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PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: MERCEDEL W. MILES, INDIVIDUALLY AND AS
ADMINISTRATRIX OF THE SUCCESSION OF
LUDWICK ADAM TORREGANO, Petitioner V.
APEX MARINE CORPORATION, ET AL.

CASE NO: 89-1158

PLACE: Washington, D.C.

DATE: October 3, 1990

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MERCEDEL W. MILES, INDIVIDUALLY :

4 AND AS ADMINISTRATRIX OF THE :

5 SUCCESSION OF LUDWICK ADAM :

6 TORREGANO, :

7 Petitioner :

8 v. : No. 89-1158

9 APEX MARINE CORPORATION, ET AL. :

10 - - - - - X

11 Washington, D.C.

12 Wednesday, October 3, 1990

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States at
15 1:00 p.m.

16 APPEARANCES:

17 ALLAIN F. HARDIN, ESQ., New Orleans, Louisiana; on behalf
18 of the Petitioner.

19 GERARD T. GELPI, ESQ., New Orleans, Louisiana; on behalf of
20 the Respondent.

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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 89-1158, Mercedel W. Miles v. Apex Marine Corporation.

Mr. Hardin.

ORAL ARGUMENT OF ALLAIN F. HARDIN

ON BEHALF OF THE PETITIONER

MR. HARDIN: Mr. Chief Justice, and may it please the Court:

In Moragne v. States Marine Lines this Court recognized the general maritime wrongful death cause of action. In Sea-Land Services v. Gaudet this Court established the damages allowed thereunder. In this case the Court has the opportunity to address and define the beneficiaries who may recover under this cause of action. Additionally, the Court has the opportunity to define what damages are allowed under a general maritime survival action.

QUESTION: (Inaudible).

MR. HARDIN: Correct, Your Honor. The facts of this case involve the death of a 24-year-old seaman who was horrendously killed off the coast of the State of Washington. He was survived only by his parents. There was no issue or wife. Unseaworthiness was found as a matter of

1 law, and Jones Act negligence was assessed.

2 The first issue that this Court must address is
3 whether or not a dependency must be established by the
4 parents before they have a claim for loss of society
5 damages. The second issue is whether or not an estate under
6 a survival action has a claim for decedent's economic loss
7 when not otherwise recovered.

8 The context of this case must be remembered
9 because in Moragne what the Court did was to bring into the
10 20th century the maritime wrongful death cause of action.
11 What it has also done by that case is to foreclose State
12 remedies in the maritime jurisdiction. Before that wasn't
13 the case. And this takes on great importance when it comes
14 to deaths that result in territorial waters, because State
15 remedies no longer apply. In fact, those have been
16 foreclosed.

17 A case that is of significance in this area is
18 Foremost v. Richardson, where it was held that if two
19 pleasure boats in a collision on the Emite River in the
20 State of Louisiana was held to fall within the maritime
21 jurisdiction. So that death cases on -- in territorial
22 waters, the damages are established by this Court.

23 QUESTION: You're talking about a lot of different
24 overlaps, Mr. Hardin, aren't you? The Jones Act, the Death
25 on the High Seas Act, the maritime law. You're not

1 suggesting that in this case the Court can straighten out
2 all the edges?

3 MR. HARDIN: No, I think it's impossible, Your
4 Honor, just given the contradictory nature of the various
5 statutes. The point I was trying to make is that now that
6 there is a Federal wrongful death cause of action in the
7 maritime law, State remedies no longer apply in that area.
8 And it takes -- it is significant. It is very significant,
9 because in the old days when the Harrisburg was good law,
10 state remedies would apply.

11 In this particular case we are dealing with a
12 Jones Act seaman, and what I am trying to show, and the
13 first issue I would like to address, is whether parents must
14 establish financial dependency.

15 The Fifth Circuit says they must. I submit that
16 that is an incorrect decision, and the basis being first of
17 all --

18 QUESTION: This is in a wrongful death action?

19 MR. HARDIN: Yes, Your Honor. I am not speaking
20 of the survival action at this point.

21 QUESTION: Okay.

22 QUESTION: Well, I suppose we have to decide
23 whether there is such a cause of action. I think you are
24 kind of jumping over a critical step.

25 MR. HARDIN: Your Honor, I -- I am. I was getting

1 to the dependency issue first. But to respond to your
2 question, it's been universally recognized by the courts of
3 appeals; the underlying courts have recognized it also. Not
4 to recognize it would be devastating to many claims, because
5 when you are talking about nonseamen, you are talking about
6 pain and suffering being done away with, medical expenses
7 prior to death --

8 QUESTION: Well, why should this Court create such
9 a cause of action if Congress hasn't done so?

10 QUESTION: Well, what -- what are you talking
11 about? Wrongful death action?

12 MR. HARDIN: No, the question was directed to the
13 survival action, and that was what I was addressing.
14 Congress has not spoken in this area, and that is correct.
15 But I think this Court is well aware of the authority it has
16 within the admiralty jurisdiction, and it has exercised that
17 jurisdiction before, for example in Moragne and in Gaudet.

18 To get to the point --

19 QUESTION: And in Higginbotham.

20 MR. HARDIN: And also in Higginbotham, Your Honor.

21 But to get to the point of the wrongful death on
22 the statutory -- that is on the statutory guides that are
23 to be utilized, the point I am making here is that
24 dependency does not have to be established in order to have
25 a claim under DOHSA or under the Jones Act. Dependency is

1 an adjective, appears before next of kin and relatives. It
2 does not appear before parents. And I think Congress had
3 the intention of allowing parents to have a recovery even
4 if they were not dependent. For example, in this very case
5 Mrs. Miles had an award of \$7,800 even though she was not
6 dependent.

7 The other --

8 QUESTION: You are talking now about a wrongful
9 death claim, not a survivor claim.

10 MR. HARDIN: Correct, Your Honor. I -- I'm in the
11 wrongful death area, not the survival action.

12 QUESTION: And what is the statutory text you are
13 appealing to now?

14 MR. HARDIN: Death on the High Seas Act.

15 QUESTION: Where is it in your brief that you say
16 parents are not --

17 MR. HARDIN: It's in the appendix, Your Honor.

18 QUESTION: Well, why don't you give me a page so
19 I can look at the words?

20 MR. HARDIN: It's on page A-1, and the Jones Act
21 is referred to on the subsequent pages, and it applies FELA,
22 F-E-L-A.

23 QUESTION: But where you said -- you're relying
24 on the act, on the language "for the exclusive benefit of
25 the decedent's wife, husband, parent, child, or dependent

1 relative"? What language are you relying on --

2 MR. HARDIN: I am relying on that very language.
3 What has happened is the lower court has said in order to
4 claim loss of society damages, dependency has to be
5 established. I represent the parents of a deceased seaman.
6 My point is that if we are to look to the statutes as a
7 guide, as this Court has held, then you will see that
8 dependency as an adjective only comes after parents.

9 QUESTION: You are not talking -- you're not
10 saying the Death on the High Seas Act covers your case?

11 MR. HARDIN: No, not at all.

12 QUESTION: You are just saying by analogy.

13 MR. HARDIN: Not at all. In fact, it has been
14 specifically held in Gaudet the distinction, and in
15 Higginbotham, that the distinction was made, this is
16 territorial water claim as opposed to the death on the high
17 seas claim.

18 QUESTION: And the Jones Act does not allow loss
19 of society damages for death resulting from negligence,
20 isn't that right?

21 MR. HARDIN: It does not allow --

22 QUESTION: It does not.

23 MR. HARDIN: -- nonpecuniary damages for deaths
24 caused by negligence of the ship owner. That is correct,
25 Your Honor.

1 QUESTION: And if we were to confine that Gaudet
2 case to its facts, I guess we wouldn't find any basis for
3 liability here.

4 MR. HARDIN: But you would, Your Honor. I'm
5 saying that Gaudet, what it did was it recognized the
6 damages of loss of society in the general maritime law.
7 That action applies to seamen on the unseaworthiness claim,
8 as opposed to his Jones Act claim which comes on the law
9 side of the court.

10 But I'd also like to point out as far as
11 dependency, I would submit that it's inappropriate to use
12 that as a requirement, since loss of society damages are
13 nonfinancially based. They don't arise from any financial
14 connection with the decedent. They are -- they speak
15 directly to the bonds that would take place between family
16 members. They exist --

17 QUESTION: How much of a family bond is there
18 between an emancipated seaman, 23 or 24 years old, and his
19 adult parents?

20 MR. HARDIN: There is some, Your Honor.

21 QUESTION: Well, how much though? It's not like
22 having children at home.

23 MR. HARDIN: Well, if it's a matter to quantify,
24 then that may very well go to the issue of damages, as to
25 the amount, as to what is the relationship between that

1 person and the decedent.

2 QUESTION: Well, you -- you might say that in a
3 particular case one's great aunt was very dear to him, and
4 there was a loss of society there. But that doesn't mean
5 you create a cause of action for the loss of society of your
6 great aunt. You draw the line based largely on, as a group
7 is there -- does there tend to be a significant loss of
8 society here.

9 MR. HARDIN: Your Honor, I submit that there is
10 a tremendous loss of society. This is the youngest child
11 of this lady. There was a close bond that existed between
12 the two. When he came back to the city they would -- he
13 would stay there. Your Honor, they are real damages. I
14 agree that a line has to be drawn, and I am not saying here
15 to extend it to whoever you could make up or include as a
16 person that would have some connection --

17 QUESTION: What about brothers and sisters?

18 MR. HARDIN: They would not be, unless they are
19 dependent. Because I am saying to apply the statutes, that
20 is DOHSA and the Jones Act, as the guides. If the brothers
21 and sisters are nondependent, they would not qualify for
22 loss of society damages. However, parents don't have a
23 dependency requirement.

24 And I am saying draw the line like Congress drew
25 the line. That is all I am asking. I am not here for

1 mothers-in-laws, or brother and -- or nondependent brothers
2 and sisters, or aunts and uncles. In fact I have got a
3 class that I view is more manageable than a dependency. A
4 mother-in-law could be dependent upon the deceased seaman,
5 and she would have a claim for loss of society damages.

6 QUESTION: Is it clearly established that
7 nondependent parents may recover for loss of society under
8 Death on the High Seas?

9 QUESTION: No.

10 MR. HARDIN: It is clearly established that they
11 may not.

12 QUESTION: All right.

13 QUESTION: Just like the Jones Act.

14 QUESTION: And the same with the Jones Act,
15 correct?

16 MR. HARDIN: That is correct.

17 QUESTION: All right.

18 MR. HARDIN: But there has always been a
19 traditional separation of the general maritime remedies for
20 seamen, and also the Jones Act claim under the law court on
21 the other side.

22 QUESTION: And yet you urge us to incorporate from
23 the Jones Act by analogy. You can't have it both ways.

24 MR. HARDIN: Well, that's the direction that the
25 Court has given, Your Honor, that to use as a guide in

1 formulating your general maritime remedies and damages, to
2 use those that exist on the law side of the court. And to
3 use that as a guide, the line that is drawn is after parents
4 when it comes to dependencies.

5 And I can't emphasize enough that I have the
6 restrictive class, because to say that someone is dependent
7 is to say well, it's based upon a financial relationship.
8 Verdicts are going to be unreasonable, inconsistent, and
9 unfair if that is the criteria upon which loss of society
10 damages are to be awarded.

11 QUESTION: Well, Mr. Hardin, you can make a
12 sympathetic argument on that point, but unless we're
13 satisfied that loss of society damages can be awarded at
14 all we don't get there.

15 MR. HARDIN: Your Honor --

16 QUESTION: And I think that you have a much harder
17 case on that question.

18 MR. HARDIN: Your Honor, I think the point that
19 you have -- that you are bringing out is that the Jones Act
20 has preempted the general maritime law. That has
21 specifically been held by this Court, for example in the
22 American Export Lines v. Alvez, that it does not. That they
23 do not preempt. That it is better to give the remedy than
24 to foreclose it if there is no inflexible rules --

25 QUESTION: Has this Court recognized such a cause

1 of action in the circumstances here?

2 MR. HARDIN: Not under these exact circumstances,
3 Your Honor.

4 QUESTION: No. So you have to persuade us that
5 we should.

6 MR. HARDIN: Right. And the point I would make
7 in response to that, Your Honor, is that this is a Jones Act
8 claim on one hand, but it has always been the practice, and
9 it has been what has been taking place in the lower courts,
10 is that there is likewise a general maritime claim based
11 upon unseaworthiness.

12 And I think the point has to be brought home this
13 way. The Court, in overruling the Harrisburg, addressed
14 directly that they were applying this new cause of action
15 to seamen. The Harrisburg involved the death of a seaman
16 in territorial waters. And the respondents argue, well,
17 then -- well, no, in Moragne, by overruling the Harrisburg,
18 only meant to apply to longshoremen and not to seamen. But
19 why overrule a case that dealt directly with that? It just
20 doesn't make sense, Your Honor, is what I am pointing out.

21 QUESTION: Well, there is a wrongful death action,
22 I suppose, isn't there? We have recognized a wrongful death
23 action --

24 MR. HARDIN: Yes, you have, Your Honor.

25 QUESTION: -- under the general maritime law.

1 MR. HARDIN: Yes, you have.

2 QUESTION: And the court of appeals said well, we
3 won't give you nonpecuniary loss because we think that we
4 ought to hold the same as the Jones Act.

5 MR. HARDIN: They didn't hold that though. They
6 didn't -- Your Honor, they did not address that issue. What
7 they said was I didn't show dependency.

8 QUESTION: Was that we ought to be uniform. They
9 said we ought to have a uniform -- if they -- if you --
10 didn't they take some guidance from the Jones Act?

11 MR. HARDIN: Yes they did. They spoke in terms
12 of the uniformity. But --

13 QUESTION: And DOHSA.

14 MR. HARDIN: Yes. But uniformity in this area
15 cannot be held -- cannot be had, given the decision in
16 Higginbotham.

17 QUESTION: And why would, why would there be, in
18 the court of appeals' view, a recovery for loss of society
19 if the parents were dependent?

20 MR. HARDIN: Because it -- it's under the general
21 maritime law. That is where it is allowed. That is Gaudet
22 applying to seamen.

23 QUESTION: Okay.

24 MR. HARDIN: Which is what I am arguing here, that
25 it should be applied to seamen, and that it shouldn't be a

1 rule of dependency. Gaudet -- bottom line on the Gaudet
2 case is that in reality it is a seaman's case, even though
3 it was a longshoreman, because it was based upon
4 unseaworthiness.

5 QUESTION: But -- the facts of Gaudet were
6 longshoreman.

7 MR. HARDIN: That's correct, Your Honor. But --

8 QUESTION: It was a 5 to 4 decision. The Court
9 is not likely to extend it.

10 MR. HARDIN: I understand though that it would
11 still be stare decisis as far as the Court is concerned, at
12 least I am hopeful of that. I can't say what the Court is
13 going to do.

14 But I say the issue has already been decided. It
15 is an unseaworthiness claim. The only reason the
16 longshoreman has the unseaworthiness claim was because he
17 was doing work of a seaman. So it doesn't make sense not
18 to apply it to seamen, because it was a seaman's remedy that
19 was at issue there.

20 QUESTION: The longshoreman couldn't have been
21 under the -- couldn't have recovered under the Jones Act.

22 MR. HARDIN: No, he could not. But he could
23 utilize territorial --

24 QUESTION: Even if he was doing seamen's work.

25 MR. HARDIN: That is correct. But he could

1 utilize State remedies. And this -- when the Court is
2 fashioning this remedy in terms of the seaman, you must
3 remember that it also applies to the nonseaman alike. And
4 what I am trying to emphasize is by not allowing, by having
5 no nonpecuniary damages, that is, no loss of society, what
6 the Court will end up doing if dependency is the requirement
7 is for example the case I cited, Neal v. Barisich, which was
8 upheld by the Fifth Circuit in an unpublished opinion.

9 We had a 19 year old seaman knocked off board a
10 vessel by a collision; his body was found later. And the
11 only damages that were left in that case were funeral
12 expenses and nothing more, because there was no dependency.

13 I don't think that's what the admiralty law is all
14 about. Take it or no --

15 QUESTION: I don't understand what principle you
16 are appealing to, that somebody has to be able to collect
17 money when somebody wrongfully dies, no matter what? I
18 mean, if he has no children, no parents, we've got to find
19 somebody to give money to?

20 MR. HARDIN: Well, it goes back -- in admiralty
21 law it goes back to the old principle that the wrongdoer
22 should not benefit from his own wrong. That's the principle
23 --

24 QUESTION: But he shouldn't have to compensate
25 any more than there have been actual damages incurred by

1 that wrong, either. And if a person has no dependents, the
2 funeral expenses are the actual damages.

3 MR. HARDIN: But if there is a loss of society
4 damage that exists in fact --

5 QUESTION: If there is such a thing.

6 MR. HARDIN: -- why base it upon dependency?
7 That's not a good rule, that I would submit. It's not a
8 good rule.

9 QUESTION: If you are urging loss of society as
10 a reason why we can give compensation to a whole bunch of
11 people that aren't getting it now, I mean, you know, that
12 may appeal to some and not appeal to others.

13 MR. HARDIN: Your Honor, to bring home the point
14 in the nonseaman area, there are cases -- there is a
15 situation where children, that is 17 through 19 years old,
16 are killed by another pleasure boater, that is a 40-foot
17 cigarette boat, and this is a real case, rakes over the top
18 of the vessel. Impact injuries instantly kill four children
19 on board that vessel. Under the law, if dependency is the
20 requirement, because they were -- clearly did not support
21 their parents, the only damages that would be allowed are
22 the funeral expenses. State law at least allowed those type
23 of damages, the nonpecuniary damages. But this Court, by
24 creating the wrongful death remedy, has taken those State
25 remedies out.

1 QUESTION: Mr. Hardin, can I just stop you right
2 -- have we held that, that there are no State remedies in
3 territorial waters?

4 MR. HARDIN: Your Honor, you have held it in the
5 language that was used in Moragne. Part of the reason for
6 Moragne was to do away with the conflicting State remedies.
7 Admiralty law was to be uniform. The lower Federal courts
8 have interpreted it that way, that you have done away with
9 -- it's the reversed Erie doctrine, is what it is. State
10 courts are required to apply the Federal --

11 QUESTION: Is it uniformly held in the lower
12 courts that there is no State cause -- State wrongful death
13 action in the territorial waters?

14 MR. HARDIN: The case -- it is uniformly held --
15 all I know is the cases that have been decided. In the
16 Fifth Circuit, S.S. Helena specifically held that. The case
17 I cited, Truehart v. Blandon, specifically holds that. Neal
18 v. Barisich specifically holds that. And I think the lower
19 courts --

20 QUESTION: Are they all Fifth Circuit cases?

21 MR. HARDIN: Yes.

22 QUESTION: I just wonder if that is critical to
23 your argument. I am just not sure it is.

24 MR. HARDIN: Well, it's not critical to the
25 element of the argument. I am just, I am trying to bring

1 home the point of the effect of this ruling will have in the
2 general maritime law. It goes beyond just seamen. It is
3 the ship owner's position that the pendency was what was
4 required to be shown, as per Gaudet, simply by the use of
5 that term by this Court.

6 I would point out that in the dissent in Gaudet,
7 there the organ for the Court said that we have yet to
8 decide who the beneficiaries are under this cause of action.
9 So that Gaudet is not a case that establishes that only
10 dependents can recover this item of damages. And I have
11 also cited to the Court Cohen v. Virginia, where the general
12 expressions in one opinion do not necessarily control the
13 very point when it comes to issue in another case.

14 The ship owner also argues that the Jones -- that
15 is that the Jones Act preempts. And I pointed out that in
16 the Harrisburg, that is definitely not the case because it
17 overruled a seaman's case.

18 And more importantly, in Moragne the Court
19 addressed the third anomaly. And the third anomaly was that
20 longshoremen, who were relying upon the unseaworthiness
21 claim, which is a seaman's remedy, were granted a wrongful
22 death cause of action by relying upon State remedies in
23 territorial waters, where Jones Act seaman, because it
24 preempted the state law, was not allowed a claim. If a
25 seaman died strictly from an unseaworthiness condition and

1 not Jones Act negligence, then there would be no recovery
2 in that case.

3 And the Court in Gaudet, when it was referring to
4 Moragne about the three anomalies, said that Moragne ended
5 these anomalies. So clearly the Court was saying that the
6 benefit was being provided to seamen. The same thing is
7 addressed in footnote 12 of Moragne, where it is clear from
8 that --

9 QUESTION: We were either saying that or we were
10 mistaken.

11 MR. HARDIN: It's your call.

12 QUESTION: Well, we weren't holding that it ended
13 the anomalies, if it in fact didn't. I mean, that was our
14 interpretation, I suppose, of what the effect of the earlier
15 case was. But that might have been -- might have been an
16 error. I mean, we didn't report to be holding anything new
17 in that case.

18 MR. HARDIN: I can only tell you what the Court
19 said in Gaudet, saying that Moragne ended these anomalies.

20 QUESTION: To me there are still some anomalies
21 around. I think today's argument -- to convince me of it.

22 MR. HARDIN: Also, in American Export Lines v.
23 Alvez, the issue of statutory preemption was addressed
24 directly, and then it was -- and clearly rejected.

25 The second issue in this case is whether or not

1 an estate has a claim for a decedent's economic loss when
2 not recovered by loss of support. It's opposition that
3 there is clearly a survival action under the general
4 maritime law. I am now on that part of it.

5 Your Honor, I would submit that what the Evich
6 court in this instance was trying to do was to place back
7 the seaman, the basic principle, to the position he would
8 have been had he not been killed. And by that I mean is
9 that had he lived his normal life there would have been an
10 estate at the end of that life that would have gone to his
11 beneficiaries.

12 And that is all the Evich court has done, is put
13 that person back where he was before, that there would have
14 been an estate. We are not talking about substantial
15 damages. We are talking about actually a small amount. For
16 example, in Muirhead, the case relied upon in Evich, the
17 total award for a residual estate was \$10,000, because it's
18 net earnings offset by consumption to present value. We are
19 not talking about a significant item in damages.

20 QUESTION: Well, you're going to tell us next,
21 aren't you, that lost wages should be included?

22 MR. HARDIN: It forms an element of what was going
23 to be generated by the estate. But if the rule to be
24 applied is as it was in Muirhead, then we are dealing with
25 the residual estate, which is after consumption, which would

1 have been recovered on a loss of support side. And I should
2 point out that in an unpublished opinion that decision was
3 followed by the Ninth Circuit in Case No. 87-3984, Lasigne
4 v. Bacon.

5 Your Honors, I would like to reserve the balance
6 of my time.

7 QUESTION: Very well, Mr. Hardin.

8 Mr. Gelpi, we'll hear now from you.

9 ORAL ARGUMENT OF GERARD T. GELPI

10 ON BEHALF OF THE RESPONDENT

11 MR. GELPI: Mr. Chief Justice, and may it please
12 the Court:

13 (Inaudible) said there was no recovery except for
14 funeral expenses. To answer the query of Justice Scalia,
15 that was the proper result in that case. Just because
16 there's an accident or death doesn't automatically mean
17 there is liability. And just because there is liability
18 doesn't automatically mean there is a person entitled to
19 recover damages.

20 I was going to be a bit different in my approach
21 to my argument, but there are some things I think I need to
22 say first.

23 Moragne involved a longshoreman. At that time a
24 longshoreman had cause of action under State law if it
25 provided him a remedy for unseaworthiness. And Moragne gave

1 the longshoreman -- admittedly Moragne painted with a broad
2 brush, but it was a longshoreman's case, and it gave the
3 longshoreman the right to sue for unseaworthiness in the
4 event of a death case.

5 Gaudet, some 4 years --

6 QUESTION: Before you leave Moragne, when you say
7 it painted with a broad brush, I take it you are saying that
8 nothing in the opinion made it seem to turn on the fact the
9 man was a longshoreman.

10 MR. GELPI: I think there is some language in
11 Moragne that has been seized upon -- seized upon is too
12 strong a word, Mr. Justice Brennan -- Stevens, is too strong
13 a word which has been interpreted by the lower courts to say
14 that Moragne applied to seamen. There is no case, to my
15 knowledge, which was given a general maritime law wrongful
16 death benefit, no Supreme Court case --

17 QUESTION: Right.

18 MR. GELPI: -- to a seaman. Lindgren in 1930 said
19 no, that is not what the Jones Act meant. Gillespie, 34
20 years later, said no, that is not what the Jones Act meant.
21 And I suggest that the reasoning in Your Honors' opinion in
22 Higginbotham and Justice O'Connor's opinion in Tallentire
23 said where Congress has set out a scheme and has entered the
24 field and has preempted the field -- you all were both
25 talking about Death on the High Seas Act in those cases.

1 Where Congress has entered the field and has preempted it,
2 it has struck the balance for us. It did not create in the
3 Death on the High Seas Act a remedy which required and gave
4 only pecuniary loss to encourage courts to expand or
5 supplement that remedy.

6 Gaudet in 1974 was a 5 to 4 decision with a
7 vigorous dissent. It applied to a longshoreman.

8 QUESTION: By the circuit justice of the Fifth
9 Circuit.

10 MR. GELPI: Sir?

11 QUESTION: The dissent was by the circuit justice
12 for the Fifth Circuit.

13 MR. GELPI: Is that right?

14 QUESTION: Yes.

15 MR. GELPI: But even if you apply Gaudet to
16 seamen, I don't think we can extend it that far. Clearly,
17 --

18 QUESTION: Wouldn't you have been surprised, be
19 surprised though that the majority in Gaudet, five, or
20 whatever it was, would have come out differently if a seaman
21 had been injured?

22 MR. GELPI: I think Congress enters the field for
23 the seaman, and I think the answer is yes, Your Honor.
24 Alvez, an opinion cited by -- by --

25 QUESTION: You mean because of the Jones Act?

1 MR. GELPI: Yes, sir. In answer to --

2 QUESTION: did you make this point in your brief,
3 that there's no wrongful death action at all for the seaman?

4 MR. GELPI: Yes, sir.

5 The query posed by Mr. Chief Justice, can we
6 straighten all the edges, this is a very confused field.

7 QUESTION: But except for the Jones Act, I would
8 suppose that the majority would have come out the same way
9 if it had been for a seaman, because the Jones Act was cited
10 right in their face.

11 MR. GELPI: The Jones Act didn't find Gaudet --

12 QUESTION: I know, I know. But they have cited
13 by analogy. Why should the Jones Act -- why should you come
14 out differently than the Jones Act does.

15 MR. GELPI: Because the Jones --

16 QUESTION: That was the argument of the dissent.

17 MR. GELPI: Yes, sir. The Jones Act struck the
18 balance, to use Mr. Justice Stevens' words, struck the
19 balance. And he was talking about the Death on the High
20 Seas Act. But it's a symbol of Federal statute created in
21 -- passed in 1920, and supplemented by the Federal
22 Employers' Liability Act of 1908, as amended in 1910, to
23 provide remedies for seamen.

24 QUESTION: But how about in Moragne? The same
25 argument could have been made about the Jones Act sort of

1 thing, and that didn't prevent the Court from recognizing
2 a cause of action there.

3 MR. GELPI: Moragne did not deal with the Jones
4 Act. It dealt with -- it was creating a wrongful death
5 remedy for a longshoreman.

6 QUESTION: Sure, but the same type of argument
7 could have been made there, and the Court recognized a cause
8 of action.

9 MR. GELPI: There would have been -- I don't know
10 that that argument was in fact made. I don't read the
11 opinion as overcoming that argument. As I said before, I
12 view the opinion as painted with a very broad brush, which
13 I think has been narrowed by the wisdom of this Court in
14 Higginbotham and Tallentire. Alvez says the Jones Act
15 doesn't regulate longshoremen that strictly. Of course not.
16 The Jones Act doesn't regulate longshoremen at all. It
17 applies to seamen.

18 Now, it was mention of the third anomaly, and
19 Justice Scalia commented on that a bit. The third anomaly
20 doesn't exist if we throw out Moragne, because from 1972 on
21 the longshoremen, by the 1972 amendments of the Longshoremen
22 and Harbor Workers Act, has no injury or death remedy for
23 unseaworthiness. But what this Court has the opportunity
24 to do --

25 QUESTION: He doesn't need it.

1 MR. GELPI: Sir?

2 QUESTION: Doesn't need it.

3 MR. GELPI: Well, whether he does or doesn't, he's
4 got a compensation act. With the damages he has to prove
5 negligence. So the anomaly does not exist if we -- if we
6 say that general maritime or wrongful death statute doesn't
7 apply in the seaman's case, the true seaman's case. What
8 this Court can straighten the edges and make uniform the law
9 as it applies to seamen, a particular class for which an
10 act, the Jones Act of 1920, was passed.

11 The Jones Act was passed to overcome partially the
12 Harrisburg and partially the OSCEOLA, which said the seaman
13 has no cause of action for the negligence of a fellow
14 servant, and no cause of action for the negligence of his
15 employer. The Jones Act said we are going to change that.
16 They did not see fit to change the Harrisburg rule to the
17 extent that it allowed a cause of action for death based on
18 unseaworthiness.

19 QUESTION: Well, I guess all the lower courts have
20 recognized a survival action, haven't they? Can you think
21 of any that haven't?

22 MR. GELPI: I don't think they have recognized it,
23 except for Evich, in the case of the Jones Act seaman. And
24 Evich, as I discuss in the brief, we suggest is just a wrong
25 decision. Evich and the decision of Judge Beaks in Muirhead

1 upon which Evich -- Evich II, I'm talking about, treated as
2 a DOHSA, death on the high seas case. Evich was a seaman
3 as I read the cases, including the original Berg v. Chevron
4 case.

5 So there was no reason to supplement the Death on
6 the High Seas Act, which provides no survival action. Since
7 Evich was a seaman, the Jones Act, through section 59 of the
8 FELA, provides a survival action. And that survival action,
9 if I may discuss that for a moment now, has been interpreted
10 by craft to be that which the decedent would have had
11 available to him but for his death. And the craft language
12 of 1915 specifically addresses the point raised by
13 petitioner, taking no notice of what he might have become
14 or what he might have earned during his lifetime. And that
15 was a FELA case which applies to the Jones Act.

16 QUESTION: Are you arguing that there should be
17 no survival action in this case at all?

18 MR. GELPI: No general maritime law survival
19 action available to the beneficiaries of the seaman.

20 QUESTION: Well, the Fifth Circuit recognizes such
21 though, doesn't it?

22 MR. GELPI: Not -- not in a seaman's case, I don't
23 think. They disagree --

24 QUESTION: What -- what's involved in this case?
25 A seaman?

1 MR. GELPI: This case, the seaman --

2 QUESTION: I know, but the Fifth Circuit held that
3 in a survival action you can't recover wages.

4 MR. GELPI: Future lost wages. But -- but --

5 QUESTION: Well, I know, but why did they get to
6 that if there wasn't a survival action at all?

7 MR. GELPI: Because they said the position of the
8 petitioner in citing Evich v. Morris, they didn't agree with
9 Evich v. Morris. And that is where we have a split in the
10 circuits. The Ninth Circuit said, in that one decision,
11 said that a general maritime law survival action exists
12 which encompasses the future lost wages.

13 QUESTION: Exactly. But you don't need to reach
14 that issue if there is no survival action at all.

15 MR. GELPI: I don't think there is in the case of
16 a true seaman, Your Honor.

17 QUESTION: Well, isn't there a true seaman here?

18 MR. GELPI: Yes, sir.

19 QUESTION: Well, but the Fifth Circuit didn't hold
20 that there is no survival action at all.

21 MR. GELPI: It didn't give him one. They gave him
22 the survival action for -- they gave the mother, Mrs. Miles,
23 a survival action for conscious pain and suffering under the
24 Jones Act.

25 The Jones Act has a survival section brought in

1 through the Death on the High Seas Act, section 59.

2 QUESTION: And he sued under the Jones Act.

3 MR. GELPI: Yes, sir. And he recovered a verdict,
4 and that verdict was satisfied.

5 QUESTION: And what was the verdict for?

6 MR. GELPI: Conscious pain and suffering, and loss
7 of support.

8 QUESTION: During his lifetime?

9 MR. GELPI: Yes, sir.

10 QUESTION: But you are going farther than the
11 Fifth Circuit. I mean, they assume, as Justice White says,
12 there is a survival action to recover that kind of damage.
13 You say, well, there isn't even that, if I read you --

14 MR. GELPI: There is certainly, Mr. Justice
15 Stevens, there is certainly a survival action as provided
16 by the Jones Act, and that is what the Fifth Circuit
17 approved, and that is what we paid. That part of the case
18 is gone. The Fifth Circuit said the survival action is
19 under the Jones Act and doesn't contemplate loss of wages.

20 QUESTION: Well, that's right, that's right. But
21 now there's a claim -- there's a claim that there is a
22 survival action under the --

23 QUESTION: Maritime law.

24 MR. GELPI: General maritime law.

25 QUESTION: -- general maritime law.

1 QUESTION: Counsel, here is what the Fifth Circuit
2 said just on this point. I just want to make it clear. My
3 understanding is that the Fifth Circuit did recognize under
4 general maritime law a survival cause of action, not for
5 the damages that we're discussing here.

6 MR. GELPI: That's correct. I agree with you.

7 QUESTION: And then, and Justice O'Connor was
8 correct earlier when she said all of the circuits have
9 agreed, that have addressed this point, that there is a such
10 a survival cause of action for other kinds of damages, not
11 these damages.

12 MR. GELPI: That is correct.

13 QUESTION: All right.

14 QUESTION: But you are arguing there isn't one.

15 MR. GELPI: There is one as for a seaman, Your
16 Honor.

17 QUESTION: I know, but you're saying under the
18 general maritime law there is none.

19 MR. GELPI: Not to a seaman, because his rights
20 are set forth in the Jones Act.

21 QUESTION: All right. In this case there is no
22 -- under the maritime law he has no cause of action on a
23 survival basis.

24 MR. GELPI: I think that is a correct reading.

25 QUESTION: Then you are really asking for a

1 greater relief than the Fifth Circuit gave you, and I'd
2 guess you didn't cross-petition, did you?

3 MR. GELPI: On another issue on this. We cross-
4 petitioned on unseaworthiness as a matter of law.

5 QUESTION: If we held that there was -- there was
6 no survival action under general maritime law in this case,
7 would we do anything other than affirm the judgment of the
8 court of appeals?

9 MR. GELPI: I think you would hold what
10 Higginbotham suggested should be held, and what I think
11 Tallentire did. Yes, you would affirm it. There -- I think
12 there are decisions which, and I -- but I don't think Judge
13 Rubin's decision was one, I think there are decisions where,
14 and I can't quote one to you, Your Honor, where they may
15 have said a Jones Act seaman -- *Evich v. Morris* is a
16 specific one where the Ninth Circuit said a Jones Act seaman
17 has, in addition to whatever he has under the Jones Act, a
18 general maritime law survival action.

19 Now, the future damages to -- that are sought in
20 this case are not survival damages, because they don't
21 accrue to the decedent while he lived. And as the language
22 of *Gaudet*, which talked about survival versus wrongful death
23 -- in fact it said survival damages are those which the
24 decedent could have recovered but for his death. These are
25 damages the estate -- an inanimate, nondependent estate, I

1 might add, which Judge Rubin found important, would occur
2 -- seek -- because of his death. So it is not the but for,
3 it is because of.

4 The damages sought by the petitioner in this case
5 are not given by any of the Federal statutes involved. And
6 I can't emphasize often enough how this Court has
7 recognized, in 1978 and again in 1986, that where Congress
8 has struck the balance it did not do so to encourage courses
9 of supplement, specified items of recovery, and theories of
10 recovery.

11 The decision in *Evich v. Morris* seems to me to be
12 based on the rather inartfully expressed, I suggest,
13 language that giving -- give the estate these survival
14 damages -- these damages as survival, because if you don't
15 you award a tort feisor for killing his victim rather than
16 injuring him. That smacks strongly of punitive damages.
17 It says so that you don't reward him, let's punish him.

18 There is somebody who is being punished in this
19 case, as properly should have been. Clifford Melrose is the
20 murderer, and he is in jail. The -- the jury found --

21 QUESTION: But we're talking about unseaworthiness
22 generally, and it's recognized in the law of torts that
23 compensation is in part to -- in large part to ensure proper
24 conduct on the part of employers. That's hardly a novel
25 principle.

1 MR. GELPI: I'm glad Your Honor mentioned the word
2 unseaworthiness, because unseaworthiness in this specific
3 case was found to be liability without fault. And I think
4 it really strains reason to say where somebody is liable
5 without fault, as Gaudet did and as Evich did, that you give
6 him more damages than the Jones Act, which requires fault.

7 Congress considered the rights and remedies it
8 wanted to give the seaman. It passed the Jones Act to
9 overcome some of the problems with the OSCEOLA and the
10 Harrisburg. That was in 1920. In 1930 the United States
11 Supreme Court in Lindgren considered whether the decedent
12 beneficiaries had a cause of action under the
13 unseaworthiness claim, and the Court said no. That is not
14 what Congress did. 34 years later Gillespie considered the
15 same issue and said Congress hasn't amended the statute
16 since then, it still means what it says. To this date
17 Congress has not amended the statute, despite Moragne.

18 Congress knows how to amend a statute when they
19 want to. They -- in 1982 they limited the remedies
20 available to Jones Act workers, or people who want to be
21 Jones Act workers in the foreign oil fields, foreign
22 nationals in foreign territorial waters. The Death on the
23 High Seas Act was amended in about 1980 or 1983 to extend
24 the period of the limitations for 3 years rather than 2.

25 While it doesn't relate to seamen's rights,

1 Congress acted in 1972 to amend the Longshore and Harbor
2 Workers' Act to take away from Archery Gaudet and Edward
3 Moragne and their beneficiaries. After 1972, for accidents
4 occurring after 1972, they don't have anymore
5 unseaworthiness remedies. So Congress knows how to act, and
6 has acted.

7 The language of Gaudet, if -- if we assume -- and
8 I am just about finished unless the Court has some more
9 questions -- if we assume that Gaudet for some reason should
10 extend to seamen, and I submit earnestly it should not, and
11 that the decision of this Court in Higginbotham, and while
12 slightly different in Tallentire but the principles are the
13 same, that Congress has entered the field for Jones Act --

14 QUESTION: Again on this point, I just want to be
15 sure I haven't lost track of the case, the Fifth Circuit in
16 this case assumed that the cause of action was available to
17 seamen?

18 MR. GELPI: Yes, sir, it did.

19 QUESTION: Assumed that both causes of action were
20 available --

21 MR. GELPI: Yes, sir.

22 QUESTION: -- but did not allow the recovery in
23 both of them.

24 MR. GELPI: Yes, it did.

25 QUESTION: May I just ask -- ask you your own

1 view? Do you think that the Moragne case preempted any
2 State law causes of action death -- for death, death actions
3 in territorial waters?

4 MR. GELPI: It did for a longshoreman, because the
5 Florida Supreme Court gave its opinion that the State death
6 act did not provide a remedy based on unseaworthiness. And
7 it was, I suggest, to fill that vacuum to give (inaudible)
8 Ella Moragne a remedy to collect for the death of her
9 husband, who didn't have a State law remedy and had no
10 unseaworthiness remedy under the Harrisburg, and had no
11 Federal statute dealing with his remedies against tort
12 feasers, who created that remedy. And I think they painted
13 with too broad a brush so that some of the district courts
14 and appellate courts have implied -- felt that it applied
15 to seamen. But I think that the language --

16 QUESTION: Does the Florida case that you
17 mentioned -- I don't know, it's probably not cited in the
18 briefs. But the Florida case, the Florida Supreme Court
19 held that the Federal cause of action prevented the State
20 of Florida as a matter of preemption from having it State
21 law --

22 MR. GELPI: No, sir. Florida was -- Moragne --
23 Mrs. Moragne sued under the Florida death statute.

24 QUESTION: Right.

25 MR. GELPI: And the district court or the court

1 of appeals, and I don't remember which, but it is discussed
2 in the Moragne opinion, certified to the Florida State
3 Supreme Court the question of whether its wrongful death
4 statute encompassed an unseaworthiness remedy. And the
5 answer was no.

6 QUESTION: The answer was no, but that was a
7 matter of State law.

8 But my question -- it seems to be everybody
9 understands this except me. But -- but I'm trying to --

10 MR. GELPI: A lot of people don't understand this
11 whole field. It's very confusing, Your Honor.

12 QUESTION: Well, but it's a simple proposition.
13 The question I am uncertain about, and your opponent seemed
14 to be certain, is that did Moragne have the effect, because
15 it held a maritime cause of action in territorial waters
16 for the -- death in territorial waters existed, did that
17 preempt any State attempt to create a State cause of action
18 for death in territorial waters?

19 MR. GELPI: I would think it did for longshoremen,
20 because that's the class of claim that it dealt with.

21 QUESTION: You think it did, but it really hasn't
22 been -- has it been decided, do you know?

23 MR. GELPI: I am not aware of anything.

24 QUESTION: Okay.

25 MR. GELPI: And there is no court saying that

1 Moragne applies to a seaman, no supreme court saying that.
2 At the times the issue of a Jones Act seaman's rights to
3 recover for unseaworthiness in a death case have been before
4 this Court in Lindgren and Gillespie, and they said no.
5 General maritime law survival statute was in Cortes, and
6 they said no, the Jones Act covers it.

7 And I think the opinions in Higginbotham and
8 Tallentire soundly state the principle why those old
9 decisions, someone said hoary but -- but valid, are valid
10 decisions.

11 QUESTION: But haven't all the lower courts for
12 20 years read Moragne as indicating there is a general
13 maritime wrongful death act for seamen?

14 MR. GELPI: I wouldn't agree all, but a lot of
15 them have.

16 QUESTION: Oh, I think pretty -- you'd be very
17 hard pressed to find any that haven't.

18 MR. GELPI: The ones in the Fifth Circuit have.
19 I've had that issue before. But I think Your Honor's
20 reasoning in Tallentire v. -- Offshore Logistics v.
21 Tallentire, and Justice Stevens' reasoning in Higginbotham,
22 while they dealt with Death on the High Seas Act, would
23 apply equally if not more so with respect to the Jones Act,
24 which is to take care of seamen wherever they are. It was
25 remedial legislation passed to take care of seamen, and to

1 protect them and their dependents. Dependency is required
2 in the Death on the High Seas Act; pecuniary loss is
3 required. I suggest that --

4 QUESTION: But you know, it's entirely consistent
5 with that -- of course, they should -- they are intended to
6 take care of seamen wherever they are, but they do not
7 necessarily foreclose other remedies that may be provided
8 to seamen by either other statutes, maritime law, State law,
9 whatever it is. I mean, the fact that it was a general
10 protection for seamen is not quite the same as saying it's
11 the only protection seamen may get, which is what you're
12 arguing, as I understand you.

13 MR. GELPI: Yes, sir, it is. And I would adopt
14 your reasoning in Higginbotham, Your Honor, which applied
15 to say that there is no general maritime law remedy
16 available to someone who is subject to Death on the High
17 Seas Act. Why is that given any more deference than the
18 Jones Act, which is for a specific class of beneficiaries?

19 Now, the -- I'm almost finished, obviously, unless
20 the Court has anymore questions. A couple more points I
21 would like to make.

22 If we have a loss-of-society remedy available, and
23 I strongly suggest that the Jones Act precludes that,
24 Moragne said we do not decide who the beneficiary is and we
25 do not decide the remedies. That is grist for the mills of

1 the lower courts. But the practical difficulties of
2 deciding what the class of beneficiaries is something that
3 will have to be done.

4 Gaudet, whether I like the decision or not,
5 whether it applies to seamen or not, used the words
6 "dependent," "dependent upon" so many times that I can't
7 believe Justice Brennan meant anything but dependency as we
8 understand it.

9 If you have no more questions, I will sit down.
10 Thank you.

11 QUESTION: Thank you, Mr. Gelpi.

12 Mr. Hardin, you have 8 minutes remaining.

13 REBUTTAL ARGUMENT OF ALLAIN F. HARDIN

14 ON BEHALF OF THE PETITIONER

15 MR. HARDIN: Justice Stevens, I would only point
16 you to a case, Fifth Circuit, matter of S.S. Helena, 529
17 F.2d 744, where it specifically held that a State wrongful
18 death statute was preempted by the Moragne cause of action.
19 Also in Truehart they referred to a Supreme Court case, East
20 River Steamship, found in 476 U.S.

21 What I would respond as far as the loss-of-
22 society damage claim is that the lower courts have in fact
23 recognized a seaman's claim for this item of damages. It
24 is clearly recognized for injuries. What we are asking is
25 that it be recognized certainly for wrongful deaths under

1 the general maritime law. Even this defendant did not raise
2 that issue in the lower court. It wasn't an issue. The
3 only issue was dependency, whether or not dependency had to
4 be established before loss of society damages could be had.

5 Also, the respondent relies upon Gillespie and
6 Lindgren, but the commentators have all pointed out that
7 those cases have been overruled by Moragne through the --
8 the wording used in the language there. The commentators
9 clearly recognize that. We as practitioners have recognized
10 it, because we always, when we are dealing with an admiralty
11 case, is link up the general maritime claim on the admiralty
12 side of the court with the Jones Act claim. The Jones Act
13 was passed in order to expand seamen's remedies, not to
14 limit them. It certainly wasn't meant by Congress to do
15 away with the general maritime causes of action that a
16 seaman has under that area of the law.

17 This Court recognizes, no doubt, that seamen are
18 the wards of this Court, that it is better to give the
19 remedy --

20 QUESTION: Well, now, Mr. Hardin, that statement
21 appears in some cases, that seamen are wards of the court,
22 but that dates from centuries ago, when seamen really were
23 in a tough position. They have unions now, they make good
24 money. Don't you think that is a little bit language of the
25 past?

1 MR. HARDIN: Your Honor, I disagree. I
2 respectfully disagree. A seaman has to go out. He is under
3 the command of the master at all times that he is on the
4 vessel. He's subjected to wherever that vessel goes,
5 wherever the captain sends it. He is subjected to the
6 hazards of the sea, that is the machinery and all of the
7 equipment that is utilized there. It's not a rule that
8 should be done away with, or a viewpoint that should be done
9 away with. They are still under the orders of the captain
10 and must do what they are told.

11 QUESTION: Well, certainly, but that doesn't
12 necessarily mean hardship. There are statutes that limit
13 what the -- limit what the captain can do to them.

14 MR. HARDIN: Well, they can't walk away from the
15 vessel, Your Honor. They cannot, without being charged with
16 some criminal conduct that actually the captain has the
17 right to charge them with, on their own.

18 QUESTION: Maybe they are wards of the captain.

19 MR. HARDIN: Well, they are wards -- in that sense
20 they are, because I think that is what the court is trying
21 to do by saying that, is to impose a burden upon the captain
22 to watch these men. And that is exactly what the court has
23 done by saying -- by stating that.

24 QUESTION: Do you ever consider the union, the
25 union and the captain? Does the union run it or does the

1 captain run it?

2 MR. HARDIN: The captain runs it, Your Honor.

3 QUESTION: You want to bet?

4 (Laughter.)

5 MR. HARDIN: Well, when that vessel out there --
6 when that vessel is out there it is the captain that
7 operates the vessel, Your Honor.

8 QUESTION: (Inaudible).

9 MR. HARDIN: Well, actually it is interesting
10 because they are saying there is no general maritime cause
11 of action, yet Justice -- Judge Rubin recognized that they
12 had a cause of action under general maritime law against the
13 union, despite all of the congressional acts dealing with
14 unions. And that didn't preempt. And certainly the Jones
15 Act and DOHSA don't preempt as far as the general maritime
16 claims are concerned.

17 As far as the estate's claim, I think it's
18 important to recognize that those damages place that estate
19 back to where it would have been. And what Evich court was
20 saying was going back to the old common law principle that
21 the wrongdoer does not benefit from his wrong. And for that
22 reason those damages should be allowed.

23 It may be a peculiar item of damages, but in --
24 under the admiralty law there are other peculiar items.
25 There is limitation of liability. There is general average.

1 There are rules in the admiralty courts that certainly are
2 unusual, and there should be no reason why this element of
3 damages should not be allowed under a survival action,
4 especially given the interpretation that it is better to
5 give the remedy than to deny it, and the humane and generous
6 character of the admiralty law that has long been recognized
7 by this Court.

8 If there's no further questions, Your Honor.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Hardin.

10 The case is submitted.

11 (Whereupon, at 1:49 p.m., the case in the above-
12 entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#89-1158 - MERCEDEL W. MILES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE
SUCCESSION-OF LUDWICK ADAM TORREGANO, Petitioner V. APEX MARINE
CORPORATION, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

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