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Punitive Damages In Eleventh Circuit Maritime Cases After Batterton

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Recent Supreme Court Precedent Concerning Recoverability of Punitive Damages in Maritime Cases, Generally

As explained in *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489-90 (2008) ("*Exxon*"), punitive damages are recoverable under the general maritime law unless a statute provides otherwise: "*Exxon* raises an issue of first impression about punitive damages in maritime law, which falls within a federal court's jurisdiction to decide in the manner of a common law court, *subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result*." *Id.* (emphasis added). Acknowledging that punitive damages are generally recoverable, the Court held that in ordinary circumstances punitive damages should not exceed a ratio of 1:1 to compensatory damages, stating "[w]e consider that a 1:1 ratio, which is above the median award, is a fair upper limit in such maritime cases." *Id.* at 494-95. *Exxon* further endorses the principle that certain types of cases warrant punitive damages awards greater than a 1:1 ratio:

> Regardless of culpability, however, heavier punitive awards have been thought to be justifiable when wrongdoing is hard to detect (increasing chances of getting away with it), *See, e.g., BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582 (1996) ("A higher ratio may also be justified in cases in which the injury in hard to detect."), or when the value of injury and the corresponding compensatory award are small (providing low incentives to sue), *See, e.g., ibid.* ("[L]ow awards of compensatory damages may properly support a higher ratio ... if, for example, a particularly egregious act has resulted in only a small amount of economic damages."); 4 Restatement § 908, Comment c, p. 465 ("Thus, an award of nominal damages ... is enough to support a further award of punitive damages, when a court ... is committed for an outrageous purpose, but no significant harm has resulted"). And, with a broadly analogous object, some regulatory schemes provide by statute for multiple recovery in order to induce private litigation to supplement official enforcement that might fall short if unaided. *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (discussing antitrust trouble damages).

Ibid. at 494-95.

In *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009) ("*Townsend*"), the Court commented that punitive damages have been available in appropriate maritime cases since at least 1818 when Justice Story wrote the opinion for the Court in *The Amiable Nancy*, 3 Wheat 546 (1818). Specific to maintenance and cure, the Court stated "[l]ike negligence, '[t]he general maritime law has recognized ... for more than a century' the duty of maintenance and cure and the general availability of punitive damages." *Id.* at 422 (citing *Norfolk Shipbuilding & Dry Dock Corp. v. Garris*, 532 U.S. 811, 820 (2001)). *Townsend* holds: "[b]ecause punitive damages have long been an accepted remedy under the general maritime law, and because nothing in any statute altered this understanding,

such damages ... should remain available in the appropriate case as a matter of general maritime law." *Id.*, 557 U.S. at 424.

On June 24, 2019, the Supreme Court, in a 6-3 vote authored by Justice Alito, held a mariner may not recover punitive damages on a claim of unseaworthiness. *The Dutra Group v. Batterton*, ___ U.S. ___, 139 S.Ct. 2275, 204 L.Ed.2d 692 (June 24, 2019) ("*Batterton*"). The Court again acknowledged the traditional role of punitive damages in maritime cases, stating "[i]n *Atlantic Sounding [v. Townsend]*, we allowed recovery of punitive damages, but ... based on the established history of awarding punitive damages for certain maritime torts, including maintenance and cure." *Id.* ___ U.S. ___, ___, 139 S.Ct. at 2283.

Uncertainty Within the Eleventh Circuit on the Issue of Punitive Damages, Generally

Prior to *Batterton*, the status of recoverability of punitive damages in the Eleventh Circuit was already uncertain because of the tension created by the holdings in four cases *In re Amtrak "Sunset Limited" Train Crash in Bayou Canot, Ala. on September 22, 1993*, 121 F.3d 1421 (11th Cir. 1997) ("*Amtrak*") (consolidation of over one hundred wrongful death and personal injury cases following the derailment of a train passing over a bridge that had been damaged when struck by a barge, thereby giving rise to the application of maritime law and a holding that punitive damages are not recoverable in maritime personal injury cases except when caused by "very rare" intentional misconduct); *Atlantic Sounding v. Townsend*, 557 U.S. 404 (2009) ("*Townsend*") (seaman is entitled under the general maritime law to seek punitive damages for an employer's willful and wanton disregard of maintenance and cure obligations); *Lollie v. Brown Marine Service, Inc.*, 995 F.2d 1565 (11th Cir. 1993) ("*Lollie*") (seamen could not recover for loss of consortium under general maritime law); and *Self v. Great Lakes Dredge and Dock Co.*, 832 F.2d 1540, 1550 (11th Cir. 1987)("*Self*") ("[p]unitive damages should be available in cases where the shipowner willfully violated the duty to maintain a safe and seaworthy ship").

The *Amtrak* court held "we expressly extend our holding in *Lollie* to preclude the availability of punitive damages in personal injury actions brought under the general maritime law." *In re Amtrak*, 121 F.3d at 1429. Somewhat contradictorily, however, the Amtrak court further stated "personal injury claimants have no claim for non-pecuniary damages such as ... punitive damages, *except in exceptional circumstances such as ... intentional denial of a vessel owner to furnish a seaworthy vessel to a seaman and in those very rare situations of intentional wrongdoing*." *Id.* (emphasis added).

Following *Townsend's* release in 2009, federal district courts – particularly in the Southern District of Florida – began issuing conflicting decisions questioning whether *Townsend's* reasoning effectively overruled *Amtrak's* express holding: *e.g., Boney v. Carnival Corp.*, 2009 WL 4039886 at *1, n. 1 (S.D. Fla. 2009) (not reported in F.Supp.) (Seitz, J.) ("While the Eleventh Circuit Court of Appeals stated in *Amtrak* that it looks 'disfavorably' on the availability of punitive damages under maritime law, the Supreme Court has now [in *Townsend*] suggested that punitive damages are available in general maritime claims unless Congress has expressed otherwise."); *Lobegeiger v. Celebrity Cruises, Inc.*, 2011 WL 3703329 at *7 (S.D. Fla. 2011) (not reported in F.Supp.) (Altonaga, J.) ("... *Amtrak*, to the extent that it foreclosed a plaintiff's right to seek punitive damages in a personal injury case under general maritime law, is clearly inconsistent with *Atlantic Sounding* [v. *Townsend*] and is no longer the correct rule of decision in the Eleventh Circuit.... Accordingly, a plaintiff may recover punitive damages under general maritime law, consistent with the common-law rule, where the plaintiff's injury was due to the defendant's 'wanton, willful, or outrageous conduct.' "); *Wolf v. McCulley Marine Services, Inc.*, 2012 WL 4077240, at **5-6 (M.D. Fla. 2012) (not reported in F.Supp.) (Moody, J.) (denying motion for partial summary judgment on punitive damages for unseaworthiness reasoning "In *Atlantic Sounding [v. Townsend]*, the Supreme Court clarified that punitive damages historically 'extended to claims arising under general maritime law' .... Thus, punitive damages may be awarded in an unseaworthiness action when the plaintiff can prove 'wanton, willful or outrageous conduct.' "; *Doe v. Royal Caribbean Cruises Ltd.*, 2012 WL 920675, at *4 (not reported in F. Supp.) (S.D. Fla. Mar. 19, 2012) (Goodman, Magistrate Judge) (cruise passenger rape victim may recover punitive damages because "[f]ollowing *Atlantic Sounding* [v. *Townsend*], punitive damages are ... available in a maritime personal injury action, as at common law, for 'wanton, willful, or outrageous conduct.' "); *Terry v. Carnival Corp.*, 3 F.Supp.3d 1363, 1371-72 (S.D. Fla. Jan. 16, 2014) (Graham, J.) ("Personal injury claimants in actions brought under general maritime law have no claim for non-pecuniary damages, including punitive damages, 'except in exceptional circumstances such as willful failure to furnish maintenance and cure to a seaman, intentional denial of a vessel owner to furnish a seaworthy vessel to a seaman and in those very rare situations of intentional wrongdoing.' " Because plaintiffs have failed to demonstrate and the record evidence does not support a finding of intentional misconduct, Carnival's motion for summary judgment on punitive damages is granted); *Crusan v. Carnival Corp.*, 2015 WL 13743473 at **6-8 (S.D. Fla. Feb. 24, 2015) (Williams, J.) ("To demonstrate 'the intentional misconduct' for the purposes of recovering punitive damages, the Plaintiffs must show that the 'defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursue that course of conduct, resulting in injury or damage."); *Kennedy v. Carnival Corp.*, 385 F.Supp.3d 1302, 1328-30 (S.D. Fla. Mar. 6, 2019) (Torres, Magistrate Judge) ("Maritime law precedents hold that punitive damages, when available, arise only 'in those very rare situations of intentional wrongdoing.' ... Additionally, 'punitive damages may be awarded in maritime tort actions where defendant's actions were intentional, deliberate, or so wanton and reckless as to demonstrate a conscious disregard of the rights of others.' "); *Doe v. Celebrity Cruises, Inc.*, 389 F.Supp.3d 1109, 1113-1116 (S.D. Fla. 2019) (William, J.) (district court adopts report and recommendation of magistrate judge denying cruise ship's and ship's spa's motions to dismiss claims for punitive damages in on-board sexual assault case, finding plaintiff's allegation that defendants knew spa employee was a sex predator with dangerous propensities when they hired him were sufficient to qualify as intentional misconduct under Eleventh Circuit precedent which will allow plaintiff to recover punitive damages if proven true); and *In re Bowman*, 2019 WL 2516232, at *2-3 (M.D. Fla. June 18, 2019) (Steele, J.) (allegations that recreational boater operated vessel in an unsafe and reckless manner,

without proper training, in a no-wake zone at a high rate of speed while intoxicated and striking plaintiff's vessel and causing it to sink, but thereafter not assisting with rescue but instead covering up evidence of consumption of alcohol beverages stated a plausible claim for punitive damages under *Amtrak* standard).

Florida state courts also read *In re Amtrak* as allowing punitive damages, but only in cases involving "intentional wrongdoing." *See, e.g., Royal Caribbean Cruises, Ltd. v. Doe*, 44 So.3d 230 (Fla. 3d DCA 2010) and *Carnival Corp. v. Iscoa*, 922 So.2d 359 (Fla. 3d DCA 2006). *See also Juno Marine Agency, Inc. v. Taibl*, 761 So.2d 373 (Fla. 3d DCA 2000), in which the court upheld an award of punitive damages for the family of a deceased rescuer, who had previously been given seaman's status under the rescue doctrine in an earlier federal court ruling pursuant to *Grigsby v. Coastal Marine Services, Inc.*, 412 F.2d 1011 (5th Cir. 1969).

Impact of Batterton Within the Eleventh Circuit

The most significant effect of *Batterton* within the Eleventh Circuit was to abrogate the decision in *Self v. Great Lakes Dredge & Dock Co., supra*, thereby undermining decisions of district courts within the Eleventh Circuit which had permitted recovery of punitive damages for unseaworthiness.

With the exceptions of *Eslinger v. Celebrity Cruises, Inc.*, 772 Fed. Appx. 872 (11th Cir. June 28, 2019), *Noon v. Carnival Corporation*, 2019 WL 3886517 (S.D. Fla. Aug. 12, 2019), and *Simmons v. Royal Caribbean Cruise Lines, Ltd.*, 2019 WL 8109958, ___ F.Supp.3d ___ (S.D. Fla. Aug. 13, 2019) (each analyzed below), no other decisions applying or even mentioning *Batterton* have yet been released by the Eleventh Circuit Court of Appeals, any federal district courts within the Eleventh Circuit, or the state appellate courts of Alabama, Florida, or Georgia. So where are we in the Eleventh Circuit following *Batterton*? Obviously, *Batterton's* holding with respect to mariners' claims for punitive damages in unseaworthiness cases within the Eleventh Circuit is now clear. But what about the status of the recoverability of punitive damages by mariners for intentional, willful, and wanton disregard of maintenance and cure obligations? And what about non-mariners' claims? What is *Batterton's* impact within the Eleventh Circuit upon longshoremen's and harbor workers' § 905(b) claims and those of passengers aboard cruise ships claiming intentional, willful, and/or wanton breaches of the duties owed under the general maritime law?

Seamen – Intentional, Willful, and/or Wanton Disregard of Maintenance and Cure Obligations

A seaman who is injured or becomes ill while in the service of a vessel (even if the injury or illness occurs ashore) is entitled to maintenance and cure. "Maintenance" is comprised of money to live on (room and board) while "cure" is medical care until maximum medical recovery is attained. *See Atlantic Sounding Co. v. Townsend*, *supra*; *Flores v. Carnival Cruise Lines*, 47 F.3d 1120, 1122 (11th Cir. 1995).

Nothing about *Batterton* undermines the Supreme Court's holding in *Townsend*, which, on certiorari from the United States Court of Appeals for the Eleventh Circuit (see *Atlantic Sounding Co., Inc. v. Townsend*, 496 F.3d 1282 (11th Cir. 2007)), held that a seaman is entitled under the general maritime law to seek punitive damages for his employer's alleged willful and wanton disregard of its maintenance and cure obligations. Again, *Batterton* expressly states "[i]n *Atlantic Sounding [v. Townsend]*, we allowed recovery of punitive damages, but ... based on the established history of awarding punitive damages for certain maritime torts, including maintenance and cure." 139 S.Ct. at 2283.

Thus, *Townsend's* holding permitting recovery of punitive damages for willful failure to pay maintenance and cure, as followed by numerous courts within the Eleventh Circuit, remains good law. *See*, e.g., *Kuithe v. Gulf Caribe Maritime, Inc.*, 2009 WL 3158193 (S.D. Ala. Sept. 29, 2009) (not reported in F.Supp.) (Steele, J.) (recognizing right within the Eleventh Circuit to recover punitive damages in the event of a willful failure to pay maintenance and cure); *Wolf v. McCulley Marine Services, Inc.*, 2012 WL 4077240, at *5 (M.D. Fla. Sept. 17, 2012) (not reported in F.Supp.) (Moody, J.) (court denies summary judgment, holding a reasonable jury could find the employers' "behavior evinces willful and callous disregard of the maintenance and cure obligation, especially because of the Supreme Court's admonition to resolve doubts in favor of seamen."); *Zukowski v. Foss Maritime Co.*, 2013 WL 1966001, at *7 (S.D. Ala. May 10, 2013) (not reported in F.Supp.) (Granade, J.) (recognizing right to recover punitive damages in a proper case and providing "examples of willfulness meriting punitive damages and counsel fees include: (1) laxness in investigating a claim; (2) termination of benefits in response to a seaman's retention of counsel for refusal of a settlement offer; [and] (3) failure to reinstate benefits after diagnosis of an ailment previously not determined medically."); *Weeks Marine, Inc. v. Wright*, 2015 WL 4389918, at *6 (S.D. Ala. July 15, 2015) (not reported in F.Supp.) (DuBose, J.) (recognizing the right of a seaman to recover punitive damages but he "must establish that defendants' conduct ... was callous, willful, unreasonable, wanton, egregious or otherwise in bad faith."); *Salty Dawg Expedition, Inc. v. Borland*, 2017 WL 2834775, at *5 (M.D. Fla. June 30, 2017) (not reported in F.Supp.) (Merryday, J.) (A seaman may recover punitive damages when an employer willfully fails to pay maintenance and cure, but such recovery requires "an element of bad faith." Here, the employer's motion for summary judgment on punitive damages is granted because of an insufficiency of evidence of any willful failure to pay maintenance and cure benefits.); *Varela v. Dantor Cargo Shipping, Inc.*, 2017 WL 7184605, at *3 (S.D. Fla. Nov. 14, 2017) (not reported in F.Supp.) (Scola, J.) (recognizing the right of seamen to recover punitive damages for the willful and wanton disregard of the maintenance and cure obligation and finding that defendants "have admitted, through default, that their failure to provide the plaintiff with maintenance and cure was, and continues to be willful, arbitrary, capricious, and in callous disregard for the plaintiff's rights as a seaman.").

Indeed, the Eleventh Circuit Pattern Jury Instruction No. 8.2 continues to provide that punitive damages are recoverable in the appropriate case:

> When a defendant willfully and arbitrarily fails to pay maintenance or provide cure to a seaman up to the time that the seaman receives maximum cure, and the failure results in

> an aggravation of the seaman's injury, the seaman may recover damages for prolonging or aggravating [his/her] injury, pain and suffering, additional medical expenses incurred because of the failure to pay, punitive damages, and reasonable attorney's fees and costs.

http://www.ca11.uscourts.gov/pattern-jury-instructions Civil No. 8.2 (last revised February, 2020).

Jones Act: Negligence versus Unseaworthiness

Congress enacted the Jones Act in 1920 (now codified at 46 U.S.C. § 30104) to remove the bar to suits for negligence articulated in *The Osceola*, 189 U.S. 158 (1903). See *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 43 (1943); *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995). The Jones Act adopted for seamen the remedies afforded under the Federal Employer's Liability Act for railroad employees. *Atlantic Sounding Co., Inc. v. Townsend*, *supra*. The Jones Act is generally understood to limit recovery for injured seamen to pecuniary damages. See *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990), citing *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59 (1913).

Whether a Jones Act seaman can recover punitive damages from third parties or his employer on a Jones Act claim in the Eleventh Circuit is unsettled. Unlike the spirited and ongoing debate among courts within the Fifth Circuit (compare *Rockett v. Belle Chasse Marine Transportation, LLC*, 260 F.Supp.3d 688 (E.D. La. May 22, 2017)(Lemmon, J.) (holding that non-pecuniary damages, including punitive damages, are not available to a seaman on a general maritime law negligence claim against a non-employer) with *Hume v. Consolidate Grain & Barge, Inc.*, 2016 WL 1089349 (E.D. La. Mar. 21, 2016) (not reported in F.Supp.) (Zainey, J.) (holding that a seaman could pursue a punitive damages claim against a third-party non-employer tortfeasor under general maritime law)), the Eleventh Circuit has thus far only held in what appears to be *dicta* that a Jones Act seaman cannot recover punitive damages on a Jones Act count against his Jones Act employer. *See, Lindo v. NCL (Bahamas) Ltd.*, 652 F.3d 1257, 1284 (11th Cir. 2011)(under Bahamian law, a plaintiff seaman injured by an employer's breach of duty may sue in negligence and recover damages for pain and suffering, loss of wages and future earnings, medical expenses, and aggravated or punitive damages, "damages that may be unavailable in strict Jones Act cases.").

Nevertheless, the Eleventh Circuit's Pattern Jury Instructions continue to recognize the right of a Jones Act seaman to recover in a negligence case (as opposed to an unseaworthiness case) when the defendant has acted "willfully, intentionally, or with callous and reckless indifference to" the seaman's "rights, which entitles [him/her] to an award of punitive damages in addition to compensatory damages." Eleventh Circuit Pattern Instruction Civil No. 8.1. This charge further states:

> If you find for [the seaman], and if you further find that [the Jones Act employer] acted with malice, willfulness, or callous and reckless indifference to [the seaman's] rights, the law allows you, in your discretion, to assess punitive damages against [the Jones Act employer] as punishment and as a deterrent to others.
>
> If you decide to assess punitive damages against [the Jones Act employer], you may consider [employer's] financial resources to determine the amount [and you may assess punitive damages against one or more defendants – and not others – or against two or more defendants in different amounts].

http://www.ca11.uscourts.gov/pattern-jury-instructions Civil No. 8.1 (last revised February, 2020). In the Eleventh Circuit's "Special Interrogatories to the Jury" appended to Pattern Charge No. 8.1, the jury is instructed to answer whether it found "from a preponderance of the evidence" whether there was negligence or unseaworthiness. If the jury finds either *negligence or unseaworthiness*, the Special Interrogatory permits the jury to award punitive damages. *See* http://www.ca11.uscourts.gov/pattern-jury-instructions Civil No. 8.1 (last revised February, 2020) Special Interrogatory 1, 2, and 5(e) ("If you answered 'yes' to Question No. 1 [negligence] or Question No. 2 [unseaworthiness] what sum of money do you find to be the total amount of [seaman's] [5(e)][Punitive] damages...?). Given the holding in *Batterton*, the unseaworthiness part of this pattern charge is now in doubt.

Post-Batterton: Non-Seamen and Recoverability of Punitive Damages, Generally

In *Eslinger v. Celebrity Cruises, Inc.*, 772 Fed. Appx. 872 (11th Cir. June 28, 2019) (i.e., four days post-*Batterton*), the Eleventh Circuit, citing the prior precedent rule, relied upon *In re Amtrak Sunset Ltd. Train Crash in Bayou Canot, Ala. on Sept. 22, 1993*, *supra*, 121 F.3d 1421 at 1429, and *Lollie v. Brown Marine Serv., Inc.*, *supra*, 995 F.2d 1565 at 1565, in holding "[o]ur court has held that plaintiffs may not recover punitive damages, including loss of consortium damages, for personal injury claims under federal maritime law." *Id.* at 872-73. However, *Eslinger* must be closely scrutinized. First, *Eslinger* was not selected for publication in *West's Federal Reporter*. Following Fed. R. App. P. 32.1 and U.S. Ct. of App. 11th Cir. Rule 36-2, *Eslinger* is not *precedential* but may be cited only as persuasive authority. Second, its mention of punitive damages must be deemed *dicta* because the only issue presented in the appeal is whether the district court erred in dismissing a spouse's claim of loss of consortium resulting from an injury sustained by her husband onboard a pleasure cruise ship. Third, *In re Amtrak Sunset Limited*, one of the opinions cited for this proposition, expressly permits the recovery of punitive damages *upon a showing of intentional misconduct*. *See Id.,* 121 F.3d at 1429. In *Amtrak*, the Eleventh Circuit held that punitive damages were precluded under general maritime law "except in exceptional circumstances such as willful failure to furnish maintenance and cure to a seaman, intentional denial of a vessel owner to furnish a seaworthy vessel to a seaman, and in those very rare situations of intentional wrongdoing." *Id.* (emphasis added). *Lollie v. Brown Marine Serv., Inc.*, *Eslinger's* other authority, likewise acknowledges that punitive damages are recoverable in the appropriate case.

Hence, *Eslinger* cannot be read as some new holding altogether precluding recovery of punitive damages for all personal injury claims under federal maritime law.

Another post-*Batterton* cruise ship passenger/punitive damages decision is an amended report and recommendation in *Noon v. Carnival Corporation*, 2019 WL 3886517, ___ F.Supp.3d ___ (S.D. Fla. Aug. 12, 2019) (Torres, Magistrate Judge). In recommending denial of Carnival's mo-

tion to dismiss or in the alternative to strike plaintiff's claims for punitive damages in a wrongful death action premised upon allegations of negligent failures to diagnose, evaluate, and treat a passenger's difficulty breathing which precipitated respiratory arrest (where plaintiff sought compensatory damages under Florida's wrongful death statute and punitive damages premised upon allegations that Carnival's conduct was "willful, wanton, and reckless in light of the knowledge of [defendant's] medical crew members regarding [decedent's] condition and the limitations known to them on the capabilities of the onboard medical crew and facilities"), the Magistrate Judge recommends finding punitive damages recoverable after *Batterton*. Because this recommendation comprehensively surveys Eleventh Circuit law in this context, it is set forth at length herein:

D. Whether Plaintiff's Punitive Damages Should be Stricken

> Carnival's final argument is that Plaintiff's demand for punitive damages should be stricken because they are unavailable in personal injury actions brought under general maritime law absent a showing of intentional misconduct. *See Crusan v. Carnival Corp*., 2015 U.S. Dist. LEXIS 191522, *17 (S.D. Fla. 2015) ("[T]he Court finds that Amtrak is controlling on this issue, and Plaintiffs in this action may recover punitive damages only upon a showing of intentional misconduct.") (citing *Terry v. Carnival Corp*., 3 F. Supp. 3d 1363, 1371-72 (S.D. Fla. 2014); *In re Amtrak Sunset Ltd. Train Crash in Bayou Canot, Ala. On Sept. 22, 1993*, 121 F.3d 1421 (11th Cir. 1997)).
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> Plaintiff's response is that punitive damages are available under general maritime law where a tortfeasor's conduct is willful, wanton, or reckless and not merely where there is intentional misconduct. Plaintiff concedes that the Eleventh Circuit previously held that punitive damages are unavailable in personal injury actions brought under general maritime law "except in exceptional circumstances such as willful failure to furnish maintenance and cure to a seaman, intentional denial of a vessel owner to furnish a seaworthy vessel to a seaman and in those very rare situations of intentional wrongdoing." *In re Amtrak*, 121 F.3d at 1429. But, Plaintiff maintains that, twelve years later, the U.S. Supreme Court overruled *Amtrak* when the Court held that punitive damages are available under general maritime law for a shipowner's willful breach of the obligation to pay maintenance and cure to an injured seaman. *See Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 424 (2009). The Court found (1) that punitive damages were traditionally available at common law, (2) that the common law tradition of punitive damages extends to maritime claim, and (3) that there is no evidence that claims for maintenance and cure were excluded from the general maritime rule by the Jones Act (or otherwise). *See id*. at 414-15.
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> There has been a split among district courts in the Eleventh Circuit as to whether *Atlantic Sounding* abrogated *Amtrak*. Compare *Lobegeiger v. Celebrity Cruises, Inc*., 2012 A.M.C. 202, 214 (S.D. Fla. 2011), and *Doe v. Royal Caribbean Cruises, Ltd*., 2012 WL 920675, at *4 (S.D. Fla. Mar. 19, 2012) (finding that *Atlantic Sounding* abrogated *Amtrak* and that punitive damages are available in maritime personal injury actions for willful, wanton, or outrageous conduct), with *Bonnell v. Carnival Corp*., 2014 WL 12580433, at *3 (S.D. Fla. Oct. 23, 2014), and *Gener [Celebrity Cruises, Inc.]*, 2011 WL 13223518, at *2 [(S.D. Fla. Feb. 10, 2011)] (finding that while *Atlantic Sounding's* "reasoning may be at odds with *Amtrack* [sic], its holding is not, and the mere reasoning of the Supreme Court is no basis for this Court to depart from clear circuit precedent").
>
> We begin with the familiar principle that the Eleventh Circuit's decisions are binding upon the district courts within this circuit. See 11th Cir. R. 36, I.O.P. (2) ("Under the law of this circuit, published opinions are binding precedent."); *see also Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992) (holding that "the courts in this circuit" have a duty to apply the binding precedent established by published opinions even before a mandate issues). Under the Eleventh Circuit's prior panel precedent rule, a "panel's holding is binding on all subsequent panels" – and, by extension, all district courts within the Eleventh Circuit – "unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc." *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) (citing *Smith v. GTE Corp*., 236 F.3d 1292, 1300 n.8 (11th Cir. 2001); *Chambers v. Thompson*, 150 F.3d 1324, 1326 (11th Cir. 1998)); *see also United States v. Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009) (observing that courts "may disregard the holding of a prior [Eleventh Circuit] opinion only where that 'holding is overruled by the Court sitting en banc or by the Supreme Court.' "). Importantly, there is a difference between the holding in a case and its underlying reasons – meaning that, "[e]ven if the reasoning of an intervening high court decision is at odds with a prior appellate court decision, that does not provide the appellate court with a basis for departing from its prior decision." *United States v. Vega-Castillo*, 540 F.3d 1235, 1237 (11th Cir. 2008).
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> We acknowledge that the reasoning in *Atlantic Sounding* – that punitive damages have traditionally been available at common law for wanton, willful, or outrageous conduct and that this tradition extends to federal maritime law – appears at first blush to be inconsistent with the Eleventh Circuit holding in Amtrak that punitive damage are unavailable in maritime personal injury cases absent intentional wrongdoing. But a closer reading of the decision shows that the holding in *Atlantic Sounding* did not overrule or cast any doubt on the holding in *Amtrak*. As Judge Williams explained in *Bonnell v. Carnival Corp*., 2014 WL 12580433, at *3 (S.D. Fla. Oct. 23, 2014), the issue is not whether punitive damages are available under general maritime law, but what standard of liability should apply in determining whether they may be recovered:
>
> > The real issue, it appears, is not whether punitive damages are available under general maritime law – they are – but what standard of liability should apply in determining whether punitive damages may be recovered for

> a particular maritime claim. Plaintiff argues that, under the "broad reasoning" of *Atlantic Sounding*, punitive damages should be available in this action even in the absence of a showing of intentional misconduct. However, the Court believes that *Atlantic Sounding's* statement that "[p]unitive damages have long been an available remedy at common law for wanton, willful or outrageous conduct" was simply a general description of the circumstances in which such damages are available at common law, and was not intended to announce a bright-line standard of liability governing recovery of punitive damages in all maritime tort claims. Again, the Court notes that *Atlantic Sounding* addressed only the availability of punitive damages in a cause of action for maintenance and cure, and did not specifically discuss personal injury claims brought by ship passengers. Given the relatively narrow scope of the issues presented in *Atlantic Sounding*, the Court does not believe that holding should be read so broadly as to find it in conflict with *Amtrak*.

2014 WL 12580433, at *3 (footnote in original).

> We agree with the reasoning in *Bonnell* because *Amtrak* did not foreclose the availability of punitive damages - only that they should be available in "exceptional circumstances," such as "those very rare situations of intentional wrongdoing." *Amtrak*, 121 F.3d at 1429. That analysis remains sound after *Atlantic Sounding*, where the Supreme Court addressed a narrower issue as to whether punitive damages were available as a remedy for a breach of the maritime duty of maintenance and cure. And in answering this question, the Court concluded that, because punitive damages were available under general maritime law, they are available for a maintenance and cure claim. *Atlantic Sounding*, 557 at 418-24. This means that *Atlantic Sounding* did not overrule Amtrak because (1) the former focused exclusively on the availability of punitive damages in a cause of action for maintenance and cure, and (2) the former merely announced a generic description as to how punitive damages have been available at common law - i.e. for wanton, willful, or outrageous conduct. Nothing in *Atlantic Sounding* delineated a bright-line rule as to how that standard should be applied in all maritime tort claims. Therefore, "*Atlantic Sounding's* holding that punitive damages are available under general maritime law for the arbitrary withholding of maintenance and cure did not overrule, and is not in direct conflict with, *Amtrak's* holding that punitive damages are precluded in maritime personal injury claims 'except in exceptional circumstances such as willful failure to furnish maintenance and cure to a seaman, intentional denial of a vessel owner to furnish a seaworthy vessel to a seaman and in those very rare situations of intentional wrongdoing.' " *Bodner v. Royal Caribbean Cruises*, Ltd., 2018 WL 4047119, at *5 (S.D. Fla. May 8, 2018) (citing *In re Amtrak*, 121 F.3d at 1429).

Defendant's position also overstates the effect of *Amtrak* in the context of general maritime tort principles. After all, the Supreme Court in other contexts has repeatedly recognized that punitive damages are generally available as a remedy in maritime tort cases. *See Exxon Shipping Co. v. Baker*, 554 U.S. at 489-490 (remitting punitive damages award in maritime tort action but rejecting argument that no punitive damages should be recoverable under maritime law). The only exception is if a particular cause of action (i.e. maintenance and cure or unseaworthiness) calls for a different application when viewed in its proper historical context. *See Atlantic Sounding*, 557 U.S. at 423 ("[R]emedies for negligence, unseaworthiness, and maintenance and cure have different origins and may on occasion call for application of slightly different principles and procedures."). For example, we now know, from the Supreme Court's most recent maritime case, that punitive damages are available for maintenance and cure claims but not for claims of unseaworthiness. *Compare The Dutra Grp. v. Batterton*, 139 S. Ct. 2275, 2287 (2019) ("[A] plaintiff may not recover punitive damages on a claim of unseaworthiness."), with *Atlantic Sounding*, 557 U.S. at 412 ("[A] seaman denied maintenance and cure has a free option to claim damages (including punitive damages) under a general maritime law count") (citation and quotation marks omitted). We need not focus on other maritime causes of action, however, because the Supreme Court has repeatedly recognized that punitive damages are available for traditional negligence claims that arise in the maritime context. *See id*. 422 ("Like negligence, '[t]he general maritime law has recognized ... for more than a century' the duty of maintenance and cure and the general availability of punitive damages.") (citing *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 820 (2001)). The recent decision in *Batterton* underscores that view. *Batterton*, 139 S. Ct. at 2283 ("In *Atlantic Sounding*, we allowed recovery of punitive damages, but ... based on the established history of awarding punitive damages for certain maritime torts, including maintenance and cure.").

Therefore, the only question in this traditional maritime tort case is what standard of liability should apply.

With these principles in mind, Plaintiff may only recover punitive damages upon a showing of intentional misconduct. To demonstrate "intentional misconduct," a plaintiff must show that "the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage." *Mee Indus. v. Dow Chemical Co.*, 608 F.3d 1202, 1220 (11th Cir. 2010) (citing Fla. Stat. § 768.72(2)(a)). The Eleventh Circuit has described instances of intentional misconduct as "very rare." *In re Amtrak* 121 F.3d at 1429. That is consistent with how the Supreme Court itself interpreted that standard in *Exxon*, where the Court defined the threshold for awarding punitive damages as being necessary for retribution and deterrence based on the "enormity" and "outrageous-

ness" of the conduct "owing to 'gross negligence,' 'willful, wanton and reckless indifference for the rights of others,' or behavior even more deplorable...." 554 U.S. at 493 (citations omitted).

Here, Plaintiff's demand for punitive damages is well taken because Plaintiff alleges that Carnival's non-medical crewmembers had actual knowledge of Mrs. Noon's medical condition and did nothing to aid her. Plaintiff claims, for example, that Mrs. Noon's family members requested that crewmembers arrange for emergency transportation services to a land-based medical facility, but that Carnival's personnel refused and intentionally prevented the family from arranging their own transportation.

Defendant takes issue with Plaintiff's position because punitive damages are purportedly not recoverable under general maritime law where only simple negligence is alleged. But, Plaintiff's allegations, in the light most favorable to Plaintiff, include gross recklessness tantamount to intentional misconduct because the crewmembers not only refused to assist Mrs. Noon, but they even prevented her family members from contacting emergency service providers in a timely basis after Mrs. Noon's oxygen had been cut off. In other words, Plaintiff's allegations go well beyond a simple negligence claim because they rely on knowledge and intent to deny Mrs. Noon life-saving services (as tenuous as those allegations may be).

Defendant relies on several cases to support its position that negligence claims cannot trigger demands for punitive damages. We take no issue with those cases but they are inapposite; they merely require that demands for punitive damages require intentional misconduct and that most cases fail to meet that standard given the underlying allegations. In fact, the cases that Defendant relies upon contemplate the possibility of a gross negligence claim with a demand for punitive damages as opposed to a bright-line rule that intentional misconduct can never be available in negligence cases. *See, e.g., Butler v. Carnival Corp.*, 2014 WL 5430313, at *5 (S.D. Fla. Oct. 24, 2014) ("Plaintiff has not pled specific facts that support the claim for punitive damages ... Plaintiff may replead but must allege the actions Defendant, as an ordinarily prudent person, could have taken yet did not, and that the failure to take those actions was willful, wanton, or outrageous.").

> After all, if Defendant's microscopically narrow definition of intentional misconduct was the law, the Supreme Court in Exxon would never have upheld any punitive damages for the Valdez disaster. The captain of that ship did not intentionally ground his vessel for the precise purpose of damaging the water and wildlife off the coast of Alaska. He was drunk in piloting the vessel, an act so reckless and wanton that warranted a $507.5 million punitive award enforceable under maritime law.
>
> This case is not on par with that disaster to most of us. But for Mrs. Noon's family, it exceeds it. Because the facts of this case are unique in that there are allegations that Carnival's crewmembers were grossly reckless and acted with an intent to deprive Mrs. Noon of life-saving emergency services, with knowledge of her condition, Defendant's motion to dismiss Plaintiff's demand for punitive damages should be DENIED.

Id. at Ms. *11-14. *Noon* provides a thorough and dispositive assessment.

Relatedly, *Simmons v. Royal Caribbean Cruises, Ltd.*, 2019 WL 8109958, ___ F.Supp.3d ___ (S.D. Fla. Aug. 13, 2010)(Ungaro, J.) held that a cruise ship passenger's negligence allegations concerning construction, maintenance and operation of a rock-climbing wall on a cruise ship did not rise to the level of intentional misconduct necessary for the court to find that this was an Amtrak-type of "exceptional circumstance" for which punitive damages could be warranted. The district court reasoned:

> Assuming punitive damages may be sought at all in maritime personal injury cases, the case law both before and after *Atlantic Sounding* supports that such claims should proceed only "in exceptional circumstances." *See, e.g., Altonsino v. Warrior & Gulf Navigation Co. (In re Amtrak Sunset Ltd. Train Crash in Bayou Canot, Ala., on Sept. 22, 1993)* [hereinafter "*Amtrak*"], 121 F.3d 1421, 1429 (11th Cir. 1997)(concluding that "personal injury claimants have no claim for nonpecuniary damages such as … punitive damages, except in exceptional circumstances such as … those very rare situations of intentional wrongdoing."); *Doe v. Celebrity Cruises, Inc.*, 389 F.Supp.3d 1109, 1113-15 (S.D. Fla. 2019) (holding that *Amtrak* still controls post-*Atlantic Sounding* such that a plaintiff may only seek punitive damages upon a showing of the defendant's intentional misconduct); *Bodner v. Royal Caribbean Cruises, Ltd.*, No. 17-20260-CIV-LENARD/GOODMAN, 2018 WL 4047119, at *2-5 (S.D. Fla. May 8, 2018)(same); *see also Petersen v. NCL (Bahamas) Ltd.*, 748 F. App'x 246, 251-52 (11th Cir. 2018)(rejecting the contention that *Atlantic Sounding* abrogated *Amtrak* vis-à-vis loss of consortium claims, and affirming summary judgment in favor of defendant on plaintiff's loss of consortium claim where there were "no exceptional circumstance in this case and no allegations of intentional conduct").

Plaintiff's negligence allegations here simply do not rise to the level of "intentional misconduct" necessary for the Court to find that this is an "exceptional circumstance" in which punitive damages may be warranted. Plaintiff alleges no facts to suggest Defendant had actual knowledge of its allegedly wrongful conduct. Nor do Plaintiff's allegations reflect a "high probability that injury or damage," *cf. Doe*, 389 F.Supp.3d at 1115, would occur to an experienced climber such as herself. Indeed, Plaintiff has brought a claim for negligence, not an intentional tort. *Cf. Bodner*, 2018 WL 4047119, at *8 (permitting punitive damages request to proceed as to battery and false imprisonment claims but striking punitive damages request as to negligence claims). And to the extend Plaintiff argues that the "intentional misconduct" standard is too strict in light of *Atlantic Sounding*, D.E. 12 at 5, the Court disagrees. *See, e.g., Kennedy v. Carnival Corp.*, 385 F.Supp 3d 1302, 1329 (S.D. Fla. 2019)(rejecting as

"wrongly argue[d]" the claim that "the 'intentional wrongdoing' rule from *Amtrak* was abrogated by the Supreme Court in *Atlantic Sounding*" and holding that a "[p]laintiff must plausibly allege a factual basis for intentional misconduct in order to recover punitive damages.).

Id., 2019 WL 8109958 at *2-3, ___ F.Supp.3d ___, ___.

Heald v. Carnival Corporation, 2019 WL 1318190, **3-4, ___ F.Supp.3d ___, ___ (S.D. Fla. Jan. 16, 2019) (Altonaga, J.) (pre-*Batterton*), earlier observed that "the case law pertinent to resolving [Carnival's] Motion [for partial summary judgment on plaintiff's claim for punitive damages] is in a state of flux." Similar to *Noon* and *Simmons*, the court describes the tension among the district courts within the Eleventh Circuit:

> As relevant here, Defendant submits punitive damages for ordinary negligence claims under general maritime law are unavailable except when the injury is caused by intentional wrongdoing. (*See* Def.'s Mot. 3) (citing *In re Amtrak Sunset Ltd. Train Crash in Bayou Canot, Ala. on Sept. 22, 1993*, 121 F.3d 1421, 1429 (11th Cir. 1997)). As Plaintiff notes, however, the undersigned, along with most of her colleagues in this District, has held the United States Supreme Court's decision in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 409 (2009), abrogated the Eleventh Circuit's decision in *In re Amtrak*, when the Supreme Court declared "the common-law tradition of punitive damages extends to maritime claims." *Atl. Sounding Co.*, 557 U.S. at 414 (footnote call number omitted); *see also Lobegeiger v. Celebrity Cruises, Inc.*, No. 11-21620-CIV, 2011 WL 3703329, at *7 n.7 (S.D. Fla. Aug. 23, 2011) (noting in *Atlantic Sounding*, the Supreme Court "recognized that punitive damages have traditionally been, and still remain, available as a remedy under general maritime law"). Accordingly, after *Atlantic Sounding*, "a plaintiff may recover punitive damages under general maritime law, consistent with the common-law rule, where the plaintiff's injury was due to the defendant's 'wanton, willful, or outrageous conduct.'" *Id.* at *7 (citations omitted). By the same token, Defendant correctly points to the Eleventh Circuit's recent opinion in *Petersen v.* NCL (Bahamas) Ltd., No. 17-15581, 2018 WL 4214239 (11th Cir. Sept. 5, 2018). (See Def.'s Mot. 4). In *Petersen*, the Eleventh Circuit noted, in dictum, that "[n]othing in [*Atlantic Sounding*] undermines our holding in In re Amtrak." *Id.* at *4 (alteration added; citing *In re Amtrak*, 121 F.3d at 1429). The Eleventh Circuit went on to state the applicable standard for punitive or loss-of-consortium damages for ordinary personal injury claims under maritime law. *See id.* Specifically, the Eleventh Circuit noted that consistent with *In re Amtrak*, courts must find "exceptional circumstances" and "allegations of intentional conduct" before allowing an award of punitive or loss-of-consortium damages. *Id.*

Id. "Given the uncertain legal landscape surrounding the question," the district court invoked Fed. R. Civ. P. 42(b) and bifurcated the issue of punitive damages from the other issues at trial to await guidance from the Supreme Court of the United States in *Batterton*. *Ibid.* Other similar decisions include: *Terry v. Carnival Corp.*, 3 F.Supp.3d 1363, 1371-72 (S.D. Fla. Jan. 16, 2014) (not reported in F.Supp.) (Graham, J.) ("Personal injury claimants in actions brought under general maritime law have no claim for non-pecuniary damages, including punitive damages, 'except in exceptional circumstances such as willful failure to furnish maintenance and cure to a seaman, intentional denial of a vessel owner to furnish a seaworthy vessel to a seaman and in those very rare situations of intentional wrongdoing.' " (citing In re Amtrak). Because plaintiffs have failed to demonstrate and the record evidence does not support a finding of intentional misconduct, Carnival's motion for summary judgment on punitive damages is granted); *Crusan v. Carnival Corp.*, 2015 WL 13743473 at **6-8 (S.D. Fla. Feb. 24, 2015) (not reported in F.Supp.) (Williams, J.) ("To demonstrate 'the intentional misconduct' for the purposes of recovering punitive damages, the Plaintiffs must show that the 'defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursue that course of conduct, resulting in injury or damage."); *Kennedy v. Carnival Corp.*, 385 F.Supp.3d 1302, 1328-30 (S.D. Fla. Mar. 6, 2019) (Torres, Magistrate Judge) ("Maritime law precedents hold that punitive damages, when available, arise only 'in those very rare situations of intentional wrongdoing.' ... Additionally, 'punitive damages may be awarded in maritime tort actions where defendant's actions were intentional, deliberate, or so wanton and reckless as to demonstrate a conscious disregard of the rights of others.' "); *Doe v. Celebrity Cruises, Inc.*, *supra*, 389 F.Supp.3d at 1113-1116 (district court adopts report and recommendation of Magistrate Judge denying cruise ship's and ship's spa's motions to dismiss claims for punitive damages in on-board sexual assault case, finding plaintiff's allegation that defendants knew spa employee was a sex predator with dangerous propensities when they hired him were sufficient to qualify as intentional misconduct under Eleventh Circuit precedent which will allow plaintiff to recover punitive damages if proven true); and *In re Bowman, supra*, 2019 WL 2516232, at **2-3 (allegations that recreational boater operated vessel in an unsafe and reckless manner, without proper training, in a no-wake zone at a high rate of speed while intoxicated and striking plaintiff's vessel and causing it to sink, but thereafter not assisting with rescue but instead covering up evidence of consumption of alcohol beverages stated a plausible claim for punitive damages under *Amtrak* standard).

Longshoremen and Harbor Workers

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 ("LHWCA"), provides federal workers compensation remedies for non-seaman maritime workers including longshoremen, harbor workers, shipbuilders, and ship repairmen. 33 U.S.C. § 902. "The LHWCA establishes a comprehensive federal workers' compensation program that provides covered employees and their families with medical, disability, and survivor benefits for work-related injuries and death." *In re Nature's Way Marine, LLC*, 984 F.Supp.2d 1231, 1236 (S.D. Ala. 2013) (DuBose, J.), citing *Howlett v. Birksdale Shipping Co.*, 512 U.S. 92, 96 (1994). "Section 904 of the LHWCA allows maritime employees to recover 'compensation from their em-

ployers for certain injuries' irrespective of fault as a cause for the injury." 33 U.S.C. § 904. The Act excludes "a master or member of a crew of any vessel" from its coverage. 33 U.S.C. § 902(3)(G).

The Act also provides a negligence remedy for covered LHWCA employees against a vessel owner for injuries caused by a vessel's negligence, i.e., within its privity and knowledge. 33 U.S.C. § 905(b).

For deaths in territorial waters, the Supreme Court in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), overruled the *Harrisburg*, 119 U.S. 199 (1886), and held that the general maritime law provides a cause of action for longshoremen and harbor workers killed in state waters by unseaworthiness. Subsequently, in *Norfolk Shipbuilding & Dry Dock v. Garris*, 532 U.S. 811 (2001), the Court held that the *Moragne* wrongful death remedy was also available for negligence claims in territorial waters. Following *Sea-Land Services v. Gaudet*, 414 U.S. 573 (1974), survivors of dead longshoremen and harbor workers may recover non-pecuniary damages such as loss of society so long as the death occurs within territorial waters. *See Miles v. Apex Marine, supra*, 498 U.S. at 36 ("The holding of *Gaudet* applies only in territorial waters, and it applies only to longshoremen."). "Loss of society" damages include "nurture, training, education, and guidance that a child would have received from his now-deceased parent and the services the decedent performed at home for his spouse, including love, affection, care, companionship, comfort, and protection." *McKenzie v. C&G Boat Works*, 322 F.Supp.2d 1330, 1333 (S.D. Ala. 2004) (Steele, J.).

While the Eleventh Circuit, like the Fifth Circuit, has not yet *expressly* ruled on the issue, several district court decisions from across the county have ruled that punitive damages are recoverable in actions brought under the LHWCA. For the time being, this issue remains unsettled for courts within the Eleventh Circuit. *See, e.g., In re Rodi Marine, LLC*, 2019 WL 861251 (E.D. La. Feb. 22, 2019), at *3 (Morgan, J.) (To recover punitive damages, claimants "must demonstrate the defendant engaged in 'behavior that is more than merely negligent; rather, [the court] looks for 'gross negligence' ... 'reckless or callous disregard for the rights of others,' ... or 'actual malice or criminal indifference.' "); *Callahan v. Gulf Logistics, LLC*, 2013 WL 5236888 (W.D. La. 2013) (Minaldi, J.) (denying a motion to dismiss claim for punitive damages under § 905(b)); *Rutherford v. Mallard Bay Drilling, LLC*, 2000 WL 805230 (E.D. La. June 21, 2000) (Vance, J.) (LHWCA does not prevent an injured longshoreman from recovering punitive damages); *Kahumoku v. Titan Maritime*, 86 F.Supp.2d 1144, 1152 (D. Hawaii 2007) (Seabright, J.) ("Punitive damages are available under 905(b)"); *Summers v. Salmon Bay Barge Line, Inc.*, 2013 WL 5912917, at *11-12 (W.D. Wash. Nov. 4, 2013) (Bryan, J.) ("The statutory language of § 905(b) does not limit what damages are available for the negligence of a vessel. The common law rule allowing for punitive damages applies."); *Wheelings v. Sea-Trade Groningen, BV*, 516 F.Supp.2d 488, 496 (E.D. Pa. 2007) (Shapiro, J.); *Gravatt v. City of New York*, 53 F.Supp.2d 388, 428-29 (S.D. N.Y. 1999) (Sweet, J.) (Nothing about LHWCA § 905(b) precludes punitive damages). But *see Exxon Mobil Corp. v. Minton*, 285 Va. 115, 737 S.E.2d 16 (Va. 2013) (Supreme Court of Virginia vacates $12.5 million punitive damages award for former shipyard worker diagnosed with malignant mesothelioma in LHWCA case against shipowner, holding "... punitive damages are not a remedy made available within the terms of the LHWCA ....").

Death on the High Seas Act

The Death on the High Seas Act ("DOHSA"), now codified at 46 U.S.C. § 30302, applies to "wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States...." *Id.* DOHSA limits recovery to the pecuniary loss sustained by the persons for whose benefit suit is brought. *See Mobil Oil v. Higginbotham*, 436 U.S. 618 (1978).

Congress recently created an exception for victims of commercial air crashes within twelve nautical miles of shore who are now permitted to seek non-pecuniary damages for loss of care, comfort, and companionship. 46 U.S.C. § 762.

Kennedy v. Carnival Corporation, 385 F.Supp.3d 1302 (S.D. Fla. Mar. 6, 2019) (Torres, Magistrate Judge) holds that Congress impliedly forbade an award of punitive damages for an action lying under DOHSA. Congress sanctioned only a compensatory damages award for actual damages and losses suffered by the decedent's survivors. Hence, the mother of a cruise ship passenger, who died at an island beach excursion, was permitted to bring a wrongful death action against the cruise operator on behalf of the passenger's estate, but damages were limited to pecuniary losses such as the loss of services, and when the beneficiary is a child, for the loss to that child of that care, counsel, training, and education which it might have reasonably received from the parent which can be supplied only by the service of another for compensation. *Id.* at 1318-19. Claims for punitive damages are precluded by Congress's judgment to limit DOHSA damages to "fair compensation." *Id.* at 1319-28. Because this analysis is so comprehensive, it is repeated here verbatim.

(A) **PUNITIVE DAMAGES ARE BARRED UNDER DOHSA**

The Fifth and Ninth Circuits expressly hold that punitive damages are barred as a matter of law under DOHSA for any wrongful death claims covered by the statute. Most district courts have followed suit. The Supreme Court, however, has never addressed the issue directly, and neither has the Eleventh Circuit as best as we can tell. Some in the admiralty bar, however, have advanced the argument that the Supreme Court's decision in *Atlantic Sounding* should reopen the question. And some commentary on the subject, both before and after *Atlantic Sounding*, have described the issue, as settled as it may be among lower federal courts, to be an open question. In our view, however, the text and historical purpose of the DOHSA preclude such an interpretation. Congress is free to amend the statute to provide for a punitive damage recovery. But until it does, the majority view is sound and DOHSA currently precludes any recovery for punitive damages.

First, we look back to the relevant historical context. Prior to the enactment of DOHSA, tort recoveries in admiralty cases were limited to applicable wrongful death statutes enacted by particular states. The Supreme Court in 1886 declined to recognize a common law wrongful death claim arising under general maritime law separate and apart from the scope and limits of any applicable state statute. *The Har-*

risburg, 119 U.S. 199, 200, 7 S.Ct. 140, 30 L.Ed. 358 (1886) (citing [*Mobile Life] Insurance Co. v. Brame*, 95 U. S. 754, 756, 24 L.Ed. 580 (1877) (" 'that by the common law no civil action lies for an injury which results in death.' ")). Though that decision was revisited and reversed a century later for maritime actions caused by the unseaworthiness of marine vessels, *see Moragne v. States Marine Lines, Inc*., 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), the state of the law from 1877 through 1920 undoubtedly precluded any recovery for wrongful death under federal common law.

Even before the celebrated Titanic sank in 1912, efforts were underway to address the perceived deficiency in admiralty law that followed *The Harrisburg's* myopic reasoning that courts were not equipped to change settled common law rules. 119 U.S. at 214, 7 S.Ct. 140 ("as it is the duty of courts to declare the law, not to make it, ..."). Those early efforts accelerated after 1912 and the public uproar over the extensive loss of life that resulted from that disaster.

Those efforts culminated, after a series of compromises, in the enactment of the Death on the High Seas Act, *supra*, (1920) (now codified at 46 U.S.C. § 30301, et seq). As we discussed above, the text of the statute is unambiguous as to the limits of the recovery available to the personal representative of the decedent: "fair compensation for the pecuniary loss sustained by the individuals for whose benefit the action is brought." *Id*. § 30303. As the Supreme Court explained in *Dooley*, this provision was intended to be the exclusive recovery for deaths occurring on the high seas. 524 U.S. at 123, 118 S.Ct. 1890 ("By authorizing only certain surviving relatives to recover damages, and by limiting damages to the pecuniary losses sustained by those relatives, Congress provided the exclusive recovery for deaths that occur on the high seas.").

Without having to analyze the effect of other cases or statutes or harmonizing those authorities with the express limitations found in section 30303, the answer to the question presented here is self-evident under modern principles of statutory interpretation. Briefly, those principles require that we "respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan." King v. Burwell, U.S. , 135 S.Ct. 2480, 2496, 192 L.Ed.2d 483 (2015). So we must follow the " 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.' " *Utility Air Regulatory Grp. v. E.P.A*., 573 U.S. 302, 320, 134 S.Ct. 2427, 189 L.Ed.2d 372 (2014) (citation omitted). "If the statutory language is plain, we must enforce it according to its terms." *Hardt v. Reliance Standard Life Ins. Co*., 560 U.S. 242, 251, 130 S.Ct. 2149, 176 L.Ed.2d 998 (2010). But often the "meaning – or ambiguity – of certain words or phrases may only become evident when placed in context ... Our duty, after all, is 'to construe statutes, not isolated provisions.' " *King*, 135 S.Ct. at 2489 (citations omitted).

Along those same lines, other relevant principles are significant here. In interpreting a statute it is understood that "Congress legislates against the backdrop" of certain unexpressed presumptions. *EEOC v. Arabian American Oil Co*., 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991). One such presumption is that, when Congress employs a common law term, the cluster of common law ideas embodied in that term is imported into statutory text. *E.g., Carter v. United States*, 530 U.S. 255, 264, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (citing *Morissette v. United States*, 342 U.S. 246, 263, 72 S.Ct. 240, 96 L.Ed. 288 (1952) ("[W] here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.")). And the other related presumption is that Congress is aware of existing law when it enacts legislation. *Miles*, 498 U.S. at 32, 111 S.Ct. 317 (citing *Cannon v. University of Chicago*, 441 U.S. 677, 696-97, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979)).

Applying these principles here is fatal to the argument that punitive damages are recoverable under section 30303. Congress's judgment to limit DOHSA damages to "fair compensation" – a concept well established in the common law – is decisive. The common law recognized two general categories of damage: compensatory damages "for the injuries received" and, by 1763, exemplary damages that were deemed necessary where damages were "for more than the injury received" so as to "deter from any such proceeding for the future." *See Wilkes v. Wood*, 98 Eng. Rep. 489, 498 (1763), cited and quoted in *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 490, 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008)). English common law thus fully recognized the viability of such "exemplary damages," which damages crossed the Atlantic by the time that the colonies declared their independence. *See, e.g., Coryell v. Colbaugh*, 1 N.J.L. 77 (1791) (jury instructed "to give damages for example's sake, to prevent such offenses in [the] future").

The development over time of the American common law of torts continued to recognize the distinction between damages designed as "fair compensation" versus additional *damages* designed to set an example for others. In *Day v. Woodworth*, the Supreme Court affirmed the continued viability of these distinct measures of damage:

> It is a well-established principle of the common law that, in actions of trespass and all actions on the case for torts, a jury may inflict what are called "exemplary," "punitive," or "vindictive" damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff.... In many civil actions, ... the wrong done to the plaintiff is incapable of being measured by a money standard, and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of

> the defendant's conduct, and may properly be deemed "exemplary" or "vindictive" rather than "compensatory."

54 U.S. (13 How.) 363, 14 L.Ed. 181 (1852).

> And most significantly here, the categorization of "exemplary" or "punitive" damages as something far different from "compensation" was the predominant view by the end of the nineteenth century and' the start of the twentieth century. *See, e.g., Scott v. Donald*, 165 U.S. 58, 86, 17 S.Ct. 265, 41 L.Ed. 632 (1897) ("Damages have been defined to be the compensation which the law will award for an injury done, and are said to be exemplary and allowable in excess of the actual loss where a tort is aggravated by evil motive, actual malice, deliberate violence, or oppression."); *Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101, 107, 13 S.Ct. 261, 37 L.Ed. 97 (1893) ("Exemplary or punitive damages [are] awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others ...."); *Milwaukee & St. Paul Rwy. Co. v. Arms*, 91 U.S. 489, 492-93, 23 L.Ed. 374 (1875) ("it may well be considered whether the doctrine of exemplary damage cannot be reconciled with the idea that compensation alone is the true measure of redress. But jurists have chosen to place this doctrine on the ground, not that the sufferer is to be recompensed, but that the offender is to be punished; ..."); *see generally* A. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 Chi.-Kent L. Rev. 163, 204 (2003); 1 Schlueter, *Punitive Damages* §§ 1.3(C) - (D).

> So when the DOHSA statute was enacted to change the legal landscape for certain wrongful death claims in admiralty, one obvious compromise was the limitation of damages in derogation of existing common law principles. "Fair and just compensation" was expressed to be the only measure of damages. By the use of that term, Congress obviously intended to adopt common law principles of "compensation" into the statute. And only that compensatory and remedial concept was included as evidenced by the next limitation that followed: "for the pecuniary loss sustained by the persons for whose benefit the suit was brought ...."

"Pecuniary" losses were also specifically recognized in the common law at the time as being limited to compensation for the actual wrong suffered by a plaintiff, and nothing more. *See, e.g., Milwaukee & St. Paul*, 91 U.S. at 492 ("It is undoubtedly true that the allowance of anything more than an adequate pecuniary indemnity for a wrong suffered is a great departure from the principle on which damages in civil suits are awarded."). Indeed the Supreme Court expressly defined pecuniary losses to be something in addition to, and thus separate from, exemplary or punitive damages in *Barry v. Edmunds*, 116 U.S. 550, 562, 6 S.Ct. 501, 29 L.Ed. 729 (1886) (cause of action in trespass permitted recovery for plaintiff's "actual, direct and immediate pecuniary loss" in addition to "exemplary damages calculated to vindicate his right and protect it against future similar invasions.").

Because this view of the common law at the time of the statute's passage was settled, and Congress is presumed to know what the law was at the time, only one persuasive conclusion can be drawn: Congress impliedly forbade an award of punitive damages for an action lying under DOHSA. Congress only expressly sanctioned a compensatory damage award for actual damages and losses suffered by the decedent's survivors. Armed with that knowledge, Congress chose to pick and choose from the available remedies in determining what could be awarded under DOHSA for deaths on the high seas in admiralty. In doing so, Congress was certainly extending protections to the decedent's survivors that *The Harrisburg* had declined to award without legislative action. But those protections were expressly limited in scope. And they certainly did not include exemplary or punitive damages.

Second, Congress's use of that damage limitation was not novel. The Congress had already enacted a similar survivor's wrongful death statute, the Federal Employer's Liability Act, 45 U.S.C. § 51, which had just been amended in 1908. That statute granted a right of recovery for injured workers or their survivors against railroad companies operating in interstate commerce, but also based on a similar damage limitation: "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; ..." Though the extent of "damages" available was not expressly defined in that statute, the Supreme Court recognized that using the common law term "damages" in isolation, like other survivor's statutes of the day, was tantamount to a limitation for only pecuniary losses:

> This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had, – one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them, and for that only.

Michigan Cent. R. Co. v. Vreeland, 227 U.S. 59, 68, 33 S.Ct. 192, 57 L.Ed. 417 (1913) (emphasis added).

> The Court reasoned that damages in such statutes had to be deemed pecuniary to delineate the proper measure of damages to a survivor:
>
> > A pecuniary loss or damage must be one which can be measured by some standard. It is a term employed judicially, 'not only to express the character of that loss to the beneficial plaintiffs which is the foundation of their right of recovery, but also to discriminate between a material loss which is susceptible of a pecuniary valuation, and that inestimable loss of

> the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation.'

id. at 71, 33 S.Ct. 192 (citation omitted).

Congress, understanding this principle seven years later, adopted a similar survivor's statute in the DOHSA and expressly defined "fair and just compensation" to be limited to pecuniary losses. As *Vreeland* shows, of course, the statute would likely have been interpreted to that effect without that language. *See also American R.R. Co. Porto Rico v. Didricksen*, 227 U.S. 145, 149, 33 S.Ct. 224, 57 L.Ed. 456 (1913) ("The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employee. The damage is limited strictly to the financial loss thus sustained."). But by including it, Congress made it abundantly clear that it was limiting the scope of damages available under the DOHSA to compensation, nothing more and nothing less. That means that punitive damages are unavailable under DOHSA, just as much as they are unavailable under the FELA. *See, e.g., Gulf, Colo., & Santa Fe Ry. Co. v. McGinnis*, 228 U.S. 173, 175, 33 S.Ct. 426, 57 L.Ed. 785 (1913) (recovery under FELA "must ... be limited to compensating those ... as are shown to have sustained some pecuniary loss"); *Kozar v. Chesapeake & Ohio Ry.*, 449 F.2d 1238, 1241-42 (6th Cir. 1971) (Supreme Court decisions interpreting FELA are "clear, unambiguous statements ... holding that damages recoverable under the Act are compensatory only."); *Wildman v. Burlington N. R.R. Co.*, 825 F.2d 1392, 1393 (9th Cir. 1987) (following Jones Act precedent, punitive damages unavailable under the FELA).

Third, since the statute's passage the Supreme Court's cases directly interpreting DOHSA have consistently drawn analogous conclusions. The statute only allows for compensatory damages for the pecuniary losses suffered by the decedent's beneficiaries. *See Sea-Land Services, Inc. v. Gaudet*, 414 U.S. at 583-87, 94 S.Ct. 806 (distinguishing remedies available under DOHSA, which are limited to pecuniary losses that exclude recovery for loss of society; finding that common law remedy for wrongful death in territorial waters could include loss of society damages); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978) ("The Death on the High Seas Act, however, announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages.... The Act does not address every issue of wrongful-death law, ... but when it does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless.") (reversing award of damages for loss of society under DOHSA because the statute is limited to pecuniary losses); *Miles v. Apex Marine Corp.*, 498 U.S. at 32-34, 111 S.Ct. 317 ("We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them. Congress has placed limits on recovery in survival actions that we cannot exceed. Because this case involves the death of a seaman, we must look to the Jones Act.") (analogizing recovery for pecuniary losses under DOHSA to recovery under Jones Act, which thus precludes recovery for loss of society damages in a general maritime action for wrongful death of a Jones Act seaman); *Offshore Logistics v. Tallentire*, 477 U.S. at 230-32, 106 S.Ct. 2485 (DOHSA limited to pecuniary losses that preclude recovery of loss of society damages; such damages are not recoverable under state wrongful death claim in addition to DOHSA; "To read § 7 as intended to preserve intact largely nonexistent or ineffective state law remedies for wrongful death on the high seas would, of course, be incongruous. Just as incongruous is the idea that a Congress seeking uniformity in maritime law would intend to allow widely divergent state law wrongful death statutes to be applied on the high seas."); *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 231, 116 S.Ct. 629, 133 L.Ed.2d 596 (1996) ("We conclude that Articles 17 and 24(2) of the Warsaw Convention permit compensation only for legally cognizable harm, but leave the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice-of-law rules. Where, as here, an airplane crash occurs on the high seas, DOHSA supplies the substantive United States law. Because DOHSA permits only pecuniary damages, petitioners are not entitled to recover for loss of society."); *Dooley v. Korean Air Lines*, 524 U.S. at 121-22, 118 S.Ct. 1890 (because DOHSA "provided the exclusive recovery for deaths that occur on the high seas" non-pecuniary losses like loss of society damages and pain and suffering damages are preempted and non-recoverable under general maritime law).

Fourth, though the Eleventh Circuit has not directly addressed the availability of punitive damages under DOHSA, it is inconceivable that our circuit would ignore the text, historical context, and accepted application of DOHSA to allow for the recovery of punitive damages under the statute. All indications are to the contrary. *See, e.g., Tucker v. Fearn*, 333 F.3d 1216, 1222 (11th Cir. 2003) (rejecting recovery for loss of society damages under general maritime law in favor of nondependent survivors of decedent killed in territorial waters; "DOHSA provides a wrongful death action in favor of anyone killed on the high seas, but limits recoverable damages in wrongful death suits to 'pecuniary loss sustained by the persons for whose benefit the suit is brought.' ... In light of this limitation, it would be inconsistent with Congress's 'considered judgment' for this Court to permit the recovery that plaintiff Tucker seeks in this case under general maritime law.") (following *Higginbotham* and *Miles*, as well as *Norfolk Shipbuilding Drydock Corp. v. Garris*, 532 U.S. 811, 820, 121 S.Ct. 1927, 150 L.Ed.2d 34 (2001) ("[w]hile there is an established and continuing tradition of federal common lawmaking in admiralty, that law is to be developed, insofar as possible, to harmonize with the enactments of

Congress in the field." ... "Because of Congress's extensive involvement in legislating causes of action for maritime personal injuries, it will be the better course, in many cases that assert new claims beyond what those statutes have seen fit to allow, to leave further development to Congress."));
Ford v. Wooten, 681 F.2d 712, 716 (11th Cir. 1982) ("As with the Jones Act, 'supplementation' of DOHSA's pecuniary loss remedy with the *Moragne* loss-of-society remedy would totally alter the remedial scheme, which already provides a cause of action for death due to negligence.... At least where statutory remedies exist, we deem consistency with the federal remedial schemes to be more important than the somewhat limited loss of uniformity. Therefore, we hold that where a cause of action exists for wrongful death under DOHSA, no additional action exists under general maritime law for wrongful death caused by negligence; ..."); *Solomon v. Warren*, 540 F.2d 777, 789 (5th Cir. 1976) (recognizing "the narrow pecuniary loss standard of DOHSA").

Fifth, decisions from our Court have consistently rejected efforts to retain punitive damage awards for claims governed by DOHSA. *See, e.g., Broberg v. Carnival Corp*., 303 F.Supp.3d 1313, 1318 (S.D. Fla. 2017) ("Where an action for wrongful death exists under the Death on the High Seas Act, the statute provides punitive damages are unavailable."); *Blair v. NCL (Bahamas) Ltd*., 212 F.Supp.3d 1264, 1269 (S.D. Fla. 2016) (striking non-pecuniary damage claims from complaint in DOHSA action including claim for punitive damages); *Cubero v. Royal Caribbean Cruises Ltd*., 2016 WL 4270216, at *2 (S.D. Fla. Aug. 15, 2016) (same); *see also Lasky v. Royal Caribbean Cruises, Ltd.*, 850 F.Supp.2d 1309, 1312 (S.D. Fla. 2012) ("Moreover, the section of DOHSA that applies to commercial aviation accidents provides for recovery of non-pecuniary damages. 46 U.S.C. § 30307. Accordingly, if Congress intended to provide such damages for other types of accidents under DOHSA, it could have done so. Thus, DOHSA does not permit Plaintiff to recovery non-pecuniary damages.").

Sixth, though not binding, highly persuasive decisions from other Courts of Appeal expressly reject awards for punitive damages in DOHSA cases. The rationale in these cases follows the text, historical context and interpretation of section 30303 that limits damages to "fair compensation" and "pecuniary losses." *See, e.g., Motts v. M/V Green Wave*, 210 F.3d 565, 569 (5th Cir. 2000) ("Because DOHSA does not permit the award of non-pecuniary damages, ... and preempts all wrongful death actions under state law where it applies, *see* [*Dooley*,] Appellee can recover punitive and other non-pecuniary damages only if DOHSA is inapplicable.") (holding that DOHSA applied and reversing award for non-pecuniary damages, including punitive damage award); *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1347 (9th Cir. 1987), modified on reh'g, 866 F.2d 318 (9th Cir. 1989) ("Only pecuniary damages are available under the Jones Act, 46 U.S.C. § 688, and under the Death on the High Seas Act. 46 U.S.C. § 762; ... Punitive damages are non-pecuniary damages unavailable under the Jones Act.... Punitive damages are therefore also unavailable under DOHSA.") (reversing award of punitive damages that was grounded on general maritime law as supplement to DOHSA damages); *cf. McBride v. Estis Well Serv., L.L.C.*, 768 F.3d 382, 388 (5th Cir. 2014) ("Miles court established 'a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act or the general maritime law.' ") (holding in Jones Act case that punitive damages were not recoverable and could not be categorized as pecuniary losses); *Batterton v. Dutra Grp*., 880 F.3d 1089, 1096 (9th Cir.), cert. granted, – U.S. – , 139 S. Ct. 627, 202 L.Ed.2d 454 (2018) (disagreeing with *McBride* and awarding punitive damages in unseaworthiness claim for injured seaman but only because such a claim falls outside the scope of statutory causes of action like DOHSA; "There is no way to compensate a dead seaman for the wrong done to him. Compensation for his survivors is generally limited by statute to their resulting 'pecuniary loss.' ").

Finally, any doubt about the proper application of DOHSA's damage limitation is foreclosed as a practical matter by the Supreme Court's analysis of a related issue – the remedies available to survivors under general maritime law, specifically loss of society damages. In Miles, after extended discussion and analysis, the Court limited the survivors in a maritime wrongful death action to recovery of their "pecuniary losses." As a result, the Court denied recovery for damages for loss of society. 498 U.S. at 30-33, 111 S.Ct. 317. In considering this element of damages, the Court began its analysis by interpreting its DOHSA decision in *Mobil Oil Corp. v. Higginbotham*. It noted that *Higginbotham* rejected a claim for loss of society because Congress, in DOHSA, expressly limited recovery to "pecuniary losses." It therefore declined to supplement the statute and allow more expansive damages. The Court emphasized the important language it relied on from *Higginbotham*: "But in an 'area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries.' " *Id*. at 31, 111 S.Ct. 317.

The Court then reasoned that its logic in *Higginbotham* controlled its decision in *Miles* even though DOHSA did not directly apply. That opinion first acknowledged that, unlike the statutory language in DOHSA, neither the Jones Act nor FELA made explicit the "pecuniary loss" limitation. The Court concluded, however, that the limitation applied, as per *Vreeland*. The Court therefore squarely held that the recovery of the deceased seaman;' survivors under the Jones Act is limited to pecuniary losses.

The *Miles* Court then turned to the issue in that case as to the scope of the survivor's recovery for unseaworthiness under the general maritime law. As the Court explained, "our place in the constitutional scheme does not permit us to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negli-

gence. We must conclude that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seamen." *id*. at 32-33, 111 S.Ct. 317. Thus, *Miles* established "a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act or the general maritime law." *Id*. at 33, 111 S.Ct. 317.

Most significantly here, the Court did not limit its holding to claims under the Jones Act. Rather, the Court held that the damages available under the general maritime law cause of action for wrongful death – which cause of action the Court recognized for the first time in *Miles* – were likewise limited to recovery of pecuniary losses. It follows from *Miles* that the same result flows when a general maritime law personal injury claim is joined with a Jones Act claim as well as a DOHSA claim. So *Miles's* conclusion applies with equal force here: regardless of opposing policy arguments, "Congress has struck the balance for us" in determining the scope of damages. This means that Plaintiff's claims here are similarly limited to pecuniary losses, which thus means that no punitive damages are recoverable.

Some have argued that the decision of the Supreme Court in *Atlantic Sounding Co. v. Townsend* overrules or severely undermines *Miles*, thus leaving the door open to applying punitive damages in cases like ours. 557 U.S. 404, 411, 129 S.Ct. 2561, 174 L.Ed.2d 382 (2009) ("[P]unitive damages have long been available at common law ... [and] the common-law tradition of punitive damages extends to maritime claims."). But instead of overruling *Miles*, *Atlantic Sounding* carefully distinguished its facts from *Miles* and reaffirmed that *Miles* is still good law.

The Court in *Atlantic Sounding* considered a seaman's claim for punitive damages for the willful failure to pay maintenance and cure. In distinguishing its maintenance and cure case from *Miles's* wrongful death action, the Court recognized that "a seaman's action for maintenance and cure is 'independent' and 'cumulative' from other claims such as negligence and that the maintenance and cure right is 'in no sense inconsistent with, or an alternative of, the right to recover compensatory damages [under the Jones Act]." *Id*. at 423, 129 S.Ct. 2561. The Court agreed that "both the Jones Act and the unseaworthiness remedies are additional to maintenance and cure: the seaman may have maintenance and cure and also one of the other two." *Id*. at 424, 129 S.Ct. 2561. Unlike the seaman's remedy for damages based on negligence and unseaworthiness, "the Jones Act does not address maintenance and cure or its remedy." *Id*. at 420, 129 S.Ct. 2561. Thus, in contrast to the action for damages based on unseaworthiness, in an action for maintenance and cure it is "possible to adhere to the traditional understanding of maritime actions and remedies without abridging or violating the Jones Act; unlike wrongful-death actions, this traditional understanding is not a matter to which 'Congress has spoken directly.' " *Id*. at 420-21, 129 S.Ct. 2561.

So it follows that *Atlantic Sounding* expressly adopted *Miles's* reasoning by recognizing that "Congress' judgment must control the availability of remedies for wrongful-death actions brought under general maritime law." *Id*. at 419, 129 S.Ct. 2561. The Court could not have been clearer in signaling its approval of *Miles* when it added: "The reasoning of *Miles* remains sound." *Id*. at 420, 129 S.Ct. 2561. Hence, any argument that *Atlantic Sounding* revitalizes a punitive damage claim under the Jones Act or DOHSA, notwithstanding these statutes' text, historical context and consistent application, holds no credible weight.

In sum, any claim for punitive damages in the pending complaint should be STRICKEN as a matter of law *because* DOHSA applies to this wrongful death action and the statute limits the available remedies to compensatory damages.

Id., 385 F.Supp.3d 1319-28.

Two months after the release of *Kennedy v. Carnival Corp.*, another DOHSA decision was released, *Mary Ann Murphy and Others, Plaintiffs v. Carnival Corp.*, 2019 WL 3936673 (S.D. Fla. Aug. 20, 2019) (not reported in F.Supp.) (Judge Robert N. Scola, Jr.). In *Murphy*, Judge Scola follows Magistrate Judge Torres's recommendation in *Kennedy* and holds "Although the Eleventh Circuit and the Supreme Court have not expressly ruled on this issue, decisions from this Court have 'consistently rejected efforts to retain punitive damages awards for claims governed by DOHSA.' ... This Court follows the lower court decisions and the majority view that DOHSA precludes any recovery for punitive damages." *Id*. at *5.

Alabama's Anomalous Wrongful Death Punitive-Damages-Only Rule

Pursuant to § 6-5-410, Ala. Code 1975, Alabama's Wrongful Death Act allows the representative of a decedent's estate to recover damages from a person or corporation whose "wrongful act, omission, or negligence" resulted in the death of the decedent, provided the decedent "could have commenced an action for such wrongful act, omission, or negligence if it had not caused death." The Wrongful Death Act's goal is to prevent death, not to compensate for the loss of human life, which Alabama believes possesses a value "beyond measure." *American National Property & Casualty Co. v. Gulf Coast Aerial, LLC*, 2019 WL 4131107, *5, n. 15, ___ F.Supp.3d ___, ___ (S.D. Ala. Aug. 29, 2019)(Nelson, Magistrate Judge) (citing *Campbell v. Williams*, 638 So. 2d 804, 811 (Ala. 1994)). "Thus, [an Alabama] Wrongful Death Act plaintiff may recover only punitive, rather than compensatory, damages." *Id*. (citing *Campbell v. Williams*, 638 So. 2d at 809).

> In calculating a [Alabama Wrongful Death] damage award, an Alabama Wrongful Death Act jury is instructed to consider: (1) the finality of death, (2) the propriety of punishing the defendant, (3) whether the defendant could have prevented the victim's death, (4) how difficult it would have been for the defendant to have prevented the death, and (5) the public's interest in deterring others from engaging in conduct like the defendant's. *Tillis Trucking* [*Co., Inc. v. Moses*], 748 So. 2d [874,] 889 [Ala. 1999)]. In assessing punitive damages, the worst the defendant's conduct

was, the greater the damages should be. *See Ala. Hours v. Turner*, 575 So. 2d 551, 554-55 (Ala. 1991); Alabama Pattern Jury Instructions: Civil 11A.28 (2d ed.).

Ibid. at *5, n. 15 (quoting *Roe v. Michelin N. Am., Inc.*, 613 F.3d 1058, 1065 (11th Cir. 2010)).

Thus, application of *Moragne v. State Marine Lines*, 398 U.S. 375 (1970) (general maritime law provides a cause of action for longshoremen and harbor workers killed in state waters by unseaworthiness); and *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996) (non-seafarers killed in territorial waters are entitled to sue under state wrongful death and survival statutes), are problematic in death cases arising in Alabama territorial waters. The Eleventh Circuit in *American Dredging Co. v. Lambert*, 81 F.3d 127 (11th Cir. 1996), followed *Yamaha* and held that the personal representatives of non-seamen (passengers in a motor boat) killed in territorial waters were entitled to recover under state wrongful death and survival statutes for non-pecuniary damages under applicable state law. The Supreme Court of Alabama in *Choat v. Kawasaki Motors Corp.*, 675 So. 2d 879 (Ala. 1996), permitted an Alabama Wrongful Death Act claim in admiralty for a child struck by a jet ski while wading in shallow water with a toy raft. *Choat* remains "good law" in Alabama state courts. However, in *In re Amtrak "Sunset Limited" Train Crash at Bayou Canot, supra*, a panel of the Eleventh Circuit refused to permit an Alabama Wrongful Death Act claim for train passengers killed in Bayou Canot in Mobile County. Notably, *Amtrak's* holding has repeatedly been criticized and even declared "no longer good law." *See Lobegeiger v. Celebrity Cruises, supra*, 2011 WL 3703329, at **6-7, n. 6, 7 ("Therefore, Amtrak, to the extent that it foreclosed a plaintiff's right to seek punitive damages in a personal injury case under general maritime law, is clearly consistent with *Atlantic Sounding* [*v. Townsend*] and is no longer the correct rule of decision in the Eleventh Circuit.").

Recoverability of Punitive Damages in Other Contexts

While fact-specific, numerous reported decisions permit recovery of punitive damages for maritime torts to recreational boaters and ordinary invitees. *E.g., CEH, Inc. v. F/V Seafarer*, 70 F.3d 694 (1st Cir. 1995) (malicious destruction of lobster traps); *Szollosy v. Hyatt Corp.*, 396 F.Supp.2d 159 (D. Conn. 2005) (Droney, J.) (punitive damages recoverable in negligence and products liability case against concessionaires of personal water craft at beach resort); *Edwards v. Jones*, 1999 WL 641776 (D. Md. 1999) (not reported in F.Supp.2d) (collision of pleasure craft); *Kludt v. Majestic Star Casino, LLC*, 200 F.Supp.2d 973 (N.D. Ind. 2001) (riverboat casino patron in escalator fall could recover punitive damages only if evidence revealed casino's bartenders acted intentionally or wantonly such that their conduct was wanton or reflected a conscious disregard for patron's rights); *In re Plaquemine Towing Corp.*, 190 F.Supp.2d 889 (M.D. La. 2002) (ferry boat passengers and spouses); *Warren v. Shelter Mutual Ins. Co.*, 233 So. 3d 568 (La. 2017) (affirming jury verdict, including punitive damages, for recreational boat passenger's estate in maritime products liability case concerning hydraulic steering helm).

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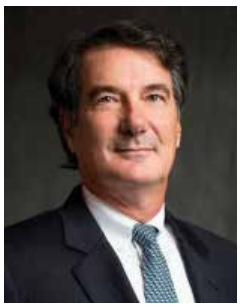

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