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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

CASE NO.: 78,638

DISTRICT COURT OF APPEAL
THIRD DISTRICT NO.: 90-02497

HARVEY GORDON, :

Petitioner, :

VS. :

STATE OF FLORIDA, et al.,

Respondent.

INITIAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

LAW OFFICES

BERNARD B. WEKSLER

GABLES INTERNATIONAL PLAZA - 2655 LEJEUNE ROAD - CORAL GABLES. FLORIDA 33134 - (305) 446-2826

FAX NO.: (305) 448-2825

TABLE OF AUTHORITIES

CASES **PAGE**

LAW OFFICES
BERNARD B. WEKSLER
GABLES INTERNATIONAL PLAZA - 2655 LEJEUNE ROAD - CORAL GABLES, FLORIDA 33134 - (305) 446-2826
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GABLES INTERNATIONAL PLAZA - 2655 LeJEUNE ROAD - CORAL GABLES. FLORIDA 33134 - (305) 446-2826
FAX NO: (305) 446-2825

CONSTITUTIONS:

STATUTES:

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GABLES INTERNATIONAL PLAZA - 2655 LEJEUNE ROAD - CORAL GABLES, FLORIDA 33134 - (305) 446-2826
FAX NO. (305) 446-2825

RULES:

OTHER AUTHORITIES:

LAW OFFICES
BERNARD B. WEKSLER
GABLES INTERNATIONAL PLAZA - 2655 LEJEUNE ROAD - CORAL GABLES, FLORIDA 33134 - (305) 446-2826
FAX NO.: (305) 446-2825

PREFACE

This case involves the application and constitutionality of §768,73(2)(b), Florida Statutes (Supp. 1986), and the Legislature's authority to allot and take 60% of a punitive damages award for the State. The District Court of Appeal of Florida, Third District, has decided that Section 768.73(2)(b) is constitutional, and that the Section does not deprive the Petitioner of a due process right to property, and does not violate substantive due process rights.

This case has been certified to this Court in that the case involves a question of great public importance as to the constitutionality of Section 768.73(2)(b).

Petitioner, HARVEY GORDON, was the Plaintiff in the trial court, and the Appellant in the Third District Court. He will be referred to as "GORDON". The Defendants in the trial court were K-MART CORPORATION, and two of its employees, PETER MIRAMBEAU, an assistant store manager, and DAVID SPARROCK, the store loss prevention manager. They will be collectively referred to as "K-MART". The State of Florida, a non-party in the trial court, but "designated" by the Third District Court as a "Defendant/Appellee", will be referred to as "STATE". The Record will be referred to as (R.). An Appendix will be referred to as (A.).

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FAX NO. (305) 446-2825

STATEMENT OF THE CASE AND FACTS

Petitioner, GORDON, the Plaintiff in the trial court was falsely accused of Shoplifting and a Fraudulent Refund, detained, imprisoned, handcuffed, kicked, and battered by two K-MART employees.

On February 16, 1987, GORDON, a Funeral Director, was a business invitee in a Dade County K-MART store. He had initially entered the store that morning to purchase a certain type of tennis racquet. (R. 21) Several hours after he purchased the racquet, he returned to the store in order to return the racquet and obtain a cash refund. He then decided to purchase two sets of tire valve caps with valve extensions. After he tried a cap on his car in the K-MART parking area, and found the tire cap unsatisfactory, he decided to exchange them for the less expensive standard tire caps. Based upon the exchange, he was to receive a refund of 77 cents. (R. 21) While GORDON was waiting at the K-MART service desk to obtain his refund, a K-MART loss prevention manager detained him, took him into detention, and took him to the security office for questioning. (R. 21) After a while, GORDON decided to leave. After exiting the office and walking down an aisle, GORDON was tackled from behind, thrown to the floor, handcuffed, kicked, battered, and then turned over to the Metro-Dade County Police. He was charged by K-MART with Fraudulent Refund and

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FAX NO. (305) 446-2825

Retail Theft -- Shoplifting. He was jailed, booked, and then released on bond. K-MART pressed criminal charges against him. The Fraudulent Refund charge was eventually dropped, but GORDON was then tried in County Court, Criminal Division on the crimes of Retail Theft and Battery. The Battery was allegedly committed on K-MART employees.

In December, 1987, a bench trial commenced in the County Court, Criminal Division in connection with the criminal charges. During the trial, the State Attorney's Office nolle prossed the charges and the prosecution was terminated. The State Attorney and K-MART did not refile the criminal charges.

In an ensuing civil action against K-MART and its two employees, GORDON alleged causes of action for false imprisonment, battery, malicious prosecution, and negligent retention and supervision of the two K-MART employees, MIRAMBEAU and SPARROCK. He sought compensatory and punitive damages, and demanded a trial by jury. As part of the Defendants' defense to the malicious prosecution cause of action, the Defendants called as their witnesses, two assistant Dade State Attorneys. /1

/1 Assistant State Attorney Richard Shiffrin, chief of the legal division, and Assistant State Attorney Rose Marie Shearn, over the objection of Plaintiff's counsel, testified that in their opinions, probable cause existed for the criminal prosecution of the Plaintiff. Their testimony adversely affected the malicious prosecution cause of action.

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FAX NO. (305) 446-2825

The jury returned a jury verdict on July 25, 1989 where the jury found for GORDON on hi5 claim for Negligent Retention and Supervision, on his claim for False Imprisonment, and on his claim for Battery. The jury found for the Defendants on his claim for Malicious Prosecution. The compensatory damages verdict amounted to $72,500.00. The jury found that the three Defendants had acted with malice, moral turpitude, wantonness, willfulness, or reckless indifference to GORDON'S rights, and assessed punitive damages against the three Defendants totaling $512,000.00.

A Final Judgment for $72,500.00 in compensatory damages, and $512,000.00 in punitive damages was entered solely in GORDON'S favor and against the Defendants on July 27, 1989. (R. 3) Post-trial motions, including a Motion for New Trial, Remittitur or Judgment Notwithstanding the Verdict, and a Supplement to Defendants' Post Trial Motions were denied on October 5, 1989. GORDON filed a Verified Motion to Tax Costs seeking a costs recovery of $16,858.30. The trial court entered a Costs Judgment of $9,247.64.

K-MART filed a Notice of Appeal to the Third District Court of Appeal on November 3, 1989. Subsequently, on August 7, 1990, in K-Mart Corp. v. Gordon, 565 So.2d 834 (Fla. 3d DCA 1990) the Judgment was entirely affirmed. (R. 5)

LAW OFFICES
BERNARD B. WEKSLER
GABLES INTERNATIONAL PLAZA - 2655 LEJEUNE ROAD - CORAL GABLES. FLORIDA 33134 - (305) 446-2826
FAX NO.: (305) 446-2825

After the issuance of the Mandate, K-MART on September 20, 1990, filed a Motion to Amend the Final Judgment. (R. 8) /2 The Motion for Amendment sought an order amending the Final Judgment to comply with Florida Statute §768.73(2)(b), making sixty (60%) percent of the punitive damages award payable to the General Revenue Fund. The Motion was made, "pursuant to Florida Rule of Civil Procedure 1.540(a) amending the final judgment entered in the cause so that it complies with the requirements of section 768.73". (R. 8-9) /3

On August 8, 1990, one day after the Final Judgment was affirmed, the K-MART attorney contacted Insurance Commissioner Tom Gallagher and other state officials

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/2 Rule of Civil Procedure 1.530(g), requires a motion to alter or amend the Judgment to be served not later than ten days after the entry of the Judgment. K-MART'S motion to amend was not timely filed.

/3 K-MART subsequently filed an Addendum to Motion for Amendment of Final Judgment wherein K-MART alleged that it was not seeking relief under Rule of Civil Procedure 1.530(g), but pursuant to Rule of Civil Procedure 1.540. (R. 16) The movant did not allege any of the bases, i.e., clerical mistake, fraud, inadvertence, newly discovered evidence, etc., for relief.

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FAX NO.. (305) 446-2825

regarding the "proper procedure to be followed in order to comply with Section 768.73". (R. 9) The written response from Treasurer Gallagher, dated August 17, 1990, was attached to the K-MART Motion. (R. 11-12). The letter informed K-MART'S attorney, inter alia, that:

> "The Comptroller's office will provide your client with a receipt and release, which should act to satisfy your clients' responsibilities under the statute. The Attorney General's office advises that a satisfaction of judgment would not be appropriate since the State of Florida was not a party to the litigation." (emphasis supplied) (R. 11)

On October 4, 1990, the State of Florida petitioned the trial court to, "intervene and assert its rights pursuant to 5768.73 Fla.Stat.". (R. 18) The Petition alleged that the Final Judgment entered in the case did not make sixty percent (60%) of the punitive damage award payable to the PMATF (Public Medical Assistance Trust Fund), as provided by Statute. Therefore, the Petition alleged, inter alia, that:

> "5. The State, in order to protect and defend its statutory rights, seeks intervention because its interest in this litigation is of such direct and immediate character that it will either gain or lose by direct legal operation and effect of the judgment if it is not permitted to intervene."
> (emphasis supplied) (R. 18-19)

LAW OFFICES
BERNARD B. WEKSLER
GABLES INTERNATIONAL PLAZA - 2655 LEJEUNE ROAD - CORAL GABLES. FLORIDA 33134 - (305) 446-2826
FAX NO.; (305) 446-2825

The State did not allege that it was intervening as a party plaintiff for the purpose of applying §768.73(2)(b), Florida Statutes. That section, which is part of the Tort Reform and Insurance Act of 1986, became effective on July 1, **1986**, and requires that 60% of any punitive damages award be payable either to the Public Medical Assistance Trust Fund or, as in this case of intentional torts, to the General Revenue Fund of the State of Florida.

The Plaintiff filed a Response to the Defendants' Motion for Amendment of Final Judgment, Etc., objecting to the Defendants' Motion. (R. 22-29)

At a hearing held on October 9, 1990, over the objection of Plaintiff's counsel, the trial court entered an order granting the State's Petition to Intervene, and the Defendants' Motion to Amend the Final Judgment. The trial court then entered an Order Amending Final Judgment, nunc pro tunc, as follows:

> "1. It appearing that the Final Judgment dated July 27, **1989** and **recorded on** the 28th day of July, **1989**, in the Official Records Book No. **14195** at Page **1542** of the Public Records of Dade County, was in error in that it failed to make sixty (60) percent of the punitive damages awarded payable to the State of Florida pursuant to section 768.73, Florida Statutes (1987), the same is hereby amended nunc pro tunc so that the said Final Judgment shall read as **follows:**

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FAX NO' (305) 446-2825

PURSUANT TO the verdict rendered in this action. it is

ORDERED AND ADJUDGED that the Plaintiff, HARVEY GORDON, recover from the Defendants, K MART CORPORATION, DAVID SPARROCK, and PETER MIRAMBEAU, the sum of TWO HUNDRED SEVENTY-SEVEN THOUSAND THREE HUNDRED AND 00/100 ($277,300.00) with costs to be hereinafter taxed, that shall bear interest at the rate set by Florida Statute for which let execution issue.

Pursuant to section 768.73, Florida Statutes (1987) a judgment is hereby entered in favor of the General Revenue Fund of the State of Florida in the amount of THREE HUNDRED SEVEN THOUSAND TWO HUNDRED AND 00/100 DOLLARS ($307,200.00) which sum represents sixty (60) percent of the punitive damage award.

2. This Court hereby directs the Clerk to amend the Final Judgment accordingly. (emphasis supplied) (R. 1-2)

The Order Amending Final Judgment reduced GORDON'S July 12, 1989 Final Judgment from a total of $584,500.00 down to $277,300.00, with the State of Florida receiving $307,200.00, plus accrued interest. (R. 1-2)

Section 768.73 (4), provides that the 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 40% payable to the claimant. Therefore, GORDON'S attorney who was providing his legal services on a contingent fee for trial services on 40% of

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GABLES INTERNATIONAL PLAZA - 2655 LEJEUNE ROAD - CORAL GABLES. FLORIDA 33134 - (305) 446-2826
FAX NO,, (305) 446-2825

the Judgment, would not be paid any fee calculated on the "award" to the State of $307,200.00.

GORDON filed with the Third District Court of Appeal a Motion to Enforce the prior Mandate and a Notice of Appeal from the Order Amending Final Judgment. The District Court denied GORDON'S Motion to Enforce the Mandate of the July 27, 1989 Final Judgment. The District Court entered an Order denying K-MART'S Motion to Dismiss GORDON'S appeal, and ordered the State of Florida to be a Defendant/Appellee, and file a brief.

In his appeal from the Order Amending Final Judgment, GORDON raised various contentions regarding the unconstitutionality of Section 768.73(2)(b). The Third District decided that the constitutional attacks upon the statute were "very insubstantial", and affirmed the trial court. Gordon v. State of Florida, K-Mart Corp., Etc., et al., Case No. 90-2497, ___ So. 2d ___ (Fla. 3d DCA 1991) 16 FLW D 2256.

In affirming the trial court's amended Final Judgment, the Third District decided that: (1) There was no deprivation of due process right to property in that GORDON did not have a cognizable, protectable right to the recovery of punitive damages at all; (2) that the legislature may place conditions upon the recovery of punitive damages or

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FAX NO: (305) 446-2825

even abolish it altogether; (3) that where the incident in question occurred subsequent to the effective date of the statute that GORDON cannot obtain a vested right to a punitive damages claim, and (4) that Section 768.73 (2)(b) is not "arbitrary" and "unreasonable".

In opining that Section 768.73 (2)(b) was rationally related to a legitimate legislative interest or objective, the appellate court found two such bases as readily apparent. The court decided that the present Statute directly served one of the most basic justifications for the existence of punitive damages; to serve as punishment for what amounts to a public wrong and thus to protect the public in inhibiting future such conduct. (R. 75) In addition, the appellate court decided that the legislature had every right to conclude, as a matter of public policy, that punitive damage claims suits should be discouraged -- even eliminated -- and that, "this affords a perfectly legitimate ground for upholding the statute". (R. 78)

In a footnote 13, the District Court certified to the Supreme Court, "that this case involves a question of great public importance as to the constitutionality of §768.73(2)(b), Fla. Stat. (Supp. 1986)". (R. 80)

The opinion of the District Court was filed on August 27, 1991. GORDON filed his Notice to Invoke Discretionary

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FAX NO (305) 446-2825

Jurisdiction of Supreme Court with the District Court on September 13, 1991.

SUMMARY OF ARGUMENT

Section 768.73 (2)(b) is unconstitutional and violates the Fifth and Fourteenth Amendments of the United States Constitution, and Article X, Section 6 of the Florida Constitution in taking private property for public use without full compensation paid to the Plaintiff who obtained a $512,000.00 punitive damages award and Judgment. Section 768.73 (2)(b), violates other constitutional rights, including the right of access to the courts to redress for injury, the inviolate right of trial by jury with the verdict free from substantial impairment, and the equal protection of the law.

A right to punitive damages existed as common law, and has been adopted as a statute in this State. Further, as soon as a Final Judgment for punitive damages was entered, the Plaintiff's rights were vested, In any event, the Legislature cannot abolish an existing right to recover punitive damages without providing a reasonable alternative to protect the injured plaintiff, or without a showing of an overpowering public necessity for the abolishment of the

LAW OFFICES
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GABLES INTERNATIONAL PLAZA - 2655 LEJEUNE ROAD - CORAL GABLES, FLORIDA 33134 - (305) 446-2826
FAX NO' (305) 446-2825

plaintiff's right, and no alternative method of meeting the public necessity. There has been no such showing. The established "public policy" of the State is to uphold the principle of awarding punitive damages and to seek redress in the courts.

The State was not a party in the civil action in the trial court, and cannot become a judgment creditor of the Defendant tort feasors. Therefore, it cannot share in the Judgment.

Leaving the injured Plaintiff's right to recover some punitive damages intact but authorizing the State, a non-participant or Plaintiff's helper in the Civil Action, to take 60% of the recovery, is arbitrary and capricious. The State assisted in arresting the Plaintiff, placed him in jail, criminally prosecuted him, and in the subsequent civil action, aided K-MART, did not assist in defending against an appeal, did not share any of the costs or legal fees, and now seeks to gain $317,200.00 by its own misconduct and omissions.

There is no rational relationship between giving 60% of the full punitive damages to the State, and the announced purpose of tort reform of affordable liability insurance. Insurance companies do not provide insurance for punitive damages.

LAW OFFICES
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GABLES INTERNATIONAL PLAZA - 2655 LEJEUNE ROAD - CORAL GABLES, FLORIDA 33134 - (305) 446-2826
FAX NO: (305) 446-2825

The entire proceeding is a fraud on the jury which is given the job of applying community standards against outrageous, willful, and wanton misconduct, while being statutorily and intentionally misled into believing that the punitive damages amount awarded will be paid to the injured plaintiff. The State is critical of the punitive damages, and want to discourage them by "making them less remunerative to the plaintiff and his attorneys" -- while at the same time, the State seeks to secretly step into the shoes and pockets of the Plaintiff to take the money while sharing none of the costs, fees, aggravation, trauma, or risks. Since the guilty defendant pays the same amount, but now unequally shared by the State and the plaintiff, the 60% exaction by the State does not solve or reform any perceived insurance or tort reform problems.

Two States, Georgia and Colorado, have already declared their punitive damages sharing statutes unconstitutional.

The Plaintiff's lawyer's work, time, efforts, and skills in the trial court in obtaining the punitive damages award in the trial court, obtaining the Final Judgment, and then prevailing in the K-MART appeal, should be compensated in accordance with his contingent fee agreement. When the State takes 60% of the punitive damages award without compensating him, he has been deprived of property without

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FAX NO.. (305) 446-2825

due process of law. He is entitled to be compensated for his services in obtaining an award which may benefit the State in the sum of $307,200.00, whether his fee be the agreed upon contingent fee amount, a "quantum meruit" fee, an "unjust enrichment" amount, or some other reasonable sum.

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FAX NO: (305) 446-2825

ARGUMENT

I.

WHETHER SECTION 768.73(2)(b), FLORIDA STATUTE (SUPP. 1986), PROVIDING FOR THE STATE OF FLORIDA TO OBTAIN AND TAKE 60% OF A PUNITIVE DAMAGES AWARD IS CONSTITUTIONAL?

This case involves a challenge to the constitutionality of the punitive damages sharing statute, Section 768.73(2)(b), Florida Statutes, which was enacted in 1986 as part of the Tort Reform and Insurance Act of 1986. The Section requires a party receiving a punitive damage award to have 60% of the award payable to either the State of Florida's Public Medical Assistance Trust Fund or to the General Revenue Fund. /4

In the case at bar, the General Revenue Fund of the State of Florida received 60% of the $584,500.00 punitive damages awarded to GORDON, thus reducing his recovery to $277,300.00.

/4 5768.73 (2) Florida Statute (Supp. 1986)

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 upon personal injury or wrongful death, sixty percent of the award shall be payable to the Public Medical Assistance Trust Fund created in §409.2662; otherwise, sixty percent of the award shall be payable to the General Welfare Fund.

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GABLES INTERNATIONAL PLAZA - 2655 LEJEUNE ROAD - CORAL GABLES. FLORIDA 33134 - (305) 446-2826
FAX NO.: (305) 446-2825

Section 768.73 (2)(b), has effectuated a forced taking of HARVEY GORDON'S $307,200.00 property interest in the award and judgment, and does so in a manner and degree unrelated to any constitutionally permissible governmental interest served by the taking and, therefore, violates the federal and state constitutional prescriptions against the taking of private property without just or any compensation. U.S. Constitution Amendments V and XIV; Florida Constitution Article X. Section 6. /5

The Declaration of Rights of the Florida Constitution, Article I, Section 2, declares the basic inalienable rights of all natural persons to enjoy and defend life and liberty, to pursue happiness, to be awarded for industry, and to

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/5 The Fifth Amendment to the United States Constitution provides in part:

. . . nor shall private property be taken for public use, without just compensation.

This amendment is made applicable to the states through the due process clause of the Fourteenth Amendment. Chicago, Burlington, and Quincy R.R. Co., v. Chicago, 166 U.S. 226 17 S.Ct. 581 (1897).

Article X, Section 6 of the Florida Constitution provides in part:

No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner.

LAW OFFICES
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FAX NO (305) 446-2825

acquire, possess, and protect property. The ownership of property is guaranteed by the Constitutions, and has been termed a "sacred right", encouraged and protected by the federal and state Constitutions. City of Palmetto v. Katsch, 86 Fla. 506, 98 So.352 at 354 (1923).

The taking clause of both the Federal and State Constitutions is, "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole". Penn Central Transportation Co. v. City of New York, 438 U.S. 104 at 123; 98 S.Ct. 2646 (1978). Resolving the question of "what constitutes a taking" is a problem of considerable difficulty, and courts have been unable, "to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons". Id. at 124. When governmental regulation, "goes too far it will be recognized as a taking". Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 43 St. 158 (1922).

The definition of "property" is broad enough in condemnation cases to extend to intangible and incorporeal rights such as contractual rights and leasehold interests, Pinellas County v. Brown, 450 So.2d 240, 242 (Fla. 2d DCA 1984) and should extend to jury verdicts and awards, as well

LAW OFFICES
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FAX NO.. (305) 446-2825

as to judgments. It has long been established in FLorida that the prohibition against the taking of private property without just compensation is not limited to the taking of property under the right of eminent domain. State Plant Board v. Smith, 110 So.2d 401, 405 (Fla. 1959).

The right of a citizen to hold property is a valuable right and one which the sovereign should not and cannot take without compensations and due process of law. There has been no due process of law in this case since the State merely awaited the return of the jury's verdict (after two Assistant State Attorneys testified on behalf of and in aid of K-MART), the entry of a judgment including punitive damages following the verdict, failed to participate with the Plaintiff in defending against an appeal, did not contribute to the Plaintiff's costs and fees, and then only after the Final Judgment had been affirmed, decided it should intervene and take away 60% of the punitive damages award for the State -- all without compensation to the Plaintiff. /6

/6 The State knew about the jury verdict as it was well publicized. See Miami Herald article of July 27, 1989. (R. 21) Why did not K-MART notify the State about the jury verdict before any Judgment was entered? Because neither K-MART nor the State were interested in having the State enter into the case to assist the Plaintiff in sustaining the punitive damages award!

LAW OFFICES
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FAY NO.: (305) 446-2825

UNCONSTITUTIONAL TAKING OF PROPERTY WITHOUT DUE PROCESS

The determination of whether a "taking" has occurred by reason of a governmental regulation interfering with or impairing the interest of a private property owner involves essentially an "ad hoc, factual" analysis. Kaiser Aetna v. United States, 444 U.S. 164, 175, 100 S.Ct. 383 (1979). In resolving a "taking" issue, the United States Supreme Court has considered the totality of circumstances underlying the taking, including such factors as the character of the governmental action, its economic impact, and its interference with reasonable economic expectations of the property owner. See Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); Pruneyard Shopping Center v. Robins, 447 U.S. 74, 83, 100 S.Ct. 2035 (1980).

An additional factor, and one entitled to considerable weight, is whether the property right has ripened into a judgment. In Ross v. Gore, 48 So.2d 412 (Fla. 1950), a libel case, this Court held that the right to have punitive damages assessed is not property, and that until a judgment is rendered, there is no vested right in a claim for punitive damages. However, in the case at bar, a judgment was rendered giving GORDON a vested right in the punitive damages award. Such vested property right cannot be constitutionally abrogated or taken away without due process

LAW OFFICES
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GABLES INTERNATIONAL PLAZA - 2655 LEJEUNE ROAD - CORAL GABLES, FLORIDA 33134 - (305) 446-2826
FAX NO.: (305) 446-2825

and full compensation. The Judgment was not void, although as we have seen, the trial court amended the Judgment.

HISTORY OF PUNITIVE DAMAGES AND PUBLIC POLICY

The taking of property without due process was terminated more than 736 years ago in 1255 when King John of England permitted the ratification of the Magna Carta which guaranteed the property rights of an individual as well as his liberties. The rights granted by the Magna Carta and protected by the State and Federal Constitutions, are now being diluted and taken away by the actions of an ill-informed Legislature lobbied by insurance companies, large manufacturers, power seeking persons, and wealthy corporate defendants bent on stripping away the right of the individual to punish the wrongdoer defendant and deter future wrongdoings.

Punitive damages have a long history, and are traceable to English Common Law antecedents. In Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257, 254, 109 S.Ct. 2909, (1989), the United States Supreme Court stated that the practice of awarding exemplary damages was well recognized when the Constitution was adopted and that exemplary damages are founded in the British common law

LAW OFFICES
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GABLES INTERNATIONAL PLAZA - 2655 LEJEUNE ROAD - CORAL GABLES. FLORIDA 33134 - (305) 446-2826
FAX NO.. (305) 446-2825

which is the basis for much Florida law. Punitive damages are imposed through the aegis of courts and serve to advance governmental interests in punishment and deterrence. Id. at 109 S.Ct. at 2911.

Florida adopted the English common law in enacting Section 2.01, Florida Statutes, which states:

> 2.01 Common law and certain statutes declared in force -- The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the Legislature of this state.

The English common law provided for punitive damages. In adopting the English common law as of July 4, 1776, Florida made the law a part of the Statutes of the State of Florida. Therefore, a statutory right to punitive damages exists as an adapted part of the statutory law of the State. The 1986 Florida Tort Reform Act specifically provides in §768.71(3) that:

> If a provision of this part [Part II on damages] is in conflict with any other provision of the Florida Statutes such other provision shall apply, (emphasis supplied)

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GABLES INTERNATIONAL PLAZA - 2655 LEJEUNE ROAD - CORAL GABLES, FLORIDA 33134 - (305) 446-2826
FAX NO: (305) 446-2825

Thus, a right to punitive damages exists as a part of the Florida Statutes because Florida Statute Section 2.01 is in conflict with Section 768.71(3). The Tort Reform Act specifically deferred to other existing statutory law, including punitive damages, when the Act was adopted. The Act thus recognizes the long existing statutory right to punitive damages.

Since a right to punitive damages against a private tort feasor existed at common law, and since this right became a part of the statutory law of the State of Florida by adoption under Florida Statute Section 2.01, the Legislature cannot arbitrarily abolish or substantially diminish the right without providing reasonable alternative protection to the damaged plaintiff or a demonstration of an overpowering public necessity.

Chief Judge SCHWARTZ in speaking for the Third District articulated that the allowance of punitive damages, "is based entirely upon considerations of public policy . . . and the very existence of an inchoate claim for punitive damages is subject to the plenary authority of the ultimate policy maker . . . the legislature." (R. 73) He then opined that the Legislature may place limitations upon such a recovery or even abolish it altogether. (R. 73) However, "with all due respect", the Chief Judge overlooked the principle that when a statute contravenes an established

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FAX NO (305) 446-2825

interest of society, it is void as against public policy.

While "public policy" is a term of vague and variable meaning, it may be said that it is the community common sense and common conscience extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like. City of Leesburg v. Ware, 113 Fla. 760, **153 So.87 (1934)**. Historically and **today**, the established "public policy" of Florida is to uphold the principle of awarding punitive damages as a deterrent to wrongdoers inclined to commit a like offense, with the allowance dependent on malice, moral turpitude, wantonness, or outrageousness of tort. Dr. P. Phillips & Sons, Inc. v. Kilgore, 152 Fla. **578, 12** So.2d **465 (1943).**

If there was some great public necessity arising from an evil within the punitive damages system for intentional torts, then the Legislature could have taken steps to cure that devil. Instead, the State wants to preserve and uphold the Plaintiff's right to sue for and obtain an award for punitive damages but to then secretly take the lion's share of the Plaintiff's hard earned and hard fought for jury verdict. Furthermore, if there was some overpowering public necessity, then the jury, as well as the general public, should be made aware of the great public necessity, and also be made aware of the 60%/40% split. However, **Florida**

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FAX NO: (305) 446-2825

Statute, Section 768.73(5), provides that the jury shall not be instructed, nor shall it be informed, as to the provisions of Section 768.73. Why should a "great public necessity" be concealed from a jury? Why should the jury not be advised that the State will grab or take 60% of the punitive damage award? Why hide the fact? Should not the jury know what the statutory "law" provides? Is this a government of deceit? The answers are obvious. There was not and there is not any "great public necessity" for the State to take away 60% of the punitive damages award. A legislative enactment may be overturned on due process grounds when it is clear that it is not in any way designed to promote the people's health, safety, or welfare, or where it appears that the statutory provision under attack bears no reasonable relationship to the statute's avowed purpose. Department of Ins. v. Dade County Consumer Advocate's Office, 492 So.2d 1032, **1034 (Fla. 1986).**

The law giving exemplary damages to the injured claimant is an outgrowth of the English love of liberty regulated by law. It tends to elevate the jury as a responsible instrument of government, discourages private reprisals, restrains the strong, influential and unscrupulous, vindicates the right of the weak, and encourages recourse to and confidence in the courts of law

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by those wronged or oppressed by acts or practices not cognizable in or not sufficiently punished by the criminal law. Punitive damages have developed as the most effective means by which the states can protect their citizens against corporate misconduct, and channel the victim's vengeance away from self help.

The United State Supreme Court has recognized that one of the traditional aims of punishment is retribution and deterrence. Kennedy v. Mendoza-Martinez, 372 U.S. 165 at 168, 83 S.Ct. 554 at 567. Punishment of the wrongdoer by a punitive damages award is an alternative to lynch mob rule and physical combat. Punitive damages maintain public tranquility by permitting the wronged plaintiff to take his revenge in the courtroom and not by self-help. Campbell v. Government Employees Insurance Co., 306 So.2d 525, 531 (Fla. 1974).

If the bulk of the punitive damages award is taken by the State, then the jury's measure for satisfaction of the Plaintiff's need for retribution and revenge is arbitrarily capped or limited, and his or her rights to an inviolate jury trial and access to the courts is unconstitutionally violated. See generally, Smith v. Dept. of Insurance, 507 So.2d 1080 (Fla. 1987), where this Court held that a statutory cap on compensatory damages violates a

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constitutional right of access to courts and trial by jury, notwithstanding the fact that an injured Plaintiff's right of action is not totally abolished. /7

UNCONSTITUTIONAL VIOLATION OF ACCESS TO COURTS

Article I, Section 21 of the **Florida** Constitution, provides that the courts shall be open to every person for redress of any injury without sale, denial, or delay. Section 768.73(2)(b), violates this constitutional provision. In Kluger v. White, **281** So.2d 1,4 **(Fla.** 1973), cited in Abdula v. World Omni Leasing, Inc., 583 So.2d 330 (Fla. 1991), this Court repeated this constitutional limitation on the Legislature's power as follows:

> "[W]here 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

/7 It should be noted that, while the Supreme Court in Smith rejected an attack upon the constitutionality of Section 52 of the Tort Reform and Insurance Act, which was codified into the statute in question, the Appellants' argument of unconstitutionality there was based only on the separation of powers clause of the Florida Constitution. See 507 So.2d at 1092.

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> part of the common law of the State pursuant to Fla. Stat. §2.01 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 necessity can be shown." (emphasis supplied)

The Legislature failed to provide a reasonable alternative or to show an overpowering public necessity for abrogating an injured person's right to retain 100% of a jury awarded punitive damages amount. The allotment of 60% of the punitive damages award to the State is inherently unconstitutional, when the State has done nothing whatsoever to punish and deter the wrongdoer, and did nothing to assist the claimant and his counsel in obtaining the jury verdict and affirming the Final Judgment. The State did not provide GORDON or any other injured person with any reasonable alternative to punish K-MART other than bringing a civil action and seeking compensatory damages.

In fact, when the State takes 60% of the punitive damages award away from GORDON, the State is punishing GORDON for having the courage and the fortitude to do legal battle with a behemoth like K-MART. GORDON has been punished by the State for seeking appropriate redress. His

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right to punitive damages redress is now denied by 60%.

The forced contribution of 60% of the punitive damages award is imposed not on the Defendant wrongdoer who caused the injuries, but upon the Plaintiff who suffered the wrong. It goes without saying that placing the burden on the judgment creditor, GORDON, of obtaining the award, suffering pain and emotional distress, the trauma, the stigma of being arrested for "shoplifting" and fraudulent refund, a "criminal record", paying of costs, arranging for counsel fees, trying the jury case without the assistance of the State, cross-examining the State's Assistant State Attorneys testifying as K-MART'S witnesses, the jury being uninformed of the State's inchoate claim for 60% of the award, all bears no reasonable relationship to any arguable goal of punishing the wrongdoer or deterring others from engaging in similar conduct.

We wonder why the Legislature, if it really wanted to punish the wrongdoer, did not enact a Statute compelling the wrongdoer to pay to the State a sum equal to 60% of any punitive damage award entered in favor of the Plaintiff, in addition to paying 100% of any award to the Plaintiff. Such a statute would serve as a very strong deterrent without punishing the injured claimant. The State of Florida has not attempted to exercise its police power in preventing or

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punishing the conduct of **K-MART** or its employees and after prosecuting GORDON, the State now seeks to benefit from **K-MART'S** outrageous behavior **of** GORDON.

TAX ON JUDGMENTS

The 60% assessment against GORDON'S Judgment is nothing more than a tax on Judgments and a revenue producing measure. The State will try to argue against this categorization, but the argument will lack merit. The State will say that the 60% is not a tax, but will be unable to support any reasons as to why it **is** not a tax.

Article VII, Section 1(a) **of** the Florida Constitution, provides that no tax shall be levied except **in** pursuance of law. Section II of Article III of the Florida Constitution, prohibits special laws and mandates that there shall be no special law or general law of local application pertaining to the assessment or collection of taxes for state or county purposes.

Section 768.73 (2)(b), violates the above cited constitutional protections. The offending Section is a special law relating to, or designed to operate upon, particular persons or things, or one that purports to operate upon **classified** persons or things pertaining to

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punitive damages in civil actions. The special tax is 60% of the punitive damages award with the taxed monies to be paid into one of two State funds, and to be used for general State purposes.

STATUTE IS NOT RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST

In response to the alleged widespread difficulty in obtaining liability insurance in Florida, the Tort Reform and Insurance Act of 1986, Ch. 86-160, 1986 Laws 695 (The Act) was passed. Concerned with the problems of availability and affordability of commercial liability insurance, the Legislature, responding to public pressure, embarked on a journey to resolve and alleviate this "crisis". It has culminated in a law that changes legal doctrine that have existed for over 200 years. The Act is a coalescense of bills intended to produce significant changes in the insurance and tort systems. The Legislature explained in the preamble of the Act that tort reform provisions and the insurance regulatory provisions are, "properly connected'' by stating:

> "[T]here is . . . a serious lack of availability of many lines of commercial liability insurance and . . . the present

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> crisis is not abated, many persons who are subject to civil actions will be unable to purchase liability insurance, and many injured persons will therefore be unable to recover damages for either their economic losses or their non-economic losses, and . . . the current tort system has significantly contributed to the insurance availability and affordability crisis . . . ."

In Smith v. Dept. of Insurance, 507 So.2d 1080 (Fla. 1987), the Supreme Court interpreted the Act as applying only to claims for personal injury and property damage, both tort and contract. The Smith opinion did not discuss the constitutionality or unconstitutionality of Section 768.73 Punitive Damages. The Court articulated that the statutory scheme enacted by the Legislature was to address one primary goal: the availability of affordable liability insurance. Id. at 1084. The Court concluded that the Legislature was attempting to meet, "the single goal of creating a stable market for liability insurance in this state". Id. at 1087.

However, the statute is not rationally related to the Legislature's goal and a legitimate state interest. The Court can take judicial notice that insurance policies are not issued to insure against punitive damage awards. It is against public policy in the State of Florida to buy or sell liability insurance to protect one from having to pay punitive damages for all but an employer's vicarious

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liability. The rationale for the general rule is that the purpose of punitive damages is to punish and deter misconduct. To allow insurance for punitive damages is to thwart that punishment. Further, giving the State 60% of the punitive damages has no effect whatsoever upon the total amount of the punitive damages awarded, and would have no effect upon affordable liability insurance. K-MART is self-insured. No insurance company is involved in this case, but in any event, K-MART or any other wrongdoer, or any insurance carrier, pays the same amount of punitive damages. The Legislature did not intend to protect intentional tortfeasors and wrongdoers from the punishment and deterrence of punitive damages, and there was and is no liability insurance crisis concerning such tortfeasors. /8

There is no rational or reasonable nexus to the State receiving 60% of a punitive damages award and any liability insurance crisis. The State's appropriation or taking of 60% of the punitive damages award must bear a reasonable relationship to the governmental services provided to GORDON and other civil litigants in making use of the courts and

/8 Contrary to the Third District's conclusion that "as a matter of public policy, that such [punitive damages] suits should be discouraged -- even eliminated", (R. 78), the Legislature has not eliminated or discouraged punitive damages, but avariciously seeks a large portion for the State as a revenue measure.

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the judicial process for the purpose of resolving civil actions. Because a judgment for punitive damages entitles the judgment creditor to a satisfaction of the real and personal property of the judgment debtor, i.e., K-MART, the taking of 60% from the judgment creditor, GORDON, is substantially equivalent to the taking of money itself. Furthermore, the State of Florida should not benefit from its own conduct and cooperation with the wrongdoer, K-MART. The State of Florida arrested, imprisoned, charged, and tried GORDON all at the behest of K-MART. To allow the State to benefit from its own conduct and the testimony of Assistant State Attorneys inimical to GORDON'S claim for malicious prosecution is absolutely arbitrary and capricious, and serves no rational, just, or fair purpose. The jury would have been justifiably outraged had they known that the State was going to receive any part of the punitive damages awarded to and for GORDON.

RIGHT TO JURY TRIAL AND AWARD SHALL BE INVIOLATE, FREE FROM SUBSTANTIAL IMPAIRMENT

Section 22, Article I of the Florida Constitution, guarantees the right of trial by jury and provides that the "right of trial by jury shall forever remain inviolate".

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FAX NO.: (305) 446-2825

Rule of Civil Procedure 1.430 (a), provides that the right of trial by jury as declared by the Constitution or by state shall be preserved to the parties inviolate. "Inviolate" means ". . . free from substantial impairment". Black's Law Dictionary (6th Ed. 1990) 826. The term "inviolate" connotes deserving of the highest protection. Webster's Third New International Dictionary, 1190 (1976), defines "inviolate" as, "free from change or blemish, pure, unbroken . . . free from assault or trespass, untouched, intact . . . ." Applied to the right to trial by jury, this language indicates that the right must remain the essential component of our legal system that it has always been. For such a right to remain inviolate, it must not diminish over time, and must be protected from all assaults to its essential guarantees. In Florida, these guarantees include allowing the jury to determine the amount of damages in a civil case.

Although the courts can affect access to the jury, and affect jury verdicts in procedural ways, such as by granting new trials, entering remittiturs, etc., the Legislature does not have the power, right, or authority to affect jury verdicts by a Legislatively enacted, "remittitur of punitive damage" awards and thus prevent a jury verdict from being inviolate. See Sofie v. Fibreboard Corp., 771 P.2d 711

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FAX NO.: (305) 446-2825

(Wash. 1989).

The term "shall remain inviolate" does not merely imply that the right of jury trial shall not be abolished or wholly denied, but that it shall not be impaired. Flint River Steamboat Co. v. Roberts, 2 Fla. 102, 114, 48 Am. Dec. 178.

Applying Section 768.73(2)(b) to reduce 60% of the jury's punitive damages award in the case at bar, would clearly infringe upon the jury's function to determine damages. The application of the statute substitutes the will of the State Legislature for that of the jury in any case where a jury awards punitive damages. The Jury verdict speaks for itself and is only subject to the judicial processes -- not to any legislative edict. Any application of the statute "substantially impairs" the right of the Plaintiff to a trial by jury and substantially erodes that sacred and fundamental Constitutional right.

The GORDON punitive damages verdict has been violated, and is not "inviolate" as required by the Constitution.

A constitutional protection cannot be by-passed by allowing it to exist in form but letting it have no effect in function.

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DENIAL OF EQUAL PROTECTION RIGHTS

The Florida Constitution provides that all men are equal before the law. The Fourteenth Amendment to the United States Constitution declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. The guaranty of equal protection applies to the exercise of all state powers which can affect the individual or his property.

GORDON and other persons similarly situated who have obtained punitive damage awards and judgments are being denied their equal protection rights.

The offending Statute, §768.73(2)(b), takes aim at punitive damages awarded in "any civil action'', but does not take any percentage of the trebled damages available for those statutory torts as those brought under the Civil Remedies for Criminal Practices Act, Chapter 772, Florida Statutes (1989). Indeed, a defendant found liable under 5772.103 and 5772.104, for violating the State's version of the Racketeering Influenced and Corrupt Organizations Act, and simultaneously liable civilly for Theft under S772.11 could face two (2) trebled damages because of the cumulative remedy provision specified at 5772.18, with no part of those damages going to the State of Florida under 5768.73.

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The State does not take 60% of the treble damages awarded in civil actions filed under Florida Statute S874.06 far violations of Chapter 874 Street Terrorism Enforcement and Prevention, or 60% of the treble damages awarded in civil actions filed under Florida Statute 775.085 (2) where a criminal "evidences" prejudice while committing an offense.

Inasmuch as the Statute does not apply to plaintiffs or claimants until they obtain an award, there is discrimination between the party plaintiffs who settle their claims, either pre or post verdict, and those who litigate their claims to judgment. There will be and is discrimination between the Plaintiff who obtains a jury verdict for punitive damages, and then agrees with the wrongdoer to settle for an amount less than the verdict, and then stipulate to set aside the verdict and award without obtaining a judgment. In such case, the State receives nothing, but the injured plaintiff receives a settlement amount which is more than 40% of the original verdict, but less than 100%.

STATE WAS A NON-PARTY AND CANNOT BE A JUDGMENT CREDITOR

Under both federal and Florida law, a person who is not

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a party to an action may not be a party to a judgment entered in the action. Illinois Surety Co. v. United States, 240 U.S. 214, 36 S.Ct. 321, 325-326 (1916); Warshaw-Seattle, Inc. v. Clark, 85 So.2d 623 (Fla. 1955). In Coral Realty Co. v. Peacock Holding Co., 138 So.622, 624-625, 103 (Fla. 1931), this Court held that the rights of persons who have an interest in the subject matter of the litigation, whether legal or equitable, cannot be adjudicated or affected by a decree rendered in a suit to which they were not made parties. The portion of a decree that attempts to adjudicate rights of persons not parties to the action must be reversed on appeal. West Hialeah Mfg. Co. v. Hialeah, 134 So.2d 505 (Fla. 3d DCA 1961).

Neither the State of Florida, nor the General Revenue Fund of the State of Florida, was a party in the trial court. The State's post-trial Petition to Intervene petitioned the trial court, "for permission to intervene and assert its rights pursuant to 5768.73, Fla. Stat. . . . because its interests in this litigation is of such direct and immediate character that it will either gain or lose by direct legal operation and effect of the judgment if it is not permitted to intervene". (R. 18) The Court's Order Granting State of Florida's Petition to Intervene merely granted the "Motion", but did not make the State a party.

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(R. 30) The State is not a party, but apparently took the status of some type of a Non-Party Statutory Creditor.

In the case at bar, the Third District summarily denied the personal claim of GORDON'S attorney for attorney's fees as to the State's 60% share of the punitive damages award. The denial stated in footnote 7 was, "Because he is not a party to this controversy . . . we do not consider here the personal claim of Cordon's attorney that the statutory scheme invalidly interferes with his rights under his fee contract with his client." (R. 77)

The District Court relied on Warshaw-Seattle, Inc., supra, as authority for the denial of a contractual property right to the non-party attorney. The same reasoning of a non-party status and a denial of any participation in the punitive damages award should apply to the State of Florida, a "non party to this controversy" in the trial court. The first time the State ever acquired a status as a "party", if any, was when the Third District Court entered an Order on November 30, 1990, denying a K-MART Motion to Dismiss the appeal, and therein, sua sponte, "designated" the State of Florida as a "party appellee". /9

/9 The Order of November 30, 1990, is not included in the present Record, but may be one of the items to be designated in a Motion to Supplement the Record.

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FAX NO (305) 446-2825

As a non-party in the trial court, the State cannot be a Judgment Creditor. Therefore, the Order Amending Final Judgment of October 9, 1990, entering a Judgment, "in favor of the General Revenue Fund of the State of Florida" in the amount of $307,200.00, must be reversed and the Final Judgment of July 27, 1989 reinstated.

TWO OTHER STATES HAVE DECIDED THAT THEIR PUNITIVE DAMAGES SHARING STATUES ARE UNCONSTITUTIONAL

The District Court referred to the case of McBride v. General Motors Corp., 737 F.Supp. 1563, 1578 (M.D. Ga. 1990), deciding the Georgia punitive damages sharing act unconstitutional, but ridiculed the court's discussion as "completely unpersuasive". (R. 78, footnote 9) In another footnote, the District Court referred to several other states having enacted statutes similar to Florida. (R. 75) As of this writing, two states have declared their "similar" statutes unconstitutional.

Two months ago, the Colorado Supreme Court in Kirk v. The Denver Publishing Co., __ P.2d ___ (Colo. 1991), Case No. 88SA 405, concluded that Colo. Rev. Stat. £13-21-102(4) (1987) requiring a party receiving an exemplary damages award to pay one-third of all such "damages collected . . . into the state general fund" to be unconstitutional. The court held that the statute:

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> "effectuates a forced taking of the judgment creditor's property interest in the judgment and does *so* in a manner and to a degree unrelated to any constitutionally permissible governmental interest served by the taking and, therefore, violates the federal and state constitutional proscriptions against the taking of private property without just compensation,"

In Georgia, the United States District Court, in McBride v. General Motors Corp., supra, ruled that Ga. Code Ann. §51-12-5.1(e)(2) (Suppl. 1987), was unconstitutional. Although our Third District Court of Appeal dismissed the McBride case and discussion as "completely unpersuasive" (Footnote 9; R. 78), the McBride case did find that the Georgia Tort Reform Act, through product liability punitive damage subsection conferring upon the State a non party judgment creditor status and entitling the State to receive 75% of the punitive damage award, violated the excessive fines provision of state and federal Constitutions. McBride further held that the punitive damages provision created an arbitrary and unreasonable classification between products liability tort plaintiffs and other tort plaintiffs, and that the statute authorizing the state to recover 75% of the punitive damages award was a revenue producing measure and unconstitutional.

The McBride judge, a former state legislator, opined

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that:

> "The Court finds that there is no rational basis under the reasoning advanced by the State that the 75% award is a revenue producing measure inasmuch as it would be arbitrary to fail to assess all punitive damage awards if the purpose of assessing any award was to raise revenue for the State. The Court finds that revenue is incidental and that the arbitrary and unreasonable provision is business oriented, designed to restrict injured plaintiffs of an incentive to bring actions to punish, penalize, or deter egregious business practices." (emphasis added) 737 at 1578

11.

WHETHER SECTION 768.73 (4), FLORIDA STATUTES LIMITING THE CLAIMANT'S ATTORNEY'S FEES TO BE CALCULATED ONLY ON THE PORTION OF THE JUDGMENT PAYABLE TO THE CLAIMANT AND NOT TO BE PAYABLE FROM THE 60% OF THE STATE'S SHARE OF THE PUNITIVE DAMAGES AWARD, IS CONSTITUTIONAL?

Section 768.73(4) is not constitutional. /10 The

/10 "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."

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attorney who has been providing his legal services to GORDON under a written agreement form approved by the Florida Bar, has a property right in the recovery of monies from K-MART and cannot be deprived of his property right without due process and compensation. However, Section 768.73(4) does deprive him of any fee whatsoever on the State's 60% of $512,000.00, i.e., $307,200.00.

GORDON'S trial and appellate attorney, WEKSLER, agreed to provide legal services to GORDON on a contempt fee basis. He did not agree to provide legal services to the State of Florida on a pro bono basis, or as a type of indentured servant. In the event this appeal is unsuccessful, and the State of Florida is constitutionally permitted to retain the $307,200.00, plus interest heretofore obtained from K-MART, the claimant's recovery has been reduced by $307,200.00. His attorney's contingent fee will not pertain to the "unrecovered" $307,200.00, thereby depriving and taking away from the attorney valuable property, i.e., the agreed contingent fee. /11

/11 The contingent fee agreement in the form approved by The Florida Bar Rules Regulating The Florida Bar 4-1.5(F)(4)(b) provides for a contingent fee of 40% of recovery up to $1 million through the trial of the case with an additional 5% of any recovery after notice of appeal is filed or post-judgment relief or action is required for recovery on the judgment.

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In Baruch v. Giblin, 164 So.2d 831, 833 (Fla. 1935), this Court stated that lawyers are officers of the court and that the attorney's fee is a very important factor in the administration of justice, and if it is not determined with proper relation to that fact, it undermines the confidence of the public in the bench and bar. Whenever the State uses or retains outside attorneys to provide services for the State's benefit and to obtain monies for the State, the State pays for such services. There is no reason why the State should be statutorily precluded from paying for GORDON'S attorney's services in obtaining $307,200.00 for the State.

The State did not assist GORDON'S attorney in the preparation for trial or in the trial of this case. The State did not assist the attorney in defending against the post-trial motions or in defending against the K-MART appeal. Now, the State not only insists on obtaining $307,200.00, but has made no effort or offer to compensate the attorney for his efforts and success. The State had everything to gain and nothing to lose if GORDON prevailed in his claim for punitive damages. The State shared no part of the burden, the trauma, the costs, etc., but now takes away 60% of the punitive damages award, and the attorney's contingent fee portion of the 60%.

On the basis of a "quantum meruit" doctrine or on the

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"unjust enrichment" basis, or pursuant to Florida Statute 73.091 "Costs of the Proceedings", and S73.092 "Attorneys Fees", in Eminent Domain cases, the attorney is entitled to receive a reasonable fee from the State.

In Gamble v. Wells, 450 So.2d 850 (Fla. 1984), a case easily distinguishable from the case at bar, and which will be cited by the State, this Court held that the Legislature did not unconstitutionally impair a contractual obligation in violation of Article I, Section 10, Florida Constitution, by imposing a limitation upon plaintiff's attorney's fees substantially lower than the contingent fee he had negotiated. Gamble, unlike this case, pertained to a private relief statute awarding $150,000.00 in damages to a child injured while in the custody of the Department of Health and Rehabilitative Services. The attorney's fee was limited to $10,000.00, as a "matter of grace", by the Legislature in the private relief act despite the fact that the attorney had contracted to take the case for a 33 1/3% contingent fee. This Court held that the parties cannot enter into a contract to bind the state and the exercise of its sovereign power. The only possible means available for recovery was a private relief act. Id. at 853.

If the State does not pay reasonable attorney's fees to GORDON'S attorney, the State obtains an undeserved windfall.

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Because the attorney's services and GORDON'S civil action resulted in the punitive damages award, the beneficiary of which is the general public and the General Revenue Fund, it follows that the claimant's attorney's fees should be based upon the total verdict of punitive damages, and not the reduced 40% paid to the claimant. It is due to the attorney's efforts that the public interest has been served.

The theoretical and practical effect and application of Section 768.73(4) results in the pirating by the State of Florida of not only 60% of GORDON'S punitive damages award, but of the efforts, skills, industry, and time of GORDON'S counsel. At best, the Statute is an unconstitutional tax provision, and at its worst is condemnation of the attorney's private property and work, without compensation and without due process of law.

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CONCLUSION

It is clear that Section 768.73(2)(b) is not in any way designed to promote the people's health, safety, or welfare, and bears no reasonable relationship to the Statute's avowed liability insurance purposes, and must be overturned, on constitutional due process and all of the other constitutional grounds stated herein.

This Court is the last bastion upon which most citizens can depend to protect their constitutional rights. Accordingly, this Court is obligated to protect an individual's right to his or her property, to protect the individual from the taking of his or her property without compensation, to protect an individual's rights to trial by jury, and keep such rights inviolate, and to ensure that the doors of the courthouse remain wide open, not just a-jar. This Court must protect individuals from the arbitrary and unreasonable acts of the state government, and thereby ensure the right of the people to due process of law and the equal protection of the laws.

With these objectives in mind, it is submitted that Section 768.73 (2)(b) is unconstitutional. The Florida Constitution is meant to protect every citizen -- including those who are the victims of intentional torts. Punitive damages have helped to maintain public peace and tranquility

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by permitting the wronged plaintiff to take his revenge in the courtroom, and not by self-help. The decision of the District Court of Appeal should be quashed with direction that on remand the trial court's Final Judgment of July 27, 1989 be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE DO HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 6th day of November, **1991** to Craig Willis, Esq., Assistant Attorney General, Attorney for Respondent, Florida Department of Legal Affairs, The Capitol, Suite **1601**, Tallahassee, Florida **32399-1050**, and to Yvette Rhodes Prescott, Esq., PETERS, PICKLE, Attorneys for K-MART CORP., et al., 600 Ingraham Building, 25 Southeast Second Avenue, Miami, Florida 33131-1691.

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049

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 78,638

DISTRICT COURT OF APPEAL
THIRD DISTRICT NO.: 90-02497

HARVEY GORDON,

Petitioner,

vs.

STATE OF FLORIDA, et al.,:

Respondent.

APPENDIX TO INITIAL BRIEF OF PETITIONER

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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED, OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1991

HARVEY GORDON,

Appellant,

vs.

STATE OF FLORIDA, K-MART CORPORATION, etc., et al.,

Appellees.

** CASE NO. 90-2497

opinion filed August 27, 1991.

An Appeal from the Circuit Court for Dade County, Margarita Esquiroz, Judge.

Bernard B. Weksler, for appellant.

Robert A. Butterworth, Attorney General, and Craig B. Willis, Assistant Attorney General; Peters Pickle Niemoeller Robertson Lax & Parsons and Yvette Rhodes Prescott, for appellees,

Roy D. Wasson for Academy of Florida Trial Lawyers as amicus curiae.

Mershon Sawyer Johnston Dunwody & Cole and Edward T. O'Donnell for Product Liability Advisory Council as amicus curiae.

Before SCHWARTZ, C.J., and NESBITT and GERSTEN, JJ.

SCHWARTZ, Chief Judge.

By this decision, we uphold the legislature's authority to allot a portion of a punitive damages award to the state.

I

Harvey Gordon was falsely imprisoned and battered by employees of K-Mart Corporation in an incident which occurred in one of its stores on February 16, 1987. In the ensuing action by Gordon against K-Mart, he recovered a jury verdict for $72,500 in compensatory damages and $512,600 in punitive damages. A final judgment for these amounts was entered in Gordon's favor on July 27, 1989, and post-trial motions were denied on October 5, 1989. Subsequently, in K-Mart Corp. v. Gordon, 565 So.2d 834 (Fla. 3d DCA 1990) (per curiam), the judgment was entirely affirmed.

After the issuance of the mandate, K-Mart, on September 20, 1990, moved to amend the final judgment pursuant to Florida Rule of civil Procedure 1.540, and the State of Florida moved to intervene as a party plaintiff for the purpose of applying section 768.73(2)(b), Fla. Stat. (Supp. 1986).[1] That section, which was part of the Tort Reform and Insurance Act of 1986, which became effective July 1, 1986, requires that 60% of any punitive damages award be payable either to the Public Assistance Trust Fund or, as in this case, to the General Revenue Fund of the state. On October 9, 1990, the trial court granted these motions and entered the following final judgment nunc pro tunc the date of the original judgment:

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[1] Section 768.73(2)(b) provides:

> 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.

> **PURSUANT** TO the verdict rendered in this action, it is
>
> **ORDERED AND ADJUDGED** that the Plaintiff, **HARVEY** GORDON, recover from the Defendants, K MART CORPORATION, **DAVID** SPARROCK, and **PETER** MIRAMBEAU, the **sum of TWO HUNDRED SEVENTY-SEVEN THOUSAND THREE HUNDRED AND** 00/100 ($277,300.00) with costs to be hereinafter **taxed**, that shall bear interest at the rate set by **Florida** Statute for **which** let execution issue..
>
> Pursuant to section 768.73, Florida Statutes (1987) 'a judgment is hereby entered in **favor** of the General Revenue Fund of the State of Florida in the amount of THREE **HUNDRED SEVEN THOUSAND TWO HUNDRED AND 00/100 DOLLARS ($307,200.00) which** sum represents sixty (60) percent of the punitive damage **award.**
>
> 2. This Court hereby directs the Clerk to amend the Final Judgment accordingly.

Gordon now **appeals from** that portion of **the** amended judgment which, in effect, transfers $307,200.00 **from him** to the State **of Florida. He raises** the dual contentions that section 768.73(2)(b) is unconstitutional and that the manner **in** which **his** initial judgment **was** amended to reflect **the state's recovery was** procedurally invalid, We find that neither of these contentions has merit.

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[2] **K-Mart** has paid **the** amount of the judgment including the compensatory award and the 40% of the punitive damages to which entire punitive **award** into the registry of the court. The Gordon is indisputably entitled have been released **to him.** Accordingly, the only controversy is between Gordon and **the state as** to the entitlement to the 60% allocation **provided** by the statute.

II

With all due respect,[3] we find that Gordon's constitutional attacks upon the statute are very insubstantial:

1. No deprivation of due process right to property.

The appellant's first claim -- that the statute constitutes an unconstitutional "taking" of a property right without due process -- is wholly without merit. This is true simply because he has no cognizable, protectable right to the recovery of punitive damages at all. Unlike the right to compensatory damages, *see* Smith v. Department of Ins,, *507* So.2d 1080 (Fla. 1987); University of Miami v. Echarte, ——So.2d—— (Fla. 3d DCA Case no, 90-982, opinion filed, June 11, 1991)[16 FLW D1539], the allowance of punitive damages is based entirely upon considerations of public policy. Accordingly, it is clear that the very existence of an inchoate claim for punitive damages is subject to the plenary authority of the ultimate policy-maker under our system, the legislature, In the exercise of that discretion, it may place conditions upon such a recovery or even abolish it altogether. Ross v. Gore, 48 So.2d 412 (Fla. 1950); cf. Pacific Mutual Lire Ins. Co. v. Haslip, ___U.S.___, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). As our court clearly stated in Ross:

> As to question No.1, plaintiff contends that the statute has "changed the amount of damages recoverable, and

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[3] We have noticed that this phrase is almost always employed, as it is here, when very little, if any, respect is actually deemed "due" to the contention or institution to which it is directed.

> thus has unconstitutionally impaired appellant's rights." There is no merit to this contention. As to the denial of "punitive damages," such damages are allowed, not as compensation to a plaintiff, but as a deterrent to others inclined to commit a similar offense, and their allowance depends on malice, or moral turpitude, wantonness or outrageousness of tort. Dr. P. Phillips & Sons, Inc., V. Kilgore, 152 Fla. 578, 12 So.2d 465. 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, Kelly v. Hall et al., 191 Ga. 470, 12 S.E.2d 881: Osborn V. Leach, 135 N. C. 628, 47 S.E. 811. It cannot, then, be said that the denial of punitive damages has unconstitutionally impaired any property rights of appellant.

Ross, 48 So.2d at 414; accord Louisville & Nashville R.R. V. Street, 164 Ala. 155, 51 So. 306 (1909); Smith v, Hill, 12 Ill.2d 588, 147 N.E.2d 321 (1958).

In addition, because the incident in question, much less the entry of the final judgment, occurred subsequent to the effective date of the statute, the case is governed also by the rules that (a) where an existing statute provides that funds recovered under it are subject to a prior claim, a party cannot thereafter obtain a vested right to that claim, see United States Fidelity & Guar. co. v. Department of Ins., 453 So.2d 1355 (1984), and that (b) even substantive rights and obligations created by statute do not vest until the accrual of the cause of action which gives rise to them. L. Ross, Inc. v. R. W. Roberts Const. Co., 466 So.2d 1096 (Fla. 5th DCA 1985), aff'd, 481 So.2d 484 (Fla. 1986). For all

these reasons, we summarily reject the contention that the state has invalidly taken a property right of the plaintiff. Ross, 48 So.2d at 412.

2. No violation of substantive due process rights.

We find Gordon's alternative contention that section 768.73(2)(b) is "arbitrary" and "unreasonable" and therefore somehow deprives him of his rights to substantive due process on that basis even less persuasive. To successfully surmount such an objection, it need only be shown that the statute under attack bears a rational relation to a legitimate legislative interest or objective. Abdala v. World Omni Leasing, Inc., ___ So.2d ___ (Fla. Case nos. 75,966 & 75,968, opinion filed, June 27, 1991)[16 FLW S464]; Vildibill v. Johnson, 492 So.2d 1047 (Fla. 1986). At least two such bases of 768.73(2)(b) are readily apparent:

(a) it is clear that the present statute[4] is founded upon and directly serves one of the most basic justifications for the existence of punitive damages in the first place: to serve as punishment for what amounts to a public wrong and thus to protect the public by inhibiting future such conduct, Ingram v. Pettit, 340 So.2d 922, 924 (Fla. 1976) ("It has long been established that the availability of punitive damages is reserved to those kinds of cases where private injuries partake of public wrongs. The intentional infliction of harm, or a recklessness which is

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[4] Several other states have enacted similar statutes. See Colo. Rev. Stat. § 13-21-102(4) (1987); Ga. Code Ann. § 51-12-5.1(e)(2)(Supp. 1987); Ill. Rev. Stat. Ch. 110, para. 2-1207(Supp. 1987); Iowa Code Ann. § 668A.1(2)(b)(West Supp. 1987); Mo. Stat. Ann. § 537.675 (1987).

the result of an intentional act, authorize punishment which may deter future harm to the public by the particular party involved and by others acting similarly."); Florida Southern R.R. v. Hirst, 30 Fla. 1, 11 So. 506 (1892); 22 Am.Jur.2d Damages § 734 (1988)("The intentional or reckless infliction of harm may be likened to culpable negligence in criminal cases and authorizes the infliction of punishment which may deter future harm to the public. So viewed, punitive damages are allowed on grounds of public policy and in the interest of society and for the public benefit."). The allotment of a portion of these funds directly to the State as a representative of the public whose interest the award is thus largely designed to serve, may obviously have been viewed by the legislature as an appropriate means of effecting that legitimate purpose,[5] We agree with the thrust of Justice Shores's opinion in Fuller v. Preferred Risk Life Ins. Co., 577 So.2d 878, 886-87 (Ala. 1991)(Shores, J., concurring specially), that, on this basis, the courts may make such an allocation even in the absence of statutory authorization:

> If the court concludes that the amount is not so excessive as to deprive the defendant of his property in contravention of § 13, Ala. Constitution 1901, it nevertheless may also determine that it would be in the best interest of justice to require the plaintiff to accept less than all of the amount and to require the defendant to devote a part of the amount to such purposes as the court may

[5] Of course, since the legislature could have abolished the punitive damage claim altogether, or under this rationale, required that all of the award be payable to the state, the plaintiff can hardly complain that the determination that 60% (as opposed to 30% or 90%) was inappropriate.

> determine would best serve the goals for which punitive damages are allowed in the first place: vindication of the public and deterrence to the defendant and to others who might commit similar wrongs in the future.
>
> * * *
>
> The courts, however, have inherent authority to allocate punitive damages with jurisdiction over both plaintiff and defendant, by reducing the amount that the plaintiff is to receive to less than the full amount of the verdict, and directing the defendant to pay a part of a punitive damages award to the state general fund or any special fund devoted to the furtherance of justice on behalf of all the people. To do so in proper cases could serve the purpose for which punitive damages were authorized to a greater degree than would allowing the plaintiff to receive the entire amount.

Fuller, 577 So.2d at 886-87.

(b) The legislative history indicates that one reason for the provision in question was to discourage punitive damages claims by making them less remunerative to the plaintiff and his attorneys. See § 768.73(4), Fla. Stat. (Supp. 1986).[6,7] Since

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[6] Section 768.73(4) 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.

[7] Because he is not a party to this controversy, see Warshaw-Seattle, Inc. v. Clark, 85 So.2d 623 (Fla. 1955), we do not consider here the personal claim of Gordon's attorney that the statutory scheme invalidly interferes with his rights under his fee contract with his client. But see Gamble v. Wells, 450 So.2d 850 (Fla. 1984), which is directly contrary to this contention.

the legislature had every right to conclude, as a matter of public policy, that such suits should be discouraged -- even eliminated-- this affords a perfectly legitimate ground for upholding the statute.[8,9]

III

Turning to the procedural objections to the effectuation of the statute by substituting the state for Gordon as to $307,200.00 of the punitive damages award, we also find no merit.

1. First, it is clear that the trial judge properly exercised her discretion, even after judgment, to permit the state to intervene as a plainly interested party plaintiff. Wags Transp. System v. City of Miami Beach, 88 So.2d 751 (Fla. 1956).

2. The amendment to the initial judgment, to reflect the clear and mandatory terms of a controlling statute, was properly effected to correct "an error therein arising from oversight"

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without expressing any opinion on the issue, however, we note the possibility of a separate quantum meruit claim by the attorney against the state for the services rendered in recovery of the 60% of the punitive damages on its behalf. *See* Government Employees Ins. Co. v. Graff, 227 So.2d 89 (Fla. 1st DCA 1976); Fuller, 577 So.2d at 886-87 (Shores, J., specially concurring).

[8] We relegate to a footnote the claim that Gordon obtained a constitutionally vested right to 100% of the punitive damages when the initial judgment for that amount was entered in his favor. Because that judgmant was obviously erroneously entered as in contravention of a contrary statute, this contention is equivalent to stating that no judgment may constitutionally be corrected or reversed on appeal.

[9] In deciding that § 768.73(2)(b) is valid, we have not overlooked McBride v. General Motors Corp., 737 F.Supp. 1563 (M.D. Ga. 1990). We find its brief discussion of the present issue, 737 F.Supp. at 1578, completely unpersuasive.

under Florida Rule of Civil Procedure 1.540(a),[10] see Stuckey v. Northern Propane Gas Co., 874 F.2d 1563 (11th Cir. 1989)(verdict corrected to properly apportion damages according to Georgia law); United States v. Griffin, 782 F.2d 1393 (7th Cir. 1986)(interest rate in judgment correctable after property sold at auction); O'Tell v. New York, New Haven & Hartford R.R., 236 F.2d 472 (2nd Cir. 1956) (judgment amended to reflect deduction from damages of sum plaintiff received for executed release; omitted in jury charge prior to verdict); 'First Nat'l Bank v. National Airlines, Inc., 167 F.Supp. 167 (S.D.N.Y. 1958)(judgment overlooking statute awarding costs upon dismissal of suit amendable), or to correct a plain "mistake" under Florida Rule of Civil Procedure 1.540(b).[11] See Taylor v. United States, 821 F.2d 1428 (9th Cir. 1987)(government did not waive claim to statutory limitation on noneconomic damages for professional

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[10] This was the view correctly adopted by the trial judge below:

> THE COURT: I don't think this is a clerical mistake. I think it's a mistake on my part but not a clerical one, in other words in typing, I did not miswrite anything or whoever prepared the order did not miswrite anything.
>
> It was an oversight in the sense that I did not realize that it was meant to be interpreted that it would exclude the statute. And that was not my intention in any way, shape or form, you know. So it was an oversight on my part in that regard.

[11] The 1.540 motion was timely under either 1.540(a), which provides that it may be invoked "at any time," or under 1.540(b), since it was filed within a year after the denial of the post-trial motions. See Pruitt V. Brock, 437 So.2d 768 (Fla. 1st DCA 1983). *See* generally Franklin v. Franklin, 573 So.2d 401 (Fla. 3d DCA 1991).

negligence where it fail d to assert it prior to judgment), cert. denied, 485 U.S. 992, 108 S.Ct. 1300, 99 L.Ed.2d 510 (1988); Federal Deposit Ins. Corp. v. Castle, 781 F.2d 1101 (5th Cir. 1986)(retroactive social security benefits subject to statutory limitation asserted for first time in Rule 60(b) motion): Meadows v. Cohen 409 F.2d *750*, 753 (5th Cir. 1969)(trial court properly amended judgment under Fed. R. Civ. P. 60(b) to statutorily limit disability benefit government had failed. to bring to trial judge's attention).

Finally, the court properly proceeded under 1.540 notwithstanding our affirmance of the earlier judgment, Ohio Casualty Group v. Parrish, 350 So.2d 466 (Fla. 1977); Avant v. Waites, 295 So.2d 362 (Fla. 1st DCA 1974),[12] and without obtaining this court's permission to do so. Ohio Casualty, 350 So.2d at 466.

Affirmed.[13]

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[12] We therefore deny Gordon's motion to enforce the prior mandate in the original appeal, *case* no. 89-2617.

[13] We certify to the Supreme Court that this case involves a question of great public importance as to the constitutionality of § 768.73(2)(b), Fla. Stat. (Supp. 1986).