IN THE SUPREME COURT OF FLORIDA



CASE NO. 78.638

HARVEY GORDON,

Petitioner,



vs.

STATE OF FLORIDA, ET AL.,

Respondent.



# BRIEF OF AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF STATE OF FLORIDA

On Appeal from the District Court
Of Appeal of Florida, Third District

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## STATEMENT OF AMICUS' IDENTITY AND REASONS FOR APPEARANCE

The membership of the Product Liability Advisory Council (PLAC) includes manufacturers of automotive, industrial, farm and mining equipment. This case concerns us because the plaintiff attempts to nullify critical reforms which the legislature and the Supreme Court have achieved in recent years.

## STATEMENT OF FACTS

To avoid repetition, Amicus PLAC adopts the facts stated in the briefs of the parties,[1] insofar as they are consistent.

## STATEMENT OF PROCEEDINGS BELOW

PLAC adopts the parties' Statements of procedural steps below, insofar as they are consistent.

## SUMMARY OF ARGUMENT

(a) The plaintiff's property law analysis does not support their constitutional arguments. The Insurance and Tort Reform Act took effect before this lawsuit was tried. Any rights the plaintiff acquired were subject to Fla. Stat. § 768.73, a pre-existing statute. It follows that the State did not take any property from them: the plaintiff could never have "owned" that portion of a potential punitive damage award which the statute already had allocated to the public.

(b) The statute satisfies the applicable tests of constitutionality.

(c) As to Due Process, the provision is a reasonable step to allocate the windfall inherent in a punitive damage award--dividing

[1] The Plaintiff's brief will be cited as PB_____



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it between the plaintiff and the general public and so recognizing the legitimate interests of each. The question, moreover, is not whether the legislature made the wisest possible choice but only whether the measure must be upheld as one choice among many permissible alternatives.

(d) Their "right of access" argument fails because (1) there is no "right" to punitive damages: (2) if there were, the Legislature has only modified that right, not abolished it: and (3) even if there were a denial of access, the legislative action would be permissible because it was taken in response to a strong public need--the insurance crisis--which both the Legislature and the Supreme Court have recognized.

(e) The Excessive Fines provision has no bearing on this case in terms of precedent, history or logic. In effect, the plaintiff would have the Court create a new constitutional doctrine in the absence of precedent, federal or state.

(f) Their reliance on dicta from various cases' is misplaced. Each is readily distinguishable.

(g) In reality, the plaintiff's arguments boil down to assertions as to what is fair and wise. But in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985) the Supreme Court held that the legislature, the people's elected representatives, are to make those choices.

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[2]Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257, 109 S. Ct. 2909 (1989), Denver Post, McBride v. General Motors Corp., 737 F. Supp. 1563 (M.D. Ga. 1990),



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## ARGUMENT

Introduction: Allocating a share of punitive damages to the public is a small step toward the correction of a large wrong. Indeed, from the perspective of amicus PLAC and those who produce goods, punitive damage awards are so subject to abuse that abolition is the only true cure.

But Florida has not abolished punitive damages and manufacturers realize that they must accept that reality.

It is equally clear, however, that the State has the power to regulate those claims and that Section 768.73 - the provision of the Insurance and Tort Reform Act which awards a share of the verdict to the public - is one permissible exercise of that authority.

The question before the Court is whether plaintiffs and their representatives also must accept reality.

### I.

### THE PLAINTIFF COULD NOT GAIN ANY "VESTED PROPERTY RIGHT" IN THAT PORTION OF A FUTURE PUNITIVE DAMAGE AWARD WHICH THE LEGISLATURE HAD IDENTIFIED, IN ADVANCE, AS THE PUBLIC'S SHARE.

The plaintiff begs the question when he asserts that the punitive damage award was his "property." He could have no property rights until the judgment was entered and the judgment itself necessarily was subject to 768.73, a statute prior to it in time.

Ross v. Gore, 48 So.2d 412 (Fla. 1950), set forth the principle which is fatal to that position:



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> The sight 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 Appellant.

Id. at 414. Emphasis added.

The plaintiff's brief attempts to reduce Ross to the truism that a party has a "right" when a judgment awards damages to it. But if the plaintiff's right arise from the judgment--as the plaintiff says it does in this case - the public's statutory right to sixty percent of punitive damage award must "vest" at the same instant as the plaintiff's right to forty percent. It follows that neither takes away property from the other.

Further a judgment must be valid if it is to create a "right" and a judgment cannot be valid if it violates the terms of a statute which was prior to it in time. That principle was established early in the history of the Republic.

In 1827, the U.S. Supreme Court held in Ogden v. Saunders, 25 U.S. 213 (12 Wheat.) that a New York state insolvency law could be applied, without constitutional objection, to debts which the defendant incurred after the law had been enacted. The majority's reasoning was that state laws in existence at the time an agreement or obligation was incurred became part of the contract: as a result, enforcing them later could not be an impairment of a contractual obligation. Tribe, American Constitutional Law, at 467.



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## II.

## THE PLAINTIFF HAS NOT PROVED THAT THE STATUTE VIOLATES EITHER DUE PROCESS OR THE RIGHT OF ACCESS TO THE COURTS.

### A. The statute meets the requirements of due process because the provision could serve a number of logical and permissible legislative objectives.

When the question is one of economic regulation, a statute is subject only to the most lenient form of review. If any state of facts can be imagined which would justify that legislative action, it must be affirmed. Johns v. May, 402 So.2d 1166 (Fla. 1981); In re Wood, 866 F.2d 1367 (11th Cir. 1989).

This settled law requires that the insurance and tart reform statute be upheld.

The reasons which led the Legislature to take action are apparent on the face of Fla. Stat. § 768.73 and in its history.

**1. Compensation to the general public.**

The rationale for punitive damages is, in large part, that they are necessary to right wrongs done to the public interest. Epstein, MODERN PRODUCTS LIABILITY LAW, p. 179, 189.

More particularly, similar wrongs might be done to members of the public and yet, for various reasons, the wrong-doer might not be required to compensate them, For example, it might not be practical for the victim to bring such a case; or the result reached in the individual lawsuit could be wrong. See generally Posner, Economic Analysis of Law § 6.12 and 7.12.

To the extent, then, that punitive damages can be justified on the basis of the public's loss, it follows that the award should be



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designed to compensate the public rather than to provide a windfall to the individual litigant.

One reasonable way to compensate the public is to allow the public to share in the money. The public authorities are the most logical surrogate for members of the public who suffer injury but who cannot recover.

This suggests that it was reasonable for the legislature to conclude that the State should share in the punitive award.

**2. The regulation of lawyers' incentive.**

The plaintiff complains that the change in the allocation of the punitive damage award would reduce the incentive for lawyers to bring such claims.

They are right.

The legislative history shows that the Legislature recognized the link between the economic motive of claimants and the caseload the courts bear:

> Because of the increased burden that must be carried by a plaintiff in order to plead punitive damages, and because of the method of distribution of these damages once awarded, it is probable that enactment of Cs./465 will be significantly decrease the number of cases in which punitive damages are pled and, therefore, awarded.

Staff analysis of Cs/465, p. 25, May 29, 1986. (Emphasis added). (See Appendix A of this Brief).

Indeed, the Court itself has recognized that marginal punitive damage claims can be unfair to defendants, that they increase costs to the public and that they burden the courts, Wolmer v. Chrysler, 474 So.2d 834 (4th DCA 1985); also see generally Owen, Problems in



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Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1 (1982). The reform statute is designed to reduce the number of such cases and, thus, to complement the Court's efforts.[3]

Any suggestion by the plaintiff that the reform will go too far must be both premature and self-serving. There is no evidence of a "shortage" of punitive damage claims.

The plaintiff, in fact, brought this very case in spite of his knowledge of the existence of the statute.

**3. The Forty/Sixty Ratio As A Compromise.**

The plaintiff also claims that a punitive award serves to compensate him for elements excluded from normal damages and that there could be a need for an incentive to private persons to advance claims which benefit the public. PLAC disagrees.[4] But,

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[3]For an example of provisions which have that effect, see Section 768.72 creating new evidentiary requirements for the pleading of punitive damages.

[4]A scholar has refuted suggestions comparable to those the plaintiffs offer in this case:

> The argument that punitive damages are in essence a form of disguised compensation rests on the assumption that the actual damages awarded in the ordinary tort action will not provide full compensation. . . [for the plaintiff's legal fees and other costs. . . ; and . . . the loss of full familial relationships. Punitive damages, it can be argued, would help fill this gap. This position is subject, however, to several objections. . . The legal fees can to same degree be embedded in the generous awards for pain and suffering, and second, that the unsuccessful plaintiff is likewise under no obligation to reimburse the successful defendant for the costs incurred in the defense of this suit. . . Thus before the final resolution of the suit, the knowledge that costs need not be paid in the event that the defendant prevails will strengthen the resolve of all



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arguendo, those contentions might justify punitive damages on some occasions and the person bringing the lawsuit would have a right to participate in the profit. That however, would not exclude the idea that the State also should be entitled to a portion of the award--again, as the logical surrogate for those members of the public who are wrongfully denied recovery.

Plaintiff urges that the legislature should have taken a different approach (PB 28), increasing the punitive award so that the state's share would come from the defendant rather than the plaintiff. It would seem, however, that increasing jackpot would have frustrated the legislature's expressed desire to deter marginal claims.

More important, the legislature has made a different decision as to the purpose and effect of punitive damage awards and, accordingly, the manner in which shared by claimants, lawyers and

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> plaintiffs to continue. More importantly, the absence of appropriate compensation for costs does not argue for the routine award of punitive damages, but . . . for a complete modification of the costs rules which . . . should be, on an English and European model, routinely awarded to the winner . . . The treatment of familial lawsuits raises similar issues. These . . . could be built in to the general award for pain and suffering, especially in the light of the unavoidably loose standards by which pain and suffering are determined. Even if they are not, . . . the proper approach is to face the question . . . head on, wholly apart from the question of special liabilities for defendants who have manifestly improper ways. . . If . . . these damages are both measurable and appropriate, then they should be awarded generally to all eligible plaintiffs against all eligible defendants. There seems to be no case to use the asserted weaknesses of the law of costs and of general damages to justify punitive damage awards.
>
> Epstein, MODERN PRODUCTS LIABILITY LAW, p. 178.



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the public. That was another avenue precisely the type of political compromise between conflicting interests and rights which the Florida Supreme Court held to be constitutional in the context of Statute of Repose. Pullum v. Cincinnati, Inc., 476 S. 2d 657 (Fla. 1985).

The question is not whether that choice is "right" or "wrong". If the plaintiff's approach were logical, that would only mean that there was another avenue the legislature might have chosen - not that the choice it did make was impermissible.

**B. The statute does not infringe the right of access to the courts.**

The plaintiff asserts, next, that § 768.73 somehow violates his constitutional right to access to the courts (Article 1, Section 21, Fla. Const.)

Note, however, that the "open courts" provision limits the State's right to eliminate a previously enforceable cause of action. Verdecia v. American Risk Assur. Co., 543 So.2d 321 (3d DCA 1987). The portion of the reform statute at issue in this case does not eliminate punitive damages; it only redistributes them in part.

Nevertheless the plaintiff characterizes the provision as the reciprocal of the $450,000 cap on non-economic damages which the Supreme Court held to be unconstitutional in Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987). He would dismiss the difference as a mere matter of the limit being expressed in percentages rather than as a flat maximum. (PB 25-26).



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To say these things, he has to ignore the fundamental difference between compensatory and punitive damages.

Punitive damages are unique in that the claimant does not have a property right in them. More specifically, the plaintiff never had--at English common law or under Florida precedent--an absolute right to recover punitive damages. It follows that the plaintiff had no "right" which the "open courts" provision could protect. See Prosser, Keeton, The Law of Torts, 14 (1984).

If there were no such precedent, common sense would call for the same result.

Non-economic damages are intangible and difficult to quantify. Nevertheless, they arise from "real" injuries to the individual. But punitive damages do not redress an injury; by definition they are payments over and above actual or compensatory damages, Goodrich v. Malownev, 157 So.2d 829, 834 (Fla. 2d DCA 1963). Therefore the plaintiff's claim to such an award is far less compelling than a demand for compensation for "true injuries."

We add, moreover, that if there were a "right" to punitive damages, the basic legal analysis would not change. The Legislature identified a critical need, - the insurance crisis - in Smith v. Department of Insurance, supra at 1086. That satisfies the requirements of the access to the courts clause.

True, the plaintiff asserts (at PB 12) that the insurance crisis is not relevant, on the theory that there can be no insurance for punitive damages. Yet he himself later refers (PB 31-32) to Florida precedent that an employer can be liable for



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punitive damages on the basis of respondeat superior and a failure of supervision: and he offers no reason why there could not be insurance against that liability.

Further, the change in the law which the plaintiff seeks would have an impact on insurance rates even if no policies were effected directly.

If this part of the Tart Reform Act can be nullified at the demand of the organized plaintiff's bar, the same thing could happen to any other safeguard. Insurance companies and manufacturers would have to protect their stockholders and employees against that risk. The only way to do that would be to increase prices in order to establish a reserve against unpredictable changes in the law.

## III.

## THE AUTHORITIES THE PLAINTIFF TRIES TO RELY UPON DO NOT SUPPORT THEIR "EXCESS FINES CLAUSE" ARGUMENT.

The plaintiff tries to invoke a Colorado case, Denver Post, 737 F. Supp. 1563 (M.D. Ga. 1990); a federal trial level decision, McBride v. General Motors, 737 F. Supp. 1563 (M.D. Ga. 1990); and dicta from Browninq-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257, 109 S. Ct. 2909 (1989) as authority for his contention that § 768.73 violates the prohibition against "excessive fines" in the Florida and federal constitutions. In reality, however, none of these cases supports his position.



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### A. The Plaintiff attempts to treat negative aspects of Supreme Court dicta as if it were a positive holding.

The plaintiff cites only fragmentary dicta from Browning-Ferris, that in which the Supreme Court said the opinion did not address the instance where the State participated in the punitive damage award. Worse, he treats that negative language as if it were affirmative and even a "holding" that any instance where the State does participate in a punitive damage award would violate the excessive fines provision of the Federal constitution.

The answer, of course, is that if the United States Supreme Court says it is not addressing a question, the opinion cannot be precedent on the point.

### B. McBride v. General Motors is not authority on the Florida Constitution.

It is remarkable that the federal judge who decided McBride v. General Motors, 737 F. Supp. 1563 (M.D. Ga. 1990) saw fit to use the limiting language of Browning-Ferris as if it were a positive pronouncement an the federal constitution and, then, as the equivalent of a Supreme Court holding on a far different question the scope of the Georgia constitution's prohibition of "excessive fines".

In any event, the plaintiff tries to go to a still greater extreme in this case.

He tries to use the federal trial court's statement about the Georgia constitution as if it were a "holding" which somehow could control the Florida courts in their interpretation of the Florida constitution.



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The answers are that (I) Judge Elliott had no reason to consider the Florida constitution and no authority to rule on it and (2) logically enough, he did not do so, and (3) it would not matter if he had.

At the outset, the interpretation of a state constitution would not seem to be a matter of federal law or the subject of any other Supreme Court jurisdiction. Thus the Supreme Court not only did not, but could not, decide the question which the plaintiffs try to use as the starting point for their own radical extension.

In any event, the Georgia statute is far different from the Florida Insurance and Tort Reform Act.

Further, Judge Elliott emphasized (pp. 1568-69) that the state of Georgia had not taken any position before him on a hotly disputed question--whether there truly was an insurance crisis. In the present case, the State of Florida does urge that there is an insurance crisis - as it must, given the statements in the legislative history and the text of the statute, alike, that insurance has become excessively expensive and that action is necessary.

Similarly, Judge Elliott emphasized that the Georgia statute did not set forth any finding or statement of legislative purpose on that subject. (p. 1568) But the Florida statute does contain just those findings and statements of purpose:

> the Florida legislature, in enacting Chapter 86-160 was responding to public pressure brought about by liability insurance crisis. Claims were presented that businesses were closing, physicians were severely limiting their practice in certain areas of medicine and public entities were reducing



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> public services, all resulting from the unavailability or increased cost of liability insurance. . . .
>
> Smith v. Department of Insurance, 507 So.2d at 1086

The rationale of McBride reflected, as well, the Judge's belief that the Georgia statute did not contain any quid pro quo for the public. But the punitive damage provision in the Florida Tort Reform Statute does have a quid pro quo. To the extent that limitations on punitive damages reduce the cost of insurance, any Florida citizen is just as likely to benefit in his or her capacity of purchaser of goods (or the payer of insurance premiums) as to lose in the capacity of lawsuit plaintiff.

Finally, the plaintiff quotes McBride for the assertion that the Federal Court could set aside the Georgia statute as "business oriented. (p. 1578, quoted at PB 49).

PLAC disputes the assertion that the Florida statute is favorable to "business" as opposed to the general public. The concerns expressed in the legislative history were those of the general public and the legislature rejected a number of pleas by business interests for more sweeping reforms. Indeed, the insurance industry and the Organized Plaintiffs' Bar each attacked the constitutionality of the legislation, albeit from different perspectives. Smith v. Department of Insurance, supra.

But if the characterization were accurate, that would not make the legislature's action unconstitutional.

Once again, the extent to which a statute should be "business" or "labor-oriented" is a political question, not a matter for the courts.

**C. The statute does not impose any "fine" much less an "excessive" one.**

The plaintiff argues, in effect, that any meaningful limitation on the amount of punitive damages paid to him has the practical effect of a "fine" and, therefore, that it is a violation of "access to the courts." There is no Florida precedent for that contention. The Supreme Court, in fact, rejected a comparable argument by the defense in Smith v. Department of Insurance--the contention by the insurance industry that the rollback of premiums and limitations on sates constituted a "fine" Id. at 1093.

Beyond that, a fine is an order requiring that a person pay his or her money to the government as punishment for a violation of criminal or quasi-criminal law. Brawninq-Ferris, supra. (O'Connor J. dissent).

Under the Florida Tort Reform Act the defendant pays, not the plaintiff. More particularly, the plaintiff did not "pay" the sixty percent in this case because it was never his property. Further, no one has ever suggested that the provision was meant to stigmatize plaintiffs for misconduct or to suggest that they violate any criminal law.

In sum, an apple is not an orange and a statute which gives the state a share of punitive damages is not a "fine" against the plaintiff.



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Remember, moreover, that the plaintiff's argument is not that sixty percent is too large a share for the State. Instead he seems to claim that any share for the State would be a "fine" and also "excessive" per se, regardless of amount. That, too, ignores the holding in Browning-Ferris.

**D. If he were right, the plaintiff would argue himself out of court.**

If arsuendo the excessive fines provision did apply to punitive damages, that would not help the plaintiff.

He has identified an argument against the constitutionality of any punitive damage award,[5] not a reason why he should be able to keep all of such an award.

Consider the key precedent.

The thrust of the majority opinion in Browning-Ferris was that in spite of the superficial resemblance between a "fine" and punitive damages, the clause never had been applied to a matter decided by a jury. Id. at 492 U.S. 234-236 25 Tulsa L.J. 337 at 341 (1989). The constitutional provision, instead, was directed at the different instance where the government itself imposed the penalty.

In her dissent, Justice O'Connor said that the majority opinion would raise questions about the Florida statute. But her point was that the logic of the majority opinion would make the public's statutory share in such an award under Florida's 768.73

[5]The defendants, alone, would have had standing to make that argument. The State could not make the argument because it did not yet have anything at stake and the plaintiffs, obviously, could not say that the constitutional provisions outlawed the award because that would mean that they had no right to the claim they were asserting.



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"state action", sufficient to make constitutional safeguards apply. Browning-Ferris, S. Ct. 2933; also see Tulsa, at 344. The net result was that she questioned the validity of the entire award.

The public's share to such an award was a side issue which neither majority nor dissent analyzed.

(e) Kirk v. Denver Publishing Company, also is readily distinguishable.

The dissent from the Colorado opinion, Denver Post, answers the majority opinion on traditional grounds, much like those we have set forth earlier in this brief.

Aside from that, the majority opinion is readily distinguishable on its own terms.

The proponents of the Colorado statute sought to defend the State's share as a "user fee." The majority opinion points to their failure to demonstrate that the one-third share of the punitive damage award was reasonably related to the cost of trying the individual damage case.

The Florida statute is different, both in its language and in the intentions expressed by its draftsman.

Specifically, the Florida legislature did not discuss the bill which became 768.73 as a user's fee--either fixed or contingent--but, instead, as one means to deter marginal punitive damage claims which were clogging the courts[6].

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[6]We suggest, however, that the state's share could be defended as a form of contingent users fee. It might not be possible to justify the state's 60% as a fee for the individual case but the situation is different when the focus is on punitive damage claims as a broad category.



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More important, the Colorado court itself pointed to U.S. Supreme Court precedent which is far closer to the point than Denver Post. In Bankers Life & Casualty Co. v. Crenshaw, 406 U.S. 71 (1988) the Supreme Court held that a statute which imposed a fifteen percent penalty on a party who unsuccessfully appeals from a money judgment was not unconstitutional under the Equal Protection clause. The means chosen were sufficiently related to state's interest in discouraging frivolous appeals.

Note, also, that the Colorado statute contained a provision that the state was to have no property interest in the claim before the trial judge entered judgment.

That meant the constitutional attack could work in Denver Post. The statute ruled out any economic interest on the part of the state and it necessarily followed that the party pursuing the claim must have the sole ownership of it.[7] Therefore under traditional property law, it could be said to be "deprived of property".

The difference is that the Florida statute contains no such provision.

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The State, after all, would not collect anything in those instances where it provided the judge and the courtroom but the lawsuit was not successful. Yet it would recover something in the instance where the punitive damage complaint did succeed. Viewed in that light, the state's contingent share could be justified to the same extent that plaintiff's lawyers contingent fees.

There is no reason to decide that question however.

Denver Post is distinguishable an more limited grounds.

[7]There being no one else who had any interest in the matter other than the defendant.



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Therefore, the factor which the Colorado court stressed does not exist in this instance.

Later in the opinion, the Court said that it would not place its decision solely on that ground. But that does not change matters. The holding was that the Court would view the cumulative effect of several aspects of the issue. These included the failure of the attempt to justify the statute as a user fee (a matter not present in the Florida case) and the provisions saying that the state had no interest prior to judgment - something else not present in this case.

On the other hand, the Colorado Supreme Court did not consider an aspect of the matter which is an important part of the rationale of the Florida reform. We refer to the idea that the public had a right to a portion of the punitive award because that award was based, at least in part, upon injuries to the general public rather than to the individual claimant. (Supra. P. 6).

## IV

## THE PLAINTIFF'S ATTEMPT TO USE FLA. STAT. §2.01 TO NULLIFY THE PUNITIVE DAMAGE SECTION OF THE TORT REFORM ACT IGNORES THE DIFFERENCE BETWEEN STATUTORY AND COMMON LAW AND IT MUST LEAD TO ABSURDITIES.

The plaintiff's attempts to nullify the reform by the "interpretation" of Fla. Stat. 2.01 (PB 21-22) need not detain the Court long. The statement in Fla. Stat. 5768.71 that one part of the reform statute would be subordinated to an other statute does not mean that the new statute was to be subordinated to ancient judicial opinions from a foreign country.



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Indded, if everything English courts said before 1776 were to be deemed the "statutory" law of Florida, as the plaintiff claims the result would be absurdity. The ownership of condominiums would be subject to the eccentricities of medieval land tenure if, in fact, the citizens of Fort Lauderdale did not awake to find themselves subjects of the King of England.

The answer, of course, is that Fla. Stat. 5768.71 and Fla. Stat. §2.01 have little, if anything, to do with each other.

Even to make such an argument, the plaintiff must assert that 52.01 somehow obliterates the distinction between common law and statutory law. In fact, however, the statute says no such thing.

On the contrary, §2.01 makes English common law a part of the common law of the state of Florida, not of the State's statutory law. See, Kluger v. White, 281 So. 2d 1 (Fla. 1973).

We add that if case law could be so easily transformed into a "statute" the Legislature would have performed a vain act.

The draftsmen obviously meant to change parts of existing Florida common law which they thought contributed to unpredictable results and higher insurance costs. See Senate Staff Analysis and Economic Impacts Statement re: CS/465 dated May 22, 1986 (Appendix A of this Brief) and Smith v. Department of Insurance, 507 So. 2d 1080 (1987). Yet the Insurance and Tort Reform Act could do little to reform either ''tort"or "insurance" if it were to be aver-ridden by anything litigants might dredge up from opinions English courts had issued from the Dark Ages until the later part of the Eighteenth Century.

V

**THE LAWYER'S CLAIM CAN BE NO STRONGER THAN HIS CLIENT'S**

The balance of plaintiff's Brief contends that the lawyer should collect a fee measured by all punitive damages, rather than the portion which his client is permitted to keep.

That argument fails for the same reason that the client's contentions fail: it also has distinctive weaknesses of its own.

(a) When he took the case the Plaintiff's counsel knew that he could not collect a fee for a portion of whatever punitive damage award there might be.

The lawyer's right to a contingent fee arises from a contract between him and his client. In this case, the State of Florida was not a party to the contract; therefore, it is not bound by it.

It is true the Florida courts sometimes have been willing to protect contingent fee claims where the lawyer and his client acted in reliance upon an existing state of the law. Frazier v. Baker Material Handling Corp., 15 Fla. L.W. 33 (Fla. 1990). Here, however, the situation is just the opposite. The statute was passed long before the plaintiff and his counsel had filed this lawsuit and, in fact, before the cause of action even accrued -- as the trial judge herself pointed out. The lawyer could not have acted in reliance upon any reasonable belief that he would be entitled to a fee calculated on the entire amount of the contingent damage award.

Every citizen is charged with knowledge of the law. Akins v. Bethea, 160 Fla. 99, 33 So. 2d 38 (Fla. 1948). Indeed, the

plaintiff's counsel -- a leading member of the Bar -- does not even hint that he had not been aware of the reform act and the effect it would have upon his fee.

See also United States Fidelity and Guaranty v. Dept. of Ins., 453 So. 2d 1353 (Fla. 1984). These, the court upheld the constitutionality of a statute which required the refund of excess profits. This was the critical point:

> . . . since the insurers knew when they entered into these contracts that excess profits might have to be refunded, the statute does not operate as a substantial impairment of a contractual relationship.
>
> **Id. at 1361**

If an insurer is bound by its knowledge of statutes which effect its business transactions, the same is true of a lawyer.

> **(b) A lawyer** cannot expect to be rewarded for "creating" **new value in the same way that a farmer or scientist does.**

The other aspect of the lawyer's argument of "fairness" rests an the premise that having created the punitive damage award he should be rewarded for his work. The idea is plausible on the surface, but it involves troubling assumptions.

If a punitive damage award is valid, the jurors must have reached their conclusions because of the facts of the case, not because they were overcome by the lawyer's theatrics. Even to suggest that the punitive damage award reflected the cleverness of counsel rather than the substance of the case would suggest that it was excessive or even unwarranted by Florida's standards.

On the other hand, we do not suggest that counsel's skill and work do not add something to the punitive damage claim. The

statute, however, leaves a plaintiff with a large part of the punitive damage award and his lawyer will recover a contingent fee based On that amount. Therefore, Mr. Gordon's counsel will be rewarded for his efforts, although he will not get as much as he might want.

Remember, moreover, that before he filed the complaint, the lawyer had the choice of rejecting the **case** or of taking it. He knew that the part of his fee measured by the punitive damage award to his client would be smaller because of Fla. Stat. §768.73. Presumably he thought - reasonably enough, in our view - that the chance to get a fee based on forty percent of a large punitive damage award made that disadvantage acceptable.

## VI

## THE PLAINTIFF CANNOT ASK THE COURT TO BE THE FINAL ARBITER OF "PUBLIC POLICY" OR FUNCTION AS A SUPER-LEGISLATURE, REVIEWING "FAIRNESS" AND DECIDING WHETHER THE REPRESENTATIVES THE PEOPLE ELECTED WERE "INFORMED".

The Plaintiff does not offer any authority to support his demand that the Court accept his view of "public policy" and then enforce that notion as constitutional law. (PB **23)**

Indeed the plaintiff's denunciation of the "ill-informed" legislature (PB **23-24)** highlights **a** weakness that runs through all of his arguments.

The law-makers held extensive hearings before they passed the Act. The legislative history consumes some two hundred eighty pages. Presumably, then, **the** legislature was quite "informed".



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But even if there were some indication that the legislature had acted without study, how can the plaintiff expect the Court to strike down the act of an equal branch of the government on such a basis?

Voters decide the wisdom of legislators, not the courts.

## CONCLUSION

The states created modern tort law and they have the power to reform it. The Florida legislature has taken steps to do just that.

Those steps are modest--even inadequate from the perspective of PLAC.

But the people's elected representatives have made their choice, exercising their broad constitutional right,

Those who have profited by the expansion of product liability law should not be allowed to veto reform by concocting new constitutional "rights" from dicta in cases from other states.

Therefore PLAC urges that the Court of Appeal affirm the decision below in its entirety.

Respectfully submitted,

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## APPENDIX A TO BRIEF OF AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL, INC.

## PORTIONS OF THE LEGISLATIVE HISTORY CITED IN THIS BRIEF



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REVISED: _____

CS/CS/SB 465, 349, 592, 698, 699, 700, 701, 702, 956, 977 & 1120

DATE: May 22, 1986 Series reference



## SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Granger | Fort | | |
| 2. | | | | |
| 3. | | | | |

SUBJECT: Liability Insurance/Tort Reform

BILL NO. AND SPONSOR: Analysis of CS/CS/SBs 465, 349, 592, 698, 699, 700, 701 702, 956, 977 & 1120 by Commerce Committee and Senators Hair, Barron, Kirkpatrick, Vogt, Crawford and others

I. SUMMARY:

Present Situation and Effect of Proposed Changes:

The provisions of CS/CS/SB 465, 349, 592, *698*, 699, 700, 701, 702, 956, 977, & 1120 (hereinafter CS/SB 465) are intended to ameliorate the current commercial liability insurance crisis by making commercial liability insurance more available, by increasing the regulatory authority of the Department of Insurance (department), and by modifying legal doctrines that have aggravated the crisis.

Among other things, the bill:

1) authorizes commercial liability risks to be group insured (sec. 5, p. 10);

2) significantly increases the department's rate review and enforcement authority (sec. 7, p. 12);

3) authorizes creation of a commercial property/casualty joint underwriting association (sec. 11, p. 26);

4) expands the types of health care providers that can self-insure and authorizes CPAs, architects, engineers, and veterinarians to self-insure (secs 12 & 13, pp. 30 & 32);

5) authorizes financial institutions to participate in reinsurance and Florida insurance exchanges (sec. 2, p. 5);

6) creates a property casualty insurance excess profits law (sec. 8, p. 18);

7) establishes notice requirements for cancellation, nonrenewal, and renewal of premium of commercial liability policies (sec. 14, p. 36);

8) authorizes the creation of commercial self-insurance funds (secs. 24-39, pp. 42-59);

9) limits application of the doctrine *of* joint and several liability to economic damages (sec. 41, p. 59);

10) *limits* when punitive damages may be pled and specifies to whom they are to be distributed (sec. 42, p. 61);

the claimant to vhich economic damages are attributable, will indeed be met.

In October 1985 the united States Attorney General ertablirhed the Tort Policy Working Group vhich published in February of this year the "Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability." This report states that it is estimated that 2.1 percent of all medical malpractice claims (5.6 percent of all paid medical malpractice claims) receive noneconomic compensation in excess of $100,000. However, when noneconomic damages exceed $100,000, they avtrrge betvctn $428,000 and $738,000 and of these cases, on the average, 80 percent of the total avard is for the noneconomic damages component of the award. In addition, the Medical Maloractice Policy Guidebook, cited in the Tort Policy Working Group Report, estimates that pain and suffering awards greater than $100,000 account for nearly 39 percent of all medical malpractice damages. These figures are based on nationwide data and there are no comparable, reliable figures applicable to Florida.

In medical malpractice actions, to the extent that the above figures are indicative of Florida trends, plaintiff recovery of noneconomic damage awards will be somewhat diminished under this bill because of the cap of $500,000 it places on noneconomic damages and because of its limitation of the doctrine of joint and several liability to economic damages. In other types of negligence cases, especially those involving large noneconomic damages not attributable to "deep pocket" defendants, recovery of noneconomic damages will also be diminished.

Because of the increased burden that must be carried by a plaintiff in order to plead punitive damages, and because of the method of distribution of these damages once avarded, it is probable that enactment of CS/SB 465 will significantly decrease the number of cases in vhich punitive damages are pled, and, therefore, avarded.

The collateral source provision in section 18 should reduce both the number of claims filed and the amounts of damages awarded. In the only definitive study to date on the issue, Dr. Patricia Danzon, in a report entitled "The Frequency and Severity of Medical Malpractice Claims: New Evidence" published in January, 1986, states that laws providing collateral source offset appear to reduce awards by 11 percent to 18 percent, and reduce claim frequency (number of claims filed) by approximately 14 percent.

Section 22 requires insurers to file rates for all lines of commercial liability insurance reflecting the expected effects of tort reform measures. In addition, section 49 requires that on the effective date of this act rates for all lines of commercial liability insurance be rolled-back to January 1, 1984 levels. Unless the expected effects of tort reform suggest that rates should be lower than January, 1984 rates, the section 22 rate filing will be meaningless, only resulting in unnecessary insurance company expenditures. It is questionable whether 1984 rates will be actuatilly sound for 1986 risks. As such, the roll-back provision should be further studied to ensure that it will not result in a further tightening of the market.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing were furnished by United States mail on the 23rd day of December 1991 to:

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