

No. 92913-1

SUPREME COURT
OF THE STATE OF WASHINGTON

ALLAN A. TABINGO

Appellant,

v.

AMERICAN TRIUMPH LLC, and AMERICAN SEAFOODS
COMPANY, LLC,

Respondents.

BRIEF OF RESPONDENTS

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A. INTRODUCTION

The Trial Court ruled that punitive damages are not recoverable by a seaman under the Jones Act or the general maritime law doctrine of unseaworthiness. Unlike the general maritime no-fault remedy of maintenance and cure,¹ neither of the two liability theories available to a seaman and at issue here (Jones Act negligence and unseaworthiness) allows recovery of punitive damages. Plaintiff is limited to compensatory (or non-pecuniary) damages.²

The Trial Court's decision was correct and consistent with Washington State Supreme Court interpretations of federal maritime law dating back to *Peterson v. Pacific S.S. Co.*, 145 Wash. 460, 474, 261 P. 115 (1927), *aff'd*, *Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 49 S.Ct. 75, 73 L. Ed. 220 (1928). There is no conflict among decisions of the Washington Court of Appeals or an inconsistency in decisions of the Washington Supreme Court. Both federal case law and Washington State Supreme Court interpretations of federal maritime law mandate that the

¹ Maintenance is a daily stipend paid to seaman while recovering from an injury or illness; and cure is the payment of the treatment costs.

² Washington State courts have consistently used the term "compensatory" rather than "pecuniary" to describe the damages allowed under the Federal Employers' Liability Act ("FELA") and the Jones Act. *E.g. Williams v. Steamship Mut. Underwriting Ass'n, Ltd.*, 45 Wn.2d 209, 215-16, 273 P.2d 803 (1954); *Peterson v. Pacific S.S. Co.*, 145 Wash. 460, 474, 261 P. 115 (1927), *aff'd*, *Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 49 S.Ct. 75, 73 L. Ed. 220 (1928).

type of damages available to a seaman under the doctrine of unseaworthiness be the same as those available under the Jones Act.

As the U.S. Supreme Court stated in *Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 49 S.Ct. 75, 73 L. Ed. 220 (1928):

...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.**"

Id. at 138 (emphasis added). Indeed, as recently as 1997, the Washington State Supreme Court 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*) (emphasis added).

These decisions are consistent with the roles of Congress and the courts in formulating maritime remedies, specifically including the courts' authority to fashion elements of recovery when Congress has already occupied the field. Congress has formulated rights and remedies for maritime workers since the inception of the nation, and is the branch of government with the paramount power to fix, determine, and amend the general maritime law. Just as Congress' enactment of the Federal Employers' Liability Act ("FELA") "took possession of the field of

employers' liability to employees in interstate transportation by rail," so Congress' enactment of the Jones Act "covers the entire field of liability for injuries to seamen, it is paramount and exclusive..." *Lindgren v. U.S.*, 281 U.S. 38, 45, 47, 50 S.Ct. 207, 74 L.Ed. 686 (1930). There can be no resort to other law "to establish a measure of damages not provided by the Act." *Id.* at 47.

From this Congressional action follows the uniformity principle articulated by the U.S. Supreme Court in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990). As explained by the U.S. Supreme Court in *Miles*, in enacting the Jones Act and incorporating FELA therein, Congress was aware of the state of incorporated FELA law, including FELA's prohibition on punitive damages: "Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well." *Miles*, 498 U.S. at 32; *see also, McBride v. Estis Well Service, LLC*, 768 F.3d 382, 387 (5th Cir. 2014), *cert. den.*, 135 S.Ct. 2310, 191 L.Ed.2d 978 (2015). As previously explained by the Washington State Supreme Court, the Jones Act served to extend a seaman's right to **compensatory** damages. *Williams v. Steamship Mut. Underwriting Ass'n, Ltd.*, 45 Wn.2d 209, 215-16, 273 P.2d 803 (1954); *Peterson*, 145 Wash. at 47 (*citing, Panama R. Co. v. Johnson*, 264 U.S. 375, 44 S.Ct. 391, 68 L.Ed. 748 (1924)), for the rule that

the Jones Act grants seaman an alternative action to recover compensatory damages).

The Trial Court's decision is also consistent with the U.S. Supreme Court's decision in *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 420, 129 S. Ct. 2561, 174 L. Ed. 2d 382 (2009) ("The reasoning of *Miles* remains sound."). "Respondent is entitled to pursue punitive damages **unless Congress has enacted legislation departing from this common-law understanding.**" *Id.* at 415 (emphasis added). In fact, Plaintiff's argument here that *Townsend* altered the historical unavailability of punitive damages for liability claims for Jones Act negligence or unseaworthiness was expressly rejected by the *en banc* Fifth Circuit in *McBride*:

Appellant argues that the decision of the Supreme Court in *Atlantic Sounding Co. v. Townsend* overrules or severely undermines *Miles* so that it does not control today's case. **But instead of overruling *Miles*, the *Townsend* Court carefully distinguished its facts from *Miles* and reaffirmed that *Miles* is still good law.**

...

The *Townsend* court expressly adopted *Miles*'s reasoning by recognizing that "Congress' judgment must control the availability of remedies for wrongful-death actions brought under general maritime law." **The Court could not have been clearer in signaling its approval of *Miles* when it added: "The reasoning of *Miles* remains sound."**

McBride, 768 F.3d at 389-90 (emphasis added).

The position advocated by Plaintiff—expanding and extending the damages recoverable for unseaworthiness beyond that allowed by Congress under the Jones Act—would violate both U.S. and Washington State Supreme Court authority, violate the limits imposed by Congress, and create a conflict that does not presently exist.³ The Trial Court’s decision was correct and should be affirmed.

B. STATEMENT OF THE CASE⁴

Plaintiff asserts two liability causes of action against Defendants: negligence under the Jones Act (46 U.S.C. §30104), and unseaworthiness under general maritime law. CP 6 (Amended Complaint), ¶3.1. In connection with his claim for unseaworthiness, he alleges willful and wanton misconduct—willful and wanton failure to provide a seaworthy vessel—and claims entitlement to punitive damages. CP 7, ¶4.2.

³ “Since 1891, in an unbroken line of cases, it has been the law of this state that punitive damages are not allowed unless expressly authorized by the legislature.” *Barr v. Interbay Citizens Bank of Tampa, Fla.*, 96 Wn. 2d 692, 699-700, 635 P.2d 441 (1981) (“punitive damages are contrary to public policy”) (citing, *Maki v. Aluminum Bldg. Prods.*, 73 Wn. 2d 23, 436 P.2d 186 (1968); *Spokane Truck & Dray Co. v. Hoefler*, 2 Wash. 45, 25 P. 1072 (1891)).

⁴ Defendants dispute Plaintiff’s factual allegations and note that they lack foundation as based solely on the declaration of counsel, but will not dissect them as they are immaterial to the question of law before this Court. *See, Contreras v. Crown Zellerbach Corp.*, 88 Wn.2d 735, 742, 565 P.2d 1173 (1977) (“The question under CR 12(b)(6) is basically a legal one, and the facts are considered only as a conceptual background for the legal determination.”) (citing, *Brown v. MacPherson’s, Inc.*, 86 Wn.2d 293, 298, 545 P.2d 13 (1975)); *Joslin v. Joslin*, 45 Wn.2d 357, 363, 274 P.2d 847 (1954) (motion for judgment on the pleadings tests the sufficiency of the pleadings and presents to the court a question of law).

In addition to his two liability causes of action, Plaintiff asserts a third remedy available to a seaman, the no-fault entitlement to maintenance, cure, and unearned wages under general maritime law. CP 8, Section V. However, Plaintiff has admitted that his Amended Complaint does not state a claim for punitive damages relating to this maritime benefits claim. CP 40 (Plaintiff's Responses to Defendants' First Requests for Admission), RFA No. 6.

Neither of Plaintiff's liability theories (Jones Act negligence and unseaworthiness) allows recovery of punitive damages. Nevertheless, less than two months after the U.S. Supreme Court declined to review the Fifth Circuit's *en banc* decision in *McBride*, 768 F.3d 382, dismissing punitive damages in the unseaworthiness context, *McBride*, 135 S.Ct. 2310 (May 18, 2015), Plaintiff filed the instant lawsuit claiming punitive damages for unseaworthiness. Plaintiff thus failed to state a claim, and dismissal of Plaintiff's claim for punitive damages was warranted under CR 12(b)(6) and (c). Defendants so moved, and on February 22, 2016, the Trial Court granted Defendants' Motion for Partial Summary Judgment Dismissing Plaintiff's Claim for Punitive Damages. CP 87-91.

Plaintiff sought direct review by this Court despite the absence of a conflict among decisions of the Washington Court of Appeals or inconsistency in decisions of the Washington Supreme Court, as required

for direct review under RAP 4.2(a)(3). In fact, in Washington State, the appellate level decisions on the issue of punitive damages in the context of a Jones Act seaman's remedies and the Trial Court decision at issue here are consistent and in harmony.

C. ARGUMENT

1. Congress has Occupied the Field of Seamen's Liability Claims, Precluding Any Supplementation by the Courts

As well articulated by Amicus Curiae Kenneth G. Engerrand, who submitted amicus briefs in both *McBride v. Estis Well Service, LLC*, 768 F.3d 382 (5th Cir. 2014), *cert. den.*, 135 S.Ct. 2310, 191 L.Ed.2d 978 (2015), and *Batterton v. the Dutra Group*, (Case No. 15-56775) (9th Cir. 2016), the issue presented to the Court involves the roles of Congress and the courts in formulating maritime remedies, specifically the authority of the courts to supplement a measure of damages in an area where Congress has already occupied the field.

There can be no question that the authority to regulate and set a uniform national maritime policy lies with Congress.

Over 160 years ago, Chief Justice Taney declared that the maritime law was subject to regulation by Congress: "The power of Congress to change the mode of proceeding in this respect in its courts of admiralty, will, we suppose, hardly be questioned." [*The Genesee Chief*, 53 U.S. (12 How.) 443, 459-60 (1851)] Justice Bradley later explained: "But we must always remember that the court cannot make the law, it can only declare it. If, within its proper scope,

any change is desired in its rules, other than those of procedure, it must be made by the legislative department.” [The *Lottawanna*, 88 U.S. (21 Wall.) 558, 576-77 (1874)] Therefore, the Court summarized: “**it must now be accepted as settled doctrine that, in the consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country.**” [*So. Pac. Co. v. Jensen*, 244 U.S. 205, 215, 37 S.Ct. 524, 61 L.Ed. 1086 (1917)]

Amicus Curiae Brief of Kenneth G. Engerrand in Support of Appellee, Estis Well Services, L.L.C., for Affirmance of the Judgment of the District Court, 2014 WL 2110783, *2 (5th Cir. 2014) (Appellate Brief) (emphasis added).

The first Congress enacted a statute regulating the payment of wages to seamen, *id.* at *2-3, fn. 9, and since then “Congress has responded to decisions by the U.S. Supreme Court by enacting maritime legislation that radically restructured the principles of general maritime law enunciated by the Supreme Court.” *Id.* Congress had always legislated with “respect to the conditions of employment seamen and their relations with their employers.” *Id.* at *6 (citing, S. Rep. No. 94, 67th Cong., 1st Sess. 2 (1921)). For our purposes, the most notable example is Congress’ response to the U.S. Supreme Court’s decision in *The Osceola*, 189 U.S. 158 (1903), which ultimately resulted in the Jones Act.⁵

⁵ For additional examples of Congressional action in the area relating to the relationship between seamen and their employers see *Amicus Curiae Brief of Kenneth G. Engerrand*, 2014 WL 2110783.

In *The Osceola*, the U.S. Supreme Court denied seamen a negligence cause of action under general maritime law, although available to land-based workers such as longshoremen, holding “seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expenses of his maintenance and cure.” *Id.* at 175.

In response, Congress initially tried to give seamen a state workers’ compensation remedy, but that statute was declared unconstitutional. *Amicus Curiae Brief of Kenneth G. Engerrand*, 2014 WL 2110783, *4-5 (citing, Act of Oct. 6, 1917, ch. 97, 40 Stat. 395; *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164, 40 S.Ct. 438, 64 L.Ed. 834 (1920) (holding it was unconstitutional for Congress to authorize the states to provide a compensation remedy for maritime workers, but recognizing that “Congress could have enacted a compensation act applicable to maritime injuries”)). Congress then enacted the Jones Act.

The U.S. Supreme Court addressed the effect of the Jones Act on the preexisting general maritime claim for unseaworthiness in *Panama R. Co. v. Johnson*, 264 U.S. 375, 44 S.Ct. 391, 68 L.Ed. 748 (1924). The Court confirmed that the paramount authority to set a uniform national maritime policy lies with Congress:

After the Constitution went into effect, the substantive law

theretofore in force was not regarded as superseded or as being only the law of the several States but as having become the law of the United States—subject to power in Congress to alter qualify or supplement it as experience or changing conditions might require. When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire subject and permits of the exercise of a wide discretion.

Id. at 386.

The Court explained that the Jones Act, like FELA, modified and controlled the pre-existing common law remedy: "...it makes applicable to personal injuries suffered by seamen ... 'all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees.'" *Id.* at 389.

The Court concluded the Jones Act was to have supreme uniform application over the common law remedy "and neither is nor can be deflected therefrom by local statutes or local views of common-law rules." *Id.* at 392. "So we think the reference is to all actions brought to recover compensatory damages under the new rules as distinguished from the allowances covered by the old rules, usually consisting of wages and the expense of maintenance and cure." *Id.* at 391.

The U.S. Supreme Court further explained the effect of the Jones Act in *Lindgren v. U.S.*, 281 U.S. 38, 45, 47, 50 S.Ct. 207, 74 L.Ed. 686 (1930). "It is plain that the [Jones Act] is one of general application

intended to bring about the uniformity in the exercise of admiralty jurisdiction required by the Constitution..." *Id.* at 44; *see also, Miles*, 498 U.S. at 29 ("the Jones Act establishes a uniform system of seamen's tort law parallel to that available to employees of interstate railway carriers under FELA."). Just as Congress' enactment of FELA "took possession of the field of employers' liability to employees in interstate transportation by rail," so Congress' enactment of the Jones Act "covers the entire field of liability for injuries to seamen, it is paramount and exclusive..." *Lindgren*, 281 U.S. at 45, 47. There can be no resort to other law "to establish a measure of damages not provided by the Act." *Id.* at 47.

Thereafter, the Court has not wavered from its deference to Congress' paramount role in defining seamen's remedies: "Whatever may be this Court's special responsibility for fashioning rules in maritime affairs, we do not believe that we should now disturb the settled plan of rights and liabilities established by the Jones Act." *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 156, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964).

2. Plaintiff May Not Recover Punitive Damages

The Trial Court's decision is correct. Plaintiff asserted a claim that, as a matter of law, is not recoverable.⁶ Under substantive maritime law,

⁶ The "savings to suitors" clause of the United States' Constitution affords Plaintiff the right to sue on maritime claims at law in state court. *Endicott v. Iccicle Seafoods, Inc.*, 167 Wn.2d 873, 878-79, 224 P.3d 761 (2010) (*citing*,

specifically the liability causes of action asserted against Defendants (Jones Act negligence and unseaworthiness), damages are limited. Notably, Washington Supreme Court interpretations of federal maritime law have long been in accord.

a. Punitive Damages Are Not Available under the Jones Act

The Jones Act expressly provides seamen with the same remedy as railroad workers have against their employers. 46 U.S.C. §30104. This has been interpreted to mean that the Jones Act incorporates by reference FELA, 45 U.S.C. §51, *et seq.*, which provides railroad workers with negligence claims against their employers, *Panama R. Co.*, 264 U.S. at 395-396; this includes incorporating the case law that interprets and applies FELA. *Kernan v. Am. Dredging Co.*, 355 U.S. 426, 439, 78 S. Ct. 394, 2 L. Ed. 2d 382 (1958).

FELA has long been held to limit recovery only to “pecuniary” damages. *Miles*, 498 U.S. at 32 (*citing, Michigan Cent. R. Co. v. Vreeland*, 227 U.S. 59, 195-196 (1913)); and, therefore, punitive damages, which are non-pecuniary in nature, are not recoverable under FELA. *Wildman v. Burlington N.R. Co.*, 825 F.2d 1392, 1395 (9th Cir. 1987). This limitation

Madruga v. Superior Court, 346 U.S. 556, 560-61, 74 S. Ct. 298, 98 L. Ed. 290 (1954)). However, “[s]uch suits are governed by substantive federal maritime law.” *Id.* at 879 (*citing, Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409-10, 74 S. Ct. 202, 98 L. Ed. 143 (1953)).

on damages applies uniformly to injury and death cases. “No case under FELA has allowed punitive damages, whether for personal injury or death.” *McBride*, 768 F.3d at 388 (citing, *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1457 (6th Cir.1993)) (“It has been the unanimous judgment of the courts since before the enactment of the Jones Act that punitive damages are not recoverable under the Federal Employers’ Liability Act.”); *Kozar v. Chesapeake & O. Ry. Co.*, 449 F.2d 1238, 1240–43 (6th Cir.1971) (“there is not a single case since the enactment of FELA in 1908 in which punitive damages have been allowed.”); *Wildman*, 825 F.2d at 1395 (“[P]unitive damages are unavailable under the FELA.”)).

As explained by the U.S. Supreme Court in *Miles*, in enacting the Jones Act and incorporating FELA therein, Congress was aware of the state of incorporated FELA law, including FELA’s prohibition on punitive damages: “Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well.” *Miles*, 498 U.S. at 32; *see also*, *McBride*, 768 F.3d at 387. Indeed, as explained by the Washington State Supreme Court, the Jones Act served to extend a seaman’s right to **compensatory** damages. *Williams v. Steamship Mut. Underwriting Ass’n, Ltd.*, 45 Wn.2d 209, 215-16, 273 P.2d 803 (1954); *Peterson*, 145 Wash. at 474 (citing, *Panama R.R. Co.*,

264 U.S. 375, for the rule that the Jones Act grants seaman an alternative action to recover compensatory damages); *see also*, *Peterson*, 278 U.S. at 138 (seaman “entitled to but one indemnity by way of compensatory damages”). Accordingly, punitive damages are not available for a cause of action under the Jones Act. *E.g.*, *McBride*, 768 F.3d at 388 (“Because the Jones Act adopted FELA as the predicate for liability and damages for seamen, no cases have awarded punitive damages under the Jones Act.”) (citing, *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1347 (9th Cir.1987), *opinion modified on reh’g*, 866 F.2d 318 (9th Cir.1989) (“Punitive damages are non-pecuniary damages unavailable under the Jones Act... Punitive damages are therefore also unavailable under DOHSA.”); *Kopczynski v. The Jacqueline*, 742 F.2d 555, 561 (9th Cir.1984)), *cert. den.*, 471 U.S. 1136, 105 S. Ct. 2677, 86 L. Ed. 2d 696 (1985) (denying a claim for punitive damages under the Jones Act, and noting that prior to the enactment of the Jones Act in 1920, it had been established that only compensatory damages were available in FELA actions); *Miller*, 989 F.2d at 1457 (“Punitive damages are not therefore recoverable under the Jones Act.” (citing, *Kopczynski*, 742 F.2d at 560–61))); *see also*, *Complaint of Aleutian Enterprise Ltd.*, 777 F. Supp. 793, 794 (W.D. Wash. 1991) (holding that punitive damages are not recoverable under the Jones Act)

(citing, *Kopczynski*, 742 F.2d at 560-61). Plaintiff cannot, as a matter of law, recover punitive damages under his Jones Act-based liability claims.

This limitation on damages under the Jones Act applies equally to Plaintiff's unseaworthiness claim.

b. Punitive Damages Are Not Available for Unseaworthiness

Both federal case law and Washington State Supreme Court interpretations of federal maritime law mandate that the type of damages available to a seaman under the doctrine of unseaworthiness be the same as those available under the Jones Act. In contrast to maintenance and cure, there is a single legal wrong for negligence and unseaworthiness for which the seaman "is entitled to but one indemnity by way of compensatory damages." *Peterson*, 278 U.S. at 138. As the U.S. Supreme Court stated:

...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.**"

Id. at 138 (emphasis added); *see also*, *Miller v. Arctic Alaska Fisheries Corp.*, 133 Wn.2d 250, 265-66, 944 P.2d 1005 (1997) (*en banc*) ("unseaworthiness and a Jones Act negligence case have essentially

identical measures of damages.”); *Townsend*, 557 U.S. at 424 (citing, G. Gilmore & C. Black, *The Law of Admiralty* (2nd Ed. 1975) § 6-13 at 342 (“the seaman may have maintenance and cure and also one of the other two.”); *Szymanski v. Columbia Transp. Co.*, 154 F.3d 591, 596 (6th Cir. 1998) (“If no damages are permitted under the Jones Act, then an unseaworthiness claim cannot supply them either.”)

In *Miller*, a unanimous Washington State Supreme Court specifically noted that unseaworthiness and Jones Act negligence are alternative grounds for recovery for a single cause of action, and a seaman is **not** entitled to independent recoveries for his unseaworthiness and Jones Act negligence claims. *Id.* at 266 (citations omitted). This is consistent with the foundational cases (e.g., *Panama R. Co.*, *Peterson*, and *Lindgren*) and the uniformity principle set forth by the U.S. Supreme Court in *Miles* that those damages prohibited under the statutory umbrella of the Jones Act are not allowed under any companion cause of action under the general maritime law doctrine of unseaworthiness. *Miles*, 498 U.S. at 32-33.

The U.S. Supreme Court has consistently recognized that Jones Act and unseaworthiness claims should not be severed from each other or supplemented. For example, in *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 78 S.Ct. 1201, 2 L.Ed.2d 1272 (1958), the Court imposed a

similar time limitation for bringing an unseaworthiness claim. *Id.* at 225. The Court, distinguishing the maintenance and cure remedy, stated “if the seaman is to sue for both unseaworthiness and Jones Act negligence, he must do so in a single proceeding.” Citing *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 47 S.Ct. 600, 71 L.Ed. 1069 (1927), the Court explained that unseaworthiness and negligence are “but alternative ‘grounds’ of recovery for a single cause of action.” *McAllister*, 357 U.S. at 225. “A judgment in the seaman’s libel for unseaworthiness was held to be a complete ‘bar’ to his subsequent action for the same injuries under the Jones Act.” *Id.* Indeed, in *The Law of Admiralty*, Gilmore and Black describe the two causes of action as “Siamese twins,” explaining that “[t]he Jones Act count and the unseaworthiness count overlap completely; they derive from the same accident and look toward the same recovery.” Gilmore & Black, *The Law of Admiralty* (2nd Ed. 1975), §6-38 at 383.

As discussed above, it is clear that punitive damages are not allowed under the Jones Act; and, therefore, neither are they allowed for general maritime law liability claims. “It is plain that the [Jones Act] is one of general application intended to bring about the uniformity in the exercise of admiralty jurisdiction required by the Constitution...” *Lindgren*, 281 U.S. at 44. The Jones Act “covers the entire field of liability for injuries to seamen, it is paramount and exclusive...” *Id.*, at 45, 47.

There can be no resort to other law “to establish a measure of damages not provided by the Act.” *Id.* at 47. “If this court allowed a punitive damage claim under general [maritime] law, it would be supplanting Congress’ judgment under the Jones Act.” *La Voie v. Kualoa Ranch and Activity Club, Inc.*, 797 F. Supp. 827, 831 (D. Haw. 1992) (*quoting*, *Miles*, 111 S. Ct. at 325-26) (applying the Jones Act damages limitation and granting judgment on the pleadings dismissing punitive damages as unavailable under general maritime law unseaworthiness); *Complaint of Aleutian Enterprise, Ltd.*, 777 F. Supp. at 795-796 (dismissing punitive damages claims, and holding that supplanting Congress’ judgment by awarding punitive damages under general maritime law was not proper function of court) (*quoting*, *Miles*, 111 S. Ct. at 325–26). Indeed, as the U.S. Supreme Court stated in *Miles*:

It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence.

Miles, 498 U.S. at 32-33.⁷ “Although Congress and the courts both have a lawmaking role in maritime cases, ‘Congress has paramount power to fix

⁷ *Miles* addressed both wrongful death and survival remedies. Although often characterized as a “wrongful death” case, the U.S. Supreme Court in *Miles* actually also addressed the seaman’s surviving independent “injury” action (the survival claim), holding that the Jones Act damages limitations applied to such actions as well: “Congress has limited the survival right for seamen’s injuries

and determine the maritime law which shall prevail throughout the country.” *McBride*, 768 F.3d at 385 (citing, *So. Pac. Co. v. Jensen*, 244 U.S. at 215).

The most recent decisions on point confirm that the reasoning of *Miles* remains sound and punitive damages are not recoverable in personal injury or wrongful death cases where liability is predicated on the Jones Act or unseaworthiness. *See, McBride*, 768 F.3d at 384 and 390 (holding punitive damages are not recoverable in personal injury or wrongful death cases where liability is predicated on the Jones Act or unseaworthiness; and quoting *Townsend*, 557 U.S. at 420 (“The reasoning of *Miles* remains sound.”)); *see also, Jones v. Yellow Fin Marine Servs., LLC*, 2015 WL 3756163, at *1 (E.D. La. June 16, 2015) (“*McBride* held that punitive damages were not recoverable under either an unseaworthiness claim or the Jones Act.”); *Butler v. Ingram Barge Co.*, 2015 WL 1517438, at *3 (W.D. Ky. Apr. 1, 2015; *In re Complaint of Brennan Marine, Inc.*, 2015 WL 4992321, at *7 (D. Minn. Aug. 20, 2015).

Plaintiff’s contention that the *en banc* Fifth Circuit in *McBride* was badly split and the holding limited to wrongful death is without merit. Contrary to Plaintiff’s representation, *Appellant’s Brief*, p. 21, the

resulting from negligence. As with loss of society in wrongful death actions, this forecloses more expansive remedies in a general maritime action founded on strict liability [*i.e.*, unseaworthiness].” *Miles*, 498 U.S. at 36.

concurring opinion of Circuit Judge Haynes was not limited to the wrongful death claim. Judge Haynes expressly joined the judgment affirming the lower courts' decision, which involved both injury and death. *McBride*, 768 F.3d at 401, 404. He disagreed with the majority opinion's reasoning as to injured seamen, but recognized the historical unavailability of punitive damages in the unseaworthiness context, *Id.* at 403, and that allowing punitive damages would be an expansion of a remedy best left to Congress. *Id.* at 404 ("For these reasons, I join the judgment of the court expressed in the majority opinion, although, as to the remaining surviving seamen, not its reasoning.").

Indeed, the issue presented is not whether *Miles* addresses punitive damages or whether *Miles* should be applied narrowly or broadly. The question is simply whether the Court should, by supplementing the damages provided by Congress with an element of recovery that was not afforded by the Jones Act, "disturb the settled plan of rights and remedies established by the Jones Act," *Gillespie*, 379 U.S. at 155, in which Congress "cover[ed] the entire field of liability for injuries to seamen." *Lindgren*, 281 U.S. at 47. That issue was not new to the Court in *Miles*, and the answer is not affected by the Court's decision in *Townsend*. Plaintiff cannot, as a matter of law, recover punitive damages for unseaworthiness, the Trial Court correctly dismissed his claim for punitive

damages, and this Court should not allow the supplementation of damages not allowed by the Jones Act.

c. *Townsend* Is Consistent with this Damage Limitation

The U.S. Supreme Court's decision in *Townsend*, 557 U.S. 404, did not alter the historical unavailability of punitive damages for liability claims grounded in the Jones Act or general maritime law. *E.g.*, *Snyder v. L&M Botruc Rental, Inc.*, 2013 WL 594089, *6 (E.D. La. Feb. 15, 2013) (dismissing claims for punitive damages under negligence and unseaworthiness claims). That argument was expressly rejected by the *en banc* Fifth Circuit in *McBride*:

Appellant argues that the decision of the Supreme Court in *Atlantic Sounding Co. v. Townsend* overrules or severely undermines *Miles* so that it does not control today's case. **But instead of overruling *Miles*, the *Townsend* Court carefully distinguished its facts from *Miles* and reaffirmed that *Miles* is still good law.**

...

The *Townsend* court expressly adopted *Miles*'s reasoning by recognizing that "Congress' judgment must control the availability of remedies for wrongful-death actions brought under general maritime law." **The Court could not have been clearer in signaling its approval of *Miles* when it added: "The reasoning of *Miles* remains sound."**

McBride, 768 F.3d at 389-90 (emphasis added).

Townsend involved only the no-fault seaman's general maritime remedy of maintenance and cure, not the separate theories of Jones Act

negligence and unseaworthiness that are involved in the matter before this Court.⁸ Therefore, the U.S. Supreme Court's recognition of a punitive damage claim for a maintenance and cure cause of action in *Townsend* is inapposite to the question of the damages recoverable under Plaintiff's liability claims. As explained by the Fifth Circuit in *McBride*, and as noted by the U.S. Supreme Court in *Townsend*, 557 U.S. at 420-21, the U.S. Supreme Court could allow punitive damages in seamen's maintenance and cure claims, without running afoul of the Supreme Court precedent, precisely because maintenance and cure is not addressed by or defined by the Jones Act or any other act of Congress:

Unlike the seaman's remedy for damages based on negligence and unseaworthiness, "the Jones Act does not address maintenance and cure or its remedy." *Townsend*, 557 U.S. at 420, 129 S.Ct. 2561. Thus, in contrast to the action for damages based on unseaworthiness, in an action for maintenance and cure it is "possible to adhere to the traditional understanding of maritime actions and remedies without abridging or violating the Jones Act; unlike wrongful-death actions, this traditional understanding is not a matter to which 'Congress has spoken directly.'" *Id.* at

⁸ Indeed, Justice Thomas starts his opinion by identifying the question presented as "whether an injured seaman may recover punitive damages for his employer's willful failure to pay maintenance and cure;" then stating the Court's conclusion that "nothing in *Miles* or the Jones Act eliminates that availability." *Townsend*, 557 U.S. at 407. Justice Thomas reiterates this narrow focus throughout the opinion. *E.g., id.*, at 412 ("Nothing in maritime law undermines the applicability of this general rule **in the maintenance and cure context.**" (emphasis added)); at 419 ("***Miles* does not address either maintenance and cure** actions in general or the availability of punitive damages for **such actions.**" (emphasis added)).

420-21, 129 S.Ct. 2561 (quoting, *Miles*, 498 U.S. at 31, 111 S.Ct. 317).

McBride, 768 F.3d at 389-90; see also, *Townsend*, 557 U.S. at 421 (“The availability of punitive damages for maintenance and cure actions is entirely faithful to these ‘general principles of maritime tort law,’ and **no statute casts doubt on their availability...**”) (emphasis added).

In contrast, a determination that a seaman could recover punitive damages under the doctrine of unseaworthiness would directly violate the *Miles* uniformity mandate because the complementary Congressionally-enacted seaman’s negligence liability claim (Jones Act, incorporating FELA) bars recovery of such damages. *McBride*, 768 F.3d at 389-90; see also, *La Voie*, 797 F. Supp. at 831 (quoting, *Miles*, 111 S. Ct. at 325-26).

Indeed, contrary to Plaintiff’s contention that the U.S. Supreme Court in *Townsend* limited the holding in *Miles*, the Supreme Court in fact confirmed that “[t]he reasoning of *Miles* remains sound.” *Townsend*, 557 U.S. at 420; *McBride*, 768 F.3d at 390. The Supreme Court thus endorsed the continuing validity of the limitation on available damages that the Court in *Miles* imposed on unseaworthiness claims, and which is needed to preserve uniformity with the Jones Act. “It would have been illegitimate to create common law remedies [e.g., under unseaworthiness] that

exceeded those remedies statutorily available under the Jones Act and DOHSA.” *Townsend*, 557 U.S. at 420.⁹

Notably, there can be no distinction between injury and death cases. The Jones Act provides a damage remedy for injury and death and thus occupies the field. 46 U.S.C. §30104 (titled: “Personal injury to or death of seamen”; stating that “[l]aws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.”). Moreover, in *Townsend* the U.S. Supreme Court, when distinguishing the holding in *Miles* from the maintenance and cure context, relied on *Peterson*, 278 U.S. 130, which involved an injury, not wrongful death. *Townsend*, 557 U.S. at 423 (quoting, *Peterson*, 278 U.S. at 138, 139, as “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]’”). Thus, whether deceased, as in *Miles*, or injured, as in *Peterson*, the Supreme Court has recognized that “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

⁹ DOHSA, the Death On The High Seas Act, specifically limits damage recovery to pecuniary loss. 46 U.S.C. §30303.

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.” *Peterson*, 278 U.S. at 138.

Indeed, it is difficult to reconcile the imposition of punitive damages under a strict liability cause of action like unseaworthiness, where liability is imposed without regard to conduct or a culpable state of mind. “The duty of the shipowner to maintain a seaworthy vessel is an absolute one and exists *regardless of the shipowner’s fault*. Thus, seaworthiness has to do only with the *condition* of the vessel. Since a shipowner is strictly liable for injuries caused by unseaworthy conditions, his state of mind in allowing such conditions to exist is irrelevant in an action for unseaworthiness.” *In re Mardoc*, 768 F. Supp. 595, 597-98 (E.D. Mich. Mar. 22, 1991) (concluding that punitive damages may not be awarded in an action for unseaworthiness); *see also, Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 207-208, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996) (*citing, Miles*, 498 U.S. at 25 and *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94, 66 S.Ct. 872, 90 L.Ed. 1099 (1946)) (doctrine of unseaworthiness imposes strict liability upon the vessel owner irrespective

of fault).¹⁰ Moreover, by its strict, no-fault nature this cause of action already imposes a greater burden and thus pre-imposes the deterrent effect intended by the post-injury imposition of an exemplary or punitive award. It is “an absolute duty not satisfied by due diligence.” *Mahnich v. So. S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561 (1944).

d. Cases Allowing Punitive Damages for Unseaworthiness Did Not Predate the Jones Act

Plaintiff cites cases indicating that punitive damages, in general, were available under general maritime law before 1920. *Appellant's Brief* p. 22, fn. 25. That is immaterial. Under Plaintiff's formulation of *Townsend*, the issue is whether punitive damages were specifically available for a claim of unseaworthiness before the Jones Act (1920).¹¹ However, this is not possible, because the modern unseaworthiness cause of action was not recognized until after the passage of the Jones Act. As Judge Clement, author of a concurring opinion in *McBride*, explained in exhaustive detail, the modern form of the unseaworthiness claim, as a no-fault cause of action providing for strict liability and damages, did not take form until the mid-twentieth century, “well after the passage of the Jones

¹⁰ The fault-based cause of action is the Jones Act, which by incorporation of FELA bars punitive damages.

¹¹ This formulation of *Townsend* cannot stand as it fails to consider the preclusive effect of the involvement of Congress in establishing the national maritime policy by enacting the Jones Act.

Act.” *McBride*, 768 F.3d at 393-394 (Clement, J., concurring) (*citing*, *Miles*, 498 U.S. at 25; *Mahnich*, 321 U.S. 96). Indeed, Plaintiff appears to concede that the first time the U.S. Supreme Court expressly recognized the unseaworthiness cause in the seaman’s injury context was in 1922 in *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 42 S.Ct. 475, 66 L.Ed. 927 (1922), *see*, *Appellant’s Brief*, p. 9, two years *after* the Jones Act was passed. Notably, *Sandanger* makes no mention of punitive damages, but rather describes the damages available as “compensatory.” *Id.* at 259.

Contrary to Plaintiff’s assertion, *Appellant’s Brief*, p. 24, there is no decision pre-dating the passage of the Jones Act in 1920 that held that punitive damages are available to a seaman allegedly injured as a result of unseaworthiness. As Plaintiff acknowledges, *The Rolph*, 293 F. 269 (N.D. Cal. 1923), *aff’d*, 299 F. 52 (9th Cir. 1924), was decided *after* the passage of the Jones Act and cannot support the assertion that punitive damages was an established measure of damages for unseaworthiness before the Jones Act. Furthermore, punitive damages were neither considered nor awarded in that case. The case involved a violent mate (Hansen) who injured several crew members. Although the court found “the employment of Hansen rendered the *Rolph*, in so far as the sailors were concerned, an unseaworthy vessel,” *Id.* at 272, the court did not award or mention punitive damages:

Inasmuch as the injuries were fully set forth in the testimony by medical and other witnesses, the expectation of life and earnings of these men were laid before the court, there is no necessity for a reference to a commissioner in the usual manner.

The decree, therefore, will provide that the judgment be, for Kohilas, in the sum of \$10,000; for Kapstein in the sum of \$3,500; for Seppinen and Arnesen, in the sum of \$500.

Id. at 272.

Clearly, the award was based on medical evidence of injury and the expectations of life and earnings. This represents an award of compensatory damages. Indeed, Justice Alito, when researching cases in *Townsend*, concluded *The Rolph* was not a punitive damages case. *Townsend*, 557 U.S. at 431. If anything, this case confirms that punitive damages were not an established measure of damages in early unseaworthiness cases.

The other two cases cited by Plaintiff, *The City of Carlisle*, 39 F. 807 (D. Ore. 1889), and *The Troop*, 118 F. 769 (D. Wash. 1902), were cited by the U.S. Supreme Court in *Townsend* as maintenance and cure cases, *Townsend*, 557 U.S. at 414, and do not support the contention that punitive damages were an established measure of damages in unseaworthiness cases. Indeed, these “obscure” cases involved maltreatment and failure to provide cure. *Id.* Furthermore, a punitive element is not clear from these cases. As Justice Alito noted in his dissent,

the Court was careful to note that these cases “**appear** to contain at least some punitive element.” *Townsend*, 557 U.S. at 430 (emphasis added). The \$1,000 award in *The City of Carlisle* likely represented compensation for pain and suffering and disability. *Id.* In fact, Judge Deady described the award as consequential damages, not punitive or exemplary damages.¹² Similarly, in *The Troop*, it is far from clear that the undifferentiated award of \$4,000 did not consist entirely of compensatory damages for medical expenses, lost future income, and pain and suffering. *Id.* at 430-31.

e. Miles Abrogated Cases Allowing Punitive Damages for Unseaworthiness

Plaintiff misplaces reliance on the *Evich v. Morris*, 819 F.2d 256, 258 (9th Cir. 1987). *Evich* pre-dates *Miles* and relies on the Fifth Circuit’s decision in *In Re Merry Shipping*, 650 F.2d 622, 625 (5th Cir. 1981). *Merry Shipping* and its progeny, including *Evich*, are no longer good law. *See, Guevara v. Mar. Overseas Corp.*, 59 F.3d 1496, 1507 (5th Cir. 1995) (“After *Miles*, it is clear that *Merry Shipping* has been effectively

¹² The basis for Judge Deady’s \$1,000 damage assessment is not entirely clear. In his damage discussion, he initially addressed medical expenses, travel expenses, and wages, and emphasized “[i]his includes nothing for pain, suffering or inconvenience resulting from the injury...” *The City of Carlisle*, 39 F. at 817. He then stated that “the libelant must have damages for the gross neglect and mistreatment he received after the injury, whereby his injury and suffering were much aggravated,” and awarded \$1,000 for this suffering. *Id.* Judge Deady described this as consequential damages, not punitive damages. *Id.*

overruled.”), *abrogated on other grounds by Townsend*, 557 U.S. at 408 (as to availability of punitive damages for maintenance and cure claims); *see also, McBride*, 768 F.3d at 394-95 (Clement, J., concurring) (criticizing *Merry Shipping*). Indeed, contrary to Plaintiff’s contention that *Evich* represents a long-standing rule in the Ninth Circuit, *Appellant’s Brief*, p. 12, the very same year *Evich* was decided, the Ninth Circuit held that “[p]unitive damages are non-pecuniary damages unavailable under the Jones Act,” and questioned the availability of punitive damages in the unseaworthiness context. *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1347 Fn.1 (9th Cir.1987), *opinion modified on reh’g*, 866 F.2d 318 (9th Cir.1989). Notably, in *Bergen*, the Ninth Circuit rejected the contention that general maritime law punitive damages could supplement a Jones Act award for pain and suffering, and held “where an action under DOHSA is joined with a Jones Act action, neither statutory scheme may be supplemented by the general maritime law or by state law.” *Id.* at 1349. Moreover, as Plaintiff is careful to note, Circuit Court decisions are only persuasive authority for this Court, and cannot overrule U.S. Supreme Court precedent. *Appellant’s Brief*, p. 18, fn. 22.

Plaintiff cites three federal district court cases for the proposition that *Evich* remains good law. *Appellant’s Brief*, p. 13, fn. 14. Two of the cases, *Rowe v. Hornblower Fleet*, 2012 WL 5833541 (N.D. Cal. 2012),

and *Wagner v. Kona Blue Water Farms, LLC*, 2010 WL 3566731 (D. Haw. 2010), merely illustrate the Ninth Circuit's binding authority on lower federal courts in the Ninth Circuit. In *Rowe* and *Wagner*, the courts recognized the unavailability of punitive damages under the Jones Act, but felt bound by the Ninth Circuit's decision in *Evich* on unseaworthiness. *Rowe*, 2012 WL 5833541, *16; *Wagner*, 2010 WL 3566731, *6 ("To be clear, the court does not determine how it would decide this case as a matter of first impression—*Evich* is binding on this court unless it has been directly overruled or its holding is clearly irreconcilable with those decisions"). This Court is not bound by *Evich*, and thus not compelled toward a similar violation of the *Miles* uniformity mandate. To the contrary, this Court is bound by the Washington State interpretations mandating identical damages for unseaworthiness and Jones Act negligence. The third case cited by Plaintiff, *In re Complaint of Osage Marine Services, Inc.*, 2012 WL 709188 (E.D. Mo. 2012), failed to recognize that by enacting the Jones Act Congress enacted legislation directly implicating seamen's injury liability claims and the damages availability in that context. As discussed below, this was the distinction made in *Townsend*.

Indeed, the trend interpreting *Miles* as foreclosing punitive damages in seamen's liability claims under general maritime law

continues. *See, Snyder*, 924 F. Supp. 2d at 736 (punitive damages not recoverable for personal injury claims under Jones Act or general maritime law); *Hackensmith v. Port City Steamship Holding Co.*, 2013 WL 1451703 (E.D. Wis. Apr. 9, 2013) (punitive damages precluded as a matter of law on seaman's negligence and unseaworthiness liability claims); *Bloodsaw v. Diamond Offshore Mgmt. Co.*, 2013 WL 5339207, *1 (E.D. La. Aug. 19, 2013) (no punitive damages available for general maritime law claims other than maintenance and cure); *McBride*, 768 F.3d at 384, 390 (holding punitive damages are not recoverable in personal injury or wrongful death cases where liability is predicated on the Jones Act or unseaworthiness); *Jones v. Yellow Fin Marine Servs., LLC*, 2015 WL 3756163, *1 (E.D. La. June 16, 2015) ("*McBride* held that punitive damages were not recoverable under either an unseaworthiness claim or the Jones Act."); *Butler v. Ingram Barge Co.*, 2015 WL 1517438, *3 (W.D. Ky. Apr. 1, 2015); *In re Complaint of Brennan Marine, Inc.*, 2015 WL 4992321, *7 (D. Minn. Aug. 20, 2015).

Plaintiff also cites four pre-*Miles* "unseaworthiness" cases for the proposition that punitive damages have been historically available. *Appellant's Brief*, p. 22, fn. 25. However, as the cases do not pre-date the Jones Act, they offer no support for this contention. Moreover, there was no mention of unseaworthiness in *U.S. Steel Corp. v. Fuhrman*, 407 F.2d

1143 (6th Cir. 1969). That case involved a collision and the related reckless acts of a master. The availability of punitive damages for such acts by a master was merely assumed, but no such award allowed under the facts. *Id.* at 1148. In *In re Marine Sulphur Queen*, 460 F.2d 89 (2nd Cir. 1972), the court also assumed, without discussion, that punitive damages were available, but found no evidence to support such an award and affirmed the lower court's dismissal of said claim. *Id.* at 105. *Murray v. Hunt*, 552 F. Supp. 234 (S.D. Fla. 1982), involved a claim of both unseaworthiness and abandonment relating to the captain's incarceration in Greece when authorities found hashish in the yacht owner's cabin safe. There was no discussion of the availability of punitive damages—this was merely assumed, and the Court questioned whether the presence of a narcotic substance constituted an unseaworthy condition. *Id.* at 237. Finally, in *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), the court, relying on *Merry Shipping*, stated that punitive damages “should” be available. *Id.* at 1550. As explained above, *Merry Shipping* and its progeny are no longer good law.

f. *Baker, Hausman and Clausen Are Irrelevant*

Contrary to Plaintiff's inference, *Exxon Shipping v. Baker*, 554 U.S. 471 (2008), neither rejected *Miles* nor “made clear” that punitive damages are recoverable in a vessel unseaworthiness cases. *Appellant's*

Brief, p. 15. *Baker* concerned penalties under the Clean Water Act and did not address the Jones Act, FELA, or unseaworthiness.¹³

Hausman v. Holland Am. Line USA, 2015 WL 10684573 (W.D. Wash. July 23, 2015), is immaterial because it is a passenger case. In fact, Judge Rothstein distinguished it from *Miles* and *McBride* on that basis. *Id.* at *3.

Clausen v. Icicle Seafoods, Inc., 174 Wn.2d 70, 272 P.3d 827 (2012), involved punitive damages awarded in a maintenance and cure case. *Id.* at 80 (“[I]n this case, the seaman’s damages are for maintenance and cure.”). As a maintenance and cure case, *Clausen* tells us nothing about whether punitive damages are available in unseaworthiness claims under general maritime law. Notably, however, Judge Hollis Hill instructed the jury that while punitive damages were available for willful withholding of maintenance and cure benefits, “[t]he plaintiff may not recover punitive damages for the prosecution of the Jones Act or unseaworthiness claims.” *See*, Appendix, p. 12 (Jury Instruction No. 13, Brief in Opposition to Petition for Writ of Certiorari in *Clausen v. Icicle Seafoods*, No. 8-2-03333-3SEA) (emphasis added).

¹³ Plaintiff’s argument was also rejected by the Fifth Circuit: “*Baker* only addressed whether the [CWA] preempted punitive damages supposedly available at general maritime law—not whether punitives were available in unseaworthiness actions.” *McBride*, 768 F.3d at 392 (Clement, J., concurring).

D. CONCLUSION

The Trial Court's decision to grant Defendants' Motion for Partial Summary Judgment Dismissing Plaintiff's Claim for Punitive Damages was correct and consistent with both federal precedent and prior Washington State Supreme Court decisions on point. Congress occupied the field of seamen's liability claims with the passage of the Jones Act in 1920. The Jones Act "covers the entire field of liability for injuries to seaman, it is paramount and exclusive." *Lindgren*, 281 U.S. at 45. As explained by the U.S. Supreme Court in *Miles*, in enacting the Jones Act and incorporating FELA therein, Congress was aware of the state of incorporated FELA law, including FELA's prohibition on punitive damages: "Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well." *Miles*, 498 U.S. at 32. This damage limitation applies equally to Plaintiff's unseaworthiness claim. *See, Townsend*, 557 U.S. at 420 ("The reasoning of *Miles* remains sound."). Indeed, in contrast to the seaman's maintenance and cure remedy, the claims for unseaworthiness and Jones Act negligence are Siamese twins, with "essentially identical measures of damages." *Miller*, 133 Wn.2d at 265-66.

...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.”

Peterson, 278 U.S. at 138 (emphasis added).

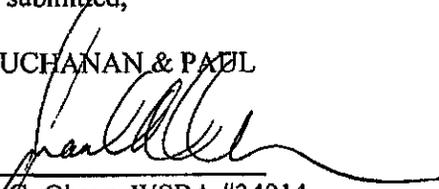
For the foregoing reasons, Defendants respectfully request that the Court affirm the decision of the Trial Court dismissing, as a matter of law, Plaintiff’s claims for punitive damages for Jones Act negligence and unseaworthiness.¹⁴

DATED this 1st day of September, 2016.

Respectfully submitted,

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¹⁴ Costs on appeal should be awarded to Defendants.

APPENDIX

Excerpts from Brief in Opposition to Petition for Writ of Certiorari in
Clausen v Icicle Seafoods, No. 8-2-0333-3 SEA
with
Appendix A: Jury Instruction No. 13

No. 11-1475

IN THE
Supreme Court of the United States

ICICLE SEAFOODS, INC.,
Petitioner,

v.

DANA CLAUSEN,
Respondent.

**On Petition for a Writ of Certiorari
to the Supreme Court of Washington**

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APPENDIX

QUESTIONS PRESENTED

1. Whether the Supreme Court of Washington erred when it read this Court's decision in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), consistently with this Court's decision in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009), to hold that there is no strict and immutable maximum ratio of 1:1 between punitive and compensatory damages in maritime cases of wrongfully denied maintenance and cure, particularly when the misconduct at issue was extremely egregious, involved significant aggravating factors, and included further attempts to evade responsibility for it through litigation misconduct?

2. Whether limited compensatory damages resulting from extreme reprehensible misconduct may be combined with other compensatory damages arising from the same nucleus of operative fact and attorney fees awarded as compensation to justify, on a ratio analysis, the size of a punitive damage award?

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Dana Clausen respectfully requests that this Court deny the petition for writ of certiorari that seeks review of the decision of the Supreme Court of Washington in this case.

In its Petition, Icicle Seafoods, Inc. seeks this Court's intervention to relieve it of the full extent of its punitive liability assessed and confirmed in the state courts of Washington as a result of its repeated and extreme misconduct in failing to provide maintenance and cure to one of its employees, its extraordinarily detestable misconduct in attempting to avoid responsibility for that failure, and its abuse of process in seeking judicial authorization based on false representations to avoid that responsibility. Each court below to hear this matter properly described Icicle's actions as constituting the misconduct at the extreme end of the reprehensibility scale. The punitive damages assessed reflected the existence of each and every one of the aggravating factors this Court has outlined to justify higher awards. There is no warrant for further reexamination of the punitive damages in this case.

COUNTERSTATEMENT OF THE CASE

Dana Clausen, age 52, worked as an engineer, responsible for repairing equipment on board Icicle Seafoods' *Bering Star* vessel, a seafood-processing barge based in Alaska. Pet. App. 3a. On February 12, 2006, Clausen injured his lower back, neck, and hand after lifting a 122-pound piece of steel being used to fabricate a plate intended to improve ventilation on the vessel. *Id.* He was sent ashore in

Alaska for preliminary medical care and later sent home to Louisiana for further care. *Id.*

The injuries left Clausen unable to work. *Id.* Icicle paid \$20 per day in maintenance to cover Clausen's living expenses, including lodging, utilities, and meals, but stopped even that payment prematurely. *Id.* Based on this limited income, Clausen was forced to live in a recreational vehicle with a leaking roof and without heat, air conditioning, running water, electricity, or toilet facilities. *Id.* Even while allocating some funds for maintenance, Icicle persistently resisted, delayed, or refused to pay for cure, the medical treatment Clausen needed. *Id.* Although Icicle resisted paying Clausen's medical bills, it nonetheless, through an agent, paid a nurse to monitor Clausen's treatment, allocating an amount for that service that surpassed its actual medical payments for Clausen. RP 402.¹ When it deigned to pay medical bills, Clausen's physicians still had to await payment for unreasonable lengths of time, sometimes as long as two years. Ex. 212; RP 669-73, 1544-45. Icicle's adjusting firm, Spartan, found Clausen's injuries likely to be career-ending and recommended, in writing, Icicle settle with him before he hired counsel, after which, it stated, "the value of this claim will increase considerably." CP 429.

¹ Respondent repeats the citations used in the lower courts. RP refers to the Washington Superior Court's Report of Proceedings; CP refers to that court's Clerks' Papers. Each is part of the record on review in the Washington appellate courts.

Clausen's doctors advised Icicle that he needed epidural spinal injections and back surgery, a diagnosis consistent with determinations by Icicle's designated medical examiner, though never disclosed to Clausen because the report was "not good for Icicle." Pet. App. 38a-39a. Estimates put the surgical costs at between \$40,000 to \$75,000. RP 1483-84, 1491-92. In fact, due to his injuries, pain, destitution, and the delays in obtaining the financial assistance due him, Clausen contemplated suicide. Pet. App. 45a.

Despite Clausen's complete cooperation and apparent need, and rather than provide legally mandated cure, Icicle brought suit against Clausen in federal court in September 2007, seeking a declaration that the company had no further responsibility for Clausen's maintenance and cure, falsely claiming he had impeded its ability to investigate his claimed injuries and proposed treatment. Pet. App. 4a. Clausen hired counsel, who brought this lawsuit in King County (Washington) Superior Court, alleging claims under the Jones Act, 46 U.S.C. § 30104, the unseaworthiness doctrine, and the common-law obligations of maintenance and cure. *Id.* Counsel also obtained dismissal of Icicle's federal lawsuit and demonstrated, through Icicle's own records, that the allegations made in federal court were entirely and knowingly fanciful. *Id.*

During the case's pendency in superior court, Icicle and its trial counsel were sanctioned for intentionally withholding key documents, including a medical report by Icicle's selected physician that supported Clausen's claims. Pet. App. 35a n.1. The trial court determined that the withholding of this material adversely affected the presentation of

Clausen's case and fined both the defendant and its counsel. Order Granting Pl.'s Mot. for Sanctions 4 (Wash. Sup. Ct. Jan. 29, 2010) (App. 13a-14a). Rather than allocate the sanction to Clausen, the judge had the fines paid into a court fund, because he determined the punitive damages awarded made up for any lost compensation it may have occasioned. *Id.*

After a two-week trial and two-and-a-half days of deliberation, the jury found Icicle liable under the Jones Act and for maintenance and cure, determining that Icicle had not only unreasonably withheld maintenance and cure but acted in a fashion that was "callous and indifferent, or willful and wanton." Pet. App. 4a. The jury rejected Clausen's unseaworthiness allegations. They found compensatory damages to total \$490,520,² representing \$453,100 for violations of the Jones Act and \$37,420 in additional, wrongfully withheld maintenance and cure. *Id.* The jury had also been instructed on punitive damages, without objection or subsequent assignment of error, *inter alia*:

If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering the

² Clausen was found 44 percent comparatively at fault for his Jones Act claim, reducing the damages awarded for negligence under the Jones Act to \$253,736. Special Verdict Form 2 (Wash. Sup. Ct. Nov. 16, 2009) (App. 3a).

amount of any punitive damages, consider the degree of reprehensibility of the defendant's conduct.

Clausen Br. App. (Court's Instruction No. 13) ¶ 4 (Wash. Ct. App. Oct. 13, 2010) (App. 1a).

Based on those instructions, the jury assessed \$1.3 million in punitive damages for Icicle's willful misconduct. Pet. App. 4a. Post-trial, the trial court awarded \$387,558.00 in attorney fees and \$40,547.57 in costs relating to the claim for maintenance and cure. Pet. App. 4a-5a.

Icicle obtained transfer for its appeal to the Washington Supreme Court, which ultimately upheld the judgment in all respects. Pet. App. 5a. First, it found no error in having the court, rather than the jury, award attorney fees and costs (an issue not before this Court). Second, in reviewing the punitive damages, it found that the award of attorney fees and costs could be combined with the small amount awarded for maintenance and cure to yield a less than 3:1 ratio between punitive and compensatory damages. Pet. App. 21a. It also rejected Icicle's argument this Court in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), had mandated a 1:1 cap on punitive damages in all maritime cases. Pet. App. 17a-19a. The Washington Supreme Court found as well that the amount actually awarded was not excessive. *Id.*

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2010) 10a**

APPENDIX A:

Court's Jury Instruction Number 13

You may award punitive damages only if you find that the defendant acted with willful and wanton disregard its obligation to provide maintenance and cure.

However, you should not award punitive damages unless the shipowner acted willfully in disregard of the seaman's claim for maintenance and cure. The plaintiff may not recover punitive damages for the prosecution of the Jones Act or unseaworthiness claims. Thus, you may award only those punitive damages plaintiff incurred in pursuing the maintenance and cure claim and only if you find that the shipowner acted willfully in failing to pay maintenance and cure.

The purposes of punitive damages are to punish a defendant and to deter similar acts in the future. Punitive damages may not be awarded to compensate a plaintiff. The plaintiff has the burden of proving by a preponderance of the evidence that punitive damages should be awarded.

If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering the amount of any punitive damages, consider the degree of reprehensibility of the defendant's conduct.

RP 1685-86.

CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused to be served via email, a copy of the Response to Motion for Discretionary Review in Supreme Court Cause No. 92913-1 on the following counsel of record:

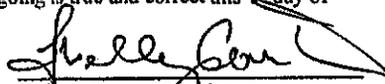
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct this 1st day of September, 2016.



Shelley Courter, Legal Assistant
Signed at Seattle, Washington

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Received 9/1/16.

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Subject: Tabingo / American Triumph et al; No. 92913-1 - Attached Brief of Respondents with Appendix

Dear Court Clerk –

Attached please find the **Brief of Respondents with Appendix** in the *Tabingo v American Triumph LLC and American Seafoods Company, LLC*, Case No. 92913-1 matter before the Court.

This filing is presented by:

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Please do not hesitate to contact us should you have any difficulty accessing the document.

Thank you,

Shelley

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