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IN THE SUPREME COURT OF FLORIDA

HARVEY GORDON,

Petitioner,

v.

CASE NO.: 78,638

STATE OF FLORIDA, et al.,

Respondents.

BRIEF OF FLORIDA DEFENSE LAWYERS ASSOCIATION, AMICUS CURIAE

On Discretionary Review of a Decision of the District Court of Appeal, Third District

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: **Pages**

CONSTITUTIONAL PROVISIONS:

PRELIMINARY STATEMENT

In this brief, the parties will be referred to by name or as they stood in the trial court, Petitioner having been plaintiff. Respondent The State of Florida will be referred to as "the State". References to the Record on Appeal will be by the symbol "R:____". References to the Initial Brief of Petitioner will be by "Brief at _____ "

All emphasis herein is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

For purposes of this brief, the relevant facts and procedural matters[1] are as follows.

The acts out of which this case arose occurred on February 16, 1987 (R:21), subsequent to the July 1, 1986, effective date of Section 768.73, Florida Statutes. At the conclusion of the trial, the jury awarded plaintiff Gordon $72,500 in compensatory damages and $512,000 in punitive damages.[2] A final judgment in Gordon's favor was entered in those amounts. (R:3). Following denial of post-trial motions, an appeal was taken, resulting in an affirmance. K-Mart Corp. v. Gordon, 565 So.2d 834 (Fla. 3d DCA 1990).

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[1]These facts and procedural matters are taken from the District Court's opinion as reported at 16 FLW D2256.

[2]Of the total punitive damage award, $500,000 was awarded against K-Mart, $10,000 against defendant Sparrock, and $2,000 against defendant Mirambeau. Both individual defendants were employees of K-Mart.

After issuance of the mandate, K-Mart moved to amend the final judgment (R:8), and the State moved to intervene as a party plaintiff for the purpose of applying Section 768.73 (2)(b), Florida Statutes. (R:18). The trial court granted those motions and entered an amended final judgment providing that plaintiff Gordon receive $277,300 and that the State recover $307,200.[3] (R:1-2). Gordon appealed, and the District Court of Appeal, Third District, affirmed. The District Court certified that its opinion involved a question of great public importance.

SUMMARY OF ARGUMENT

The trial court properly entered judgment awarding 60% of the jury's punitive damage verdict to the Public Medical Assistance Trust Fund, as required by Section 768.73, Florida Statutes, and properly rejected plaintiff's claims that this statute was constitutionally invalid. None of plaintiff's constitutional attacks have any merit, and they were correctly rejected by the trial court and by the District Court of Appeal.

The rendition of the jury's verdict and the subsequent ministerial entry of judgment did not convert what had been, at most, the possibility of a punitive damage award into a "vested

[3] It appears that there may be a typographical error in the report of the District Court's decision. The amended final judgment awards the State 60% of a $512,000 punitive damage amount, and plaintiff Gordon 40% of that same amount (as well as the compensatory damage amount), rather than allocating a punitive damage amount of $512,600, as stated in the published report in Florida Law Weekly. We note that petitioner states (Brief at 4) that the punitive damage award was $512,000, not that it was $512,600.

right" not subject to the pre-existing statutory allocation or to judicial correction. As both the trial judge and the District Court recognized, plaintiff had no vested right to any punitive damage award when the jury's verdict was rendered. The statutory provision for distribution of punitive damage awards was in full force before entry of the judgment -- indeed, it was in full force **before** plaintiff's cause of action ever accrued. The trial court properly entered an amended judgment in conformity with the statute when the matter was brought to its attention, and the District Court properly affirmed.

The fundamental question involved in this case is whether plaintiff Gordon obtained a vested right to punitive damages in this case prior to July 1, 1986, the effective date of Section 768.73, Florida Statutes. If so, the statute could not constitutionally deprive him of that vested right. If, on the other hand, he had no vested right to a punitive damage award at that time, his "right" to punitive damages (which, in reality was nothing more than an inchoate claim until judgment **was** entered) was properly subject to the statute's allocation provisions. It is clear that plaintiff Gordon's "right" to punitive damages in the instant case came into existence well after the statute's effective date.

A jury verdict, and a judgment entered on that verdict, do not create rights which cannot be judicially altered pursuant to statutory or case law requirements in response to post-trial motions, on appeal, or in response to a motion under Rule 1.540,

Florida Rules of Civil Procedure. At least until a judgment has been rendered and has survived post-trial motions and appellate review (or until it is no longer subject to judicial review, as by lapse of time to take an appeal), it remains subject to judicial correction. Even after the time for taking an appeal has expired, a judgment is still subject to modification pursuant to motion under Rule 1.540, Florida Rules of Civil Procedure. The plaintiff's "vested rights" theory, if accepted, would make a mockery of the procedural provisions for post-verdict changes (i.e., setoffs and the like), and for post-trial motions, and would render plenary appeals wholly meaningless. Errors committed in the trial court would become unreviewable -- even by the trial judge himself. The plaintiff's theory thus enshrines and immunizes error.

Additionally, the plaintiff's theory wholly ignores the role of punitive damages and settled legal principles as to whether and when a party has an entitlement to a punitive damage recovery. Florida law has long held that such damages (in those cases where they may be awarded at all) are committed to the fact-finder's discretion, and that no plaintiff has a right to a punitive damage award. The statutory provision here in issue recognizes the role of punitive damages as a sanction for public wrongs, and the lack of any "vested right" in plaintiff to recover punitive damages. Unlike compensatory damages, the recovery of punitive damages by a plaintiff does not involve any vested right. The courts below properly recognized that plaintiff had no vested right to a

punitive damage award, and that the statute took effect prior to accrual of plaintiff's cause of action, much less entry of this judgment.

Once plaintiff's vested rights theory is rejected, many of plaintiff's other constitutional arguments fall with it. Absent a "property right", for instance, plaintiff cannot have been deprived of property without due process or just compensation.

Plaintiff has not been deprived of the right to trial by jury -- he has been given a jury trial. The fact that the statute changes the provisions of the judgment to be entered on the jury's verdict does not infringe on his jury trial right any more than do the provisions of the Florida Automobile Reparations Reform Act, which also changes the provisions of a judgment to be entered on a jury's verdict. Nor is the right to jury trial infringed because the jury is not told of the statutory allocation plan; juries are not told of a number of things which have no proper bearing on their deliberations.

There is no denial of access to the courts here. Applying the analysis of Kluger v. White, 281 So.2d 1 (Fla. 1973), there is no right to recover punitive damages and, in any event, they are not a right to "redress for injuries" so as to be subject to Kluger analysis. Rather, punitive damages are a matter of legislative grace, and may be constitutionally restricted or abolished entirely.

Plaintiff's claim that this is an impermissible special law taxing judgments is wholly specious. This statute is plainly not a special law, and in any event does not levy a tax.

Nor does the statute deny equal protection of the laws. There are legitimate reasons for not including statutory treble damage cases within the statutory sweep and for excluding cases settled prior to judgment.

Plaintiff's claim that the statutory attorneys' fee provision (requiring that his contingent fee be based on that portion of the punitive damage amount actually received by his client) deprives him of property rights without due process or compensation must be rejected. Just as plaintiff had no vested right to a punitive damage award, plaintiff's counsel had no vested right under his contingent fee contract until well after the statute became effective. When the fee contract was entered into, the statute was already in effect, and the statute was an implicit part of the contingent fee contract. Plaintiff's attorney was on at least constructive notice of the existing statutory provision. Plaintiff's theory would require either that the "full" attorney's fee be paid by the State, which never agreed to pay a fee, or by plaintiff, with the result that plaintiff would receive no part of the punitive damage award and would likely see his compensatory damage award diminished by payment of part of the contingent fee attributable to the punitive damages. Limiting the contingent fee in direct proportion to plaintiff's own recovery advances the legislative objective and is in full conformity with historic

practice and fundamental notions of fairness. Adoption of plaintiff's theory, in contrast, is directly contrary to the legislative goal, inevitably results in significant conflicts of interest, and is contrary to the established public policy favoring the compromise settlement of disputes.

Plaintiff's arguments should be rejected. The ruling of both the trial court and the District Court was correct and should be affirmed.

ARGUMENT

I. THE COURT BELOW PROPERLY HELD, IN *AN* ACTION ACCRUING SUBSEQUENT TO THE EFFECTIVE DATE OF SECTION 768.73(2), FLORIDA STATUTES, THAT THE ENTRY OF A JURY VERDICT AND JUDGMENT INCORRECTLY AWARDING PUNITIVE DAMAGES SOLELY TO PLAINTIFF DID NOT CREATE VESTED PROPERTY RIGHTS WHICH COULD NOT BE THEREAFTER MODIFIED BY ENTRY OF *AN* AMENDED JUDGMENT PROVIDING FOR DIBTRIBUTION OF THE PUNITIVE DAMAGE AWARD AS REQUIRED BY THAT STATUTE.

Plaintiff mounts a multifaceted attack[4] on the constitutional validity of Section 768.73, Florida Statutes, which provides for allocation of a portion of a punitive damage award to a state

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[4]Indeed, plaintiff's attack is so wide-ranging that it includes at least one argument (that the statute deprives him of equal protection) not raised in the District Court of Appeal. A review of the briefs filed in the District Court reveals that other constitutional attacks plaintiff makes in this Court were not raised in his District Court briefs, but were raised only by an amicus curiae supporting his ultimate position. Points of law not raised in the lower court cannot be raised for the first time on appeal. Northeast Polk County Hosp. District v. Snively, 162 So.2d 657 (Fla. 1964); Williamson v. Williamson, 335 So.2d 346 (Fla. 1st DCA 1976). Nonetheless, in an effort to assist the Court, we will briefly respond to each of plaintiff's assertions.

fund, rather than to the plaintiff. Those constitutional assaults must be rejected. Most of plaintiff's claims rest on a single erroneous premise -- that plaintiff had a vested right to a punitive damage award which cannot be affected by a pre-existing statute. Once that premise is rejected, as it must be under Florida law, plaintiff's theories collapse like a house of cards in a hurricane.

At the Outset, it is appropriate to briefly set forth some fundamental precepts of constitutional review. It is settled that courts will avoid declaring a statute unconstitutional if the statute can be fairly construed in a constitutional manner. Sandlin v. Criminal Justice Standards & Training Commission, 531 So.2d 1344 (Fla. 1988). There is a presumption that a statute is constitutional. State v. State Board of Education, 467 So.2d 294 (Fla. 1985); Bonvento v. Board of Public Instruction of Palm Beach County, 194 So.2d 605 (Fla. 1967); Spencer v. Hunt, 109 Fla. 248, 147 So. 282 (1933). In determining whether a statute is constitutional, every presumption is to be indulged in favor of validity. Griffin v. State, 396 So.2d 152 (Fla. 1981).

The courts are bound to uphold a statute unless it is clearly made to appear beyond a reasonable doubt that it is unconstitutional. Spencer v. Hunt, supra; Campbell v. Skinner Manufacturing Co., 53 Fla. 632, 43. So, 874 (1907). See also, to like effect, Bonvento v. Board of Public Instruction of Palm Beach County, supra. One who asserts that a statute is unconstitutional has the burden of clearly demonstrating that invalidity. Lasky v.

State Farm Ins. Co., 296 So.2d 9 (Fla. 1974); Milliken v. State, 131 So.2d 889 (Fla. 1961); Spencer v. Hunt, supra. In the present case, plaintiff has not even come close to making such a demonstration.

A. Plaintiff was not deprived of any vested right.

In the instant case, the trial court and the District Court both properly recognized that plaintiff had no vested right to a punitive damage award when the jury's verdict was rendered, and both courts correctly held that the jury's verdict and the ensuing judgment incorrectly awarding the entire punitive damage amount to plaintiff did not create vested property rights which could not be affected by the pre-existing punitive damage distribution provisions of Section 768.73(2), Florida Statutes. Plaintiff's contrary theory not only departs from fundamental precepts of constitutional law and settled law concerning punitive damage awards, but, additionally, espouses a doctrine which would make post-trial motion practice and plenary appellate review meaningless.

The essential facts out of which this cause arises are as follows: Section 768.73(2), Florida Statutes, became effective on July 1, 1986. Chapter 86-160, Laws of Florida, Sections 52, 70. The acts which gave rise to the present litigation all occurred thereafter. The jury rendered a verdict for substantial compensatory and punitive damages. The trial judge entered judgment pursuant to the jury's verdict, and that judgment was upheld on appeal. Thereafter, the provisions of Section 768.73,

Florida Statutes, were brought to the trial judge's attention, and he then entered an amended final judgment allocating 60% of the punitive damage award to the State, as required by Section 768.73, Florida Statutes.' Plaintiff assaulted the constitutional validity of the statute in both the trial court and the District Court of Appeal, and renews that assault here.

Section 768.73(2), Florida Statutes, provides:

> In any civil action, an award of punitive damages shall be payable as follows:
>
> (a) Forty percent of the award shall be payable to the claimant.
>
> (b) If the cause of action was based on personal injury or wrongful death, 60 percent of the award shall be payable to the Public Medical Assistance Trust Fund created in s. 409.2662; otherwise, 60 percent of the award shall be payable to the General Revenue Fund.

This provision became effective on July 1, 1986, before plaintiff's cause of action accrued. The trial court correctly recognized that before a judgment is rendered, a plaintiff has no vested right to punitive damages, and that any right to such damages may be taken away by a statute taking effect **before** judgment is rendered. In the context of the present case, Section 768.73, Florida Statutes, is such a statute. Accordingly, the trial judge correctly held that the statute could constitutionally

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'Plaintiff does not assert in this Court that the procedures used in amending the final judgment were improper, as was argued in the District Court of Appeal. Accordingly, we assume that the procedural methodology, although perhaps somewhat inelegant, is no longer in issue.

be applied in this case.' The District Court of Appeal properly affirmed that decision.

Plaintiff argues that he obtained a vested right to 100% of the punitive damage award when the jury returned its verdict and the trial court ministerially entered judgment on that verdict two days later, without having been advised of the potential applicability of Section 768.73, Florida Statutes. The plaintiff's extreme views of the effect of the entry of a jury verdict and resulting judgment are not merely inconsistent with the accepted structure and role of our judicial system, but in fact are wholly repugnant to it. Additionally, the plaintiff's theory is at odds with settled case law concerning the role, purpose, and "vesting" of punitive damages.

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[6]We submit that, from a technical perspective, it might have been preferable if the Amended Final Judgment had either provided that the award of punitive damages is "subject to the provisions of Sections 768.73 (2) and (3), Florida Statutes!! or tracked the language of Sections 768.73 (2) and (3), Florida Statutes, in terms of 60% of the punitive damage award being "payable to" the State, with further provision that if the full amount of the punitive damage award cannot be collected, plaintiff and the State "shall each be entitled to a proportional share of the punitive damages collected." Such a provision would avoid further problems and litigation should one or more of the defendants be wholly or partially !!judgment-proof." In the present case, for instance, the jury awarded $500,000 in punitive damages against K-Mart, $2,000 in punitive damages against defendant Mirambeau, and $10,000 in punitive damages against defendant Sparrock. It is possible that one or more of those defendants might not have the financial wherewithal to satisfy the applicable punitive damage award. A Final Judgment which speaks in terms of particularized dollar amounts, such as the one here under review, could lead to either plaintiff or the State recovering more than its statutory "proportional share" in such circumstances.

A jury verdict does not create vested property rights until the resulting judgment becomes truly final by affirmance on appeal, by expiration of the time within which an appeal may be taken, or by compromise and settlement of the dispute prior to appellate resolution. Until one of those events occurs, no one -- neither the plaintiff nor the State -- has any vested right to any portion of the punitive damage award. Thus, on the facts of the instant case, the right to punitive damages vested on September 6, 1990, when the District Court denied rehearing in the initial appeal from the underlying judgment. The rights that vested at that time, however, were not solely those of plaintiff Gordon; the State's pre-existing statutory "right" to 60% of any punitive damages collected vested at the same instant.

In the present case, the provisions of Section 768.73, Florida Statutes, became effective before the events which ultimately resulted in this litigation, and hence before plaintiff's cause of action accrued. This is not a case about retroactive application of a statute. When plaintiff's cause of action accrued, this statute was in full force and effect, and the "right" to a punitive damage award which plaintiff eventually acquired was already subject to the statutory allocation provisions. At the very instant that plaintiff's "right"[7] to punitive damages first came

[7]Of course, that "right" (i.e., a cause of action for punitive damages) depended on numerous contingencies along the way before it could blossom into an actuality, including timely filing of a suit, ability to prove sufficiently egregious acts to warrant imposition of punitive damages, and a jury's discretionary decision to award punitive damages.

into existence, it was already qualified by the State's proportionate interest in any punitive damage award.

The handing down of a verdict and entry of a resulting judgment, without more, does not somehow magically transform what had been (as discussed below) nothing more than an inchoate claim to 40% of any punitive damage award into a vested right to 100% of the punitive damage award which cannot be judicially modified to comply with pre-existing statutes. It is only when the judgment becomes truly final, after post-trial motions and exhaustion of appellate review (or lapse of time within which to seek appellate review), that plaintiff acquires any right to any portion of the punitive damage award. If, prior to that time, that right has been qualified or limited, the "vesting" is subject to that qualification or limitation. That is the situation here. When plaintiff Gordon's right to recover punitive damages vested in 1990 (when the District Court denied rehearing on the initial appeal), his "right" to punitive damages had long since been qualified by the pre-existing provisions of Section 768.73, Florida Statutes, which became effective on July 1, 1986 -- a date, it might be noted, prior to the acts which led up to the filing of the suit. Because the statute was in full force and effect long before plaintiff obtained any vested right to punitive damages, it cannot be said that the statute deprived him of any pre-existing vested right. The original judgment, which inadvertently failed to recognize the statutory provision, could not create a vested right,

where none existed, by its inadvertent failure to give effect to the statute.

The return of a jury verdict, or the entry of a judgment pursuant to that verdict, does not create a vested right which cannot be judicially modified where appropriate. If, for example, one or more defendants have settled with a plaintiff prior to trial, and the jury's damage award includes their proportionate liability as well as that of the "remaining" defendants,[8] the verdict does not give rise to a vested right in plaintiff to a judgment in the full verdict amount. Rather, in entering judgment on the jury's verdict, the trial judge must make an appropriate adjustment for the settlement. Under plaintiff's "vested rights" theory, that judicial modification of the jury's verdict would be wholly unconstitutional,

Similarly, if, after entry of the judgment, defendant renews a prior motion for directed verdict, moves for new trial, or moves for a remittitur (or, for that matter, if plaintiff moves for an additur or the like), the mere fact that a verdict has been handed down and a judgment entered does not create a constitutional bar to granting such a motion. Otherwise, such post-trial motions

[8]So far as we are aware, the instant case does not involve application of the proportionate liability provisions of Section 768.81(3), Florida Statutes, to an "absent defendant." The language of that section, however, would seem to indicate that the verdict should include an allocation of fault to all entities involved, rather than only the defendants remaining at the time of trial. If, however, only "remaining" defendants are included in the fault allocation, a setoff for settlement amounts is clearly required.

could serve no possible purpose.[9] Under the plaintiff's theory, the plaintiff would have a vested property right to the compensatory and punitive awards set forth in the judgment, and the trial court would be powerless to alter that judgment. In short, even if the trial court had determined that it should have directed a verdict on liability for defendants, or should have directed a verdict for defendants on the punitive damage claim, acceptance of plaintiff's "vested rights" theory would preclude the trial court from correcting its own error.[10]

Likewise, under plaintiff's theory, plenary appeals would be a frivolous and functionless extravagance, since the plaintiff's entitlement to whatever was encompassed in the verdict and judgment would have become a "vested" right. In that type of judicial system, there would be little point in even having an appellate court structure, since the appellate courts would be legally unable to affect rights which had become "vested" by the entry of a

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[9]For instance, in the instant case, the original final judgment was entered two days after the jury returned its verdict, and defendant's post-trial motions were not denied until more than two months later. (Brief at 4). If the trial court's entry of judgment, in and of itself, created vested rights, as plaintiff contends, such post-trial motions would be an exercise in futility.

[10]In addition to making a mockery and a farce out of the provisions of Rules 1.530 and 1.540, Florida Rules of Civil Procedure, this ''vested rights" theory would completely emasculate the practice of reserving ruling on such matters as motions for directed verdict or for mistrial. But see Ed Ricke and Sons, Inc. v. Green, 468 So.2d 908 (Fla. 1985). Moreover, application of such a ''vested rights" theory in dissolution of marriage actions would make a shambles out of current law concerning modification of alimony and child support provisions.

verdict and judgment. At least as to civil cases, the plaintiff's theory would thus restrict appellate review solely to interlocutory review under Rule 9.130, Florida Rules of Appellate Procedure, and, occasionally, to issuance of extraordinary writs under Rule 9.100, Florida Rules of Appellate Procedure. Such a result would effectively nullify the provisions of Article V, §§3(b)(1) through (3)(b)(6), Florida Constitution (granting appellate jurisdiction to the Supreme Court of Florida), Article V, §§4(b)(1) and (2), Florida Constitution, (granting appellate jurisdiction to the District Courts of Appeal) and part of Article V, §5(b), Florida Constitution, (granting appellate jurisdiction to the Circuit Courts). Although that result would certainly reduce congestion in the appellate courts, it is nonetheless wholly foreign to the judicial structure created by the Constitution of the State of Florida.

Even if a less extreme view is taken, and plaintiff instead contends that his right to the punitive damage award vested when appellate review was exhausted, plaintiff's position still is not advanced. At the instant that plaintiff's right to any punitive damage amount vested, so too did the State's statutory right to a portion of that punitive damage award. Section 768.73, Florida Statutes, allocating a portion of the punitive damage award to the State, was in full force and effect at that time -- indeed, it had been in full force and effect when the jury handed down its verdict and even when the cause of action accrued. The statute does not affect a right which vested prior to its enactment, but instead

merely deals with the allocation of punitive damages when what had been an inchoate claim, accruing after the statute became effective, finally ripens into a judgment liability no longer subject to appellate review.

B. "Vested rights" and the nature of punitive damages.

Additionally, consideration of the function of punitive damages, and the settled legal principles concerning recovery of punitive damages, further demonstrates the plaintiff's error.

Punitive damages are awarded to punish the wrongdoer and to deter the commission of similar acts in the future. Chrysler Corp. v. Wolmer, **499** So.2d **823** (Fla. **1986);** St. Resis Paser **Co.** v. Watson, **428 So.2d 243** (Fla. **1983);** Campbell **v.** Government Emslovees Ins. Co., **306 So.2d 525** (Fla. **1974);** Fisher **v.** City of Miami, 172 **So.2d 455** (Fla. 1965); Florida East Coast Railway Co. v. McRoberts, 111 **Fla. 278, 149 So. 631 (1933).** ***See*** also, to like effect, Jacksonville Frosted Foods, Inc. v. **Haigler, 224 So.2d 437** (Fla. 1st DCA **1969).**

Punitive damages tend to bring to punishment certain cases of oppressive conduct often criminally unpunishable and which in actual life go unnoticed in the criminal law. Campbell v. Government Employees Ins. Co., supra. The availability of punitive damages is reserved to those kinds of cases where private injuries partake of public wrongs. Ingram v. Pettit, 340 So.2d 922 (Fla. 1976). Punitive damages are warranted only where the egregious wrongdoing of the defendant, although perhaps not covered by the

criminal law, nevertheless constitutes a public wrong. Chrysler Corp. v. Wolmer, supra.

The jury's duty in considering the imposition of punitive damages is to assess the appropriate degree of punishment to be imposed on the defendant commensurate with enormity of the offense. St. Regis Paper Co. v. Watson, supra. Once a plaintiff has introduced evidence to establish a basis for recovery of punitive damages, the jury, acting on behalf of the public, has the responsibility to determine whether to award punitive damages and, if so, what amount would best serve the public policies of punishment and deterrence. Id.

The provisions of Section 768.73(2), Florida Statutes, give appropriate recognition to the fact that punitive damages are awarded to punish defendant for wrongs to the public, and to serve as a deterrent to others: the statute does so by providing for the distribution of a portion of the punitive damage award to the State (thereby ensuring that defendant remains liable for the full punitive sanction and providing funds for the public benefit while, at the same time, retaining an incentive for an injured plaintiff to seek an award of punitive damages, by permitting him to retain 40% of any proper punitive damage award). Thus, "windfall" recoveries by a plaintiff, having no relationship to the damages sustained (which are covered in the compensatory damage award) are lessened, and a major portion of the monetary punishment is made available for the benefit of the public.

The plaintiff's discussion of the philosophical underpinning of punitive damages leads him to the conclusion that awarding 100% of the punitive damages to plaintiff is necessary in order to satiate plaintiff's thirst for private vengeance (Brief at 24-25). Unfortunately, the plaintiff fails to enlighten us on how plaintiff's thirst for private vengeance is affected if the jury simply decides, in its unfettered discretion, not to impose punitive damages, or imposes them in an amount less than that sufficient to satiate plaintiff's thirst. Surely, plaintiff does not intend to argue that plaintiff is the sole proper arbiter of how large a punitive award must be. If this statute had never been enacted, and this jury had awarded plaintiff $204,800 in punitive damages (40% of the award in issue here), would plaintiff have been entitled to complain? Certainly not!

Moreover, vengeance is, at least in its normally understood sense, achieved by inflicting harm (here, a large monetary judgment), not by enriching oneself. The plaintiff seems to have confused vengeance with avarice.

As is readily apparent, punitive damages serve a wholly different function than compensatory damages. Compensatory damages, as the name implies, serve to compensate the plaintiff for whatever injuries he has sustained by virtue of the defendant's tortious act, thereby providing redress for injuries. Accordingly, a plaintiff has, on proper proof, a right to receive compensatory damages, and the Legislature is constitutionally restricted from infringing on that cause of action without

providing a reasonable alternative, absent an overpowering public necessity and the lack of any alternative method of meeting that necessity.[11] Lasky v. State Farm Ins. Co., supra; Kluger v. White, supra. Punitive damages, however, serve a different function, implicate different principles, and are treated differently.

The law permits the imposition of punitive damages, in proper cases, at the discretion of the jury, not because the party injured is entitled under the law to recover punitive damages as a matter of right, but as a punishment to the wrongdoer. Florida East Coast Railway Co. v. McRoberts, supra; Lindgren Plumbing Co., Inc. v. Doral Country Club, Inc., 196 So.2d 242 (Fla. 3d DCA 1967), cert. den., 201 So.2d 558 (Fla. 1967). Punitive damages are allowed, not as redress for plaintiff's injuries, but as a deterrent to defendant and others inclined to commit a similar offense. Ross v. Gore, 48 So.2d 412 (Fla. 1950); Florida East Coast Railway Co. v. McRoberts, supra.

As those cases hold, punitive damages are awarded only at the discretion of a jury, even in cases in which an award of punitive damages is clearly proper. It has repeatedly been held that a plaintiff has no right to a punitive damage award, and a jury may decide not to award them, even though the evidence plainly supports their award. St. Regis Paper Co. v. Watson, supra; Fisher v. City of Miami, supra; Florida East Coast Railway Co. v. McRoberts,

[11]The access-to-courts issue is more fully discussed infra.

supra; Comfort Makers, Inc. v. Estate of Kenton, 515 So.2d 1384 (Fla. 5th DCA 1987); Adler v. Seligman of Florida, Inc., 438 So.2d 1063 (Fla. 4th DCA 1983); Lindgren Plumbing Co., Inc. v. Doral Country Club, Inc., supra. In short, in a proper case punitive damages may be awarded in the discretion of the jury. Lindgren Plumbing Co., Inc. v. Doral Country Club, Inc., supra.

As this Court observed in Ross v. Gore, supra, at 414:

> 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. (citations omitted). It cannot, then, be said that the denial of punitive damages has unconstitutionally impaired any property rights of appellant.

The only logical conclusion which can be drawn is the one drawn by the trial judge and the District Court -- that plaintiff had no vested right to the 60% of the punitive damage award the statute made payable to the State. Plaintiff argues, however, that the handing down of the jury's verdict and the resulting ministerial entry of judgment somehow vested in plaintiff an absolute property right to the entire punitive damage award because the verdict and judgment gave no recognition to the statutory provision -- as, indeed, the verdict could not, given the statutory prohibition against advising the jury of the punitive damage allocation provisions. Plaintiff's conclusion is wholly erroneous.

An instructive example of the essential error in the plaintiff's theory is found in Sharrow v. City of Dania, 83 So.2d 274 (Fla. 1955). In that case, the city had passed on first

record evidence to establish that the property owners had adequate forewarning of the pending ordinance when they applied for and received the building permit, and concluded that if the right to the permit became **"vested",** that "vesting" **was subject** to the warning evidenced by **the** ordinance then pending, and therefore subject to the ultimately-completed exercise of the police power signaled by the pending ordinance.

Similarly here, when plaintiff's cause of action accrued, when the jury returned its verdict awarding substantial punitive damages, and when the trial court entered judgment on that verdict, plaintiff was on actual or constructive notice of the provisions of Section 768.73(2), Florida Statutes. Indeed, the present case is stronger than Sharrow, since here the statute was not merely pending before the legislative body for additional consideration,

but in fact had become law before the verdict was entered -- indeed, before the cause of action first accrued. As in Sharrow, plaintiff was on at least constructive notice of the law and its requirements. Accordingly, as in Sharrow, the plaintiff's rights were subject to the exercise of the legislative power.

The mere fact that the jury later handed down a verdict did not in any way magically transform plaintiff's inchoate claim to 40% of any punitive damage award which might remain on completion of the appellate process into an immediate vested right to 100% of the punitive damage award, any more than it gave the State a "vested" right to 60% of the punitive damage award. Both the plaintiff's "rights" and the State's "rights" were still subject to post-trial motions and appellate resolution.[12] When that appellate resolution reached its fruition in the form of an affirmance -- and only then -- did anyone have any vested right to any part of the punitive damage award. When plaintiff's inchoate claim became a vested right, it did so subject to the existing statutory law which provided that the State's claim to 60% of the punitive damage award vested in the same instant.

The fact that the initial judgment did not recognize the State's right does not alter that result. The State's statutory right to 60% of any punitive damage award which survived appellate

[12]Similarly, a jury's verdict for the full amount of damages sustained by a plaintiff does not give plaintiff a "vested right" to that amount which cannot be partially divested by a setoff to reflect settlements with any defendants who settled prior to trial.

review cannot be cut off in a case to which it had not been made a party, simply because the parties, for whatever reason, failed to advise the trial or appellate courts of the potential applicability of the statute's provisions. Indeed, plaintiff concedes (Brief at 38) that a decree which attempts to adjudicate rights of persons not parties to the action must be reversed on appeal. That concession is wholly at variance with his attempts to cut off the State's pre-existing statutory right to a portion of the punitive damage award on the basis that the original judgment, entered before the State's first involvement in this case, failed to recognize the State's interests.

The theory espoused by plaintiff is fundamentally flawed. The mere rendition of a verdict, without more, does not magically create "vested rights" -- much less vest them retroactively to a date before the plaintiff's cause of action accrued. Prior to entry of a judgment, plaintiff had, at most, the possibility of a punitive damage recovery -- even if the evidence had proven, beyond any possible doubt, that defendants' acts were so heinous as to plainly warrant a punitive damage award. The jury's verdict reflects a factual determination (subject to appropriate judicial review) that defendants' acts met the legal standard of egregiousness warranting punitive damages, and that the jury has exercised its discretion and found that such damages should be imposed. It does not, by itself, create vested rights which cannot be divested, in whole or in part, by appropriate judicial action. Entry of a judgment gives recognition to the jury's verdict, but

still does not, without more, create vested rights. Such a judgment still remains subject to correction on timely post-trial motions; the granting of such a motion would not unconstitutionally deprive a plaintiff of vested property rights. Furthermore, even when no post-trial motions are timely filed, and even when such motions are denied, vested rights are still not created until the appellate process has been completed (by lapse of time for taking an appeal, by compromise during the pendency of the appeal, or by appellate affirmance of the final judgment). Only when the judgment has in fact become final through resolution of post-trial motions and the appellate process are any vested rights created in either plaintiff or the State -- and the rights of both plaintiff and the State vest at the same instant. Since the State's statutory entitlement to a portion of the punitive damage award predated plaintiff's rights becoming vested, and indeed predated the accrual of the plaintiff's cause of action, the statutory allocation provisions do not deprive plaintiff of any property without due process or without just compensation.

c. The right to trial by jury.

Plaintiff asserts (Brief at 33-35) that the statute deprives him of his right to jury trial because it changes the effect of the jury's verdict by allocating a portion of the punitive damage award to the State instead of to the plaintiff. At the same time, plaintiff concedes (Brief at 34) that jury verdicts can properly be affected by grants of a new trial, remittiturs and additurs (additur, we note, was not recognized at common law), and the like.

Without even attempting to explain the distinction he seems to perceive, plaintiff then boldly asserts that the Legislature cannot, by statute, affect the results of jury verdicts. If that theory is correct, the Legislature also acted unconstitutionally in enacting statutory provisions dealing with additur and remittitur (Section 768.74, Florida Statutes) and dealing with collateral sources of indemnity (Section 768.76, Florida Statutes), since both of those statutes (as well as many others) also affect the results of jury verdicts. To the best of our knowledge, no statute has ever been held constitutionally infirm on this basis by any Florida appellate court.

For instance, the provisions of the Florida Automobile Reparations Reform Act (better known as the "no-fault insurance" law) change, by legislative command, the effect of a jury's verdict. At common law, a plaintiff in an automobile accident case need not have suffered a permanent injury (or one of the other statutory thresholds) in order to recover for pain and suffering. Under Section 627.737(2), Florida Statutes, such damages cannot be recovered (where the statute applies) unless one of the statutory thresholds is met. The statute thus changes the effect of the jury's verdict. Just as this Court in Laskv v. State Farm Ins. Co., susra, held that the no-fault statute did not deprive plaintiff of jury trial rights, it should hold that this statute likewise does not deprive plaintiff of jury trial rights.

Plaintiff also claims that he is denied the right to jury trial because the jury is not advised as to how punitive damages

will be allocated. That argument is specious. Such information is simply not pertinent to the jury's determination of whether punitive damages are appropriate and, if so, how much to award in order to sufficiently punish the defendant without bankrupting him. There are many things that juries are not told, including, for example: (1) the amounts paid by other former defendants in settlement; (2) the amount of available liability insurance; (3) the tax consequences of their verdict; and (4) in civil antitrust cases, that the verdict amount will be trebled. The right to jury trial is not violated in any of these instances, As in those situations, this information is withheld from the jury because it is not relevant to the decisions they must make and could easily be used for improper purposes; for instance, a jury of taxpayers informed that 60% of any punitive damage award would be paid into the public treasury might be tempted to alleviate their own tax burden somewhat by awarding punitive damages where they might not otherwise do so, or by awarding a greater amount of punitive damages.

D. Access *to* the courts.

Plaintiff claims (Brief at 26-29) that he was deprived of access to the courts -- in the limited sense that he was deprived of a pre-existing "right" to recover 100% of the punitive damages awarded in the verdict. Plaintiff, of course, has to admit that the right of access to the courts still exists in terms of being able to plead and prove a punitive damage claim, and in terms of recovering the "other" 40% of any punitive damage award. Thus, the

access-to-courts argument involves solely the allocation of 60% of the punitive damages to the State.

The seminal case in this area is Kluser v. White, 281 So.2d 1 (Fla. 1973), in which this Court set out the following test (at 4):

> We hold, therefore, that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. 52.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

Application of the Kluser test to this cause reveals that there is no deprivation of access to the courts here.

Kluger establishes a four-part test to determine if the abolition of a pre-existing right of action violates the constitutional right of access to the courts: (1) Does the case involve a right to redress for injuries, which right has been limited or abolished?; (2) Did that right to redress for injuries exist at common law or prior to the adoption of the Declaration of Rights?; (3) Has the Legislature provided a reasonable alternative for the abolished right to redress for injuries? and (4) Has the Legislature shown an overpowering public necessity for the

abolishment and the lack of an alternative means of meeting that necessity?

As demonstrated above, of course, there simply was no pre-existing right to punitive damages -- merely the possibility that, if plaintiff's proofs cleared the legal threshold, the jury might, in its discretion, decide to award punitive damages. Only if all four elements of the Kluger test are met is there an unconstitutional deprivation of access to the courts. In this cause, the very first element is absent -- there is no "right" to punitive damages, and punitive damages do not serve as a "redress for injuries".

As demonstrated at length above, there simply is no pre-existing right to punitive damages. St. Regis Paper Co. v. Watson, supra; Fisher v. City of Miami, supra; Florida East Coast Ry. Co. v. McRoberts, supra; Comfort Makers, Inc. v. Estate of Kenton, supra; Adler v. Seligman of Florida, Inc., susra. Since there is no right to a punitive damage award, and since, unlike compensatory damages, punitive damages are not given to compensate plaintiff for something he has lost by virtue of defendant's acts, there is no constitutional prohibition against abolishing punitive damages entirely -- much less merely redistributing a portion of them. As this Court pointed out in Ross v. Gore, 48 So.2d 412, 414 (Fla. 1950), the "right" to have punitive damages assessed is not property and a statutory denial of punitive damages does not unconstitutionally impair any property rights of plaintiff.

Even if plaintiff had a pre-existing right to punitive damages, the Kluger analysis still does not support his position. As noted above, Kluger spoke of a right to redress for injuries. Patently, that phrase refers to compensatory damages, which are specifically intended to provide redress for injuries. Punitive damages, in contrast, serve a wholly different function. They are not intended to provide compensation (redress for injuries), but rather to punish the wrongdoer, set an example and deter the commission of similar acts in the future. In short, punitive damages do not provide "redress for injuries", and thus do not come within the scope of Kluger's prohibitions.

E. Tax on judgments.

Plaintiff asserts (Brief at 29-30) that the statute is an impermissible tax on judgments and a special law. Dealing with the latter claim[13] first, a special law or general law of local application is one relating to particular specified persons or portions of the state or to particular classified persons or localities. State ex rel. Gray v. Stoutamire, 131 Fla. 698, 179 So.730 (1938). The instant statute, in contrast, is of general application throughout the state. Surely, plaintiff cannot be contending that this statute is a special law simply because it operates only on persons who thereafter meet generally-applicable

[13]We frankly confess that we do not understand whether plaintiff is asserting that the statute is unconstitutional both as a tax and as a special law, or if his claim is that it is unconstitutional as a special law regarding taxation. We will respond to both aspects.

criteria (recipients of a punitive damage verdict). If that were the test, all laws would be special laws -- for instance criminal statutes only apply to those who thereafter commit the crimes, venue statutes only apply to those who become litigants, and divorce statutes only apply to those involved in a dissolution of marriage. Under any recognized standard, Section 768.73, Florida Statutes, is not a special law. Thus, even if it were a tax, as plaintiff claims, it would not violate Article VII, Section 1(a), Florida Constitution, since it was "levied" pursuant to general law.

Moreover, this is not a tax: simply because money is paid to a State fund does not mean that a tax is being imposed. Fines imposed for violations of traffic regulations (or as part of the sentence for a criminal violation) are not taxes. Neither are usage charges for public buildings, or entry fees for public exhibitions, or filing fees in the judicial system. Other than the fact that monies are paid into a state fund, plaintiff has shown no reason for categorizing this as a "taxing" statute. This claim must likewise be rejected.

F. **Reasonable relationship to legitimate governmental objectives.**

Plaintiff asserts (Brief at 30-33) that the statute is constitutionally infirm because it lacks a reasonable relationship to the statute's avowed purpose of increasing the availability and affordability of liability insurance. Once again, plaintiff's claim rests entirely on a single erroneous premise -- this time, the premise that there can be no insurance coverage for punitive

damages.[14] To the contrary, punitive damages **are**, in some situations, covered by insurance. For instance, an employer who is himself guilty of some fault may be vicariously liable for punitive damages where his employee's conduct meets the requisite standard (indeed, we understand that this is precisely the basis for imposing $500,000 in punitive damages on K-Mart in this case). Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981). Public policy considerations against insurance of direct liability for punitive damages do not preclude insurability of this vicarious punitive damage liability.[15] U.S. Concrete Pipe Co. v. Bould, 437 So.2d 1061 (Fla. 1983); Country Manors Assoc., Inc. v. Master Antenna Systems. Inc., 534 So.2d 1187 (Fla. 4th DCA 1988); McCutchen v. Highlands Ins, Co., 424 So.2d 26 (Fla. 3d DCA 1982), approved, 446 So.2d 1073 (Fla. 1984). Thus, the cost and availability of liability insurance **is** affected by punitive damage awards.[16] As the District Court correctly recognized, Section

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[14]From that premise, plaintiff asserts that a statute allocating a portion of a punitive damage award to the State, rather than to the plaintiff, cannot affect insurance costs and hence cannot affect the affordability or availability of insurance. Plaintiff never addresses the point that, by allocating a portion of punitive damage judgments to the State, the Legislature has lessened the incentive for a plaintiff to pursue a punitive damage claim in the first place.

[15]Although vicarious punitive damage liability occurs most frequently in an employment context, it can arise in other contexts as well.

[16]In the circumstances of the present case, the $500,000 punitive damage award against K-Mart is of the class of vicarious punitive damage awards which can be covered by insurance, while the individual defendants' $10,000 and $2,000 punitive damage

(continued...)

768.73, Florida Statutes, acts to decrease the size and frequency of punitive damage awards by making them less financially attractive to plaintiffs and their counsel, thereby acting to lessen the impact of punitive damage awards on insurers, and thus increases the availability and affordability of commercial liability insurance.[17]

G. Equal protection of the laws.

Plaintiff asserts (Brief at 36-37) that Section 768.73, Florida Statutes, violates the constitutional equal protection guarantees by (1) treating plaintiffs with punitive damage claims differently from plaintiffs with statutory treble damage claims and (2) treating plaintiffs who settle their claims differently from plaintiffs who fully litigate their claims. No equal protection violation exists.

The constitutional demands of the equal protection clause do not include a requirement that a statute necessarily apply equally to all persons. Rinaldi v. Yeager, 384 U.S. 305 (1966); Kotch v. Board of River Port Pilot Commissioners, 330 U.S. 552 (1947). The courts will give great latitude to the Legislature in making

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[16](...continued)
liabilities are of a type which cannot, for public policy reasons, be covered by insurance.

[17]It should be kept in mind that Section 768.73, Florida Statutes, is one portion of a complex law, the 1986 Tort Reform Act, containing numerous provisions which, working together, are intended to achieve the legislative goal of improving the availability and affordability of liability insurance. Whether this particular statute tends to achieve the legislative goal should be viewed in that broader context.

classifications, and the rough accommodations made by government do not violate the equal protection clause unless the lines drawn are hostile or invidious. Levy v. Louisiana, 391 U.S. 68 (1968); Norvell v. State of Illinois, 373 U.S. 420 (1963).

The constitution does not require the Legislature to cure a perceived problem "across the board", but rather allows it to enact statutes requiring a particular type of procedure in certain types of cases but not in others, so long as the classification is reasonable. Laskv v. State Farm Ins. Co., supra; State v. White, 194 So.2d 601 (Fla. 1967). The Legislature may chose to attack "the evil at hand", and is not required by the equal protection clause to act to cure the problem across the board, it being permissible to attack only the portion of the problem which appears to be most urgently in need of correction. In re Estate of Greenberg, 390 So.2d 40 (Fla. 1980), app. dism'd, 450 U.S. 961 (1981); Pacheco v. Pacheco, 246 So.2d 778 (Fla. 1971), app. dism'd, 404 U.S. 92 (1971). Underinclusiveness of a statute is not necessarily fatal to it under an equal protection attack. Nixon v. Administrator of General Services, 433 U.S. 425 (1977); Laskv v. State Farm Ins. Co., supra; Carr v. Central Florida Aluminum Products, Inc., 402 So.2d 565 (Fla. 1st DCA 1981).

It is certainly reasonable for the Legislature to exclude from the scope of Section 768.73, Florida Statutes, treble damages under the statutes cited by plaintiff. Those statutes deal with liability for such matters as RICO violations, hate crimes, and street terrorism. Such situations are not generally covered by

insurance (so as to be within the statutory purpose of improving affordability and availability of liability insurance). Additionally, the Legislature could easily have found that treble damage awards should not be discouraged in these particular areas. There is ample rational basis for the legislative choice in this instance.

As to discrimination between plaintiffs who settle and those who litigate, we initially observe that it is the plaintiff, not the State, who chooses which category he comes within. Moreover, the Legislature could well have determined that the problem was more acute when a punitive damage claim is pursued to judgment than when that same claim is resolved (by settlement, summary judgment, directed verdict, or jury refusal to impose punitive damages) short of a punitive damage judgment. Punitive damage claims are frequently disposed of adversely to a plaintiff prior to entry of a judgment, thereby greatly lessening the impact of such claims on insurance affordability and availability.[18] Moreover, had the Legislature elected to make the State an interested party in punitive damage cases prior to the judgment becoming final, it would not only have required the expenditure of considerable time, effort and expense by State-employed attorneys in connection with

[18]When a punitive damage claim is disposed of on the merits in a defendant's favor, the only costs incurred by an insurer are the incremental costs of defending against a punitive damage claim in addition to the compensatory damage claim. When a judgment for punitive damages is entered, in contrast, the insurer faces potential exposure to liability for that punitive damage award, such as where its insured is vicariously liable for the punitive award.

those claims, but would also have enormously complicated, if not precluded, settlement negotiations, contrary to Florida's settled public policy in favor of compromise and settlement of litigation.

H. Effect of Section 768.71(3), Florida Statutes.

Plaintiff claims (Brief at 21-22) that Section 768.73, Florida Statutes, does not require or permit any allocation of any part of the punitive damage award because Chapter 768, Florida Statutes, provides, in Section 768.71(3), Florida Statutes, that: "If any provision of this part is in conflict with any other provision of the Florida Statutes, such other provision shall apply." Plaintiff reasons that, since punitive damages were recognized at common law, the categorical adoption of the common law in Section 2.01, Florida Statutes, created a statutory right to punitive damages as part of the statutory law of this state. In short, plaintiff takes the position that, under Section 768.71(3), Florida Statutes, none of the provisions of Sections 768.72 through 768.81, Florida Statutes, may alter the common law in any way -- even though it is obvious that the Legislature's intent in enacting these statutes was precisely to alter certain common law rules by, for instance, imposing pleading requirements as to punitive damages (Section 768.72, Florida Statutes), providing rules regarding collateral sources of indemnity (Section 768.76, Florida Statutes), providing for itemized verdicts (Section 768.77, Florida Statutes) and abolishing, in certain circumstances, the doctrine of joint and several liability (Section 768.81, Florida Statutes).

Section 768.71(3), Florida Statutes, cannot be given the enormously broad scope which plaintiff attributes to it, since giving it that wide sweep results in entirely nullifying numerous other provisions enacted in the same session law. The legislative intent is the polestar by which the courts must be guided, since it is the essence and vital force behind the law. Deltona Corp. v. Florida Public Service Comm., 220 So.2d 905 (Fla. 1969); Tyson v. Lanier, 156 So.2d 833 (Fla. 1963). Any construction of a statute which would operate to impair, pervert, nullify or defeat the object of the statute should be avoided. Becker v. Amos, 105 Fla. 231, 141 So.136 (1932); Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 693 (1918).

A court should not construe a statute in such a manner as to reach an illogical or ineffective conclusion when another construction is possible. Gracie v. Deming, 213 So.2d 294 (Fla. 2d DCA 1968). The courts will not presume that the Legislature intended to enact purposeless legislation. Sharer v. Hotel Corp. of America, 144 So.2d 813 (Fla. 1962); State v. Zimmerman, 370 So.2d 1179 (Fla. 4th DCA 1979). Plaintiff's suggested reading of Section 768.71(3), Florida Statutes, violates each of these principals, and must accordingly be rejected.

I. Summary

In reality, plaintiff's constitutional assault is nothing more than a poorly-disguised attack on the Legislature's wisdom in enacting Section 768.73, Florida Statutes. Even if the Court felt that the statute was unwise, that is not a permissible basis for

a finding of unconstitutionality under the doctrine of separation of powers. As this Court has expressed the point, the courts do not concern themselves with the wisdom of the Legislature in choosing the means to be used, or even with whether the means chosen will in fact accomplish the intended goals, but rather only concern themselves with the constitutionality of the means chosen. Lasky v. State Farm Ins. Co., supra. To like effect, see Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987).

The courts give full effect to their proper role under a constitutional plan calling for the separation of powers by indulging every presumption in favor of the constitutionality of a duly enacted statute. In the present case, however, it is not necessary to rely on those presumptions since, as shown above, the plaintiff's theory is so fundamentally erroneous that it could not be accepted even if a presumption of unconstitutionality were applicable.

II. THE PROVISIONS OF SECTION 768.73(4), FLORIDA STATUTES, REQUIRING THAT PLAINTIFF'S ATTORNEY'S CONTINGENCY FEE BE CALCULATED BASED SOLELY ON WHAT WAS RECOVERED BY PLAINTIFF, ARE CONSTITUTIONALLY VALID.

The result reached by the District Court was correct.[19] Just as the statute provides, the contingent fee due plaintiff's

[19]Since the question before the Court is the correctness of the District Court's result, rather than the correctness of its reasoning, the judgment will be affirmed as long as the record discloses any reasonable basis, theory, reason, or ground on which the lower tribunal's result can be supported. Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979); Firestone v. Firestone, 263 So.2d 223 (Fla. 1972).

attorney in this case must be based solely on the recovery by his client, the plaintiff, without regard to any amount received by the State.

For exactly the same reasons that plaintiff had no vested right to 100% of the punitive damage award, plaintiff's counsel had no vested right in recovering a contingent fee based on 100% of that award. Just as the punitive damage award and the accrual of plaintiff's cause of action both occurred after the effective date of Section 768.73, Florida Statutes, the contingent fee contract was entered into long after that statute went into effect. Plaintiff was on constructive notice of the statute, and his attorney was certainly on constructive (if not actual) notice of the statutory provisions.

Additionally, plaintiff's attorney fee claim ignores the fact that the statutory limitation on attorney's fees was an implicit portion of the contingent fee contract itself. The laws of Florida are a part of every Florida contract. Board of Public Instruction v. Town of Bay Harbor Islands, 81 So.2d 637 (Fla. 1955). All contracts are made in view of the law in force and applicable thereto, and are subject to valid provisions of law pertaining to their construction and effect. Carey & Co. v. Hyer, 91 Fla. 322, 107 So. 684 (1926).

Valid laws in effect at the time a contract is made enter into and become a part of the contract as if they were expressly referred to and incorporated in the contract. State ex rel. Select Tenures. Inc. v. Raulerson, 129 Fla. 346, 176 So. 270 (1937);

Humphreys v. State ex rel. Palm Beach Co., 108 Fla. 92, 145 So. 858 (1933). A valid, applicable statute becomes as much a part of the contract as if written in it, and it cannot be claimed that the statute abrogates a contract entered into after the enactment of the statute. Grand Lodge, Knights of Pythias v. Moore, 120 Fla. 761, 163 So. 108 (1935); Clemons v. Clemons, 197 So.2d 38 (Fla. 2d DCA 1967). In short, the attorney's fee provisions of Section 768.73(4), Florida Statutes, became a part of this contingency fee contract at the instant of its execution, and hence cannot have impaired any pre-existing contractual rights of plaintiff's attorney.

Notwithstanding plaintiff's attorney's constructive (if not actual) prior knowledge of the attorney's fee provisions of Section 768.73 (4), Florida Statutes, which clearly limit his contingent fee to a percentage of the amounts recovered by his client, plaintiff's attorney seeks a fee based on 100% of the punitive damage award. Even aside fromthe reasons discussed above, that is impermissible.

Section 768.73(4), Florida Statutes, provides:

> Claimant's attorney's fees, if payable from the judgment, shall, to the extent that they are based on the punitive damages, be calculated based only on the portion of the judgment payable to the claimant as provided in subsection (2). Nothing herein shall be interpreted as limiting the payment of attorney's fees based upon the award of damages other than punitive damages.

The statutory directive on attorney's fees complements the statutory allocation of the punitive damage award itself. Just as the statutory allocation of the punitive damage award serves to

provide a mild economic disincentive to the plaintiff's pursuit of a punitive damage claim, this attorney's fee provision provides a corresponding economic disincentive to plaintiff's attorney. It thus furthers the legislative goal of increasing the availability and affordability of commercial liability insurance by decreasing the frequency of punitive damage awards insurers must pay on behalf of their vicariously-liable insureds.

Plaintiff's theory, in contrast, would work directly contrary to this legislative objective. If, as plaintiff contends, the contingent fee must (contrary to the plain statutory language) be based on 100% of the punitive damage award, plaintiff's counsel will continue to have a strong personal economic incentive to pursue punitive damage claims, rather than statutory disincentive the Legislature created to further the statutory goals.

Moreover, the statutory limitation of the contingency fee in direct proportion to the amounts actually received by the plaintiff himself is in full conformity with historic practice, with fundamental notions of fairness, and with controlling law regarding the calculation of contingent fee amounts. Contingent fees are calculated based on the amount the client actually receives as a result of his attorney's efforts. If the client receives nothing, the attorney gets no fee. If the client receives $100,000, the contingent fee is a percentage of that amount. If a judgment is entered for $100,000, but only $50,000 can be collected (for instance, where a personal injury judgment exceeds available insurance limits and defendant has no other assets available to

satisfy the judgment), the contingent fee is calculated based on the amounts actually received, not the higher amount of the partially-uncollectible judgment.

That historic understanding of the proper method of calculating a contingent fee accords with fundamental notions of elementary fairness. The contingent fee amount should reflect the tangible benefits the attorney has achieved for his client, not the pyrrhic victory of an uncollectible judgment. In the example above, for instance, it would be wholly unfair for an attorney with a 40% contingency fee agreement to collect $40,000 (40% of the entire judgment), leaving his client with the remaining $10,000 and a worthless piece of paper called an unsatisfied judgment. Such a result would deservedly cast the attorneys and the judicial system into well-earned public scorn and disregard.

Rather, consistent with Rule 4-1.5(F)(4)(b), Rules Regulating the Florida Bar, the contingency fee should and must be based on what plaintiff actually recovers (in the words of that Rule, "40% of any recovery" plus an "additional 5% of any recovery" by virtue of the appeal). In this context, "recovery" plainly refers to amounts actually received by plaintiff. Assume, for instance, that both individual defendants in this cause were financially incapable of paying any part of the punitive damage awards entered against them (in the vernacular, "judgment-proof"). Would plaintiff's attorney still be permitted to calculate his 45% contingency fee by including the $12,000 in punitive damages assessed against them which was uncollectible? Certainly not! Instead, his fee would

be based on what plaintiff actually received; that is the "recovery" referred to in the Rule. Similarly, since plaintiff will not receive the portion of the punitive damage award allocated to the State, that portion of the punitive damages cannot be included in plaintiff's "recovery" for purposes of calculating a contingent fee amount.

Plaintiff's claim that the contingency fee must be based on 100% of the punitive damage award -- even though plaintiff himself will only receive 40% of that punitive damage award -- overlooks the conflicts of interest that will inevitably arise under his theory, as well as its adverse effects on settlement of lawsuits in which punitive damages are sought.

The contingent fee in this case can only be paid from two sources: plaintiff (who contracted to pay a contingent fee to his attorney based on the recovery he obtained) or the State. Plaintiff's attorney had no contract with the State requiring the State to pay any part of his fee -- indeed, by enacting this statute, the State made clear in advance that it would not enter into such a contract. Plaintiff's attorney's only contract was with his own client, and that contract was entered into with (at least) constructive knowledge that the contingency fee calculation would be based solely on what plaintiff recovered, not on the basis of 100% of any punitive damage award.

Nor should plaintiff's attorney be heard to claim that the State should pay him a fee because his efforts benefitted the

State.[20] Mr. Gordon was his client, not the State. Indeed, plaintiff's attorney would face an intolerable conflict of interests if he had attempted to represent both plaintiff and the State. In the present appeal, for instance, plaintiff seeks to invalidate the statute and obtain the entire punitive damage award, while the State seeks to uphold the statute and obtain its statutory portion of that award. Similarly, an attorney representing both plaintiff and the State would face an intolerable conflict of interests if defendant offered to settle for the entire compensatory amount sought, in exchange for plaintiff abandoning his punitive damage claim -- that offer might well be in the plaintiff's economic interest, but it would be directly contrary to the State's economic interest.

That conflict of interests would be even further exacerbated if, as plaintiff asserts, the contingent fee were to be based on the entire punitive award (resardless of who pays the fee), even though plaintiff himself only receives 40% of any punitive damage recovery.[21] Plainly, plaintiff's attorney did not, and could not,

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[20]To the extent that imposition of punitive damages on egregious wrongdoers advances the public policies of deterrence and civil punishment in cases where private injuries partake of public wrong, the State has always benefitted from the imposition of punitive damages in appropriate cases. So far as we are aware, there has never been an attempt to claim an attorney's fee from the State on that basis. Thus, the question is whether the State must pay an attorney's fee because it now also receives a monetary benefit, in the form of a portion of the punitive damage recovery being paid into the Public Medical Assistance Trust Fund.

[21]Assume, for instance, a case in which there was a 75% likelihood of recovering compensatory damages and a 10% chance of also recovering punitive damages, and in which compensatory damages (continued...)

represent the State, and has no just claim to an attorney's fee

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[21] (...continued)
would be $100,000 and punitive damages, if awarded, would be $200,000. If defendant settled for the full compensatory amount in exchange for an abandonment of the punitive damage claim, plaintiff would receive $60,000 and his attorney would receive $40,000. Plaintiff would give up a 10% chance of obtaining an additional $48,000 (40% of $200,000 punitive damages = $80,000, less a 40% contingency fee on that amount) and would be relieved of a 25% chance of getting nothing. The State, on the other hand, would obtain nothing in such a settlement, and would have no economic incentive to agree to such a settlement.

If the same claim went to trial and plaintiff won both compensatory and punitive damages, he would receive (after deducting attorney's fees) that same $60,000 in compensatory damages plus $48,000 in punitive damages. The State would obtain $120,000 (less any fees or costs incurred). If the attorney's contingent fee is based solely on plaintiff's actual recovery, it would be $72,000 ($100,000 in compensatory damages plus $80,000 in punitive damages (40% of the punitive damage award) = $180,000, times.4). If, as plaintiff claims here, the fee is based on the entire $200,000 punitive damage award (in addition, of course, to the compensatory award), the attorney's fee would be $80,000 for the punitive damage claim alone, for a total fee of $120,000.

In short, in this hypothetical, settlement on a compensatory-damages-only basis would avoid a 25% chance that plaintiff would receive nothing, and plaintiff would receive $60,000 in exchange for giving up a 10% chance of receiving an extra $48,000. Plaintiff might well be willing to settle in these circumstances. His attorney, on the other hand, would have a wholly different cost/benefit calculus under plaintiff's theory. The fee if the case settled would be a sure $40,000. If the case went to trial, there would be a 25% chance of no recovery (hence, no fee), a 65% chance of a $40,000 fee (40% fee in those cases in which compensatory, but not punitive, damages were awarded), and (under plaintiff's theory) a 10% chance of $120,000 fee (40% fee in those cases in which both compensatory and punitive damages were awarded). The personal economic interests of plaintiff's attorney thus point strongly towards rejecting such a settlement offer, even though his client would risk a 25% chance of losing a potential verdict for $60,000 in return for a 10% chance of getting an additional $48,000. The State's economic incentives for rejecting such a compromise offer would be even stronger; if the offer were accepted, the State would get nothing, while if it were rejected, the State would have a 10% chance of obtaining $120,000 (60% of a $200,000 punitive damage award).

Plainly, plaintiff's theory leads to the strong likelihood of creating conflicts of interest between counsel and client. Moreover, as discussed below, it contravenes Florida public policy favoring settlement of disputes.

from the State's portion of the punitive damages.

If, on the other hand, plaintiff's attorney seeks to recover his fee solely from his client, the plaintiff, and to base that fee on the full amount of the punitive award, the plaintiff himself could easily end up with little or nothing (or even owing his attorney money for the "privilege" of having succeeded in a punitive damage claim) despite having proven significant injuries caused by a defendant's willful and wanton acts.[22] The instant case provides its own example. The contingent fee agreement between plaintiff and his counsel apparently provides for a contingent fee of 40% through trial, plus an additional 5% for the appeal, for a total of 45%. (Brief at 43). If the fee is calculated on the entire compensatory and punitive award, rather than on plaintiff's actual recovery, the fee would be $263,025 ($72,500 in compensatory damages plus $512,000 in punitive damages, times .45). The amended final judgment awarded plaintiff a total of $277,300 in compensatory and punitive damages. Thus, if the "full" attorney's fee is deducted solely from the award to plaintiff, plaintiff will ultimately only recover $14,275 (assuming

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[22]It is worthy of note that, under a 40% contingent fee contract, plaintiff's theory would result, if the attorney's fee were to be taken solely from plaintiff's portion of the punitive damage judgment, in the State receiving 60% of the punitive damage award, plaintiff's attorney receiving 40% of the award, and plaintiff himself not receiving any part of the punitive damage award. Where, as in the present case, the contingency fee is 45%, plaintiff's compensatory award would be diminished by a part of the fee attributable to the punitive damage award. Non-taxable costs would further diminish the award, and in some cases might even exceed what was left of the compensatory award.

that nontaxable costs are waived) -- less than 20% of the jury's award of compensatory damages and roughly 5% of what the attorney would recover under his 45% contingency fee contract.[23] Clearly, this is not a desirable result.

Finally, plaintiff's theory is contrary to Florida's well-settled public policy of encouraging the compromise and Settlement of disputes. If the attorney's fee is calculated as the statute requires, the interests of plaintiff and his attorney will be congruent, since both recover on the same basis, a percentage of the judgment amount received by plaintiff. Conflicts of interest are avoided, and plaintiff's attorney can exercise his professional judgment as to whether a particular settlement offer is in plaintiff's interest without clouding his professional judgment with personal economic advantage. Not so under plaintiff's theory. As noted above, plaintiff's theory results in plaintiff's attorney having a strong economic incentive to recommend rejection of a compensatory-damages-only settlement offer which could be to the plaintiff's benefit, and thus tends to discourage settlements. Florida public policy, however, strongly favors and encourages the good-faith settlement of controversies. City of Coral Gables v. State, 128 Fla. 874, 176 So. 40 (1937); In re Estate of Kemp, 177

[23]By way of contrast, if the contingent fee is calculated as the statute requires, plaintiff will receive $152,515 (55% of the amounts he is entitled to under the amended final judgment) and his attorney will receive a contingent fee of $124,785 (his 45% contingency fee based on the amended final judgment).

So.2d 757 (Fla. 1st DCA 1965). Plaintiff's theory is contrary to this public policy.

In summary, plaintiff's claim that his attorney's contingency fee should be calculated on 100% of the punitive damage award must be rejected for a number of reasons. It ignores the fact that the contingent fee contract was entered into after Section 768.73, Florida Statutes, became effective as an implicit part of the contract. It is directly contrary to the legislative objective of providing a disincentive to pursuing punitive damage claims. It is contrary to the historic concept that a contingency fee represents a percentage of what the client actually receives, as well as being contrary to fundamental notions of fairness. It is inconsistent with the rules governing contingency fee contracts. It would either impose a fee obligation on one who has refused in advance to enter into such a fee contract or, in the alternative, would decimate plaintiff's recovery without any corresponding benefit to (indeed, to the detriment of) the attorney's own client. It would create enormous conflicts of interest, and would be contrary to Florida's public policy of encouraging the amicable settlement of litigation. Plaintiff's theory must be rejected by this Court, just as it was rejected by the trial court and by the District Court of Appeal.

CONCLUSION

For all the reasons set forth above, the decision of the lower tribunals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 25th day of November, 1991 to: CRAIG WILLIS, ESQUIRE, Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1601, Tallahassee, Florida 32399-1050; YVETTE RHODES PRESCOTT, ESQUIRE, 600 Ingraham Building, 25 Southeast Second Avenue, Miami, Florida, 33131-1691; BERNARD B. WEKSLER, ESQUIRE, 522 Gables International Plaza, 2655 Le Jeune Road, Coral Gables, Florida, 33134; and JOHN R. BERANEK, ESQUIRE, Monroe-Park Tower, Suite 1000, 101 North Monroe Street, Tallahassee, Florida, 32302.

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