

No. 90377-8

SUPREME COURT
OF THE STATE OF WASHINGTON

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The STATE OF WASHINGTON and
the DEPARTMENT OF CORRECTIONS,

Appellants / Defendants

v.

SCOTT WALTER MAZIAR,

Respondent / Plaintiff

SUPPLEMENTAL BRIEF OF RESPONDENT MR. SCOTT MAZIAR

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 ORIGINAL

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IDENTITY OF RESPONDING PARTY

Mr. Scott Maziar, respondent, plaintiff who brought a general maritime negligence claim against the State of Washington and the Department of Corrections (State) for personal injuries Mr. Maziar suffered on board a ferry owned and operated by the State, respectfully submits the following supplemental brief.

COURT OF APPEALS DECISION FOR REVIEW

Mr. Maziar was injured on January 16, 2003, when the captain of the ferry that Mr. Maziar was riding on yanked a chair out from underneath Mr. Maziar. Mr. Maziar suffered injuries to his back, left ankle, knee and left shoulder.

On remand from Maziar v. Department of Corrections (Maziar I), 151 Wn.App. 850, 216 P.3d 430, 2009 AMC 1999 (2009)(Armstrong J.)(holding the Industrial Insurance Act, Title 51 RCW, did not preclude Mr. Maziar's general maritime claim and that his claim was not barred by sovereign immunity), Mr.

Maziar successfully prosecuted his general maritime claim and was awarded \$585,000.00 in a bench trial.¹

The State appealed the decision of the trial court to strike the jury demand. Division I of the Washington State Court of Appeals affirmed the trial court's decision. Maziar v. Washington State Dept.of Corrections, (Maziar II), 180 Wn.App. 209, 327 P.3d 1251 (2014)(Dwyer J.).

The State's petition for review was granted on the issue of whether the State had a right to a jury trial in a general maritime claim brought against it.

ISSUE PRESENTED FOR REVIEW

Whether the State had a right to a jury trial in a general maritime claim brought against it.

¹ The trial court found in favor of Maziar, and awarded \$572,251.50 for pain and suffering and loss of enjoyment of life. However the trial court found that Mr. Maziar had failed to mitigate his damages because "he did not attempt" the mailroom position "even for 10 or 15 minutes." Hence the trial court awarded lost wages for only the periods of January to February 2003 and September to November 2003, for a total of \$12,487.50. In total, the trial court awarded \$585,000.

Maziar II, 180 Wn.App. at ¶ 8 (217), 327 P.3d at 1255.

STATEMENT OF THE CASE

This is the second appeal in Mr. Maziar's case. The first is reported at Maziar I, 151 Wn.App. 850, 216 P.3d 430, 2009 AMC 1999 (2009)(holding the Industrial Insurance Act, Title 51 RCW, did not preclude Mr. Maziar's claim and that his claim was not barred by sovereign immunity).

At a bench trial following the first appeal, Mr. Maziar was awarded \$585,000.00 for the injuries he suffered on January 16, 2003, when the captain of the ferry that Mr. Maziar was riding on yanked a chair out from underneath Mr. Maziar. CP 128-42. When injured, Mr. Maziar was a prison guard on his way from McNeil Island Penitentiary to the mainland on a ferry. CP 130 ¶¶ 5-7. The ferry was owned and operated by the State. The captain was a State employee. CP 130 ¶ 5.

When Mr. Maziar first brought his general maritime claim for relief, he asked for a jury trial. CP 186-191. However, following the decision in Endicott v. Icicle Seafoods, Inc., 167 Wn. 2d 873, 224 P.3d 761, 2010 AMC 624, cert. denied 561 US 1008, 130 S.Ct. 3482, 177 L.Ed.2d 1059 (2010), where this Court pointed out the distinction between common law and general maritime claims, and noted the latter had no right to a jury trial, it

became clear Mr. Maziar's general maritime claim should be tried to the bench.² The trial court agreed. CP 238.

Following the bench trial, the State appealed. Division I of the Washington State Court of Appeals affirmed the trial court. Maziar II, 180 Wn.App. 209, 327 P.3d 1251 (2014)(Dwyer J.) The Court of Appeals upheld the trial court on the grounds that the State had no Constitutional or statutory right to a jury trial.

On the issue of the State's right to a jury trial, both the trial court and the Court of Appeals are correct.

² Footnote 3 in Endicott states:

Both parties assume that, if Icicle has a jury trial right on Endicott's Jones Act claim, the right necessarily extends to Endicott's unseaworthiness claim. Cf. Fitzgerald v. U.S. Lines Co., 374 U.S. 16, 21, 83 S.Ct. 1646, 10 L.Ed.2d 720 (1963) (adopting this approach in federal court). This point is not self-evident under our law. Jury trial rights for the Jones Act and general maritime claims do not necessarily arise together. Nevertheless, the parties' briefs do not address the jury trial right in general maritime cases or what effect it may have on this case, a "mixed" action in which general maritime and Jones Act claims are joined in one suit. Because the issue is not disputed, we simply assume without deciding that the jury will resolve both claims on remand.

It is noteworthy that although Endicott was a "mixed" action in which a general maritime claim is joined with a Jones Act claim for relief, Mr. Maziar's case is a pure general maritime case. He did not have, nor did he argue at trial that he had, a Jones Act claim.

ARGUMENT

A. Introduction

The State claims it has a constitutional right to jury trial. That argument is ill founded.

To determine whether the Washington Constitution confers a right to a jury trial in a particular cause of action, the Court follows a two-step approach. Wash. Const. Art. 1, sec. 21; Sofie v. Fibreboard Corp., 112 Wash.2d 636, 645, 771 P.2d 711; 780 P.2d 260 (1989). The first step is to determine the scope of the jury trial right as it existed at the State Constitution's adoption in 1889. The second step is to determine the causes of action to which the right attaches. Id.

Endicott v. Icicle Seafoods, Inc., 167 Wn.2d 873, ¶ 21 (884), 224 P.3d 761, 2010 AMC 624, cert. denied 561 US 1008, 130 S.Ct. 3482, 177 L.Ed.2d 1059 (2010).³

At the time of adoption of the State Constitution the State had no right to a jury trial, and the Constitution did not provide

³ Not all matters tried in state court have the right to be heard by a jury. For example, "proceedings in quo warranto, prohibition and the like are special and extraordinary proceedings and they do not fall within the purview of § 248, supra, which restricted the right of trial by jury to actions denominated as actions at law." In re Mullen v. Doherty, 16 Wash 382, 385, 47 P. 958, 959 (1897). See also, actions regarding filiation. State ex rel Goodner v. Speed, 96 Wn.2d 838, 640 P.2d 13 (1982), cert. denied 459 U.S. 863 (1982). Also actions in equity. Osgood & Co. v. Ralph, 4 Wash. 617, 30 P.709 (1892). Also actions for an injunction. Spokane Co-op Mining Co. v. Pearson, 28 Wash 118, 68 P. 165 (1902). Likewise general maritime cases are not tried to a jury. United States v. La Vengeance, 3 U.S. 27, 301, 3 Dall. 297, 1 L.Ed. 610 (1796).

the State with the right to a jury trial. Maziar II, 180 Wn.App. at ¶¶ 24-34 (225-30), 327 P.3d at 1259-62.

Additionally, at the time of the enactment of the State Constitution, general maritime claims were tried without a jury.

To this[, the right to a jury trial at common law,] there are two exceptions; first, the trial of cases in equity; and, secondly, of cases of admiralty and maritime jurisdiction. These may be tried according to the forms of the English chancery court, or the English admiralty court, and without the intervention of a jury.

Waring v. Clarke, 46 U.S. 44, 46, 5 How. 441, 12 L.Ed 226, 2006 AMC 2646 (1847).⁴

Prior to the adoption of the Washington Constitution, cases in the Territory were heard in the Territorial Court, which, through the Territorial Organic Act (10 U.S. Statutes at Large, c

⁴ A general maritime claim is distinct from a Jones Act claim, which may be tried “at law” to a jury.

Some maritime law has been created by Congress, see generally Titles 33, 46 U.S.C. [the Longshore and Harbor Workers’ Act, and the Jones Act] but Maziar’s claim falls under the “general maritime law,” which is an ancient set of judge-made laws the federal courts have adopted and developed. 1 Thomas Shoenbaum, ADMIRALTY AND MARITIME LAW 158 (4th Ed. 2004); see Exxon Shipping Co. v. Baker, 554 U.S. 471, 128 S.Ct. 2605, 2619, 171 L.Ed. 2d 570 (2008)(quoting Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 259, 99 S.Ct. 2753, 61 L.Ed. 2d 521 (1979).

Maziar I, 151 Wn.App. at 854 n.2.

90 p 172, March 2, 1853) gave the courts jurisdiction over maritime claims.⁵ Therefore, in 1889, a passenger injury claim would be heard in admiralty without a jury. E.g., Phelps v. City of Panama, 1 Wash.Terr. 518 (1877).⁶

So, in 1889, although a jury trial was available for common law actions in the Washington Territory, a jury trial was not available for a general maritime claim in the Washington Territory. They were tried without a jury in the Territorial Courts.

The Washington Constitution was written during a Populist movement on the West Coast. This led to emphasizing individual rights over those of the government, an institution that was not fully trusted.

⁵ All our local courts derive their operative energy from one head, namely, the Territorial Organic Act or charter. That charter was the creative word which gave them being. By virtue of its provisions, as preserved and re-enacted in the revised statutes of the United States, they at present exist. Hitherto that organic act has been generally understood, by those interested, to study its language, not only to grant to the District courts, but to require of them the cognizance of admiralty and maritime causes.

Phelps v. City of Panama, 1 Wash.Terr. 518, 523, (1877).

⁶ Although called "negligence" there are substantive legal differences between general maritime negligence and common law negligence. For example, under general maritime negligence there are only two classes of passengers: Passengers who are owed reasonable care and stowaways. At common law there are invitees, trespassers, guests, etc. each with their own unique standard of care.

In many states, including Washington, the Declaration of Rights is a source of individual protection that is the equal of the federal document. Not merely a restatement of its national counterpart, Washington's Declaration of Rights contains unique and additional protections of individual rights.

....

Problems peculiar to the West and the Populist movement of the late nineteenth century provided a vastly different context for the creation of the state constitution than for the federal document.

Robert F. Utter & Hugh D. Spitzer, *THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE* 15 (2002).

The Declaration of Rights (Article I of the Washington Constitution) addresses the “rights of a Washington citizen,” not the rights of the State. Robert F. Utter, Freedom and the Diversity in a Federal System: Perspectives and State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L.Rev. 491, 524 (1984).

“[T]he fundamental purpose of our state's constitution” is “to protect and maintain individual rights.” Utter, *supra*, at 507. Accordingly, the Washington Constitution delineates a set of limitations on state power, not a set of powers or rights granted to the State. *UTTER & SPITZER, supra*, at 2. It would require a strained reading of our Declaration of Rights to find that one of its provisions grants to the State any of the rights enumerated therein. Accordingly, article I, section 21 of the Washington Constitution does not grant the State the right to a jury trial.

Maziar II, 180 Wn.App. at ¶ 27 (226), 327 P.3d at 1259-60.

At the time the Constitution was adopted the State had not waived its sovereign immunity, so the Founders would not have considered whether the State would have the right to demand a jury in a civil tort case against it.⁷ There were no civil tort cases against the State. To sue the State for a civil tort is a claim that has no common law equivalent. The claim is completely foreign to the common law.

The fact there is no Constitutional right for the State to demand a jury trial in a civil tort action is more than a historical anomaly. It flows from the Founders' distrust of the power of the State.

The State misapprehends that it is the same as any individual or a corporate defendant. The State is not the same as other defendants. It is a sovereign - a unique entity under the law. It is treated differently.

⁷ Similarly when the Legislature enacted RCW 4.40.060 and 4.44.090 (originally enacted as Territorial laws in 1854 and 1869 respectively) both of which grant the right to a jury trial, the Legislature was not granting a jury trial to the State. In 1854 and 1869, there was no State of Washington. Additionally, in 1854 and 1869 there was no such thing as a civil tort action against the State. "A familiar and fundamental rule for the interpretation of a statute is that it is presumed to have been enacted in the light of existing judicial decisions that have a direct bearing upon it." Kelso v. City of Tacoma, 63 Wn.2d 913, 917, 390 P.2d 2 (1964).

Due to the “express constitutional authority in article II, section 26 for the legislature to direct ‘in what manner, and in what courts, suit may be brought against the state’” the State is often treated very differently than other defendants.⁸ McDevitt v. Harborview Medical Center, 179 Wn.2d 59, ¶ 1, 316 P.3d 469, 471 (2013). It is left to the Legislature to determine in what manner, and in what courts, suit may be brought against the State.

The State could at any time modify or repeal any or all of RCW 4.92 and change in what manner, and in what courts, suit may be brought against the State. That modification could include providing the State with the right to a jury trial in a civil tort claim against the State, if the Legislature determined that was appropriate. However, providing the State with such power should be a legislative, not judicial, decision.

Mr. Maziar was able to bring his claim against the ferry owner-operator and the employer of the ferry skipper only because the State waived its sovereign immunity allowing said suit. RCW 4.92.090; Maziar I. Nevertheless, Mr. Maziar had to follow the manner that the Legislature set forth in RCW 4.92.090

⁸ E.g., compare Waples v. Yi, 169 Wn.2d 152, 234 P.3d 187 (2010)(90-day pre-suit notice against non-State medical malpractice defendants found invalid), and McDevitt v. Harborview Medical Center, 179 Wn.2d 59, 316 P.3d 469 (2013) (90-day pre-suit notice against State medical malpractice defendants found valid.)

for civil tort claims with the State, to successfully prosecute his claim.

It took Legislative action to determine the manner in which Mr. Maziar could litigate with the State.⁹

RCW 4.92 sets out a number of special procedures for claims against the State; RCW 4.92.010 - venue; RCW 4.92.020 - service of summons; RCW 4.92.080 - the State need not file a bond; RCW 4.92.100 - the use and contents of a notice of claim, and so on. While RCW 4.92 provides a number of special procedural requirements to litigate a tort claim with the State, it does not provide that the State may demand a jury trial.

B. There is No Constitutional Basis for the State to Demand a Jury Trial in a Civil Tort Case.

The State has argued it has a right to demand a jury trial under Article I, section 21 of the State Constitution. That argument is ill placed, as detailed in Maziar II, ¶¶ 24-34.

It would require a strained reading of our Declaration of Rights to find that one of its provisions grants to the State

⁹ As a citizen of the State of Washington, the 11th Amendment to the United States Constitution bars Mr. Maziar from bringing a general maritime claim against the state of Washington in federal court. Welch v. Dept. of Highways & Public Transportation, 483 U.S. 468, 17 S.Ct. 2941, 97 L.Ed.2d 389 (1987); Collins v. State of Alaska, 823 F.2d 329 (9th Cir. 1987).

any rights enumerated there in. Accordingly, article I, section 21 of the Washington Constitution does not grant the State the right to a jury trial.

Maziar II, at ¶ 27 (226).

The State has argued that under article IV, section 24 of the State Constitution the same rules must apply to all defendants. If not, the State argued, then two different classes of tortfeasors, government and non-government, would be created. The State incorrectly claimed this idea was rejected, in Hunter v. North Madison High Sch., 85 Wn.2d 810, 539 P.2d 845 (1975). However, treating the State differently than other defendants is allowed, and “subsequent cases have indicated that Hunter’s reach is limited to legislation that essentially shortens the statute of limitations for suits against state defendants.” McDevitt v. Harborview Medical Center, 179 Wn.2d 59, ¶15 (71), 316 P.3d

469, 475 (2013); McDevitt, 179 Wn.2d at 71 fn8 and cases cited therein.¹⁰

Treating the State differently when it is the defendant in a civil tort case is also consistent with the Founders' protection of individual rights. There are many times when a plaintiff may not want a jury trial when litigating a civil tort against the State.

Under article II, section 26 of the Washington Constitution the Legislature can choose whether the State has a right to a jury in a civil tort claim or not. The Legislature does this by directing "in what manner, and in what courts, suit may be brought against the state." The Legislature had the Constitutional authority to direct that the State had the right to jury trial in a civil tort action, but it did not so direct.

¹⁰ The State being treated differently is not a violation of article I, Section 12 of the Washington State Constitution. Article I, section 12 states:

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not be equally belonging to all citizens or corporations.

The State is not a citizen, class of citizens, or corporation other than municipal, so by its terms, article 1, section 12 does not apply to the State.

C. There Is No Statutory Basis to Support the State's Claim for a Jury.

As a sovereign, the State Legislature determines if, how and when the State may be sued for its tortious conduct.¹¹ Article II, section 26 of the Washington State Constitution. The State waved its sovereign immunity for its tortious conduct in RCW 4.92.090.

RCW 4.92.090 states:

The 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.

RCW 4.92.090, as amended, Laws of 1963, ch 159, § 2 (emphasis added).

Looking at the plain meaning of the language in RCW 4.92.090, the place to start in statutory interpretation, RCW 4.92.090 does not give the State the right to a jury trial.

¹¹ We start with the proposition that the abolition of sovereign immunity is a matter within the legislature's determination. Haddenham v. State, 87 Wash.2d 145, 149, 550 P.2d 9 (1976). This is not because the court says so, but because the constitution so states. Article 2, section 26, of our constitution provides: "The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state."

Coulter v. State, 93 Wn.2d 205, 207, 608 P.2d 261, 262 (1980) (upholding RCW 4.92.100); McDevitt, 179 Wn.2d at ¶6 (64), 316 P. 3d at 472.

“Liability for damages” is defined as:

Liability for an amount to be ascertained by trial of the facts in particular cases.

Black’s Law Dictionary 823 (5th ed. 1979).

Liable for damages as used in RCW 4.92.090 means the State is not immune from being required to pay damages for its tortious conduct.

And “extent” is defined as:

Amount; scope; range; magnitude.

Black’s Law Dictionary 524 (5th ed. 1979).

The plain meaning of RCW 4.92.090 is that the State may be required to answer for its tortious conduct in damages in the same amount, or to the same magnitude, as a private person or corporation.

Although under article II, section 26 of the Washington Constitution the Legislature has the unique authority to set the manner¹² in which a suit may be brought against the State in a

¹² Manner is defined as:

A way, mode, method of doing something, or mode of proceeding in any case or situation.

Black’s Law Dictionary 868 (5th ed. 1979)

civil tort claim, the Legislature did not exercise that authority to provide the State with the right to jury trial in a civil tort claim.¹³

The State must follow the direction of Legislature found in RCW 4.92.

The State is a unique entity under the law, a sovereign, which may set forth whether it can be, and the terms under which it may be, sued for damages. McDevitt v. Harborview Medical Center, 179 Wn.2d 59, 316 P.3d 469 (2013). The conditions the Legislature set for the State to be sued do not include a right for the State to demand a jury trial.

The State has also incorrectly argued that Sofie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 771 (1989), stands for the proposition that the State has a right to jury trial even though no such right existed when the Constitution was enacted. The State claims that it is the jury function that receives constitutional protections from article 1 section 21. Sofie v. Fibreboard, 112 Wn.2d at 648. The State incorrectly argues that the Court in Maziar II is in error and the right to a jury trial attached to the

¹³ Compare the Massachusetts Torts Claim Act, G.L. c. 258, s 2, which does provide for the manner in which a claim may be made against the State of Massachusetts, to RCW 4.92.090, which does not. Please see detailed argument in Mr. Maziar's Answer to the Petition for Review and Cross Petition for Review at pages 14-15 (filed July 3, 2014).

types of actions in existence in 1889, even if the legal liability theory was not then in existence. Sofie, 112 Wn.2d at 638-49.

This argument fails for three primary reasons. First, there is no common law right to sue a sovereign. So there was no similar claim to suing a sovereign existing in 1889, when the State Constitution was adopted.

Second, with citizens and corporations, the State never had the right to a jury trial in a civil tort claim. The State does not have a constitutional right, nor is there a statutory right for the State to demand a jury trial.

Third, unlike with any other litigant, it is the State Legislature, not the courts, that directs in what manner suits may be brought against the State. “The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state.” Washington State Constitution Article II, section 26. And the Legislature has not provided the State with the right to a jury trial in a civil tort action brought against it.

This Court would tread on the purview of the State Legislature should it determine the State has a right to a jury trial in a civil tort action when the Legislature has not so stated.

The State asks the Courts to create a new procedural mechanism for a tort claim, a procedure the Legislature did not

create, for a claim against the sovereign which has no parallel at common law.

CONCLUSION

The Court of Appeals decision that the State did not have a right to jury trial in Mr. Maziar's case is correct.

Nothing in the State Constitution provides the State with the right to a jury trial in a civil tort claim. The State is not a person or corporation that has a constitutionally protected right to a jury trial under the Washington Constitution.

The State Constitution gave the Legislature the unique duty to set the manner in which the State could be sued. In RCW 4.92.090, the Legislature allowed the State to be sued for civil torts. However, the Legislature did not provide the State with the right to a jury trial.

As the Constitution provides that it is the legislative branch that is to direct the manner in which the State may be sued, the Court should not impinge upon the direction of the Legislature by changing the manner in which the State may be sued for a civil tort claim.

Additionally, at the time of adoption of the State Constitution, general maritime claims were tried without a jury in the Territorial Courts.

At the time of the adoption of the State Constitution, a civil tort claim against the State did not exist. No person or corporation could sue the sovereign under any tort theory. The idea of a tort claim against the sovereign was completely foreign. There is no common law equivalent to a civil tort claim against the State.

For these and other reasons contained in Mr. Maziar's briefs which are part of the record on appeal, Mr. Maziar respectfully requests the decision Maziar v. Washington State Dept. of Corrections, (Maziar II), 180 Wn.App. 209, 327 P.3d 1251 (2014)(Dwyer J.) be affirmed.

RESPECTFULLY SUBMITTED this 19 day of
December 2014.



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CERTIFICATE OF DELIVERY

I, the undersigned, certify under the penalty of perjury in the State of Washington that on the 17 day of December 2014, I had a copy of this document mailed to the attorney of record for the appellee/defendant, first class postage pre-paid to:

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Please file the attached brief:

Supplemental Brief of Respondent Mr. Scott Maziar, in

State of Washington and the Dept. of Corrections v. Scott Maziar

Case No. 90377-8

Submitted by:

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