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No. 66812-9-I and 6813-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

REPRESENTACIONES DISTICUCIONES Y DISTICUIONES EVYA,
S.V. DE C.V., a Mexican Corporation; and INSTALACIONES
ELETROMECAINAIS, CIVILES Y ELETROMECAINAIS, S.A. DE
C.V, a Mexican Corporation,

Respondents/ Cross-Appellants,

v.

GLOBAL EXPLORER, LLC, a Washington LLC; GLOBAL
ENTERPRISES, LLC, a Washington LLC; MARITIME
MANAGEMENT SERVICES, INC.,

Appellants/Cross-Respondents,

And

FRANK AND JANE DOE STEWART; and STEWART INVESTMENT
COMPANY,

Cross-Respondents.

Hon. Laura Gene Middaugh

CROSS-APPELLANTS' REPLY BRIEF

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A. Introduction And Summary

Mischaracterization of the clear record at trial pervade Global and Stewart's response brief. They ignore the Court's factual findings and all the evidentiary support for them. Most notably, they ignore the clear findings that Mr. Steuart was simply not believable. He simply made up whatever excuses or actions he could in hopes of extorting funds from EVYA and taking away their charter so he could make more money elsewhere. At trial he paid the price for his actions. The trial court found Mr. Steuart's actions so devious as to make a finding that if punitive damages were available against he and his company, they certainly would be awarded. Each finding of fact made by the Court is supported by documentary evidence or testimony, and those facts led to a finding that Steuart and his company willfully and maliciously breached the charter contract and converted property in an attempt to harm EVYA and further line his own pockets with higher charter fees after Hurricane Katrina. After the testimony and after reviewing all the evidence the Court awarded lost profits to EVYA. The Court also awarded a recovery of an expense paid to Global, that would not have been paid but for the breach. The court, however, left out that amount in the final judgment, presumably by oversight, as it was not a business expense that would

have been wrapped into the lost profit claim, which would have been the same, with or without considering the overpayment made to Global for funds not due and owing.

It is also quite obvious that the Court found Frank Steuart to be an un-credible witness. This Court should not second guess such credibility findings, as the trial court heard six weeks of testimony, weighed Steuart's testimony and determined that his testimony could not be believed and in fact rose to the level of an award of punitive damages. The testimony of several EVYA witnesses provided ample evidence to support the fact that Steuart acted willfully and maliciously in breaching the contract, and that his actions were essentially fraudulent. Consequently, an award of punitive damages is justified and should be awarded.

B. The Court Erred In Not Including Payments Made For \$371,000 and \$292,368 In The Final Judgment

There is no dispute that EVYA paid Global an extra \$371,000 for money that was not due and owing, because Global had breached the charter agreement before the money would have become due and owing. Global cites to Conclusion of law 15 and Finding of Fact 63, for the proposition that the Court somehow declined to award the damages EVYA is requesting. This is simply not true. The \$371,000 was for

charter hire payments from May 12, 2006 to May 26, 2006, and the diving operations were suspended and the charter breached by Global on May 13, 2006. The charter hire was paid prospectively.

As the Court found in FF 65, the plaintiffs paid the full amount of invoice #161 which was \$419,006.56, but only \$46,000 was incurred prior to the breach. The other amount was not owed and was not part of the lost profits off-set. As the Court found in FF 40, invoices were billed for advance payment of the charter fee and for past expenses and costs incurred. Invoice 161 specifically covered rental of the ship for the period of May 12, 2006 through May 26, 2006 as well as payment for supplies and services for April and March. The payment was stated to be due on May 16, 2006, which was after the suspension of the diving operations. EVYA ultimately paid invoice #161 on June 5, 2006, even though under the contract they were allowed to withhold payment if there was a dispute. They did this in good faith, despite the fact that Stuart and Global were actively searching for ways to defraud EVYA and weasel out of the contract.

The lost profit claim was the same without taking into consideration the \$371,000 payment, which should revert back to EVYA. The Court recognized this in Conclusion of Law 13, noting that plaintiffs

overpaid the charter hire by \$371,000. See CL 13. The Court simply failed to include it in the final judgment award. It was a mere oversight as recovery of that amount is necessary to put EVYA in as good a position as it would have been but for the breach.

Additionally, trial court found but did not award the damages specified at CL 15, namely \$2,250,000 for unpaid Iecesa invoices and \$292,368.00 for commercial claims. Evya understands the Court's reasoning on the Iecesa invoices as those would have been paid by Evya during its charter contract from funds Evya received from PEMEX had it continued the contract. While this logic may apply to the Iecesa invoices, it would not apply to the commercial claims, \$292,368.00. The commercial claims were separate damages that Evya suffered as a result of the charter being breached. These would not have been incurred had Global and Steuart honored the charter contract and not set out to breach it in whatever manner they could in order to abscond with the vessel in hopes of retaining higher charter rates. But for the breach, Evya would have earned its lost profit and it would not have had to pay the commercial claims. Therefore this should have been added to, not included in, the lost profit award.

The rule of contract damages is fairly straightforward.

“Contract damages are ordinarily based on the injured party's expectation interest and are intended to give that party the benefit of the bargain by awarding him or her a sum of money that will, to the extent possible, put the injured party in as good a position as that party would have been in had the contract been performed”

Mason v. Mortgage America, Inc., 114 Wn.2d 842, 849 (1990).

Here, the error occurred where the trial court properly found that Evya suffered two specific damages, but then failed to transfer them over to the final judgment. The first, the invoice 161 refund, appears to simply have been omitted by oversight as there is no justifiable reason it would not be awarded. The second, the commercial claims damage, appears to have been incorrectly subsumed inside the lost profit award, even though the commercial claims flowed from claims made against Evya that they would not have had to pay had the contract continued.

C. The Court Should Award Punitive Damages

After reviewing all the evidence and the testimony the Trial Court held:

If punitive damages were allowed, the court would find that the defendants deliberate and planned conduct to terminate the contract in order to obtain a higher charter rate and to leave the area where plaintiffs could have recovered their property to warrant an award of punitive damages.

The punitive damage finding by the trial court was based not only the intentional breach of the contract but also the tortuous conduct of removing the vessel taking plaintiffs property with it. The trial court clearly found that the conduct of the defendants was “of enormity where a defendant’s conduct is outrageous, owing to gross negligence, willful, wanted and reckless indifference for the rights of others, or behavior more deplorable.” See *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008). Steuart’s conduct was found to be tantamount to a fraud upon the plaintiffs. He lied about the lack of an insurance policy, and used that law to (1) extort a payment of funds from the plaintiffs that they didn’t need to pay under the Contract; (2) remove plaintiffs off their PEMEX contract; (3) take away the vessel the plaintiffs needed to complete the contract; and (4) kept all of their property and belongings, and lying to them about the need to move the vessel from the Mexican port. Not only did his conduct and the conduct of his company breach the contract, he committed various torts in the process of intentionally breaching the contract.

Defendant’s argument that the actions of the defendants do not rise to the level necessary for punitive damages to be awarded is simply wrong. Those facts have already been found. Defendants seek to

reargue them and hope that this Court ignores the findings of willful misconduct. Mr. Steuart's conduct was outrageous and caused tremendous damages to a great number of people. He wanted out of the charter and/or to extort a higher charter rate, such that for him the ends justified the means. The Court reviewed those means, and his arguments otherwise, and determined that he simply was not believable. It's not for the Court to reanalyze that for purposes of a punitive damages determination. The sole issue regarding punitive damages is not whether they should be awarded, but whether they can be awarded under maritime law. Evya believes they can.

Federal courts sitting in admiralty have the power, at least in some circumstances, to award common-law punitive damages to supplement statutory remedies. *Atlantic Sounding Co., Inc. v. Townsend*, 129 S. Ct. 2561, 2567, 174 L. Ed. 2d 382 (2009); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 128 S. Ct. 2605, 2619-21, 171 L. Ed. 2d 570 (2008). The first award of punitive damages in an admiralty case occurred in 1859. *Gallagher v. The Yankee*, 9 F. Cas. 1091 (N.D. Ca. 1958). Since then there has been much debate over whether punitive damages are available in admiralty. *Vaughan v. Atkinson*, 369 U.S. 527 (1962) has been interpreted by Courts and secondary sources as authority

for an award of the punitive damages under the general maritime law. As has *The Amiable Nancy*, 16 U.S. (3 Wheat) 564 (1818), wherein the Court stated “if this suit were against the original wrongdoers, it might be proper to go yet farther, and visit upon them in the shape of exemplary damages the proper punishment . . .”

Now, the law of punitive damages under the general maritime law tends to be that they are available, unless a congressional statutory scheme affirmatively precludes them, such as the case with DOHSA or Jones Act claims. However, where there is no congressional statutory scheme precluding them, they are available. *See e.g., Quinn v. St. Charles Gaming Com.*, 2002 AMC 1566 (La.App 2002):

There is no relevant congressional tort recovery regime pertaining to the wrongful death of a nonseafarer within state territorial limits. There fore the limiting principle of *Miles* do not apply. Accordingly until Congress addresses this issue, we find that [the plaintiffs] are entitled to seek punitive damages under general maritime law.

In short, the general rule is that unless there is a statutory scheme in place that precludes an award of punitive damages, they are awardable under the general maritime law.

Defendants further allege that punitive damages cannot be awarded under the maritime law for breach of contract. This is not the

case. The general maritime law will allow for punitive damages for breach of contract, if the conduct constituting the breach is also a tort for which punitive damages are appropriate. In *Thyssen, Inc., v. S.S. Fortune Star*, 777 F.2d 57 (2nd Cir. 1985), the late Judge Friendly considered the extent to which courts have power to award punitive damages under general maritime law. He explained that the power to impose punitive damages in a maritime tort action was well established, but that authority to award punitive damages in a maritime breach of contract action was uncertain. “Accordingly, with the thoroughness and scholarship that typified his opinions, Judge Friendly set out to demarcate the limits of a court's power to award punitive damages for breach of a maritime contract. He concluded that, as in breach of contract actions generally, punitive damages are available for breach of a maritime contract only where the breach constitutes an independent, willful tort in addition to being a breach of contract. *Id.* at 63-64. Judge Friendly went on to hold that a “mere deviation” from a contract of carriage does not amount to a tort for which punitive damages can be imposed. *Id.* at 65.” *Armada Supply v. S/T Agios Nikolas*, 639 F. Supp. 1161, 1162 (S.D.N.Y. 1986). In this case, we have much more than a mere deviation from a contract, we have willful and wanton fraudulent conduct designed to extort funds,

and abscond with them and property in order to obtain a higher charter rate by profiteering off one of the worst natural disasters and human tragedies in recent memory.

In fact, Courts are increasingly becoming “aware of a recent trend to permit punitive damages in the contract setting in a narrow range of circumstances. See 5 A. Corbin, Corbin on Contracts § 1077 (1964 and Supp. 1992). This practice has been deemed appropriate when the breaching party acted with "the state of mind which accompanies an intentional tort." *id.* (Supp.) at 179. *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270, 1284 (1st Cir. Me. 1993).

It is hard to imagine a breach of contract case where the tortious conduct in committing the breaches is more prevalent than in this particular case. Here Stuart took a methodical and calculated approach to defraud Evya, convert their funds, take their boat and equipment and then abscond with the contract, the boat, EVYA’s money, and its property. Stuart has absolutely no regard for his legal duty or the damage and destruction his greedy fraud caused Evya, and its workers and their families when he shot down the project so he could profiteer from a hurricane.

D. Conclusion

Based upon the foregoing, EVYA that it be awarded the funds omitted from the final judgment for commercial claims and invoice 161, and that the case be remanded to the trial court solely for a determination of a punitive damage award.

DATED this 31st day of December 2011.

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