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No. 92913-1

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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ALLAN A. TABINGO,

Appellant,

v.

AMERICAN TRIUMPH LLC, and AMERICAN SEAFOODS  
COMPANY, LLC,

Respondents.

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PETITIONER  
BRIEF OF APPELLANT

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A. INTRODUCTION

This Court should confirm that punitive damages are available to an injured seaman making a general maritime law vessel unseaworthiness claim. This principle flows directly from the decision of the United States Supreme Court in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 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, as well as the decision of this Court in *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 272 P.3d 827, *cert. denied*, 133 S. Ct. 199 (2012). There, this Court ruled that punitive damages are recoverable for a vessel owner's wrongful withholding from an injured seaman of maintenance and cure, another federal maritime common law claim.

The recovery of punitive damages from a vessel owner that fails to provide a safe workplace, a seaworthy ship, is fully consistent with the long-standing public policy rationale that allows the recovery of such damages to punish and deter vessel owners from risking the health and lives of crew members who are "wards of admiralty."

B. ASSIGNMENTS OF ERROR

(1) Assignment of Error

1. The trial court erred in entering its February 22, 2016 order granting American Seafoods' so-called motion for partial summary judgment.

(2) Issue Pertaining to Assignment of Error

Does federal maritime common law permit the recovery of punitive damages against a vessel owner whose wanton and willful misconduct or grossly negligent conduct creates an unseaworthy vessel that causes severe personal injuries to a seaman on board that vessel? (Assignment of Error Number 1)

C. STATEMENT OF THE CASE

F/V AMERICAN TRIUMPH is a factory trawler that hauls fish aboard with nets. CP 43. After the fish are aboard, a deckhand opens a steel hatch, a door in the floor/deck. *Id.* The steel hatch (like a door) is hinged on one side and opens and shuts by way of hydraulics. *Id.* This hatch, when opened, allows the fish to drop into tanks below the deck, and the factory workers below then take the fish from those tanks to process. *Id.*

Allan A. Tabingo was a deckhand trainee at the time of his injury. *Id.* One of his tasks was to make sure that fish got into these tanks. *Id.* After the fish net is emptied on deck, the fish hatch is opened by a hydraulics operator on the deck. *Id.* This hydraulics operator stands at the hydraulics station and pushes a hydraulics valve to open and shut the hatch/door. *Id.* The deckhands and deckhand trainees push the fish into

the open hatches and into these tanks. CP 44. Most of the fish can be pushed into the tanks with shovels, but the last bit of fish needs to be cleared and pushed around by hand. *Id.*

On January 12, 2015, Tabingo was on his hands and knees pushing the last remaining fish into the open hatch with his hands. *Id.* The hydraulics operator for some unknown reason pushed the hydraulics valve that shut the hatch while Tabingo's hand was near the hinge of this hatch. *Id.* Realizing his mistake, the operator tried to stop the closing of the hatch, but the hydraulics handle was broken; it came out of the hydraulics valve. *Id.* In fact, this hydraulics valve had been broken for *approximately two years*, and American Seafoods neglected to fix it. *Id.* The open hydraulics valve could not be stopped in time. *Id.* The steel hatch closed onto Tabingo's hand, resulting in injury to his fingers that became gangrenous, necessitating amputation of two of them. *Id.*

Tabingo sued American Triumph LLC and American Seafoods Co., LLC ("American Seafoods"), the owner of the factory trawler F/V AMERICAN TRIUMPH, in the King County Superior Court on July 15, 2015, for vessel unseaworthiness, a general maritime law claim. CP 5-8. American Seafoods filed what it described as a motion for partial summary judgment seeking dismissal of Tabingo's punitive damages request associated with his common law vessel unseaworthiness claim.

CP 13-27.<sup>1</sup> In fact, as argued in American Seafoods' motion, it was a CR 12(b)(6) motion for dismissal. CP 15-17. The trial court, the Honorable Bill Bowman, granted that motion in a February 22, 2016 order. CP 87-91.<sup>2</sup> Tabingo timely sought discretionary review by this Court. CP 92-99. Commissioner Pearce filed a ruling granting direct discretionary review. See Appendix.

#### D. SUMMARY OF ARGUMENT

The trial court here erred in granting American Seafoods' CR 12(b)(6) dismissal motion, concluding that punitive damages cannot be recovered by an injured seaman in a general federal maritime claim of vessel unseaworthiness.

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<sup>1</sup> Tabingo later filed an amended complaint. CP 5-8.

<sup>2</sup> The trial court concluded:

Washington Supreme Court interpretations of maritime law, as well as the uniformity principle set forth by the United States Supreme Court in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990), and confirmed in subsequent decisions, mandate that the measure of damages available under the Jones Act are identical to, and circumscribe, the damages available under the doctrine of unseaworthiness. The United States Court of Appeals for the Fifth Circuit has specifically found that the uniformity principle of *Miles* applies when a general maritime law personal injury claim is joined with a Jones Act claim. *McBride v. Estis Well Service, LLC*, 768 F.3d 382 (2014), *cert. denied*, 135 S. Ct. 2310 (2015). Additionally, the Washington State Supreme Court has held that "unseaworthiness and a Jones Act negligence case have essentially identical measures of damages." *Miller v. Arctic Alaska Fisheries Corp.*, 133 Wn.2d 250, 265-66, 944 P.2d 1005 (1997) (*en banc*).

CP 88-89. For reasons articulated *infra*, the trial court misread the state and federal cases it cites, and failed to appreciate the fundamental importance of *Townsend*.

Federal admiralty law as well as general federal maritime law<sup>3</sup> have long permitted the recovery of punitive damages. In particular, the United States Supreme Court in *Townsend* and this Court in *Clausen* reaffirmed that an injured seaman could recover punitive damages where a vessel owner wrongfully withheld maintenance and cure, another federal maritime common law remedy available to injured seamen.

Vessel unseaworthiness, like maintenance and cure, is a cause of action available to injured seamen under general maritime law. Congress has not chosen to restrict the remedies associated with such a cause of action by statute.

The recovery of punitive damages by injured seamen in vessel unseaworthiness claims under federal maritime common law fully comports with long-standing public policy rationales to protect seamen, who are wards of admiralty, from egregious wrongful conduct by vessel owners in failing to provide them a safe workplace.

#### E. ARGUMENT<sup>4</sup>

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<sup>3</sup> Tabingo uses federal maritime common law or general maritime law interchangeably.

<sup>4</sup> Insofar as the trial court actually granted American Seafoods' CR 12(b)(6) motion for dismissal, the trial court should have taken the facts and any reasonable inferences from those facts as true in addressing American Seafoods' motion. American Seafoods was required to show, beyond a reasonable doubt, that Tabingo could not prove any set of facts that justify recovery. *Futureselect Portfolio Mgmt., Inc. v. Tremont Group Holdings, Inc.*, 180 Wn.2d 954, 962-63, 331 P.3d 29 (2014). The trial court was also required to take into account any hypothetical facts supporting the claim. *Id.* A

(1) Federal Maritime Law on Vessel Unseaworthiness<sup>5</sup>

With regard to tort claims by seamen against vessel owners, both federal maritime law, based on common law principles, and various statutes passed by Congress, govern.<sup>6</sup> Injured seamen have recourse to a mixture of federal maritime common law and statutory remedies as “wards of admiralty.” *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354, 115 S. Ct.

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complaint survives a CR 12(b)(6) motion if any set of facts could exist that would justify recovery. This Court reviews the trial court decision de novo. *Id.* at 962.

Here, the Court must assume for purposes of review that the F/V AMERICAN TRIUMPH was unseaworthy and that its unseaworthiness resulted in Tabingo’s severe injuries. Moreover, the Court must assume the vessel was unseaworthy due to egregious misconduct on American Seafoods’ part, justifying an award of punitive damages against it.

<sup>5</sup> Washington courts have what amounts to concurrent jurisdiction with the federal courts over seamen’s maritime tort claims under the “savings to suitors” clause of the United States Constitution, art. III § 2 cl. 1 and 28 U.S.C. § 1333(1). *Dean v. Fishing Co. of Alaska, Inc.*, 177 Wn.2d 399, 405, 300 P.3d 815 (2013); *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 878, 224 P.3d 761 (2010). For such actions in state court, substantive federal maritime law controls. *Id.* at 879.

<sup>6</sup> Article III, § 2 of the United States Constitution confers authority on the federal courts to address “all cases of admiralty and maritime jurisdiction.” Pursuant to this authority, the federal courts have developed a body of federal common law, or general maritime law. *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 359-61, 79 S. Ct. 468, 3 L. Ed. 2d 368 (1959). Under its coordinate constitutional authority, Congress may modify general maritime law by statute. *Panama Railroad Co. v. Johnson*, 264 U.S. 375, 385-86, 44 S. Ct. 391, 68 L. Ed. 748 (1924). When Congress enacts such a statute, where it directly addresses an issue, the statute displaces conflicting general maritime law, *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625, 98 S. Ct. 2010, 56 L. Ed. 2d 561 (1978), but until it does, federal maritime common law controls. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489-90, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008). In admiralty, federal courts have traditionally taken the lead in formulating remedies, including those for injured seamen. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409, 95 S. Ct. 1708, 44 L. Ed. 2d 251 (1975).

2172, 132 L. Ed. 2d 314 (1995).<sup>7</sup> General maritime law affords ill or injured seamen a cause of action for room and board (maintenance) and health care (cure) if he/she became injured or ill in the service of the ship. *Clausen*, 174 Wn.2d at 76. Similarly, as will be noted in greater detail *infra*, a seaman has long had a general maritime claim against the vessel owner for a ship's operational unfitness – vessel unseaworthiness.

Congress has acted to provide certain statutory remedies for injured seamen as well. Because general maritime law did not give seamen a separate cause of action for personal injuries resulting from shipowner negligence, *The Osceola*, 189 U.S. 158, 175, 23 S. Ct. 483, 47 L. Ed. 760 (1903), nor did it permit wrongful death or survival claims on behalf of seamen killed during the course of their employment, *The Harrisburg*, 119 U.S. 199, 204-14, 7 S. Ct. 140, 30 L. Ed. 358 (1886), overruled by *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S. Ct. 1772, 26 L. Ed. 2d 339 (1970), Congress intervened. In 1920, it enacted the Jones Act<sup>8</sup> and the Death on the High Seas Act (“DOHSA”). Those statutes respectively authorized causes of action for negligence in

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<sup>7</sup> Seamen are wards of admiralty “because they ‘are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour.’” *Id.* at 354-55 (quoting *Harden v. Gordon*, 11 F. Cas. 480, 485, 483 (No. 6,047) (CC Me. 1823)).

<sup>8</sup> In *Endicott*, this Court discussed the genesis of a Jones Act statutory negligence claim of a seaman against a vessel owner. 167 Wn.2d at 879-80.

navigable waters and on the high seas, and survival and wrongful death remedies. *See* 46 U.S.C. § 688 (1920) (codified as amended at 46 U.S.C. § 30104 (2006)); 46 U.S.C. § 76168 (1920) (codified as amended at 46 U.S.C. § 3030108 (2006)).

Tabingo's vessel unseaworthiness claim, the only claim at issue here,<sup>9</sup> is a common law claim arising under general federal maritime law. The *Osceola* court in 1903 recognized that injured seamen were entitled to "an indemnity for injuries received...in consequence of the unseaworthiness of the ship," 189 U.S. at 175, and described the unseaworthiness doctrine as follows:

[T]he vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship.

*Id.*<sup>10</sup>

But the *Osceola* court's discussion of unseaworthiness was dictum because the injured seaman there did not specifically allege unseaworthiness. The United States Supreme Court first applied the

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<sup>9</sup> In argument before the trial court, Tabingo confined his punitive damages argument to his vessel unseaworthiness claim. RP 3-4.

<sup>10</sup> The Court rested its determination on seven district court decisions from the 1880s and 1890s and the Merchant Shipping Act, 1876, 39 & 40 Vict., c. 80, § 5 (U.K.). *See* 189 U.S. at 173-75.

doctrine in *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 42 S. Ct. 475, 66 L. Ed. 927 (1922), a case arising three years before the enactment of the Jones Act. There, the plaintiff seaman was injured in a cookstove explosion and prevailed in Washington in his action against his employer/shipowner for negligence. *Sandanger v. Carlisle Packing Co.*, 112 Wash. 480, 192 Pac. 1005 (1920). The United States Supreme Court affirmed Sandanger's judgment, explaining that the trial judge's negligence-based jury charge was error because the liability of vessel owner is strict liability, but the error was harmless where the jury ruled for the seaman in any event:

[W]e think the trial judge might have told the jury that *without regard to negligence* the vessel was unseaworthy when she left the dock if the can marked "coal oil" contained gasoline.... The verdict shows that the jury found gasoline had been negligently placed in the can.... [T]he charge was more favorable to the [employer] than it could have demanded, and we think no damage could have resulted from the erroneous theory adopted by the trial court.

259 U.S. at 259-60 (citations omitted, emphasis added). Thus, the Court specifically recognized that an injured seaman could recover for vessel unseaworthiness on a common law basis before the enactment of the Jones Act.

The enactment of the Jones Act did not expressly displace general maritime law on vessel unseaworthiness. In fact, unseaworthiness is not a

negligence theory addressed by the Jones Act.<sup>11</sup> “The admiralty doctrine of unseaworthiness is a form of strict liability that requires the owner of a vessel to ensure that a vessel and its appurtenant equipment and appliances are reasonably fit for her intended service.” *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 499, 91 S. Ct. 514, 27 L. Ed. 2d 562 (1971). In *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 93, 66 S. Ct. 872, 90 L. Ed. 1099 (1946), the Supreme Court explained that a claim for unseaworthiness is based on the “hazards of marine service which unseaworthiness places on the men who perform it.” The Court further stated “[t]hese, together with their helplessness to ward off such perils and the harshness of forcing them to shoulder alone the resulting personal disability and loss, have been thought to justify and to require putting their burden, in so far as it is measurable in money, upon the owner regardless of his fault.” *Id.* The Court reasoned that imposing such strict liability on the owner was warranted because the risks of unseaworthiness are “avoidable by the owner to the extent that they may result from negligence [a]nd beyond this he is in position, as the worker is not, to distribute the

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<sup>11</sup> Vessel unseaworthiness cannot be maintained as a Jones Act negligence claim and must be asserted independently. *Usner*, 400 U.S. at 494, 498 & nn.10-11 (1971) (“[U]nseaworthiness...is a remedy separate from, independent of, and additional to other claims against the shipowner, whether created by statute (e.g., the Jones Act) or under general maritime law (e.g., maintenance and cure).”).

loss in the shipping community which receives the service and should bear its cost.” *Id.*

The claim for vessel unseaworthiness has evolved over the years into a powerful tool by which seamen can compel vessel owners to provide them a safe workplace; the owner’s duty to provide a seaworthy ship is an absolute duty not satisfied by due diligence on the owner’s part. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 2d 561 (1944); *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941 (1960); *Moragne, supra.* To establish a vessel unseaworthiness claim, an injured seaman must document that he was injured while in the ship’s service by a piece of equipment that was not reasonably fit for its intended use. *Miller*, 133 Wn.2d at 264.<sup>12</sup>

In sum, vessel unseaworthiness is a common law doctrine, an aspect of general maritime law, that pre-dates the Jones Act and is unaffected by it.

(2) Federal Maritime Law Authorizes the Recovery of Punitive Damages in the Federal Common Law Claim of Vessel Unseaworthiness

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<sup>12</sup> The trial court here relied on *Miller* to equate common law vessel unseaworthiness claims with Jones Act negligence claims. CP 89. This was a misreading of *Miller*. As Commissioner Pierce cogently observed in her ruling at 9-10, *Miller* long preceded *Townsend* and *Miller* never sought recovery of punitive damages either for his unseaworthiness or Jones Act claims.

Federal maritime law, a body of common law, specifically permits the recovery of punitive damages in the appropriate vessel unseaworthiness case, as the United States Supreme Court confirmed in cases like *Baker* and *Townsend*.

(a) History of the Punitive Damages Issue in Federal Jurisprudence

It has long been the rule in the Ninth Circuit that punitive damages are recoverable in vessel unseaworthiness actions. *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987), *cert. denied*, 484 U.S. 914 (1987). *Evich* involved a seaman named Robert Connelly who drowned off of Fox Island Alaska due to the unseaworthiness of his vessel. His brother sought to bring a Jones Act wrongful claim as DOHSA did not apply to Connelly because his death occurred in U.S. territorial waters. Ultimately, the Ninth Circuit determined that the brother could bring a general maritime survival action for vessel unseaworthiness, a common law claim. *Evich v. Connelly*, 759 F.2d 1432, 1434 (9th Cir. 1985). Later, in a second appeal, the court concluded that such damages could be recovered where the vessel owner's conduct manifested a reckless or callous disregard of Connelly's rights, gross negligence, or actual malice criminal indifference. *Id.* at 258.<sup>13</sup> The Ninth Circuit stated:

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<sup>13</sup> The court cited a number of cases from other circuits affirming such a principle. *Id.* at 258.

Punitive damages are available under general maritime law for claims of unseaworthiness, *In re Merry Shipping, Inc.*, 650 F.2d 622, 625 (5th Cir. 1981); *In re Marine Sulphur Queen*, 460 F.2d 89, 105 (2d Cir.), cert. denied, 409 U.S. 982, 93 S. Ct. 318, 34 L. Ed. 2d 246 (1972), and for failure to pay maintenance and cure, *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048, 1051-52 (1st Cir. 1973). See generally *Protectus Alpha Navigation Co., Ltd. v. North Pac. Grain Growers, Inc.*, 767 F.2d 1379, 1385 (9th Cir. 1985). While punitive damages are not available under the Jones Act, *Kopczynski v. The Jacqueline*, 742 F.2d 555, 560-61 (9th Cir. 1984), cert. denied, 471 U.S. 1136, 86 L. Ed. 2d 696, 105 S. Ct. 2677 (1985), it does not follow that they are unavailable under general maritime law. *In re Merry Shipping, Inc.*, 650 F.2d at 626.

Punitive damages serve the purposes “of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example.” *Protectus Alpha Navigation Co., Ltd.*, 767 F.2d at 1385 (quoting Prosser, *THE LAW OF TORTS* § 2 at 9 (1971)). These purposes support their availability in general maritime law and the trend is to allow such recoveries. 2 M. Norris, *THE LAW OF SEAMEN* § 30:41 at 517 (4th ed. 1985); cf. *Thyssen, Inc. v. S.S. Fortune Star*, 777 F.2d 57, 62-63 (2d Cir. 1985) (not available in contract). We find that punitive damages are available in a general maritime survival action upon a showing of ‘conduct which manifests “reckless or callous disregard” for the rights of others, or “gross negligence or actual malice criminal indifference.”’ *Protectus Alpha Navigation Co., Ltd.*, 767 F.2d at 1385 (citations omitted). It is for the trier of fact to determine whether they are warranted. See *In re Merry Shipping, Inc.*, 650 F.2d at 626-27.

*Id.* at 258-59 (ellipses omitted).<sup>14</sup>

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<sup>14</sup> *Evich* remains good law after *Townsend*. This was the conclusion of numerous district court cases such as *Rowe v. Hornblower Fleet*, 2012 WL 5833541 (N.D. Cal. 2012); *In re Complaint of Osage Marine Services, Inc.* 2012 WL 709188

After *Evich*, the United States Supreme Court filed its opinion in *Miles*, a case many observers felt limited the availability of punitive damages in federal maritime tort claims.<sup>15</sup> That decision, however, did not specifically address punitive damages in general maritime law. *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495, 1503 (9th Cir. 1995),

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(E.D. Mo. 2012); and *Wagner v. Kona Blue Water Farms, LLC*, 2010 WL 3566731 (D. Haw. 2010).

<sup>15</sup> The *Miles* court addressed “pecuniary damages” in the context of whether a mother could recover for loss of consortium with her son stabbed to death by a crew mate and whether his estate could recover for non-economic damages. The *Miles* court indicated that there needed to be a uniform treatment of issues in maritime law and held that because the Jones Act and Federal Employer Liability Act, 45 U.S.C. § 51, *et seq.* (“FELA”) barred the recovery of non-pecuniary damages such as those for loss of consortium, general maritime law did so as well. In *Kopczynski v. The Jacqueline*, 742 F.2d 555, 561 (9th Cir. 1984), for example, without significant analysis, the court concluded punitive damages were not “pecuniary” in nature. This led some to conclude after *Miles* that punitive damages were unrecoverable in general maritime law claims.

The scholarly critique of this analysis was instantaneous and intense. For example, the director emeritus of the Tulane Maritime Law Center, Professor Robert Force, asserted that *Miles* threatened to “swallow the whole of maritime personal injury and death law” by inspiring some lower courts to take “upon themselves the agenda of tort reform despite the fact that Congress itself has not seen fit to do so.” Robert Force, *The Legacy of Miles v. Apex Marine Corp.*, 30 Tul. Mar. L.J. 35, 54 (2006); *see also*, Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Com. 73, 164 (1998) (explaining that the “leaps” by the lower courts in extending the *Miles* uniformity principle beyond the narrow context for which it was truly intended would “obliterate the doctrine of punitive damages by something akin to sleight of hand”); Robert Force, *The Curse of Miles v. Apex Marine Corp.: The Mischief of Seeking ‘Uniformity’ and ‘Legislative Intent’ in Maritime Personal Injury Cases*, 55 La. L. Rev. 745, 798 (1995) (“The curse of *Miles v. Apex Marine Corp.* [, and the] lure of ‘uniformity’ ha[ve] drawn and will continue to draw courts to a mechanical, rather than a reasoned, approach to the resolution of issues.”); Peltz, *Circuit Courts Gone Wild: Restoring Rationality to the Interpretation of Miles*, 26 U.S.F. Mar. L.J. 49, 49 (2013/2014) (“Although the Supreme Court in *Miles v. Apex Marine Corp.* repeatedly warned that its rationale was limited to those specific circumstances where ‘Congress has spoken directly to the question,’ a number of circuit courts subsequently seized upon what they perceived to be the ‘*Miles*’ philosophy” to limit remedies in many situations that were not contemplated by the Court.”).

abrogated on other grounds by *Townsend*, 557 U.S. at 408. The *Miles* court mentioned punitive damages only once<sup>16</sup> – while reciting the case’s procedural history. *Id.* at 22.<sup>17</sup>

In *Baker*, the case that resulted from the massive EXXON VALDEZ oil spill in Alaska, the United States Supreme Court made clear that punitive damages were recoverable in maritime common law cases, 554 U.S. 489-92, rejecting the misreading of its *Miles* decision and foreshadowing the Court’s *Townsend* decision that specifically held seamen could recover punitive damages in cases of a vessel owner wrongfully withholding maintenance and cure.

Subsequently, in a case involving the vessel owner’s wrongful withholding of maintenance and cure to an injured seaman,<sup>18</sup> the *Townsend* court made it clear that its *Miles* decision had been misinterpreted as eliminating the recovery of punitive damages in general

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<sup>16</sup> *Miles* actually sought punitive damages, but the district court dismissed that claim after the close of plaintiff’s case. 882 F.2d at 989. The Fifth Circuit noted that punitive damages were available in unseaworthiness actions, *id.*, but affirmed the district court because the evidence did not demonstrate that the shipowner had engaged in “the type of outrageous conduct that justifies imposing punitive damages.” *Id.* at 989. The Supreme Court mentioned the lower courts’ treatment of punitive damages, but never expressed any doubt about the availability of such damages in vessel unseaworthiness actions. 498 U.S. at 22.

<sup>17</sup> The Court granted review in *Miles* to decide “whether the parent of a seaman who died from injuries aboard respondents’ vessel may recover under general maritime law for loss of society, and whether a claim for the seaman’s lost future earnings survives his death.” *Id.* at 21. The *Miles* court answered both questions “no.” *Id.* at 32-33, 36.

maritime cases, emphatically rejecting the argument that *Miles* spoke to the issue of recovery of punitive damages by an injured seaman:

Petitioners nonetheless argue that the availability of punitive damages in this case is governed by the Jones Act because of this Court's decision in *Miles*. In *Miles*, petitioners argue, the Court limited recovery in maritime cases involving death or personal injury to the remedies available under the Jones Act and the Death On the High Seas Act (DOSHA). *Petitioners' reading of Miles is far too broad.*

557 U.S. at 418-19 (internal citations omitted) (emphasis added). The Court specifically held that nothing in the Jones Act overrode the ability of an injured seaman to recover punitive damages against a vessel owner that wrongfully withheld maintenance and cure. *Id.* at 420-22. Similarly, nothing in the Jones Act foreclosed the general maritime law remedy of punitive damages in a vessel unseaworthiness case.<sup>19</sup>

The *Townsend* court specifically addressed the Court's actual holding in *Miles*: "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 causes of action." *Id.* at

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<sup>18</sup> Like a vessel unseaworthiness case, an action for maintenance and cure arises under maritime common law. *Dean*, 177 Wn.2d at 405-06.

<sup>19</sup> In fact, the *Townsend* court specifically recognized that denial of maintenance and cure may be part of a Jones Act claim, but the overlapping of negligence, unseaworthiness, and maintenance/cure claims in that fashion did not suggest that the Jones Act overrode federal maritime common law remedies available to an injured seaman. *Id.* at 422-24.

424. The Court specifically clarified and limited the holding in *Miles* to apply *only to wrongful death claims*. *Townsend*, 557 U.S. at 419. As the Court noted, *Miles* “grapples with the entirely different question of whether general maritime law should provide *a cause of action for wrongful death* based on unseaworthiness.” 557 U.S. at 419 (emphasis added).

As a result, the *Townsend* court found that: (1) *Miles* only applies in wrongful death cases; and (2) an injured seaman can still recover punitive damages under the maritime common law because that remedy has traditionally been available to injured seamen. *Id.* at 419-24. The Court stated that its *Miles* decision was based on the fact that a wrongful death cause of action was not traditionally available under the maritime common law. *Id.* at 419. Instead, the wrongful death cause of action was created by Congress. Since there was no wrongful death cause of action prior to the Congressional enactment of a wrongful death cause of action, the courts could not provide wrongful death remedies beyond those which were provided by Congress.<sup>20</sup> Conversely, since punitive damages were

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<sup>20</sup> Even the *Miles* court made clear that its ruling “did not disturb” the seamen’s general maritime claims and remedies resulting from unseaworthiness that *pre-existed* the enactment of the Jones Act. 498 U.S. at 19 (“The Jones Act evinces no general hostility to recovery under maritime law since it does not disturb seamen’s general maritime claims for injuries resulting from unseaworthiness...”).

available under maritime common law prior to the Jones Act, then that remedy is available to seamen today.

The trial court here failed to apply the teaching of *Townsend* and instead relied on the Fifth Circuit opinion in *McBride*, a case in which a badly split en banc court ruled that an injured seaman could not recover punitive damages in a vessel unseaworthiness claim. CP 88-89.<sup>21</sup> *McBride* does not “control” here because on matters of federal law, only decisions of the United States Supreme Court are binding precedent.<sup>22</sup> *Townsend* controls here. As noted *supra*, a careful application of *Townsend* compels the conclusion that punitive damages may be

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<sup>21</sup> American Seafoods argued below that the denial of certiorari was significant. RP 24-25. The trial court thought it was relevant as well. RP 20. American Seafoods then raised this point in its pleadings on review. Commissioner Pierce made it clear in her ruling at 8 that American Seafoods’ effort to make something of the denial of certiorari was improper. If American Seafoods argues that this Court should treat the United States Supreme Court’s denial of certiorari in *McBride* as an expression of that Court on the merits of the Fifth Circuit opinion, it is wrong. That Court has consistently ruled:

Inasmuch, therefore, as all that a denial of a petition for writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court’s views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated.

*State of Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919, 70 S. Ct. 252, 94 L. Ed. 562 (1950).

<sup>22</sup> *W.G. Clark Constr. Co. v. Pac. Nw. Regional Council of Carpenters*, 180 Wn.2d 54, 62, 322 P.3d 1207 (2014). Decisions of the circuit courts are only persuasive authority for this Court. *Id.* They cannot overrule United States Supreme Court precedents. *State v. Hairston*, 133 Wn.2d 534, 540-41, 946 P.2d 397 (1997).

recovered by an injured seaman pressing a federal maritime common law claim for personal injuries whether under a withholding of maintenance and cure, or vessel unseaworthiness.

As noted *supra*, other persuasive authority such as *Evich* demonstrates that although the *Townsend* court did not expressly address the recovery of punitive damages in an injured seaman's case of vessel unseaworthiness, the Court's analysis requires that result.

District court cases in the Ninth Circuit agree that *Townsend* controls and *McBride* does not alter that result. For example, *McBride*'s analysis was rejected by Judge Barbara Rothstein in a July 2015 ruling in *Hausman v. Holland America Line USA*, 2015 WL 10684573, 2016 A.M.C. 22 (W.D. Wash. 2015).<sup>23</sup> In that case, Holland America argued that *Miles* and *McBride* precluded an award of punitive damages. Judge Rothstein analyzed *Miles* and *McBride* and ruled that *Townsend* provided for punitive damages under general maritime law: “[T]he *Atlantic Sounding* decision made clear that *Miles* should not be read ‘to eliminate the general maritime remedy of punitive damages,’ as punitive damages have been around long before the Jones Act was passed.” *Id.* at 26. Judge

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<sup>23</sup> *Batterton v. The Dutra Group* (Case No. 14-cv-7667-PJW) (N.D. Cal. 2016) (court concluded that *Evich* remained good law in the Ninth Circuit and was unaffected by *McBride*; an injured seaman could recover punitive damages in a vessel unseaworthiness case).

Rothstein correctly noted that, under *Townsend*, the *Miles* decision did not apply to situations where both the general maritime cause of action (i.e. unseaworthiness) and the remedy (punitive damages) were well established before the enactment of the Jones Act in 1920. *Id.*

Judge Rothstein's opinion also addressed American Seafoods' argument here that *Townsend* should be read strictly as a "maintenance and cure" case only:

This Court is not persuaded that *Atlantic Sounding* should be construed narrowly so as to apply only to maintenance and cure actions. As explained above, the *Atlantic Sounding* decision made clear that punitive damages are available for "a general maritime cause of action" that was "well established before the passage of the Jones Act," as long as the Jones Act does not alter the available damages. While the Supreme Court could have carved out a rather narrow holding that would apply only to maintenance and cure claims, it did not such thing. Instead, the *Atlantic Sounding* majority opted to interpret *Miles* narrowly, limiting the holding in *Miles* to wrongful-death actions.

*Id.* at 27.

Additionally, even to be persuasive authority for this Court, the holding in *McBride* must be as clear as American Seafoods claims it is. It is not. Below, American Seafoods *vastly overstated* what a badly split en banc Fifth Circuit<sup>24</sup> actually *held* there. CP 20-22, 80-82. *Davidson v.*

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<sup>24</sup> The split in the Fifth Circuit was profound. In *McBride*, a seaman was killed and two others injured. Judge Davis wrote in the lead opinion, holding that a seaman could not recover punitive damages in a Jones Act, negligence action, or in a maritime law vessel unseaworthiness action. Judge Clement concurred in the result, concluding

*Hensen*, 135 Wn.2d 112, 128, 954 P.2d 1327 (1988) (the holding of a decision is the narrowest principle on which a majority of judges agreed). The *holding* in *McBride* was that punitive damages are not recoverable in wrongful death actions involving vessel unseaworthiness. As such, the

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that punitive damages are not available in vessel unseaworthiness claims. Judge Haines concurred in the majority's result as to the wrongful death action, but did not join the majority as to the surviving seamen, and contended that Congress should address the punitive damages issue. Judge Higginson dissented, asserting that vessel unseaworthiness, like maintenance and cure, was a common law doctrine and nothing in the Jones Act prevented recovery of punitive damages in such claims. Judge Greaves also dissented, joining the Higginson dissent and further noting that the majority misread *Miles*.

A majority of the *McBride en banc* panel (all six dissenters and two of the judges who concurred with the principal opinion) rejects the position that a living seaman cannot recover punitive damages in a vessel unseaworthiness case. As the six dissenters put it:

[Read] with its proper scope, the pecuniary damages limitation recognized in *Miles* applies only to the wrongful death causes of action brought by *McBride*. It does not apply to Touchet, Suire, and Bourque, who are seamen asserting Jones Act negligence and general maritime law unseaworthiness causes of action on their own behalf. The pecuniary damage limitation was created in the context of wrongful death statutes, and by statute, history, and logic, it applies only to survivors asserting wrongful death claims. This distinction is inherent in the text of the Jones Act itself, which allows a survivor or personal representative to sue in wrongful death only if the seaman dies from the injury. If the seaman survives, he must bring his own action, and the pecuniary damages limitation created by wrongful death statutes and case law should be inapplicable.

763 F.3d at 419 (Graves J. and Dennis J., dissenting).

Two of the seven judges who concurred with the principal opinion agree with the dissenters on this point. *See id.* at 402 (Haynes J. and Elrod J. concurring) ("the family of a deceased seaman might not be able to recover punitive damages for his death, while the surviving injured seamen could").

The *McBride* court's holding is that of the judges concurring on the narrowest of grounds. *Davidson, supra. McBride* only affects wrongful death actions.

*McBride* decision actually *holds* that a live, injured seaman may recover punitive damages in a vessel unseaworthiness case.

(b) Punitive Damages in General Maritime Law

The most critical aspect of the *Townsend* court's opinion is its aggressive reaffirmation of the view that punitive damages have long been a part of admiralty and general maritime law jurisprudence. The United States Supreme Court stated that punitive damages are available in admiralty since the early days of our Republic.<sup>25</sup>

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<sup>25</sup> In *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 558 (1818), Justice Story spoke of maritime punitive ("exemplary") damages as "the proper punishment which belongs to ... lawless misconduct." For decades thereafter courts took for granted the recovery of such damages. *E.g.*, *Sampson v. Smith*, 15 Mass. 365, 370 (1819) ("malicious or vindictive" punishment of seamen calls for "retributive justice [to] apportion the penalty and the damages to the malignity of the [punisher's] motives"); *Elwell v. Martin*, 8 F. Cas. 584, 588 (D. Me. 1824) ("vindictive" damages might be awarded for excessive punishment of seamen); *Sheridan v. Furbur*, 21 F. Cas. 1266, 1269 (S.D.N.Y. 1834) ("abrupt and severe" discipline of seaman calls for "punishment in damages, corresponding to the wantonness of the wrong" and "exemplary compensation"); *Hutson v. Jordan*, 12 F. Cas. 1089, 1092 (D. Me. 1837) (excessive punishment of seamen calls for "exemplary damages"); *The Childe Harold*, 5 F. Cas. 619, 620 (S.D.N.Y. 1846) ("punitive and compensatory" damages would be appropriate if ship fed rotted food to crew); *Jay v. Almy*, 13 F. Cas. 387, 389 (D. Mass. 1846) (excessive punishment could yield "smart money or vindictive damages"); *Nevitt v. Clark*, 18 F. Cas. 29, 31 (S.D.N.Y. 1846) (shipowner's "wanton and unjustifiable tort" against seaman would warrant "vindictive damages"); *The Scotland*, 42 F. 925, 927 (S.D.N.Y. 1890) (inadequate medical treatment to injured seaman can yield "punitive damages"); *The State of Missouri*, 76 F. 376, 380 (7th Cir. 1896) (steamboat master who kidnapped laborers and forced them to work as steamboat hands would have been "mulcted in exemplary damages" had he been sued); *Pacific Packing & Navigation Co. v. Fielding*, 136 F. 577, 579-80 (9th Cir. 1905) ("exemplary or punitive damages" can be awarded for excessive punishment of seaman); *The Margharita*, 140 F. 820, 828 (5th Cir. 1905) (award of damages "not only to compensate the seaman for his ... suffering when the duty of the ship [to provide medical treatment to injured crewman] is disregarded, but to emphasize the importance of humane and correct judgment under the circumstances on the part of the master" reversed on view that master did the best he could, *id.* at 824); *Latchmacker v. Jacksonville Towing & Wrecking Co.*, 181 F. 276, 278 (C.C.S.D. Fla. 1910) ("wantonness or reckless negligence" could justify "exemplary damages" against

The *Townsend* court specifically held that punitive damages are recoverable by a seaman for a vessel owner's wrongful withholding of maintenance and cure, another general maritime law claim. 557 U.S. at 424-25. This Court recognized and applied that specific holding in *Clausen*. 174 Wn.2d at 80.

In *Townsend* and *Clausen*, it so happened that only one type of maritime common law claim – maintenance and cure – was at issue, but that does not mean that other maritime common law tort claims like vessel unseaworthiness were not subject to the identical analysis with respect to the recovery of punitive damages. Claims for maintenance and cure *are common law claims under federal maritime law, just as are claims involving vessel unseaworthiness*. 557 U.S. at 413 (“the legal obligation to provide maintenance and cure dates back centuries as an aspect of

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towage service that injured seaman); *The Ludlow*, 280 F. 162, 163 (N.D. Fla. 1922) (excessive punishment could yield “exemplary or punitive” damages); *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1148 (6th Cir. 1969) (punitive damages are available in unseaworthiness actions); *In re Marine Sulphur Queen*, 460 F.2d 89, 105 (2d Cir. 1972) (same); *Murray v. Hunt*, 552 F. Supp. 234, 235, 238 (S.D. Fla. 1982) (awarding punitive damages for unseaworthiness); *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048, 1051-53 (1st Cir. 1973) (affirming punitive award in maintenance and cure case); *Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110, 1118, 1121 (5th Cir. 1986) (same); *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187, 1189-90 (11th Cir. 1987) (same); *Weason v. Harville*, 706 P.2d 306, 310-11 (Alaska 1985) (reversing refusal to award punitive damages for maintenance and cure); *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1550 (11th Cir. 1987) (punitive damages are available in unseaworthiness actions); *Hoeffling v. United States Steel Corp.*, 792 F. Supp. 1029 (E.D. Mich. 1991) (denying employer's motion to dismiss punitive damages claim in maintenance and cure action).

general maritime law”).<sup>26</sup> The *Townsend* court specifically spoke in general terms of the recovery of punitive damages in maritime common law; it nowhere stated that vessel unseaworthiness claims were somehow *excluded* from federal maritime law.

Historically, punitive damages were recovered in vessel unseaworthiness actions *before* the enactment of the Jones Act, reinforcing the point that Congressional enactment of that statute did not foreclose the availability of punitive damages in general maritime law claims.

In a number of pre-Jones Act cases, courts authorized the recovery of what were punitive damages in vessel unseaworthiness cases. For example, the events of *The Rolph*, 293 F. 269 (N.D. Cal. 1923), *aff'd*, 299 F. 52 (9th Cir. 1924), took place after the enactment of the Jones Act, but at a time when seamen were required to elect to proceed under that Act or general maritime law. The plaintiffs there chose to proceed under general maritime law. The viciousness of the first mate of the vessel made it unseaworthy, and four brutally beaten seamen recovered what amounted to punitive damages of \$10,000, \$3,500, \$500, and \$500; two of the seamen “did not claim any personal injury.” *Id.* at 269.

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<sup>26</sup> The entire first half of the *Townsend* decision involved the Court’s explanation in great detail of how punitive damages have historically been available to seamen in claims arising under federal maritime common law, including maintenance and cure. *Id.* at 413-16.

In *The City of Carlisle*, 39 F. 807 (D. Ore. 1889), a 16-year-old apprentice seaman suffered a skull fracture working aboard the vessel. Instead of caring properly for the boy, the vessel's master simply "left [him] in an unconscious or delirious state, sweltering and roiling [in his bunk] in his own excrement." *Id.* at 811. The court then described a course of "neglect and maltreatment thereafter," *id.* at 808, characterizing the circumstances of the boy's treatment by the master as "brutal and indecent," "simply inhuman," and "a grieving wrong," *id.* at 811-17. It awarded special damages and an additional \$1,000, explaining:

[The boy] must have damages for the gross neglect and mistreatment he received after the injury, whereby his injury and suffering were much aggravated.... On the ground of gross neglect and cruel maltreatment of [Basquall] since his injury, I estimate and assess the damages... at \$1,000. It may be said that this result is a hardship on the owners, who will probably have to satisfy the decree. That may be so, but Basquall's is much the harder lot of the two. *And if [ship] owners do not wish to be mulct in damages for such misconduct, they should be careful to select men worthy to command their vessels and fit to be trusted with the safety and welfare of their crews, and particularly apprentice boys, during the long and perilous voyage from the North Atlantic to the North Pacific.*

*Id.* at 817 (emphasis added).

In *The Troop*, 118 F. 769 (D. Wash. 1902), *aff'd*, 128 F. 856 (9th Cir. 1904), the vessel was unseaworthy because of the master's treatment of an injured seaman. The court described that treatment as "horrible" and

“sickening” and characterized the master’s conduct as “a shocking instance of man’s inhumanity to man,” and a “monstrous wrong,” *id.* at 770, 773. The court said that when proper care of an injured seaman “is not supplied by reason of the cruelty and incompetency of a captain or owners in charge of the vessel, *the ship herself is, in the eyes of the maritime law, the guilty thing.*” *Id.* at 772 (emphasis added). The court awarded punitive damages.

Since *Townsend*, Congress has not chosen to enact statutes restricting the recovery of punitive damages to maintenance and cure actions only.<sup>27</sup> The *Townsend* court and this Court in *Clausen* got it right – punitive damages are recoverable in maritime common law tort claims, whether they involve maintenance and cure or vessel unseaworthiness.

(3) Public Policy Strongly Supports the Recovery of Punitive Damages Where a Vessel Owner Has Failed to Provide a Seaworthy Vessel and a Seaman Suffers Injury as a Result

The public policy behind punitive damages is unambiguous: such damages are meant “to punish the person doing the wrongful act and to discourage others from similar conduct in the future.” cmt. a. *Restatement*

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<sup>27</sup> Washington law recognizes that a legislative body may acquiesce in a judicial interpretation by failing to act to alter what it perceives as an incorrect judicial interpretation of its work. *E.g., Soproni v. Polygon Apt. Partners*, 137 Wn.2d 319, 327 n.3, 971 P.2d 500 (1999). Here, Congress took *no action* to enact a specific statute prohibiting punitive damage awards in vessel unseaworthiness actions in light of *Townsend*.

(Second) of Torts § 908.<sup>28</sup> See *Baker*, 554 U.S. at 492-93; *Clausen*, 174 Wn.2d at 84.

That federal maritime law permits injured seamen to recover punitive damages from the vessel owner in a vessel unseaworthiness case is entirely consistent with the policy reasons for the application of punitive damages in federal maritime law. As noted *supra*, seamen are “wards of admiralty.” *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 355, 91 S. Ct. 409, 27 L. Ed. 2d 456 (1971). Nearly two centuries ago, Justice Story declared: “Every court should watch with jealousy an encroachment upon the rights of a seaman, because they are unprotected and need counsel;...They are emphatically the wards of the admiralty.” *Harden*, 11 F. Cas. at 485.<sup>29</sup>

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<sup>28</sup> With regard to punitives, § 908 provides:

(1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.

(2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant’s act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

*Restatement (Second) Torts* § 908.

<sup>29</sup> In fact, the United States Supreme Court has referred to seamen as “wards of admiralty” in some 24 decisions. David W. Robertson, *Punitive Damages in U.S. Maritime Law: Miles, Baker, and Townsend*, 70 La. L. Rev. 463, 499 n.107 (2010), most recently in *Townsend*, 557 U.S. at 417.

It is because “admiralty courts have always shown a special solicitude for the welfare of seamen and their families,” *Miles*, 498 U.S. at 36, that the remedy of punitive damages is so important. “Imposing exemplary damages...creates a strong incentive for vigilance” on the part of those best able to protect seamen from injury aboard unseaworthy vessels. *Pacific Mut. Life Ins. v. Haslip*, 499 U.S. 1, 14, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991).

Federal courts have applied punitive damages as a deterrent against egregious vessel owner misconduct in a variety of settings. *See, e.g., Baker, supra* (fishermen awarded punitive damages for their loss of livelihood claims, many of whom were Jones Act seamen); *Gaffney v. Riverboat Servs. of Indiana, Inc.*, 451 F.3d 424 (7th Cir. 2006), *cert. denied*, 549 U.S. 1111 (2007) (court affirming award of punitive damages to seamen asserting retaliatory discharge); *Pino v. Protection Mar. Inc. Co.*, 490 F. Supp. 277 (D. Mass. 1980) (seamen entitled to seek punitive damages from insurance company for interfering with their employment rights by charging higher insurance premiums from owners of fishing vessels on which they worked because seamen had failed to settle insurance claims to the insurer’s satisfaction); *Townsend* (seamen entitled to seek punitive damages for the willful and wanton violation of their right to maintenance and cure); *Callahan v. Gulf Logistics, LLC*, 2013 WL

5236888 (W.D. La. 2013) (acknowledging that punitive damages may be recoverable under maritime law in a third party action by a longshore or harbor worker under 905(b) of the LHWCA); *In re Horizon Cruises Litigation*, 101 F. Supp. 2d 204, 210 (S.D.N.Y. 2000) (observing that passengers have been entitled to punitive damages in maritime law since at least 1823).

Central to this Court's analysis is the simple question of whether the availability of punitive damages in a vessel unseaworthiness case will better effectuate the policy of that cause of action – to provide a safe workplace for the wards of admiralty. Plainly, to allow recover of punitive damages will deter vessel owners like American Seafoods from cutting corners to achieve greater productivity on board their vessels at the expense of the safety and lives of their crews.

Moreover, it would simply be unjust not to allow recovery of punitive damages in this type of maritime claim. There is no conceivable justification for allowing the recovery of punitive damages by injured longshore workers (*Callahan*), cruise ship passengers (*Horizon Cruises*), Jones Act seamen in loss-of-livelihood cases (*Baker*), retaliatory discharge cases (*Gaffney*), tortious interference with employment cases (*Pino*), or in maintenance and cure cases (*Townsend*), but not by seamen injured due to the vessel owner's egregious conduct in failing to provide a safe

workplace, a seaworthy vessel. There is no basis in policy, principle, or common sense that could justify the exclusion of injured seamen from access to a remedy that is available to so many other types of maritime litigants.

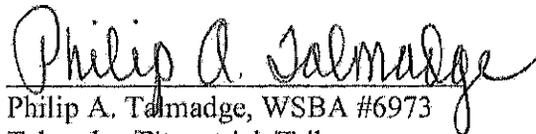
In sum, the trial court erred in light of *Townsend* and *Clausen* when it concluded as a matter of law that a seaman could not recover punitive damages in a vessel unseaworthiness action.

F. CONCLUSION

The trial court here erred in dismissing Tabingo's claim for punitive damages in a vessel unseaworthiness case. Consistent with federal maritime law after *Townsend*, 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 2d day of August, 2016.

Respectfully submitted,



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# APPENDIX

FILED  
JUN 28 2016  
WASHINGTON STATE  
SUPREME COURT  
E  
bjh

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ALLAN A. TABINGO,  
Petitioner,

v.

AMERICAN TRIUMPH LLC, and  
AMERICAN SEAFOODS COMPANY,  
LLC,  
Respondents.

NO. 92913-1  
RULING GRANTING REVIEW

Allan Tabingo was injured while working as a deckhand trainee on a factory trawler owned by his employer, American Triumph LLC and American Seafoods Company, LLC (American Seafoods). While he was pushing fish through a hatch and into tanks below the deck, the hatch closed on his hand, eventually resulting in the amputation of two fingers. Mr. Tabingo alleges that the operator of the hydraulic hatch mistakenly pushed the valve that closed the hatch while Mr. Tabingo's hand was near the hinge, and was unable to stop the closing due to a defective hydraulic handle that had been broken for approximately two years. Mr. Tabingo alleges causes of action available to a seaman injured in the course of his employment, including an action against American Seafoods as his employer for

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negligence under the Jones Act, 46 U.S.C. § 30104, and a general maritime law action against American Seafoods as the vessel owner for unseaworthiness. As to the unseaworthiness claim, he alleges willful and wanton failure to provide a seaworthy vessel and seeks both compensatory damages and punitive damages. The King County Superior Court granted American Seafoods partial summary judgment, dismissing Mr. Tabingo's claim for punitive damages on the basis that such damages are not recoverable under the general maritime doctrine of unseaworthiness as a matter of law. In the order granting partial summary judgment, the court explained as follows:

Washington State Supreme Court interpretations of maritime law, as well as the uniformity principle set forth by the United States Supreme Court in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990), and confirmed in subsequent decisions, mandate that the measure of damages available under the Jones Act are identical to, and circumscribe, the damages available under the doctrine of unseaworthiness. The United States Court of Appeals for the Fifth Circuit has specifically found that the uniformity principle of *Miles* applies when a general maritime law personal injury claim is joined with a Jones Act claim. *McBride v. Estis Well Service, LLC*, 768 F.3d 382 (2014), *Cert. Denied*, 135 S. Ct. 2310 (2015). Additionally, the Washington State Supreme Court has held that "unseaworthiness and a Jones Act negligence case have essentially identical measures of damages." *Miller v. Arctic Alaska Fisheries Corp.*, 133 Wn.2d 250, 265-66, 944 P.2d 1005 (1997) (*en banc*).

Based on this reading of the case law, the court concluded, "Accordingly, Plaintiff may not recover non-pecuniary damages, including punitive damages, under either of his liability theories." The court dismissed with prejudice Mr. Tabingo's claim for punitive damages under the Jones Act and the general maritime law doctrine of unseaworthiness.<sup>1</sup> Mr. Tabingo now seeks this court's direct discretionary review of this partial summary judgment order. RAP 2.3; RAP 4.2.

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<sup>1</sup> Mr. Tabingo states in his motion for discretionary review that in argument before the superior court he indicated he was seeking punitive damages only as to the unseaworthiness claim.

The initial question before me is whether this case is one of the rare instances in which review of an interlocutory summary judgment order is appropriate. In *Hartley v. State*, 103 Wn.2d 768, 773-74, 698 P.2d 77 (1985), this court noted that “[j]udicial policy generally disfavors interlocutory appeals,” but there found that the trial court committed “obvious or probable error” and that discretionary review was appropriate to avoid a useless trial. *See also Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 808, 818 P.2d 1362, 1363 (1991) (finding interlocutory review of a statute of limitations issue was appropriate to avoid a useless trial).

At issue here is whether a seaman may recover punitive damages for an employer’s willful and wanton breach of the general maritime law duty to provide a seaworthy vessel. The answer to this legal question involves the relationship of remedies under the maritime common law and remedies provided by Congress under the Jones Act, 46 U.S.C. § 30104. Ultimately, the question is whether the remedy of punitive damages was historically available in maritime law under the doctrine of unseaworthiness and, if so, whether the availability of punitive damages was supplanted by Jones Act pecuniary remedies for negligence in cases where the injured person is an employee of the vessel owner.

The background framing the issues is well established. Under maritime common law an injured seaman has two available causes of action: an action for “maintenance and cure” during his or her recovery from any injury and an action against the shipowner (who may also be the employer) for unseaworthiness of the vessel. In the pre-Jones Act case *The Osceola*, 189 U.S. 158, 175, 23 S. Ct. 483, 487, 47 L. Ed. 760 (1903), the Supreme Court determined that a seaman, though entitled to maintenance and cure whether or not negligence caused the injuries, was not allowed pecuniary recovery for the negligence of the vessel master or a member of the crew. In response, Congress enacted the Jones Act, providing a seaman injured in the course

of employment or, if the seaman dies from the injury, the personal representative of the seaman, a cause of action against the employer. 46 U.S.C. § 30104. The Jones Act incorporated the substantive provisions of the Federal Employers Liability Act (FELA), 45 U.S.C. § 51, that govern actions for personal injury or death of a railway employee. *Id.* In discerning congressional intent, courts have considered how FELA was interpreted before the enactment of the Jones Act. Relevant here, prior to enactment of the Jones Act, the Supreme Court had determined that an injured worker bringing an action under FELA could recover only pecuniary damages. *St. Louis, Iron Mountain & S. Ry. v. Craft*, 237 U.S. 648, 658, 35 S. Ct. 704, 59 L. Ed. 1160 (1915). Many years later the Supreme Court reasoned that since the holding in *Craft* predated the Jones Act, “Congress must have intended to incorporate [FELA’s] pecuniary limitation on damages as well.” *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990).

Many lower courts read *Miles* as limiting recovery in maritime personal injury cases to only those remedies available under the Jones Act. But almost two decades later, the Supreme Court rejected the broad proposition that a seaman may recover only those damages available under the Jones Act. *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 407, 129 S. Ct. 2561, 174 L. Ed. 2d 382 (2009). The question presented in *Townsend* was whether an injured seaman could recover punitive damages for his employer’s willful failure to pay maintenance and cure. The Supreme Court distinguished maintenance and cure from the wrongful death action in *Miles*, noting that general maritime law denied any recovery for wrongful death, and that the Jones Act and the Death on the High Seas Act (DOHSA), 46 U.S.C. § 30301, *et seq.*, are the sole sources of a wrongful death cause of action. The Supreme Court observed that punitive damages historically have been available in general maritime actions, and that the Jones Act did not eliminate preexisting remedies available to

seamen for the separate common law cause of action based on the right to maintenance and cure. *Id.* at 415-16. Thus, it distinguished *Miles* on the grounds that “*Miles* does not address either maintenance and cure actions in general or the availability of punitive damages for such actions.” *Id.* at 419.

After *Townsend*, lower courts have wrestled with the issues of whether prior to the Jones Act punitive damages were available under the doctrine of unseaworthiness and whether the provisions of the Jones Act supplanted historical remedies as to a seaman employed by the vessel owner. Some courts have concluded that vessel passengers and seamen *not* employed by the vessel owner may seek punitive damages under the doctrine of unseaworthiness in light of *Townsend*. *See, e.g., Hausman v. Holland Am. Line-USA*, 2015 WL 10684573 (W.D. Wash.); *Collins v. A.B.C. Marine Towing, L.L.C.*, 2015 WL 5254710 (E.D. La.). However, as the district court observed in *Hausman*, these cases did not address whether punitive damages are available to a seaman bringing a personal injury suit under the Jones Act.

This issue has been addressed post-*Townsend* by federal district courts and by the Fifth Circuit Court of Appeals. In *Rowe v. Hornblower Fleet*, 2012 WL 5833541 (N.D. Cal.), the district court concluded that punitive damages are available in general maritime claims and that nothing in the Jones Act limits a seaman’s right to seek punitive damages against an employer on a claim for unseaworthiness. *See also Wagner v. Kona Blue Water Farms, LLC*, 2010 WL 3566731 (D. Haw.) (same). These district courts concluded that the Ninth Circuit’s decision in *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987), remained binding circuit precedent following *Townsend*, such that punitive damages are available in a general maritime action upon a showing of conduct that manifests reckless or callous disregard, gross negligence, actual malice, or criminal indifference.

More recently, the question of the availability of punitive damages was presented in *McBride v. Estis Well Service, LLC*, 768 F.3d 382 (5th Cir. 2014) (en banc), *cert. denied*, 135 S. Ct. 2310 (2015), in the context of a wrongful death action and personal injury actions against an employer who was the vessel owner. A drilling rig on a barge toppled over, killing one seaman and injuring others, and the personal representative of a deceased seaman and the injured seamen sought punitive damages for their employer's willful and wanton breach of the general maritime law duty to provide a seaworthy vessel. The federal district court considered *Townsend*, but it determined the remedy of punitive damages was not legally cognizable for unseaworthiness or Jones Act causes of action and dismissed all claims for punitive damages. But recognizing that the issues presented were "the subject of national debate with no clear consensus," the court certified the judgment for immediate appeal. Initially, a panel of the Fifth Circuit considered the question on interlocutory appeal and reasoned that *Townsend's* holding on maintenance and cure would extend to an unseaworthiness cause of action and the availability of punitive damages as a remedy. In the initial decision, *McBride v. Estis Well Serv., L.L.C.*, 731 F.3d 505, 518 (5th Cir. 2013), the court would have held, "Like maintenance and cure, unseaworthiness was established as a general maritime claim before the passage of the Jones Act, punitive damages were available under general maritime law, and the Jones Act does not address unseaworthiness or limit its remedies. We conclude, therefore, that punitive damages remain available to seamen as a remedy for the general maritime law claim of unseaworthiness." As indicated, the Fifth Circuit then reheard the case en banc. The fifteen member en banc court affirmed the district court's dismissal of the punitive damages claims in a 7-2-6 decision. Broadly summarized, the lead opinion by Judge Davis found that the wrongful death action by the personal representative of the deceased seaman was indistinguishable from *Miles*, where

recovery was limited to pecuniary losses, and further that “no one has suggested why its holding and reasoning would not apply to an injury case” such as asserted by the injured seamen. *McBride*, 768 F.3d at 388. Judge Clement wrote and four judges signed a separate concurring opinion that joined Judge Davis’s opinion but also concluded that punitive damages were not historically available in unseaworthiness cases. *Id.* at 391-401 (Clement, J., concurring). Thus, less than a majority of the court fully joined in the lead opinion. Significantly, Judge Haynes’s opinion concurring in the judgment, joined by one other judge, concurred in the reasoning in the lead opinion as to the wrongful death action but disagreed that the outcome on the wrongful death action dictated the outcome for the surviving seamen. *Id.* at 401-02 (Haynes, J., concurring in judgment). But after indicating disagreement with the concept that the outcome in the wrongful death action dictated the outcome for the injured seamen, Judge Haynes wrote, “That said, I cannot join the dissenting opinions with respect to the surviving seamen.” *Id.* at 402. She noted that “the parties have not sought and have not briefed a different treatment of one category of claimant from the other, and we should be reluctant to address such differences *sua sponte*.” *Id.* at 403. Additionally, she expressed views that it would be “inappropriate for a federal intermediate appellate court to extend the law here,” *id.*, that the subject was best left to Congress, and that “[i]f a federal court is the right place to extend remedies in this area, I submit that federal court is the United States Supreme Court, not this one.” *Id.* at 404. Judge Higginson was joined by five other judges in a dissenting opinion that concluded general maritime law afforded injured seamen a cause of action for unseaworthiness if a seaman was injured by a ship’s operational unfitness, and that punitive damages, though not always designated as such, historically were available and awarded in such general maritime actions. *Id.* at 406 (Higginson, J., dissenting). Accordingly, the dissenting opinion concluded that Congress’s enactment of

negligence and wrongful death causes of action for injured seaman or the representatives of deceased seamen to remedy gaps in general maritime law did not eliminate the preexisting remedy of punitive damages. *Id.* at 409. The dissenting opinion applied the reasoning in *Townsend* that the Jones Act's purpose was to enlarge a seaman's protection, not to narrow it, and that the Jones Act preserved the seaman's right to elect between the remedies there provided and those recoverable under preexisting general maritime law for negligence. *Id.* This reasoning led the dissent to the same conclusion as that reached in *Townsend* for maintenance and cure claims; that is, the Jones Act did not eliminate preexisting remedies available to seamen for the separate common law cause of action based on unseaworthiness. *Id.* at 418-19.

American Seafoods relies heavily on *McBride* in opposing discretionary review and asserts that "the U.S. Supreme Court effectively endorsed this holding by declining to hear the petition for review." But the general proposition that denial of certiorari is an implicit endorsement of the lower court's holding has been rejected by the Supreme Court. *See Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 366, n.1, 93 S. Ct. 647, 34 L. Ed. 2d 577 (1973) (noting "the well-settled view that denial of certiorari imparts no implication or inference concerning the Court's view of the merits"); *Teague v. Lane*, 489 U.S. 288, 296, 109 S. Ct. 1060, 1067-68, 103 L. Ed. 2d 334 (1989) (reiterating that denial of certiorari imports no expression of opinion on the merits and observing that the variety of considerations that underlie denials of the writ counsels against according denials of certiorari any precedential value). And I find it doubtful that this court would agree with Judge Haynes's view in concurring in the judgment that this unsettled question of law should be left to Congress or the Supreme Court to decide. Rather, I believe this court would view the question of the availability of punitive damages in an injured seaman's unseaworthiness claim as

whether such claim is or is not logically compelled by Supreme Court precedents. *Cf. Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 820, 121 S. Ct. 1927, 1933, 150 L. Ed. 2d 34 (2001) (cautioning that recognition of new types of maritime claims may be best left to Congress rather than federal common law, but that “Congress’s occupation of this field is not yet so extensive as to preclude us from recognizing what is already logically compelled by our precedents”). The Supreme Court has not reserved to itself the question of what result is logically compelled by its precedents; the Supreme Court is the court of last resort on issues of maritime law, not the court of first resort. Further, Supreme Court Rule 10 contemplates that unsettled questions of federal law will continue to be addressed by the federal and state courts, and that the Supreme Court will consider the question if conflicting decisions emerge among different circuits of the federal courts of appeals or with a state court of last resort. *McBride* is not persuasive authority for denying discretionary review.

American Seafoods also argues, and the superior court order suggests, that this court decided this issue in *Miller v. Arctic Alaska Fisheries Corp.*, 133 Wn.2d 250, 265-66, 944 P.2d 1005 (1997), when it stated, “While distinct theories of recovery, unseaworthiness and a Jones Act negligence case have essentially identical measures of damages.” But this statement was made in a case that preceded *Townsend*. And in *Miller* the injured seaman explicitly did not seek punitive damages in his unseaworthiness and Jones Act causes of action. See Brief of Appellant, bound volume of briefs, Wash. State Law Library, 133 Washington 2d Briefs, Vol. 5, 187-290 (noting the *Miles* holding precluded punitive damages in a wrongful death action and stating, “The holding in *Miles* would seem to preclude punitive damages for injury claims as well, for unseaworthiness or Jones Act negligence. Mr. Miller

does not seek punitive damages for those causes of action. Instead, he seeks punitive damages for the cut-off of maintenance and cure”).

This background indicates that resolution of the issue in this court likely would turn on application of the principles of *Townsend* to claims for egregious breaches of the warranty of seaworthiness, such that the questions are whether punitive damages were available to an injured seaman prior to enactment of the Jones Act and whether the Jones Act altered the damages available. *Cf. Townsend*, 557 U.S. at 418. In *Townsend*, the Court first reviewed the extension of punitive damages available at common law to claims arising under maritime law for acts of a particularly egregious nature:

The general rule that punitive damages were available at common law extended to claims arising under federal maritime law. See *Lake Shore & Michigan Southern R. Co. v. Prentice*, 147 U.S. 101, 108 (1893) (“[C]ourts of admiralty ... proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages ...”). One of this Court’s first cases indicating that punitive damages were available involved an action for marine trespass. See *The Amiable Nancy*, 3 Wheat. 546 (1818). In the course of deciding whether to uphold the jury’s award, Justice Story, writing for the Court, recognized that punitive damages are an available maritime remedy under the proper circumstances. Although the Court found that the particular facts of the case did not warrant such an award against the named defendants, it explained that “if this were a suit against the original wrong-doers, it might be proper to ... visit upon them in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct.” *Id.*, at 558; see also *Barry, supra*, at 563 (“In *The Amiable Nancy*, which was the case of a marine tort, Mr. Justice Story spoke of exemplary damages as ‘the proper punishment which belongs to ... lawless misconduct’” (citation omitted)).

*Townsend*, 557 U.S. at 411. The Court further noted a couple of early cases, specific to the maintenance and cure cause of action at issue in *Townsend*, that included punitive elements:

In addition, the failure of a vessel owner to provide proper medical care for seamen has provided the impetus for damages awards that appear to contain at least some punitive element. For example, in *The City of Carlisle*, 39 F. 807 (DC Ore. 1889), the court added \$1,000 to its damages award to compensate an apprentice seaman for “gross neglect and cruel maltreatment of the [seaman] since his injury.” *Id.*, at 809, 817.

The court reviewed the indignities to which the apprentice had been subjected as he recovered without any serious medical attention, see *id.*, at 810–812, and explained that “if owners do not wish to be mulct in damages for such misconduct, they should be careful to select men worthy to command their vessels and fit to be trusted with the safety and welfare of their crews, and particularly apprentice boys.” *Id.*, at 817; see also *The Troop*, 118 F. 769, 770–771, 773 (DC Wash. 1902) (explaining that \$4,000 was a reasonable award because the captain’s “failure to observe the dictates of humanity” and obtain prompt medical care for an injured seaman constituted a “monstrous wrong”).

*Id.* at 414.

American Seafoods argues that this discussion of the availability of punitive damages under general maritime law is immaterial to the issue of whether punitive damages were specifically available for a claim of unseaworthiness before the Jones Act. But *Townsend* was based on the general common law rule that made punitive damages available in maritime actions and the fact that the early cases supported, rather than refuted, application of the general rule to pre-Jones Act maintenance and cure actions that involved wanton, willful, or outrageous conduct. *Id.* at 414-15 n.4 (agreeing with the dissent that the handful of early maintenance and cure cases did not resolve the question of the availability of punitive damages, but observing that the dissent did not explain why maintenance and cure should be excepted from the general rule in light of the early cases that supported rather than refuted application of the rule to such actions). There is no apparent reason the general principles identified in *Townsend* would not extend to unseaworthiness claims involving egregious conduct. American Seafoods argues to the contrary that the Supreme Court’s discussion of the historic availability of “indemnity or compensatory damages” on the ground of unseaworthiness, as described in *Pacific Steamship Co. v. Peterson*, 278 U.S. 130, 135, 49 S. Ct. 75, 73 L. Ed. 220 (1928), indicated punitive damages were not available. See also *McBride*, 768 F.3d at 398-99 (Clement, J., concurring). But *Pacific Steamship Co.* and the case it discusses, *The Osceola*, did not involve any claims for damages beyond those that were compensatory. And the

decision in *Pacific Steamship Co.* rejected application of a broad incidental statement in a previous case as “this was at the most a general expression respecting a particular as to which no question was raised—no allowance for maintenance, cure and wages being there involved—which ought not to control the judgment in a subsequent suit when the very point is presented for decision.” *Id.* at 136. There is no indication the Supreme Court in discussing indemnity in these previous cases was considering the point of whether punitive damages would or would not extend to unseaworthiness claims where egregious conduct was involved.

American Seafoods also argues that the modern unseaworthiness cause of action that is based on strict liability was not recognized until after the enactment of the Jones Act, and therefore the common law rule allowing punitive damages could not have extended to such claims. But even if the unseaworthiness cause of action has evolved from the duty to use due diligence to provide a seaworthy vessel to one of strict liability, recovery of punitive damages depends on fault on the part of the vessel owner. The development of the law as to the showing necessary to establish a vessel owner’s liability did not change the common law as to the culpability necessary to impose punitive damages. This argument is not a convincing basis to distinguish application of the principles of *Townsend* to an unseaworthiness cause of action. *Cf. In re Asbestos Products Liab. Litig.*, 2014 WL 3353044, at \*8-10 (E.D. Pa. 2014) (rejecting the argument that the principles of *Townsend* are inapplicable to an unseaworthiness cause of action because a vessel owner can be held strictly liable for harm caused by an unseaworthy vessel).

I am not aware of any early cases that directly support or refute application of the general rule on the availability of punitive damages to unseaworthiness actions. But it seems to me that the discussion on the inadequacy of compensatory damages to address unseaworthiness in *United States v. Givings*, 25 F. Cas. 1331 (D. Mass. 1844),

lends support to application of the general rule. There the defendant seamen were indicted for a revolt when they refused to sail away from port and into dangerous waters aboard a whaling ship with rotten masts. The federal court noted the limits of compensatory damages as a means to address the seamen's concerns, instructing the jury as follows:

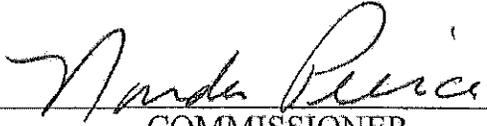
Full force should be given to the necessity of upholding the power of the master, and to the policy of requiring seamen to submit, in some instances, even to evident injustice, waiting for redress from the home tribunals; but a distinction should be drawn between cases of ordinary injuries, which can be compensated by pecuniary damages, and those where the wrong about to be done is of so serious a nature, as not to be measured by subsequent compensation in money; as when life or limbs are put in danger. The law regards life, and the safety of limbs, as of a higher value than the cost of surveys or repairs.

*Id.* at 1332. The Supreme Court later observed that the pre-Jones Act doctrine related to damages for unseaworthiness seems to have derived from the seaman's privilege to abandon a ship improperly fitted out. *See Mahnich v. Southern S. S. Co.*, 321 U.S. 96, 99, 64 S. Ct. 455 88 L. Ed. 561 (1944). Viewed in this light, *Givings* supports the view that the general punitive damage rule historically would have been applied to willful and wanton failure to provide a seaworthy vessel. *Cf. Exxon Shipping Co. v. Baker*, 554 U.S. 471, 504, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008) (comparing the purposes of punitive damages under maritime common law with the criminal law and concluding that both advance deterrence).

Clearly, the question is an arguable one. Determining whether discretionary review should be granted in this matter requires me to consider whether the superior court committed "probable" error in the sense that the error "can reasonably and fairly convincingly be accepted as true ... without being undeniably so ... ." *See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1806* (2002) (definition of "probable"). After considering the many scholarly opinions on this issue, I am persuaded that under the "probable error" standard the motion for discretionary

review should be granted. And like in *Hartley*, deciding the fully developed legal issue on interlocutory review may avoid a second trial that is essentially a retrial before a new jury.<sup>2</sup> Further, this is a matter “involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination” warranting this court’s direct review. RAP 4.2(a)(4). The unquestionable importance of this issue, the full development of the arguments relating to the issue of law, and the lack of controlling authority in Washington all weigh in favor of direct review.

The motion for direct discretionary review is granted. The Clerk is requested to set a perfection schedule.

  
\_\_\_\_\_  
COMMISSIONER

June 28, 2016

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<sup>2</sup> American Seafoods claims bifurcation of the punitive damages claim would be warranted in any event, but it provides no authority or argument for this proposition. CR 42 allows separate trials to avoid prejudice, but American Seafoods does not explain how it would be prejudiced by resolution of all the claims in a trial before the same jury.

DECLARATION OF SERVICE

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

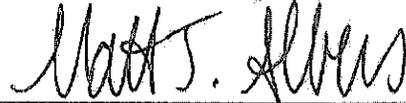
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Original E-filed with:  
Washington Supreme Court  
Clerk's Office

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: August 2, 2016, at Seattle, Washington.



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Matt J. Albers, Paralegal  
Talmadge/Fitzpatrick/Tribe

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