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No. 92913-1

SUPREME COURT
OF THE STATE OF WASHINGTON

ALLAN A. TABINGO,

Appellant,

v.

AMERICAN TRIUMPH LLC, and AMERICAN SEAFOODS
COMPANY, LLC,

Respondents.

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

The brief of respondent American Seafoods Co. LLC (“American Seafoods”) is rife with misstatements of the law based on misrepresentations of the cases it cites. Lacking a firm foundation in the actual law, American Seafoods tries to make up for that problem by concocting its own version of the cases. In particular, American Seafoods fails to come to grips with the implications of the decision of the United States Supreme Court in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 401, 129 S. Ct. 2561, 174 L. Ed. 2d 382 (2009) in which the Court traced the historical availability of punitive damages in admiralty generally and in federal maritime common law personal injuries cases in specific. The *Townsend* court concluded that an injured seaman could recover punitive damages in a case involving a vessel owner’s wrongful withholding of maintenance and cure, a federal maritime common law claim. Vessel unseaworthiness, at issue here, is but another federal maritime common law claim.

Just as the *Townsend* court concluded that nothing in the Jones Act or the Court’s prior cases prevented recovery of punitive damages in a maintenance/cure claim, nothing in the Jones Act prevents recovery of punitive damages, contrary to American Seafoods’ argument. This result

is consistent with the long-standing history of punitive damages in general maritime actions discussed in *Townsend*.

This Court should reaffirm the principle that a seaman injured as a result of a vessel's unseaworthiness may, in the appropriate case, recover punitive damages against the vessel owner.

B. STATEMENT OF THE CASE

American Seafoods' discussion of the facts and procedure herein, br. of resp't at 5-7, is flawed for three key reasons.

First, while it complains about the characterization of its wanton and willful misconduct leading to Allan Tabingo's serious injuries, *id.* at 5, American Seafoods must accept that characterization of its misconduct in this appeal. On review of an order on a CR 12(b)(6) motion to dismiss, this Court treats such a fact pleaded in Tabingo's complaint as *true*. See Br. of Appellant at 5 n.4. In any event, Tabingo's allegation is amply supported. American Seafoods neglected to fix the hydraulics valve to shut the fish hatch on the F/V AMERICAN TRIUMPH for *two years*, despite its knowledge that it did not function, putting the vessel's crew, including Tabingo, at major risk of serious injury. CP 44.

Second, American Seafoods is exceedingly sloppy in its discussion of the issue before this Court in its Statement of the Case and later in the Argument section of its brief. While Tabingo pleaded maintenance and

cure, Jones Act, and vessel unseaworthiness claims in his complaint, CP 3-4, American Seafoods neglects to differentiate between Tabingo's Jones Act and vessel unseaworthiness, *deliberately* implying that he is seeking punitive damages in connection with his Jones Act claim. Br. of Resp't at 6. He is not; he specifically explained in his opening brief at 8 n.9 that the *only* issue in this case is whether Tabingo can recover punitive damages against American Seafoods in his vessel unseaworthiness claim.

Finally, American Seafoods carps about Commissioner Pierce's decision to grant direct discretionary review without expressly acknowledging that ruling. Br. of Resp't at 6-7. But it never sought to modify that ruling. RAP 17.7. Indeed, Commissioner Pierce's ruling, with its cogent analysis of the issue now before the Court, documents precisely why the trial court erred in dismissing Tabingo's punitive damages claim. American Seafoods has no real answer to the Commissioner's analysis.

C. ARGUMENT

(1) Federal Maritime Common Law Permits Recovery of Punitive Damages in Seamen's Personal Injuries Actions¹

¹ Typical of its approach to the law, American Seafoods argues in a footnote to its Introduction that Tabingo's recovery of punitive damages here would offend Washington public policy. Br. of Resp't at 5 n.3. American Seafoods knows (br. of resp't at 11 n.6) that federal maritime common law, not Washington law, governs with regard to such a substantive legal issue. *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 879, 224 P.3d 761 (2010) (suits under federal savings to suitors statute "governed by substantive federal maritime law."). Moreover, this Court has readily applied the law of other jurisdictions where punitive damages are recoverable. *Kammerer v. Western Gear*

Rather than directly address the *Townsend* court's lengthy, detailed analysis of the availability of punitive damages in admiralty cases generally and in maritime common law personal injuries claims in specific, American Seafoods resorts to quotation of an amicus curiae in two federal circuit court of appeals cases, as if such a partisan recitation was on a par with the analysis of the *Townsend* court. It is not. This Court should disregard it.²

The central flaw in the brief submitted by American Seafoods is its deliberate disregard of controlling United States Supreme Court precedent on the availability of punitive damages in general maritime personal injuries claims. Accordingly, Tabingo reaffirms his discussion of those controlling decisions here.

Corp., 96 Wn.2d 416, 422, 635 P.2d 708 (1981). *See also, Singh v. Edwards Lifesciences Corp.*, 151 Wn. App. 137, 140, 210 P.3d 337 (2009).

² The citation to the brief of an amicus curiae in another case is itself *entirely improper*, as American Seafoods should know. If this "amicus curiae" wished to present argument to this Court, he was obliged to comply with RAP 10.6, pertaining to the submission of amicus curiae briefs. He did not. Washington has long adhered to the principle that litigants, not amici, must make their case. *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962). Citation to an amicus brief from another case is simply not citation to "legal authority" within the meaning of RAP 10.3(a)(6), and defies the limited nature of amicus status in Washington. 2 WSBA, *Washington Appellate Practice Deskbook* at § 19.10.

Tabingo could have moved to strike American Seafoods' brief under RAP 10.7 as a result, but he did not do so only because of the delay that such a motion and American Seafoods' subsequent submission of a proper brief would entail. Tabingo asks instead that the Court disregard this blatantly improper effort to circumvent the Court's rules on amicus curiae and citation of authority in a brief.

(a) Controlling United States Supreme Court Decisions³ in *Baker* and *Townsend* Hold that Punitive Damages Are Recoverable in General Maritime Personal Injuries Actions Like Tabingo's

American Seafoods wants this Court to ignore the controlling United States Supreme Court opinions in *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008) and *Townsend* cases expressly addressing punitive damages, in favor of that Court's decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990), an earlier case that did not actually address the recovery of punitive damages at all. For all the reasons set forth in Tabingo's opening brief at 14-18, this Court should not do so.

In *Miles*, the Court held that the Jones Act prevented the family of a seaman stabbed to death by another crew member from recovering for loss of society as the seaman's damages under that statute were confined to pecuniary damages. 498 U.S. at 32-33. The Court noted that Congress occupied the field of wrongful death actions pertaining to seamen by enacting the Jones Act and Death on the High Seas Act ("DOHSA") in 1920. *Id.* at 23-27. The Court specifically noted at 29: "The Jones Act

³ On issues of federal law, decisions of the United States Supreme Court are binding on this Court; decisions of the circuit courts of appeal are only persuasive authority. *W.G. Clark Constr. Co. v. Pac. Nw. Regional*, 180 Wn.2d 54, 62, 322 P.3d 1207 (2014).

evinces no general hostility to recovery under maritime law. It does not disturb seamen's general maritime claims for injuries resulting from unseaworthiness." In dictum, the Court indicated that the Jones Act establishes a uniform system of seamen's tort law parallel to that of railway workers in FELA. *Id.* at 29.

In *Baker*,⁴ the Court was largely concerned with the due process implications of excessive punitive damages awards. However, at its core, the case dealt with tort claims brought by commercial fishers, native Alaskans, and landowners against Exxon, the vessel owner, for oil spill-related damages occasioned by the grounding of the Exxon VALDEZ supertanker when its captain operated it under the influence. The Court rejected Exxon's argument that the federal Clean Water Act preempted the plaintiffs' maritime common law punitive damages claims. 554 U.S. at 488-89. In fact, recognizing the validity of such punitive damage claims, Exxon did not even challenge the plaintiffs' ability to recover such damages, only their amount. *Id.* at 490 ("... it does not offer a legal ground for concluding that maritime law should never award punitive damages, or that none should be awarded in this case...").

⁴ American Seafoods is simply wrong when it blithely asserts in its brief at 33 that *Baker* is "irrelevant." Ironically, it attributes more significance to *Miles*, a case not even addressing punitive damages, than to *Baker*, a case confronting the issue in detail.

Finally, in *Townsend*, the most critical of the three cases for purposes of the present action, the Court made clear certain fundamental points. First, punitive damages have a *long* history in admiralty actions generally and in maritime personal injuries claims in specific. 557 U.S. at 409-12, 414-15. The Court specifically noted that the Jones Act did not eliminate pre-existing common law remedies available to injured seamen such as maintenance and cure. *Id.* at 415-16. The Court emphasized that this understanding was consistent with the remedial purpose of the Jones Act, broadening, not narrowing, remedies. *Id.* at 416-17. Summarizing, the Court stated at 418:

Nothing in the text of the Jones Act or this Court's decisions issued in the wake of its enactment undermines the continued existence of the common-law cause of action providing recovery for the delayed or improper provision of maintenance and cure. Petitioners do not deny the availability of punitive damages in general maritime law, or identify any cases establishing that such damages were historically unavailable for breach of the duty of maintenance and cure. The plain language of the Jones Act, then, does not provide the punitive damages bar that petitioners seeks.

The Court then addressed *Miles*, stating that the *holding* in *Miles* – loss of society damages were not available in a wrongful death action under the Jones Act/DOHSA – remained sound because Congressional action displaced common law remedies *in wrongful death actions*. *Id.* at 420. The Court *rejected* the argument that the Jones Act and *Miles* barred

the recovery of punitive damages in connection with a vessel owner's wrongful withholding of maintenance and cure to an injured seaman; the Court so ruled because that common law claim predated the enactment of the Jones Act in 1920. The Court stated:

As this Court has repeatedly explained, "remedies for negligence, unseaworthiness, and maintenance and cure have different origins and may on occasion call for application of slightly different principles and procedures." *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 18, 83 S. Ct. 1646, 10 L. Ed. 2d 720 (1963); see also *Peterson*, 278 U.S. at 138, 139, 49 S. Ct. 75 (emphasizing that a seaman's action for maintenance and cure is "independent" and "cumulative" from other claims such as negligence and that the maintenance and cure right is "in no sense inconsistent with, or an alternative of, the right to recover compensatory damages [under the Jones Act]"). See also *Gilmore & Black* § 6-23, at 342 ("It is unquestioned law that both the Jones Act and the unseaworthiness remedies are additional to maintenance and cure: the seaman may have maintenance and cure and also one of the other two"). The laudable quest for uniformity in admiralty does not require the narrowing of available damages to the lowest common denominator approved by Congress for distinct cases of action. Although "Congress ... is free to say this much and no more," *Miles*, 498 U.S., at 24, 111 S. Ct. 317 (internal quotation marks omitted), we will not attribute words to Congress that it has not written.

Id. at 423-24. Thus, the *Townsend* court rejected the view that "uniformity" must invariably trump the individual remedies recoverable for a seaman's independent maritime causes of action.

In light of the foregoing, nothing in the Jones Act or *Miles* compels the conclusion that punitive damages may not be recovered in a common

law vessel unseaworthiness claim; instead, the overarching principle that such damages are recoverable in seamen's maritime personal injuries claims, articulated by Justice Thomas in *Townsend*, is controlling.

Indeed, based on a proper reading of *Townsend*, a number of assertions set forth in American Seafoods' brief become demonstrably baseless. First, its assertion that the Jones Act somehow "preempted" vessel unseaworthiness claims, br. of resp't at 9-11, claims arising under federal maritime common law is simply *false*. It cites two ancient cases, *Panama R. Co. v. Johnson*, 264 U.S. 375, 44 S. Ct. 391, 68 L. Ed. 748 (1924) and *Lindgren v. United States*, 281 U.S. 38, 50 S. Ct. 207, 74 L. Ed. 686 (1930), both of which long pre-date *Townsend*, neither of which stand for the proposition for which American Seafoods cites them.⁵ In fact, the Third Circuit specifically rejected American Seafoods' very argument in *Calhoun v. Yamaha Motor Corp. USA*, 40 F.3d 622, 632 n.18

⁵ American Seafoods misstates the holding in *Panama R. Co.* by implying the Court there ruled that the Jones Act superseded federal maritime common law remedies. Br. of Resp't at 9-10. The Court did not do that. Rather, the Court there rejected a vessel owner's challenge to the Jones Act, as it then existed, giving an injured seaman the right to elect to recover under general maritime law or to pursue the Act's statutorily-created negligence action. 264 U.S. at 388-89. The Court noted that the Jones Act election preserved pre-existing federal maritime common law remedies. *Id.* The *Townsend* court, in fact, observed that this election confirmed that Congress did not intend to supersede maritime common law remedies when it enacted the Jones Act. 557 U.S. at 415-16.

In *Lindgren*, the Court did hold that Jones Act superseded *state wrongful death statutes* in an area that was exclusively within the purview of federal law. 281 U.S. at 44. For American Seafoods to assert in its brief at 11 that these cases support the view that the Jones Act preempts the entire field of liability for injuries to seamen ignores *Townsend* and is plainly unsupported.

(3d Cir. 1994) when that court pointedly observed that *Lindgren* only addressed state wrongful death statutory remedies, stating that the decision

did not challenge the Supreme Court's holding in *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 561 (1944), that an injured Jones Act seaman could invoke the doctrine of unseaworthiness to sue for *injuries*, wherever contracted.

(Court's emphasis).

American Seafoods also contends that early decisions of this Court in *Miller v. Arctic Alaska Fisheries Corp.*, 133 Wn.2d 250, 944 P.2d 1005 (1997) or *Peterson v. Pacific S.S. Co.*, 145 Wash. 460, 261 Pac. 115 (1927) support its contention that claims under the Jones Act are the equivalent of vessel unseaworthiness actions. Br. of Resp't at 2. They do not. In *Miller*, the case dealt primarily with the admissibility of evidence in light of ER 904. When the Court did address vessel unseaworthiness, it held that the trial court erred in refusing to instruct the jury on *both* Jones Act negligence and vessel unseaworthiness. *Id.* at 262-66. But the error was harmless because the claims, though distinct, had the same measure of compensatory damages, *id.* at 266, and punitive damages were not at issue, as Commissioner Pierce correctly noted.⁶ *Pacific S.S. Co.* made essentially the same point where this Court ruled that a claim for

⁶ Commissioner's Ruling at 9-10.

maintenance and cure was not part of the injured seaman's Jones Act election. 145 Wash. at 475-76. The United States Supreme Court agreed:

The right to recover compensatory damages under the new rule for injuries caused by negligence is, however, an alternative of the right to recover indemnity under the old rules on the ground that the injuries were occasioned by unseaworthiness; and it is between these two inconsistent remedies for an injury, both grounded on tort, that we think an election is to be made under the maritime law as modified by the statute. Unseaworthiness, as is well understood, embraces certain species of negligence; while the statute includes several additional species not embraced in that term. But, whether or not the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew, or both combined, there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong, for which he is entitled to but one indemnity by way of compensatory damages.

(citations omitted). *Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 138, 49 S. Ct. 75, 73 L. Ed. 220 (1928).

Both cases specifically treat negligence, unseaworthiness, and maintenance/cure as distinct bases for recovery, foreshadowing the *Townsend* court's adoption of that view. 557 U.S. at 423.

Simply stated, the Jones Act does not preempt a common law claim for vessel unseaworthiness or the remedies available in such a claim where the federal law has continued to recognize distinct causes of action.⁷

⁷ Indeed, the fact that the Jones Act addresses vessel owner *negligence*, while liability in a vessel unseaworthiness is strict only further supports the view that the Jones

Second, American Seafoods' claim that *Townsend* is consistent with a limitation on the recovery of punitive damages in a vessel unseaworthiness action, br. of resp't at 21-26, is belied by the language of the *Townsend* court's opinion. American Seafoods affirmatively misrepresents that Court's explicit statement that *Miles* remains sound law only in connection with *wrongful death actions*. *Id.* at 23-24.

Third, American Seafoods seeks to make much of the notion that *Townsend* only spoke to maintenance and cure. *Id.* at 21-22. The plain flaw in this argument, however, is the fact that the wrongful withholding of maintenance and cure, like vessel unseaworthiness, are *maritime common law actions*. The *Townsend* court's reasoning on the recovery of punitive damages related to maritime common law actions *generally*.

Fourth, American Seafoods also asserts that punitive damages in a vessel unseaworthiness case, a strict liability cause of action, would be unnecessary as the deterrent effect of punitive damages is satisfied if the vessel owner is strictly liable for vessel unseaworthiness. Br. of Resp't at 25-26. Such an argument is baseless. *See In re Asbestos Products Liab. Litig.*, 2014 WL 3353044 at *8-10 (E.D. Pa. 2014) (court rejects the argument that *Townsend* is inapplicable to an unseaworthiness cause of

Act and the common law claim of vessel unseaworthiness are distinct grounds for an injured seaman to recover.

action because a vessel owner can be held strictly liable for harm caused by vessel unseaworthiness).⁸ In any event, punitive damages are routinely recovered in product liability cases, for example, whose basis for recovery is in strict liability. *Allowance of Punitive Damages in Product Liability Cases*, 13 ALR 4th.

Finally, American Seafoods seeks to import what it perceives to be a Congressional limitation in FELA on the recovery of non-pecuniary damages into the Jones Act, and then, in turn, to import such a restriction on Jones Act recoveries into general maritime tort claims like vessel unseaworthiness. Br. of Resp't at 2-4, 12-21. American Seafoods makes this argument despite the lack of *any* language in the Jones Act that specifically supersedes maritime law personal injuries remedies of injured seamen, an argument that is plainly not true after *Townsend's* discussion *supra* of the injured seaman's election of remedies authorized by the Jones Act.

Further, it relies on the notion that punitive damages are non-pecuniary and therefore fall within the ambit of FELA's limitation. That proposition is not universally accepted. *See* David W. Robertson, *Punitive*

⁸ That decision is also important because the court there provides an excellent, detailed analysis of a seaman's ability to recover punitive damages in a vessel unseaworthiness case, concluding that such damages could be recovered in such claims prior to 1920 and that nothing in the Jones Act prevented such a recovery now.

Damages in U.S. Maritime Law: Miles, Baker, and Townsend, 70 La. L. Rev. 463, 473-75 (2010).

In sum, American Seafoods simply cannot distinguish *Townsend*, a case that confined the reach of *Miles* and implicitly rejected the proposition that a so-called uniformity principle foreclosed the affirmation of the recovery of punitive damages in a general maritime common law claim like vessel unseaworthiness. No express Congressional decision addresses this particular aspect of maritime law; nothing in the Jones Act compels the conclusion that it barred the recovery of punitive damages in a common law vessel unseaworthiness action.

(b) Decisions of the Federal Circuit Courts Support Tabingo's Argument That Punitive Damages Are Recoverable in a Vessel Unseaworthiness Action

Finding no real support for its arguments after *Baker* and *Townsend*, American Seafoods relies on federal circuit court authority as if it were controlling and, as noted *supra*, it is not. Br. of Resp't at 19-20. Moreover, American Seafoods is very selective in its citation of such authority, downplaying Ninth Circuit precedent in favor of that of the Fifth Circuit. *Id.* at 29-32. As for the latter, American Seafoods makes far more of the *McBride* decision than it should. To the extent that such persuasive authority is useful to this Court, the Ninth Circuit precedent is better analyzed and is more consistent with the United States Supreme

Court's *Townsend* analysis and the public policy of protecting seamen from injury.

As recounted in Tabingo's opening brief at 20 n.24, the Fifth Circuit in *McBride v. Estis Well Service, LLC*, 768 F.3d 382 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 2310 (2015) was badly split. It is difficult to discern an actual holding in that case because of the odd nature of Judge Haynes' concurring opinion. That judge actually agreed with the dissent that after *Townsend*, *Miles* only restricted an injured seaman's right to recover punitive damages in wrongful death actions involving vessel unseaworthiness. *Id.* at 401-02. However, Judge Haynes declined to align herself with the dissent in her voting on the case's outcome, believing the issue involved should be resolved by Congress. *Id.* at 402-03. For purposes of this Court's traditional analysis of a holding in a case where the appellate court is split, *Dauidsen v. Hensen*, 135 Wn.2d 112, 128, 954 P.2d 1327 (1998), this Court must look to the position taken by the various opinions, not merely the votes.⁹ Thus, Judge Haynes' *position* indicates that a majority of the Fifth Circuit in *McBride* agreed that a living injured

⁹ This approach is akin to this Court's analysis of when a party "prevails" for purposes of fee or cost awards; this Court looks beyond the mere result of "reversal" or "affirmance." *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000).

seaman can recover punitive damages in a vessel unseaworthiness action.¹⁰

American Seafoods is dismissive of this Court's decision in *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 272 P.3d 827 (2012)¹¹ and case law in the Ninth Circuit that supports Tabingo's position here. Br. of Resp't at 29-34. However, that Circuit has agreed with Tabingo's position since 1987 in *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987), *cert. denied*, 484 U.S. 914 (1987) and it has been applied in numerous thoughtful decisions by district courts in the Ninth Circuit since that time. *E.g.*, *Batterton v. The Dutra Group* (Case No. 14-cv-7667-PJW) (N.D. Cal. 2016); *Hausman v. Holland America Line USA*, 2015 WL 10684573, 2016 A.M.C. (W.D. Wash. 2015); *Rowe v. Hornblower Fleet*, 2012 WL 5833541 (N.D. Cal. 2012); and *Wagner v. Kona Blue Water Farms, LLC*,

¹⁰ *McBride* has also spawned conflicting scholarly analysis and criticism. At least one commentator thought the case was correctly decided, Phillip M. Smith, *A Watery Grave for Unseaworthiness Punitive Damages: McBride v. Estis Well Service, LLC*, 76 La. L. Rev. 619 (2015). But another rejected the *McBride* court's analysis. Brian C. Colomb, *McBride v. Estis Well Service, LLC: The Seaman's Case for Punitive Damages Under His Unseaworthiness Claim and How the U.S. Fifth Circuit Got It Wrong, Again*, 14 Loy. Mar. L.J. 205 (2015).

¹¹ To suggest that this Court's *Clausen* decision did not bear on punitive damages in a vessel unseaworthiness claim (although it does), American Seafoods again improperly relies on extrarecord material. Br. of Resp't at 34. How the trial court in *Clausen* instructed the jury on an issue not addressed by this Court is irrelevant, but American Seafoods improperly included that extrarecord material in the appendix to its brief in violation of RAP 10.3(a)(8). The document it includes in the appendix to its brief was never made a part of the trial record here. This Court should disregard such improper "authority," yet another example of American Seafoods' willingness to disregard the Rules here.

2010 WL 3566731 (D. Haw. 2010). Courts in other states agree. *E.g.*, *In re Complaint of Osage Marine Services, Inc.*, 20912 WL 709188 (E.D. Mo. 2012); *In re Asbestos Products Liab. Litigation, supra*.

This Court should apply the persuasive authority of *Evich* and district courts in the Ninth Circuit.

(c) Punitive Damages Were Recovered by Injured Seamen in Vessel Unseaworthiness Claims Before the Enactment of the Jones Act in 1920

As noted *supra*, the key question for the *Townsend* court in applying its analysis pertaining to the recovery of punitive damages in general maritime personal injuries cases is whether such damages were recoverable prior to the Jones Act's enactment in 1920. The *Townsend* court concluded that was true as to common law claims involving the wrongful withholding of maintenance and cure. *See also, Clausen, supra*.

As recounted in Tabingo's opening brief at 8-11, a vessel unseaworthiness claim was available to injured seamen as a part of maritime common law before the Jones Act's enactment in 1920. *See also, Commissioner Ruling at 13-14. The Osceola court clearly so stated in 1903. The Osceola*, 189 U.S. 158, 175, 23 S. Ct. 483, 47 L. Ed. 760 (1903). Moreover, vessel unseaworthiness is a claim *separate* from any Jones Act claim, as the United States Supreme Court expressly stated in *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 498, 91 S. Ct. 514,

27 L. Ed. 2d 562 (1971), belying any contention that the Jones Act preempted or superseded a vessel unseaworthiness claim.¹²

Further, although it is not pertinent to the analysis required by the *Townsend* court focusing solely on whether a maritime common law claim existed before 1920, there are cases indicating that injured seamen recovered punitive damages in vessel unseaworthiness cases long ago. Br. of Appellant at 24-26. American Seafoods disputes that those cases involved the recovery of punitive damages. Br. of Resp't at 26-29. This Court can read the cited cases as well as the parties, but no less an authority than Professor David Robertson, an eminent maritime law scholar, has opined, as did the *Townsend* court, that seamen have always had the right to seek punitive damages in maritime common law personal injuries cases. 70 La. L. Rev. at 478-82.

Focusing on the proper question posed in *Townsend* for the punitive damages analysis, this Court should readily conclude that vessel unseaworthiness claims existed at common law before 1920; the Jones Act did not preempt or supersede them.

¹² This also reinforces the point made *supra* that this Court's *Miller* decision only indicates that the measure of compensatory damages for a Jones Act negligence action and a common law vessel unseaworthiness claim are the same; the claims are *distinct*, and may have different damage elements.

(2) The Public Policy of General Maritime Law of Protecting Seamen From Personal Injuries Is Better Upheld by Allowing Recovery of Punitive Damages in Vessel Unseaworthiness Actions

Tabingo argued in his opening brief at 26-30 that the public policy of general maritime law protecting seamen from injuries as “wards of admiralty” is better served by allowing injured seamen to recover punitive damages from vessel owners in the appropriate case. American Seafoods has not disputed anywhere in its brief the view that seamen are wards of admiralty subject to special protective rules. Nor could it. That policy was long ago articulated by Justice Storey in *Harden v. Gordon*, 11 F. Cas. 480, 483, 485 (CC Me. 1823) and repeated in case law ever since. In fact, American Seafoods has *no answer* to Tabingo’s public policy argument generally.

Simply put, the imposition of punitive damages will better deter a vessel owner from deliberately or in a wanton or willful fashion putting a vessel’s crew in harm’s way by placing them in an unsafe workplace, an unseaworthy vessel. This Court has had a special sense that workers are entitled to safe workplaces. *E.g., Afoa v. Port of Seattle*, 176 Wn.2d 460, 296 P.3d 800 (2013) (recognizing expansive common law and statutory safe workplace obligation for Washington employers). Tabingo’s position here better accomplishes this desired public policy goal.

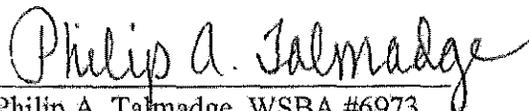
D. CONCLUSION

The trial court here erred in dismissing Tabingo's claim for punitive damages in a vessel unseaworthiness case. That result is inconsistent with federal maritime law after *Townsend* that explained in detail why punitive damages are recoverable by an injured seaman in a federal maritime common law action. Further, awards of punitive damages will better uphold the public policy of deterring vessel owners from risking the lives and health of crewmembers by providing them egregiously unsafe workplaces.

This Court should reverse the trial court's CR 12(b)(6) order, remanding the case for trial on all issues, including Tabingo's claim for punitive damages in a vessel unseaworthiness case. Costs on appeal should be awarded to Tabingo.

DATED this 14th day of September, 2016.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the Reply Brief of Appellant in Supreme Court Cause No. 92913-1 to the following:

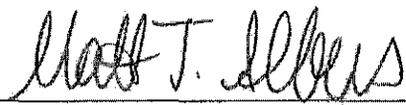
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: September 19, 2016, at Seattle, Washington.



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