No. __-___

IN THE

Supreme Court of the United States

ICICLE SEAFOODS, INC.,

Petitioner,

v.

DANA CLAUSEN,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Washington

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this maritime case, a jury awarded Respondent $37,420 for maintenance and cure, and $1.3 million in punitive damages—more than 34 times the compensatory damages. Notwithstanding the strict ratio between compensatory and punitive damages required in maritime cases by *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), the Supreme Court of Washington upheld the full $1.3 million punitive award. In conflict with several other courts, as well as this Court's decisions in *Exxon* and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), it inflated the "compensatory damages" element of the ratio by adding in $387,558 in later-awarded attorney's fees, turning a 34:1 ratio into a purported 2.79:1 ratio. And it dismissed the argument that even that ratio was excessive under *Exxon*'s 1:1 standard, holding that *Exxon* established no "broad, general rule."

The questions presented are:

1. Whether, in determining the ratio between compensatory and punitive damages for purposes of applying federal limits on punitive damages, court-awarded attorney's fees are properly included as compensatory damages.

2. Whether, and to what extent, punitive damages in maritime cases may exceed the 1:1 ratio between compensatory and punitive damages applied by the Court's *Exxon* decision.

PARTIES TO THE PROCEEDING

The sole defendant below was Petitioner Icicle Seafoods, Inc. The sole plaintiff below was Respondent Dana Clausen.

CORPORATE DISCLOSURE STATEMENT

Petitioner Icicle Seafoods, Inc., is a private corporation that is wholly owned by Icicle Midco, Inc., a private corporation that is wholly owned by Icicle Holdings, Inc. No publicly held company owns 10% or more of Icicle Seafoods' stock.

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS
(continued)

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the Supreme Court of Washington, Pet. App. 1a-30a, is reported at 272 P.3d 827. The opinion of the Superior Court of Washington, Pet. App. 31a-50a, is unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The Supreme Court of Washington entered its final judgment on March 15, 2012. Pet. App. 1a. This petition is timely filed on June 4, 2012.

STATEMENT OF THE CASE

This case arises out of a February 2006 maritime accident involving Respondent Dana Clausen, an engineer for Petitioner Icicle Seafoods, Inc. Pet. App. 3a. While working on board the Bering Star, a barge that had been docked in Dutch Harbor, Alaska, Clausen injured himself lifting a 122-pound piece of steel. *Id.* After reporting his injuries, Clausen went ashore to receive medical care, and returned home to Louisiana for additional care. *Id.*

A. Trial Court Proceedings

On January 18, 2008, Clausen commenced this action against Icicle in Washington state court, seeking damages for his injuries under federal maritime law. He asserted three claims. First, he sought to recover under the Jones Act, 46 U.S.C. § 30104, alleging that Icicle's negligence had caused his accident on the barge. *See* Pet. App. 4a. Second, Clausen brought a common-law claim alleging that Icicle's barge was not seaworthy. *Id.* Third, again under federal common law, Clausen sought "maintenance and cure," i.e., the

medical and living expenses incurred during his recovery.[1] *Id.*

Clausen's claims were tried before a Washington jury in 2009. On November 16, 2009, the jury found in Clausen's favor on his Jones Act claim and his maintenance-and-cure claim, and found in Icicle's favor on Clausen's unseaworthiness claim. *Id.*

On the Jones Act claim, after finding Icicle 56% responsible and Clausen 44% responsible for his actual injury on the barge, the jury determined that Clausen had suffered $453,100 in damages for that injury. *Id.* No punitive damages or attorney's fees are available under the Jones Act, and none were awarded.[2]

On the maintenance-and-cure claim, the jury found that Icicle unreasonably failed to pay Clausen's maintenance and cure, Pet. App. 4a, but that this conduct resulted in no additional injury to Clausen beyond the unpaid amounts themselves, Pet. App. 30a n.2. The jury awarded Clausen $37,420 in compensatory damages on the claim, for his actual medical and living expenses in arrears. Pet. App. 30a n.2.

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[1] Maintenance and cure are no-fault remedies akin to workers' compensation available to seamen under maritime law. *See, e.g.*, *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527-28 (1938). If a seaman is injured while in his ship's service, his employer, even if not responsible for the injury, must pay him maintenance and cure. *See, e.g.*, *id.*

[2] *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (holding that the Jones Act "incorporate[s] the pecuniary limitation on damages" set forth in the Federal Employers' Liability Act (FELA)); *Mich. Cent. R.R. Co. v. Vreeland*, 227 U.S. 59, 71 (1913) (holding that FELA "provid[es] only for compensation for pecuniary loss or damage").

But the jury awarded Clausen $1.3 million in punitive damages—a sum over 34 times Clausen's compensatory damages—in light of its finding that Icicle was "callous and indifferent, or willful and wanton" in its failure to pay Clausen's maintenance and cure. *See* Pet. App. 4a.

After the jury's verdict, Clausen filed a post-trial motion requesting over $470,000 in attorney's fees and costs under *Vaughan v. Atkinson*, 369 U.S. 527, 530-31 (1962), which permits an award of attorney's fees when an employer's failure to pay maintenance and cure is "callous" or "willful and wanton." *See* Pet. App. 4a. This request included the attorney work on Clausen's Jones Act and unseaworthiness claims, for which Clausen was not entitled to recover attorney's fees. Yet the trial court reduced the total amount of attorney's fees for the entire case by only ten percent, reasoning "that this was the attorneys' first case involving punitive damages for maintenance and cure, suggesting that the issue required a significant amount of time." Pet. App. 13a. The trial court ultimately awarded $387,558 in fees and $40,547.57 in costs. Pet. App. 5a.

Icicle moved to amend the judgment to reduce the punitive award to within the 1:1 compensatory-to-punitive damages ratio announced in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008). The trial court rejected Icicle's *Exxon* challenge, reasoning that, for ratio purposes, Clausen's compensatory damages should include his court-awarded attorney's fees and costs. With the inclusion of those items, Clausen's alleged "compensatory damages" swelled from the jury's award of $37,420 to a final total of $465,525. Pet. App. 37a.

Even with this inflation of the "compensatory damages" element of the *Exxon* ratio, the punitive damages still nearly tripled the compensatory award. The trial court held, however, that this 2.79:1 ratio complied with *Exxon*. *See* Pet. App. 50a. "*Exxon* imposed a 1:1 ratio under [its] particular facts," the trial court indicated, but "did not establish a 1:1 limit for all maritime cases." Pet. App. 34a.

Based on its review of the record, the trial court concluded that Icicle's failure to pay maintenance and cure was reprehensible. To the trial court, Icicle had "demonstrated intentional indifference to Mr. Clausen's health," in part because "Clausen's necessary medical care was going to cost [Icicle] money." Pet. App. 38a-39a. Among other things, the trial court found that Icicle had paid Clausen "only [$]20.00 a day in maintenance," which was "clearly not enough money for safe and secure lodging" and food; intentionally declined to pay Clausen's benefits "for a considerable time"; and misled Clausen about his condition "to force Mr. Clausen to settle his claim" for less than would otherwise be due. Pet. App. 39a-42a. The trial court also took issue with a lawsuit Icicle filed against Clausen a few months before this action commenced seeking to terminate Clausen's maintenance-and-cure rights. That suit's complaint, in the trial court's view, included "deliberate false statements." Pet. App. 43a. In light of these facts, the trial court stated that "[t]he punitive damages must be too painful to make such conduct profitable." Pet. App. 47a.

B. Appellate Proceedings

Icicle appealed, arguing (as relevant here) that *Exxon* required the trial court to substantially reduce

Clausen's $1.3 million punitive-damages award, Pet. App. 15a, and that the trial court erred by adding Clausen's attorney's fees to the compensatory-damages element of the ratio between compensatory and punitive damages, Pet. App. 20a. Due to the significance of the issues, the appeal was immediately transferred to the Washington Supreme Court. Pet. App. 5a.

The Washington Supreme Court affirmed in a divided decision. Pet. App. 21a. The majority rejected both Icicle's contention that attorney's fees are not properly included in the punitive-to-compensatory ratio under *Exxon* and its contention that *Exxon* imposed a maximum 1:1 ratio in maritime cases.

With respect to the 1:1 ratio, the majority characterized *Exxon* as not "establishing a broad, general rule limiting punitive damage awards," Pet. App. 17a, but rather as embracing "a variable limit" on punitive damages "based on the tortfeasor's culpability." Pet. App. 18a. The ratio applied in *Exxon* was inapplicable here, the majority held, because *Exxon* involved "a case of reckless action, profitless to the tortfeasor," Pet. App. 17a (quoting 554 U.S. at 510-11), whereas "Icicle's conduct was not just reprehensible, it was egregious," so a substantial punitive award was necessary to "serve[] as a deterrent" to prevent "Icicle, and any employer," "from profiting at the expense of their employee's health." Pet. App. 19a.

The court further reasoned that the applicable punitive-to-compensatory ratio was not 34 to 1 but rather was really 2.79 to 1, holding that the trial court properly "include[d] attorney fees as part of the compensatory damages award when calculating the puni-

tive damages ratio." Pet. App. 20a. "[R]ecovery of attorney fees is compensatory in that those fees attempt to make Clausen whole for the employer's actions." *Id.* Citing several cases applying the due-process limits on punitive damages, the court concluded that "[c]ourts in other jurisdictions include attorney fees as part of the compensatory damages award for punitive damages ratio comparison purposes." Pet. App. 20a (citing *Blount v. Stroud*, 915 N.E.2d 925, 944 (Ill. App. Ct. 2009); *Action Marine, Inc. v. Cont'l Carbon Inc.*, 481 F.3d 1302, 1321 (11th Cir. 2007); *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 235-36 (3rd Cir. 2005)).

Justice Johnson dissented, in an opinion joined by Justice Alexander, arguing that "the majority ignore[d] instruction from the United States Supreme Court . . . as articulated in *Exxon*." Pet. App. 21a. "To solve the problem of runaway punitive damage awards," the dissent emphasized, "the *Exxon* Court concluded that punitive damages should be 'pegg[ed] . . . to compensatory damages using a ratio. . . .'" Pet. App. 23a (quoting 554 U.S. at 506). While noting the possibility that *Exxon* might be interpreted as permitting a slightly higher ratio than 1:1 in some cases, the dissent pointed out that the "highest ratio considered potentially applicable in *Exxon* was 3:1." Pet. App. 26a.

The dissent next rejected the majority's assertion that "the punitive damage award in this case is no more than three times the compensatory award"—based on the majority's inclusion of nearly $400,000 of attorney's fees as compensatory damages—as sheer "fiction." Pet. App. 27a. It explained that "attorney fee awards in maintenance and cure actions

are characterized as punitive," not compensatory—as this Court and other courts have indicated—"because fees are not available unless a showing of callous or willful and wanton conduct is made." Pet. App. 28a (citing *Vaughan*, 369 U.S. at 531). Thus, the dissent explained, Clausen's punitive damages dwarfed his compensatory damages by a measure that "vastly exceeds any ratio considered palatable by the *Exxon* Court," Pet. App. 26a, and were "plainly excessive in relation to the actual harm caused by" Icicle. Pet. App. 30a. "By upholding the award," the dissent warned, "this court perpetuates a problem the *Exxon* Court intended to remedy: the issue of unpredictable punitive damage awards that fail the fundamental goal of deterrence." Pet. App. 30a. Thus, the dissent would have reduced Clausen's punitive damages to, at most, "$112,260—three times the compensatory award of $37,420." Pet. App. 27a.

REASONS FOR GRANTING THE PETITION

In recent years, this Court has repeatedly found it necessary to establish limits on punitive damages, both as a matter of federal due process, *see State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-23 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585-86 (1996), and as a matter of federal admiralty law, *see Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513-14 (2008). In both types of cases, the Court has used the *ratio* between the punitive and compensatory damages as a critical objective indicator for preventing runaway punitive awards. In admiralty cases, the Court has established the general rule that "[a] punitive-to-compensatory ratio of 1:1 . . . yields maximum punitive damages." *Exxon*, 554 U.S. at 515. In due-process cases, the ratio is also a "central

feature in [the Court's] analysis," *id.* at 507, because "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," *State Farm*, 538 U.S. at 425.

This admiralty case presents two important and recurring questions fundamental to the application of those federal limits on punitive damages. The Washington Supreme Court purported to justify a punitive award 34 times the size of the compensatory damages by (1) comparing the punitive award to a "compensatory" figure inflated by nearly $400,000 in attorney's fees instead of to compensatory damages as required by *Exxon*, and (2) interpreting *Exxon* as establishing no generally applicable limit on punitive damages. The questions presented are: *First*, whether court-awarded attorney's fees are properly included as compensatory damages for purposes of the federal limits on punitive awards. *Second*, whether, and if so to what extent, admiralty courts may depart from the 1:1 ratio that *Exxon* applied.

I. THE DECISION BELOW THAT ATTORNEY'S FEES ARE PROPERLY INCLUDED IN THE PUNITIVE-DAMAGES RATIO CONFLICTS WITH THIS COURT'S DECISIONS AND NUMEROUS STATE AND FEDERAL CASES

The Court should grant certiorari to address the recurring question whether, for purposes of the federal limits on punitive damages, attorney's fees are properly included in the compensatory side of the ratio between compensatory and punitive damages. The Washington Supreme Court's decision to do so in this case conflicts with this Court's decisions, adds to

an existing split of authority, and raises an issue that is recurring, important, and in need of resolution.

A. The Decision Below Conflicts With This Court's Decisions In *Exxon* And *State Farm*

In this case, the Washington Supreme Court upheld a $1.3 million punitive award more than 34 times larger than the $37,420 in compensatory damages, on the "fiction," Pet. App. 27a, that the ratio was purportedly only 2.79:1. This manipulation of the prescribed ratio is comparable to other courts' efforts to "depart[] from well-established constraints on punitive damages," *State Farm*, 538 U.S. at 427, such as by relying on the defendant's assets, *id.*, or by looking to harm to others not before the court, *Philip Morris USA v. Williams*, 549 U.S. 346, 354 (2007), when attempting to justify an excessive ratio between punitive and compensatory damages.

The Washington Supreme Court's alteration of the punitive-to-compensatory ratio is squarely contrary to this Court's cases. *Exxon* adopted a ratio requirement for maritime cases because of the need for a specifically defined "quantified limit[]" that could be mechanically and consistently applied and thereby eliminate "unpredictable outliers." 554 U.S. at 504, 506. It defined that ratio as the one between punitive damages and *compensatory damages*, holding it appropriate to "peg[] punitive to *compensatory damages* using a ratio or maximum multiple." *Id.* at 506 (emphasis added). And, when opting for the precise 1:1 ratio, the Court noted that "a median ratio of punitive to *compensatory damages* of about 0.65:1 probably marks the line near which cases like this one largely should be grouped." *Id.* at 513 (emphasis added).

This Court's definition of the ratio as one between the punitive award and compensatory damages plainly excludes court-awarded attorney's fees. To begin with, the established and widely accepted meaning of "compensatory damages" in this country excludes attorney's fees. Except in unusual cases—such as lawsuits for abuse of process—attorney's fees are not an element of damages. *See, e.g.*, *Doe v. Chao*, 540 U.S. 614, 625 n.9 (2004) (distinguishing "actual damages" from "costs and reasonable attorney's fees"); Fed. R. Civ. P. 54(d)(2) (noting that "a claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages"). Indeed, under the American Rule, attorney's fees normally are not recoverable, and even when they are recoverable (whether by statute, as a sanction for misconduct, or for some other reason), they are a form of collateral relief ordered as costs by the court, not an element of damages found by the factfinder. *See, e.g.*, *Hutto v. Finney*, 437 U.S. 678, 697 (1978) ("In America, although fees are not routinely awarded, there are a large number of statutory and common-law situations in which allowable costs include counsel fees."). Here, for example, attorney's fees were "not part of the plaintiff's substantive claim for damages," Pet. App. 12a, which would have required the jury to find them, but rather a form of subsequent and collateral relief ordered by the trial court. In short, the plain meaning of "compensatory damages" in the *Exxon* ratio excludes court-awarded attorney's fees.

Moreover, the *Exxon* Court's reasoning in support of the ratio it adopted relied significantly on recommendations that themselves compared punitive

awards with the compensatory verdict alone—i.e., without including attorney's fees. *See* 554 U.S. at 506-07; *see, e.g.*, ABA, Report of Special Comm. on Punitive Damages, Section of Litigation, Punitive Damages: A Constructive Examination 65 (1986) ("Our specific proposal is that a ratio be adopted of a punitive damages three times the *compensatory verdict*." (emphasis added)). Likewise, in analyzing the question, the Court relied on a host of studies identifying ratios between compensatory and punitive damages. *See Exxon*, 554 U.S. at 497-98 & nn.13-14, 506-07. "[B]y most accounts," the Court noted, "the median ratio of punitive to *compensatory awards* has remained less than 1:1." *Id.* at 497-98 n.14 (citing Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. of Empirical Legal Studies 263, 278 (2006); Vidmar & Rose, *Punitive Damages by Juries in Florida*, 38 Harv. J. Legis. 487, 492 (2001)). All of these studies appear to have addressed the ratio between punitive awards and the compensatory verdicts; there is no indication that any of them included attorney's fees in that ratio.

This Court's decision in *State Farm* likewise identified the relevant ratio as that between punitive and compensatory *damages*—and, in fact, specifically excluded attorney's fees. The respondents in *State Farm* expressly argued that the Court should include as "compensatory damages" not simply the $1 million compensatory award, but also over $800,000 in attorney's fees and costs. *See* Br. of Respondents, *State Farm Mutual. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (No. 01-1289), 2002 WL 31387421, at *17 n.5. This Court, however, excluded those amounts

from its calculation and determined that the punitive-to-compensatory ratio was "145 to 1," 538 U.S. at 425—the ratio between the $145 million punitive award and the $1 million compensatory award. It further found the $1 million award to be "complete compensation" for the plaintiffs. *Id.* at 426; *see also BMW*, 517 U.S. at 580 (noting "[t]he principle that exemplary damages must bear a 'reasonable relationship' to *compensatory damages*" (emphasis added)).

In short, the Washington Supreme Court's decision to justify a disproportionate punitive award by comparing it to the amount of attorney's fees cannot be reconciled with *Exxon* and *State Farm*.[3]

B. The Decision Below Deepens An Existing Split Over Whether Attorney's Fees May Be Used In The Ratio

Certiorari is also warranted because the decision below deepens a significant split of authority over whether—in applying the punitive-to-compensatory ratio under *Exxon* and *State Farm*—an award of attorney's fees is properly included in the compensatory-damages element of the ratio. Consistent with this Court's cases, most courts have excluded attorney's fees from the ratio. But a growing number of courts, several of them cited in support of the holding below, *see* Pet. App. 20a, have held that attorney's

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[3] In addition to this direct inconsistency with *Exxon* and *State Farm*, the decision below is inconsistent with the reasoning of those cases. *See* Part I.D, *infra*.

fees are properly included as compensatory damages.[4]

1. Several courts have flatly rejected plaintiffs' requests to treat attorney's fees as "compensatory" when analyzing whether the ratio between punitive and compensatory damages complied with federal law. The Utah Supreme Court adopted this approach on remand from this Court's *State Farm* decision. *See Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 419-20 (Utah 2004). The Utah Supreme Court recognized that this Court itself had not included the plaintiffs' award of attorney's fees in the ratio, and thus it held that the Court's opinion "foreclose[d] consideration of a compensatory damages award" inflated to include attorney's fees. *Id.* at 419. It further noted that "[t]o consider attorney fees and expenses in awarding punitive damages . . . invites unnecessary conceptual and practical complications to an already complex enterprise." *Id.* at 420. Unlike the Washington Supreme Court, *see* Pet. App. 12a, the Utah Supreme Court held that "[t]he incorporation of attorney fees and expenses into the compensa-

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[4] Many of these cases have arisen in the context of the *State Farm* due-process analysis rather than the *Exxon* federal common-law analysis, but the question is identical in both contexts. While the Due Process Clause may permit a higher ratio of compensatory to punitive damages than federal admiralty law, *compare Exxon*, 554 U.S. at 513, *with State Farm*, 538 U.S. at 425, the definition of the ratio is the *same* in both types of cases. *Exxon* noted that the same ratio it applied was "a central feature in [the Court's] due process analysis." 554 U.S. at 507. The Washington Supreme Court itself recognized as much, relying on several such due-process cases as the sole authority for its holding. Pet. App. 20a.

tory damages award" would require those items to be considered by the jury during trial rather than by the judge after trial, and so would "substantially alter the manner in which trials are conducted." *State Farm*, 98 P.3d at 419-20.

The D.C. Court of Appeals has likewise rejected inclusion of attorney's fees in the compensatory damages denominator under *State Farm*, and has even gone a step further by suggesting that an award of attorney's fees should mean a reduced punitive award, not a greater one. In *Daka, Inc. v. McCrae*, 839 A.2d 682 (D.C. 2003), that court explained that attorney's fees "'includ[e] a certain punitive element' and to that extent . . . favor[] a lesser rather than greater award of punitive damages" under this Court's cases. *Id.* at 701 n.24 (citation omitted); *see also Parrish v. Sollecito*, 280 F. Supp. 2d 145, 164 (S.D.N.Y. 2003) (same).

Since *State Farm*, the Arizona and California appellate courts have also repeatedly rejected plaintiffs' "attempts to alter the ratio by arguing that" their post-trial awards of attorney's fees should be treated as compensatory damages. *Amerigraphics, Inc. v. Mercury Cas. Co.*, 107 Cal. Rptr. 3d 307, 329 (Cal. Ct. App. 2010); *Chasan v. Farmers Group, Inc.*, No. 1 CA-CV 07-0323, 2009 WL 3335341, at *10 (Ariz. Ct. App. Sept. 24, 2009). Like the Utah Supreme Court, these courts have found as a matter of "[l]ogic and common sense" that the jury's compensatory award "most closely reflects the United States Supreme Court's formulation of the 'actual harm as determined by the jury.'" *Bardis v. Oates*, 14 Cal. Rptr. 3d 89, 101 (Cal. Ct. App. 2004) (quoting *BMW*, 517 U.S. at 582); *Chasan*, 2009 WL 3335341, at *10; *see also Walker v. Farmers Ins. Exch.*, 63 Cal. Rptr. 3d 507,

513 (Cal. Ct. App. 2007) (finding a reduced punitive award proper in light of plaintiff's receipt of attorney's fees).

Finally, perhaps reflecting the obviousness of the correct approach, many decisions have (like *State Farm* itself) excluded attorney's fees from the punitive-to-compensatory ratio when finding a punitive award excessive, without even addressing the possibility that the attorney's fees might properly be included—even where, as here, attorney's fees dwarfed the compensatory damages. *See, e.g.*, *Quigley v. Winter*, 598 F.3d 938, 955-58 (8th Cir. 2010); *Wallace v. DTG Operations, Inc.*, 563 F.3d 357, 362-63 (8th Cir. 2009); *Mendez v. Cnty. of San Bernardino*, 540 F.3d 1109, 1120-23 (9th Cir. 2008); *Fabri v. United Techs. Int'l, Inc.*, 387 F.3d 109, 118, 126-27 (2d Cir. 2004).

The Ninth Circuit's *Mendez* decision, for example, leaves no doubt that that court would have reached a different result from the Washington Supreme Court had this suit been filed in federal court. There, the jury awarded the plaintiff $2 in compensatory damages and $250,000 in punitive damages for claims under 42 U.S.C. § 1983. *See* 540 F.3d at 1120. The Ninth Circuit found that the $250,000 punitive award was "excessive as a matter of due process," because it was 125,000 times the compensatory damages that the jury awarded. *Id.* at 1121-23. In deciding the case based on a ratio of 125,000:1, the court excluded from the ratio the award of attorney's fees under 42 U.S.C. § 1988 to which it held the plaintiff entitled. *Id.* at 1120, 1130. Thus, the Ninth Circuit, along with several others, has repeatedly *reduced*

punitive awards based on a ratio that routinely *excludes* awards of attorney's fees.[5]

2. By contrast, a growing number of cases has taken the opposite position, adding attorney's fees to the ratio to justify an otherwise disproportionate punitive award. Indeed, one court recently suggested that "the majority of the courts across the country that have considered this issue have agreed that an award of attorney fees should be taken into account as part of the compensatory damages factor." *Blount v. Stroud*, 915 N.E.2d 925, 943 (Ill. App. Ct. 2009). The decision below falls into this camp, and thereby deepens the split, adopting the view that attorney's fees should generally be included "as part of the compensatory damages award when calculating the punitive damages ratio." Pet. App. 21a.

A similar stance has become well established in Illinois. In *Blount*, the court added the plaintiff's $1,182,832.10 award of attorney's fees to her $282,350 compensatory damages to uphold the jury's $2.8-million punitive award. *Id.* at 943-46. The court justified this result because "the economic cost of the litigation is a relevant consideration to factor into the side of the ratio that quantifies the amount necessary to make the plaintiff whole." *Id.* at 943; *see also Lawlor v. N. Am. Corp. of Ill.*, 949 N.E.2d 155, 170 (Ill. App. Ct. 2011) (upholding $1.75-million award because, while compensatory damages were only $65,000, the plaintiff had been awarded $600,000 in

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[5] Such a conflict between a federal appellate court and the high court of one of its constituent states is a particularly compelling reason to grant review. *See, e.g.*, *Baldwin v. Alabama*, 472 U.S. 372, 374 (1985).

attorney's fees); *Kirkpatrick v. Strosberg*, 894 N.E.2d 781, 797 (Ill. App. Ct. 2008) (upholding $300,000 punitive-damages award because, while compensatory damages were nominal, the plaintiff was awarded $83,000 in attorney's fees).

Two federal circuit courts have likewise permitted attorney's fees to be included in the federal punitive-to-compensatory ratio, at least where the fees could be characterized under state law as "compensatory." In *Willow Inn, Inc. v. Public Service Mutual Insurance Co.*, 399 F.3d 224 (3d Cir. 2005), for example, the Third Circuit held that "attorney fees and costs awarded pursuant to" a state statute prohibiting an insurance company from acting in bad faith toward an insured were "compensatory damages for *Gore*/*Campbell* multiplier purposes." *Id.* at 236; *see also Gallatin Fuels, Inc. v. Westchester Fire Ins. Co.*, 244 F. App'x 424, 435-37 (3d Cir. 2007) (same).

The Eleventh Circuit agreed with the Third Circuit's view in *Action Marine, Inc. v. Continental Carbon Inc.*, 481 F.3d 1302, 1321 (11th Cir. 2007), a case that involved a similar Georgia statute that permitted an award of attorney's fees where a litigant acts in bad faith. Citing *Willow Inn* for the proposition that courts should "rely[] on state law to define the character of an attorney fee award," the Eleventh Circuit noted that, "[i]n Georgia, awards of attorney fees in tort cases involving bad faith are compensatory in nature." *Id.* It thus "include[d] the attorney fees as part of the measure of actual damages for the necessary comparison" in applying *State Farm*. *Id.*

As these diverging cases show, there is now a well-established split over when, if ever, an award of attorney's fees may be treated as compensatory when

determining whether a punitive award comports with federal limits on punitive damages.

C. The Decision Below Raises A Question That Is Important, Recurring, And In Need Of Immediate Resolution

The question whether attorney's fees are properly included in the compensatory-damages element of the ratio between punitive and compensatory damages is an important one in need of immediate resolution. The ratio is "perhaps [the] most commonly cited indicium of an unreasonable or excessive punitive damages award," and one with a "long pedigree." *BMW*, 517 U.S. at 580. In admiralty cases, it now provides the definitive test for determining the cap on punitive damages. *See Exxon*, 554 U.S. at 506. In constitutional cases, the ratio is a "significant," *BMW*, 517 U.S. at 581, and "central" part of the analysis, *Exxon*, 554 U.S. at 507.

In addition, the question needs immediate resolution. The ratio exists to provide an *objective* factor for comparing punitive awards across cases and thereby to eliminate the "stark unpredictability" of unconstrained punitive awards. *Exxon*, 554 U.S. at 499. As this Court indicated, "a penalty should be reasonably predictable in its severity, so that even Justice Holmes's 'bad man' can look ahead with some ability to know what the stakes are in choosing one course of action or another." *Id.* at 502. But the ratio cannot serve this central purpose if, as exists now, courts take drastically differing approaches for calculating it. When the Ninth Circuit excludes attorney's fees and as a result rejects a $500,000 punitive award, *see Mendez*, 540 F.3d at 1120, whereas a state supreme court within the Ninth Circuit upholds

a $1.3-million award by including attorney's fees, Pet. App. 20a, the law does not provide a "fair probability"—indeed, does not provide any probability—that defendants will "suffer[] in like degree when they wreak like damage," *Exxon*, 554 U.S. at 502.

If allowed to stand, moreover, the decision below offers a roadmap for other courts on how effectively to turn "well-established constraints on punitive damages" into meaningless exercises. *State Farm*, 538 U.S. at 427. Because attorney's fees are often large in relation to compensatory damages—as here and in many of the other cases cited in Part I.B, *supra*—they can frequently be used to rationalize otherwise excessive punitive awards. And a trial court's acknowledged discretion as to the amount of attorney's fees likewise provides it with substantial room to insulate itself from the otherwise *de novo* review that would apply to a review of a punitive-damages award. *See Cooper Indus., Inc. v. Leatherman Tool Grp.*, 532 U.S. 424, 443 (2001). The Court has cautioned against allowing states to evade its punitive-damage limits in the due-process context. "While States enjoy considerable discretion in deducing when punitive damages are warranted, each award must comport with the principles set forth in *Gore*." *State Farm*, 538 U.S. at 427. That concern is even more appropriate in this admiralty case, in which this Court, not state courts, exercises final responsibility to create the proper "judge-made law." *Exxon*, 554 U.S. at 502.

Finally, the question arises frequently. Punitive damages and attorney's fees are routinely available for the same state or federal claims. They are, of course, both available for the claim at issue here. *See Atl. Sounding Co. v. Townsend*, 129 S. Ct. 2561, 2575

(2009); *Vaughan*, 369 U.S. at 530-31. Additionally, an array of federal statutes authorizes both types of awards. For example, 42 U.S.C. § 1988 makes attorney's fees available under numerous civil-rights statutes, many of which permit punitive damages, including 42 U.S.C. § 1983, *see Mendez*, 540 F.3d at 1120-23, Title VII, *see* 42 U.S.C. § 1981a(a)(1), and the Americans with Disabilities Act of 1990, *see* 42 U.S.C. § 1981a(a)(2). Both awards are also expressly available under the Fair Housing Act, *see* 42 U.S.C. § 3613(c), and the Fair Credit Reporting Act, *see* 15 U.S.C. § 1681n(a)(2)-(3), among many others. Moreover, attorney's fees and punitive damages are routinely available together under many state claims. *See, e.g.*, Brown & Helper, *Comparison of Consumer Fraud Statutes Across the Fifty States*, 55 Fed'n Def. & Corp. Couns. Q. 263, 279-82 (2005) (both available under a majority of states' consumer fraud statutes); Frankel, *Secret Sabermetrics: Trade Secret Protection in the Baseball Analytics Field*, 5 Alb. Gov't L. Rev. 240, 244, 279 n.214 (2012) (both available under the Uniform Trade Secrets Act).

D. The Decision Below Is Simply Wrong

Lastly, the Washington Supreme Court was simply mistaken to use attorney's fees in the ratio. In addition to the direct inconsistency with *Exxon*'s and *State Farm*'s definition of the prescribed ratio, detailed in Part I.A, *supra*, the decision below cannot be squared with the reasoning of those cases. *First*, the Court has required a comparison to compensatory damages because those damages measure the harm caused by the defendant's conduct. *See, e.g.*, *BMW*, 517 U.S. at 582 ("The $2 million in punitive damages awarded to Dr. Gore by the Alabama Supreme Court

is 500 times the amount of *his actual harm as determined by the jury*." (emphasis added)). Attorney's fees, in contrast, are not a measure of harm; they are a measure of subsequent litigation cost—and one that, as in this case (where the attorney's fees were more than ten times the amount of maintenance-and-cure damages), can easily overwhelm the actual harm found by the jury. The inclusion of attorney's fees turns the required proportionality between punitive damages and the harm caused by the wrongful conduct into a nonsensical requirement that punitive damages be proportional to litigation cost.[6]

Second, a core problem addressed by the *Exxon* ratio "is the stark unpredictability" of punitive awards. 554 U.S. at 499; *see also id.* at 501 ("We are aware of no scholarly work pointing to consistency across punitive awards in cases involving similar claims and circumstances."). Alleviating this problem, the punitive-to-compensatory ratio provides an objective baseline against the "risks of arbitrariness, uncertainty, and lack of notice" that result from unconstrained punitive awards. *Williams*, 549 U.S. at 354.

The addition of attorney's fees into the ratio fundamentally conflicts with this reason for the ratio. The American Rule renders attorney's fees only intermittently available, and many of the cases where

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[6] Indeed, if the relevant harm from a defendant's conduct included subsequent attorney's fees, it would make no sense to include those fees in the ratio only for plaintiffs who are awarded attorney's fees: the "harm" of paying one's attorney is the same regardless of whether the plaintiff is fortunate enough to qualify for an exception to the American Rule that each party bears its own fees.

an exception is potentially applicable will turn on an unpredictable exercise of the trial court's discretion. *See, e.g.*, *Estate of Hevia v. Portrio Corp.*, 602 F.3d 34, 46 (1st Cir. 2010) (noting that "district courts have broad discretion in determining when and whether to exercise inherent powers, particularly with respect to fee-shifting on account of a party's supposed bad faith").

Further, even when permitted, the amount that any plaintiff receives as attorney's fees will vary with the billing rates of the lawyer employed by the plaintiff, the complexity of the litigation, the extent of discovery and motion practice permitted by the trial judge, and the trial court's ultimate exercise of discretion as to the amount of fees awarded. *See, e.g.*, *Cardinal Health 110, Inc. v. Cyrus Pharm., LLC*, 560 F.3d 894, 902 (8th Cir. 2009) (noting that the "'district court's determination of the amount of the fee award is reviewed for abuse of discretion'").

Third, tying the amount of punitive damages to an award of attorney's fees produces various anomalies. For one thing, the very same attorney's fees would be deemed "compensatory damages" or "not compensatory damages" under the ratio depending solely on an unrelated after-the-fact determination of whether the court exercises its discretion to award them in a particular case. For another, a plaintiff who has received *greater* compensation (by receiving attorney's fees) will be entitled to greater punitive damages than a plaintiff who received *lesser* compensation (even though both will have incurred attorney's fees). *Cf. State Farm*, 538 U.S. at 426 (suggesting that punitive-damages ratios should be lower, not higher, when a plaintiff receives "complete compensation").

In short, the Washington Supreme Court's decision to include attorney's fees in the ratio will enhance the "stark unpredictability" of punitive damages that led the Court to adopt that ratio. *Exxon*, 554 U.S. at 499.

Fourth, the use of attorney's fees in the ratio conflicts with this Court's analysis that punitive awards are *more* suspect, not *less* so, if there is a likelihood that those damages "duplicate[]" a "component" of the plaintiff's "compensatory damages." *State Farm*, 538 U.S. at 426. In *State Farm*, for example, because the plaintiffs obtained compensatory damages for their emotional distress, which "already contain[ed] [a] punitive element," the Court found a smaller punitive award necessary. *Id.*

The Washington Supreme Court's decision suffers from the same duplication that concerned *State Farm*, because attorney's fees themselves frequently are a form of punishment. Indeed, as the dissent noted, Pet App. 28a, and as this Court made clear in *Townsend*, attorney's fees in maintenance-and-cure cases are themselves punitive relief, in that they are awarded only if the employer has engaged in a "callous," "willful and persistent" failure to pay maintenance and cure. *Vaughan*, 369 U.S. at 530-31. In other words, "the underlying rationale of 'fee shifting'" in these cases is "punitive, and the essential element in triggering the award of fees is therefore the existence of 'bad faith' on the part of the unsuccessful litigant." *Hall v. Cole*, 412 U.S. 1, 5 (1973); *see, e.g.*, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 53-54 (1991). In *Townsend*, the Court cited *Vaughan* as the prime example of punitive relief "available in maintenance and cure actions," confirming that the Court views these attorney's fees as punitive. 129 S. Ct. at 2571. The

award of such punitive relief should *reduce*, not *increase*, the amount of additional punitive damages permitted.[7] The contrary decision of the Washington Supreme Court does not withstand scrutiny.

II. THE DECISION BELOW CONFLICTS WITH *EXXON* BY NARROWING ITS LIMITS ON PUNITIVE DAMAGES UNDER FEDERAL ADMIRALTY LAW

The Court should also grant certiorari to address whether, and to what extent, courts may depart from the 1:1 ratio between punitive and compensatory damages applied under federal admiralty law in *Exxon*. In addition to the Washington Supreme Court's manipulation of the ratio in this case to produce one purportedly less than 3:1, the court also interpreted *Exxon* in a way that significantly undermines the rule this Court established in that case. Specifically, the court below essentially limited *Exxon* to its facts, holding that "[t]he *Exxon* case cannot be read as establishing a broad, general rule limiting punitive damage awards, primarily because nowhere in the opinion can such a rule be found." Pet. App. 17a. The Washington Supreme Court asserted that this Court had "expressly limit[ed] its holding to the facts presented," *id.*, such that "[n]othing in the *Exxon* opinion can be read as overruling cases allowing higher punitive awards," Pet. App. 18a. The court thus distinguished *Exxon* from this case because in

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[7] The duplication was further enhanced in this case because a "significant part" of the attorney time for which fees were awarded was time spent pursuing punitive damages. *See* Pet. App. 13a.

its opinion Icicle's conduct "was not just reprehensible, it was egregious." Pet. App. 19a.

This view that *Exxon* simply engaged in a traditional review of a punitive award without setting any new limits on punitive damages is irreconcilable with that decision. To begin with, the notion that the Court was not establishing any general rules for punitive awards conflicts with the Court's description of the problem that punitive damages pose. *See Exxon*, 554 U.S. at 499-503. The Court found the "real problem" to be "the stark unpredictability of punitive awards," noting that there is an unacceptable "spread between high and low individual awards" under current law. *Id.* at 499. In other words, the problem with punitive damages was not one limited to the facts of the case, but was a *systematic* problem that applied across the board, and thus required a general response.

The Washington Supreme Court's decision is equally inconsistent with the Court's solution to the problem. *Exxon* rejected a status-quo solution that would consider a host of factors on a case-by-case basis, expressing "skeptic[ism] that verbal formulations, superimposed on general jury instructions, are the best insurance against unpredictable outliers." *Id.* at 504; *cf. id.* at 523 (Ginsburg, J., dissenting) ("question[ing] whether there is an urgent need in maritime law to break away from the traditional common-law approach" (internal quotation marks omitted)). Rather, the Court's "best judgment" was to opt for "*quantified* limits" by "pegging punitive to compensatory damages using a ratio or maximum multiple." *Id.* at 506 (emphasis added).

Finally, the Washington Supreme Court's decision is inconsistent with the underlying reasons why *Exxon* opted for the specific 1:1 "qualified limit" in particular. The *Exxon* Court chose that ratio based on "studies cover[ing] cases of the *most* as well as the least blameworthy conduct triggering punitive liability." *Id.* at 512 (emphasis added). Those studies suggested a "median ratio for the *entire gamut* of circumstances at less than 1:1, . . . meaning that the compensatory award exceeds the punitive award in most cases." *Id.* (emphasis added). And it found that the merely reckless conduct at issue on the facts of the case should fall "at the median or lower" of these awards. *Id.* at 513 (noting that "a median ratio of punitive to compensatory damages of about 0.65:1 probably marks the line near which cases like this one largely should be grouped"). Yet *Exxon* ultimately opted for a greater 1:1 ratio (rather than the 0.65:1 ratio), illustrating that it was adopting a *broader* rule to govern more than just the facts of the case at issue. *Id.*

Confirming the Washington Supreme Court's conflict with *Exxon*, the dissent below properly recognized that, unlike the majority, many "other courts" have interpreted *Exxon* "as limiting punitive damage awards in maritime cases, with the potential for even broader application." Pet. App. 24a. In *Kunz v. DeFelice*, 538 F.3d 667 (7th Cir. 2008), for example, the Seventh Circuit noted—when exploring whether punitive damages should be similarly limited under 42 U.S.C. § 1983—that under *Exxon*, "as a matter of federal common law, a punitive damages award in an admiralty case may not exceed the compensatory award (that is, a 1:1 ratio is the upper limit for this class of cases)." *Id.* at 678. Similarly, the Ninth Cir-

cuit has stated that *Exxon*'s "1:1 ratio" under "the federal common law of maritime torts" provides a model for any analogous common-law limits on § 1983 cases. *Mendez*, 540 F.3d at 1122; *see also So. Union Co. v. Irvin*, 563 F.3d 788, 791 n.1 (9th Cir. 2009) ("[W]hen the Supreme Court selected a ratio for federal maritime law purposes, . . . it saw a ratio of one to one as the fair upper limit." (internal quotation marks omitted)). When discussing *Exxon*, several other circuits[8] and state courts[9] have similarly interpreted its scope.

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[8] *See Mendez-Matos v. Municipality of Guaynabo*, 557 F.3d 36, 54 n.14 (1st Cir. 2009) ("In [*Exxon*], the Court established a 1:1 ratio of punitive to compensatory damages under federal maritime law."); *JCB, Inc. v. Union Planters Bank*, 539 F.3d 862, 876 n.9 (8th Cir. 2008) ("[T]he Supreme Court determined that a 1:1 ratio of compensatory to punitive damages was appropriate in a maritime case."); *PAM, S.p.A. v. United States*, 582 F.3d 1336, 1341 (Fed. Cir. 2009) ("The [*Exxon*] Court ultimately settled on a rule where the appropriate upper limit ratio for punitive to compensatory damages in maritime cases was 1:1."); *Jurinko v. Med. Protective Co.*, 305 F. App'x 13, 27 n.15 (3d Cir. 2008) ("The Supreme Court recently found that a punitive damages award may not exceed a 1:1 ratio in the context of maritime law."); *Duckworth v. United States*, 418 F. App'x 2, 3 (D.C. Cir. 2011) (finding "the *Exxon* 1:1 ratio rule inapplicable" to claims arising under the Magnuson-Stevens Act).

[9] *See Sec. Title Agency, Inc. v. Pope*, 200 P.3d 977, 1001 (Ariz. Ct. App. 2008) (stating that *Exxon* held that "a 1:1 ratio is a fair upper limit for punitive damage awards" under "maritime law"); *Bridgeport Harbour Place I, LLC v. Ganim*, 30 A.3d 703, 735 n.55 (Conn. App. 2011) ("The Supreme Court determined that a 1:1 ratio was a fair upper limit for punitive damages in federal maritime cases."); *Modern Mgmt. Co. v. Wilson*, 997 A.2d 37, 52 n.17 (D.C. 2010) (describing *Exxon* to hold that a maritime punitive award "should be limited to an amount equal to compensatory damages"); *Peters v. Rivers Edge Min., Inc.*, 680 S.E.2d

* * * *

In sum, there is no dispute that the jury awarded $37,420 in compensatory damages on Clausen's maintenance-and-cure claim and $1.3 million in punitive damages arising out of the allegedly willful failure to pay that maintenance and cure. This roughly 34:1 ratio between punitive and compensatory damages would raise serious constitutional concerns under the Court's cases, and plainly cannot be justified under admiralty law after *Exxon*.

CONCLUSION

The petition for certiorari should be granted.

791, 825 (W. Va. 2009) (stating that *Exxon* found a 1:1 ratio to be "a fair upper limit in . . . maritime cases").

Respectfully submitted,

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JUNE 4, 2012

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APPENDIX

APPENDIX A

Supreme Court of Washington,
En Banc.
Dana CLAUSEN, Respondent,
v.
ICICLE SEAFOODS, INC., Appellant.

No. 85200–6.
Argued Sept. 15, 2011.
Decided March 15, 2012.

Background: Maritime employee brought action against maritime employer for negligence, unseaworthiness of ship, and wrongful withholding of maintenance and cure. After jury trial, the Superior Court, King County, 2010 WL 2011586, Hollis R. Hill, J., entered judgment in favor of employee and awarded attorney fees. Employer appealed.

Holdings: After granting transfer, the Supreme Court, en banc, C. Johnson, J., held that:

(1) under general maritime law, the court, rather than the jury, calculates and awards attorney fees related to an employer's willful withholding of maintenance and cure;

(2) award of attorney fees of $387,558 was appropriate; and

(3) trial court was not required to cap jury's $1.3 million punitive damage award.

Affirmed.

J.M. Johnson, J., dissented and filed opinion in which Gerry L. Alexander, J., concurred.

Michael Alan Barcott, Megan Elizabeth Blomquist, Holmes Weddle & Barcott, Seattle, WA, Thaddeus O'Sullivan, K & L Gates, Spokane, WA, for Appellant.

Philip Albert Talmadge, Talmadge/Fitzpatrick, Tukwila, WA, James P. Jacobsen, Beard Stacey & Jacobsen LLP, Seattle, WA, Lawrence N. Curtis, Lafayette, LA, for Respondent.

Lincoln Dennis Sieler, Friedman.Rubin, Seattle, WA, David W. Robertson, The University of Texas at Austin, Austin, TX, amicus counsel for Inlandboatmen's Union of the Pacific.

C. JOHNSON, J.

¶ 1 This case involves a maritime claim for maintenance and cure and whether, under federal maritime law, a judge, instead of a jury, awards attorney fees following the jury award of compensatory and punitive damages in favor of an injured seaman against the employer for willful failure to pay maintenance and cure. This case also involves whether the jury's award for punitive damages must be limited and reduced under federal maritime law.

¶ 2 We hold that a judge determines and awards attorney fees in a maintenance and cure case and that the jury's punitive damage award for the willful withholding of maintenance and cure is not limited by federal maritime law cases. We affirm.

FACTS

¶ 3 Dana Clausen worked on board Icicle Seafoods' *Bering Star* as second engineer when he sustained his injuries. As an engineer, he performed various duties, including fixing machinery used aboard the vessel. In February 2006, Clausen suffered serious injury to his lower back, neck, and hand when he lifted a 122–pound piece of steel. After reporting the injury to Icicle, he went ashore in Alaska for initial medical care and was eventually sent home to Louisiana for further care.

¶ 4 Clausen encountered persistent difficulties in getting Icicle and its adjusting firm, Spartan, to meet its obligation to pay him maintenance and cure, traditional maritime remedies providing living and medical expenses, during his recovery. During this period, Clausen was unable to work due to his injuries. As part of its obligation to pay maintenance for Clausen's living expenses, Icicle paid Clausen $20 per day to cover lodging, utilities, and meals. Clausen resorted to living in a recreational vehicle with a leaking roof and with no heat, air conditioning, running water, or toilet facilities. Additionally, on its obligation to pay cure for Clausen's medical expenses, Icicle delayed or refused to pay for treatment that Clausen's doctors recommended.

¶ 5 In a May 2006 report to Icicle, Spartan confirmed that Clausen's injuries were likely career-ending and recommended that Icicle authorize settlement before Clausen secured legal representation. In a June 2006 letter, Clausen's doctor told Icicle that Clausen needed treatment by epidural spinal injections and was a candidate for

back surgery. About a week later, an internal report recommended that Icicle meet face-to-face with Clausen to propose settlement. The June 2006 letter was never disclosed to Clausen.

¶ 6 In September 2007, Icicle filed suit in federal court against Clausen to terminate Clausen's right to maintenance and cure alleging that he impeded their right and obligation to investigate his claim. After the complaint was filed, Clausen hired counsel who issued subpoenas for Spartan's and his medical providers' records, which revealed that Icicle had extensively monitored and investigated the ongoing status of his condition.

¶ 7 Upon learning of Icicle's actions, Clausen filed the present action in King County Superior Court and Icicle's suit in federal court was dismissed. Clausen sought damages for Icicle's negligence under the Jones Act, 46 U.S.C. § 30104, unseaworthiness of the *Bering Star*, and wrongful withholding of maintenance and cure. The jury found Icicle negligent under the Jones Act, awarding Clausen $453,100 in damages. Clerk's Papers (CP) at 111–12. The jury also found that Icicle was callous or willful and wanton in its failure to pay maintenance and cure, awarding Clausen $37,420 in compensatory damages for maintenance and cure plus $1.3 million in punitive damages for Icicle's willful misconduct. CP at 108, 114.

¶ 8 After the verdict, Clausen filed a posttrial motion requesting attorney fees. Icicle opposed the fee request by moving for judgment as a matter of law, arguing that under federal maritime law only the jury could award attorney fees. Icicle also argued for a reduction in the amount of attorney fees sought

because Clausen's attorneys failed to keep contemporaneous time records, reducing the reliability and "reasonableness" of the hours claimed. The trial court denied Icicle's motion, ruling the attorney fees issue was for the court, not the jury; the court also noted Icicle took no issue with the amount of time spent on various tasks, making no claim that Clausen's attorneys wasted time or duplicated efforts. The court determined that under federal maritime law, Clausen could recover attorney fees and costs only for time spent on his maintenance and cure claim. Because Clausen's three claims were intertwined, making the hours spent on each claim difficult to segregate, the trial court reduced his total fees and costs by 10 percent and awarded $387,558.00 in fees and $40,547.57 in costs. CP at 432.

¶ 9 Icicle also filed a motion to amend the judgment challenging the jury's punitive damage award, which the trial court denied.

¶ 10 Icicle appealed. We granted Clausen's motion requesting transfer to this court due to the significant federal maritime law issues involved. Icicle assigns error to the award for attorney fees and to the punitive damages related to maintenance and cure. Icicle challenges the amount of the attorney fees award, and it argues that under federal maritime law (1) only the jury can award attorney fees as damages, and (2) punitive damages cannot exceed compensatory damages. We affirm the trial court.

ISSUES

1. Whether under general maritime law, the court and not the jury determines the amount of attorney

fees related to the jury's punitive damage award for the employer's willful withholding of maintenance and cure.

2. Whether under general maritime law, punitive damages for willful withholding of maintenance and cure must be capped.

ANALYSIS

1. Attorney fees

¶ 11 The trial court concluded that the attorney fees issue in a maintenance and cure action was for the court, not the jury, and awarded fees and costs. Icicle contends the trial court erred because attorney fees are a form of punitive damages to be found by the jury. Icicle also objects to the amount of fees the trial court awarded. These issues involve both questions of law and review of discretionary orders by the trial court.

¶ 12 Maritime actions brought in state courts are governed by federal maritime law, both common law (referred to here as "general") and statutory. Injured seamen do not qualify for state or federal worker compensation for on-the-job-injuries. RCW 51.12.100(1); 33 U.S.C. § 902(3)(G). Seamen, however, retain the right to sue for personal injury under the Jones Act. Additionally, under general maritime law, the injured seaman can seek an award for unpaid maintenance and cure. "Maintenance" is the living allowance for food and lodging while "cure" is the right to necessary medical services. *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 528, 58 S.Ct. 651, 82 L.Ed. 993 (1938). A seaman is also entitled to unearned wages for the period from the onset of the injury or illness until the end of the voyage. The right to maintenance and cure extends to the point of

maximum medical cure. *Vaughan v. Atkinson*, 369 U.S. 527, 531, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962).

¶ 13 The doctrine of maintenance and cure, an ancient right in British admiralty law, was introduced into American maritime law by Justice Story in *Harden v. Gordon*, 2 Mason 541, 11 F. Cas. 480, 482–83 (C.C.D.Me.1823). Justice Story expressed concern for seamen whose work made them vulnerable to sickness from climate, peril, and exhausting labor; who suffered away from home from disease, poverty, and lack of nourishment; and whose earnings were insufficient to provide for the expenses of their sickness. Subsequently, the United States Supreme Court recognized the right in *The Osceola*, 189 U.S. 158, 169, 23 S.Ct. 483, 47 L.Ed. 760 (1903). Since then, the Court has articulated that the underlying policy of maintenance and cure is (1) to protect the poor and improvident seaman from being abandoned while ill or injured in foreign ports, (2) to induce employers to protect the safety and health of seaman while in service, and (3) to induce employment in maritime service. *Calmar*, 303 U.S. at 528, 58 S.Ct. 651 (citing *Harden*, 11 F. Cas. 480).

¶ 14 Because maintenance and cure is a right created under common law, courts have fashioned equitable remedies to further the underlying policies. As to recovery of attorney fees, the United States Supreme Court recognized the remedy in *Vaughan*. In that case, the lower court had denied fees on the basis that the fees were not recoverable in a breach of con-tract suit. The United States Supreme Court reversed, recognizing that the duty to provide maintenance and cure was created at law, not by an employment contract. As a result, the Court held

that while the failure of an employer to pay maintenance and cure gives rise to damages for the suffering and physical disability that followed, the recovery for those damages could also include "necessary expenses," including counsel fees. The Court then emphasized that the employer's callous and willful behavior in withholding maintenance and cure forced the seaman to bring suit to recover what was plainly owed to him under the law. *Vaughan*, 369 U.S. at 531–33, 82 S.Ct. 997. Thus, under general maritime law, it developed that a finding that an employer acted callously or willfully in withholding maintenance and cure was a basis for recovering attorney fees and punitive damages.

¶ 15 Icicle contends, based on the Court's reasoning in Vaughan and purported clarification in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 129 S.Ct. 2561, 174 L.Ed.2d 382 (2009), that attorney fees are punitive, the fees are a form of punitive damages in maintenance and cure actions. Icicle argues that be-cause the jury always awards and calculates damages, as a matter of substantive general maritime law, the trial court's determination and attorney fees award should be vacated. Icicle cites Fifth Circuit Court of Appeals cases as support for this argument.[1] We disagree.

¶ 16 The United States Supreme Court in *Vaughan* was unclear on whether the fees were compensatory or punitive in nature, but its rationale and other cases citing *Vaughan* leads us to conclude the fees are compensatory. While the fees are awarded on the

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[1] *See, e.g., Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110 (5th Cir.1984).

same general basis as punitive damages, that is, only upon a callous and willful finding, that does not make the fees punitive. The purpose of punitive damages is to punish the defendant and deter similar conduct. On the other hand, the purpose of compensatory damages is to make the plaintiff whole for their injury, for example for pain and suffering, and in this case, for maintenance and cure payments. The United States Supreme Court made clear that the failure to give maintenance and cure may give rise to damages for pain and suffering but that the "recovery may also include 'necessary expenses.'" *Vaughan*, 369 U.S. at 530, 82 S.Ct. 997 (quoting *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 371, 53 S.Ct. 173, 77 L.Ed. 368 (1932)). There necessary expenses were the attorney fees the seaman incurred for being forced to bring a suit. *Vaughan*, 369 U.S. at 530, 82 S.Ct. 997. Thus, while the fees are tied to a certain level of culpability, the focus is on compensating the seaman for necessary expenses incurred in litigation, rather than on punishing and deterring the employer. Although fee-shifting in this context may have a punitive feel, it serves to compensate the seaman for being forced to bring an action to recover what he was clearly entitled to all along.

¶ 17 At common law, an award for attorney fees is created in equity as an exception to the American rule that parties bear their own costs and fees in litigation.[2] In a maintenance and cure action, equity

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[2] Under the American rule, attorney fees are recoverable only when authorized by private agreement of the parties, or statute, unless an equitable exception exists. *Summit Valley Indus., Inc. v. Local 112, United Bhd. of Carpenters & Joiners of Am.*, 456 U.S. 717, 721, 102 S.Ct. 2112, 72 L.Ed.2d 511 (1982).

supports a recovery of such fees only where the payments were withheld because of the employer's misconduct; the jury must find callous or willful behavior, which it did here. In other cases, the United States Supreme Court discusses the fees award in *Vaughan* as an equitable exception to the American rule. *See, e.g., Summit Valley Indus., Inc. v. Local 112, United Bhd. of Carpenters & Joiners of Am.*, 456 U.S. 717, 721, 102 S.Ct. 2112, 72 L.Ed.2d 511 (1982); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258–59, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). Several circuits also treat *Vaughan* as establishing an equitable basis for awarding attorney fees and have affirmed the trial judge's determination of the amount of fees after the jury returns a favorable verdict to the seaman.[3] The Second Circuit in *Incandela v. American Dredging Co.*, 659 F.2d 11, 15 (2d Cir. 1981), has held that fees are assessed by the trial court after the jury makes the factual finding as to whether the defendant's actions are willful and arbitrary. *See also Williams v. Kingston Shipping Co.*, 925 F.2d 721 (4th Cir. 1991). Likewise, we interpret Vaughan as creating an equitable basis to award attorney fees under the American rule.

¶ 18 Icicle contends the *Townsend* decision, a case in which the United States Supreme Court cited

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[3] For example, comments to the Ninth Circuit Model Civil Jury Instruction 7.12, "Maintenance and Cure—Willful and Arbitrary Failure To Pay," provide, "If the jury finds that the defendant willfully and arbitrarily failed to pay maintenance or cure, the plaintiff will be entitled to reasonable attorneys' fees as determined by the court." MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT 120 cmt. (2007).

Vaughan in the context of punitive damages, clarifies or alters the rule regarding recovery of attorney fees. We find Icicle's reliance on *Townsend* unpersuasive because the issue in *Townsend* was not whether the attorney fees were a form of punitive damages. Rather, the issue was whether remedies available at general maritime law were restricted because of the Jones Act. The Court held that remedies under general maritime law, such as punitive damages, remained available. The Jones Act created a statutory cause of action for negligence, which had been barred at general maritime law. Because Congress, by enacting the Jones Act, created a new cause of action, the Court recognized the Act expanded and supplemented, rather than restricted, the rights of seamen under maritime law. And while the Jones Act excluded recovery of certain types of damages, such as for loss of society or lost future earnings, the Court held that those restrictions applied only to claims brought under the Jones Act. In other words, the statutory limitations did not affect the types of damages recoverable under general maritime law, such as punitive damages in maintenance and cure actions. *Townsend,* 557 U.S. at ——, —— – ——, 129 S.Ct. at 2565, 2570–71. While *Vaughan* is cited, the issue and holding in *Townsend* relates to the continued viability of common law causes of action and remedies, not whether a recovery of attorney fees under *Vaughan* is punitive or compensatory. Given this, *Townsend* cannot stand for or be read to alter the nature or availability of attorney fees.

¶ 19 Allowing a judge to determine and calculate an equitable fees award is consistent with our practice in Washington and makes procedural sense.

Primarily, the fee recovery is not part of the plaintiff's substantive claim for damages; in this case, the seaman's damages are for maintenance and cure. The plaintiff must prove the substantive claim and further, the jury must specifically find callous or willful conduct before a plaintiff qualifies for an attorney fees recovery. Given this, it is procedurally impractical to have a jury consider evidence of attorney fees when it has not yet made the necessary finding to award those fees. The attorney fees issue becomes relevant only after a verdict is rendered, that is, posttrial. Even then, the plaintiff's fees recovery is subject to the judge's determination that there is an equitable basis to award fees. And, a trial judge, who is more familiar with advocacy and trial preparation, is better suited to determine the reasonableness of the fees award and whether particularities of the case require the fee request to be adjusted. We agree with the trial court and hold that under general maritime law, a trial judge, and not the jury, calculates an attorney fees award related to the employer's willful withholding of maintenance and cure.

¶ 20 After the jury returned the verdict, Clausen requested attorney fees in a posttrial motion. Icicle challenges the amount awarded. We review a trial court's award of attorney fees for an abuse of discretion. *Chuong Van Pham v. Seattle City Light,* 159 Wash.2d 527, 538, 151 P.3d 976 (2007) (citing *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971)). A trial court initially determines attorney fees and costs using the "lodestar" calculation, multiplying the total number of hours reasonably expended in the litigation by the reasonable hourly rate. Once the lodestar has been

calculated, the court may adjust the fee to reflect factors not considered yet. The two categories for adjustment are based on whether the fee was contingent on the outcome and the quality of work performed. The party requesting an adjustment has the burden to show the deviation is justified. *Bowers v. Transamerica Title Ins. Co.*, 100 Wash.2d 581, 597–99, 675 P.2d 193 (1983).

¶ 21 The trial court estimated that 90 percent of the attorneys' time was spent on issues related to maintenance and cure and accordingly, reduced total fees and costs by 10 percent. The court recognized that maintenance and cure issues were present from the beginning of the case and that 12 out of 14 witnesses testified about those issues. The court also acknowledged that this was the attorneys' first case involving punitive damages for maintenance and cure, suggesting that the issue required a significant amount of time.

¶ 22 Icicle contends it was improper for the trial court to segregate hours spent on the maintenance and cure claim from other claims based on a generalized percentage reduction rather than on actual hourly records. Appellate courts, however, have permitted the use of a percentage reduction in segregating fees and costs when, as here, the specifics of the case make segregating actual hours difficult. Other maintenance and cure cases support the trial court's determination here. *See Deisler v. McCormack Aggregates Co.*, 54 F.3d 1074, 1087 (3rd Cir.1995) (recognizing the difficulty in segregating hours and holding the use of 10 percent reduction to calculate fees and costs not an abuse of discretion); *see also Peake v. Chevron Shipping Co.*, No. C00–

4228 MHP, 2004 WL 1781008, 2004 A.M.C. 2778, 2791 (N.D.Cal. Aug.10, 2004) (unpublished) ("overlap" in claims warranted a twenty percent reduction).

¶ 23 Icicle argues the trial court's reliance on *Deisler* and *Peake* is misguided. Icicle contends that in *Deisler* the 10 percent reduction was justified because the plaintiff had to prove an accident occurred,[4] arguably taking more time, whereas in this case Clausen did not. Still, this difference does not necessarily mean the maintenance and cure claim would take less time in Clausen's case. Each case has its own peculiarities, and the trial court is best situated to make these determinations.

¶ 24 Additionally, Icicle contends that in *Peake* the court awarded only 44 percent of fees and costs, but *Peake* actually supports the trial court's decision here. There, the court accepted counsels' contention that 80 percent of the time was spent on the maintenance and cure claim but reduced the number of hours after finding some of the hours were duplicative and inadequately documented. Here, Icicle makes no claim that the hours themselves were invalid. Again, the trial court is in the best position

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[4] In *Deisler*, the employer refused to pay maintenance and cure based on its claim the seaman had not been injured in an accident. The accident also related to the negligence claim under the Jones Act. Because the trial court found it impossible to segregate the maintenance and cure claim from the Jones Act claim, the trial court apportioned the time 90 percent to maintenance and cure and 10 percent to the Jones Act claim and reduced attorney fees by 10 percent. *Deisler*, 54 F.3d at 1087.

to make this determination. No abuse of discretion has been shown.

¶ 25 Icicle also does not show the trial court abused its discretion in setting the hourly rate for Clausen's attorneys. An attorney's hourly rate is determined in reference to a reasonable rate. The court may consider the attorney's usual billing rate, level of skill required by the litigation, time limitations imposed on the litigation, the amount of potential recovery, the attorney's reputation, and the undesirability of the case. *Bowers*, 100 Wash.2d at 597, 675 P.2d 193. Here, the court supported its findings based on declarations from Clausen's attorneys describing their qualifications, which Icicle did not challenge. The court also considered a survey indicating that the hourly rate was reasonable for attorneys with similar qualifications.

¶ 26 The record here reflects that the trial court properly exercised its discretion in determining the number of hours related to the maintenance and cure claim and the reasonable hourly rate for Clausen's attorneys. We affirm the trial court's award of attorney fees and costs.

2. Punitive Damages

¶ 27 Icicle contends that under federal law, the trial court erred in failing to reduce the judgment by not capping the jury's $1.3 million punitive damage award. Icicle makes no assertion that Clausen was not entitled to punitive damages or that the trial court used the incorrect standard to determine whether punitive damages were excessive. Rather, Icicle argues the trial court was required to reduce the jury's award of punitive damages in accordance with *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 128

S.Ct. 2605, 171 L.Ed.2d 570 (2008), where the United States Supreme Court reduced a punitive damages award applying a 1:1 ratio to compensatory damages. We disagree with Icicle's reading of the scope of the *Exxon* case.

¶ 28 In the *Exxon* case, the United States Supreme Court's decision involved punitive damages awarded for the *Exxon Valdez* oil spill in Alaska. The jury had awarded $507 million in compensatory damages and $4.5 billion in punitive damages, which, upon remand by the Ninth Circuit, was reduced to $2.5 billion. The United States Supreme Court further limited the punitive damages award, capping punitive damages at a 1:1 ratio to compensatory damages. In its decision, the Court discusses the history, development, and justifications underlying the creation of the punitive damages remedy. The Court recognized that a punitive damages remedy advances the goals of punishing egregious and willful behavior resulting in injury and punishing conduct designed and intended to provide some financial gain to the offending party, as well as deterring similar conduct. The Court also recognized that punitive damages awards failing to advance these goals not only would be carefully scrutinized, but could be subject to constitutional due process concerns. In essence, the Court established that, under general maritime law, punishment for conduct minimally related to the goals of punishment could be limited and subject to a 1:1 ratio with compensatory damages, which in the *Exxon* case were substantial. Important to the analysis here, throughout the *Exxon* case, the Court emphasized it was faced with facts establishing that Exxon's conduct was not at the extreme end of the scale of egregiousness, no profit motive was expressly

involved, and there was already a substantial recovery for damages. *Exxon*, 554 U.S. at 510–13, 128 S.Ct. 2605.

¶ 29 We find nothing in the *Exxon* case establishing a general rule limiting the jury's role in deter-mining appropriate damages. The *Exxon* case cannot be read as establishing a broad, general rule limiting punitive damage awards, primarily because nowhere in the opinion can such a rule be found. To the contrary, the United States Supreme Court expressly limits its holding to the facts presented. In the first paragraph of the opinion, the issue is framed as "whether the award . . . *in this case* is greater than maritime law should allow *in the circumstances*." *Exxon*, 554 U.S. at 476, 128 S.Ct. 2605 (emphasis added).

¶ 30 Toward the end of its analysis, the Court again, in the context of analyzing the spectrum of laws and cases establishing limits on punitive awards, observes ". . . the upper limit is not directed to cases *like this one*, where the tortious action was worse than negligent but less than malicious, . . . the 3:1 ratio . . . applies to awards in *quite different* cases involving . . . malicious behavior and dangerous activity carried on for the purpose of increasing a tortfeasor's financial gain. We confront, instead, *a case* of reckless action, profitless to the tortfeasor." *Exxon*, 554 U.S. at 510–11, 128 S.Ct. 2605 (footnotes omitted). Continuing in that same paragraph, during its discussion of limits established legislatively, the Court states, "[t]hus, a legislative judgment that 3:1 is a reasonable limit overall is not a judgment that 3:1 is a reasonable limit *in this particular type of case*." *Exxon*, 554 U.S. at 510–11, 128 S.Ct. 2605

(emphasis added). Nothing in the Exxon opinion can be read as overruling cases allowing higher punitive awards or limiting the government's ability to statutorily provide other limits. Quite the opposite, the Court seems to embrace an approach of applying a variable limit based on the tortfeasor's culpability. *Exxon*, 554 U.S. at 510 n. 24, 128 S.Ct. 2605.

¶ 31 Here, as found by the jury and confirmed by the trial court, Icicle's conduct lies at the extreme end of the scale. The jury found that Icicle acted callously or willfully and wanton in its failure to pay maintenance and cure. And the trial court, in denying Icicle's motion to reduce the punitive damages award, entered findings of fact emphasizing Icicle's egregious conduct. The court found that Icicle intentionally disregarded Clausen's health by refusing to pay for his spinal injections and surgery that Icicle's own "hand-picked" doctor had recommended, and that Icicle provided Clausen only $20 per day in maintenance and knew Clausen was practically homeless, living in a broken down recreational vehicle, yet it wanted Clausen to take the "bait" and settle early without legal representation. The court also found that Icicle deliberately made false statements in its federal court complaint seeking to terminate Clausen's maintenance and cure; that Icicle's conduct was motivated by profit; and that the size of the punitive damages award was required because Icicle needed substantial deterrence not to treat other workers in the same way it treated Clausen, noting that Icicle had claimed no wrongdoing throughout the suit.

¶ 32 Unlike the reckless conduct the *Exxon* Court faced, here, the jury found and the trial court

described in depth that Icicle's actions were far from reckless and nearer the "most egregious" end of the culpability scale. The *Exxon* Court was clear that it was applying a ratio limiting the punitive damages award due to the circumstances of the case, that is, reckless conduct not expressly motivated by profit, where a substantial compensatory damages recovery existed. But while it limited the punitive damages award in *Exxon*, the Court embraced a variable limit approach based on culpability. Given the facts of our case, it is appropriate to apply that principle here. Icicle's conduct was not just reprehensible, it was egregious.

¶ 33 The availability of punitive damages, without a 1:1 ratio to compensatory damages, for willful withholding of maintenance and cure is necessary because it also serves as a deterrent. A variable punitive damages award creates a disincentive to employers who would otherwise prefer to hold out on paying maintenance and cure until a suit is filed, if at all. Because seamen do not qualify for state or federal worker compensation, their only recourse from being abandoned when sick or injured on the job is maintenance and cure. But it appears Icicle wanted to do just that by intentionally withholding maintenance and cure, at the expense of Clausen's health, and then by attempting to terminate maintenance and cure. Icicle, and any employer, must be deterred from profiting at the expense of their employee's health. The availability of punitive damages serves as this deterrent since the simple solution for employers to avoid exposure to punitive damages in a lawsuit is by complying with their maritime responsibilities.

¶ 34 Lastly, Icicle contends the trial court erred when calculating the punitive damages ratio because it included the attorney fees award in the compensatory damages figure.[5] The compensatory nature of attorney fees does not change because the attorney fees are awarded posttrial rather than with the jury's compensatory damages award. Courts in other jurisdictions include attorney fees as part of the compensatory damages award for punitive damages ratio comparison purposes. *See, e.g., Blount v. Stroud*, 395 Ill.App.3d 8, 915 N.E.2d 925, 944, 333 Ill.Dec. 854 (2009) (courts consider attorney fees as part of compensatory award when considering the punitive damages award ratio); *Action Marine, Inc. v. Cont'l Carbon Inc.*, 481 F.3d 1302, 1321 (11th Cir. 2007); *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 235–36 (3rd Cir. 2005). As mentioned, the reason Clausen incurred any attorney fees was for having to bring a suit to recover maintenance and cure payments. Like a recovery for maintenance and cure payments, recovery of attorney fees is compensatory in that those fees attempt to make Clausen whole for the employer's actions in intentionally failing in its maritime duty to provide maintenance and cure. It was proper for trial court to include attorney fees as part of the compensatory damages award when calculating the punitive damages ratio. No error occurred.

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[5] After including the attorney fees in the compensatory award, the trial court found the punitive damages award was less than three times the size of the compensatory award and within due process limits. Because Icicle does not contend the punitive damages award violates due process, we need not determine whether the trial court used the correct standard or applied it properly.

CONCLUSION

¶ 35 We conclude that under federal maritime law, the trial court calculates an attorney fee award related to a maintenance and cure action. We also conclude that under federal maritime law, the punitive damages award as determined by the jury here, based on the callous or willful and wanton withholding of maintenance and cure, was proper.

¶ 36 We affirm. We award costs, including reasonable attorney fees, to Clausen as the prevailing party pursuant to RAP 18.1(a).[6]

WE CONCUR: BARBARA A. MADSEN, Chief Justice, TOM CHAMBERS, SUSAN OWENS, MARY E. FAIRHURST, DEBRA L. STEPHENS, and CHARLES K. WIGGINS, Justices.

J.M. JOHNSON, J. (dissenting).

¶ 37 This is a case governed by federal maritime law. Today, the majority ignores instruction from the United States Supreme Court—the final arbiter of federal maritime law—as articulated in *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008). In *Exxon*, the Supreme Court held that in maritime cases, punitive damage awards cannot be excessive in relation to the actual harm caused. *Id.* at 503, 128 S.Ct. 2605 (holding the appropriate ratio of punitive to compensatory

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[6] On review, because this award is primarily based in equity, not contract or statute, we award reasonable attorney fees and costs to Clausen on the same basis supporting the trial court's attorney fees award.

damages in that case was 1:1). Following this decision, I would hold the $1.3 million punitive damage award in this case must be reduced as it is excessive and bears no relation to the compensatory award of $37,420.

¶ 38 *Exxon* was a class action brought by commercial fishermen, Native Alaskans, and landowners harmed by the *Exxon Valdez* oil spill. *Id.* at 476, 128 S.Ct. 2605. The spill resulted when the Valdez's intoxicated captain, Joseph Hazelwood, left the ship's bridge at the time his presence was needed to perform a critical turn. *Id.* at 477–78, 128 S.Ct. 2605. Hazelwood also put the ship on autopilot, causing it to speed up and rendering the turn more difficult. *Id.* at 478, 128 S.Ct. 2605. The ship grounded, ripping the hull and spilling 11 million gallons of crude oil into the Prince Edward Sound. *Id.* The evidence indicated Exxon knew Hazelwood was a relapsed alcoholic but nevertheless placed him in charge of a 900–foot oil tanker in a region that was notoriously difficult to navigate. *Id.* at 477, 128 S.Ct. 2605. The jury assessed $507.5 million in compensatory damages and $5 billion in punitive damages against Exxon. *Id.* at 480–81, 128 S.Ct. 2605. The Ninth Circuit Court of Appeals remitted the punitive award to $2.5 billion on due process grounds. *Id.* at 481, 128 S.Ct. 2605.

¶ 39 The United States Supreme Court reviewed the punitive damage award for conformity with federal maritime law. *Id.* at 489–90, 128 S.Ct. 2605. It expressed concern over the unpredictability of punitive damage awards. *Id.* at 499, 128 S.Ct. 2605. Unpredictable awards fail to promote one of the essential goals of punitive damages: deterrence. *Id.*

at 502, 128 S.Ct. 2605 ("[A] penalty should be reasonably predictable in its severity, so that even Justice Holmes's 'bad man' can look ahead with some ability to know what the stakes are in choosing one course of action or another."). The *Exxon* Court was particularly troubled by "outlier" punitive damage awards "that dwarf the corresponding compensatories," much like the punitive damage award in this case. *Id.* at 500, 128 S.Ct. 2605.

¶ 40 To solve the problem of runaway punitive damage awards, the *Exxon* Court concluded that punitive damages should be "pegg[ed] . . . to compensatory damages using a ratio. . . ." *Id.* at 506, 128 S.Ct. 2605. The Court analyzed ratios ranging from 3:1 to 1:1. *Id.* at 507–13, 128 S.Ct. 2605. The Court considered a 3:1 ratio inappropriate in *Exxon*, even though it reflected the statutory cap in a majority of states, because the 3:1 ratio is often applied to the "most egregious conduct." *Id.* at 510–11, 128 S.Ct. 2605 ("[A] legislative judgment that 3:1 is a reasonable limit overall is not a judgment that 3:1 is a reasonable limit in this particular type of case."). The Court next calculated the median ratio of punitive to compensatory damages actually awarded in a cross section of cases. They arrived at a ratio close to 1:1, which was deemed to reflect "what juries and judges have considered reasonable across many hundreds of punitive awards." *Id.* at 512, 128 S.Ct. 2605. Based on "the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary," the *Exxon* Court held a 1:1 ratio was the "fair upper limit" in that case. *Id.* at 513, 128 S.Ct. 2605.

¶ 41 The majority avoids *Exxon* by claiming the case does not establish "a general rule limiting the jury's role in determining appropriate damages." Majority at 835 [Pet. App. 17a]. But, the *Exxon* decision has been interpreted by other courts and scholars as limiting punitive damage awards in maritime cases, with the potential for even broader application. *See, e.g., Duckworth v. United States*, 418 Fed.Appx. 2, 3 (D.C.Cir.2011) (unpublished) ("In [*Exxon*], the Supreme Court addressed 'punitive damages in maritime law' . . . and held that a jury's award of punitive damages may not exceed the amount of compensatory damages in a federal maritime case." (quoting *Exxon* 554 U.S. at 489–90, 128 S.Ct. 2605)); *Hayduk v. City of Johnstown*, 580 F.Supp.2d 429, 484 n. 46 (W.D.Pa.2008) ("Although *Exxon* is a maritime law case, it is clear that the Supreme Court intends that its holding have a much broader application."); Joni Hersch & W. Kip Viscusi, *Punitive Damages by Numbers: Exxon Shipping Co. v. Baker*, 18 SUP.CT. ECON. REV. 259, 259 (2010) ("The U.S. Supreme Court decision in *Exxon Shipping Co. v. Baker* is a landmark that establishes an upper bound ratio of punitive damages to compensatory damages of 1:1 for maritime cases, with potential implications for other types of cases as well."); Victor E. Schwartz et al., *The Supreme Court's Common Law Approach to Excessive Punitive Damage Awards: A Guide for the Development of State Law*, 60 S.C. L.Rev. 881, 882 (2009) ("Will state courts view the [*Exxon*] decision as solely limited to the field of federal maritime law, or will the high court's powerful reasoning broadly influence state courts struggling to cabin in 'outlier' punitive damage verdicts?").

¶ 42 Dissenting in part in *Exxon*, Justice Ginsburg emphasized the weight of the Court's decision. Wary of its ramifications beyond the context of maritime law, she queried, "[I]s the Court holding only that 1:1 is the maritime-law ceiling, or is it also signaling that any ratio higher than 1:1 will be held to exceed 'the constitutional outer limit'?" *Exxon*, 554 U.S. at 524, 128 S.Ct. 2605 (Ginsburg, J., dissenting in part). Given *Exxon's* potential to influence even nonmaritime cases, the majority's attempt to restrict the case to its facts is unconvincing.

¶ 43 The holding in *Exxon* surely controls maritime cases like this one. The majority reasons that the 1:1 ratio applied in Baker is inappropriate under these facts and therefore no limiting ratio whatsoever should be applied. While the facts of this case do not mirror *Exxon*, the basic rationale of *Exxon* still governs. At its core, *Exxon* stands for the premise that punitive damage awards in maritime cases cannot be excessive when compared with the actual harm caused by the defendant. *Id.* at 503, 128 S.Ct. 2605 ("The common sense of justice . . . bar[s] penalties that reasonable people would think excessive for the harm caused in the circumstances."). The degree that a punitive damage award may depart from the corresponding compensatory award depends on the facts of the case, including the culpability or blameworthiness of the defendant, whether the wrongdoing was hard to detect, and the size of the compensatory award. *Id.* at 493–94, 128 S.Ct. 2605. In other words, *Exxon* instructs that punitive awards in maritime cases should "pegg[ed] . . . to compensatory damages" in a manner suited to the circumstances of the case. *Id.* at 506, 128 S.Ct. 2605.

¶ 44 The highest ratio considered potentially applicable in *Exxon* was 3:1. *Id.* at 510, 128 S.Ct. 2605. This ratio was considered appropriate only for cases "involving some of the most egregious conduct." *Id.* at 509, 128 S.Ct. 2605. The majority seems to acknowledge that a 3:1 ratio was the "upper limit" discussed in *Exxon* by quoting that portion of the decision. Majority at 835. (" 'the upper limit is not directed to cases *like this one* . . . the 3:1 ratio . . . applies to awards in quite different cases involving . . . malicious behavior and dangerous activity carried on for the purpose of increasing a tortfeasor's financial gain'" (second and third alterations in original) (quoting *Exxon*, 554 U.S. at 510, 128 S.Ct. 2605)). The court nevertheless sustains a punitive to compensatory ratio that vastly exceeds any ratio considered palatable by the Exxon Court. Assuming, as the majority does, that Icicle's conduct was more blameworthy than Exxon's, a 3:1 ratio should be the "upper limit" here.[1] Accordingly, the punitive

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[1] The majority's conclusion that Icicle's conduct was more reprehensible than Exxon's is certainly debatable. Majority at 835–36 [Pet. App. 20a-21a]. Exxon's conduct led to harm that was exponentially more devastating than Icicle's wrongful withholding of maintenance and cure from one individual. Over 32,000 plaintiffs were involved in the *Exxon* class action. 554 U.S. at 479, 128 S.Ct. 2605. The oil spill stripped them of their livelihoods. *Id.* While the jury found Exxon reckless, it did not have the opportunity to consider the possibility of any degree of fault beyond recklessness. *Id.* at 480 n. 2, 128 S.Ct. 2605. Given the evidence presented, "[t]he jury could reasonably have believed that Exxon knowingly allowed a relapsed alcoholic repeatedly to pilot a vessel filled with millions of gallons of oil through waters that provided the livelihood for the many plaintiffs." *Id.* at 525, 128 S.Ct. 2605 (Breyer, J., dissenting in part).

damage award should be reduced to $112,260—three times the compensatory award of $37,420.

¶ 45 In a footnote, the majority infers the punitive damage award in this case is no more than three times the compensatory award. Majority at 836 [Pet. App. 20a] n. 5. The court reaches this fiction by reasoning that attorney fees should be added to the compensatory side of the punitive to compensatory damages ratio. Majority at 836. In the cases cited by the majority for this proposition, the courts looked to the classification of attorney fees as compensatory under the law of the state involved. *See Blount v. Stroud,* 395 Ill.App.3d 8, 27, 915 N.E.2d 925, 333 Ill.Dec. 854 (2009) ("In Illinois, our supreme court has recognized that the amount of attorney fees expended . . . is a relevant consideration to factor into the side of the ratio that quantifies the amount necessary to make the plaintiff whole." (Citations omitted.)); *Action Marine, Inc. v. Cont'l Carbon Inc.,* 481 F.3d 1302, 1321 (11th Cir. 2007) ("In Georgia, awards of attorney fees in tort cases involving bad faith are compensatory in nature."); *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 237 (3d Cir. 2005) (alteration in original) (""The obvious design of the Pennsylvania statute is, first, to place [plaintiffs] in the same economic position they would have been in had the insurer performed as promised, by awarding attorney's fees as additional damages."' (quoting *Klinger v. State Farm Mut. Auto. Ins. Co.*, 115 F.3d 230, 236 (1997))). But, the classification of attorney fees as compensatory in other jurisdictions is not controlling where a case is governed exclusively by federal maritime law.

¶ 46 Moreover, the attorney fees awarded in *Blount* under 42 U.S.C. section 1988 were specifically classified by the court as "'remedial'" rather than punitive in nature. 395 Ill.App.3d at 28, 915 N.E.2d 925, 333 Ill.Dec. 854 (quoting *Williams v. City of Fairburn*, 702 F.2d 973, 976 (11th Cir. 1983)). Section 1988 does not require a showing of a particular type of blameworthiness before attorney fees may be recovered. *See* 42 U.S.C. § 1988 ("the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs").

¶ 47 In contrast, attorney fee awards in maintenance and cure actions are characterized as punitive because fees are not available unless a showing of callous or willful and wanton conduct is made. *See Vaughan v. Atkinson*, 369 U.S. 527, 531, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962) (assessing an award of attorney fees against a shipowner due to "callous" attitude, "recalcitrance," and "willful and persistent" failure to pay its maintenance and cure obligations). In a recent maintenance and cure case, *Atlantic Sounding Co. v. Townsend*, the United States Supreme Court described attorney fees in this context as punitive in nature:

> [O]ur case law also supports the view that punitive damages awards, in particular, remain available in maintenance and cure actions . . . In *Vaughan v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962), for example, the Court permitted the recovery of attorney's fees for the "callous" and "willful and persistent" refusal to pay maintenance and cure

557 U.S. 404, 129 S.Ct. 2561, 2571, 174 L.Ed.2d 382 (2009); *see also Kraljic v. Berman Enters., Inc.,* 575 F.2d 412, 414 (2d Cir.1978) ("We conclude therefore that the majority in *[Vaughan v.] Atkinson* . . . was in fact awarding counsel fees as punitive damages. . . . Recovery of such fees is therefore based upon the traditional theory of punitive damages.").

¶ 48 Construing the attorney fee award in this case as punitive is also supported by the majority's interpretation of the award as an "exception to the American rule that parties bear their own costs and fees in litigation." Majority at 832 [Pet. App. 9a]. Fees awarded under this exception to the American rule have been classified as punitive by the United States Supreme Court. *Hall v. Cole*, 412 U.S. 1, 5, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973) ("a federal court may award counsel fees to a successful party when his opponent has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons.' . . . [T]he underlying rationale of 'fee shifting' is, of course, punitive" (citations omitted) (quoting 6 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE 54.77[2], at 1709 (2d ed. 1972))); *see also Shimman v. Int'l Union of Operating Eng'rs*, 744 F.2d 1226, 1232 n. 9 (6th Cir.1984) ("Fees awarded under the bad faith exception [to the American rule] are punitive in nature."). Where an award of attorney fees "includes a certain punitive element," the fee award supports a lower punitive to compensatory ratio as punishment has already been partially imposed in the form of attorney fees. *Parrish v. Sollecito*, 280 F.Supp.2d 145, 164 (S.D.N.Y.2003). In such cases, attorney fees are not considered part of the compensatory award. *Laymon v. Lobby House, Inc.*, 613 F.Supp.2d 504 (D.Del.2009).

¶ 49 Properly disregarding the attorney fee award, the punitive award of $1.3 million is nearly 35 times the compensatory award of $37,420. This punitive award is plainly excessive in relation to the actual harm caused by the defendant.[2] By upholding the award, this court perpetuates a problem the *Exxon* Court intended to remedy: the issue of unpredictable punitive damage awards that fail the fundamental goal of deterrence. I would hold the punitive damage award must be reduced to conform to federal maritime law as articulated in *Exxon*. Therefore, I respectfully dissent.

I CONCUR: GERRY L. ALEXANDER, Justice Pro Tem.

Wash., 2012.
Clausen v. Icicle Seafoods, Inc.
272 P.3d 827, 2012 A.M.C. 660

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[2] The jury found that Icicle's failure to pay maintenance and cure, although willful, caused no harm to Clausen beyond the amount of maintenance and cure in arrears.

APPENDIX B

2010 WL 2011586, 2010 A.M.C. 793
American Maritime Cases

DANA CLAUSEN

v.

ICICLE SEAFOODS, INC.

Washington, Superior Court for King County

March 2, 2010

Case No. 08-2-03333-3

DAMAGES — 124. Maintenance, Cure and Wages — 172. Attorneys' Fees — 1832. Measure.

To determine any cap on the ratio of punitive damages to compensatory damages for a shipowner's failure to pay maintenance and cure, the amount of attorney's fees awarded to the seaman are included in compensatory damages.

DAMAGES — 124. Maintenance, Cure and Wages — 1832. Measure.

The 1:1 cap on the ratio of punitive damages to compensatory damages used by the Supreme Court in the *Exxon Valdez* case, 2008 AMC 1521, is not fixed when extraordinary circumstances justify departure. Here, where compensatory damages of $465,525 (including attorney's fees) were awarded for wrongful failure to pay maintenance and cure to a

seaman, the factors used to analyze the amount of punitive damages justify an award of $1.3 million, which produces a 1:2.79 ratio. The seaman was particularly vulnerable and the shipowner's denial of medical care and maintenance and cure was egregious.

James Jacobsen (Beard Stacey Trueb and Jacobsen) and Larry Curtis *for Clausen*

Philip W. Sanford (Holmes, Weddle and Barcott) for *Icicle Seafoods*

Hollis Hill, J.:

I. INTRODUCTION

The defendant has filed a Rule 59(h) motion asking the Court to eliminate or reduce the punitive damage award for its willful and wanton actions in denying Mr. Clausen the maintenance and cure to which the jury found he was entitled. The Court has carefully considered the briefs, affidavits, and arguments of the parties. For the following reasons the Court denies the defendant's motion.

II. APPLICABLE LAW

As Mr. Clausen's claims arise under the maritime law, federal law controls the outcome of this motion.

Under maritime law, the defendant has an affirmative duty to provide its employee with medical care. *The Iroquois*, 194 U.S. 240, 2009 AMC 834 (1903). "The duty to provide proper medical treatment and attendance for seamen falling ill or suffering injury in the service of the ship has been imposed upon the shipowners by all maritime nations." 194 U.S. at 241-242, 2009 AMC at 835. The employer is the "legal guardian in the sense that it is a part of his duty to look out for the safety and

care of his seamen, whether they make a distinct request for it or not." 194 U.S. at 247, 2009 AMC at 840.

Admiralty courts have been liberal in interpreting this duty "for the benefit and protection of seamen who are its wards." We noted in *Aguilar v. Standard Oil Co.*, that the shipowner's liability for maintenance and cure was among "the most pervasive" of all and that it was not to be defeated by restrictive distinctions nor "narrowly confined." When there are ambiguities or doubts, they are resolved in favor of the seaman. [citations omitted].

Vaughan v. Atkinson, 369 U.S. 527, 532, 1962 AMC 1131, 1135 (1962).

The defendant was under the most stringent legal obligation to take detailed and affirmative action to *ensure* that Mr. Clausen received his maintenance and cure. Willful and wanton violation of this stringent legal duty is uniquely culpable conduct.

The defendant claims that the *Exxon* case provided a universal cap of a 1:1 ratio between punitive damages and compensatory damages in all maritime cases. The Court disagrees. In *Atlantic Soundings v. Townsend*, 557 U.S at , 129 S.Ct. 2561, 2574, 2009 AMC 1521, 1537 n.11 (2009), the Supreme Court stated that it was not applying a recovery cap as it did in the *Exxon Valdez* case. Specifically, the Court stated:

Nor have petitioners argued that the size of punitive damages awards in maintenance and cure cases necessitates a recovery cap, which the Court has elsewhere imposed. *See Exxon Shipping Co. v. Baker*, 554 U.S. , 128 S.Ct. 2605, 2008 AMC 1521, [slip op] at 42 (2008)(imposing a punitive-to-

compensatory ratio of 1:1). We do not decide these issues.

Thus, *Atlantic Soundings* specifically did not impose a 1:1 limit as implied by the defendant.

Moreover, a careful examination of the *Exxon* case also teaches that the Supreme Court did not establish a bright line rule for all maritime cases. In *Exxon Shipping Co. v. Baker*, 554 U.S. , 128 S.Ct. 2605, 2008 AMC 1521 (2008), the Supreme Court stated that it imposed a cap of 1:1 in "such maritime cases" which did not involve "exceptional blameworthiness" or "behavior driven primarily by desire for gain" and that was "profitless for the tortfeasor" and that was the result of "reckless" rather than "intentional" behavior. 128 S.Ct. at 2633-2634, 2008 AMC at 1548-49. Moreover, the Court stated that in cases with substantial damages, $507,000,000 in the *Exxon* case, a 1:1 ratio can reach the outer limit of due process. 128 S.Ct. at 2634, 2008 AMC at 1549. Thus, *Exxon* imposed a 1:1 ratio under those particular facts, and it did not establish a 1:1 limit for all maritime cases.

The 1:1 cap applied in the *Exxon* case has also been projected as the appropriate cap in non-maritime cases where the compensatory award, like it was in *Exxon*, is particularly large. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) ("When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.").

In assessing the punitive damage award in this particular case, the most important indicium of the reasonableness of a punitive damages award is the

degree of reprehensibility of the defendant's conduct." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996). The Supreme Court's jurisprudence provides a detailed list of the markers employed for judging the reprehensibility of the defendant's conduct. By these standards, the instant defendant's conduct reaches the zenith of reprehensibility, thus supporting a substantial punitive damage award. The Court will consider all of the relevant markers below.

The defendant argues that neither the award of unpaid maintenance and cure nor the award of attorney's fees are compensatory damages and therefore cannot be compared to the punitive award.[1] The defendant fails to cite any case on point to support its argument. To the contrary, the Court concludes that the attorney's fees are compensatory damages, as are the awards for maintenance and cure. In discussing attorney's fees in *Vaughan v. Atkinson*, 369 U.S. 527, 531, 1962 AMC 1131, 1134 (1962), the Supreme Court stated that the seaman "was forced to hire a lawyer to get what was plainly owed to him," and that "it is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one." Thus, the Supreme Court stated that the attorney's fees were awarded as

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[1] In its award of sanctions for defendant's failure to disclose its misdeeds, this Court was extremely lenient, both in terms of the sum awarded and it directing payment to the Clerk of the Court, rather than as compensation to Plaintiff. This was based on a finding that the jury's award of punitive damages was an indication that Plaintiff was not harmed in the verdict by the withholding. Should the punitive damages award be reduced, this Court's assessment of appropriate sanctions should be revisited.

damages for failure to pay maintenance. In *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967), the Supreme Court stated even more explicitly that *Vaughn v. Atkinson* attorney fees are awarded as compensatory damages.

Limited exceptions to the American rule have, of course, developed. They have been sanctioned by this Court when overriding considerations of justice seemed to compel such a result. In appropriate circumstances, we have held, an admiralty plaintiff may be awarded counsel fees *as an item of compensatory damages* (not as a separate cost to be taxed). *Vaughan v. Atkinson*, 369 U.S. 527, 1962 AMC 1131 (1962). [Emphasis supplied].

Thus, the Supreme Court itself holds that *Vaughan v. Atkinson* attorney's fees are "compensatory damages".

Specifically addressing a maintenance and cure case, the Fifth Circuit Court of Appeals also held that *Vaughan v. Atkinson* attorney's fees are compensatory damages, not punitive damages. *Guevara v. Maritime Overseas Corporation*, 1995 AMC 2409, 2418-20, 59 F.3d 1496, 1501-03 (5 Cir. 1995), *rev'd on other grounds, Atlantic Soundings v. Townsend*, 557 U.S., 129 S.Ct. 256, 2009 AMC 1521 (2009).

In other "bad faith" cases, akin to this case, courts have characterized awards of attorney's fees as compensatory damages and include the fees as compensatory damages to be compared against the punitive award. *Action Marine, Inc. v. Continental Carbon Inc.*, 481 F.3d 1302, 1321 (11 Cir. 2007) (applying Georgia law, holding that $1.3 million in attorney's fees is a compensatory award and should

be compared against the punitive damage award); *Leeper-Johnson v. Prudential Ins. Co. of America*, 2009 WL 1318692, 23 (Cal. Ct. App. 2009) (court awarded attorney's fees included in compensatory damages which are compared against the punitive award). Applying these cases, the attorney's fees will be characterized as compensatory damages.

Adding together the unpaid maintenance and cure and attorney's fees award, the amount of compensatory damages is $465,525. The punitive damages are $1.3 million. The resulting ratio is 1:2.79. The question before the Court is whether this ratio passes legal muster.

III. FACTS RELATING TO THE DEFENDANT'S CONDUCT

The Supreme Court has provided clear instructions for trial courts to determine whether a particular punitive damage award is appropriate. In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419-421 (2003) the court identified markers of reprehensibility as follows: (1) Indifference to or reckless disregard for the health of others; (2) the target of the conduct was financially vulnerable; (3) the conduct involved repeated actions and was not isolated; (4) the harm was a result of intentional malice, trickery, or deceit, and was not an accident. *Id.* Furthermore, deliberate false statements, acts of affirmative misconduct, and concealment of evidence of improper motive demonstrates the most reprehensible conduct. *BMW of North America, Inc, v. Gore*, 517 U.S. 559, 575-580 (1996). "[M]alicious behavior" "carried on for the purpose of increasing the tortfeasor's financial gain" is "some of the most egregious conduct". *Exxon*, 128 S.Ct. at 2631-32,

2008 AMC at 1548. The reviewing court must also consider the potential damage if the defendant had succeeded in its scheme, as well as the size of the award that is required to deter the defendant from similar conduct in the future. *TX0 Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993).

Each issue will be addressed below.

(1) Indifference to or Reckless Disregard For the Health of Others.

The defendant demonstrated intentional indifference to Mr. Clausen's health. The defendant paid the Seattle Panel of Consultants' Dr. Richard Meeks to review Mr. Clausen's medical records. Its hand-picked doctor advised the defendant that Mr. Clausen needed epidural spinal injections and was a back surgery candidate. Upon review of the report, Chris Kline, a corporate officer, considered the report "not good for Icicle." (Trial Exhibits 198 & 199 & Trial Testimony of Mr. Gremmert). Although advised by its doctor that the injections were medically necessary and related to Mr. Clausen's work injury, the defendant refused to pay for the injections as well as the surgery. The defendant persisted in this behavior despite repeated requests to authorize and pay for Mr. Clausen's necessary medical care. These actions demonstrate an intentional disregard for Mr. Clausen's health.

When the defendant obtained Dr. Meeks' opinion that Mr. Clausen was not at maximum medical cure, could benefit from epidural steroid injections, and was a surgical candidate, it did not provide a copy of the report to Mr. Clausen, the nurse case manager, or any of Mr. Clausen's treating physicians, leaving Plaintiff misled as to his medical condition. Instead,

the defendant kept the report secret because it was "not good for Icicle". The implication is that Mr. Clausen's necessary medical care was going to cost the defendant money. These actions amount to intentional disregard for Mr. Clausen's health, and evidence a plan to trade Mr. Clausen's health for corporate profits.

Significant to this conclusion is that the defendant was under a legal obligation to *ensure* that Mr. Clausen received proper medical care for his shipboard injury. Thus, the defendant was under a strict and heightened duty to be concerned with Mr. Clausen's care which it intentionally and repeatedly repudiated.

(2) Mr. Clausen Was Financially Vulnerable.

Mr. Clausen's back injury rendered him unable to do any of the work for which he was qualified. Mr. Gremmert admitted that he knew this during the spring of 2006. (See also Exhibit 11, Dec. of Jacobsen). Also, the defendant paid only 520.00 [sic] a day in maintenance — clearly not enough money for safe and secure lodging with heat, cooling, shower, toilet and electricity, plus three meals a day. Mr. Clausen was reduced to living in a broken down recreational vehicle with no heat, air conditioning, toilet, or running water. Eventually, the roof leaked and could not be repaired. Mr. Clausen was practically homeless, and therefore quintessentially financially vulnerable.

Ms. Moore testified at trial that during this time she knew or suspected that Mr. Clausen had only an old RV for shelter. Mr. Gremmert testified that it is possible to live on $20.00 in a safe and clean environment and still eat three meals a day. The

defendant knew that Mr. Clausen was financially vulnerable and that is why it wanted him to take the "bait" so that he could get "a" by hacking off of his medical care.

The manner in which the defendant sought to use Mr. Clausen's financial vulnerability against him is particularly reprehensible in light of the legal duty the defendant owed Mr. Clausen to ensure he received the medical care he needed.

(3) The Defendant Repeatedly Violated Mr. Clausen's Right To Maintenance And Cure.

Defendant repeatedly violated Mr. Clausen's right to maintenance and cure. Based upon the jury's award of unpaid maintenance and cure, Mr. Clausen's right to these benefits extended for a considerable time past the date when the defendant quit paying. Plaintiff's Trial Exhibits 59 to 123 are the 64 letters that Mr. Curtis sent to the defendant enclosing medical records and bills and asking for payment of cure.

(4) The Failure To Pay Maintenance and Cure Was the Result of Intentional Malice, Trickery and Deceit, And It Was Not A Mistake.

The decision to deny Mr. Clausen maintenance and cure was made by Ms. Laurenda Moore and it was an intentional decision, not a mistake. The claims adjuster's file demonstrates that the decision was carried out with both trickery and deceit.

In a letter dated June 20, 2006, Dr. Richard E. Marks told the defendant that Mr. Clausen had not reached maximum medical care, that he needed epidural steroid injections, and that he was a surgical candidate. (Panel of Consultants Report, Exhibit 1 to

the Declaration of James P. Jacobsen). The defendant refused to pay for this treatment. Instead, defendant sued Mr. Clausen in federal court.

The adjuster's file demonstrates a conspiracy within the defendant's corporate management to deny Mr. Clausen his medical care.

be On May 25, 2006, the defendant reported to the insurance company: "We feel that settlement in this range would be preferable to taking any chances with the outcome of a functional capacity exam and future medical treatment"

be On June 5, 2006, in telephone notes that the insurance company had authorized a settlement offer an, — INUS1 [sic] that, "We should move on this before guy gets away from us — He agreed will talk to Leauri — Good."

be On June 9, 2006, in telephone notes the adjuster says: " — We Hv Reviewed the email from the nurse case mgr. Review earlier med recs — Looks like medical situation is wide open again after we thought it was almost finished — He agrees — Maybe he will take bait & my to back down his medical treatment in order to get S$ by "closing' file."

be On June 28, 2006, in the telephone notes it states: " — Read med recs review Rpt — Not good for Icicle — We should really try and corral this guy — May end up with a back surgery" (Exhibits 4 and 2, Dec. of Jacobsen in support of Opposition to Motion to Amend Judgment).

Mr. Gremmert testified that the back surgery was expected to cost between forty and seventy-five thousand dollars. Thus, beginning in the summer of 2006 the defendant engaged in an elaborate scheme

to force Mr. Clausen to settle his claim in order to avoid paying for an expensive back surgery — a surgery which its own doctor concluded would be therapeutic.

The evidence at trial also established that Lori Gregoire, the nurse assigned by the defendant to monitor Mr. Clausen's medical care, believed that Dr. Brennan, Mr. Clausen's treating physician, was incorrect when he said Mr. Clausen had reached maximum medical cure. This was the same conclusion reached by Dr. Richard Meeks, defendant's hand-picked doctor. And Mr. Gremmert testified at trial that he accepted the fact that Mr. Clausen had not reached maximum medical cure as stated by Dr. Brennan.

Nevertheless, concealing Dr. Richard Meeks' opinion and that of Nurse Lori Gregoire, Mr. Gremmert was still relying upon Dr. Brennan's statement that Mr. Clausen had reached maximum medical cure to support the defendant's denial of maintenance and cure. (Exhibit 13, December 5, 2006 Facsimile from Kurt Gremmert to Larry Curtis, and Exhibit 14, letter dated December 12, 2006, Dec. of Jacobsen). These facts demonstrate the use of deceit, false statement and trickery, because the opinions of Dr. Meeks and Nurse Gregoire were withheld from Mr. Clausen, but the discredited opinion of Dr. Brennan was still being used to deny him maintenance and cure.

(5) The Defendant Employed Deliberate False Statements.

One example of the many false statements defendant made in denying Mr. Clausen maintenance and cure is contained in its federal court Complaint. On or

about September 18, 2007, the defendant sued Mr. Clausen in the United States District Court in order to terminate his rights to maintenance and cure. The defendant's Complaint made deliberate false statements. Under the facts section, the defendant's Complaint stated:

Throughout this matter Mr. Clausen has impeded his employer's right and obligation to investigate Mr. Clausen's ongoing entitlement to maintenance and cure by way of example and without limitation, failing to keep Icicle Seafoods, Inc. apprised of his medical status, failing to provide Icicle Seafoods, Inc. with copies of medical records, failing to adequately allow Icicle Seafoods, Inc. access to the treating physicians, failing to seek authorization for medical treatment, [and] failing to apprise Icicle Seafoods, Inc. of medical bills[.]

(Complaint 4.2, Exhibit 15, Dec. of Jacobsen). The adjuster's file demonstrates that each one of these allegations was false. The progress reports and billing records from Nurse Lori Gregoire, show that for every step of the way, she talked with Mr. Clausen and his doctors, reviewed his medical records, and reported all of this information in detail to the claims adjuster. (Nurse Lori Gregoire's records. Exhibits 6 to 10, Dec. of Jacobsen). When the defendant filed its federal lawsuit, these records were still a secret in the claims adjuster's file. Trial Exhibit 202 was a letter dated June 29, 2006 from Mr. Curtis to Mr. Gremmert which contained numerous medical records, medical bills, a summary of medical bills that remained unpaid, and fifteen releases signed by Mr. Clausen so that the defendant could obtain his medical records directly from the

providers. Mr. Gremmert admitted on cross examination that none of these releases for medical records were ever used. The law suit was filed two and one-half months after receipt of the releases.

Thus, the Complaint that the defendant filed in the U.S. District Court contained patently false and misleading statements.

These false statements were particularly egregious because the defendant owed Mr. Clausen a fiduciary duty to ensure that he received the medical care to which he was due.

(6) Defendant's Misconduct Was Motivated By Profit.

Mr. Gremmert's telephone notes of the conversations with Mr. Chris Kline, the defendant's corporate officer, demonstrate that the defendant was trying to "corral" Mr. Clausen and get him to take the "bait" of some small settlement "to back down his medical treatment in order to get $$". The motive was to enhance the defendant's profit margin. According to *Exxon*, willful and wanton conduct in the pursuit of profit is "the most egregious conduct".

(7) The Potential Harm If The Defendant Had Fully Succeeded In Its Plan Is Severe.

On June 9, 2006, Nurse Lori Gregoire reported to the defendant that, "Mr. Clausen reports increased pain to his hips and flare up on Saturday, described as a "lightning bolt" that lasted about ten minutes to his left hip. Dr. Brennan deferred any work release and recommended referral to a neurosurgeon, Dr. Tsaza." (Exhibit 5, Dec. of Jacobsen). Mr. Gremmert's notes from that same day state, " — We Hv Reviewed the email from the nurse case mgr. Review earlier med revs[.] — Looks like medical situation is wide open

again after we thought it was almost finished[.] — He agrees[.] — Maybe he will take bait & my to back down his medical treatment in order to get $S by "closing" file." (Exhibit 2, Dec. of Jacobsen). As of June 9, 2006 it is therefore undisputed that the defendant knew that Mr. Clausen was suffering from "lightning bolt" pain and that his treating physician wanted Mr. Clausen to see a neurosurgeon for further treatment. Despite this knowledge, the defendant planned to offer Mr. Clausen "bait" of a small settlement to forego his medical treatment.

Later that summer, Mr. Clausen continued to suffer from excruciating pain. In Dr. Isaza's record from the Baton Rouge Orthopedic Clinic, dated August 17, 2006, is the following chart note.

Patient advised to go to er if medicine is not helping his pain. His friend "frailly" is aware of this — she states patient has threatened to kill himself and we advised her to go to ER —

(Exhibit 16). Nurse Gregoire reported this emergency room visit to the defendant. (Progress Report No. 6, page 2, Exhibit 6).

The defendant knew that Mr. Clausen was suffering from excruciating pain so intense that it was reported to his doctor that he contemplated suicide. Nevertheless, shortly after this chart note and the report from Nurse Gregoire, the defendant refused to pay any further maintenance and cure.

After the defendant refused to pay for his medical care, Mr. Clausen was able to borrow money to obtain some of the care which was required. If the defendant had fully succeeded in its plan, and Mr. Clausen had been unable to borrow money for his medical treatment and prescription medications, Mr.

Clausen would have been left suffering excruciating unremitting pain — pain so bad that he contemplated death as an alternative.

Moreover, the defendant quit paying maintenance in September, 2006, and only gave him a token amount in 2007. Mr. Clausen was living in his broken down RV in squalid conditions. Only because he borrowed money was he was able to put a modest roof over his head.

The potential harm, if the defendant's decision to deny Mr. Clausen his maintenance and cure had been fully successful, was hardship, pain, and devastation of his life.

(8) The Size of the Award That is Required to Deter the Defendant From Similar Conduct in the Future.

The jury in this case made a finding that the defendant's conduct was willful and wanton. Nevertheless, the defendant argues here that it should be subject to no punitive damages. The defendant needs substantial deterrence not to repeat what it did to Mr. Clausen.

First, that the defendant has opportunity to treat other workers in the same way it treated Mr. Clausen. The defendant admitted that it employs hundreds of seamen.

The defendant's opening statement claimed that the defendant had done nothing wrong. The defendant tried to blame its actions on Mr. Clausen. The defendant's closing statement made the same arguments. Mr. Gremmert and Ms. Moore claimed that they did nothing wrong. Both were unrepentant.

When this case came to trial the defendant knew that if it lost the case, it faced the prospect of an award of attorney's fees, costs, and punitive damages. During the entire time that it was willfully and wantonly denying Mr. Clausen maintenance and cure, and intentionally betraying its stringent duty to provide him proper cure, defendant's managers knew that it was exposed to damages and attorney's fees. Nevertheless, the defendant denied Mr. Clausen his due. The punitive damages must be too painful to make such conduct profitable. The jury's modest award to Mr. Clausen for general damages under the Jones Act and the substantial comparative fault finding demonstrates that this jury in this case was careful and thoughtful. The jury did not go "wild" assessing Jones Act damages against the defendant. The jury's considered judgment was that it would require $1.3 million to adequately punish and deter the defendant. Considering the stringent legal duty the defendant breached, the intentional and cynical manner in which Mr. Clausen was treated, and what the defendant put Mr. Clausen through — $1.3 million is an appropriate award.

(9) Punitive Damages Are Properly Awarded In Cases Involving Economic Harm.

The defendant claims that Mr, Clausen, because he cannot recover punitive damages, was not awarded physical damages for wrongful denial of maintenance and cure under the general maritime law. This argument is foreclosed by Supreme Court precedent.

To be sure, infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially

vulnerable, can warrant a substantial penalty. [citation omitted].

BMW of North America, Inc. v. Gore, 517 U.S. 559, 576 (1996). Here the defendant's repeated acts were intentional and Mr. Clausen was a quintessentially financially vulnerable victim.

Thus, this case warrants a "substantial penalty." *Id.*

The jury was entitled to take into consideration the conditions under which the defendant caused Mr. Clausen to live. The jury did not have to award him separate damages under the general maritime law in order for it to abhor what the defendant did to him. The Jury found the defendant's conduct abhorrent, which is why it awarded $1.3 million in punitive damages. Moreover, under the Special Verdict Form, the jury was required to award compensatory damages under the Jones Act before it reached the general maritime law. The jury may have thought that the general maritime law compensatory damages duplicated the Jones Act damages and therefore declined to award any more.

The Supreme Court's markers of reprehensibility apply whether or not there is physical injury. And that analysis, applied to this case, fully supports the $1.3 million punitive award.

(10) The Ratio Of Compensatory Damages To Punitive Damages is Well Within Federal Limits.

The nub of defendant's argument is that the punitive damage award is too high based upon the compensatory damages awarded in this case. "The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff" [sic] *State*

Farm Mat. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

The application of the Supreme Court's punitive damage jurisprudence to this case establishes that under the "facts and circumstances" of this case the award is fully justified. Objective application of the Supreme Court's markers places the defendant's conduct at the zenith of reprehensibility. The defendant preyed upon a man incapable of work living in a broken down old RV. The defendant did it intentionally, repeatedly, over a period of years, and the purpose of its malicious actions was corporate profit. Moreover, while doing this, the defendant was subject to a stringent legal duty to do just the opposite — to carefully care for Mr. Clausen. Thus, a large punitive damage award is fully supported by the law.

The question then becomes what is a large award? That is determined by the reprehensibility of the conduct and the size of the compensatory award. The Supreme Court has many cases which discuss the ratio of punitive to compensatory damages.

TX0 Production Corp., 509 U.S. at 453, the Supreme Court affirmed a punitive damage award that was 526 times as great as the compensatory damages in action for slander of title. In affirming the award, the Supreme Court observed that it "is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." *Id.* at 460. The Court then held that it did not consider the dramatic disparity between the

actual damages and the punitive award controlling in a case of this character. Here, there is no drastic disparity between the harm and the potential harm and the punitive award. The ratio is less than three and fully supported by the case law and defendant's reprehensible conduct.

Many courts have upheld damage ratios higher than the one in this case. E.g. *Action Marine, Inc v. Continental Carbon Inc.*, 481 F.3d 1302. [sic] 1321 (11 Cir. 2007)(ratio of 1:9 appropriate where the defendant's actions particularly reprehensible); *Southern Union Co. v. Irvin*, 563 F.3d 788, 790 - 794 (9 Cir. 2009) (1:3.1 upheld); *Jones v. United Parcel Service, Inc.*, 658 F.Supp.2d 1308 (D.Kan. 2009) (1:3.1 ratio in wrongful discharge case upheld); *Everhart v. O'Charley's Inc.*, 683 S.E.2d 728, 741 (N.C. Ct. App. 2009) (1:25 ratio upheld where compensatory low and defendant's conduct reprehensible); *Jolley v. Energen Resources Corp.*, 198 P.3d 376, 385-86 (N.M. App. 2008) (1:6.76 ratio is upheld when the conduct was particularly reprehensible).

This award is not out of line, does not unfairly punish the defendant, and is fully supported by the evidence before the jury and the controlling case law.

IV. CONCLUSION

The defendant's Rule 59(h) motion is hereby denied.

Wash. Super., 2010

2010 WL 2011586, 2010 A.M.C. 793