

STORAGE NAME: h3873a.cjc
DATE: March 12, 1998

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
CIVIL JUSTICE & CLAIMS
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: HB 3873

RELATING TO: Punitive Damages

SPONSOR(S): Committee on Civil Justice and Claims, Representative Warner, and others.

COMPANION BILL(S): SB 874 (compare)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) CIVIL JUSTICE & CLAIMS YEAS 7 NAYS 2
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I. SUMMARY:

This bill is one of several bills produced as a result of extensive hearings conducted by the Committee on Civil Justice and Claims between September 15, 1997 and February 17, 1998. These hearings dealt with many aspects of the tort system and focused, in particular, upon the impact of tort litigation on small business.

This bill amends ss. 768.72 and 768.73, F.S., and modifies the requirements for imposing punitive damages upon a defendant in a civil action.

This bill strengthens the requirements which apply to claims for punitive damages. It raises the burden of proof by requiring plaintiffs to prove they are entitled to punitive damages by clear and convincing evidence. It also establishes that the level of misconduct sufficient to support a punitive damages claim is intentional misconduct or gross negligence. The bill defines gross negligence as "conduct so reckless or wanting in care that it constitutes a conscious disregard or indifference to the life, safety or rights of persons exposed to such conduct."

This bill addresses the vicarious liability of employers or principals for the intentional torts of employees or agents. Currently, any negligence by the employer or principal is sufficient to allow the vicarious imposition of punitive damages. The bill raises the standard for obtaining vicarious punitive damages. It requires at least gross negligence on the part of the employer or principal.

This bill contains a provision related to the recovery of attorneys' fees under s. 400.023, F.S., which provides for the civil enforcement of rights under Part II, of Chapter 400 (Nursing Homes). It specifies that any award of punitive damages must be reasonable in light of the harm suffered and the egregiousness of the conduct.

Finally, this bill addresses some difficulties associated with repetitive claims for punitive damages. It creates a cumulative punitive damages trial. A defendant who has been subjected to repetitive punitive damages claims can request a cumulative proceeding, at which time a jury would determine the defendant's total punitive damages liability for the act or course of conduct under consideration.

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This bill will not result in any new taxes and may reduce the cost and scope of litigation.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

1. **Types of Damages** - Damages are sums of money awarded in the courts to a person or entity injured by the tortious acts or omissions of another. Compensatory damages are awarded to pay for the actual losses sustained by a plaintiff. They are intended solely to restore the injured party to the position he or she occupied prior to the defendant's misconduct; to make good for the harm sustained. Compensatory damages can be subdivided into economic and noneconomic damages. Economic damages include such things as lost wages, medical costs, and property destruction. Noneconomic damages include items such as pain and suffering and loss of enjoyment. Punitive damages are damages imposed to punish the defendant and to deter future misconduct. They are not intended to compensate. Punitive damages are awarded on an increased scale, over and above compensatory damages, to make an example of the defendant and to warn potential wrongdoers.
2. **Requirements for Punitive Damages** - The courts will sustain an award of punitive damages only if the acts complained of were committed with malice, moral turpitude, wantonness, willfulness, outrageous aggravation, or reckless indifference to the rights of others. Intentional misconduct is not necessarily required. However, the misconduct:

[M]ust be of a gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to the consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them. Ten Associates v. Brunson, 492 So.2d 1149, 1150 (Fla. 3d DCA 1986)(citations omitted).

Pursuant to s. 768.72, F.S., a claim for punitive damages is not allowed unless there is evidence proffered or in the record to provide a reasonable basis for recovery of punitive damages. Discovery of the defendant's financial worth is not allowed until after the court allows the punitive damages claim. Until a 1995 Florida Supreme Court ruling, Globe Newspaper Co. v. King, 658 So.2d 518 (Fla. 1995), the District Courts of Appeal held conflicting positions on the issue of whether an appellate court could review a trial judge's finding that a plaintiff had met the evidentiary standard for punitive damages contained in s. 768.72, F.S. In Globe, the Florida Supreme Court held that common law certiorari is not available to review the sufficiency of the evidence before a judgment is rendered because the harm to the defendant is not irreparable. The court determined, however, that certiorari is available to resolve whether the trial court complied with procedural aspects of the statute.

3. **Limitations on Punitive Damages** - Section 768.73, F.S., limits the amount of punitive damages that can be awarded in a civil action based on negligence, strict liability, products liability, misconduct in commercial transactions, professional liability, or breach of warranty. In these causes of action, punitive damages may not exceed three times the amount of compensatory damages awarded unless the claimant demonstrates by clear and convincing evidence that the award is not excessive in light of the facts developed at trial. Currently, Florida law does not limit

the amount of punitive damages that can be awarded in a civil action for intentional torts such as defamation or assault.

4. **Repetitive Punitive Damages** - Recent litigation on asbestos liability and other "mass torts" has raised the issue of whether a defendant can be subject to several punitive damages awards in different trials growing out of the same conduct. In W. R. Grace & Co. v. Waters, 638 So.2d 502 (Fla. 1994), the Florida Supreme Court held that a defendant could be subject to multiple punitive damages awards for the same conduct. The defendants in W. R. Grace argued that, in the context of the asbestos litigation which had been brought against them, the public policy behind punitive damages had already been served. Punitive damages awards had already been entered against them in other jurisdictions for the same conduct. The Florida Supreme Court relied on the unanimous position of other Florida state appellate courts and federal courts that had considered the issue and held that previous punitive damages awards did not insulate a defendant from future punitive damages awards. However, the court agreed with the defendants that evidence of other punitive damages awards could prejudice a jury's deliberations concerning liability. Therefore, the court held that upon motion of a defendant, the determination of whether punitive damages should be awarded could be separated from the rest of the trial.
5. **Redistribution of Punitive Damage Awards** - Currently, the full amount of punitive damage awards are payable to the claimant. Formerly, s. 768.73, F.S., required the division of punitive damage awards between the claimant and the state. If the claim was a result of personal injury or wrongful death, the state's share of any punitive damages was payable to the Public Medical Assistance Trust Fund. For awards based on any other claims, the state's share of the punitive damages award was payable to the General Revenue Fund. On July 1, 1995, the provision which required a split of punitive damage awards was repealed pursuant to Chapter 92-85, s. 3, L.O.F.

The Florida Supreme Court, in Gordon v. State, 608 So.2d 800 (Fla.1992), upheld the constitutionality of dividing the punitive damage award between the state and the claimant. The Florida Supreme Court determined:

Unlike the right to compensatory damages, the allowance of punitive damages is based entirely upon considerations of public policy. Accordingly, it is clear that the very existence of an inchoate claim for punitive damages is subject to the plenary authority of the ultimate policy-maker under our system, the legislature. In the exercise of that discretion, it may place conditions upon such a recovery or even abolish it altogether....The right to have punitive damages assessed is not property; and it is the general rule that, until a judgment is rendered, there is no vested right in a claim for punitive damages. It cannot, then, be said that the denial of punitive damages has unconstitutionally impaired any property rights of the appellant....The statute under attack here bears a rational relationship to legitimate legislative objectives: to allot to the public weal a portion of damages designed to deter future harm to the public and to discourage punitive damage claims by making them less remunerative to the claimant and the claimant's attorney. Id. at 801-802 (citations omitted).

Several nuances within the litigation process may affect whether punitive damages are actually awarded. First, many cases settle before trial. Settlement agreements rarely provide for or apportion punitive damages. Second, counsel may withdraw a client's plea for punitive damages just before the jury goes out. This situation would

permit the trier of fact to consider the conduct giving rise to punitive damages, but would result in the removal of punitive damages from the verdict form. Third, a case may settle in the appellate stage, after the jury has rendered an award of punitive damages. Again, such settlement agreements generally do not address punitive damages awards.

5. **Vicarious Liability for Punitive Damages** - Vicarious liability involves the imposition of liability on one person, usually an employer or principal, for the conduct of another, usually an employee or agent. It is imputed liability, based solely upon the relationship between the two persons. When an employee or agent commits an intentional tort, or engages in conduct which warrants an award of punitive damages, the employer or principal may be held liable for punitive damages under certain circumstances.
 - a. **Defining the Relationship between the Parties** - Employers can be held vicariously liable for the torts of employees who are acting within the scope of employment. Principals, by contrast, generally cannot be held vicariously liable for the acts of independent contractors. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995); Williams v. Fort Pierce Tribune and Claims Center, 667 So.2d 174 (Fla. 1995); Miami Herald Publishing Co. v. Kendall, 88 So.2d 276 (Fla. 1956); Buitrago v. Rohr, 672 So.2d 646 (Fla. 4th DCA 1996); Alexander v. Morton, 595 So.2d 1015 (Fla. 2d DCA 1992); Kane Furniture Corp. v. Miranda, 506 So.2d 1061 (Fla. 2d DCA 1987). Several exceptions allow the imposition of vicarious liability against principals under limited circumstances. See e.g., Midyette v. Madison, 559 So.2d 1129 (Fla. 1990)(holding that the property owner could be held vicariously liable for the negligence of an independent contractor who had engaged in inherently dangerous activities); Insinga v. Bell, 543 So.2d 209 (Fla. 1989)(holding that the corporate negligence doctrine imposed a duty on hospitals to choose and retain competent medical practitioners, irrespective of the status of such practitioners as independent contractors). The courts will independently assess the relationship between the entities to determine whether the relationship is one of principal/ independent contractor or employer/ employee. St. Johns & H.R. Co. v. Shalley, 14 So. 890 (Fla. 1894); Mumby v. Bowden, 6 So. 453 (Fla. 1889). If the supervising entity exerts considerable day-to-day control over the details of the work performed by the subordinate entity, courts will deem the relationship to be that of employer/employee, even if the parties themselves categorize their relationship as one of principal/ independent contractor. Carroll v. Kencher, Inc., 491 So.2d 1311 (Fla. 4th DCA 1986).
 - b. **Defining the Scope of Employment** - Employers may be held vicariously liable for the tortious conduct of employees which occurs within the scope and course of employment. Rabideau v. State, 409 So.2d 1045 (Fla. 1982); Saudi Arabian Airlines Corp. v. Dunn, 438 So.2d 116 (Fla. 1st DCA 1983); Stinson v. Prevatt, 94 So. 656 (Fla. 1922). The main complexity which arises in this area of law is delineating the scope of employment. In Foremost Dairies of the South v. Godwin, 26 So.2d 773 (Fla. 1946), rehearing denied (Sept. 14, 1946), the Florida Supreme Court held that an employer was not liable for damages sustained in a collision with an automobile owned by an employee. The collision took place while employee was driving to work. The court noted that employer contributions for maintenance of the automobile did not place any

ownership interest in the employer, so as to make the employer liable under the dangerous instrumentalities doctrine.

- c. **Conduct Allowing the Imposition of Vicarious Punitive Damages** - In Schropp v. Crown Eurocars, Inc., 654 So.2d 1158 (Fla. 1995), the Florida Supreme Court held that a corporation may be held liable for punitive damages based upon the conduct of a managing agent, or may be found vicariously liable for punitive damages for wanton and willful conduct by an employee, if the plaintiff establishes some negligence by the corporation. In Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981), the Florida Supreme Court determined that a corporate employer could not be held vicariously liable for punitive damages for the willful and wanton misconduct of its employee, where the plaintiff failed to allege any fault on the part of the corporate employer.

B. EFFECT OF PROPOSED CHANGES:

1. **Requires Clear and Convincing Evidence to Support Punitive Damages** - This bill strengthens the restraints on bringing claims for punitive damages. It raises the burden of proof by requiring clear and convincing evidence to support a claim for punitive damages.
2. **Requires a Slightly Higher Level of Misconduct for Punitive Damages** - This bill simplifies the requirements for punitive damages. It establishes that the level of conduct required to bring a punitive damages claim is intentional misconduct or gross negligence. The bill defines gross negligence as "conduct so reckless or wanting in care that it constitutes a conscious disregard or indifference toward the life, safety or rights of persons exposed to such conduct." Current jury instructions for punitive damages contain four separate standards. Critics have characterized these standards as overly complex and somewhat cryptic.
3. **Requires Gross Negligence for Vicarious Punitive Liability** - This bill also addresses the vicarious liability of employers or principals for the intentional torts of employees or agents. Currently, any negligence by the employer or principal is sufficient to allow the vicarious imposition of punitive damages. The bill raises the standard for obtaining vicarious punitive damages to require gross negligence on the part of the employer or principal. The bill lists several other types of conduct which would allow the imposition of punitive damages on an employer. These additional provisions reflect common law principles concerning the liability of an employer or principal for the acts of an employee or agent.
4. **Provides for the Recovery of Attorney Fees in Actions against Nursing Homes** - This bill contains a provision related to the recovery of attorneys' fees under s. 400.023, F.S., which provides for the civil enforcement of rights under Part II, of Chapter 400 (Nursing Homes). This provision requires mediation and sets forth time frames and procedural guidelines. If the parties do not reach an agreement through mediation, the bill requires the mediator to record the amount of the last offer made by the defendant. If the plaintiff's eventual recovery is equal to or less than this last offer, then the plaintiff is not entitled to attorney fees. It specifies that any award of punitive damages must be reasonable in light of the harm suffered and the egregiousness of the conduct.

5. **Addresses Repetitive Claims for Punitive Damages** - This bill creates two mechanisms aimed at alleviating the difficulties posed by repetitive claims for punitive damages.
 - a. **Provides for a Pretrial Hearing** - If punitive damages have been awarded against a defendant on three or more occasions, this bill would allow the court to conduct a hearing prior to trial to determine whether previous awards were sufficient to address the consequences of the defendant's conduct.
 - b. **Creates a Consolidated Trial on Punitive Damages** - The bill creates a consolidated punitive damages trial. A defendant who has been or may be subjected to repetitive punitive damages claims can request a cumulative proceeding, at which time a jury would determine the defendant's total punitive damages liability for the act or course of conduct under consideration. The defendant would then be required to make reasonable efforts to identify and notify potential claimants. If punitive damages are awarded, the court would distribute the proceeds among potential claimants.
6. **Excludes Certain Claims from Restrictions** - This bill excludes certain types of claims from its provisions, specifically those involving "child abuse, abuse of the elderly, or abuse of the developmentally disabled, or arising under chapter 400." Torts based upon abuse may involve intentional misconduct, in which case they would be excepted from the bill's monetary caps even without this further exclusion. However, actions based upon negligence could also be affected. Chapter 400, which relates to nursing homes and other facilities, addresses various matters and s. 400.023 provides, in part, "Any resident whose rights as specified in this part are deprived or infringed upon shall have a cause of action against any licensee responsible for the violation." This provision, therefore, appears to eliminate all constraints on punitive damages (including elevated proof requirements) for a range of actions brought against certain institutions.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

- a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

N/A

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

N/A

(3) any entitlement to a government service or benefit?

N/A

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

N/A

b. Does the bill require or authorize an increase in any fees?

N/A

c. Does the bill reduce total taxes, both rates and revenues?

N/A

d. Does the bill reduce total fees, both rates and revenues?

N/A

e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

This bill may remove some uncertainty for potential defendants by limiting their exposure to claims for punitive damages and repetitive punitive damages.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

This bill amends ss. 768.72 and 768.73, F.S.

E. SECTION-BY-SECTION RESEARCH:

Section 1. Amends s. 400.023, F.S.; provides guidelines for the recovery of attorney fees in actions instituted against nursing homes; provides for mediation; provides guidelines for discovery related to punitive damages; establishes that punitive damages must be reasonable in light of the circumstances.

Section 2. Amends s. 768.72, F.S.; requires clear and convincing evidence to support an award of punitive damages; requires gross negligence or intentional misconduct before permitting an award of punitive damages; defines gross negligence; provides criteria for awarding punitive damages with respect to employers and principals for the tortious conduct of employees and agents; provides for the application of provisions.

Section 3. Amends s. 768.73, F.S.; provides monetary limits on the award of punitive damages; provides an exception for intentional misconduct; provides for a consolidated punitive damages trial; provides a limitation on attorney fees with respect to consolidated punitive damages trials; provides for the application of provisions.

Section 4. Provides a effective date of October 1 of the year in which this bill is enacted.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

Some commentators argue that any reduction in the ability of plaintiffs to collect punitive damages would diminish the incentives that motivate businesses to provide safe products and services. Others disagree, pointing to the sporadic nature of punitive awards. They suggest that the current system has resulted in a form of over deterrence that stifles innovation, causes defensive marketing and product development, and results in the withdrawal of beneficial products that cannot be made absolutely safe. See The Committee on Commerce, Science and Transportation, Report on S. 648 - Product Liability Reform Act of 1997, 44-48 (June

19, 1997). Because punitive damages are awarded to punish, not to compensate, plaintiffs would not bear any direct costs stemming from a reduction in their ability to collect punitive damages.

2. Direct Private Sector Benefits:

This bill may remove some of the perils and uncertainties faced by businesses in Florida by limiting their exposure to claims for punitive damages. Repetitive claims for punitive damages could potentially bankrupt a defendant, eliminating the ability of future claimants to recover punitive or compensatory damages. This bill, because it creates a consolidated trial for punitive damages, would lessen the likelihood of this type of occurrence. Proponents of the types of changes proposed in this bill urge that a reduction in the threat of punitive damage awards could benefit consumers by encouraging innovation and spurring the development of new and potentially useful products and services.

3. Effects on Competition, Private Enterprise and Employment Markets:

Any reduction in the risks posed by civil litigation could attract new business to the state and could enhance the competitiveness of businesses already operating in the state.

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill would not reduce the percentage of a state tax shared with counties or municipalities. Therefore, it would not contravene the requirements of Article VII, Section 18, of the state constitution.

V. COMMENTS:

Key Issues - This subsection uses a question format to stimulate debate about the joint resolution under review.

1. **Question Presented** - *Whether current standards relating to punitive damages are fair and understandable or whether such standards expose defendants to arbitrary, redundant, or disproportionate awards.*
2. **Other Policy Considerations:**
 - a. Do punitive damages encourage the production of safer products or the provision of safer services? Are there other ways of encouraging safe conduct by manufacturers that are equally persuasive and less costly? How effective are regulatory actions, negative publicity, media investigations, consumer groups, declining markets, and other incentives? Are punitive damages used with sufficient frequency to further their stated goals of punishment and deterrence?
 - b. What level of conduct justifies the imposition of punitive damages? Are punitive damages ever warranted in the absence of due process protections afforded to criminal defendants?
 - c. Are current standards related to punitive damages comprehensible, or is clarification and simplification required? Is this bill likely to clarify applicable standards and lend predictability to the process?
 - d. What level of conduct justifies the vicarious imposition of punitive damages? Should employers be subjected to vicarious punitive damages for negligence, gross negligence, intentional ratification or participation, or some other standard?
 - e. Does a problem exist with respect to repetitive claims for punitive damages? If so, does a consolidated punitive damages trial represent a workable solution? What are some other alternatives? Does the possibility of bankrupting a defendant through repetitive punitive awards penalize future plaintiffs? If so, how could such a situation be prevented?
 - e. Does the receipt of punitive damages amount to a windfall for the plaintiff and the plaintiff's attorney? Should the proceeds be distributed in some other fashion? Would any such arrangement be workable as a practical matter? Could such a scheme complicate matters to a degree that it eclipses any benefits?

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

Second reading occurred on March 6, 1998. One amendment was adopted, which adds language to s. 400.023, F.S. The amendment provides guidelines for the recovery of attorney fees in actions instituted against nursing homes. It requires mediation and establishes time limits and procedures. The amendment also provides guidelines for discovery related to punitive damages and states that punitive damages must be reasonable in light of the circumstances.

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This bill was read for the third time on March 10, 1998. It passed by a vote of 68 to 22.

VII. SIGNATURES:

COMMITTEE ON CIVIL JUSTICE & CLAIMS:

Prepared by:

Legislative Research Director:

Charles R. Boning

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