No. 11-1475

IN THE
Supreme Court of the United States

ICICLE SEAFOODS, INC.,
Petitioner,
v.
DANA CLAUSEN,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

BRIEF IN OPPOSITION

James P. Jacobsen
BEARD STACEY & JACOBSEN, LLP
4039 21st Avenue, West
Suite 401
Seattle, WA 98199
(206) 282-3100

Lawrence N. Curtis
LARRY CURTIS, APLC
300 Rue Beauregard
Building C
Lafayette, LA 70508
Phone: (337) 235-1825

Robert S. Peck
Counsel of Record
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
777 6th Street, N.W.
Suite 520
Washington, DC 20001
Phone: (202) 944-2874
Fax: (202) 965-0920
robert.peck@cclfirm.com

Counsel for Respondent

QUESTIONS PRESENTED

1. Whether the Supreme Court of Washington erred when it read this Court's decision in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), consistently with this Court's decision in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009), to hold that there is no strict and immutable maximum ratio of 1:1 between punitive and compensatory damages in maritime cases of wrongfully denied maintenance and cure, particularly when the misconduct at issue was extremely egregious, involved significant aggravating factors, and included further attempts to evade responsibility for it through litigation misconduct?

2. Whether limited compensatory damages resulting from extreme reprehensible misconduct may be combined with other compensatory damages arising from the same nucleus of operative fact and attorney fees awarded as compensation to justify, on a ratio analysis, the size of a punitive damage award?

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Dana Clausen respectfully requests that this Court deny the petition for writ of certiorari that seeks review of the decision of the Supreme Court of Washington in this case.

In its Petition, Icicle Seafoods, Inc. seeks this Court's intervention to relieve it of the full extent of its punitive liability assessed and confirmed in the state courts of Washington as a result of its repeated and extreme misconduct in failing to provide maintenance and cure to one of its employees, its extraordinarily detestable misconduct in attempting to avoid responsibility for that failure, and its abuse of process in seeking judicial authorization based on false representations to avoid that responsibility. Each court below to hear this matter properly described Icicle's actions as constituting the misconduct at the extreme end of the reprehensibility scale. The punitive damages assessed reflected the existence of each and every one of the aggravating factors this Court has outlined to justify higher awards. There is no warrant for further reexamination of the punitive damages in this case.

COUNTERSTATEMENT OF THE CASE

Dana Clausen, age 52, worked as an engineer, responsible for repairing equipment on board Icicle Seafoods' *Bering Star* vessel, a seafood-processing barge based in Alaska. Pet. App. 3a. On February 12, 2006, Clausen injured his lower back, neck, and hand after lifting a 122-pound piece of steel being used to fabricate a plate intended to improve ventilation on the vessel. *Id*. He was sent ashore in

Alaska for preliminary medical care and later sent home to Louisiana for further care. *Id*.

The injuries left Clausen unable to work. *Id*. Icicle paid $20 per day in maintenance to cover Clausen's living expenses, including lodging, utilities, and meals, but stopped even that payment prematurely. *Id*. Based on this limited income, Clausen was forced to live in a recreational vehicle with a leaking roof and without heat, air conditioning, running water, electricity, or toilet facilities. *Id*. Even while allocating some funds for maintenance, Icicle persistently resisted, delayed, or refused to pay for cure, the medical treatment Clausen needed. *Id*. Although Icicle resisted paying Clausen's medical bills, it nonetheless, through an agent, paid a nurse to monitor Clausen's treatment, allocating an amount for that service that surpassed its actual medical payments for Clausen. RP 402.[1] When it deigned to pay medical bills, Clausen's physicians still had to await payment for unreasonable lengths of time, sometimes as long as two years. Ex. 212; RP 669-73, 1544-45. Icicle's adjusting firm, Spartan, found Clausen's injuries likely to be career-ending and recommended, in writing, Icicle settle with him before he hired counsel, after which, it stated, "the value of this claim will increase considerably." CP 429.

---

[1] Respondent repeats the citations used in the lower courts. RP refers to the Washington Superior Court's Report of Proceedings; CP refers to that court's Clerks' Papers. Each is part of the record on review in the Washington appellate courts.

Clausen's doctors advised Icicle that he needed epidural spinal injections and back surgery, a diagnosis consistent with determinations by Icicle's designated medical examiner, though never disclosed to Clausen because the report was "not good for Icicle." Pet. App. 38a-39a. Estimates put the surgical costs at between $40,000 to $75,000. RP 1483-84, 1491-92. In fact, due to his injuries, pain, destitution, and the delays in obtaining the financial assistance due him, Clausen contemplated suicide. Pet. App. 45a.

Despite Clausen's complete cooperation and apparent need, and rather than provide legally mandated cure, Icicle brought suit against Clausen in federal court in September 2007, seeking a declaration that the company had no further responsibility for Clausen's maintenance and cure, falsely claiming he had impeded its ability to investigate his claimed injuries and proposed treatment. Pet. App. 4a. Clausen hired counsel, who brought this lawsuit in King County (Washington) Superior Court, alleging claims under the Jones Act, 46 U.S.C. § 30104, the unseaworthiness doctrine, and the common-law obligations of maintenance and cure. *Id.* Counsel also obtained dismissal of Icicle's federal lawsuit and demonstrated, through Icicle's own records, that the allegations made in federal court were entirely and knowingly fanciful. *Id.*

During the case's pendency in superior court, Icicle and its trial counsel were sanctioned for intentionally withholding key documents, including a medical report by Icicle's selected physician that supported Clausen's claims. Pet. App. 35a n.1. The trial court determined that the withholding of this material adversely affected the presentation of

Clausen's case and fined both the defendant and its counsel. Order Granting Pl.'s Mot. for Scantions 4 (Wash. Sup. Ct. Jan. 29, 2010) (App. 13a-14a). Rather than allocate the sanction to Clausen, the judge had the fines paid into a court fund, because he determined the punitive damages awarded made up for any lost compensation it may have occasioned. *Id*.

After a two-week trial and two-and-a-half days of deliberation, the jury found Icicle liable under the Jones Act and for maintenance and cure, determining that Icicle had not only unreasonably withheld maintenance and cure but acted in a fashion that was "callous and indifferent, or willful and wanton." Pet. App. 4a. The jury rejected Clausen's unseaworthiness allegations. They found compensatory damages to total $490,520,[2] representing $453,100 for violations of the Jones Act and $37,420 in additional, wrongfully withheld maintenance and cure. *Id*. The jury had also been instructed on punitive damages, without objection or subsequent assignment of error, *inter alia*:

> If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering the

[2] Clausen was found 44 percent comparatively at fault for his Jones Act claim, reducing the damages awarded for negligence under the Jones Act to $253,736. Special Verdict Form 2 (Wash. Sup. Ct. Nov. 16, 2009) (App. 3a).

> amount of any punitive damages, consider the degree of reprehensibility of the defendant's conduct.

Clausen Br. App. (Court's Instruction No. 13) ¶ 4 (Wash. Ct. App. Oct. 13, 2010) (App. 1a).

Based on those instructions, the jury assessed $1.3 million in punitive damages for Icicle's willful misconduct. Pet. App. 4a. Post-trial, the trial court awarded $387,558.00 in attorney fees and $40,547.57 in costs relating to the claim for maintenance and cure. Pet. App. 4a-5a.

Icicle obtained transfer for its appeal to the Washington Supreme Court, which ultimately upheld the judgment in all respects. Pet. App. 5a. First, it found no error in having the court, rather than the jury, award attorney fees and costs (an issue not before this Court). Second, in reviewing the punitive damages, it found that the award of attorney fees and costs could be combined with the small amount awarded for maintenance and cure to yield a less than 3:1 ratio between punitive and compensatory damages. Pet. App. 21a. It also rejected Icicle's argument this Court in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), had mandated a 1:1 cap on punitive damages in all maritime cases. Pet. App. 17a-19a. The Washington Supreme Court found as well that the amount actually awarded was not excessive. *Id.*

REASONS FOR DENYING THE PETITION

I. THIS CASE PROVIDES A POOR VEHICLE FOR THE EXERCISE OF THIS COURT'S DISCRETION, GIVEN THE FULL DEPTH OF ICICLE'S MISCONDUCT AND THE EXTENT TO WHICH ITS ACTIONS WERE COMPOUNDED BY LITIGATION MISCONDUCT.

Courts do not lightly conclude that acts of misconduct fall outrageously beyond reprehensibility and display a shocking callousness. If anything, members of the judiciary have seen a broad range of misconduct, civil and criminal, that makes them more likely to be blasé rather than stunned by new instances of egregious misconduct that may come before them. In colloquial language, they are likely to have "seen it all."

For that reason, when the trial court described Icicle's misconduct, not once but twice, as "at the zenith of reprehensibility," Pet. App. 35a, 49a, and the state supreme court called it "not just reprehensible, it was egregious" and "at the extreme end of the [reprehensibility] scale," Pet. App. 19a, 18a, those courts' determinations should be credited as heightened condemnations that merits the significant punitive damages here and undermines Icicle's plea for relief.

The record below establishes a strategy of denial, deception, and subterfuge that permeated Icicle's treatment of Clausen, despite his status as a seaman, a category that makes him a favorite of the law. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 36

(1990) ("admiralty courts have always shown a special solicitude for the welfare of seamen and their families."); *The Arizona v. Anelich*, 298 U.S. 110, 123 (1936) (describing seamen as "wards of admiralty").[3]

Maintenance and cure[4] are not tricky, unexpected, or unusual obligations. *See Farrell v. United States*, 336 U.S. 511, 516 (1949) ("seaman's right to maintenance and cure . . . is so inclusive as to be relatively simple, and can be understood and administered without technical considerations. It has few exceptions or conditions to stir contentions, cause delays, and invite litigations."). Its duties are imposed on shipowners by federal common law and were well-established in ancient times. *See Aguilar v. Standard Oil Co. of N.J.*, 318 U.S. 724, 730 (1943); *Gardiner v. Sea-Land Serv., Inc.*, 786 F.2d 943, 945 (9th Cir. 1986) ("dates back to the Middle Ages"). They have long been recognized in the United States. *See Harden v. Gordon*, 11 F. Cas. 480 (C.C.D. Me. 1823) (Story, J.). *See also Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 413 (2009) ("the legal

---

[3] Solicitude for the plight of an injured seaman is so great that he is not only a "ward of admiralty," but the law of maintenance and cure makes his employer his "legal guardian in the sense that it is part of his duty to look out for the safety and care of his seaman, whether they make a distinct request or not." *The Iroquois*, 194 U.S. 240, 247 (1904).

[4] Maintenance requires the shipowner to provide a seaman with food and lodging if he becomes injured or ill while in service of the ship. Cure requires the shipowner to provide necessary medical care and attention. *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 441 (2001).

obligation . . . dates back centuries" and punitive damages have been available in such cases "as early as the 1800's").

Nonetheless, Icicle resisted its obligations and took extreme measures to avoid them. The Washington Supreme Court describes the findings of fact established at trial succinctly this way:

> Icicle intentionally disregarded Clausen's health by refusing to pay for his spinal injections and surgery that Icicle's own "handpicked" doctor had recommended, and that Icicle provided Clausen only $20 per day in maintenance and knew Clausen was practically homeless, living in a broken down recreational vehicle, yet it wanted Clausen to take the "bait" and settle early without legal representation. The court also found that Icicle deliberately made false statements in its federal court complaint seeking to terminate Clausen's maintenance and cure; that Icicle's conduct was motivated by profit; and that the size of the punitive damages award was required because Icicle needed substantial deterrence not to treat other workers in the same way it treated Clausen, noting that Icicle had claimed no wrongdoing throughout the suit.

Pet. App. 18a.

The trial court found that each of the aggravating factors identified in *State Farm Mut.*

Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003), were present. Pet. App. 37a-44a. On this record of reprehensibility and "unclean hands," the award of $1.3 million in punitive damages is amply justified and warrants no further review.

II. THE CLAIMED CONFLICT WITH *EXXON*'S TREATMENT OF PUNITIVE DAMAGES DOES NOT EXIST.

To seek review, Icicle incorrectly claims that this Court established a maximum ratio of 1:1 between punitive and compensatory damages for maritime cases in *Exxon*. Pet. 24. It thus seeks this Court's determination of "whether, and to what extent, courts may depart" from that supposedly immutable and mandatory ratio. Pet. 24. Yet, this Court has not established a maximum ratio in maintenance and cure cases, nor even in maritime cases generally.

Icicle's reading of *Exxon* cannot be reconciled with this Court's actual decision or its subsequent explanation of it. In *Exxon*, this Court exercised its common law authority over admiralty cases to determine that a $2.5 billion punitive damage award was excessive because it was "five times the size of the award that jury practice and our judgment would signal as reasonable *in a case of this sort*." *Exxon*, 554 U.S. at 513 n.27 (emphasis added). After examining empirical studies establishing median punitive damage awards generally, this Court declared that "a median ratio of punitive to compensatory damages of about 0.65:1 probably marks the line near which *cases like this one* largely should be grouped." *Id.* at 513 (footnote omitted; emphasis added). Thus, this Court "consider[ed] that

a 1:1 ratio, which is above the median award, is a fair upper limit *in such maritime cases*." *Id*. (footnote omitted; emphasis added).

What constitutes "cases of this sort," "cases like this one," or "such maritime cases"? This Court made clear that it was referring to cases involving a liability based on recklessness rather than more blameworthy criteria, misconduct not motivated by profit, an enormous compensatory damage award ($507.5 million), and evidence of contrition on the defendant's part (Exxon pleaded guilty to criminal violations and paid extensive criminal fines, as well as $2.1 billion in cleanup efforts, at least $900 million in a civil settlement with the United States and Alaska, and another $303 million in voluntary payments to private parties). *Id*. at 510 n.23, 510-11, 513, 515, 479.

Moreover, contrary to cases that might justify higher awards, this Court held Exxon's conduct did not merit a level of condemnation that would permit a multiple of the compensatory award:

> In a well-functioning system, we would expect that awards at the median or lower would roughly express jurors' sense of reasonable penalties in cases with no earmarks of exceptional blameworthiness within the punishable spectrum (*cases like this one, without intentional or malicious conduct, and without behavior driven primarily by desire for gain, for example*) and cases (*again like this one*) without the modest economic harm or odds of detection that have opened the door to higher awards.

Id. at 512-13 (emphasis added). *See also id*. at 524 ("The 1:1 ratio is good for this case, the Court believes, because Exxon's conduct ranked on the low end of the blameworthiness scale. . .") (Ginsburg, J., concurring in part, dissenting in part).

Icicle's misconduct was the mirror opposite of Exxon's in all respects. It engaged in wanton and willful misconduct, not recklessness, it advanced its cause by fraud, it was motivated by profit, the damages awarded against it was comparatively small, and it not only showed no remorse but continued to deny its wrongdoing throughout the case.

Even if the language in *Exxon* were not so translucently clear that this Court was not prescribing a uniform punitive damage ratio for all maritime law, any doubt was definitively dispelled a year later. There, in the course of holding that punitive damages remain available in maintenance and cure cases, this Court stated:

> Nor have petitioners argued that the size of punitive damages awards in maintenance and cure cases necessitates a recovery cap, which the Court has elsewhere imposed. See *Exxon Shipping Co. v. Baker,* 554 U.S. 471, ---, 128 S. Ct. 2605, 2634, 171 L.Ed.2d 570 (2008) (imposing a punitive-to-compensatory ratio of 1:1). We do not decide these issues.

Townsend, 557 U.S. at 424 n.11.

Obviously, if *Exxon* had settled the question of the proper maximum ratio in maintenance and cure cases, there would have been no need for the Court to consider resolving that topic because it was settled. Instead, the Court recognized the cap was only imposed "elsewhere." Moreover, *Townsend* found no compelling reason to settle the issue. This Petition similarly provides no compelling reason to address the question. The paucity of punitive damage awards in maintenance and cure cases,[5] *see id.* at 429-30 (Alito, J., dissenting), strongly evidences that this is not an issue of great national significance and that does not require this Court's attention.

---

[5] Counsel has identified a handful of modern maintenance and cure cases that have distinct punitive damage awards: *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187, 1189 (11th Cir. 1987) (compensatory damages $15,150, punitive damages $5,000); *Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110, 1113 (5th Cir. 1984) ($420,016, $11,550); *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048, 1049, 1053 (1st Cir. 1973) ($56,366, $10,000); *Babbidge v. Crest Tankers, Inc.*, No. 89-0232-P, 1991 WL 432058, *3 (D. Me. Mar. 19, 1991) (unreported) ($7,200, $35,000); *Hodges v. Keystone Shipping Co.*, 578 F. Supp. 620, 624, 621 (S.D. Tex. 1983) ($12,500, $100,000); *Jordan v. Intercontinental Bulktank Corp.*, 621 So. 2d 1141, 1147-48, 1158 (La. Ct. App. 1993) ($544,759, $500,000); *Porche v. Maritime Overseas Corp.*, 550 So. 2d 278, 279-80 (La. Ct. App. 1989) ($144,000, $100,000). Two other cases appear to have awarded punitive damages in maintenance and cure cases but do not separate the punitive from the compensatory damages. *See Gaspard v. Taylor Diving & Salvage Co.*, 649 F.2d 372 (5th Cir. 1981); *Martin v. G & A Limited*, 604 So. 2d 1014 (La. Ct. App. 1992).

That maintenance and cure merits different punitive damage considerations makes sense given the unique nature of the cause of action and the particular vulnerability of the seaman. The cause of action is "sui generis," *Clauson v. Smith*, 823 F.2d 660, 661 n.1 (1st Cir. 1987), and a form of strict liability. *Aguilar*, 318 U.S. at 730 (maintenance and cure "in no sense is predicated on the fault or negligence of the shipowner."). Because maintenance and cure is a no-fault cause of action, a case producing punitive damages requires significant additional evidence of reckless disregard or ill intent not necessary for compensatory damages. *Townsend*, 557 U.S. at 424. Thus, it is very much unlike other maritime actions for which punitive liability might be imposed.

Finally, it is also telling that this Court apparently did not consider its decision in *Exxon* to have the plenary effect Icicle subscribes to it when it held the certiorari petition in *Action Marine, Inc. v. Continental Carbon Inc.*, 481 F.3d 1302 (11th Cir. 2007) (involving a 9:1 ratio of punitive to compensatory damages, litigation misconduct by the defendant, and highly reprehensible actions), during the pendency of *Exxon*[6] and, rather than grant certiorari, vacate, and remand the case for further

[6] The petition for a writ of certiorari was filed on August 24, 2007, the brief in opposition was filed September 26, 2007, the case was conferenced on October 26, 2007, and reconferenced on June 26, 2008. The petition was denied on June 27, 2008, one day after this Court decided *Exxon*. Docket sheet No. 07-257, *available at* http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/07-257.htm.

consideration in light of *Exxon*, this Court denied certiorari the day after this Court issued its decision in *Exxon*. 128 S. Ct. 2994 (2008) (Mem.).

In short, the decision below does not conflict with this Court's *Exxon* decision, and the issue is not of such import that it warrants this Court's attention.

III. THE PUNITIVE DAMAGES AWARDED ARE NOT EXCESSIVE, AND NO CLARIFICATION ON APPROPRIATE RATIOS IS NEEDED.

A. Reprehensibility Remains the "Most Important Indicium of the Reasonableness of a Punitive Damage Award."

Icicle errs in treating the ratio between punitive and compensatory damages as if it were the conclusive and overriding consideration as to the reasonableness of a punitive damages verdict and suggesting that this Court's further guidance is needed. Icicle's suggested use of a mathematical bright line wrongly denigrates the primary, important, and historic role that reprehensibility plays in both the assessment of punitive damages and the determination of their proportionality. Courts do not need further instruction on this point, so the Petition provides no proper ground for certiorari.

Indeed, from its earliest antecedents to its most recent application, the one constant that has defined the law of punitive damages is that an appropriate punitive award reflects "'the enormity of

the offense.'" *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996) (quoting *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851)). This Court has plainly stated that reprehensibility, not some arbitrary mathematical formula, remains the "'most important indicium of the reasonableness of a punitive damages award.'" *State Farm*, 538 U.S. at 419 (citation omitted).

It is *this* proportionality principle, focusing on reprehensibility, that is "'deeply rooted and frequently repeated in common law jurisprudence.'" *BMW,* 517 U.S. at 575 n.24 (citation omitted). *See also Pacific Mut. Life Ins. Co. v. Haslip*, 449 U.S. 1, 15 (1991) ("traditional common-law approach . . . consider[s] the gravity of the wrong."). In exercising its common law authority over admiralty law, this Court has never said anything different. In fact, *Exxon* repeatedly recognizes reprehensibility's importance. *See, e.g.*, 554 U.S. at 493-94.

This Court has already advised other courts that an excessiveness inquiry is a highly fact-sensitive undertaking. *State Farm*, 538 U.S. at 425 ("The precise award in any case . . . must be based upon the facts and circumstances of the defendant's conduct."). It has further instructed courts reviewing the level of punishment and deterrence needed to justify the size of punitive damages to consider the presence or absence of five aggravating factors, specifically whether:

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the

> conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

State Farm, 538 U.S. at 419 (citations omitted).

Here, the trial court and state supreme court both agreed that all five aggravating factors were present. Mr. Clausen's injuries were undeniably physical. As detailed by the trial court, Icicle also "demonstrated intentional indifference to Mr. Clausen's health. . . . [and] persisted in this behavior." Pet. App. 38a. That court found Mr. Clausen "practically homeless, and therefore quintessentially financially vulnerable," and determined that Icicle "sought to use Mr. Clausen's financial vulnerability against him." Pet. App. 39a, 40a. Icicle's actions were not an isolated incident but repeated and continued up to the filing of his lawsuit. Pet. 40a. Moreover, the "claims adjuster's file demonstrates that the decision [to deny maintenance and cure] was carried out with both trickery and deceit," and evidences "a conspiracy within the defendant's corporate management to deny Mr. Clausen's medical care." Pet. 40a, 41a. Plainly, the court held, Icicle's "motive was to enhance [its] profit margin." Pet. 44a.

The trial court also found the potential harm, only remedied by this lawsuit, "was hardship, pain, and devastation of [Mr. Clausen's] life." Pet. 46a. It concluded that size of the award was necessary to deter Icicle from "repeat[ing] what it did to Mr. Clausen." Pet. App. 46a. Based on this record, there is little doubt that Icicle's misconduct was at the

extreme end of the reprehensibility scale and justified this award. The guidance provided by this Court in determining the degree of reprehensibility is clear, and the lower courts have exhibited no difficulty in applying it.

B. Ratio Analysis Properly Takes Account of the Entire Compensatory Award.

In this case, compensatory damages sufficient to make Clausen whole arising out of the same nucleus of operative fact totaled $918,625.57. Of that amount, $37,420 represented improperly withheld maintenance and cure, $453,100 represented damages for negligence attributable to a violation of the Jones Act but was reduced by Clausen's 44 percent comparative fault to $253,736, and $428,105.57 represented attorney fees and costs awarded as compensation. Given this total, the ratio between punitive and compensatory damages rests at an unremarkable 1.4:1.[7]

---

[7] The full amount of damages assessed represents the harm and potential harm that befell Clausen and may properly be taken into account for ratio purposes. *See BMW*, 517 U.S. at 575, (ratio guidepost considers "the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award"); *see also Philip Morris USA v. Williams*, 549 U.S. 346, 354 (2007) (the potential harm properly considered is the "harm potentially caused *the plaintiff*."). However, even if one does not give Clausen the full benefit of the jury's assessment of damages and reduces the total damages by his assigned comparative fault, the ratio only climbs to 1.8:1, a quotient that should not "raise a suspicious judicial eyebrow." *See BMW*, 517 U.S. at 583 (quoting,

Icicle does not dispute use of the $37,420 awarded for maintenance and cure in the denominator for ratio analysis, but attacks the Washington courts' inclusion of attorney fees and costs awarded to pursue the maintenance and cure claim. While a small award can justify a high ratio, *see State Farm*, 538 U.S. at 425 (holding that where "'a particularly egregious act has resulted in only a small amount of economic damages,'" a higher than single-digit ratio can be justified) (citation omitted), consideration of the other compensatory damages trims the ratio here to the low single-digits.

1. Compensation for Clausen's Jones Act claim should be considered as part of the ratio analysis.

Although the Washington courts did not do so, damages awarded for Mr. Clausen's injuries under the Jones Act are properly taken into consideration as one element in the denominator for purposes of calculating the punitive-compensatory ratio. It is axiomatic that a plaintiff with a cause of action for maintenance and cure avails himself of all three causes of action identified within the "trilogy" of seaman's rights, the Jones Act, unseaworthiness, and maintenance and cure. *See Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995). Moreover, this Court has long recognized that:

> Although remedies for negligence, unseaworthiness, and maintenance and

---

with approval, *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 481 (1993) (O'Connor, J., dissenting)).

> cure have different origins and may on occasion call for application of slightly different principles and procedures, they nevertheless, when based on one unitary set of circumstances, serve the same purpose of indemnifying a seaman for damages caused by injury, depend in large part upon the same evidence, and involve some identical elements of recovery.

Fitzgerald v. U.S. Lines Co., 374 U.S. 16, 18 (1963). *See also Cortes v. Baltimore Insular Lines*, 287 U.S. 367, 374-75 (1932), *superseded on other grounds by statute as recognized in Miles v. Apex Marine Corp.*, 498 U.S. 19, 33 (1990) (recognizing a "cause of action for personal injury created by the statute may have overlapped his cause of action for breach of the maritime duty of maintenance and cure."); *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480, 1490-91 (5th Cir. 1992) (Jones Act and maintenance and cure claims are not separate and independent claims when arising from the same set of operative fact).

In fact, a seaman has the option of seeking damages for wrongfully denied maintenance and cure under the Jones Act, instead of as a general maritime law claim. *See Cortes*, 287 U.S. at 378; *see also Kernan v. Am. Dredging Co.*, 355 U.S. 426, 432 (1958) (Jones Act intended "to provide liberal recovery for injured [maritime] workers."). As the record shows that Mr. Clausen's damages arise entirely as result of the events that caused his injury and a consequence of his wrongfully denied maintenance and cure, their relevance for the review of his punitive damage award is apparent, even if the

Jones Act, by itself, provides no basis for punitive damages.

Because the Jones Act claim is tied to the facts concerning the claim for maintenance and cure, which permits the assessment of punitive damages, the total damages arising from the same operative facts must be considered for ratio purposes. Thus, the jury found that Mr. Clausen's injury, as compensated through his Jones Act claim, required damages for lost wages and earning capacity totaling $259,000 ($114,00 in past losses and $145,000 in future losses). Special Verdict Form 2 (Wash. Sup. Ct. Nov. 16, 2009) (App. 2a). In addition, pain and suffering totaled $278,000. *Id*. These and other damages are intimately tied to the injuries for which maintenance and cure applied and cannot be cordoned off from his other compensatory damages for purposes of determining whether the punitive damages are excessive.

Punitive damages in maintenance and cure cases are extremely rare. *See* p. 12 n.5, *supra*. No conflict exists between courts on this issue that requires resolution by this Court.

2. It was proper to consider the attorney fees and costs awarded as compensation in the ratio analysis.

Finally, it was entirely appropriate to consider the attorney fees and costs connected to the maintenance and cure claims and awarded as compensation as part of the ratio analysis. The fees and costs derive directly from the maintenance and cure cause of action. What this Court said in

Vaughan v. Atkinson, 369 U.S. 527, 531 (1962) is entirely applicable here: "[i]t is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one."

Icicle counters that by mistakenly asserting that *Exxon* and *State Farm* foreclose consideration of attorney fees in the ratio analysis and suggests that there is a split in authority, but neither contention holds up to scrutiny.

Contrary to Icicle's assertion, Pet. 10, 11 (citing *Exxon*, 554 U.S. at 506-07), *Exxon* does not mandate the exclusion of court-awarded attorney fees as costs, an issue not raised in that case. *Exxon* did not attempt to define what properly comprises compensatory damages, probably because this Court understood that damages naturally vary with the cause of action.[8]

Icicle's claim that attorneys fees cannot be included in the ratio analysis rests largely on its assertion that, in the various punitive-damage cases

---

[8] This Court did recognize that states take varying approaches to punitive damages. Among the states cited was Connecticut, which has limited its punitive recoveries to attorney fees and costs. *Exxon*, 554 U.S. at 495. That mention was the only place in the opinion that attorney fees are discussed. In maintenance and cure cases, however, such as this one, attorney fees and costs serve a plainly compensatory purpose, categorically different goal than punitive damages. *See Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (punitive and compensatory damages "serve distinct purposes," the first as non-compensatory private fines and the second to compensate for distinct losses).

it cites addressing ratios, "there is no indication that any of them included attorney's fees in that ratio." Pet. 11. The fact that the issue went unaddressed in those cases is patently insufficient to indicate that an affirmative decision was made, let alone one that affects maintenance and cure cases, where they have always been treated as compensatory damages. Nor does it support Icicle's request to examine that question in this case.

Icicle does assert that the plaintiffs in *State Farm*, in their brief to this Court, asked that $800,000 in attorney's fees and costs be considered in addition to the $1 million in compensatory damages in order to lower the otherwise 145:1 ratio this Court found excessive. It then claims this Court "excluded those amounts from its calculation." Pet. 11-12 (citing 538 U.S. at 425). Yet, the *State Farm* opinion is silent on attorney fees and that particular request by plaintiffs. That silence cannot constitute a holding, as Icicle seems to suggest when it assets that the decision below's consideration of attorney fees "cannot be reconciled with *Exxon* and *State Farm*." Pet. 12. Instead, this Court has consistently said that binding precedent consists only of holdings and explications of the governing rules in those cases, not unaddressed issues. *See, e.g.*, *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in part, dissenting in part).

Even the remand in *State Farm* provides no basis for this Court's consideration, contrary to Icicle's assertion. On remand, the Utah Supreme Court refused to consider attorney fees because it felt bound by this Court's use of $1 million as the compensatory denominator in its analysis. Secondarily, it mentioned other difficulties relevant

to state law. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 419-20 (Utah 2004).

Icicle also seeks support from *Daka, Inc. v. McCrae*, 839 A.2d 682 (D.C. 2003), Pet. 14, but its reliance is misplaced. In *Daka*, statutory attorney fees that, by design, had "a certain punitive element" was not compensation and thus could be considered as part of the compensatory comparative. *Id.* at 701 n.24 (quoting *Parrish v. Sollecito*, 280 F. Supp. 2d 145, 164 (S.D.N.Y. 2003)).

The decision below remains the only maintenance and cure case that discusses the use of attorney fees as part of the compensatory denominator for ratio analysis of a punitive damage award. Icicle does not deny this, but attempts to import inapposite decisions, involving very different *statutory* causes of action, to assert that consistency *across* causes of action is necessary to avoid the "stark unpredictability" of punitive damages awards. Pet. 18 (citing *Exxon*, 554 U.S. at 499). Yet, the fact that different causes of action will permit or foreclose the award of punitive damages or will merit differing amounts to serve the purpose of punishment and deterrence, based on different degrees of reprehensibility, makes it inherent that punitive damages cannot be uniform—and this Court has never said that uniformity, rather than appropriate notice of the size of potential liability, is desirable.

The fact remains that maintenance and cure cases are unique. In most causes of action, as Icicle argues, Pet. 10, "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser," and that this Court has held that it is generally the Congress's task, not the courts', to

reallocate that burden. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). However, even our earliest statutes recognized that courts could award attorney fees as costs in admiralty and maritime cases. *Id*. at 248.

In *Vaughan*, 369 U.S. 527, this Court established that attorney fees and costs were specifically available as compensation to a seaman-litigant wrongfully denied maintenance and cure by his employer. Consistent with that holding, Icicle took the position throughout this litigation that "[u]nder federal maritime law, an award of attorney fees for failure to pay maintenance and cure is an element of damages, and is therefore a question of fact that must be decided by the jury."[9] Icicle Br. 9 (Wash. Ct. App. Sept. 20, 2010).

---

[9] Icicle also claimed that the attorney fees awarded were punitive, at the same time that they were compensatory, *because* they constituted a factual finding of the jury, citing *Haslip*, 499 U.S. at 15-16. Icicle apparently was unaware of this Court's post-*Haslip* decision in *Cooper*, 532 U.S. at 432, where punitive damages were defined as an expression of a jury's moral condemnation and not a factual assessment. Icicle also asserted that *Townsend* "left no doubt that [attorney fees in maintenance and cure cases] are a form of punitive damages." Icicle Br. 10 (citing 557 U.S. 417-18). *Townsend* made no such pronouncement, but merely quoted *Boston Manufacturing Co. v. Fiske*, 3 F. Cas. 957, 957 (C.C.D. Mass. 1820) (Story, J.) to the effect that counsel fees are awardable in admiralty cases "as a recompense for injuries sustained, as exemplary damages, or as a remuneration for expences incurred, or losses sustained, by the misconduct of the other party." *Id*. (footnote

That such fees and costs are recoverable as compensation makes great sense, particularly when Icicle engaged in repeated litigation abuse in this matter,[10] when reasonable costs alone to prove the wrongful withholding of maintenance and cure totaled $40,547.57, and recovery for wrongfully withheld maintenance and cure only amounted to $37,420. If seamen are wards of admiralty, then the law must assist them in opening the courthouse door to wrongfully denied financial assistance. That is why *Vaughan* made a point that the attorney fees were recoverable because the shipowner had forced the injured seaman to hire counsel in order to receive maintenance and cure, which authorizes a cause of action for all "necessary expenses." 369 U.S. at 530. As explained by the district court on remand, Vaughan seeks to "make the seaman 'whole', i.e., he should not be required to pay money out of his pocket to collect maintenance lawfully due to him."

---

omitted). Still, *Vaughan* established that these fees were compensatory in nature.

[10] That litigation abuse included the filing of a federal declaratory judgment action to stop maintenance and cure on the basis of a false allegation that Mr. Clausen had been uncooperative, despite the fact that he had agreed to have Icicle's nurse case manager accompany him on all medical visits, provided prompt copies of all records, and provided complete authorization to obtain any records from his medical providers. In addition, Icicle wrongfully withheld documents during the trial that showed its own doctor supported Mr. Clausen's claims, which resulted in sanctions for both Icicle and its counsel.

Vaughan v. Atkinson, 206 F. Supp. 575, 576 (E.D. Va. 1962).

Perhaps when more courts have weighed in on this question of considering all the compensatory damages arising from the wrongful denial of maintenance and cure and, if they have taken differing positions, there will be a split in authority that this Court may wish to resolve. Those circumstances do not now exist, and the Petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Date: July 30, 2012

Respectfully submitted,

Robert S. Peck
Counsel of Record
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
777 6th Street, N.W.
Suite 520
Washington, DC 20001
Phone: (202) 944-2874
Fax: (202) 965-0920
robert.peck@cclfirm.com

James P. Jacobsen
BEARD STACEY & JACOBSEN, LLP
4039 21st Avenue, West
Suite 401
Seattle, WA 98199
(206) 282-3100

Lawrence N. Curtis
LARRY CURTIS, APLC
300 Rue Beauregard
Building C
Lafayette, LA 70508
Phone: (337) 235-1825
Counsel for Respondent

APPENDIX

TABLE OF CONTENTS

APPENDIX A:

Court's Jury Instruction Number 13

You may award punitive damages only if you find that the defendant acted with willful and wanton disregard its obligation to provide maintenance and cure.

However, you should not award punitive damages unless the shipowner acted willfully in disregard of the seaman's claim for maintenance and cure. The plaintiff may not recover punitive damages for the prosecution of the Jones Act or unseaworthiness claims. Thus, you may award only those punitive damages plaintiff incurred in pursuing the maintenance and cure claim and only if you find that the shipowner acted willfully in failing to pay maintenance and cure.

The purposes of punitive damages are to punish a defendant and to deter similar acts in the future. Punitive damages may not be awarded to compensate a plaintiff. The plaintiff has the burden of proving by a preponderance of the evidence that punitive damages should be awarded.

If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering the amount of any punitive damages, consider the degree of reprehensibility of the defendant's conduct.

RP 1685-86.

APPENDIX B:

Special Verdict Form
(filed Nov. 16, 2009)

THE HONORABLE HOLLIS HILL, TRIAL JUDGE

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

DANA CLAUSEN,

Plaintiff,

v.

ICICLE SEAFOODS, INC.,

Defendant.

Case No. 08-2-03333-3 SEA

FILED
King County, Washington
Nov. 16, 2009
Superior Court Clerk
By: Julie Warfield, Deputy

SPECIAL VERDICT FORM

1. Do you find, from a preponderance of the evidence, that Icicle was negligent in the manner claimed by Dana Clausen and that such negligence played any part, no matter how small, in causing or contributing to the injuries suffered by him?

Answer Yes or No: YES

(Note: Go to Question No. 2)

2. Was the *BERING STAR* unseaworthy in the manner claimed by Dana Clausen and was such unseaworthiness a legal cause of the injuries suffered by Dana Clausen under the standards given to you in regard to the unseaworthiness claim?

Answer Yes or No: NO

(Note: If you answered "Yes" to Question No. 1 or Question No. 2, proceed to Question No. 3. If you answered "No" to Question No. 1 and No. 2, proceed to Question No. 9.)

3. Do you find from a preponderance of the evidence that Dana Clausen was himself negligent in the manner claimed by Icicle and that such negligence was a legal cause of his own damages under the standards given to you in regard to the Jones Act of unseaworthiness claims?

Answer Yes or No: YES

(Note: If you answered "Yes" to Question Nos. 1 or 2 and "Yes" to Question Nos. 1 or 2 and "No" to Question No. 3, proceed to Question No. 5.)

4. What proportion or percentage of Dana Clausen's damages was legally caused by the following entities or persons?

Answer in terms of percentage:

Icicle..... 56%

Dana Clausen..... 44%

(Note: The total of the percentages given in your answer to Question No. 4 should equal 100%. Go to Question 5.)

5. Without regard to any percentage that you may have given in answer to Question No. 4, please state the entire amount of damages suffered by Dana Clausen from the date of the accident to the date of the trial.

a.	Loss of past wages including loss of earning capacity	$114,000
b.	Physical pain and suffering past and present	$59,000
c.	Mental pain and suffering, including such items as fear, anxiety, humiliation, embarrassment and nervousness, past and present	$13,000 ~~$2,1000~~
d.	Past disability	$2,100 ~~$21,000~~
e.	Loss of enjoyment of life, that is the normal ability to enjoy the pleasures and pursuits of life, past	$21,000

(Note: Got to Question No. 6.)

6. Without regard to any percentage that you may have given in answer to Question No. 4, please state the entire amount of damages suffered

by Dana Clausen from the date of the trial into the future.

a.	Hospital, medical, nursing pharmaceutical and other related expenses, future (excluding cure under No. 12)	$35,000
b.	Loss of future wages, including loss of earning capacity	$145,000
c.	Physical pain and suffering, future	$10,000
d.	Mental pain and suffering, including such items as fear, anxiety, humiliation, embarrassment and nervousness, future	$4,000
e.	Permanent future disability	$20,000
f.	Loss of enjoyment of life, that is the normal ability to enjoy the pleasures and pursuits of life, future	$30,000

7. Do you find, from a preponderance of the evidence that Dana Clausen has failed to use reasonable efforts to mitigate his damages?

Answer Yes or No: No

(Note: If you answered "Yes" to Question No. 7, please proceed to Question No. 8. If you

answered "No" to Question No. 7, please proceed to Question No. 9.)

8. What *sum of* damages do you find, from a preponderance of the evidence, could have been avoided, had Dana Clausen used reasonable efforts to mitigate his damages?

Answer in Dollars: $

(Note: Go to Question No. 9.)

9. Do you find, from a preponderance of the evidence, that Dana Clausen has reached maximum medical cure?

Answer Yes or No Yes

(Note: If you answered "Yes", go to Question No. 10. If you answered "No", go to Question No. 11.)

10. On what date did Dana Clausen reach maximum medical cure?

Answer: (*Insert Date):* 4-23-2009

(Note: Go to Question No. 11.)

11. If you find that Mr. Clausen is not at maximum medical cure, what amount do you find, from a preponderance of the evidence, is owed to Dana Clausen for maintenance from February 12, 2006 through May 10, 2010?

Answer in Dollars: $

(Note: Go to Question No. 12.)

12. If you find that Mr. Clausen is not at maximum medical cure, what amount do you find, from a preponderance of the evidence is owed to Dana Clausen for cure from February 12, 2006 through May 10, 2010?

Answer in Dollars: $

(Note: Go to Question No. 13.)

13. Do you find, from a preponderance of the evidence, that Icicle was unreasonable in its failure to pay maintenance to Dana Clausen?

Answer Yes or No: Yes

(Note: Go to Question No. 14.)

14. Do you find, from a preponderance of the evidence, that Icicle was unreasonable in its failure to pay cure to Dana Clausen?

Answer Yes or No: Yes

(Note: If you answer "Yes" to Question No. 13 or 14 proceed to answer Question No. 15. If you answered "No" to Question No. 13 and Question No. 14 you need not consider or answer any of the remaining questions. Simply sign and date the verdict form and return it to the Bailiff.)

15. Do you find, from a preponderance of the evidence, that Icicle's unreasonable failure to pay maintenance or cure to Dana Clausen was a legal cause of some injury to him?

Answer Yes or No: No

(Note: If you answered "Yes" to Question No. 15, proceed to Question No. 16. If you answered "No" to Question No. 15, go to Question No. 17.)

16. Please state the entire amount of damages sustained by Dana Clausen as a result of the Icicle's unreasonable failure to pay prompt and proper maintenance and cure?

Answer in Dollars: $

(Note: Go to Question No. 17.)

17. Do you find, from a preponderance of the evidence, that Icicle was callous and indifferent or willful and wanton in its failure to pay maintenance to Dana Clausen?

Answer Yes or No: Yes

(Note: Go to Question No. 18.)

18. Do you find, from a preponderance of the evidence, that Icicle was callous and indifferent, or willful and wanton in its failure to pay cure?

Answer Yes or No: Yes

(Note: If you answered "Yes" to Question No. 17 or No. 18 proceed to answer Question No. 19. If you answered "No" to Question No. 17 and No. 18 you need not consider or answer Question No. 19. Simply sign and date the verdict form and return it to the Bailiff.)

19. Please state the entire amount of punitive Damages to be awarded to Dana Clausen:

Answer in Dollars: $1.3 Million

_____
FOREPERSON

Seattle, Washington
_____, 2009

APPENDIX C:

Order Granting Plaintiff's Motion for Sanctions (filed Jan. 29, 2010)

JUDGE HOLLIS R. HILL

FILED
10 Jan. 29 PM 3:39
KING COUNTY
SUPERIOR COURT CLERK
KENT, WA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY
No. 08-2-03333-3 SEA

DANA CLAUSEN,
Plaintiff,
v.
ICICLE SEAFOODS, INC.,
Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SANCTIONS

THE COURT having reviewed Plaintiff's Motion for Sanctions and the Memorandum and Declaration in Support thereof, the Defendant's Opposition to said Motion, the remaining record and the Court having heard testimony regarding said Motion at hearing on January 21, 2010, does hereby find and ORDER:

Plaintiff's Motion is GRANTED.

The Court finds that defendant and defendant's counsel violated Civil Rule 26(g) and Civil Rule 26(e)(2). The Court exercises its discretion in this matter to impose monetary sanctions for these violations.

The defendant and its lawyer violated Civil Rule 26(g) when they recklessly certified that they had made reasonable inquiries and that based on those inquiries, they had produced in discovery the entire claim's adjuster's file with the exception of documents contained in the privilege log.

Mr. Kurt Gremmer, the claims adjuster, testified at the time of trial that in mid-2007 defense counsel had requested a copy of his file. In response to this request, he copied selected portions of the file which he thought counsel should see. He then forwarded those portions. Many documents in the adjuster's file were not provided to defense counsel at that time. Contained in the adjuster's file at that time, but not provided in discovery, was a Panel of Consultant's report regarding plaintiff Clausen's medical condition, which was highly relevant to the claims in this case as well as other relevant documents. In early, 2009 plaintiffs propounded a Request for Production seeking the entire adjuster's file. Defense counsel and the defendant's representative provided to plaintiff only those documents they had received from Mr. Gremmer in 2007. They certified that their response to this request was complete excepting certain documents covered by a privilege log provided to plaintiff's counsel. These certifications were made without any effort to review the adjuster's original file to ensure that all the documents therein had been produced

and without asking the adjuster to update the materials he had provided earlier.

Among the documents reviewed by defense counsel were certain communications that made reference to the Panel of Consultants report.[1] These references should have resulted in a reasonable inquiry as to the existence of such a report and as to why no such report was included in the documents in defendant's possession. Furthermore, documents which were listed in the privilege log provided in discovery indicated that defendant's agents had discussed among themselves that the Panel of Consultant's report "did not look good" for them regarding Mr. Clausen's claim for continuing maintenance and cure. Despite these red flags, evidently, no inquiry was made to determine the whereabouts of the report and the Panel of Consultants report was not provided to plaintiff in response to the discovery request. Neither were numerous other documents that the adjuster had withheld when, in 2007, he had provided portions of his file to defense counsel. Failure to make any reasonable inquiry before certifying the answers to discovery constitutes a reckless violation of CR 26(g) which mandates an appropriate sanction against defendant and defense counsel.

---

[1] The defense maintains that this report was not included when Mr. Gremmer produced portions for his file in 2007. Mr. Grenuner was at a loss to explain why that document would not have been copied and provided by his office, but he could not say with certainty whether or not it bad been copied and provided.

During trial, plaintiff's counsel raised the issue of possible missing documents from the claims adjuster's file. After this was raised, defense counsel came forward and acknowledged that he had just received that day from the adjuster a copy of the Panel of Consultant's report and that this was the first time he had ever seen it. This Court does not question defense counsel's veracity in this regard, but admonishes defense counsel for not providing the report to plaintiff before the issue was raised.

According to defense counsel, upon learning of the Panel of Consultant's report he had the claims adjuster bring his entire file to counsel's office for review that day. At this time counsel should have informed the Court and plaintiff's counsel that there were many documents that had not been provided in discovery. Instead, defense counsel resisted the calling of the claims adjuster in plaintiff's case in chief, resisted the enforcement of plaintiff's trial subpoena for the adjuster's file and resisted the production of the adjuster's file in open court. The defense was ordered to produce the entire f1le in court six trial days after defense counsel became aware that he had in fact failed to produce the entire adjuster's file as he had certified.

Documents in the adjuster's file which were not produced until during the trial were relevant to plaintiff's maintenance and cure, Jones Act and punitive damages claims. Defense counsel's failure to rectify its misleading certification of discovery responses in a timely manner constitutes a violation of Civil Rule 26(e)(2). This violation subjects defense counsel and defendant to such terms as the trial court may deem appropriate. CR 26(e)(4)

The withholding of the claims adjuster's file impacted the presentation of plaintiff's case. However, it is not clear to the Court, given the punitive damages award herein that plaintiff's case was prejudiced. Therefore, the Court does not award compensatory sanctions to be paid to plaintiff. Rather, the Court orders sanctions to be paid into the court registry in the amount of $5,000 against defense counsel and $10,000 against the defendant. These amounts are designed for the purpose of deterring, punishing and educating those sanctioned regarding future rules violations of this nature. *Washington State Ins. Ex. Ass'n* v. *Fisons*, 122 Wn. 2d 299, 356 (1993).

IT IS SO ORDERED.

Dated this 28th day of January, 2010.

_____

HONORABLE HOLLIS HILL
King County Superior Court Judge