

**In the
Supreme Court of the United States**

SUNSET CRUISES, INC.,

Petitioner,

v.

PETER MCGREGOR,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

COMPETITION PACKET FOR THE
SIXTEENTH ANNUAL JUDGE JOHN R. BROWN
ADMIRALTY MOOT COURT COMPETITION, 2009

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-2318

PETER MCGREGOR,
Plaintiff-Appellant,

v.

SUNSET CRUISES, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the District of South Carolina, at Charleston
Michele Y. Portia, District Judge.
(6:06-cv-00945-MYP)

Argued: March 3, 2008

Decided: May 5, 2008

Before JUSTINIAN, SOLOMON, and HAMMURABI, Circuit Judges.

Reversed and remanded by published opinion. Judge Hammurabi wrote the opinion, in which Judge Justinian joined. Judge Solomon dissented.

HAMMURABI, Circuit Judge:

Plaintiff-appellant Peter McGregor was a seaman employed by defendant-appellee Sunset Cruises, Inc. (Sunset) when he lost the vision in his left eye. McGregor alleges that this tragic loss was a result of the captain's refusal to provide him with adequate medical care. McGregor sued Sunset seeking compensatory and punitive damages. The district court dismissed the claim for punitive damages and certified that decision for interlocutory appeal. We accepted the appeal. We now reverse and remand the case for further proceedings.

I
Facts and Proceedings

McGregor's complaint alleges that in May 2005 he was employed by Sunset as a steward aboard Sunset's cruise ship *S.S. Golden Girl*. Sunset owned and operated the *Golden Girl* and employed the ship's captain and crew (including McGregor). On May 16, 2005, the *Golden Girl* took on passengers at Baltimore for a regularly scheduled, round-trip cruise of five days to Bermuda. The ship pulled away from the dock at noon. Shortly thereafter, McGregor began experiencing a visual disturbance that seemed to originate in the bottom part of his left eye.

As the day progressed, the obstruction to McGregor's vision expanded. Around 11 p.m., just as the ship was reaching the open sea, McGregor went to the ship's doctor, who immediately diagnosed the problem as a detached retina. The doctor told the ship's master, Captain Robert Strong, that McGregor needed to see an ophthalmologist on an emergency basis and recommended that a pilot vessel or helicopter be summoned to transport McGregor to the nearest hospital. Captain Strong rejected this recommendation and ordered McGregor to rest his eyes and await further medical treatment until the ship arrived at Bermuda two days later. McGregor alleges that this delay in treating his detached retina was the cause of his permanent loss of vision in his left eye.

McGregor, invoking the district court's admiralty jurisdiction under 28 U.S.C. § 1333(1), sued Sunset in the United States District Court for the District of South Carolina. In Count I, seeking compensatory damages, McGregor alleges that Captain Strong, acting in the course and scope of his employment, was negligent in rejecting the physician's recommendation. In Count II, seeking punitive damages, McGregor alleges that Strong's conduct was reckless, callous, willful, and wanton.

Sunset moved to dismiss Count II under Fed. R. Civ. P. 12(b)(6), arguing that punitive damages were unavailable as a matter of law. The district court granted Sunset's motion on the ground that our precedent precludes holding an employer vicariously liable for punitive damages unless the employer authorized or ratified the tortfeasor employee's objectionable conduct. The

district court then certified its decision as appropriate for interlocutory appeal under 28 U.S.C. § 1292(b). We accepted the appeal and hereby reverse the district court's decision and remand the case for further proceedings.

II Analysis

Sunset's motion to dismiss McGregor's punitive damages claim was based on two arguments. First, Sunset argued that this Court's controlling jurisprudence precludes holding an employer vicariously liable for punitive damages unless the employer authorized or ratified the tortfeasor employee's objectionable conduct. Second, Sunset argued that federal maritime law does not permit seamen to sue their employers for punitive damages. The district court agreed with Sunset on the first point; it did not address the second. Under our view of the case, both points must be resolved.

A. Sunset's Liability in Punitive Damages for Capt. Strong's Misconduct

Sunset's first argument is bottomed on *Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U.S. 101, 106-107 (1893), in which the Supreme Court announced a rule "of general [federal] jurisprudence" that an employer "cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of [an employee]," but went to say that punitive damages might lie if the employer knew the employee was "an unsuitable person" or if the employer "participated in, approved, or ratified" the employee's tort. *Id.* at 117.

In *Norfolk & Portsmouth Traction Co. v. Miller*, 174 F. 607, 610 (4th Cir. 1909), we read *Lake Shore* to mean that a complaint seeking to hold an employer liable for punitive damages for the tortious conduct of an employee must be dismissed unless it alleges that the employer "authorized, participated in, or ratified the act" of the employee. In several other decisions we

have similarly embraced the *Lake Shore* rule. See *Pullman Co. v. Hall*, 46 F.2d 399, 404-405 (4th Cir. 1931); *Davenport v. Southern Ry. Co.*, 135 F. 960, 967 (4th Cir. 1905).

If the foregoing decisions were controlling—as the district court thought—then the dismissal of McGregor’s punitive damages count would have been correct, because McGregor does not claim that the corporate managers of Sunset authorized, participated in, or ratified Captain Strong’s conduct. But we do not think the decisions are or should be controlling. They are not controlling because they did not address federal maritime law; instead they purported to declare federal general common law on the authority of *Swift v. Tyson*, 41 U.S. 1 (1842), which was overruled by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). They should not be controlling because *Lake Shore*’s “strict complicity” requirement, David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, 122 (1997), is dramatically out of step with modern thinking. *Restatement (Second) of Torts* § 909 sets forth a more nuanced approach that exposes employers to punitive damages for highly culpable conduct of employees acting as “managerial agent[s].” Section 909 has found acceptance in modern federal maritime law. See *C.E.H., Inc. v. F/V Seafarer*, 70 F.3d 694, 1996 AMC 467 (1st Cir. 1995); *Protectus Alpha Navigation Co. v. North Pacific Grain Growers*, 767 F.2d 1379, 1986 AMC 56 (9th Cir. 1985). We think the general approach of § 909 should be followed, and that on remand McGregor may be able to prove that Captain Strong was acting as a “managerial agent” when he required McGregor to wait for two days before seeing an eye specialist.

B. The Availability of Punitive Damages in Seamen’s Actions

Sunset cites *Miles v. Apex Marine Corp.*, 498 U.S. 19, 1991 AMC 1 (1990), *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1993 AMC 1217 (6th Cir. 1993), and *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1995 AMC 2409 (5th Cir. 1995) (en banc), in support

of its argument that seamen are not entitled to seek punitive damages from their employers. None of these cases will bear the weight.

Miles did not address punitive damages. It held that seamen's families cannot recover damages for loss of society in wrongful death actions for negligence under the Jones Act, 46 U.S.C. § 30104, and for unseaworthiness under the general maritime law. *Miller* extended the *Miles* holding from loss-of-society damages to punitive damages. Those two cases are distinguishable in multiple respects from the present case. First, this is not a wrongful death case. Second, McGregor does not allege that the *Golden Girl* was unseaworthy. Third, McGregor's punitive damages count is not pleaded under the Jones Act but under the general maritime law duty of an employer of seamen to furnish prompt and adequate maintenance and cure to injured or ill crew members. See *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 374-375 (1932); *Morales v. Garijak, Inc.*, 829 F.2d 1355, 1358, 1988 AMC 1075 (5th Cir. 1987).

Guevara is not fairly distinguishable from the present case, but the law of this Circuit is squarely opposed to the *Guevara* court's view. *Manuel v. United States*, 50 F.3d 1253, 1260, 1995 AMC 2551 (4th Cir. 1995), sets forth the controlling law in this Circuit: "Courts have long awarded punitive damages to seamen where maintenance and cure benefits have been arbitrarily and willfully denied." In any event, even if we were not bound to follow *Manuel*, we think *Guevara* was wrongly decided. See David W. Robertson, *The Future of Maritime Law in the Federal Courts: Personal Injury and Wrongful Death*, 31 J. MAR. L. & COM. 293, 293-309 (2000).

III Conclusion

For the foregoing reasons, the decision below is reversed and the case is remanded to the district court for further proceedings consistent with this opinion.

SOLOMON, Circuit Judge, dissenting:

Because I cannot agree with the analysis in Part II of the Court's opinion, I respectfully dissent.

I

I would affirm the district court's decision for the reasons given by the district court. Unlike the majority, *see supra* at [4a], I do not believe that the *Lake Shore* rule is limited to "federal general common law on the authority of *Swift v. Tyson*, 41 U.S. 1 (1842)." The principle can in fact be traced back to a venerable maritime case, *The Amiable Nancy*, 16 U.S. 546 (1818), on which the Supreme Court relied in *Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U.S. 101, 107-108 (1893), and on which this Court relied in *Norfolk & Portsmouth Traction Co. v. Miller*, 174 F. 607, 609 (4th Cir. 1909). Moreover, it is—and has long been—recognized as the general maritime law rule by most of our sister circuits that have addressed the issue. *See, e.g.*, *In re P&E Boat Rentals*, 872 F.2d 642, 652, 1989 AMC 2447 (5th Cir. 1989) (en banc); *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1148, 1969 AMC 252 (6th Cir. 1969); *The State of Missouri*, 76 F. 376, 380 (7th Cir. 1896). Even *C.E.H., Inc. v. F/V Seafarer*, 70 F.3d 694, 705, 1996 AMC 467 (1st Cir. 1995), on which the majority relies, requires "some level of culpability" on the part of the employer. 70 F.3d at 705. McGregor has alleged none here.

The Ninth Circuit's decision in *Protectus Alpha Navigation Co. v. North Pacific Grain Growers*, 767 F.2d 1379, 1986 AMC 56 (9th Cir. 1985), stands alone, and even that case is clearly distinguishable. The employee misconduct justifying punitive damages in *Protectus Alpha* was by a shore-based employee, not the captain or a member of the ship's crew.

II

In my view (like the district court's), it is unnecessary to reach Sunset's second argument. If I were to reach it, however, I would again disagree with the majority's conclusion. The courts of appeals with the most extensive experience of maintenance and cure cases have all determined that punitive damages are inappropriate in that area of the law. In *Guevara*, the en banc Fifth

Circuit—which the Supreme Court has recognized as the circuit with the most experience in seamen’s injury cases—unanimously so decided. *See also Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495, 1995 AMC 2022 (9th Cir. 1995); *Kraljic v. Berman Enterprises, Inc.*, 575 F.2d 412, 1978 AMC 1297 (2d Cir. 1978). Nothing impedes our acquiescence in the wisdom of those courts. Our statement in *Manuel* was the barest dictum, in no way necessary to the decision in that case.

III

I respectfully dissent. The district court’s judgment should be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-2318

PETER MCGREGOR,
Plaintiff-Appellant,

v.

SUNSET CRUISES, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the District of South Carolina, at Charleston
Michele Y. Portia, District Judge.
(6:06-cv-00945-MYP)

June 26, 2008

Before JUSTINIAN, SOLOMON, and HAMMURABI, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

SOLOMON, Circuit Judge, dissenting:

For the reasons expressed in my dissenting opinion, I would grant the petition for rehearing and set the case for argument en banc. In *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2008 AMC 1521 (2008), the Supreme Court granted certiorari on the first issue presented here—the only issue that the district court addressed—but failed to resolve that issue because the Court was evenly divided. This demonstrates not only the importance of the question, showing it to be an issue undoubtedly worthy of our attention, but also the continuing need to resolve it.

United States District Court for the District of South Carolina

PETER McGREGOR,
Plaintiff,

v.

SUNSET CRUISES, INC.,
Defendant.

No. 6:06-cv-00945-MYP

March 12, 2007

PORTIA, J.:

Defendant Sunset Cruises, Inc. (“Sunset”) moves under Fed. R. Civ. P. 12(b)(6) to strike Plaintiff Peter McGregor’s claim for punitive damages in this maritime claim. For the reasons stated below, Sunset’s motion is granted.

A motion to dismiss for failure to state a claim upon which relief can be granted filed pursuant to Fed. R. Civ. P. 12(b)(6) tests the legal sufficiency of a complaint. *See, e.g., Schatz v. Rosenberg*, 943 F.2d 485, 489 (4th Cir. 1991). The court must accept the allegations in the complaint as true, and all reasonable factual inferences must be drawn in favor of the party opposing the motion. *See, e.g., Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Republican Party v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992).

I. Relevant Facts as Alleged in the Complaint

1. From October 1, 2004, to May 19, 2005, McGregor was employed as a steward on the cruise ship *S.S. Golden Girl*, which is owned and operated by Sunset. Sunset employed the entire crew of the vessel, including McGregor. Sunset also employed the master of the vessel, Capt. Robert Strong.

2. At 12:00 noon, on May 16, 2005, the *Golden Girl* departed from Baltimore for a scheduled cruise to Bermuda. Shortly thereafter, McGregor began experiencing a visual

disturbance originating in the bottom part of his left eye. During the day, the obstruction to McGregor's vision expanded. At approximately 11:00 p.m., when the ship was reaching the open sea, McGregor went to the ship's doctor, who correctly diagnosed the problem as a detached retina.

3. In treating a detached retina, prompt action is essential. With immediate surgery, a detached retina can be reattached and the success rate is so high that the operation is considered routine. But a delay of even a few days can make successful treatment impossible. The ship's doctor accordingly advised Capt. Strong that McGregor needed to see an ophthalmologist on an emergency basis. Ideally, Capt. Strong would have arranged for a helicopter to take McGregor back to Baltimore, where the nearest hospital was located. At the very least, a pilot vessel could have taken McGregor back to Baltimore for surgery. The ship's doctor recommended that one of these options should be adopted.

4. Captain Strong rejected the doctor's recommendation and ordered McGregor to rest his eyes and await further medical treatment until the ship arrived at Bermuda two days later. This two-day delay in treating McGregor's detached retina caused a permanent loss of vision in his left eye.

II. Conclusions of Law

1. This court has admiralty jurisdiction over this matter under 28 U.S.C. § 1333(1).

2. Sunset moves to strike McGregor's claim for punitive damages for two independent reasons, but this Court need address only Sunset's first argument. Under binding Fourth Circuit precedent, an employer is not vicariously liable for punitive damages unless it authorized or ratified the tortfeasor employee's tortious conduct. *Norfolk & Portsmouth Traction Co. v. Miller*, 174 F. 607, 610 (4th Cir. 1909); *see also Pullman Co. v. Hall*, 46 F.2d 399, 404-405 (4th Cir. 1931); *Davenport v. Southern Ry. Co.*, 135 F. 960, 967 (4th Cir. 1905). Here McGregor seeks punitive damages from Sunset, the employer. Captain Strong, the tortfeasor employee, is not even a party to the action. And McGregor has not alleged that Sunset authorized or ratified

Captain Strong's refusal to provide him with adequate medical care. Thus Sunset is not liable for punitive damages. Sunset's motion to strike McGregor's claim for punitive damages must be granted.

3. Although this Court is bound by Fourth Circuit precedent that directly addresses the issue at hand, no matter how old it might be, the Court is well aware that the most relevant binding precedent in this case is almost a century old. The most recent Fourth Circuit case on point that either party has cited is three-quarters of a century old. In the intervening years, the *Restatement* and the Ninth Circuit have taken a different approach. *See Restatement (Second) of Torts* § 909; *Protectus Alpha Navigation Co. v. North Pacific Grain Growers*, 767 F.2d 1379, 1986 AMC 56 (9th Cir. 1985). This Court has no power to give effect to these more recent developments, but it is appropriate that the court of appeals be given this opportunity as soon as possible. This Court therefore certifies the present case for interlocutory appeal under 28 U.S.C. § 1292(b).

IV. Conclusion

Defendant's motion to strike Count II of plaintiff's complaint is *granted*. The case is also *certified* for interlocutory appeal under 28 U.S.C. § 1292(b).

It is so ordered.

Selected Chronology of the Case *

May 16-18, 2005	McGregor's injury
May 11, 2006	McGregor's complaint filed
Mar. 12, 2007	Sunset's motion to dismiss McGregor's punitive damages claim granted, with an opinion
Mar. 22, 2007	McGregor's notice of appeal filed
Mar. 3, 2008	Oral argument in the court of appeals
May 5, 2008	Court of appeals opinion filed and judgment entered
May 12, 2008	Sunset's petition for rehearing filed
June 26, 2008	Sunset's petition for rehearing denied
Sept. 2, 2008	Sunset's petition for certiorari filed presenting two issues: (1) an employer's liability for punitive damages when the employer did not authorize or ratify the tortfeasor employee's conduct, and (2) the availability of punitive damages in seaman's personal injury action against the employer.
Dec. 1, 2008	Sunset's petition for certiorari granted

* This information is included in the packet for the information of Competition participants. Unlike the preceding pages, it should not be considered part of the APPENDIX TO THE PETITION FOR CERTIORARI filed with the Court.