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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.

RESPONSE TO MOTION FOR DISCRETIONARY REVIEW

Markus B.G Oberg, WSBA #34914
LeGros, Buchanan & Paul
701 Fifth Avenue, Suite 2500
Seattle, WA 98104
(206) 623-4990

Attorneys for Respondents
American Triumph LLC, and
American Seafoods Company, LLC

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LeGros, Buchanan & Paul
701 Fifth Avenue, Suite 2500
Seattle, WA 98104
(206) 623-4990

A. INTRODUCTION

The Trial Court ruled a Jones Act seaman may not recover punitive damages under the Jones Act or the general maritime law doctrine of unseaworthiness. This is correct. Under the two liability theories available (Jones Act negligence and unseaworthiness), Plaintiff is limited to compensatory (or non-pecuniary) damages. This has been the position of the Washington State Supreme Court dating back to *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). The Trial Court's decision is also consistent with the uniformity principle set forth by the U.S. Supreme Court in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990), and the recent *en banc* decision by the Fifth Circuit Court of Appeals in *McBride v. Estis Well Service, LLC*, 768 F.3d 382, 384 (5th Cir. 2014), *cert. denied*, 135 S.Ct. 2310, 191 L.Ed.2d 978 (2015), the highest federal court to address this issue post *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 420, 129 S. Ct. 2561, 174 L. Ed. 2d 382 (2009). Furthermore, the Trial Court's decision does not conflict with *Townsend* or *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70 (2012). These cases deal with a different issue, namely punitive damages in the maintenance and cure context.

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LeGros, Buchanan & Paul
701 Fifth Avenue, Suite 2500
Seattle, WA 98104
(206) 623-4990

B. STATEMENT OF THE CASE

Plaintiff brings liability claims against Defendants under the Jones Act and the general maritime doctrine of unseaworthiness.¹ Neither of these liability theories allows recovery for non-pecuniary damages, including punitive damages. Nevertheless, in July 2015, less than two months after the U.S. Supreme Court declined the plaintiffs' petition to review the Fifth Circuit's *en banc* decision in *McBride*, 768 F.3d 382 (dismissing punitive damages in the unseaworthiness context), *see, McBride*, 135 S.Ct. 2310 (May 18, 2015), Plaintiff filed the instant lawsuit claiming punitive damages for unseaworthiness. Plaintiff thus failed to state a claim, and dismissal of Plaintiff's claim for these unavailable punitive damages was warranted under CR 12(b)(6) and (c). Defendants so moved, and on February 22, 2016, the Trial Court granted Defendants' Motion for Partial Summary Judgment Dismissing Plaintiff's Claim for Punitive Damages. *Appendix to Motion*, pp. 83-87.

¹ Defendants dispute Plaintiff's factual allegations, but will not dissect them as they are immaterial to the question of law before this Court. *See, Contreras v. Crown Zellerbach Corp.*, 88 Wn.2d 735, 742, 565 P.2d 1173 (1977) ("The question under CR 12(b)(6) is basically a legal one, and the facts are considered only as a conceptual background for the legal determination.") (*citing, Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 298, 545 P.2d 13 (1975)); *Joslin v. Joslin*, 45 Wn.2d 357, 363, 274 P.2d 847 (1954) (motion for judgment on the pleadings tests the sufficiency of the pleadings and presents to the court a question of law).

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C. ARGUMENT WHY REVIEW SHOULD BE DENIED

Interlocutory review is disfavored. *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591, 593 (2010), *citing*, *Maybury v. City of Seattle*, 53 Wash.2d 716, 721, 336 P.2d 878 (1959) (“Piecemeal appeals of interlocutory orders must be avoided in the interests of speedy and economical disposition of judicial business.”) Furthermore, here there is no basis for review. The Trial Court committed neither an obvious error which rendered further proceedings useless, *see*, RAP 2.3(b)(1), nor a probable error that substantially altered the status quo or substantially limited Plaintiff’s freedom to act, *see*, RAP 2.3(b)(2), and Plaintiff’s Motion for Discretionary Review should be denied.

1. The Trial Court Did Not Commit Obvious or Probable Error under RAP 2.3(b)(1) and (2)

The Trial Court’s decision is correct. Plaintiff asserted a claim that, as a matter of law, is not recoverable. Under substantive maritime law, specifically the liability causes of action asserted against Defendants (Jones Act negligence and unseaworthiness), damages are limited.²

² 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 (28401-00201852;1)

Notably, Washington Supreme Court interpretations of federal maritime law have long been in accord.

a. Punitive Damages Are Not Available under the Jones Act

The Jones Act expressly provides seamen with the same remedy as railroad workers have against their employers. 46 U.S.C. §30104. This has been interpreted to mean that the Jones Act incorporates by reference the Federal Employers' Liability Act, 45 U.S.C. §51, *et seq.* ("FELA"), which provides railroad workers with negligence claims against their employers, *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 395-396, 44 S. Ct. 391, 68 L. Ed. 748 (1924); this includes incorporating the case law that interprets and applies FELA. *Kernan v. Am. Dredging Co.*, 355 U.S. 426, 439, 78 S. Ct. 394, 2 L. Ed. 2d 382 (1958).

FELA has long been held to limit recovery only to "pecuniary" damages. *Miles*, 498 U.S. at 32 (*citing, Michigan Cent. R. Co. v. Vreeland*, 227 U.S. 59, 195-196 (1913)); and, therefore, punitive damages, which are non-pecuniary in nature, are not recoverable under FELA. *Wildman v. Burlington N.R. Co.*, 825 F.2d 1392, 1395 (9th Cir. 1987). "No case under FELA has allowed punitive damages, whether for personal injury or

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)).

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death.” *McBride*, 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*, 825 F.2d at 1395 (“[P]unitive damages are unavailable under the FELA.”)).

As explained by the U.S. Supreme Court in *Miles*, in enacting the Jones Act and incorporating FELA therein, Congress was aware of the state of incorporated FELA law, including FELA’s prohibition on punitive damages: “Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well.” *Miles*, 498 U.S. at 32; *see also*, *McBride*, 768 F.3d at 387. As explained by the Washington State Supreme Court, the Jones Act served to extend a seaman’s right to **compensatory** damages. *Williams v. Steamship Mut. Underwriting Ass’n, Ltd.*, 45 Wn.2d 209, 215-16, 273 P.2d 803 (1954); *Peterson*, 145 Wash. at 474 (citing, *Panama R.R. Co.*, 264 U.S. 375, for the rule that the Jones Act grants seaman an alternative

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action to recover compensatory damages).³ Accordingly, punitive damages are not available for a cause of action under the Jones Act.

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*, 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*, 768 F.3d at 384.

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

In *McBride*, 768 F.3d 382, 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 petition for review. *McBride v. Estis Well Service, LLC*, 135 S.Ct. 2310, 191 L.Ed.2d 978 (2015).

³ 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.

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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*, 498 U.S. at 32-33.

As discussed above, it is clear that punitive damages are not allowed under the Jones Act; and, therefore, neither are they allowed for general maritime law liability claims. “If this court allowed a punitive damage claim under general [maritime] law, it would be supplanting

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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.*, 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, 498 U.S. at 32-33.⁴ "Although Congress and the courts both have a lawmaking role in maritime cases, 'Congress has paramount power to fix

⁴ *Miles* addressed both wrongful death and survival remedies. Although often characterized as a "wrongful death" case, the U.S. Supreme Court in *Miles* actually also addressed the seaman's surviving independent "injury" action (the survival claim), holding that the Jones Act damages limitations applied to such actions as well: "Congress has limited the survival right for seamen's injuries resulting from negligence. As with loss of society in wrongful death actions, this forecloses more expansive remedies in a general maritime action founded on strict liability [*i.e.*, unseaworthiness]." *Miles*, 498 U.S. at 36.

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and determine the maritime law which shall prevail throughout the country.” See, *McBride*, 768 F.3d at 384.

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

c. *Townsend* Does Not Apply

The U.S. Supreme Court’s decision in *Townsend*, 557 U.S. 404, did not alter the historical unavailability of punitive damages for liability

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claims grounded in the Jones Act or general maritime law. *E.g.*, *Snyder v. L&M Botruc Rental, Inc.*, 2013 WL 594089, *6 (E.D. La. Feb. 15, 2013) (dismissing claims for punitive damages under negligence and unseaworthiness claims). That argument was expressly rejected by the *en banc* Fifth Circuit in *McBride*:

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

...

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

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

Townsend involved only the no-fault seaman's general maritime remedy of maintenance and cure,⁵ not the separate theories of Jones Act negligence and unseaworthiness that are involved in the matter before this

⁵ Maintenance is a daily stipend paid to seaman while recovering from an injury or illness; and cure is the payment of the treatment costs.

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Court.⁶ 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

⁶ Indeed, Justice Thomas starts his opinion by identifying the question presented as "whether an injured seaman may recover punitive damages for his employer's willful failure to pay maintenance and cure;" and then stating the Court's conclusion that "nothing in *Miles* or the Jones Act eliminates that availability." *Townsend*, 557 U.S. at 407. Justice Thomas reiterates this narrow focus throughout the decision. *E.g., id.*, at 412 ("Nothing in maritime law undermines the applicability of this general rule **in the maintenance and cure context.**" (emphasis added)); at 419 ("***Miles* does not address either maintenance and cure actions in general or the availability of punitive damages for such actions.**" (emphasis added))

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

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

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

Indeed, contrary to Plaintiff’s contention that the U.S. Supreme Court in *Townsend* limited the holding in *Miles*, *Motion*, p. 8, the Supreme Court in fact confirmed that “[T]he reasoning of *Miles* remains sound.” *Townsend*, 557 U.S. at 420; *McBride*, 768 F.3d at 390. The Supreme Court thus endorsed the continuing validity of the limitation on available damages that the Court in *Miles* imposed on unseaworthiness claims, and which is needed to preserve uniformity with the Jones Act. “It would have been illegitimate to create common law remedies [e.g., under unseaworthiness] that exceeded those remedies statutorily available under the Jones Act and DOHSA.” *Townsend*, 557 U.S. at 420.⁷ The Supreme

⁷ DOHSA, the Death On The High Seas Act, specifically limits damage recovery to pecuniary loss. 46 U.S.C. §30303.

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Court's more recent decision to forego review of the Fifth Circuit's *en banc* decision in *McBride* affirms this conclusion.

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

Plaintiff cites cases indicating that punitive damages, in general, were available under general maritime law before 1920. *Motion*, pp. 13-14. That is immaterial. Under *Townsend*, the issue is whether punitive damages were specifically available for a claim of unseaworthiness before the Jones Act (1920). However, this is not possible, because the modern unseaworthiness cause of action was not recognized until after the passage of the Jones Act. As Judge Clement 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) (citing, *Miles*, 498 U.S. at 25; *Mahnich v. S.S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed.561 (1944)).

e. Miles Abrogated Cases Allowing Punitive Damages for Unseaworthiness

Plaintiff misplaces reliance on the *Evich v. Morris*, 819 F.2d 256, 258 (9th Cir. 1987). *Evich* pre-dates *Miles* and relies on the Fifth Circuit's decision in *In Re Merry Shipping*, 650 F.2d 622, 625 (5th Cir. 1981).

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Merry Shipping and its progeny, including *Evich*, are no longer good law. See, *Guevara v. Mar. Overseas Corp.*, 59 F.3d 1496, 1507 (5th Cir. 1995) (“After *Miles*, it is clear that *Merry Shipping* has been effectively overruled.”), *abrogated on other grounds by Townsend*, 557 U.S. at 408 (as to availability of punitive damages for maintenance and cure claims); see also, *McBride*, 768 F.3d at 394-95 (Clement, J., concurring) (criticizing *Merry Shipping*). Indeed, contrary to Plaintiff’s contention that *Evich* represents a long-standing rule in the Ninth Circuit, *Motion*, p. 7, the very same year *Evich* was decided, the Ninth Circuit held that “[p]unitive damages are non-pecuniary damages unavailable under the Jones Act,” and questioned the availability of punitive damages in the unseaworthiness context. *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1347 Fn.1 (9th Cir.1987), *opinion modified on reh’g*, 866 F.2d 318 (9th Cir.1989).

f. *Baker, Hausman and Clausen Are Irrelevant*

Contrary to Plaintiff’s representation, *Exxon Shipping v. Baker*, 554 U.S. 471 (2008), neither confirmed that punitive damages are recoverable in a vessel unseaworthiness case nor “definitively resolved the

issue.” *Motion*, pp. 4 and 7. *Baker* concerned penalties under the Clean Water Act and did not address the Jones Act, FELA, or unseaworthiness.⁸

Hausman v. Holland Am. Line USA, is immaterial because it is a passenger case. In fact, Judge Rothstein distinguished it from *Miles* and *McBride* on that basis. *Appendix*, p. 70, ll. 6-7.⁹

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

⁸ Plaintiff’s argument was also rejected by the Fifth Circuit: “*Baker* only addressed whether the [CWA] preempted punitive damages supposedly available at general maritime law—not whether punitives were available in unseaworthiness actions.” *McBride*, 768 F.3d at 392 (Clement, J., concurring).

⁹ Plaintiff also misquotes Judge Rothstein’s order, inserting parentheticals that do not appear in the original Order. Compare, *Motion* p. 11, with *Plaintiff’s App.*, 70, ll. 10-12.

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2. The Trial Court's Decision Did Not Render Further Proceedings Useless

Whether the alleged error will have a “significant impact on future proceedings in the case,” *Motion*, p. 3, is not the applicable standard. Former Commissioner Geoffrey Crooks explained RAP 2.3(b)(1) and (2) are intended to apply to different circumstances, and may be further distinguished based on whether the error affects the internal workings of the lawsuit at issue, or has immediate effect outside the court room. Geoffrey Crooks, *Discretionary Review of Trial Court Decisions under the Washington Rules of Appellate Procedure*, 61 Wash. L. Rev. 1541, 1546 (1986).¹⁰ “An error affecting the internal workings of the lawsuit would be reviewable only if ‘obvious’ and, as required by RAP 2.3(b)(1), only if it truly rendered further proceedings useless.” *Id.* Discretionary review under RAP 2.3(b)(1) is warranted only “when the error committed is so blatant and severe that there is no point to continuing the particular litigation.” 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, 102 (2014). The well-reasoned case-law “confirms that pretrial orders affecting the

¹⁰ Also cited by Plaintiff. *Motion*, p. 3, Fn. 1.

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course of the litigation with no immediate effects on the parties' rights outside the litigation properly qualify for discretionary review only when the subject ruling is obviously incorrect and reversal would obviate the need for further proceedings." *Dwyer*, 38 Seattle U. L. Rev. at 103.

For the reasons stated above, the Trial Court's decision was in fact correct. Assuming arguendo that it was obviously erroneous, it does not render further proceedings in this matter useless.¹¹ The effect of the decision is to allow trial to proceed in the usual course on the issue of liability and compensatory damages without the potential prejudice of tainting any compensatory determination with allegations of willful or wanton misconduct that are irrelevant to the unseaworthiness analysis. As discussed above and as Plaintiff concedes, unseaworthiness is a strict liability concept that does not involve the examination of conduct, merely whether there was an unseaworthy condition.¹² Allowing irrelevant

¹¹ Plaintiff essentially concedes this point by instead contending that the proceedings will be adversely affected. *See, Motion*, p. 16.

¹² 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 (28401-00201852;1))

evidence of misconduct into the determination of whether such a condition existed would constitute unfair prejudice and warrant a new trial—the jury would be presumed to have been influenced by the evidence of misconduct so as to have inflated any compensatory award to punish Defendants. The better course in any event is to allow the jury to assess unseaworthiness before introducing evidence regarding willful and wanton misconduct relevant only to the concept of punitive damages—a bifurcation to avoid prejudice. If the jury finds no unseaworthiness, there is no reason to proceed further. Alternatively, if the case proceeds to trial and is appealed and the Appellate Court orders a trial on the issue of punitive damages, it will merely be a matter of engaging in the second phase of a bifurcated proceeding, namely a determination of whether the alleged misconduct surrounding the existence of the alleged unseaworthy condition warrants exemplary damages.¹³ There would be no need for a new trial on the underlying question of unseaworthiness. Judicial economy favors this course—the present status.

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).

¹³ As Crooks notes, “[m]ost cases in which pretrial discretionary review has been sought but denied probably do not, in fact, return later on appeal.” *Crooks*, 61 Wash. L. Rev. at 1550.
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3. The Decision Did Not Alter the Status Quo or Substantially Limits the Freedom of a Party to Act

Subsection RAP 2.3(b)(2) is properly limited to orders pertaining to injunctions, attachments, receivers, and arbitration. *Crooks*, 61 Wash. L. Rev. at 1545-46. Where the status quo or a party's freedom to act is thus altered outside the court room the less restrictive 'probable' error test is applied. *Crooks*, 61 Wash. L. Rev. at 1546; *see also*, *Dwyer*, 38 Seattle U. L. Rev. at 92-93 ("That is, [RAP 2.3(b)(2)] applies to rulings that have the effect of doing something other than merely resolving an issue in the litigation.") "A trial court action then arguably would not qualify for review under RAP 2.3(b)(2) if it merely altered the status of the litigation itself or limited the freedom of a party to act in the conduct of the lawsuit." *Crooks*, 61 Wash. L. Rev. at 1546. Unlike a preliminary injunction order, an order transferring custody, or an order compelling parties to arbitration, "CR 12 rulings, discover orders, summary judgment rulings, and most evidentiary rulings do not alter the substantive rights of any party." *Dwyer*, 38 Seattle U. L. Rev. at 102-103. Such rulings might be incorrect and warrant reconsideration or reversal on appeal, but the terms of subsection (b)(2), on their face, do not apply to such rulings." *Id.*

Here, the Court's decision was not probably erroneous, and even assuming arguendo it was, there has been no effect on the parties outside

this litigation such as in the case of an injunction or custody transfer. Plaintiff's status quo remains unaltered as does his freedom to act.

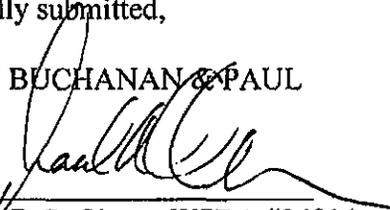
D. CONCLUSION

Plaintiff's Motion for Discretionary Review should be denied. The Trial Court committed neither an obvious error which rendered further proceedings useless, nor a probable error that substantially altered the status quo or substantially limited Plaintiff's freedom to act. *See*, RAP 2.3(b)(1) and (2). The Court's decision was correct and consistent with prior Washington State Supreme Court decisions on point.

DATED this 20TH day of April, 2016.

Respectfully submitted,

LE GROS BUCHANAN & PAUL

By 

Markys B.G. Oberg, WSBA #34914
701 Fifth Avenue, Suite 2500
Seattle, WA 98104
Phone: (206) 623-4990
moberg@legros.com

*Attorneys for Respondents American
Triumph LLC, and American Seafoods
Company, LLC*

{28401-00201852;1}

Response to Motion for Discretionary Review - 20

LeGros, Buchanan & Paul
701 Fifth Avenue, Suite 2500
Seattle, WA 98104
(206) 623-4990

CERTIFICATE OF SERVICE

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

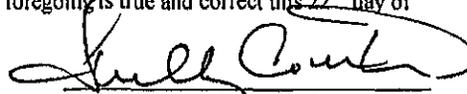
Joseph Stacey
4039-21st Ave. W #401
Seattle, WA 98199
206-282-3100
bstj@maritimelawyer.us

Philip A. Talmadge
Talmadge/Fitzpatrick/Tribe
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Petitioner Allan A. Tabingo

Original efiled with:
Washington State Supreme Court Clerk's Office
supreme@courts.wa.gov

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct this 22nd day of April, 2016.


Shelley Courter, Legal Assistant
Signed at Seattle, Washington

(28401-00201852;1)

Certificate of Service

LeGros, Buchanan & Paul
701 Fifth Avenue, Suite 2500
Seattle, WA 98104
(206) 623-4990

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To: Shelley Courter
Cc: Joe Stacey; phil@tal-fitzlaw.com; Marianne Jacka; matt@tal-fitzlaw.com; Markus Oberg; Elizabeth Moore
Subject: RE: Tabingo / American Triumph et al; No. 92913-1 - Attached RESPONSE to Motion for Discretionary Review

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Supreme Court Clerk's Office

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Subject: Tabingo / American Triumph et al; No. 92913-1 - Attached RESPONSE to Motion for Discretionary Review

Dear Court Clerk –

Attached please find the **Response to Motion for Discretionary Review** in the *Tabingo v American Triumph LLC and American Seafoods Company, LLC*, Case No. 92913-1 matter before the Court.

This filing is presented by:

Markus B.G. Oberg, WSBA #34914
LeGros Buchanan & Paul
701 Fifth Avenue, Suite 2500
Seattle, WA 98104
(206) 623-4990
Attorneys for Respondents American Triumph LLC and
American Seafoods Company LLC
moberg@legros.com

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

Thank you,
Shelley

SHELLEY D. COURTER

Legal Assistant to Markus Oberg

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LEGROS BUCHANAN & PAUL, P.S.

701 Fifth Avenue, Suite 2500
Seattle, WA 98104-7051

P: 206.623.4990 F: 206.467.4828 Direct: 206.467.3186

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