

**In the
Supreme Court of the United States**

CARL MORGAN,

Petitioner,

v.

ROSHTO MARINE, INC.,

Respondent.

**On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit**

COMPETITION PACKET FOR THE
TWENTY-THIRD ANNUAL JUDGE JOHN R. BROWN
ADMIRALTY MOOT COURT COMPETITION, 2016

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-23186
D.C. No. CV 11-6838

CARL MORGAN,
Plaintiff-Appellee-Cross-Appellant,

v.

ROSHTO MARINE, INC.
Defendant-Appellant-Cross-Appellee.

Appeal from the Decision of the United States District Court
for the District of Hawaii,
Michele Y. Portia, District Judge, Presiding

Argued and Submitted, March 3, 2015
San Francisco, California
[Filed May 5, 2015]

Before JUSTINIAN, SOLOMON, and HAMMURABI, Circuit Judges

HAMMURABI, Circuit Judge:

This is an action by a Jones Act seaman, Carl Morgan, seeking recovery of compensatory and punitive damages from his employer, Roshto Marine, Inc. Roshto Marine owned and operated the vessel aboard which Morgan was working when the injury in suit allegedly occurred. Here on interlocutory appeals* are two rulings of the United States District Court for the District of Hawaii (Portia, J.). The first ruling granted Roshto Marine's motion for dismissal of the count in Morgan's complaint seeking punitive damages under the Jones Act, 46 U.S.C. § 30104. That ruling is affirmed.

* A previous panel of this Court agreed to hear both appeals under 28 U.S.C. § 1292(b).

Judge Portia's second ruling denied Roshto Marine's motion for dismissal of the count in Morgan's complaint seeking punitive damages under the general maritime doctrine of unseaworthiness. That ruling is reversed.

I

The facts alleged in Morgan's complaint are adequately set forth in the opinion of the court below. In brief summary: Morgan alleges that negligent conduct on the part of Roshto Marine brought about a violation of the Jones Act duty to provide a safe workplace, and that the same conduct created a shipboard condition constituting unseaworthiness under the general maritime law. He contends that Roshto Marine's conduct was not merely negligent but also reckless, justifying punitive damages under the blameworthiness standards articulated and applied in *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 2008 AMC 1521 (2008), and *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 2009 AMC 1521 (2009).

We need not decide whether Morgan's allegations are correct, or whether Roshto Marine's alleged conduct was sufficiently egregious to justify punitive damages. Roshto Marine argues that Morgan may not claim punitive damages as a matter of law no matter how egregious its conduct may have been, and that is the sole issue before us.

II

The district court's dismissal of Morgan's Jones Act count for punitive damages was clearly correct under this Court's decision in *Kopczynski v. The Jacqueline*, 742 F.2d 555, 1985 AMC 769 (9th Cir. 1984). The reasoning and result in *Kopczynski* have not been undermined by any subsequent decision of this Court. And *Kopczynski* was lent strong if indirect support by the Supreme Court's decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 1991 AMC 1 (1990). See also *McBride v. Estis Well Service, L.L.C.*, 768 F.3d 382, 2014 AMC 2409 (5th Cir. 2014) (en banc), *cert. denied*, 135 S. Ct. 2310 (2015).

III

As the district court noted, the availability of punitive damages in seamen's unseaworthiness actions is a "close[] call." After careful study of the parties' doctrinal, historical, and policy arguments, we have concluded that our decision in *Evich v. Morris*, 819 F.2d 256, 258-259, 1988 AMC 74, 77 (9th Cir. 1987), is no longer good law. Accordingly, the district court's denial of Roshto Marine's motion to dismiss the unseaworthiness-based count for punitive damages is reversed. *Evich* has been significantly undermined by *Miles*, and the *Evich* court's reasoning was convincingly demolished by the *en banc* Fifth Circuit in *McBride*. Roshto Marine's motion to dismiss the unseaworthiness-based count for punitive damages must be granted.

JUSTINIAN, Circuit Judge, concurring in part and dissenting in part:

The district court's denial of Roshto Marine's motion to dismiss Morgan's unseaworthiness-based count for punitive damages was correct. Respectfully, I am convinced that my appellate colleagues are in error in their abandonment of *Evich*. No *en banc* decision of this Court has undone *Evich*. The Supreme Court's decision in *Miles* does not address punitive damages. And the reasoning of the Fifth Circuit in *McBride* seems to me to have been plainly wrong, and is thoroughly refuted by the opinions of the six dissenters in that case, 768 F.3d at 404-424, 2014 AMC at 2442-74.

Reluctantly, I agree that we must affirm the district court's dismissal of the Jones Act punitive damages count. *Kopczynski*, like *Evich*, remains the law of this circuit until reversed or overtly undermined by this Court sitting *en banc* or by the Supreme Court.

Although I am bound to follow *Kopczynski*, I must note my strong disagreement with its reasoning and result. The ruling against Jones Act punitive damages was based in major part on

Kozar v. Chesapeake & Ohio Railway Co., 449 F.2d 1238 (6th Cir. 1971). See *Kopczynski*, 742 F.2d at 560, 1985 AMC at 776:

[T]he Jones Act incorporates by reference the standards of the [Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60]. Prior to enactment of the Jones Act in 1920, it had been established that only compensatory damages were available in FELA actions. * * * See *Kozar* [449 F.2d at 1240-43]. We find this limitation of recovery applicable to this [Jones Act] case.

The Sixth Circuit's opinion in *Kozar* is brief, cursory, and unpersuasive. In sharp contrast, the district court's scholarly opinion in that case, 320 F. Supp. 335, 346-357 (W.D. Mich. 1970), demonstrates that there is no plausible basis for holding that punitive damages are unavailable in FELA cases. In another scholarly and careful opinion, the court in *In re Den Norske Amerikalinje A/S*, 276 F. Supp. 163, 174-176, 1967 AMC 1965, 1980-84 (N.D. Ohio 1967), *rev'd on other grounds sub nom. United States Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1969 AMC 252 (6th Cir. 1969), held that Jones Act seamen may seek punitive damages. And the Supreme Court in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 424 n.12, 2009 AMC 1521, 1538 n.12 (2009), flags the availability of punitive damages in Jones Act actions as an open question.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-23186
D.C. No. CV 11-6838

CARL MORGAN,
Plaintiff-Appellee-Cross-Appellant,

v.

ROSHTO MARINE, INC.
Defendant-Appellant-Cross-Appellee.

Appeal from the Decision of the United States District Court
for the District of Hawaii,
Michele Y. Portia, District Judge, Presiding

June 12, 2015

Before JUSTINIAN, SOLOMON, and HAMMURABI, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

JUSTINIAN, Circuit Judge, dissenting:

For the reasons expressed in my dissenting opinion, I would grant the petition for rehearing and set the case for argument *en banc*.

United States District Court
for the District of Hawaii

CARL MORGAN,
Plaintiff,

v.

ROSHTO MARINE, INC.,
Defendant.

No. CV 11-6838

September 10, 2013

PORTIA, J.:

Pending before the Court are two defensive motions filed pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff's complaint alleges defendant's liability under the Jones Act, 46 U.S.C. § 30104, and under the general maritime law¹ doctrine of unseaworthiness. The complaint includes counts seeking punitive damages under the Jones Act and the unseaworthiness doctrine.

Defendant's 12(b)(6) motions seek dismissal of the punitive-damages counts. For the reasons set forth below, defendant's Rule 12(b)(b) motion directed to the Jones Act punitive-damages count is granted. Defendant's Rule 12(b)(6) motion directed to the unseaworthiness punitive-damages count is denied. Because the availability of punitive damages in seaman's actions involves controlling questions of law as to which there is substantial ground for difference of opinion, and an immediate appeal may materially advance the ultimate termination of this litigation, these rulings are certified as suitable for interlocutory appeal as provided in 28 U.S.C. § 1292(b).

¹ A frequent synonym for "general maritime law" is "judge-made federal common law." See, e.g., *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 206, 1996 AMC 305, 310 (1996).

I

Plaintiff Carl Morgan's complaint alleges an injury aboard a towboat, the *Sally Mae*, which was owned and operated by defendant Roshto Marine, Inc. The injury occurred while the towboat was engaged in offloading a barge at Port Allen Harbor, Kauai, Hawaii. The parties agree that (1) at the time of his injury, Morgan was working in the course of his employment with Roshto Marine, and (2) Morgan was a "seaman" within the meaning of the Jones Act, 46 U.S.C. § 30104, and the general maritime law doctrine of unseaworthiness.

Archie Roshto, as president and owner of Roshto Marine, purchased the *Sally Mae* in January 2009, and retained Dan Perkins as the vessel's permanent captain. In June 2010, Carl Morgan applied for a position with Roshto Marine. Roshto hired Morgan as the *Sally Mae*'s relief captain.

The *Sally Mae* is a pushboat, equipped with two towing winches on her bow, which are used to secure lines joining the *Sally Mae* to the barges in her tow. The starboard-side winch is hydraulic and the port-side winch is electric. Upon being hired, Morgan was taken to the *Sally Mae* and instructed on her operation by Archie Roshto. Roshto took Morgan on a tour of the vessel, showing him the layout of the *Sally Mae* and familiarizing him with her equipment. Roshto showed Morgan the manual crank handle that accompanied the electric winch and told him that it was to be used to override the electric switches on the winch if they failed. Roshto explained that, if the winch became "bound up" and would not engage by use of the electric ignition switch, the manual crank should be attached to the winch motor and turned a few times to "unbind" the winch, and that the electric ignition switch should then be used to try to engage the winch. No one told Morgan that while using the manual crank handle he should not leave the handle on the winch motor when attempting to engage the winch by pressing the electric ignition switch.

About four months after he was hired, Morgan, serving as captain of the *Sally Mae*, relieved the tanker man on duty and began offloading the barge in tow. As the barge discharged the cargo, it began to rise in the water, eventually causing the towing wires connecting it to the *Sally Mae* to become taut. Noticing this, Morgan attempted to relieve the tension in the wires by unwinding them from the winches. He released the starboard wire first, which caused that side of the *Sally Mae* to drop and the port-side towing wire to become even tighter. Morgan then attempted to release the port-side wire, but the electric winch would not work. He attached the manual crank handle to the winch motor, and began turning the handle while simultaneously pressing the electric ignition switch. When the motor started, the manual crank handle flew off and struck Morgan on the right side of his face, crushing his right eye and inflicting other severe fractures and lacerations.

Subsequently Morgan learned that his predecessor as the *Sally Mae*'s relief captain had been injured by the winch handle in substantially the same way. Indeed, the job was vacant when Morgan applied for it because the predecessor relief captain's injuries disabled him from further work as a seaman. Archie Roshto had explicitly instructed Captain Perkins not to inform Morgan of this history, or even to mention the accident, because Roshto was afraid that Morgan might resign his position if he knew how dangerous the vessel was. Like his predecessor, Morgan was permanently disabled from further work as a seaman after his injury.

II

Morgan's suit against Roshto Marine alleges that his injuries were caused by Jones Act negligence and by the unseaworthiness of the *Sally Mae*. Specifically, Morgan alleges that Archie Roshto and thus defendant Roshto Marine were negligent in failing to replace the dangerous port-side winch immediately after it had injured Morgan's predecessor; that Archie

Roshto and Roshto Marine were also negligent in failing to properly train Morgan in the use and operation of the winch and its manual crank handle; that the combination of the dangerous winch and Morgan's lack of training constituted a negligently unsafe workplace within the meaning of the Jones Act; and that the port-side winch was a dangerously defective appurtenance of the vessel, rendering the vessel unseaworthy.

In the punitive-damages counts, Morgan asserts that Archie Roshto and Roshto Marine were not only negligent but also reckless in all of the foregoing respects. A key paragraph of Morgan's complaint asserts:

The conduct of Archie Roshto and Roshto Marine respecting Morgan's high exposure to injury by the port-side electric winch constituted Jones Act negligence and created a dangerous and unseaworthy condition of the vessel. This conduct, singly and cumulatively, was not only negligent but also egregious, willful, and wanton, far exceeding the "recklessness" threshold for punitive damages set forth in *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 493-494, 2008 AMC 1521, 1535-36 (2008). Therefore, Roshto Marine is liable to Morgan for punitive damages under the Jones Act and the general maritime law doctrine of unseaworthiness.

III

It is clear that the complaint's allegations seeking punitive damages under the Jones Act must be dismissed. This Court is subject to the authority and guidance of the United States Court of Appeals for the Ninth Circuit. Ninth Circuit jurisprudence has established a clear rule for this Circuit: punitive damages may not be sought in Jones Act actions. *Kopczynski v. The Jacqueline*, 742 F.2d 555, 560-561, 1985 AMC 769, 776 (9th Cir. 1984); *Evich v. Morris*, 819 F.2d 256, 258, 1988 AMC 74, 77 (9th Cir. 1987); *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1347, 1987 AMC 2024, 2026-27 (9th Cir. 1987). Morgan's argument that the Supreme Court has undermined the *Kopczynski* line of cases in *Exxon Shipping v. Baker* and *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 2009 AMC 1521 (2009), is unavailing. Neither *Baker* nor

Townsend was a Jones Act case. Moreover, the Supreme Court in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 1991 AMC 1 (1990), has lent its support to the reasoning in *Kopczynski* and its progeny.

IV

Roshto Marine's 12(b)(6) challenge to Morgan's pursuit of punitive damages in the unseaworthiness action is a closer call. However, ultimately this Court's obligation to follow the Ninth Circuit's lead controls here again; thus Roshto's motion to dismiss Morgan's unseaworthiness/punitives claim must be denied. *Evich*, 819 F.2d at 258-259, 1988 AMC at 77, stands for the proposition that "[p]unitive damages are available under general maritime law for claims of unseaworthiness." This decision has not been directly challenged by any panel decision of the Ninth Circuit, and it has certainly not been called into question in any Ninth Circuit *en banc* decision. Moreover, this Court believes that *Evich* acquires significant support from the Supreme Court's decision in *Townsend*.

V

Roshto Marine's motion to dismiss Morgan's punitive damages claims in the Jones Act action is granted. The motion to dismiss the punitive damages claims in the unseaworthiness action is denied. These rulings are certified as suitable for interlocutory appeal under 28 U.S.C. § 1292(b).

Selected Chronology of the Case*

Jan. 5, 2009	Defendant Roshto Marine purchases the <i>Sally Mae</i>
Jun. 14, 2010	Plaintiff Carl Morgan begins work on the <i>Sally Mae</i>
Oct. 18, 2010	Morgan injured while working on the <i>Sally Mae</i>
Oct. 11, 2011	Morgan files his complaint in district court
Sept. 10, 2013	District court grants Roshto Marine's motions under Fed. R. Civ. P. 12(b)(6) (to strike the claims for punitive damages), with an opinion
Sept. 24, 2013	Roshto Marine files notice of appeal
Oct. 2, 2013	Morgan files notice of appeal
Mar. 3, 2015	Oral argument in the court of appeals
May 5, 2015	Court of appeals files opinion and enters judgment
May 12, 2015	Morgan files petition for rehearing
Jun. 12, 2015	Court of appeals denies petition for rehearing
Sept. 10, 2015	Morgan files petition for certiorari filed presenting two issues: (1) the availability of punitive damages in actions under the Jones Act, and (2) the availability of punitive damages in general maritime law actions for unseaworthiness.
Dec. 7, 2015	Supreme Court grants Morgan's petition for certiorari

* This information is included in the packet for the information of Competition participants. Unlike the preceding pages, it should not be considered part of the APPENDIX TO THE PETITION FOR CERTIORARI filed with the Court.