No. 08-___

In The Supreme Court of the United States

ATLANTIC SOUNDING CO., INC.
and WEEKS MARINE, INC.,

Petitioners,

versus

EDGAR L. TOWNSEND,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

DAVID W. MCCREADIE
(*Counsel of Record*)
EDDIE G. GODWIN
LAU, LANE, PIEPER,
CONLEY & MCCREADIE, P.A.
100 South Ashley Drive, Suite 1700
Tampa, Florida 33602
Telephone: (813) 229-2121

and

STEVEN L. BRANNOCK
HOLLAND & KNIGHT, LLP
100 North Tampa Street, Suite 4100
Tampa, Florida 33602

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

May a seaman recover punitive damages for the willful failure to pay maintenance and cure? The Eleventh Circuit's decision below holds in the affirmative, but conflicts with the Second, Third, Fifth and Ninth Circuits as well as two state courts of last resort, the reasoning of *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), and *Vaughan v. Atkinson*, 369 U.S. 527 (1962).

PARTIES TO THE PROCEEDING

Petitioners are Atlantic Sounding Co., Inc. and Weeks Marine, Inc., defendants-appellants below. Respondent is Edgar L. Townsend.

RULE 29.6 DISCLOSURE

Atlantic Sounding Co., Inc. is a wholly-owned subsidiary of Weeks Marine, Inc. Weeks Marine, Inc. is a privately held corporation.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

Atlantic Sounding Co., Inc. and Weeks Marine, Inc. (collectively "Weeks Marine") respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

Atlantic Sounding Co. v. Townsend, No. 3:05-CV-649, 2006 WL 4702150 (M.D. Fla. April 20, 2006)

Atlantic Sounding Co. v. Townsend, 496 F.3d 1282 (11th Cir. 2007)

JURISDICTION

The trial court certified a legal question to the Eleventh Circuit under 28 U.S.C. § 1292(b). On 23 August 2007, the Eleventh Circuit answered the certified question and created conflict with other circuits and two state courts of last resort. On 27 May 2008, the Eleventh Circuit denied Weeks Marine's request for an en banc rehearing. Pursuant to 28 U.S.C. § 1254(1), this Court has jurisdiction to review the Eleventh Circuit's decision.

This Court has exercised its discretion to decide a number of important maritime questions of law that were authorized for review under Sections 1292(b) and 1254(1). *See Norfolk Southern Ry. Co. v. Kirby*,

543 U.S. 14 (2004); *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996); *Vimar Seguros y Reaseguros, S.A. v. M/V SKY REEFER*, 515 U.S. 528 (1995); *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494 (1971); *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375 (1970). The willingness of this Court to examine certified questions is understandable because some of the key criteria utilized for determining whether this Court should exercise its jurisdiction mirror the requirements set forth in Section 1292(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. III, Section 2:

> The judicial power shall extend . . . to all Cases of admiralty and maritime jurisdiction. . . ."

The Federal Employer's Liability Act, 45 U.S.C. § 51:

> Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow . . . for such injury or death resulting in whole or in part from the negligence of . . . such carrier. . . .

The Jones Act, 46 U.S.C. §§ 30104-30105(b):

> A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law . . . against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.
>
> * * * * *
>
> [A] civil action for maintenance and cure or for damages for personal injury or death may not be brought under a maritime law of the United States if . . . the individual suffering the injury . . . was not a citizen or permanent resident alien of the United States . . . the incident occurred in the territorial waters . . . overlaying the continental shelf of a country other than the United States . . . and the individuals suffering the injury . . . was employed . . . by a person . . . engaged in the exploration . . . of energy resources. . . .

The Death on the High Seas Act, 46 U.S.C. §§ 30302-30303:

> When the death of an individual is caused by wrongful act . . . occurring on the high seas . . . of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. . . . The recovery in an action under this chapter shall be a fair compensation for the pecuniary loss sustained by

the individuals for whose benefit the action is brought.

INTRODUCTION

The Eleventh Circuit held in *Atlantic Sounding Company v. Townsend*, 496 F.3d 1282 (11th Cir. 2007), that seamen may recover punitive damages for their employers' willful failure to pay maintenance and cure. That holding conflicts with four other circuits and two state courts of last resort that decided the same issue. Moreover, *Townsend* fails to follow *Miles v. Apex Marine Corporation*, 498 U.S. 19 (1990), and *Vaughan v. Atkinson*, 369 U.S. 527 (1962).

In *Miles*, this Court articulated what has subsequently been referred to in admiralty jurisprudence as the "Miles Uniformity Principle." *Miles* teaches that, because Congress has addressed the remedies available to seamen, the courts must defer to Congress and the dominating statutes to determine what remedies are available to seamen under general maritime law. The dominating statutes for seamen are the Jones Act (which incorporates the remedies available under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51) and the Death on the High Seas Act ("DOHSA"), none of which allow for the recovery of punitive damages. 46 U.S.C. § 30104-30105; 46 U.S.C. § 30302.

Townsend ignores the Miles Uniformity Principle and allows a punitive damage remedy that is not

provided by any statute governing a seaman's personal injury or death claim. In doing so, *Townsend* conflicts with three circuits and two state courts of last resort that hold the Miles Uniformity Principle either precludes or militates against an award of punitive damages in a maintenance and cure case. *See Kopacz v. Delaware River and Bay Authority*, 248 Fed. App'x 319 (3d Cir. 2007); *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir.) (*en banc*), *cert. denied*, 516 U.S. 1046 (1996); *Glynn v. Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495 (9th Cir.), *cert. denied*, 516 U.S. 1046 (1996); *Stone v. Int'l Marine Carriers, Inc.*, 918 P.2d 551 (Alaska 1996); *Maritime Overseas Corp. v. Waiters*, 917 S.W.2d 17 (Tex. 1996).

Townsend is also in conflict with *Vaughan. Vaughan* holds that seamen are entitled to recover attorney's fees for the willful failure to pay maintenance and cure. The *dissent* in *Vaughan* argued that "exemplary damages" should have been awarded. If *Townsend* is traced to its inception, *Townsend's* holding is based on the dubious rationale advanced by three other circuits that the mere mention of "exemplary damages" in the *Vaughan* dissent authorizes punitive damages in a maintenance and cure case. *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048 (1st Cir. 1973); *Manuel v. United States*, 50 F.3d 1253 (4th Cir. 1995); *Al-Zawkari v. American S.S. Co.*, 871 F.2d 585 (6th Cir. 1989). On the other hand, the Second Circuit directly conflicts with *Townsend's* interpretation of *Vaughan* and rejects punitive damages in maintenance and cure cases. *See Kraljic v. Berman Enter.,*

Inc., 575 F.2d 412, 415-16 (2d Cir. 1978) (finding "obvious difficulty" with following a dissenting opinion and holding that no authority permits seamen to recover punitive damages in a maintenance and cure case).

This Court has often stressed the need for uniformity in the interpretation of admiralty law. *See, e.g., Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) ("[F]ederal admiralty law should be a system of law coextensive with, and operating uniformly in, the whole country."). In particular, *Miles* instructs that courts throughout the nation should interpret general maritime law in a way that ensures a uniform system of damage remedies for seamen, regardless of the basis of the action or the court in which the lawsuit is filed. The current conflict will promote forum shopping. The Court should take this opportunity to restore uniformity in the application of *Miles* and to ensure that the remedies extended in a maintenance and cure case are consistent, whatever the circuit, whatever the court, throughout the nation.

Finally, Weeks Marine anticipates that Mr. Townsend will assert that *Baker v. Exxon Shipping Company* answers positively the question presented in this case. No. 07-219, 2008 WL 2511219 (June 25, 2008). *Baker* offers no such answer. *Baker* is inapplicable because it analyzes the availability of punitive damages in a vessel pollution case. This case involves whether punitive damages are available in a seaman's maintenance and cure action under general

maritime law in view of the Miles Uniformity Principle and the applicable statutes (the Jones Act, FELA, and DOHSA). Therefore, relying on *Baker* to argue that punitive damages are available to seamen will create further confusion in an area of law that is already burdened with significant conflict.

STATEMENT OF THE CASE

I. Factual Background

In the suit below, seaman Edgar L. Townsend's ("Mr. Townsend") asserts that an alleged trip and fall aboard a tugboat gives rise to claims for Jones Act negligence, general maritime law unseaworthiness, and general maritime law maintenance and cure. With respect to his maintenance and cure claim, Mr. Townsend is claiming punitive damages.

II. Proceedings Below

On 16 March 2006, Weeks Marine filed its Motion to Strike, or, in the Alternative Dismiss Mr. Townsend's Request for Punitive Damages ("Motion to Strike"). Weeks Marine's Motion to Strike included the argument that the Miles Uniformity Principle precluded Mr. Townsend from seeking punitive damages under general maritime law.

The District Court denied the Motion to Strike because, notwithstanding *Miles*, the District Court concluded that it was bound by *Hines v. LaPorte, Inc.,*

820 F.2d 1187 (11th Cir. 1987) (the "Punitive Damages Order"). *Hines* is an Eleventh Circuit decision that cites overruled, pre-*Miles* Fifth Circuit precedent in holding that seamen may recover punitive damages for employers willfully failing to pay maintenance and cure. 820 F.2d at 1189.

Weeks Marine filed its Motion for Reconsideration of the Punitive Damages Order, or Alternatively, Motion for Certification Pursuant to 28 U.S.C. § 1292(b) and Stay. The District Court denied Weeks Marine's request to reconsider its Punitive Damages Order, but granted the request for certification and stay pursuant to 28 U.S.C. § 1292(b). The pure question of law certified by the District Court is, "Whether punitive damages may be legally awarded in a case where maintenance and cure has been arbitrarily and willfully withheld from a seaman?"

The Eleventh Circuit granted Weeks Marine's Petition for Permission to Appeal Pursuant to Section 1292(b). On 23 August 2007, the Eleventh Circuit held that the Miles Uniformity Principle does not control the availability of punitive damages in a maintenance and cure case and reaffirmed *Hines*. *Townsend*, 496 F.3d at 1285-86.

On 11 September 2007, Weeks Marine filed a Petition for Rehearing En Banc. On 27 May 2008, the Eleventh Circuit denied Weeks Marine's request. This Petitions follows.

REASONS FOR GRANTING THE PETITION

I. Certiorari Is Appropriate To Resolve A Four-Four Split Among The Circuit Courts

Townsend is emblematic of the conflict among the circuit courts that exists on two different levels. As demonstrated below, *Townsend* and the other decisions that allow punitive damages are contrary to the majority opinion in *Vaughan*, 369 U.S. 527, which only authorizes the recovery of attorney's fees. Likewise, *Townsend* is inconsistent with the uniformity principle articulated in *Miles*, 498 U.S. 19.

A. Circuit Conflict Exists Regarding Whether The Dissent In *Vaughan* Authorizes Punitive Damages

1. The First and Second Circuits Conflict

In 1962, this Court sanctioned the award of attorney's fees as "necessary expenses" for the willful failure to pay maintenance and cure. *Vaughan*, 369 U.S. at 530-31. Although the majority opinion awarded only attorney's fees as "necessary expenses," the dissent in *Vaughan* sowed the seeds of conflict and confusion by arguing that a seaman should recover "exemplary damages" that "would not necessarily be measured by the amount of counsel fees." *Vaughan*, 369 U.S. at 534-40.

Eleven years later, the First Circuit relied on the dissent's reference to "exemplary damages" to become

the first circuit court in the nation to hold that *Vaughan* authorizes the recovery of punitive damages for the willful failure to pay maintenance and cure. *Robinson*, 477 F.2d at 1051. Without providing a valid explanation, the First Circuit quoted the *Vaughan* dissent in affirming the trial court's decision to permit an award of punitive damages. *Robinson*, 477 F.2d at 1051.

In 1978, the Second Circuit created the initial conflict regarding the recovery of punitive damages for the willful failure to pay maintenance and cure. *Kraljic*, 575 F.2d 412. Unlike the First Circuit, *Kraljic* was troubled by the "obvious difficulty with . . . follow[ing] the views of the dissenters in [*Vaughan*] and not the majority." *Kraljic*, 575 F.2d at 415. Because "the majority [in *Vaughan*] saw fit to go no further than . . . counsel fees," *Kraljic* "fe[lt] constrained to follow [the holding of *Vaughan*]" and reversed the district court's decision to allow punitive damages for the willful failure to pay maintenance and cure. 575 F.2d at 416-17. The conflict between *Kraljic* and *Robinson* remains to this day.

2. The Eleventh Circuit Follows *Robinson* And Pre-*Miles* Fifth Circuit Precedent

In 1981, the former Fifth Circuit relied on *Vaughan* and *Robinson* to hold that an injured seaman may recover punitive damages "when a shipowner has

willfully violated the duty to furnish and maintain a seaworthy vessel." *Complaint of Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir. Unit B 1981). After the Eleventh Circuit was created, the Fifth Circuit extended *Merry Shipping* by holding that seamen are also entitled to punitive damages for the willful failure to pay maintenance and cure. *See Holmes v. J. Ray McDermott Co.*, 734 F.2d 1110, 1117-18 (5th Cir. 1987).

Similar to the First Circuit, the Fifth Circuit failed to explain why it found the *Vaughan* dissent compelling. *See Holmes*, 734 F.2d at 1118. Notwithstanding the weak underpinnings of the Fifth Circuit's precedent and *Kraljic's* criticism of *Robinson*, the Eleventh Circuit cited *Merry Shipping* and *Holmes* as support for its holding in *Hines* that seamen may recover punitive damages for the willful failure to pay maintenance and cure. *Hines*, 820 F.2d at 1187.

3. The Fourth And Sixth Circuits Follow *Robinson*

The Fourth and Sixth Circuits suggest that they follow *Robinson* and not *Kraljic*. *Manuel*, 50 F.3d 1253; *Al-Zawkari*, 871 F.2d 585. In *Manuel*, the Fourth Circuit cites *Robinson* and *Holmes* with approval in confirming that "[p]unitive damages . . . [are] an additional remedy in the seaman's maintenance and cure case." *See Manuel*, 50 F.3d at 1260. Similarly, the Sixth Circuit cites to *Holmes* in

Al-Zawkari to explain that seamen may only recover punitive damages when the employer willfully denies maintenance and cure. 871 F.2d at 590, n. 8.

B. The Miles Uniformity Principle Turns The Tide Against Punitive Damages As A Proper Remedy For Seamen

In *Miles,* the representative of a seaman's estate brought suit against various defendants, including the shipowner, alleging negligence under the Jones Act and breach of the general maritime law warranty of seaworthiness. 498 U.S. at 22. The specific issue before this Court was whether a non-dependent parent could recover non-pecuniary, loss of society damages in a general maritime wrongful death action.

Before deciding the issue, this Court discussed *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, at length because it "exemplifies the fundamental principles that guide [a] decision in [a maritime] case." *Miles*, 498 U.S. at 27. In *Moragne*, this Court recognizes that decisions addressing maritime remedies must ensure consistency with the Jones Act and DOHSA and effectuate "the constitutionally based principle that federal admiralty law should be a system of law coextensive with, and operating uniformly in, the whole country." *Miles*, 498 U.S. at 27. This Court states as follows:

> [W]e no longer live in an era when seamen and their loved ones must look primarily to

> the courts as a source of substantive legal protection from injury and death . . . [I]n this era, . . . Congress retains superior authority in these matters, and *an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. The [Congressional] statutes both direct and delimit [a court's] actions*.

Miles, 498 U.S. at 27 (emphasis added).

After confirming that the remedies provided by the Jones Act and DOHSA would "direct and delimit" its actions, this Court analyzed those dominating statutes to determine whether they allow for non-pecuniary, loss of society damages. The Court concluded that DOHSA's prohibition of non-pecuniary damages is clear because Congress specifically limits damages to "pecuniary loss sustained by the persons for whose benefit the suit is brought." *Miles*, 498 U.S. at 31 (citing 46 U.S.C. § 30303). In analyzing the Jones Act, this Court followed previous decisions in concluding that by "[i]ncorporating the FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well." *Miles*, 498 U.S. at 32; *see also Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 224 (1996) (confirming that *Miles* recognizes that the Jones Act, which "provides 'action for damages' to '[a]ny seaman who shall suffer personal injury,' permits *compensation only for pecuniary loss*") (emphasis added); *Guevara*, 59 F.3d at 1507, n. 9 (collecting cases including *Pacific S.S. Co. v. Peterson*, 278

U.S. 130, 136-39 (1928), and *St. Louis, Iron Mountain & Southern Ry. Co. v. Craft*, 237 U.S. 648, 656 (1915)).

Guided by *Moragne's* "fundamental principles" and the knowledge that DOHSA and the Jones Act prohibit seamen from recovering non-pecuniary damages, *Miles* holds that Congress' "explicit limitation [expressed by statute] forecloses recovery for non-pecuniary loss, such as loss of society, in a general maritime action" brought by a seaman. *Miles*, 498 U.S. at 31. *Miles* reasons that "[i]t would be inconsistent with [the Court's] place in the constitutional scheme were [it] 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. . . ." *Miles*, 498 U.S. at 32-33; *see also Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) (explaining that in an "area covered by [a] 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").

Miles forcefully explains as follows:

> 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 [for seaman in the Jones Act]. Because the case

> involves . . . a seaman, we must look to the Jones Act.

498 U.S. at 36. Hence, *Miles* "restore[s] a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law." *Miles*, 498 U.S. at 33.

C. The Post-*Miles* Conflicts In The Federal Circuits

After this Court decided *Miles*, circuit courts addressing the question of the availability of punitive damages for the willful failure to pay maintenance and cure confirmed that the subject was no longer guided solely by the decision of whether to follow *Robinson's* or *Kraljic's* interpretation of *Vaughan*. The first circuit to recognize the relevance of the Miles Uniformity Principle was the Ninth Circuit.

In *Glynn*, the Ninth Circuit analyzes *Vaughan* and *Miles* and holds that a seaman may not recover punitive damages in a maintenance and cure case. *Glynn* flatly rejects *Robinson* and states that it "see[s] no . . . reason why punitive damages, in addition to attorney's fees, should be allowed." *Glynn*, 57 F.3d at 1505. Furthermore, *Glynn* found that "limiting recovery to pecuniary damages [and prohibiting the recovery of punitive damages] is consistent with *Miles*[']" admonishment of attempts to utilize general maritime law to expand the remedies offered to seamen beyond the controlling legislation (i.e., the Jones Act and DOHSA). *Glynn*, 57 F.3d at 1505; *see also In re*

EXXON VALDEZ, 270 F.3d 1215, 1226-27 (9th Cir. 2001) (noting that the Ninth Circuit holds that punitive damages are unavailable in a maintenance and cure case for a number of reasons, including recognition in *Glynn* that "under *Miles* . . . we were not free to expand seamen's remedies at will").

Less than one month after *Glynn* was decided, the Fifth Circuit went en banc to analyze whether *Miles* precludes seamen from recovering punitive damages in a maintenance and cure case. *Guevara*, 59 F.3d 1446. The Fifth Circuit recognized that "it should be clear that actions under the general maritime law for *personal injury* are also subject to the *Miles* uniformity principle, as non-fatal actions for personal injury to a seaman are covered by statute – i.e., the Jones Act." *Guevara*, 59 F.3d at 1506 (emphasis in original). Consequently, "[a]fter *Miles*, it is [also] clear that [pre-*Miles* precedent allowing punitive damages] has been effectively overruled. [Pre-*Miles* precedent] . . . is no longer good law in light of the *Miles* uniformity principle because . . . the Jones Act damages limitations control." *Guevara*, 59 F.3d at 1507.

After recognizing that *Miles* "effectively overruled" its previous case law, the Fifth Circuit held that punitive damages are no longer available for the willful failure to pay maintenance and cure. 59 F.3d at 1507-13. Significantly, the Fifth Circuit also warned the Eleventh Circuit that "[o]f course, *Hines'* reliance on [pre-*Miles* precedent] is now analytically problematic because . . . [the decisions were]

effectively overruled by the later decision in *Miles*." 59 F.3d at 1509.

The Eleventh Circuit ignored *Guevara's* shot across the bow and chose to adhere to *Hines* in *Townsend*, 496 F.3d 1282. Contrary to the reasoning of *Miles*, contrary to the holding in *Vaughan*, contrary to the decisions in *Glynn* and *Guevara*, and seemingly untroubled by its "analytically problematic" reliance upon precedent overruled by the Fifth Circuit, the Eleventh Circuit followed *Hines* to hold that punitive damages are available for the willful failure to pay maintenance and cure. *Townsend*, 496 F.3d 1282. *Townsend* is devoid of any meaningful analysis of the conflict that it perpetuates.

Within ten days of the decision in *Townsend*, the Third Circuit reached the opposite result when it decided *Kopacz v. Delaware River and Bay Authority*, 248 Fed. App'x 319. *Kopacz* joins *Glynn* and *Guevara* to hold that *Miles* precludes seamen from recovering punitive damages in a maintenance and cure case. 248 Fed. App'x at 323. *Kopacz* explains as follows:

> Although the *Miles* case addressed a wrongful death action brought under general maritime law, the holding is applicable in this case because the failure to provide maintenance and cure is similarly a 'judicially created cause of action in which liability is without fault.'

248 Fed. App'x at 323. Thus, the Third Circuit "follow[s] the majority of courts" by recognizing that the

Miles Uniformity Principle precludes seamen from receiving punitive damages for the willful failure to pay maintenance and cure. *Kopacz*, 248 Fed. App'x at 323.

D. The Four-Four Circuit Conflict Provides A Compelling Reason For Granting The Petition

The Court should grant the writ of certiorari in this case because *Townsend* impermissibly expands the holding of *Vaughan*, improperly fails to apply the Miles Uniformity Principle, and brings into sharp focus the four-four split among the circuits regarding the availability of punitive damages in a maintenance and cure case. *Compare Kopacz*, 248 Fed. App'x 319, *Guevara*, 59 F.3d 1496, *Glynn*, 57 F.3d 1495, *and Kraljic*, 575 F.2d 412 *with Townsend*, 496 F.3d 1282, *Manuel*, 50 F.3d 1253, *Al-Zawkari*, 871 F.2d 585, *and Robinson*, 477 F.2d 1048. This issue is ripe for review.

II. Certiorari Is Appropriate To Resolve The Conflict Between *Townsend* And Two State Courts Of Last Resort

Townsend not only conflicts with the Third, Fifth and Ninth Circuit's post-*Miles* decisions, but also conflicts with the decisions of two state courts of last resort that have interpreted *Miles* as foreclosing a seaman's ability to recover punitive damages in a maintenance and cure case. *See Stone*, 918 P.2d 55; *Waiters*, 917 S.W.2d 17. Contrary to *Townsend*, the

Supreme Court of Alaska followed the "Fifth and Ninth Circuits" to hold that "allowing the recovery of punitive damages in a maintenance and cure case would be inconsistent with the principles set forth in *Miles*." *Stone*, 918 P.2d at 556.

Similarly, the Supreme Court of Texas concludes in *Waiters* that *Guevara* "accurate[ly] state[s]" the impact of *Miles.* 917 S.W.2d at 18. "Punitive damages, like loss of society damages, are nonpecuniary losses and are not recoverable under the Jones Act." *Waiters*, 917 S.W.2d at 18. Consequently, to "award punitive damages in maintenance and cure claims involving personal injuries would be inconsistent with remedies for those injuries available under the Jones Act." *Waiters*, 917 S.W.2d at 18.

Townsend conflicts with two state supreme courts deciding this important federal question and provides an additional reason why this Court should grant the petition.

III. Certiorari is Appropriate Because the Constitution and the Jones Act Require Uniform Remedies for Seamen

A. This Court Consistently Recognizes the Need For Uniformity in General Maritime Law

"[S]ince the birth of this Nation," maritime commerce has been recognized as its "jugular vein." *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 501 (1998) (quoting F. Frankfurter & J. Landis, *The*

Business of the Supreme Court 7 (1927)). Because of the importance of maritime commerce, maritime law has a "more powerful constitutional basis than other federal law" and "[t]he need for a body of [maritime] law applicable throughout the nation was recognized by every shade of opinion in the Constitutional Convention." Charles M. Davis, *Federal Supersession of State Workers' Compensation Acts as Applied to Jones Act Seamen*, 8 U.S.F. Mar. L.J. 185, 191-92 (1996) (explaining how the Commerce, Supremacy, and Admiralty Clauses all allocate powers to Congress and the federal courts to allow for the uniform laws that govern maritime commerce); *Deep Sea Research*, 523 U.S. at 501; *see also Kirby*, 543 U.S. at 25 ("[w]e have reiterated that the 'fundamental interest giving rise to maritime jurisdiction is the protection of maritime *commerce*' ") (quoting *Exxon Corp. v. Cent. Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991)). This Court explains as follows:

> Article III's grant of admiralty jurisdiction " 'must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed. . . .' "

Kirby, 543 U.S. at 28 (quoting *Am. Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994) (quoting *The Lottawanna*, 88 U.S. 558, 575 (1875)). Accordingly, nothing is more settled than the need for uniformity in maritime law.

Because of the Constitutional need to ensure a system of coextensive maritime law throughout the nation, this Court frequently exercises its jurisdiction to correct conflicting jurisprudence regarding maritime remedies. *See, e.g., Dooley v. Korean Air Lines Co.*, 524 U.S. 116 (1998); *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1996); *Miles*, 498 U.S. 19; *Higginbotham*, 43 U.S. 618. Moreover, this Court's duty to ultimately declare uniform law is heightened when the question at issue involves "the determination of employer liability to seamen" because the "Jones Act adopts the 'uniformity requirement' of the FELA," which requires all federal and state courts to consistently apply the statute that governs seamen's legal remedies. *Miller*, 510 U.S. at 455-56.

B. Lower Federal And State Court Decisions Confirm That The Law Is Not Uniform

Despite this Court's articulated desire to ensure uniform remedies for seamen, the law is anything but uniform. To be blunt, the law is a conflicting mess and ripe for forum shopping. *See, e.g.,* Robert Force, *The Legacy of Miles v. Apex Marine Corp.*, 30 Tul. Mar. L.J. 35, 42 (2006) (discussing the conflicts that exist among 116 federal cases and numerous state cases that analyze the affect of the Miles Uniformity Principle on plaintiffs' claims for non-pecuniary damages (punitive or loss of society damages)); Thomas J. Schoenbaum, *Admiralty and Maritime Law* §§ 6-34 (4th ed. 2004) (collecting a substantial

number of conflicting pre- and post-*Miles* decisions that address the availability of punitive and loss of society damages for seamen).

Consider the example of a seaman sailing the waters of the United States. As the seaman travels on a clockwise voyage, starting in the Northeast and bound for the West Coast, the supposedly "uniform remedies" available to the seaman change on an almost state-by-state basis.

The trip begins in Maine, where the First Circuit approves of punitive damages in a general maritime law maintenance and cure case, but paradoxically, recognizes that the Miles Uniformity Principle precludes the recovery of punitive damages in a personal injury, general maritime law unseaworthiness claim. *Compare Robinson*, 477 F.2d at 1051 *and Ellenwood v. Exxon Shipping Co.,* 984 F.2d 1270 (1st Cir. 1993) (reaffirming the ability of seamen to recover punitive damages) *with Horsley v. Mobil Oil Corp.*, 15 F.3d 200 (1st Cir. 1994) (following the reasoning of *Miles* and precluding seamen from recovering punitive damages or loss of society damages because they are non-pecuniary damages). District courts within the First Circuit either suggest that *Robinson* remains good law or deny that *Miles* precludes the recovery of punitive damages in a maintenance and cure case. *See Williamson v. Horizon Lines*, *LLC*, Civil No. 06-119-B-W, 2008 WL 2222055, at *2 (D. Me. Feb. 26, 2008) (noting that a seaman may recover punitive damages); *Smith v. Mar*, 877 F. Supp. 62, 67 (D. R.I.

1995) (denying that *Miles* precludes the recovery of punitive damages).

The right to recover punitive damages ends as a seaman sails into New York Harbor or along the Delaware River.[1] *Kraljic*, 575 F.2d at 415-16; *Kopacz*, 248 Fed. App'x 319. However, further complexity arises as the seaman's vessel continues south and enters the waters of Virginia, North Carolina, or South Carolina. The Fourth Circuit suggests approval of *Robinson* and confirms that seamen may recover punitive damages, but published district court opinions within the Fourth Circuit conflict. *Compare Manuel*, 50 F.3d 1253 *and Lady Deborah, Inc. v. Ware*, 855 F. Supp. 871, 871, n. 1 (E.D. Va. 1994) (generally stating that seamen may recover punitive damages in a maintenance and cure case) *with Boyd v. Cinmar of Gloucester, Inc.,* 919 F. Supp. 208, 209-11 (E.D. Va. 1996) (recognizing that *Manuel* exists, but holding that *Miles* precludes the recovery of punitive damages in a maintenance and cure case) *and Carolina Clipper, Inc. v. Axe*, 902 F. Supp. 680, 683-84 (E.D. Va. 1995) (same).

---

[1] Because the Third Circuit "by tradition does not cite to its not precedential opinions as authority," litigants along the Delaware River could technically argue that they are not bound to follow *Kopacz's* bar on punitive damages. Third Circuit Internal Operating Procedures Rule 5.7. The ability of litigants to rely upon *Kopacz's* designation as "not precedential" to seek an opposite result further complicates the current status of the law and adds to the reasons for accepting this petition.

Once the voyage down the East Coast reaches Georgia, punitive damages are allowed pursuant to *Townsend*. However, as discussed in Section I.C. above, the precedent relied upon by the Eleventh Circuit was overruled by the Fifth Circuit. *See Townsend*, 496 F.3d 1282; *Guevara*, 59 F.3d at 1509 ("[o]f course, *Hines'* reliance on [pre-*Miles*, Fifth Circuit precedent] is now analytically problematic because . . . [those decisions were] effectively overruled by the later decision in *Miles*").[2] Prior to *Townsend*, district courts in Georgia recognized that *Hines* was no longer good law and the Miles Uniformity Principle precluded seamen from recovering punitive damages. *See Ponder v. M/V CHILBAR*, 2002 AMC 2022 (S.D. Ga. 2002); *Blige v. M/V GEECHEE GIRL*, 180 F. Supp. 2d 1349 (S.D. Ga. 2001).

Seamen stopping in Florida's ports are greeted with decisions that create a county-by-county conflict. *Compare Nurkiewicz v. Vacation Break U.S.A., Inc.*, 771 So. 2d 1271 (Fla. Dist. Ct. App. 2000) (recognizing

---

[2] Courts within the Eleventh Circuit are "guided" by a decision that adopts the rationale of overruled decisions and must also attempt to reconcile that the Eleventh Circuit relies on the Miles Uniformity Principle to hold that seamen may not recover any form of non-pecuniary damages in a personal injury, unseaworthiness claim. *Lollie v. Brown Serv. Inc.*, 995 F.2d 1565 (11th Cir. 1993) (per curiam). No logical reason exists for applying the Miles Uniformity Principle to the general maritime law claim of unseaworthiness, but not applying the same reasoning to a general maritime law maintenance and cure claim – both of which are no-fault remedies for injured seamen.

that the reasoning of *Miles* precludes seamen from recovering punitive damages) *with Norwegian Cruise Lines, Ltd. v. Zareno*, 712 So. 2d 791 (Fla. Dist. Ct. App. 1998) (including dicta that confirms the availability of punitive damages) *and Kloster Cruise Ltd. v. Segui*, 679 So. 2d 10 (Fla. Dist. Ct. App. 1996) (recognizing that *Guevara* and *Miles* may have undermined its previous precedent approving of punitive damages, but (like the Eleventh Circuit) deciding to follow pre-*Miles* precedent).

Not only have Florida state courts failed to consistently apply the Miles Uniformity Principle, but the existence of *Townsend* also creates forum shopping opportunities for seamen analyzing whether to file in state or federal court. Seamen that file lawsuits within the same Florida county could find punitive damages denied in state court while the federal court within that county might feel compelled to follow *Townsend.*

A visit to the Gulf of Mexico returns the seaman to a geographical region where punitive damages are unavailable. The Fifth Circuit, which has undertaken the most thorough and consistent analysis of *Miles*, holds that punitive damages are not recoverable. *Guevara*, 59 F.3d 1496; *see also Murray v. Anthony J. Bertucci Constr., Inc.*, 958 F.2d 127 (5th Cir.), *cert. denied*, 506 U.S. 865 (1992) (stating that the "reasoning [of *Miles*] applies with equal force to a seaman's claim for injuries" and holding that "[a]s a result, the Jones Act limits a seaman's recovery for injury to pecuniary losses and precludes any recovery for

non-pecuniary losses, such as loss of society"); *Michel v. Total Transp., Inc.*, 957 F.2d 186 (5th Cir. 1992) (same); *Waiters*, 917 S.W.2d 17.

As the seaman leaves the Gulf of Mexico and continues the voyage up the Mississippi River, the availability of punitive damages is equally uncertain. Like the First and Eleventh Circuits, the Sixth Circuit's jurisprudence is inconsistent with respect to the availability of punitive damages under general maritime law. Specifically, the Sixth Circuit asserts that punitive damages are available in a maintenance and cure action (*see Al-Zawkari*, 871 F.2d 585), but utilizes the Miles Uniformity Principle to hold that punitive damages are not available in a wrongful death action alleging unseaworthiness. *Miller v. Am. President Lines, Ltd.*, 989 F.2d 1450 (6th Cir.), *cert. denied*, 510 U.S. 915 (1993); *see also Hoeffling v. U.S. Steel*, 792 F. Supp. 1029, 1030 (E.D. Mich. 1991) (recognizing that "[t]here is a noticeable absence of case authority in the Sixth Circuit on this issue," but relying on *Al-Zawkari* to hold that punitive damages are available in a maintenance and cure case).

Further up the river, the Seventh and Eighth Circuits have not addressed the issue and the district courts along the Mississippi's banks have failed to provide a uniform answer. *Compare Frost v. TECO Barge Lines*, No. 04-CV-00752-DRH, 2005 WL 1389118, at *2 (S.D. Ill. June 1, 2005) (denying the recovery of punitive damages by seamen and stating that "[w]hile the Seventh Circuit has not considered whether punitive damages are available

under general maritime law," "[t]he court finds the reasoning of the Fifth and Ninth Circuits persuasive on this issue"); *Watters v. Harrah's Illinois Corp.*, 993 F. Supp. 667 (N.D. Ill. 1998) (denying the recovery of punitive damages by seamen), *and Owens v. Conti-carriers & Terminals, Inc.*, 591 F. Supp. 777 (W.D. Tenn. 1984) (adopting the reasoning of *Kraljic* in denying the recovery of punitive damages by seamen) *with McNeil v. Jantran, Inc.* 258 F. Supp. 2d 926, 931 (W.D. Ark. 2003) (stating in dicta that an employer is liable for punitive damages for the willful failure to pay maintenance and cure) *and White v. Am. River Transp. Co.*, 853 F. Supp. 300 (S.D. Ill. 1993) (analyzing *Miles*, but holding that seamen may recover punitive damages for the willful failure to pay maintenance and cure).

Last, employers and seamen operating in the Pacific Ocean receive the benefit of a uniform answer regarding the recoverability of punitive damages in a maintenance and cure case. The uniformity results only because California, Oregon, Washington, Hawaii and Alaska are all within the Ninth Circuit. Consequently, *Glynn* controls and seamen are precluded from recovering punitive damages. 57 F.3d 1495; *Stone*, 918 P.2d 551.

C. Review Of *Townsend* Allows This Court To Restore The Uniformity Required By The Constitution And The Jones Act

The Petitioners' survey of federal and state case law throughout the nation is not exhaustive. However, the survey highlights the multiple conflicts that exist within a body of law where the Constitution requires uniformity. This case provides the opportunity for the Court to restore the uniformity in maritime remedies that the Constitution and the Jones Act require. This Court should address the nationwide conflict, which allows for forum shopping at the state and federal levels, and provide one answer regarding whether a seaman may recover punitive damages in a maintenance and cure case.

IV. Certiorari Is Appropriate Because *Baker* Does Not Resolve The Conflict

Weeks Marine anticipates that Mr. Townsend will argue that this Court's recent decision in *Baker v. Exxon Shipping Company* undermines the Miles Uniformity Principle and supports the argument that seamen may recover punitive damages in a maintenance and cure claim. 2008 WL 2511219, at *1. In addition to the Ninth Circuit's explicit recognition that its holding in *Baker* was distinguishable from *Glynn*, an analysis of this Court's reasoning in *Baker* further confirms that *Baker* does not speak to the current eight circuit conflict. *See In re EXXON VALDEZ*, 270 F.3d at 1226-27 (emphasizing that "*Glynn* was about maintenance and cure" and "is clearly

distinguishable" from analyzing the availability of punitive damages in a vessel pollution case). Any reference to *Baker* will simply create additional confusion regarding the effect of *Miles*.

Baker addresses Exxon's argument that the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, prevents private individuals from recovering punitive damages in a general maritime law claim arising out of the EXXON VALDEZ's pollution of Prince William Sound in Alaska. 2008 WL 2511219, at *8-10. Unlike the Jones Act and its maintenance and cure counterpart (both of which protect seamen), the CWA did not preempt the plaintiffs' claims in *Baker* because the statute protects the "water" and "shorelines" and not "private individuals."[3] *Baker*, 2008 WL 2511219, at *10. Consequently, this Court "f[ound] it too hard to

[3] Other distinguishing factors exist. Contrary to the CWA, the Jones Act specifically references the general maritime law claim (maintenance and cure) that Weeks Marine asserts is displaced by Congress. *See* 46 U.S.C. § 30105(b) (describing "civil action[s]" controlled by the restrictions of subsection (b) as actions "for maintenance and cure or for damages for personal injury or death . . . "); *see also Guevara*, 59 F.3d at 1511, n. 14 (relying upon the language of 46 U.S.C. § 30105(b) as further support for deciding that the Jones Act and a tort-like maintenance and cure action overlap). Additionally, unlike the question of first impression presented in *Baker*, the Jones Act is steeped in a rich history of Supreme Court and circuit court precedent that unanimously finds Congress intended the Jones Act (and FELA) to sanction the recovery of compensatory damages only. *See Zicherman*, 516 U.S. at 224; *Miles*, 498 U.S. at 32; *Peterson*, 278 U.S. at 136-39; *Craft*, 237 U.S. at 656; *Guevara*, 59 F.3d at 1507, n. 9 (collecting cases).

conclude that a statute expressly geared to protecting . . . 'natural resources' was intended to eliminate *sub silentio* oil companies' common law duties to refrain from injuring . . . private individuals." *Baker*, 2008 WL 2511219, at *10.

Baker also differs from this Court's previous analysis of the dominating statutes for seaman in that the CWA includes a "saving clause reserving 'obligations . . . under any provision of law for damages to any . . . privately owned property resulting from a discharge of any oil.'" *Baker*, 2008 WL 2511219 at *10 (quoting 33 U.S.C. § 1321(o)). Common sense dictates that this Court would not have needed to address the effect of the Jones Act on seamen's general maritime law remedies if that statute included a "saving clause." *See Miles*, 498 U.S. 19.

In short, *Baker* does not settle the conflict. Courts should continue to follow *Miles* in maintenance and cure cases because the CWA is not analogous to the dominating statutes applicable to seamen. *Baker's* analysis has nothing to do with this Court's mandate that "*an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation*" for seamen. *Miles*, 498 U.S. at 27 (emphasis added). Those circuit courts that refuse to apply the Miles Uniformity Principle may, perhaps, find comfort in *Baker* because it permits an award of punitive damages. Ultimately, *Baker* settles nothing concerning the application of the Miles Uniformity Principle to seamen's claims, does not create the uniformity of law among the circuits required by the Constitution, and makes no attempt

to settle the conflict created by *Vaughan*. Therefore, this Court's guidance on whether the Miles Uniformity Principle precludes the recovery of punitive damages in a maintenance and cure case remains the only hope for creating a uniform rule of law for seamen and maritime employers throughout the United States.

CONCLUSION

This Court should grant the petition and exercise its jurisdiction.

Respectfully submitted,

DAVID W. MCCREADIE
(*Counsel of Record*)
EDDIE G. GODWIN
LAU, LANE, PIEPER,
CONLEY & MCCREADIE, P.A.
100 South Ashley Drive,
Suite 1700
Tampa, Florida 33602
Telephone: (813) 229-2121

and

STEVEN L. BRANNOCK
HOLLAND & KNIGHT, LLP
100 North Tampa Street,
Suite 4100
Tampa, Florida 33602

Attorneys for Petitioners

Dated: 18 August 2008

496 F.3d 1282

United States Court of Appeals, Eleventh Circuit.

ATLANTIC SOUNDING CO., INC., Weeks Marine, Inc., Plaintiffs-Counter-Defendants-Appellants,

v.

Edgar L. TOWNSEND, Defendant-Counter-Claimant-Appellee, Thomas Kimbrough, Defendant.

No. 06-13204.

Aug. 23, 2007.

David W. McCreadie, Eddie G. Godwin, Michael Kestenbaum, Lau, Lane, Pieper, Conley & McCreadie, P.A., Tampa, FL, for Plaintiffs-Counter-Defendants-Appellants.

Gerard Joseph Sullivan, Jr., Sullivan & Co., Jacksonville, FL, for Townsend.

Appeal from the United States District Court for the Middle District of Florida.

Before EDMONDSON, Chief Judge, and CARNES and FAY, Circuit Judges.

EDMONDSON, Chief Judge:

In this interlocutory appeal, Plaintiffs-Appellants Atlantic Sounding Co., Inc., and Weeks Marine, Inc. ("Plaintiffs") appeal the district court's denial of Plaintiffs' motion to strike Defendant-Appellee Edgar L. Townsend's ("Defendant") request for punitive damages. The district court concluded that it was bound by our prior panel decision in *Hines v. J.A. LaPorte, Inc.,* 820 F.2d 1187 (11th Cir.1987), which

permits a seaman to recover punitive damages when an employer arbitrarily and willfully refuses to pay maintenance and cure. Plaintiffs contend that *Hines* was abrogated by *Miles v. Apex Marine Corp.,* 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990), in which the Supreme Court concluded that recovery for non-pecuniary loss in the wrongful death of a seaman was not available under general maritime law. We conclude that our prior decision in *Hines* remains binding law in this Circuit; therefore, we affirm.

On 5 July 2005, Defendant, a seaman and crew member of the Motor Tug Thomas, allegedly slipped and landed shoulder first on the steel deck of the vessel, injuring his shoulder and clavicle. According to Defendant, Plaintiffs advised him that they would not provide him with maintenance and cure, which covers medical care, a living allowance, and wages for seamen who become ill or are injured while serving aboard a vessel.[1] Plaintiffs then filed this suit for

[1] In *Flores v. Carnival Cruise Lines,* 47 F.3d 1120, 1127 (11th Cir.1995), we described this kind of cause of action:

> The seaman's action for maintenance and cure may be seen as one designed to put the sailor in the same position he would have been had he continued to work: the seaman receives a maintenance remedy, because working seamen normally are housed and fed aboard ship; he recovers payment for medical expenses in the amount necessary to bring him to the maximum cure; and he receives an amount representing his unearned wages for the duration of his voyage or contract period.

declaratory relief on the question of their obligations in this matter.

Two days later, Defendant filed suit against Plaintiffs pursuant to the Jones Act, 46 U.S.C. § 688, and general maritime law, alleging negligence, unseaworthiness, arbitrary and willful failure to pay maintenance and cure, and wrongful termination. He then filed the same claims as counterclaims to the declaratory judgment action and sought punitive damages on his maintenance and cure claim. The district court later consolidated the two actions.

Plaintiffs moved to strike or to dismiss Defendant's request for punitive damages. Plaintiffs contended that, under *Miles,* neither the Jones Act nor general maritime law provides a cause of action against an employer for non-pecuniary damages. The district court denied Plaintiffs' motion, concluding that it was bound by our rule in *Hines*. The district court later denied Plaintiffs' motion for reconsideration of the issue, but certified the question for review on interlocutory appeal.

Whether punitive damages may be recovered in maintenance and cure actions is a question of law that we review *de novo*. *See Tucker v. Fearn,* 333 F.3d 1216, 1218 n. 2 (11th Cir.2003). The central question here is whether we may depart from our prior ruling in *Hines,* based on the Supreme Court's intervening decision in *Miles*; we conclude that we may not.

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." *Garrett v. Univ. of Ala. at Birmingham Bd. of Trustees,* 344 F.3d 1288, 1290-92 (11th Cir.2003) (concluding that an intervening Supreme Court decision did not "implicitly overrule" a prior circuit decision because the cases dealt with different issues and were not "clearly inconsistent"). The Supreme Court reminds us that "[t]here is, of course, an important difference between the holding in a case and the reasoning that supports that holding." *Crawford-El v. Britton,* 523 U.S. 574, 118 S.Ct. 1584, 1590, 140 L.Ed.2d 759 (1998). So, that the reasoning of an intervening high court decision is at odds with that of our prior decision is no basis for a panel to depart from our prior decision. As we have stated, "[o]bedience to a Supreme Court decision is one thing, extrapolating from its implications a holding on an issue that was not before that Court in order to upend settled circuit law is another thing." *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.,* 475 F.3d 1228, 1230 (11th Cir.2007) (concluding that the Supreme Court's determination that the time requirement in Fed.R.Crim.P. 33 was not jurisdictional did not "relieve[ ] us from the obligation to follow our prior panel decisions holding that the requirements of Appellate Rule 5 are jurisdictional"); *see also Smith v. GTE Corp.,* 236 F.3d 1292, 1303 (11th Cir.2001) ("[W]e categorically reject any exception to the prior panel precedent rule based upon a perceived defect in the prior panel's reasoning or analysis as it relates to the law in existence at that time."); *Fla. League of Prof'l Lobbyists, Inc. v. Meggs,* 87 F.3d 457, 462 (11th

Cir.1996) ("[W]e are not at liberty to disregard binding case law that is so closely on point and has been only weakened, rather than directly overruled, by the Supreme Court.").

In *Hines,* a panel of this Court determined that, in an action for maintenance and cure, "both reasonable attorney's fees and punitive damages may be legally awarded in a proper case" – that is, upon a showing of a shipowner's willful and arbitrary refusal to pay maintenance and cure. *Hines,* 820 F.2d at 1189. In reaching this conclusion, we relied mainly on four cases: *Vaughan v. Atkinson,* 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962); *Complaint of Merry Shipping, Inc.,* 650 F.2d 622 (5th Cir. Unit B 1981); *Holmes v. J. Ray McDermott & Co.,* 734 F.2d 1110 (5th Cir.1984); and *Robinson v. Pocahontas, Inc.,* 477 F.2d 1048 (1st Cir.1973). We started with the proposition that *Vaughan* "permitted a seaman to recover reasonable counsel fees when the shipowner's default in the duty to provide maintenance and cure was willful and persistent." *Hines,* 820 F.2d at 1189.[2] We then noted that we had previously concluded in *Merry Shipping* that "punitive damages [were] recoverable under general maritime law upon a showing of a shipowner's willful and wanton misconduct in a death action." *Id.* And we noted that the Fifth Circuit had

[2] We did, however, acknowledge that it was unclear whether the *Vaughan* majority regarded attorney's fees as an item of compensatory damages or as a punitive measure. *See Hines,* 820 F.2d at 1189.

extended the *Merry Shipping* rule to maintenance and cure actions in *Holmes* and that the First Circuit also allowed punitive damages in similar circumstances. *Id.* While stating that *Vaughan* was not dispositive because it considered only attorney's fees, we decided to follow the Fifth Circuit in adopting the reasoning of *Merry Shipping* and extending *Vaughan*'s rule to punitive damages in maintenance and cure actions. *Id.*

Three years later in *Miles,* the Supreme Court "conclude[d] that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman." *Miles,* 111 S.Ct. at 326. In reaching this conclusion, the Court made this observation:

> We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress.

Id. at 323. Then, taking note that neither the Jones Act nor the Death on the High Seas Act ("DOHSA"),

46 U.S.C. §§ 761, 762 – both of which provide causes of action for the wrongful death of a seaman – permits the recovery of non-pecuniary losses, such as loss of society, the Court stated that "[i]t would be 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." *Id.* at 326. Therefore, the Court denied the recovery sought and "restore[d] a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law." *Id.*

Plaintiffs argue that "[t]he *Miles* uniformity principle dictates that all subsequent courts determining the availability of damages in a maritime case must provide for uniform results in similar factual settings, regardless of whether the action is brought pursuant to the Jones Act, DOHSA, or general maritime law." Under this principle, Plaintiffs reason, Defendant cannot recover punitive damages for a general maritime maintenance and cure cause of action because he would not be able to recover punitive damages – which are non-pecuniary in nature – under the Jones Act. But this argument can only be based on the reasoning of the *Miles* opinion, not on the *Miles* decision: its holding. *Miles* says and – more important – decides nothing about maintenance and cure actions or punitive damages. *See Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 399, 5 L.Ed. 257 (1821) (Marshall, C.J.) ("[G]eneral expressions, in

every opinion, are to be taken in connection with the case in which those expressions are used.") For this reason, the *Miles* decision provides no basis for this panel to depart from *Hines* under our prior panel precedent rule. *See Guevara v. Maritime Overseas Corp.,* 34 F.3d 1279, 1283 (5th Cir.1994), *rev'd in part on reh'g,* 59 F.3d 1496 (1995) ("Maritime's argument that *Miles* abrogates this Circuit's rule [announced in *Holmes*] permitting the recovery of punitive damages in maintenance and cure cases obviously cannot rest upon the specific holding in *Miles*. . . . *Miles* did not involve maintenance and cure or punitive damages."); *Glynn v. Roy Al Boat Mgmt. Corp.,* 57 F.3d 1495, 1503 (9th Cir.1995) ("Because *Miles* did not consider the availability of punitive damages, and was not faced with a claim for maintenance and cure that has no statutory analog, it does not directly control the question of whether punitive damages are available for the willful failure to pay maintenance.").[3] Therefore, the district court did not err in

[3] Even those courts that have extended *Miles* to factual situations that are more similar to that presented in *Miles* have recognized that they do so under the reasoning, rather than the holding, of the Supreme Court's opinion. *See, e.g., Horsley v. Mobil Oil Corp.,* 15 F.3d 200, 202-03 (1st Cir.1994) (relying on the "rationale" and "analysis" of *Miles* to conclude that seaman who had suffered nonfatal injuries could not recover punitive damages in an unseaworthiness action under general maritime law); *Miller v. Am. President Lines, Ltd.,* 989 F.2d 1450, 1455, 1459 (6th Cir.1993) (concluding that punitive damages are not available in general maritime law unseaworthiness action for wrongful death of a seaman, after stating that

(Continued on following page)

following *Hines* – the law of this Circuit – and in denying Plaintiffs' motion to strike Defendant's request for punitive damages.

AFFIRMED.

CARNES, Circuit Judge, concurring:

I join Chief Judge Edmondson's opinion in its entirety. For the reasons it explains and on the basis of the decisions it cites, we are obligated to follow our prior precedent in *Hines v. J.A. LaPorte, Inc.,* 820 F.2d 1187 (11th Cir.1987). We must follow *Hines*' specific holding that punitive damages are available where there is a willful and persistent failure to pay maintenance and cure, 820 F.2d at 1189-90, even though this Court might have decided that issue differently if *Miles v. Apex Marine Corp.,* 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990), had been available at the time it first arose.

The prior panel precedent rule is a fundamental ground rule that embodies the principle of adherence to precedent. It promotes predictability of decisions and stability of the law, it helps keep the precedential peace among the judges of this Court, and it allows us to move on once an issue has been decided. Without the rule every sitting of this court would be a series of do-overs, the judicial equivalent of the movie "Groundhog Day." While endlessly recurring fresh

---

Miles's "reasoning, if not its holding, seems to cover the type of damages before us").

starts is an entertaining premise for a romantic comedy, it would not be a good way to run a multi-member court that sits in panels. As a panel, we must follow our holding in *Hines* instead of any inferences we may draw from the Supreme Court's reasoning in deciding a different issue in *Miles* because the prior precedent rule requires that we do so, and we take that rule seriously.

At the same time, of course, we are obligated to take Supreme Court decisions seriously, very seriously. Our obligation to do so flows from the constitutional plan of "one supreme Court, and . . . such inferior Courts as the Congress may from time to time ordain." U.S. Const. Art. III, § 1; *see Schwab v. Crosby,* 451 F.3d 1308, 1325 (11th Cir.2006) ("We have always believed that when the Founders penned Article III's reference to the judicial power being vested 'in one supreme Court and in such inferior Courts' as Congress may establish, they used 'supreme' and 'inferior' as contrasting adjectives, with us being on the short end of the contrast." (citation omitted)), *cert. denied,* ___ U.S. ___, 127 S.Ct. 1126, 166 L.Ed.2d 897 (2007).

The duty of a later panel of this Court to follow an earlier one's decision ends when that decision conflicts with the holding of a later Supreme Court decision. If *Miles* had held that punitive damages were not available for the willful failure to pay maintenance and cure, we certainly would follow that holding instead of our contrary one in *Hines,* even if the *Miles* opinion did not mention the *Hines* decision.

See In re Provenzano, 215 F.3d 1233, 1235 (11th Cir.2000); *Davis v. Singletary,* 119 F.3d 1471, 1482 (11th Cir.1997); *United States v. Hogan,* 986 F.2d 1364, 1369 (11th Cir.1993). But *Miles* held nothing about maintenance and cure or punitive damages. It addressed the different issue of whether damages for loss of society are recoverable in a general maritime cause of action for the wrongful death of a seaman, deciding that they were not. 498 U.S. at 37, 111 S.Ct. at 328.

The contention of the appellants in this case is not that the *Miles* holding is contrary to the *Hines* holding, but that the reasoning the Supreme Court used to reach its holding in *Miles,* 498 U.S. at 30-33, 111 S.Ct. at 324-26, is inconsistent with the holding in *Hines,* 820 F.2d at 1189-90. The argument does not pit holding against holding, but reasoning against holding. The broader question this argument presents is whether, and if so when, a panel of this Court may vary from a specific holding of an earlier one based on the reasoning the Supreme Court used to reach a later decision on a different issue.

That question is not particularly difficult in this case because even if there is some tension between the two, it is far from clear that *Miles*' reasoning conflicts with *Hines*' holding. At least a half dozen courts have held that *Miles* does not compel the conclusion that punitive damages are unavailable in maintenance and cure cases. *See Glynn v. Roy Al Boat Mgmt. Corp.,* 57 F.3d 1495, 1503 (9th Cir.1995) (concluding that *Miles* "does not directly

control the question of whether punitive damages are available for the willful failure to pay maintenance" but deciding that punitive damages are unavailable for another reason); *Smith v. MAR, Inc.,* 877 F.Supp. 62, 67 (D.R.I.1995) (noting that "*Miles* has not stated that punitive damages are unavailable in a claim for maintenance and cure," and concluding that "plaintiff's claim for punitive damages for the agent's arbitrary and willful conduct in failing to pay maintenance and cure is a viable claim post *Miles*"); *White v. Am. River Transp. Co.,* 853 F.Supp. 300, 301 (S.D.Ill.1993) ("As a purely judicial remedy, maintenance and cure has no statutory counterpart. Consequently, it does not defeat *Miles*' goal of uniformity to permit nonpecuniary damages in conjunction with a claim for maintenance and cure."); *Ortega v. Oceantrawl, Inc.,* 822 F.Supp. 621, 624 (D.Alaska 1992) ("*Miles* does not extend to preclude a claim for exemplary damages in regard to a claim for maintenance and cure."); *Ridenour v. Holland Am. Line Westours, Inc.,* 806 F.Supp. 910, 911, 913 (W.D.Wash.1992) (concluding that "*Miles* is not dispositive as to the availability of punitive damages for willful withholding of maintenance and cure" and holding that "punitive damages are available in an action for maintenance and cure"); *Anderson v. Texaco, Inc.,* 797 F.Supp. 531, 536 (E.D.La.1992) (concluding that the availability "punitive damages for willful failure to pay maintenance and cure, a firmly rooted general maritime law claim, is unaffected by *Miles* because failure to pay is a contractual claim not reached by any maritime statute").

Other courts have decided differently. *See Guevara v. Mar. Overseas Corp.,* 59 F.3d 1496, 1512 (5th Cir.1995) (en banc) (relying on *Miles* to overrule a prior panel decision and hold that "punitive damages [are] not . . . available in any action for maintenance and cure" (emphasis omitted)); *In re J.A.R. Barge Lines, L.P.,* 307 F.Supp.2d 668, 673 (W.D.Pa.2004) ("Under the *Miles* uniformity principle, then, punitive damages are unavailable in maintenance and cure actions under general maritime law."); *Blige v. M/V GEECHEE GIRL,* 180 F.Supp.2d 1349, 1355 (S.D.Ga.2001) (same); *Watters v. Harrah's Ill. Corp.,* 993 F.Supp. 667, 676-77 (N.D.Ill.1998) (citing cases coming down on different sides of the issue, but deciding that "[p]ursuant to the *Miles* uniformity principle, punitive damages are not recoverable in the tort-like maintenance and cure action" and that "punitive damages should not be recoverable in a contract-like maintenance and cure action if they are not recoverable in a tort-like maintenance and cure action"); *Boyd v. Cinmar of Gloucester, Inc.,* 919 F.Supp. 208, 209-10 (E.D.Va.1996) ("extending" the Supreme Court's ruling in *Miles* to bar recovery of punitive damages in maintenance and cure actions).

The bottom line is that courts are divided over whether the reasoning of *Miles* conflicts with a holding that punitive damages are available in maintenance and cure actions. At least where reasonable jurists may disagree about whether a later Supreme Court decision compels a different answer to an issue

decided by an earlier panel, later panels should follow the existing circuit precedent. That is the case here.

Of course, even if an intervening Supreme Court decision does not conflict with a prior panel precedent to the extent of overruling it, en banc rehearing may be granted for the purpose of addressing the issue afresh in light of the reasoning or implications of the Supreme Court decision. Whether to do that, however, is a different question.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN ADMIRALTY

ATLANTIC SOUNDINGS COMPANY, INC. et. al,

Plaintiffs,

v.

EDGAR TOWNSEND,

Defendant.

Case No. 3:05-cv-649-J-20HTS CONSOLIDATED

EDGAR TOWNSEND,

Plaintiff,

v.

WEEKS MARINE, INC.,

Defendant. /

ORDER

(Filed Apr. 25, 2006)

Before the Court is Atlantic Soundings Co. Inc.'s and Weeks Marine Inc.'s ("AS & WM") Motion for Reconsideration of 7 April 2006 Order Denying Motion to Strike Punitive Damages Or, Alternatively, Motion for Certification Pursuant to 28 U.S.C. § 1292(b) And Stay (Doc. No. 45, filed April 12, 2006), to which Edgar Townsend responded in opposition (Doc. No. 46, filed April 12, 2006). For the following

reasons, the Court **denies** the Motion for Reconsideration, but **grants** the Motion for Certification, pursuant to Section 1292(b), and **stays** the current proceedings in this Court, pending further proceedings by the Court of Appeals.

Background

This matter arises from able bodied seaman and crew member Edgar Townsend's fall on the steel deck of the Motor Tug Thomas, whereby he injured his right shoulder, rotator cuff, and possibly fractured his right clavicle. He seeks, *inter alia,* punitive damages and attorney's fees on the ground that AS & WM willfully and wantonly withheld from him maintenance and cure. AS & WM argues that punitive damages are no longer available to individuals in Mr. Townsend's position. Relying on a Fifth Circuit case, *Guevara v. Maritime Overseas Corp.,* AS & WM argues that punitive damages are unavailable under a Jones Act claim. *See Guevara v. Maritime Overseas Corp.,* 59 F.3d 1496, 1512 (5th Cir. 1995) (en banc).

In 1987, the Eleventh Circuit held that "both reasonable attorney's fees and punitive damages may be legally awarded in a proper case." *Hines v. J.A. LaPorte,* Inc. 820 F.2d 1187, 1109 (11th Cir. 1987). Proper cases include those where maintenance and cure has been arbitrarily and willfully withheld from a seaman. While noting that there is "no bright line to measure arbitrary conduct," examples of willfulness meriting punitive damages and attorneys fees

include: "(1) laxness in investigating a claim; (2) termination of benefits in response to the seaman's retention of counsel or refusal of a settlement offer; and (3) failure to reinstate benefits after diagnosis of an ailment previously not determined medically." *Id.* at 1190 (citation omitted).

Subsequent to *Hines*, the U.S. Supreme Court in 1990 ruled that the Jones Act, the Death on the High Seas Act (DOHSA), and general maritime law preclude recovery for non-pecuniary loss, thereby "restor[ing] a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law." *Miles v. Apex Marine Corp.,* 498 U.S. 19, 33 (1990). AS & WM argues that courts have followed the Supreme Court's rationale in *Miles* and have refused to supplement the list of remedies afford by Congress to seamen. *See, e.g., Blige v. M/V GEECHEE GIRL,* 180 F.Supp.2d 1349, 1352 (S.D. Ga. 2001) ("Under the *Miles* uniformity principle, then, punitive damages are unavailable in maintenance and cure actions under general maritime law."); *Wininger v. Hendry Corp.,* No. 99-1184, 1999 WL 33218593, at *2 (M.D. Fla. Oct, 22, 1999) ("It is well-settled that punitive damages are unavailable in disputes concerning the payment of maintenance and cure."). Yet, in cases subsequent to *Miles*, the Eleventh Circuit has noted, albeit in *dicta,* the viability of *Hines* and the availability of punitive damages in exceptional cases. *See, e.g., In re Amtrak Sunset Ltd. Train Crash,* 121 F.3d 1421, 1429 (11th Cir. 1997) (punitive damages may be

available in "exceptional circumstances such as willful failure to furnish maintenance and cure to a seaman"); *Flores v. Carnival Cruise Lines,* 47 F.3d 1120, 1127 (11th Cir. 1995) ("Carnival did not abrogate any established legal duty toward Flores, and therefore did not exhibit willful and wanton misconduct, which is the standard Flores must meet to recover punitive damages in admiralty law."); *Kasprik v. United States,* 87 F.3d 462, 464 (11th Cir. 1996) ("*Hines v. J.A. LaPorte, Inc.,* 820 F.2d 1187 (11th Cir. 1987) is the leading case in our circuit and is consistent with traditional admiralty law which provides the highest safeguards for a seaman's right to maintenance and cure.").

Discussion

The general rule is that interlocutory appeals, pursuant to 28 U.S.C. § 1292(b), are allowed when the following three requirements are satisfied: (1) a controlling question of law is involved; (2) the question is one where there is substantial ground for difference of opinion; and (3) an immediate appeal would materially advance the ultimate termination of the litigation.[1] *Accord McFarlin v. Conseco Services, LLC,* 381 F.3d 1251 (11th Cir. 2004).

---

[1] In pertinent part, 28 U.S.C. § 1292(b), provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling

(Continued on following page)

Controlling Question of Law

Questions of law are distinguished from questions of fact and the Eleventh Circuit has elucidated: "What the framers of § 1292(b) had in mind is more of an abstract legal issue or what might be called one of 'pure' law, matters the court of appeals 'can decide quickly and cleanly without having to study the record.'" *McFarlin v. Conseco Services, LLC,* 381 F.3d 1251, 1258 (11th Cir. 2004) (quoting *Ahrenholz v. Board of Trustees of the University of Illinois,* 219 F.3d 674, 677 (7th Cir. 2000)); *see also Tucker v. Fearn,* 333 F.3d 1216 (11th Cir. 2003) (granting interlocutory appeal on whether a nondependent parent may recover loss of society damages for the wrongful death of his minor child under general maritime law). Moreover, "§1292(b) appeals were intended, and should be reserved, for situations in which the court of appeals can rule on a pure, controlling question of law without having to delve beyond

---

question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

the surface of the record in order to determine the facts." *McFarlin,* 381 F.3d at 1259. Furthermore, "[t]he legal question must be stated at a high enough level of abstraction to lift the question out of the details of the evidence or facts of a particular case and give it general relevance to other cases in the same area of law." *Id.*

Substantial Ground for Difference of Opinion

AS & WM has pointed to a split of authority with regard to the availability of punitive damages in a willful denial of maintenance and cure. *Compare Hines v. J.A. LaPorte, Inc.,* 820 F.2d 1187, 1189 (11th Cir. 1987) (holding punitive damages may be awarded for arbitrarily and willfully withholding maintenance and cure from a seaman); *GEH, Inc. v. F/V Seafarer,* 70 F.3d 694, 702 (1st Cir. 1995) (affirming district court's determination that punitive damages are recoverable under plaintiff's general maritime claim; In the absence of any relevant legislation, we think that the uniformity principle enunciated in *Miles* is inapplicable. Therefore, plaintiffs are entitled to forms of relief traditionally available under the general maritime law, including punitive damages."), *with Guevara v. Maritime Overseas Corp.,* 59 F.3d 1496, 1512 (5th Cir. 1995) (en banc) (holding punitive damages are not available in cases of willful nonpayment in any action for maintenance and cure under the general maritime law); *Glynn v. Roy Al Boat Mgmt. Corp.,* 57 F.3d 1495, 1512 (9th Cir. 1995) (finding punitive damages were not available for

willful failure to investigate seaman's claim for maintenance and cure, or to pay maintenance); *Miller v. Am. President Lines Ltd.,* 989 F.2d 1450, 1457 (6th Cir. 1993) (holding punitive damages are not recoverable under the Jones Act). This Court submits that the "substantial ground for difference of opinion" requirement has been satisfied.

Materially Advance the Ultimate Termination of the Litigation

The third statutory requirement "means that resolution of a controlling legal question would serve to avoid a trial or otherwise substantially shorten the litigation." *McFarlin,* 381 F.3d at 1259 (citation omitted). Evidence to support an award of punitive damages can be extensive. Whether this is an available remedy, may affect not only the length of discovery and the litigation, but also the complexity of the trial.[2] Accordingly, a resolution of this question would materially advance the ultimate termination of the litigation.

Conclusion

For the foregoing reasons, this Court **GRANTS** AS & WM's Motion, and pursuant to 28 U.S.C.

[2] Financial and punitive damage related questions have been at issue in discovery related disputes in this case. At this time, discovery is still on-going. The parties have intimated that more such discovery disputes may be forthcoming.

§ 1292(b), certifies the following question for interlocutory appeal:

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

This Court will **STAY** the current proceedings, pending the Court of Appeals' consideration of the interlocutory appeal.

DONE AND ENTERED at Jacksonville, Florida, this 24th day of April, 2006.

/s/ Harvey E. Schlesinger
HARVEY E. SCHLESINGER
United States District Judge

Copies to:

David W. McCreadie, Esq.
Michael H. Kestenbaum, Esq.
G.J. Rod Sullivan, Jr., Esq.
Garry Randolph, CRD
Eleventh Circuit Court of Appeals

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

ATLANTIC SOUNDINGS COMPANY, INC. et. al,

Plaintiffs,

v.

EDGAR TOWNSEND,

Defendant.

Case No. 2:05-cv-649-J-20HTS

EDGAR TOWNSEND,

Plaintiff,

v.

WEEKS MARINE, INC.,

Defendant. /

Case No. 3:05-cv-653-J-20HTS

ORDER

(Filed Apr. 7, 2006)

Before the Court is Atlantic Soundings Co. Inc.'s and Weeks Marine Inc.'s ("AS & WM") Motion to Strike, Or, In the Alternative, Dismiss Edgar Townsend's Request for Punitive Damages (Doc. No. 30, filed March 16, 2006), to which Townsend responded (Doc. No. 38, filed March 31, 2006). Upon due consideration, AS & WM's Motion is **DENIED**.

Edgar Townsend seeks punitive damages on the grounds that AS & WM willfully and wantonly withheld from him maintenance and cure. On July 5,

2005, Townsend, an able bodied seaman and crew member of the Motor Tug Thomas, allegedly landed shoulder first on the steel deck of the Motor Tug Thomas, injuring his right shoulder, rotator cuff, and possibly fracturing his right clavicle. Townsend further alleges that on July 7, 2005, Weeks Marine advised him that it would not provide him with maintenance and cure. Townsend suggests that "Weeks Marine has a history of manufacturing pretexts for denying maintenance and cure" and that such denials are "arbitrary and capricious." Accordingly, Townsend seeks both attorneys fees and punitive damages. AS & WM suggest that punitive damages are no longer available to individuals in Mr. Townsend's position. Relying on a Fifth Circuit case, *Guevara v. Maritime Overseas Corp.,* AS & WM argue that punitive damages are unavailable under a Jones Act claim. *See Guevara v. Maritime Overseas*, 59 F.3d 1496, 1512 (5th Cir. 1995) (en banc).

In 1987, the Eleventh Circuit held that "both reasonable attorney's fees and punitive damages may be legally awarded in a proper case." *Hines v. J.A. LaPorte,* Inc. 820 F.2d 1187, 1189 (11th Cir. 1987). Proper cases include those where maintenance and cure has been arbitrarily and willfully withheld from a seaman. While noting that there is "no bright line to measure arbitrary conduct," examples of willfulness meriting punitive damages and attorneys fees include: "(1) laxness in investigating a claim; (2) termination of benefits in response to the seaman's retention of counsel or refusal of a settlement offer,

and (3) failure to reinstate benefits after diagnosis of an ailment previously not determined medically." *Id.* at 1190 (citation omitted).

Subsequent to Hines, the U.S. Supreme Court in 1990 ruled that the Jones Act, the Death on the High Seas Act (DOHSA), and general maritime law preclude recovery for non-pecuniary loss, thereby "restor[ing] a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law." *Miles v. Apex Marine Corp.,* 498 U.S. 19, 33 (1990). AS & WM argue that courts have followed the Supreme Court's rationale in *Miles* and have refused to supplement the list of remedies afford by Congress to seamen. *See, e.g., Blige v. M/V GEECHEE GIRL,* 180 F.Supp.2d 1349, 1352 (S.D.Ga. 2001) ("Under the *Miles* uniformity principle, then, punitive damages are unavailable in maintenance and cure actions under general maritime law."). However, this Court is not in the business of predicting whether "the Eleventh Circuit would follow *Guevara* when presented with the issue." *Id.* (citing *Hollinger v. Kirby Tankships, Inc.,* 910 F.Supp. 571 (S.D. Ala. 1996)).

Until the Eleventh Circuit overrules *Hines,* it is still the controlling precedence. In cases subsequent to *Miles* in 1990, the Eleventh Circuit has noted the viability of *Hines* and the availability of punitive damages in exceptional cases. *See, e.g., In re Amtrak Sunset Ltd. Train Crash,* 121 F.3d 1421, 1429 (11th Cir. 1997) (punitive damages maybe available in "exceptional circumstances such as willful failure to

furnish maintenance and cure to a seaman"); *Flores v. Carnival Cruise Lines,* 47 F.3d 1120, 1127 (11th Cir. 1995) ("Carnival did not abrogate any established legal duty toward Flores, and therefore did not exhibit willful and wanton misconduct, which is the standard Flores must meet to recover punitive damages in admiralty law."); *Kasprik v. United States,* 87 F.3d 462, 464 (11th Cir. 1996) ("*Hines v. J.A. LaPorte, Inc.,* 820 F.2d 1187 (11th Cir.1987) is the leading case in our circuit and is consistent with traditional admiralty law which provides the highest safeguards for a seaman's right to maintenance and cure.").

Moreover, the principle of stare decisis requires this Court to follow that law. *Scott v. Wainwright,* 617 F.2d 99, 104 (5th Cir. 1980).[1] In an analogous setting to the question before this Court, the Eleventh Circuit has recently instructed: "It is not given to us to overrule the decisions of the Supreme Court. We have stated repeatedly, and with respect to the very issue presented in this appeal, that 'we are not at liberty to disregard binding case law that is so closely on point and has been only weakened, rather than directly overruled, by the Supreme Court.'" *Gibson,* 434 F.3d 1234, 1246-47 (11th Cir. 2006) (citations omitted). "This is so even if we are convinced that the Supreme Court will overturn its previous decision the next

[1] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

time it addresses the issue. Though wounded, [the legal principle in question] still marches on and we are ordered to follow. We will join the funeral procession only after the Supreme Court has decided to bury it." *Id.* This reasoning and rationale applies with equal force to a district court with respect to binding case law from the Eleventh Circuit.

Accordingly, it is **ORDERED AND ADJUDGED**

Atlantic Soundings Co. Inc.'s and Weeks Marine Inc.'s Motion to Strike, Or, In the Alternative, Dismiss Edgar Townsend's Request for Punitive Damages is **DENIED**.

DONE AND **ENTERED** at Jacksonville, Florida, this 7th day of April, 2006.

/s/ Harvey E. Schlesinger
HARVEY E. SCHLESINGER
United States District Judge

Copies to:

David W. McCreadie, Esq.
Michael H. Kestenbaum, Esq.
G.J. Rod Sullivan, Jr., Esq.
Garry Randolph, CRD

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 06-13204-BB

ATLANTIC SOUNDING CO., INC.,
WEEKS MARINE, INC.,

Plaintiffs-Counter-
Defendants-Appellants,

versus

EDGAR L. TOWNSEND,

Defendant-Counter-
Claimant-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed May 27, 2008)

Before: EDMONDSON, Chief Judge, CARNES and FAY, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service an the Court having

requested that the Court be polled on rehearing en Banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J. Edmondson
CHIEF JUDGE