No. 17-449

IN THE

Supreme Court of the United States

AMERICAN TRIUMPH LLC AND AMERICAN SEAFOODS COMPANY, LLC,

Petitioners,

v.

ALLAN A. TABINGO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF IN OPPOSITION

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In addition to the opinions referenced in the petition for a writ of certiorari respondent Alan Tabingo provides the Ruling Granting Review (App. at 1a).

JURISDICTION

This Court lacks jurisdiction over this case. 28 U.S.C. § 1257.

INTRODUCTION

In an effort to forestall the possible award of punitive damages in a maritime common-law vessel unseaworthiness claim, American Seafoods Co. LLC ("American Seafoods") asks this Court to grant certiorari to review an interlocutory order from a state court which has yet to make even a finding of liability, let alone any damages award. This Court should reject the petition. Its jurisdictional statute and established precedent foreclose certiorari at this stage of a state law case—and even if they did not, the interlocutory nature of the proceeding would make this case a poor vehicle to address the question presented.

Moreover, American Seafoods massively overstates the actual split of decision that it claims exists on the question presented; only *two* appellate courts (the Washington Supreme Court in this case and the Fifth Circuit) have addressed the availability of punitive damages in light of *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009). Further percolation is appropriate, especially given that the same question is now pending before the Ninth Circuit.

Finally, American Seafoods is wrong when it contends that the decision below departs from this Court's prior rulings. In *Atlantic Sounding,* the Court traced the historical availability of punitive damages in admiralty generally and in federal maritime common law personal injuries cases specifically, concluding that an injured seaman could recover punitive damages in a case involving a vessel owner's wrongful withholding of maintenance and cure, a federal maritime common law claim. No different result follows for claims of vessel unseaworthiness, and—just as in *Atlantic Sounding*—nothing in the Jones Act or the Court's prior cases otherwise suggest that the recovery of punitive damages in the appropriate case should be foreclosed.

STATEMENT OF THE CASE

F/V AMERICAN TRIUMPH is a factory trawler that hauls fish aboard with nets. After the fish are aboard, a deckhand opens a steel hatch, a door in the floor/deck. The steel hatch is hinged on one side and opens and shuts by way of hydraulics. When opened, the hatch allows the fish to drop into tanks below the deck, from which factory workers below take the fish for processing.

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

the last bit of fish needs to be cleared and pushed around by hand.

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

Tabingo sued American Triumph LLC and American Seafoods Co., LLC ("American Seafoods"), the owner of the factory trawler F/V AMERICAN TRIUMPH, in the King County Superior Court on July 15, 2015, for vessel unseaworthiness. American Seafoods filed what it styled as a motion for partial summary judgment seeking dismissal of Tabingo's punitive damages request associated with his common law vessel unseaworthiness claim. The trial court granted that motion in a February 22, 2016, order. Tabingo sought discretionary review by the Washington Supreme Court. That court's Commissioner granted direct discretionary review, and the court unanimously reversed the trial court. *Tabingo v. American Triumph LLC*, 391 P.3d 434 (Wash. 2017).

ARGUMENT WHY THE PETITION SHOULD BE DENIED

(1) This Court Lacks Jurisdiction Over the Interlocutory Decision of the Washington Supreme Court

The decision below was an interlocutory decision of the Washington Supreme Court. It relates to but one damages issue with respect to one claim in the case. In the state court trial, a jury may, or may not, conclude American Seafoods is liable to Tabingo for vessel unseaworthiness, and may, or may not, decide that an award of punitive damages is appropriate.

This fact alone requires denial of the petition. This Court's jurisdiction is limited to "*[f]inal* judgments or decrees rendered by the highest court of a State in which a decision could be had." Under 28 U.S.C. § 1257 (emphasis added). *See also*, *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 476–77 (1975) (noting that "[s]ince 1789, Congress has granted this Court appellate jurisdiction with respect to state litigation only after the highest state court in which judgment could be had has rendered a '(f)inal judgment or decree'"). Section 1257 "establishes a firm final judgment rule" that "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 81 (1997) (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)).

American Seafoods (briefly) acknowledges this problem at the end of its petition, but argues that the Court nonetheless has jurisdiction under the exceptions enumerated in *Cox*. *See* Pet. at 26-28. This Court, however,

has warned that these are "exceptional categories," *Johnson v. California*, 541 U.S. 428, 429 (2004), that apply only to "a limited set of situations[.]" *O'Dell v. Espinoza*, 456 U.S. 430, 430 (1982). Careful examination of each confirms that this case does not fall within any of these exceptions.[1]

The first category includes those cases where "the federal issue is conclusive or the outcome of further proceedings preordained[.]" *Cox*, 420 U.S. at 480. American Seafoods does not argue that this case falls within that category, and for good reason—the outcome of the trial on the unseaworthiness claim is an open question, and the award of any damages—much less punitive damages—is certainly not "preordained."

The second *Cox* category involves those cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480. Again, American Seafoods does not—and cannot—argue that this is one of those cases. The outcome of the state court trial may well moot the federal issue.

The third category identified in *Cox* are those cases "in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. American Seafoods claims it fits within this exception, *see* Pet. at 26-27, but fails to recognize that it could obtain

1. Perhaps to obscure the weakness of its position, American Seafoods foregoes any analysis of the specific categories identified by this Court in *Cox* in favor of a series of disjointed quotations from different passages of the opinion. *See* Pet. at 26-27.

review of any punitive damages award after trial, either before the Washington Supreme Court or in a petition here. This Court has explicitly rejected the argument that this type of interlocutory decision fits within the *Cox* exceptions. *See Johnson*, 541 U.S. at 430-31 (dismissing case for want of jurisdiction and noting that "[i]n the event that the California Court of Appeal on remand affirms the judgment of conviction, petitioner could once more seek review of his [] claim in the Supreme Court of California-albeit unsuccessfully-and then seek certiorari on that claim from this Court"). *See also*, *Jefferson*, 522 U.S. at 77–78 ("If the federal question does not become moot, petitioners will be free to seek our review when the state-court proceedings reach an end.").[2]

American Seafoods also argues that it fits within the fourth *Cox* exception, for cases in which "a refusal immediately to review the state court decision might seriously erode federal policy." *Cox*, 420 U.S. at 482. Contrary to American Seafoods' hyperbole, this case—involving a single injury to a seaman's hand on a fishing boat—does not portend "potentially serious consequences to the national economy, environment, and security"—especially where there ultimately may be no punitive damages award at all. This Court has warned against expansive attempts to invoke federal policies in way that

2. American Seafoods' speculative musings that review could be rendered impossible if the mere possibility of a large punitive damages award, Pet. at 27, may lead it to settle finds no support in *Cox* or any other decision of this Court applying the jurisdictional limits of § 1257. *Any* interlocutory decision might naturally affect the parties' settlement calculus, but this fact of life does not mean the third *Cox* exception swallows the entire rule set forth in the jurisdictional statute.

would "permit the fourth exception to swallow the rule." *Flynt v. Ohio*, 451 U.S. 619, 622 (1981) (per curiam), and American Seafoods cannot credibly claim some overriding federal policy interest here. It certainly falls far short of the cases where the failure to obtain interlocutory rule will result in the permanent denial of an alleged federal right or protection. *See Cox* at 482 n.10 *(citing Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

In sum, the petition does not fit within any of the exceptions to § 1257.[3] Rather, it "presents the typical situation in which the state courts have resolved some but not all of petitioners' claims." *Jefferson*, 522 U.S. at 84. This Court's "jurisdiction therefore founders on the rule that a state-court decision is not final unless and until it has effectively determined the entire litigation." *Id.*

(2) The Alleged Split Is Vastly Overstated and Further Percolation Is Warranted

Contrary to American Seafoods' claim that the decision below "conflicts with numerous federal and state appellate decisions," Pet. at 8, the alleged split here is about as shallow as one could be. Only *two* appellate courts

3. Because § 1257 governs this Court's jurisdiction, Petitioner's reliance on the posture of *Atlantic Sounding* is misplaced. But even if this case arose in the federal courts, the interlocutory nature of the dispute would weigh against a grant of certiorari. *See, e.g.*, *Locomotive Firemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) (denying interlocutory petition the case was "not yet ripe for review by this Court"); E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, Supreme Court Practice 280 (9th ed. 2007) (hereinafter Stern & Gressman).

have actually addressed the question presented after this Court's decision in *Atlantic Sounding*, and one of those decisions is interlocutory. American Seafoods reaches back to a variety of pre-*Âtlantic Sounding* decisions that instead applied *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1995) to determine the remedies available for unseaworthiness claims. But there is no disputing the fact that *Atlantic Sounding* addressed the proper scope of *Miles. See* 557 U.S. at 425–27. Indeed, both this Court and the Fifth Circuit in *McBride v. Estis Well Service, LLC,* 768 F.3d 382 (5th Cir. 2014) (en banc), extensively discussed the extent to which *Atlantic Sounding* limited *Miles* and what it meant for unseaworthiness claims. It follows that this Court should await further developments to see if other Circuits revisit their approaches to punitive damages in unseaworthiness actions in light of *Atlantic Sounding.*

Indeed, a case raising that question is currently pending before the Ninth Circuit. *See Batterton v. Dutra Group*, (9th Cir. Cause No. 15-56775) (filed November 18, 2015). At a minimum, this Court should deny review of this question until the Ninth Circuit weighs in. Indeed, the Ninth Circuit's decision may itself resolve the split if it were influence any future action by the Washington Supreme Court if Tabingo were to obtain an award of punitive damages.

(3) The Washington Supreme Court's Decision Is Consistent with This Court's Decision in *Atlantic Sounding*

American Seafoods is wrong to suggest that the Washington Supreme Court misapplied Supreme Court

precedent. To the contrary, the decision below is entirely consistent with this Court's *Atlantic Sounding* decision. American Seafoods ignores the analytical framework this Court set forth in *Atlantic Sounding,* relying instead on *Miles*, a case focused on wrongful death claims where Congress has enacted a statute to supplant common law remedies, unlike here. *Atlantic Sounding,* not *Miles*, controls, and the Washington court followed this Court's analytical protocol in its ruling.

The *Atlantic Sounding* 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, the answer to the first question is no, and to the latter two questions, yes. The Washington court correctly determined 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 petition detracts from the logic of this analysis, notwithstanding its effort to embark upon a revisionist history of this Court's jurisprudence. Punitive damages are recoverable in a vessel unseaworthiness claim, a maritime common law claim, just as they are in a maintenance and cure claim, also a maritime common law claim.

(a) Punitive Damages Were Available in Federal Maritime Personal Injuries Claims, and Nothing in the Jones Act Precludes Them in an Unseaworthiness Action

Punitive damages were recoverable historically in admiralty and specifically in maritime personal injuries cases, as this Court explained in *Atlantic Sounding.* 557 U.S. at 411-17. Both admiralty law generally and federal maritime personal injuries law specifically recognized that a party could recover punitive damages in the appropriate case. *See, e.g., The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 558 (1818); *Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U.S. 101, 108 (1893); *see also*, 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).

Moreover, nothing in the language of the Jones Act indicates any intention to supplant federal maritime common law claims and/or remedies. 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 (1983). In analyzing this question, one must begin with the text of the Jones Act itself:[4] which states:

> 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.

46 U.S.C. § 30104. *Nowhere* does that statute purport to supersede federal maritime common law vessel unseaworthiness claims.[5] *Nowhere* does it purport to

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4. "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 (2004) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).

5. 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 at nn.10-11 (1971) ("[U]nseaworthiness … is a remedy separate

eliminate the remedy of punitive damages for vessel unseaworthiness or other federal maritime claims.

Apart from the text of the statute, American Seafoods' contention that the Jones Act restricted remedies available to injured seamen (Pet. at 12-16) is belied by the Act's history, and has been *rejected* by this Court. In *Miles*, the Court made clear that the Jones Act did not 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…" 498 U.S. at 29.[6]

Although *Miles* did not address punitive damage, *Atlantic Sounding* did. There, this Court "recognized that the [Jones] Act 'was remedial, for the benefit and

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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.

6. In *Atlantic Sounding,* the Court explained that *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811 (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 not 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 provided 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).

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' analysis, this Court would have to believe that Congress *sub silentio* took away a significant remedy from injured seamen–the ability to obtain punitive damages in a common-law vessel unseaworthiness claim— by the enactment of the Jones Act.

In *Atlantic Sounding*, the defendants argued that *Miles* "limited recovery in maritime cases involving death or personal injury to the remedies available under the Jones Act and the Death on the High Seas Act (DOSHA) [46 U.S.C. §§ 30301-08]." *Id.* at 418. The *Atlantic Sounding* court called this a "lowest common denominator" approach 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.

Id. at 419-20 (emphasis added). The *Atlantic Sounding* court corrected the erroneous, overboard interpretation of *Miles* that American Seafoods now advances; the Court held that reading *Miles* to limit recovery in all claims of personal injury was "far too broad." *Atlantic Sounding*, 557 U.S. at 418-19 (internal citations omitted).[7]

American Seafoods' reliance on the pecuniary/nonpecuniary distinction articulated in *Miles,* Pet. at 13-14, is equally unavailing. The words "pecuniary" and "nonpecuniary" do not appear in the Jones Act. Nor has this Court ever held that punitive damages are "non-pecuniary."[8] *Miles* addressed loss of consortium

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7. This Court's holding in *Atlantic Sounding* renders irrelevant the Petitioner's claim that the Jones Act's incorporation of the Federal Employees Liability Act, 45 U.S.C. § 59 ("FELA") precludes punitive damages in a Jones Act negligence claim.

8. 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/

damages and not punitive damages.[9] Punitive damages are obviously "pecuniary."

In sum, this Court has already 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. The Washington court correctly applied this element of the *Atlantic Sounding* analysis. 391 P.3d at 438.

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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 estimated and awarded monetarily, levied as "measured retribution[,]" *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513 (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.

9. The *Miles* court did not address punitive damages and considered "pecuniary damages" in the context of whether a mother could recover for loss of consortium with her son stabbed to death by a crew mate and whether his estate could recover for non-economic damages. The *Miles* court indicated that there needed to be a uniform treatment of issues in maritime law and held that because the Jones Act and FELA barred the recovery of non-pecuniary damages such as those for loss of consortium, general maritime law did so as well.

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

Finally, vessel unseaworthiness claims and the recovery of punitive damages in such claims, predated the 1920 enactment of the Jones Act. Again relying on *Miles,* American Seafoods asserts that vessel unseaworthiness claims are the product of a "revolution," misstating the actual historical origins of that claim. Pet. at 17-19.

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).[10] *The Osceola*, 189 U.S. 158 (1903), is pivotal in any determination regarding the origin of the doctrine of seaworthiness. 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, this 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

10. 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.

384, this determination "represented a long step forward in the history of seamen's rights."[11]

The *Osceola* court dealt 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 ruled 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.

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,

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11. 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.

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.

In *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 259 (1922), the Court reiterated such a claim existed "without regard to negligence." Although the scope of the vessel unseaworthiness claim was further developed later in *Munich v. Southern S.S. Co.*, 321 U.S. 96 (1944), *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), and *Usner*, this does not detract from the critical point: *vessel unseaworthiness claims predated* 1920, thereby meeting the requirements for the availability of a remedy under the *Atlantic Sounding* approach.

Again, the Washington court correctly concluded that vessel unseaworthiness claims and recovery of punitive damages predate the enactment of the Jones Act in 1920. 391 P.3d at 437-38.

American Seafoods is also incorrect to suggest that the public interest in this case favors reversal of the decision below and re-invigoration of the overly broad reading of *Miles*. *See* Pet. at 23-25. The public policy behind punitive damages is equally important: such damages are meant "to punish the person doing the wrongful act and to discourage others from similar conduct in the future." Cmt. a. *Restatement (Second) of Torts* § 908. *See Baker*, 554 U.S. at 492-93. This Court has long underscored the need to ensure that seamen, who are "wards of admiralty,"

U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 355 (1971),[12] have the necessary remedies to protect their rights. As Justice Story declared nearly two centuries ago: "Every court should watch with jealousy an encroachment upon the rights of a seaman, because they are unprotected and need counsel." *Harden*, 11 F. Cas. at 485. "Imposing exemplary damages…creates a strong incentive for vigilance" on the part of those best able to protect seamen from injury aboard unseaworthy vessels. *Pacific Mut. Life Ins. v. Haslip*, 499 U.S. 1, 14 (1991).

Federal courts have applied punitive damages as a deterrent against egregious vessel owner misconduct in a variety of settings. *See*, *e.g.*, *Baker*, *supra* (fishermen awarded punitive damages for their loss of livelihood claims, many of whom were Jones Act seamen); *Gaffney v. Riverboat Servs. of Indiana, Inc.*, 451 F.3d 424 (7th Cir. 2006), *cert. denied*, 549 U.S. 1111 (2007) (court affirming award of punitive damages to seamen asserting retaliatory discharge); *Pino v. Protection Mar. Inc. Co.*, 490 F. Supp. 277 (D. Mass. 1980) (seamen entitled to seek punitive damages from insurance company for interfering with their employment rights by charging higher insurance premiums from owners of fishing vessels on which they worked because seamen had failed to settle insurance claims to the insurer's satisfaction); *Atlantic Sounding* (seamen entitled to seek punitive damages for the willful and wanton violation of their right to maintenance and cure); *Callahan v. Gulf Logistics, LLC*, 2013 WL 5236888

12. In fact, this Court has referred to seamen as "wards of admiralty" in some 24 decisions. Robertson, *supra*, 70 La. L. Rev. at 499 n.107 (2010), most recently in *Atlantic Sounding*, 557 U.S. at 417.

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

Preserving the traditional remedy of punitive damages in this case will help provide a safe workplace for seamen and discourage employers, such as American Seafoods, from cutting corners to achieve greater productivity on board their vessels at the expense of the safety and lives of their crews. And certainly, there is no conceivable justification for allowing the recovery of punitive damages by injured longshore workers (*Callahan*), cruise ship passengers (*Horizon Cruises*), Jones Act seamen in loss-of-livelihood cases (*Baker*), retaliatory discharge cases (*Gaffney*), tortious interference with employment cases (*Pino*), or in maintenance and cure cases (*Atlantic Sounding*), but not by seamen injured due to the vessel owner's egregious conduct in failing to provide a safe workplace, a seaworthy vessel. Punitive damages have long been available to other types of maritime litigants, and the Washington Supreme Court was correct to preserve them injured seamen asserting claims of unseaworthiness.

CONCLUSION

The petition should be denied for lack of jurisdiction, and because the Washington court faithfully applied this Court's *Atlantic Sounding* analytical protocol in concluding that an injured seaman could recover punitive damages in a vessel unseaworthiness claim.

DATED this 13th day of November, 2017.

Respectfully submitted,

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APPENDIX

APPENDIX — RULING GRANTING REVIEW OF THE SUPREME COURT OF THE STATE OF WASHINGTON, FILED JUNE 28, 2016

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 92913-1

ALLAN A. TABINGO,

Petitioner,

v.

AMERICAN TRIUMPH LLC, AND
AMERICAN SEAFOODS COMPANY, LLC,

Respondents.

RULING GRANTING REVIEW

Allan Tabingo was injured while working as a deckhand trainee on a factory trawler owned by his employer, American Triumph LLC and American Seafoods Company, LLC (American Seafoods). While he was pushing fish through a hatch and into tanks below the deck, the hatch closed on his hand, eventually resulting in the amputation of two fingers. Mr. Tabingo alleges that the operator of the hydraulic hatch mistakenly pushed the valve that closed the hatch while Mr. Tabingo's hand was near the hinge, and was unable to stop the closing due to a defective hydraulic handle that had been broken

for approximately two years. Mr. Tabingo alleges causes of action available to a seaman injured in the course of his employment, including an action against American Seafoods as his employer for negligence under the Jones Act, 46 U.S.C. § 30104, and a general maritime law action against American Seafoods as the vessel owner for unseaworthiness. As to the unseaworthiness claim, he alleges willful and wanton failure to provide a seaworthy vessel and seeks both compensatory damages and punitive damages. The King County Superior Court granted American Seafoods partial summary judgment, dismissing Mr. Tabingo's claim for punitive damages on the basis that such damages are not recoverable under the general maritime doctrine of unseaworthiness as a matter of law. In the order granting partial summary judgment, the court explained as follows:

> Washington State Supreme Court interpretations of maritime law, as well as the uniformity principle set forth by the United States Supreme Court in *Miles v. Apex Marine Corp.,* 498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990), and confirmed in subsequent decisions, mandate that the measure of damages available under the Jones Act are identical to, and circumscribe, the damages available under the doctrine of unseaworthiness. The United States Court of Appeals for the Fifth Circuit has specifically found that the uniformity principle of *Miles* applies when a general maritime law personal injury claim is joined with a Jones Act claim. *McBride v. Estis WellService, LLC,* 768

> F.3d 382 (2014), *Cert. Denied,* 135 S. Ct. 2310 (20 15). Additionally, the Washington State Supreme Court has held that "unseaworthiness and a Jones Act negligence case have essentially identical measures of damages." *Miller v. Arctic Alaska Fisheries Corp.,* 133 Wn.2d 250, 265-66, 944 P.2d 1005 (1997) *(en banc).*

Based on this reading of the case law, the court concluded, "Accordingly, Plaintiff may not recover non-pecuniary damages, including punitive damages, under either of his liability theories." The court dismissed with prejudice Mr. Tabingo's claim for punitive damages under the Jones Act and the general maritime law doctrine of unseaworthiness.[1] Mr. Tabingo now seeks this court's direct discretionary review of this partial summary judgment order. RAP 2.3; RAP 4.2.

The initial question before me is whether this case is one of the rare instances in which review of an interlocutory summary judgment order is appropriate. In *Hartley v. State,* 103 Wn.2d 768, 773-74, 698 P.2d 77 (1985), this court noted that "[j]udicial policy generally disfavors interlocutory appeals," but there found that the trial court committed "obvious or probable error" and that discretionary review was appropriate to avoid a useless trial. *See also Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 808, 818 P.2d 1362, 1363 (1991) (finding interlocutory review of a statute of limitations issue was appropriate to avoid a useless trial).

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1. Mr. Tabingo states in his motion for discretionary review that in argument before the superior court he indicated he was seeking punitive damages only as to the unseaworthiness claim.

Appendix

At issue here is whether a seaman may recover punitive damages for an employer's willful and wanton breach of the general maritime law duty to provide a seaworthy vessel. The answer to this legal question involves the relationship of remedies under the maritime common law and remedies provided by Congress under the Jones Act, 46 U.S.C. § 30104. Ultimately, the question is whether the remedy of punitive damages was historically available in maritime law under the doctrine of unseaworthiness and, if so, whether the availability of punitive damages was supplanted by Jones Act pecuniary remedies for negligence in cases where the injured person is an employee of the vessel owner.

The background framing the issues is well established. Under maritime common law an injured seaman has two available causes of action: an action for "maintenance and cure" during his or her recovery from any injury and an action against the shipowner (who may also be the employer) for unseaworthiness of the vessel. In the pre-Jones Act case *The Osceola*, 189 U.S. 158, 175, 23 S. Ct. 483, 487, 47 L. Ed. 760 (1903), the Supreme Court determined that a seaman, though entitled to maintenance and cure whether or not negligence caused the injuries, was not allowed pecuniary recovery for the negligence of the vessel master or a member of the crew. In response, Congress enacted the Jones Act, providing a seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman, a cause of action against the employer. 46 U.S.C. § 30104. The Jones Act incorporated the substantive provisions of the Federal Employers Liability Act (FELA), 45 U.S.C.

§ 51, that govern actions for personal injury or death of a railway employee. *Id.* In discerning congressional intent, courts have considered how FELA was interpreted before the enactment of the Jones Act. Relevant here, prior to enactment of the Jones Act, the Supreme Court had determined that an injured worker bringing an action under FELA could recover only pecuniary damages. *St. Louis, Iron Mountain & S. Ry. v. Craft,* 237 U.S. 648, 658, 35 S. Ct. 704, 59 L. Ed. 1160 (1915). Many years later the Supreme Court reasoned that since the holding in *Craft* predated the Jones Act, "Congress must have intended to incorporate [FELA's] pecuniary limitation on damages as well." *Miles v. Apex Marine Corp.,* 498 U.S. 19, 32, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990).

Many lower courts read *Miles* as limiting recovery in maritime personal injury cases to only those remedies available under the Jones Act. But almost two decades later, the Supreme Court rejected the broad proposition that a seaman may recover only those damages available under the Jones Act. *Atlantic Sounding Co., Inc. v. Townsend,* 557 U.S. 404, 407, 129 S. Ct. 2561, 174 L. Ed. 2d 382 (2009). The question presented in *Townsend* was whether an injured seaman could recover punitive damages for his employer's willful failure to pay maintenance and cure. The Supreme Court distinguished maintenance and cure from the wrongful death action in *Miles,* noting that general maritime law denied any recovery for wrongful death, and that the Jones Act and the Death on the High Seas Act (DOHSA), 46 U.S.C. § 30301, *et seq.,* are the sole sources of a wrongful death cause of action. The Supreme Court observed that punitive damages historically have

been available in general maritime actions, and that the Jones Act did not eliminate preexisting remedies available to seamen for the separate common law cause of action based on the right to maintenance and cure. *Id.* at 415-16. Thus, it distinguished *Miles* on the grounds that "*Miles* does not address either maintenance and cure actions in general or the availability of punitive damages for such actions." *Id.* at 419.

After *Townsend,* lower courts have wrestled with the issues of whether prior to the Jones Act punitive damages were available under the doctrine of unseaworthiness and whether the provisions of the Jones Act supplanted historical remedies as to a seaman employed by the vessel owner. Some courts have concluded that vessel passengers and seamen *not* employed by the vessel owner may seek punitive damages under the doctrine of unseaworthiness in light of *Townsend. See, e.g., Hausman v. Holland Am. Line-USA,* 2015 WL 10684573 (W.D. Wash.); *Collins v. A.B.C. Marine Towing, L.L.C.,* 2015 WL 5254710 (E.D. La.). However, as the district court observed in *Hausman,* these cases did not address whether punitive damages are available to a seaman bringing a personal injury suit under the Jones Act.

This issue has been addressed post-*Townsend* by federal district courts and by the Fifth Circuit Court of Appeals. In *Rowe v. Hornblower Fleet,* 2012 WL 5833541 (N.D. Cal.), the district court concluded that punitive damages are available in general maritime claims and that nothing in the Jones Act limits a seaman's right to seek punitive damages against an employer on a claim for

unseaworthiness. *See also Wagner v. Kana Blue Water Farms,* LLC, 2010 WL 3566731 (D. Haw.) (same). These district courts concluded that the Ninth Circuit's decision in *Evich v. Morris,* 819 F.2d 256 (9th Cir. 1987), remained binding circuit precedent following *Townsend,* such that punitive damages are available in a general maritime action upon a showing of conduct that manifests reckless or callous disregard, gross negligence, actual malice, or criminal indifference.

More recently, the question of the availability of punitive damages was presented in *McBride v. Estis Well Service, LLC,* 768 F.3d 382 (5th Cir. 2014) (en banc), *cert. denied,* 135 S. Ct. 2310 (2015), in the context of a wrongful death action and personal injury actions against an employer who was the vessel owner. A drilling rig on a barge toppled over, killing one seaman and injuring others, and the personal representative of a deceased seaman and the injured seamen sought punitive damages for their employer's willful and wanton breach of the general maritime law duty to provide a seaworthy vessel. The federal district court considered *Townsend,* but it determined the remedy of punitive damages was not legally cognizable for unseaworthiness or Jones Act causes of action and dismissed all claims for punitive damages. But recognizing that the issues presented were "the subject of national debate with no clear consensus," the court certified the judgment for immediate appeal. Initially, a panel of the Fifth Circuit considered the question on interlocutory appeal and reasoned that *Townsend's* holding on maintenance and cure would extend to an unseaworthiness cause of action

and the availability of punitive damages as a remedy. In the initial decision, *McBride v. Estis Well Serv., L.L.C.*, 731 F.3d 505, 518 (5th Cir. 2013), the court would have held, "Like maintenance and cure, unseaworthiness was established as a general maritime claim before the passage of the Jones Act, punitive damages were available under general maritime law, and the Jones Act does not address unseaworthiness or limit its remedies. We conclude, therefore, that punitive damages remain available to seamen as a remedy for the general maritime law claim of unseaworthiness." As indicated, the Fifth Circuit then reheard the case en banc. The fifteen member en banc court affirmed the district court's dismissal of the punitive damages claims in a 7-2-6 decision. Broadly summarized, the lead opinion by Judge Davis found that the wrongful death action by the personal representative of the deceased seaman was indistinguishable from *Miles,* where recovery was limited to pecuniary losses, and further that "no one has suggested why its holding and reasoning would not apply to an injury case" such as asserted by the injured seamen. *McBride,* 768 F.3d at 388. Judge Clement wrote and four judges signed a separate concurring opinion that joined Judge Davis's opinion but also concluded that punitive damages were not historically available in unseaworthiness cases. *Id.* at 391-401 (Clement, J., concurring). Thus, less than a majority of the court fully joined in the lead opinion. Significantly, Judge Haynes's opinion concurring in the judgment, joined by one other judge, concurred in the reasoning in the lead opinion as to the wrongful death action but disagreed that the outcome on the wrongful death action dictated the outcome for the surviving seamen. *Id.* at

401-02 (Haynes, J., concurring in judgment). But after indicating disagreement with the concept that the outcome in the wrongful death action dictated the outcome for the injured seamen, Judge Haynes wrote, "That said, I cannot join the dissenting opinions with respect to the surviving seamen." *Id.* at 402. She noted that " the parties have not sought and have not briefed a different treatment of one category of claimant from the other, and we should be reluctant to address such differences *sua sponte.*" *Id.* at 403. Additionally, she expressed views that it would be "inappropriate for a federal intermediate appellate court to extend the law here," *id.*, that the subject was best left to Congress, and that " [i]f a federal court is the right place to extend remedies in this area, I submit that federal court is the United States Supreme Court, not this one." *Id.* at 404. Judge Higginson was joined by five other judges in a dissenting opinion that concluded general maritime law afforded injured seamen a cause of action for unseaworthiness if a seaman was injured by a ship's operational unfitness, and that punitive damages, though not always designated as such, historically were available and awarded in such general maritime actions. *Id.* at 406 (Higginson, J., dissenting). Accordingly, the dissenting opinion concluded that Congress's enactment of negligence and wrongful death causes of action for injured seaman or the representatives of deceased seamen to remedy gaps in general maritime law did not eliminate the preexisting remedy of punitive damages. *Id.* at 409. The dissenting opinion applied the reasoning in *Townsend* that the Jones Act's purpose was to enlarge a seaman's protection, not to narrow it, and that the Jones Act preserved the seaman's right to elect between the remedies there provided and

those recoverable under preexisting general maritime law for negligence. *Id.* This reasoning led the dissent to the same conclusion as that reached in *Townsend* for maintenance and cure claims; that is, the Jones Act did not eliminate preexisting remedies available to seamen for the separate common law cause of action based on unseaworthiness. *Id.* at 418-19.

American Seafoods relies heavily on *McBride* in opposing discretionary review and asserts that "the U.S. Supreme Court effectively endorsed this holding by declining to hear the petition for review." But the general proposition that denial of certiorari is an implicit endorsement of the lower court's holding has been rejected by the Supreme Court. *See Hughes Tool Co. v. Trans World Airlines, Inc.,* 409 U.S. 363, 366, n.1, 93 S. Ct. 647, 34 L. Ed. 2d 577 (1973) (noting " the well-settled view that denial of certiorari imparts no implication or inference concerning the Court's view of the merits"); *Teague v. Lane,* 489 U.S. 288, 296, 109 S. Ct. 1060, 1067-68, 103 L. Ed. 2d 334 (1989) (reiterating that denial of certiorari imports no expression of opinion on the merits and observing that the variety of considerations that underlie denials of the writ counsels against according denials of certiorari any precedential value). And I find it doubtful that this court would agree with Judge Haynes's view in concurring in the judgment that this unsettled question of law should be left to Congress or the Supreme Court to decide. Rather, I believe this court would view the question of the availability of punitive damages in an injured seaman's unseaworthiness claim as whether such claim is or is not logically compelled by Supreme Court

precedents. *Cf. Norfolk Shipbuilding & Drydock Corp. v. Garris,* 532 U.S. 811, 820, 121 S. Ct. 1927, 1933, 150 L. Ed. 2d 34 (2001) (cautioning that recognition of new types of maritime claims may be best left to Congress rather than federal common law, but that "Congress's occupation of this field is not yet so extensive as to preclude us from recognizing what is already logically compelled by our precedents"). The Supreme Court has not reserved to itself the question of what result is logically compelled by its precedents; the Supreme Court is the court of last resort on issues of maritime law, not the court of first resort. Further, Supreme Court Rule 10 contemplates that unsettled questions of federal law will continue to be addressed by the federal and state courts, and that the Supreme Court will consider the question if conflicting decisions emerge among different circuits of the federal courts of appeals or with a state court of last resort. *McBride* is not persuasive authority for denying discretionary review.

American Seafoods also argues, and the superior court order suggests, that this court decided this issue in *Miller v. Arctic Alaska Fisheries Corp.,* 133 Wn.2d 250, 265-66, 944 P.2d 1005 (1997), when it stated, "While distinct theories of recovery, unseaworthiness and a Jones Act negligence case have essentially identical measures of damages." But this statement was made in a case that preceded *Townsend.* And in *Miller* the injured seaman explicitly did not seek punitive damages in his unseaworthiness and Jones Act causes of action. *See* Brief of Appellant, bound volume of briefs, Wash. State Law Library, 133 Washington 2d Briefs, Vol. 5, 187-290

(noting the *Miles* holding precluded punitive damages in a wrongful death action and stating, "The holding in *Miles* would seem to preclude punitive damages for injury claims as well, for unseaworthiness or Jones Act negligence. Mr. Miller does not seek punitive damages for those causes of action. Instead, he seeks punitive damages for the cut-off of maintenance and cure").

This background indicates that resolution of the issue in this court likely would turn on application of the principles of *Townsend* to claims for egregious breaches of the warranty of seaworthiness, such that the questions are whether punitive damages were available to an injured seaman prior to enactment of the Jones Act and whether the Jones Act altered the damages available. *Cf. Townsend,* 557 U.S. at 418. In *Townsend,* the Court first reviewed the extension of punitive damages available at common law to claims arising under maritime law for acts of a particularly egregious nature:

> The general rule that punitive damages were available at common law extended to claims arising under federal maritime law. See *Lake Shore & Michigan Southern R. Co. v. Prentice,* 147 U.S. 101, 108 (1893) "[C]ourts of admiralty ... proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages ..."). One of this Court's first cases indicating that punitive damages were available involved an action for marine trespass. See *The Amiable Nancy,* 3 Wheat. 546 (1818). In the course of deciding whether to

> uphold the jury's award, Justice Story, writing for the Court, recognized that punitive damages are an available maritime remedy under the proper circumstances. Although the Court found that the particular facts of the case did not warrant such an award against the named defendants, it explained that "if this were a suit against the original wrong-doers, it might be proper to ... visit upon them in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct." *Id.*, at 558; see also *Barry, supra,* at 563 ("In *The Amiable Nancy,* which was the case of a marine tort, Mr. Justice Story spoke of exemplary damages as 'the proper punishment which belongs to ... lawless misconduct'" (citation omitted)).

Townsend, 557 U.S. at 411. The Court further noted a couple of early cases, specific to the maintenance and cure cause of action at issue in *Townsend,* that included punitive elements:

> In addition, the failure of a vessel owner to provide proper medical care for seamen has provided the impetus for damages awards that appear to contain at least some punitive element. For example, in *The City of Carlisle,* 39 F. 807 (DC Ore. 1889), the court added $1,000 to its damages award to compensate an apprentice seaman for "gross neglect and cruel maltreatment of the [seaman] since his

> injury." *Id.,* at 809, 817. The court reviewed the indignities to which the apprentice had been subjected as he recovered without any serious medical attention, see *id.,* at 810-812, and explained that "if owners do not wish to be mulct in damages for such misconduct, they should be careful to select men worthy to command their vessels and fit to be trusted with the safety and welfare of their crews, and particularly apprentice boys." *Id.,* at 817; see also *The Troop,* 118 F. 769, 770-771, 773 (DC Wash. 1902) (explaining that $4,000 was a reasonable award because the captain's "failure to observe the dictates of humanity" and obtain prompt medical care for an injured seaman constituted a "monstrous wrong").

Id. at 414.

American Seafoods argues that this discussion of the availability of punitive damages under general maritime law is immaterial to the issue of whether punitive damages were specifically available for a claim of unseaworthiness before the Jones Act. But *Townsend* was based on the general common law rule that made punitive damages available in maritime actions and the fact that the early cases supported, rather than refuted, application of the general rule to pre-Jones Act maintenance and cure actions that involved wanton, willful, or outrageous conduct. *Id.* at 414-15 n.4 (agreeing with the dissent that the handful of early maintenance and cure cases did not resolve the question of the availability of punitive damages,

but observing that the dissent did not explain why maintenance and cure should be excepted from the general rule in light of the early cases that supported rather than refuted application of the rule to such actions). There is no apparent reason the general principles identified in *Townsend* would not extend to unseaworthiness claims involving egregious conduct. American Seafoods argues to the contrary that the Supreme Court's discussion of the historic availability of "indemnity or compensatory damages" on the ground of unseaworthiness, as described in *Pacific Steamship Co. v. Peterson,* 278 U.S. 130, 135, 49 S. Ct. 75, 73 L. Ed. 220 (1928), indicated punitive damages were not available. *See also McBride,* 768 F.3d at 398-99 (Clement, J., concurring). But *Pacific Steams/zip Co.* and the case it discusses, *The Osceola,* did not involve any claims for damages beyond those that were compensatory. And the decision in *Pacific Steamship Co.* rejected application of a broad incidental statement in a previous case as "this was at the most a general expression respecting a particular as to which no question was raised-no allowance for maintenance, cure and wages being there involved—which ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Id.* at 136. There is no indication the Supreme Court in discussing indemnity in these previous cases was considering the point of whether punitive damages would or would not extend to unseaworthiness claims where egregious conduct was involved.

American Seafoods also argues that the modem unseaworthiness cause of action that is based on strict liability was not recognized until after the enactment of

the Jones Act, and therefore the common law rule allowing punitive damages could not have extended to such claims. But even if the unseaworthiness cause of action has evolved from the duty to use due diligence to provide a seaworthy vessel to one of strict liability, recovery of punitive damages depends on fault on the part of the vessel owner. The development of the law as to the showing necessary to establish a vessel owner's liability did not change the common law as to the culpability necessary to impose punitive damages. This argument is not a convincing basis to distinguish application of the principles of *Towns end* to an unseaworthiness cause of action. *Cf. In re Asbestos Products Liab. Litig.,* 2014 WL 3353044, at *8-10 (E.D. Pa. 2014) (rejecting the argument that the principles of *Townsend* are inapplicable to an unseaworthiness cause of action because a vessel owner can be held strictly liable for harm caused by an unseaworthy vessel).

I am not aware of any early cases that directly support or refute application of the general rule on the availability of punitive damages to unseaworthiness actions. But it seems to me that the discussion on the inadequacy of compensatory damages to address unseaworthiness in *United States v. Givings,* 25 F. Cas. 1331 (D. Mass. 1844), lends support to application of the general rule. There the defendant seamen were indicted for a revolt when they refused to sail away from port and into dangerous waters aboard a whaling ship with rotten masts. The federal court noted the limits of compensatory damages as a means to address the seamen's concerns, instructing the jury as follows:

> Full force should be given to the necessity of upholding the power of the master, and to the policy of requiring seamen to submit, in some instances, even to evident injustice, waiting for redress from the home tribunals; but a distinction should be drawn between cases of ordinary injuries, which can be compensated by pecuniary damages, and those where the wrong about to be done is of so serious a nature, as not to be measured by subsequent compensation in money; as when life or limbs are put in danger. The law regards life, and the safety of limbs, as of a higher value than the cost of surveys or repairs.

Id. at 1332. The Supreme Court later observed that the pre-Jones Act doctrine related to damages for unseaworthiness seems to have derived from the seaman's privilege to abandon a ship improperly fitted out. *See Mahnich v. Southern* S.S. *Co.,* 321 U.S. 96, 99, 64 S. Ct. 455 88 L. Ed. 561 (1944). Viewed in this light, *Givings* supports the view that the general punitive damage rule historically would have been applied to willful and wanton failure to provide a seaworthy vessel. *Cf. Exxon Shipping Co. v. Baker,* 554 U.S. 471, 504, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008) (comparing the purposes of punitive damages under maritime common law with the criminal law and concluding that both advance deterrence).

Clearly, the question is an arguable one. Determining whether discretionary review should be granted in this matter requires me to consider whether the superior court

committed "probable" error in the sense that the error "can reasonably and fairly convincingly be accepted as true ... without being undeniably so . . .." *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1806 (2002) (definition of "probable"). After considering the many scholarly opinions on this issue, I am persuaded that under the "probable error" standard the motion for discretionary review should be granted. And like in *Hartley,* deciding the fully developed legal issue on interlocutory review may avoid a second trial that is essentially a retrial before a new jury.[2] Further, this is a matter "involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination" warranting this court's direct review. RAP 4.2(a)(4). The unquestionable importance of this issue, the full development of the arguments relating to the issue of law, and the lack of controlling authority in Washington all weigh in favor of direct review.

The motion for direct discretionary review is granted. The Clerk is requested to set a perfection schedule.

/s/_____
COMMISSIONER

June 28, 2016

2. American Seafoods claims bifurcation of the punitive damages claim would be warranted in any event, but it provides no authority or argument for this proposition. CR 42 allows separate trials to avoid prejudice, but American Seafoods does not explain how it would be prejudiced by re solution of all the claims in a trial before the same jury.