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No. 92913-1

SUPREME COURT
OF THE STATE OF WASHINGTON

ALLAN A. TABINGO,

Petitioner,

v.

AMERICAN TRIUMPH LLC, and AMERICAN SEAFOODS
COMPANY, LLC,

Respondents.

MOTION FOR DISCRETIONARY REVIEW

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 ORIGINAL

A. IDENTITY OF PETITIONER

Allan A. Tabingo asks this Court to accept review of the decision designated in Part B of this motion.

B. DECISION

The trial court entered an order on February 22, 2016, dismissing as a matter of law Tabingo's claim for punitive damages against the respondents under the general maritime claim of vessel unseaworthiness.

A copy of the decision is in the Appendix.

C. ISSUE PRESENTED FOR REVIEW

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

D. STATEMENT OF THE CASE

Allan A. Tabingo sued American Triumph LLC and American Seafoods Co., LLC ("American Seafoods"), the owner of the factory trawler F/V AMERICAN TRIUMPH, on which he was injured on January 12, 2015, for vessel unseaworthiness, a common law claim.

F/V AMERICAN TRIUMPH is a factory trawler that hauls fish aboard with nets. After the fish are aboard, a deckhand opens a steel hatch, a door in the floor/deck. The steel hatch (like a door) is hinged on

one side and opens and shuts by way of hydraulics. This hatch, when opened, allows the fish to drop into tanks below the deck. The factory workers below then take the fish from those tanks to process.

Tabingo was a deckhand trainee at the time of his injury. One of his tasks was to make sure that fish got into these tanks. After the fish net is emptied on deck, the fish hatch is opened by a hydraulics operator on the deck. This hydraulics operator stands at the hydraulics station and pushes a hydraulics valve to open and shut the hatch/door. The deckhands and deckhand trainees push the fish into the open hatches and into these tanks. Most of the fish can be pushed into the tanks with shovels, but the last bit of fish needs to be cleared and pushed around by hand.

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

hand, resulting in injury to his fingers that became gangrenous, necessitating amputation of two of them.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court may grant discretionary review if a party documents both that the trial court committed error, obvious or probable, and that the error will have a significant impact on future proceedings in the case. RAP 2.3(b).¹

The trial court's punitive damages decision was erroneous and it will have an impact on future proceedings in this case from discovery and ultimately to the trial. Interlocutory review is appropriate to ensure that the correct legal standard governs in the case, particularly where the issue is one with substantial public ramifications, as noted in Tabingo's statement of grounds for direction review.

(1) The Trial Court Erred in Dismissing Tabingo's Punitive Damages Claim – RAP 2.3(b)(1-2)²

The trial court committed error, obvious or probable, in dismissing Tabingo's claim for punitive damages here because federal maritime law,

¹ See generally, Geoffrey Crooks, *Discretionary Review of Trial Court Decisions under the Washington Rules of Appellate Procedure*, 61 Wash. L. Rev. 1541 (1986); Stephen Dwyer, Leonard Feldman, Hunter Ferguson, *The Confusing Standards for Discretionary Review in Washington and a Proposed Framework for Clarity*, 38 Seattle U. L. Rev. 91 (2014).

² Tabingo is not seeking review under RAP 2.3(b)(3). RAP 2.3(b)(4) is inapplicable here.

a body of common law, specifically permits the recovery of such damages in the appropriate vessel unseaworthiness case, as the United States Supreme Court confirmed in cases like *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008) and *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 129 S. Ct. 2561, 174 L. Ed. 2d 382 (2009).

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

Second, with regard to tort claims by seamen against vessel owners, both federal maritime law, based on common law principles, and various statutes passed by Congress, govern.³ In *Endicott*, this Court

³ The dissent in *McBride v. Estis Well Service LLC*, 768 F.3d 382 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 2310 (2015) appropriately summarized the claims available to an injured seaman:

Traditionally, general maritime law afforded ill and injured seamen two causes of action against shipowners and employers. If a seaman became ill or injured while in the service of the ship, the seaman's employer and the ship's owner owed the seaman room and board ("maintenance") and medical care (cure) without regard to fault, and, if

discussed the genesis of a Jones Act statutory negligence claim of a seaman against a vessel owner. 167 Wn.2d at 879-80.

Third, Tabingo's vessel unseaworthiness claim, the only claim at issue here,⁴ involved a common law claim arising under general federal maritime law. "The admiralty doctrine of unseaworthiness is a form of strict liability that requires the owner of a vessel to ensure that a vessel and its appurtenant equipment and appliances are reasonably fit for her

not provided, the seaman had a claim against them for "maintenance and cure." If a seaman was injured by a ship's operational unfitness, the seaman had a cause of action for "unseaworthiness." General maritime law did not provide seamen with a separate cause of action for personal injury resulting from employer negligence. *The Osceola*, 189 U.S. 158, 175, 23 S. Ct. 483, 47 L.Ed. 760 (1903), nor did it permit wrongful death or survival claims on behalf of seamen killed during the course of their employment, *The Harrisburg*, 119 U.S. 199, 204-14, 7 S. Ct. 140, 30 L.Ed. 358 (1886), *overruled by Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S. Ct. 1772, 26 L.Ed.2d 339 (1970).

To remedy those perceived gaps in general maritime law, which, until then, had been filled by a patchwork of state wrongful death statutes, Congress in 1920 enacted the Jones Act and the Death on the High Seas Act ("DOHSA"), which created causes of action for employer negligence in navigable waters and on the high seas, respectively, and authorized survival and wrongful death remedies. *See* 46 U.S.C. 688 (1920) (codified as amended at 46 U.S.C. 30104 (2006)); 46 U.S.C. 76168 (1920) (codified as amended at 46 U.S.C. 3030108 (2006)). The Supreme Court has since recognized a parallel cause of action under general maritime law for employer negligence resulting in injury or death. *See Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 818-20, 121 S. Ct. 1927, 150 L.Ed.2d 34 (2001) (*citing Moragne*, 398 U.S. at 409, 90 S. Ct. 1772).

Id. at 405-06 (Higginson, J., dissenting).

⁴ In argument before the trial court, Tabingo confined his punitive damages argument to his vessel unseaworthiness claim.

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

The vessel unseaworthiness claim has evolved over the years into a powerful tool by which seamen can compel vessel owners to provide them a safe workplace; the owner’s duty to provide a seaworthy ship is an absolute duty not satisfied by due diligence on the owner’s part. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 2d 561 (1944);

Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941 (1960); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S. Ct. 1772, 26 L. Ed. 2d 339 (1970). An injured seaman must document that he was injured while in the ship's service by a piece of equipment which was not reasonably fit for its intended use to establish a vessel unseaworthiness claim. *Miller v. Arctic Alaska Fisheries Corp.*, 133 Wn.2d 250, 264, 944 P.2d 1005 (1997).

Fourth, the question of whether punitive damages are recoverable in vessel unseaworthiness actions has had a somewhat checkered history in federal maritime law, but the Supreme Court's *Baker* and *Townsend* decisions definitively resolved the issue.

It has long been the rule in the Ninth Circuit that punitive damages are recoverable in vessel unseaworthiness actions. In *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987), *cert. denied*, 484 U.S. 914 (1987), the court concluded that such damages could be recovered where the vessel owner's conduct manifested a reckless or callous disregard of the seaman's rights, gross negligence, or actual malice criminal indifference. *Id.* at 258.⁵ *Evich* remains good law after *Townsend*.⁶

⁵ The court cited a number of cases from other circuits affirming such a principle. *Id.* at 258.

⁶ This was the conclusion of a thoughtful 2012 decision in *Rowe v. Hornblower Fleet*, 2012 WL 5833541 (N.D. Cal. 2012). *Accord, In re Complaint of Osage Marine*

After *Evich*, the United States Supreme Court filed its opinion in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990), a case many observers felt limited the availability of punitive damages in federal maritime tort claims. That decision, however, did not address punitive damages. The *Miles* court mentioned punitive damages only once – while reciting the case’s procedural history. *Id.* at 22.⁷

In *Baker*, the case that resulted from the massive EXXON VALDEZ oil spill in Alaska, the Court made clear that punitive damages were recoverable in maritime common law cases, rejecting the misreading of the Court’s decision in *Miles* and foreshadowing the Court’s *Townsend* decision that specifically held seamen could recover punitive damages in cases of a vessel owner wrongfully withholding maintenance and cure. Like a vessel unseaworthiness case, an action for maintenance and cure arises under maritime common law. *Dean*, 177 Wn.2d at 405-06.

Subsequently, the *Townsend* court then specifically clarified and limited the holding in *Miles* to apply *only to wrongful death claims*. *Townsend*, 557 U.S. at 419. *Miles* “grapples with the entirely different

Services, Inc. 2012 WL 709188 (E.D. Mo. 2012); *Wagner v. Kona Blue Water Farms, LLC*, 2010 WL 3566731 (D. Haw. 2010).

⁷ The Court granted review in *Miles* to decide “whether the parent of a seaman who died from injuries aboard respondents’ vessel may recover under general maritime law for loss of society, and whether a claim for the seaman’s lost future earnings survives his death.” *Id.* at 21. The *Miles* court answered both questions “no.” *Id.* at 32-33, 36.

question of whether general maritime law should provide a cause of action for wrongful death based on unseaworthiness.” 557 U.S. at 419 (emphasis added). As a result, the *Townsend* court found that: (1) *Miles* only applies in wrongful death cases; and (2) an injured seaman can still recover punitive damages under the maritime common law because that remedy has traditionally been available to injured seamen. *Id.* at 419-24. The Court stated that its *Miles* decision was based on the fact that a wrongful death cause of action was not traditionally available under the maritime common law. *Id.* at 419. Instead, the wrongful death cause of action was created by Congress. Since there was no wrongful death cause of action prior to the Congressional enactment of a wrongful death cause of action, the courts could not provide wrongful death remedies beyond those which were provided by Congress.⁸ Conversely, since punitive damages were available under maritime common law prior to the Jones Act, then that remedy is available to seamen today.

⁸ The *Miles* court made clear that its ruling “did not disturb” the seamen’s general maritime claims and remedies resulting from unseaworthiness that *pre-existed* the enactment of the Jones Act. 498 U.S. at 19 (“The Jones Act evinces no general hostility to recovery under maritime law since it does not disturb seamen’s general maritime claims for injuries resulting from unseaworthiness...”). The *Townsend* court concluded that *Miles* simply held that any remedies *created* by the Jones Act displaced similar remedies *subsequently* provided by the courts. 557 U.S. at 420.

In any event, the *Townsend* court emphatically rejected the argument that the holding in *Miles* spoke to the issue of punitive damages for a seaman:

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

557 U.S. at 418-19 (internal citations omitted) (emphasis added).

Tabingo fully expects that American Seafoods will contend that the Fifth Circuit opinion in *McBride*, a case in which a badly split en banc court ruled that an injured seaman could not recover punitive damages in a vessel unseaworthiness claim, controls.⁹ But that decision misreads *Townsend* and stands in contrast to the Ninth Circuit's opinion in *Evich*.

⁹ If American Seafoods argues that this Court should treat the United States Supreme Court's denial of certiorari in *McBride* as an expression of the Court on the merits of the Fifth Circuit opinion, it is wrong. That Court has consistently ruled:

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

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

In *Batterton v. The Dutra Group* (Case No. 14-cv-7667-PJW), the federal district court for the Northern District of California specifically concluded that *Evich* remained good law in the Ninth Circuit and was unaffected by *McBride*. An injured seaman could recover punitive damages in a vessel unseaworthiness case.

Indeed, *McBride's* analysis was rejected by Judge Barbara Rothstein in a July 2015 ruling in *Hausman v. Holland America Line USA*. App. at 66-75. In that case, Holland America argued that *Miles* and *McBride* precluded an award of punitive damages. Judge Rothstein analyzed *Miles* and *McBride* and ruled that *Townsend* provided for punitive damages under general maritime law. App. at 69-72. “[T]he *Atlantic Sounding* decision made clear that *Miles* should not be read ‘to eliminate the general maritime remedy of punitive damages,’ as punitive damages have been around long before the Jones Act was passed.” App. at 70. Judge Rothstein correctly noted that, under *Townsend*, the *Miles* decision did not apply to situations “where both the general maritime cause of action (i.e. unseaworthiness) and the remedy (punitive damages) were well established before the passage of the Jones Act in 1920.” *Id.*

Judge Rothstein’s opinion also addressed American Seafoods’ argument here that *Townsend* should be read strictly as a “maintenance

and cure” case only: “This Court is not persuaded that *Atlantic Sounding* should be construed narrowly so as to apply only to maintenance and cure actions. As explained above, the *Atlantic Sounding* decision made clear that punitive damages are available for ‘a general maritime cause of action’ that was ‘well established before the passage of the Jones Act.’” App. at 71. “While the Supreme Court could have carved out a rather narrow holding that would apply only to maintenance and cure claims, it did not such thing. Instead, the *Atlantic Sounding* majority opted to interpret Miles narrowly, limiting the holding in *Miles* to wrongful-death actions.” App. at 71-72.

The core holding of the *McBride* court is that punitive damages are not recoverable in *wrongful death actions* claiming vessel unseaworthiness.¹⁰

¹⁰ The split in the Fifth Circuit was profound. In *Miles*, a seaman was killed and two others injured. Judge Davis wrote in the lead opinion, holding that a seaman could not recover punitive damages in a Jones Act, negligence action, or in a maritime law vessel unseaworthiness action. Judge Clement concurred in the result, concluding that punitive damages are not available in vessel unseaworthiness claims. Judge Haines concurred in the majority’s result as to the wrongful death action, but did not join the majority as to the surviving seamen, and contended that Congress should address the punitive damages issue. Judge Higginson dissented, asserting that vessel unseaworthiness, like maintenance and cure, was a common law doctrine and nothing in the Jones Act prevented recovery of punitive damages in such claims. Judge Greaves also dissented, joining the Higginson dissent and further noting that the majority misread *Miles*.

A majority of the *McBride en banc* panel (all six dissenters and two of the judges who concurred with the principal opinion) rejects the position that a living seaman

Most significantly; the *Townsend* court specifically held that punitive damages are recoverable by a seaman for a vessel owner's wrongful withholding of maintenance and cure. 557 U.S. at 424-25. This Court recognized and applied that specific holding in *Clausen*. 174 Wn.2d at 80. Claims for maintenance and cure are common law claims under federal maritime law, just as are claims involving vessel unseaworthiness. 557 U.S. at 413 ("the legal obligation to provide maintenance and cure dates back centuries as an aspect of general maritime law"). The entire first half of the *Townsend* decision involved the Court's explanation in

cannot recover punitive damages in a vessel unseaworthiness case. As the six dissenters put it:

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

Id. at 419 (Graves J. and Dennis J., dissenting).

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

The *McBride* court's holding is that of the judges concurring on the narrowest of grounds. *Davidson v. Hensen*, 135 Wn.2d 112, 128, 954 P.2d 1327 (1998). *McBride* only affects wrongful death actions.

great detail of how punitive damages have historically been available to seamen in claims arising under federal maritime common law, including maintenance and cure. *Id.* at 413-16. The *Townsend* court specifically spoke in general terms of the recovery of punitive damages in maritime common law; it nowhere stated that vessel unseaworthiness claims were excluded from federal maritime law. Since *Townsend*, Congress has not chosen to enact statutes restricting the recovery of punitive damages to maintenance and cure actions only.¹¹ The *Townsend* court and this Court in *Clausen* got it right – punitive damages are recoverable in maritime common law tort claims, whether they are maintenance and cure or vessel unseaworthiness.

Moreover, this interpretation of federal maritime law is entirely consistent with the policy reasons for the application of punitive damages in federal maritime law. Seamen are “wards of admiralty.” *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 355, 91 S. Ct. 409, 27 L. Ed. 2d 456 (1971). Nearly two centuries ago, Justice Story declared: “Every court should watch with jealousy an encroachment upon the rights of a

¹¹ Washington law recognizes that a legislative body may acquiesce in a judicial interpretation by failing to act to alter what it perceives as an incorrect judicial interpretation of its work. *E.g., Soproni v. Polygon Apt. Partners*, 137 Wn.2d 319, 327 n.3, 971 p.2d 500 (1999). Here, Congress took no action to enact a specific statute prohibiting punitive damage awards in vessel unseaworthiness actions in light of *Townsend*.

seaman, because they are unprotected and need counsel;...They are emphatically the wards of the admiralty.” *Harden v. Gordon*, 11 F. Cas. 480, 485 (C.C. Me. 1823).¹²

It is because “admiralty courts have always shown a special solicitude for the welfare of seamen and their families,” *Miles*, 498 U.S. at 36, that the remedy of punitive damages is so important. “Imposing exemplary damages...creates a strong incentive for vigilance” on the part of those best able to protect seamen from injury aboard unseaworthy vessels. *Pacific Mut. Life Ins. v. Haslip*, 499 U.S. 1, 14, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991).¹³

¹² In fact, the United States Supreme Court has referred to seamen as “wards of admiralty” in some 24 decisions. David W. Robertson, *Punitive Damages in U.S. Maritime Law: Miles, Baker, and Townsend*, 70 La. L. Rev. 463, 499 n.107 (2010), most recently in *Townsend*, 557 U.S. at 417.

¹³ Federal courts have applied punitive damages as a deterrent against egregious vessel owner misconduct in a variety of settings. *See, e.g., Exxon Shipping v. Baker*, 554 U.S. 471, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008) (fishermen awarded punitive damages for their loss of livelihood claims, many of whom were Jones Act seamen); *Gaffney v. Riverboat Servs. of Indiana, Inc.*, 451 F.3d 424 (7th Cir. 2006), *cert. denied*, 549 U.S. 1111 (2007) (court affirming award of punitive damages to seamen asserting retaliatory discharge); *Pino v. Protection Mar. Inc. Co.*, 490 F. Supp. 277 (D. Mass. 1980) (seamen entitled to seek punitive damages from insurance company for interfering with their employment rights by charging higher insurance premiums from owners of fishing vessels on which they worked because seamen had failed to settle insurance claims to the insurer’s satisfaction); *Townsend* (seamen entitled to seek punitive damages for the willful and wanton violation of their right to maintenance and cure); *Callahan v. Gulf Logistics, LLC*, 2013 WL 5236888 (W.D. La. 2013) (acknowledging that punitive damages may be recoverable under maritime law in a third party action by a longshore or harbor worker under 905(b) of the LHWCA); *In re Horizon Cruises Litigation*, 101 F. Supp. 2d 204, 210 (S.D.N.Y. 2000) (observing that passengers have been entitled to punitive damages in maritime law since at least 1823).

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

(2) The Trial Court's Ruling on Punitive Damages Will Adversely Affect the Course of Proceedings Below

Whether framed as “rendering further proceedings useless,” “substantially altering the status quo,” or “substantially limiting the freedom of a party to act,” the trial court’s ruling on punitive damages will have a profound impact on the future course of this case.

If, as Tabingo believes, the trial court erred in dismissing such a claim as a matter of law, any verdict in this case will be tainted by the exclusion of the theory and the evidence relevant to it, and a new trial will be required.

In particular, vessel unseaworthiness is a strict liability claim, as noted *supra*. Evidence supporting such a claim goes to the additional misconduct of the vessel owner in providing an unseaworthy vessel.

There is no conceivable justification for allowing the recovery of punitive damages by injured or killed longshore workers (*Callahan*), cruise ship passengers (*Horizon Cruises*), Jones Act seamen in loss-of-livelihood cases (*Baker*), retaliatory discharge cases (*Gaffney*), tortious interference with employment cases (*Pino*) or in maintenance and cure cases (*Townsend*) but not by seamen injured due to the vessel owner’s egregious conduct. There is no basis in policy, principle, or common sense that could justify the perverse disuniformity with federal maritime law that would result from excluding seamen from access to a remedy that is available to so many other types of maritime litigants.

Tabingo fully expects that American Seafoods will resist discovery relevant to such misconduct on the grounds that it will not lead to the discovery of admissible evidence. CR 26(b)(1). A reversal post-verdict will render the entire proceedings leading up to the verdict a waste of time, as this necessary discovery will need to be undertaken.

Ultimately, regardless of the outcome at trial, it is highly likely that either party will seek appellate review. This Court will be called upon to resolve this issue. A final determination of the critical legal issue presented in this case by Washington's highest court is appropriate and necessary.

This Court can avoid a waste of the parties' time and scarce judicial resources by now granting interlocutory review of this narrow issue of law.

F. CONCLUSION

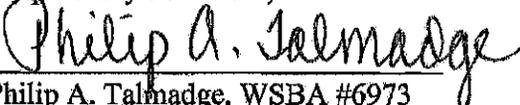
The trial court here committed error in dismissing Tabingo's claim for punitive damages in a vessel unseaworthiness case and such a ruling will prejudice future proceedings in the case in the trial court. Review is merited. RAP 2.3(b)(1-2).

This Court should grant review and reverse the trial court's February 22, 2016 order, remanding the case for trial on all issues,

including Tabingo's claim for punitive damages in a vessel unseaworthiness case. Costs on appeal should be awarded to Tabingo.

DATED this 13^d day of March, 2016.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below, I e-served a true and accurate copy of the Motion for Discretionary Review in Supreme Court Cause No. 92913-1 to the following:

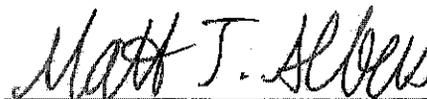
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Original efiled with:
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Clerk's Office

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

DATED: March 23, 2016, at Seattle, Washington.



Matt J. Albers, Paralegal
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OFFICE RECEPTIONIST, CLERK

To: Matt Albers
Cc: Jim Jacobsen; Joe Stacey; moberg@legros.com; Phil Talmadge; Marianne Jacka
Subject: RE: Allan A. Tabingo v. American Triumph LLC, et al. - Supreme Ct Cause #92913-1

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Supreme Court Clerk's Office

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.

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Sent: Wednesday, March 23, 2016 12:14 PM
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Subject: Allan A. Tabingo v. American Triumph LLC, et al. - Supreme Ct Cause #92913-1

Good afternoon:

Attached please find the following document for filing with the Supreme Court:

Documents to be filed: (1) Statement of Grounds for Direct Review; and (2) Motion for Discretionary Review
(Please note that the Appendix to Motion for Discretionary Review will be submitted in a separate email)**

Case Name: Allan. A. Tabingo v. American Triumph LLC, et al.

Case Cause Number: 92913-1

Attorney Name and WSBA#: Philip A. Talmadge, WSBA #6973

Contact information: Matt J. Albers, (206) 574-6661, matt@tal-fitzlaw.com

Please let me know if you have any questions. Thank you.

Very truly yours,

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Received
Washington State Supreme Court

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No. 92913-1

SUPREME COURT
OF THE STATE OF WASHINGTON

ALLAN A. TABINGO,

Petitioner,

v.

AMERICAN TRIUMPH LLC, and AMERICAN SEAFOODS
COMPANY, LLC,

Respondents.

APPENDIX TO MOTION FOR DISCRETIONARY REVIEW

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**APPENDIX TO
MOTION FOR DISCRETIONARY REVIEW**

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HON. JULIE SPECTOR

**IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
FOR KING COUNTY**

ALLAN A. TABINGO,)	
	)	Case No. 15-2-17089-9 SEA
Plaintiff,)	
	)	AMENDED
v.	)	SEAMAN'S COMPLAINT FOR
	)	PERSONAL INJURY UNDER THE
AMERICAN TRIUMPH LLC, and	)	JONES ACT AND THE
AMERICAN SEAFOODS	)	GENERAL MARITIME LAW
COMPANY LLC,)	
)	
Defendants.)	

Comes now the plaintiff, Allan A. Tabingo, and for his complaint against the defendants alleges:

I. JURISDICTION

1.1 This is a claim for personal injuries sustained by a seaman in the course and scope of his employment aboard a commercial fishing vessel against his employer, the owner and operator of the vessel, and for punitive damages for the willful and wanton failure to provide a seaworthy vessel. Plaintiff Allan Tabingo is a seaman within the meaning of the Merchant Marine Act of 1920, 46 U.S.C. § 30104, et. seq., commonly known as the Jones Act. Jurisdiction is vested pursuant to the maritime law, 28 U.S.C.

AMENDED SEAMAN'S COMPLAINT-1

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1 § 1333, and 46 U.S.C. § 30104.
2

3 **II. THE PARTIES**

4 2.1 Plaintiff Allan Tabingo was a seaman in the employment of the defendants
5 and in the services of F/V AMERICAN TRIUMPH at the time of his injury.

6 2.2 Defendant American Triumph LLC is a corporation or some other legal entity
7 licensed to do and doing business in the State of Washington. At all times relevant
8 hereto, this defendant owned and/or operated and/or managed F/V AMERICAN
9 TRIUMPH and/or employed the plaintiff thereon as a seaman.
10

11 2.3 Defendant American Seafoods Company LLC is a corporation or some other
12 legal entity licensed to do and doing business in the State of Washington. At all times
13 relevant hereto, this defendant owned and/or operated and/or managed F/V AMERICAN
14 TRIUMPH and/or employed the plaintiff thereon as a seaman.
15

16 **III. LIABILITY**

17 3.1 On or about February 12, 2015, while in the course of his employment with
18 the defendants and while in the service of the defendants' vessel, plaintiff was severely
19 injured as a direct and proximate result and/or legal cause of the negligence of the
20 defendants and/or the unseaworthiness of F/V AMERICAN TRIUMPH.
21

22 3.2 Defendants may have breached State and/or Federal laws and/or regulations
23 (hereafter, also referred to as negligence and/or unseaworthiness).

24 3.3 Plaintiff, at the time of his injury, was a deck hand trainee on defendants'
25 vessel F/V AMERICAN TRIUMPH.
26

AMENDED SEAMAN'S COMPLAINT-2

1
2
3 3.4 At the time of plaintiff's injury, defendants had a deckboss on duty. The
4 deckboss was plaintiff's supervisor at the time of his injury.

5
6 3.5 Plaintiff's hand was injured on the vessel's stern trawl deck when the RSW
7 hatch was lowered onto his hand.

8
9 3.6 Plaintiff's hand was injured on or about February 12, 2015 while working on
10 F/V AMERICAN TRIUMPH.

11
12 3.7 At the time of plaintiff's injury, the hydraulic valve which operated the hatch
13 malfunctioned, closing onto plaintiff's hand.

14 **IV. DAMAGES**

15
16 4.1 As a direct and proximate result and/or legal cause of the negligence of the
17 defendants, and the unseaworthiness of the F/V AMERICAN TRIUMPH, plaintiff
18 sustained severe injuries to his left hand and fingers, and other injuries. The full extent of
19 his injuries are presently undetermined. He has suffered pain, anguish, disfigurement,
20 disability and loss of enjoyment of life in the past and will in the future, and other related
21 damages. He has incurred substantial medical expenses in the past and may in the future.
22 He has lost wages in the past and he will lose wages in the future. The full extent of the
23 permanent impairment to his wage-earning capacity is presently undetermined.

24
25 4.2 Defendants willfully and wantonly failed to provide a seaworthy vessel.
26 Defendants failed to repair the defective hydraulic handle for the stern RSW hatch.
Defendants continued to use this defective hydraulic system, recklessly subjecting its
crew to significant danger. Defendants' callous, willful and wanton indifference gives

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rise to punitive damages and attorney's fees.

V. MAINTENANCE, CURE AND UNEARNED WAGES

5.1. Defendants, by reason of the injuries received by plaintiff in the course of his employment on board F/V AMERICAN TRIUMPH, are liable to plaintiff for his provable entitlements.

WHEREFORE, plaintiff prays for judgment in accordance with the evidence to be presented at the time of trial and as may be permitted under the General Maritime Law and the Jones Act for all general and special damages permitted under the law including but not limited to: maintenance and cure, entitlements, lost wages both past and future, pain and suffering both past and future, anguish, disability, punitive damages, together with taxable costs, interest and attorney fees. Plaintiff prays for all remedies and procedures available under the law.

DATED this 17 day of July, 2015.

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IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
AT SEATTLE

ALLAN A. TABINGO,

Plaintiff,

v.

AMERICAN TRIUMPH LLC, and
AMERICAN SEAFOODS COMPANY,
LLC,

Defendants.

No. 15-2-17089-9 SEA

ANSWER AND AFFIRMATIVE
DEFENSES OF DEFENDANTS
AMERICAN TRIUMPH, LLC, AND
AMERICAN SEAFOODS COMPANY, LLC

FOR ANSWER to Plaintiff's Amended Seaman's Complaint for Personal Injury under the Jones Act and the General Maritime Law, Defendants American Triumph, LLC, and American Seafoods Company, LLC, respond and allege as follows:

1.1 The allegations present questions of law for the Court's determination to which no affirmative response appears required from answering Defendants. To the extent any response is required, denied.

2.1 Admit that on or about the date alleged Plaintiff was employed by Defendant American Seafoods Company, LLC, as a seaman aboard the F/T AMERICAN TRIUMPH. Except as specifically admitted, the allegations in this paragraph are denied.

2.2 Admitted that Defendant American Triumph, LLC, was doing business in Washington and was the owner of the F/T AMERICAN TRIUMPH. Any remaining or unaddressed allegations in this paragraph are denied.

2.3 Admit that on or about the date alleged Defendant American Seafoods Company, LLC, was doing business in Washington and employed Plaintiff as a seaman. Except as specifically admitted, the allegations in this paragraph are denied.

3.1 Denied.

3.2 Denied.

3.3 Denied.

3.4 Denied.

3.5 Denied.

3.6 Denied.

3.7 Denied.

4.1 Denied.

4.2 Denied.

5.1 Denied.

Plaintiff's Prayer for Relief is denied in its entirety.

AFFIRMATIVE DEFENSES

BY WAY OF FURTHER ANSWER AND FOR THEIR AFFIRMATIVE DEFENSES, Defendants state:

1. Plaintiff has failed, in whole or in part, to state a claim upon which relief can be granted.

2. Plaintiff's injuries and/or damages, if any, were proximately caused in whole or in part by Plaintiff's own actions, fault, negligence and/or misconduct.

3. Plaintiff's injuries and/or damages, if any, are barred or mitigated due to Plaintiff's failure to take reasonable steps to avoid, limit or minimize same.

4. Plaintiff timely received all seamen's benefits (maintenance, cure and unearned wages) to which he was entitled.

Defendants reserve the right to add such other affirmative defenses as discovery may reveal.

WHEREFORE, having answered Plaintiff's Amended Seaman's Complaint for Personal Injury under the Jones Act and the General Maritime Law and stated their affirmative defenses, Defendants pray as follows:

1. That Plaintiff's Amended Complaint be dismissed with prejudice and that Plaintiff take nothing thereby.

2. That Defendants' costs and reasonable attorney's fees be taxed against Plaintiff;

3. For such other relief as the Court may deem just and equitable.

DATED this 27th day of July, 2015.

s/ Markus B.G. Oberg
Markus B.G. Oberg, WSBA #34914
Attorneys for Defendants
LeGros, Buchanan & Paul
701 Fifth Avenue, Suite 2500
Seattle, WA 98104
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E-mail: moberg@legros.com

CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused to be served in the manner noted below, a copy of the document to which this certificate is attached, on the following counsel of record:

Joseph Stacey
4039-21st Ave. W #401
Seattle, WA 98199
206-282-3100
bstj@maritimelawyer.us

- Via Mail
 Via E-mail
 Via Messenger

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct this 27th day of July, 2015.

s / Andrea Anthony
Andrea Anthony, Legal Assistant
Signed at Seattle, Washington

HONORABLE JULIE SPECTOR

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
AT SEATTLE

ALLAN A. TABINGO,

Plaintiff,

v.

AMERICAN TRIUMPH LLC, and
AMERICAN SEAFOODS COMPANY,
LLC,

Defendants.

No. 15-2-17089-9 SEA

DEFENDANTS' MOTION FOR PARTIAL
SUMMARY JUDGMENT DISMISSING
PLAINTIFF'S CLAIM FOR PUNITIVE
DAMAGES

**NOTED FOR ORAL ARGUMENT:
NOVEMBER 20, 2015 AT 9:00 A.M.**

I. RELIEF REQUESTED

Plaintiff Allan A. Tabingo ("Plaintiff") has failed to state a legally cognizable claim for relief under his general maritime law cause of action for unseaworthiness.¹ Plaintiff brings liability claims against Defendants under the Jones Act and the general maritime doctrine of unseaworthiness. Neither of those liability theories allows recovery for non-pecuniary damages, including punitive damages—he is limited to compensatory damages, if

¹ Defendants understand Plaintiff's claim for punitive damages as alleged in his Amended Complaint to be limited to his claim for unseaworthiness. To the extent Plaintiff is claiming punitive damages for Jones Act negligence, then dismissal of that claim is warranted as well. *See* Section 1 *infra*.

any. In *McBride v. Estis Well Service, LLC*, 768 F.3d 382 (2014), the Fifth Circuit addressed this question *en banc* to decide whether a seaman (injured or deceased) can recover punitive damages where liability is predicated on the Jones Act or unseaworthiness. The Fifth Circuit held punitive damages are **not** recoverable. *Id.* at 384. Significantly, on May 18, 2015, the U.S. Supreme Court endorsed the Fifth Circuit's *en banc* decision by declining to hear the plaintiffs' petition for review. *McBride v. Estis Well Service, LLC*, 135 S.Ct. 2310, 191 L.Ed.2d 978 (2015). Washington State Supreme Court interpretations of federal maritime law have long been in accord. Nevertheless, in July 2015, Plaintiff filed the instant lawsuit claiming punitive damages for unseaworthiness. Plaintiff has thus failed to state a claim against Defendants as to such alleged damages and dismissal of Plaintiff's claim for these unavailable punitive damages is warranted under CR 12(b)(6) and (c).

II. STATEMENT OF FACTS

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. *See*, Ex. A (Amended Complaint), p. 2, ¶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. *Id.*, p.3, ¶4.2.

In addition to his two liability causes of action against Defendants, Plaintiff asserts a third remedy available to a seaman, the no-fault entitlement to maintenance, cure, and unearned wages under general maritime law. *Id.*, p.3, Section V. However, Plaintiff has admitted that his Amended Complaint does not state a claim for punitive damages relating to this maritime benefits claim. Ex. B (Plaintiff's Responses to Defendants' First Requests for

Admission), p. 4, RFA No. 6.

III. STATEMENT OF THE ISSUE

Whether Plaintiff has failed to state a claim for relief, and whether Defendants are entitled to judgment on the pleadings as a matter of law, as to Plaintiff's claim for punitive damages? YES.

IV. EVIDENCE RELIED UPON

Defendant's motion raises questions of law based on the allegations in Plaintiff's Amended Complaint, substantive federal maritime law, and the Declaration of Markus B.G. Oberg, with exhibits.

V. AUTHORITY

A. CR 12(b)(6) Standard

A motion to dismiss under CR 12(b)(6) questions the legal sufficiency of the allegations in a pleading. *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." *Id.* (citing *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 298, 545 P.2d 13 (1975)). A trial court should grant a motion to dismiss pursuant to CR 12(b)(6) "if it appears beyond a reasonable doubt that no facts exist that would justify recovery." *Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 376, 166 P.3d 662 (2007) (*en banc*) (quoting *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994)); *Ottgen v. Clover Park Technical College*, 84 Wn. App. 214, 222, 928 P.2d 1119 (Div. 2, 1996) (affirming dismissal based on issue of law, namely entity's Consumer Protection Act exemption as complete bar to the plaintiff's claim).

Here, Plaintiff's Amended Complaint asserts a claim for punitive damages based on unseaworthiness under general maritime law. Plaintiff's claim for punitive damages is not viable as a matter of law. As explained by the Washington State Supreme Court, the Jones Act served to extend a seaman's right to **compensatory** damages, previously limited to injuries caused by unseaworthiness of the vessel, to injuries caused by negligence. *See Williams v. Steamship Mut. Underwriting Ass'n, Ltd.*, 45 Wn.2d 209, 215-16, 273 P.2d 803 (1954); *see also Peterson v. Pacific S.S. Co.*, 145 Wash. 460, 474, 261 P. 115 (1927), *affirmed by Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 49 S.Ct. 75, 73 L. Ed. 220 (1928), (*citing, Panama R.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). Punitive damages are non-compensatory (or non-pecuniary),² and therefore are not available under the Jones Act. *E.g. Kopczynski v. The Jacqueline*, 742 F.2d 555, 560 (9th Cir. 1984), *cert. den.*, 471 U.S. 1136, 105 S. Ct. 2677, 86 L. Ed. 2d 696 (1985). Under the uniformity principle set forth by the United States Supreme Court in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990), the same prohibition on non-compensatory damages applies to the general maritime cause of action for unseaworthiness, precluding an award of punitive damages for unseaworthiness. *McBride v. Estis Well Service, LLC*, 768 F.3d 382, 384 (2014), *cert. den.*, 135 S.Ct. 2310 (2015). Indeed, the Washington State Supreme Court has held that "unseaworthiness and a Jones Act negligence case have essentially identical measures of damages." *Miller v. Arctic Alaska Fisheries Corp.*, 133 Wn.2d 250, 265-66, 944 P.2d 1005 (1997) (*en banc*). Even accepting Plaintiff's

² Washington State courts have consistently used the term "compensatory" rather than "pecuniary" to describe the damages allowed under FELA and the Jones Act. *E.g. Williams, supra.*, 45 Wn.2d at 215-16; *Peterson, supra.*, 145 Wash. at 474.

allegations as true, therefore, no set of facts consistent with the Amended Complaint would entitle Plaintiff to relief. See *Atchison, supra.*, 161 Wn.2d at 376; *Ottgen, supra.*, 84 Wn. App. at 222. Plaintiff's claim for punitive damages for unseaworthiness under general maritime law is rightfully dismissed under CR 12(b)(6) for failure to state a claim.³

B. Plaintiff May Not Recover Punitive Damages.

Plaintiff asserts a claim that, as a matter of law, is not recoverable. 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. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 878-79, 224 P.3d 761 (2010) (citing, *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)). Under substantive maritime law, specifically the causes of action asserted against Defendants—the Jones Act and the General Maritime Law (Unseaworthiness)—damages are limited. As federal maritime law controls in this maritime case, the federal case authority discussed below is controlling. Notably, Washington State Supreme Court interpretations of federal maritime law have long been in accord.

1. Punitive Damages Are Not Available under the Jones Act.

The Jones Act expressly provides seamen with the same remedy against employers 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 the Federal Employers’ Liability Act, 45 U.S.C. §51, *et seq.* (“FELA”), which provides railroad workers with negligence claims

³ To the extent Plaintiff is claiming punitive damages under his Jones Act cause of action, that claim should also be dismissed.

against their employers, *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 395-396, 44 S. Ct. 391, 68 L. Ed. 748 (1924); and 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 v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990) (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). “No case under FELA has allowed punitive damages, whether for personal injury or death.” *McBride, supra.*, 768 F.3d at 388 (citing, *Miller v. Am. 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, supra.*, 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, supra.*, 498 U.S. at 32; *see also, McBride, supra.*, 768 F.3d at 387. As explained by the Washington State Supreme Court, the Jones Act serves 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 v. Pacific S.S. Co.*, 145 Wash. 460, 474, 261 P. 115 (1927), *affirmed by Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 49 S. Ct. 75, 73 L. Ed. 220 (1928) (*citing, Panama R.R. Co., supra*, for the rule that the Jones Act grants seaman an alternative action to recover compensatory damages).⁴

Accordingly, punitive damages are not available for any cause of action arising under the Jones Act. *E.g., McBride, supra.*, 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, supra.*, 989 F.2d at 1457 (“Punitive damages are not therefore recoverable under the Jones Act.” (*citing, Kopczynski, supra.*, 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, supra.*, 742 F.2d at 560-61). Plaintiff cannot, as a matter of law, recover punitive damages under his Jones Act-based liability claims.

⁴ As stated, Washington State courts have consistently used the term “compensatory” rather than “pecuniary” to describe the damages allowed under FELA and the Jones Act. *E.g. Williams, supra.*, 45 Wn.2d at 215-16; *Peterson, supra.*, 145 Wash. at 474.

This limitation on damages under the Jones Act applies equally to Plaintiff's unseaworthiness claim. "[T]his case is controlled by the Supreme Court decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990), which holds that the Jones Act limits a seaman's recovery to pecuniary losses where liability is predicated on the Jones Act or unseaworthiness." *McBride, supra.*, 768 F.3d at 384.

2. Punitive Damages Are Not Available under General Maritime Law (Unseaworthiness).

As stated, in *McBride v. Estis Well Service, LLC*, 768 F.3d 382 (2014), the Fifth Circuit addressed the question before this Court *en banc*, holding that a seaman (injured or deceased) cannot as a matter of law recover punitive damages where liability is predicated on the Jones Act or unseaworthiness. *Id.* at 384. More recently, on May 18, 2015, the U.S. Supreme Court effectively endorsed this holding by declining to hear the plaintiffs' petition for review. *McBride v. Estis Well Service, LLC*, 135 S.Ct. 2310, 191 L.Ed.2d 978 (2015).

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. *See, 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."). 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 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, supra*, 498 U.S. at 32-33.⁵

As discussed above, it is clear that punitive damages are not allowed under the Jones Act; and, therefore, neither are they allowed under general maritime law claims. “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, supra*, 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., supra.*, 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, supra*, 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, supra, 498 U.S. at 32-33.⁶ “Although Congress and the courts both have a lawmaking

⁵ Moreover, punitive damages are as a general rule not permitted under Washington law. *See, Dailey v. North Coast Life Insurance Co.*, 129 Wn.2d 572, 919 P.2d 589 (1996) (*en banc*) (“Since its earliest decisions this court has consistently disapproved of punitive damages as contrary to public policy”) (*citing Spokane Truck & Dray Co. v. Hoefler*, 2 Wash. 45, 50-56, 25 P. 1072 (1891)).

⁶ Notably, although *Miles* is 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 resulting from negligence. As with loss of society in

role in maritime cases, ‘Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country.’” *See, McBride, supra.*, 768 F.3d at 384.

The post-*Miles* jurisprudence consistently interprets *Miles* as foreclosing punitive and other non-pecuniary damages under general maritime law based liability claims. *E.g.*, *Horseley v. Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994) (rejecting claim for punitive damages); *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1457 (6th Cir. 1993) (punitive damages not available in general maritime law unseaworthiness action for asbestos-related wrongful death of seaman); *Jackson v. Unisea, Inc.*, 824 F. Supp. 895, 896 (D. Alaska 1992) (finding *Miles* precludes recovery of punitive damages for unseaworthiness under general maritime law); *Hollinger v. Kirby Tankships, Inc.*, 910 F. Supp. 571, 572 (S.D. Ala. 1996) (granting motion to dismiss punitive damages claim); *In re Matter of Waterman S.S. Corp.*, 780 F. Supp. 1093, 1096 (E.D. La. 1992); *In re Mardoc (asbestos case cluster)*, 768 F. Supp. 595, 597 (E.D. Mich. 1991) (granting motion to dismiss punitive damages in asbestos actions).⁷

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 wrongful death actions, this forecloses more expansive remedies in a general maritime action founded on strict liability [*i.e.*, unseaworthiness].” *Miles, supra*, 498 U.S. at 36.

⁷ 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, supra*, 768 F. Supp. at 597-98 (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).

liability is predicated on the Jones Act or unseaworthiness. *See, McBride, supra.*, 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 *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.”)). Plaintiff cannot, as a matter of law, recover punitive damages for unseaworthiness and dismissal of his claim for punitive damages claims is warranted.

3. *Atlantic Sounding Co., Inc. v. Townsend* Does Not Apply

Plaintiff may attempt to argue that the historical unavailability of punitive damages for liability claims grounded in the Jones Act or general maritime law, was altered by the U.S. Supreme Court’s decision in *Atlantic Sounding Co., Inc. v. Townsend, supra.*, 557 U.S. 404 (2009), but this is not the case. *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). Indeed, that argument was expressly rejected by the *en banc* Fifth Circuit in *McBride*, which was effectively endorsed by the U.S. Supreme Court in May 2015:

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, supra., 768 F.3d at 389-90.

Townsend involved only the no-fault seaman's general maritime remedy of maintenance and cure,⁸ not the separate theories of Jones Act negligence and unseaworthiness that are involved in the matter before this Court. 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 420-21, 129 S.Ct. 2561 (quoting, *Miles*, 498 U.S. at 31, 111 S.Ct. 317).

McBride, supra., 768 F.3d at 389-90.⁹

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

⁸ Maintenance is a daily stipend paid to seaman while recovering from an injury or illness; and cure is the payment of the treatment costs.

⁹ Indeed, as explained in the concurring opinion, "notwithstanding the American courts' judicial creativity, unseaworthiness was 'an obscure and relatively little used remedy' until it became a strict liability action during the 1940s." *McBride, supra.*, 768 F.3d at 394 (citing, *Miles, supra.*, 498 U.S. at 25 (quoting, Grant Gilmore & Charles L. Black Jr., *The Law of Admiralty* 383 (2d ed.1975)); *Mahnich v. S. S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561 (1944)).

complementary Congressionally-enacted seaman's negligence liability claim (Jones Act, incorporating FELA) bars recovery of such damages. *McBride, supra.*, 768 F.3d at 389-90; *see also, La Voie, supra*, 797 F. Supp. at 831, *quoting, Miles, supra.*, 111 S. Ct. at 325-26.

Indeed, in *Townsend*, the U.S. Supreme Court confirmed that “[T]he reasoning of *Miles* remains sound.” *Townsend*, 557 U.S. at 420; *McBride, supra.*, 768 F.3d at 390. The U.S. 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 420.¹⁰ The U.S. Supreme Court’s more recent decision to forego review of the Fifth Circuit’s *en banc* decision in *McBride* affirms this conclusion. *See, McBride v. Estis Well Service, LLC*, 135 S.Ct. 2310, 191 L.Ed.2d 978 (2015).

For these reasons, Plaintiff has failed to state a claim against Defendants as to punitive damages and dismissal of Plaintiff’s claim for punitive damages is warranted under CR 12(b)(6) and (c).

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¹⁰ DOHSA, the Death On The High Seas Act, specifically limits damage recovery to pecuniary loss. 46 U.S.C. §30303.

VI. PROPOSED ORDER

A proposed order granting the relief requested is attached.

DATED this 23rd day of October, 2015.

s/ Markus B.G. Oberg

Markus B.G. Oberg, WSBA #34914

Attorneys for Defendants

LeGros, Buchanan & Paul

701 Fifth Avenue, Suite 2500

Seattle, WA 98104

E-mail: moberg@legros.com

CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused to be served via electronic service through the King County Superior Court, a copy of the document to which this certificate is attached, on the following counsel of record:

Joseph Stacey
4039-21st Ave. W #401
Seattle, WA 98199
206-282-3100
bstj@maritimelawyer.us

- Via Mail
- Via E-Service
- Via Messenger

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct this 23rd day of October, 2015.

s / Andrea Anthony
Andrea Anthony, Legal Assistant
Signed at Seattle, Washington

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HONORABLE JULIE SPECTOR

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
AT SEATTLE

ALLAN A. TABINGO,

Plaintiff,

v.

AMERICAN TRIUMPH LLC, and
AMERICAN SEAFOODS COMPANY,
LLC,

Defendants.

No. 15-2-17089-9 SEA

DECLARATION OF MARKUS B.G.
OBERG IN SUPPORT OF DEFENDANTS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT DISMISSING PLAINTIFF'S
CLAIM FOR PUNITIVE DAMAGES

**NOTED FOR ORAL ARGUMENT:
NOVEMBER 20, 2015 AT 9:00 A.M.**

I, Markus B.G. Oberg, being first duly sworn on oath, depose and say:

1. I am an attorney for Defendants, American Triumph LLC and American Seafoods Company, LLC. I am over the age of majority, make this declaration on personal knowledge, and am competent to testify regarding the facts contained herein.

2. Attached hereto as Exhibit A is a true and correct copy of the Amended Seaman's Complaint for Personal Injury under the Jones Act and the General Maritime Law, dated July 17, 2015.

3. Attached hereto as Exhibit B is a true and correct copy of Defendants' First

{28401-00139190:1}

DECLARATION OF MARKUS B.G. OBERG IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT- Page 1

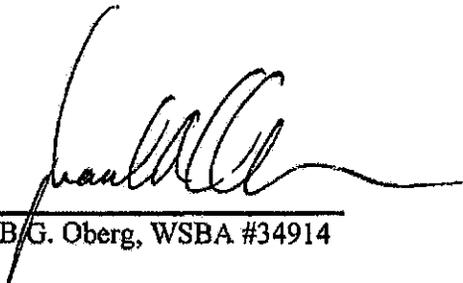
LE GROS BUCHANAN
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Requests for Admissions to Plaintiff and Responses Thereto, dated August 24, 2015.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON AND THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

DATED this 22nd day of October, 2015.



Markus B.G. Oberg, WSBA #34914

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CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused to be served via electronic service through the King County Superior Court, a copy of the document to which this certificate is attached, on the following counsel of record:

Joseph Stacey
4039-21st Ave. W #401
Seattle, WA 98199
206-282-3100
bstj@maritimelawyer.us

- Via Mail
- Via E-Service
- Via Messenger

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct this 23rd day of October, 2015.

s/ Andrea Anthony
Andrea Anthony, Legal Assistant
Signed at Seattle, Washington

{28401-00159190;1}

DECLARATION OF MARKUS B.G. OBERG IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT- Page 3

EXHIBIT A

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HON. JULIE SPECTOR

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
FOR KING COUNTY

ALLAN A. TABINGO,)	
	)	Case No. 15-2-17089-9 SEA
Plaintiff,)	
	)	AMENDED
v.	)	SEAMAN'S COMPLAINT FOR
	)	PERSONAL INJURY UNDER THE
AMERICAN TRIUMPH LLC, and	)	JONES ACT AND THE
AMERICAN SEAFOODS	)	GENERAL MARITIME LAW
COMPANY LLC,)	
)	
Defendants.)	

Comes now the plaintiff, Allan A. Tabingo, and for his complaint against the defendants alleges:

I. JURISDICTION

1.1 This is a claim for personal injuries sustained by a seaman in the course and scope of his employment aboard a commercial fishing vessel against his employer, the owner and operator of the vessel, and for punitive damages for the willful and wanton failure to provide a seaworthy vessel. Plaintiff Allan Tabingo is a seaman within the meaning of the Merchant Marine Act of 1920, 46 U.S.C. § 30104, et. seq., commonly known as the Jones Act. Jurisdiction is vested pursuant to the maritime law, 28 U.S.C.

AMENDED SEAMAN'S COMPLAINT-1

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ATTORNEYS AT LAW
WASHINGTON • ALASKA • OREGON

4030 - 21ST AVENUE WEST, SUITE 401
SEATTLE, WASHINGTON 98109
TELEPHONE (206) 282-3100

1 § 1333, and 46 U.S.C. § 30104.
2

3 **II. THE PARTIES**

4 2.1 Plaintiff Allan Tabingo was a seaman in the employment of the defendants
5 and in the services of F/V AMERICAN TRIUMPH at the time of his injury.

6 2.2 Defendant American Triumph LLC is a corporation or some other legal entity
7 licensed to do and doing business in the State of Washington. At all times relevant
8 hereto, this defendant owned and/or operated and/or managed F/V AMERICAN
9 TRIUMPH and/or employed the plaintiff thereon as a seaman.
10

11 2.3 Defendant American Seafoods Company LLC is a corporation or some other
12 legal entity licensed to do and doing business in the State of Washington. At all times
13 relevant hereto, this defendant owned and/or operated and/or managed F/V AMERICAN
14 TRIUMPH and/or employed the plaintiff thereon as a seaman.
15

16 **III. LIABILITY**

17 3.1 On or about February 12, 2015, while in the course of his employment with
18 the defendants and while in the service of the defendants' vessel, plaintiff was severely
19 injured as a direct and proximate result and/or legal cause of the negligence of the
20 defendants and/or the unseaworthiness of F/V AMERICAN TRIUMPH.
21

22 3.2 Defendants may have breached State and/or Federal laws and/or regulations
23 (hereafter, also referred to as negligence and/or unseaworthiness).

24 3.3 Plaintiff, at the time of his injury, was a deck hand trainee on defendants'
25 vessel F/V AMERICAN TRIUMPH.
26

AMENDED SEAMAN'S COMPLAINT-2

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TELEPHONE (206) 282-3100 FAX (206) 282-3100

1
2 3.4 At the time of plaintiff's injury, defendants had a deckboss on duty. The
3 deckboss was plaintiff's supervisor at the time of his injury.

4 3.5 Plaintiff's hand was injured on the vessel's stern trawl deck when the RSW
5 hatch was lowered onto his hand.

6 3.6 Plaintiff's hand was injured on or about February 12, 2015 while working on
7 F/V AMERICAN TRIUMPH.

8 3.7 At the time of plaintiff's injury, the hydraulic valve which operated the hatch
9 malfunctioned, closing onto plaintiff's hand.
10

11 **IV. DAMAGES**

12 4.1 As a direct and proximate result and/or legal cause of the negligence of the
13 defendants, and the unseaworthiness of the F/V AMERICAN TRIUMPH, plaintiff
14 sustained severe injuries to his left hand and fingers, and other injuries. The full extent of
15 his injuries are presently undetermined. He has suffered pain, anguish, disfigurement,
16 disability and loss of enjoyment of life in the past and will in the future, and other related
17 damages. He has incurred substantial medical expenses in the past and may in the future.
18 He has lost wages in the past and he will lose wages in the future. The full extent of the
19 permanent impairment to his wage-earning capacity is presently undetermined.
20

21 4.2 Defendants willfully and wantonly failed to provide a seaworthy vessel.
22 Defendants failed to repair the defective hydraulic handle for the stern RSW hatch.
23 Defendants continued to use this defective hydraulic system, recklessly subjecting its
24 crew to significant danger. Defendants' callous, willful and wanton indifference gives
25
26

AMENDED SEAMAN'S COMPLAINT-3

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TELEPHONE (206) 282-3100

1 rise to punitive damages and attorney's fees.

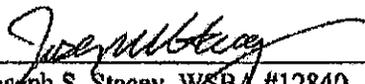
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3 **V. MAINTENANCE, CURE AND UNEARNED WAGES**

4 5.1. Defendants, by reason of the injuries received by plaintiff in the course of his
5 employment on board F/V AMERICAN TRIUMPH, are liable to plaintiff for his
6 provable entitlements.

7 **WHEREFORE**, plaintiff prays for judgment in accordance with the evidence to
8 be presented at the time of trial and as may be permitted under the General Maritime Law
9 and the Jones Act for all general and special damages permitted under the law including
10 but not limited to: maintenance and cure, entitlements, lost wages both past and future,
11 pain and suffering both past and future, anguish, disability, punitive damages, together
12 with taxable costs, interest and attorney fees. Plaintiff prays for all remedies and
13 procedures available under the law.
14

15 DATED this 17 day of July, 2015.

16
17 **BEARD STACEY & JACOBSEN, LLP**

18 
19 Joseph S. Stacey, WSBA #12840
20 Beard Stacey & Jacobsen, LLP
21 4039 - 21st Avenue W., #401
22 Seattle, WA 98199
23 Telephone: 206-282-3100
24 Fax: 206-282-1149
25 E-mail: bstj@maritimelawyer.us
26 Attorneys for Plaintiff

AMENDED SEAMAN'S COMPLAINT-4

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EXHIBIT B

RECEIVED
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LEGROS, BUCHANAN
& PAUL

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
AT SEATTLE

ALLAN A. TABINGO,

Plaintiff,

v.

AMERICAN TRIUMPH LLC, and
AMERICAN SEAFOODS COMPANY LLC,

Defendants.

No. 15-2-17089-9 SEA

DEFENDANTS' FIRST REQUESTS FOR
ADMISSIONS TO PLAINTIFF AND
RESPONSES THERETO

TO: ALLAN A. TABINGO, Plaintiff;

AND TO: JOSEPH S. STACEY, his attorney.

Pursuant to Civil Rule 36, you will please respond to the following requests for admissions under oath within 30 days of the date of service.

GENERAL INSTRUCTIONS

The definitions provided in Defendant American Seafoods Company LLC's First Set of Interrogatories and Requests for Production are hereby reincorporated by reference and shall apply to these requests for admissions.

DEFENDANTS' FIRST REQUESTS FOR
ADMISSIONS AND RESPONSES THERETO - Page 1
(No. 15-2-17089-9 SEA)

(28401-00138900;1)

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& Paul
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(206) 467-4550

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Additionally, if you deny any of these requests, set forth in detail the reasons for your denial, or the reasons why the answering party cannot truthfully admit or deny the matter. Denial shall fairly meet the substance of the requested admission. If you deny only part of the matter, specify so much of it as true and qualify or deny the remainder.

If you base your denial on lack of information or knowledge, state the following:

1. What you have done to make a reasonable inquiry;
2. Identify the information or material you would need to review in order to respond; and
3. Why this material or information is unavailable to you.

TIME LIMIT

Each and every request for admission you do not fully respond to within thirty (30) days after service SHALL BE DEEMED ADMITTED and shall be conclusively established in THIS matter.

REQUESTS FOR ADMISSIONS

REQUEST FOR ADMISSION NO. 1: Admit that you have been paid maintenance benefits.

RESPONSE:

Admit.

REQUEST FOR ADMISSION NO. 2: Admit that to date you have been paid the full amounts of maintenance to which you were legally entitled.

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RESPONSE:

Deny.

REQUEST FOR ADMISSION NO. 3: Admit that your medical bills on account of your alleged injury have been paid by defendants.

RESPONSE:

Admit that to date, to Plaintiff's knowledge, all medical bills have been paid.

REQUEST FOR ADMISSION NO. 4: Admit that you have been paid all unearned wages to which you were legally entitled on account of your alleged injury.

RESPONSE:

Can neither admit nor deny until plaintiff receives copy of employment contract, to be provided by defendant in discovery.

REQUEST FOR ADMISSION NO. 5: Admit that you have reached maximum medical improvement.

RESPONSE:

Deny.

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REQUEST FOR ADMISSION NO. 6: Admit that plaintiff's complaint does not state a claim for punitive damages relating to his claim for maritime benefits (maintenance, cure, and unearned wages).

RESPONSE:

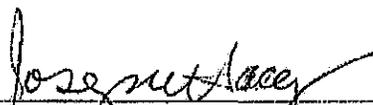
Admit.

REQUEST FOR ADMISSION NO. 7: Admit that plaintiff's claim for punitive damages is limited to his allegations of unseaworthiness as to the F/V AMERICAN TRIUMPH.

RESPONSE:

Objection: This request is improper, as it asks for a legal conclusion. See Weber v. Biddle, 72 Wash.2d 22, 29 (1967). If a response is required by the Court, it would be Deny.

ANSWERS DATED this 24th day of August, 2015.

By: 
JOSEPH S. STACEY, WSBA #12840
Attorneys for Plaintiff

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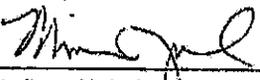
Certificate of Service

I hereby certify that on the 24th day of August, 2015, the undersigned caused a copy of the foregoing document to be served on

Markus B.G. Oberg
LeGros Buchanan & Paul
701 Fifth Avenue, #2500
Seattle, WA 98104

by

mail
 fax
 hand delivery



Marianne V. Jucka

DEFENDANTS' FIRST REQUESTS FOR
ADMISSIONS AND RESPONSES THERETO – Page 5
(No. 15-2-17089-9 SEA)

[28401-001.38500;1]

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701 FIFTH AVENUE
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SEATTLE, WASHINGTON 98101-7001
206462-4000

HONORABLE JULIE SPECTOR
Motion Date: November 20, 2015
With Oral Argument

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
FOR KING COUNTY

ALLAN A. TABINGO,)
)
 Plaintiff,)
 v.)
)
 AMERICAN TRIUMPH LLC, and)
 AMERICAN SEAFOODS COMPANY,)
 LLC,)
)
 Defendants.)

Case No. 15-2-17089-9 SEA

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT
DISMISSING PLAINTIFF'S CLAIM
FOR PUNITIVE DAMAGES**

Introduction And Summary

Defendants move pursuant to CR 12(b)(6) for dismissal of plaintiff's claim for punitive damages. Defendants' motion should be denied. As a matter of law, the United States Supreme Court recognized punitive damages under general maritime law in *Atlantic Sounding v Townsend*. The *Townsend* Court established a straightforward rule going forward: If a general maritime law cause of action and remedy were established before the passage of the Jones Act, and the Jones Act did not address that cause of action or remedy, then that remedy remains available under that cause of action unless and until Congress intercedes. Although *Townsend* was a maintenance and cure case, the *Townsend* analysis applies with equal force to

Opposition To Motion For Summary Judgment 1.

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TELEPHONE (206) 282-3100

1 the unseaworthiness claim because unseaworthiness, like maintenance and cure, is a general
2 maritime cause of action that was established before the passage of the Jones Act, and the
3 Jones Act did not address that cause of action or remedy.

4 Defendants, in their motion, fail to mention that this court has previously ruled on the
5 same exact issue in a seaman's case involving the same two law firms. Attached as Exhibit
6 A to the Declaration of Joseph S. Stacey, filed herewith, are two orders that this court entered
7 in *McCallum v Glacier Fish Co., LLC*, 12-2-11635-1SEA.¹ This court, less than two years
8 ago, ruled that a seaman may maintain a claim for punitive damages under general maritime
9 law.
10

11 Facts

12 Plaintiff was injured while working on defendants' factory trawler fishing vessel
13 AMERICAN TRIUMPH. This vessel hauls fish aboard with nets. After the fish are aboard, a
14 deckhand opens a steel "hatch," which is essentially a door in the floor/deck. The steel hatch
15 (like a door) is hinged on one side and opens and shuts by way of hydraulics. This hatch,
16 when opened, allows the fish to drop into tanks below the deck. The factory workers below
17 then take the fish from those tanks to process.
18

19 Plaintiff was a "deckhand trainee" at time of his injury. One of his tasks was to make
20 sure that fish got into these tanks. After the fish net is emptied on deck, the fish hatch is
21 opened by the hydraulics operator on the deck. On the day of injury, the hydraulics operator
22 was Mr. Herrera. This hydraulics operator stands at the hydraulics station and pushes a
23 hydraulics valve to open and shut the hatch/door. The deckhands and deckhand trainee push
24

25 ¹. In the December 10, 2013 order, this court upheld punitive damages under general
26 maritime law but dismissed the claim for punitive damages under the Jones Act.

1 the fish into the open hatches and into these tanks. Most of the fish can be pushed into the
2 tanks with shovels. But, the last bit of fish needs to be cleared and pushed around by hand.

3 On January 12, 2015, plaintiff was on his hands and knees pushing the last remaining
4 fish into the open hatch with his hands. Mr. Herrera - for some unknown reason - pushed the
5 hydraulics valve that shut the hatch while plaintiff's hand was near the hinge of this hatch.
6 Realizing his mistake, Mr. Herrera tried to stop the closing of the hatch. But, the hydraulics
7 handle was broken - it came out of the hydraulics valve. In fact, this hydraulics valve had
8 been broken for approximately 2 years, and defendant never bothered to fix it. The open
9 hydraulics valve could not be stopped in time. The steel hatch closed onto plaintiff's hand,
10 amputating two fingers.
11

12 Arguments

13 A. Seamen's Injury And Death Law. Maintenance And Cure and 14 Unseaworthiness Are General Maritime Law Causes Of Action And Should Be 15 Treated the Same With Respect To Punitive Damages.

16 A brief analysis of seamen's injury and death law is necessary to understand why
17 punitive damages are available to plaintiff here, as provided by the *Townsend* case, and why
18 *Miles v. Apex Marine Corp* applies only to a wrongful death case. An injured seaman has
19 three separate and distinct causes of action available to him against the shipowner and his
20 employer: (1) maintenance (i.e. a daily living allowance) and cure (i.e. medical bills); (2)
21 unseaworthiness; and (3) Jones Act negligence. The maintenance and cure and
22 unseaworthiness causes of action are provided under general maritime law. General maritime
23 law is the common law developed by federal courts exercising the maritime authority conferred
24 on them by the Admiralty Clause of the Constitution. *McBride v Estis Well Serv., LLC*, 731
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1 F.3d 505, 507-08 (5th Cir. 2013)(rev'd. *McBride v Estis Well Serv., LLC*, 768 F.3d 382 (5th Cir,
2 2014)(en banc). The general maritime law-based actions for maintenance and cure *and*
3 unseaworthiness were available to seamen long before the enactment of the Jones Act in 1920.
4 *THE OSCEOLA*, 189 US 158, 175 (1903). The duties to provide maintenance and cure and a
5 seaworthy ship are not based upon statute but have developed over centuries through decisional
6 admiralty law. *Baptiste v Superior Court*, 106 Cal. App. 3rd 87, 89 (Cal. Ct. App. 1980), *cert.*
7 *denied*, 449 US 1124 (1981). The Jones Act was enacted in 1920 to overrule *THE OSCEOLA*,
8 a 1903 Supreme Court decision holding that a seaman had no claim for injuries or death caused
9 by the employer's negligence under general maritime law. *Chandris, Inc. v Latsis*, 515 US
10 347, 354 (1995). The Jones Act's purpose was to enlarge, not narrow, the causes of action and
11 remedies available to seamen under maintenance and cure and unseaworthiness. *See Atlantic*
12 *Sounding v Townsend*, 557 US 404, 417 (2009).

13
14
15 **B. The United States Supreme Court Provides For Punitive Damages Under General**
16 **Maritime Law. The Warranty of Seaworthiness is General Maritime Law.**
17 **Punitive Damages Long Predated The Jones Act (1920). Punitive Damages Are**
18 **Available In This Case Under General Maritime Law.**

19 Recently, in *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 129 S. Ct. 2561
20 (2009), the Supreme Court specifically held that punitive damages are available to the seaman
21 under general maritime law. Further, the *Townsend* decision (in conjunction with other
22 Supreme Court decisions) provides a clear indication that punitive damages are available to the
23 seaman under the Jones Act as well. In *Townsend*, the Court explained at length that punitive
24 damages were generally available under maritime law from the earliest days of our Republic.

25 Punitive damages have long been an available remedy at common law for
26 wanton, willful, or outrageous conduct.

557 U.S. at 407, 129 S. Ct. at 2566.

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Second, the Court noted that:

The general rule that punitive damages were available at common law extended to claims arising under federal maritime law.

557 U.S. at 407, 129 S. Ct. at 2567, citing *Lake Shoer & Michigan Southern R. Co. v Prentice*, 147 U.S. 101, 108 (1893).

In short, prior to enactment of the Jones Act in 1920, 'maritime jurisprudence was replete with judicial statements approving punitive damages, especially on behalf of passengers and seamen.'

557 U.S. at 412, 129 S. Ct. at 2568 quoting Robertson, 28 J. Mar. L. & Com. at 115.

Furthermore, the Court in *Townsend* did not limit its discussion to the narrow issue of punitive damages for the failure to pay maintenance and cure. *Townsend* specifically noted that:

Historically, punitive damages have been available and awarded in general maritime actions, including some in maintenance and cure. We find that nothing in *Miles or the Jones Act* eliminates that availability.

557 U.S. at 407, 129 S. Ct. at 2565(emphasis added).

The Jones Act ... created a statutory cause of action for negligence, but it did not eliminate pre-existing remedies available to seamen for the separate common-law cause of action based upon a seaman's right to maintenance and cure.

Id. at 2570.

The *Townsend* Court thus held that a maritime plaintiff is "entitled to pursue punitive damages *unless* Congress has enacted legislation departing from this common-law understanding." *Townsend*, 557 U.S. at 415, 129 S. Ct. at 2568 (emphasis added). Congress has not enacted such legislation under the Jones Act.

Since punitive damages were available to the seaman before 1920 (when the Jones Act was passed), it is presumed that Congress was aware of the state of the law on punitive

1 damages when it passed the Jones Act. *Townsend*, 557 U.S. at 422, 129 S. Ct. at 2573.

2 Congress chose not to alter the state of the law when it passed the Jones Act (Jones Act is silent
3 on punitive damages), so the *Townsend* Court correctly noted that Congress chose not to alter
4 the availability of punitive damages to the seaman when it passed that Act.

5 **C. The *Miles* Muddle Must Be Seen Through The *Townsend* Lens.**

6 Defendants rely heavily upon *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). The
7 *Miles* decision, however, did not concern punitive damages. The *Miles* court mentioned
8 punitive damages only once - while reciting the case's procedural history. *Miles*, 498 U.S. 19,
9 22 (1990). "*Miles* says and - more important - decides nothing about ... punitive damages."
10 *Atlantic Sounding Co., Inc. v. Townsend*, 496 F.3d 1282, 1286 (11th Cir. 2007). The Supreme
11 Court in *Miles* granted review to decide "whether the parent of a seaman who died from
12 injuries aboard respondents' vessel may recover under general maritime law for loss of society,
13 and whether a claim for the seaman's lost future earnings survives his death." *Miles*, 498 U.S.
14 19, 21 (1990). The *Miles* Court answered both questions "no." *Id.* at 32-33, 36. The *Miles*
15 decision does not control the issue of punitive damages for a seaman.

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17
18 Defendants insist on citing to "post *Miles* jurisprudence" (defendants' motion, p. 10,
19 lines 3-14) and basically ask this court to pretend that *Townsend* never happened. Defendants
20 refuse to acknowledge that *Townsend* clarified and severely limited the holding in *Miles*. The
21 *Townsend* Court specifically limited the holding in *Miles* to apply only to wrongful death
22 claims. *Townsend*, 557 U.S. at 419, 129 S. Ct. at 2572. The decision in *Miles* was based on
23 the fact that a wrongful death cause of action was not traditionally available under the general
24 maritime law. *Townsend*, 557 U.S. at 419, 129 S. Ct. at 2572. Instead, the wrongful death
25 cause of action was created by Congress. Since there was no wrongful death cause of action
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1 prior to the Congressional enactment providing a wrongful death cause of action, then the
2 courts cannot provide wrongful death remedies beyond those which were provided by
3 Congress. Conversely, since punitive damages were available under general maritime law prior
4 to the Jones Act, then that remedy is available to seamen today.

5 In any event, the *Townsend* Court emphatically rejected the argument that the holding in
6 *Miles* spoke to the issue of punitive damages for a seaman:

7
8 Petitioners nonetheless argue that the availability of punitive damages in this
9 case is governed by the Jones Act because of this Court's decision in *Miles*. In
10 *Miles*, petitioners argue, the Court limited recovery in maritime cases involving
11 death or personal injury to the remedies available under the Jones Act and the
12 Death On the High Seas Act (DOHSA). *Petitioners' reading of Miles is far too*
13 *broad.*

14 *Id.*, 557 U.S. at 418-19, 129 S. Ct. at 2571-72 (internal citations omitted)(emphasis added).

15 Instead, *Miles* “grapples with the entirely different question of whether general
16 maritime law should provide a cause of action for wrongful death based on unseaworthiness.”
17 *Id.*, 557 U.S. at 419, 129 S. Ct. at 2572 (emphasis added). As a result, the *Townsend* Court
18 found that: (1) *Miles* only applies in wrongful death cases; and (2) an injured seaman can still
19 recover punitive damages under the general maritime law because that remedy has traditionally
20 been available to injured seamen. *Id.*, 557 U.S. at 419-24, 129 S. Ct. at 2572-75.

21 Further, the *Miles* Court made clear that its ruling “did not disturb” the seamen’s
22 general maritime claims and remedies resulting from unseaworthiness that *pre-existed* the
23 enactment of the Jones Act. *Miles* at 19 (“The Jones Act evinces no general hostility to
24 recovery under maritime law since it does not disturb seamen’s general maritime claims for
25 injuries resulting from unseaworthiness....”). Instead, *Miles* simply held that any remedies
26

1 created by the Jones Act displaced similar remedies *subsequently* provided by the courts.

2 *Townsend* at 420.

3 Unfortunately, in several cases following *Miles* (and prior to *Townsend*), several courts
4 seeking to limit seamen's damages seized upon the seemingly broad displacement language and
5 extended it to cover nearly all seamen's damages, including punitive damages. *See e.g. In Re*
6 *ALEUTIAN ENTERPRISE*, 777 F.Supp. 793 (W.D. Wash. 1991). Defendants here make the
7 same discredited arguments in its motion. Defendants' arguments are stale and misplaced in
8 light of *Townsend's* clarification and severe limitation of the *Miles* holding.
9

10 **D. Baker Court Reaffirmed Maritime Law's Recognition Of Punitive Damages.**

11 Prior to *Miles*, the Supreme Court consistently applied a straightforward displacement
12 analysis in treating maritime remedies: If Congress has not expressly spoken to the issue, then
13 the courts are free to formulate remedies. *See generally, Moragne v States Marine Lines, Inc.*,
14 398 US 375 (1970). Following *Miles*, the Court, in a series of maritime cases culminating
15 with *Townsend*, returned to this analysis.
16

17 In 2008, a unanimous Supreme Court upheld punitive damages to fishermen whose
18 livelihoods were damaged by the EXXON VALDEZ oil spill. *Exxon Shipping v. Baker*, 554
19 U.S. 471 (2008). Most importantly, with respect to defendant's motion to strike punitive
20 damages under the Jones Act, Exxon argued that the Clean Water Act (CWA) preempted the
21 general maritime punitive damages remedy. *Baker*, 554 U.S. 487-89, 128 S.Ct. 2605, 2618-19.
22 The Supreme Court unanimously rejected Exxon's preemption argument. *Baker*, 554 U.S.
23 489, 128 S.Ct. 2605, 128 S.Ct. 2605, 2619.
24

25 The Court gave several explanations for rejecting Exxon's preemption argument. Those
26 same explanations apply to a motion by a maritime employer, like defendant here, who argues

1 that the Jones Act preempts the maritime remedy of punitive damages. For instance, the *Baker*
2 Court found that “there was no clear indication of congressional intent [in the CWA] to occupy
3 the entire field of pollution remedies.... *Baker*, 554 U.S. 489, 128 S.Ct. at 2619. Likewise,
4 there can be no serious contention made by any maritime employer that the Jones Act occupied
5 the entire field of maritime remedies. The Jones Act, for instance, makes no mention of
6 maintenance and cure. Further, the Supreme Court has stated that “[t]he only purpose of the
7 Jones Act was to remove the bar created by *The Osceola*” so that seamen would have a
8 negligence cause of action. *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991).
9 The Supreme Court also stated that “[A] remedial omission in the Jones Act is not evidence of
10 considered congressional policymaking that should command our adherence in analogous
11 contexts.” *Am. Exp. Lines, Inc. v. Alvez*, 446 U.S. 274, 283-84 (1980).
12

13 The *Baker* Court also stated that “[N]or for that matter do we perceive that punitive
14 damages for private harms will have any frustrating effect on the CWA remedial scheme,
15 which would point to preemption.” *Baker*, 554 U.S. 489, 128 S.Ct. at 2619. Likewise, the
16 maritime employer here cannot suggest that the Jones Act’s remedial scheme would be
17 frustrated by allowing punitive damages against employers.
18

19 **E. The Ninth Circuit (And Others) Provide For Punitive Damages When A Vessel**
20 **Owner Has Not Only Breached The Duty To Provide A Seaworthy Vessel, But Has**
21 **Done So Willfully.**

22 Prior to the *Miles* decision, all federal appellate courts that had addressed the issue,
23 including the Fifth Circuit, agreed that punitive damages were an available remedy under the
24 seaman’s unseaworthiness claim. *See Evich v Morris*, 819 F.2d 256, 258 (9th Cir.
25 1987)(punitive damages are available under general maritime law for claims of
26 unseaworthiness); *In Re Merry Shipping*, 650 F.2d 622, 623 (5th Cir. 1981)(“punitive damages

1 may be recovered under general maritime law upon a showing of willful and wanton
2 misconduct by the shipowner in the creation or maintenance of unseaworthy conditions.”); *Self*
3 *v Great Lakes Dredge*, 832 F.2d 1540, 1550 (11Cir. 1987)(“punitive damages should be
4 available in cases where the shipowner willfully violated the duty to maintain a safe and
5 seaworthy ship....”). Now that *Townsend* has clarified and limited *Miles* to wrongful death
6 cases, the Ninth Circuit holding of *Evich v Morris* should be followed.

7
8 The California courts allow punitive damages under general maritime law. See
9 *Baptiste v Superior Court*, 106 Cal. App. 3rd 87, 89 (Cal. Ct. App. 1980), *cert. denied*, 449 US
10 1124 (1981); *Columbo v BRP US, Inc.*, 179 Cal. Rptr.3d 580 (2014). Judge Eadie of the
11 Superior Court, King County followed the holding in *Townsend* and ruled that punitive
12 damages are available under the Jones Act and general maritime law. *Nes v Sea Warrior, Inc.*,
13 2010 AMC 2297 (2010). The majority of trial court decisions around the country allow for
14 punitive damages for the seaman under general maritime law.

15
16 Plaintiff asks this court to review the July 23, 2015 Western District of Washington
17 ruling of Judge Rothstein in *Hausman v Holland America Line USA*, 13cv00937BJR, attached
18 as Exhibit B to the declaration of Joseph S. Stacey filed herewith. Although the *Hausman* case
19 is a passenger case (not a seaman), the general maritime law analysis applies to seamen as well
20 as all other maritime plaintiffs. In that case, defendant argued (just as defendants here) that
21 *Miles* precluded an award of punitive damages. In that case, defendant also argued (just as
22 defendants here) that *McBride v Estis Well Service, LLC*, 768 F.3d 382 (5th Cir. 2014) should
23 be read to bar punitive damages. Judge Rothstein analyzed *Miles* and *McBride* and ruled that
24 *Townsend* provided for punitive damages under general maritime law. *Hausman*, pps 4-7.
25 “[T]he *Atlantic Sounding* decision made clear that *Miles* should not be read ‘to eliminate the
26

1 general maritime remedy of punitive damages,' as punitive damages had been around long
2 before the Jones Act was passed." *Hausman*, p 5, lines 6-9. Judge Rothstein correctly noted
3 that, under *Atlantic Sounding*, the *Miles* decision did not apply to situations "where both the
4 general maritime cause of action (i.e. unseaworthiness) and the remedy (punitive damages)
5 were well established before the passage of the Jones Act in 1920." *Id.*

6
7 Judge Rothstein's opinion also addresses defendants' argument here that *Townsend*
8 should be read strictly as a "maintenance and cure" case only (defendants' motion, p. 12, lines
9 2-8). "This Court is not persuaded that *Atlantic Sounding* should be construed narrowly so as
10 to apply only to maintenance and cure actions. As explained above, the *Atlantic Sounding*
11 decision made clear that punitive damages are available for 'a general maritime cause of action'
12 that was 'well established before the passage of the Jones Act.'" *Hausman*, p 6, lines 20-23.
13 "While the Supreme Court could have carved out a rather narrow holding that would apply only
14 to maintenance and cure claims, it did not such thing. Instead, the *Atlantic Sounding* majority
15 opted to interpret *Miles* narrowly, limiting the holding in *Miles* to wrongful-death actions."
16 *Hausman*, p 6, lines 24-25 to p. 7, lines 1-2).

17
18 Plaintiff urges this court to follow Judge Rothstein's reasoning in *Hausman*.

19 **F. Defendants Overlook Ninth Circuit Authority Which Provides Punitive Damages.**
20 **The McBride Majority Ignores Townsend And Misreads Miles.**

21 Defendants conveniently overlook *Evich v Morris*. Instead, defendants rely heavily
22 upon the sharply divided Fifth Circuit en banc decision in *McBride*. The *McBride* case
23 provides no authority for defendants' motion here. The *McBride* decision was so fractured that,
24 in fact, in a concurring opinion (authored by Judge Haynes and joined by Judge Elrod), two
25 members of the majority indicated they believed that injured seamen, but not the families of
26

1 deceased seamen, should be able to recover punitive damages. See *McBride v Estis Well Serv.*,
2 LLC, 768 F.3d 382, 401-404 (5th Cir. 2014) *petition for cert pending* (Dec.24, 2014) No. 14-
3 761. In other words, when considering punitive damages for the injured seamen - as in this
4 case - the majority of judges in the *McBride* case would rule that punitive damages **are**
5 available. Further, there were 6 judges dissenting.²

6
7 To reach its holding, the *McBride* majority begins, as it must, by addressing why it
8 believes *Townsend's* logic and reasoning do not apply to the issue of recoverability of punitive
9 damages under the seaman's unseaworthiness action; "[T]he *Townsend* court was presented
10 with the *limited* issue of whether a seaman can recover punitive damages from his employer for
11 willful failure to pay maintenance and cure. That case did not involve a claim for punitive
12 damages under either the Jones Act or general maritime law." *McBride*, 768 F.3d at
13 384(emphasis added). The statement that *Townsend* did not involve a claim for punitive
14 damages under general maritime law is simply untenable.

15
16 *Townsend* involved a claim for punitive damages under the seaman's claim for
17 maintenance and cure. *Townsend*, 557 US 408. It is a basic tenet of maritime law that the
18 claim for maintenance and cure is a general maritime law based claim. *Townsend*, 557 US at
19 413 ("the legal obligation to provide maintenance and cure dates back centuries as an aspect of
20

21
22 ². Defendants, in their motion, twice claim that the United States Supreme Court
23 "endorsed" the *McBride* decision "by declining to" grant certiorari. Defendants' motion p.
24 2, lines 4-6; p. 8, lines 11-13. Defendants again overstate their case and misrepresent
25 precedent. As the U.S. Supreme Court consistently provided: "Inasmuch, therefore, as all
26 that a denial of a petition for a writ of certiorari means is that fewer than four members of
the Court thought it should be granted, this Court has rigorously insisted that such a denial
carries with it no implication whatever regarding the Court's views on the merits of a case
which it has declined to review. The Court has said this again and again; again and again
the admonition has to be repeated." *State of Maryland v Baltimore Radio Show*, 338 US
912, 919 (1950).

1 general maritime law”). Moreover, to make this statement, the majority must completely
2 ignore the first half of the *Townsend* decision in which the Court explains, in great detail, how
3 punitive damages have historically been available to seamen in claims arising under maritime
4 law, “including” in the maintenance and cure context. *Townsend*, 557 US at 413-16. It is also
5 difficult to square the majority’s extremely narrow interpretation of *Townsend* as not involving
6 a seaman’s claim for punitive damages under general maritime law, while extending *Miles*,
7 which contains no mention of punitive damages, to somehow serve as a bar to punitive
8 damages. Plaintiff urges this court to follow the 9th Circuit holding of *Evich v Morris* and
9 Judge Rothstein’s decision in *Hausman*.
10

11 **G. Washington Supreme Court Expressed Language In *Clausen* Which Foretells**
12 **Agreement With *McBride* Dissent.**

13 Defendants’ motion, in essence, asks this Court to predict how the Washington Supreme
14 Court will rule on whether a seaman is entitled to make a punitive damages claim against his or
15 her employer for reckless conduct. The Washington Supreme Court decision in *Clausen v.*
16 *Icicle Seafoods, Inc.*, 174 Wash. 2d 70, 80, 272 P.3d 827, 833, *cert denied*, 133 S. Ct. 199, 184
17 L. Ed. 2d 39 (2012) answers that question.

18 The Washington Supreme Court’s statements in *Clausen* reveal that it will agree with
19 the *McBride* dissent and hold that the Jones Act adds remedies, it does not take them away.
20 *Clausen v. Icicle Seafoods, Inc.* is a seaman’s maintenance and cure punitive damage case in
21 which the Washington Supreme Court, as part of its decision, was required to consider whether
22 the Jones Act limited a seaman’s general maritime law remedies. Significantly, regarding the
23 meaning of *Townsend*, the Washington Supreme Court agreed with the dissenters in *McBride*.
24

25 Rather, the issue was whether remedies available at general maritime law were
26 restricted because of the Jones Act. The Court held that remedies under general

1 maritime law, such as punitive damages, remained available. The Jones Act
2 created a statutory cause of action for negligence, which had been barred at
3 general maritime law. Because Congress, by enacting the Jones Act, created a
4 new cause of action, the Court recognized the Act expanded and supplemented,
5 rather than restricted, the rights of seamen under maritime law. And while the
6 Jones Act excluded recovery of certain types of damages, such as for loss of
7 society or lost future earnings, the Court held that those restrictions applied only
8 to claims brought under the Jones Act. In other words, the statutory limitations
9 did not affect the types of damages recoverable under general maritime law,
10 such as punitive damages in maintenance and cure actions. *Townsend*, 557 U.S.
11 at —, —, —, 129 S.Ct. at 2565, 2570–71.

12 *Clausen v. Icicle Seafoods, Inc.*, 174 Wash. 2d at 80, 272 P.3d at 833. In short, like the
13 dissenters in *McBride*, the Washington Supreme Court recognizes that the Jones Act adds
14 remedies, it doesn't take them away.

15 Defendants cite to several Washington State and Federal Circuit cases that predate
16 *Townsend* and *Clausen* (see p. 9-10 defendants' motion). Defendants basically ask this court
17 to turn a blind eye toward the ruling in *Townsend*. The *Townsend* decision is a "game-changer,"
18 and those cases cited by defendants would not be decided the same post *Townsend*. No court
19 after *Townsend* can analyze a claim for punitive damages today without dealing with
20 *Townsend*.

21 **H. Policy Considerations Favor Allowing Seamen To Seek Punitive Damages When**
22 **Injured Due To Egregious Conduct.**

23 An additional and compelling reason for this court to allow punitive damages is that
24 seafarers have always been accorded a special solicitude by the federal courts. From this
25 country's beginnings, seafarers have been deemed "wards of admiralty." *U.S. Bulk Carriers,*
26 *Inc. v. Arguelles*, 400 U.S. 351, 355 (1971). Early in our nation's history, Justice Story
declared: "Every court should watch with jealousy an encroachment upon the rights of a
seaman, because they are unprotected and need counsel; . . . They are emphatically the wards

1 of the admiralty.” *Harden v. Gordon*, 11 F. Cas. 480, 485 (C.C. Me. 1823). In fact, the United
2 States Supreme Court has referred to seamen as “wards of admiralty” in some 24 decisions.
3 David W. Robertson, *Punitive Damages in U.S. Maritime Law: Miles, Baker, and Townsend*,
4 70 La. L. Rev. 463, 499 n.107 (2010). It did so most recently in *Atlantic Sounding Co. v.*
5 *Townsend*, 557 U.S. 404, 417 (2009), upholding the right of seamen to recover punitive
6 damages under general maritime law.

7
8 It is because “admiralty courts have always shown a special solicitude for the welfare
9 of seamen and their families,” *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990), that the
10 remedy of punitive damages is so important. “Imposing exemplary damages . . . creates a
11 strong incentive for vigilance” on the part of those best able to protect seamen from injury
12 aboard unseaworthy vessels. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 14 (1991).

13
14 If the *McBride* majority’s ruling stands, injured and killed seamen will have been demoted
15 from “wards of the admiralty” to the least favored among maritime tort litigants. *See e.g. Exxon*
16 *Shipping v. Baker*, 554 U.S. 471 (2008) (among the plaintiffs awarded punitive damages for
17 their loss of livelihood claims were seafaring fishermen, many of whom were Jones Act
18 seamen); *Gaffney v Riverboat Servs. Of Indiana, Inc.*, 451 F.3d 424 (7th Cir. 2006), *denying*
19 *cert.*, 549 US 1111 (2007)(court affirming award of punitive damages to seamen asserting
20 retaliatory discharge); *Pino v Protection Mar. Inc. Co.*, 490 F. Supp. 277 (D. Mass. 1980)
21 (seamen entitled to seek punitive damages from insurance company for interfering with their
22 employment rights by charging higher insurance premiums from owners of fishing vessels on
23 which they worked because seamen had failed to settle insurance claims to the insurer’s
24 satisfaction); *Townsend* (seamen entitled to seek punitive damages for the willful and wanton
25 violation of their right to maintenance and cure); *Callahan v Gulf Logistics, LLC*, 2013 WL

1 5236888 (W D La. Sept. 16, 2013)(acknowledging that punitive damages may be recoverable
2 under maritime law in a third party action by a longshore or harbor worker under 905(b) of the
3 LHWCA); *In re Horizon Cruises Litigation*, 101 F.Supp.2d 204, 210 (SDNY 2000)(observing
4 that passengers have been entitled to punitive damages in maritime law since at least 1823).

5 There is no conceivable justification for allowing the recovery of punitive damages by
6 injured or killed longshore workers (*Callahan*), cruise ship passengers (*Horizon Cruises*), Jones
7 Act seamen in loss-of-livelihood cases (*Baker*), retaliatory discharge cases (*Gaffney*), tortious
8 interference with employment cases (*Pino*) or in maintenance and cure cases (*Townsend*) but
9 not by seamen injured due to the vessel owner's egregious conduct. There is no basis in
10 policy, principle, or common sense that could justify the perverse disuniformity with federal
11 maritime law that would result from excluding seamen from access to a remedy that is
12 available to all other types of maritime litigants.
13

14
15 **I. Judicial Economy Is Served By Allowing Punitive Damages Question To**
16 **Go To Jury.**

17 Regardless of the outcome of this motion, one party or the other will seek appeal.
18 Accordingly, the most efficient way forward is to allow the issue of punitive damages to go to a
19 jury. The case on liability will be the same regardless of whether punitive damages are part of
20 the case or not. At the conclusion of the liability portion of the trial, the jury will be given a
21 Special Verdict Form asking whether punitive damages should be awarded. It is possible that a
22 jury will decide that punitive damages are not warranted. In that case, defendants are not
23 prejudiced by a ruling here allowing punitive damages to go forward.

24 If the jury decided that punitive damages are appropriate, the second phase of the trial
25 would begin and the jury would have to decide an appropriate award. That award would be
26

1 independent from general and special damages awarded in the first phase of the trial. If the
2 appellate court rules that punitive damages are not available as a matter of law, then that
3 independent punitive damages award would be reversed.

4 If, on the other hand, punitive damages are not allowed to go forward in the underlying
5 trial on liability and damages, and if the appellate court rules that punitive damages are
6 available to the seaman, then the entire case would have to be retried. The same jury must
7 decide both underlying damages and punitive damages. Even if a second jury were impaneled
8 to decide the punitive damages case after the appellate court reversal, the entire case on liability
9 would have to be retried. The second jury would need to understand the bases for the punitive
10 damages award in order to make an award. Judicial economy supports a ruling that punitive
11 damages go the jury in this case.
12

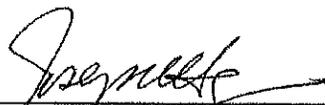
13 Conclusion

14 The *Townsend* Court ruled that punitive damages are available under general maritime
15 law. The Court so ruled because punitive damages were available under general maritime law
16 long before the Jones Act was passed, and Congress did not address punitive damages when it
17 passed the Jones Act. Punitive damages are, therefore, available to plaintiff here.
18

19 Defendants' motion should be denied.

20 Dated this 9 day of November, 2015.

21 BEARD STACEY & JACOBSEN, LLP

22 
23 _____
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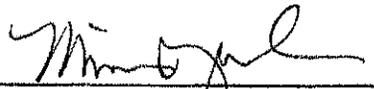
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Fax: 206-282-1149
lstacey@maritimelawyer.us

CERTIFICATE OF SERVICE

I hereby certify that on November 9th, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Markus B.G. Oberg
moberg@legros.com


Marianne V. Jacka

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HON. JULIE SPECTOR
HEARING: November 20, 2015
With Oral Argument

**IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
FOR KING COUNTY**

ALLAN A. TABINGO,)	
)	
Plaintiff,	)	Case No. 15-2-17089-9 SEA
)	
vs.	)	DECLARATION OF JOSEPH S.
	)	STACEY IN OPPOSITION TO
AMERICAN TRIUMPH LLC,	)	DEFENDANTS' MOTION
and AMERICAN SEAFOODS	)	TO DISMISS PLAINTIFF'S
COMPANY LLC,	)	CLAIM FOR PUNITIVE
	)	DAMAGES
Defendants)	
)	

I, Joseph S. Stacey, make the following declarations under penalty of perjury under the laws of the State of Washington.

1. That I am the attorney of record for plaintiff in the above captioned matter.
2. That attached as Exhibit A hereto are two orders of this court in *Brian C. McCallum, Jr. v Glacier Fish Company, LLC*, No. 12-2-11635-1 SEA. This Court ruled that punitive damages were available to the seaman (just like Mr. Tabingo here) under general maritime law (but not under the Jones Act).

STACEY DECLARATION OPPOSING DEFENDANTS' MOTION
FOR PARTIAL SUMMARY JUDGMENT - 1

BEARD STACEY & JACOBSEN, LLP
ATTORNEYS AT LAW
WASHINGTON · ALASKA · OREGON

4039 - 21ST AVENUE WEST, SUITE 401
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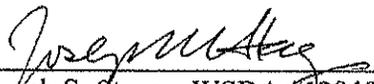
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3. That the law firms representing plaintiff and defendant here are the same law firms that represented the plaintiff and defendant in the *McCallum* case.

4. That attached hereto as Exhibit B is a copy of Judge Rothstein's Memorandum Opinion & Order in *Hausman v Holland America Line-USA, et al*, 13cv00937 BJR. In that case, Judge Rothstein ruled that punitive damages are available under general maritime law.

Dated this 9th day of November, 2015.

BEARD STACEY & JACOBSEN, LLP


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Attorneys for Plaintiff

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Markus B.G. Oberg
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Marianne V. Jacka

EXHIBIT A

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KING COUNTY WASHINGTON
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SUPERIOR COURT CLERK
ANDRE JONES
DEPUTY

HON. JULIE SPECTOR

**IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
FOR KING COUNTY**

BRIAN C. McCALLUM, JR.)
)
Plaintiff,)
)
v.)
)
GLACIER FISH COMPANY LLC,)
)
Defendant.)
)
)
)
)

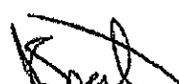
Case No. 12-2-11635-1 SEA

~~(Proposed)~~
**ORDER DENYING DEFENDANT'S
CR 12(b)(6) MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM**

THIS MATTER came before the Court on Defendant's motion under CR 12(b)(6) to dismiss Plaintiff Brian C. McCallum, Jr.'s claims for punitive damages under the Jones Act and under his general maritime law cause of action for unseaworthiness.

After a review of all the materials presented and the entire matter before this Court, the court DENIES Defendant's motion to dismiss plaintiff's punitive damages claims.

DATED this ~~21st~~ ^{5th} day of ~~August~~ ^{September}, 2012.


THE HONORABLE JULIE SPECTOR
Superior Court Judge

ORDER DENYING DEFENDANT'S CR 12(b)(6)
MOTION TO DISMISS FOR FAILURE TO STATE
A CLAIM - 1

ORIGINAL

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Presented by:



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Attorneys for Plaintiff

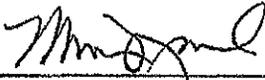
Certificate of Service

I hereby certify that on the 30 day of
July, 2012, the undersigned served
a copy of the foregoing document on:

David C. Bratz
LeGros Buchanan & Paul
701 Fifth Avenue, #2500
Seattle, WA 98104

by

mail
 fax
 hand delivery


Marianne V. Jacka

ORDER DENYING DEFENDANT'S CR 12(b)(6)
MOTION TO DISMISS FOR FAILURE TO STATE
A CLAIM - 2

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FILED
KING COUNTY, WASHINGTON

DEC 11 2013

SUPERIOR COURT CLERK
BY JUAN C. BUENAFE
DEPUTY

Hon. Julie Spector

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

BRIAN C. McCALLUM, JR,

Plaintiff,

vs.

GLACIER FISH COMPANY LLC,

Defendant.

NO. 12-2-11635-1 SEA

ORDER PARTIALLY GRANTING
DEFENDANT'S PARTIAL MOTION
FOR SUMMARY JUDGMENT RE:
PUNITIVE DAMAGES UNDER THE
JONES ACT

THIS MATTER came before the Court on Defendant Glacier Fish Company, LLC's Motion for Partial Summary Judgment on Plaintiff's Claim for Punitive Damages Under the Jones Act and General Maritime Law (Unseaworthiness). The Court has reviewed the files and records herein, the memoranda and declarations submitted and incorporated by the parties in support of and in opposition to the motion, including specifically:

1. Defendant's Motion;
2. Declarations of David C. Bratz and Brandon Erickson and the exhibits thereto;
3. Declarations of Michael Witte, Vebjorn Antonsen, Uffe Bojen, David Carlton Dana, Jay Fuiava, Keith Autele, Salvador Allcazar, Tuvao Ualesi, Fiti Pese, Manuel Vega, Warren Mulligan, Jaes Mazza, and Faleupolu Tualapapa;

ORDER PARTIALLY GRANTING
DEFENDANT'S PARTIAL MOTION
FOR SUMMARY JUDGMENT RE:
PUNITIVE DAMAGES UNDER THE
JONES ACT- Page 1 of 3

Judge Julie A. Spector
King County Superior Court
516 Third Avenue
Seattle, WA 98104
206-477-1342

ORIGINAL

- 1 3. Declarations of Michael Witte, Vebjorn Antonsen, Uffe Bojen, David Carlton
- 2 Dana, Jay Fuiava, Keith Autele, Salvador Allcazar, Tuvao Ualesi, Fiti Pese, Manuel
- 3 Vega, Warren Mulligan, Jaes Mazza, and Faleupolu Tualapapa;
- 4 4. Plaintiff's Opposition to Defendant's Motion for Partial Summary Judgment re
- 5 Punitives;
- 6 5. Declaration of Joseph Stacey in Support of Plaintiff's Opposition and exhibits
- 7 thereto;
- 8 6. Declarations of Harold Limasene, Arthur Fahery, and Kenneth Blundell in Support
- 9 of Plaintiff's Opposition;
- 10 7. Defendant's Reply Memorandum in Support of Defendant's Partial Motion for
- 11 Summary Judgment re Punitive Damages; and
- 12 8. Second Declaration of David C. Bratz in Support of Defendant's Reply
- 13 Memorandum and exhibits thereto.

14 The Court additionally considered the oral argument presented by counsel for both
15 parties on Friday, December 6, 2013.

16 The Court being fully advised on the premises holds as follows:

- 17 1. Plaintiff's claim for punitive damages under the Jones Act is not viable as a
- 18 matter of law and must therefore be dismissed.
- 19 2. The claim for punitive damages under general Maritime Law
- 20 (Unseaworthiness) remains.

21 NOW, THEREFORE, the Court hereby ORDERS, ADJUDGES, AND
22 DECREES that Defendants' Motion for Summary Judgment on Plaintiff's Punitive
23 Damages Claims is GRANTED as to the Jones Act. The punitive damages claim
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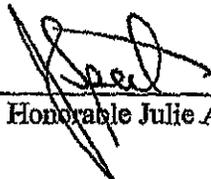
25 ORDER PARTIALLY GRANTING
DEFENDANT'S PARTIAL MOTION
FOR SUMMARY JUDGMENT RE:
PUNITIVE DAMAGES UNDER THE
JONES ACT- Page 2 of 3

Judge Julie A. Spector
King County Superior Court
516 Third Avenue
Seattle, WA 98104
206-477-1342

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asserted by Plaintiff under the Jones Act Negligence is DISMISSED with prejudice.

DATED this 10th day of December, 2013.



Honorable Julie A. Spector

ORDER PARTIALLY GRANTING
DEFENDANT'S PARTIAL MOTION
FOR SUMMARY JUDGMENT RE:
PUNITIVE DAMAGES UNDER THE
JONES ACT- Page 3 of 3

Judge Julie A. Spector
King County Superior Court
516 Third Avenue
Seattle, WA 98104
206-477-1342

EXHIBIT B

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES R. HAUSMAN,

Plaintiff,

v.

HOLLAND AMERICA LINE- USA, *et al.*

Defendants.

CASE NO. 13cv00937 BJR

MEMORANDUM OPINION & ORDER

DENYING IN PART AND DEFERRING IN PART
DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO PUNITIVE DAMAGES

I. INTRODUCTION & BACKGROUND

Plaintiff, James R. Hausman, filed this negligence action against Holland America Line-U.S.A., a cruise company, and other related corporate entities (collectively, Defendants or "HAL Defendants"). Plaintiff alleges that on November 26, 2011, while traveling as a passenger on Defendants' cruise ship - the *MS AMSTERDAM*, an automatic sliding glass door improperly closed, striking his head and causing him serious injury. Plaintiff claims that Defendants were aware of the danger that the sliding doors pose to passengers and yet did nothing to remedy this danger. Am. Compl. ¶ 41. More specifically, Plaintiff argues that "passengers aboard

1 [Defendants'] ships have been forced to file personal lawsuits in this Court at least as far back as
2 2003, and as recently as 2012," and that these lawsuits alerted Defendants to "the danger posed
3 by the dangerously calibrated and maintained automatic sliding doors." *Id.* ¶¶ 40-4.

4 Plaintiff seeks both compensatory and punitive damages. Defendants argue that
5 admiralty law precludes Plaintiff from seeking punitive damages for his negligence action, and
6 has moved for partial summary judgment on these grounds.¹ The Court turns now to the parties'
7 arguments and the relevant legal standards.
8

9 10 II. ANALYSIS

11 A. Under Maritime Law, Plaintiff May Pursue Punitive Damages

12 The Defendants rely on the Supreme Court's opinion in *Miles v. Apex Marine*
13 *Corporation et al.* and the Ninth Circuit's decision in *Chan v. Society Expeditions, Inc.* as
14 support for their position that, as a matter of law, Plaintiff is prohibited from recovering non-
15 pecuniary damages, including punitive damages. In *Miles*, the Supreme Court held that "there is
16 no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act
17 seaman." 498 U.S. 19, 33 (1990). In so determining, the Supreme Court relied on the fact that
18 the Death of High Seas Act ("DOHSA") and the Jones Act both foreclose recovery for
19 nonpecuniary loss in a maritime action. *Id.* at 31 (explaining that DOHSA explicitly "forecloses
20 recovery for nonpecuniary loss, such as loss of society, in a general maritime action"); *id.* at 32
21 ("The Jones Act applies when a seaman has been killed as a result of negligence, and it limits
22 recovery to pecuniary loss."). The Supreme Court then highlighted the importance of
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¹ Alternatively, Defendants argue that that no reasonable juror could find that punitive damages are warranted based on the undisputed facts. At this time, the Court will not rule on this argument, but takes it under advisement.

1 maintaining uniformity in maritime law and its desire to issue a “rule applicable to actions for the
2 wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law.”

3 *Id.* at 33. As a result, the *Miles* Court determined that “there is no recovery for loss of society in
4 a general maritime action for the wrongful death of a Jones Act seaman.” *Id.*

5 A few years later, in *Chan v. Society Expeditions, Inc.*, the Ninth Circuit determined that
6 general maritime law barred injured cruise passengers from recovering another form of non-
7 pecuniary damages; this time loss of consortium damages. 39 F.3d 1398, 1407-1408 (9th Cir.
8 1994). In making this decision, the *Chan* Court followed the lead of the Supreme Court in *Miles*
9 and turned to maritime statutes for guidance. *Id.* at 1407 (“In determining whether damages are
10 recoverable in a negligence action brought under general maritime law, this court must look for
11 guidance to congressional enactments in the field of maritime law, Supreme Court decisions, and
12 relevant state legislations.” (citing *Miles*, 498 U.S. 19 (1990)). The Ninth Circuit relied on the
13 maritime statutes for guidance notwithstanding that the cruise passenger plaintiffs in the case
14 were not covered under the Jones Act or the DOHSA.² *Id.* at 1407-1408 (noting that the case fell
15 “outside the ambit of statutory maritime law”).

16
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18 Defendants urge that under *Chan* and *Miles*, Plaintiff is precluded from recovering any
19 nonpecuniary damages, including punitive damages. Under such reasoning, Defendants
20 implicitly ask this Court to again draw “guidance” from maritime statutes and treat a cruise
21 passenger the same as a Jones Act seaman who was injured or killed. The Court concludes,
22 however, that doing so would fail to recognize the Supreme Court’s ruling in *Atlantic Sounding*
23 *Co., Inc. v. Townsend*, 557 U.S. 404 (2009).

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² As in *Chan*, the Plaintiff here is neither a seaman nor died on the open sea, and therefore, the Jones Act and DOHSA are inapplicable. See *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 817 (2001) (“[T]he Jones Act bears no implication for actions brought by nonseamen.”).

1 In *Atlantic Sounding*, the issue before the Supreme Court was whether an injured seaman
2 may recover punitive damages for his employer's willful failure to pay maintenance and cure.
3 The employer argued that punitive damages were not available because *Miles* limited a seaman's
4 recovery to only those damages available under the Jones Act. The Supreme Court disagreed,
5 and, in a five to four decision, found that punitive damages had been historically available and
6 awarded in maritime actions and that "nothing in *Miles* or the Jones Act eliminates that
7 availability." *Id.* at 407. Stated otherwise, the Supreme Court held that a plaintiff is "entitled to
8 pursue punitive damages unless Congress has enacted legislation departing from this common-
9 law understanding." *Id.* at 415.

11 In so holding, the Supreme Court explicitly rejected the notion that *Miles* limited
12 recovery in maritime personal injury case to only those remedies available under the Jones Act
13 and DOHSA. *Id.* at 418-419 ("In *Miles*, petitioners argue, the Court limited recovery in
14 maritime cases involving death or personal injury to the remedies available under the Jones Act
15 and the Death on the High Seas Act. Petitioners' reading of *Miles* is far too broad."). The
16 Supreme Court clarified that *Miles* dealt with the narrow issue of "whether general maritime law
17 should provide a cause of action for wrongful death based on unseaworthiness." *Id.* at 419. The
18 *Atlantic Sounding* Court further explained that *Miles* had justified expanding general maritime
19 law to include a wrongful death cause of action by relying on the fact that the Jones Act and
20 DOHSA had already statutorily created wrongful death actions. In determining what remedies
21 would be available for those pursuing the newly created wrongful death cause of action under
22 general maritime law, the *Miles* Court turned to the Jones Act and the DOHSA and decided to
23 incorporate the same limitations on recovery found in those maritime statutes, *i.e.* non-
24 pecuniary damages were barred. *Id.* at 420 ("[I]t was only because of congressional action that a
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1 general federal cause of action for wrongful death on the high seas and in territorial waters even
2 existed; until then, there was no general common-law doctrine providing for such an action. As
3 a result, to determine the remedies available under the common-law wrongful-death action, ‘an
4 admiralty court should look primarily to these legislative enactments for policy guidance.’”
5 (quoting *Miles*, 498 U.S. at 27)).

6 However, the *Atlantic Sounding* decision made clear that *Miles* should not be read “to
7 eliminate the general maritime remedy of punitive damages,” as punitive damages had been
8 around long before the Jones Act was passed. *Id.* at 422. Thus, under *Atlantic Sounding*, the
9 *Miles* limitation on the recovery of non-pecuniary damages does not apply to situations “where
10 both the general maritime cause of action [. . .] and the remedy [. . .] were well established
11 before the passage of the Jones Act.” *Id.* at 420.

12 Applying this reasoning, this Court must ask whether the general maritime cause of
13 action at issue here, negligence for personal injury, and the remedy of punitive damages were
14 available under maritime law prior to the Jones Act. The latter proves an easy inquiry given that
15 *Atlantic Sounding* explicitly discusses that maritime law provided for punitive damages before
16 the Jones Act was passed. 557 U.S. at 415 (noting that courts had allowed punitive damages as
17 far back as the early 1800s, thereby supporting “[t]he general rule that punitive damages were
18 available at common law extended to claims arising under federal maritime law.”). Similarly,
19 personal injury claims have long been asserted under maritime law. *Norfolk Shipbuilding &*
20 *Drydock Corp. v. Garriss*, 532 U.S. 811, 820 (2001) (“The general maritime law has recognized
21 the tort of negligence for more than a century”); *New York & L. B. S. B. Co. v. Johnson*, 195
22 F. 740, 741 (3d Cir. 1912) (noting that the injury to a steamboat passenger “was a maritime tort,
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1 and clearly warranted maritime relief.”). As such, under *Atlantic Sounding’s* reasoning, the
2 Court finds that Plaintiff is entitled to punitive damages.

3 Defendant erroneously relies on two cases to argue that *Atlantic Sounding* does not apply
4 to Plaintiff’s case: the Fifth Circuit’s *en banc* decision in *McBride v. Estis Well Service, L.L.C.*,
5 786 F.3d 382 (5th Cir. 2014), and the Ninth Circuit decision in *Chan*, which was described
6 above. Def.’s Reply at 7. The Court discusses each in turn.

7 In *McBride*, the estate of a deceased seaman and two injured seamen brought an action
8 for unseaworthiness under general maritime law and negligence under the Jones Act. *McBride*,
9 786 F.3d at 384. With the Fifth Circuit split nine to six, the majority held that punitive damages
10 were not recoverable in a seaman’s wrongful death or personal injury suit, regardless of whether
11 the action was brought under the Jones Act or general maritime law (specifically, a suit for
12 unseaworthiness). *Id.* at 391. In other words, *McBride* found that pursuant to *Miles*, no punitive
13 damages were available when “a general maritime law personal injury claim is joined with a
14 Jones Act claim.” Furthermore, in distinguishing *Atlantic Sounding*, the *McBride* majority
15 highlighted that *Atlantic Sounding* dealt with a maintenance and cure claim which was not
16 addressed by the Jones Act, and was an “independent” cause of action different from wrongful
17 death or negligence under the Jones Act. *McBride*, 786 F.3d at 389-390.

18 This Court is not persuaded that *Atlantic Sounding* should be construed narrowly so as to
19 apply only to maintenance and cure actions. As explained above, the *Atlantic Sounding* decision
20 made clear that punitive damages are available for “a general maritime cause of action” that was
21 “well established before the passage of the Jones Act,” as long as the Jones Act does not alter the
22 damages available. While the Supreme Court could have carved out a rather narrow holding that
23 would apply only to maintenance and cure claims, it did no such thing. Instead, the *Atlantic*
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1 *Sounding* majority opted to interpret *Miles* narrowly, limiting the holding in *Miles* to wrongful
2 death actions. *Atlantic Sounding*, 557 U.S. at 419 (explaining that “Congress had chosen to limit
3 . . . the damages available for wrongful-death actions under the Jones Act and DOHSA,” and
4 thus “Congress’ judgment must control the availability of remedies for wrongful-death actions
5 brought under general maritime law”).

6 Unlike the plaintiffs in *Miles* and *McBride*, Plaintiff here does not bring a wrongful death
7 suit or negligence action under the Jones Act (or for that matter, DOHSA), but rather pursues a
8 general maritime personal injury action. Because the reasoning of *Atlantic Sounding* appears to
9 apply with ease to allow punitive damages for a personal injury negligence suit brought by a
10 non-seaman like Plaintiff,³ the Court is persuaded that Plaintiff should be allowed to pursue
11 punitive damages. See *Summers v. Salmon Bay Barge Line, Inc.*, No. 12-5859 RJB, 2013 WL
12 5912917, *11 (W.D. Wash. Nov. 4, 2013) (explaining that, pursuant to *Atlantic Sounding*, a
13 plaintiff “is entitled to pursue punitive damages unless Congress has enacted legislation
14 departing from [the] common law understanding [that punitive damages are available]”).
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16
17 Next, the Court turns to Defendant’s argument that the Ninth Circuit’s decision in *Chan*
18 requires that Plaintiff be prohibited from seeking punitive damages, notwithstanding the
19 Supreme Court’s decision in *Atlantic Sounding*. Of course, this Court is generally bound to the
20 holdings of the Ninth Circuit and its “explications of the governing rules of law.” *Miller v.*
21 *Gammie*, 335 F.3d 889, 900 (9th Cir. 2003). However, a district court is no longer bound by
22 Circuit precedent where the Supreme Court, issues an intervening decision that “undercut[s] the
23 theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly
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³ The Court need not decide whether punitive damages are available to a seaman bringing a personal injury suit under the Jones Act.

1 irreconcilable.” *Id.* at 900. Moreover, the issues decided by the Supreme Court “need not be
2 identical [to those presented in the prior circuit precedent] in order to be controlling.” *Id.*

3 The Court is persuaded that the Supreme Court’s decision in *Atlantic Sounding* is “clearly
4 irreconcilable” with the Circuit’s decision in *Chan*. As discussed above, the *Chan* panel largely
5 relied on the reasoning in *Miles*, and determined that courts should look to “maritime statutes for
6 guidance in determining what remedies should be available in an admiralty case,” even when the
7 case “falls outside the ambit of statutory maritime law.” However, *Atlantic Sounding* warns that
8 such a reading of *Miles* “is far too broad,” and goes to great lengths to explain why a wrongful
9 death action which exists “only because of congressional action” is distinct from a general
10 maritime cause of action that was well established before the passage of maritime statutes like
11 the Jones Act. *Atlantic Sounding*, 557 U.S. at 419-420. Contrary to *Chan*’s reasoning, *Atlantic*
12 *Sounding* makes clear that punitive damages remain available for a general maritime cause of
13 action that predates the Jones Act. *Id.* at 420. Moreover, *Atlantic Sounding* explicitly rejects the
14 notion that all maritime personal injury actions are limited by the Jones Act. *Id.* at 421 (noting
15 that Supreme Court precedent had explicitly rejected the notion that “*Miles* precludes any action
16 or remedy for personal injury beyond that made available under the Jones Act . . .” (citing
17 *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 818 (2001))). This, of course,
18 undermines *Chan*’s insistence that *Miles* limited the remedies for non-statutory maritime
19 personal injury suits to those remedies available under the Jones Act. *See Chan*, 39 F.3d at 1407.
20 In sum, under *Atlantic Sounding*, courts need no longer limit recovery of punitive damages for a
21 cause of action that “falls outside the ambit of statutory maritime law,” so long as the cause of
22 action existed before the Jones Act and independently from maritime statutes.
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1 Lastly, the *Chan* panel underscored the importance of “the goal of uniformity in remedies
2 in maritime cases,” to conclude that a passenger injured in an accident at sea should not be
3 allowed to pursue remedies that were denied to the dependents of a passenger killed at sea.
4 *Chan*, 39 F.3d at 1407. However, as the Supreme Court explained in *Atlantic Sounding*, “[t]he
5 laudable quest for uniformity in admiralty law does not require the narrowing of available
6 damages to the lowest common denominator approved by Congress for distinct causes of
7 action.” 557 U.S. at 423; accord *McBride*, 768 F.3d at 409 (Higginson, J., dissenting) (noting
8 that, following *Miles*, a wave of district courts had disallowed punitive damages for non-Jones
9 Act claims under the “*Miles* uniformity principle,” but that “[m]omentum in that direction [had
10 been] sea-tossed by *Atlantic Sounding* . . .”).

12 Because, as explained above, *Chan* is “clearly irreconcilable” with *Atlantic Sounding*,
13 this Court does not consider itself bound by *Chan*. See *Barrette v. Jubilee Fisheries, Inc.*, 2011
14 WL 351061, at *7 (W.D. Wash. Aug. 11, 2011) (declining, in light of *Atlantic Sounding*, to
15 apply Ninth Circuit precedent that had foreclosed the recovery for loss of consortium under
16 general maritime law and holding that a seaman’s wife may pursue loss of consortium damages
17 for an unseaworthiness claim because recovery for loss of consortium has been available prior to
18 the Jones Act and there was “no evidence that claims premised on unseaworthiness were
19 exempted from the common-law rule extending loss of consortium to maritime suits”); see also
20 *Rowe v. Hornblower Fleet*, 2012 U.S. Dist. LEXIS 164402, at *47 (N.D. Cal. Nov. 16, 2012)
21 (refusing to apply *Miles* to limit the availability of punitive damages in an unseaworthiness claim
22 because of *Atlantic Sounding*’s reasoning that punitive damages are available so long as
23 Congress has not indicated otherwise); *Wagner v. Kona Blue Water Farms*, 2010 U.S. Dist.
24 LEXIS 96106 (D. Hawaii Sept. 13, 2010) (“[A]lthough cases predating [*Atlantic Sounding*]

1 consistently interpreted *Miles* to bar punitive damages for general maritime law claims including
2 unseaworthiness, [citing cases], [*Atlantic Sounding*] suggests that such interpretations of *Miles*
3 are 'far too broad.'" Specifically, [*Atlantic Sounding*] held that *Miles* does not limit recovery in
4 general maritime actions to the remedies available by statute.)

5 **III. CONCLUSION**

6 In conclusion, the Court holds that Plaintiff is not legally barred from pursuing punitive
7 damages as a remedy.⁴ This 23rd day of July, 2015, the Court ORDERS that Defendants' motion
8 for partial summary judgment is DENIED in part and DEFFERED in part.
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10 SO ORDERED.

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BARBARA J. ROTHSTEIN
14 UNITED STATES DISTRICT JUDGE
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25 ⁴ In so holding, the Court notes that the Southern District of Florida, which arguably hears more cruise-line cases than any other district court, has similarly found that, in the wake of *Atlantic Sounding*, punitive damages were available to cruise passengers pursuing personal injury suits under maritime law. See e.g., *Doe v. Royal Caribbean Cruises, LTD.*, No. 11-23323, 2012 U.S. Dist. LEXIS 36274 (S.D. Fla. March 19, 2012); *Lobegeiger v. Celebrity Cruises, Inc.*, No. 11-21620, 2011 U.S. Dist. LEXIS 93933 (S.D. Fla. Aug. 23, 2011).

HONORABLE JULIE SPECTOR
Hearing Date: November 20, 2015
Hearing Time: 9:00 a.m.

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
AT SEATTLE

ALLAN A. TABINGO,

Plaintiff,

v.

AMERICAN TRIUMPH LLC, and
AMERICAN SEAFOODS COMPANY,
LLC,

Defendants.

No. 15-2-17089-9 SEA

REPLY IN SUPPORT OF DEFENDANTS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT DISMISSING PLAINTIFF'S
CLAIM FOR PUNITIVE DAMAGES

A. **The Fifth Circuit, the Highest Federal Court to Address This Issue, Now Holds That Punitive Damages Are Not Recoverable For Unseaworthiness.**

Plaintiff correctly points out that this Court denied a dispositive motion to dismiss a claim for punitive damages for unseaworthiness in *McCallum v. Glacier Fish Co., LLC*. Opposition (“Opp.”) at 2. There is a critical difference. This Court entered the *McCallum* order on December 10, 2013. At the time, the leading decision on this issue was the October 2, 2013 panel decision in *McBride v. Estis Well Service, LLC*, 731 F.3d 505 (5th Cir. 2013), which allowed punitive damages for unseaworthiness. Eleven months later, after this Court ruled in *McCallum*, the Fifth Circuit granted rehearing en banc and reversed. The Fifth Circuit now holds that punitive damages cannot be recovered for unseaworthiness. *McBride v. Estis Well Service, LLC*, 768 F.3d 382 (2014) (en banc) (hereinafter referred to as “*McBride*”).

To review, in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990), the U.S. Supreme Court upheld the dismissal of non-pecuniary damages (loss of society) in a seaman's wrongful death case asserting claims under the Jones Act and general maritime law (unseaworthiness). As to the Jones Act, the Court reasoned that Congress intended to preserve FELA's limitation of non-pecuniary damages by incorporating FELA unaltered into the Jones Act. *Miles*, 498 U.S. at 32. As to unseaworthiness, the Court stated 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 [unseaworthiness] in which liability is without fault than Congress has allowed in cases of death resulting from negligence." *Miles*, 498 U.S. at 32. This later became known as the "uniformity principle." *McBride*, 768 F.3d at 397-98 (Clement, J., concurring). Courts and scholars widely understood *Miles* to preclude recovery of punitive damages under the general maritime law.

The Court in *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404 (2009), arguably confused the issue when holding that punitive damages are available for maintenance and cure claims—a remedy that derives from the general maritime law. But instead of overruling *Miles*, *Townsend* carefully distinguished its facts from *Miles* and reaffirmed that *Miles* is still good law. "Unlike the situation presented in *Miles*," the *Townsend* Court noted that "both the general maritime cause of action (maintenance and cure) and the remedy (punitive damages) were well established before the passage of the Jones Act." *Townsend*, 557 U.S. at 420. To eliminate any doubt about the continued viability of *Miles*, the *Townsend* Court expressly stated that "[t]he reasoning of *Miles* remains sound." *Id.*

Sitting en banc, the Fifth Circuit held that recoverable damages under the general maritime law is limited to "pecuniary losses" and does not include punitive damages. *McBride*,

768 F.3d at 390. It held the issue was “controlled by the Supreme Court’s decision in [*Miles*],” reading *Townsend* as narrowly applying to maintenance and cure claims. *Id.* at 384, 389-90.

Multiple courts have followed *McBride*’s en banc decision and dismissed non-pecuniary and punitive damages claims brought as unseaworthiness claims. *E.g.*, *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).

B. Cases Allowing Punitive Damages in Unseaworthiness Claims Did Not Predate the Jones Act (1920).

Plaintiff states that *Miles* and *Townsend* require both the general maritime cause of action and remedy to preexist the enactment of the Jones Act. *Opp.* at 1. Plaintiff proceeds to cite cases indicating that punitive damages, in general, were available under the general maritime law before 1920. *Opp.* at 4-6. That is beside the point. The issue is whether punitive damages were specifically available for a claim of unseaworthiness before the Jones Act (1920). To be viable after *Miles* and *Townsend*, the punitive damages remedy must have existed for the specific type of general maritime claim. The distinction matters—otherwise there would be no way to reconcile *Miles*, which barred punitive damages in a seaman’s wrongful death case under the general maritime law, from *Townsend*, which permitted punitive damages in a maintenance and cure claim under the general maritime law.¹

However, courts could not have awarded punitive damages for unseaworthiness claims prior to the enactment of the Jones Act, because the modern unseaworthiness cause of action was

¹ Moreover, *Miles*’s uniformity principle requires that the remedies available under the Jones Act and unseaworthiness be the same.

not recognized by courts until after the passage of the Jones Act. As Judge Clement 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 Act.” *McBride*, 768 F.3d at 393-394 (Clement, J., concurring).

C. Miles Abrogated Cases Allowing Punitive Damages for Unseaworthiness.

Plaintiff misplaces his reliance on three pre-*Miles* appellate cases, including *In Re Merry Shipping*, 650 F.2d 622, 625 (5th Cir. 1981). Opp. at 9-10. *Miles* overruled *Merry Shipping*. 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 overruled.”), *abrogated on other grounds by Townsend*, 557 U.S. at 408 (as to availability of punitive damages for maintenance and cure claims). The other federal appellate cases cited by Plaintiff, *Evich v. Morris*, 819 F.2d 256, 258 (9th Cir. 1987), and *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1550 (11th Cir. 1987), pre-date *Miles* and rely upon *Merry Shipping*. Opp. at 9-10; see also *McBride*, 768 F.3d at 394-95 (Clement, J., concurring) (criticizing *Merry Shipping*).

D. Baker, Hausman and Clausen Are Irrelevant.

Plaintiff repeats an argument based on *Exxon Shipping v. Baker*, 554 U.S. 471 (2008), that *McBride* considered and rejected. Opp. at 8-9. “*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). Moreover, if *Baker* decided the issue there would be no need for *Townsend*. *Id.*

Similarly, *Hausman v. Holland Am. Line USA*, is immaterial because it is a passenger case. Opp. at 10-11. The key inquiry under *Miles* and *Townsend* is whether a general maritime

cause of action and remedy existed prior the Jones Act. The enactment of the Jones Act is critical because it “extended to seamen the same negligence remedy for damages afforded to railroad workers under [FELA].” *McBride*, 768 F.3d at 385-86. It provided a bright line to determine, under the uniformity principle, what general maritime remedies remain viable. Passenger cases do not implicate the Jones Act and have no bearing on whether punitive damages can be recovered by seamen in unseaworthiness claims under the general maritime law.

Additionally, *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70 (2012), bears no relation to this case because, like *Townsend*, *Clausen* involves punitive damages awarded in a maintenance and cure case. Opp. at 13-14. *Clausen*, 174 Wn.2d 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.

Finally, the other cases cited by Plaintiff, such as *Bergen v. F/V St. Patrick*, 816 F.2d 1345 (9th Cir. 1987), or *Nes v. Sea Warrior, Inc.*, 2010 A.M.C. 2297 (King County Sup. Ct. 2010), do not support Plaintiff’s position as they either ignore *Miles*, follow *Merry Shipping* or its progeny, or simply do not stand for the proposition for which Plaintiff cites them.²

E. Denying Defendants’ Motion for Judicial Economy Would Be Improper.

A denial for the purpose of “judicial economy” would be improper. If this Court allows a jury to hear evidence of alleged willful conduct relating to Jones Act negligence or unseaworthiness, Defendants will be unfairly prejudiced, requiring a new trial.³

² For example, *Bergen v. F/V St. Patrick*, 816 F.2d 1345 (9th Cir. 1987), did not hold punitive damages could be awarded for unseaworthiness. In fact, *Bergen* 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*, 816 F.2d at 1347 n.1.

³ Defendants dispute and object to Plaintiff’s statement of facts (Opp. at 2-3) as based on hearsay and lacking foundation (evidentiary support).

DATED this 16th day of November, 2015.

s/ Markus B.G. Oberg

Markus B.G. Oberg, WSBA #34914

Attorneys for Defendants

LeGros, Buchanan & Paul

701 Fifth Avenue, Suite 2500

Seattle, WA 98104

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CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused to be served via electronic service through the King County Superior Court, a copy of the document to which this certificate is attached, on the following counsel of record:

Joseph Stacey
4039-21st Ave. W #401
Seattle, WA 98199
206-282-3100
bstj@maritimelawyer.us

- Via Mail
 Via E-Service
 Via Messenger

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct this 16th day of November, 2015.

s / Andrea Anthony
Andrea Anthony, Legal Assistant
Signed at Seattle, Washington

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
AT SEATTLE

ALLAN A. TABINGO,

Plaintiff,

v.

AMERICAN TRIUMPH LLC, and
AMERICAN SEAFOODS COMPANY,
LLC,

Defendants.

No. 15-2-17089-9 SEA

ORDER GRANTING DEFENDANTS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT DISMISSING PLAINTIFF'S
CLAIM FOR PUNITIVE DAMAGES

HONORABLE BILL BOWMAN

Hearing Date: 02/05/2016

Hearing Time: 10:30 a.m.

THIS MATTER came before the Court on Defendants American Triumph LLC and American Seafoods Company, LLC's motion for partial summary judgment dismissing Plaintiff's claim for punitive damages not recoverable under the Jones Act or under the general maritime doctrine of unseaworthiness as a matter of law. The Court has reviewed the files and records herein, the memoranda and declarations submitted and incorporated by the parties in support of and in opposition to the motion, including specifically:

1. Defendants' Motion for Partial Summary Judgment Dismissing Plaintiff's Claim for Punitive Damages;
2. Declaration of Markus B.G. Oberg in Support of Defendants' Motion for Partial Summary Judgment Dismissing Plaintiff's Claim for Punitive Damages, with Exhibits;

3. Plaintiff's Opposition to Defendants' Motion for Partial Summary Judgment Dismissing Plaintiff's Claim for Punitive Damages;

4. Declaration of Joseph S. Stacey in Opposition to Defendants' Motion to Dismiss Plaintiff's Claim for Punitive Damages; and

5. Reply in support of Defendants' Motion for Partial Summary Judgment Dismissing Plaintiff's Claim for Punitive Damages;

The Court additionally considered the oral argument presented by counsel for all interested parties on Friday, February 5, 2016.

The Court being fully advised on the premises finds as follows:

1. Plaintiff's Amended Complaint states claims upon which relief may not be granted and Defendants are entitled to judgment on the pleadings.

2. Specifically, Plaintiff's Amended Complaint asserts claims for damages that are not recoverable under a personal injury claim predicated on the Jones Act or the general maritime theory of unseaworthiness, specifically punitive damages.

3. The Jones Act, by incorporation of FELA, limits Plaintiff's recovery, if any, to pecuniary damages. Punitive damages are non-pecuniary and therefore not available under the Jones Act for the injury or death of a seaman.

4. Washington State Supreme Court interpretations of maritime law, as well as the uniformity principle set forth by the United States Supreme Court in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990), and confirmed in subsequent decisions, mandate that the measure of damages available under the Jones Act are identical to, and circumscribe, the damages available under the doctrine of unseaworthiness. The United States Court of Appeals for the Fifth Circuit has specifically found that the uniformity principle of *Miles* applies when a general maritime

law personal injury claim is joined with a Jones Act claim. *McBride v. Estis Well Service, LLC*, 768 F.3d 382 (2014), *Cert. Denied*, 135 S.Ct. 2310 (2015). Additionally, the Washington State Supreme Court has held that “unseaworthiness and a Jones Act negligence case have essentially identical measures of damages.” *Miller v. Arctic Alaska Fisheries Corp.*, 133 Wn.2d 250, 265-66, 944 P.2d 1005 (1997) (*en banc*).

5. Accordingly, Plaintiff may not recover non-pecuniary damages, including punitive damages, under either of his liability theories.

6. Plaintiff’s claim for punitive damages, under the Jones Act and general maritime law (unseaworthiness) are dismissed under CR 12(b)(6) for failure to state a claim, because even accepting Plaintiff’s allegations as true, no set of facts consistent with the Amended Complaint would entitle Plaintiff to those damages.

NOW, THEREFORE, the Court hereby ORDERS, ADJUDGES, AND DECREES that Defendants’ Motion for Partial Summary Judgment Dismissing Plaintiff’s Claim for Punitive Damages is **GRANTED**. Plaintiff’s claim for punitive damages under the Jones Act and the general maritime law doctrine of unseaworthiness is **DISMISSED with prejudice**.

DATED this 22nd day of February, 2016.

/s/ E-Filed

THE HONORABLE BILL BOWMAN
KING COUNTY SUPERIOR COURT JUDGE

Presented By:

s/ Markus B.G. Oberg

Markus B.G. Oberg, WSBA #34914

Attorneys for Defendants

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CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused to be served via electronic service through the King County Superior Court, a copy of the document to which this certificate is attached, on the following counsel of record:

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- Via Mail
- Via E-Service
- Via Messenger

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

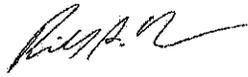
Jaimie M.L. O'Tey, Legal Assistant
Signed at Seattle Washington

King County Superior Court
Judicial Electronic Signature Page

Case Number: 15-2-17089-9
Case Title: TABINGO VS AMERICAN SEAFOODS CO ET ANO

Document Title: ORDER

Signed by: Bill Bowman
Date: 2/22/2016 3:53:27 PM



Judge/Commissioner: Bill Bowman

This document is signed in accordance with the provisions in GR 30.

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Bowman:EAdKjnn44hGdr5s3YYhwmw=="

Page 5 of 5

DECLARATION OF SERVICE

On said day below, I e-served a true and accurate copy of the Appendix to Motion for Discretionary Review in Supreme Court Cause No. 92913-1 to the following:

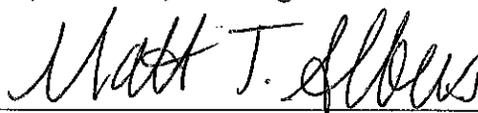
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Original efiled with:
Washington Supreme Court
Clerk's Office

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

DATED: March 23, 2016, at Seattle, Washington.



Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe