

No. 17A_____

IN THE SUPREME COURT OF THE UNITED STATES

DUTRA GROUP,

Applicant,

v.

CHRISTOPHER BATTERTON,

Respondent.

**APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT
OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS**

To the Honorable Anthony Kennedy, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Pursuant to this Court's Rule 13.5, applicant Dutra Group respectfully requests a 30-day extension of time, to and including August 30, 2018, in which to file a petition for a writ of certiorari in this case.¹ The United States Court of Appeals for the Ninth Circuit entered judgment on January 23, 2018. App. A, *infra*. On May 2, 2018, the Court of Appeals denied Dutra Group's petition for rehearing and rehearing en banc. *See* App. B, *infra*. Absent an extension, therefore, a petition for a writ of certiorari would be due on July 31, 2018.

1. While working for Dutra Group aboard a vessel, Christopher Batterton was injured. He sued Dutra Group in the United States District Court for the Central District of California for maintenance and cure and unearned wages, as well as for

¹ Applicant is not aware of any parent corporation or any publicly held company that owns 10% or more of its stock.

compensatory damages based on theories of unseaworthiness under general maritime law and negligence under the Jones Act. He also sought punitive damages on his unseaworthiness claim.

2. The Dutra Group moved to dismiss Mr. Batterton's punitive damages claim on the ground that seamen cannot can recover punitive damages for unseaworthiness. The district court denied the motion. App. C, *infra*.

3. The court of appeals affirmed the denial on appeal. The court of appeals believed that this case was controlled by this Court's decision in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009), which held that punitive damages are available in an action for maintenance and cure, rather than *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), which held that only compensatory damages are available for wrongful death claims based on unseaworthiness. App. A, *infra*, at 1095-96. The court expressly disagreed with the Fifth Circuit's decision in *McBride v. Estis Well Service, LLC*, 768 F.3d 382 (5th Cir. 2014) (en banc), which held that, under *Miles*, seamen cannot can recover punitive damages for unseaworthiness. App. A, *infra*, at 1095-96.

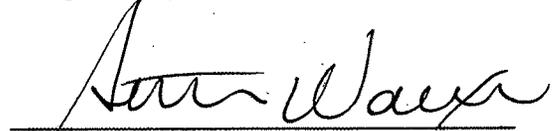
4. Dutra Group has engaged new counsel to assist it with a petition for certiorari, and undersigned counsel require additional time to become familiar with this case. In addition, undersigned counsel face several imminent deadlines in other cases that cannot be extended.

5. This Court would have jurisdiction pursuant to 28 U.S.C. § 1254(1).

6. The requested extension would not result in unfair prejudice to Batterton; even if the extension is granted, the case, if the Court grants certiorari, would likely be heard and decided by the Court in its upcoming Term.

For the foregoing reasons, Dutra Group respectfully requests that the time for filing a petition for a writ of certiorari in this case be extended to and including August 30, 2018.

Respectfully submitted.



SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
DAVID M. LEHN
CHRISTOPHER ASTA
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

BARRY W. PONTICELLO
RENEE C. ST. CLAIR
ENGLAND, PONTICELLO & ST. CLAIR
701 B Street Suite 1790
San Diego, CA 92101
619-255-6450
bponticello@eps-law.com

June 7, 2018

APPENDIX A

district court granted the motion to seal. After the district court denied their motion to seal, the Demarees had five days to file their document publicly, which they did not do.⁵ AZ LR 5.6(e). Thus, the document was never before the district court to consider, much less somehow confer authority on this court by considering the merits of a lodged motion.

Accordingly, this case is not properly before us for lack of jurisdiction and timely filing of a tolling motion.



Christopher BATTERTON,
Plaintiff-Appellee,

v.

DUTRA GROUP, Defendant-Appellant.

No. 15-56775

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted February 8,
2017, Pasadena, California

Filed January 23, 2018

Background: Seaman brought action for unseaworthiness under general maritime law against vessel owner and operator alleging that his left hand was crushed when vessel's hatch cover blew open while he was working as deckhand, and seeking punitive damages. The United States District Court for the Central District of California, No. 2:14-cv-07667-PJW, Patrick J. Walsh, United States Magistrate Judge, 2014 WL 12538172, denied owner's motion to strike portion of prayer seeking punitive

5. If the Demarees had filed their Rule 59 motion publicly within five days after the district court entered its denial, they would have a much stronger argument that their situation was akin to the plaintiff in *Escobedo*, where the district court gave the plaintiff thirty days to pay her filing fee after denying her motion

damages, and certified order for immediate appeal.

Holding: The Court of Appeals, Kleinfeld, Senior Circuit Judge, held that seaman could recover punitive damages on his unseaworthiness claim.

Affirmed.

1. Damages ⇌91.5(3)

Death ⇌81

Seaman, whose left hand was allegedly crushed when vessel's hatch cover blew open while he was working as deckhand, could recover punitive damages under general maritime law on his unseaworthiness claim against vessel owner and operator; punitive damages were available in maintenance and cure actions, actions for unseaworthiness and for maintenance and cure were both general maritime causes of action, there was no reason to treat unseaworthiness claim differently than maintenance and cure claim with respect to availability of punitive damages, and limitation of recovery on wrongful death claim under Jones Act to pecuniary loss did not apply to general maritime claims by living seamen for injuries to themselves. Jones Act, 46 U.S.C.A. § 30104 et seq.

2. Seamen ⇌9

Unseaworthiness is a general maritime cause of action.

3. Damages ⇌87(1)

Punitive damages are not "pecuniary loss," because although they are pecuniary,

to proceed without paying it. *Escobedo*, 787 F.3d at 1228. *Escobedo* paid the filing fee within the deadline set by the district court and, on appeal, this court held the filing was timely. *Id.* at 1233–34. This, however, is not what the Demarees did.

that is, like all damages, for money, they are not for loss.

See publication Words and Phrases for other judicial constructions and definitions.

Appeal from the United States District Court for the Central District of California, Patrick J. Walsh, Magistrate Judge, Presiding, D.C. No. 2:14-cv-07667-PJW

Barry W. Ponticello (argued) and Renee C. St. Clair, England Ponticello & St. Clair, San Diego, California, for Defendant-Appellant.

David W. Robertson (argued), Dripping Springs, Texas; Adam K. Shea and Brian J. Panish, Panish Shea & Boyle LLP, Los Angeles, California; Preston Easley, Law Offices of Preston Easley APC, San Pedro, California; for Plaintiff-Appellee.

Kenneth G. Engerrand, Brown Sims P.C., Houston, Texas, for Amicus Curiae Kenneth G. Engerrand.

Michael F. Sturley, Austin, Texas; Lyle C. Cavin Jr., Law Offices of Lyle C. Cavin Jr., San Francisco, California; William L. Banning, Banning LLP, Rancho Santa Fe, California; Paul T. Hofmann, Hofmann & Schweitzer, Raritan, New Jersey; for Amici Curiae Mick McHenry, Frank Maloney, and Aifeula Moloasi.

John R. Hillsman, McGuinn Hillsman & Palefsky, San Francisco, California, for Amicus Curiae Sailors' Union of the Pacific.

Robert S. Peck and Jeffrey R. White, Center for Constitutional Litigation P.C.,

Washington, D.C.; Larry A. Tawwater, President, American Association for Justice, Washington, D.C.; for Amicus Curiae American Association for Justice.

Before: SIDNEY R. THOMAS, Chief Judge, and ANDREW J. KLEINFELD and JACQUELINE H. NGUYEN, Circuit Judges.

OPINION

KLEINFELD, Senior Circuit Judge:

We address the availability of punitive damages for unseaworthiness.

This case comes to us on a 28 U.S.C. § 1292(b) certification for interlocutory appeal. The district court certified the appeal, and we granted permission for it. District courts within our circuit have divided on the substantive issue,¹ as have the circuits,² and the issue is of considerable importance in maritime law.

Facts

The case comes to us on the pleadings and nothing else. The district court denied a motion to strike the portion of the prayer seeking punitive damages for unseaworthiness. We therefore take our facts from the complaint. They are not proved, and we intimate no view as to whether punitive damages may ultimately turn out to be appropriate.

The plaintiff, Christopher Batterton, was a deckhand on a vessel owned and operated by the defendant, Dutra Group. While Batterton was working on the vessel in navigable waters, a hatch cover blew open and crushed his left hand. Pressur-

1. Compare, e.g., *Rowe v. Hornblower Fleet*, No. C-11-4979 JCS, 2012 WL 5833541, at *900 (N.D. Cal. Nov. 16, 2012) and *Wagner v. Kona Blue Water Farms, LLC*, 2010 A.M.C. 2469, 2483 (D. Haw. Sept. 13, 2010) with *Jackson v. Unisea, Inc.*, 824 F.Supp. 895, 897-98 (D. Alaska 1992) and *Complaint of Aleutian Enter., Ltd.*, 777 F.Supp. 793, 796 (W.D. Wash. 1991).

2. Compare *Evich v. Morris*, 819 F.2d 256, 258 (9th Cir. 1987), overruling on other grounds acknowledged by *Saavedra v. Korean Air Lines Co.*, 93 F.3d 547, 553-54 (9th Cir. 1996) and *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1550 (11th Cir. 1987) with *McBride v. Estis Well Service*, 768 F.3d 382, 384 (5th Cir. 2014) (en banc) and *Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994).

ized air was being pumped into a compartment below the hatch cover, and the vessel lacked an exhaust mechanism to relieve the pressure when it got too high. The lack of a mechanism for exhausting the pressurized air made the vessel unseaworthy and caused permanent disability and other damages to Batterton.

Analysis

[1] The only question before us is whether punitive damages are an available remedy for unseaworthiness claims. We answered it in *Evich v. Morris*.³ That would be the end of the case, except that Dutra contends, and the Fifth Circuit agrees,⁴ that the later Supreme Court decision in *Miles v. Apex Marine Corp.*⁵ implicitly overrules *Evich*.

In *Evich* we squarely held that “[p]unitive damages are available under general maritime law for claims of unseaworthiness, and for failure to pay maintenance and cure.”⁶ We distinguished Jones Act claims, where punitive damages are unavailable.⁷ The standard for punitive damages, we held, was “conduct which manifests ‘reckless or callous disregard’ for the rights of others . . . or ‘gross negligence or actual malice [or] criminal indifference.’”⁸

Evich was a wrongful death case, not an injury case.⁹ But we did not speak to

whether there might be any distinction regarding the availability of punitive damages according to whether the seaman had died. Generally, the availability of damages is more restricted in wrongful death cases than in injury cases. So without authority to the contrary, we have no reason to distinguish *Evich* and limit its holding to wrongful death cases. No party has suggested that we do so.

Under *Miller v. Gammie*,¹⁰ we must follow *Evich* unless it is “clearly irreconcilable” with the Supreme Court’s decision in *Miles*.¹¹ *Miles* holds that loss of society damages are unavailable in a general maritime action for the wrongful death of a seaman and that lost future earnings are unavailable in a general maritime survival action.¹² That is because wrongful death damages are limited to “pecuniary loss”¹³ and because “[t]he Jones Act/[Federal Employers’ Liability Act] survival provision limits recovery to losses suffered during the decedent’s lifetime.”¹⁴

[2] The Supreme Court’s more recent decision in *Atlantic Sounding Co. v. Townsend*¹⁵ speaks broadly: “Historically, punitive damages have been available and awarded in general maritime actions, including some in maintenance and cure.”¹⁶ Unseaworthiness is a general maritime cause of action.¹⁷ *Townsend* reads *Miles* as

3. 819 F.2d at 258.

4. See *McBride*, 768 F.3d at 384.

5. 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990).

6. 819 F.2d at 258 (citations omitted).

7. *Id.*

8. *Id.* at 258–59 (quoting *Protectus Alpha Nav. Co. v. N. Pac. Grain Growers, Inc.*, 767 F.2d 1379, 1385 (9th Cir. 1985)).

9. *Id.* at 258.

10. 335 F.3d 889 (9th Cir. 2003).

11. *Id.* at 893.

12. *Miles*, 498 U.S. at 37, 111 S.Ct. 317.

13. *Id.* at 32, 111 S.Ct. 317.

14. *Id.* at 36, 111 S.Ct. 317.

15. 557 U.S. 404, 129 S.Ct. 2561, 174 L.Ed.2d 382 (2009).

16. *Id.* at 407, 129 S.Ct. 2561.

17. See *id.* at 419, 129 S.Ct. 2561; see also *Miles*, 498 U.S. at 29, 111 S.Ct. 317.

limiting the availability of damages for loss of society and lost future earnings¹⁸ and holds that *Miles* does not limit the availability of punitive damages in maintenance and cure cases.¹⁹ By implication, *Townsend* holds that *Miles* does not limit the availability of remedies in other actions “under general maritime law,”²⁰ which includes unseaworthiness claims.

Arguably, *Townsend* leaves room for a distinction between maintenance and cure claims and unseaworthiness claims. The Court recognizes that “remedies for negligence, unseaworthiness, and maintenance and cure have different origins and may on occasion call for application of slightly different principles and procedures.”²¹ But nothing in *Townsend*’s reasoning suggests that such a distinction would mean that a limitation ought to be made on the availability of punitive damages as a remedy for general maritime unseaworthiness claims.

So far our discussion suggests that *Miles* does not overturn *Evich*, that *Evich* remains in force as controlling circuit law, and that *Evich*’s holding that punitive damages are available as a remedy for unseaworthiness claims is undisturbed and binding. Appellant’s arguments to the contrary, though, are given force by *McBride v. Estis Well Service*.²²

McBride, a sharply divided Fifth Circuit en banc decision, holds that “punitive dam-

ages are non-pecuniary losses”²³ and therefore may not be recovered under the Jones Act or under the general maritime law.²⁴ We held in another context in *Kopczynski v. The Jacqueline* that “[p]unitive damages are non-pecuniary” and so are not allowable under the Jones Act.²⁵ *McBride* has five extensive and scholarly opinions addressing all sides of the question. Six dissenters note that *Miles* “addressed the availability of loss of society damages to non-seamen under general maritime law, not punitive damages,”²⁶ and that “*Townsend* announced the default rule that punitive damages are available for actions under the general maritime law (such as unseaworthiness).”²⁷

Well before our decision in *Evich*, the Supreme Court addressed in *Moragne v. States Marine Lines, Inc.*²⁸ whether the general maritime law affords a cause of action for wrongful death. The Court overruled its 1886 decision that it did not.²⁹ Though *Moragne* concerns the availability of a wrongful death action under the general maritime law, it matters in our case, where the seaman did not die, because it bears on how we should understand *Miles*.

Moragne holds that the denial of a wrongful death remedy “had little justification except in primitive English legal history.”³⁰ Lord Ellenborough had held in *Baker v. Bolton* that in “a Civil court, the death of a human being could not be com-

18. *Townsend*, 557 U.S. at 419, 129 S.Ct. 2561.

19. *Id.*

20. *Id.* at 421, 129 S.Ct. 2561.

21. *Id.* at 423, 129 S.Ct. 2561 (quoting *Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 18, 83 S.Ct. 1646, 10 L.Ed.2d 720 (1963)).

22. 768 F.3d 382 (5th Cir. 2014) (en banc).

23. *Id.* at 384.

24. *Id.*

25. 742 F.2d 555, 561 (9th Cir. 1984).

26. 768 F.3d at 408–09 (Higginson, J., dissenting).

27. *Id.* at 413 n.16; see *id.* at 418.

28. 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970).

29. *Id.* at 409, 90 S.Ct. 1772 (overruling *The Harrisburg*, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886)).

30. *Id.* at 379, 90 S.Ct. 1772.

plained of as an injury.”³¹ The Court noted that there was no good reason to maintain this “barbarous” view,³² let alone extend it to the maritime law, the principles of which “included a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages.”³³ In any event, the common law rule had been overturned in England by Lord Campbell’s Act, in American states by wrongful death statutes, and in our federal law by the Federal Employers’ Liability Act, the Death on the High Seas Act, and the Jones Act.³⁴ The Court noted that its “transformation of the shipowner’s duty to provide a seaworthy ship into an absolute duty not satisfied by due diligence” had made unseaworthiness doctrine “the principal vehicle for recovery by seamen for injury or death.”³⁵ It concluded that the limitations of the Death on the High Seas Act did not preclude the availability of a wrongful death remedy under the general maritime law where the Act did not apply.³⁶

Three years after our decision in *Evich*, the Supreme Court decided *Miles v. Apex Marine Corp.*³⁷ *Miles* was a wrongful death case.³⁸ The immediate issues before the Court were whether the parent of a deceased seaman could recover under the

general maritime law for loss of society and whether a seaman’s lost future earnings claim survived his death.³⁹ A fellow crew member had stabbed a seaman to death.⁴⁰ His mother brought a Jones Act negligence claim for failure to prevent the deadly assault and a general maritime unseaworthiness claim for hiring an unfit crew member.⁴¹ Among other things, she sought loss of society, lost future income, and punitive damages.⁴² The jury, though it found negligence, rejected the unseaworthiness claim, returning a verdict that the ship was seaworthy.⁴³ The Fifth Circuit reversed, holding that because of the extraordinarily violent disposition of the fellow crewman, the ship was unseaworthy as a matter of law.⁴⁴

Miles declined to limit *Moragne* to its facts.⁴⁵ The Court noted that the “Jones Act evinces no general hostility to recovery under maritime law.”⁴⁶ It does not “disturb seamen’s general maritime claims for injuries resulting from unseaworthiness.”⁴⁷ Nor does it “preclude the recovery for wrongful death due to unseaworthiness.”⁴⁸ The permissibility of a punitive damages award was not before the Court, just loss of society and of future earnings.⁴⁹

31. *Id.* at 383, 90 S.Ct. 1772 (quoting *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808)).

32. *Id.* at 381, 90 S.Ct. 1772.

33. *Id.* at 387, 90 S.Ct. 1772.

34. *Id.* at 389–90, 394, 90 S.Ct. 1772.

35. *Id.* at 399, 90 S.Ct. 1772.

36. *Id.* at 402, 90 S.Ct. 1772.

37. 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990).

38. *Id.* at 21, 111 S.Ct. 317.

39. *Id.* at 23, 111 S.Ct. 317.

40. *Id.* at 21, 111 S.Ct. 317.

41. *Id.*

42. *Id.* at 21–22, 111 S.Ct. 317.

43. *Id.* at 22, 111 S.Ct. 317.

44. *Id.*

45. *Id.* at 27, 111 S.Ct. 317.

46. *Id.* at 29, 111 S.Ct. 317.

47. *Id.*

48. *Id.*

49. *See id.* at 23, 111 S.Ct. 317.

The basis for Dutra's argument that *Miles* implicitly overturns *Evich* is Miles's discussion of damages. Noting that the Death on the High Seas Act limited the availability of damages for wrongful death to "pecuniary loss sustained by the persons for whose benefit the suit is brought,"⁵⁰ the Court held that damages "for non-pecuniary loss, such as loss of society, in a general maritime action" are barred.⁵¹ Likewise, Lord Campbell's Act, which is the basis for most state and federal statutes for wrongful death recovery, had long been interpreted to provide recovery only for pecuniary loss.⁵² And so the Court concluded that the Jones Act, too, having inherited the Supreme Court's interpretation in *Vreeland* of Lord Campbell's Act and the Federal Employers' Liability Act, also limited recovery to "pecuniary loss."⁵³ The Court therefore held that "there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman."⁵⁴

[3] But it is not apparent why barring damages for loss of society should also bar punitive damages. *Miles* itself suggests no such broad interpretation of "pecuniary loss"—it expressly notes that the Jones Act "evinces no general hostility to recovery under maritime law" and "does not disturb seamen's general maritime claims for injuries resulting from unseaworthiness."⁵⁵ Lord Campbell's Act and its progeny provide an opportunity for a sailor's widow and children to recover the money

that they were deprived of by his death. That is what "pecuniary loss" means: loss of money.⁵⁶ Non-pecuniary damages have long been understood to mean claims for such injuries as physical pain, mental anguish, or humiliation,⁵⁷ as well as loss of consortium. Punitive damages, allowed by *Evich*, are not "pecuniary loss." Though they are pecuniary, that is, like all damages, for money, they are not for loss. They are punitive, not compensatory. Their relationship to loss is that they may not exceed some multiple of the compensatory damages.⁵⁸

That a widow may not recover damages for loss of the companionship and society of her husband has nothing to do with whether a ship or its owners and operators deserve punishment for callously disregarding the safety of seamen. One might reasonably argue that loss of society is more important than such punishment, or that such punishment is more important than loss of society. However, it cannot reasonably be argued that they are both compensation for "loss." If they were, they would fall within the rubric of compensatory damages, not punitive damages.

Following *Miles*, we held in *Smith v. Trinidad Corp.* that loss of consortium damages are unavailable to the wives of injured mariners in their own actions under the Jones Act or general admiralty law.⁵⁹ And we noted in *Chan v. Society Expeditions, Inc.* that neither the general

50. *Id.* at 31, 111 S.Ct. 317 (quoting then 46 U.S.C. App. § 762, now 46 U.S.C. App. § 30303).

51. *Id.*

52. *Id.* at 32, 111 S.Ct. 317.

53. *Id.* (citing *Michigan Cent. R. Co. v. Vreeland*, 227 U.S. 59, 69–71, 33 S.Ct. 192, 57 L.Ed. 417 (1913)).

54. *Id.* at 33, 111 S.Ct. 317.

55. *Id.* at 29, 111 S.Ct. 317.

56. See *Pecuniary and Pecuniary Damages*, BLACK'S LAW DICTIONARY (10th ed. 2014).

57. CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 105 (West 1935).

58. See, e.g., *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513–15, 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008).

59. 992 F.2d 996 (9th Cir. 1993).

maritime law nor the Jones Act permits recovery for loss of society for the wrongful death of a seaman, nor does the Jones Act permit it for injury.⁶⁰ Neither speaks to punitive damages.

Whatever room might be left to support broadening *Miles* to cover punitive damages was cut off by the Supreme Court's decision in *Atlantic Sounding Co. v. Townsend*.⁶¹ The shipowner in *Townsend* argued that *Miles* barred punitive damages for willful failure to pay maintenance and cure.⁶² The Court noted that “[h]istorically, punitive damages have been available and awarded in general maritime actions.”⁶³ It found “that nothing in *Miles* or the Jones Act eliminates that availability.”⁶⁴ Unseaworthiness is a general maritime action long predating the Jones Act.⁶⁵

It is true, as Dutra contends, that *Miles*, taken alone, might arguably be read to suggest that the available damages for a general maritime unseaworthiness claim by an injured seaman should be limited to those damages permissible under the Jones Act for wrongful death. But that is a stretch. The remark upon which Dutra relies is Miles's justification for its narrow-

er conclusion: “that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman.”⁶⁶ Dutra takes that narrow remark out of context and reads it expansively.⁶⁷ Miles's juxtaposition of the terms “pecuniary” and “non-pecuniary loss” was with reference to loss of society, not punitive damages.⁶⁸ *Miles* did not address punitive damages. It expressly noted that the Jones Act “evinces no general hostility to recovery under maritime law” and “does not disturb seamen's general maritime claims for injuries resulting from unseaworthiness.”⁶⁹ *Miles* further holds that lost future earnings are unavailable in a general maritime survival action.⁷⁰ But that is because “[t]he Jones Act/[Federal Employers' Liability Act] survival provision limits recovery to losses suffered during the decedent's lifetime.”⁷¹

It is also true, as Dutra argues, that if we were to interpret *Miles* broadly and *Townsend* narrowly, as the Fifth Circuit has in *McBride*, then we might infer that *Miles* implicitly overruled *Evich*. But we would then have to disregard Miles's statement that the Jones Act “does not disturb

60. 39 F.3d 1398, 1407 (9th Cir. 1994).

61. 557 U.S. 404, 129 S.Ct. 2561, 174 L.Ed.2d 382 (2009).

62. *Id.* at 418–19, 129 S.Ct. 2561.

63. *Id.* at 407, 129 S.Ct. 2561.

64. *Id.*

65. *See id.* at 419, 129 S.Ct. 2561; *see also Miles*, 498 U.S. at 29, 111 S.Ct. 317; *Tabingo v. Am. Triumph LLC*, 188 Wash.2d 41, 391 P.3d 434, 438–40 (2017).

66. *Miles*, 498 U.S. at 33, 111 S.Ct. 317.

67. *Miles* states:

The Jones Act also precludes recovery for loss of society in this case. The Jones Act applies when a seaman has been killed as a result of negligence, and it limits recovery

to pecuniary loss. The general maritime claim here alleged that Torregano had been killed as a result of the unseaworthiness of the vessel. It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence. We must conclude that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman.

Id. at 32–33, 111 S.Ct. 317.

68. *See id.* at 31–33, 111 S.Ct. 317.

69. *Id.* at 29, 111 S.Ct. 317.

70. *Id.* at 36, 111 S.Ct. 317.

71. *Id.*

seamen's general maritime claims for injuries resulting from unseaworthiness."⁷² The Fifth Circuit's leading opinions in *McBride* are scholarly and carefully reasoned, but so are the dissenting opinions, which to us are more persuasive.

Starting with Lord Campbell's Act, and continuing through the Federal Employers' Liability Act, the Death on the High Seas Act, and the Jones Act, wrongful death is a statutory cause of action.⁷³ There is no way to compensate a dead seaman for the wrong done to him. Compensation for his survivors is generally limited by statute to their resulting "pecuniary loss."⁷⁴ These limitations, based on the restrictive recoveries permitted for wrongful death, have no application to general maritime claims by living seamen for injuries to themselves. The *Townsend* Court made this distinction when addressing maintenance and cure actions,⁷⁵ and there is no persuasive reason to distinguish maintenance and cure actions from unseaworthiness actions with respect to the damages awardable. The purposes of punitive damages, punishment and deterrence,⁷⁶ apply equally to both of these general maritime causes of action. Nor are punitive damages compensation for a pecuniary or non-pecuniary "loss," as described

in *Miles*.⁷⁷ They are not compensation for loss at all. One might argue for or against the desirability of punitive damages, but unless Congress legislates on the matter, their availability is clearly established not only in *Townsend*⁷⁸ but also in *Baker*.⁷⁹ They have been recognized as proper in appropriate circumstances since *The Amiable Nancy*.⁸⁰

Conclusion

The district court correctly denied Dutra's motion to strike the prayer for punitive damages. They are indeed awardable to seamen for their own injuries in general maritime unseaworthiness actions. Under *Miller v. Gammie*,⁸¹ we cannot treat *Evich* as overruled by *Miles* unless *Miles* is "fundamentally inconsistent with the reasoning"⁸² of *Evich* and *Evich* is "clearly irreconcilable"⁸³ with *Miles*. It is not. Under the *Miller* standard, *Evich* remains good law. And under *Townsend*, we would reach the same conclusion *Evich* did, even if we were not bound by *Evich*.

AFFIRMED.



72. *Id.* at 29, 111 S.Ct. 317.

73. *Id.* at 31–32, 111 S.Ct. 317.

74. *Id.* at 31, 32, 111 S.Ct. 317 (citing *Vreeland*, 227 U.S. at 69–71, 33 S.Ct. 192).

75. 557 U.S. at 419–20, 129 S.Ct. 2561.

76. See *Exxon Shipping Co.*, 554 U.S. at 492–93, 128 S.Ct. 2605.

77. See 498 U.S. at 30–33, 111 S.Ct. 317.

78. 557 U.S. at 407, 129 S.Ct. 2561 (“Historically, punitive damages have been available and awarded in general maritime actions. . . . We find that nothing in *Miles* or the Jones Act eliminates that availability.”).

79. 554 U.S. at 489–90, 515, 128 S.Ct. 2605 (noting that the issue of punitive damages in 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,” and allowing an award of punitive damages).

80. 16 U.S. (3 Wheat.) 546, 4 L.Ed. 456 (1818).

81. 335 F.3d 889 (9th Cir. 2003).

82. *Id.* at 892.

83. *Id.* at 893.

APPENDIX B

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAY 02 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

CHRISTOPHER BATTERTON,

Plaintiff-Appellee,

v.

DUTRA GROUP,

Defendant-Appellant.

No. 15-56775

D.C. No. 2:14-cv-07667-PJW
Central District of California,
Los Angeles

ORDER

Before: THOMAS, Chief Judge, and KLEINFELD and NGUYEN, Circuit Judges.

The panel has voted to deny the petition for rehearing. Chief Judge Thomas and Judge Nguyen have voted to deny the petition for rehearing en banc, and Judge Kleinfeld has recommended the same.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and petition for rehearing en banc are DENIED.

APPENDIX C

2014 WL 12538172

Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Christopher BATTERTON, Plaintiff,
v.
The DUTRA GROUP, Defendant.

CASE NO. 14-CV-7667-PJW
|
Signed 12/15/2014

Attorneys and Law Firms

Adam Kent Shea, Brian J. Panish, J. Patrick Kravetz
Gunning, Panish Shea and Boyle LLP, Los Angeles, CA,
Christopher Vincent Bulone, Preston Easley, Law Offices
of Preston Easley, San Pedro, CA, for Plaintiff.

Barry W. Ponticello, England Ponticello & St. Clair, San
Diego, CA, for Defendant.

ORDER DENYING DEFENDANT'S MOTION
TO STRIKE PUNITIVE DAMAGES FROM THE
COMPLAINT OR IN THE ALTERNATIVE TO
DISMISS FOR FAILURE TO STATE A CLAIM

PATRICK J. WALSH, UNITED STATES
MAGISTRATE JUDGE

I.

INTRODUCTION

*1 Before the Court is Defendant The Dutra Group's motion to strike Plaintiff's punitive damages claim. Alternatively, Defendant moves to dismiss that claim for failure to state a claim upon which relief may be granted. For the following reasons, the motion is denied.

II.

STATEMENT OF FACTS

Plaintiff Christopher Batterton is a former employee of The Dutra Group. (First Amended Complaint ("FAC") at ¶ 1.) He worked as a deckhand and crew member on

a number of vessels that were owned and operated by Defendant. (FAC at ¶ 2.) In August 2014, he was working aboard the SCOW 3 near Newport Beach, California, when a hatchcover blew open as a result of too much pressure in a compartment below the hatch and crushed his left hand. (FAC at ¶ 5.) Plaintiff sustained serious injuries and believes that he will be permanently disabled as a result. (FAC at ¶ 11.)

Following the accident, Plaintiff brought this action for negligence, unseaworthiness, maintenance and cure, and unearned wages. He seeks general and punitive damages. (FAC at 7.) Defendant moves to dismiss Plaintiff's punitive damages claim under Federal Rule of Civil Procedure 12(b)(6) on the ground that, as a matter of law, punitive damages are not available in a maritime action. For the following reasons, the motion is denied.¹

¹ Defendant also argues that the punitive damages claim should be stricken under Federal Rule of Civil Procedure 12(f) on the ground that it is "redundant, immaterial, impertinent, or scandalous." (Motion at 4.) The Court finds that Rule 12(f) does not apply, see *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, (9th Cir. 2010) (holding "Rule 12(f) does not authorize district courts to strike claims for damages on the ground that such claims are precluded as a matter of law"), and analyzes the motion under Rule 12(b)(6).

III.

ANALYSIS

A. Standard of Review

In ruling on a motion to dismiss, the Court accepts as true the factual allegations contained in the complaint and views all inferences in a light most favorable to the plaintiff. See *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001). Dismissal for failure to state a claim is appropriate if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Id.* Dismissal is appropriate only if there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

B. The Law of this Circuit Holds that Punitive Damages are Available in Unseaworthiness Claims

Defendant moves to dismiss Plaintiff's punitive damages claim, arguing that under "controlling, unequivocal, and settled legal authority ... punitive damages are not available for personal injury actions based on claims of unseaworthiness." (Motion at 3.) In support of its motion, it relies primarily on the Supreme Court's decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), and the Fifth Circuit's decision in *McBride v. Estis Well Service, LLC*, 768 F.3d 382 (5th Cir. 2014) (en banc). In *Miles*, the Supreme Court held that the family of a seaman who had died on a ship could not recover non-pecuniary damages for loss of society because such damages were barred by the Jones Act, which governed, and the family could not sidestep that bar by bringing a claim for unseaworthiness under general maritime law. In *McBride*, decided by an en banc panel of the Fifth Circuit in September of this year, the court held that punitive damages were barred in unseaworthiness actions under general maritime law.

*2 Plaintiff contends that *Miles* was limited to wrongful death suits and does not bar punitive damages here. In support of his argument, he cites *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 419 (2009), wherein the Supreme Court held that punitive damages were available in maintenance and cure actions because they were available before the Jones Act and the Jones Act did not purport to change that law. As to *McBride*, Plaintiff argues that it is not binding on this Court and that *Evich v. Morris*, 819 F.2d 256, 258 (9th Cir. 1987) (overruled on other grounds), which is, specifically holds that punitive damages are available in unseaworthiness claims.

Having closely read all of these cases and a host of others on point, the Court is certain of one thing: the law on this issue is not unequivocal or settled as urged by Defendant. In fact, the Court would characterize the law as equivocal and unsettled. To begin with, the United States Supreme Court has never decided whether punitive damages are available in an unseaworthiness claim like the one at bar. And, though the Fifth Circuit took a stab at the issue in September, the majority garnered only eight of 15 votes. Thus, seven of the 15 appellate judges who decided this issue three months ago believed that punitive damages were available in unseaworthiness claims under general maritime law.

The Court then turns to the Ninth Circuit law. In *Evich*, decided in 1987, the Ninth Circuit made clear that punitive damages are available in unseaworthiness claims under general maritime law. *Evich*, 819 F.2d at 258. Interestingly, the Court relied on a Fifth Circuit case, *In re Merry Shipping, Inc.*, 650 F.2d 622, 625 (5th Cir. 1981), to reach this conclusion. In 1990, the Supreme Court decided *Miles*, holding that non-pecuniary damages were not available in wrongful death suits by family members because they were not available under the governing Jones Act and the family members were not allowed to sidestep this bar by suing under general maritime law. In the wake of *Miles* it was uncertain whether *Evich* was still good law. In 1994, in *Sutton v. Earles*, 26 F.3d 903, 919-20 (9th Cir. 1994) and *Davis v. Bender Shipbuilding & Repair Co.*, 27 F.3d 426, 427 (9th Cir. 1994), the circuit explained that it was, holding that *Miles* only called into doubt *Evich*'s holdings as to survival actions asserted by seamen's estates in wrongful death suits. Nothing from the Ninth Circuit since then has suggested that the law is otherwise.

Thus, as the Court sees it, *Evich*'s holding that punitive damages are available in unseaworthiness claims under general maritime law has never been expressly or impliedly overruled. Nor is it clearly irreconcilable with *Miles* or any of the Supreme Court's other decisions since 1987. As such, it is still good law in this circuit. See, e.g., *Wagner v. Kona Blue Water Farms, LLC*, No. 9-600 JMS/BMK, 2010 WL 3566731, at *6-7 (D. Hi. Sept. 13, 2010) (holding *Evich*'s holding that punitive damages are available in general maritime suit still good law in the Ninth Circuit despite *Miles*); *Rowe v. Hornblower Fleet*, No. C-11-4979 JCS, 2012 WL 5833541 (N.D. Cal. Nov. 16, 2012) (denying motion to dismiss punitive damages claim in unseaworthiness action as "[t]here are no provisions in the Jones Act that limit the right to seek punitive damages on a claim for unseaworthiness ... [and] *Evich* is not clearly irreconcilable with *Miles* and *Atlantic Sounding*."). For these reasons, Defendant's motion to dismiss Plaintiff's punitive damages claim is denied.

*3 IT IS SO ORDERED.

DATED: December 15, 2014.

All Citations

Not Reported in Fed. Supp., 2014 WL 12538172

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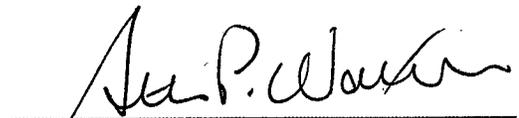
CERTIFICATE OF SERVICE

I, Seth P. Waxman, a member of the bar of this Court, certify that on this 7th day of June 2018, I caused all parties requiring service in this matter to be served with a copy of the foregoing by first-class mail at the addresses listed below:

ADAM KENT SHEA
BRIAN J. PANISH
PANISH SHEA AND BOYLE LLP
11111 Santa Monica Boulevard Suite 700
Los Angeles, CA 90025
310-477-1700
shea@psblaw.com
panish@psblaw.com

PRESTON WARHAM EASLEY JR.
PRESTON EASLEY LAW OFFICES
2500 Via Cabrillo Marina Suite 106
San Pedro, CA 90731
310-832-5315
maritime@earthlink.net

DAVID ROBERTSON
P.O. Box 699
Dripping Springs, TX 78705
512-858-4158
drobertson@law.utexas.edu



SETH P. WAXMAN