Affirmed in Part, Reversed and Remanded in Part, and Majority and Concurring Opinions filed June 18, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-00573-CV

ROBIN BLAINE ANDREWS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE HEIRS AND ESTATE OF GARLAND DALE PEPPER, DECEASED, AND GARLAND PEPPER, JR., SUSAN ANDREWS, KIMBERLY BROWN, AND CAROLYN WALKER, Appellants

V.

JOHN CRANE, INC., Appellee

On Appeal from the 11th District Court
Harris County, Texas
Trial Court Cause No. 2014-02782-ASB

C O N C U R R I N G   O P I N I O N

At issue is availability of survival damages for the decedent's pre-death pain and suffering under general maritime law from John Crane, Inc. (JCI), which is alleged to have defectively designed, manufactured, and marketed asbestos-containing sheet gasket material provided to the United States Navy. The

decedent, Garland Pepper, allegedly was exposed to the gaskets while serving aboard two Navy vessels from 1957 to 1967. The court concludes that JCI did not waive application of general maritime law, which applies to appellants' claims, and that survival damages for the decedent's pre-death pain and suffering are recoverable under general maritime law. While I join the majority opinion with respect to parts I and II, I concur in the judgment as to part III and write separately to explain my reasoning.

A. Maritime uniformity under *Miles*

In passing the Jones Act, 46 U.S.C. §§ 30104-30105(b), and the Death on the High Seas Act (DOHSA), 46 U.S.C. § 30302, Congress created what the Supreme Court has described as uniform systems of seamen's tort law and maritime wrongful death recovery. *See Miles v. Apex Marine Corp*., 498 U.S. 19, 25, 28-29 (1990). Admiralty legislation, however, co-exists with a body of common-law rules forming the general maritime law. *See The Dutra Grp. v. Batterton*, 139 S. Ct. 2275, 2278 (2019). The Supreme Court has more than once explained the desirability of aligning or reconciling admiralty law so that rights and remedies recognized by the judicial branch remain uniform with, and appropriately defer to, legislative enactments. *See id.* at 2278, 2285; *Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 423-25 (2009); *Miles*, 498 U.S. at 27, 33 (discussing *Moragne v. States Marine Lines, Inc*., 398 U.S. 375, 401 (1970)). The court has also emphasized, however, that while the judicial branch may supplement legislation when necessary, "Congress retains superior authority in these matters" and that federal courts exercising admiralty jurisdiction "must be vigilant not to overstep the well-considered boundaries imposed by federal legislation." *Miles*, 498 U.S. at 27. This uniformity principle forms the foundation of both sides' arguments in the present case, so I examine how the Supreme Court has applied it.

In *Moragne*, a nonseaman was killed on a vessel in territorial waters. *Moragne*, 398 U.S. at 376. His widow sued the shipowner to recover damages for wrongful death due to the ship's unseaworthiness. The district court dismissed this claim because it was neither allowed under statute nor recognized in general maritime law. *Id.* The case highlighted inconsistencies in admiralty law, which left Moragne's widow without an available remedy because (1) the general maritime law did not recognize a claim for wrongful death at that time, *The Harrisburg*, 119 U.S. 199 (1886), and (2) her claim did not fall within the ambit of admiralty statutes, such as the Jones Act and DOHSA, despite the overwhelming legislative judgment behind those statutes favoring maritime wrongful death actions. The court overruled *The Harrisburg* and created a general maritime wrongful death cause of action, thereby unifying maritime wrongful death law for breach of the duty of seaworthiness. *See Moragne*, 398 U.S. at 402. *Moragne*'s significance to the present matter lies in its effectuation of a fundamental "constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.'" *Id*. (quoting *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875)). *Moragne* eliminated nonuniformities among various relevant sources of admiralty law. Achieving that end, as *Moragne* and later cases illustrate, necessarily entails examination of, and respect for, legislative policy preferences.

The court applied this principle again in *Miles*, which involved the death of a seaman in territorial waters. *Miles*, 498 U.S. at 21. The Supreme Court addressed Miles's unseaworthiness claim for wrongful death under general maritime law, beginning with whether such a cause of action exists.[1] Discussing extensively both

[1] The decedent's mother asserted two claims: negligence under the Jones Act, and unseaworthiness under general maritime law. *Miles*, 498 U.S. at 21-22. She sought wrongful death damages on her behalf and survival damages on behalf of her son's estate. *Id*. at 22. A

Moragne and the unambiguous legislative policy favoring maritime wrongful death claims, *id*. at 25-30, the court made clear that admiralty courts "should look primarily to . . . legislative enactments for policy guidance" in promoting consistency in maritime remedies. *Id*. at 27. When Congress has prescribed specific rules, the federal judiciary "may supplement these statutory remedies where doing so would achieve the uniform vindication" of the policies served by the relevant statutes. *See id*. *Moragne*, for example, modified general maritime law to fill a gap left open by statute. *Id*. at 31. Similarly, based on *Moragne*, *Miles* allowed a general maritime wrongful death action for seamen sounding in unseaworthiness (when the Jones Act would not apply) and in territorial waters (where DOHSA would not apply). *See id*. at 30. However, the court emphasized that court-developed maritime law must remain within legislative boundaries for parallel statutory claims, *id.* at 27, so if a remedy is unrecognized under a maritime cause of action established by statute, general maritime law should not recognize it either.

Miles sanctioned a general maritime wrongful death claim for seamen in large measure due to significant and overwhelming legislative support. Likewise, the court turned to legislative policy to guide its consideration of recoverable damages under the general maritime unseaworthiness claim at issue. Miles sought her loss of society as wrongful death damages and also asserted a survival claim for her son's lost future earnings. *Id*. at 22-23. The court found legislative support lacking for wrongful death recovery of non-pecuniary damages, including loss of society. *Id*. at 32 (noting, for example, that the Jones Act limits wrongful death recovery to pecuniary loss). The court discerned a similar dearth of support for

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jury found in Miles's favor on the Jones Act claim and awarded wrongful death and survival damages, including compensation to the estate for the seaman's pre-death pain and suffering. *Id*. The Jones Act recovery was affirmed on appeal and was not at issue in the Supreme Court. *Id*.

recovering future lost earnings in survival. *Id*. at 35. Miles wanted more expansive remedies for wrongful death and survival under general maritime law than permitted by analogous legislation. The court declined. Holding otherwise, the court said, would be "inconsistent with our place in the constitutional scheme" and go "well beyond the limits of Congress' ordered system of recovery for seamen's injury and death." *Id*. at 32, 36. Faced with a claim under general maritime law in an area covered by a statute, courts should not "'prescribe a different measure of damages.'" *Id*. at 31 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

In subsequent cases, the court has consistently adhered to *Miles*'s teachings. For instance, the court has said that admiralty law "'is to be developed, insofar as possible, to harmonize with the enactments of Congress in the field,'" *Norfolk Shipping & Drydock Corp. v. Garris*, 532 U.S. 811, 820 (2001) (recognizing wrongful death claim sounding in negligence for nonseamen) (quoting *Am. Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994)), and, as recently as last term, reiterated "*Miles*'s command" that federal courts should "seek to promote a 'uniform rule applicable to all actions' for the same injury," whether under statutory or court-made law. *Batterton*, 139 S. Ct. at 2285 (holding punitive damages unavailable in unseaworthiness actions) (quoting *Miles*, 498 U.S. at 33).

B. Relevant legislative policy supports recovery of pre-death pain and suffering damages under a general maritime survival claim

With that, I turn to the case at hand. After concluding that maritime law governed, the trial court applied *Miles*, looked to DOHSA as a legislative policy reference, and ruled that appellants may not recover non-pecuniary damages, including loss of society, lost future earnings, pre-death pain and suffering, and

punitive damages. On appeal, regarding recoverable damages, appellants challenge the judgment only with respect to pre-death pain and suffering.

Applicable in territorial waters and on the high seas, the Jones Act establishes a negligence cause of action for injuries or death suffered in the course of employment, but only for seamen.[2] *Norfolk*, 532 U.S. at 817. It makes applicable to seamen the substantive recovery provisions of the Federal Employers Liability Act (FELA).[3] *See Miles*, 498 U.S. at 23-24. Similarly, the Jones Act's companion statute, DOHSA, creates wrongful death actions for the benefit of representatives of "any person" whose death is caused by "wrongful act, neglect, or default occurring on the high seas." 46 U.S.C. § 30302; *see Dooley v. Korean Air Lines Co*., 524 U.S. 116, 119 (1998). Both acts apply to seamen and both permit wrongful death claims sounding in negligence. *See Miles*, 498 U.S. at 25. They differ in at least two important respects, however. The Jones Act contains a survival provision, whereas DOHSA does not. *Dooley*, 524 U.S. at 122 ("DOHSA does not authorize recovery for the decedent's own losses. . . ."). Also, DOHSA does not apply in territorial waters.

Viewing the facts most favorably to appellants, neither the Jones Act nor DOHSA apply directly to their claims, and appellants have not pleaded a right to recover under either statute. Though the parties agree that Pepper was a seaman under general maritime law, that he was allegedly injured in the course of employment as a seaman, and that he ultimately died from his injuries, Pepper did not have a Jones Act claim against JCI because JCI was not his employer. *See*

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[2] To qualify as a seaman under the Jones Act, the worker's duties must contribute to the function of the vessel or to the accomplishment of its mission, and the worker must have a connection to a vessel in navigation (or an identifiable group of vessels) that is substantial in terms of both its duration and its nature. *See Chandris, Inc. v. Latsis*, 515 U.S. 347, 376 (1995) (describing test for seaman status).

[3] 45 U.S.C. §§ 51 *et seq.*

Miles, 498 U.S. at 23, 28. Neither is DOHSA controlling because there exists at least some evidence that the alleged wrongful acts or negligence causing Pepper's death occurred only in part on the high seas, if at all.

The claims against JCI are for products liability. The law of products liability has been incorporated into general maritime law. *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 865 (1986); *Scarborough v. Clemco Indus.*, 391 F.3d 660, 666 (5th Cir. 2004). I agree that general maritime law applies to appellants' claims. *Gen. Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 919 (Tex. 1993). Under *Miles*, we must therefore consult relevant legislative policy preferences in assessing whether the representative of Pepper's estate may recover pre-death pain and suffering in a general maritime survival action.[4]

Both sides rely heavily on the *Miles* uniformity doctrine. But given the differences between the Jones Act and DOHSA pertaining to survival claims, the parties predictably disagree on which statutory expression of policy properly guides us in determining availability of survival damages under general maritime law for a products liability claim against a product manufacturer who is not the decedent seaman's employer. Appellants say we should refer to the Jones Act as defining the limits of available relief because: (1) Pepper's personal injury claim as a seaman parallels the Jones Act, which allows pain and suffering damages in survival; (2) in fact, the seaman in *Miles* recovered pre-death pain and suffering damages, which remained undisturbed on appeal; and (3) two recent decisions

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[4] I will presume that a survival action under general maritime law exists because it does in this circuit and the Supreme Court has yet to affirmatively say otherwise. *See Miles v. Melrose*, 882 F.2d 976, 986 (5th Cir. 1989), *aff'd sub nom. Miles*, 498 U.S. at 34; *Law v. Sea Drilling Corp.*, 523 F.2d 793, 795 (5th Cir. 1975); *see also Batterton*, 139 S. Ct. at 229 n.4; *Dooley*, 524 U.S. at 124.

from Virginia[5] and Florida[6] addressing this issue—indeed involving JCI—referred to the Jones Act in holding that such recovery is available.

JCI, on the other hand, argues that DOHSA controls all remedies because: (1) "an unbroken line of Supreme Court precedent dictates that courts must follow DOHSA's remedial scheme in determining the damages available under general maritime law"; (2) Pepper was exposed to asbestos while working on the high seas; (3) Pepper was a seaman whose recovery is defined by *Miles*, which limits survival damages to pecuniary losses; and (4) to the extent the Jones Act is relevant, the claimed damages should not be recoverable from a non-employer. According to JCI, if DOHSA is the only relevant statutory guide, no survival damages are available at all because DOHSA has no survival provision. JCI cites *Dooley* and *Higginbotham* in support of its exclusive remedy argument under DOHSA. *Dooley*, 524 U.S. at 121; *Higginbotham*, 436 U.S. at 624 ("DOHSA should be the courts' primary guide as they refine the nonstatutory death remedy").

1. *Relevant legislative guidance is not limited to DOHSA.*

Upon full consideration, I disagree with JCI that we should look only to DOHSA as the relevant legislative policy guide. For several reasons, the Jones Act is a proper reference. To begin with, the Jones Act bears on the analysis because Pepper was a seaman, and the parallels between appellants' claims and the Jones Act are numerous. While DOHSA applies broadly to "any person," including seamen, the Jones Act created causes of action to benefit seamen specifically, establishing a "uniform system of seamen's tort law," *Miles*, 498 U.S. at 29, particularly to address seamen's injury and death suffered while in the course of

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[5] *John Crane, Inc. v. Hardick*, 732 S.E.2d 1 (Va. 2012), *cert. denied*, 568 U.S. 1161 (2013).

[6] *Hays v. John Crane, Inc.*, No. 09-81881-CIV-KAM, 2014 WL 10658453, at *2 (S.D. Fla. Oct. 10, 2014).

employment on a vessel, as allegedly happened to Pepper. The Jones Act permits actions in negligence, and appellants' products liability claims sound in negligence, at least in part. As mentioned, there is some evidence that the alleged negligence in question did not occur on the high seas, but in part in territorial waters where the Jones Act applies and DOHSA does not. The only reason Pepper did not have a direct claim under the Jones Act against JCI is because JCI was not Pepper's employer.

Of course, the Jones Act provides that a seaman's injury claims survive death, and this case is about survival damages.[7] Maritime survival is a statutory creation traditionally unavailable at common law. *See Miles*, 498 U.S. at 33. By providing a survival remedy for injuries, the Jones Act displaced a general maritime rule that denied recovery for survival damages in case of injured seamen. As explained in *Townsend*, "Congress enacted the Jones Act primarily to overrule *The Osceola*, . . . in which this Court prohibited a seaman or his family from recovering for injuries or death suffered due to his employers' negligence." *Townsend*, 557 U.S. at 415. The Jones Act reflects a policy choice to allow a survival right for seamen injured due to employer negligence.

As a seaman, moreover, Pepper was uniquely a ward of admiralty, to whom general maritime law has long directed "special solicitude." *Miles*, 498 U.S. at 36; *see Townsend*, 557 U.S. at 417. This point did not carry the day in *Miles*, *see Miles*, 498 U.S. at 36, but it has greater heft here, when, as I reference below, the pre-death pain and suffering recovery we have been asked to allow has an entrenched history of legislative endorsement under FELA, which was incorporated into the Jones Act for the benefit of seamen. *See St. Louis, I.M. & S.*

[7] Texas state law also permits survival claims. *See* Tex. Civ. Prac. & Rem. Code § 71.021.

Ry. Co. v. Craft, 237 U.S. 648, 658 (1915) (FELA permits compensatory survival damages, including "suffering"); *Mich. Cent. R.R. Co. v. Vreeland*, 227 U.S. 59, 65 (1913) (same).

Additionally, insofar as seamen are concerned, the Jones Act and DOHSA provide complementary, not preclusive, remedies. If a seaman dies on the high seas, he is not limited solely to DOHSA but may sue under the Jones Act as well. *See, e.g.*, *Higginbotham*, 436 U.S. at 620-21 & n.11 ("The Jones Act gives a remedy to the dependents of a seaman killed in the course of employment by his employer's negligence, no matter where the wrong takes place."); *Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1125 (9th Cir. 2010), *cert. denied*, 566 U.S. 961 (2012); *Doyle v. Albatross Tanker Corp.*, 367 F.2d 465 (2d Cir. 1966) (Jones Act does not preclude remedy under DOHSA). Congress's acknowledged purpose in passing both the Jones Act and DOHSA was to *expand*, not contract, seamen's remedies in light of *The Harrisburg*. *See Townsend*, 557 U.S. at 417 ("[T]his Court has consistently recognized that the [Jones] Act['s] . . . purpose was to enlarge protection to seamen, not to narrow it.") (internal quotation omitted); *Dooley*, 524 U.S. at 124; *Moragne*, 398 U.S. at 397-99; *see also Sistrunk v. Circle Bar Drilling Co.*, 770 F.2d 455, 457 (5th Cir. 1985) (DOHSA provided seamen greater range of remedies), *cert. denied*, 475 U.S. 1019 (1986). The acts clearly work together, and it would be anomalous to conclude that DOHSA preempts a remedy expressly available to seamen under its "companion statute." *Miles*, 498 U.S. at 29. "The laudable quest for uniformity in admiralty does not require the narrowing of available damages to the lowest common denominator approved by Congress for distinct causes of action." *Townsend*, 557 U.S. at 424. It follows that when both the Jones Act and DOHSA are closely related to the general maritime claim at issue, the most restrictive relief is not mandated.

Thus, even accepting JCI's proposition that all of its allegedly negligent conduct and all of Pepper's alleged asbestos exposure occurred on the high seas, the Jones Act would remain relevant to assessing available general maritime remedies because the Jones Act applies to seamen on the high seas. While DOHSA, too, provides a wrongful death claim for seamen, the Jones Act does not suddenly become irrelevant when a seaman such as Pepper is injured and later dies. *See Miles*, 498 U.S. at 32 ("[T]he Jones Act applies when a seaman has been killed as a result of negligence . . . .").

Notably, the Supreme Court has turned to the Jones Act in pursuing maritime uniformity when a seaman is involved. *Miles* itself is a helpful example because it examined the availability of a seaman's estate's survival remedies under general maritime law. *Id.* at 36. The court looked to the Jones Act because *Miles* "involve[d] the death of a seaman." *Id*. Because the survival damages sought in *Miles*—the decedent's lost future income—was not available under the Jones Act and enjoyed little legislative support elsewhere, the court held it was not available under a general maritime law seaworthiness claim as well. *Id*. "We will not create, under our admiralty powers, a remedy that is disfavored by a clear majority of the States and that goes well beyond the limits of Congress' ordered system of recovery for seamen's injury and death." *Id*. *Miles* limited general maritime remedies for seamen's survival claims to those available under the Jones Act and no more. Here, as addressed below, the damages sought *are* available under the Jones Act; they should be available under a parallel general maritime claim too. This result promotes a "'uniform rule applicable to all actions' for the same injury." *Batterton*, 139 S. Ct. at 2285 (quoting *Miles*, 498 U.S. at 33).

The Supreme Court has also looked to the Jones Act as a relevant legislative reference even when seamen were not involved. In *Norfolk*, the court considered

whether negligent breach of a general maritime duty of care is actionable for death as with injury. Acknowledging the need to ensure that general maritime law complies with a legislative resolution of the same issue, *Norfolk*, 532 U.S. at 817, the court notably consulted three "relevant" statutes—the Jones Act, DOHSA, and the Longshore and Harbor Workers' Compensation Act—even though none applied directly and the victim was a nonseaman injured in territorial waters. *Id.* at 817.

Citing *Higginbotham* and *Dooley*, JCI says "DOHSA should be the courts' primary guide" in cases of death on the high seas. *Higginbotham*, 436 U.S. at 624. JCI asserts that *Dooley*, which looked solely to DOHSA, precludes any survival damages here. To be sure, *Dooley* says that "DOHSA expresses Congress' judgment that there should be no [survival] cause of action in cases of death on the high seas." *Dooley*, 524 U.S. at 123. But DOHSA applied directly to the claim there at issue, which did not involve the death of a seaman. The *Dooley* plaintiffs acknowledged that DOHSA did not allow pre-death pain and suffering in survival actions but wanted the court to permit such recovery under general maritime law even though Congress had denied it. The plaintiffs were seeking an expansion of general maritime remedies beyond that provided by an act directly applicable to the suit. *Id*. As to seamen, in contrast, *Dooley* does not foreclose a survival claim under the Jones Act. Reading *Dooley* otherwise, as JCI suggests we do, would effectively nullify the Jones Act's survival provision when a seaman dies from his injury. *Higginbotham* is similarly distinguishable. *Higginbotham* involved the "refine[ment of] the nonstatutory death remedy" for nonseamen; it did not address available remedies for seamen's personal injuries, as we have here. Yes, *Higginbotham* said DOHSA should be courts' "primary guide" in death cases on

the high seas, but it is not the only guide when injuries and death to seamen are at issue.

Because the parallel rights created by the Jones Act are "closely related" to appellant's survival claims, *see Townsend*, 557 U.S. at 426 (Alito, J., dissenting), the Jones Act is an appropriate legislative reference for promoting maritime uniformity under *Miles* in this instance. As the majority observes, the courts in *Hardick* and *Hays* have reached the same conclusion. JCI says those decisions are wrong. For the reasons explained, I respectfully disagree.

2. *A seaman may recover pain and suffering for his personal injuries under the Jones Act; his estate may recover those damages in survival.*

Having concluded that the Jones Act is an appropriate legislative reference for applying *Miles* uniformity, the remaining question is whether an injured seaman's pre-death pain and suffering is an available remedy to his estate under general maritime law. Case law interpreting the Jones Act and its incorporation of FELA answers this question in appellants' favor. In evaluating survival damages available under FELA, courts have recognized that injured workers could recover "such damages as will be reasonably compensatory for the loss and suffering of the injured person while he lived." *Craft*, 237 U.S. at 658; *see Vreeland*, 227 U.S. at 65 (allowing damages for injured workers' "suffering"). As such damages were available under FELA before 1920, and because the Jones Act incorporated FELA's remedial scheme, courts have considered pre-death pain and suffering as an available remedy for injured seamen under the Jones Act's survival provision, which JCI acknowledges. *See, e.g.*, *McBride v. Estis Well Serv., LLC*, 853 F.3d 777, 781 (5th Cir. 2017); *Deal v. A.P. Bell Fish Co.*, 728 F.2d 717, 718 (5th Cir. 1984).

Pain and suffering is a non-pecuniary form of damage. *See, e.g.*, *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 544 n.10 (1991); *Scarfo v. Cabletron Sys., Inc.*, 54 F.3d 931, 939 (1st Cir. 1995); *Patel v. Hussain*, 485 S.W.3d 153, 183 (Tex. App.—Houston [14th Dist.] 2016, no pet.). While JCI correctly notes *Miles*'s holding that the Jones Act limits recovery to pecuniary damages only, *Miles*, 498 U.S. at 32, that statement was made in the context of the court's wrongful death discussion. When the court addressed survival damages, it did not rely upon a pecuniary versus non-pecuniary distinction, but rather held that Jones Act survival damages were limited to losses suffered pre-death. *Id*. at 27-28. I do not read *Miles*'s survival damages discussion as overruling the court's precedent permitting pain and suffering as a form of relief in survival for seamen, even though such damages are non-pecuniary. *Miles* neither rejected decades of admiralty precedent nor precluded survival recovery for pre-death pain and suffering (which the estate recovered under the Jones Act claim). *Miles* does not permit survival recovery in general maritime beyond that otherwise available under the Jones Act. Neither do we.[8]

Allowing pre-death pain and suffering under the present circumstances is both within the legislative limits established by Congress and "more consistent with general principles of maritime tort law" as revealed by relevant legislatures. *See id.* at 35. Remedies for a general maritime survival claim for seamen, assuming one exists, extend at least to the Jones Act boundaries but no further. *See id.* at 36. I therefore agree with the trial court in all respects except for Pepper's pre-death pain and suffering survival claim under general maritime law.

3. *Under the present circumstances, recovery is available from a non-employer product manufacturer.*

[8] We do not address any form of damage other than the decedent's pre-death pain and suffering.

Finally, JCI argues that pre-death pain and suffering as survival damages under a general maritime claim should never be available against a non-employer, even if reference to the Jones Act is proper. JCI points to *Scarborough*, 391 F.3d at 666-68. There, the survivors of a seaman sought non-pecuniary wrongful death damages from a non-employer defendant, who was alleged to have defectively manufactured protective equipment that caused the decedent to develop silicosis. *Id*. at 662. The Jones Act did not apply directly in that suit because the defendant was not the employer. The claimants in *Scarborough*, much like the claimants in *Miles*, sought more expansive relief under a general maritime claim than would be allowed under the Jones Act. *Id*. at 667-68. Relying on *Miles*, the Fifth Circuit held that damages disallowed against an employer under the Jones Act are likewise disallowed against a non-employer under general maritime law. *Id*. Here, as mentioned, appellants are not seeking a form of recovery unavailable under the Jones Act, so *Scarborough* is not on point.

Moreover, I disagree with JCI for a separate reason. Given that the present claims are based on products liability—a body of law incorporated into general maritime law—JCI's argument contravenes an underlying purpose of products liability law: that strict liability should be imposed on the party best able to protect persons from hazardous materials. JCI's proposed rule would shield product manufacturers in these types of suits. Subsuming products liability law into the general maritime law would serve little purpose if seamen could not bring such claims against product manufacturers, who rarely if ever are the seaman's employer. I thus conclude that pain and suffering losses are recoverable under a products liability claim in survival against JCI even though it was not Pepper's employer.

For these reasons, I concur in the judgment as to part III of the majority opinion.

/s/ Kevin Jewell
Justice

Panel consists of Justices Jewell, Bourliot, and Zimmerer (Zimmerer, J., majority).