No. 85200-6

J.M. JOHNSON, J. (dissenting)—This is a case governed by federal maritime law. Today, the majority ignores instruction from the United States Supreme Court—the final arbiter of federal maritime law—as articulated in *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008). In *Exxon*, the Supreme Court held that in maritime cases, punitive damage awards cannot be excessive in relation to the actual harm caused. *Id.* at 503 (holding the appropriate ratio of punitive to compensatory damages in that case was 1:1). Following this decision, I would hold the $1.3 million punitive damage award in this case must be reduced as it is excessive and bears no relation to the compensatory award of $37,420.

Exxon was a class action brought by commercial fishermen, Native Alaskans, and landowners harmed by the *Exxon Valdez* oil spill. *Id.* at 476. The spill resulted when the *Valdez's* intoxicated captain, Joseph Hazelwood,

left the ship's bridge at the time his presence was needed to perform a critical turn. *Id.* at 477-78. Hazelwood also put the ship on autopilot, causing it to speed up and rendering the turn more difficult. *Id*. at 478. The ship grounded, ripping the hull and spilling 11 million gallons of crude oil into the Prince Edward Sound. *Id*. The evidence indicated Exxon knew Hazelwood was a relapsed alcoholic but nevertheless placed him in charge of a 900-foot oil tanker in a region that was notoriously difficult to navigate. *Id.* at 477. The jury assessed $507.5 million in compensatory damages and $5 billion in punitive damages against Exxon. *Id.* at 480-81. The Ninth Circuit Court of Appeals remitted the punitive award to $2.5 billion on due process grounds. *Id.* at 481.

The United States Supreme Court reviewed the punitive damage award for conformity with federal maritime law. *Id.* at 489-90. It expressed concern over the unpredictability of punitive damage awards. *Id.* at 499. Unpredictable awards fail to promote one of the essential goals of punitive damages: deterrence. *Id.* at 502 ("[A] penalty should be reasonably predictable in its severity, so that even Justice Holmes's 'bad man' can look ahead with some ability to know what the stakes are in choosing one course

of action or another."). The *Exxon* Court was particularly troubled by "outlier" punitive damage awards "that dwarf the corresponding compensatories," much like the punitive damage award in this case. *Id.* at 500.

To solve the problem of runaway punitive damage awards, the *Exxon* Court concluded that punitive damages should be "pegg[ed] . . . to compensatory damages using a ratio . . . ." *Id.* at 506. The Court analyzed ratios ranging from 3:1 to 1:1. *Id.* at 507-13. The Court considered a 3:1 ratio inappropriate in *Exxon*, even though it reflected the statutory cap in a majority of states, because the 3:1 ratio is often applied to the "most egregious conduct." *Id.* at 510-11 ("[A] legislative judgment that 3:1 is a reasonable limit overall is not a judgment that 3:1 is a reasonable limit in this particular type of case."). The Court next calculated the median ratio of punitive to compensatory damages actually awarded in a cross section of cases. They arrived at a ratio close to 1:1, which was deemed to reflect "what juries and judges have considered reasonable across many hundreds of punitive awards." *Id.* at 512. Based on "the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are

unpredictable and unnecessary," the *Exxon* Court held a 1:1 ratio was the "fair upper limit" in that case. *Id.* at 513.

The majority avoids *Exxon* by claiming the case does not establish "a general rule limiting the jury's role in determining appropriate damages." Majority at 19. But, the *Exxon* decision has been interpreted by other courts and scholars as limiting punitive damage awards in maritime cases, with the potential for even broader application. *See, e.g., Duckworth v. United States*, 418 F. App'x 2, 3 (D.C. Cir. 2011) (unpublished) ("In [*Exxon*], the Supreme Court addressed 'punitive damages in maritime law' . . . and held that a *jury's* award of punitive damages may not exceed the amount of compensatory damages in a federal maritime case." (quoting *Exxon* 554 U.S. at 489-90)); *Hayduk v. City of Johnstown*, 580 F. Supp. 2d 429, 484 n.46 (W.D. Pa. 2008) ("Although *Exxon* is a maritime law case, it is clear that the Supreme Court intends that its holding have a much broader application."); Joni Hersch & W. Kip Viscusi, *Punitive Damages by Numbers:* Exxon Shipping Co. v. Baker, 18 Sup. Ct. Econ. Rev. 259, 259 (2010) ("The U.S. Supreme Court decision in *Exxon Shipping Co. v. Baker* is a landmark that establishes an upper bound ratio of punitive damages to compensatory damages of 1:1 for

maritime cases, with potential implications for other types of cases as well."); Victor E. Schwartz et al., *The Supreme Court's Common Law Approach to Excessive Punitive Damage Awards: A Guide for the Development of State Law*, 60 S.C. L. Rev. 881, 882 (2009) ("Will state courts view the [*Exxon*] decision as solely limited to the field of federal maritime law, or will the high court's powerful reasoning broadly influence state courts struggling to cabin in 'outlier' punitive damage verdicts?").

Dissenting in part in *Exxon*, Justice Ginsburg emphasized the weight of the Court's decision. Wary of its ramifications beyond the context of maritime law, she queried, "[I]s the Court holding only that 1:1 is the maritime-law ceiling, or is it also signaling that any ratio higher than 1:1 will be held to exceed 'the constitutional outer limit'?" *Exxon*, 554 U.S. at 524 (Ginsburg, J., dissenting in part). Given *Exxon*'s potential to influence even nonmaritime cases, the majority's attempt to restrict the case to its facts is unconvincing.

The holding in *Exxon* surely controls maritime cases like this one. The majority reasons that the 1:1 ratio applied in Baker is inappropriate under these facts and therefore no limiting ratio whatsoever should be applied.

While the facts of this case do not mirror *Exxon*, the basic rationale of *Exxon* still governs. At its core, *Exxon* stands for the premise that punitive damage awards in maritime cases cannot be excessive when compared with the actual harm caused by the defendant. *Id.* at 503 ("The common sense of justice . . . bar[s] penalties that reasonable people would think excessive for the harm caused in the circumstances."). The degree that a punitive damage award may depart from the corresponding compensatory award depends on the facts of the case, including the culpability or blameworthiness of the defendant, whether the wrongdoing was hard to detect, and the size of the compensatory award. *Id*. at 493-94. In other words, *Exxon* instructs that punitive awards in maritime cases should "pegg[ed] . . . to compensatory damages" in a manner suited to the circumstances of the case. *Id.* at 506.

The highest ratio considered potentially applicable in *Exxon* was 3:1. *Id.* at 510. This ratio was considered appropriate only for cases "involving some of the most egregious conduct." *Id*. at 509. The majority seems to acknowledge that a 3:1 ratio was the "upper limit" discussed in *Exxon* by quoting that portion of the decision. Majority at 19-20 ("'the upper limit is not directed to cases *like this one* . . . the 3:1 ratio . . . applies to awards in

quite different cases involving . . . malicious behavior and dangerous activity carried on for the purpose of increasing a tortfeasor's financial gain'" (second and third alterations in original) (quoting *Exxon*, 554 U.S. at 510)). The court nevertheless sustains a punitive to compensatory ratio that vastly exceeds any ratio considered palatable by the *Exxon* Court. Assuming, as the majority does, that Icicle's conduct was more blameworthy than Exxon's, a 3:1 ratio should be the "upper limit" here.[1] Accordingly, the punitive damage award should be reduced to $112,260—three times the compensatory award of $37,420.

In a footnote, the majority infers the punitive damage award in this case is no more than three times the compensatory award. Majority at 23 n.5. The court reaches this fiction by reasoning that attorney fees should be added to the compensatory side of the punitive to compensatory damages ratio. Majority at 23. In the cases cited by the majority for this proposition, the

[1] The majority's conclusion that Icicle's conduct was more reprehensible than Exxon's is certainly debatable. Majority at 19-20. Exxon's conduct led to harm that was exponentially more devastating than Icicle's wrongful withholding of maintenance and cure from one individual. Over 32,000 plaintiffs were involved in the *Exxon* class action. 554 U.S. at 479. The oil spill stripped them of their livelihoods. *Id.* While the jury found Exxon reckless, it did not have the opportunity to consider the possibility of any degree of fault beyond recklessness. *Id.* at 480 n.2. Given the evidence presented, "[t]he jury could reasonably have believed that Exxon knowingly allowed a relapsed alcoholic repeatedly to pilot a vessel filled with millions of gallons of oil through waters that provided the livelihood for the many plaintiffs." *Id.* at 525 (Breyer, J., dissenting in part).

courts looked to the classification of attorney fees as compensatory under the law of the state involved. *See Blount v. Stroud*, 395 Ill. App. 3d 8, 27, 915 N.E.2d 925, 333 Ill. Dec. 854 (2009) ("In Illinois, our supreme court has recognized that the amount of attorney fees expended . . . is a relevant consideration to factor into the side of the ratio that quantifies the amount necessary to make the plaintiff whole." (Citations omitted.)); *Action Marine, Inc. v. Cont'l Carbon, Inc.*, 481 F.3d 1302, 1321 (11th Cir. 2007) ("In Georgia, awards of attorney fees in tort cases involving bad faith are compensatory in nature."); *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 237 (3d Cir. 2005) (alteration in original) ("'The obvious design of the Pennsylvania statute is, first, to place [plaintiffs] in the same economic position they would have been in had the insurer performed as promised, by awarding attorney's fees as additional damages.'" (quoting *Klinger v. State Farm Mut. Auto. Ins. Co.*, 115 F.3d 230, 236 (1997))). But, the classification of attorney fees as compensatory in other jurisdictions is not controlling where a case is governed exclusively by federal maritime law.

Moreover, the attorney fees awarded in *Blount* under 42 U.S.C. section 1988 were specifically classified by the court as "'remedial'" rather than

punitive in nature. 395 Ill. App. 3d at 28 (quoting *Williams v. City of Fairburn*, 702 F.2d 973, 976 (11th Cir. 1983)). Section 1988 does not require a showing of a particular type of blameworthiness before attorney fees may be recovered. *See* 42 U.S.C. § 1988 ("the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs").

In contrast, attorney fee awards in maintenance and cure actions are characterized as punitive because fees are not available unless a showing of callous or willful and wanton conduct is made. *See Vaughan v. Atkinson*, 369 U.S. 527, 531, 82 S. Ct. 997, 8 L. Ed. 2d 88 (1962) (assessing an award of attorney fees against a shipowner due to "callous" attitude, "recalcitrance," and "willful and persistent" failure to pay its maintenance and cure obligations). In a recent maintenance and cure case, *Atlantic Sounding Co. v. Townsend*, the United States Supreme Court described attorney fees in this context as punitive in nature:

> [O]ur case law also supports the view that punitive damages awards, in particular, remain available in maintenance and cure actions . . . In *Vaughan v. Atkinson*, 369 U.S. 527, 82 S. Ct. 997, 8 L.Ed.2d 88 (1962), for example, the Court permitted the recovery of attorney's fees for the "callous" and "willful and persistent" refusal to pay maintenance and cure

557 U.S. 404, 129 S. Ct. 2561, 2571, 174 L. Ed. 2d 382 (2009); *see also Kraljic v. Berman Enters., Inc.*, 575 F.2d 412, 414 (2d Cir. 1978) ("We conclude therefore that the majority in [*Vaughn v.*] Atkinson . . . was in fact awarding counsel fees as punitive damages. . . . Recovery of such fees is therefore based upon the traditional theory of punitive damages.").

Construing the attorney fee award in this case as punitive is also supported by the majority's interpretation of the award as an "exception to the American rule that parties bear their own costs and fees in litigation." Majority at 10. Fees awarded under this exception to the American rule have been classified as punitive by the United States Supreme Court. *Hall v. Cole*, 412 U.S. 1, 5, 93 S. Ct. 1943, 36 L. Ed. 2d 702 (1973) ("a federal court may award counsel fees to a successful party when his opponent has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons.' . . . [T]he underlying rationale of 'fee shifting' is, of course, punitive" (citations omitted) (quoting 6 James Wm. Moore, Moore's Federal Practice 54.77[2], at 1709 (2d ed. 1972))); *see also Shimman v. Int'l Union of Operating Eng'rs*, 744 F.2d 1226, 1232 n.9 (6th Cir. 1984) ("Fees awarded under the bad faith exception [to the American rule] are punitive in nature."). Where an award of attorney

fees "includes a certain punitive element," the fee award supports a lower punitive to compensatory ratio as punishment has already been partially imposed in the form of attorney fees. *Parrish v. Sollecito,* 280 F. Supp. 2d 145, 164 (S.D.N.Y. 2003). In such cases, attorney fees are not considered part of the compensatory award. *Laymon v. Lobby House, Inc.*, 613 F. Supp. 2d 504 (D. Del. 2009).

Properly disregarding the attorney fee award, the punitive award of $1.3 million is nearly 35 times the compensatory award of $37,420. This punitive award is plainly excessive in relation to the actual harm caused by the defendant.[2] By upholding the award, this court perpetuates a problem the *Exxon* Court intended to remedy: the issue of unpredictable punitive damage awards that fail the fundamental goal of deterrence. I would hold the punitive damage award must be reduced to conform to federal maritime law as articulated in *Exxon*. Therefore, I respectfully dissent.

[2] The jury found that Icicle's failure to pay maintenance and cure, although willful, caused no harm to Clausen beyond the amount of maintenance and cure in arrears.

AUTHOR:

Justice James M. Johnson

WE CONCUR:

Gerry L. Alexander, Justice Pro Tem.