

No. 92913-1

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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ALLAN A. TABINGO,

Appellant,

v.

AMERICAN TRIUMPH LLC, and AMERICAN SEAFOODS  
COMPANY, LLC,

Respondents.

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TABINGO'S ANSWER TO  
AMICI BRIEFS

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A. INTRODUCTION

This Court has accepted the Inland Boatmen’s Union of the Pacific (“IBU”) and the American Waterways Operators, Foss Maritime Company, Tote Maritime Alaska, Inc., and Harley Maritime Services, Inc. (“maritime industry”) amici briefs. Those briefs only confirm that this Court should hold that Allan Tabingo may recover punitive damages in his vessel unseaworthiness claim against American Triumph LLC and American Seafoods Co., LLC (“American Seafoods”) under federal maritime law.

The logic of the analysis of the United States Supreme Court in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 401, 129 S. Ct. 2561, 174 L. Ed. 2d 382 (2009), compels the result Tabingo advocates. There, the Court effectively set a 3-part test to determine if punitive damages are recoverable in the maritime setting:

- (1) Did the Jones Act preclude either the action or the remedy?
- (2) Did the general maritime cause of action (vessel unseaworthiness) predate the enactment of the Jones Act in 1920?
- (3) Did the remedy (punitive damages) predate the Jones Act?

Here, plainly the answer to the first question is no, and to the latter two questions, yes. Tabingo has documented that:

- nothing in the Jones Act expressly eliminated claims for punitive damages in federal maritime personal injuries claims like vessel unseaworthiness claims;
- federal admiralty law has long recognized that punitive damages are recoverable generally and federal maritime personal injuries law has also long recognized that injured seamen may recover punitive damages;
- vessel unseaworthiness claims were recognized in federal maritime law prior to the enactment of the Jones Act in 1920.

Nothing in the amici briefs detracts from the logic of this analysis, notwithstanding the effort of the maritime industry to embark upon a revisionist history of vessel unseaworthiness claims.

#### B. STATEMENT OF THE CASE

Tabingo reaffirms his discussion of the facts and procedure herein set forth in his opening brief at 2-4, and in this reply brief at 2-3.

The maritime industry amici do not address the facts in the parties' statements of the case *directly*, but attempt to do so *indirectly* in their brief at 18-19. As this Court is well aware, the trial court here granted American Seafoods' CR 12(b)(6) motion to dismiss. In reviewing that decision, as Tabingo has noted, br. of appellant at 5 n.4, this Court must treat the facts pleaded in Tabingo's complaint, and any hypothetical facts associated with them, as *true*. Thus, this Court must treat Tabingo's assertion that the F/V AMERICAN TRIUMPH was unseaworthy and that

American Seafoods' conduct in making it unseaworthy was egregious as *true*.

C. ARGUMENT

Applying the three-part *Townsend* analysis of the United States Supreme Court, this Court should conclude that Tabingo is not foreclosed from recovering punitive damages in his vessel unseaworthiness claim against American Seafoods. The trial court erred in ruling to the contrary.

(1) The Recovery of Punitive Damages in Federal Maritime Personal Injuries Claims Long Predated the Enactment of the Jones Act in 1920

No one in this case seriously disputes the proposition that punitive damages were recoverable historically in admiralty and specifically in maritime personal injuries cases. Nor could they after the *Townsend* court's extensive analysis of that point by Justice Thomas.<sup>1</sup> Both admiralty law generally and federal maritime personal injuries law specifically recognized that a party could recover punitive damages in the appropriate case. *See* David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. Com. 73 (1997); David W. Robertson, *Punitive Damages in U.S. Maritime Law: Miles, Baker, and Townsend*, 70 La. L. Rev. 463 (2010). In admiralty generally, cases like

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<sup>1</sup> Indeed, neither American Seafoods nor the maritime industry amici argue to the contrary in their briefs.

*The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 558 (1818) and *Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U.S. 101, 108, 13 S. Ct. 261, 37 L. Ed. 97 (1893) (recognizing punitive damages in federal law generally and in admiralty specifically, citing *The Amiable Nancy*), made clear that an injured party could recover punitive damages. *See generally*, br. of appellant at 25 n.25. Similarly, punitive damages were recoverable by an injured seaman in a maritime personal injuries case. *See generally*, br. of appellant at 25 n.25. In fact, *Townsend* itself and this Court's decision in *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 272 P.3d 827, *cert. denied*, 133 S. Ct. 199 (2012) make it absolutely clear that an injured seaman could recover such damages in a case involving the wrongful withholding of maintenance and cure because such an action was itself an action arising under federal maritime law and was not eliminated by the enactment of the Jones Act.

The parties disagree, however, about whether the Jones Act somehow foreclosed the remedies available to injured seamen harmed by the vessel owner's infliction of an unseaworthy vessel upon them, and whether vessel unseaworthiness claims actually predate the Jones Act.

- (2) Nothing in the Jones Act Forbids Tabingo's Vessel Unseaworthiness Claim or Recovering Punitive Damages with Respect to Such Claim

A careful assessment of the language of the Jones Act and the decision in *Townsend*, a case both American Seafoods and the maritime industry amici would have this Court ignore, compels the conclusion that the Jones Act did not foreclose Tabingo from recovering punitive damages against American Seafoods.

In effect, this Court must decide the question of whether Congress intended to supplant federal maritime common law claims and/or remedies by enacting the Jones Act. Both federal and state interpretive law provide that the common law is not superseded by statute unless the intent of the applicable legislative body to do so is clear and explicit from the statutory language. *Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co. of Va.*, 464 U.S. 30, 35-36, 104 S. Ct. 304, 78 L. Ed. 2d 29 (1983); *Potter v. Wash. St. Patrol*, 165 Wn.2d 67, 77, 196 P.3d 691 (2008). In analyzing this question, it is important to examine the text of the Jones Act itself;<sup>2</sup> 46 U.S.C. § 30104 states:

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<sup>2</sup> The primary goal of statutory interpretation is to carry out Congressional intent. *U.S. Aviation Underwriters, Inc. v. Nabtesco Corp.*, 697 F.3d 1092, 1096 (9th Cir. 2012). The “starting point in discerning congressional intent is the existing statutory text.” *Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004) (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438, 119 S. Ct. 755, 142 L. Ed. 2d 881 (1999)). “The preeminent canon of [federal] statutory interpretation requires [a court] to ‘presume that [the] legislature says in a statute what it means and means in statute what it says there.’” *BedRoc Ltd. LLC v. United States*, 541 U.S. 176, 183, 124 S. Ct. 1587, 158 L. Ed. 2d 338 (2004) (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992)). Thus, a court’s “inquiry begins with the statutory text, and ends there as well if the text is unambiguous.” *Id.* (citing *Lamie*, 540 U.S. at 534). Washington law on statutory interpretation, if apt for

A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

*Nowhere* does that statute purport to supersede federal maritime common law vessel unseaworthiness claims.<sup>3</sup> *Nowhere* does it purport to eliminate the remedy of punitive damages for vessel unseaworthiness or other federal maritime claims. Indeed, *nowhere* does it make reference to pecuniary or nonpecuniary damages.

Apart from the text of the statute, the argument by American Seafoods and the maritime industry amici that the Jones Act restricted remedies available to injured seamen is belied by the Act's very history, and is *rejected* 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 (1995), the Court made clear that the Jones Act did not

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the construction of a federal statute, is analogous. *E.g.*, *State, Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

<sup>3</sup> A vessel unseaworthiness claim is a federal maritime common law claim entirely distinct from a Jones Act claim. Unlike a maintenance/cure withholding claim, a vessel unseaworthiness claim may not be maintained as a part of a Jones Act negligence claim. *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 498 & nn.10-11, 91 S. Ct. 514, 27 L. Ed. 2d 562 (1971) (“[U]nseaworthiness ... is a remedy separate from, independent of, and additional to other claims against the shipowner, whether created by statute (e.g., the Jones Act) or under general maritime law (e.g., maintenance and cure).”). The Jones Act does not purport to supersede it.

eliminate vessel unseaworthiness claims: “The Jones Act evinces no general hostility to recovery under maritime law. It does not disturb seamen’s general maritime claims for injuries resulting from unseaworthiness...” *Id.* at 29.<sup>4</sup> *Miles* did not address punitive damages. The *Townsend* court did.

The *Townsend* court noted the liberal and remedial purpose of the Jones Act, stating “this Court has consistently recognized that the [Jones] Act ‘was remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it.’” 554 U.S. at 417. To adopt American Seafoods’ and the maritime industry’s analysis, this Court would have to believe that Congress *sub silentio* took away a significant remedy from injured seamen – the common law vessel unseaworthiness claim.

In *Townsend*, the defendants argued that *Miles* “limited recovery in maritime cases involving death or personal injury to the remedies

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<sup>4</sup> The *Townsend* court explained that *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 121 S. Ct. 1927, 150 L. Ed. 2d 34 (2001), “directly rejected” the “contention that *Miles* precludes *any* action or remedy for personal injury beyond that made available under the Jones Act.” 557 U.S. at 421 (Court’s emphasis). There, the Court held that “*Miles* presented no barrier to [the] endorsement of a previously unrecognized maritime cause of action for negligent wrongful death [of a maritime worker who was neither a seaman nor a long-shoreman].” *Id.* at 421-22. The decision was inconsistent with the “lowest common denominator” interpretation of *Miles*, discussed *infra*. In fact, Justice Scalia’s opinion expressly rejected it: “[E]ven as to seamen, we have held that general maritime law may provide wrongful-death actions predicated on *duties beyond those that the Jones Act imposes*. See, e.g., *Miles ... (seaworthiness)*.” 532 U.S. at 818 (emphasis added).

available under the Jones Act and the Death on the High Seas Act (DOSHA) [46 U.S.C. §§ 30301-08].” *Id.* at 418. The Court called this a “lowest common denominator” approach<sup>5</sup> and rejected it:

*Miles* does not address either maintenance and cure actions in general or the availability of punitive damages for such actions. The decision instead grapples with the entirely different question whether general maritime law should provide a cause of action for wrongful death [of a seaman] based on unseaworthiness.... The Court in *Miles* first concluded that the unanimous legislative judgment behind the Jones Act, DOSHA, and the many state statutes authorizing maritime wrongful death actions, supported the recognition of a [new] *general maritime action* for wrongful death of a seaman. Congress had chosen to limit, however, the damages available for wrongful-death actions under the Jones Act and DOSHA, such that damages were not statutorily available for loss of society or lost future earnings. The Court thus concluded that Congress’ judgment must control the availability of remedies for wrongful death actions brought under general maritime law.... [T]o determine the remedies available under the [new] *common-law wrongful-death action*, an admiralty court should look primarily to [the Jones Act and DOSHA] for policy guidance. It would have been illegitimate to *create* common-law remedies that exceeded those remedies statutorily available under the Jones Act and DOSHA.

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<sup>5</sup> While *Miles* spoke of a need for uniformity in federal maritime law, that policy is not controlling, as the *Townsend* court stated:

The laudable quest for uniformity in admiralty does not require the narrowing of available damages to the lowest common denominator approved by Congress for distinct causes of action.

*Id.* at 423. Thus, the maritime industry amicus’ assertion in their brief at 13 that uniformity is somehow mandated by the enactment of the Jones Act falls away in light of *Townsend*, where that argument was expressly rejected.

*Id.* at 419-20 (emphasis added). The Court applied Congressional intent in enacting the Jones Act to define precisely the areas in which Congress intended statutory policy to prevail over the common law.

Moreover, the *Townsend* court noted that “Congress knows how to restrict ... traditional [maritime remedies] when it wants to,” *id.* at 416, and accordingly the Court would “not attribute words to Congress that [Congress] has not written.” *Id.* at 424. The Court re-affirmed Tabingo’s argument *supra* that the language of the Jones Act nowhere supports the American Seafoods/maritime industry argument.

Finally, both American Seafoods and the maritime industry amici make much of the language in the Act that applies law “regulating recovery for personal injury to, or death of, a railway employee” to injured seamen.<sup>6</sup> American Seafoods contends that the Jones Act eliminated the ability of injured seamen to recover punitive damages in vessel unseaworthiness claims relying on the notion that such damages were not recoverable under the Federal Employees Liability Act, 45 U.S.C. § 59,

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<sup>6</sup> The maritime industry amici assert in their brief at 2 that the parties “agree” that punitive damages are not recoverable under the Jones Act and supports that claim as to Tabingo by a cite to his reply brief. Industry br. at 3 n.1. In fact, the passage in Tabingo’s reply brief to which the industry refers merely states that he is not seeking punitive damages in his Jones Act claim in this case and makes no concession about their recovery under the Act generally.

(“FELA”). Br. of Resp’ts at 12-15. For all the reasons set forth articulately in the IBU amicus brief, that assertion is simply incorrect.

Further, American Seafoods contends the pecuniary/nonpecuniary distinction articulated in *Miles* controls and must bar this action. It is wrong, particularly after the *Townsend* court distinguished *Miles*. As noted *supra*, the words “pecuniary” and “nonpecuniary” do not appear in the Jones Act. Nor has the United States Supreme Court ever held that punitive damages are “non-pecuniary.” As noted *supra*, *Miles* addressed loss of consortium damages and not punitive damages. The notion that punitive damages are “nonpecuniary” likely emanates from *Kopczynski v. The Jacqueline*, 742 F.2d 555, 561 (9th Cir. 1984), *cert. denied*, 471 U.S. 1136 (1985). The *Kopczynski* court did not reveal why punitive damages are nonpecuniary; it simply said they were without citing any supporting authority. *Id.* In ordinary English, “pecuniary” means “of or relating to money,” or “consisting of or given or exacted in money or monetary payments.” *Pecuniary*, Dictionary.com, <http://www.dictionary.com/browse/pecuniary> (last visited Dec. 14, 2016). In legal parlance, “pecuniary damages” are “[d]amages that can be estimated and monetarily compensated,” and “nonpecuniary damages” are “[d]amages that cannot be measured in money.” Bryan A. Garner, *Black’s Law Dictionary* (10th ed.) at 473.

Punitive damages are obviously “pecuniary” by any of these definitions. They are estimated and awarded monetarily, levied as “measured retribution[.]” *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008) and designed not to provide compensation but to constitute “punishment to the offender ... as a warning to others...” *Lake Shore & M. S. Ry. Co.*, 147 U.S. at 107.

In sum, the Supreme Court in *Miles* and *Townsend* answered the question at issue here; nothing in the Jones Act *per se* forecloses either a vessel unseaworthiness claim or the recovery of punitive damages associated with it. Such an argument would be fully *inconsistent* with the text of the Jones Act and the manifest intent of Congress to *expand* remedies available to injured seamen by enacting the Act and not to *restrict* their existing common law remedies.<sup>7</sup>

(3) Vessel Unseaworthiness Claims Predated the Enactment of the Jones Act in 1920

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<sup>7</sup> *Miles*, as construed by *Townsend*, holds only that the Jones Act and DOSHA control over common law claims because those statutes dealt *specifically* with wrongful death actions. Br. of Appellant at 14 n.15, 15-18; reply br. at 5-6. Similarly, the maritime industry’s assertion in its brief at 12 that *Lindgren v. United States*, 281 U.S. 38, 50 S. Ct. 207, 74 L. Ed. 686 (1930) “held that the Jones Act covers the field, preempting all federal and state remedies for injury or death to a seaman” is a *vast* overstatement of that case’s holding, belied by the result in *Townsend*. Rather, the *Lindgren* court held that Jones Act superseded *state wrongful death statutes* in an area that was exclusively within the purview of federal law and not the entire field of liability for injuries to seamen. *Id.* at 44.

The central argument of the maritime industry amici is that vessel unseaworthiness claims, or the recovery of punitive damages in such claims, did not predate the enactment of the Jones Act in 1920; that contention is ultimately an exercise in focusing on the trees, perhaps the bark of the trees, and missing the forest. The vessel unseaworthiness doctrine was established in general maritime law *long prior* to the enactment of the Jones Act, as early as 1789. *Dixon v. The Cyrus*, 7 Fed. Cas. 755 (1789).<sup>8</sup>

The maritime industry amici argue that “pre-Jones Act personal injury liability sounded exclusively in negligence – unseaworthiness being but a limited species of negligence claims.” Industry br. at 3. “Not until the Jones Act’s passage did the judicially created cause of action for unseaworthiness that Tabingo asserts, in which liability is not based on negligence, have its ‘humble origin as a dictum in an obscure case in

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<sup>8</sup> As stated in G. Gilmore & C. Black, *The Law of Admiralty* (2d ed. 1975) [“Gilmore & Black”] at 384, vessel unseaworthiness was a recognized remedy for a seaman, even though the right to recover damages came later in the development of the doctrine:

[I]n that and other early cases there was no suggestion that for a breach of the duty a seaman could recover damages for personal injuries: unseaworthiness merely gave the seaman a privilege to leave the service of the ship without coming under the penalties for desertion and without forfeiting his wages. Until late in the 19th century the shipowner’s obligation to provide maintenance and cure marked the limit of his liability to seamen injured as a result of either the ship’s unseaworthiness or negligence on the part of the master and fellow crew members.

1922.” *Id.* That description of the law is hyperbole, and unsupported. A pre-Jones Act unseaworthiness claim was a tort distinct from negligence.

American Seafoods and its amici allies *concede*, as they must, that *The Osceola*, 189 U.S. 158, 23 S. Ct. 483, 471 L. Ed. 2d 760 (1903), is pivotal in any determination regarding the origin of the doctrine of seaworthiness. Industry br. at 4-8. They argue the Supreme Court in *The Osceola* ruled that a vessel owner is not liable for injuries caused by captain’s negligence “unless it results in injury-causing unseaworthy conditions.” *Id.* at 7. “Thus, unseaworthiness was born as a form of limited owner liability for certain types of shipboard negligence.” *Id.* In other words, they try to cast *The Osceola*’s discussion of the unseaworthiness claim as a condition of the vessel that arose from owner negligence. They do not cite to any authority to support such a severely strained interpretation of pre-Jones Act unseaworthiness.

Unambiguously, the *Osceola* court specifically recognized that the seaman had a common law cause of action for unseaworthiness: “Upon a full review, however, of English and American authorities upon these questions, we think the law may be considered as settled upon the following propositions:....‘That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship....’” 189 U.S.

at 175. In so holding, the Court made no mention of negligence that caused the unseaworthy condition. The Court specifically referred to the *condition* of the ship not the actions of the crew, owner, or employer. As Gilmore & Black notes at 384, this determination “represented a long step forward in the history of seamen’s rights.”<sup>9</sup>

The maritime industry amici attempt to recast unseaworthiness noted by the *Osceola* court into a species of negligence, i.e., negligence that creates an unseaworthy condition, is unfounded. The *Osceola* court was dealing directly with the question of negligence; it ruled that the *seaman had no negligence cause of action in general maritime law*. The issue of negligence was not a side issue in *The Osceola*, nor was it dictum. The Court dealt directly with negligence, ruling that the seaman had no cause of action for negligence – in any form or under any circumstances. In fact, Congress, largely in response to the ruling in *The Osceola*, enacted the Jones Act which allowed the seaman the negligence cause of action.

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<sup>9</sup> The *Osceola* court reviewed several earlier cases where a finding of unseaworthiness supported an award of damages for the seaman. For instance, it cited to *The Edith Godden*, 23 Fed. 43 (S.D. N.Y. 1885). There, the *Osceola* court stated that the vessel was held liable for personal injuries received from “the neglect of the owner to furnish appliances to the place and occasion where used; in other words unseaworthiness.” 189 U.S. at 173. It also cited to *Olson v. Flavel*, 34 Fed. 477 (D. Or. 1888). In reviewing this case, the Court noted that the owner did not provide proper appliances, “so that case was one really of unseaworthiness.” 189 U.S. at 174. The Court also cited to *The A. Heaton*, 43 Fed. 592 (D. Mass. 1890), *The Julia Fowler*, 49 Fed. 277 (S.D. N.Y. 1892), and *Kalleck v. Deering*, 37 N.E. 450 (Mass. 1894) all in support of its holding that the seaman had no cause of action for negligence but only for unseaworthiness.

The vessel owner under general maritime law warrants a seaworthy vessel. The maritime industry asks this Court to focus on the “breach of the warranty” as opposed to the “condition of the vessel” (e.g. improper appliances, not fit for its intended purpose). But the injury to a seaman can occur from both negligence and unseaworthiness concurrently or independently. In fact, Tabingo was injured by *both* the employer’s negligence providing a broken hydraulic handle and by the unfit condition of the hydraulic handle, left unrepaired for years, making the hatch a trap. A shipowner can breach the warranty of seaworthiness *without being negligent*. Nothing in *The Osceola* hinted that negligence must give rise to the unseaworthy condition of the vessel.

The decision on unseaworthiness in *The Osceola* was crucial, though it was dictum

since the holding in *The Osceola* was that no recovery could be had for injuries caused by operating negligence. Nevertheless, it proved to be an influential dictum and during the twenty-year period between the handing down of *The Osceola* and the passage of the Jones Act there came to be a substantial volume of litigation over the “indemnity for ... unseaworthiness.”

Gilmore & Black at 384.<sup>10</sup>

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<sup>10</sup> In fact, as noted in Gilmore & Black, numerous decisions between 1903 and 1920 recognized that after *The Osceola*, an injured seaman could recover for his/her personal injuries on a theory of vessel unseaworthiness distinct from any claim in negligence of the vessel owner. *E.g.*, *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 380-81, 38 S. Ct. 501, 62 L. Ed. 2d 1171 (1918). *See also*, *The Svealand*, 136 F. 109, 110

The maritime industry amici imply that in the 1922 case of *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 259, 42 S. Ct. 475, 66 L. Ed. 2d 927 (1922), the Supreme Court merely hinted that unseaworthiness may be found without regard to negligence; they suggest it is but a post-Jones Act elaboration on the claim, and an “obscure” case. Industry br. at 8-9, 16. The Supreme Court there did more than “hint” at vessel unseaworthiness being a distinct cause of action from a negligence claim against the vessel owner. *Id.* at 8. It so *held* in recognizing such a claim existed “without regard to negligence.” That case merely reaffirmed the rule previously established in *The Osceola in 1903*, long before the Jones Act.

The scope of the vessel unseaworthiness claim certainly became more fully developed in *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 2d 275 (1944), *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 91 S. Ct. 514, 217 L. Ed. 2d 562 (1946), and *Usner*, making it a powerful remedy for seamen, but that does not detract from the *critical*

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(4th Cir. 1905) (“And the freedom of the ship from liability to its seamen for injury received in the discharge of their duties, except in cases arising by reason of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship, is recognized.”); *The Fullerton*, 167 F. 1, 11 (9th Cir. 1908) (same); *Globe S.S. Co. v. Moss*, 245 F. 54, 55 (6th Cir. 1917) (same); *John A. Roebling’s Sons Co. of N.Y. v. Erickson*, 261 F. 986, 987 (2d Cir. 1919).

*point that vessel unseaworthiness claims clearly predated 1920, thereby meeting the Townsend test.*

Similarly, federal authorities also support the view that punitive damages were recoverable by injured seamen in vessel unseaworthiness claims prior to 1920, just like they were recoverable in other maritime personal injuries actions. Br. of Appellant at 24-26. The industry amici do not distinguish those authorities cited by Tabingo.

The industry amici fall back on the notion, surfaced in *Miles*, that FELA's limitation on the recovery of certain non-economic damages the Supreme Court there described as "non-pecuniary" must apply in the maritime setting. Industry br. at 10-12. But, for the reasons articulated *supra*, that distinction is simply unsupported in the language of the Jones Act and rejected by the *Townsend* court in concluding that punitive damages (what the maritime industry amici claim are "non-pecuniary" damages) are recoverable in a federal maritime common law action for a vessel owner's withholding of maintenance and cure to an injured seaman.

Ultimately, the maritime industry amici, like American Seafoods, have no real answer to Judge Wright's well-articulated conclusion in *Evich v. Connelly*, 819 F.2d 256, 258-59 (9th Cir. 1987), *cert. denied*, 484 U.S. 914 (1987), that punitive damages are recoverable in vessel unseaworthiness cases. That rule remains the prevailing principle in the

Ninth Circuit. *Wagner v. Kona Blue Water Farms LLC*, 2010 WL 3566731 (D. Haw. 2010); *Rowe v. Hornblower Fleet*, 2012 WL 5833541 (N.D. Cal. 2012); *Batterton v. Dutra Group*, 2014 WL 12538172 (C.D. Cal. 2014); *Hausman v. Holland America Line USA*, 2015 WL 10684573 (W.D. Wash. 2015). It is also the prevailing rule in California since 1980. *Baptiste v. Superior Court of Los Angeles Cty.*, 164 Cal. App. 3d 87 (1980), *cert. denied, sub nom. Chevron Shipping Co. v. Baptiste*, 449 U.S. 1124 (1981). This Court should agree.

(4) Public Policy Supports the Imposition of Punitive Damages Against Vessel Owners that Compel Seamen to Work in Egregiously Unsafe Vessels

As Tabingo argued, br. of appellant at 26-30; reply br. at 19, the public policy of federal maritime law – protection of seamen who are “wards of admiralty” – is better served by the imposition of punitive damages against vessel owners who provide an egregiously unsafe workplace, an unseaworthy vessel, in which the seaman is injured. This is particularly so where injured seamen may recover punitive damages when the vessel owner withholds maintenance and cure and so many others, such as longshore workers or cruise ship passengers, who are not “wards of admiralty” and entitled to special protection, may recover them in the proper case.

To this argument, the maritime industry amici have no real response, other than retreating behind their tired contention that Congress foreclosed the recovery of punitive damages under FELA, and the Jones Act swallowed FELA wholesale, both points that the IBU's amicus brief indicates are unsupported. The industry even poses the rhetorical question: "Who better to insure workplace safety than the employer, on whom the Jones Act imposes liability?," industry br. at 17, and it then asserts that vessel unseaworthiness should not be singled out for "harsh treatment."

The industry amici's arguments are easily countered. The industry is the last entity to be the watchdog for "wards of admiralty." That is akin to the old notion of allowing the fox to guard the henhouse. And an unseaworthy vessel whose danger is sufficiently manifest to justify an award of punitive damages should be singled out for "harsh treatment" to deter vessel owners from subjecting seamen to such an extreme danger as a condition of their work. Mandating that workers have safe working conditions and deterring employers from failing to do so are vital components of workplace safety laws like OSHA, 29 U.S.C. § 651, and WISHA, RCW 49.17.010. *See Afoa v. Port of Seattle*, 176 Wn.2d 460, 470, 296 P.3d 800 (2013) (recognizing the purpose of WISHA expressed in RCW 49.17.010). Indeed, this Court has noted the notion that "the

blood of the workman is a cost of production” is no longer the public policy of Washington. *Birklid v. Boeing Co.*, 127 Wn.2d 853, 874, 904 P.2d 278 (1995).

Imposing punitive damages on vessel owners who provide egregiously unsafe workplaces for seamen better serves the policy of protecting such wards of admiralty.

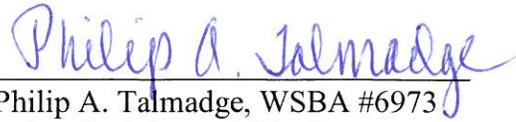
#### D. CONCLUSION

Nothing in the maritime industry amicus’ brief should dissuade this Court from concluding that the trial court erred in dismissing Tabingo’s claim for punitive damages in a vessel unseaworthiness case. That result is inconsistent with federal maritime law after *Townsend* that explained in detail why punitive damages are recoverable by an injured seaman in a federal maritime common law action. As the IBU notes, it is also consistent with FELA and the Jones Act. Moreover, awards of punitive damages will better uphold the public policy in maritime law of deterring vessel owners from risking the lives and health of crewmembers by providing them egregiously unsafe workplaces.

This Court should reverse the trial court’s CR 12(b)(6) 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 4<sup>th</sup> day of January, 2017.

Respectfully submitted,



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DECLARATION OF SERVICE

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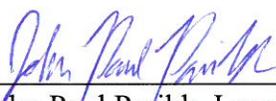
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: January 4, 2017, at Seattle, Washington.

  
\_\_\_\_\_  
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