

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
CLERK'S OFFICE

Nov 30, 2016, 2:56 pm

RECEIVED ELECTRONICALLY

No. 92913-1

SUPREME COURT OF
OF THE STATE OF WASHINGTON

ALLAN A. TABINGO,

Appellant,

v.

AMERICAN TRIUMPH LLC and
AMERICAN SEAFOODS COMPANY, LLC

Respondents.

FILED
DEC 13 2016
WASHINGTON STATE
SUPREME COURT

E
byh

BRIEF OF INLANDBOATMEN'S UNION OF THE PACIFIC AS
AMICUS CURIAE IN SUPPORT OF APPELLANT ALLAN A.
TABINGO

MICHAEL F. STURLEY 81090
NY Bar No. 1939537
727 E. Dean Keeton Street
Austin, Texas 78705
telephone: 512-232-1350
*Counsel for Amicus Curiae
Inlandboatmen's Union
of the Pacific*

LINCOLN SIELER
WSBA #20774
FRIEDMAN RUBIN
601 Union Street, suite 3100
Seattle, Washington 98101
telephone: 206-576-6905
*Counsel for Amicus Curiae
Inlandboatmen's Union
of the Pacific*



ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 1

ARGUMENT 1

I. Punitive Damages Are Properly Available in
Actions Under FELA 3

 A. Injured railway employees had both a
 negligence cause of action and a punitive
 damages remedy prior to FELA 4

 1. Injured railway workers could bring an
 action for negligence against their
 employers prior to FELA 4

 2. Punitive damages were generally
 available prior to FELA 5

 B. Congress enacted FELA to expand the rights
 and remedies available to injured railway
 workers without limiting the rights and
 remedies that were previously available to
 them 6

 C. The U.S. Supreme Court has never held that
 punitive damages are unavailable under
 FELA 10

 D. Lower federal courts have erred in holding
 that punitive damages are categorically
 unavailable under FELA 11

II. Punitive Damages Are Properly Available in Actions under the Jones Act	13
A. Because punitive damages are properly available under FELA, no basis exists to deny their availability under the Jones Act	14
B. Even if punitive damages were unavailable under FELA, they are still properly available under the Jones Act	14
III. This Court Is Not Bound by Erroneous Maritime Law Decisions of Lower Federal Courts	18
CONCLUSION	20

TABLE OF AUTHORITIES

CASES:

<i>American Railroad Co. v. Didricksen</i> , 227 U.S. 145 (1913)	10, 11
<i>The Amiable Nancy</i> , 16 U.S. (3 Wheat.) 546 (1818)	17
<i>The Arizona v. Anelich</i> , 298 U.S. 110 (1936)	15, 16
<i>Arms</i> , see <i>Milwaukee & St. Paul Railway Co. v. Arms</i>	
<i>Atlantic Sounding Co. v. Townsend</i> , 557 U.S. 404 (2009)	<i>passim</i>
<i>Baptiste v. Superior Court</i> , 106 Cal. App. 3d 87, 164 Cal. Rptr. 789 (1980)	17
<i>Barry v. Edmunds</i> , 116 U.S. 550 (1886)	5
<i>Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar</i> , 377 U.S. 1 (1964)	8
<i>Brown v. Memphis & C.R. Co.</i> , 7 F. 51 (C.C. W.D. Tenn. 1881)	6
<i>Choctaw, Oklahoma & Gulf Railroad Co. v. Holloway</i> , 191 U.S. 334 (1903)	4, 5
<i>Cleghorn v. New York Central & Hudson River Railroad Co.</i> , 56 N.Y. 44 (1874)	5
<i>Cortes v. Baltimore Insular Line, Inc.</i> , 287 U.S. 367 (1932)	15
<i>Cox v. Roth</i> , 348 U.S. 207 (1955)	16, 17
<i>Craig v. Atlantic Richfield Co.</i> , 19 F.3d 472 (9th Cir. 1994)	19
<i>Day v. Woodworth</i> , 54 U.S. (13 How.) 363 (1852)	5
<i>Denver & Rio Grande Railway Co. v. Harris</i> , 122 U.S. 597 (1887)	6
<i>Didricksen</i> , see <i>American Railroad Co. v. Didricksen</i>	
<i>Endicott v. Icicle Seafoods, Inc.</i> , 167 Wn.2d 873, 224 P.3d 761, cert. denied, 561 U.S. 1008 (2010)	19
<i>Exxon Shipping Co. v. Baker</i> , 554 U.S. 471 (2008)	9, 12
<i>Fell v. Northern Pac. R. Co.</i> , 44 F. 248 (C.C.D.N.D. 1890)	6

<i>Gardiner v. Sea-Land Service, Inc.</i> , 786 F.2d 943 (9th Cir. 1986)	19
<i>Guevara v. Maritime Overseas Corp.</i> , 59 F.3d 1496 (5th Cir. 1995) (en banc)	9
<i>Gulf, Colorado & Santa Fe Railway Co. v. McGinnis</i> , 228 U.S. 173 (1913)	10, 11, 12
<i>Holmes</i> , see <i>Santa Fe Pacific Railroad Co. v. Holmes</i>	
<i>Johnson v. Southern Pacific Co.</i> , 196 U.S. 1 (1904)	8
<i>Kopczynski v. The Jacqueline</i> , 742 F.2d 555 (9th Cir. 1984)	2, 11, 14, 20
<i>Kozar v. Chesapeake & Ohio Railway</i> , 449 F.2d 1238 (6th Cir. 1971)	10, 12, 13
<i>Lake Shore & Michigan Southern Railway Co. v. Prentice</i> , 147 U.S. 101 (1893)	5
<i>Lockhart v. Fretwell</i> , 506 U.S. 364 (1993)	18
<i>Lundborg v. Keystone Shipping Co.</i> , 138 Wn.2d 658, 981 P.2d 854 (1999)	19
<i>McBride v. Estis Well Service</i> , 768 F.3d 382 (5th Cir. 2014) (en banc)	17
<i>McGinnis</i> , see <i>Gulf, Colorado & Santa Fe Railway Co. v.</i> <i>McGinnis</i>	
<i>McGuire v. The Golden Gate</i> , 16 F. Cas. 141 (No. 8,815) (C.C.N.D. Cal. 1856)	9
<i>Michigan Central Railroad Co. v. Vreeland</i> , 227 U.S. 59 (1913)	10, 11, 12
<i>Miles v. Apex Marine Corp.</i> , 498 U.S. 19 (1990)	9, 12, 14
<i>Milwaukee & St. Paul Railway Co. v. Arms</i> , 91 U.S. 489 (1876)	5
<i>Missouri Pacific Railway Co. v. Humes</i> , 115 U.S. 512 (1885)	6
<i>New England Railroad Co. v. Conroy</i> , 175 U.S. 323 (1899)	5

<i>Northern Pacific Railway Co. v. Dixon</i> , 194 U.S. 338 (1904)	5
<i>Offshore Logistics, Inc. v. Tallentire</i> , 477 U.S. 207 (1986)	18
<i>Panama Railroad Co. v. Johnson</i> , 264 U.S. 375 (1924)	3, 14
<i>Penrod Drilling Corp. v. Williams</i> , 868 S.W.2d 294 (Tex. 1993)	19
<i>Philadelphia, Wilmington & Baltimore Railway Co. v. Quigley</i> , 62 U.S. (21 How.) 202 (1859)	6
<i>Santa Fe Pacific Railroad Co. v. Holmes</i> , 202 U.S. 438 (1906)	4, 5
<i>Southern Pacific Co. v. Seley</i> , 152 U.S. 145 (1894)	5
<i>Texas & Pacific Railway Co. v. Swearingen</i> , 196 U.S. 51 (1904)	4, 5
<i>Townsend</i> , see <i>Atlantic Sounding Co. v. Townsend</i>	
<i>United States v. Texas</i> , 507 U.S. 529 (1993)	12
<i>Vreeland</i> , see <i>Michigan Central Railroad Co. v. Vreeland</i>	
<i>Wildman v. Burlington Northern Railroad Co.</i> , 825 F.2d 1392 (9th Cir. 1987)	<i>passim</i>

STATUTES AND RULES:

Clean Water Act § 311, 33 U.S.C. § 1321	9
Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60	<i>passim</i>
FELA § 1, 45 U.S.C. § 51	6
FELA § 3, 45 U.S.C. § 53	6
Act of Apr. 22, 1908, ch. 149, § 3, 35 Stat. 65, 66	7
Act of Aug. 11, 1939, ch. 685, § 1, 53 Stat. 1404, 1404	7
FELA § 4, 45 U.S.C. § 54	7

Jones Act, 46 U.S.C. § 30104	<i>passim</i>
Merchant Marine Act, ch. 250, § 33, 41 Stat. 988, 1007 (1920) (codified as amended at 46 U.S.C. § 30104)	3

OTHER AUTHORITIES:

Dino Drudi, <i>Railroad-Related Work Injury Fatalities</i> , MONTHLY LAB. REV., July/Aug. 2007 (<i>available at</i> http://www.bls.gov/opub/mlr/2007/07/art2full.pdf)	8
Henry M. Hart, Jr., <i>The Relations Between State and Federal Law</i> , 54 COLUM. L. REV. 489 (1954)	18
H.R. Rep. No. 60-1386 (1908)	8
S. Rep. No. 60-460, at 1 (1908)	6
S. Rep. No. 61-432 (1910), <i>reprinted in</i> 45 Cong. Rec. 4040 (1910)	8

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus Curiae Inlandboatmen's Union of the Pacific ("IBU"), headquartered in Seattle, is among the nation's largest maritime labor unions. Its members work as seamen on ferries, tugs, and other commercial vessels. General maritime law requires shipowners to ensure those vessels are seaworthy so that all seamen have a safe workplace. The threat of punitive damages for an egregious failure to comply with the warranty of seaworthiness provides an important incentive to encourage shipowners to fulfill their general maritime law duties.

Because many IBU members live in Washington and work on Washington waters, this case will have an impact on their safety. IBU accordingly submits this *amicus* brief in support of Appellant, urging this Court to reverse the decision of the Superior Court.

STATEMENT OF THE CASE

Amicus adopts Appellant's Statement of the Case, Tabingo Br. 2-4.

ARGUMENT

Respondents American Triumph LLC and American Seafoods Company, LLC ("American Seafoods") advocate a *per se* rule that an injured seaman can never recover punitive damages under the general maritime law doctrine of unseaworthiness, no matter how egregious a defendant shipowner's fault may be. Even if a shipowner made a delib-

erate, cold-hearted calculation to send a doomed rust-bucket to sea because the expected profit on the voyage exceeded the compensatory damages the shipowner inevitably would be required to pay, it could not be liable for punitive damages — even for deliberate wrong-doing — under the rule that American Seafoods asks this Court to adopt. American Seafoods’ argument for such an extreme rule depends entirely on the assumption that punitive damages are legally unavailable under the Jones Act. *See, e.g., American Seafoods Br. 12-15.* But that assumption is incorrect.

Neither the Jones Act nor the Federal Employers’ Liability Act (FELA), which the Jones Act incorporates by reference, addresses punitive damages. The U.S. Supreme Court has never held that punitive damages are unavailable under the Jones Act or FELA. Indeed the Court in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 424 n.12 (2009), explicitly recognized that the availability of punitive damages under the Jones Act remains an open question.

Unfortunately, some lower federal courts — including the Ninth Circuit — have mistakenly held that punitive damages are unrecoverable under the Jones Act, *e.g., Koczynski v. The Jacqueline*, 742 F.2d 555, 560-561 (9th Cir. 1984), and FELA, *e.g., Wildman v. Burlington Northern Railroad Co.*, 825 F.2d 1392 (9th Cir. 1987). But this Court, which is not bound by those erroneous decisions, is free to apply the principles

announced by the U.S. Supreme Court, most recently in *Townsend*, and recognize that punitive damages are available under the Jones Act. With that recognition, the entire basis for American Seafoods' case evaporates.

Punitive damages are properly available in unseaworthiness cases for many reasons, and would be even if they were unavailable under the Jones Act. Mr. Tabingo explains many of those reasons in his brief. *See generally* Tabingo Br. 5-30. But understanding the error in the fundamental assumption on which American Seafoods' argument rests provides yet another reason to reverse the decision below.

I. Punitive Damages Are Properly Available in Actions Under FELA

The Jones Act gave seamen the right to "maintain an action for damages at law" and provided that "in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply." Merchant Marine Act, ch. 250, § 33, 41 Stat. 988, 1007 (1920) (codified as amended at 46 U.S.C. § 30104). *Panama Railroad Co. v. Johnson*, 264 U.S. 375, 391-92 (1924), recognized that Congress had incorporated the rules of the Federal Employers' Liability Act (FELA) and its amendments, now codified at 45 U.S.C. §§ 51-60. A proper analysis of the availability of punitive damages under the Jones Act must therefore begin with FELA.

A. Injured railway employees had both a negligence cause of action and a punitive damages remedy prior to FELA

Under *Townsend*, the test in this context for determining if an injured railway worker can seek punitive damages for an employer's egregious fault turns on (1) whether the cause of action (negligence) and (2) the remedy (punitive damages) preexisted FELA, and (3) whether FELA precluded the action or the remedy. Pre-FELA caselaw demonstrates that the first two requirements are easily satisfied.

1. Injured railway workers could bring an action for negligence against their employers prior to FELA

In the years immediately prior to FELA, the U.S. Supreme Court regularly recognized that injured railway workers could bring common-law negligence actions against employers. *See, e.g., Santa Fe Pac. R.R. v. Holmes*, 202 U.S. 438 (1906) (engineer injured in head-on collision recovered for employer's negligence in sending approaching trains on same track); *Texas & Pac. Ry. v. Swearingen*, 196 U.S. 51 (1904) (switchman recovered for employer's negligence in placing scale box too close to track); *Choctaw, Okla. & Gulf R.R. v. Holloway*, 191 U.S. 334 (1903) (fireman recovered for employer's failure to equip engine with brakes).

Prior to FELA, railroads often escaped negligence liability under three harsh common-law rules denying recovery in many typical situations — the fellow-servant rule, the contributory-negligence rule, and the

assumption-of-the-risk rule.¹ See, e.g., *N. Pac. Ry. v. Dixon*, 194 U.S. 338, 346-47 (1904) (fellow-servant rule); *New England R.R. v. Conroy*, 175 U.S. 323 (1899) (same); *Southern Pac. Co. v. Seley*, 152 U.S. 145, 154-56 (1894) (assumption-of-the-risk rule); *id.* at 156 (contributory-negligence rule) (alternate holding).

2. Punitive damages were generally available prior to FELA

Although *Holmes*, *Swearingen*, and *Holloway* did not seek punitive damages, other pre-FELA cases establish that punitive damages were then available at common law,² available in common-law negligence actions,³ available against railroads,⁴ and in fact awarded against rail-

¹ In *Holmes*, the railroad asserted the fellow-servant doctrine; in *Swearingen* and *Holloway*, the railroads asserted the assumption-of-the-risk rule; and in all three cases the railroads asserted the contributory-negligence rule. See *Holmes*, 202 U.S. at 438-39; *Swearingen*, 196 U.S. at 53; *Holloway*, 191 U.S. at 337. But the defenses failed on the facts and the injured employees succeeded in their negligence actions.

² See, e.g., *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1852) (well established that "a jury may inflict what are called exemplary, punitive, or vindictive damages"); *Barry v. Edmunds*, 116 U.S. 550, 562 (1886) ("[A]ccording to the settled law of this court, [a plaintiff] might show himself, by proof of the circumstances, to be entitled to exemplary damages calculated to vindicate his right and protect it against future similar invasions.").

³ See, e.g., *Milwaukee & St. Paul Ry. Co. v. Arms*, 91 U.S. 489, 492 (1876) ("well settled . . . that exemplary damages may in certain cases be assessed"); *Cleghorn v. N.Y. Cen. & Hudson River R.R.*, 56 N.Y. 44, 47-48 (1874) (railroad would be "liable to be punished in punitive damages" for "injuries [caused] by the negligence of a servant while engaged in the [railroad's] business" if the railroad "is also chargeable with gross misconduct").

⁴ See, e.g., *Lake Shore & Mich. S. Ry. v. Prentice*, 147 U.S. 101, 107 (1893) ("[T]he doctrine is well settled, that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive or vindictive damages, sometimes called smart money, if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations."); *Arms*, 91 U.S. at 492 ("well settled . . . that exemplary

roads.⁵ In any event, *Townsend*, 557 U.S. at 414-15, 420, 424, puts the burden on a defendant to show that railway workers' cases were an exception to the general rule permitting punitive damages. The cited cases make it impossible for a defendant to carry that burden.

B. Congress enacted FELA to expand the rights and remedies available to injured railway workers without limiting the rights and remedies that were previously available to them

The third *Townsend* element — whether FELA precluded the cause of action or the remedy — requires attention to FELA itself. The statute's primary purpose was to expand the negligence action by eliminating the harsh defenses that so often denied recovery. *See supra* at 4-5. Section 1, 45 U.S.C. § 51, accordingly eliminated the fellow-servant rule, which allowed employers to escape liability “for injuries sustained by one employee through the negligence of a coemployee,” S. Rep. No. 60-460, at 1 (1908). FELA § 3, 45 U.S.C. § 53, modified the contributory-negligence rule, under which a plaintiff's negligence was a complete bar

damages may in certain cases be assessed”); *Philadelphia, W. & B. Ry. v. Quigley*, 62 U.S. (21 How.) 202, 214 (1859) (“Whenever the injury complained of has been inflicted maliciously or wantonly ... the jury are not limited to the ascertainment of a simple compensation for the wrong ...”).

⁵ *See, e.g., Denver & Rio Grande Ry. v. Harris*, 122 U.S. 597, 609-10 (1887) (affirming an award that included “punitive or exemplary damages”); *Fell v. N. Pac. R.R.*, 44 F. 248, 252-53 (C.C.D.N.D. 1890) (awarding punitive damages to passenger forced to jump from a moving train); *Brown v. Memphis & C.R. Co.*, 7 F. 51, 63-64 (C.C. W.D. Tenn. 1881) (awarding punitive damages to passenger wrongfully excluded from “ladies’ car”); *cf. Missouri Pac. Ry. v. Humes*, 115 U.S. 512, 522-23 (1885) (affirming award of statutory double damages as analogous to punitive damages).

to recovery, and instead provided that “damages shall be diminished ... in proportion to the amount of negligence attributable to [the] employee.” See, e.g., S. Rep. No. 60-460, at 2 (“It is the purpose of this measure to modify the law of contributory negligence.”). And FELA § 4, 45 U.S.C. § 54, eliminated the assumption-of-the-risk rule, which allowed employers to avoid liability if the employee knew of the unsafe work conditions.⁶

When enacting FELA to give *greater* rights and remedies to injured railway workers who sued their employers for negligence, Congress did not intend to deprive injured workers of any of the rights and remedies that they had already enjoyed under the common law prior to FELA. The Senate Judiciary Committee explained this point emphatically in the course of describing the proposed 1910 amendments to FELA:

In considering the advisability of amending [the original FELA of 1908], it is important at the outset to understand that the purpose of Congress in the passage of this act was to extend further protection to employees. This was its manifest purpose, as is apparent from a consideration of the circumstances of its enactment. It is manifest from a consideration of the reports, both of the Senate and House committees, when the measure was pending before those bodies prior to its enactment, that the purpose of the statute was to extend and enlarge the remedy provided by [the common] law to [railway] employees *No purpose or intent on the part of Congress can be found to limit or to take away from such an employee any right theretofore existing by which*

⁶ FELA originally eliminated that defense only when “the violation ... of any statute enacted for the safety of employees contributed to the injury or death of such employee.” Act of Apr. 22, 1908, ch. 149, § 3, 35 Stat. 65, 66. In 1939, Congress completely eliminated the defense. Act of Aug. 11, 1939, ch. 685, § 1, 53 Stat. 1404, 1404.

such employees were entitled to a more extended remedy than that conferred upon them by the act.

S. Rep. No. 61-432 (1910), *reprinted in* 45 Cong. Rec. 4040, 4044 (1910) (emphasis added).

Congress intended not only to provide more compensation to railway workers but also to “greatly lessen personal injuries . . .” H.R. Rep. No. 60-1386, at 2 (1908). During the late 19th century, railway work was extraordinarily dangerous.⁷ “In 1888 the odds against a railroad brakeman’s dying a natural death were almost four to one,” and “the average life expectancy of a switchman in 1893 was seven years.” *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 3 (1964). President Benjamin Harrison called it “a reproach to our civilization” that rail workers were “subjected to a peril of life and limb as great as that of a soldier in time of war.” *Johnson v. S. Pac. Co.*, 196 U.S. 1, 19 (1904). Congress accordingly sought to induce railroads “to exercise the highest degree of care . . . for the safety of [all employees] in the performance of their duties.” H.R. Rep. No. 60-1386, at 2. Congress would have recognized that the threat of punitive damages for egregious misconduct contributed to those goals, for it was understood then (as now) that one of

⁷ Although conditions have improved, railroad work remains dangerous. *See, e.g.,* Dino Drudi, *Railroad-Related Work Injury Fatalities*, MONTHLY LAB. REV., July/Aug. 2007, at 17 (noting that railway industry has “fatal injury rate more than twice the all-industry rate”) (available at <http://www.bls.gov/opub/mlr/2007/07/art2full.pdf>).

the purposes of punitive damages is to “teach the tort feisor the necessity of reform.” *McGuire v. The Golden Gate*, 16 F. Cas. 141, 143 (No. 8,815) (C.C.N.D. Cal. 1856). The threat of both punitive and compensatory damages provides a greater incentive for railroads to operate safely than would the threat of compensatory damages alone.

It is implausible that Congress, in its effort to provide incentives for railroads to improve safety standards, would — with no discussion of the subject — eliminate a well-established common-law remedy that created a powerful incentive to improve safety standards. The U.S. Supreme Court addressed essentially the same situation in *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 488-89 (2008). When Exxon — relying on *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), and *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995) (en banc) — argued that the penalties for water pollution under section 311 of the Clean Water Act, 33 U.S.C. § 1321, displaced its liability to pay punitive damages following the *Valdez* spill, the Court summarily rejected the argument. It explained:

[W]e find it too hard to conclude that a statute expressly geared to protecting “water,” “shorelines,” and “natural resources” was intended to eliminate *sub silentio* oil companies’ common law duties to refrain from injuring the bodies and livelihoods of private individuals.

554 U.S. at 488-89. It is, if anything, even harder to conclude that FELA, a statute expressly geared to protecting railway workers and improving

their remedies, was intended to eliminate *sub silentio* the railroads' corresponding liability to pay punitive damages for the breach of their common-law duties to refrain from injuring their employees.

C. The U.S. Supreme Court has never held that punitive damages are unavailable under FELA

Lower federal courts that have denied punitive damages in FELA cases have directly or indirectly relied primarily on three U.S. Supreme Court decisions: *Michigan Cen. R.R. v. Vreeland*, 227 U.S. 59 (1913); *American R.R. v. Didricksen*, 227 U.S. 145 (1913); and *Gulf, Colorado & Santa Fe Ry. v. McGinnis*, 228 U.S. 173 (1913).⁸ None involved punitive damages (or even used the words "punitive" or "exemplary"). Indeed none of them was even a personal-injury case. All three were wrongful-death cases that turned on the unique history of wrongful-death statutes.

The *Vreeland* Court distinguished between survival and wrongful-death actions, *see* 227 U.S. at 65-70, and held that — in a wrongful-death action — the widow of a railway worker killed in the railroad's service could not recover loss-of-society damages because wrongful-death statutes historically did not permit such damages, *id.* at 70-71.

In *Didricksen*, a week after *Vreeland*, the Court again distinguished between survival and wrongful-death actions, *see* 227 U.S. at 149,

⁸ *See, e.g., Wildman*, 825 F.2d at 1394; *Kozar v. Chesapeake & Ohio Ry.*, 449 F.2d 1238, 1241-42 (6th Cir. 1971).

and held (following *Vreeland*) that the surviving parents of a railway worker fatally injured in the service of the railroad could not recover loss-of-society damages in their wrongful-death action, *id.* at 149-50.

McGinnis (following *Vreeland* and *Didricksen*) held that the non-dependent child of an engineer killed in a derailment could not recover compensatory damages in a wrongful-death action. *See* 228 U.S. at 174-76. The rationale again turned on the unique history of wrongful-death statutes — a history that has no relevance to whether an injured plaintiff may claim a well-established remedy such as punitive damages.

D. Lower federal courts have erred in holding that punitive damages are categorically unavailable under FELA

Because *Townsend*'s three requirements are satisfied, injured railway workers are properly entitled to seek punitive damages under FELA. Lower federal courts' decisions to the contrary are simply wrong. The Ninth Circuit's decision in *Wildman* well illustrates the error. The *Wildman* panel relied primarily on *Kopczynski*, 742 F.2d at 560-61, which held that punitive damages are categorically unavailable under the Jones Act.⁹ The *Kopczynski* panel, in turn, relied primarily on *Vreeland* and *McGinnis*, which are discussed in the previous section, *see supra* at 10-11, and on

⁹ Given that the only basis for denying punitive damages under the Jones Act is their presumed unavailability under FELA, it is somewhat ironic that the *Wildman* Court's principal rationale for denying punitive damages under FELA was their presumed unavailability under the Jones Act.

Kozar v. Chesapeake & O. Ry., 449 F.2d 1238, 1240-43 (6th Cir. 1971). *Wildman* also relied heavily on *Kozar*. See 825 F.2d at 1394-95. *Vreeland*, *McGinnis*, and *Kozar* were all wrongful-death cases in which the holdings turned on the unique history of wrongful-death statutes. And punitive damages were not even at issue in *Vreeland* or *McGinnis*.

Wildman was a personal-injury case in which a railway worker sought to recover his own damages. The historic limitations of wrongful-death statutes should have been irrelevant. But the panel showed no recognition of the fundamental distinction between wrongful-death and personal-injury cases.

Even more seriously, *Wildman* rejected the injured worker's arguments on grounds that are inconsistent with *Townsend*. Two examples illustrate the inconsistencies. First, *Wildman* applied the "least common denominator" approach that *Townsend* rejects, 557 U.S. at 424, reasoning that by failing to authorize punitive damages FELA had silently prohibited them. See *Wildman*, 825 F.2d at 1394-95. In this regard, *Wildman* also ignored the established rule that "to abrogate a common-law principle, a statute must speak directly to the question addressed by the common law," *Exxon Shipping*, 554 U.S. at 489 (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)); cf. *Miles*, 498 U.S. at 31 (recognizing Congress's power when "Congress has spoken directly to the question").

Second, the *Wildman* plaintiff (anticipating *Townsend*) argued “that punitive damages were available at common law prior to the enactment of the FELA, and that it was Congress’s expressed intent in enacting the law not to limit any existing remedies.” 825 F.2d at 1394. Thus it followed that punitive damages were still available. *See id.* The *Wildman* Court apparently accepted both of the plaintiff’s premises, *see id.* (citing *Kozar*, 449 F.2d at 1240), but it rejected his conclusion on the facially surprising ground that “‘the right to recover punitive damages at common law’” was not “‘a “common law remedy,””” *id.* (quoting *Kozar*, 449 F.2d at 1240). That assertion was wrong. *Townsend* explicitly described punitive damages as “an available remedy at common law,” 557 U.S. at 409; “an available maritime remedy,” *id.* at 411, 412 n.2; a “remedy ... well established before the passage of the Jones Act,” *id.* at 420; a “general maritime remedy,” *id.* at 422; and “an accepted remedy under general maritime law,” *id.* at 424. Simply put, *Townsend* precludes the argument that punitive damages are not a “remedy.”

II. Punitive Damages Are Properly Available in Actions under the Jones Act

The *Wildman* panel erred when it followed *Kozar* to conclude that punitive damages are categorically unavailable under FELA, but an even more relevant error for present purposes was the extension of *Kozar*’s

mistaken FELA conclusion to the Jones Act context — a mistake that is well illustrated by the Ninth Circuit's decision in *Kopczynski*.

A. Because punitive damages are properly available under FELA, no basis exists to deny their availability under the Jones Act

Courts that have held that punitive damages are unavailable under the Jones Act have all reasoned that seamen's Jones Act rights are defined by railway workers' FELA rights. *See, e.g., Kopczynski*, 742 F.2d at 560. As the Jones Act incorporates FELA by reference, *see Panama Railroad*, 264 U.S. at 391-92, that reasoning is logical. But once it is recognized that punitive damages are properly available under FELA, *see supra* at 3-13, the reasoning collapses. No conceivable basis exists for construing the Jones Act to prohibit punitive damages that are available under FELA.

B. Even if punitive damages were unavailable under FELA, they are still properly available under the Jones Act

Jones Act seamen generally have the same rights railway workers have under FELA. Thus the *Miles* Court held that a seaman's mother could not recover for loss of society in a Jones Act wrongful-death claim because a similarly situated family member of a railway worker could not recover for loss of society in a FELA wrongful-death claim (based on the unique history of wrongful-death statutes). *See* 498 U.S. at 32. But the FELA-Jones Act linkage is not universally true.

The U.S. Supreme Court has recognized that FELA's limitations do not always constrain Jones Act seamen; in some situations, seamen and their families have greater rights. *Townsend*, which upheld a seaman's right to seek punitive damages for the "willful and wanton disregard of the maintenance and cure obligation," 557 U.S. at 424, offers a particularly relevant example. Injured railway workers may not seek punitive damages in that context because they are not entitled to maintenance and cure in the first place. Moreover, in *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 374-75 (1932), the Court held that seamen can sue for the negligent withholding of maintenance and cure under the Jones Act — even though FELA does not give that right to railway workers.

The *Townsend/Cortes* example is not unique. Until 1939, FELA eliminated the assumption-of-the-risk defense only when the violation of a safety statute contributed to the injury or death. *See supra* note 6. In *The Arizona v. Anelich*, 298 U.S. 110, 120-23 (1936), however, the Court recognized that seamen have greater rights under the unseaworthiness doctrine, and thus were not subject to that defense when an unseaworthy condition contributed to the seaman's death.¹⁰ The Court explained:

¹⁰ *Anelich's* status as a fatal-injury case is particularly telling. The U.S. Supreme Court explicitly recognized that the plaintiff, as the administratrix of the deceased seaman's estate, would have had no cause of action prior to the Jones Act. *See* 298 U.S. at 118. But the Court still held that her rights were not limited by FELA.

The [Jones Act] was remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it. Its provisions . . . are to be liberally construed to attain that end, and are to be interpreted in harmony with the established doctrine of maritime law of which it is an integral part.

Id. at 123 (citations omitted). Because maritime law prior to the Jones Act did not recognize the assumption-of-the-risk defense in unseaworthiness actions and “[n]o provision of the Jones Act is inconsistent with the admiralty rule,” the Court would not assume “that Congress intended, by [the Jones Act’s] adoption, to modify that rule by implication.” *Id.* In other words, FELA establishes a floor for seamen, not a ceiling. Seamen are guaranteed at least the rights that FELA grants to railway workers, but in some contexts they have greater rights under maritime law. Asserting rights under the general maritime law’s warranty of seaworthiness is one example of such a context.

The U.S. Supreme Court confirmed the principle that FELA establishes a floor, not a ceiling, in *Cox v. Roth*, 348 U.S. 207 (1955), which held that the death of an individual employer does not defeat a Jones Act claim even though FELA does not provide for the survival of actions against deceased tortfeasors. The Court explained:

The Jones Act, in providing that a seaman should have the same right of action as would a railroad employee, does not mean that the very words of the FELA must be lifted bodily from their context and applied mechanically to the specific facts of maritime

events. Rather, it means that those contingencies against which Congress has provided to ensure recovery to railroad employees should also be met in the admiralty setting.

Id. at 209. The Court accordingly rejected the approach that a plurality opinion of the Fifth Circuit later adopted in *McBride v. Estis Well Service*, 768 F.3d 382 (5th Cir. 2014) (en banc), which lifted the word “non-pecuniary” from the FELA wrongful-death context and applied it mechanically to the Jones Act personal-injury context. *See also Baptiste v. Superior Court*, 106 Cal. App. 3d 87, 102, 164 Cal. Rptr. 789, 797 (1980) (“FELA precedents do not constitute a bar to punitive damages in Jones Act cases” because “the kinship of railway workers and seamen, as perceived by Congress, should not lead to overly literal or rigid transplanting of principles from land to sea”).

Because nothing in FELA suggests that Congress intended to deny injured railway workers the right to seek punitive damages from a railroad, *see supra* at 6-10, this is a typical situation in which an injured plaintiff’s rights are the same under FELA or the Jones Act. But even if FELA prohibited punitive damages, they would still be available under the Jones Act. Punitive damages are even more firmly established in maritime law. *See generally* *Tabingo Br.* 22-26. Indeed, the general maritime law recognized the availability of punitive damages before the nation even had railroads. *See The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 558 (1818).

III. This Court Is Not Bound by Erroneous Maritime Law Decisions of Lower Federal Courts

This Court must apply federal law under the reverse-*Erie* doctrine. See, e.g., *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 223 (1986). But in deciding the content of federal law, state courts are not bound by decisions of the lower federal courts, not even decisions of the federal circuit in which they are located. Justice Thomas succinctly explained the relevant principle in *Lockhart v. Fretwell*, 506 U.S. 364 (1993):

[N]either federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation. In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located.

506 U.S. at 376 (Thomas, J., concurring); see also Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 510 (1954) ("The suggestion seems never to have been seriously made that the courts of the states are formally bound by the decisions . . . of federal courts of appeal on questions of federal law."). The U.S. Supreme Court is the only federal court whose decisions are binding on this Court.

In prior cases, this Court has properly recognized its authority to interpret the general maritime law, rejecting lower federal court decisions

that it found unpersuasive.¹¹ In *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 878-84, 224 P.3d 761, 764-67, *cert. denied*, 561 U.S. 1008 (2010), for example, this Court was called upon to decide whether a defendant is entitled to demand a jury trial in a case under the Jones Act. Lower federal courts, including the Ninth Circuit, had previously held that only the Jones Act plaintiff has a jury-trial right. *See, e.g., Craig v. Atlantic Richfield Co.*, 19 F.3d 472, 476 (9th Cir. 1994). This Court acknowledged *Craig*, *see* 167 Wn.2d at 880-81, 224 P.3d at 765, but concluded that “the Ninth Circuit’s statutory interpretation arises from a misreading of two Fifth Circuit cases,” 167 Wn.2d at 882, 224 P.3d at 766. Rejecting that “misreading,” this Court instead “[fou]nd the analysis in [an Illinois Supreme Court decision] persuasive,” 167 Wn.2d at 884, 224 P.3d at 767, and held that the defendant was entitled to a jury trial.

Similarly, in *Lundborg v. Keystone Shipping Co.*, 138 Wn.2d 658, 981 P.2d 854 (1999), this Court rejected *Gardiner v. Sea-Land Service, Inc.*, 786 F.2d 943, 948-50 (9th Cir. 1986), and several other federal appellate decisions. The Court instead followed “[c]lear and well-established principles of general maritime law” to grant an injured seaman

¹¹ Other State Supreme Courts have similarly recognized their authority. *See, e.g., Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (“While Texas courts may certainly draw upon the precedents of the Fifth Circuit, or any other federal or state court, in determining the appropriate federal rule of decision, they are obligated to follow only higher Texas courts and the United States Supreme Court.”)

rights that the federal courts had denied. *See* 138 Wn.2d at 667, 981 P.2d at 859.

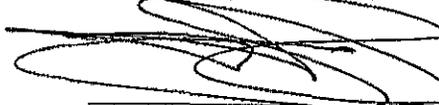
Under equally “well-established principles of general maritime law,” this Court is free here to reject the Ninth Circuit’s decisions in *Wildman* and *Kopczynski* and hold — under the approach announced by the U.S. Supreme Court in *Townsend* — that punitive damages are available in FELA and Jones Act cases. Accordingly, no reason exists to deny punitive damages in unseaworthiness cases.

CONCLUSION

The Superior Court’s ruling should be reversed.

DATED this 30th day of November, 2016.

Respectfully submitted,



20774
for

MICHAEL F. STURLEY
NY Bar No. 1939537
727 E. Dean Keeton St.
Austin, TX 78705
telephone: 512-232-1350

Counsel for Amicus Curiae



LINCOLN SIELER, WSBA #20774
FRIEDMAN RUBIN
51 University Street, Suite 201
Seattle, WA 98101
telephone: 206-501-4446

Counsel for Amicus Curiae

Nov 30, 2016, 2:56 pm

RECEIVED ELECTRONICALLY

SUPREME COURT
OF THE STATE OF WASHINGTON

ALLAN A. TABINGO,

Appellant,

v.

AMERICAN TRIUMPH LLC, and
AMERICAN SEAFOODS
COMPANY, LLC,

Respondents.

No. 92913-1

DECLARATION OF SERVICE

On said day below, I sent for service true and accurate copies of
the Motion for Leave to File Brief of Amicus Curiae and Brief of Amicus
Curiae on the following:

Markus B.G. Oberg
LeGros Buchanan & Paul, P.S.
4025 Delridge Way SW, Suite 500
Seattle, WA 98106-1271
Via Legal Messenger by 12/2/16

James P. Jacobsen
Joseph S. Stacey
Stacey & Jacobsen, LLP
4039 21st Avenue West, Suite 401
Seattle, WA 98199
Via Legal Messenger by 12/2/16

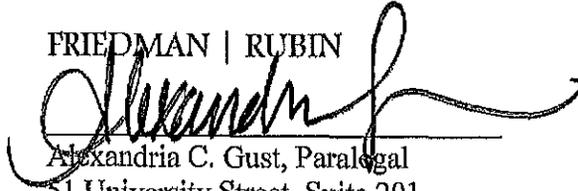
The original will be e-filed by December 2, 2016 on:
Washington Supreme Court
Clerk's Office
supreme@courts.wa.gov

////

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED this 30th day of November, 2016, at Seattle, Washington.

FRIEDMAN | RUBIN

A handwritten signature in black ink, appearing to read "Alexandria C. Gust", written over a horizontal line.

Alexandria C. Gust, Paralegal

51 University Street, Suite 201

Seattle, WA 98101

Tel: 206-501-4446

Email: lsieler@friedmanrubin.com

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Wednesday, November 30, 2016 2:57 PM
To: 'Alexandria Gust'
Cc: Lincoln Sieler
Subject: RE: Tabingo v. American Triumph, LLC, et al., Case No. 92913-1

Received 11-30-16.

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

Questions about the Supreme Court Clerk's Office? Check out our website:

http://www.courts.wa.gov/appellate_trial_courts/supreme/clerks/

Looking for the Rules of Appellate Procedure? Here's a link to them:

http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=app&set=RAP

Searching for information about a case? Case search options can be found here:

<http://dw.courts.wa.gov/>

From: Alexandria Gust [mailto:AGust@friedmanrubin.com]
Sent: Wednesday, November 30, 2016 2:52 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Lincoln Sieler <lsieler@friedmanrubin.com>
Subject: Tabingo v. American Triumph, LLC, et al., Case No. 92913-1

Please find the attached Motion for Leave to File Brief of Amicus Curiae, Brief of Inlandboatmen's Union of the Pacific as Amicus Curiae in Support of Appellant Allan A. Tabingo, and Declaration of Service for filing with the Court by:

Lincoln D. Sieler, WSBA #20774
FRIEDMAN RUBIN
51 University Street, Suite 201
Seattle, WA 98101
lsieler@friedmanrubin.com

Thank you.

Alexandria

Alexandria Gust | Paralegal
Friedman | Rubin®
51 University Street, Suite 201
Seattle, WA 98101-3614
Tel (206) 501-4446 Fax (206) 623-0794
www.friedmanrubin.com

