

hjh

No. 92913-1

SUPREME COURT
OF THE STATE OF WASHINGTON

ALLAN A. TABINGO,

Petitioner,

v.

AMERICAN TRIUMPH LLC, and AMERICAN SEAFOODS
COMPANY, LLC,

Respondents.

REPLY ON
MOTION FOR DISCRETIONARY REVIEW

Joseph S. Stacey, WSBA #12840
Beard Stacey & Jacobsen LLP
4039 21st Avenue W, Suite 401
Seattle, WA 98199
(206) 282-3100

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Petitioner Allan A. Tabingo

A. INTRODUCTION

The response of American Triumph LLC and American Seafoods Co., LLC (“American Seafoods”) to Allan A. Tabingo’s motion for discretionary deliberately misstates the actual issue before the Court, attempting to mischaracterize this case as one involving the Jones Act when the case actually pertains to the federal maritime common law remedy of vessel unseaworthiness.

More troubling yet is American Seafoods’ zeal to distort the law pertinent to punitive damages generally in the maritime setting and in connection with punitive damages in vessel unseaworthiness actions specifically.

Here, the trial court erred in deciding punitive damages were unavailable in Tabingo’s vessel unseaworthiness action. This decision will profoundly impact the trial of the case. Direct discretionary review of this important question by Washington’s highest court is apt. RAP 2.3(b); RAP 4.2(a).

B. STATEMENT OF THE CASE

American Seafoods has no answer, resp. at 1,¹ to the facts recited in Tabingo’s motion that evidenced its wanton and willful, or grossly

¹ American Seafoods asserts that the facts are “immaterial.” Resp. at 2. It is wrong. As this is review of a CR 12(b)(6) decision, this Court must treat the recitation of

negligent, conduct that resulted in severe personal injuries to Tabingo during his service on the crew of the F/V AMERICAN TRIUMPH in January 2015. Motion at 1-3.

C. ARGUMENT WHY DIRECT DISCRETIONARY REVIEW SHOULD BE GRANTED

(1) The Trial Court Erred in Dismissing Tabingo's Request for Punitive Damages in an Unseaworthiness Claim

First, it is important to note precisely what is at issue in this case. The *only* issue here is punitive damages under the maritime common law claim of vessel unseaworthiness.²

The principal thrust of American Seafoods' response to Tabingo's motion is that this Court must follow *McBride v. Estis Well Service, LLC*, 768 F.3d 382 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 2310 (2015), a case it repeatedly cites as if it were controlling authority for this Court. American Seafoods is wrong.

First, as this Court knows, on matters of federal law, only decisions of the United States Supreme Court are binding precedent. *W.G. Clark*

American Seafoods' egregious misconduct, the threshold for punitive damages, as true. *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998).

² Thus, American Seafoods' reference to Tabingo as "a Jones Act seaman," its constant reference to the Jones Act in both its answer to the statement of grounds and response to Tabingo's motion for discretionary review, and the discussion of the Jones Act in the response at 4-6 are a deliberate red herring argument. Tabingo made clear in his motion that punitive damages in a Jones Act case are *not* at issue here. Motion at 5 n.4. Moreover, as will be noted *infra*, tort claims under the Jones Act and maritime common law are distinct.

Reply on Motion for
Discretionary Review - 2

Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

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

Here, it is the United States Supreme Court decisions in *Exxon Shipping Co. v. Baker*, 55 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) that are the *binding* authorities for this Court. This Court can read both cases just as readily as the parties, but American Seafoods simply misstates the Court's decision in *Townsend* in particular. *See generally*, motion at 8-10.

The *Townsend* court *rejected* the notion advanced by American Seafoods throughout its response that *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S. Ct. 317, 112 L. Ed.2d 275 (1990) foreclosed the availability of punitive damages in federal maritime common law tort claims. Indeed, the entire thrust of Justice Thomas's *Townsend* opinion

³ Ignoring Tabingo's citation of *State of Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919, 70 S. Ct. 252, 94 L. Ed.2d 562 (1960), motion at 10 n.9, American Seafoods *repeatedly* claims that the denial of review by the United States Supreme Court in *McBride* evidences that Court's "endorsement" of the Fifth Circuit's decision. Resp. at 6; answer to statement of grounds at 5. Bluntly stated, American Seafoods' counsel should know better. RPC 3.3(a)(1).

was to confine *Miles* to wrongful death claims, and to make clear that punitive damages are available to injured seamen in claims arising under the maritime common law as was historically true. 557 U.S. at 419-24.⁴

In *Townsend*, it so happened that only one type of maritime common law claim – maintenance and cure – was at issue. *See also, Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 272 P.3d 827, *cert. denied*, 133 S. Ct. 199 (2012). But that does not mean that other maritime common law tort claims like vessel unseaworthiness were not subject to the identical analysis with respect to the recovery of punitive damages.

The trial court's decision was erroneous precisely because unlike the Jones Act, a *statutory* negligence claim, vessel unseaworthiness is a *common law maritime tort claim* that is controlled by the analysis in *Townsend*.⁵

⁴ In *Townsend*, the Court concluded that punitive damages had been a part of federal maritime common law historically, and that “nothing in *Miles* or the Jones Act eliminated that availability.” *Id.* at 407. In fact, the Court *rejected* a reading of *Miles* that it had limited maritime common law remedies to those available under the Jones Act or the Death on the High Seas Act, describing such a reading as “far too broad.” *Id.* at 419. Thus, an injured seaman could pursue punitive damages unless Congress enacted legislation overriding the common law. *Id.* at 415. Congress has not done so as to vessel unseaworthiness claims.

⁵ American Seafoods relies on language in *Townsend* discussing *Miles* and allegedly foreclosing the recovery of non-pecuniary damages like punitives unless the maritime common law recognized both a cause of action and a punitive damages remedy before the enactment of the Jones Act in 1920. 557 U.S. at 420.

American Seafoods cites no case holding that a vessel unseaworthiness claim did not exist prior to 1920. At best, it offers a concurring opinion from *McBride*. Resp.

Reply on Motion for
Discretionary Review - 4

Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Additionally, even to be persuasive authority for this Court, the holding in *McBride* must be clearly as American Seafoods claims. It is not. American Seafoods *vastly overstates* what a badly split en banc Fifth Circuit actually *held* there. *Davidson v. Hensen*, 135 Wn.2d 112, 128, 954 P.2d 1327 (1988) (the holding of a decision is the narrowest principle on which a majority of judges agreed). The *holding* in *McBride* was that punitive damages are not recoverable in wrongful death actions involving vessel unseaworthiness.⁶ As such, the *McBride* decision has no relevance here.

Finally, the trial court erred because Tabingo's position that punitive damages are recoverable is supported in *numerous* decisions, both appellate and district court, in the Ninth Circuit; courts in those cases have

at 13. Similarly, it cannot cite a case holding that a vessel unseaworthiness claim is not a maritime common law tort claim or that punitive damages could not be recovered in such actions prior to 1920. Such an assertion flies in the face of *Townsend*, and the cases on vessel unseaworthiness cited in Tabingo's motion at 5-7. The United States Supreme Court in *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 99, 64 S. Ct. 455, 88 L.Ed. 861 (1944) specifically noted that a vessel owner's liability to an injured seaman for an unseaworthy vessel "has been settled law since this Court's ruling to that effect in *The Osceola*," a 1903 decision. The Fifth Circuit in *Complaint of Merry Shipping, Inc.*, 650 F.2d 622, 624-26 (5th Cir. 1981), did not question the historical availability of punitive damages in maritime common law actions, foreshadowing *Townsend*.

Finally, American Seafoods really grasps at straws in equating unseaworthiness and Jones Act cases, citing *Miller v. Arctic Alaska Fisheries Corp.*, 133 Wn.2d 250, 944 P.2d 1005 (1997), resp. at 7; answer at 3, a case that never addressed punitive damages and long pre-dated the United States Supreme Court's seminal *Townsend* decision.

⁶ American Seafoods fails to address the analysis of the Fifth Circuit's actual holding found in Tabingo's motion at 12 n.10.

held that punitive damages are recoverable in maritime common law tort actions. *E.g.*, *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987), *cert. denied*, 484 U.S. 914 (1987) (punitive damages are recoverable where the vessel owner's conduct manifested a reckless or callous disregard of the seaman's rights, gross negligence, or actual malice criminal indifference);⁷ *Batterson v. The Dutra Group* (Case No. 14-v-7667-PJW);⁸ *Hausman v. Holland America Line USA*, 2015 WL 10684573 (W.D. Wash. 2015) (App. at 66-75).⁹ California has also determined that punitives are recoverable in maritime common law tort actions. Statement of grounds for direct review at 5 n.5.

Thus, notwithstanding all of American Seafoods' baseless efforts to conflate Tabingo's arguments on vessel unseaworthiness with a Jones Act claim not at issue in this motion, it is plain that the trial court erred in

⁷ American Seafoods would like to have this Court believe that *Evich* is no longer good law, resp. at 13-14, but after *Townsend's* correction of the *Miles* decision's scope, that argument is simply wrong as numerous district courts have determined. *Rowe v. Hornblower Fleet*, 2012 WL 5833541 (N.D. Cal. 2012); *In re Complaint of Osage Marine Services, Inc.*, 2012 WL 709188 (E.D. Mo. 2012); *Wagner v. Kona Blue Water Farms, LLC*, 2010 WL 3566731 (D. Haw. 2010). *Bergen v. F/V St. Patrick*, 816 F.2d 1345 (9th Cir. 1987), cited by American Seafoods in its response at 14, does not even address *Evich*.

⁸ The vessel owner in *Batterson*, a case from the Central District of California, sought review by the Ninth Circuit in Case No. 15-56775.

⁹ American Seafoods contends that the maritime common law tort claim available to injured vessel passengers is different than the maritime common law tort claim available to injured seamen like Tabingo. Resp. at 15. That assertion is unsupported. See Motion at 15 n.13.

dismissing under CR 12(b)(6) Tabingo's punitive damages request in his present vessel unseaworthiness action against American Seafoods. *Townsend* controls here. *Townsend* made clear that punitive damages are recoverable in maritime common law tort actions. Tabingo's vessel unseaworthiness claim is a maritime common law tort action.

(2) The Trial Court's Error Affects Future Proceedings in This Case, Meriting Review

American Seafoods seeks to narrow the basis for Tabingo's motion to RAP 2.3(b)(1) pertaining to obvious error, claiming that the probable error standard of RAP 2.3(b)(2) does not apply here citing law review articles discussing the scope of discretionary review. Resp. at 16. But American Seafoods has *no controlling authority* for its position that RAP 2.3(b)(2) "probable error" is confined to review of matters involving the impact of trial court decision outside the court. In fact, Commissioner Crooks acknowledged in his seminal article on discretionary review that RAP 2.3(b)(2) is often read more broadly than that:

The practice has not reflected the drafters' intended distinction between the two subsections based on the type of trial court order being challenged. Indeed, petitioners commonly argue, without regard to the type of trial court decision, that e standards of both subsections are met. This should not be particularly surprising. Nothing in subsection (b)(2) limits its applicability to cases involving injunctions and the like. And its probable error standard is somehow more comfortable to deal with than the

subsection (b)(1) obvious error standard. Probable error is simply easier to claim and find than obvious error. Also, from the appellate court commissioner's point of view, to label a trial court's good faith effort as obvious error as obvious error seems needlessly harsh and insulting, and perhaps a bit arrogant. Finally, there is some incongruity in identifying error as obvious in an appellate court ruling that merely grants review and allows the issue to proceed to a full appellate hearing on the merits.

Geoffrey Crooks, *Discretionary Review of Trial Court Decisions under the Washington Rules of Appellate Procedure*, 61 Wash. L. Rev. 1541, 1546 (1986).

In any event, whether the error is obvious or probable, it will profoundly impact the course of proceedings here.

American Seafoods' argument in its response at 17-20 that this Court should deny review and allow a trial with a critical structural error on the damages to be recovered to go forward represents the height of impracticality. If Tabingo is correct that punitive damages are recoverable in a vessel unseaworthiness claim, the entire trial proposed by American Seafoods in its response at 17-18 would be a *complete waste of time* for the parties and a *squandering of judicial resources*. Contrary to the view that it would "merely" require the engagement of a second phase of a bifurcated proceeding, resp. at 18, the jury on remand would need to hear the evidence to decide the punitive damages issue, *repeating* the testimony

heard in the first trial.¹⁰ Moreover, an entirely new jury would have to be convened to hear the trial on remand. The sensible course here is for this Court to clearly pronounce what the law is, and have a trial proceed on it.

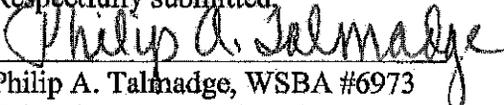
D. CONCLUSION

This is a case involving an important issue of public policy in Washington¹¹ that merits review now by this Court in light of the trial court's erroneous decision. RAP 2.3(b)(1-2); RAP 4.2(a).

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 28th day of April, 2016.

Respectfully submitted,


Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

¹⁰ American Seafoods will likely object to the admission of any evidence in the trial on unseaworthiness pertinent to punitive damages, based on the trial court's order excluding jury consideration of punitive damages.

¹¹ American Seafoods has no answer to the fact that Washington state courts are frequently hearing maritime tort claims and that the availability of punitive damages in a vessel unseaworthiness is an important question. Motion at 4; statement of grounds for direct review at 3.

Joseph S. Stacey, WSBA #12840
Beard Stacey & Jacobsen LLP
4039 21st Avenue W, Suite 401
Seattle, WA 98199
(206) 282-3100
Attorneys for Petitioner
Allan A. Tabingo

Reply on Motion for
Discretionary Review - 10

Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

APPENDIX

WESTLAW

2015 WL 10684573
United States District Court,
W.D. Washington,
at Seattle.
Hausman v. Holland America Line-USA
United States District Court, W.D. Washington, at Seattle. July 23, 2015 . Slip Copy . 2015 WL 10684573 2015 A.M.C. 22 (Approx. 7 pages)
James R. Hausman, Plaintiff,
v.
Holland America Line-USA, et al. Defendants.

CASE NO. 13cv00937 BJR
Signed 07/23/2015

MEMORANDUM OPINION & ORDER

BARBARA J. ROTHSTEIN, UNITED STATES DISTRICT JUDGE

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

I. INTRODUCTION & BACKGROUND

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

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

II. ANALYSIS

A. Under Maritime Law, Plaintiff May Pursue Punitive Damages

The Defendants rely on the Supreme Court's opinion in Miles v. Apex Marine Corporation et al. and the Ninth Circuit's decision in Chan v. Society Expeditions, Inc. as support for their position that, as a matter of law, Plaintiff is prohibited from recovering non-pecuniary damages, including punitive damages. In Miles, the Supreme Court held that "there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman." 498 U.S. 19, 33 (1990). In so determining, the Supreme Court relied on the fact that the Death of High Seas Act ("DOHSA") and the Jones Act both foreclose recovery for nonpecuniary loss in a maritime action. Id. at 31 (explaining that DOHSA explicitly "forecloses recovery for nonpecuniary loss, such as loss of society, in a general maritime action"); id. at 32 ("The Jones Act applies when a seaman has been killed as a result of negligence, and it limits recovery to pecuniary loss."). The Supreme Court then highlighted the importance of maintaining uniformity in maritime law and its desire to issue a "rule applicable to actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law." Id. at 33. As a result, the Miles Court determined that "there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman." Id.

SELECTED TOPICS

Shipping

Carriage of Passengers
Active Negligence of Owner-Operator of Vessel

Secondary Sources

Liability of owner or operator of pleasure boat for injury or death of guest passenger

35 A.L.R.4th 104 (Originally published in 1986)

...This annotation collects and discusses the state and federal cases wherein the courts have considered the liability of the owner or operator of a pleasure boat for injuries to, or the death of, a guest...

Liability of owner or operator of motorboat for injury or damage

63 A.L.R.2d 343 (Originally published in 1959)

...This annotation discusses the liability of the owner or operator of a motorboat for personal injury or property damage. The Federal Motorboat Act of 1940, regulating the operation and equipment of cert...

Liability of Cruise Ship Operator for Injury to or Death of Passengers

82 A.L.R.6th 176 (Originally published in 2013)

...This annotation collects and discusses all of the cases which have addressed the liability of a cruise ship operator for injury to or death of passengers. Some opinions discussed in this annotation may...

See More Secondary Sources

Briefs

Cross-Appellants/Appellees' Opening/Answering Brief

1995 WL 33416905

Benny and Victoria CHAN, individually, and as husband and wife, and Victoria Chan as Guardian Ad Litem for Samantha Chan, Plaintiffs - Appellees - Cross-appellants, v. SOCIETY EXPEDITIONS, INC., a Washington Corporation, et al., Defendants - Appellants - Cross-appellees, WORLD DISCOVERER, Claimant - Appellee, United States Court of Appeals, Ninth Circuit, Sep. 25, 1995

...Cross-appellants / appellees (hereinafter "plaintiffs") agree with appellants' (hereinafter "defendants") statement that the District Court had jurisdiction over this admiralty case pursuant to 28 U.S....

Petitioner's Reply Brief

1951 WL 82048

Anna DESPER, Administratrix of the Estate of Thomas J. Desper, Jr., Deceased, Petitioner, v. STARVED ROCK FERRY COMPANY, a corporation, Respondent, Supreme Court of the United States, Oct. 05, 1951

...It is not essential to status as a member of a crew that a ship be in navigation. No reasons were suggested by the Court of Appeals, and none have been suggested by respondent, why navigation is essent...

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

² Defendants urge that under *Chan* and *Miles*, Plaintiff is precluded from recovering any nonpecuniary damages, including punitive damages. Under such reasoning, Defendants implicitly ask this Court to again draw "guidance" from maritime statutes and treat a cruise passenger the same as a Jones Act seaman who was injured or killed. The Court concludes, however, that doing so would fail to recognize the Supreme Court's ruling in *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404 (2009).

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

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

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

³ Applying this reasoning, this Court must ask whether the general maritime cause of action at issue here, negligence for personal injury, and the remedy of punitive damages were available under maritime law prior to the Jones Act. The latter proves an easy inquiry given that *Atlantic Sounding* explicitly discusses that maritime law provided for punitive damages before the Jones Act was passed. 557 U.S. at 415 (noting that courts had allowed punitive damages as far back as the early 1800s, thereby supporting "[t]he general rule that punitive damages were available at common law extended to claims arising under federal maritime law."). Similarly, personal injury claims have long been asserted under maritime law. *Norfolk*

Respondent's Brief on Writ of Certiorari.

1951 WL 82047
Anna DESPER, Administratrix of the Estate of Thomas J. Desper, Jr., Deceased, Petitioner, v. STARVED ROCK FERRY COMPANY, a Corporation, Respondent, Supreme Court of the United States Nov. 28, 1951

...To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States: The opinion of the Court of Appeals is reported in 188 F. 2d 177; it will also be found at R. 2...

See More Briefs

Trial Court Documents

The Float Home, LLC v. Portage Bay Place Condominium Ass'n

2015 WL 6407520
THE FLOAT HOME, LLC, a Washington Limited Liability Company, Plaintiff, v. PORTAGE BAY PLACE CONDOMINIUM ASSOCIATION, a Washington non-profit corporation, Defendant, Superior Court of Washington, Oct. 12, 2015

...Defendant Portage Bay Place Condominium Association hereby submit these written Findings of Fact and Conclusions of Law. 1. Plaintiff The Float Home, LLC [Plaintiff] is a limited liability company ll...

The Newport Yacht Basin Ass'n of Condominium Owners v. Supreme Northwest, Inc.

2010 WL 8727821
THE NEWPORT YACHT BASIN ASSOCIATION OF CONDOMINIUM OWNERS, an unincorporated condominium association, Plaintiff, v. SUPREME NORTHWEST, INC., a Washington corporation dba Seattle Boat Newport, and Seattle Marine Management Company, LLC, a Washington Limited Liability Company, Defendants and Third-Party Plaintiffs, v. Bridges Investment Group, LLC, a Washington limited liability company; and Douglas L. Burbridge and Margie L. Burbridge, husband and wife, Superior Court of Washington, Aug. 02, 2010

...The Court presided over the Phase I trial from May 17, 2010 through June 2, 2010. After hearing all the testimony, reviewing the exhibits admitted into evidence, and considering the argument of counsel...

Representaciones Districiones Y Districiones Evya, S.V. De C.V. v. Global Explorer, LLC

2011 WL 836362
REPRESENTACIONES DISTICUCIONES Y DISTICUCIONES EVYA, S.V. DE C.V., a Corporation; and Instalaciones Electromecanicas, Civiles y Electromecanicas, S.A. De C.V, a Mexican Corporation, Plaintiffs, v. GLOBAL EXPLORER, LLC, a Washington LLC; Global Enterprises, LLC, a Washington LLC; Maritime Management Services, Inc., a Washington Corporation; Trevor and Jane Doe Stabbert, and the marital community composed thereof; Jaquin Parrusquia, a citizen of Mexico, Frank and Jane Doe Superior Court of Washington, Mar. 03, 2011

...This case was tried beginning on Tuesday, October 19, 2010 and ending on Monday, November 29, 2010, before this Court. The plaintiffs were represented by Moran, Windeas & Wong, PLLC, defendants Global E...

See More Trial Court Documents

Shipbuilding & Drydock Corp. v. Garris, 532 U.S. 811, 820 (2001) ("The general maritime law has recognized the tort of negligence for more than a century...."); *New York & L.B.S.B. Co. v. Johnson*, 185 F. 740, 741 (3d Cir.1912) (noting that the injury to a steamboat passenger "was a maritime tort, and clearly warranted maritime relief."). As such, under *Atlantic Sounding's* reasoning, the Court finds that Plaintiff is entitled to punitive damages.

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

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

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

Unlike the plaintiffs in *Miles* and *McBride*, Plaintiff here does not bring a wrongful death suit or negligence action under the Jones Act (or for that matter, DOHSA), but rather pursues a general maritime personal injury action. Because the reasoning of *Atlantic Sounding* appears to apply with ease to allow punitive damages for a personal injury negligence suit brought by a non-seaman like Plaintiff,³ the Court is persuaded that Plaintiff should be allowed to pursue punitive damages. See *Summers v. Salmon Bay Barge Line, Inc.*, No. 12-5859 RJB, 2013 WL 6912917, *11 (W.D.Wash. Nov. 4, 2013) (explaining that, pursuant to *Atlantic Sounding*, a plaintiff "is entitled to pursue punitive damages unless Congress has enacted legislation departing from [the] common law understanding [that punitive damages are available]").

⁴ Next, the Court turns to Defendant's argument that the Ninth Circuit's decision in *Chan* requires that Plaintiff be prohibited from seeking punitive damages, notwithstanding the Supreme Court's decision in *Atlantic Sounding*. Of course, this Court is generally bound to the holdings of the Ninth Circuit and its "explications of the governing rules of law." *Miller v. Gemmie*, 335 F.3d 889, 900 (9th Cir.2003). However, a district court is no longer bound by Circuit precedent where the Supreme Court, issues an intervening decision that "undercut[s] the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *id.* at 900. Moreover, the issues decided by the Supreme Court "need not be identical [to those presented in the prior circuit precedent] in order to be controlling." *id.*

The Court is persuaded that the Supreme Court's decision in *Atlantic Sounding* is "clearly irreconcilable" with the Circuit's decision in *Chan*. As discussed above, the *Chan* panel largely relied on the reasoning in *Miles*, and determined that courts should look to "maritime statutes for guidance in determining what remedies should be available in an admiralty case," even when the case "falls outside the ambit of statutory maritime law." However, *Atlantic Sounding* warns that such a reading of *Miles* "is far too broad," and goes to great lengths to explain why a wrongful death action which exists "only because of congressional action" is distinct from a general maritime cause of action that was well established before the passage of maritime statutes like the Jones Act. *Atlantic Sounding*, 557 U.S. at 419-420.

Contrary to *Chan*'s reasoning, *Atlantic Sounding* makes clear that punitive damages remain available for a general maritime cause of action that predates the Jones Act. *Id.* at 420. Moreover, *Atlantic Sounding* explicitly rejects the notion that all maritime personal injury actions are limited by the Jones Act. *Id.* at 421 (noting that Supreme Court precedent had explicitly rejected the notion that "*Miles* precludes any action or remedy for personal injury beyond that made available under the Jones Act ..." (citing *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 818 (2001))). This, of course, undermines *Chan*'s insistence that *Miles* limited the remedies for non-statutory maritime personal injury suits to those remedies available under the Jones Act. See *Chan*, 39 F.3d at 1407. In sum, under *Atlantic Sounding*, courts need no longer limit recovery of punitive damages for a cause of action that "falls outside the ambit of statutory maritime law," so long as the cause of action existed before the Jones Act and independently from maritime statutes.

Lastly, the *Chan* panel underscored the importance of "the goal of uniformity in remedies in maritime cases," to conclude that a passenger injured in an accident at sea should not be allowed to pursue remedies that were denied to the dependents of a passenger killed at sea. *Chan*, 39 F.3d at 1407. However, as the Supreme Court explained in *Atlantic Sounding*, "[t]he laudable quest for uniformity in admiralty law does not require the narrowing of available damages to the lowest common denominator approved by Congress for distinct causes of action." 557 U.S. at 423; accord *McBride*, 768 F.3d at 409 (Higginson, J., dissenting) (noting that, following *Miles*, a wave of district courts had disallowed punitive damages for non-Jones Act claims under the "*Miles* uniformity principle," but that "[m]omentum in that direction [had been] sea-tossed by *Atlantic Sounding* ...").

Because, as explained above, *Chan* is "clearly irreconcilable" with *Atlantic Sounding*, this Court does not consider itself bound by *Chan*. See *Barrette v. Jubilee Fisheries, Inc.*, 2011 WL 351061, at *7 (W.D.Wash. Aug. 11, 2011) (declining, in light of *Atlantic Sounding*, to apply Ninth Circuit precedent that had foreclosed the recovery for loss of consortium under general maritime law and holding that a seaman's wife may pursue loss of consortium damages for an unseaworthiness claim because recovery for loss of consortium has been available prior to the Jones Act and there was "no evidence that claims premised on unseaworthiness were exempted from the common-law rule extending loss of consortium to maritime suits"); see also *Rowe v. Hornblower Fleet*, 2012 U.S. Dist. LEXIS 164402, at *47 (N.D.Cal. Nov. 16, 2012) (refusing to apply *Miles* to limit the availability of punitive damages in an unseaworthiness claim because of *Atlantic Sounding*'s reasoning that punitive damages are available so long as Congress has not indicated otherwise); *Wagner v. Kona Blue Water Farms*, 2010 U.S. Dist. LEXIS 66106 (D. Hawaii Sept. 13, 2010) ("[A]lthough cases predating [*Atlantic Sounding*] consistently interpreted *Miles* to bar punitive damages for general maritime law claims including unseaworthiness, [citing cases], [*Atlantic Sounding*] suggests that such interpretations of *Miles* are 'far too broad.'" Specifically, [*Atlantic Sounding*] held that *Miles* does not limit recovery in general maritime actions to the remedies available by statute.).

III. CONCLUSION

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

SO ORDERED.

All Citations

Slip Copy, 2015 WL 10684673, 2016 A.M.C. 22

Footnotes

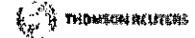
- 1 Alternatively, Defendants argue that no reasonable juror could find that punitive damages are warranted based on the undisputed facts. At this time, the Court will not rule on this argument, but takes it under advisement.
- 2 As in *Chan*, the Plaintiff here is neither a seaman nor died on the open 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.").
- 3 The Court need not decide whether punitive damages are available to a seaman bringing a personal injury suit under the Jones Act.

* 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); *Labegaiger v. Celebrity Cruises, Inc.*, No. 11-21620, 2011 U.S. Dist. LEXIS 93933 (S.D. Fla. Aug. 23, 2011).

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

Westlaw. © 2016 Thomson Reuters | Privacy Statement | Accessibility | Supplier Terms | Contact Us | 1-800-REF-ATTY (1-800-733-2889) | Improve Westlaw



WESTLAW

Overruling Recognized by *Korala v. Thal Airways Intern., Ltd.*, 9th Cir.(Cal.), September 26, 1997

Original Image of 819 F.2d 258 (PDF)

Evich v. Morris, 819 F.2d 256, 1988 A.M.C. 74 (Approx. 5 pages)
United States Court of Appeals, Ninth Circuit. June 10, 1987

Peter EVICH; Estate of Ogie Berg, as owners of the M/V CAPELLA,
Petitioners-Appellees,
v.
Terry MORRIS, Personal Representatives of the Estate of Robert J.
Connelly, John S. Connelly, Claimants-Appellants.

No. 86-3587.
Argued and Submitted April 7, 1987.
Decided June 10, 1987.

Nondependent brothers of deceased seaman filed action against owner of seaman's vessel and owner of vessel which attempted to rescue seaman's vessel. The United States District Court for the Western District of Washington, Jack E. Tanner, J., dismissed action against owners of seaman's vessel and entered judgment against owner of other vessel. Appeal was taken. The Court of Appeals, 759 F.2d 1432, affirmed in part, vacated and remanded in part, and reversed and remanded in part. On remand, the District Court entered judgment in favor of the brothers. Brothers appealed. The Court of Appeals, Eugene A. Wright, Circuit Judge, held that: (1) state law was preempted by the general federal maritime survival action; (2) the brothers could recover future economic loss; (3) punitive damages were available if the brothers could show owner of seaman's vessel was guilty of conduct which manifested reckless or callous disregard for the rights of others or gross negligence or actual malice criminal indifference; and (4) remand was necessary on prejudgment Interest Issue.

Reversed and remanded.

West Headnotes (4)

Change View

- 1 Admiralty Wrongful death
State law was preempted by general federal maritime survival action, even though death occurred in state territorial waters.
14 Cases that cite this headnote
2 Death Pecuniary losses to deceased
Future economic loss was recoverable in general federal maritime survival action brought by nondependent brothers of deceased seaman against owner of seaman's vessel, even though majority of states do not allow future economic loss to be recovered in survival actions and even though the Jones Act provides for no such recovery; recovery of future economic loss prevented the anomaly of rewarding owner of vessel for killing seaman rather than injuring him. Jones Act, 46 U.S.C.A. § 688.
31 Cases that cite this headnote
3 Death Exemplary damages
Punitive damages would be available in general federal maritime survival action brought by nondependent brothers of deceased seaman against owner of

SELECTED TOPICS

- Actions for Causing Death
Award of Exemplary or Punitive Damages
Admiralty
Jurisdiction
Federal Maritime Law
Federal Courts
Courts of Appeals
Interim Attorney Fee Award

Secondary Sources

P1900 - UPDATE LIST OF CASES

Mandated Health Benefits - COBRA Guide P1900
...Tab 1900 provides a comprehensive list of the court decisions in which COBRA figured prominently, and the general legal principles involved in these cases. The tab includes the following sections: 1. A...

§ 3672. The Saving-to-Suitors Clause

14A Fed. Prac. & Proc. Juris. § 3672 (4th ed.)
...Although the Judiciary Act of 1789 granted the federal trial courts "original exclusive cognizance of all civil causes of admiralty and maritime jurisdiction," it also reserved to "suitors, in all cases...

"Sentimental" losses, including mental anguish, loss of society, and loss of marital, filial, or parental care and guidance, as elements of damages in action for wrongful death

74 A.L.R. 11 (Originally published in 1931)

...The question under annotation is intended to include all "sentimental" or nonpecuniary losses sustained by the statutory beneficiaries as elements of damages in an action for wrongful death, such as re...

See More Secondary Sources

Briefs

Brief for Plaintiff-Appellant, Andover Newton Theological School, Inc.

1988 WL 1335736
ANDOVER NEWTON THEOLOGICAL SCHOOL, INC., Plaintiff-Appellant, v. CONTINENTAL CASUALTY COMPANY, Defendant-Appellee. Andover Newton Theological School, Inc., Plaintiff-Appellee, v. Continental Casualty Company, Defendant-Appellant. United States Court of Appeals, First Circuit. 1988

...The District Court determined, in reliance upon McLaughlin v. Richland Shoe Co., 486 U.S. 128, 109 S.Ct. 1677, 108 L.Ed.2d 1681 (1988), that Andover Newton's "willful" violation of the ADEA was a "deliberate or in...

BRIEF FOR THE PETITIONERS

1995 WL 451711
Yamaha Motor Corporation, U.S.A., Yamaha Motor Company, Ltd. v. Lucien B. Cathoun, Robin L. Cathoun, as Administrators of Estate of Natalia K. Cathoun. Supreme Court of the United States. July 28, 1995

seaman's vessel if brothers could show owner was guilty of conduct which manifested reckless or callous disregard for the rights of others or gross negligence or actual malice criminal indifference.

31 Cases that cite this headnote

- 4 **Federal Courts** Determination of damages, costs, or interest; remittitur Peculiar circumstances justifying denial of prejudgment interest were not so obvious as to preclude remand in general federal maritime survival action brought by nondependent brothers of deceased seaman against owner of seaman's vessel; general federal maritime survival action was not novel, and argument that death of wronged party justified denial of such award defied reason.

22 Cases that cite this headnote

Attorneys and Law Firms

*257 Casey A. Nagy, Seattle, Wash., for petitioners-appellees.

John G. Cooper, Seattle, Wash., for claimants-appellants.

Appeal from the United States District Court for the Western District of Washington.

Before BROWNING, WRIGHT and HALL, Circuit Judges.

Opinion

EUGENE A. WRIGHT, Circuit Judge:

In this appeal we are asked to determine whether a general federal maritime survival action preempts state law, and what damages are recoverable in the federal action. We conclude that state law is preempted and that future economic loss, punitive damages, and prejudgment interest may be recovered.

This appeal follows previous remands in which we joined other circuits in recognizing a general federal maritime survival action. *Berg v. Chevron, U.S.A., Inc.*, 759 F.2d 1425 (9th Cir.1985); *Evich v. Connelly*, 759 F.2d 1432 (9th Cir.1985). The remand in *Evich* directed the district court to consider the maritime survival action against Evich and the Berg estate. 759 F.2d at 1434.

On remand, Evich and Berg moved for summary judgment, conceding liability. Judge Tanner granted the motion and entered judgment in favor of Connelly for \$25,000. At the previous trial, he had awarded Connelly \$264,439 against Chevron. Twenty-five thousand dollars of that award represented pre-death pain and suffering. The remainder was attributed to an unspecified economic loss.

II.

1 Connelly's personal representatives argue that Alaska state law supplements federal maritime law when deaths occur in state territorial waters. When the same argument was made in the context of wrongful death actions, we rejected it. *Nelson v. United States*, 639 F.2d 469, 473 (9th Cir.1980); see also *Matter of S/S Helena*, 529 F.2d 744, 748-53 (5th Cir.1975). The parties have presented us with no reason to depart from *Nelson*. The need for *258 uniformity in maritime survival actions is no less than the need for it in maritime wrongful death actions. We adhere to *Nelson*, holding that state law is preempted by the general federal maritime survival action.

III.

Connelly's representatives next claim Judge Tanner erred by limiting damages to pre-death pain and suffering. They argue that future economic loss, punitive damages, and prejudgment interest may be recovered in a federal maritime survival action. We agree.

2 Although federal circuit courts considering survival damages have generally stated that pre-death pain and suffering is compensable, see, e.g., *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 893 (5th Cir.1984); *Barbe v. Drummond*, 507 F.2d 764, 769-800 (1st Cir.1974); *Spiller v. Thomas M. Lowe, Jr. & Assoc., Inc.*, 466 F.2d 903, 911 (8th Cir.1972), the recoverability of future economic loss in a post-*Morgue* survival action has not been addressed by a circuit court. Cf. *Mascuilli v. United States*, 411 F.2d 887, 873 (3d Cir.1969) (pre-*Morgue* case allowing such recovery). The issue was addressed in *Multhead*

...The memorandum opinion and orders of the district court below (Pet.App.51a) are reported at No. Civ. A. 90-4285, 1993 WL 216238 (E.D. Pa., June 22, 1993). The combined order denying Yamaha's motion to...

Joint Appendix

2009 WL 4729140
ESTHER HUI AND STEPHEN GONSALVES, Petitioners, v. YANIRA CASTANEDA, et al., Respondents.
Supreme Court of the United States
Dec. 04, 2009

...08-55884 Docket [LOGO] DEPARTMENT OF HEALTH & HUMAN SERVICES Health Resources and Services Administration Bureau of Primary Health Care Rockville MD 20857 1. I am the Associate Administrator for the BU...

See More Briefs

Trial Court Documents

Catello v. Oriental Weavers Rug Mfg. Co., Inc.

2003 WL 28074477
Joan CATELLO, Plaintiff, v. ORIENTAL WEAVERS RUG MANUFACTURING COMPANY, INC., et al./a Oriental Weavers of America, Paul D'Huyvetter, individually and Robert Gregg, individually, Defendants.
United States District Court, W.D. Pennsylvania.
Jan. 30, 2003

...Plaintiff prevailed at trial on her claim of retaliation under Title VII and received an award of damages for back pay, unreimbursed expenses, and emotional distress. The jury also awarded punitive dam...

In re Overseas Shipholding Group, Inc.

2014 WL 3764493
In re OVERSEAS SHIPHOLDING GROUP, INC., et al., Debtors.
United States Bankruptcy Court, D. Delaware.
June 28, 2014

...Upon the motion (the "Motion"), of Maremar Tanker LLC (the "Debtor Seller"), Maremar Product Tanker Corporation (the "Debtor Buyer"), and certain of their affiliates, as debtors and debtors in possessi...

In re Flamingo Investments.

2010 WL 7375884
In re FLAMINGO INVESTMENTS, Debtors and Debtor-in-Possession. Check One or More as Appropriate: Affects Both Debtors: 2 Affects Flamingo Investments only: X Affects Paradise Investments, Inc. only: 2
United States Bankruptcy Court, C.D. California.
Mar. 02, 2010

...Chapter 11 DATE: February 16, 2010 TIME: 11:00 a.m. CTRM: 302 The "Motion of Flamingo Investments For Order: (1) Authorizing Sale Of Real Property Pursuant To Section 363(f); (2) Approving Bankrupt Fee;...

See More Trial Court Documents

v. *Pacific Inland Navigation, Inc.*, 378 F.Supp. 361 (W.D.Wash.1974). There, Judge Beeks, relying on *Moragne v. States Marine Lines*, 398 U.S. 376, 90 S.Ct. 1772, 28 L.Ed.2d 339 (1970), allowed recovery for future economic loss. *Id.* at 363.¹

While the majority of states do not allow future economic loss to be recovered in survival actions, and the Jones Act provides for no such recovery, we find recovery here "better becomes the humane and liberal character of proceedings in admiralty", *Moragne*, 398 U.S. at 367, 90 S.Ct. at 1780 (citation omitted), and prevents the anomaly of rewarding a petitioner for killing his victim rather than injuring him, *see id.* at 366, 90 S.Ct. at 1784. Most states and the Jones Act allow these damages to be recovered in the form of loss of support when wrongful death beneficiaries exist. Where, as here, those beneficiaries do not exist, potential problems with double recovery do not exist. Under these circumstances, the decedent's estate should be compensated for loss of future earnings. *See Kriesak v. Crowe*, 36 F.Supp. 127, 129 (M.D.Pa.1940).

Claimants also seek punitive damages. Punitive damages are available under general maritime law for claims of unseaworthiness, *in re Merry Shipping, Inc.*, 650 F.2d 622, 626 (5th Cir.1981); *in re Marine Sulphur Queen*, 460 F.2d 69, 106 (2d Cir.), *cert. denied*, 409 U.S. 682, 93 S.Ct. 318, 34 L.Ed.2d 246 (1972), and for failure to pay maintenance and cure, *Robinson v. Pocahontas, Inc.*, 477 F.2d 1046, 1051-52 (1st Cir.1973). *See generally Protectus Alpha Navigation Co., Ltd. v. North Pac. Grain Growers, Inc.*, 767 F.2d 1379, 1385 (9th Cir.1985). While punitive damages are not available under the Jones Act, *Kopczynski v. The Jacqueline*, 742 F.2d 555, 560-61 (9th Cir.1984), *cert. denied*, 471 U.S. 1138, 105 S.Ct. 2677, 86 L.Ed.2d 696 (1986), it does not follow that they are unavailable under general maritime law. *in re Merry Shipping, Inc.*, 650 F.2d at 626.

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

4 Also, "prejudgment interest must be granted unless peculiar circumstances justify its denial." *Vance v. American Hawaii Cruises, Inc.*, 789 F.2d 790, 795 (9th Cir.1986) (quoting *Dillingham Shipyard v. Associated Insulation Co.*, 649 F.2d 1322, 1328 (9th Cir.1981)). We reject petitioner's argument that peculiar circumstances justifying its denial are so obvious as to preclude the need for a remand. The general maritime survival action was not novel, and the argument that the death of the wronged party justifies denial of such an award defies reason. Judge Tanner must award prejudgment interest on remand or specify the peculiar circumstances justifying its denial.

REVERSED and REMANDED.

All Citations

819 F.2d 256, 1988 A.M.C. 74

Footnotes

- 1 Petitioners attempt to undermine *Multhead* by arguing that reliance on a state survival statute is no longer accepted practice. While Judge Beeks referred to the result under Washington law, he based his holding on a "survival remedy independent of state law." 378 F.Supp. at 363.

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

DECLARATION OF SERVICE

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

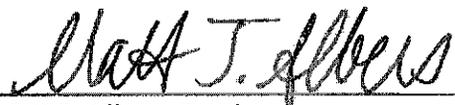
Markus B.G. Oberg
LeGros Buchanan & Paul, P.S.
701 Fifth Avenue, Suite 2500
Seattle, WA 98104-7051

James P. Jacobsen
Joseph S. Stacey
Beard Stacey & Jacobsen, LLP
4039 21st Avenue West, Suite 401
Seattle, WA 98199

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: April 28, 2016, at Seattle, Washington.



Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe

TALMADGE/FITZPATRICK/TRIBE

April 28, 2016 - 11:09 AM

Confirmation of Filing

Filed with Court: Supreme Court
Appellate Court Case Number: 92913-1
Appellate Court Case Title: Allan A. Tabingo v. American Triumph LLC, et. al.

The following documents have been uploaded:

- 929131_20160428110525SC927838_8108_Answer_Reply.pdf
This File Contains:
Answer/Reply - Reply to Answer to Motion for Discretionary Review
The Original File Name was Reply on Motion for Discretionary Review.pdf

A copy of the uploaded files will be sent to:

- phil@tal-fitzlaw.com
- moberg@legros.com
- jjacobsen@maritimelawyer.us
- jstacey@maritimelawyer.us
- mjacka@maritimelawyer.us
- scourter@legros.com
- matt@tal-fitzlaw.com

Comments:

Sender Name: Matt Albers - Email: matt@tal-fitzlaw.com

Filing on Behalf of: Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

Address:

2775 Harbor Avenue SW
Third Floor Ste C
Seattle, WA, 98126
Phone: (206) 574-6661

Note: The Filing Id is 20160428110525SC927838