworthiness case is bound to apply federal substantive law. In this circumstance, when mixed cases involving Jones Act and unseaworthiness claims are brought at law, the vast majority of federal and state courts have found that prejudgment interest is not available as a substantive right when damages for the respective claims cannot be apportioned.

## II. ANSWER TO THE ARGUMENTS OF *AMICUS*

“*Amicus* must review all briefs on file and avoid repetition of matters in other briefs.” RAP 10.3(e). Similarly, a brief in answer to a

brief of *amicus curiae* is to be limited to “solely to the new matters raised in the brief of *amicus curiae*.” *Id.* According to their Motion for Leave to file a brief, *Amicus* IBU members assert they have a “direct interest” in this matter and their “broad experience” in these issues “will be beneficial to this Court.” *Amicus* Motion for Leave at 2. Notwithstanding this rule, comparison of the *Amicus* brief with the brief of Respondent Justin Endicott (“Endicott”) demonstrates that the *Amicus* brief repeats virtually all of Endicott’s arguments. It is unclear what “broad experiences” of the IBU or “new matters” raised by *Amicus* are brought to the Court’s attention here. Nonetheless, Appellant Icycle Seafoods, Inc. (“Icycle”) provides this answer to the arguments of *Amicus*.

**A. A Jones Act Defendant Has a Right to a Jury Trial in Washington State Courts.**

**1. Federal Law Reaches the Same Result When Admiralty Jurisdiction is Not Invoked.**

*Amicus* improperly argue a “shipowner has no federal right to a jury trial.” *Amicus* Brief at 5. This assertion is contrary to federal law, as *Amicus* later acknowledge in their brief. *Id.* Federal law grants admiralty jurisdiction exclusively to federal district courts and, when admiralty jurisdiction is invoked, there is no recognized right to a jury. Fed. R. Civ. P. 38(e); Wilmington Trust v. U.S. District Court, 934 F.2d 1026, 1029

(9<sup>th</sup> Cir. 1991). Because admiralty jurisdiction is exclusively federal, a true “admiralty” claim is never cognizable in state court. Linton v. Great Lakes Dredge & Dock Co., 964 F.2d 1480, 1487 (5<sup>th</sup> Cir. 1992). Therefore, if an injured seaman proceeds in federal court on the admiralty side, neither the plaintiff nor the defendant is entitled to a jury.

However, when admiralty jurisdiction is **not** invoked in federal court, such as in a diversity action, either side may elect a jury. *Amicus* admit this in their brief: “If the parties invoke federal diversity jurisdiction, both a plaintiff and a defendant have a Seventh Amendment right to a jury.”<sup>1</sup> *Amicus* Brief at 5. It is unsupported and at best awkward for *Amicus* to admit that federal law allows either party to elect a jury trial when admiralty jurisdiction is not invoked, and then suggest that state courts cannot similarly provide for a jury trial based on an alleged prohibition under federal law.

In effect, *Icicle* seeks the same rights it has in federal court when admiralty jurisdiction is not invoked. For example, when *Icicle* is in federal court in a diversity case and admiralty jurisdiction is not invoked, *Icicle* can opt for a jury trial. *Icicle* should logically be afforded the same

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<sup>1</sup> *Amicus* acknowledge this right just two paragraphs under the heading and argument that “A Shipowner Has No Federal Right To a Jury Trial.”

right when it is in state court, where admiralty jurisdiction can never be invoked.

**2. Washington Procedural Laws Provide Either Party the Right to a Jury.**

Next, *Amicus* suggest, just as Endicott did in his brief, that the right to a bench trial is substantive, not procedural, and that this “substantive” federal right controls the right to a jury in state court. *Amicus* Brief at 6. This assumption is simply wrong.

Like Endicott, *Amicus* rely solely on the unpublished California opinion in Peters v. San Francisco, 1994 WL 782237, 1995 A.M.C. 788, 791 (Cal. Ct. App. 1994), in support of this assumption. Icicle previously addressed the weaknesses and distinctions of this minority, unpublished decision in its Reply brief. Reply Brief of Icicle Seafoods, Inc. at 5-8. In summary, and contrary to this minority opinion, the majority of state courts that have decided this issue have recognized state law determines the defendant’s right to a jury trial. See, e.g., Spencer v. Dept of Transp. and Development, 887 So.2d 28 (La. Ct. App. 2004).

*Amicus* also criticize the law review articles cited by Icicle in support of this position, which were published by two of the most respected admiralty scholars in the United States, Professors Sturley and

Robertson. See Brief of Appellant Icicle Seafoods, Inc. at fn. 3. *Amicus* suggest these articles are “hardly the last word” on the subject and cite instead to an article by Roy Dripps.<sup>2</sup> *Amicus* Brief at 12. Professors Sturley and Robertson in fact did get the “last word” in on this debate with Mr. Dripps in a later law review article, “*Understanding Panama Railroad Co. v. Johnson: The Supreme Court’s Interpretation of the Seaman’s Elections Under the Jones Act.*” 14 U.S.F. Mar. L.J. 229 (2001-2002)<sup>3</sup> Instead, as this article concludes, it is “nothing short of astonishing to suggest that – in a forum in which jury trials are generally available at the request of either party – one party would have a unilateral right to choose between a jury trial and a bench trial...[s]uch a unilateral right would be unprecedented in law, offensive to the Seventh Amendment, and contrary to basic notions of even-handed procedural fairness” 14 U.S.F. Mar. L.J. at 268.

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<sup>2</sup> Roy Dripps, like counsel for *Amicus*, is a plaintiff-side maritime lawyer.

<sup>3</sup> In essence, Dripps argued in the article cited by *Amicus* that the Supreme Court in Panama Railroad Co. concluded the “election clause” of the Jones Act allows a seaman to choose the “form of trial,” which he asserts means “either a jury or non-jury trial.” Dripps, 14 U.S.F. Mar. L.J. at 131 (2001-2002). Professors Sturley and Robertson point out in their response that nothing supports this argument of Dripps, and instead painstakingly analyze the history and arguments in the Panama Railroad Co. case to conclude that the election referenced in the decision is the procedural choice between bringing suits in admiralty or on the law side. Robertson and Sturley, 14 U.S.F. Mar. L.J. at 247-257 (2001-2002). See also Appendix to the opening Brief of Appellant, Icicle Seafoods, Inc., A-126 to A-130.

This exact question was addressed by in Linton v. Great Lakes Dredge & Dock Co., 964 F.2d 1480 (5<sup>th</sup> Cir. 1992), where the Fifth Circuit recognized that when a plaintiff elects to proceed at law on a maritime claim in state court, “procedurally, whether he, **or the defendant**, would have a right to a trial by jury would depend on state civil procedure.” Linton, 964 F.2d at 1487 (emphasis added). In that case, state procedural law precluded a jury trial for the defendant under a peculiar Louisiana law designating the case as an admiralty case (there is of course no such procedure in Washington state procedural rules). Instead, Washington Superior Court procedural rules repeat and emphasize the constitutional preservation of the right of either party to a jury trial in state courts:

**Rule 38: JURY TRIAL OF RIGHT.**

**(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 statute shall be preserved **to the parties** inviolate.

**(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 therefore [...].

CR 38 (emphasis added).

**3. Washington Constitutional Protections Further  
Preserve a Jones Act Defendant's Right to a Jury Trial.**

Finally, *Amicus* suggest that “even if analyzed solely under Washington law, which this Court should not do, the Washington State Constitution protects only those rights to trial by jury which existed at the time of the adoption of the Constitution in 1889.” *Amicus* Brief at 13. *Icicle* previously argued that the 1917 case of Larson v. Alaska S.S. Co., 96 Wn. 665, 667, 165 P. 880 (Wash. 1917), demonstrates Washington courts recognized a jury right in personal injury claims involving seaman even before the Jones Act was enacted in 1920. In response, *Amicus* argue that “Larson was “effectively overruled by the United States Supreme Court in Chelentis.” *Amicus* Brief at fn. 6.

Whether or not this is correct, Larson recognized that a jury right was afforded in a maritime case in Washington state courts prior to the enactment of the Jones Act in 1920, which is the limited inquiry for the Court here. The suggestion by *Amicus* that the right to a jury trial in cases such as this was not recognized because the case cited was later overruled is akin to suggesting that there was no school segregation in the United States in the early part of the twentieth century because school segregation

was disallowed by the Supreme Court in Brown v. Board of Education (citations omitted).

**B. A Plaintiff May Not Be Awarded Prejudgment Interest Under the Majority Rule for Mixed Cases Involving Jones Act and Unseaworthiness Claims.**

The parties here agree that because prejudgment interest is a part of the measure of damages a plaintiff may recover, questions concerning the availability of prejudgment interest are a matter of substantive law. *Amicus* Brief at 17; Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330, 335, 108 S.Ct. 1837, 100 L.Ed.2d 349 (1988). Where a state court hears a case involving maritime claims, it is widely recognized that the state court must apply federal substantive law. Militello v. Ann & Grace, Inc., 576 N.E.2d 675, 676 (Mass. 1991). Applying these principles, state courts must apply federal substantive law with respect to the availability of prejudgment interest. *Id.* at 678.

What the parties here disagree on is the application of federal substantive law in a mixed case involving both Jones Act and unseaworthiness claims. Like Endicott, *Amicus* rely on the minority opinion set out in the Second Circuit case of Magee as the “better analyzed decision.” *Amicus* Brief at 18. Additionally, *Amicus* cite to a

law review article<sup>4</sup> by J. Noelle Hicks, which recommends that courts ignore precedent and permit the recovery of prejudgment interest in Jones Act cases. J. Noelle Hicks, 16 U.S.F. Marl. L.J. at 86 (2003-2004).

Magee is the only federal circuit court decision to so hold. The majority of circuits that have analyzed this issue have long held that prejudgment interest is not available in mixed cases. See, e.g., McPhillamy v. Brown & Root, Inc., 810 F.2d 529, 532 (5<sup>th</sup> Cir. 1987); Petersen v. Chesapeake & Ohio Ry. Co., 784 F.2d 732, 741 (6<sup>th</sup> Cir. 1986). States with maritime interests including Louisiana, Texas, and Alaska have appropriately applied this majority rule under federal maritime law. See, e.g., Marine Solution Services, Inc. v. Horton, 70 P.3d 393, 412 (Alaska 2003).

Division Two of the Washington Court of Appeals similarly recognized the majority rule in Foster v. State of Washington, Dept. of Transp., 128 Wn. App. 275, 279, 115 P.3d 1029 (2005)(citing majority rule where no prejudgment interest available in mixed case involving Jones Act and unseaworthiness claims and where damages for respective

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<sup>4</sup> This despite their disdain for law review articles cited by Icicle.

claims cannot be apportioned).<sup>5</sup> The reasoning behind this majority rule focuses on the fact that prejudgment interest in these cases is governed by a statute that does not provide for this benefit and courts are not at liberty to award additional damages not authorized by statute. Monessen, 486 U.S. at 336-39 (injured workers bringing claims under FELA cannot recover prejudgment interest). The Jones Act expressly incorporates FELA by reference. See, e.g., Miles v. Apex Marine Corp., 498 U.S. 19, 23-24, 111 S.Ct. 37, 112 L.Ed. 2d 275 (1990). Given this, and applying as it must federal substantive law, Washington state courts may not award prejudgment interest in a mixed case involving Jones Act and unseaworthiness claims where the damages are not apportioned.

### III. CONCLUSION

A state must look to its constitutional and procedural laws to determine the extent of a Jones Act defendant's right to a jury trial when a Jones Act plaintiff proceeds at law in state court. See Linton, 964 F.2d at 1487. The Washington State Constitution and corresponding state procedural rules clearly provide a Jones Act defendant an equal right to a

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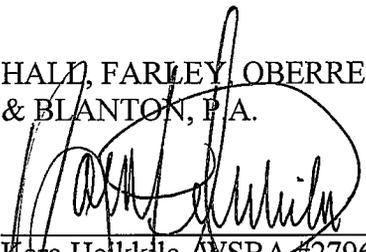
<sup>5</sup> *Amicus* acknowledges "Endicott's recovery here was not differentiated between his Jones Act and unseaworthiness claims by the trial court." *Amicus* Brief at 18.

jury trial. *Amicus* provide no "new" or compelling reason to hold otherwise.

A state court must apply federal maritime law in matters of substantive law including the application of prejudgment interest. *Amicus*, like *Endicott*, cite the minority and not the majority rule for applying federal substantive maritime law in mixed cases involving both Jones Act and unseaworthiness claims. As the majority of courts have reasoned, courts including state courts may not create new federal statutory rights where none presently exist. As such, and following federal substantive law, prejudgment interest in a mixed case where damages have not been apportioned may not be awarded.

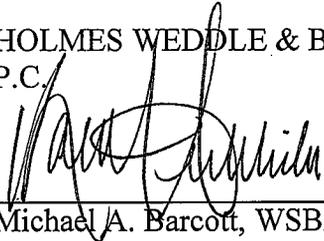
RESPECTFULLY SUBMITTED this 10 day of September, 2009.

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