PUNITIVE DAMAGES IN MARITIME BEFORE AND IN THE WAKE OF BATTERTON THE FUTURE - A QUIXOTIC QUEST FOR A LEGAL UNICORN? – PART 1 OF 2[+]

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[+] **Editor's Note:** This essay is part one of a two part work. Part one is an introduction to the Essay. Part two will include all **bold face sections** of the Table of Contents and shall appear in the Loyola Maritime Law Journal Summer 2022 Edition.

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I. Introduction

Recovery of punitive damages under General Maritime Law has become a contentious issue during the final thirty years of the Twentieth Century and at the turn of the Twenty-First Century. The recent decision of the Supreme Court of the *United States in Dutra Group v. Batterton*[1] has put to rest, at least for the time being, the question of whether punitive damages are available to seamen[2] injured or killed due to the alleged unseaworthiness of a vessel. But, the purpose of this article, to paraphrase Marc Antony in Shakespeare's Julius Caesar,[3] is neither to praise nor to bury exemplary damages. Punitive damages for gross negligence or willful misconduct under maritime law are now established as a general proposition but apparently only when based on historical precedent.[4] Opponents must accept it as a *fait accompli* despite their protestations that the foundation on which the Supreme Court based its decision in *Exxon Shipping Co. v. Baker*[5] as well as *Atlantic Sounding Co., Inc. v. Townsend*[6] may be questionable. They now applaud the result in *Batterton*. Likewise, plaintiffs' counsel derides the *Batterton* decision as a rebuke to the principle and reasoning of *Townsend* and a step in the wrong direction. The remaining questions are to what extent will punitive damages remain viable for tort claims under maritime law? For which types of claims may a party recover punitive damages? What is the standard to impute gross negligence to the principal? Is there a proper standard to govern excessive punitive damages?

This essay will first examine the emergence of punitive damages in General Maritime Law in the late Twentieth Century[7] and its equally abrupt disappearance. It will then follow with a review of the resurrection and present state of punitive damages in certain tort claims arising under General Maritime Law as a consequence of the 2008 *EXXON VALDEZ*[8] decision and subsequent extension to seamen's claims for maintenance and cure only one year later in *Atlantic Sounding Co., Inc. v. Townsend*.[9] The next section will briefly analyze the Supreme Court's recent decision

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[1] Dutra Grp. v. Batterton, 139 S. Ct. 2275, 2019 U.S. LEXIS 4202, 2019 WL 2570621 (No. 18–266, June 24, 2019) [Hereinafter *Batterton*].

[2] The more familiar and entrenched term "seaman" (plural "seamen") will be used throughout for those who are within the purview of the Jones Act. The term "seafarer" which appeared first in the U.S. maritime lexicon in Yamaha Motor Corp. v. Calhoun, 516 U.S. 199 (1996) is used to include Jones Act seamen and those employees covered under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. Non-seafarers includes commercial fishermen, passengers and invitees on vessels and recreational boaters. *See also* In re Marquette Transp. Co. Gulf-Inland, LLC, 182 F. Supp. 3d 607 (E.D. La. 2016) in which Judge Vance evaluates the cases discussing the meaning of "seafarer" and "non-seafarer" due to the ambiguity in the *Calhoun* decision. She concludes that "seafarers" are Jones Act seamen and LSHWCA employees.

[3] William Shakespeare, Julius Caesar, Act III, Scene 2.

[4] *Batterton*, 139 S.Ct. at 2283(citing Atlantic Sounding v. Townsend, 557 U.S. 504, 511 (2009)).

[5] Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008) [Hereinafter *EXXON VALDEZ*]. The Supreme Court allowed commercial fishermen to recover punitive damages for their economic losses due to the spill of crude from S/S EXXON VALDEZ.

[6] Atl. Sounding Co. v. Townsend, 557 U.S. 404 (2009) [Hereinafter *Townsend*].

[7] *See* In re Marine Sulphur Queen, 460 F.2d 89 (2d Cir.), cert. denied, 409 U.S. 982 (1972) [Hereinafter *Marine Sulphur Queen*].

[8] *EXXON VALDEZ*, 554 U.S. at 475.

[9] *Townsend*, 557 U.S. at 407.

in *Dutra Group v. Batterton*[10] and follow with a discussion of what questions *Batterton* answers also raises. The penultimate section will explore the anomalies which exist in the recovery of punitive damages, and areas of tort claimants can likely still recover punitive damages. Finally, a prediction will be made about the ultimate future of punitive damages for seaman and other claimants.

A. The Rise of Punitive Damages Under General Maritime Law in the Twentieth Century

The first reference to punitive damages in a maritime context arose in what is now considered the fountainhead for the recovery of punitive or exemplary damages in a maritime tort, *The Amiable Nancy*.[11] Though ostensibly the primary issue in that case was the imputation of the egregious acts of the officers and crew in seizing another vessel as maritime prize,[12] the decision is considered the genesis for recovery of punitive damages under maritime law.[13] Despite the majority's statement in *Townsend* that punitive damages extended to maritime claims,[14] suits for punitive damages under maritime law were apparently rare if at all clearly discernible in the cases reported.[15]

Claims for punitive damages in maritime law did not clearly arise again until 1969 in *United States Steel Corporation v. Fuhrman*.[16] Three crew of the U.S. Steel vessel were killed and

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[10] *Batterton*, 139 S. Ct. 2275.

[11] 16 U.S. 546, 3 Wheat. 546 (1818). The only reference is a statement by Justice Story regarding the action which was brought by the claimant: "And if this were a suit against the original wrong-doers, it might be proper to go yet farther, and visit upon them in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct." (16 U.S. at 558)

[12] Federal courts have exclusive jurisdiction of any prize brought into the United States. (28 U.S.C. § 1333(2)). The procedure for maritime prize is found in 10 U.S.C. § 7651-7681. Prize as is defined as capture of vessels during war authorized by the United States. (10 U.S.C. § 7651(a))

[13] Justice Thomas in Townsend cited *The Amiable Nancy* "as one of the [Supreme Court's] first cases indicating that punitive damages were available involved an action for marine trespass." *Townsend*, 557 U.S. at 411. He then references cases which admittedly may contain a punitive element on which he and the majority rely on for further support for the recovery of punitive damages in admiralty cases. *Townsend*, 557 U.S. at 411-12. Justice Alito in his dissent, joined by Justices Roberts, Kennedy and Scalia, questioned whether any of the cases clearly included any punitive damages and others were undifferentiated awards. *Townsend*, 557 U.S. at 429-30. But, in the *Batterton* case, Justice Alito who authored the majority opinion accepted "the established history of awarding punitive damages for certain maritime torts, including maintenance and cure…." *Batterton*, 189 S.Ct at 283. *See* also Sir William Peel, 72 U.S. 517 (1866), another prize case in which punitive damages were sought.

[14] *Townsend*, 557 U.S. at 411. The majority cites Lake Shore & Michigan S. R. Co. v. Prentice, 147 U.S. 101, 108 (1893) for support. But, the language in that case is also *dictum* as the issue was the imputation of the unlawful acts of the officers and crew to the employer as in *The Amiable Nancy*.

[15] *See* Justice Alito's dissent in *Townsend*, 557 U.S. at 429-31.

[16] U. S. Steel Corp. v. Fuhrman, 407 F.2d 1143 (6th Cir. 1969), cert. denied, 398 U.S. 958 (1970) [Hereinafter *Fuhrman*].

others injured in a collision in the Straits of Mackinac in heavy fog.[17] The trial court held that U.S. Steel was liable for punitive damages under the Jones Act.[18] The Sixth Circuit reversed not on the basis that punitive damages were unavailable under the Jones Act but on the basis that even if the actions of the captain were sufficient to warrant punitive damages, those actions could not be imputed to the owner of the vessel.[19] The case, like *The Amiable Nancy,* is one of imputation of gross negligence to the vessel owner. Nonetheless, the court acknowledged that punitive damages were available in a Jones Act claim.

The issue of the recovery of punitive damages for a maritime tort arose three years later in the Second Circuit in the case *In re: Marine Sulphur Queen*.[20] The vessel, an oil tanker which had been converted into a vessel to carry molten sulfur, was lost at sea along with the entire 39 member crew.[21] The personal representatives of the deceased seaman filed suits under the Jones Act[22] for negligence of the employer, unseaworthiness, and the Death on the High Seas Act.[23] Punitive damages were sought, but it is unclear whether this was based on the unseaworthiness claim. Though the trial court found that the vessel was intrinsically unseaworthy,[24] the claim for punitive damages was briefly referred to and dismissed, with the trial judge noting "the evidence, in this case, does not justify any assessment of punitive damages."[25] The Second Circuit affirmed, stating there was no evidence to support a finding of gross negligence or "reckless or wanton misconduct."[26] It does not appear that the defendant sought dismissal of the punitive damage claim on the basis that the Death on the High Seas Act restricts recovery in a wrongful death suit to pecuniary damages.[27]

The availability of punitive damages under General Maritime Law for tortious conduct finally came to a head in the Fifth Circuit's decision *In re: Complaint of Merry Shipping*.[28] The tug ROYAL LADY sank in Port Royal Sound off the coast of South Carolina within three nautical miles of the coast, resulting in the deaths of three of the four crew members.[29] The beneficiary of one of the seamen sought to recover under the Jones Act for negligence of the employer and under General Maritime Law for breach of the warranty of seaworthiness seeking pecuniary, non-pecuniary, and punitive damages.[30]

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[17] *Id.* at 1144.
[18] Petition of Den Norske Amerikalinje A/S, 276 F. Supp. 163 (N.D. Oh. 1967).
[19] *Id*.
[20] *Marine Sulphur Queen*, 460 F. 2d 89.
[21] *Id.* at 93.
[22] 46 U.S.C. § 30104
[23] In re Marine Sulphur Transp. Corp., 312 F.Supp. 1081, 1087 (S.D. N.Y. 1970).
[24] *Id*. at 1096.
[25] *Id*. at 1104.
[26] *Marine Sulphur Queen*, 460 F.2d at 105.
[27] 46 U.S.C. § 30301 et seq.
[28] In re Complaint Merry Shipping, 650 F.2d 622 (5th Cir. 1981) [Hereinafter *Merry Shipping*].
[29] *Id*. at 623.
[30] *Id*.

The Fifth Circuit panel noted that under the unseaworthiness claim, there were two actions, namely the survivor's action and the wrongful death action.[31] The issue before the court was whether punitive damages could be recovered under maritime law for breach of the warranty of seaworthiness and the Jones Act.[32] After surveying the case law, the court determined that punitive damages are recoverable under general maritime law for unseaworthiness.[33] "Punitive damages should be available when a shipowner has willfully violated the duty to furnish and maintain a seaworthy vessel."[34] Judge Roney, speaking for the unanimous panel, in reasoning which would prove to be prescient and reflected by Justice Thomas in *Townsend*, stated that the claim for breach of the warranty of seaworthiness has no statutory basis or restraints on recovery such as the Jones Act.[35] It is a claim under general maritime law which has allowed recovery for nonpecuniary and punitive damages.[36] The court held punitive damages were available for "willful and wanton misconduct by the shipowner."[37] The Fifth Circuit panel demurred on deciding whether punitive damages were recoverable under the Jones Act.[38]

The Ninth Circuit followed the Fifth Circuit in *Protectus Alpha Navigation Co., Ltd. v. North Pacific Grain Growers, Inc*.[39] and held that punitive damages may be recovered under General Maritime Law for gross negligence in claims for wrongful death and personal injury by non-seamen. In *Protectus Alpha*, the supervisor of the wharf ignored entreaties of firefighters and cast a vessel adrift though the fire was not subdued.[40] One Coast Guardsman was killed, another injured, and the vessel was a total loss.[41] The same circuit also subsequently held that punitive damages may be recovered by non-dependent brothers in a survival action when their sibling seaman was killed in state waters of Alaska.[42] Thereafter, though the U.S. First Circuit Court of

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[31] *Id*. Note: The U.S. Supreme Court unanimously held in Dooley v. Korean Air Lines, Co., 524 U.S. 116, 124 (1998), that there is no survivor's action under General Maritime Law. However, the Court in Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 215, footnote 1 (1986), left open the question of whether a state survivor's action which may apply on the high seas could be appended to a DOHSA claim.

[32] *Merry Shipping*, 650 F.2d at 624-625, footnote 9.

[33] *Id*. at 625. The court cites The Amiable Nancy, 16 U.S. (3 Wheat.) 546 (1818); Lake Shore Railway Co. v. Prentice, 147 U.S. 101 (1893) (wrongful arrest of a passenger on a train); Robinson v. Pocahontas, Inc., 477 F.2d 478 (1stCir. 1973) (callous failure to pay maintenance and cure); Pino v. Protection Maritime Ins. Co., 490 F. Supp. 277 (D. Mass. 1980) (tortious interference with employment contract).

[34] *Merry Shipping*, 650 F.2d at 625.

[35] *Id*. at 626.

[36] *Id*.

[37] *Id*.

[38] *Id*.

[39] Protectus Alpha Nav. Co., Ltd. v. N. Pac. Grain Growers, Inc., 767 F.2d 1379 (9th Cir. 1985) [Hereinafter *Protectus Alpha*].

[40] *Id*. at 1381-82.

[41] Protectus Alpha Nav. Co., Ltd. v. N. Pac. Grain Growers, Inc., 585 F. Supp. 1062, 1065 (D. Or. 1984). The suit for damages was under General Maritime Law as the defendant was neither the employer of the decedent or injured party nor owner of the vessel.

[42] Evich v. Connelly, 759 F.2d 1432 (9th Cir. 1985); on appeal after remand, Evich v. Morris, 819 F.2d 256, 257 (9th Cir. 1987, cert. denied, 484 U.S. 914 (1987); punitive damages were available

Appeals also acknowledged that punitive damages could be recovered under General Maritime Law, that court reversed the trial court's award of punitive damages for intentional infliction of emotional distress on the basis that the callous acts of its employees could not be imputed to the vessel owner.[43] None of these decisions are addressed or referenced in the *Batterton* opinion, which in denying punitive damages for alleged breach of the warranty of seaworthiness, relied on the "historical evidence that punitive damages are not available."[44]

While claims for punitive damages were raised on a periodic basis, the availability of punitive damages arose mostly in the context of the employer's willful or arbitrary and capricious refusal to pay maintenance and cure.[45] The U.S. First Circuit Court of Appeals in *Robinson v. Pocahontas*, Inc.[46] summarily dismissed the employer's objection to an award of punitive damages for failure maintenance and cure on the basis that, as the progeny of *Vaughan v. Atkinson*,[47] courts have awarded punitive damages on such claims.[48] Likewise, the Fifth Circuit affirmed an award of punitive damages for willful and arbitrary refusal to pay maintenance and cure in *Holmes v. J. Ray McDermott*.[49] The Eleventh Circuit followed suit in *Hines v. J.A. La Porte, Inc.*[50] Only the U.S. Court of Appeals for the Second Circuit denied punitive damages in claims for arbitrary or capricious failure or refusal to pay maintenance and cure.[51]

B. The Fall of Punitive Damages Under General Maritime Law in the Twentieth Century

Almost as suddenly as punitive damages based on unseaworthiness ascended in the late Twentieth Century in the major maritime circuits, the basis on which they relied collapsed almost as quickly as a result of the watershed decision of the U.S. Supreme Court in *Miles v. Apex Marine Corporation*.[52] Though not a claim for punitive damages, nonetheless, the *Miles* decision caused the leading maritime circuit courts to reconsider the availability of punitive damages under General Maritime Law in the context of claims for the arbitrary or willful refusal to pay maintenance and cure.

In *Miles*, a wrongful death claim was brought by the non-dependent mother of a seaman who was killed on a vessel in the port of Vancouver, Washington, due to a vicious attack by a fellow seaman.[53] After a jury verdict finding the employer negligent but the vessel seaworthy, the Fifth Circuit reversed the seaworthiness finding and held that the violent disposition of the attacker

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in a survival action under maritime law. (In Dooley v. Korean Airlines Co., 524 U.S. 116 (1998), the Supreme Court held there is no survival action under maritime law.)

[43] Muratore v. M/S SCOTIA PRINCE, 845 F.2d 347 (1st Cir. 1988).

[44] *Batterton*, 189 S.Ct. at 2283.

[45] *Merry Shipping*, 650 F.2d at 624-25.

[46] Robinson v. Pocahontas, Inc., 477 F.2d 1048 (1st Cir. 1973).

[47] Vaughan v. Atkinson, 369 U.S. 527 (1962).

[48] *Robinson*, 477 F.2d at 1051.

[49] Holmes v. McDermott, 734 F.2d 1110 (5th Cir. 1984); *see also* Harper v. Zapata Off-Shore Co., 741 F.2d 87 (5th Cir. 1984); Morales v. Garijak, Inc., 829 F.2d 1355 (5th Cir. 1987); Tullos v. Resource Drilling, Inc., 750 F.2d 380 (5th Cir. 1985).

[50] Hines v. J.A. La Porte, Inc., 829 F.2d 1187 (11th Cir. 1987).

[51] Kraljic v. Berman Enterprises, Inc., 575 F.2d 412 (2d Cir. 1978).

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

[53] *Id*. at 21.

rendered the vessel unseaworthy as a matter of law.[54] This resurrected the damage claim for non-pecuniary damages for loss of society.[55] The Supreme Court unanimously affirmed the Fifth Circuit Court of Appeals, which in an opinion by Justice O'Connor, denied the non-dependent mother's claim for non-pecuniary damages as a result of the death of a seaman in territorial waters, based on the unseaworthiness of the vessel.[56]

The reasoning of the Court in *Miles* required courts to re-focus on the availability of punitive damages under General Maritime Law, including claims for refusal to pay maintenance and cure. The Fifth U.S. Court of Appeals granted *en banc* rehearing in *Guevara*[57], in which the first three-judge panel, following Fifth Circuit precedent, affirmed an award of punitive damages for willful and callous refusal of the employer to pay maintenance and cure. A unanimous *en banc* court reasoned that the *Miles* decision compelled it to conclude that punitive damages were no longer available for willful failure to pay maintenance and cure.[58] The Ninth Circuit followed in *Glynn v. Roy Al Boat Management*.[59] The Eleventh Circuit, one of the major maritime circuits,[60] did not re-assess the impact of *Miles* in a claim for punitive damages for refusal to pay maintenance and cure until 2008 in *Townsend*.[61]

In the maritime tort context, the Second Circuit in *Wahlstrom v. Kawasaki Heavy Industries, Ltd.* denied punitive damages to non-dependent parents under maritime law when their seventeen-year-old son was killed in a collision with a vessel on a river in Connecticut.[62] The panel in *Wahlstrom* referenced post *Miles* authority as sufficient support to deny punitive damages under maritime law.[63]

Initially, a panel of the U.S. Court of Appeals for the First Circuit in Horsley v. Mobil Oil Corp., denied a claimant punitive and non-pecuniary damages for loss of society for the non-fatal

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[54] *Id*. at 22.

[55] Non-pecuniary damages for loss of society under the General Maritime Law wrongful death action recognized in Moragne v. State Marine Lines, Inc., 398 U.S. 375 (1970) became available in Sea-Land Services v. Gaudet, 414 U.S. 573 (1974); yet, in *Miles*, the Court restricts the holding in *Gaudet* to its facts: "The holding of *Gaudet* applies only in territorial waters, and it applies only to longshoremen." 498 U.S. at 31.

[56] Justice Souter took no part in the case. 498 U.S. at 37.

[57] Guevara v. Marine Overseas Corp., 34 F.3d 1279, 1290 (5th Cir.); *reh'g en banc granted*, 34 F.3d 1279 (5th Cir. 1994).

[58] 59 F.3d 1496, 1513 (5th Cir. 1995); cert. denied, 516 U.S. 1154 (1996).

[59] 57 F.3d 1495, 1505 (9th Cir. 1995) (reasoning that recovery of attorney's fees was a sufficient deterrent and that as the claim is pseudo-contractual, punitive damages are not awards for contractual claims).

[60] The First, Second, Fifth, Ninth and Eleventh Circuits which cover most states along the Atlantic, Gulf and Pacific coasts handle the majority of maritime cases.

[61] Atl. Sounding Co. v. Townsend, 496 F.3d 1282, 1283 (11th Cir. 2007). (The panel held that it was required to follow the precedent of *Hines*, which allowed punitive damages for failure to pay maintenance and cure).

[62] Wahlstrom v. Kawasaki Heavy Indus., 4 F.3d 1084, 1094 (2d Cir. 1993).

[63] *Id*.

injury to a seaman in territorial waters based on the unseaworthiness of the vessel.[64] The following year another panel of the same circuit disagreed in *CEH, Inc. v. F/V SEAFARER*[65] and affirmed an award of punitive damages under General Maritime Law for willful and malicious destruction of property, namely lobster gear.[66] The First Circuit distinguished *Miles* and its progeny, including the Fifth Circuit's decision in *Guevara*, reasoning that only in cases based on either statute, DOHSA or the Jones Act, or where there is "an overlap between statutory and decisional law"[67] does the reasoning of the Court in *Miles* apply. Finding no statutory basis for a claim property damage, punitive damages were available.[68] This decision also clearly highlights the curious anomaly which still exists under General Maritime Law. Punitive damages may be recovered for damage to property but not the death of anyone on the high seas due to the explicit statutory restriction in DOHSA. Yet, the First Circuit panel in language foreshadowing *Townsend* stated that "*Miles* does not mandate a uniform result for every maritime action."[69]

II. What Controls Statutory or Decisional Law?

A. *Moragne v. States Marine Lines, Inc. and Sealand Services, Inc. v. Gaudet*

The supplementation of statutory maritime claims began when the Supreme Court in *Moragne v. States Marine Lines, Incorporated*[70] overruled the precedent established in *The Harrisburg*.[71] The unanimous decision, carefully crafted by Justice Harlan, an experienced jurist in maritime law, held that there is a cause of action for wrongful death under maritime law in territorial waters of a state and within three nautical miles of the shore of the United States.[72] The decedent in *Moragne* was a longshoreman who was killed in Florida state waters. When the claim arose, the vessel and vessel owner owed longshoremen the duty to provide a seaworthy vessel under maritime law.[73] The Florida wrongful death statute also did not recognize a wrongful death

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[64] 15 F.3d 200, 203 (1st Cir. 1994) (determining it was compelled by the reasoning in *Miles* to deny punitive and non-pecuniary damages based on the claim of the unseaworthiness of the vessel).
[65] 70 F.3d 694 (1st Cir. 1995).
[66] *Id* at. 696-97.
[67] *Id*. at 701.
[68] *Id*.
[69] *Id*. at 702.
[70] 398 U.S. 375 (1970).
[71] 119 U.S. 199 (1886).
[72] The Death on the High Seas Act (46 U.S.C. § 30301 et seq.) passed in 1920 created a uniform federal statutory cause of action for wrongful death "beyond three nautical miles of the shore of the U.S." (46 U.S.C. § 30302) based on negligence as well as unseaworthiness. (*Moragne*, 398 U.S. at 398). DOHSA was amended in 2000 adding the exception for commercial aviation accidents which occur "on the high seas more than 12 nautical miles from the shore of the United States…" 46 U.S.C. § 30307 (b) allowing recovery for non-pecuniary damages ("loss of care, comfort and companionship" 46 U.S.C. § 30307 (a) but expressly excluding recovery of punitive damages. DOHSA does not apply to commercial aviation accidents occurring within 12 nautical miles of the U.S. shore.)
[73] Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) The *Sieracki* doctrine was abrogated by Congress when the Longshore Act was substantially amended in 1972. (33 U.S.C. § 905(b)).

claim based on unseaworthiness.[74] Thus, there was no remedy for damages under either General Maritime Law or the applicable state wrongful death statute. Specifically, the Court granted the *writ of certiorari* on the "question of remedies under federal maritime law for tortious deaths on state territorial waters."[75]

Finding that Congress gave "no affirmative indication of an intent to preclude the judicial allowance of a remedy for wrongful death…,"[76] the unanimous Court sought to cure three anomalies.[77] A review of Congressional legislation revealed that Congress favored the application of state law for wrongful death in a state's territorial waters by passing the Death on the High Seas Act and the Jones Act.[78] At the time of the decision, conduct which may give rise to a claim for injury in territorial waters caused by unseaworthiness would give rise to a claim under maritime law; but, the same conduct in territorial waters which caused death would not.[79] Under DOHSA, negligence and unseaworthiness may give rise to a claim but may not for similar tortious conduct within territorial waters, and then only if the state recognized unseaworthiness as a basis for recovery.[80] Finally, "the strangest anomaly"[81] was that maritime law did not recognize a claim for the death of a seaman in territorial waters caused by unseaworthiness; but a longshoreman could recover on that basis.[82] The Court concluded that the Death on the High Seas Act did not preclude an action for wrongful death "in situations not covered by the Act." [83] *The Harrisburg* was overruled with the Court acknowledging a cause of action for wrongful death under maritime law for breach of the warranty of seaworthiness in territorial waters.[84] The eponymous *Moragne* cause of action for wrongful death based on the unseaworthiness of the vessel was further extended to apply to general maritime negligence claims thirty-one years later in *Norfolk Shipbuilding & Drydock Corporation v. Garris*.[85] In creating this new cause of action under General Maritime Law, the Court gave only general guidance for lower courts to fashion the parameters of the action by applying "accepted maritime law"[86] for the statute of limitations, the Death on the High Seas Act for the beneficiaries,[87] and both DOHSA and state wrongful death statutes for damages.[88]

The Court encountered the damage issue only four years later when by a five to four vote, it decided *Sea-Land Services, Inc. v. Gaudet*.[89] Mr. Gaudet, like the decedent in *Moragne*, was a longshoreman who sustained serious injuries while working on a vessel in the state waters of

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[74] 398 U.S. at 377.
[75] *Id*.
[76] 398 U.S. at 393.
[77] 398 U.S. at 395.
[78] 398 U.S. at 393.
[79] 398 U.S. at 395.
[80] *Id*.
[81] *Id*.
[82] *Id*.
[83] 398 U.S. at 402.
[84] 398 U.S. at 409.
[85] 532 U.S. 811 (2001).
[86] 398 U.S. at 406.
[87] 398 U.S. at 407.
[88] 398 U.S. at 408.
[89] 414 U.S. 573 (1974).

Louisiana.[90] He sued the vessel owner for unseaworthiness and was awarded a judgment by a jury for "permanent disability, physical agony, and loss of earnings."[91] After the suit was terminated, he died; his widow then sued for wrongful death.[92] The trial court dismissed the suit based on *res judicata* grounds,[93] but the Fifth Circuit Court of Appeals reversed, stating that the *Moragne* decision created a separate and distinguishable cause of action.[94] The Supreme Court granted the writ on this issue and, in a slim majority decision,[95] affirmed the Court of Appeals holding that the recovery by the longshoreman for his losses did not preclude recovery for the losses of the dependents.[96] Including loss of support, services, funeral expenses, and for "loss of society,"[97] a non-pecuniary loss not otherwise recoverable under any federal maritime statute.[98]

Justice Powell criticized the majority for its failure to defer to congressional policy as well as *stare decisis*.[99] He interpreted the *Moragne* decision as an "admonition to draw by analogy from the federal statutes"[100] in crafting the new wrongful death cause of action. In his view, the majority, in recognizing that non-pecuniary damages for loss of society were recoverable, repudiated two acts of Congress which dealt specifically with maritime death claims, neither of which allowed recovery of such damages.[101] The dissenters believed the Court, in defining the parameters of the *Moragne* cause of action, should thus defer to Congress's express intent to limit recoverable damages for wrongful death to the statutory remedies.

B. *Mobil Oil Corp. v. Higginbotham and Miles v. Apex Marine Corporation*

In *American Export Lines v. Alvez*,[102] the Court expanded the recovery of non-pecuniary damages for loss of consortium to the wife of a longshoreman non-fatally injured in coastal waters. *Moragne* and its progeny, *Gaudet* and *Alvez*, were major diversions in maritime law in the United States. Only four years after the Court decided *Gaudet,* a new conservative Court began a re-assessment of its interpretation of the *Moragne* decision and the parameters of the damages available under the *Moragne* wrongful death cause of action in *Mobil Oil Corp. v. Higginbotham*.[103] The pilot of a helicopter and its three passengers, (which included workers who were Jones Act seamen), crashed in the Gulf of Mexico beyond three nautical miles from the coast and thus on the high seas.[104] The Death on the High Seas Act unquestionably created a federal

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[90] *Id.* at 574.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] 414 U.S. at 574-575.
[95] Justice Powell wrote the dissent which was joined by the Chief Justice Burger, Justices Stewart and Kennedy. 414 U.S. at 595.
[96] 414 U.S. at 583.
[97] *Id.* at 584.
[98] "We recognize, of course, that our decision permits recovery of damages not generally available under the Death on the High Seas Act." 414 U.S. at 588.
[99] 414 U.S. at 596.
[100] *Id.* at 602.
[101] *Id.* at 605.
[102] 446 U.S. 274 (1980).
[103] 436 U.S. 618 (1978).
[104] *Id.* at 619.

cause of action for wrongful death on the high seas on behalf of the beneficiaries defined as the "spouse, parent, child, or dependent relative."[105] DOHSA explicitly limits recovery to the "fair compensation for the *pecuniary loss*"[106] of each beneficiary.

The trial court awarded the dependents pecuniary damages but denied recovery for non-pecuniary damages for loss of society.[107] On appeal, the U.S. Court of Appeals for the Fifth Circuit reversed[108] based on its prior precedent in which a panel held that *Moragne* applied "not only to navigable waters of the States, but to the High Seas as well, including the area defined in DOHSA. . . ."[109] The Supreme Court granted writs to resolve the issue of statutory rights and judicially created rights.[110]

A divided Supreme Court, in reversing the Fifth Circuit, restricted the *Gaudet* decision to "coastal waters."[111] While it recognized the policy considerations for awarding or denying non-pecuniary damages, such as loss of love and affection or society, it chose not to venture into policy issues, stating that Congress made that decision and "struck the balance"[112] by limiting damages for deaths on the high seas to pecuniary damages. The majority acknowledged that the damages recovered in coastal waters will be different from those recovered on the high seas.[113] Though DOHSA is not comprehensive in scope, the Court was not free to ignore its statutory provisions, which address the specific issue or to the point "that the Act becomes meaningless."[114] Justice Marshall, joined by Justice Blackmun in dissent, opined that the decision undermined the rationale of *Moragne*, making recovery dependent on the location of the accident.[115] He proposed reconciling the anomaly, maintaining that Congress, by enacting DOHSA, established the minimum recovery for seamen killed on the high seas.[116]

But, to what extent would *Moragne* and its progeny *Gaudet* continue to affect the recovery of seaman killed in coastal waters? Did the *Higginbotham* decision eviscerate *Moragne* and restrict

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[105] 46 U.S.C. § 30302 (2006).
[106] 46 U.S.C. § 30303 (2006) (italics added).
[107] Higginbotham v. Mobil Oil Corp., 545 F.2d 422, 435 (5th Cir. 1977).
[108] *Id.* at 435-436.
[109] 545 F.2d at 435 (*quoting* Law v. Sea Drilling Co., 5 Cir. 1975, 510 F.2d 242, 250, reh. denied, modified in part, 523 F.2d 793 (5th Cir. 1975)). Judge Brown of the Fifth Circuit as author of the opinion on rehearing in *Law* stated that the *Moragne* decision displaced or "at least augmented" the Death on the High Seas Act. 523 F.2d at 798.
[110] The First Circuit in Barbe v. Drummond, 507 F.2d 794, 799-800 (1st Cir. 1974) held that there was a federal maritime survival action allowing beneficiaries to recover for pre-death pain and suffering. The Court reasoned that as the *Moragne* Court created a right which did not previously exist under maritime law, there was no conflict with DOHSA, solely a wrongful death statute, for the court to create a survivor's right of action.
[111] 436 U.S. at 624.
[112] *Id.* at 623.
[113] 436 U.S. at 624, n. 20: "It remains to be seen whether the difference between awarding loss-of-society damages under *Gaudet* and denying them under DOHSA has a great practical significance."
[114] 436 U.S. at 625.
[115] 436 U.S. at 628.
[116] 436 U.S. at 630.

seaman to statutory remedies and damages? Would the beneficiaries of a seaman killed in territorial waters due to the unseaworthiness of a vessel be permitted to recover non-pecuniary damages, such as loss of society and loss of love and affection and beneficiaries of those killed on the high seas denied recovery of punitive damages? Would the statutory limitation of the Jones Act also limit recovery to pecuniary damages were a seaman injured by the unseaworthiness of a vessel? If a seaman were killed or injured due to the negligence of a third party in coastal waters, would the statutory restriction to pecuniary damages apply? As DOHSA only applies to wrongful death claims, would those injured in a maritime accident beyond three nautical miles from the coast of the U.S. be able to recover punitive damages, but those killed in the same event be barred from recovery? Some of these questions would be answered in the next major maritime decision from the Supreme Court.

Miles v. Apex Marine Corp.[117] is likely the second most important maritime decision of the U.S. Supreme Court in the waning years of the Twentieth Century, notwithstanding *Gaudet*. The Court in *Miles* applied the reasoning of *Higginbotham* to a claim for the wrongful death of a seaman in territorial waters. The claimant, the non-dependent mother, sought to recover non-pecuniary damages for the wrongful death of her son, who was killed by a fellow seaman on a vessel in the port of Vancouver, Washington.[118] In *Higginbotham,* the Court was confronted with whether the *Moragne* cause of action could supplement the statutory cause of action afforded by DOHSA. In *Miles*, it had to confront the issue of whether the pecuniary damage limitation in DOHSA also applied to a *Moragne* cause of action and *Gaudet* non-pecuniary damages for the death of a seaman in territorial waters.

Justice O'Connor, as the author of the unanimous opinion, joined by the then seven other members of the Court,[119] acknowledged unequivocally that the *Moragne* decision recognized a cause of action for wrongful death under General Maritime Law for seamen and that the *Moragne* cause of action was not limited to longshoremen.[120] However, with respect to damages, the *Gaudet* decision was expressly limited to longshoremen in territorial waters and did not address the rights of seamen killed in territorial waters[121] or the "preclusive effects of the Jones Act."[122] The wrongful death cause of action acknowledged by the Court in *Moragne* benefits the beneficiaries of seaman killed but only in territorial or coastal waters due to unseaworthiness but does not allow recovery for loss of society or non-pecuniary damages.[123] In doing so, the Court cured the anomaly it created in *Higginbotham*[124] and restored uniformity. Famously, Justice O'Conner stated: "It would be

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[117] Miles v. Apex Marine Corp., 498 U.S. 19 (1990).
[118] 498 U.S. at 21.
[119] 498 U.S. at 37. Justice Souter took no part in the case.
[120] 498 U.S. at 30. "If there has been any doubt about the matter, we today make explicit that there is a general maritime cause of action for the wrongful death of a seaman…." *Id.*
[121] "The holding of *Gaudet* applies only in territorial waters, and it applies only to longshoremen." 498 U.S. at 31. The Eleventh Circuit Court of Appeals has strictly construed this language denying damages for loss of society of a minor child killed in territorial waters of Alabama. Tucker v. Fearn, 333 F.3d 1216, 122-23 (11th Cir. 2003).
[122] 498 U.S. at 31-32.
[123] 498 U.S. at 31.
[124] "Respondents in that case warned that the elimination of loss of society damages for wrongful deaths on the high seas would create an unwarranted inconsistency between deaths in territorial

inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence."[125]

As previously stated, the *Miles* decision made courts re-assess their prior evaluation of the availability of punitive damages for arbitrary or willful failure or refusal to pay maintenance and cure. The Sixth Circuit[126] was the first to address the application of the reasoning in *Miles* to an award of punitive damages in the wrongful death suit of a seaman under the Jones Act, and for unseaworthiness and reversed the punitive damage award based on its interpretation of *Miles*. The Second Circuit was next in *Wahlstrom v. Kawasaki Indus*tries,[127] a wrongful death suit brought by non-dependent parents of a minor. The Fifth Circuit fell in line in *Horsley v. Mobil Oil Corporation*[128] and its *en banc* decision in Guevara v. Maritime Overseas Corporation,[129] which the Ninth Circuit then followed in *Glynn v. Roy Al Boat Management Corporation.*[130]

In *Horsley v. Mobil Oil Corporation*[131] , the First Circuit held that a seaman non-fatally injured in territorial waters could not recover punitive damages for breach of the warranty of seaworthiness, nor could his spouse and minor child recover damages for loss of society. As previously stated, nine months later, another panel of the First Circuit allowed punitive damages under general maritime law for wanton damage to fishing gear in *CEH, Inc. v. F/V SEAFARER*.[132] The panel distinguished *Miles* and the panel's decision in *Horsley* on the basis that the claim for property damage did not even overlap with a statutory maritime claim, unlike the Jones Act, the Death on the High Seas Act, and the warranty of seaworthiness.[133]

III. The Resurrection of Punitive Damages

A. *Exxon Shipping Co. v. Baker*

Punitive damages then appeared to have been relegated to the briny deep until the *EXXON VALDEZ* opinion was released by the Court in 2008. As a result of the grounding of T/V EXXON VALDEZ in Prince William Sound, 11 million gallons (over 261,000 barrels)[134] of crude oil leaked

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waters, where loss of society was available under *Gaudet*, and deaths on the high seas." 498 U.S. at 33.

[125] 498 U.S. at 32-33.

[126] Miller v. American President Lines, Ltd., 989 F.2d 1450 (6th Cir. 1993); cert. denied, 510 U.S. 915 (1993).

[127] Wahlstrom v. Kawasaki Indus., 4 F.3d 1084 (2d Cir. 1993).

[128] Horsley v. Mobil Oil Corp., 15 F.3d 200 (5th Cir. 1994).

[129] Guevara v. Maritime Overseas Corp., 59 F.3d 1496 en banc (5th Cir. 1995) overruling its prior en banc decision, Holmes v. J. Ray McDermott & Co., 734 F.2d 1110 (5th Cir.1984).

[130] Glynn v. Roy Al Boat Management Corp., 57 F.3d 1495 (9th Cir. 1995).

[131] 15 F.3d 200 (1st Cir. 1994).

[132] CEH, Inc. v. F/V Seafarer, 70 F.3d 694 (1st Cir. 1995).

[133] "… *Miles* may be applicable in those areas of maritime law where, at the very least, there is an overlap between statutory and decisional law." *Id.* at. 701.

[134] *Exxon Valdez Oil Spill*, OFFICE OF RESPONSE AND RESTORATION (Nov. 7, 2021, 6:58PM), http://response.restoration.noaa.gov/oil-and-chemical-spills/significant-incidents/exxon-valdez-oil-spill/.

from the breached hull of the vessel, causing what was then the worst oil spill in U.S. history. Fishermen and others who had a "proprietary interest" in the property damaged by the oil sought compensatory and punitive damages under General Maritime Law. On a *writ of certiorari* to the U.S. Supreme Court, Justice Souter, the author of the majority opinion,[135] noted that Exxon did not contest whether punitive damages were available under maritime law.[136] Rather, Exxon asserted only that the amount of punitive damages was excessive.[137] Hence, punitive damages re-entered the realm of available damages under General Maritime Law.

The pre-existent controversy raised in *Merry Shipping* then resurfaced. If punitive damages are available under General Maritime Law, does the reasoning of the Supreme Court in *Miles v. Apex* also continue to apply to *purely* maritime claims which have no statutory basis or even overlap with a statutory equivalent? The Court in *Miles* denied a non-dependent mother recovery of non-pecuniary damages when her son was killed in territorial waters due to the unseaworthiness of the vessel. As the Jones Act allowed recovery of only pecuniary damages due to the judicial gloss on FELA, the Court reasoned that it could not expand benefits under a judicially created remedy when a statutory remedy limited them.

Any doubt whether punitive damages were available to seamen was soon disabused in the year following the release of the *EXXON VALDEZ* decision. The U.S. Supreme Court in THE OSCEOLA[138] enumerated and explained the rights and remedies of seamen extant at the time. Tracing the right of seaman to maintenance and cure to the Rules of Oleron,[139] the Court confirmed the right of seamen to recover maintenance and cure if the seaman becomes sick or wounded in the service of the vessel.[140] The Supreme Court in *Vaughn v. Atkinson* held the employer liable to pay attorney's fees of a seaman for the employer's willful failure or arbitrary refusal to pay maintenance and cure.[141] As noted earlier,[142] the U.S. Fifth Circuit Court of Appeals affirmed an award, which was punitive in nature, for the arbitrary failure of the employer to pay maintenance and cure.[143] The Eleventh Circuit followed.[144] However, in light of the *Miles* opinion, the Fifth

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[135] Chief Justice Roberts, along with Justices Scalia, Thomas and Kennedy joined. Justices Stevens, Ginsburg, and Breyer joined, as to Parts I, II, and III. Justice Scalia filed a concurring opinion, in which Justice Thomas joined. Justices Stevens, Ginsburg, and Breyer filed opinions concurring in part and dissenting in part. Justice Alito who had been appointed to the court in 2006 took no part in the decision. Exxon Shipping Co., et. al v. Grant Baker, et. al, 554 U.S. 471 (2008).

[136] "Other than its preemption argument, it does not offer a legal ground for concluding that maritime law should never award punitive damages…." *Exxon Shipping Co*.,554 U.S. at 490. Exxon's primary argument was that the Clean Water Act preempted the availability of punitive damages under maritime law (554 U.S. at 484) but not compensatory damages (554 U.S. at 488-489). The Court found this argument untenable. *Id.*.

[137] *Exxon Shipping Co.*, 554 U.S. at 490.

[138] The Osceola, 189 U.S. 158 (1903).

[139] *Id.* at 169.

[140] *Id.* at 175. The United States also ratified the Shipowner's Liability Convention in 1939 by presidential proclamation. *See* 54 Stat. 1693.

[141] Vaughan v. Atkinson, 369 U.S. 527 (1962).

[142] *See* supra note 49.

[143] Holmes v. J. Ray McDermott, Inc. 734 F.2d 1110, 1118 (1984).

[144] Hines v. J.A. LaPorte, Inc., 820 F.2d 1187 (11th Cir. 1987).

Circuit retraced its steps and reversed itself in *Guevara v. Maritime Overseas Corporation*[145] and concluded that the "uniformity principle" of *Miles* could no longer support the court's precedent in *Holmes*; thus, punitive damages were not available for the willful refusal to pay maintenance and cure.[146] A circuit split was created when the Eleventh Circuit addressed the applicability of *Miles* to a claim for punitive damages for willful failure to pay maintenance and cure and distinguished *Miles* on the basis that it did not involve a claim for maintenance and cure nor for punitive damages.[147] The panel then affirmed the trial court, feeling bound also by its prior precedent.[148] The Supreme Court then granted writs with a circuit split.[149]

"The general rule that punitive damages were available at common law extended to claims arising under federal maritime law."[150] Since Justice Story's pronouncement dating to 1818 in *The Amiable Nancy* that punitive damages were available for a maritime tort, lower federal courts throughout the Nineteenth Century followed suit.[151] The Jones Act established a statutory right and cause of action on behalf of the seamen to recover damages, albeit limited to pecuniary damages, due to the employer's negligence; the Act does not otherwise restrict recognized claims of seamen under General Maritime Law.[152] Justice Thomas, who authored the 5-4 majority opinion,[153] distinguished *Miles* also on the basis that the issue in the case was whether The General Maritime Law supported a cause of action for wrongful death for unseaworthiness and the relief afforded under that right and cause of action.[154] While General Maritime Law recognizes a cause of action for wrongful death of seamen, the damages available cannot exceed those damages authorized by Congress.[155] The right to recover maintenance and cure existed long before any statutory rights Congress created for seamen in 1920 with the enactment of the Jones Act and the Death on the High Seas Act. Nothing in the statutes affects the recognized remedies of seamen under General Maritime Law including the remedy to recover punitive damages for willful or arbitrary refusal or failure to pay maintenance and cure.[156]

Justice Thomas stated in *Townsend* that "[t]he reasoning of *Miles* remains sound…."[157] But, how sound could it be if the claim for unseaworthiness, like the seaman's right to maintenance and cure, also pre-existed the enactment of the Jones Act and had no statutory restrictions on

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[145] 59 F.3d 1496 (5th Cir. 1995) (en banc).
[146] *Id.* at 1512. The Ninth Circuit only months before also reached the same conclusion in Glynn v. Roy Al Boat Management Corp. 57 F.3d 1495 (9th Cir. 1995).
[147] Atl. Sounding Co. v. Townsend, 496 F.3d 1282, 1286 (11th Cir. 2007).
[148] *Id.* at 1284 "Under our prior panel precedent rule, a later panel may depart from an earlier panel's decision only when the intervening Supreme Court decision is 'clearly on point.'"
[149] 555 U.S. 993 (2008).
[150] Atl. Sounding Co. v. Townsend, 557 U.S. 404, 411 (2009).
[151] 557 U.S. at 413-414.
[152] *Id.* at 415-416.
[153] Justices Stevens, Souter, Ginsburg, and Breyer joined in the majority opinion. Justice Alito wrote the dissenting opinion which was joined by Justices Roberts, Kennedy and Scalia. 557 U.S. at 407.
[154] *Id.* at 419.
[155] *Id.*
[156] *Id.* at 424-25.
[157] *Id.* at 420.

damages? The various rights and remedies of seamen have different histories and sources.[158] A natural corollary of *Townsend* then would be that an action for personal injury or death of a seaman founded on the claim of the breach of the warranty of seaworthiness should also allow a remedy for punitive damages for the gross negligence or willful and wanton acts of the vessel owner.

The Fifth Circuit first addressed this in *McBride v. Estis Well Service, L.L.C.*[159] One employee of Estis Well Service, the owner of the rig, was killed, and three other employees were injured on Estis Barge 23 in Bayou Sorrell in the coastal waters of Louisiana.[160] All claimants sought relief under the Jones Act as well as for the alleged breach of the warranty of seaworthiness. All sought compensatory and punitive damages under General Maritime Law.[161] Estis moved to dismiss, asserting there was claim for punitive damages under the Jones Act or General Maritime Law for unseaworthiness, which was granted.[162] The trial court then certified the question for an interlocutory appeal to the Fifth Circuit.[163] Initially, the panel consisting of Judges Stewart, Barksdale, and Higginson held that as the unseaworthiness remedy pre-existed the Jones Act and as punitive damages were also established under General Maritime Law, punitive damages were available for breach of the warranty of seaworthiness.[164] On the request of a member of the Fifth Circuit, rehearing *en banc* was granted.[165] Judge W. Eugene Davis, writing for the slim majority of 8-7, concluded that *Miles* provided the answer and that punitive damages were barred by the Jones Act and for a claim based on the warranty of seaworthiness.[166] The U.S. Supreme Court denied a writ of *certiorari*.[167]

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158 *Id.* at 423-24.
159 731 F.3d 505 (5th Cir. 2013).
160 *Id.* at 507.
161 *Id.*
162 *Id.*
163 *Id.; see* 28 U.S.C §1292(b).
164 *McBride*, 731 F.3d at 518 (holding that "the Jones Act does not address unseaworthiness or limit its remedies.").
165 McBride v. Estis Well Serv., L.L.C., 743 F.3d 458, 459 (5th Cir. 2014) [hereinafter McBride II].
166 McBride v. Estis Well Serv., L.L.C., 768 F.3d 382, 384 (5th Cir. 2014) [hereinafter McBride III].
167 McBride v. Estis Well Serv., L.L.C., 135 S. Ct. 2310 (2015) [hereinafter McBride IV].

Damages