No. 08-214

In The
Supreme Court of the United States

ATLANTIC SOUNDING CO., INC.
and WEEKS MARINE, INC.,

Petitioners,

v.

EDGAR L. TOWNSEND,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF THE ARGUMENT

The method of enforcing the ancient right of a seaman to receive medical care from the seaman's employer falls within this Court's jurisdiction as a common law court of last review. The Respondent asserts that both attorney's fees and punitive damages are necessary to enforce the right, and to harmonize the common law right of seamen to maintenance and cure with the statutory remedies enacted by Congress in the Longshore and Harbor Workers' Compensation Act, the Seaman's Wage Act, and the Railroad Unemployment Insurance Act. While those statutes are not directed toward seamen, the policy behind them can provide guidance to the Court.

Congress has never expressed an intent to limit damages in non-fatal maritime accidents to pecuniary losses. The extension of the "pecuniary damages" limitation contained in the Death on the High Seas Act to non-fatal injuries is a misapplication of that Act, and the Jones Act. It violates the rule of construction that statutes enacted for the benefit of seamen are to be liberally construed to expand the available remedies. More importantly, it distorts the intent of Congress in passing the legislation.

Finally, since maintenance and cure is a common law remedy, the Court is free to construct a remedial scheme to assure that maintenance and cure is provided to seamen with a minimum of judicial intervention. The Respondent proposes a three-tiered

approach. First, where a seaman prevails in a contested claim for medical care against the shipowner, the seaman should recover attorney's fees as compensatory damages. Second, where the denial of medical care is negligent, and produces an injury or disability that would not have arisen if appropriate care had been given, the seaman should recover damages for injuries which are proximately caused by the denial of needed care. Third, where a shipowner withholds medical care with the intent of causing pain, disability, or injury, or as part of a scheme or plan to punish seamen who file claims, hire attorneys, or bring lawsuits, the seaman should recover punitive damages sufficient to both punish the shipowner, and to deter other shipowners from engaging in similar conduct.

ARGUMENT

I. Historical Context and Background

A. The right to maintenance and cure is one of ancient origin, existing as part of the maritime common law. Neither *The Osceola* nor *The Iroquois* addresses the issue before this Court: how to enforce the right in the face of a willful, intentional, and callous denial of medical care.

The "uniformity principle" articulated in *Miles v. Apex Marine Corporation*, 498 U.S. 19 (1990) applies

in situations where there are "well-considered boundaries imposed by federal legislation." Such well-considered boundaries exist in the case of deaths that occur on the high seas, beyond the three mile limit, where the damages recoverable by dependents of decedents are limited by the Death on the High Seas Act to "pecuniary damages." Where there are no such boundaries, "maritime law . . . falls within a federal court's jurisdiction to decide in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result." *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605, 2619 (2008). Maintenance and cure falls in this latter category.

The Petitioner confidently asserts that "punitive damages are non-pecuniary damages." The Respondent disagrees. This Court has defined "pecuniary damages" as follows:

> A pecuniary loss or damage must be one which can be measured by some standard. It is a term employed judicially, "not only to express the character of the loss of the beneficial plaintiff which is the foundation of the recovery, but also to discriminate between a material loss which is susceptible of pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation." [citation omitted]

> Nevertheless, the word as judicially adopted is not so narrow as to exclude damages for the loss of services of the husband, wife, or child, and, when the beneficiary is a child, for the loss of that care, counsel, training and education which it might, under the evidence, have reasonably received from the parent, and which can only be supplied by the service of another for compensation.

Michigan Central Railroad Co. v. Vreeland, 227 U.S. 59, 71 (1913).

Significant is the fact that nowhere does this Court's definition of "pecuniary damages" mention punitive damages or categorize punitive damages as non-pecuniary. From the context of the definition it can be concluded that the categories "pecuniary" and "non-pecuniary" refer to types of compensatory damages and that punitive damages, which are designed to punish rather than to compensate, are in a different category. That category is properly called "exemplary damages."

In land-based law, punitive damages are not created by statute, but instead are based upon "a well-established principle of the common law"[2] both in England before the founding of the United States, and in American courts thereafter. The courts permitted punitive damages in tort cases that involved "aggravated misconduct or lawless acts," including

[2] *Day v. Woodworth*, 54 U.S. (13 How.) 363 (1851).

those resulting from gross negligence, or intentional torts, such as battery, trespass, slander and libel. Any conduct which displayed a degree of "moral turpitude or atrocity of the defendant's conduct" could be the subject of punitive damages, which were assessed at "the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case."[3]

The earliest discussion of punitive damages, and particularly the use of punitive damages as an indirect means of awarding counsel fees and litigation expenses, arose out of a case involving damage intentionally caused to a dam in Great Barrington, Massachusetts in the 1840s. Horace Day was a New York resident who erected a mill dam across the Housatonic River. Berkshire Woolen Company owned a number of wool-producing mills further upriver, and the operation of Mr. Day's mill impeded the operation of the Berkshire Woolen mills. Rather than resort to the courts, Berkshire Woolen directed twenty-five of its employees to go to Day's mill and knock a portion of it down, which they did. Of the 112 foot long dam, they knocked down a portion 54 feet in length.

In the lawsuit that followed, Day sued the twenty-five Berkshire Woolen employees individually. The jury found that the damages to Day's dam could be fixed for a mere $200, but awarded a total of $1000, apparently to compensate Day for the attorney's fees

[3] *Day*, *supra note 1*, at 371.

and expert witness fees of an engineer, which Day had to expend to bring the case to trial. The trial judge thought the award was excessive, advised the jury that Day would recover his "taxable costs" as the winning party, and sent the jury back into deliberations to reconsider its verdict. During the later deliberation the jury reduced their award of damages to $200. Little did the jury know that under the "American Rule" the term "taxable costs" did not include attorney's fees, and that in the U.S. system of justice "the legal taxed costs are far below the real expenses incurred by the litigant."[4] Consequently, while Day was awarded $200, the likelihood is that the cost of the litigation exceeded the amount of his recovery.[5]

The Supreme Court affirmed the decision limiting Day's damages to $200, finding that state legislatures had "so much reduced attorney's fee-bills" and had refused to permit a shifting of attorney's fees from the winning to the losing party, that a jury was not authorized to increase its award of damages to account for fees and costs. The Supreme Court also noted that it was "the practice of the courts of admiralty to include in their verdict, in certain cases, a

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[4] *Day*, *supra note 1*, at 372.

[5] In its discussion of the inherent power of the courts to punish parties for vexatious litigation, the Supreme Court authorized treble damages stating "if, in the opinion of the court, the defendant has not acted in good faith, or has been stubbornly litigious, or has caused unnecessary expense and trouble to the plaintiff, the court may increase the amount of the verdict, to the extent of trebling it." *Id.,* at 372.

sum sufficient to indemnify the plaintiff for counsel-fees and other real or supposed expenses over and above taxed costs." Since admiralty law is a body of common law, this was permissible. *Day*, *supra*, at 372. However, it acknowledged that in cases decided under state law, punitive damages were sometimes awarded as an indirect means of compensating an injured plaintiff for the expenses of bringing a suit, but counseled that those damages were intended for another purpose – to punish conduct which was the result of "malice, wantonness, [or] oppression." As intended, punitive damages expressed a jury's "outrage of the defendant's conduct [and] the punishment of his delinquency."

In maritime law punitive damages have also been an historically available remedy to punish shipowner misconduct. In a 1997 article Professor David Robertson of the University of Texas School of Law catalogued twenty-five significant maritime cases decided between 1790 and 1851 where the trier of fact discussed punitive damages as a remedy available in maritime law.[6] While only four of those cases actually awarded punitive damages, the cases "contain judicial *dicta* or other indications that the maritime law of the period regarded punitive damages as unexceptional."[7]

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[6] David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Com. 73 (1997).

[7] *Id.* at 88.

Consequently, while *The Osceola* and *The Iroquois* recognized that maintenance and cure is the common law enactment of ancient remedies codified in the Rules of Oleron, which have gained acceptance worldwide, neither of those cases provide this Court with guidance on how to resolve the issue before the Court. The question in this case is whether the historically available remedy of punitive damages can be imposed to punish a shipowner who willfully withholds medical care from an injured seaman.

B. *Vaughan v. Atkinson* recognized that admiralty courts have equitable powers and can award attorney's fees in addition to maintenance and cure in order to make the seaman whole. The issue of punitive damages for the willful failure to pay maintenance and cure was not raised in the lower courts in *Vaughan*, and hence was not before the Supreme Court when *Vaughan* was decided.

In Justice Stewart's dissent in *Vaughan v. Atkinson*, 369 U.S. 527, 540 (1962) he stated "if the shipowner's refusal to pay maintenance stemmed from a wanton and intentional disregard of the legal rights of the seaman, the latter would be entitled to exemplary damages in accord with traditional concepts of the law of damages." The majority never commented on the availability of punitive damages to enforce the shipowner's duty to provide maintenance and cure because the issue was not before the Court.

Neither the district court nor the Fourth Circuit which heard the *Vaughan* case had the issue of punitive damages raised by the seaman's counsel. The district court recognized that awarding solely the amount of unpaid maintenance and cure, without an allowance for attorney's fees, would leave the injured seaman with only 50% of what he was entitled to, because the cost of hiring an attorney in a maintenance and cure case resulted in counsel fees being half of the total award.[8] If the seaman still required medical care, such as a surgery, an award of 100% of the cost of the surgery, reduced by 50% for counsel fees resulted in the seaman being unable to obtain the needed surgery.

In the Fourth Circuit the majority understood the unfortunate result, but felt unable to remedy the inequity.[9] Since the issue of punitive damages was not before the Court in *Vaughan*, it is not accurate to say that "the dissent in *Vaughan* sowed the seeds of confusion that ultimately created the dispute currently pending before this Court" because the district court in *Vaughan* on remand,[10] and the Eleventh

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[8] The Trial Court found that "the evidence does show, and the Court finds that libelant was required to pay one-half of the amount recovered by way of maintenance to his proctor. This is undoubtedly a diminution of the total amount which should have been paid to libelant . . . " *Vaughan v. Atkinson*, 200 F. Supp. 802, 804 (E.D. Va. 1960).

[9] *Vaughan v. Atkinson*, 291 F.2d 813, 815 (4th Cir. 1961).

[10] *Vaughan v. Atkinson*, 206 F. Supp. 575, 576 (E.D. Va. 1962):

(Continued on following page)

Circuit in *Hines v. J.A. La Porte, Inc.*, 820 F.2d 1187, 1189 (11th Cir. 1987)[11] both understood that the Supreme Court had not been presented with the issue, and hence had not decided the question of whether punitive damages, in addition to attorney's fees, could be awarded.

> As this court interprets the language of the Supreme Court, the intent and purpose of the same is that the trial court should make the seaman "whole", i.e., he should not be required to pay money out of his pocket to collect maintenance lawfully due to him. To accomplish this fact, the respondents are required to pay, by way of damages, a reasonable attorney's fee to libelant's proctor for prosecuting the proceedings made necessary to collect the seaman's maintenance claim.

[11] *Hines v. J.A. La Porte, Inc.*, 820 F.2d 1187, 1189 (11th Cir. 1987):

> *Vaughan* is not dispositive because in that case only a claim for attorney's fees was asserted, not separate claims for both fees and punitive damages.

C. The Eleventh Circuit was not confused by *Vaughan* into recognizing a right to claim punitive damages for the willful failure to pay maintenance and cure. Rather, between 1959 (*Vaughan*) and 1990 (*Miles)*, a consensus was emerging in the Circuits that both attorney's fees and punitive damages could be awarded, both to make the seaman whole, and to deter misconduct by shipowners.

While the First Circuit was the initial Circuit Court to hold that punitive damages could be awarded for the willful and wanton failure to provide maintenance and cure,[12] historically it was the Fifth Circuit that, twenty-two years after *Vaughan*, most aggressively supported the award of punitive damages in maritime law for the willful and wanton misconduct of a shipowner. As that Court said in *In re Complaint of Merry Shipping*, 650 F.2d 622, 625-626 (5th Cir. 1981), citing Prosser, The Law of Torts § 2, at 9 (1971):

> Punitive damages, long established in our legal system, may be recovered when a wrongdoer has acted willfully and with gross disregard for the plaintiff's rights. They serve the purpose of punishing the defendant, of teaching him not to do it again, and

[12] *Robinson v. Pocohantas, Inc.*, 477 F.2d 1048 (1st Cir. 1973).

> of deterring others from following his example . . . We therefore hold that in this Circuit punitive damages may be recovered under general maritime law upon a showing of willful and wanton misconduct by the shipowner.

Three years later the Fifth Circuit extended its ruling in *Merry Shipping* and awarded punitive damages to a seaman in a case involving the willful and wanton failure of a shipowner to provide maintenance and cure. *See Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110 (5th Cir. 1984) (" . . . it is clear that the $11,550 award was purely punitive in nature, serving both as a deterrent and as a punishment, and did not include any such [attorney's] fees.") and *Harper v. Zapata Off-Shore Co.*, 741 F.2d 87 (5th Cir. 1984). The Eleventh Circuit followed with *Hines v. J.A. La Porte, Inc.*, 820 F.2d 1187 (11th Cir. 1987) (" . . . it seems clear that even if exemplary in nature, attorney's fees, if fixed reasonably to cover only a proper fee award, would not foreclose the punitive purpose of a punitive damage award. We follow the reasoning of the Fifth Circuit and hold that both reasonable attorney's fees and punitive damages may be legally awarded in a proper case.") The Ninth Circuit continued the trend in *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987) ("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.' These purposes support their availability in general maritime law and the trend is to allow such recoveries.").

The Second Circuit was of the opinion that both the majority and minority in *Vaughan* believed that punitive damages were warranted in that case, but also that the Court's decision not to award them, and to award attorney's fees instead, reflected a considered choice between the two options. Instead, the decision to award attorney's fees was an application of the doctrine that the Court will not entertain claims for relief which have not been raised in the lower courts. *Kraljic v. Berman Enterprises, Inc.,* 575 F.2d 412, 415-416 (2d Cir. 1978) ("The [First Circuit] court [of Appeals in *Pocohantas*], we believe, correctly perceived that both majority and minority opinions in [*Vaughan v.*] *Atkinson* in essence found that punitive damages were awardable in maintenance and cure cases . . . Yet the majority saw fit to go no further than to allow punitive damages limited to counsel fees.").

Contrary to the argument of the Petitioner, there was no confusion after *Vaughan*. The historical development of the law in the Circuits after *Vaughan* shows a growing consensus that punitive damages are appropriate in cases where a shipowner willfully and wantonly denies maintenance and cure to an injured seaman. The only remaining question was whether punitive damages and attorney's fees could be awarded.

D. The real confusion began with the Fifth Circuit's interpretation of *Miles v. Apex Shipping* in *Guevara v. Maritime Overseas Corp.*[13] which extended the uniform wrongful death remedy in *Miles* to cases involving living seamen. The *Miles* decision correctly established a uniform maritime wrongful death remedy. However, the extension of *Miles* by the Fifth Circuit outside of the context of wrongful death, and into the area of non-fatal injuries, has sewn confusion in the maritime law.

There is no legislative support in the United States or England, for the proposition that either Congress or the House of Lords has expressed a policy of barring the recovery of non-pecuniary damages in cases with non-fatal injuries. Death is universal. Eventually all persons will suffer the "inestimable loss of the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation." Personal injuries are unique in the sense that most persons can go through life without experiencing personal injuries caused by the negligence of another. For that reason, damages for wrongful death and damages for personal injuries have always been treated differently

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[13] *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995).

in the law. This principle is illustrated by the 1808 English case of *Baker v. Bolton.*[14]

In *Baker v. Bolton*, Baker and his wife were on top of a stagecoach that overturned. Baker was bruised but he survived. His wife lived for about a month but subsequently died from her injuries. Baker sued for non-pecuniary damages including "the comfort, fellowship, and assistance of his said wife" (loss of society) and his "great grief, vexation, and anguish of mind" over her death (mental anguish). The court divided the damages into those accruing before death, and those accruing after, permitting the recovery of both pecuniary and non-pecuniary damages which arose during Mrs. Baker's one month convalescence, but denying further damages arising after her death. The House of Lords said:

> [T]he jury could only take into consideration the bruises which the plaintiff [Mr. Baker] had himself sustained, and the loss of his wife's society, and the distress of mind he had suffered on her account, from the time of the accident till the moment of her dissolution [death]. In a civil Court, the death of a human being could not be complained of as an injury; and in this case the damages, as to the plaintiff's wife, must stop with the period of her existence.

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[14] *Baker v. Bolton,* 170 Eng. Rep. 1033, 1 Camp 493 (Nisi Prius 1808).

The court awarded Mr. Baker pecuniary damages for his bruises, and non-pecuniary damages for the loss of the society of his wife for the one month prior to her death, and his mental anguish during her last month.[15] The important thing to recognize is that historically, at common law, non-pecuniary damages were available in non-fatal accidents. They were only barred upon the occurrence of a fatality.

In 1846, England adopted the Fatal Accidents Act of 1846[16] which expanded the remedies available in death cases and granted dependents of decedents killed due to the negligence of a third party the right to recover damages "proportional to the injury." Since

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[15] The amount of the award was of £100.

[16] Fatal Accidents Act of 1846, 9 and 10 Vict. c. 93. The Act provides:

> Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding such death, etc.
>
> Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and *in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively* for whom and for whose benefit such action shall be brought [Emphasis supplied].

the Act had been proposed by Lord Campbell, who introduced it and steered it through the Commons, it became known as Lord Campbell's Act, the first wrongful death act in English jurisprudence. It arose out of the increasing number of railroad deaths occurring in England in the mid-1800s and a conclusion that the common law, which cut off remedies for personal injury upon the death of the victim of negligence, was outdated.

How does Lord Campbell's Act, an English law dating back to 1846, relate to punitive damages in a maintenance and cure case involving non-fatal injuries which is brought by a living seaman in the 21st Century? It doesn't. The application of the pecuniary damage limitation in wrongful death suits to cases involving living seamen claiming a right to medical care could never have been predicted by either Congress or Parliament, because Lord Campbell's Act applies only to fatal injuries and never mentions pecuniary damages, non-pecuniary damages or punitive damages. Its only instruction regarding damages is that "the jury may give such damages [for wrongful death] as they may think proportioned to the injury."

Despite the fact that Lord Campbell's Act is neither U.S. law, nor a maritime act, it has become an important part of the myth that there is a "uniform plan of maritime tort law" extending to both wrongful death cases, and cases brought by living seamen, which excludes punitive damages. To come to the conclusion that Congress has intentionally restricted

punitive damages in maritime law, one must make three large leaps of logic: first, that Congress intended for the wrongful death remedy in the FELA to be interpreted using decisions of the House of Lords; second, that Congress intended the logic of the House of Lords in death cases to be applied to non-fatal personal injury cases involving railway workers; and third, that Congress believed that punitive damages were a type of compensatory remedy which could be classified under the loose definition of "non-pecuniary damages." None of those conclusions will stand up to close scrutiny.

The Employers' Liability Act of 1908, which has become known as the Federal Employers' Liability Act, or "FELA,"[17] preceded The Merchant Marine Act of 1920[18] by twelve years. FELA gave railroad workers the right to sue their employers for personal injury or wrongful death. However, FELA never

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[17] 45 U.S.C. § 51 does not limit damages to "pecuniary damages" but instead provides that "every common carrier by railroad . . . shall be liable in damages. . . ." It states:

> Every common carrier by railroad . . . *shall be liable in damages* to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative . . . for such injury or death resulting in whole or in part from the negligence . . . or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment [Emphasis supplied].

[18] 46 U.S.C. §§ 30104-30105, formerly 46 U.S.C. § 688.

mentions a measure of damages for wrongful death. The measure of damages in wrongful death cases, which the courts crafted to "fill the gap," was to limit recovery in FELA death cases to a loosely defined category called "pecuniary damages." Pecuniary damages included pain and suffering, but excluded loss of society. They included loss of support but excluded loss of future income of the decedent. However, the subject of punitive damages was simply not part of Congressional consideration when FELA was passed, or court consideration when it "filled the gap."

When Congress drafted the Jones Act it gave seamen the same cause of action against shipowners that railway workers had against railroads. However between the passage of FELA and the Jones Act, the Supreme Court implied that wrongful death damages in the death of a railway worker were to be limited to pecuniary damages, just as they were under the House of Lords' interpretation of Lord Campbell's Act.

The Supreme Court, in engrafting the words "pecuniary damages" upon FELA acknowledged that neither Congress nor Parliament had placed the word "pecuniary" in either Lord Campbell's Act or the FELA. However, because "the former act [Lord Campbell's Act] and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage" in wrongful death cases, the same would be true in FELA

wrongful death cases.[19] In other words, insertion of the words "pecuniary damages" in place of "such damages as [a jury] may think proportioned to the injury" is unsupported by the words of a legislative body. Since Congress did not limit damages to pecuniary losses only, and particularly did not do so in the case of non-fatal injuries to railway workers, the court should respect the will of Congress as expressed in the FELA, and impose no such limits on damages under the Act.

Efforts to suggest that Congressional acts intended to benefit seamen preempt maintenance and cure have been made and rejected since at least the 1820's. In *Harden v. Gordon*, 11 F. Cas. 480, 484 (U.S. Court of Appeals 1823), a shipowner confronted Justice Story, whose compassion for seamen was legendary, with the argument that the passage of a statute by Congress requiring shipowners to provide for a medicine chest to be kept aboard ship preempted a seaman's right to maintenance and cure. Justice Story dismissed the argument as follows:

> In the construction of statutes it is a general rule, that merely affirmative words do not vary the antecedent laws or rights of parties. There must be something inconsistent with or repugnant to them, to draw after a statute an implied repeal, either in whole or *pro tanto* of former laws; otherwise the statute is

[19] *Michigan C. R. Co. v. Vreeland*, 227 U.S. 59, 71 (1913).

> supposed to be merely declarative or cumulative. . . .

Justice Story found that since the obligation to provide a medicine chest aboard ship was not inconsistent with the obligation to provide maintenance and cure, the passage of the statute did not impliedly repeal or modify the obligation of the shipowner to provide medical care, but instead created an additional obligation to have a medicine chest onboard so that medical treatment could be provided promptly, without having to await arrival at the next port of call.

Using Justice Story's early formulation of the preemption doctrine in a maritime case, the Jones Act was meant by Congress to be a cumulative remedy, and not to supplant the common law remedy of maintenance and cure, because the Jones Act is neither repugnant to the policies behind maintenance and cure, nor is it inconsistent with the common law. For over two centuries the doctrine of maintenance and cure has been judicially crafted and enforced with only minor Congressional supplementation or interference.[20] Congress has demonstrated an intent "to leave well enough alone" and to permit the courts to regulate the requirements of maintenance and cure.

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[20] The only reference to maintenance and cure in the United States Code is found in 46 U.S.C. § 30105(b) (formerly 46 U.S.C. § 688(b)). That section limits the right of aliens injured in the offshore oil drilling industry in foreign territorial waters to seek redress in U.S. courts.

The rationale for most of the modern decisions which depart from that principle, and disapprove of the award of punitive damages for the wrongful denial of maintenance and cure, stems from a misinterpretation of *Miles v. Apex Marine*. The Circuit Courts have either incorrectly assumed that punitive damages are not available in maintenance and cure cases because their use was preempted by the passage of the Death on the High Seas Act[21] and the Jones Act in 1920.

In this case, the shipowner is arguing that Congress, in enacting The Merchant Marine Act of 1920,[22] commonly known as the "Jones Act," granting seamen a right of action against their employers for personal injuries caused by negligence, took from this Court its authority to award punitive damages in egregious cases in order to deter violations of the duty to provide medical care. There is nothing in the Act or its history which supports that position.[23] The Act was intended to further the treatment of seamen as a protected class, and to afford them additional

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[21] 46 U.S.C. §§ 30302-30303.

[22] Merchant Marine Act of 1920, § 19 and § 27, 46 App. U.S.C. § 876 and § 883 et seq.

[23] If that were Congress' intent, one would have thought that it would have been discovered sometime in the 75 years between when the Act was passed in 1920, and when the non-pecuniary damage limitation was first extended to non-fatal injury cases in 1995. When that leap of logic was made, Congressman Jones had been dead for 63 years.

remedies to assure that they are cared for by shipowners if injured in the service of the ship.[24]

The Jones Act[25] was pushed through Congress in the closing two days of Congress[26] without debate and

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[24] Shortly after its passage the Supreme Court acknowledged the Jones Act to be cumulative with other seamen's remedies, and not to supplant them. In *Bainbridge v. Merchants & Miners Transp. Co.*, 287 U.S. 278, 282 (1932) the Court stated:

> The Jones Act, being an addition to the Seamen's Act, was intended to be consistent with the spirit of that legislation, which was directed to promote the welfare of American seamen. We agree with that view. . . . Seamen have always been regarded as wards of the admiralty and their rights, wrongs and injuries a special subject of the admiralty jurisdiction. . . . The policy of Congress, as evidenced by its legislation, has been to deal with them as a favored class. . . . In the light of and to effectuate that policy, statutes enacted for their benefit should be liberally construed [Citations omitted].

This rule of statutory construction is applicable in this matter. The Jones Act should be interpreted to enhance seamen's remedies, not to contract them to the point where a seaman has fewer remedies than a similarly situated person who is injured ashore.

[25] The Jones Act is named for U.S. Senator Wesley L. Jones (1863-1932), a Republican from Yakima, Washington who served as Chairman of the Commerce Committee from 1919 to 1930. While seamen should be grateful for the Jones Act, it is worth noting that while he was a lawyer, he never lived near the ocean, or a navigable river, and his practice never included maritime law.

[26] "[Jones] *Urges U.S. to Fight for American Ships,*" NEW YORK TIMES, June 20, 1920.

President Woodrow Wilson signed it into law on June 5, 1920.[27] Congress left no legislative history relevant to the issue of protection of seamen, but news reports commenting on the Jones Act show that it was enacted as part of an overall plan to develop the United States merchant marine.[28] It was drafted to protect American seamen, and to appeal to foreign merchant seamen to come to the United States for better benefits and more protection than that which was offered under foreign maritime laws.[29] As Senator Jones stated, "every word, every line, every section was written solely in the interest of the United States."[30]

In the absence of legislative history one can surmise the intent of Congress in passing both the Jones Act and the Death on the High Seas Act was affected by the results of the 1912 sinking of the RMS Titanic. That disaster brought to light two points of

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[27] RENE DE LA PEDRAJA, A HISTORICAL DICTIONARY OF THE U.S. MERCHANT MARINE AND SHIPPING INDUSTRY (Greenwood Publ'g Group 1994).

[28] Admiral W.S. Benson, "The purpose of the Congress in enacting the Merchant Marine Act of 1920 was to give American ships 'national' advantage in our trades with foreign countries." NEW YORK TIMES, "*What Our Sea Carriers Are Doing and Can Do; Status of America's Merchant Marine Since the War and Need for Encouragement in Peace*," NEW YORK TIMES REVIEW OF BOOKS, June 20, 1920.

[29] "[Lawyer for seaman's union] *Declares Foreign Sailors Desert to Seek Better Pay Here*," NEW YORK TIMES, July 9, 1920.

[30] "*Jones Defends Ship Legislation,*" NEW YORK TIMES, December 11, 1920.

law. The first was the dependents of seamen and passengers who died on the high seas were only entitled to recover for the value of the decedents' lost baggage. The second was that while seamen could recover damages caused by the unseaworthiness of a vessel, damages caused by the negligence of the crew, such as in running into an iceberg, were not recoverable. One can surmise that Congress saw the injustice in permitting seamen to sue for unseaworthiness, but not negligence, and used the passage of the Merchant Marine Act of 1920 to correct that perceived injustice. One can also surmise that neither Senator Jones, nor the Senators and Congressmen who voted for the Act ever considered the possibility that voting for a bill that did not mention maintenance and cure, pecuniary damages, or punitive damages, would somehow be interpreted over 80 years later to usurp from the courts' their longstanding and historical right to enforce the obligation of maintenance and cure by awarding punitive damages for the willful failure to provide medical care.

This Court has counseled lower courts against using the Jones Act to narrow maritime remedies by analogy. In *American Export Lines v. Alvez*, 446 U.S. 274, 283-284 (U.S. 1980) the Court stated:

> . . . the liability schemes incorporated in DOHSA and the Jones Act should not be accorded overwhelming analogical weight in formulating remedies under general maritime law . . . Thus, a remedial omission in the Jones Act is not evidence of considered

> congressional policymaking that should command our adherence in analogous contexts. And we have already indicated that "no intention appears that the [Death on the High Seas] Act have the effect of foreclosing any non-statutory federal remedies that might be found appropriate to effectuate the policies of general maritime law.

For the decade between the *American Export* case and *Miles*, lower courts exercised the restraint which this Court counseled. However, since this Court's decision in *Miles*, lower courts have permitted the guidance provided by *American Export* to go ignored. The limitations on non-pecuniary[31] damages in maritime wrongful death cases occurring on the high seas have now "jumped the rails" to include non-death cases involving injuries to non-seamen such as cruise ship passengers and recreational boaters; such limitations also include accidents happening on territorial waters, as opposed to the high seas. These are areas which Congress demonstrated no intent to

[31] "Among the impediments to such discussion [of policy issues regarding punitive damages in maritime law] have been the courts' evident misunderstanding of the history of maritime punitive damages and the temptation to stop thinking once someone points out that punitive damages are 'non-pecuniary.'" David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Com. 73, 164 (1997). Professor Robertson's scholarly writings on punitive damages in maritime law support Respondent's position that non-pecuniary damages are a subset of compensatory damages intended to describe claims for loss of society and mental anguish, and that punitive damages fall into the separate classification of "exemplary damages." *Id.* 80-83.

regulate by passage of either the Jones Act or the Death on the High Seas Act.[32]

Where the decision in *Miles* "jumped the tracks" is described by the Fifth Circuit in *Guevara, supra*, 1506-1507, where that Court took the *Miles* logic one step further than either Congress in enacting the Jones Act, or this Court in rendering the decision in *Miles,* intended:

> Taking the analysis one step further, it should be clear that actions under the general maritime law for personal injury are also subject to the *Miles* uniformity principle, as non-fatal actions for personal injury to a seaman are covered by statute – i.e., the Jones Act. Thus, many courts [in the Fifth Circuit] have extended *Miles's* logic to prohibit the recovery of certain damages in personal injury factual settings that are covered by statute, even when these personal injury claims are brought under the general maritime law. *See, e.g., Murray v. Anthony J. Bertucci Constr. Co.*, 958 F.2d 127, 131-32 (5th Cir. [1992]) (applying the principles of *Miles* to preclude an injured seaman's spouse from recovering loss of society damages under the general maritime law), *cert. denied*, 121

[32] According to one noted commentator, "In this vein, some courts have taken upon themselves the agenda of tort reform despite the fact that Congress itself has not seen fit to do so." Robert Force, *The Legacy of Miles v. Apex Marine Corporation*, 30 Tul. Mar. L. J. 35, 36 (2006).

> L. Ed. 2d 134, 113 S. Ct. 190 (1992); *Michel v. Total Transp., Inc.*, 957 F.2d 186, 191 (5th Cir. 1992) (applying *Miles* to a personal injury claim by a seaman and holding that "damages recoverable in general maritime causes of action for personal injury of a Jones Act seaman do not include loss of consortium").

Indeed, in *Murray*, *Michel*, and *Guevara*, the Fifth Circuit failed to follow this Court's guidance in *American Export Lines v. Alvez* that the Jones Act and DOHSA are not to "be accorded overwhelming analogical weight in formulating remedies under general maritime law." We are primarily concerned in this case with the decision in *Guevara*.

It makes no more sense to limit remedies in non-fatal maritime cases to pecuniary damages, than it does to limit damages in land-based common law tort cases to the remedies available under a state's wrongful death act. Neither DOHSA nor state wrongful death acts are evidence of legislative intent to limit damages in non-fatal accident cases.

II. The Eleventh Circuit properly found that maintenance and cure was within the federal court's jurisdiction to decide in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagreed with the judicial result. History has committed enforcement of the obligation to provide maintenance and cure to the discretion of the courts, and Congress has studiously avoided legislating in the field.

It is a basic rule of statutory construction that in order to abrogate a common law principle, a statute must speak directly to the question addressed by the common law.[33] The Eleventh Circuit in *Townsend* correctly found that neither the Jones Act, nor the Death on the High Seas Act speak directly to the remedies available for the willful and wanton denial of maintenance and cure to a seaman. It refused to make the same mistake that the *Guevara* court made, and imply into the Jones Act and DOHSA an intent by Congress to exclude non-pecuniary damages from non-fatal cases arising under maritime law, an intent which cannot be discerned from either Act.

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[33] This is essentially a restatement of the rule of statutory construction set out by Justice Story in *Harden*, *supra*, and reiterated in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255-256, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984); *United States v. Texas*, 507 U.S. 529, 534, 113 S. Ct. 1631, 123 L. Ed. 2d 245 (1993); and *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2619 (2008).

III. The Fifth Circuit Court has taken *Miles* out of context and changed the maritime common law in ways which were unintended and unforeseeable. *Miles* decided that where Congress has ruled, the Courts are not free to re-write those rules. The reverse is also true. Where Congress has avoided ruling, courts should refrain from implying Congressional intent to limit remedies where no such intent can be discerned from Congressional actions. It is up to the Court to select a system of remedies which will permit the doctrine of maintenance and cure to operate without frequent resort to the courts.

The Respondent proposes that the Court establish a three-tiered approach to the enforcement of the shipowner's obligation to provided maintenance and cure. First, in cases where medical care is wrongfully withheld from a seaman, the seaman should recover attorney's fees. This should be true even if the shipowner's decision to withhold care was not under circumstances deserving of punishment. Attorney's fees are compensatory, not punitive, and without the recovery of attorney's fees a seaman can never be made whole because most or all of the seaman's recovery will be consumed by fees and costs, and the seaman will be deprived of the medical care needed. It should continue to be an exception to the American Rule, predicated upon the recognition that equity demands a seaman be made whole.

It is best to examine this first proposal in a practical example. Assume that a seaman required rotator cuff surgery as a result of a shipboard accident. With surgery, he will eventually return to work. Without surgery, he will not be able to return to work. Further assume that rotator cuff surgery costs about $15,000 in 2009. If the seaman is required to hire an attorney on an hourly basis at $150 per hour, and hire an expert at a cost of $1500 to testify that he needs rotator cuff surgery and that such a surgery will cost $15,000, then upon prevailing in the claim the seaman may recover $15,000 a year after the injury, but only net $6000, which is not enough to obtain the needed surgery. The seaman will never get back to work, and the shipowner will have little incentive to err on the side of the seaman.

Secondly, where a shipowner's failure to provide maintenance and cure results in the seaman suffering an increased level of disability or other personal injuries, a cause of action should exist for recovery for the additional injuries under the Jones Act, either under principles of negligence or intentional tort, depending upon the circumstances. This principle is already recognized under the law. *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367 (1932); *Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 138-139 (1928).

The third tier deals with those rare instances of actual misconduct.[34] Such misconduct would include situations where withholding maintenance and cure is done as part of an unwritten corporate policy, or as part of a common plan, scheme or design to inflict pain and disability upon injured seamen to "send a message" to other seamen not to employ counsel, or to compel a settlement of personal injury litigation as a means to ease the discomfort of disability. It may be difficult to believe that shipowners would engage in such activities, but the relationship between seaman and shipowner has always been one where overreaching is possible.

The Ninth Circuit takes the approach that attorney's fees alone is an adequate incentive. In *Glynn v. Roy Al Boat Management Company*, 57 F.3d 1495 (9th Cir. 1995) it says:

> [T]he threat of liability for attorney's fees adequately serves to deter recalcitrance, as they would likely exceed interim maintenance and cure and the use of money which

[34] The position of the Eleventh Circuit, even after the Fifth Circuit's decision in *Guevara*, was that punitive damages were still recoverable in maritime cases in "exceptional circumstances such as willful failure to furnish maintenance and cure to a seaman . . . and in those very rare situations of intentional wrongdoing." *In re Amtrak "Sunset Limited" Train Crash in Bayou Canot v. Warrior & Gulf Navigation Company*, 121 F.3d 1421, 1429 (11th Cir. 1997), *cert. den.*, 522 U.S. 1110, 118 S. Ct. 1041, 140 L. Ed. 2d 106 (1998). Consequently this conflict between the Circuits has existed for over ten years.

> would otherwise have paid it. Punitive damages, in addition to attorney's fees, are thus not needed to provide a powerful incentive for shipowners to investigate and pay promptly.

However, experience proves that there are some shipowners which do not consider the award of attorney's fees against them to be an adequate incentive. Therefore, where a shipowner intentionally, callously, and willfully withholds medical care from a seaman the shipowner has committed a separate and distinct tort, equivalent to battery, and punitive damages are warranted. Just as pulling the chair from under a person about to sit down results in the natural sequence of events to the person striking the ground, and just as feeding poison to a person results in the natural sequence of events to the person getting ill, intentionally withholding medical care from an injured seaman will, in the natural sequence of events, cause the seaman pain at best, and physical injury at worst. It is a tort, and it is one which, with an appropriate level of culpability, warrants the award of punitive damages.

This three-tiered approach finds approval in statutory enactments which can be analogized to maintenance and cure. As mentioned earlier, maintenance and cure is perhaps the earliest form of workers' compensation. Congress has left maintenance and cure in the panoply of the maritime common law, but in analogous areas, such as the Longshore and Harbor Workers Compensation Act (LHWCA), the

Seaman's Wage Statute, and the Railroad Unemployment Insurance Act ("RUIA"), 45 U.S.C. § 352, Congress has extensively legislated and left a blueprint which may guide the Court's actions in this case.

The first tier of the three-tiered approach is supported by Section 928[35] of the LHWCA which provides a longshoreman or harbor worker who successfully pursues a claim for medical care or indemnity the right to recover attorney's fees, even in the absence of any misconduct by the employer. Support for the second tier is found in Section 908 which requires an employer to pay benefits based upon the employee's level of disability. If medical care is withheld, and the disability worsens, the level of compensation increases. The third-tier is supported by Section 905(a). Where an employer fails to secure compensation and medical care, or takes action "with the intent to avoid the payment of compensation" the corporation can be charged with a crime. The President, Secretary, and Treasurer of the corporation may be imprisoned for a period of up to one year, and can

[35] 33 U.S.C. § 928. Fees for services

(a) Attorney's fee; successful prosecution of claim

If the employer or carrier declines to pay any compensation . . . on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier . . .

be held individually liable both for the payment of compensation, and for any fines assessed. Further, the employee may pursue an action at law, or in admiralty, in which neither contributory negligence, assumption of the risk, or actions of a fellow servant may be raised by an employer.[36] These penalties imposed by Congress are punitive and inure to the benefit of the injured longshoreman.

Congress established a system similar to maintenance and cure for railroad workers in 1937 in the Railroad Unemployment Insurance Act.[37] The Act provides for the payment of sickness benefits without a showing of negligence on the part of the employer, and in 45 U.S.C.A. §§ 359 establishes criminal penalties of up to $1000 and one year in jail for any violation of the provision of the Act.

In both the LHWCA and the RUIA Congress has empowered administrative agencies, the Department of Labor in the former, and the Railroad Retirement Board in the latter, and delegated to them the obligation of enforcing the rights of the employees, monitoring the obligations of the employer, and imposing punishment on employers who fail to fulfill their obligation under the respective Acts. Congress has apparently foreseen a problem with committing similar responsibilities to an administrative agency

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[36] *Probst v. Southern Stevedoring Co.*, 379 F.2d 763 (5th Cir. 1967) provides Judge John R. Brown's analysis of the remedies available to longshoremen.

[37] 45 U.S.C. §§ 351-367.

that protects seaman's rights because it is both unnecessary and impractical. It is unnecessary because the maritime common law doctrine of maintenance and cure has worked for over two centuries in the United States under the supervision of the courts, and has existed worldwide for over a thousand years. Moreover, no United States based administrative agency could effectively monitor the medical care of seamen who travel the world and whose employers may or may not be located in the United States. The obligation to enforce the shipowner's duty to provide maintenance and cure rests with the courts.

Finally, in the Seaman's Wage Act, 46 U.S.C. § 10313, Congress has enacted a punitive remedy where a seaman may recover two days of wages for each day that the seaman's wages are delayed. Such a remedy is undoubtedly punitive in effect, if not in intent. *See Griffin v. Oceanic Contractors*, 458 U.S. 564 (1982).

Amicus Curiae for the Cruise Lines International Association expresses concern that if punitive damages are available its members may find themselves responsible for paying punitive damages for making simple mistakes in failing to provide medical care. A brief look at the list of cases cited in the briefs in this case show that cruise ship operators are conspicuous in punitive damage cases only by their absence. Perhaps it is the nature of the hospitality industry to treat their employees with care, in the hopes that the employees will treat their passengers similarly. However, the concerns of the cruise industry are unfounded because punitive damages are appropriate

only against those shipowners who act odiously toward their employees. Historically cruise ship operators have not fallen in that category.

These three Acts, when considered together, answer the question of the intent of Congress. Were Congress asked what it would do to an employer which intentionally withholds medical care from an injured seaman, it would undoubtedly answer that it would punish the employer. This Court should do no less.

CONCLUSION

The decisions of the district court and of the Eleventh Circuit,[38] were correct, and both attorney's fees and punitive damages may be awarded by a court for the intentional withholding of medical care from an injured seaman.

Respectfully submitted,

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[38] *Atlantic Sounding Co. v. Townsend*, No. 3:05-CV-649, 2006 WL 4702150 (M.D. Fla. April 20, 2006).