
No. 15-615

IN THE

Supreme Court of the United States

OCTOBER TERM 2015

CARL MORGAN,

Petitioner,

v.

ROSHTO MARINE, INC.,

Respondent.

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

BRIEF FOR RESPONDENT

TEAM S

Attorneys for Respondent

QUESTIONS PRESENTED

- I. Should punitive damages be available to plaintiffs alleging violations of the Jones Act, regardless of the alleged behavior's level of blameworthiness?
- II. Should punitive damages be available to plaintiffs alleging violations of the general maritime law doctrine of unseaworthiness, regardless of the alleged behavior's level of blameworthiness?

TABLE OF CONTENTS

	<i>Page</i>
QUESTIONS PRESENTED.....	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW.....	2
STATEMENT OF JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE.....	3
SUMMARY OF THE ARGUMENT	5
ARGUMENT AND AUTHORITIES.....	8
I. PUNITIVE DAMAGES ARE UNAVAILABLE IN JONES ACT CASES	8
A. The Jones Act Incorporated FELA by Reference, and FELA Does Not Allow Non-Pecuniary Damages	9
B. <i>Miles</i> Limited Plaintiffs Suing Under the Jones Act to Recovery of Punitive Damages	12
C. The Logic of <i>Vreeland</i> and <i>Miles</i> Can and Has Been Extended to Hold That Punitive Damages Are Unavailable in Jones Act Cases.....	13
II. PECUNIARY DAMAGES ARE UNAVAILABLE IN UNSEAWORTHINESS CASES	16
A. Application of <i>Miles</i> ' Rationale, Which Continues a Long Tradition of Favoring Uniformity in Admiralty Law, Requires the Denial of Punitive Damages in Unseaworthiness Cases.....	16
B. There Should Not Be More Expansive Remedies Available for Strict Liability Than for Liability Based on Fault	19
C. <i>Townsend</i> Does Not Undermine the Logic of <i>Miles</i>	20
CONCLUSION.....	23

APPENDICES:

APPENDIX A: Appendix to the Petition for Certiorari..... A-1

APPENDIX B: The Jones Act and FELAB-1

TABLE OF AUTHORITIES

	<i>Page(s)</i>
UNITED STATES SUPREME COURT CASES:	
<i>Am. R.R. Co. of Porto Rico v. Didricksen</i> , 227 U.S. 145 (1913).....	13
<i>Atl. Sounding Co. v. Townsend</i> , 557 U.S. 404, 2009 AMC 1521 (2009).....	15, 16, 20, 21
<i>Cortes v. Balt. Insular Lines</i> , 287 U.S. 367, 1933 AMC 9 (1932).....	12
<i>Gillespie v. U.S. Steel Corp.</i> , 379 U.S. 148, 1965 AMC 1 (1964).....	16, 17, 18
<i>Hishon v. King & Spalding</i> , 467 U.S. 69 (1984).....	8
<i>Lindgren v. United States</i> , 281 U.S. 38, 1930 AMC 399 (1930).....	16, 17
<i>Mahnich v. S. S.S. Co.</i> , 321 U.S. 96, 1944 AMC 1 (1944).....	19
<i>Mich. Cent. R.R. Co. v. Vreeland</i> , 227 U.S. 59 (1913).....	8, 10, 11, 12, 13
<i>Miles v. Apex Marine Corp.</i> , 498 U.S. 19, 1991 AMC 1 (1990).....	<i>passim</i>
<i>Mobile Life Ins. Co. v. Brame</i> , 95 U.S. 754 (1877).....	10, 11
<i>Moragne v. States Marine Lines, Inc.</i> , 398 U.S. 375, 1970 AMC 967 (1970).....	16, 18
<i>Seas Shipping Co. v. Sieracki</i> , 328 U.S. 85, 1946 AMC 698 (1946).....	19
<i>St. Louis, I.M. & S. Ry. Co. v. Craft</i> , 237 U.S. 648 (1915).....	13

<i>The Lottawanna</i> , 88 U.S. (21 Wall.) 558 (1875)	16, 18
--	--------

<i>Van Beeck v. Sabine Towing Co.</i> , 300 U.S. 342, 1937 AMC 311 (1937).....	10, 11
---	--------

UNITED STATES CIRCUIT COURT CASES:

<i>Bergen v. F/V St. Patrick</i> , 816 F.2d 1345, 1987 AMC 2024 (9th Cir. 1987)	14
--	----

<i>Guevara v. Mar. Overseas Corp.</i> , 34 F.3d 1279, 1995 AMC 321 (5th Cir. 1994)	21, 22
---	--------

<i>Kopczynski v. The Jacqueline</i> , 742 F.2d 555, 1985 AMC 769 (9th Cir. 1984)	13, 14
---	--------

<i>Kozar v. Chesapeake & Ohio Ry. Co.</i> , 449 F.2d 1238 (6th Cir. 1971)	14
--	----

<i>McBride v. Estis Well Serv., L.L.C.</i> , 768 F.3d 382, 2014 AMC 2409 (5th Cir. 2014) (en banc).....	14, 15, 16
---	------------

<i>Miller v. Am. President Lines, Ltd.</i> , 989 F.2d 1450, 1993 AMC 1217 (6th Cir. 1993)	14
--	----

<i>Schatz v. Rosenberg</i> , 943 F.2d 485 (4th Cir. 1991)	8
--	---

<i>Wildman v. Burlington N. R.R. Co.</i> , 825 F.2d 1392 (9th Cir. 1987)	14
---	----

UNITED STATES DISTRICT COURT CASES:

<i>In re Cleveland Tankers, Inc.</i> , 791 F. Supp. 679 (E.D. Mich. 1992).....	14
---	----

<i>Jackson v. Unisea, Inc.</i> , 824 F. Supp. 895 (D. Alaska 1992)	14
---	----

<i>La Voie v. Kualoa Ranch & Activity Club, Inc.</i> , 797 F. Supp. 827, 1992 AMC 1493 (D. Haw. 1992)	14
--	----

STATE CASES:

<i>Tilley v. Hudson River R.R. Co.</i> , 24 N.Y. 471 (1862)	12
--	----

UNITED KINGDOM CASES:

<i>Baker v. Bolton</i> , 1 Camp. 493 (1808)	10
--	----

<i>Franklin v. S.E. Ry.</i> (1858) 3 H&N 211; 157 ER 448	11
---	----

CONSTITUTIONAL PROVISION:

U.S. Const. art. III, § 2, cl. 1–2	2, 3
--	------

FEDERAL STATUTES:

28 U.S.C. § 1254(1) (2012)	2
45 U.S.C. § 51 (1908)	9
45 U.S.C. § 51 (2012)	11
45 U.S.C. §§ 51–52 (2012)	11, 12
46 U.S.C. § 30104 (1920)	9
46 U.S.C. § 30104 (2012)	<i>passim</i>

46 U.S.C. §§ 30301–30309 (2012)	11
Fed. R. Civ. P. 12(b)(6)	8

OTHER SOURCES:

40 Cong. Rec. 4605 (1906)	9
40 Cong. Rec. 4607 (1906)	9
42 Cong. Rec. 4527 (1908)	9
William R. Cornish & Geoffrey de N. Clark, <i>Law and Society in England 1750–1950</i> (1989)	10
Lord Campbell’s Act, 9 & 10 Vict. ch. 93 (1846)	10, 11

No. 15-615

IN THE

Supreme Court of the United States

OCTOBER TERM 2015

CARL MORGAN,

Petitioner,

v.

ROSHTO MARINE, INC.,

Respondent.

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

BRIEF FOR RESPONDENT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondent, Roshto Marine, Inc., respectfully submits this brief to support its request that this Court find that Carl Morgan is not entitled to punitive damages in his negligence case against Roshto, because punitive damages are unavailable to plaintiffs suing under (1) the Jones Act, and (2) the general maritime law doctrine of unseaworthiness. Respondent asks this Court to affirm the judgment of the Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the District of Hawaii, dated September 10th, 2013, granting one of Respondent's motions to dismiss for failure to state a claim upon which relief can be granted on the ground that punitive damages are not available to plaintiffs suing under the Jones Act, and denying its other on the ground that punitive damages are available to plaintiffs suing under the general maritime law doctrine of unseaworthiness, is reported and appears as *Morgan v. Roshto Marine, Inc.*, 971 F. Supp. 2d 1349 (D. Haw. 2013), and in the Appendix to the Petition for Certiorari ("R.") R. at 6a–10a. The Appendix to the Petition for the Brief for Certiorari is reproduced in Appendix A to the brief for Respondent. *See infra* p. A-1.

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit, dated May 5, 2015, affirming the district court decision in part and reversing in part, is reported and appears as *Morgan v. Roshto Marine, Inc.*, 786 F.3d 1387, 2015 AMC 3333 (9th Cir. 2015), and in the Appendix to the Petition for Certiorari. R. at 1a–4a.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) (2012), which provides that this Court may review cases in the court of appeals, before or after rendition of judgment or decree, by writ of certiorari granted upon the petition of any party to the case. Charles Morgan filed a petition for writ of certiorari on September 10, 2015, and this Court granted the petition on December 7, 2015. This is an admiralty case and the Constitution grants this Court appellate jurisdiction over admiralty cases. U.S. Const. art. III, § 2, cl. 1–2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Admiralty Clause, U.S. Const. art. III, § 2: “The judicial power shall extend . . . to all Cases of admiralty and maritime jurisdiction”

Title 46 U.S.C. § 30104 (2012)—The Jones Act: “A seaman injured in the course of employment . . . may elect to bring a civil action at law, with the right of trial by jury, against the employer.”

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Defendant-Respondent Archie Roshto, president and owner of Roshto Marine, purchased a pushboat named the *Sally Mae* in January 2009. R. at 7a. He then hired Dan Perkins to be her permanent captain, and hired Plaintiff-Petitioner Carl Morgan as her relief captain a year and a half later (in June 2010). *Id.*

The *Sally Mae* has two kinds of winches, which control the tension of the wires connecting her and her tow. *Id.* The starboard (right) side’s winch is hydraulic, and the port (left) side’s winch is electric. *Id.* *Sally Mae*’s electric winch occasionally malfunctions, wherein it becomes “bound up” and does not respond to the electric ignition switch. *Id.*

If an electric winch malfunction occurs, Petitioner was instructed to attach a manual crank to the winch’s motor and turn it a few times to “unbind” the winch, and then try the ignition again. *Id.* He was not instructed as to whether or not to remove the crank before pressing the ignition switch. *Id.*

One day in October 2010, about four months after he began work on the *Sally Mae*, Petitioner was helping offload a barge that the *Sally Mae* was towing. *Id.* at 8a. While unloading the barge, the tow wires connecting the two became increasingly taut so he attempted

to release their tension. *Id.* The starboard-side's hydraulic winch released easily, but the port-side's electric winch malfunctioned. *Id.* Contrary to his instructions, he used the manual crank and pressed the ignition switch simultaneously. *Id.* at 7a–8a. When the ignition switch successfully engaged the engine, the crank flew off and struck him in the face. *Id.* at 8a. The injuries Appellant sustained in this accident ended his career as a seaman. *Id.*

Petitioner's accident with the electric winch was substantially similar to one involving his predecessor. *Id.* Following the accident with Petitioner's predecessor, Roshto neither repaired nor replaced the electric winch. *Id.* He also forbade Captain Perkins from describing the accident or even mentioning its existence to Petitioner, lest Petitioner resign his position because of the danger involved. *Id.*

II. STATEMENT OF THE PROCEEDINGS

Petitioner sued Roshto Marine, Inc., nearly a year after his accident on the *Sally Mae*. *Id.* Petitioner alleged that Roshto's choices regarding the electric winch and its involvement in his predecessor's accident amounted to negligence, as well as his lack of training in the operation of its manual crank, and that the combination of the dangerous winch and his lack of training constituted a negligently unsafe workplace within the meaning of the Jones Act. *Id.* at 8a–9a. He further alleged that the electric winch was a dangerously defective appurtenance of the vessel, rendering it unseaworthy. *Id.* at 9a. Finally, Petitioner alleged that Roshto's behavior constituted not just negligence but even wantonness or recklessness, and consequently sought punitive damages under both theories. *Id.*

Roshto Marine responded with Fed. R. Civ. P. 12(b)(6) motions to dismiss the counts requesting punitive damages, asserting that regardless of the character of Roshto's behavior—be it negligent, wanton, reckless, or none of the above—Petitioner would not be entitled to punitive

damages under either theory. *Id.* at 6a. The trial court granted Roshto Marine's motion to dismiss the count for punitive damages under the Jones Act, and denied its motion to dismiss under the common law doctrine of unseaworthiness. *Id.*

Both parties appealed the district court's dispositions of the 12(b)(6) motions. The Ninth Circuit Court of Appeals found for Roshto Marine on both issues, affirming the district court's dismissal of the Jones Act punitive damages, and reversing her denial of the dismissal of the unseaworthiness punitive damages. *Id.* at 1a–2a. Petitioner moved for rehearing, which the Ninth Circuit Court of Appeals denied, and then appealed to this Court, who granted certiorari in December 2015.

SUMMARY OF THE ARGUMENT

This case involves the availability of punitive damages to plaintiffs suing under one or both of two theories of recovery—Jones Act negligence, and the general maritime law doctrine of unseaworthiness. While there have been some decisions by this Court which could be extended to cover these issues, there has not yet been one that is directly on point. As a result, there is a circuit split on both of these issues. Taking the opportunity to resolve these issues will do wonders for maintaining uniformity in federal maritime law.

The Ninth Circuit Court of Appeals correctly held in the case at bar that (1) punitive damages are not available under the Jones Act, and (2) punitive damages are not available under the general maritime law doctrine of unseaworthiness. Accordingly, this Court should affirm the court of appeals in its entirety.

I.

Punitive damages are unavailable under the Jones Act. The Jones Act, also known as the Merchant Marine Act, was passed in 1920 to provide all seamen injured during the course of

their employment, or the personal representatives of those who died of their injuries, with a right of action in civil law against their employers. With its last sentence, “[l]aws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section,” the Act incorporated by reference the Federal Employer’s Liability Act (FELA).

FELA provides interstate railway employees with causes of action against their employers for injuries received during the course of their employment due to their employers’ negligence. It also allows the personal representative of one who has been killed as a result of these injuries to bring an action against the employer on behalf of specified classes of surviving family members—spouses and children, parents, and dependent relatives. Two years after it was passed in 1908, it was amended to allow decedents’ causes of actions against their employers to survive their deaths.

FELA does not specify what kind of damages are available to a plaintiff suing under it, only that the employer “shall be liable in damages,” so this Court engaged in statutory construction to decide. Five years after the Act was passed, the Court in *Vreeland* considered whether a widow could recover damages for the loss of society of her late husband. The Court analyzed the portion of the statute under which *Vreeland* was suing, and concluded that it was identical to and likely inspired by the first wrongful death act, known as Lord Campbell’s Act, which was passed in England nearly sixty years before. Lord Campbell’s Act was similarly silent with respect to types of damages available, but courts considering the issue routinely held that plaintiffs suing under it were entitled only to pecuniary damages. Pecuniary damages are designed to compensate the plaintiff and are of the type that can be measured. The Court held that because FELA’s wrongful death action was based on Lord Campbell’s Act, which limited

plaintiffs to pecuniary damages, so too did FELA. The decision was read over the years to preclude recovery of non-pecuniary damages under FELA in general, whether for injuries or deaths.

In 1990, this Court addressed the types of damages recoverable under Jones Act and general maritime law wrongful death actions in *Miles*. Just like FELA and Lord Campbell's Act, the Jones Act did not specify what kind of damages could be recovered. The Court recounted *Vreeland*'s interpretation of FELA and its decision to limit actions brought under it to pecuniary damages. It then presumed that Congress had known about *Vreeland*'s interpretation of FELA when they incorporated it in its entirety into the Jones Act. It therefore held that the Jones Act precluded non-pecuniary damages as well. *Miles*, like *Vreeland*, involved someone seeking loss of society in a wrongful death action, but its logic has been extended by several courts of appeals and district courts to other non-pecuniary damages as well, and to cases involving both injuries and deaths.

There is no reason to limit the holding in *Miles* to loss of society damages in wrongful death actions. Rather, it should be extended to cover other non-pecuniary damages in all actions brought under the statute, regardless of whether the seaman involved was injured or killed.

II.

Punitive damages are also unavailable under the general maritime law doctrine of unseaworthiness. In addition to holding that loss of society damages are not recoverable in Jones Act cases, *Miles* held that they are unavailable for wrongful death actions based on unseaworthiness as well. It also held that there is a general maritime wrongful death action. These holdings were based in large part on a constitutionally based principle that has guided this

Court in admiralty cases for well over a century: federal admiralty law should be “a system of law coextensive with, and operating uniformly in, the whole country.”

Again, the logic of *Miles* should be extended to preclude other types of non-pecuniary damages in actions for unseaworthiness, whether the seaman was injured or killed.

Finally, the Court’s opinion in *Townsend*, which flags the availability of punitive damages in maintenance and cure cases as an open question, does not undermine *Miles*’ reasoning in the slightest. As the Court itself points out, maintenance and cure is a completely different vehicle of recovery from negligence and unseaworthiness, and one which Congress has not addressed.

ARGUMENT AND AUTHORITIES

This Court will review the opinion of the United States District Court for the District of Hawaii *de novo*. At issue is the dismissal of a Fed. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, which calls into question the legal sufficiency of a complaint. This makes it a question of law, and questions of law are decided without deference to the trial court. *See, e.g., Schatz v. Rosenberg*, 943 F.2d 485, 489 (4th Cir. 1991). In its review, the court must accept the allegations in the complaint as true, and all reasonable factual inferences must be drawn in favor of the party opposing the motion. *See, e.g., Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

I. PUNITIVE DAMAGES ARE UNAVAILABLE IN JONES ACT CASES.

The Jones Act incorporates FELA by reference. This Court held in *Michigan Central Railroad Co. v. Vreeland*, that FELA limits plaintiffs pursuing wrongful death actions under the statute to non-pecuniary damages within five years of its passing. 227 U.S. 59 (1913). On this basis, the Supreme Court held in *Miles v. Apex Marine Corp.* that the Jones Act also precluded non-pecuniary damages in wrongful death actions brought under the statute. 498 U.S. 19, 32,

1991 AMC 9, 13–14 (1990). There is no reason to limit the logic and holdings of these two cases to loss of society in wrongful death actions. Instead, they should be extended to preclude other types of non-pecuniary damages, namely punitive damages, in actions under their respective statutes, whether the employees were injured or killed.

A. The Jones Act Incorporated FELA by Reference, and FELA Does Not Allow Non-Pecuniary Damages.

Application of the canons of statutory construction leads to the conclusion that the Federal Employers’ Liability Act (FELA), which was incorporated by reference into the Jones Act, does not allow plaintiffs suing under it to receive non-pecuniary damages. 45 U.S.C. §§ 51–59 (1908); 46 U.S.C. § 30104 (1920).¹ As such, non-pecuniary damages, including punitive damages, are not available to plaintiffs suing under the Jones Act.

Congress successfully passed FELA in 1908 to address the extraordinarily and increasingly high risk of injury and death that railroad employees faced during the last decade of the nineteenth century and first of the twentieth.² In doing so, Congress followed the lead of several states and European countries, which had adopted statutes ensuring negligence and wrongful death causes of action against railroad companies for many years before. 42 Cong. Rec. 4527, 4636 (1908).

In its first two sections, FELA holds interstate railroad companies or those operating in certain US territories liable to their employees for negligence resulting in their injuries, or to their employees’ survivors should their injuries have led to death. 45 U.S.C. §§ 51–52. Next, it

¹ Both statutes are set out in full in Appendix B.

² 40 Cong. Rec. 4607 (1906) (expressing desire to “do something toward stopping the fearful slaughter of human life and destruction of human limbs by our railroads.”); 40 Cong. Rec. 4605 (1906) (“The only manner in which they can be persuaded to take reasonable care of their employees is by holding them responsible in damages for the absence of such care.”).

eliminates several bars to employees' recovery, such as contributory negligence, assumption of risk, and "any contract, rule, regulation, or device," employers intended to rely on to avoid liability. *Id.* §§ 53–55. Finally, in 1910, Congress amended the Act to provide that an employee's cause of action against his or her employer survived to the benefit of family members if he or she died before a suit could be brought or completed. *Id.* § 59.

Between its first use in 1606 and the adoption of Lord Campbell's Act in 1846, the rule "*actio personalis moritur cum persona*" dominated tort law in several English-speaking countries, including the United Kingdom and the United States. *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 344–46, 1937 AMC 311, 312–14 (1937). It can be roughly translated as, "a personal action dies with the person," and operated at common law to extinguish the right to a cause of action for an injury to a person upon his or her death. *Id.*; *Baker v. Bolton*, 1 Camp. 493 (1808); *Mobile Life Ins. Co. v. Brame*, 95 U.S. 754, 756–57, 759 (1877).

In 1846, Lord Campbell introduced the Fatal Accidents Act of 1846, known popularly as Lord Campbell's Act, in response to rising public outcry in the United Kingdom against the epidemic of injuries and deaths to railway employees during the 1830s and against the railways' indifference to them. William R. Cornish & Geoffrey de N. Clark, *Law and Society in England 1750–1950*, at 503–04 (1989).

This act had several "distinguishing features," as noted by the Court in *Michigan Central Railroad Co. v. Vreeland*. 227 U.S. 59, 70 (1913). For the first time, certain family members—husbands, parents, and children—had a cause of action against the person or entity responsible for their loved one's death. Lord Campbell's Act, 9 & 10 Vict. ch. 93 (1846). This cause of action was only available to the surviving family members if the decedent had a right to it at the time of his or her death. *Id.* It was not the decedent's cause of action, but the family members',

and represented the losses and damages sustained because of his or her death. *Id.* Because Lord Campbell's Act did not speak to the damages recoverable, courts concluded that plaintiffs were limited solely to pecuniary ones. *See, e.g., Franklin v. S.E. Ry.* (1858) 3 H&N 211; 157 ER 448.

The Act inspired the creation of several similar statutes throughout the British colonies and ultimately all of the states in the United States. *Mobile Life Ins. Co.*, 95 U.S. at 759; *Van Beeck*, 300 U.S. at 346, 1937 AMC at 313–14. According to the Supreme Court, it also inspired FELA, the Jones Act, and the Death on the High Seas Act (DOHSA). *Vreeland*, 227 U.S. at 70; *Van Beeck*, 300 U.S. at 346, 1937 AMC at 313–14; 45 U.S.C. § 51; 46 U.S.C. § 30104; 46 U.S.C. §§ 30301–30309 (1920).

This Court first interpreted FELA's wrongful death section in *Michigan Central Railroad Co. v. Vreeland* five years after the Act was passed. 227 U.S. at 59. The Court was confident that it was inspired by Lord Campbell's Act as evidenced by its "distinguishing features" detailed above. *Id.* at 68–71; Lord Campbell's Act, 9 & 10 Vict. ch. 93 (1846). According to the Court, Lord Campbell's Act had been interpreted extensively to preclude non-pecuniary damages. As such, the Court limited actions under FELA to non-pecuniary damages as well. *Vreeland*, 227 U.S. at 68–71.

In *Vreeland*, the personal representatives of a railroad employee who had died because of his injuries sued the employer to recover for the loss suffered by his widow due to his wrongful death. *Id.* at 65. The Court was asked to construe FELA and determine the measure of damages recoverable. *Id.* at 64. They held that, according to the statute, an employer is liable "for the loss and damages sustained by relatives dependent on the decedent," and concluded that this recovery is limited to pecuniary damages only. *Id.* at 68–69.

In holding as they did, the Court in *Vreeland* emphasized the difference between pecuniary and non-pecuniary damages and the immeasurable quality of the latter: “[t]he word ‘pecuniary’ [is] used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though most painful and grievous to be borne, cannot be measured or recompensed by money.” *Id.* at 71 (quoting *Tilley v. Hudson River RR. Co.*, 24 N.Y. 471, 476 (1862)). It held that losses recoverable include not only financial income of the decedent, but also services, care, training, education, etc., the employee could have provided if he or she had lived, “which can only be supplied by the service of another for compensation.” *Vreeland*, 227 U.S. at 71. The amount of damages recoverable are different in each case, depending on the relationship between the decedent and their loved one, and the types of losses they incurred. *Id.* at 72.

Congress incorporated FELA by reference into the Jones Act in its last sentence, which provides, “Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.” 46 U.S.C. § 30104. Because FELA regulates recovery for personal injury to, or death of, a railway employee, this is what Congress was referring to. 45 U.S.C. § 51 (2012). This incorporation has been recognized by this Court as early as 1932 in *Cortes v. Baltimore Insular Lines*. 287 US 367, 376, 1933 AMC 9, 18(1932).

B. *Miles* Limited Plaintiffs Suing Under the Jones Act to Recovery of Punitive Damages.

In *Miles v. Apex Marine Corp.*, this Court analyzed the causes of action and measures of damages available to seamen or their survivors injured or killed while at work. 498 U.S. at 32, 1991 AMC at 10–11. It held that loss of society, a non-pecuniary damage, is unavailable in Jones Act cases, as well as in wrongful death cases brought under the general maritime law doctrine of unseaworthiness. *Id.*

In *Miles*, a steward's assistant named Torregano was brutally stabbed to death by a fellow crew member. *Id.* at 21, 1991 AMC at 2. Torregano's mother sued the vessel owners and operators, alleging negligence under the Jones Act for failing to protect her son from the assault, and under the general maritime doctrine of unseaworthiness, for hiring a crew member unfit to serve. *Id.* She sought compensation for loss of support and services, as well as loss of society, punitive damages, and loss of future income. *Id.*

In reaching its decision, the Court relied in part on *Vreeland*'s interpretation of FELA, explaining, "[w]hen Congress passed the Jones Act, the *Vreeland* gloss on FELA, and the hoary tradition behind it, were well established." 498 U.S. at 32, 1991 AMC at 13 (1990). It then reasoned that, because courts assume that Congress knows of existing law when it passes legislation, "[i]ncorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well." *Id.*

C. The Logic of *Vreeland* and *Miles* Can and Has Been Extended to Hold That Punitive Damages Are Unavailable in Jones Act Cases.

While *Vreeland* and *Miles* only specifically addressed the wrongful death section of FELA and the Jones Act respectively, and only addressed the non-pecuniary damage of loss of society, they have each been referenced in cases throughout the country in very general terms as limiting recovery under the statutes to non-pecuniary damages.³ Their analysis has been extended to punitive damages as well, in actions under their respective statutes for both injury and wrongful

³ See, e.g., *Am. R.R. Co. of Porto Rico v. Didricksen*, 227 U.S. 145, 159 (1913); *St. Louis, I.M. & S. Ry. Co. v. Craft*, 237 U.S. 648, 705–06 (1915); *Kopczynski v. The Jacqueline*, 742 F.2d 555, 560, 1985 AMC 769, 774–76 (9th Cir. 1984); *Miles v. Apex Marine Corp.*, 498 U.S. at 32.

death.⁴ On the basis of this extension, courts have never allowed punitive damages under the Jones Act.⁵

There have been several federal district court decisions extending the logic of *Miles* to cases involving claims for punitive damages under the Jones Act, and holding that they are unavailable. For example, see *Jackson v. Unisea, Inc.*, in Alaska; *La Voie v. Kualoa Ranch and Activity Club, Inc.*, in Hawaii; and *In re Cleveland Tankers, Inc.*, in Michigan, which lists several additional trial court decisions from across the country holding the same. *Jackson v. Unisea, Inc.*, 824 F. Supp. 895, 896 (D. Alaska, 1992); *La Voie v. Kualoa Ranch & Activity Club, Inc.*, 797 F. Supp. 827, 831, 1992 AMC 1493, 1497–99 (D. Haw. 1992); and *In re Cleveland Tankers, Inc.*, 791 F. Supp. 679, 680–81 (E.D. Mich. 1992).

There are also several federal circuit courts of appeals decisions which hold the same thing. *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1347, 1987 AMC 2024, 2026–28 (9th Cir. 1987); *Kozar v. Chesapeake & Ohio Ry. Co.*, 449 F.2d 1238 (6th Cir. 1971); *Miller v. Am. President Lines, Ltd.*, 989 F.2d 1450, 1993 AMC 1217 (6th Cir. 1993); *Kopczynski v. The Jacqueline*, 742 F.2d 555, 560, 1985 AMC 769, 774–76 (9th Cir. 1984).

One case with the most extensive discussion on the availability of punitive damages in Jones Act and general maritime law is *McBride v. Estis Well Service, L.L.C.*, an *en banc* decision from the Fifth Circuit Court of Appeals. 768 F.3d 382, 388–89, 2014 AMC 2409, 2416–19 (5th Cir. 2014) (en banc). They held that punitive damages were unavailable under either. *Id.* at 384,

⁴ See, e.g., *Miller v. Am. President Lines, Ltd.*, 989 F.2d 1450, 1457, 1993 AMC 1217, 1224–26 (6th Cir. 1993); *Kozar v. Chesapeake & O. Ry. Co.*, 449 F.2d 1238, 1240–43 (6th Cir. 1971); *Wildman v. Burlington N. R.R. Co.*, 825 F.2d 1392, 1395 (9th Cir. 1987).

⁵ See, e.g., *Kopczynski*, 742 F.2d at 561, 1985 AMC at 776; *Miller*, 989 F.2d at 1457, 1993 AMC at 1224; *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1347, 1987 AMC 2024, 2025–27 (9th Cir. 1987); *McBride v. Estis Well Service, L.L.C.*, 768 F.3d 382, 388–89, 2014 AMC 2409, 2417–18 (5th Cir. 2014).

2014 AMC at 2410. In *McBride*, three crew members were working on a barge that supported a truck-mounted drilling rig operating in a bayou in Louisiana. *Id.* at 384, 2014 AMC at 2410–11. The three were injured, one fatally, when the truck fell over. *Id.* The administratrix of the deceased seaman, along with the other two crewmembers, sued the owner and operator of the barge for negligence under the Jones Act and unseaworthiness, seeking compensatory and punitive damages. *Id.*

The Court began its analysis by discussing FELA and its interpretation by the Court in *Vreeland*, and the Jones Act. *Id.* at 385–86, 2014 AMC at 2413–14. It then discussed at length this Court’s decision in *Miles*, emphasizing its interest in establishing a uniform rule of law applicable to all actions for wrongful death. *Id.* at 386–89, 2014 AMC at 2414–18. Noting that the Jones Act applies to both injuries and death, the Court held that there was no reason to suggest that *Miles*’ holding and rationale ought to be limited to actions for wrongful death. *Id.* at 388–89, 2014 AMC at 2417–18. It applied *Miles*’ logic to the injured seamen’s cases and limited their recovery to pecuniary damages. *Id.* at 389, 2014 AMC at 2417–18. The Court then discussed *Atlantic Sounding Co., Inc. v. Townsend*, wherein the Supreme Court upheld the availability of punitive damages in a case involving a willful failure to provide maintenance and cure. *Id.* at 389–90, 2014 AMC at 2418–19; *Atl. Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 2009 AMC 1521 (2009). Rather than limiting the Court’s decision in *Miles*, *McBride* noted that the Court in *Townsend* “carefully distinguished its facts from *Miles* and reaffirmed that *Miles* is still good law.” 768 F.3d at 389, 2014 AMC at 2418. Maintenance and cure obligations, they noted, are entirely separate causes of action from negligence and unseaworthiness, and have not been addressed by Congress. *Id.* Finally, the Court in *McBride* explained that punitive damages are non-pecuniary, because pecuniary damages are those designed to compensate an injured

party for his or her loss, while punitive damages punish the defendant. *Id.* at 390–91, 2014 AMC at 2420–21. As such, punitive damages are unavailable in Jones Act, wrongful death, and unseaworthiness cases based on *Miles*’ logic. *Id.* at 391, 2014 AMC at 2422.

II. PECUNIARY DAMAGES ARE UNAVAILABLE IN UNSEAWORTHINESS CASES.

This Court held in *Miles* that the non-pecuniary damage of loss of society is unavailable to seamen’s personal representatives pursuing wrongful death causes of action under the doctrine of unseaworthiness. *Miles*, 498 U.S. at 36, 1991 AMC at 13–14. There is nothing to suggest that this should not be extended to other non-pecuniary damages pursuing recoveries for injury based upon the same doctrine. In fact, extending it as such would help create uniformity in maritime law. Additionally, the fact that this Court held in *Townsend* that punitive damages are available for certain maintenance and cure cases in no way undermines the Court’s holding and validity in *Miles*. *Townsend*, 557 U.S. at 424, 2009 AMC at 1537–38.

A. Application of *Miles*’ Rationale, Which Continues a Long Tradition of Favoring Uniformity in Admiralty Law, Requires the Denial of Punitive Damages in Unseaworthiness Cases.

From as early as 1875, this Court has recognized and adhered to “the constitutionally based principle that federal admiralty law should be ‘a system of law coextensive with, and operating uniformly in, the whole country.’” *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 402, 1970 AMC 967, 988–89 (1970) (quoting *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875)). This principle has guided the Court to its decisions in such notable cases as *Lindgren*, *Gillespie*, and *Moragne*. *Lindgren v. United States*, 281 U.S. 38, 44, 1930 AMC 399, 403–04 (1930); *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 154–55, 1965 AMC 1, 5–7 (1964); *Moragne*, 398 U.S. at 402, 1970 AMC at 987. The Court continued this long tradition in *Miles*. 498 U.S. at 33, 1991 AMC at 10–11.

In *Lindgren*, the Court held that the Jones Act preempts state statutes regarding seamen's wrongful death actions against employers. 281 U.S. at 44, 1930 AMC at 403–04. Barford, a seaman employed as a third mate on a merchant vessel owned by the United States, which was docked in Virginia, was working on a lifeboat suspended in midair above the dock. *Id.* at 41, 1930 AMC at 401–02. One end of the lifeboat suddenly released and he fell out onto the dock. *Id.* He died instantly. *Id.* Lindgren, his personal representative, sued for wrongful death for the benefit of his niece and nephew. *Id.* at 41–42, 1930 AMC at 401–02. The district court held that Lindgren could not recover under the Jones Act because Barford's niece and nephew were not his dependents, but that he could recover under a state statute in Virginia, which had no such limitation on beneficiaries. *Id.* at 42, 1930 AMC at 402. The court of appeals held that the Jones Act preempted state statutes. *Id.* at 42–43, 1930 AMC at 402–03. The Supreme Court affirmed, noting that “[i]t is plain that the [Jones] Act is one of general application intended to bring about the uniformity in the exercise of admiralty jurisdiction required by the Constitution.” *Id.* at 44, 1930 AMC at 404.

In *Gillespie*, the court held that the Jones Act precludes recovery under a state statute for the wrongful death of a seaman due to unseaworthiness. 379 U.S. at 155, 1965 AMC at 6–7. A seaman, Gillespie, fell from a ship and drowned while working in Ohio. *Id.* at 150, 1965 AMC at 3. His mother, as personal representative of his estate, sought recovery for wrongful death for the benefit of herself and Gillespie's dependent siblings under the Jones Act, as well as for unseaworthiness under Ohio's wrongful death statute. The Court, in reaching its decision, relied heavily on *Lindgren*. *Id.* at 154, 1965 AMC at 6–7. They described Lindgren's decision as “a reasonable one . . . provid[ing] the same remedy for injury or death for all seamen,” and adding

that “we do not believe that we should now disturb the settled plan of rights and liabilities established by the Jones Act.” *Id.* at 155, 1965 AMC at 7.

Moragne involved a longshoreman who died on duty in territorial waters. His widow sued the owner for wrongful death based on the doctrine of unseaworthiness. Unfortunately, this cause of action was not available to longshoremen in territorial waters due to gaps in state and federal laws, as well as maritime law. *Moragne*, 398 U.S. at 401, 1970 AMC at 1987.

The Court in *Moragne* recognized based on history and legislative intent that DOHSA was itself a manifestation of congressional intent “to achieve ‘uniformity in the exercise of admiralty jurisdiction.’” 398 U.S. at 401, 1970 AMC at 987 (quoting *Gillespie v. U.S. Steel Corp.*, 379 U.S. at 155, 1965 AMC at 6–7). The Court went on to further that clear intent by filling in the gaps and creating a wrongful death cause of action in general maritime law. This decision also followed “the constitutionally based principle that federal admiralty law should be ‘a system of law coextensive with, and operating uniformly in, the whole country.’” *Moragne*, 398 U.S. at 402, 1970 AMC at 998–99 (quoting *The Lottawanna*, 88 U.S. (21 Wall.) at 575).

The Court in *Miles* began its analysis with a thorough discussion of its decision in *Moragne*. *Miles*, 498 U.S. at 23–27, 1991 AMC at 3–7; *Moragne*, 398 U.S. 375, 1970 AMC 967. Then, persuaded by *Moragne*’s rationale, extended its reasoning to the case at bar. *Miles*, 498 U.S. at 27, 1991 AMC at 6–7.

In *Miles*, the Court echoed this intent and constitutional mandate to establish uniformity in the law. In this effort to establish uniformity, it denied the availability of certain non-pecuniary losses—loss of society and loss of future income—in causes of action for unseaworthiness and wrongful death. *Id.*

The fact that *Miles* involved non-pecuniary damages associated with wrongful death should not deter this Court from extending its rationale to other situations involving non-pecuniary damages, for example punitive. The beauty of legal reasoning is that it can be extended from one situation to another very similar one. In fact, law develops in this way.

Just as the Court in *Miles* declined to limit *Moragne*'s holding to deaths strictly of longshoremen, and instead applied it to seamen as well, this Court should decline to limit the rationale of *Miles* to strictly non-pecuniary damages associated with wrongful death. *Miles*, 498 U.S. at 27, 1991 AMC at 6–7.

B. There Should Not Be More Expansive Remedies Available for Strict Liability Than for Liability Based on Fault.

A defendant's liability under the general maritime law doctrine of unseaworthiness is entirely without fault, and as such the cause of action has been the principal vehicle of recovery for seamen for injury or death. *Miles*, 498 U.S. at 25–26, 1991 AMC at 5–6. This has not always been the case. The doctrine began as a duty to exercise due diligence in ensuring a seaworthy vessel. *Id.* It was transformed into a strict liability obligation in *Mahnich v. Southern Steamship Co.*, wherein this Court held that a shipowner was liable for failure to supply a safe ship regardless of fault and regardless of intervening negligence of crew members. *Miles*, 498 U.S. at 25, 1991 AMC at 5 (citing *Mahnich v. S. S.S. Co.*, 321 U.S. 96, 100, 1944 AMC 1, 4–5 (1944)). The Court reaffirmed this rule two years later in *Seas Shipping Co. v. Sieracki*, describing unseaworthiness as “a species of liability without fault.” *Id.* (citing *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94–95, 1946 AMC 698, 704–05 (1946)).

As the Court in *Miles* says,

It would be inconsistent with this Court's place in the constitutional scheme to sanction more expansive remedies for the judicially created unseaworthiness cause of action, in which liability is without fault, than Congress has allowed in cases of death

resulting from negligence. This holding restores a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law.

498 U.S. at 32–33, 1991 AMC at 10–11. This same reasoning holds true for any action involving unseaworthiness, not just when the plaintiff dies.

C. *Townsend* Does Not Undermine the Logic of *Miles*.

As Judge Justinian in his dissenting opinion in the Ninth Circuit Court of Appeals decision in the case at bar points out, *Townsend* flags the availability of punitive damages in actions for maintenance and cure as an open question. R. at 4a; *Townsend*, 557 U.S. at 424, 2009 AMC 1537–38. However, this neither undermines the Court’s holding in *Miles*, nor has anything to do with the availability of punitive damages in unseaworthiness cases. In fact, the Court even says itself that “the reasoning of *Miles* remains sound.” *Townsend*, 557 U.S. at 420, 2009 AMC at 1533. Unseaworthiness and maintenance and cure obligations are two entirely different and independent methods of recovery, the latter of which has never been addressed by Congress. *Id.* at 420–21, 2009 AMC at 1534. Maintenance and cure obligations have no counterpart in the DOHSA or the Jones Act, and there is a difference in the level of blameworthiness involved.

In *Townsend*, this Court considered the application of *Miles*’ logic to punitive damages in an action for maintenance and cure, and held that it did not preclude them. *Id.* at 408, 2009 AMC at 1523. It held that *Townsend*, a crew member injured when he slipped and fell on the deck of a tugboat owned by Atlantic Sounding Co., was free to pursue punitive damages in an action against Atlantic, who very frankly informed *Townsend* after his fall that they would not be paying maintenance and cure. *Id.* at 407, 2009 AMC at 1522. The Court reasoned that punitive damages have long been available at common law for wanton, willful, or outrageous conduct, and that this extends to claims arising under federal maritime law. *Id.* at 409, 411, 2009 AMC at

1523, 1525. It then showed that Congress had not departed from this general rule as it relates to maintenance and cure. *Id.* at 415–18, 2009 AMC at 1529–31. The court went on to distinguish itself from *Miles*. *Id.* at 421–22, 2009 AMC at 1532–38.

In addition to this Court in *Townsend*, several courts of appeals have considered the application of the logic of *Miles* to causes of action for maintenance and cure and rejected it, holding that punitive damages are available to plaintiffs pursuing these actions. *See, e.g., Guevara v. Mar. Overseas Corp.*, 34 F.3d 1279, 1283–84, 1995 AMC 321, 325–29 (5th Cir. 1994). This is not inconsistent with *Miles*.

The two causes of action, unseaworthiness and maintenance and cure, are highly distinguishable. The court in *Miles* denied the availability of punitive damages in unseaworthiness causes of action primarily in an effort to maintain uniformity in maritime law, reasoning that if non-pecuniary damages are unavailable in both the Jones Act and the DOHSA, so to should they be denied in unseaworthiness cases. 498 U.S. at 32–33, 1991 AMC at 10–12. However, as the Fifth Circuit in *Guevara* reasoned, maintenance and cure is much like worker’s compensation, and the cause of action has no counterpart in either the Jones Act or the DOHSA. 34 F.3d at 1284, 1995 AMC at 325–27. Thus, there is no need for them to be denied, because their availability would not create inconsistency in maritime law.

Another important difference between liability for unseaworthiness and maintenance and cure is the degree to which blameworthiness plays a role. Liability for unseaworthiness is irrespective of fault: a shipowner who is negligent is just as liable as one who tries his or her best to provide a safe ship for the seamen who work on board. Conversely, he or she is just as liable as one who knowingly and intentionally lets a dangerous defect in his or her ship go unfixed, completely inconsiderate to the lives and safety of its seamen.

On the other hand, the amount of damages for which an employer is liable in maintenance and cure obligations, depends upon how they respond to their obligation. For instance, in the Fifth Circuit, as the court in *Guevara* explained, a shipowner who refuses to pay maintenance and cure “is subject to an escalating scale of liability.” 34 F.3d at 1282, 1995 AMC at 324–25. If the shipowner is reasonable in his or her delay or refusal, he or she is liable only for the amount owed. If they have no reasonable excuse for refusing, however, they become liable not just for the amount owed but also for compensatory damages. And if the refusal to pay “exhibit[s] callousness and indifference to the seamen’s plight,” the owner may be liable for punitive damages as well.

This difference is important because the characterization of unseaworthiness as “a species of strict liability,” played a major role in the *Miles* Court’s analysis. 498 U.S. at 32–33, 1991 AMC at 10–12. “It would be inconsistent with our place in the constitutional scheme,” they explained, “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.” *Id.*

A shipowner’s failure to pay maintenance and cure, after it has been demanded, is likely the result of conscious choice. This makes punitive damages when the refusal exhibits callousness perfectly appropriate.

CONCLUSION

This Court should AFFIRM the Ninth Circuit Court of Appeals' judgment.

Respectfully submitted,

ATTORNEYS FOR RESPONDENT

APPENDIX TABLE OF CONTENTS

	<i>Page</i>
APPENDIX A: Appendix to the Petition for Certiorari.....	A-1
APPENDIX B: The Jones Act and FELA	B-1

APPENDIX A

APPENDIX TO THE PETITION FOR CERTIORARI

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. §§ 5 1-60]. 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)(6) 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/punitive 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).

APPENDIX B

THE JONES ACT AND FELA

The Jones Act

46 U.S.C. § 30104

A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

Federal Employer's Liability Act

45 U.S.C. § 51

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.