No. 08-214

In The

Supreme Court of the United States

ATLANTIC SOUNDINGS, INC.
and WEEKS MARINE, INC.,

Petitioners,

v.

EDGAR TOWNSEND,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether punitive damages may be legally awarded in a case where maintenance and cure has been arbitrarily and willfully withheld from a seaman.

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INTRODUCTION

Edgar Townsend, a seaman, was an employee of Atlantic Soundings/Weeks Marine who was injured in the course of his employment.

REASONS FOR GRANTING THE PETITION

I. A CONFLICT EXISTS BETWEEN THE FIRST, SECOND, THIRD, FOURTH, FIFTH, SIXTH, NINTH AND ELEVENTH CIRCUITS ON THE QUESTION PRESENTED. THE MOST RECENT AND DIRECTLY CONFLICTING DECISIONS ARE THOSE OF THE FIFTH AND ELEVENTH CIRCUITS.

The decision of the Eleventh Circuit in *Atlantic Sounding Co. v. Townsend*[1] and the decision of the Fifth Circuit in *Guevara v. Maritime Overseas Corp.*[2] are in conflict. The Fifth Circuit holds that punitive damages may not be awarded for the wilful withholding of medical care, and the Eleventh Circuit holds that they may.

The position of the Ninth Circuit on the question presented differs somewhat from the positions of both the Fifth and Eleventh Circuits. The Ninth Circuit's position is that "punitive damages, in

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[1] *Atlantic Sounding Co. v. Townsend*, 496 F.3d 1282 (11th Cir. 2007) (rehearing *en banc* denied).

[2] *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. Tex. 1995) (*en banc*), *cert. denied*, 516 U.S. 1046 (1996).

addition to attorney's fees, are . . . not needed to provide a powerful incentive for shipowners to investigate and pay promptly." *Glynn v. Roy Al Boat Management Company*.[3] Respectfully, the Ninth Circuit misjudges the human nature by concluding as a matter of law that all shipowners will be sufficiently motivated by the prospect of paying attorneys fees to properly provide injured seamen with medical care. Clearly some will not. Perhaps it can be attributed to the increase in medical costs from 1995, when *Glynn* was decided, to today, but there are published cases today which demonstrate that not all shipowners will be deterred by attorneys fees alone from withholding medical treatment from their seamen. If evidence of that trend is appearing in published opinions, those opinions represent the "tip of the iceberg." It is a growing trend.

The Second Circuit permits punitive damages, but measures the quantum of punitive damages by the amount of attorneys fees. In *Kraljic v. Berman Enterprises, Inc.*, 575 F.2d 412, 415 (2d Cir. 1978) it said "both majority and minority opinions in *Atkinson* in essence found that punitive damages were awardable in maintenance and cure cases. . . . Yet the majority saw fit to go no further than to allow punitive damages limited to counsel fees."

The First Circuit, in an opinion from 1973, permits the award of punitive damages for wilful failure

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[3] *Glynn v. Roy Al Boat Management Company*, 57 F.3d 1495 (9th Cir. 1995), *cert. denied*, 516 U.S. 1046 (1996).

to pay maintenance and cure. *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048, 1052 (1st Cir. 1973) (" . . . In view of the defendant's initial use of the venereal disease charge to justify withholding these payments, its refusal to pay past due unearned wages when notified that plaintiff was in danger of losing his home, and its termination of all payments after plaintiff refused to accept its settlement offer, the appropriateness of this instruction [on punitive damages] seems clear. . . .").

Obiter dicta in a Fourth Circuit decision states that " . . . courts have long awarded punitive damages to seamen where maintenance and cure benefits have been arbitrarily and willfully denied . . . " which indicates a willingness to award them in appropriate cases. *Manuel v. United States*, 50 F.3d 1253, 1258 (4th Cir. 1995).

The Sixth Circuit has not specifically ruled on punitive damages for wrongful failure to pay maintenance and cure. However, in *Miller v. American President Lines*, 989 F.2d 1450, 1458 (6th Cir. Ohio 1993) the Court found that punitive damages were not available to seamen in Jones Act or unseaworthiness cases. In *Huss v. King Co.*, 2000 U.S. Dist. LEXIS 13905 (W.D. Mich. Sept. 18, 2000) a district court extended that reasoning to maintenance and cure cases. Consequently while *obiter dicta* in the Sixth Circuit decision in *Al-Zawkari v. American S.S. Co.*, 871 F.2d 585, 590 (6th Cir. 1989) shows no opposition to the award of punitive damages where the issue has been properly pled and subsequently proven

(" . . . The trial court properly rejected the seaman's charges of willfulness. . . . The conclusion of the trial court was not an abuse of discretion) the trend of Sixth Circuit authority seems to point toward the position that punitive damages cannot be awarded for wrongful failure to supply medical care to seamen in that district, which includes the upper Mississippi River and portions of the Great Lakes.

The decision of the Third Circuit in *Kopacz v. Del. River & Bay Auth.*, 248 Fed. Appx. 319 (3d Cir. 2007), was that "the majority of courts do not allow punitive damages for even arbitrary and willful refusal to pay maintenance and cure." However, the decision is not a precedential opinion under Third Circuit internal operating rules. The Supreme Courts of Alaska and Texas, in opinions published before the decision of the Eleventh Circuit in this case, followed the decision of the Fifth Circuit. See *Stone v. International Marine Carriers*, 918 P.2d 551, 556 (Alaska 1996) and *Maritime Overseas Corp. v. Waiters*, 917 S.W.2d 17 (Tex. 1996).

This issue has had adequate opportunity to percolate through the Circuit Courts and no uniform resolution of the issue has emerged.

II. THE JONES ACT DOES NOT PREEMPT THE MARITIME COMMON LAW REMEDY OF MAINTENANCE AND CURE.

Maintenance and cure is a common law maritime remedy. It precedes the Jones Act by many centuries[4] and efforts to suggest that Congressional action

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[4] The concept of "maintenance and cure" can be traced back to ancient Greece and Persia. In 1154, Duchess Eleanor of Aquitaine, the mother of Richard the Lionhearted, went with her husband on the Second Crusade. At Ephesus, in Greece, she was introduced to maritime codes.

After the Second Crusade Eleanore returned to Aquitaine, a city-state in Southwest France whose major port was Bordeaux, and brought the Mediterranean maritime code with her. Since Eleanor lived on the Island of Oleron, just North of Bordeaux, her new maritime code became known as the *Rules of Oleron*. The Rules first codified in Europe a shipowner's obligation to provide maintenance and cure.

Article VI of the Rules provides that:

> [If] . . . any of the ship's company be in the service of the ship, and thereby happen to be wounded or otherwise hurt, in that case they shall be cured and provided for at the costs and charges of the said ship.

Article VII provides:

> If it happens that sickness seizes on any one of the mariners, while in the service of the ship, the master ought to set him ashore, to provide lodging and candlelight for him . . . hire a woman to attend him, and likewise to afford him such diet as is usual in the ship . . .

The requirement that the shipowner provide "a woman to attend him" has been replaced with the requirement that the shipowner provide the sick or injured seaman with hospitalization.

preempt maintenance and cure have been made since at least the 1820's.

In *Harden v. Gordon*, 11 F. Cas. 480, 484 (U.S. Court of Appeals 1823) Justice Story, whose compassion for seamen was legendary, while riding the Circuit, was confronted with a shipowner which argued that the passage of a statute by Congress requiring shipowners to provide for a medicine chest to be kept aboard ship preempted a seaman's right to maintenance and cure. Justice Story dismissed the argument as follows:

> . . . In the construction of statutes it is a general rule, that merely affirmative words do not vary the antecedent laws or rights of parties. There must be something inconsistent with or repugnant to them, to draw after a statute an implied repeal, either in whole or *pro tanto* of former laws; otherwise the statute is supposed to be merely declarative or cumulative. . . .

Using Justice Story's early formulation of the preemption doctrine in a maritime case, the Jones Act was meant by Congress to be a cumulative remedy, and not to supplant the common law remedy of maintenance and cure because the Jones Act is neither repugnant to the policies behind maintenance and cure, nor are they inconsistent. For over two centuries the doctrine of maintenance and cure has been judicially crafted and enforced with only

minor Congressional supplementation or interference.[5] Congress has demonstrated an intent "to leave well enough alone" and to permit the Courts to regulate the requirements of maintenance and cure.

The rationale for most of the modern decisions which depart from that principle, and disapprove the award of punitive damages for the wrongful denial of maintenance and cure, stem from a misinterpretation of *Miles v. Apex Marine*.[6] The Circuit Courts have either incorrectly assumed that exemplary damages were not historically available as a maritime remedy, a misconception which was cleared up in *Exxon Shipping v. Baker*,[7] or that if exemplary damages were historically available, that their use was preempted by the passage of the Jones Act in 1920.

This Court has counseled lower courts against using the Jones Act to narrow maritime remedies by analogy. In *American Export Lines v. Alvez*, 446 U.S. 274, 283-284 (U.S. 1980) the Court stated:

> . . . the liability schemes incorporated in DOHSA and the Jones Act should not be accorded overwhelming analogical weight in formulating remedies under general maritime

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[5] The only reference to maintenance and cure in the United States Code is found in 46 U.S.C. §688(b). That section limits the right of aliens injured in the offshore oil drilling industry or in foreign territorial waters to seek redress in U.S. courts.

[6] *Miles v. Apex Marine*, 498 U.S. 19 (1990).

[7] *Exxon Shipping v. Baker*, 128 S.Ct. 2605 (2008).

> law. . . . Thus, a remedial omission in the Jones Act is not evidence of considered congressional policymaking that should command our adherence in analogous contexts. And we have already indicated that "no intention appears that the [Death on the High Seas] Act have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law.

Maintenance and cure is a non-statutory federal remedy which is appropriate to effectuate the policies of the general maritime law.

For the decade between the *American Export* case and *Miles*, lower courts exercised the restraint with this Court counseled. However, since this Court's decision in *Miles*, lower courts have permitted the guidance provided by *American Export* to go ignored. The limitations on non-pecuniary[8] damages in maritime wrongful death cases occurring on the high seas to seamen have now "jumped the rails" to include cases involving injuries to non-seamen such as cruise ship passengers and recreational boaters, and to include accidents happening on territorial waters, as

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[8] "... Among the impediments to such discussions [concerning punitive damages in maritime law] have the courts' evident misunderstanding of the history of maritime punitive damages and the temptation to stop thinking once someone points out that punitive damages are 'nonpecuniary.'" David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Com. 73, 164 (1997).

opposed to the high seas. These are areas in which Congress demonstrated no intent to regulate by passage of either the Jones Act or the Death on the High Seas Act.[9]

Similarly, Congress has shown no intent to regulate maintenance and cure and hence the Jones Act does not preempt general maritime law remedies.

III. THE LONGSHORE AND HARBOR WORKERS COMPENSATION ACT IS CLOSELY ANALOGOUS TO MAINTENANCE AND CURE AND PROVIDES EVIDENCE OF CONGRESS' INTENT WITH REGARD TO EMPLOYERS WHO ARBITRARILY OR WILFULLY WITHHOLD MEDICAL CARE FROM INJURED EMPLOYEES.

Maintenance and cure is the historical predecessor to modern workers' compensation – a system of liability without fault, requiring employers to provide medical care and a living wage to employees who are injured on the job. For that reason, the analogous statute which provides the Courts with guidance in determining the bounds of general maritime law is the Longshore and Harbor Workers Compensation and not the Death on the High Seas Act or the Jones

[9] According to one noted commentator "In this vein, some courts have taken upon themselves the agenda of tort reform despite the fact that Congress itself has not seen fit to do so." Robert Force, *The Legacy of Miles v. Apex Marine Corporation*, 30 Tul. Mar. L. J. 35, 36 (2006).

Act. Most commentators have suggested that there is nothing in the Jones Act which creates a reason to deny seaman remedies which are analogous to remedies typically available to land-based workers.[10, 11]

Atlantic Soundings and Weeks Marine employ seamen and non-seamen maritime workers who work together, sometimes side by side, on dredging projects. Were a seaman and a non-seaman maritime worker to be injured by, for example, a falling crane while working shoulder to shoulder, and were they to suffer an identical injury, and were their employer to fail or refuse to provide medical care, their situations would be substantially different.

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[10] As Professor Robertson from the University of Texas pointed out "no one has suggested a justification in policy or principle for treating seamen worse than other maritime plaintiffs. Nor has anyone argued that it makes sense for the maritime law to be more restrictive of punitive liability than the prevailing land-based law." David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Com. 73, 164 (1997).

[11] As Professor Force from Tulane University has stated "the Jones Act and DOHSA are remedial legislation and quite progressive when one considers that they were both enacted in 1920. In both statutes, Congress created remedies that had been previously unavailable. Is there any reason to believe that Congress, in enacting these statutes, intended to circumscribe the entire law of maritime personal injury recovery, or that Congress intended to deny remedies that are now routinely available in land-based tort situations?" Robert Force, *The Legacy of Miles v. Apex Marine Corporation*, 30 Tul. Mar. L. J. 35, 45 (2006).

If the corporation failed to provide medical care for the maritime worker, or otherwise fail to "secure compensation" or took action "with the intent to avoid the payment of compensation," the corporation could be charged with a crime. The President, Secretary, and Treasurer of the corporation could be "severally liable to such penalty of imprisonment [for up to one year] as well as jointly liable with such corporation for such fine."[12] Not only could criminal penalties be imposed, but the maritime worker would have a civil remedy akin to strict liability. The worker would be entitled to bring an action at law, or in admiralty, for the full amount of his losses, without any limitation to the benefits provided under the Longshore Act.[13] Further, the employer would be stripped of the defenses of comparative negligence[14] and assumption of risk.

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[12] Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §938.

[13] Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §905(a).

[14] Section 905(a) says that it prevents the employer from pleading "contributory negligence." However, since the doctrine of contributory negligence was replaced by the doctrine of comparative negligence in *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975) the most logical interpretation of the Act is to bar the defense of comparative negligence. *Smallwood v. American Trading and Transport*, 839 F.Supp. 1377 (N.D. Cal. 1993) (" . . . [The House] Committee indicated that comparative rather than contributory negligence should apply and the assumption of risk doctrine, which is foreign to admiralty negligence, would not obtain . . . ").

On the other hand, under those Circuits, such as the Fifth, which prohibit the seaman from seeking punitive damages, the employer would suffer no penalty for withholding medical treatment from the seaman. It might have to pay the attorneys fees of the seaman, and some employers might find that incentive enough to not withhold medical care. However, there are "bad actors" among maritime employers, particularly in times when medical care is expensive. Some of those employers might seek to use the denial of treatment as a means to compel settlements of cases. Some might even develop the withholding of medical care into a corporate policy to keep workers in check, instill fear in employees, and keep them from seeking legal assistance.

The policy set out by Congress in the Longshore Act is clear. Maritime employers are to be punished if they fail to provide their workers with medical care so that they can get well and return to the work force. While the coverage of the Longshore Act does not extend to seamen, the intent of Congress should direct the actions of the Courts.

While the Court lacks the inherent ability to impose criminal sanctions in the absence of a statute, it does have inherent power to impose civil penalties which can create the desired effect. *Exxon Shipping v. Baker*. When employers of seamen fail to provide those seamen with medical care, it can use its admiralty powers to provide for the award of exemplary damages sufficient enough to deter "bad actors" from

intentionally causing injuries to their employees by refusing them medical care.

IV. THE CONFLICT BETWEEN THE CIRCUITS, AND THE ELEVENTH CIRCUIT DECISION IN THIS CASE, HAS CAUSED MARITIME EMPLOYERS TO INCORPORATE FORUM SELECTION CLAUSES IN THEIR CONTRACTS WITH SEAMEN.

There is urgency to the Court's resolution of this issue. First, unlike some issues which come before the Court, this issue involves real seaman suffering real physical pain and increased disability because they can't get needed surgery or other medical treatment. Certainly some seamen qualify for Social Security disability and receive Medicaid treatment, so the employer's responsibility falls upon the taxpayer. But in many cases, the seamen receive no treatment, self medicate with large doses of non-prescription pain relievers and are unable to return to work. They can end up sleeping in their cars, or homeless.

Anecdotal evidence from attorneys in the Fifth Circuit suggests that qualified maritime attorneys are unwilling to take on maintenance and cure cases on a contingent hourly fee paid at the conclusion of time-consuming and expensive litigation. Maintenance and cure cases require expert testimony. The federal cost statute does not permit the recovery of expert witness fees, so an attorney who takes on a maintenance and cure case will be required to hire expensive medical experts, pay for them out of the

attorney's pocket, with the uncomfortable assurance that win or lose, the attorney will not be compensated for hiring those experts. Unless a seaman's maintenance and cure claim is coupled with a significant personal injury for which there may be recovery under the Jones Acts, securing legal representation is difficult in that Circuit.

Since the decision of the Eleventh Circuit in this case a number of maritime employers have begun to include in their contracts with seamen forum selection clauses where the chosen forum is a federal court located outside of Florida, Alabama, or Georgia. These forum selection clauses may be included in the initial hiring contract, or may be part of a post-injury agreement, known as a wage continuation agreement, in which a seaman agrees to waive local jurisdiction in exchange for the continuation of his wages, which are later deducted from his Jones Act recovery. Wage continuation agreements are little more than loans or advances on a future settlement.

While seamen generally sign their employment contracts without consulting a lawyer, and frequently without reading them, they are unaware of the effect that agreeing to resolve their personal injury claims in New Orleans, rather than in Miami, may have on their ability to secure maintenance and cure.

Without resolution of the conflict between the Circuits, overreaching by employers will result in forum shopping and inconsistent results in maintenance and cure litigation.

V. THE REASONING IN *EXXON SHIPPING*, WHICH APPLIED MARITIME COMMON LAW PRINCIPLES TO PUNITIVE DAMAGES FOR MARITIME POLLUTION CLAIMS, CAN ONLY BE EXTENDED TO MARITIME PERSONAL INJURY CLAIMS BY THIS COURT.

In *Exxon Shipping v. Baker* the Court indicated that with regard to remedies for common law maritime causes of action for pollution, "responsibility lies with this Court as a source of judge-made law in the absence of statute." In this case the Court would be "... acting here in the position of a common law court of last review, faced with a perceived defect in a common law remedy...." regarding maritime personal injuries.

Most Circuits have taken a position on this issue, and two Circuits, the Fifth and the Eleventh, have considered or declined to consider the issue *en banc*. The Fifth Circuit issued an opinion *en banc* in *Guevera*. While the refusal to reconsider a panel decision *en banc* is usually accorded little significance, the Eleventh Circuit's decision not to reconsider in this case may be different. It should be analyzed in light of the fact that the Eleventh Circuit panel decision relied upon Fifth Circuit law which pre-existed the founding of the Eleventh Circuit, yet held directly the opposite to the Firth Circuit's decision which had overruled the earlier decision on which it was based.

CONCLUSION

Under the prior panel precedent rule, it is unlikely that the Circuits will now harmonize this law among themselves. Until this Court reconsiders the question, the law will remain in conflict.

Respectfully submitted,

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