

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Aug 31, 2011, 3:50 pm  
BY RONALD R. CARPENTER  
CLERK

---

RECEIVED BY E-MAIL

No. 85200-6

---

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

---

DANA CLAUSEN,

Respondent,

v.

ICICLE SEAFOODS, INC.,

Appellant.

---

APPELLANT ICICLE SEAFOODS, INC.'S BRIEF IN ANSWER TO  
BRIEF OF AMICUS CURIAE  
INLANDBOATMEN'S UNION OF THE PACIFIC

---

Michael A. Barcott, WSBA #13317  
Megan E. Blomquist, WSBA #32934  
HOLMES WEDDLE & BARCOTT, P.C.  
999 Third Avenue, Suite 2600  
Seattle, Washington 98104  
(206) 292-8008

Attorneys for Appellant

ORIGINAL

**FILED**  
AUG 31 2011  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON  
*[Signature]*

## TABLE OF CONTENTS

	<u>Page</u>
ARGUMENT IN ANSWER TO ISSUES RAISED BY AMICUS CURIAE.....	1
A. Judge Hill’s Attorney Fee Award Was Contrary to Both Substantive Federal Maritime Law and Washington State Procedural Law Requiring that Attorney Fees Recoverable as an Element of Damages Be Determined by the Jury.....	1
1. The IBU Misconstrues Federal Maritime Cases Wherein the Court Awarded Attorney Fees.....	1
2. <i>Vaughan</i> Attorney Fees Are an Element of Damages. ....	3
3. Washington Rule 54(d) Requires that Attorney Fees Be Determined by the Jury When, As Here, They Are an Element of Damages. ....	6
B. The Ratio Established by the U.S. Supreme Court in <i>Exxon</i> Limits Punitive Damage Awards in Maintenance and Cure Cases.....	13
1. <i>Townsend</i> Leaves Open the Question of Whether the <i>Exxon</i> Ratio Applies in Maintenance and Cure Cases. ....	14
2. The Court’s Rationale for Imposing a 1:1 Ratio in <i>Exxon</i> Applies with Equal Force in the Context of Maintenance and Cure. ....	15
3. No Departure from the <i>Exxon</i> Ratio Is Warranted under the Facts of the Present Case. ....	18
4. <i>Vaughan</i> Attorney Fees Are Punitive, Not Compensatory. ....	19

## TABLE OF AUTHORITIES

	<u>Page</u>
<b>Cases</b>	
<u>Atlantic Sounding Co. v. Townsend</u> , ___ U.S. ___, 129 S. Ct. 2561, 174 L. Ed. 2d 382 (2009) .....	passim
<u>Bally v. Ocean Transp. Svcs.</u> , 136 Wn. App. 1052 (unpublished opinion) .....	12
<u>Brown v. Safeway Stores, Inc.</u> , 94 Wn.2d 359, 617 P.2d 704 (1980) .....	6
<u>Bunch v. King County Dept. of Youth Services</u> , 155 Wn.2d 165 (2005) .....	11, 12
<u>Capital Asset Research Corp. v. Finnegan</u> , 216 F.3d 1268 (11th Cir. 2000) .....	9
<u>Carolina Power &amp; Light Co. v. Dynegy Mktg. &amp; Trade</u> , 415 F.3d 354 (4th Cir. 2005) .....	9, 10
<u>Corey v. Pierce County</u> , 154 Wn. App. 752 (Wash. Ct. App. 2010) .....	12
<u>Cortes v. Baltimore Insular Line, Inc.</u> , 287 U.S. 367, 53 S. Ct. 173, 77 L. Ed. 368 (1932) .....	18
<u>Exxon Shipping Co. v. Baker</u> , 554 U.S. 471, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008) .....	passim
<u>Fleishmann Distilling Corp. v. Maier Brewing Co.</u> , 386 U.S. 714, 87 S. Ct. 1404, 18 L. Ed. 2d 475 (1967) .....	20
<u>Glynn v. Roy Al Boat Management Corp.</u> , 57 F.3d 1495 (9th Cir. 1995) .....	passim
<u>Hairline Creations, Inc. v. Kefalas</u> , 664 F.2d 652 (7th Cir. 1981) .....	8, 9, 10

<u>In re Rodriguez</u> , 159 Wn. App. 1047 (2011) .....	12
<u>Kopacz v. Delaware River and Bay Authority</u> , 248 Fed. Appx. 319 (3d Cir. 2007).....	3
<u>Linton v. Great Lakes Dredge and Dock Co.</u> , 964 F.2d 1480 (5th Cir. 1992).....	6
<u>McGreevy v. Oregon Mutual Ins. Co.</u> , 128 Wn.2d 26, 904 P.2d 731 (1995).....	13
<u>Neely v. Club Med Mgmt. Svcs., Inc.</u> , 63 F.3d 166 (3d Cir. 1995) .....	3
<u>Olympic S.S. Co. v. Centennial Ins. Co.</u> , 117 Wn.2d 37, 811 P.2d 673 (1991).....	13
<u>Paul v. All Alaskan Seafoods</u> , 106 Wn. App. 406 (Wash. Ct. App. 2001) .....	12
<u>Pride Hyundai, Inc. v. Chrysler Fin. Co., LLC</u> , 355 F. Supp. 2d 600 (D.R.I. 2005).....	8, 10
<u>Taylor v. City of Ft. Lauderdale</u> , 810 F.2d 1551 (11th Cir. 1987) .....	9
<u>United States v. Martinson</u> , 809 F.2d 1364 (9th Cir. 1987).....	6
<u>Vaughan v. Atkinson</u> , 369 U.S. 527, 82 S. Ct. 997, 8 L. Ed. 2d 88 (1962).....	passim
<u>Williams v. Kingston Shipping Co.</u> , 925 F.2d 721 (4th Cir. 1991) .....	13
<b>Statutes</b>	
RCW § 26.18.160 .....	11
RCW § 49.12.150 .....	13
RCW § 49.48.030 .....	13

RCW § 49.52.070 .....	12
RCW § 49.60.030(2).....	11
RCW § 60.76.040 .....	13

**Other Authorities**

DeGravelles, John W., Supreme Court Charts Course for Maritime Punitive Damages, 22 U.S.F. Mar. L. J. 123 (2010).....	15
Robertson, David W., Court-Awarded Attorneys' Fees in Maritime Cases: The "American Rule" in Admiralty, 27 J. Mar. L. & Com. 507 (1996) .....	4, 20
Robertson, David W., Punitive Damages in U.S. Maritime Law: Miles, Baker & Townsend, 70 La. L. Rev. 463 (2010).....	15

**Rules**

Federal Rules of Civil Procedure 54.....	10
Federal Rules of Civil Procedure 54(d)(2).....	7, 8, 10, 12
Federal Rules of Civil Procedure 59(e) .....	12
General Rule 14.1(a).....	12

**ARGUMENT IN ANSWER TO ISSUES RAISED  
BY AMICUS CURIAE**

**A. Judge Hill's Attorney Fee Award Was Contrary to Both Substantive Federal Maritime Law and Washington State Procedural Law Requiring that Attorney Fees Recoverable as an Element of Damages Be Determined by the Jury.**

**1. The IBU Misconstrues Federal Maritime Cases Wherein the Court Awarded Attorney Fees.**

IBU opens its brief by arguing that the "standard and correct" procedure for awarding attorney fees in a maintenance and cure case is for the jury to make a finding as to blameworthiness and for the judge to then determine the amount of the fee, relying on Glynn v. Roy Al Boat Management Corp., 57 F.3d 1495 (9th Cir. 1995), abrogated on other grounds by Atlantic Sounding Co. v. Townsend, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2561, 174 L. Ed. 2d 382 (2009). Icicle agrees that Glynn provides guidance to this Court but that a reading of the **entire** decision is necessary to understand that guidance. Amicus fails to mention that in Glynn, the parties stipulated to allow the trial judge to determine the amount of attorney fees for the defendant's wrongful withholding of maintenance and cure. 57 F.3d at 1505 (stating that parties could have stipulated to have judge determine amount of prejudgment interest, "as the parties did with respect to the amount of attorney's fees"). Thus, Glynn is merely an example of parties agreeing to allow the trial judge to determine

the amount of fees in a maintenance and cure case in lieu of submitting the issue to the jury, as *Icicle* readily acknowledged in its opening brief they are free to do.<sup>1</sup> This glaring oversight in IBU's reading of Glynn completely undermines its argument. The clear implication of this discussion is that absent such a stipulation, attorney fees must go to the jury.

Moreover, the Glynn court's handling of the issue of prejudgment interest provides further support for the proposition that attorney fees must be submitted to the jury.<sup>2</sup> The plaintiff seaman in Glynn failed to present any evidence to the jury at trial regarding prejudgment interest, and the court refused to award it. 57 F.3d at 1505. The Ninth Circuit affirmed the refusal, citing authority from all four circuits that had considered the issue holding that prejudgment interest, as an element of damages, must be submitted to the jury. *Id.* The same is true of attorney fees, such as in this

---

<sup>1</sup> Such a stipulation is, in fact, the common way of handling fee awards in the maintenance and cure context, which is why the Comment to Ninth Circuit Pattern Jury Instruction 7.12 contemplates -- but does not compel - such a procedure.

<sup>2</sup> Interestingly, the Glynn case also supports *Icicle*'s position regarding the proper apportionment of attorney fees. Just as *Clausen* did, *Glynn* sought fees for the prosecution of his entire action, arguing that because the maintenance and cure claims were inextricably intertwined with his Jones Act and unseaworthiness claims, the fees attributable to each cause of action could not be apportioned. The trial judge rejected this argument, noting that the maintenance and cure claim constituted "only a small portion of the trial," and did not require extraordinary or specialized skills, given the "simplicity of the issues involved." 57 F.3d at 1501.

case.

The other federal maritime cases the IBU relies on in favor of its argument for court-awarded attorney fees are likewise inapposite. In both Kopacz v. Delaware River and Bay Authority, 248 Fed. Appx. 319 (3d Cir. 2007) and Neely v. Club Med Mgmt. Svcs., Inc., 63 F.3d 166 (3d Cir. 1995), there was no finding of unreasonable withholding of maintenance and cure, and thus no attorney fee award. While both cases indicate that it was the trial court, rather than the jury, that made the attorney fee determination, there is no indication in either case as to whether the parties had stipulated to such a procedure, as in Glynn, and the judge vs. jury issue was not discussed at all.<sup>3</sup>

**2. Vaughan<sup>4</sup> Attorney Fees Are an Element of Damages.**

The IBU's argument that attorney fees need not be submitted to the jury is predicated, just as Clausen's argument was, on the characterization of Vaughan fees as equitable in nature. As Icicle demonstrated in its earlier briefing, the language of the Vaughan decision makes clear that attorney fees awarded in a maintenance and cure action are not equitable,

---

<sup>3</sup> The other cases cited by the IBU in support of its baseless assertion that court-awarded attorney fees are the "uniform circuit-wide procedure" were also cited by Clausen, and Icicle directs the Court to its analysis of those cases in both its opening and reply briefs.

<sup>4</sup> Vaughan v. Atkinson, 369 U.S. 527, 82 S. Ct. 997, 8 L. Ed. 2d 88 (1962).

but are instead an element of damages. 369 U.S. at 531 (“It is difficult to imagine a clearer case of **damages** suffered for failure to pay maintenance and cure than this one.” (emphasis added)); Id. at 530 (discussing fee awards as a form of equitable relief and admiralty court’s authority to award such relief, but stating, “We do not have here that case. Nor do we have the usual problem of what constitutes ‘costs’ in the conventional sense. Our question concerns **damages.**” (citation omitted) (emphasis added)).

Despite his arguments on behalf of the IBU in this case, Professor Robertson has himself acknowledged that attorney fees awarded pursuant to Vaughan in maintenance and cure cases are a form of damages. In his article entitled “Court-Awarded Attorneys’ Fees in Maritime Cases: The ‘American Rule’ in Admiralty,” Professor Robertson goes to great pains to properly categorize maritime attorney fee awards in what he deems an exercise in “conceptual housekeeping.” 27 J. Mar. L. & Com. 507, 508-09 (1996). Early in the article, he draws an important distinction between attorney fees awarded as litigation costs and attorney fees awarded as an element of damages. Id. at 515. In a series of later sections discussing Vaughan at length, Professor Robertson notes that subsequent Supreme Court cases have characterized Vaughan fees as punishment awarded for

“bad faith” in the conduct of litigation. Id. at 554. However, he goes on to distinguish between two types of bad faith that may give rise to an attorney fee award: (1) bad faith during the course of litigation or in bringing an action (what he terms “litigation misconduct” and “obduracy,” respectively), and (2) bad faith in the acts giving rise to the underlying substantive claim (which he calls “transactional bad faith”). It is this type of transactional bad faith that is at issue in maintenance and cure cases, where attorney’s fees are awarded based upon the employer’s conduct in denying or withholding a seaman’s maintenance and cure. Professor Robertson concludes, “To award attorneys’ fees based on transactional bad faith is to award **substantive damages.**” Id. at 557 (emphasis added).

While Professor Robertson’s own characterization of Vaughan fees as damages is significant, of even greater significance is the U.S. Supreme Court’s recent characterization of Vaughan attorney fees as a form of damages in the Townsend decision. 129 S. Ct. at 2571 (citing Vaughan in support of proposition that “punitive damages” have been available in maintenance and cure actions even after passage of the Jones Act). While some controversy may remain as to whether Vaughan attorney fees should be considered punitive or compensatory damages (a topic addressed in the parties’ prior briefing and herein, infra, Section B.4), there can be no

doubt remaining that they are indeed a form of damages, and as such, must be decided by the jury.

Finally, as Icicle has noted in its earlier briefing, even if the Vaughan court's award of attorney fees could be characterized as an exercise of its equitable power sitting in admiralty, such a view is unavailing in the present case because a state court may not sit in admiralty. Linton v. Great Lakes Dredge and Dock Co., 964 F.2d 1480, 1487 (5th Cir. 1992); Endicott v. Icicle Seafoods, Inc., 167 Wn.2d 873, 887, 224 P.3d 761 (2010). As such, the IBU's reliance on Brown v. Safeway Stores, Inc., 94 Wn.2d 359, 367, 617 P.2d 704 (1980) and United States v. Martinson, 809 F.2d 1364, 1367-68 (9th Cir. 1987) is misplaced because Judge Hill was not sitting in equity in this case, but was instead hearing the case at law pursuant to the saving to suitors clause, and therefore could not have made an equitable award of attorney fees.

Additionally, the Ninth Circuit's handling of prejudgment interest in the Glynn decision demonstrates that it is not proper to parse such issues to the court; rather, they must go to the jury.

**3. Washington Rule 54(d) Requires that Attorney Fees Be Determined by the Jury When, As Here, They Are an Element of Damages.**

The IBU provides its own analysis of Washington Civil Rule

54(d)(2) to support its notion that post-trial motion practice is the appropriate method to seek attorney fees in this case. A review of the cases relied upon by the IBU and other cases reveals this to be an over-generalization, and reinforces Icicle's position that Rule 54(d)(2) requires that attorney fees in maintenance and cure cases be submitted to the jury.

At the outset of its Rule 54 argument, the IBU looks to the language of the rule and seemingly attempts to draw a distinction between "damages to be proved at trial" and "damages." The IBU does not dispute that in certain instances attorney fees may be an element of damages. However, it appears to suggest that in such instances, Rule 54(d)(2) would only require the issue of attorney fees to be submitted to the jury if the source of substantive law specified that the fees were an element of damages "to be proved at trial," as opposed to simply an element of damages. Amicus Brief at pp. 3-7. The IBU cites no authority to support this supposed difference, and Icicle is unaware of any authority or legal principle that contemplates a type of damages that are not to be proven at trial. Indeed, it is a fundamental principle of the legal system that plaintiffs are required to prove their alleged damages at trial.

A careful examination of the other types of cases cited by amicus in which attorney fees were awarded by the court on a post-trial motion

reveals that they are all readily distinguishable from maintenance and cure cases. Not all requests for attorney fees are Rule 54(d)(2) motions.<sup>5</sup> “[T]he rules of procedure fail to designate a single niche for attorney’s fees motions.” Hairline Creations, Inc. v. Kefalas, 664 F.2d 652, 656 (7th Cir. 1981). “Attorney’s fees can be either an element of damages to be proven at trial or a collateral matter to be determined following adjudication of the relevant claims.” Pride Hyundai, Inc. v. Chrysler Fin. Co., LLC, 355 F. Supp. 2d 600, 602 (D.R.I. 2005). When collateral, a CR 54(d)(2) post-trial motion is the proper method to recover attorney fees. Id. But when substantive, attorney fees are included among the other damages to be awarded by the trier of fact, as also contemplated by CR 54(d)(2). Id.

Whether attorney fees are collateral or substantive turns upon whether the underlying facts of the case trigger the award. If the facts of the case do not affect the attorney fee award, the attorney fees are considered collateral. If the facts of the case do affect the attorney fee award, the attorney fees are considered substantive. This distinction is best outlined by considering cases of each type.

---

<sup>5</sup> Appellant notes that the IBU does not disagree that jurisprudence of Fed. R. Civ. P. 54(d)(2) is instructive on the meaning of CR 54(d)(2).

The most prevalent form of collateral attorney fees are those awarded to the prevailing party. "Prevailing party" awards are made to litigants who are successful on a central issue in the case. Taylor v. City of Ft. Lauderdale, 810 F.2d 1551, 1555-56 (11th Cir. 1987). All that must occur in order to trigger the award of such fees is "the successful litigation of a claim." Carolina Power & Light Co. v. Dynegy Mktg. & Trade, 415 F.3d 354, 359 (4th Cir. 2005). The award has nothing to do with the facts of the case and is proper for disposition by the court on post-trial motion under CR 54(d)(2). See, e.g., Capital Asset Research Corp. v. Finnegan, 216 F.3d 1268, 1272 (11th Cir. 2000).

In contrast, substantive awards are triggered by facts supporting the claim, such as a breach of contract or trademark violation. See Carolina Power, 415 F.3d at 359 (noting that breach of contract triggered attorney's fees); Kefalas, 664 F.2d at 658 (noting that attorney fees were triggered by finding that underlying trademark violation was "exceptional"). In these instances, the award of attorney fees will depend on the facts surrounding the underlying claim, as opposed to being based merely whether the party prevailed.<sup>6</sup> In cases involving substantive

---

<sup>6</sup> Indeed, when attorney fees constitute a substantive award, the party may be the prevailing party and still not be entitled to the attorney's fees (such as where there is

awards, the post-trial motion procedure contemplated by Rule 54(d)(2) is not the proper mechanism for awarding fees. See, e.g., Carolina Power, 415 F.3d at 359; Pride Hyundai, 355 F. Supp. 2d at 603; Kefalas, 664 F.2d at 658. Rather, the party must seek the attorney fees at trial because they are an element of damages. Pride Hyundai, 355 F. Supp. 2d at 603. If substantive attorney fees are not sought at trial, attorney fees can be completely denied, as was the case with prejudgment interest in Glynn. Id.

The 1993 notes of the Advisory Committee to Fed. R. Civ. P. 54 make this clear:

This new paragraph establishes a procedure for presenting claims for attorneys' fees . . . . As noted in subparagraph (A), it does not, however, apply to fees recoverable as an element of damages, as when sought under the terms of a contract; such damages typically are to be claimed in a pleading and may involve issues to be resolved by a jury.

The rationale for requiring substantive attorney fees to be determined at trial (and not by post-trial motion) is that the question whether to award the fees is “inseparable” from the issues of the case. Kefalas, 664 F.2d at 659.

---

conduct to support the underlying claim, but the conduct was not “exceptional”). See Pride Hyundai, 355 F. Supp. 2d at 605.

In a maintenance and cure case, the attorney fee award is substantive because it is based on the underlying facts surrounding the maintenance and cure claim.<sup>7</sup> Attorney fees awarded pursuant to Townsend can only be awarded if the failure to pay maintenance and cure is “willful and wanton.” Townsend, 129 S. Ct. at 2571. Whether Icicle’s conduct was “willful and wanton” was a factual question that was determined by the jury. Because Clausen’s entitlement to attorney fees turns on the jury’s findings of fact with regard to the nature of Icicle’s conduct, the attorney fee award must also have been made by the jury at trial.

The wide-ranging cases relied upon by the IBU are inapposite. Bunch v. King County Dept. of Youth Services, 155 Wn.2d 165 (2005), involved an award of attorney’s fees under RCW § 49.60.030(2). The decision itself gives no indication as to the procedural method by which attorney fees were actually awarded. However, the statute at issue awards attorney fees to the prevailing party in employment discrimination cases. Id. at 184 n.10. The IBU also relies upon RCW § 26.18.160, another prevailing party fee statute, and In re Rodriguez, 159 Wn. App. 1047

---

<sup>7</sup> In Professor Robertson’s terminology, attorney fees in maintenance and cure cases are made in instances of transactional bad faith.

(2011), a case in which that statute is utilized. Because such “prevailing party” fee awards are collateral, this type of award can be made on post-trial motion under Rule 54(d)(2). But since the attorney fees at issue in this case were substantive rather than collateral, neither Bunch nor Rodriguez is not instructive.

Paul v. All Alaskan Seafoods, 106 Wn. App. 406 (Wash. Ct. App. 2001) and Bally v. Ocean Transp. Svcs., 136 Wn. App. 1052 (unpublished opinion)<sup>8</sup> both involve attorney fee awards under RCW § 49.52.070, and again neither contains any indication as to the procedural mechanism utilized to award the fees. The IBU assumes the fees were awarded pursuant to Rule 54(d)(2), yet there is no basis for this assumption. See Amicus Brief at 7-8. It is equally likely that the parties stipulated to the court determining the fees, or the fees were awarded under CR 59(e). The mere fact that the court awarded attorney fees does not support the IBU’s proposition that a Rule 54(d)(2) post-trial fee motion was proper here.

Corey v. Pierce County, 154 Wn. App. 752 (Wash. Ct. App. 2010), is readily distinguishable by the very language of the fee statute governing that case. There, the court awarded attorney fees pursuant to RCW

---

<sup>8</sup> Citation to unpublished decisions of the Washington Court of Appeals is not permitted. GR 14.1(a). The Bally case should therefore be disregarded by the Court in its analysis of the issues raised by the IBU.

§ 49.48.030, which explicitly states that attorney fees are to be awarded “in an amount to be determined by the court.” RCW § 49.48.030. Compare Williams v. Kingston Shipping Co., 925 F.2d 721, 723 (4th Cir. 1991) (stating “the fee award in admiralty is an element of damages whose source is judicial precedent, not a fee shifting statute.”). The IBU’s reliance on RCW §§ 49.12.150 and 60.76.040 is similarly misplaced, given that both of those statutes also specify that the court is to determine the attorney fee award.

Finally, the IBU looks to attorney fee awards made under the Olympic Steamship doctrine, first set forth in Olympic S.S. Co. v. Centennial Ins. Co., 117 Wn.2d 37, 811 P.2d 673 (1991) and elaborated upon in McGreevy v. Oregon Mutual Ins. Co., 128 Wn.2d 26, 904 P.2d 731 (1995). These fees are simply a judicially created “prevailing party” award. The conduct of the party is not an element in determining such fees, and they are therefore not applicable here.

**B. The Ratio Established by the U.S. Supreme Court in Exxon Limits Punitive Damage Awards in Maintenance and Cure Cases.**

The IBU contends that Exxon “probably” does not apply to maintenance and cure cases, based upon two faulty premises. The first is that the Townsend court’s use of the word “elsewhere” resolves the issue.

The second is that the Exxon court's stated rationale for imposing an upper limit on punitive damages in maritime cases does not apply in the maintenance and cure context. The IBU then attempts, as Clausen did in his brief, to distinguish the facts of this case from those of Exxon so as to suggest the ratio should not apply here. Finally, amicus echoes Clausen's earlier arguments on the issue of whether attorney fees are compensatory or punitive. None of the points made by the IBU is sufficient to preclude application of the Exxon punitive damages ratio to the present case, and the trial court's failure to limit Clausen's punitive damages accordingly warrants reversal.

1. **Townsend Leaves Open the Question of Whether the Exxon Ratio Applies in Maintenance and Cure Cases.**

The IBU suggests that the Townsend decision forecloses the application of the punitive damages ratio established in Exxon Shipping Co. v. Baker, 554 U.S. 471, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008) because in footnote 11, the Townsend court stated it was not called upon to decide whether the recovery cap, which the Court had "elsewhere" imposed was applicable to maintenance and cure cases. 129 S. Ct. at 2574, n.11. The term "elsewhere" in this context clearly refers to the Exxon case. The IBU attributes great significance to this particular word,

arguing that it suggests the Court considered Exxon as addressing a different area of federal maritime law from the maintenance and cure area, such that the Exxon cap “probably” does not apply to punitive damages awarded in maintenance and cure cases. Amicus Brief at p. 13. A balanced reading of this footnote shows that the Townsend court was simply using the word “elsewhere” to refer to another one of its decisions, rather than a separate and distinct aspect of maritime law.<sup>9</sup>

**2. The Court’s Rationale for Imposing a 1:1 Ratio in Exxon Applies with Equal Force in the Context of Maintenance and Cure.**

The IBU’s second reason for maintaining that the Exxon ratio does not apply in maintenance and cure cases is that the concerns that motivated the court in Exxon are not applicable in the maintenance and cure realm. Amicus correctly notes that the primary concern of the Exxon court was the “stark unpredictability” of what it called “outlier cases,”

---

<sup>9</sup> The IBU’s apparent confidence that the Townsend footnote resolves the issue notwithstanding, the fact remains that the applicability of the Exxon ratio to maintenance and cure cases was explicitly not addressed by Townsend, and has been widely acknowledged – even by Professor Robertson – as an open question. See, e.g., Robertson, David. W., Punitive Damages in U.S. Maritime Law: Miles, Baker & Townsend, 70 La. L. Rev. 463, 498 (2010) (stating under the heading “OPEN QUESTIONS,” “The [Townsend] Court expressly did not decide whether punitive damages in maintenance and cure cases are subject to the Baker ceiling (a one-to-one ratio to compensatory damages).”); DeGravelles, John W., Supreme Court Charts Course for Maritime Punitive Damages, 22 U.S.F. Mar. L. J. 123, 143 (2010) (noting that Townsend court raised but did not answer whether punitive damages awards in maintenance in cure cases will be subject to 1:1 cap imposed in Exxon).

cases in which defendants could find themselves subjected to punitive damages that “dwarf” the corresponding compensatory damages. 128 S. Ct. at 2625; see also Amicus Brief at p. 13, n. 12 (collecting references in Exxon opinion to “unpredictable” and “outlier” awards). This concern with predictability was indeed a driving factor in the Exxon court’s decision, as evidenced by the court’s statement that even Justice Holmes’s proverbial “bad man” should be able to predict potential penalties for misconduct so as to make an informed choice about his course of action. Id. at 2625-2627.

The IBU goes on to state, however, that “[t]he law of maintenance and cure has never been any part of that problem,” referring to a handful of published maintenance and cure cases (all pre-Townsend) in which punitive damages were awarded in which the punitives did not far exceed the compensatories.

The only reason why unpredictable “outlier” awards of punitive damages in maintenance and cure cases has not heretofore been a problem is because prior to Townsend, punitive damages (beyond attorney fees) were not widely available. As noted previously by the parties, this case is believed to be one of the first to award punitive damages for willful denial of maintenance and cure post-Townsend, and if it is any indication,

“outlier” punitive damage awards that “dwarf” compensatory damages are all but certain to become a significant problem in this context. In the present case, Clausen was awarded a total of \$37,420 in unpaid maintenance and cure, in contrast to his punitive damages award of \$1.3 million. Clearly, the potential for punitive damage awards to “dwarf” the amount of plaintiffs’ compensatory damages in maintenance and cure awards is very real, and thus the concerns that motivated the Exxon court and formed the underlying rationale for its imposition of a 1:1 ratio are applicable in the maintenance and cure context.

Amicus also maintains that the Exxon ratio should not apply in cases involving willful denial of maintenance and cure because the Exxon court was focused on tort cases, and “maintenance and cure law is not tort law.” Amicus Brief at p. 15. Exxon made clear that the court was establishing a rule for **maritime** cases. It did not distinguish tort or contract. There is nothing more purely maritime than maintenance and cure, which is awarded solely to seamen.

Even if the “tort/contract” distinction exists, it does not support amicus. While the seaman’s longstanding remedies of maintenance and cure are themselves a unique creature of maritime law that is neither contractual nor tort, it is equally true that courts have long held that the

**denial** of maintenance and cure is, in fact, a tort for which a seaman may bring a separate cause of action in negligence. Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367, 372-378, 53 S. Ct. 173, 77 L. Ed. 368 (1932). In addition, the “willful and wanton” standard that applies to awards of attorney fees and/or punitive damages in the maintenance and cure context is akin to the standard applied in intentional torts. Thus, the fact that the Exxon court looked to tort law in formulating its punitive damages cap is not a reason to distinguish it from cases involving denial of maintenance and cure, but, to the contrary, is yet another reason the Exxon ratio is applicable in maintenance and cure cases.

**3. No Departure from the Exxon Ratio Is Warranted under the Facts of the Present Case.**

The IBU argues, as Clausen did, that the Exxon court left open the possibility that the 1:1 ratio need not apply in cases involving particularly egregious conduct, and that Icicle’s conduct in this case warrants such a departure from the ratio.<sup>10</sup> Icicle addressed this argument at length in its Opening Brief and Reply Brief, outlining how the level of reprehensibility

---

<sup>10</sup> It bears noting that it was the jury – not Judge Hill – who made findings of fact as to the level of reprehensibility of Icicle’s conduct, and that the jury found Icicle’s conduct to be “willful and wanton.” Judge Hill’s own characterization of Icicle’s conduct in her post-trial rulings, to which amicus refers, are not the findings of fact in the record in this case.

in Exxon and in the present case were actually equivalent, despite one being labeled “reckless” and the other being labeled “willful and wanton,” and reiterates its position here that the jury’s findings regarding Icicle’s conduct place it squarely within the Exxon framework such that the 1:1 ratio applies.<sup>11</sup>

**4. Vaughan Attorney Fees Are Punitive, Not Compensatory.**

Icicle’s earlier briefing included an extensive analysis of the question of whether Vaughan attorney fees are properly considered punitive or compensatory. The language of Vaughan itself supports the position that attorney fees awarded for the willful failure to pay maintenance and cure are punitive in nature. 369 U.S. at 530-31 (characterizing defendant’s conduct as “callous,” “willful and persistent”); see also 369 U.S. at 540 (Justices Stewart and Harlan arguing in dissent that rule against recovery of counsel fees as compensatory damages precluded attorney fee award for willful denial of maintenance and cure, but noting that such a fee award could be made as a form of exemplary

---

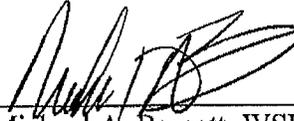
<sup>11</sup> As Icicle noted in its Opening Brief, the empirical evidence laid out in Exxon showed that the median ratio for cases of all levels of reprehensibility was 0.65:1. Because the 1:1 ratio adopted by the Exxon court exceeds this ratio, it already makes an allowance for conduct more reprehensible than “recklessness,” such that no further adjustment to the ratio is necessary in a case involving “willful and wanton” conduct such as this one.

damages). As noted above, in Townsend, the Supreme Court cited Vaughan for the proposition that punitive damages have long been available in the maintenance and cure context, leaving no question that it considers Vaughan fees punitive in nature. 129 S. Ct. at 2571.

Amicus nevertheless argues that Vaughan fees should be considered compensatory rather than punitive. As Icicle previously pointed out, the fallacy of this position is obvious in light of the fact that if such fees were indeed compensatory, they would be available in every maintenance and cure case, regardless of whether the defendant's failure to pay was willful and wanton. Moreover, Professor Robertson himself has noted that while the Supreme Court did characterize Vaughan fees as compensatory in Fleishmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718, 87 S. Ct. 1404, 18 L. Ed. 2d 475 (1967), that is the only case in which it did so, and "all of the Court's subsequent references have characterized the Vaughan attorneys' fees award as punishment for 'bad faith' in the conduct of litigation." Robertson, supra, 27 J. Mar. L. & Com. at 554. Because Vaughan attorney fees are punitive, they cannot be included in the plaintiff's measure of compensatory damages when calculating the ratio between compensatory and punitive damages, as Judge Hill erroneously did.

RESPECTFULLY SUBMITTED this 31st day of August, 2011.

HOLMES WEDDLE & BARCOTT, P.C.



---

Michael A. Barcott, WSBA #13317  
Megan E. Blomquist, WSBA #32934  
999 Third Avenue, Suite 2600  
Seattle, Washington 98104  
(206) 292-8008  
Attorneys for Appellant

G:\1143\21052\pldg\appeal\Opp to Amicus 8-31-11.doc

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Aug 31, 2011, 3:51 pm  
BY RONALD R. CARPENTER  
CLERK

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 2011, a true and correct copy of the foregoing was served on the following:

---

RECEIVED BY E-MAIL

Via Hand Delivery To:

James P. Jacobsen  
Beard Stacey Trueb & Jacobsen, LLP  
4039 21<sup>st</sup> Avenue West, Suite 401  
Seattle, WA 98199  
*Attorney for Respondent*

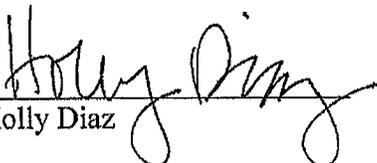
Lincoln Sieler  
Friedman Rubin  
601 Union Street, Suite 3100  
Seattle, WA 98101-1374  
*Attorney for Inlandboatmen's Union of the Pacific*

Via Email and/or U.S. Postal Service To:

Philip A. Talmadge  
Talmadge/Fitzpatrick  
18010 Southcenter Parkway  
Tukwila, WA 98188  
*Attorneys for Respondent*

Larry Curtis  
Personal Injury Attorney  
300 Rue Beauregard, Bldg. C  
Lafayette, LA 70598-0245  
*Attorney for Respondent*

David W. Robertson  
727 East Dean Keeton Street  
Austin, TX 78705  
*Attorney for the Inlandboatmen's Union of the Pacific*

  
Holly Diaz

## OFFICE RECEPTIONIST, CLERK

---

**To:** Megan E. Blomquist  
**Subject:** RE: Clausen v. Icicle Seafoods - Brief in Answer to Brief of Amicus Curiae

Received 8-31-11

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

---

**From:** Megan E. Blomquist [<mailto:Mblomquist@hwb-law.com>]  
**Sent:** Wednesday, August 31, 2011 3:50 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** Michael A. Barcott; Holly Diaz  
**Subject:** Clausen v. Icicle Seafoods - Brief in Answer to Brief of Amicus Curiae

Case Name: Clausen v. Icicle Seafoods, Inc.

Case Number: 85200-6

Identity of Person filing documents:

Megan Blomquist  
Holmes Weddle & Barcott  
206-292-8008  
WSBA No. 32934  
[mblomquist@hwb-law.com](mailto:mblomquist@hwb-law.com)

Attached please find Icicle Seafoods' Brief in Answer to Brief of Amicus Curiae and Certificate of Service.

Regards,

**Megan E. Blomquist, Attorney**  
Holmes Weddle & Barcott  
999 Third Avenue, Suite 2600  
Seattle, WA 98104  
T: 206-292-8008  
F: 206-340-0289  
[mblomquist@hwb-law.com](mailto:mblomquist@hwb-law.com)

---

Disclaimer: This electronic message contains information from the law firm of Holmes Weddle & Barcott, P.C. and is confidential or privileged. The information is intended solely for the use of the individual or entity named above. If you are not the intended recipient, do not read, distribute, reproduce or otherwise disclose this transmission or any of its contents. If you have received this electronic message in error, please notify us immediately via e-mail or by telephone at (907) 274-0666 (Anchorage) or (206) 292-8008 (Seattle).