IN THE SUPREME COURT OF FLORIDA

In the matter of Standard Jury Instructions (Civil),

Committee Report number 09-09

Punitive Damages

_____/

REPORT (NO. 09-09) OF THE SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

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To the Chief Justice and Justices of the Supreme Court of Florida:

The Committee on Standard Jury Instructions in Civil Cases recommends that this Court authorize for publication and use two new Florida Standard Jury Instructions for Punitive Damages, as set forth below and in Appendix A. This Report is filed pursuant to article V, section 2(a), of the Florida Constitution.

I. INTRODUCTION AND PROCEDURAL NOTE

The Committee has submitted simultaneously herewith a proposal for reorganization of the Standard Jury Instructions in Civil Cases, which includes a renumbering of the instructions. The "book reorganization" proposal was separately filed as this Committee's report number 09-01.

This report, number 09-09, proposes two new instructions for use in punitive damages cases. For ease of reference, this report uses the new proposed numbering system. Additionally, the appendix to report number 09-01 includes these proposed instructions as they would appear in the reorganized book if adopted by the Court.

The instructions proposed herein are stand-alone instructions that can be adopted prior to a ruling on the book reorganization. Should this Court elect to rule on this proposal first, the Committee would simply use its current numbering system for the new instructions.

II. PROPOSED INSTRUCTIONS

In its review of the overall instructions, the Committee noted that its current Punitive Damages instructions apply to various combinations of direct and vicarious punitive damages claims. However, the current instructions do not cover the situation where the plaintiff seeks punitive damages from an employer under a theory of vicarious liability, but the employee whose conduct is the basis for the claim is either not sued individually for punitive damages or is not a party to the action at all.

The Committee therefore proposes to amend the Punitive Damages instructions to include language covering those two scenarios, using the same language that has already been approved and in use for the other factual scenarios.

The Committee also notes that the instructions still include two sets of punitive damages instructions, one for causes of action arising prior to the October 1, 1999, statutory amendments, and one for causes of action arising after that date. The Committee believes that the pre-1999 instructions are rarely used anymore, and that the instructions as a whole can be simplified by moving the pre-1999 provisions into an appendix for reference as needed. In report 09-01 (the revised book), the pre-1999 instructions are located in Appendix C.

The Committee did not make, nor intend to make, any substantive changes to the punitive damages instructions.

III. DESCRIPTION OF APPENDICES

The following appendices are attached to this Report:

Appendix A:	Proposed Punitive Damages instructions
Appendix B:	May 1, 2008 Florida Bar News notice
Appendix C:	Comments received by the Committee in response
Appendix D:	Relevant excerpts from the Committee's minutes
Appendix E:	Committee materials on this topic

IV. DISSENTING VIEWS FROM THE COMMITTEE

There are no dissenting views from the Committee. The Committee unanimously recommends that the Court allow publication and use of these instructions.

V. COMMENTS RECEIVED

The proposed punitive damages instructions were published for comment, and two comments were received. The comments both relate to the existing punitive damages instructions instead of the proposed new instructions.

One comment suggested that the basic structure of the bifurcated instructions is incorrect. This comment requests a change to the existing instructions and is beyond the scope of this proposal. This comment has been referred to the Punitive Damages subcommittee for consideration.

The other comment objected to the use of the word "guilty" in these instructions. This comment also requests a change to the existing instructions and is beyond the scope of this proposal. This comment has likewise been referred to

the Punitive Damages subcommittee for consideration.

Having received no objection to the instructions proposed, the Committee now submits these additional Punitive Damages instructions to the Court.

VI. CONCLUSION

WHEREFORE, for the above reasons, the Committee respectfully requests that the Court approve the instructions set forth in Appendix A for publication and use as new standard jury instructions for civil cases.

Respectfully submitted,

Joseph H. Lang, Jr.
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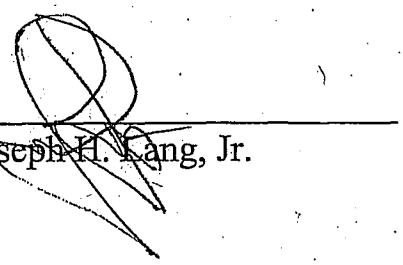
CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this report complies with the font standards set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

By: 

Joseph H. Lang, Jr.

TAB A

APPENDIX A

b(4). Vicarious liability for acts of employee where employee is not a party or is not being sued for punitive damages:

(Claimant) **claims that punitive damages should be awarded against** (defendant employer) **for** (employee/agent's) **conduct in** (describe the alleged punitive conduct)**. Punitive damages are warranted if you find by clear and convincing evidence that** (employee/agent) **was personally guilty of intentional misconduct or gross negligence, which was a substantial cause of [loss] [injury] [or] [damage] to** (claimant) **and that:**

(A) (defendant employer) **actively and knowingly participated in such conduct of** (employee/agent)**; or**

(B) the [officers] [directors] [or] [managers] of (defendant employer) **knowingly condoned, ratified, or consented to such conduct of** (employee/agent)**; or**

(C) (defendant employer) **engaged in conduct that constituted gross negligence and that contributed to the [loss] [damage] [or] [injury] to** (claimant)**.**

Under those circumstances you may, in your discretion, award punitive damages against (defendant employer)**. If clear and convincing evidence does not show such conduct by** (employee/agent)**, punitive damages are not warranted against** (defendant employer)**.**

["Intentional misconduct" means that (person whose conduct may warrant punitive damages) **had actual knowledge of the wrongfulness of the conduct and there was a high probability of injury or damage to** (claimant) **and, despite that knowledge, [he] [she] intentionally pursued that course of conduct, resulting in injury or damage. "Gross negligence" means that the conduct of** (person whose conduct may warrant punitive damages) **was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.]**

["Clear and convincing evidence" differs from the "greater weight of the evidence" in that it is more compelling and persuasive. As I have

already instructed you, "greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. To prove a claim by the greater weight of the evidence, the (claimant) **must convince you, by evidence presented in court, that what [he] [she] [it] is trying to prove is more likely true than not true. In contrast, "clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.]**

TAB B

Notices

Proposed civil jury instructions for medical malpractice insurer's bad faith failure to settle

The Supreme Court Committee on Standard Jury Instructions in Civil Cases proposes a new instruction 404.5 for a medical malpractice insurer's bad faith failure to settle. This instruction is proposed as part of the overall reorganization of the book. The new instruction is numbered in accordance with the reorganized book and shows where it would fit within the book. This instruction is based on section 766.1185(2), Florida Statutes. Comments are invited. Provide comments on this instruction separately from comments on other aspects of the book reorganization. After reviewing all comments, the committee may submit its proposal to the Florida Supreme Court. Send all comments concerning these proposed changes to Tracy Raffles Gunn, Committee Chair, Fowler White Boggs Banker, 501 East Kennedy Blvd. Suite 1700, Tampa 33602 or e-mail comments to her at tgunn@fowlerwhite.com or fax them to her at (813) 229-8313. Comments must be received by May 30 to ensure that they are considered by the committee.

404.5 MEDICAL MALPRACTICE INSURER'S BAD FAITH FAILURE TO SETTLE

In determining whether (Defendant) acted in bad faith, you shall consider the following factors or circumstances;

[(Defendant's) willingness to negotiate with (Claimant) in anticipation of settlement],

[the propriety of (Defendant's) methods of investigating and evaluating the claim of (Claimant)],

[whether (Defendant) timely informed (Insured) of an offer to settle within the limits of coverage, the right to retain personal counsel, and the risk of litigation],

[whether (Insured) denied liability or requested that the case be defended after (Defendant) fully advised (Insured) as to the facts and risks],

[whether (Claimant) imposed any condition, other than the tender of the policy limits, on the settlement of the claim],

[whether (Claimant) provided relevant information to (Defendant) on a timely basis],

[whether and when other defendants in the case settled or were dismissed from the case],

[whether there were multiple claimants seeking, in the aggregate, compensation in excess of policy limits from (Insured) or from (Defendant)],

[whether (Insured) misrepresented material facts to (Defendant) or made material omissions of fact to (Defendant)],

[and (list such additional factors as the court may determine to be relevant)].

Jury instructions for intentional torts as an exception to the exclusive remedy of workers' compensation

The Supreme Court Committee on Standard Jury Instructions in Civil Cases proposes new instructions for intentional torts as an exception to the exclusive remedy of workers' compensation. Instruction 414.5 is based on section 440.11, Florida Statutes. These instructions are proposed as part of the overall reorganization of the book and they follow the format used in the proposed reorganized book (see Notice published on April 15). The table of contents for this section appears below to illustrate how this instruction fits into the new proposed format. Comments are invited. Provide comments on instruction 414.5 separately from comments on other aspects of the proposed book reorganization. After reviewing all comments, the committee may submit its proposal to the Supreme Court. Send all comments concerning these proposed changes to Tracy Raffles Gunn, Committee Chair, Fowler White Boggs Banker, 501 East Kennedy Blvd. Suite 1700, Tampa 33602 or e-mail comments to tgunn@fowlerwhite.com or fax them to her at (813) 229-8313. Comments must be received by May 30 to ensure that they are considered by the committee.

414 INTENTIONAL TORT AS AN EXCEPTION TO EXCLUSIVE REMEDY OF WORKERS' COMPENSATION
- 414.1 Introduction
- 414.2 Summary of Claims
- 414.3 Clear and Convincing Evidence
- 414.4 Legal Cause
- 414.5 Issues on Claim
- 414.6 Burden of Proof

414.5 ISSUES ON CLAIM

The issues you must decide on (Claimant's) claim against (Defendant) are whether:

1. (Defendant) deliberately intended to injure (Claimant), or
2. whether (Defendant)

(a) engaged in conduct that (Defendant) knew, based upon [prior similar accidents] [or] [explicit warnings specifically identifying a known danger], was virtually certain to result in death or injury to (Claimant); and

(b) (Claimant) was not aware of the risk because the danger was not apparent; and

(c) (Defendant) deliberately concealed or misrepresented the danger so as to prevent (Claimant) from exercising an informed judgment;

and, if so, whether that conduct was a legal cause of [loss] [injury] [or] [damage] to (Claimant).

Proposed changes and reorganization of civil jury instructions for cases for professional negligence

The Supreme Court Committee on Standard Jury Instructions in Civil Cases proposes changes and reorganization of the jury instructions for civil cases for professional negligence. As part of the overall reorganization of jury instructions for civil cases, the committee has grouped together all professional negligence instructions in a single section, numbered 402. These reorganized instructions follow the same format as is used in the new reorganized book (see Notice published on April 15), so that the jury is first informed of the basic definitions that they must apply, followed by the issues that they must decide. In addition, some of the professional negligence instructions have been substantially rewritten and new provisions have been added to reflect new statutory and/or case law. Finally, as with the rest of the reorganized book, the Committee also has substituted "plain English" language wherever possible without altering the substantive meaning of the instructions. The table of contents for the new, reorganized professional negligence instructions appears below. Due to size limitations, the instructions themselves are not included in this publication but are available to be viewed at www.floridabar.org by clicking on Publications, then click The Florida Bar CLE Publications. Comments are invited. After reviewing all comments, the committee may submit its proposal to the Florida Supreme Court. Please provide comments on these changes separately from comments on other aspects of the book reorganization. Send all comments to Tracy Raffles Gunn, Committee Chair, Fowler White Boggs Banker PA, 501 East Kennedy Blvd. Suite 1700, Tampa 33602 or e-mail comments to her at tgunn@fowlerwhite.com or fax them to (813) 229-8313. Comments must be received by May 30 to ensure that they are considered by the committee.

402 Professional Negligence
- 402.1 Introduction
- 402.2 Summary of Claims
- 402.3 Greater Weight of the Evidence
- 402.4 Medical Negligence
- 402.5 Other Professional Negligence
- 402.6 Legal Cause
- 402.7 Legal Cause (Treatment Without Informed Consent)
- 402.8 Preemptive Charges
- 402.9 Preliminary Issues - Vicarious Liability
- 402.10 Burden of Proof on Preliminary Issues
- 402.11 Issues on Main Claim
- 402.12 Issues on Claim of Attorney Malpractice Arising Out of Civil Litigation
- 402.13 Burden of Proof on Main Claim
- 402.14 Defense Issues
- 402.15 Burden of Proof on Defense Issues
- 402.16 Emergency Medical Treatment Claims

Proposed amendments to jury instructions for punitive damages cases

The Supreme Court Committee on Standard Jury Instructions in Civil Cases proposes changes and reorganization of the jury instructions for civil cases for punitive damages.

As part of the overall reorganization of jury instructions for civil cases, the Committee has reorganized the punitive damage instructions. New material has been added in the form of transitional language and "plain English" terms. These charges are not intended to alter the substantive meaning of the instructions but only to make them more understandable. In addition, the proposed instructions clarify the distinction between a claim of direct liability as opposed to vicarious liability against an employer. A new section has been added to address the factual scenario where punitive damages are being sought against an employer for the acts of its employee who is either not a party or is not being sued for punitive damages.

The instructions for causes of action arising prior to October 1, 1999 have been moved to a new Appendix C.

These proposed instructions are part of the overall reorganization of the civil jury instructions and are numbered in accordance with the reorganized book to show where it would fit within the book.

Due to size limitations, the instructions are not included in this publication but are available to be viewed at www.FloridaBar.org by clicking on *Publications*, then click *The Florida Bar CLE Publications*. Comments are invited. After reviewing all comments, the committee may submit its proposal to the Florida Supreme Court. Provide comments on these changes separately from comments on other aspects of the book reorganization.

Send all comments to Tracy Raffles Gunn, Committee Chair, Fowler White Boggs Banker, 501 East Kennedy Blvd. Suite 1700, Tampa 33602 or e-mail your comments to her at tgunn@fowlerwhite.com or fax them to her at (813) 229-8313. Comments must be received by May 30 to ensure that they are considered by the committee.

TAB C

From: Billblews@aol.com [mailto:Billblews@aol.com]
Sent: Monday, May 12, 2008 6:30 PM
To: Gunn, Tracy
Subject: Proposed Punitive Damages Instruction

Tracy,

I would like to comment on the proposed punitive damages jury instruction 503.1(1) and 503.1(3) which are to be used in bifurcated punitive damages procedure cases.

In bifurcated trials for punitive damages, the egregiousness of the offensive conduct is fully litigated in the first stage of the trial. The defendant's wealth is not admissible during the first stage so as not to prejudice the defendant. The financial resources of the defendant do not become relevant until the second stage of the trial after plaintiff's entitlement to punitive damages is established. In cases involving the bifurcated claim for punitive damages, the jury is to consider this claim in two parts. In the first part, the jury is to determine whether punitive damages are warranted. If the jury finds they are warranted, the amount of punitive damages is to be determined in the second part after the jury has recieved evidence as the finances of the defendant. The proposed instructions are in error and confusing in that they instruct the jury to determine whether punitive damages are "warranted" by clear and convincing evidence in the first part and also to again determine if they should be "assessed" under a lesser standard of greater weight during the second part. The proposed instructions do not conform with F.S. 768.725 dealing with the burden of proof for an award of punitive damages.

Please permit me to illustrate. The second paragraph of 503.1(1)provides:

> The trial of the punitive damages issue is divided into two parts. In the first part you will decide whether the conduct of (...) is such that punitive damages are warranted. If you decide that punitive damages are warranted, we will proceed to the second part of that issue during which the parties may present additional evidence and argument on the issue of punitive damages. I will then give you additional instructions, after which you will decide whether, in you discretion, punitive damages will be assessed and, if so, the amount.

This instruction further provides that for punitive damages to be "warranted" the proof must be by "clear and convincing evidence". If the jury finds in the first stage under a "clear and convincing" standard that punitive damages are warranted, that should settle the issue of entitlement to punitive damages. However, the proposed instruction 503.3(3)(a) then provides for a "second bite" on this issue by changing the word "warranted" to the word "assessed" and dropping down from a "clear and convincing" standard to a standard of "greater weight " of the evidence. This makes no sense at all. It is not only confusing, but is not a correct statement of law under F.S. 768.725. Proposed 503.3(3) would instruct the jury:

> Members of the jury, I am now going to tell you about the rules of law that apply to determining whether punitive damages should be assessed and, if so, in what amount.

The instruction then goes on to provide that disputed factual issues are to be decided by the "greater weight" of the evidence.

The proposed instructions should be changed so that issue of assessment, applicability or entitlement to punitive damages should be decided under a clear and convincing standard once and for all in the first stage. If punitive damages apply, only the issue of the amount of damages based on defendant's financial resources should be the subject of the second stage instruction under a standard of greater weight. The Closing Punitive Damage Instruction in 503.3(3) should be changed so that the first sentence reads :

You must now decide the amount of punitive damages to be assessed as punishment against (...) and as a deterrent to others.

Additionally, the instruction in the last paragraph (You may in you discretion decline to assess punitive damages) should be deleted.

I am grateful for the fine job that you and your committee have done on this project. I appreciate this opportunity to share these comments with you and you committee members.

William F. Blews, Esquire
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FLORIDA JUSTICE ASSOCIATION
218 South Monroe St.
Tallahassee, FL 32301

May 30, 2008

Comments of Florida Justice Association on Proposed Revisions to Standard Jury Instructions

The Florida Justice Association, following review by an ad hoc committee of trial lawyers experienced in the field of trail practice and board certified appellate specialists, and approval by the FJA Executive Committee, comments as follows concerning the Proposed Revisions to Standard Jury Instructions.

Proposed Instruction 401.3—Greater Weight of the Evidence

The proposed instruction re-defining greater weight of the evidence should not be recommended for approval because it substantively changes the parties' burden of proof.

Proposed instruction 401.3, Greater Weight of the Evidence, is identical to the existing standard jury instruction on greater weight of the evidence, Florida Standard Jury Instruction (Civil) 3.9, except for the addition of this sentence:

> To prove a claim [or defense] by the greater weight of the evidence, the party must convince you, by the evidence presented in court, that what [he] [she] [it] is trying to prove is probably true.

This revision is a substantive change to the definition of greater weight of the evidence because it introduces a new element that is not present in the current instruction, specifically, a probability that the matter to be proven is true. FJA objects to this revision because it is a substantive change in the instruction that can lead to anomalous and unfair results.

The current instruction on greater weight of the evidence does not require the jury to determine whether the claim or defense to be proven is probably true. Instead, it asks the jury to determine whether the evidence favoring the claim or defense is more persuasive and convincing than the evidence opposing it. Current instruction 3.9 reads: "'Greater weight of the evidence' means the more persuasive and convincing force and effect of the entire evidence in the case." Thus, the current instruction directs the jury to perform a balancing test and decide which side's evidence is more persuasive and convincing than the evidence on the other side. It does not ask the jury to determine whether it believes the claim or defense to be proven is probably true.

This distinction will affect the outcome in cases in which the jury is not convinced that either party's case is probably true. After considering all the evidence, jury may decide that the truth is not quite what the plaintiff claims it to be and not quite what the defense claims it to be either. The jury may believe that the truth is

some third version of events that does not match what either party presented in court, or it may find that it simply cannot determine what happened with sufficient confidence to say that it is probably true. In that situation, however, the jury almost always be able to determine that the evidence favoring one side is more persuasive and convincing than the evidence favoring the other. Under the current instruction, that is all that is necessary.

If the party that has the burden of proof puts forth the more convincing case, then it would prevail under the current instruction, but it would not prevail under proposed rule 401.3 if the jury is not convinced that its claim or defense is probably true. This would lead to an anomalous result, because the party who put forth the most convincing case would lose, having failed to convince the jury that its claim or defense is probably true, and the party who put forth the least convincing case would win.

To state this hypothetical in terms of probability percentages, assume a jury decides there is a 45% probability that the plaintiff's version of events is true and a 35% likelihood that the defendant's version of events is true. If the plaintiff has the burden of proof, the plaintiff would prevail under the current instruction because the jury has found the plaintiff's case more convincing than the defendant's, but under the proposed new instruction, the defendant would prevail because the plaintiff has

not convinced the jury that there is a 50% or greater probability that the plaintiff's version is true. Under the proposed new instruction, the defendant would prevail even though its case was the least convincing and least persuasive.

The Second District Court of Appeal's discussion of the greater-weight-of-the-evidence standard in *In re Estate of Brackett, Wakefield v. Brackett*, 109 So. 2d 375 (Fla. 2d DCA 1959) supports the balancing approach embodied in the current instruction, instruction 3.9. The court wrote:

> Weight of the evidence" has been held to be equivalent to "preponderance of the evidence." It simply means that proof on one side of a cause outweighs the proof on the other side.
>
> As was stated in the case of *Waldron v. New York Cent. Ry. Co.*, 1922, 106 Ohio St. 371, 140 N.E. 161, 163, as follows:
>
> "The terms 'weight of evidence' and 'sufficient evidence' have long been regarded as synonymous terms and used interchangeably."
>
> "Weight of evidence" does not necessarily mean a greater number of witnesses, since quality of testimony and credibility must also be considered. *Bjorklund v. Continental Casualty Co.*, 1931, 161 Wash. 340, 297 P. 155, 160.
>
> "Weight of evidence" is not a question of mathematics but depends on its effect in inducing belief. *Chenery v. Russell*, 1933, 132 Me. 130, 167 A. 857, 858.
>
> The expression "weight of evidence" signifies that the proof on one side is greater than on the other, and in any proceedings before a trial judge, probative value of the testimony of each witness, and not the quantity or amount of evidence, determines its weight.

109 So. 2d 378.

Proposed instruction 401.3 confusingly narrows the gap between the greater weight of the evidence standard and the "clear and convincing evidence" standard. To satisfy the greater weight of the evidence standard under 401.3, the party bearing the burden of proof "must convince" the jury to believe the fact in question. Reasonable jurors may find that standard to be indistinguishable from the standard for clear and convincing evidence that the proof "produces a firm belief or conviction without hesitation about the matter in issue." The "must convince" standard is too high.

For these reasons, we object to the second sentence in proposed instruction 401.3, which adds a new element to the definition of greater weight of the evidence requiring the jury to determine if the claim or defense is probably true. We request that this sentence be deleted, recognizing that this would leave the current instruction unchanged.

Therefore, the instruction should not be recommended for approval by the Supreme Court of Florida.

Proposed Instruction 402.4c—Professional Negligence

The Florida Justice Association submits that the proposed instruction 402.4c.

should be modified because the proposed instruction inaccurately reflects Florida law concerning the effect of the discovery of the presence of a foreign object in a person's body.

Florida Statute section 766.102(3) establishes that "the discovery of the presence of a foreign body, such as sponge, clamp, forceps, surgical needle, or other paraphernalia commonly used in surgical, examination, or diagnostic procedures shall be *prima facie* evidence of negligence on the part of the healthcare provider." Proposed instruction 402.4c. omits any reference—either expressly or by definition—of the concept of "*prima facie*." Instead, that instruction states: "The presence of an object in (claimant's) body, such as a (name of foreign body) is evidence of negligence on the part of (defendant) and may be considered by you, together with the other facts and circumstances, in determining whether such person was negligent." The omission from the instruction of any reference to the concept of "*prima facie*" mischaracterizes the legal effect of the discovery of a foreign object because that omission conceals from the jury the fact that discovery of the foreign object is, in and of itself, sufficient evidence of negligence to support a verdict in favor of the claimant.

The definition of "*prima facie*" employed by the Florida Supreme Court means "evidence sufficient to establish a fact unless and until rebutted." *State v. Kahler*, 232

So. 2d 166, 168 (Fla. 1970). *Accord, e.g., Castleman v. Office of Comptroller*, 538 So. 2d 1365 (Fla. 1st DCA 1989). Proposed instruction 402.4(c) is legally insufficient for failing to instruct the jurors that the presence of a foreign object in the claimant's body is evidence sufficient to establish the fact of medical malpractice, unless and until rebutted by the Defendant. Therefore, the instruction should not be recommended for approval by the Supreme Court of Florida.

Proposed Instruction 402.4d—Professional Negligence

Proposed instruction 402.4d. should not be recommended for approval because it mistakenly states the legal effect of the failure of a defendant to maintain required records. The Florida Supreme Court, in *Public Health Trust v. Valcin*, 507 So. 2d 596 (Fla. 1987), held that the effect of a malpractice defendant's failure to maintain required records that works to the prejudice of the claimant created a "rebuttable presumption . . . [which] shifts the burden of proof, insuring that the issue of negligence goes to the jury." *Id.* at 600-01. The instruction proposed by the committee mistakenly provides only that the jury "may infer that the missing evidence contain proof of negligence," not that a presumption is created by which the burden of disproving negligence is shifted to the defendant.

Therefore, the instruction should not be recommended for approval by the Supreme Court of Florida.

Proposed Instruction 404.5—Medical Malpractice Insurer's Bad Faith

[Comment to be provided separately]

Proposed Instruction 411.4a. and 414.4a.—Legal Cause

The Florida Justice Association comments as follows concerning the proposed instructions defining "legal cause" in cases involving claims of civil theft and claims by employees against employers possibly subject to the exception to Workers' Compensation immunity.

Proposed instructions 411.4a. and 414.4a., apparently mistakenly, refer to actions being a cause of "severe emotional distress." Such severe emotional distress is not likely to be a consequence of civil theft, and is not necessarily an element of a tort claim against an employer. Apparently the language was imported from the definition of legal cause in cases involving extreme outrageous conduct (Instruction 410.6a.) and was not appropriately modified. Therefore, these two instructions should be corrected before being submitted to the Florida Supreme Court for approval.

Proposed Instruction 414.5—Workers' Compensation Immunity Exception

The Florida Justice Association submits that proposed instruction 414.5should be recommended for adoption and approval by the Supreme Court of Florida, because the proposed instruction accurately reflects Florida law concerning the matter in question in a clear and understandable form.

Proposed Instruction 503.1—Punitive Damages

The Florida Justice Association submits that proposed instruction 503.1, dealing with punitive damages, should be revised before being recommended for adoption and approval by the Supreme Court of Florida so as to substitute another term for the term "guilty," where the instruction states that, "[p]unitive damages are warranted against (defendant) if you find that clear and convincing evidence that (defendant) was guilty of intentional misconduct or gross negligence." Similarly, the Committee should substitute different language for the term "personally guilty" contained in all of the subparagraphs (2) (b), (c), and (d).

The FJA states that the term "guilty" is extremely misleading because it connotes a level of culpability equal to that which would support a criminal conviction. Jurors will invariably confuse the "clear and convincing" standard of proof applicable to punitive damages with the "beyond a reasonable doubt" standard necessary for a "guilty" verdict in a criminal case.

The FJA acknowledges that the term "guilty" has been used in standard instruction PD 1 previously approved by the Court. However, because the Supreme Court's committee is recommending revisions to instructions including the punitive damages instruction, instruction 503.1 should be revised to use less confusing terminology. Therefore, the instruction should not be recommended for approval by

the Supreme Court of Florida.

Respectfully submitted,

By:_____
FRANK M. PETOSA, President

TAB D

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
The Breakers
Palm Beach

July 8-9, 2004
Thursday, July 8, 2004 (Full Committee Meeting, 1:10 p.m. to 5:15 p.m.)
Friday, July 9, 2004 (Joint Committee Meeting with Criminal Instructions Committee, 8:30 a.m. to 11:25 a.m.)

a. **CONCLUSION.** At the next meeting, the committee will address punitive damages, plain English amendments to instructions 2.1 and 2.2, the Gross v. Lyons instruction and the collateral source instruction. Altenbernd asked the PIP subcommittee to work further on the instruction next week so that it can be published. The committee will also publish the new 7.0 instruction. Altenbernd will check with Rose regarding whether there is a specific spot on the Supreme Court's website where the committee's proposed revisions are published. Altenbernd adjourned the meeting at 11:25 A.M.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
Amelia Island Plantation
Amelia Island

October 21-22, 2004
October 21, 2004 (1:00 p.m. to 5:00 p.m.)
October 22, 2004 (8:30 a.m. to noon)

B) **Subcommittee Assignments.** Altenbernd revised the subcommittee assignments as follows:
Punitive Damages: Altenbernd added Brown and Griffin to the subcommittee. Walsh and Gerald will no longer be committee members.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
The Breakers
West Palm Beach, Florida

July 14-15, 2005
July 14, 2005 (1:00 p.m. to 5:00 p.m.)
July 15, 2005 (8:30 a.m. to noon)

PUNITIVE DAMAGES (Tab 7). **Gunn directed the punitive damages subcommittee to continue working on vicarious liability issues.**

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
Stetson Law School
Tampa, Florida

February 23-24, 2006
February 23, 2006 (1:00 p.m. to 5:00 p.m.)
February 24, 2006 (8:30 a.m. to noon)

5. ERRORS AND OMISSIONS (Tab 2):

****

Gunn reviewed the punitive damages instructions and referred several issues to the punitive damages subcommittee. Currently, the punitive damages section begins with a notice that the instructions are not applicable to nursing home and

drunk driving cases. The punitive damages subcommittee will consider whether these warnings should be incorporated into notes on use. Artigliere recently had a case where neither party realized that the standard punitive damages are not applicable in nursing home cases.

The notice at the beginning of the punitive damages section also states that the committee is considering revisions in light of State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003). The punitive damages subcommittee will consider whether to remove or revise this language.

The punitive damages subcommittee will also consider how to reformat the instruction on direct and vicarious liability for corporate defendants so that the instructions are internally complete.

****

Makar directed the punitive damages subcommittee to consider two issues regarding the notice concerning use on the first page of the punitive damages section: (1) whether the warning that the punitive damages instructions do not apply in nursing home and drunk driving cases should be moved to notes on use following the instructions; and (2) whether to remove or revise the statement that the committee is considering revisions in light of State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003). The punitive damages subcommittee will also reformat the instruction on vicarious and direct liability in the corporate context.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES

The Breakers
West Palm Beach, Florida

July 13-14, 2006
July 13, 2006 (1:00 p.m. to 5:00 p.m.)
July 14, 2006 (8:30 a.m. to noon)

G. Hot topics:

i. Engle v. Liggett Group, Inc., 31 Fla. L. Weekly S464 (Fla. July 6, 2006): Lang explained that the subcommittee has not formally considered this opinion, which issued last week. Lang feels that it does not directly effect any instructions, but it may need to be added as a citation to a note on use in the punitive damages instructions. **The punitive damages subcommittee will consider this decision.**

****

11.MODEL CHARGE AND VERDICT FORM (Tab 14)

****

There are also no model charges on punitive damages.

12.PUNITIVE DAMAGES (Tab 7)

Gunn reported that the subcommittee recommends amending the notice concerning use on the first page of the punitive damages section to delete the statement that the committee is considering revisions in light of State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003).

The subcommittee also reviewed whether intoxication instructions are needed. The subcommittee feels instructions are not needed and the warning in the notice concerning use on the first page of the punitive damages section appropriately flags the issue.

Gunn explained that the subcommittee is also reformatting the instructions on vicarious liability in the corporate context. The subcommittee is creating a separate instruction by cutting and pasting the existing instructions. The subcommittee plans to circulate a draft before the November meeting. Gunn would like to publish the instruction before the November meeting.

The subcommittee is also considering an unresolved issue in the law regarding the instructions on a corporation's direct liability for punitive damages. It is unclear what type of employee's acts can be considered the acts of the corporation. The subcommittee recommends flagging the issue for the public.

The subcommittee is also considering revising the vicarious liability instructions for cases applying pre-1999 law. Although Mercury Motors Express v. Smith, 393 So. 2d 545 (Fla. 1981), holds that there has to be "some fault" on the part of the corporation, the instructions state that there has to be "negligence."

The notice concerning use on the first page of the punitive damages section will be amended to delete the statement that the committee is considering revisions in light of State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003). The subcommittee will reformat the instruction on vicarious and direct liability in the corporate context and e-mail it to the committee.

SUPREME COURT COMMITTEE ON

STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
Supreme Court Building
Tallahassee, Florida

November 2-3, 2006
Thursday, November 2, 2006 (1:00 p.m. to 5:00 p.m.)
Friday, November 3, 2006 (8:30 a.m. to noon)

I. Hot topics (pages 1(F)-1 to 1(F)-50):

****

3. In re Standard Instructions in Criminal Cases, 939 So. 2d 1052 (Fla. 2006): In this opinion, the Court adopted the criminal committee's proposed instruction on the insanity defense. In the definition of clear and convincing evidence, the court deleted the word "conviction" to avoid confusion with the "beyond a reasonable doubt" standard necessary to convict of a crime. Id. at 1053 n.2. The subcommittee asks whether a similar revision should be made to the definition of clear and convincing evidence in the punitive damages instruction. Farmer observed that if he were rewriting this instruction, he would not use the word "belief." Makar tabled further consideration of this issue.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
Tampa, Florida

DATES
Thursday, February 15, 2007 (1:00 p.m. to 5:00 p.m.)
Friday, February 16, 2007 (8:30 a.m. to noon)

15. PUNITIVE DAMAGES (Tab. 7):

Gunn stated that the punitive damages subcommittee was asked to work on four projects. The **second** project was to address whether the use of the term "negligence" in the pre-1999 instructions--specifically instructions 1(a)(4)(a) and 2(c)(1)--is proper. Gunn noted that the subcommittee determined that the terms "some fault" and "negligence" are used interchangeably, and if the committee started using the term "some fault," that term would have to be defined. The subcommittee decided to leave in the term "negligence," but to add the note on use found on page 7-650 that cites to Mercury Motors Express v. Smith, 393 So. 2d 545, 549 (Fla. 1981). The note on use further states that, pending further developments in the law, the committee takes no position on whether these terms are interchangeable.

In the **third project**, the subcommittee was asked to address whose fault or negligence is at issue in pre-1999 cases. The subcommittee decided to rewrite Note2 to PD1 and Note 1 to PD2. These modifications can be found in the materials on pages 7-650 through 7-652.

In the **first project**, the subcommittee was asked to create an instruction to address a vicarious liability situation where a company is being sued for punitive damages, but the individual actor who caused the damage is not subject to the punitive damages claim. Gunn noted that there are six factual scenarios on page 7-647 that need to be addressed with the new instruction. Scenarios one, two, and three are covered by the current instructions. Scenarios four and five are not. Scenario six is probably covered by the notes.

Gunn noted that to address scenarios four and five, the subcommittee proposed a new instruction found in the materials on pages 7-648 through 7-649. The subcommittee tried to follow the format of the current instructions.

Gunn stated that there are two issues for the committee to address regarding this instruction: (1), Whether the instruction is acceptable in its current format, and (2) Whether the committee wants a plain-English rewrite of the instructions.

The committee read the instructions. Farmer noted that the formatting and punctuation may contain errors. Barton noted that the word "was" needs to be moved in the second paragraph to correct that portion of the instruction to read:

Punitive damages are warranted against (defendant employer/principal) if you find by clear and convincing evidence that (name employee's/agent's) conduct causing [loss] [injury] [or [damage]

(1) was so gross and flagrant as to show a reckless disregard of human life or the safety of persons exposed to the effects of such conduct; or
(2) showed such an entire lack of care that the (name employee/agent) must have been consciously indifferent to the consequences; or
(3) showed such an entire lack of care that the (name employee/agent) must have wantonly or recklessly disregarded the safety and welfare of the public; or
(4) showed such reckless; indifference to the rights of others to be equivalent to an intentional violation of those rights.

Farmer disliked the term "warranted" and suggested instead saying that the "jury may impose" or "may award"—"You may in your discretion award punitive damages."

Wells suggested using the plain English phrase of "It is up to you if you want to give these damages."

With respect to a plain English re-write, Stewart suggested the subcommittee look at the instruction first and any relevant cases to determine if a plain English version is even possible.

Farmer seconded that suggestion and Caldwell and Stewart agreed that the subcommittee needs to first go back and rework the instructions before they can be published.

Gunn stated that she thinks the subcommittee can revise all the punitive damages instructions using plain English by the July meeting.

Finally, Caldwell suggested that the note on use may need to refer to the 1999 statute and changes. Farmer urged the subcommittee to put this information in the headline. Gunn stated that the subcommittee will wait to fix the note on use until the rewrites are finished, but acknowledged that the existing note on use is a little confusing. Gunn suggested the committee add a subpart to the note directing users to the proper part depending on whether their cause of action is pre-1999.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
[The Omni Hotel]
Jacksonville, Florida

[DATES]
October 25, 2007 (1:00 p.m. to 5:00 p.m.)
October 26, 2007 (8:30 a.m. to noon)

3. **PUNITIVE DAMAGES)** (Tab 7): Gunn explained that the recent opinion from the United States Supreme Court, Philip Morris USA v. Williams, 549 U.S.___, 127 S.Ct.1057 (2007), which held that while harm to others may be considered with respect to reprehensibility, a defendant may not be punished for harm to others, strongly emphasizes the need for adequate jury instructions. Gunn explained that the punitive damages subcommittee is in agreement that an instruction communicating the holding in Williams is needed, but that the subcommittee has not yet reached consensus on what that instruction should look like. **Gunn stated that the subcommittee will have a draft Williams instruction for the February meeting. She also asked that anyone interested in joining the punitive damages subcommittee please contact her. Caldwell and Edwards volunteered to join the punitive damages subcommittee.**

Separately, the punitive damages subcommittee asked the Committee to authorize it to amend the "Notice Concerning Use of Punitive Damages Charges" found at the introduction to the punitive damages instructions. **Makar authorized the punitive damages subcommittee to update the notice concerning use.**

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
[July 10-11, 2008]
The Breakers, West Palm Beach, Florida

July 10, 2008 (12:00 p.m. to 5:00 p.m.)
July 11, 2008 (8:00 a.m. to 1:00 p.m.)

2. REORGANIZATION OF BOOK (Tab 11):
Gunn reminded the committee that the supreme court has requested substantive changes not be included with the reorganized book submission.

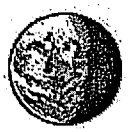
The committee received 21 comments on the various notices that were published on January 1, 2008, March 1, 2008, and April 15, 2008. Stewart walked the committee through the comments and the book reorganization subcommittee's recommended action.

****

Comments Concerning Punitive Damages:

- One comment suggested that the structure of the bifurcated punitive damages instructions should be changed. **The book reorganization subcommittee concluded this comment was beyond the scope of book reorganization and recommended referring this comment to the punitive damages subcommittee for future consideration. The committee agreed.**
- Another comment objected to the use of the word "guilty." The subcommittee recommended either substituting the word "committed" for "was guilty" or to refer this comment to the punitive damages subcommittee for future consideration. **The committee decided to refer the comment to the punitive damages subcommittee for further consideration.**

TAB E



"Lumish, Wendy F." <WLumish@CarltonFields.com>
02/08/2006 02:17 PM

To "Gunn, Tracy" <tgunn@fowlerwhite.com>, "Larry Stewart" <lsstewart@stfblaw.com>, "Gerry Rose" <grose@flabar.org>, "Daniel Mitchell"
cc "Gerry Rose" <grose@flabar.org>, "Scott Makar" <smakar@coj.net>
bcc
Subject RE: Current assignments and conf call

As referenced in the memo from Tracy below, it appears that our instructions on vicarious and direct liability of a corporation might be clearer if we provide the instruction for use in these situations instead of the current version where we just have a note on use which attempts to describe the way in which the instruction should be modified. One of my concerns has been that the instructions require significant modifications to the point that a trial judge may be uncomfortable because it is no longer the standard. Some of the issues that arise include:
1. PD2a talks about the punitive conduct but in the context of vicarious liability it doesn't explain that it is the punitive conduct of the (possibly) unnamed employee as opposed to the corporation listed in the first sentence of that instruction.

2. the notes on use indicate that if the person whose conduct may warrant punitive damages is not a defendant (e.g. an employee), then it instructs to start with PD2b but PD 2b doesn't make sense without PD 2a first explaining what the conduct is that can warrant punitive damages.

The following is a draft for discussion purposes which would be used in a case involving vicarious liability prior to Oct 1, 1999 where the corporation is the defendant. Should we decide to go forward, we would then have to create instructions for each of the different scenarios.

Plaintiff's claim for punitive damages is based on the conduct of [name employee [s]]. In order to find [defendant corporation] liable for punitive damages based on the conduct of [this] [these] employee[s], you must make two determinations. First, you must determine, by clear and convincing evidence, whether the employee[s] acted in a manner sufficient to warrant punitive damages. Second, you must determine whether [defendant corporation] was negligent separate and apart from the conduct of its employee[s].

On the first issue, punitive damages are warranted if you find by clear and convincing evidence that the employee[s]engaged in conduct which caused injury to claimant and that such conduct either:

(1) was so flagrant as to show a reckless disregard for human life or for the safety of persons exposed to the effects of such conduct; or
(2) showed such an entire lack of care that they must have been consciously indifferent to the consequences; or
(3) showed such an entire lack of care that they must have wantonly or recklessly disregarded the safety and welfare of the public; or
(4) showed such reckless indifference to the rights of others as to be equivalent to an intentional violation of those rights.

"Clear and convincing evidence" differs from the "greater weight of the evidence" in that it is more compelling and persuasive evidence. "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. In contrast, "clear

and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

If you find that [name employee[s]]acted in such a manner as to warrant punitive damages, then the second issue you must determine by clear and convincing evidence is whether there was negligence on the part of [defendant corporation] separate and apart from the conduct of the employee[s]and, if so, whether such negligence contributed to the claimant's injury. If clear and convincing evidence does not show such negligence independent of the conduct of the employee[s] , then punitive damages are not warranted against [defendant corporation]. The instructions regarding negligence and legal cause which I gave you for Plaintiff's negligence claim apply to your determination of whether [defendant corporation] was negligent, separate and apart from the acts of the [employee[s].

Tracy raised a second issue, (4) below, concerning whose conduct is considered to be the action of the corporation. Does the corporations independent negligence have to be negligence by a managing level/principal of the company or is any independent negligence sufficient. In the instruction above, I highlighted the particular language that requires some clarification. There are several cases on this but I am not sure there is a clear answer.

In Schropp v. Crown Eurocars 654 So.2d 1158 (Fla. 1995), the court indicated that for vicarious liability, plaintiff must establish some fault on the part of the corporate employer, but it did not elaborate on "corporate employer". In Partington v. Metallic Engineering 792 So.2d 498 (Fla. 4th DCA 2001), the court citing Schropp, held that there is no requirement that the independent negligent conduct by the corporation be attributed to a managing agent. I am unaware of any other cases addressing this precise point.

It seems to me that we might need a note on use or flag to indicate that pending further development, we are not commenting on how defendant corporation should be defined.

Wendy F. Lumish
Carlton Fields, P.A.
4000 Bank of America Tower
100 SE Second St.
Miami, FL 33131
(305) 539-7266 or (305) 530-0050
Fax: (305) 530-0055
http://www.carltonfields.com
email: wlumish@carltonfields.com

From: Gunn, Tracy [mailto:tgunn@fowlerwhite.com]
Sent: Wednesday, January 25, 2006 11:46 AM
To: Lumish, Wendy F.; Larry Stewart; Gerry Rose; Daniel Mitchell; LCBROWN@co.palm-beach.fl.us; griffinj@flcourts.org

Cc: Gerry Rose; Scott Makar
Subject: FW: Current assignments and conf call

Dear PD subcommittee:

I am forwarding a copy of the E&O Committee memo re issues to be addressed in the PD section of the book. Wendy is working on a proposed "fix" for item (3) below. I will follow up on items (1) and (2) with Gerry.

If anyone has any input regarding the below listed issues, or anything else that PD needs to be working on, please advise. We will have a PD conference call and/or further discussion once Wendy has her first draft ready to circulate.

Thanks,
Tracy

Tracy Raffles Gunn
Board Certified Appellate Attorney
Shareholder, Fowler White Boggs Banker P.A.
501 East Kennedy Boulevard Suite 1700
Tampa, Florida 33602
(813) 228-7411
fax (813) 229-8313

From: Ralph Artigliere [mailto:RArtigliere@Jud10.FLCourts.org]
Sent: Monday, January 23, 2006 1:54 PM
To: Gunn, Tracy
Subject: RE: Current assignments and conf call

Thanks. Talk to you on Weds.
Ralph

> -----Original Message-----
> **From:** Gunn, Tracy [mailto:tgunn@fowlerwhite.com]
> **Sent:** Monday, January 23, 2006 11:53 AM
> **To:** Ralph Artigliere; reajr@raobertaustinlaw.com; jlang@carltonfields.com; fstrelec@williamsparker.com; James Underwood (E-mail)
> **Cc:** grose@flabar.org; smakar@coj.gov
> **Subject:** RE: Current assignments and conf call
>
> **********
> Your mail has been scanned by InterScan.
> **********_**********
>
> Dear Ralph:
>
> I have reviewed PD for Errors and Omissions, and I believe there are several issues that need work:
>
> (1) we need to determine the status of the Committee's work on Campbell v. State Farm and update the "notice" at the beginning of this section accordingly
> (2) PD should reconsider instructions for use in intoxication cases. There is no current "error" in

the book, and we have noted the omission of these instructions, so this is not pressing. We need to review the prior minutes to confirm whether we decided that there was not much need for these, or whether PD should get back to work on it.

(3) The instructions as to direct and vicarious corporate punitives (PD1 (a)(3) and (4) and PD2 b. and c.) are confusing, mostly because they try to incorporate the "general" PD instruction (PD1 (a)(2) and PD2 a.), but do not explain how to use the elements from the general instruction. I think we sacrified clarity for brevity here. We need to repeat the elements from the general instruction within the direct and vicarious instructions, with some introduction regarding which elements apply to the individual employee's conduct, and which to the corporation. Wendy and I have already discussed this and she has a working draft. The goal is to make the direct and vicarious instructions internally complete so people do not have to cut and paste from the other sections.

(4) Additionally, there is a substantive question regarding whose conduct can be considered the acts of the corporation - for some catgories of punitive damages, the potential actors are defined (managing agents, officers, directors) and for others they are not. The law may be unsettled enough to prevent a fix, but this issue may warrant a "flag" along the lines of "pending further developments."

(5) I believe we still need the pre-1999 instructions.

As chair of the PD subcommittee, I will volunteer that PD should take care of these issues. Please let me know if you think that any of them are more properly handled within the E&O subcommittee.

Thanks,
Tracy

Tracy Raffles Gunn
Board Certified Appellate Attorney
Shareholder, Fowler White Boggs Banker PA
Tampa, Florida
(813) 228-7411

"Gunn, Tracy"
<tgunn@fowlerwhite.com>
07/03/2006 09:10 AM

To "Larry Stewart" <lsstewart@stfblaw.com>, "Lumish, Wendy F." <WLumish@CarltonFields.com>, "Gerry Rose" <grose@flabar.org>, "Daniel Mitchell"
cc "Gerry Rose" <grose@flabar.org>, "Scott Makar" <smakar@coj.net>
bcc
Subject RE: PD Instructions

Larry, if you can get me your response next week that will greatly help us move this along. Keep in mind that we have separate instructions for pre- and post-1999 cases, so the impact of Mercury Motors may be limited.

Please note that the issue on #4 below is really a pure formatting problem -- the format of the instructions is unworkable for corporate punitive cases (direct and vicarious) because it does not cut and paste easily into the other instructions. We should be able to fix this formatting problem without changing any language of the existing, approved instructions, and without re-debating any substantive issues. Try to look at it that way and see what you can propose.

The "whose conduct counts as acts of the corporation" issue (#3 below) is substantive. I have researched it and I currently believe that this is not sufficiently settled in the law for us to instruct on it, but that it's a question that comes up and we should flag it for people so they know that it's an issue and can argue it. If anyone comes up with research on this point, we can review it and decide whether we can address it substantively.

Tracy Raffles Gunn
Board Certified Appellate Attorney
Shareholder, Fowler White Boggs Banker PA
Tampa, Florida
(813) 228-7411

From: Larry Stewart [mailto:lsstewart@stfblaw.com]
Sent: Sat 7/1/2006 9:43 AM
To: Gunn, Tracy; Lumish, Wendy F.; Gerry Rose; Daniel Mitchell; LCBROWN@co.palm-beach.fl.us; griffinj@flcourts.org
Cc: Gerry Rose; Scott Makar
Subject: RE: PD Instructions

Tracy: I agree with you on points 1 and 2. I want, however, to give some more thought to the proposed changes for vicarious corporate liability for punitive damages before agreeing to submit it to the full committee. For example, there could be and often is a claim for punitive damages against both an individual as well as a vicarious claim against a corporate defendant, which should be accommodated in the language. Secondly, I think Mercury Motors only requires "some fault" not specific "negligence" to impose puntive damages vicariously. There may be other issues. I will try to get something out to everyone next week.

-----Original Message-----
From: Gunn, Tracy [mailto:tgunn@fowlerwhite.com]
Sent: Fri 6/30/2006 10:09 PM
To: Lumish, Wendy F.; Larry Stewart; Gerry Rose; Daniel Mitchell; LCBROWN@co.palm-beach.fl.us; griffinj@flcourts.org
Cc: Gerry Rose; Scott Makar

Subject: PD Instructions

Dear Punitive Damages Subcommittee Members:

We have several issues pending since the last meeting.

First, we needed to update the Committee's work on State Farm v. Campbell. The Committee was quite divided on the issue of whether the jury should be instructed on the limitations on punitive damages discussed in Campbell. We determined that we would hold off on the issue until some case law emerged on this question. I updated the research and was unable to find any case law nationwide, state or federal, on this issue. If anyone is aware of anything different, please let me know.

I am inclined to believe that we will be no more likely to reach an agreement about this now than we were when it was last discussed, still being without case law guidance. I suggest that we continue to keep this issue on hold. I note that our introductory page to the PD section contains a number of "cautions," including a statement advising people of the Campbell issue. This may be as much of a service as we can provide on this question at the present time.

Next, we were to determine whether there is a need for intoxication instructions. These would apply where section 768.736 operates to change the burden of proof because the defendant was intoxicated. They may also include instructions to determine whether the defendant was sufficiently intoxicated to invoke this provision.

We previously began drafting such instructions and determined that there was not sufficient need. If anyone is aware of a change in this regard or believes that we should revisit that issue, please let me know and I will circulate our previous work for further discussion.

Third, we identified that some of the instructions are vague regarding whose acts can be considered "separate" acts of the corporation -- this arises in vicarious liability cases where the potential actors are not expressly limited to a class defined by the statute (such as managing agents, officers, directors). The question is whether the acts of another category of employee can qualify as the acts of the company in such cases. It appears that no case directly addresses this issue. We need to consider whether to "flag" this issue with a "pending further developments in the law, the committee takes no position" type of note.

Finally, the direct and vicarious corporate punitive instructions are difficult to use because they must be cut and pasted in various ways with the "regular" PD instructions, and even then, some introductory/transition language is needed and people will have to do some drafting on their own. We wanted to remedy this by providing a stand-alone and complete set of instructions for such cases. Our last effort appears in Wendy's email below. I do not see any comments from anyone regarding this draft, but I am circulating it again so that we can all re-read it. If you have comments or revisions, please reply to the subcommittee members above for discussion. If not, we can present this draft to the full Committee for discussion.

Thank you!

Tracy Raffles Gunn
Board Certified Appellate Attorney
Shareholder, Fowler White Boggs Banker PA
Tampa, Florida
(813) 228-7411

From: Lumish, Wendy F. [mailto:WLumish@CarltonFields.com]
Sent: Wed 2/8/2006 2:17 PM

To: Gunn, Tracy; Larry Stewart; Gerry Rose; Daniel Mitchell; LCBROWN@co.palm-beach.fl.us; griffinj@flcourts.org
Cc: Gerry Rose; Scott Makar
Subject: RE: Current assignments and conf call

As referenced in the memo from Tracy below, it appears that our instructions on vicarious and direct liability of a corporation might be clearer if we provide the instruction for use in these situations instead of the current version where we just have a note on use which attempts to describe the way in which the instruction should be modified. One of my concerns has been that the instructions require significant modifications to the point that a trial judge may be uncomfortable because it is no longer the standard. Some of the issues that arise include:

1. PD2a talks about the punitive conduct but in the context of vicarious liability it doesn't explain that it is the punitive conduct of the (possibly) unnamed employee as opposed to the corporation listed in the first sentence of that instruction.

2. the notes on use indicate that if the person whose conduct may warrant punitive damages is not a defendant (e.g. an employee), then it instructs to start with PD2b but PD 2b doesn't make sense without PD 2a first explaining what the conduct is that can warrant punitive damages.

The following is a draft for discussion purposes which would be used in a case involving vicarious liability prior to Oct 1, 1999 where the corporation is the defendant. Should we decide to go forward, we would then have to create instructions for each of the different scenarios.

Plaintiff's claim for punitive damages is based on the conduct of [name employee [s]]. In order to find [defendant corporation] liable for punitive damages based on the conduct of [this] [these] employee[s], you must make two determinations. First, you must determine, by clear and convincing evidence, whether the employee[s] acted in a manner sufficient to warrant punitive damages. Second, you must determine whether [defendant corporation] was negligent separate and apart from the conduct of its employee[s].

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(1) was so flagrant as to show a reckless disregard for human life or for the safety of persons exposed to the effects of such conduct; or

(2) showed such an entire lack of care that they must have been consciously indifferent to the consequences; or

(3) showed such an entire lack of care that they must have wantonly or recklessly disregarded the safety and welfare of the public; or

(4) showed such reckless indifference to the rights of others as to be equivalent to an intentional violation of those rights.

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If you find that [name employee[s]]acted in such a manner as to warrant punitive damages, then the second issue you must determine by clear and convincing evidence is whether there was negligence on the part of [defendant corporation] separate and apart from the conduct of the employee[s]and, if so, whether such negligence contributed to the claimant's injury. If clear and convincing evidence does not show such negligence independent of the conduct of the employee[s] , then punitive damages are not warranted against [defendant corporation]. The instructions regarding negligence and legal cause which I gave you for Plaintiff's negligence claim apply to your determination of whether [defendant corporation] was negligent, separate and apart from the acts of the [employee[s].

Tracy raised a second issue, (4) below, concerning whose conduct is considered to be the action of the corporation. Does the corporations independent negligence have to be negligence by a managing level/principal of the company or is any independent negligence sufficient. In the instruction above, I highlighted the particular language that requires some clarification. There are several cases on this but I am not sure there is a clear answer.

In Schropp v. Crown Eurocars 654 So.2d 1158 (Fla. 1995), the court indicated that for vicarious liability, plaintiff must establish some fault on the part of the corporate employer, but it did not elaborate on "corporate employer". In Partington v. Metallic Engineering 792 So.2d 498 (Fla. 4th DCA 2001), the court citing Schropp, held that there is no requirement that the independent negligent conduct by the corporation be attributed to a managing agent. I am unaware of any other cases addressing this precise point.

It seems to me that we might need a note on use or flag to indicate that pending further development, we are not commenting on how defendant corporation should be defined.

Wendy F. Lumish
Carlton Fields, P.A.
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From: Gunn, Tracy [mailto:tgunn@fowlerwhite.com]
Sent: Wednesday, January 25, 2006 11:46 AM
To: Lumish, Wendy F.; Larry Stewart; Gerry Rose; Daniel Mitchell; LCBROWN@co.palm-beach.fl.us; griffinj@flcourts.org
Cc: Gerry Rose; Scott Makar
Subject: FW: Current assignments and conf call

Dear PD subcommittee:

I am forwarding a copy of the E&O Committee memo re issues to be addressed in the PD section of the book. Wendy is working on a proposed "fix" for item (3) below. I will follow up on items (1) and (2) with Gerry.

If anyone has any input regarding the below listed issues, or anything else that PD needs to be working on,

please advise. We will have a PD conference call and/or further discussion once Wendy has her first draft ready to circulate.

Thanks,
Tracy

Tracy Raffles Gunn
Board Certified Appellate Attorney
Shareholder, Fowler White Boggs Banker P.A.
501 East Kennedy Boulevard Suite 1700
Tampa, Florida 33602
(813) 228-7411
fax (813) 229-8313

From: Ralph Artigliere [mailto:RArtigliere@Jud10.FLCourts.org]
Sent: Monday, January 23, 2006 1:54 PM
To: Gunn, Tracy
Subject: RE: Current assignments and conf call

Thanks. Talk to you on Weds.
Ralph

-----Original Message-----
From: Gunn, Tracy [mailto:tgunn@fowlerwhite.com]
Sent: Monday, January 23, 2006 11:53 AM
To: Ralph Artigliere; reajr@raobertaustinlaw.com; jlang@carltonfields.com; fstrelec@williamsparker.com; James Underwood (E-mail)
Cc: grose@flabar.org; smakar@coj.gov
Subject: RE: Current assignments and conf call

Dear Ralph:

I have reviewed PD for Errors and Omissions, and I believe there are several issues that need work:

(1) we need to determine the status of the Committee's work on Campbell v. State Farm and update the "notice" at the beginning of this section accordingly

(2) PD should reconsider instructions for use in intoxication cases. There is no current "error" in the book, and we have noted the omission of these instructions, so this is not pressing. We need to review the prior minutes to confirm whether we decided that there was not much need for these, or whether PD should get back to work on it.

(3) The instructions as to direct and vicarious corporate punitives (PD1 (a)(3) and (4) and PD2 b. and c.) are confusing, mostly because they try to incorporate the "general" PD instruction (PD1 (a)(2) and PD2 a.), but do not explain how to use the elements from the general instruction. I think we sacrified clarity for brevity here. We need to repeat the elements from the general instruction within the direct and vicarious instructions, with some introduction regarding which elements apply to the individual employee's conduct, and which to the corporation.

Wendy and I have already discussed this and she has a working draft. The goal is to make the direct and vicarious instructions internally complete so people do not have to cut and paste from the other sections.

(4) Additionally, there is a substantive question regarding whose conduct can be considered the acts of the corporation - for some catgories of punitive damages, the potential actors are defined (managing agents, officers, directors) and for others they are not. The law may be unsettled enough to prevent a fix, but this issue may warrant a "flag" along the lines of "pending further developments."

(5) I believe we still need the pre-1999 instructions.

As chair of the PD subcommittee, I will volunteer that PD should take care of these issues. Please let me know if you think that any of them are more properly handled within the E&O subcommittee.

Thanks,
Tracy

Tracy Raffles Gunn
Board Certified Appellate Attorney
Shareholder, Fowler White Boggs Banker PA
Tampa, Florida
(813) 228-7411

From: Ralph Artigliere [mailto:RArtigliere@Jud10.FLCourts.org]
Sent: Fri 1/20/2006 9:06 AM
To: reajr@raobertaustinlaw.com; jlang@carltonfields.com; fstrelec@williamsparker.com; James Underwood (E-mail); Gunn, Tracy
Cc: grose@flabar.org
Subject: Current assignments and conf call

Hi everyone.

My JA wrote: The telephone conference for the Errors and Omissions subcommittee will be Wednesday, January 25 @ 12:00 noon. I will be sending out the telephone number information when we receive it from Gerry Rose. Thank you for your help!

We will be in contact with details for the call. The current assignments are:
The following assignments have been confirmed:
4.1-4.14 (Negligence) FRANK STRELEC
Product Liability Open BOB AUSTIN
5.1-5.3 (Causation) FRANK STRELEC
6.1-6.14 (Damages) JIM UNDERWOOD
Punitive Damages TRACY GUNN
MI1- MI 12 JOE LANG
7.1-7.4 (Closing Instructions) RALPH ARTIGLIERE
PLEASE SEND YOUR WORK IN PROGRESS AS SOON AS POSSIBLE AND AT LEAST BEFORE NEXT WEEK'S MEETING.
THANK YOU!

RALPH

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If you desire a formal opinion on a particular tax matter for the purpose of avoiding the imposition of any penalties, we will discuss the additional Treasury requirements that must be met and whether it is possible to meet those requirements under the circumstances, as well as the anticipated time and additional fees involved.

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PUNITIVE DAMAGES (PD) SUBCOMMITTEE REPORT – FEBRUARY 2007

The PD subcommittee was asked to work on four issues:

1. Creating a vicarious liability instruction for cases where the actor/employee is not a party or is not being sued directly for punitive damages.

2. Addressing the legal issue as to whether in a pre-1999 case, there has to be "negligence" on the part of the employer or "some fault."

3. Addressing the legal issue as to whether in a pre-1999 case, the independent negligence or fault must be that of a managing agent or employer or whether another employee's negligence is sufficient to trigger the employer's vicarious liability.

4. Changing the Notes on Use as needed.

I. CREATING A NEW VICARIOUS LIABILITY INSTRUCTION

There are 6 scenarios that need to be accounted for in our instructions:

1. Individual only defendant - currently PD1(a)(2)(a)and(b); PD2(a)(1) and (2);

2. Direct liability of corporate defendant - currently PD1(a)(3)(a)and(b); PD2 (b)(1)and(2);

3. Vicarious liability of a corporate defendant for the acts of an individual defendant in which punitive damages are also sought against that individual defendant - currently PD1 (a)(4)(a) and (b); PD2 (c)(1) and (2);

4. Vicarious liability of a corporate defendant for the acts of an employee or agent who is a party but against whom no punitive damages are sought – presently not covered;

5. Vicarious liability of a corporate defendant for the acts of a non-party employee or agent – presently not covered; and

6. Combination of the above – probably covered by Notes.

The subcommittee proposes the following new sections to cover scenarios number 4 and 5.

PD 1(a)(5) VICARIOUS LIABILITY FOR ACTS OF EMPLOYEE WHERE THE EMPLOYEE IS NOT A PARTY OR IS NOT BEING SUED FOR PUNITIVE DAMAGES

(a) Causes of action arising prior to October 1, 1999

If you find for (claimant) and against (defendant employer/principal), you shall also consider whether (defendant employer/principal) is liable for punitive damages. This claim is based on the conduct of (name employee/agent).

Punitive damages are warranted against (defendant employer/principal) if you find by clear and convincing evidence that (name employee's/agent's) conduct causing [loss] [injury] [or [damage] was

(1) so gross and flagrant as to show a reckless disregard of human life or of the safety of persons exposed to the effects of such conduct; or

(2) the conduct showed such an entire lack of care that the (name employee/agent) must have been consciously indifferent to the consequences; or

(3) the conduct showed such an entire lack of care that the (name employee/agent) must have wantonly or recklessly disregarded the safety and welfare of the public; or

(4) the conduct showed such reckless; indifference to the rights of others to be equivalent to an intentional violation of those rights.

If you find that (name employee/agent) acted in such a manner and if you further find by clear and convincing evidence that (defendant employer/principal) was negligent and that such negligence contributed to (claimant's) [loss] [injury] or [damage], you may determine that punitive damages are warranted against (defendant employer/principal). If the clear and convincing evidence does not show such negligence by (defendant employer/principal) independent of the conduct of (name employee/agent), punitive damages are not warranted against (defendant employer/principal).

"Clear and convincing evidence" differs from the "greater weight of the evidence" in that it is more compelling and persuasive. "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. In contrast, "clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

(b) Causes of action arising on or after October 1, 1999:

If you find for (claimant) and against (defendant employer/principal), you shall also consider whether (defendant employer/principal) is liable for punitive damages. This claim is based on the conduct of (name employee/agent).

Punitive damages are warranted against (defendant employer/principal) if you find by clear and convincing evidence that (name employee/agent) was personally guilty of intentional misconduct or gross negligence. "Intentional misconduct" means that (name employee/agent) had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to (claimant) would result and, despite that knowledge, intentionally pursued that course of conduct resulting in injury or damage. "Gross negligence" means that the conduct of (name employee/agent) was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of person exposed to such conduct.

If you find that (name employee/agent) acted in such a manner and you further find that the clear and convincing evidence shows that:

(1) (defendant employer/principal) actively and knowingly participated in such conduct: or

(2) the [officers] [directors] [or] [managers] of (defendant employer/principal) knowingly condoned, ratified, or consented to such conduct; or

(3) (defendant employer/principal) engaged in conduct that constituted gross negligence and that contributed to the [loss] [injury] [or] [damage] suffered by (claimant)

you may determine that punitive damages are warranted against (defendant employer/principal). If clear and convincing evidence does not show such conduct by (defendant employer/principal), punitive damages are not warranted against (defendant employer/principal).

"Clear and convincing evidence" differs from the "greater weight of the evidence" in that it is more compelling and persuasive. "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. In contrast, "clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

DO PRE 1999 CASES REQUIRE PROOF OF "NEGLIGENCE" OR "SOME FAULT" ON THE PART OF THE EMPLOYER?

The subcommittee was asked to review whether there is an error in our pre-1999 instructions as it relates to the level of conduct of an employer in a vicarious liability case. PD 1(a)(4)(a) and PD 2(c)(1) include the following language:

> "If you find for claimant and against (defendant employer/principal) and you find also that (name employee/agent acted in such a manner as to warrant punitive damages, then if clear and convincing evidence also shows that the (defendant/principal) was **negligent....."**

The question is whether the use of the term "negligence" is proper. In Mercury Motors Express v. Smith, 393 So. 2d 545, 549 (Fla. 1981), the court found that "before an employer may be held vicariously liable for punitive damages under the doctrine of *respondeat superior*, there must be some fault on his part... It is sufficient that the plaintiff allege and prove some fault on the part of the employer..."

There are no cases specifically addressing whether the proper term is "negligence" or "some fault." Both terms have been used, and it would appear from the cases that "some fault" has been treated synonymously with "negligence" or that negligence is the minimum degree of "fault" that is required. Thus, it would appear that it is proper to continue to use the term "negligence." The subcommittee also notes that if we did modify the language to say "some fault" we would have to define that term. Presumably, it means "negligence."

The subcommittee's recommendation is to leave the term "negligence" in the instruction, and add the following note on use:

Mercury Motors Express v. Smith, 393 So. 2d 545, 549 (Fla. 1981), requires "some fault" on the part of the employer/principal to sustain a vicarious punitive damages award, while this instruction uses the term "negligence." Some courts appear to use those terms interchangeably. See, e.g., Schropp v. Crown Eurocars, 654 So. 2d 1158, 1159 (Fla. 1995) ; Estate of Despain v. Avante Group, Inc., 900 So. 2d 637, 641 (Fla. 5th DCA 2005); Barnett Bank of Marion County v. Shirey, 655 So. 2d 1156 (Fla. 5th DCA 1995); Taylor v. Gunter Trucking Co., 520 So. 2d 624 (Fla. 1st DCA 1988). Pending further developments in the law, the Committee takes no position on whether these terms are interchangeable.

IN PRE-1999 CASES WHOSE "FAULT" OR "NEGLIGENCE" IS AT ISSUE?

In Schropp v. Crown Eurocars, 654 So. 2d 1158 (Fla. 1995), the court indicated that for vicarious liability, the plaintiff must establish some fault on the part of the corporate employer, but it did not elaborate on who is the "corporate employer." In Partington v. Metallic Engineering, 792 So. 2d 498 (Fla. 4th DCA 2001), the court citing Schropp, held that there is no requirement that the independent negligent conduct by the corporation be attributed to a managing agent. The subcommittee has not located any other cases addressing this precise point.

Our instruction has a bracket for employer/principal which may be at odds with Partington. We might need a note on use or flag to indicate that pending further development, we are not commenting on whose independent fault the jury should look to.

4. COMMENTS and NOTES ON USE

The subcommittee proposes that the notes on use relating to direct vicarious liability need to be rewritten to explain the new instructions. The impacted notes are Note 2 to PD 1 and Note 1 to PD 2. These are virtually identical.

The present version of Note 2 to PD1 states:

PD 1(a)(1) and (2) are to be given in all cases. When the demand for punitive damages is based on the doctrines of either vicarious or direct liability, see, e.g., Schropp v. Crown Eurocars, Inc., 654 So. 2d 1158 (Fla. 1995), PD 1(a)(1) and (2) should be given first if the person whose conduct may warrant punitive damages is a defendant from whom punitive damages are sought. That person should be named in PD 1(a)(1) and (2) where indicated. Then PD 1(a)(3) or PD 1(a)(4) should be given in reference to the direct or vicarious liability of a corporate or partnership defendant. If the person whose conduct may warrant punitive damages is not a defendant, or punitive damages are not sought from that person, the order and content of the charge should be modified to give the substance of PD 1(a)(3) or PD 1(a)(4) first followed by PD 1(a)(1) and (2). In appropriate cases a corporate policy can provide the basis for punitive damages against a corporation even though the particular officers or agents of the corporation responsible for the policy are not discovered or identified. See, e.g., Schropp v. Crown Eurocars, Inc., 654 So. 2d 1158 (Fla. 1995) (Wells, J., concurring). In those cases PD 1(a)(3) will need to be modified accordingly.

The subcommittee proposes the following modification:

PD 1(a)(1) should be given in all cases involving a bifurcated proceeding. The rest of the instructions cover different types of cases, and are divided between causes of action arising on or before or after October 1, 1999.

(a) PD 1(a)(2)(a) or (b) should be given when the demand for punitive damages is based on the conduct of an individual defendant.

(b) PD 1(a)(3)(a) or (b) should be given when the demand for punitive damages is based on the conduct of a managing agent or principal. Bankers Multiple Line Insurance Co. v. Farish, 464 So. 2d 530 (Fla. 1985). That person should be named in PD (a)(2) or (3). Pending further developments in the law, the Committee takes no position regarding whether the independent negligence must be on the part of a managing agent or principal or whether it can be based on the independent negligence of another employee. See, Schropp v. Crown Eurocars, Inc., 654 So. 2d 1158 (Fla. 1995), and Partington v. Metallic Engineering, 792 So. 2d 498 (Fla. 4th DCA 2001). In appropriate cases a corporate policy can provide the basis for punitive damages against a corporation even though the particular officers or agents of the corporation responsible for the policy are not discovered or identified. See, e.g., Schropp v. Crown Eurocars, Inc. 654 So, 2d 1158 (Fla.

1995) (Wells, J. concurring) . In those cases, the instruction will need to be modified accordingly.

(c) PD 1a(4)(a) or (b), should be given when there is a demand for punitive damages against the employer/principal based on the conduct of an employee and punitive damages are also being sought against the employee. See Schropp v. Crown Eurocars, Inc., 654 So. 2d 1158 (Fla. 1995).

(d) PD 1(a)(5)(a) or (b) should be given when there is a demand for punitive damages against the employer/principal for the acts of the employee, but that employee is not a defendant or is not being sued for punitive damages.

(e) In cases involving both direct and vicarious liability, PD 1(a)(3) and PD 1(a)(4) or (5) would have to be given with appropriate transitional language with respect to claims based on vicarious liability.

Westlaw.
393 So.2d 545
393 So.2d 545
(Cite as: 393 So.2d 545)

Supreme Court of Florida.
MERCURY MOTORS EXPRESS, INC., Petitioner,
v.
Patricia Lynn SMITH, as Personal Representative of the Estate of David Jefferson Faircloth, Jr., deceased, and for the benefit of David Jefferson Faircloth, III, a minor, son of David Jefferson Faircloth, Jr., deceased,
Respondent.
No. 57368.

Jan. 22, 1981.

In wrongful death action, the Circuit Court for Dade County, Thomas A. Testa, J., entered final judgment against defendant, and defendant appealed. The District Court of Appeal, 372 So.2d 116, affirmed, holding that corporate employer and Interstate Commerce Commission permit holder could be held liable in punitive damages for wilful and wanton misconduct of its employee while acting within scope of his employment. On writ of certiorari, the Supreme Court, Alderman, J., held that where plaintiff failed to allege fault on part of corporate employer, corporate employer was not liable for punitive damages based on wilful and wanton misconduct of its employee.

Decision quashed and cause remanded.

Overton, J., concurred and filed opinion in which McDonald, J., concurred.

Sundberg, C. J., and Adkins, J., dissented.

Order on mandate, 394 So.2d 1109.

West Headnotes

[1] **Corporations** 498
101k498 Most Cited Cases
Liability of corporate master for punitive or exemplary damages for wanton or malicious torts committed by agent or servant is no different from liability of individual master under same circumstances.

[2] **Damages** 15
115k15 Most Cited Cases
Objective of compensatory damages is to make injured party whole to extent that it is possible to measure his injury in terms of money.

[3] **Damages** 87(1)
115k87(1) Most Cited Cases
Punitive damages go beyond actual damages suffered by injured party and are imposed as punishment of defendant and as deterrent to others.

[4] **Labor and Employment** 3045
231Hk3045 Most Cited Cases
(Formerly 255k302(1) Master and Servant)
Employer is vicariously liable for compensatory damages resulting from negligent acts of employees committed within scope of their employment even if employer is without fault.

[5] **Labor and Employment** 3100(1)
231Hk3100(1) Most Cited Cases
(Formerly 255k331 Master and Servant)
Before employer may be held vicariously liable for punitive damages under doctrine of respondeat superior, there must be some fault on his part since punitive damages are imposed only as punishment of defendant and as deterrent to others.

[6] **Labor and Employment** 3100(1)
231Hk3100(1) Most Cited Cases
(Formerly 255k331 Master and Servant)
Although misconduct of employee, upon which vicarious liability of employer for punitive damages is based, must be wilful and wanton, it is not necessary that fault of employer, independent of his employee's conduct, also be wilful and wanton; it is sufficient that plaintiff allege and prove some fault on part of employer which foreseeably contributed to plaintiff's injury.

[7] **Labor and Employment** 3100(1)
231Hk3100(1) Most Cited Cases
(Formerly 255k331 Master and Servant)
Where personal representative of decedent's estate alleged no fault on part of employer, and relied entirely upon master-servant relationship to make the employer vicariously liable for punitive damages, employer was not liable for punitive damages based upon conduct of its employee, even if such conduct was wilful and wanton.

***546** Sheridan K. Weinstein of Papy, Poole, Weissenborn & Papy, Coral Gables, for petitioner.

Headley & Headley, Miami, and Mark Hicks of Daniels & Hicks, Miami, for respondent.

Larry Klein, West Palm Beach, for The Academy of Florida Trial Lawyers, amicus curiae.

ALDERMAN, Justice.

We accept jurisdiction of this case because the decision of the district court, reported at 372 So.2d 116 (Fla. 3d DCA 1979), conflicts with Alexander v. Alterman Transport Lines, Inc., 350 So.2d 1128 (Fla. 1st DCA 1977).

Richard Welch, an employee of the petitioner, Mercury Motors Express, while driving a tractor-trailer for his employer, lost control of the vehicle, drove off the road, and hit David J. Faircloth, Jr., causing his death. Respondent, the personal representative of the decedent's estate and the plaintiff in the trial court, alleged that Welch, "while acting in the scope of his employment with the Defendant, MERCURY MOTORS EXPRESS, INC.," was "driving and operating the said vehicle while under the influence of alcohol to the extent that his ability to drive was impaired and did so in a reckless and negligent manner and at an excessive rate of speed, with a willful and wanton disregard for the life and safety of others ...." Mercury Motors does not dispute these factual allegations, and for the purpose of our review, we accept them as true. When the case was tried, the jury awarded the plaintiff $400,000 compensatory and $250,000 punitive damages. Mercury Motors paid the compensatory damage award and appealed only the punitive damage judgment. In a brief opinion, the district court said that the legal issue presented "is whether a corporate employer and Interstate Commerce Commission permit holder can be liable in punitive damages for the willful and wanton misconduct of its employee while acting within the scope of his employment and operating a tractor and trailer leased by the corporate employer and operated under its permit." Mercury Motors Express, Inc. v. Smith, 372 So.2d at 116. The district court, concluding that "a jury may assess punitive damages against a corporate employer when its employee, ***547** acting within the scope of his employment, has been guilty of willful and wanton misconduct, such as in this case," affirmed the award of punitive damages. 372 So.2d at 117. We quash the decision of the district court and hold that, in the absence of some fault on the part of the corporate employer, it is not punitively liable for the willful and wanton misconduct of its employees.

[1] We begin our analysis of this case by affirming the long-established Florida rule that "the liability of a corporate master for punitive or exemplary damages for wanton or malicious torts committed by an agent or servant is no different from the liability of an individual master under the same circumstances." Winn & Lovett Grocery Co. v. Archer, 126 Fla. 308, 171 So. 214, 221 (1936). The fact that the employer in this case is a corporation rather than a natural person is not legally significant.

[2][3] The determinative issue is under what circumstances may an employer under the doctrine of respondeat superior be held vicariously liable for punitive damages as the result of the willful and wanton misconduct of his employees committed while acting in the scope of their employment. Relevant to this issue is the distinction between compensatory and punitive damages. The objective of compensatory damages is to make the injured party whole to the extent that it is possible to measure his injury in terms of money. The plaintiff received $400,000 for compensatory damages, and the sufficiency of that award is not questioned. Punitive damages, on the other hand, go beyond the actual damages suffered by an injured party and are imposed as a punishment of the defendant and as a deterrent to others. Fisher v. City of Miami, 172 So.2d 455 (Fla.1965).

Plaintiff effectually argues that under the doctrine of respondeat superior, an employer without fault on his part will always be vicariously liable for punitive damages for the willful and wanton misconduct committed by his employees within the scope of their employment. We reject this argument.

In Alexander v. Alterman, the First District Court, in a similar factual situation, held that the plaintiff's complaint was sufficient to allege liability on the part of the employer for compensatory damages caused by the negligent acts of its truck driver employee, but appropriately asked: "(W)hat wrong did Alterman commit that demanded that it be punished?" Answering that question, the district court said:

> According to the third amended complaint, Alterman's gross negligence was solely the act of operating a trucking business. Not a single allegation is found as to Alterman's negligently failing to investigate or to otherwise verify Penley's ability to operate its truck in a law abiding manner; there is not a single allegation that Alterman knew or should have known Penley's propensity to consume alcoholic beverages; there is not a single

> allegation that Alterman knew or should have known that Penley would operate its truck in a "grossly negligent manner and with outrageous, willful, wanton and utter disregard for other vehicles and users" ....
>
> (T)he third amended complaint before us contains no allegation from which a jury could lawfully infer that the corporate defendant was negligent by employing or retaining in its employment the defendant, Penley, or that he possessed dangerous propensities known or which should have been known to his employer.

350 So.2d at 1130. The First District Court correctly held that in the absence of fault, an employer is not vicariously liable for punitive damages as the result of the actions of its employees within the scope of their employment.

After the district court's decision in Alexander v. Alterman Transport Lines, Inc., 350 So.2d 1128 (Fla. 1st DCA 1977), the plaintiff in that case was allowed to amend his complaint as to punitive damage, and, when the case was tried, he was awarded punitive damage against the employer. The case was again appealed to the First District Court of Appeal which affirmed the punitive damage award. ***548**Alexander v. Alterman Transport Lines, Inc., 387 So.2d 422 (Fla. 1st DCA 1980). The amended complaint on which the case was tried alleged that Alterman Transport Lines knew or, in the exercise of reasonable care, should have known that immediately prior to embarking on his work assignment, its employee was in no condition to drive and operate his truck since he was under the influence of alcohol or some other drug or narcotic to the extent that his normal faculties were impaired, making it unsafe for him to drive. The issue of Alterman's knowledge of its employee's condition was presented to the jury by the court's instructions. In the most recent Alexander decision, it is clear that the plaintiff alleged and the jury found fault on the part of the employer.

Alterman sought reversal of the punitive damage award by contending that even if its employee was intoxicated when he appeared at the terminal on the morning of the accident and even if it either knew or, in the exercise of reasonable care, should have known of his condition when he took charge of the truck, such conduct on its part was not sufficiently willful, wanton, or outrageous to justify an award of punitive damages. The district court correctly rejected this contention and held that willful, wanton, or outrageous conduct on the part of the employer, independent of the willful, wanton, or outrageous conduct of its employee-driver, is not a prerequisite to the vicarious punitive damage liability of the employer. In its earlier decision, the First District properly rejected the possibility of Alterman's vicarious liability for punitive damages under the doctrine of respondeat superior, where the plaintiff alleged the willful, wanton, or outrageous conduct of the employee within the scope of his employment but failed to allege any fault on the part of the employer. A different result was justified in the subsequent case because the plaintiff alleged and proved not only willful, wanton, or outrageous conduct on the part of the employee but also negligence on the part of the employer which contributed to the plaintiff's injury. Under those circumstances, the employer was properly held vicariously liable for punitive damages based upon the willful, wanton, or outrageous conduct of its employee.

An analogous situation involving the dangerous instrumentality doctrine was presented to the Second District Court in Waldron v. Kirkland, 281 So.2d 70 (Fla. 2d DCA 1973). In that case, the plaintiff sought punitive damages against the owner of the motor vehicle based upon the flagrant and reckless misconduct of the driver. The determinative issue was whether the owner, who was without fault, was vicariously liable for punitive damages. The district court affirmed the trial court's partial summary judgment denying the plaintiff's claim for punitive damages. The court said that the owner did not know his stepson, the driver, was drinking on the date of the accident or had ever consumed alcoholic beverages and concluded that had the owner known of his stepson's propensity to drink, he would not have consented to his use of the motor vehicle. Acknowledging that the owner would be vicariously liable for compensatory damages, the court held that public policy is not served by also imposing liability for punitive damages when the owner is without fault. In other words, the court held that under the dangerous instrumentality doctrine, an owner is not vicariously liable for punitive damages just because he owned the motor vehicle.

As noted by the district court in Alexander v. Alterman Transport Lines, Inc., 350 So.2d at 1130, the issue presented in the present case was not considered or passed on by this Court in Bould v. Touchette, 349 So.2d 1181 (Fla.1977). In Bould, the plaintiff was awarded punitive damages against United States Concrete Pipe Company, the employer of Mitchell Touchette, who, in the course and scope of his employment, negligently caused the accident which was the subject of that suit. The only issue concerning punitive damages was Concrete Pipe's

contention that the award was excessive. The vicarious liability of the employer, Concrete Pipe, for punitive damages in the absence of fault on its part was not an issue in the case and was not considered by this Court.

*549 [4][5][6] We conclude that the principles of law which should be applied in this and in other similar respondeat superior cases are as follows: (1) An employer is vicariously liable for compensatory damages resulting from the negligent acts of employees committed within the scope of their employment even if the employer is without fault. This is based upon the long-recognized public policy that victims injured by the negligence of employees acting within the scope of their employment should be compensated even though it means placing vicarious liability on an innocent employer. (2) Punitive damages, however, go beyond the actual damages suffered by an injured party and are imposed only as a punishment of the defendant and as a deterrent to others. (3) Before an employer may be held vicariously liable for punitive damages under the doctrine of respondeat superior, there must be some fault on his part. (4) Although the misconduct of the employee, upon which the vicarious liability of the employer for punitive damages is based, must be willful and wanton, it is not necessary that the fault of the employer, independent of his employee's conduct, also be willful and wanton. It is sufficient that the plaintiff allege and prove some fault on the part of the employer which foreseeably contributed to the plaintiff's injury to make him vicariously liable for punitive damages.

[7] Applying these principles, we hold that there is no basis for the punitive damage award against the defendant employer. The plaintiff alleges no fault on the part of the employer and relies entirely upon the master-servant relationship to make the employer vicariously liable for punitive damages. The district court should have reversed the punitive damage judgment.

In view of our determination that the punitive damage award must be reversed, we need not consider petitioner's second point. The decision of the district court is quashed, and this cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

BOYD, OVERTON, ENGLAND and McDONALD, JJ., concur.

OVERTON, J., concurs with an opinion, with which McDONALD, J., concurs.

SUNDBERG, C. J., and ADKINS, J., dissent.

OVERTON, Justice, concurring.

The public should clearly understand that there is no difference between the owner of a single motor vehicle and the operator of a truck line. If either one knowingly allows an intoxicated driver to drive his vehicle, he may be liable for punitive damages as well as compensatory damages.

McDONALD, J., concurs.

393 So.2d 545

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Date/Time of Request:	Wednesday, October 25, 2006 09:52:00 Central
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Lines:	294
Documents:	1
Images:	0

Westlaw.
654 So.2d 1158
654 So.2d 1158, 20 Fla. L. Weekly S128
(Cite as: 654 So.2d 1158)

H

Briefs and Other Related Documents

Supreme Court of Florida.
Charles P. SCHROPP, Petitioner,
v.
CROWN EUROCARS, INC., etc, et al.,
Respondents.
No. 83522.

March 16, 1995.
Rehearing Denied May 25, 1995.

Customer who was dissatisfied with his new automobile brought action against automobile dealer and dealer's employee. The Circuit Court, Hillsborough County, Gasper J. Ficarrotta, J., entered judgment in favor of customer on his fraud claim and awarded customer punitive damages against dealer, and appeal was taken. The District Court of Appeal, 636 So.2d 30, affirmed in part, reversed in part and remanded, certifying question. The Supreme Court, Overton, J., held that: (1) corporation may be found vicariously liable for punitive damages if there is wanton and willful conduct on part of employee coupled with some negligence on part of corporation; (2) corporation may be found directly liable for punitive damages based upon conduct of a managing agent; and (3) jury's exoneration of managing agent from liability precluded finding of punitive damages against dealer.

Certified question answered; district court decision approved.

Wells, J., concurred specially and filed an opinion in which, Shaw, Kogan, and Anstead, JJ., concurred.

West Headnotes

[1] **Corporations** 498
101k498 Most Cited Cases
In order to establish corporate vicarious liability for punitive damages, it is necessary to establish that there was wrongful and wanton misconduct by employee, coupled with some of fault on part of employer which foreseeably contributed to plaintiff's injury, with ordinary negligence sufficing. (Per Overton, J., with four Justices concurring specially.)

[2] **Corporations** 498
101k498 Most Cited Cases
Corporation may be directly liable for punitive damages, based on conduct of managing agent. (Per Overton, J., with four Justices concurring specially.)

[3] **Corporations** 498
101k498 Most Cited Cases
Corporation engaged in retail automobile business could not be held for punitive damages, when its managing agent had been absolved of liability by jury. (Per Overton, J., with four Justices concurring specially.)

***1158** Raymond T. Elligett, Jr. and Mark P. Buell of Schropp, Buell & Elligett, P.A., Tampa, for petitioner.

Claude H. Tison, Jr. of Macfarlane, Ausley, Ferguson & McMullen, Tampa, for respondents.

OVERTON, Justice.

We have for review *Crown Eurocars, Inc. v. Schropp*, 636 So.2d 30 (Fla. 2d DCA 1993). This case involves a dispute between a purchaser of a Mercedes-Benz automobile and an automobile dealer concerning the paint finish on the car. The trial court judgment and district court opinion concern the broad issue of corporate liability for punitive damages. [FN1]

> FN1. The district court certified that the issue set forth later in this opinion involved a question of great public importance. We have jurisdiction pursuant to article V, section 3(b)(4), Florida Constitution.

The record reveals that Charles Schropp purchased a new Mercedes-Benz from Crown Eurocars (Crown) in St. Petersburg. A few days after the sale, Schropp complained to Crown about spots on the finish of the car. His persistent efforts to have Crown remove the spots were unavailing. According to Schropp, during one attempt to correct the defect, a Crown employee allegedly told Schropp by telephone that he was watching a worker buff the car at the dealership as they spoke. Schropp later presented evidence that this statement was untrue and that the car had not been buffed at that service visit. At a later visit, Schropp was ***1159** allegedly asked by the Crown

sales manager, Robert Cohen, to leave the Mercedes-Benz for a "special process" and inspection by a Mercedes-Benz representative. Schropp, allegedly with the understanding that the inspection was a precondition to having the car exchanged by the dealership, agreed and left the car with Crown for several days. Again not satisfied with the dealership's attempts to remove the spots, and on Crown's refusal to exchange the Mercedes, Schropp brought suit against the dealership and Cohen on multiple counts. Mercedes-Benz repurchased the car and its conduct is not an issue in this proceeding.

After a week-long trial, the jury found for Crown and Cohen on all but one count. The jury found each defendant liable for fraud based on statements made by Cohen concerning Mercedes-Benz's involvement in inspecting the car and authorizing a special process on the finish. The jury awarded $500 in compensatory damages for the time Schropp was wrongfully denied the use of the car. The interrogatory verdict also indicates that the jury found that Crown acted with malice toward Schropp and awarded $200,000 in punitive damages. The jury exonerated Cohen of any charge of malice and, consequently, declined to impose punitive damages for his actions. Crown appealed the verdict to the Second District Court of Appeal.

The Second District Court found sufficient evidence to affirm the compensatory damages award, but reversed the award of punitive damages against Crown. The district court noted that Cohen was the only Crown employee with managerial responsibility with whom Schropp had any contact; it concluded that "the jury's exoneration of Cohen from that higher level of maliciousness in the commission of the fraud, which is required to support an award of punitive damages, precludes the assessment of punitive damages against Crown." *Crown*, 636 So.2d at 35 (footnote omitted). The court analyzed the "managing agent" theory of liability found in *Bankers Multiple Line Insurance Co. v. Farish*, 464 So.2d 530 (Fla.1985), and elaborated on in *Winn-Dixie Stores, Inc. v. Robinson*, 472 So.2d 722 (Fla.1985), and found that these cases prohibited punitive damage liability for Crown because Cohen was the only management agent who had contact with Schropp, and the jury, by its verdict, had exonerated Cohen. The district court rejected Schropp's argument that *Winn-Dixie* announced a new theory of "direct corporate liability" that did not require malicious actions by a managing agent. The district court also analyzed whether Crown was vicariously liable for punitive damages under the theory explained in *Mercury Motors Express, Inc. v. Smith*, 393 So.2d 545 (Fla.1981), but determined that the evidence did not support vicarious liability under this theory. The district court then certified the following question as one of great public importance:

> IS THERE A DISTINCTION BETWEEN THE PREDICATE NECESSARY TO HOLD A CORPORATION LIABLE FOR PUNITIVE DAMAGES UNDER A THEORY BASED ON *BANKERS MULTIPLE LINE INSURANCE COMPANY V. FARISH*, 464 So.2d 530 (Fla.1985) AND UNDER A THEORY BASED ON *WINN-DIXIE STORES, INC. V. ROBINSON*, 472 So.2d 722 (Fla.1985)?

Crown, 636 So.2d at 37. We answer the certified question in the negative.

A review of the case law in Florida reveals two methods have been established by which a corporation may be held liable for punitive damages: (1) vicarious liability based on the willful and malicious actions of an employee with a finding of independent negligent conduct by the corporation; or (2) direct liability based on the willful and malicious actions of managing agents of the corporation.

Corporate Vicarious Liability for Punitive Damages

[1] In *Mercury Motors Express, Inc. v. Smith*, 393 So.2d 545 (Fla.1981), an employee of Mercury Motors Express lost control of his tractor-trailer rig while acting in the scope of his employment and killed a man. The personal representative of the decedent brought suit against the employer and alleged that it was vicariously liable for the willful and wanton acts of its employee. This Court held that, although a corporate employer could be vicariously liable for punitive damages caused by the willful and wanton ***1160** acts of an employee, there must be some independent fault on the part of the corporate employer. Because the plaintiff had failed to allege any independent fault on the part of Mercury Motors Express, we quashed the district court's decision that had approved an award of punitive damages in the trial court. In stating the requisite degree of fault that would subject an employer to vicarious liability for punitive damages, we stated the following rule:

> Although the misconduct of the employee, upon which the vicarious liability of the employer for punitive damages is based, must be willful and wanton, it is not necessary that the fault of the employer, independent of his employee's conduct, also be willful and wanton. It is sufficient that the plaintiff allege and prove some fault on the part of

the employer which foreseeably contributed to the plaintiff's injury to make him vicariously liable for punitive damages.

Id. at 549. Under this theory, a plaintiff must (a) establish that the conduct of the employee was willful and wanton and (b) establish some fault on the part of a corporate employer in order to support a claim of vicarious liability against the corporate employer for punitive damages. We emphasize that under this theory it is not necessary for the plaintiff to establish that the corporate employer acted with the same heightened culpability as the employee to allow punitive damages. It is sufficient if the plaintiff establishes ordinary negligence on the part of the corporate employer.

Corporate Direct Liability for Punitive Damages

[2] In *Bankers Multiple Line Insurance Co. v. Farish*, 464 So.2d 530, 533 (Fla.1985), we discussed the second basis for corporate punitive damages liability, direct corporate liability, and expressly distinguished the vicarious liability theory set forth in *Mercury Motors*. In *Bankers*, the president of an insurance company, together with another managing officer of the insurer, encouraged a client of Farish to discharge Farish as the client's attorney and seek other counsel. The attorney sued the insurance company as well as the president of the insurer in his individual capacity. The jury returned a verdict in favor of the attorney against the insurer, including both compensatory and punitive damages, but found in favor of the president of the insurer and refused to award damages for his personal actions. This Court approved the award of punitive damages against the insurer because of the evidence of culpability on the part of the other corporate managing officer of the insurer apart from the actions of the president. Although we never used the specific terminology, it is apparent that the insurer was liable for punitive damages based on its own *direct* liability through the actions of its other managing officer and not on the basis of vicarious liability.

Shortly after our decision in *Bankers*, we again had an occasion to discuss the direct corporate liability theory for punitive damages in *Winn-Dixie Stores, Inc. v. Robinson*, 472 So.2d 722 (Fla.1985). In *Winn-Dixie*, the plaintiff sued for false imprisonment, malicious prosecution, and conversion when he was falsely detained and accused of shoplifting. The facts established that the plaintiff's detention and arrest were expressly approved by an assistant manager of that store. The trial court granted Winn-Dixie's motion for directed verdict on the issue of punitive damages on the basis that the store could not be held vicariously liable under the rule in *Mercury Motors*. The district court reversed that ruling, finding liability for punitive damages and concluding that the rule in *Mercury Motors* was not an issue in the case. We affirmed that portion of the district court's decision and stated:

> Most recently in *Bankers Multiple Line Insurance Co. v. Farish*, 464 So.2d 530 (Fla.1985), we expressly held that *Mercury Motors* was not intended to apply to situations *where the agent primarily causing the imposition of punitive damages was the managing agent or primary owner of the corporation.* We also hold that *Mercury Motors* is not applicable in the present case where the suit was tried on the theory of the direct liability of Winn-Dixie, and the jury, by special verdict, decided that Winn-Dixie should be held directly liable for punitive damages.

***1161** *Id.* at 724 (emphasis added). It is this statement that led to the certification of the district court's question in this case. According to Schropp, the first sentence in this quote acknowledges the managing agent theory of corporate liability for punitive damages and distinguishes the theory from the vicarious liability rule found in *Mercury Motors*. Schropp then asserts that, because the next sentence begins with the words "we *also* hold," a new theory of direct corporate liability distinct from the managing agent and vicarious liability theories was established by that decision. Under this new theory, Schropp asserts that there is no requirement that the jury find punitive behavior on the part of a managing agent.

In both *Bankers* and *Winn-Dixie*, a managing agent of the defendant corporation had acted in a manner that subjected the corporation to liability for punitive damages. In *Bankers*, we held that liability for punitive damages rested on the actions of an officer of the defendant corporation. In *Winn-Dixie*, we omitted a detailed recitation of the facts of the case in part because the facts had been set out fully in the opinion of the district court. The district court's opinion in *Winn-Dixie* noted that an assistant store manager expressly approved the torts committed against the plaintiff. *See Robinson v. Winn-Dixie Stores, Inc.*, 447 So.2d 1003, 1004 (Fla. 4th DCA 1984). The acts of the store manager provided the jury with sufficient evidence of misconduct sufficient for direct liability under the *Bankers* managing-agent rule.

We reject Schropp's contention that there is a third theory of general punitive damages liability for a

corporate employer. A corporation can act only through its agents. *See* Sunrise Olds-Toyota, Inc. v. Monroe, 476 So.2d 240, 240-41 (Fla. 5th DCA 1985) ("Any intentional conduct attributed to a corporation must be committed by an officer, agent, or employee of the corporation."), *disapproved on other grounds,* Martin-Johnson, Inc. v. Savage, 509 So.2d 1097 (Fla.1987). If that person is a managing agent or holds a policy-making position, liability for punitive damages is available pursuant to the principles set forth in *Bankers;* [FN2] if that person is an employee, liability for punitive damages may be predicated on proof of facts that satisfy the independent negligence rule in *Mercury Motors.* We decline to extend corporate liability for punitive damages beyond the theories announced in these two circumstances.

> FN2. For example, corporate punitive damages liability in asbestos cases is predicated on the conduct of managing agents and corporate policy-making officers.

[3] Schropp also asserts that, in the event this Court declines to find a distinct direct corporate theory of liability for punitive damages, sufficient evidence was presented to the jury from which it could have found Crown liable under the managing agent theory. Schropp suggests that he presented evidence that Crown's managing agents, including the service manager, provided the requisite willful and wanton misconduct from which Cohen was exonerated, and that corporate liability for the punitive damages award could be predicated on the acts of these agents. We note that the district court in this case characterized Cohen as "the only person who could possibly be responsible as a managing agent for the claims in Count VI." *Crown,* 636 So.2d at 35. The district court correctly states that Cohen is the only managing agent alleged anywhere in the entire complaint to have committed *any* post-sale fraud against Schropp. Since the jury exonerated Cohen from Schropp's allegation of willful and wanton misconduct, we agree with the district court that the jury was left with no legal basis on which to impose punitive damages against Crown based on a managing agent theory.

For the reasons expressed, we answer the certified question in the negative and approve the decision of the district court in the instant case.

It is so ordered.

GRIMES, C.J., and SHAW, KOGAN, HARDING and ANSTEAD, JJ., concur.

WELLS, J., concurs specially with an opinion, in which SHAW, KOGAN and ANSTEAD, JJ., concur.

*1162 WELLS, Justice, specially concurring.

I concur with the decision of the majority. However, my view is that punitive damages can be recovered against a corporation on the basis that the corporate policy of the corporation provides a basis for the punitive damages even though the particular officers or agents of the corporation responsible for that policy are not discovered or identified. This is the kind of corporate liability for punitive damages which has been assessed in asbestos cases such as *W.R. Grace & Co. v. Waters,* 638 So.2d 502 (Fla.1994). I am concerned that the majority's opinion could be construed to the contrary on this point. A construction of the opinion which avoids punitive damages in cases in which the punitive damages are based upon acts performed in furtherance of what is determined to be corporate policy simply because the individual officer or agent responsible for the policy is not discovered or identified is not in accord with my construction of the law.

SHAW, KOGAN and ANSTEAD, JJ., concur.

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Briefs and Other Related Documents (Back to top)

- 1994 WL 16013644 (Appellate Brief) Petitioner's Reply Brief on the Merits (Jul. 25, 1994)
- 1994 WL 16013642 (Appellate Brief) Answer Brief of Respondent (Jun. 07, 1994)
- 1994 WL 16013643 (Appellate Brief) Petitioner's Initial Brief on the Merits (May. 12, 1994)

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900 So.2d 637

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900 So.2d 637, 30 Fla. L. Weekly D813, 30 Fla. L. Weekly D947

(Cite as: 900 So.2d 637)

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Briefs and Other Related Documents

District Court of Appeal of Florida,
Fifth District.
ESTATE OF Beulah DESPAIN, etc., Appellant,
v.
AVANTE GROUP, INC. and Avante at Leesburg, Inc., Appellees.
No. 5D03-3383.

March 24, 2005.
Rehearing Denied May 4, 2005.

Background: Deceased nursing home resident's estate brought negligence and wrongful death action against nursing home operator, and subsequently filed motion to amend to allege a claim for punitive damages. The Circuit Court, Lake County, T. Michael Johnson, J., denied the motion to amend, and, following jury trial, entered judgment for estate and awarded compensatory damages. Estate appealed.

Holdings: The District Court of Appeal, Sawaya, C.J., held that:
(1) Court would review trial court's order de novo;
(2) proffered evidence showed willful and wanton conduct by nursing home employees; and
(3) evidence supported claim against operator based on vicarious liability.
Reversed and remanded.

West Headnotes

[1] Damages ⇐94.1
115k94.1 Most Cited Cases
(Formerly 115k94)

[1] Damages ⇐94.4
115k94.4 Most Cited Cases
(Formerly 115k94)
Punishment of the wrongdoer and deterrence of similar wrongful conduct in the future, rather than compensation of the injured victim, are the primary policy objectives of punitive damages awards.

[2] Damages ⇐91.5(1)
115k91.5(1) Most Cited Cases
(Formerly 115k91(1))
To merit an award of punitive damages, the defendant's conduct must transcend the level of ordinary negligence and enter the realm of "willful and wanton misconduct," which the courts define as conduct that is of a gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them.

[3] Labor and Employment ⇐3100(1)
231Hk3100(1) Most Cited Cases
A corporate employer, like an individual employer, may be held liable for punitive damages based on the legal theories of either direct or vicarious liability.

[4] Labor and Employment ⇐3100(1)
231Hk3100(1) Most Cited Cases
In order to hold a corporate employer vicariously liable for punitive damages for the acts of its employees, the plaintiff must establish: (1) fault on the part of the employee that rises to the level of willful and wanton misconduct and (2) some fault on the part of the corporate employer that rises to the level of at least ordinary negligence.

[5] Damages ⇐94.3
115k94.3 Most Cited Cases

(Formerly 115k94)
Because the amount of a punitive damages award may be a pittance to a rich man and ruination to a poor one, the goal of punishment must of necessity take into account the financial worth of the wrongdoer. F.S.1999, § 768.72.

[6] Damages ⚿151
115k151 Most Cited Cases

[6] Pretrial Procedure ⚿36.1
307Ak36.1 Most Cited Cases
Although the punitive damages pleading statute is procedural in nature, it also provides a substantive right to parties not to be subjected to a punitive damages claim and attendant discovery of financial worth until the requisite showing under the statute has been made to the trial court. F.S.1999, § 768.72

[7] Damages ⚿151
115k151 Most Cited Cases
A proffer of evidence supporting a punitive damages claim is merely a representation of what evidence the defendant proposes to present and is not actual evidence. F.S.1999, § 768.72.

[8] Damages ⚿151
115k151 Most Cited Cases

[8] Damages ⚿207
115k207 Most Cited Cases
An evidentiary hearing where witnesses testify and evidence is offered and scrutinized under the pertinent evidentiary rules, as in a trial, is neither contemplated nor mandated by statute in order to determine whether a reasonable basis has been established to plead punitive damages. F.S.1999, § 768.72.

[9] Appeal and Error ⚿941
30k941 Most Cited Cases
Trial courts are granted discretion in making decisions because they have a superior vantage to observe what transpired in trial proceedings and to weigh the credibility of the witnesses, their testimony, and the evidence admitted.

[10] Damages ⚿151
115k151 Most Cited Cases
Discretion is not the standard that should apply when determining whether record evidence or a proffer is sufficient to establish a reasonable basis to plead a claim for punitive damages; rather, the finding of a reasonable basis under the statute requires a legal determination by the trial court that the statutory requirements have been met. F.S.1999, § 768.72.

[11] Appeal and Error ⚿893(1)
30k893(1) Most Cited Cases
The appellate court should review a trial court's order granting or denying a motion to amend to state a claim for punitive damages de novo. F.S.1999, § 768.72.

[12] Death ⚿52
117k52 Most Cited Cases
Evidence proffered by deceased nursing home resident's estate showed willful and wanton conduct by nursing home employees which supported initial claim for punitive damages; there was evidence employees knew decedent was at risk for weight loss, dehydration, malnutrition, and choking, but failed to monitor her food and fluid intake, that decedent was overmedicated, that nursing staff failed to prevent a recurrence of aspiration pneumonia or notice decedent's difficulties in chewing and eating, and that nursing staff failed to develop a care plan until decedent's weight had dropped to 89 pounds. F.S.1999, § 768.72.

[13] Death ⚿52
117k52 Most Cited Cases
Proffered evidence was sufficient to support initial claim for punitive damages by deceased nursing home resident's estate against corporate entities which operated nursing home, based on vicarious liability; there was evidence that nursing home was not adequately staffed, which contributed to the inability to provide the decedent with proper care, and that numerous records regarding the decedent's care were incomplete, missing, or had been fabricated, which made assessment, treatment, and referrals of the decedent much more difficult. F.S.1999, § 768.72.

*639 Susan B. Morrison of Law Offices of Susan B. Morrison, P.A., and Brian L. Thompson of Wilkes & McHugh, P.A., Tampa, for Appellant.

Betsy E. Gallagher, Aram P. Megerian and Michael C. Clarke of Cole, Scott & Kissane, P.A., Tampa, for Appellee.

SAWAYA, C.J.

The Estate of Beulah Despain appeals a final judgment rendered pursuant to a jury verdict awarding compensatory damages for violation of the decedent's rights as a nursing home resident under section 400.022, Florida Statutes (1999), negligence, and the decedent's wrongful death. Despain specifically appeals the order denying the personal representative's motion to amend the complaint to allege a claim for punitive damages against Avante Group, Inc. and Avante at Leesburg, Inc. The issue we must resolve is whether Despain made a sufficient showing by evidence in the record or proffer to establish a reasonable basis to plead a claim for punitive damages pursuant to section 768.72(1), Florida Statutes (1999).

The decedent, eighty-one-year-old Beulah Despain, was admitted to a nursing home owned and operated by Avante Group, Inc. and Avante at Leesburg, Inc. on January 15, 1999. She was hospitalized on April 1, 1999, and died of respiratory arrest secondary to aspiration pneumonia on April 6, 1999. The personal representative of the estate filed suit for compensatory damages and subsequently filed a motion to amend the complaint to allege a claim for punitive damages. In a lengthy memorandum, the estate proffered the facts it asserted formed the reasonable basis for its claim of punitive damages and filed affidavits of witnesses. This motion was denied and a subsequent motion was filed. After once again considering the proffered facts and the record evidence, the trial court denied the subsequent motion and the case proceeded to trial, resulting in a verdict and judgment awarding compensatory damages to Despain.

In order to properly decide whether the requisite showing was made under section 768.72(1) to allow Despain's claim for punitive damages, we must first determine the correct standard that establishes whether misconduct is so egregious as to warrant an award of punitive damages. Next, we must determine the appropriate standard of review that will guide us in our application of the legal standard to the record evidence and the proffer presented by Despain so we can decide whether it is sufficient to establish a reasonable basis to plead a claim for punitive damages. Once these two standards are determined, we can resolve the issue on appeal and arrive at a conclusion.

I. *The Requisite Showing That Must Be Made To Allow A Claim For Punitive Damages*

A. *The Basic Standard*

[1] A resident who has a cause of action against a nursing home under section 400.022, Florida Statutes (1999), may recover punitive damages in appropriate cases. § 400.023(1), Fla. Stat. (1999); *see also Beverly Enters.-Fla., Inc. v. Spilman*, 661 So.2d 867, 873 (Fla. 5th DCA 1995), *review denied*, 668 So.2d 602 (Fla.1996). [FN1] *640 Punishment of the wrongdoer and deterrence of similar wrongful conduct in the future, rather than compensation of the injured victim, are the primary policy objectives of punitive damage awards. *Owens-Corning Fiberglas Corp. v. Ballard*, 749 So.2d 483 (Fla.1999); *W.R. Grace & Co.-Conn. v. Waters*, 638 So.2d 502 (Fla.1994).

FN1. We note that the pertinent provisions of the Florida Nursing Home Act found in chapter 400, Florida Statutes, were substantially amended in 2001. Specifically, the Legislature stated:
Notwithstanding any other provision of this act to the contrary, sections 400.0237, 400.0238, 400.4297, 400.4298, Florida Statutes, as created by this act, and section 768.735, Florida Statutes, as amended by this act, shall become effective May 15, 2001; shall apply to causes of action accruing on or after May 15, 2001; and shall be applied retroactively to causes of action accruing before May 15, 2001, for

which no case has been filed prior to October 5, 2001.
Ch. 2001-45, § 62, Laws of Fla. Section 400.0237 was added to specifically provide for punitive damage awards under the Act. Because the cause of action in the instant case accrued in 1999 and suit was filed on May 5, 2000, the provisions of section 400.0237 are inapplicable. Accordingly, we will apply the provisions of the 1999 version of the Act.

[2] To merit an award of punitive damages, the defendant's conduct must transcend the level of ordinary negligence and enter the realm of willful and wanton misconduct, which the courts define as conduct that is of a

> gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them.

White Constr. Co. v. Dupont, 455 So.2d 1026, 1029 (Fla.1984) (quoting *Carraway v. Revell,* 116 So.2d 16, 20 n. 12 (Fla.1959)), *receded from on other grounds, Murphy v. International Robotic Sys., Inc.,* 766 So.2d 1010 (Fla.2000); *see also Owens-Corning,* 749 So.2d at 486 (quoting *White Constr.*). Section 400.023(5), Florida Statutes (1999), which codifies this standard, provides that "[f]or the purpose of this section, punitive damages may be awarded for conduct which is willful, wanton, gross or flagrant, reckless, or consciously indifferent to the rights of the resident." [FN2] This court and others have applied the standard adopted by the court in *White Construction,* and codified in section 400.023(5), to awards of punitive damages under chapter 400. *See Beverly Enters.-Fla., Inc.; Key West Convalescent Ctr., Inc. v. Doherty,* 619 So.2d 367 (Fla. 3d DCA 1993).

FN2. Section 400.023, Florida Statutes, was substantially amended in 2001 and subsection (5) was deleted. That amendment became effective after the cause of action in the instant case accrued. We will, therefore, apply the provisions of subsection (5) of the 1999 version of section 400.023.

B. *The Corporate Employer Standard*

[3][4] A corporate employer, like an individual employer, may be held liable for punitive damages based on the legal theories of either direct or vicarious liability. *Schropp v. Crown Eurocars, Inc.,* 654 So.2d 1158 (Fla.1995). Despite assertions to the contrary by Despain, we believe that this is not a case where direct corporate liability for punitive damages is applicable because there is an insufficient showing of willful and wanton misconduct on the part of a managing agent or primary owner of Avante Group, Inc. and Avante at Leesburg, Inc. *See Schropp.* Rather, if these corporate employers are to be held accountable, Despain must show that they are vicariously liable. In order to hold a corporate employer vicariously liable for punitive damages for the acts of its employees, the plaintiff must establish: (1) *641 fault on the part of the employee that rises to the level of willful and wanton misconduct and (2) some fault on the part of the corporate employer that rises to the level of at least ordinary negligence. *Schropp; Mercury Motors Express, Inc. v. Smith,* 393 So.2d 545 (Fla.1981); *Beverly Enters.-Fla., Inc.* [FN3]

FN3. Section 768.72 was amended in 1999 as part of the 1999 Tort Reform Act to include subsection (3), which adopts a different standard. This amendment became effective on October 1, 1999. Ch. 99-225, § 22, Laws of Fla. Because the cause of action in the instant case accrued prior to that date, the new standard does not apply.

C. *The Pleading Requirements*

[5][6] In order to plead a claim for punitive damages, a plaintiff must comply with section 768.72(1), Florida Statutes. This statute provides:

> In any civil action, no claim for punitive damages

> shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a **reasonable basis** for recovery of such damages. The claimant may move to amend her or his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure. The rules of civil procedure shall be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages. No discovery of financial worth shall proceed until after the pleading concerning punitive damages is permitted.

§ 768.72(1), Fla. Stat. (1999) (emphasis added); [FN4] *see also* Fla. R. Civ. P. 1.190. Because the amount of an award may be a pittance to a rich man and ruination to a poor one, the goal of punishment must of necessity take into account the financial worth of the wrongdoer. Accordingly, although section 768.72(1) is procedural in nature, it also provides a substantive right to parties not to be subjected to a punitive damage claim and attendant discovery of financial worth until the requisite showing under the statute has been made to the trial court. *Simeon, Inc. v. Cox,* 671 So.2d 158, 160 (Fla.1996); *Globe Newspaper Co. v. King,* 658 So.2d 518 (Fla.1995). [FN5]

> FN4. As part of the 1986 Tort Reform Act, the Legislature enacted section 768.72, which imposed requirements that had to be complied with before a litigant was entitled to plead a claim for punitive damages. The Legislature substantially amended section 786.72 when it enacted the 1999 Tort Reform Act to add three new subsections. However, the provisions of the previous version of section 768.72 were included unchanged in subsection (1) of the amended version. Because the cause of action in the instant case accrued prior to enactment of the 1999 Tort Reform Act, we will apply the previous version of section 768.72. However, we cite to subsection (1) of section 768.72 because that is the version that appears in the bound volume of the 1999 Florida Statutes. We also note that section 768.735, Florida Statutes (1999), enacted as part of the 1999 Tort Reform Act, provides that the provisions of section 768.72(2)- (4), 768.725, and 768.73 do not apply in civil actions arising under chapter 400, Florida Statutes. § 768.735(1), Fla. Stat. (1999). Although section 768.735 is not applicable to the instant action either, we note with interest that even under its provisions, the requirements of subsection (1) of the amended version of section 768.72 do apply to claims for punitive damages under chapter 400 because they are not excluded by section 768.735.
>
> FN5. Section 400.023(7), Florida Statutes, similarly requires that "[d]iscovery of financial information for the purpose of determining the value of punitive damages may not be had unless the plaintiff shows the court by proffer or evidence in the record that a reasonable basis exists to support a claim for punitive damages." However, this subsection did not become effective until October 1, 1999, which was after the cause of action in the instant case accrued, so we will not apply it. Ch. 99-225, § 30, Laws of Fla.

***642** There is no definition of the term "reasonable basis" in section 768.72(1). Therefore, in deciding whether a "reasonable basis" was established by the record evidence and proffer presented by Despain to allow the requested claim for punitive damages under section 768.72(1), we must determine the appropriate standard of review--de novo or abuse of discretion--to apply.

II. *Standard Of Review To Determine Whether A Reasonable Basis Has Been Shown To Allow A Claim For Punitive Damages*

Because section 768.72(1) provides a substantive right to a defendant not to be subjected to discovery of his or her financial worth until the trial court has found a reasonable basis for a plaintiff's claim for punitive damages, the court in *Holmes v. Bridgestone/Firestone, Inc.*, 891 So.2d 1188, 1191

(Fla. 4th DCA 2005), held that the abuse of discretion standard is inappropriate to review orders granting or denying a request to plead a claim for punitive damages. Although we are not much persuaded by that particular reasoning, we do agree with the part of the decision in *Holmes* that indicates the de novo standard of review is appropriate. We will now endeavor to explain why we arrive at this conclusion.

[7][8] In discussing the requirements of section 768.72(1), the court in *State of Wisconsin Investment Board v. Plantation Square Associates, Ltd.*, 761 F.Supp. 1569, 1581 n. 21 (S.D.Fla.1991), stated that "a 'proffer' according to traditional notions of the term, connotes merely an 'offer' of evidence and neither the term standing alone nor the statute itself calls for an adjudication of the underlying veracity of that which is submitted, much less for countervailing evidentiary submissions." Therefore, a proffer "is merely a representation of what evidence the defendant proposes to present and is not actual evidence." *Grim v. State*, 841 So.2d 455, 462 (Fla.) (citation omitted), *cert. denied*, 540 U.S. 892, 124 S.Ct. 230, 157 L.Ed.2d 166 (2003); *LaMarca v. State*, 785 So.2d 1209, 1216 (Fla.), *cert. denied*, 534 U.S. 925, 122 S.Ct. 281, 151 L.Ed.2d 207 (2001). A reasonable showing by evidence in the record would typically include depositions, interrogatories, and requests for admissions that have been filed with the court. Hence, an evidentiary hearing where witnesses testify and evidence is offered and scrutinized under the pertinent evidentiary rules, as in a trial, is neither contemplated nor mandated by the statute in order to determine whether a reasonable basis has been established to plead punitive damages. *See Surrey Place of Ocala v. Goodwin*, 861 So.2d 1291 (Fla. 5th DCA 2004) (holding that a hearing on a motion to amend to allege punitive damages is not necessary); *Solis v. Calvo*, 689 So.2d 366, 369 n. 2 (Fla. 3d DCA 1997) ("Pursuant to Florida Statute section 768.72 (1995), a punitive damage claim can be supported by a proffer of evidence. A formal evidentiary hearing is not mandated by the statute.") (citation omitted); *Strasser v. Yalamanchi*, 677 So.2d 22, 23 (Fla. 4th DCA 1996) ("[A]n evidentiary hearing is not mandated by the statute before a trial court has authority to permit an amendment. Pursuant to section 768.72(1), a proffer of evidence can support a trial court's determination."); *Will v. Systems Eng'g Consultants, Inc.*, 554 So.2d 591 (Fla. 3d DCA 1989); *see also Porter v. Ogden, Newell & Welch*, 241 F.3d 1334 (11th Cir.2001).

[9] Because record evidence or proffer is specified in section 768.72(1), we reject the argument that the abuse of discretion standard applies to determine whether the trial court properly found that a reasonable basis was or was not established. ***643** "Judicial discretion has been defined as: 'The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.' " *Canakaris v. Canakaris*, 382 So.2d 1197, 1202 (Fla.1980) (quoting 1 *Bouvier's Law Dictionary and Concise Encyclopedia* (8th ed.1914)). It is firmly established that trial courts are granted discretion in making decisions because they have a superior vantage to observe what transpired in trial proceedings and to weigh the credibility of the witnesses, their testimony, and the evidence admitted. [FN6] In *Stephens v. State*, 748 So.2d 1028 (Fla.1999), the court explained:

> FN6. *See Canakaris v. Canakaris*, 382 So.2d 1197, 1203 (Fla.1980) ("In reviewing a true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the 'reasonableness' test to determine whether the trial judge abused his discretion."); *Roseman v. Town Square Ass'n, Inc.*, 810 So.2d 516, 523- 24 (Fla. 4th DCA 2001) ("Like most discretionary decisions, one to bifurcate the proceedings is very difficult to overturn on appeal because of the degree of deference appellate courts give to the trial court's superior vantage point, having viewed all of the proceedings in the case."), *review denied*, 832 So.2d 105 (Fla.2002); *National Healthcorp Ltd. P'ship v. Close*, 787 So.2d 22, 25-26 (Fla.

> 2d DCA 2001) ("Nevertheless, a trial judge who is in a position to have first-hand knowledge of pending litigation and the conduct of counsel possesses broad discretion in discovery matters.... In measuring the reasonableness of a trial judge's discretion, appellate courts must recognize the superior vantage point of the trial judge.") (citation omitted).

> We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact. The deference that appellate courts afford findings of fact based on competent, substantial evidence is an important principle of appellate review. In many instances, the trial court is in a superior position "to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor, and credibility of the witnesses." *Shaw v. Shaw*, 334 So.2d 13, 16 (Fla.1976). When sitting as the trier of fact, the trial judge has the "superior vantage point to see and hear the witnesses and judge their credibility." *Guzman v. State*, 721 So.2d 1155, 1159 (Fla.1998), *cert. denied*, 526 U.S. 1102, 119 S.Ct. 1583, 143 L.Ed.2d 677 (1999). Appellate courts do not have this same opportunity.

Id. at 1034. For example, a trial judge has discretion in granting or denying a new trial because he or she presided over the proceedings and observed the witnesses as they testified and the evidence as it was presented by the parties. *See Baptist Mem'l Hosp., Inc. v. Bell*, 384 So.2d 145, 146 (Fla.1980) ("The discretionary power to grant or deny a motion for new trial is given to the trial judge because of his direct and superior vantage point."); *Cloud v. Fallis*, 110 So.2d 669, 673 (Fla.1959) ("When a motion for new trial is made it is directed to the sound, broad discretion of the trial judge, who because of his contact with the trial and his observation of the behavior of those upon whose testimony the finding of fact must be based is better positioned than any other one person fully to comprehend the processes by which the ultimate decision of the triers of fact, the jurors, is reached.") (citations omitted); *Wilson v. The Krystal Co.*, 844 So.2d 827, 829 (Fla. 5th DCA 2003) ("A trial court is given broad discretionary latitude to grant or deny a motion for new trial because of its direct and superior vantage point of the trial proceedings.") (citation omitted).

***644** However, when assessing and analyzing record evidence or a proffer, a trial court is in no better position than an appellate court to determine its sufficiency because the trial court is not called upon to evaluate and weigh testimony and evidence based upon its observation of the bearing, demeanor, and credibility of witnesses. *See, e.g., Murray v. State*, 692 So.2d 157, 164 (Fla.1997) ("Under the *de novo* standard of review we have in this area of law, we find that the evidence proffered by the State here falls far short of all three requirements set out in *Ramirez* [*v. State*, 651 So.2d 1164 (Fla.1995)] for the admission at trial of expert testimony concerning a new or novel scientific principle like DNA.") (footnote omitted). Accordingly, the personal judgment of the trial court is not needed to decide the sufficiency of record evidence or a proffer.

[10][11] We conclude, therefore, that discretion is not the standard that should apply when determining whether record evidence or a proffer is sufficient to establish a reasonable basis to plead a claim for punitive damages; rather, the finding of a reasonable basis under the statute requires a legal determination by the trial court that the requirements of section 768.72(1) have been met. *See Henn v. Sandler*, 589 So.2d 1334, 1335-36 (Fla. 4th DCA 1991) ("That finding necessarily includes a legal determination that the kind of claim in suit is one which allows for punitive damages under our law. Thus, to that extent, the legal sufficiency of the punitive damage pleading is also in issue in the section 768.72 setting."). Accordingly, we should review a trial court's order granting or denying a motion to amend to state a claim for punitive damages de novo. We are of the view that the standard that applies to determine whether a reasonable basis has been shown to plead a claim for punitive damages should be similar to the standard that is applied to determine whether a complaint states a cause of action. *See Holmes*

(holding that the analysis to determine whether a claimant has established a reasonable basis to plead a claim for punitive damages is similar to the analysis applied to determine whether the allegations of a complaint are sufficient to state a cause of action). Within the framework of this standard, we will view the record evidence and the proffer in the light most favorable to Despain and accept it as true. *Sobi v. Fairfield Resorts, Inc.*, 846 So.2d 1204 (Fla. 5th DCA 2003).

[12] The essence of the record evidence and the proffer establishes that as of the decedent's admission to Avante on January 15, 1999, she suffered from a number of maladies, including Alzheimer's disease and dementia; that the nursing staff knew that the decedent was at risk for weight loss, dehydration and malnutrition and was also informed that the decedent had difficulty swallowing and eating; that the nursing staff failed to monitor the decedent's food and fluid intake and to notice signs that she was choking on her food; that the decedent was also being overmedicated, which contributed to her array of problems; that within two weeks of her admission, the decedent had begun to lose weight and became dehydrated, contributing to her overall deterioration; the decedent had developed aspiration pneumonia as a result of choking on and inhaling her food; that although the decedent was treated for aspiration pneumonia, the nursing staff failed to prevent a recurrence or to even notice her difficulties in chewing and eating; that the nursing staff failed to develop a care plan to address these problems until March 2, 1999, by which time the decedent's weight had dropped over six pounds to eighty-eight pounds; that the decedent continued to suffer from malnutrition and dehydration and to inhale her food and nothing was really done to address her weight loss or eating problems prior to her discharge; that these problems ***645** and the neglect was so extreme that by April 1, 1999, when the decedent was admitted to the hospital, she presented with lung congestion, fever, a decreased level of consciousness, clinical dehydration, a urinary tract infection, and sepsis with aspiration pneumonia; that tests were performed at the hospital that revealed that the decedent aspirated her food when she swallowed and that she needed a feeding tube; and that the decedent ultimately died of respiratory arrest secondary to aspiration pneumonia on April 6, 1999. We conclude that this evidence constitutes a reasonable showing of willful and wanton conduct on the part of the corporate employees that evinces a reckless disregard of and a conscious indifference to the life, safety, and rights of the residents exposed to its dangerous effects.

[13] As to the vicarious liability of the corporate entities, the record evidence and proffer shows that the facility was not adequately staffed, which contributed to the inability to provide the decedent with proper care, and that numerous records regarding the decedent's care were incomplete, missing, or had been fabricated, which made assessment, treatment, and referrals of the decedent much more difficult. We believe that this showing established a reasonable basis to conclude that the corporate entities were negligent. Accordingly, Despain established a reasonable basis to plead a claim for punitive damages based on the theory of vicarious liability.

III. *Conclusion*

Based on the de novo standard of review applicable to motions to dismiss for failure to state a cause of action, we have viewed the record and the proffered evidence in the light most favorable to Despain and accept it as true. Analyzing this evidence in accordance with the standard that determines the level of misconduct that warrants an award of punitive damages and the corporate employer standard, we conclude that it formed a reasonable basis to allow Despain to plead a claim for punitive damages. Accordingly, we reverse the order denying Despain's motion to amend the complaint and remand for proceedings consistent with this opinion.

We believe it wise to protect the conclusion we reach from any interpretation suggesting that Despain is entitled to a punitive damage award. We, therefore, stress that we have merely determined Despain's right to plead a claim for punitive damages. Whether Despain will be able to prove entitlement to an award will depend on the

jury's view of the evidence submitted or the trial court's disposition of a proper motion made prior to the jury's verdict.

REVERSED AND REMANDED.

THOMPSON and MONACO, JJ., concur.

900 So.2d 637, 30 Fla. L. Weekly D813, 30 Fla. L. Weekly D947

Briefs and Other Related Documents (Back to top)

• 5D03-3383 (Docket) (Oct. 15, 2003)

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Westlaw.

655 So.2d 1156
655 So.2d 1156, 20 Fla. L. Weekly D1043
(Cite as: 655 So.2d 1156)

H

District Court of Appeal of Florida,
Fifth District.
BARNETT BANK OF MARION COUNTY, N.A.,
Appellant/Cross-Appellee,
v.
Cecil Glennis SHIREY, Jr. and Patricia A. Shirey,
etc., et al.,
Appellees/Cross-Appellants.
No. 93-1763.

April 28, 1995.
Rehearing Denied June 15, 1995.

Borrower sued bank for damages for breaches of two floor plan loan agreements, for breach of fiduciary duty by bank employee in disclosing borrower's confidences to buyer of borrower's business, and for punitive damages for employee's breach of fiduciary duty. The Circuit Court, Marion County, William T. Swigert, J., entered judgment in favor of borrowers for damages for breaches of two loan agreements and breach of fiduciary duty by bank employee, and for punitive damages. On cross appeals, the District Court of Appeal, Griffin, J., held that: (1) bank did not know nor should it have known that employee would breach bank's confidential relationship with customers and was not negligent in supervising employee so as to entitle borrowers to punitive damages; (2) borrowers were entitled to prejudgment interest on breach of fiduciary duty award from date of sale of real property; (3) evidence did not support conclusion that bank breached second floor plan agreement; and (4) borrowers were not entitled to recover entire value of destroyed business based on bank's breach of first floor plan loan agreement.

Affirmed in part; reversed in part and remanded.

Thompson, J., filed opinion concurring in part and dissenting in part.

West Headnotes

[1] **Banks and Banking** 110
52k110 Most Cited Cases
Evidence was insufficient to support conclusion that bank knew or should have known that its employee would breach bank's confidential relationship with borrowers by disclosing confidential information about borrowers to buyer of borrowers' business or that bank was negligent in supervising employee so as to support award of punitive damages against bank for employee's breach of fiduciary duty, despite performance review of employee noting that employee was required to work on keeping things to himself, where employee's supervisor and author of statement testified that he was referring to need to maintain confidences concerning bank's internal affairs as opposed to confidential relationship with customers.

[2] **Labor and Employment** 3100(1)
231Hk3100(1) Most Cited Cases
(Formerly 255k331 Master and Servant)
In absence of some fault, employer may not be held liable for punitive damages as result of misconduct of employee.

[3] **Interest** 39(2.50)
219k39(2.50) Most Cited Cases
Borrowers were entitled to prejudgment interest on award against bank employee for breach of fiduciary duty in disclosing confidences concerning borrowers to buyer of borrowers' business from date of sale of real property.

[4] **Novation** 1
278k1 Most Cited Cases
Second floor plan loan agreement between bank and borrowers did not constitute "novation" that would preclude cause of action by borrowers against bank for breach of first loan agreement, where second loan agreement resulted when bank unilaterally decided to change formula for calculating loan advances ten months into first floor plan loan agreement contrary to agreement's express provisions.

[5] **Damages** 221(7)
115k221(7) Most Cited Cases
Jury verdict in favor of borrowers against bank awarding one half of borrowers' loss as result of destruction of their business for breach of first floor plan loan agreement and the other half for breach of second floor plan agreement was improper, absent any evidence that bank breached second loan agreement in terminating it.

[6] **Contracts** 312(1)
95k312(1) Most Cited Cases
Neither "undue control" by bank of borrowers' business nor bank's appearance at borrowers'

dealership demanding inventory were legally sufficient under facts or Florida law to constitute breach of floor plan loan agreement.

[7] **Appeal and Error** 1178(6)
30k1178(6) Most Cited Cases

[7] **Damages** 189
115k189 Most Cited Cases
Evidence did not establish that borrowers' dealership was entirely destroyed solely because bank failed to loan aggregate total of $22,000 in seven month period between time it unilaterally decided to change formula for calculating loan advances under first floor plan loan agreement and date it properly terminated second floor plan loan agreement, and thus, remand was required for new trial on issue of damages for breach of first floor plan loan agreement, where each time bank breached its agreement by loaning under lesser formula, dealership had money to fund difference in order to permit business to proceed until it could have succeeded in enforcing its rights under loan agreement.

***1157** David M. Wells and Barbara B. Slott, Mahoney, Adams & Criser, P.A., Jacksonville for appellant, cross-appellee.

Edward L. Scott of Scott, Gleason & Pope, P.A., and Mark D. Shelnutt, P.A., Ocala, for appellees, cross-appellants.

***1158** GRIFFIN, Judge.

Barnett Bank of Marion County, N.A. ("Barnett") appeals a judgment rendered below in favor of Cecil Glennis Shirey, Jr., Patricia A. Shirey, and Marion Auto Sales, Inc. ("Shireys"), and the Shireys cross-appeal. The judgment awarded the Shireys total damages of $1,377,000, which included damages of $406,000 each for breaches of two loan agreements; $65,000 for breach of fiduciary duty and $500,000 in punitive damages. We affirm the judgment and award of compensatory damages against Barnett for breach of fiduciary duty. The punitive damages for breach of fiduciary duty are reversed. We also reverse the judgment for breach of the second loan agreement and remand for retrial of damages for breach of the first loan agreement. The denial of the Shireys' claim for prejudgment interest is also reversed.

This case arose from two floor plan loan agreements that the Shireys entered into with Barnett for financing purchases of used vehicles which comprised the inventory of their business, Marion Auto Sales, Inc. The Shireys had been in the wholesale used car business for twenty-two years but in 1985 they decided to enter the field of retail sales of used cars, significantly expanding their business and moving to a new first-class location. In 1987, Barnett agreed to extend them floor plan credit of up to $250,000, using the current "black book" value to calculate loan advances on the cars to be purchased. The agreement was not for a specific term; it could be terminated by either party at any time.

Within the first year, in March 1988, Barnett changed its floor plan financing policy from using "black book" value for financing the purchase of used cars, to using NADA book value. This change caused the Shireys to receive smaller loans on the used cars they wanted to purchase for their inventory. The Shireys complained about this change and by October 1988, a new loan agreement calling for NADA valuation was entered into. The Shireys' core contention is that because they could not buy enough cars at the NADA value to maintain their inventory, their business began to decline.

When Mr. Shirey told Barnett he was reducing his inventory, Barnett made an on-site inspection, found certain floor plan discrepancies and terminated the second agreement. The bank also exercised its setoff rights and the business effectively ended. The Shireys managed to repay Barnett the outstanding loan balance of some $85,000. The mortgage held by Barnett on the business property was satisfied by sale of the property to a local businessman, Scott Randall. Two years later, when Barnett filed suit to foreclose on the Shireys' residential mortgage, the Shireys counterclaimed, claiming that Barnett was the cause of the loss of their business. The Shireys also sued Barnett for breach of fiduciary duty, claiming that Greg James, Barnett's employee, revealed confidential information of the Shireys' financial plight to Randall, which severely disadvantaged the Shireys in negotiating the sale of the business property.

[1] Barnett first urges that the trial court committed reversible error by allowing the issue of punitive damages for breach of fiduciary duty by James to go to the jury. Barnett argues that there was no evidence of fault on the part of Barnett, which is required for an award of punitive damages against an employer under Florida law. This issue was hotly debated below and the trial judge was dubious. After several false starts, the Shireys settled on the argument that they had complained so much about

the handling of their loans that Barnett should have known that Patterson, James' supervisor, was incompetent, adding that a memorandum in James' personnel file suggested Patterson was aware James had trouble with confidentiality. *Schropp v. Crown Eurocars, Inc.*, 654 So.2d 1158 (Fla.1995).

[2] We agree with Barnett that the evidence was insufficient to show any negligence on its part that would support the punitive damage award. In the absence of some fault, an employer may not be held liable for punitive damages as the result of the misconduct of its employees. *Mercury Motors Express, Inc. v. Smith*, 393 So.2d 545, 549 (Fla.1981); ***1159** *S.H. Inv. & Dev. Corp. v. Kincaid*, 495 So.2d 768, 772 (Fla. 5th DCA 1986), *review denied*, 504 So.2d 767 (Fla.1987).

Greg James was one of the Barnett employees who principally handled the Shireys' banking relationship with Barnett. The Shireys introduced evidence showing that, during the time they were negotiating to sell their business property, James provided confidential financial information pertaining to the Shireys to the buyer, Randall. By having confidential information that the Shireys were in dire financial straits, Randall was able to negotiate a lower sale price.

The testimony reflected James' meetings with the buyer, during which these disclosures occurred, took place both during and after business hours. James told an associate of Randall that he was "going out on a limb" and would lose his job if it was revealed that he was disclosing the Shireys' financial position. James was apparently aware that Randall had a substantial trust and that his father was extremely wealthy. James expressed that if he could get Randall's father's money, it would be the largest trust movement in Barnett history and would elevate him to the top. James sought to persuade Randall to have the money moved to Barnett and to get James a meeting with Randall's father. James said Barnett would finance the purchase of the Shireys' property, and that he would assure Randall floor plan financing.

The Shireys urge that they presented sufficient evidence that Barnett's fault was that it knew or should have known James would disclose confidential customer information in October 1989. On appeal, the Shireys rely mainly on a December 1989 entry in James' "Officer Performance Review" which noted:

Greg understands the need to work on:

- Placing priority on activities--to not "major in the minors"--and to tackle first things first.
- Concentrate on confidentiality--learn the art of "the need to know," which in most cases means to keep things to one self [sic].

Patterson, James' supervisor and the author of this statement, testified that he was referring to the need to maintain confidences concerning Barnett's internal affairs, such as who was making what income, who was being promoted and the like.

[3] The evidence presented below simply cannot support the conclusion that Barnett knew or should have known that James would breach Barnett's confidential relationship with the Shireys or was negligent in James' supervision. Accordingly, we strike the award of punitive damages in the amount of $500,000. We do agree, however, with the Shireys that prejudgment interest should have been awarded on this breach of fiduciary duty award from the date of the sale of the real property. *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So.2d 212 (Fla.1985).

[4] We also agree in part with Barnett's attack on the judgments for breach of the two loan agreements. There was substantial competent evidence of breach of the first agreement. Ten months into the first floor plan loan agreement, contrary to its express provisions, Barnett Bank unilaterally decided to change from "black book" to NADA for purposes of calculating loan advances. It appears without substantial dispute in the record that in the period between March 1988 and October 19, 1988, when the second loan agreement calling for NADA valuation was entered into, Barnett Bank loaned an aggregate total of $22,000 on used cars *less* than what it had agreed to loan. There is no merit in Barnett's argument, either in law or in fact, that the second loan agreement constituted a novation that would preclude a cause of action for breach of the first agreement.

[5][6] The problem, however, is with the consequences of Barnett's breach. The damage theory of the Shireys was that the value of Marion Auto Sales, Inc., as an ongoing business, immediately prior to the bank's initial breach in March 1988, when it changed its loan calculation method from black book to NADA, was $812,000. According to the plaintiff, as a result of the bank's breach, the business was destroyed completely, resulting in a loss to the Shireys of $812,000. The jury apparently accepted that calculation but elected to divide this amount in half, awarding $406,000 for breach of the first agreement ***1160** and $406,000 for breach of the

second agreement. This was an understandable thing for the jury to do, faced with the complexities of the case presented to them, but it was a mistake, nevertheless. This mistake matters because there is simply no substantial competent evidence in the record that Barnett Bank ever materially breached the second loan agreement. In early 1989, finding discrepancies in the floor plan and deeming itself insecure, Barnett terminated the second agreement and exercised its collateral rights. It is abundantly clear from the record--indeed, it seems essential to the Shireys' damage theory--that Barnett Bank clearly *was* insecure, nor did it breach the second loan agreement in terminating it. [FN1]

> FN1. At trial, the Shireys principally argued to the jury that the breach was the failure to give a five day notice under the collateral disposition provision of the loan agreement. On appeal, the Shireys are even less clear about what they contend was the breach of the second agreement. They speak of undue "control" of the Shireys' business and Barnett's appearance at the dealership in April 1985 demanding the inventory, but neither of these is even close to being legally sufficient under the facts or Florida law.

[7] This brings us back to Barnett's breach of the first agreement to loan at black book value. There is no basis in the record for the $406,000 damage award due to the breach of the first agreement. [FN2] More important, we can find no record basis to conclude that this business was entirely destroyed solely because Barnett failed to loan an aggregate total of $22,000 between March and October 1988. Each time the bank breached its agreement by loaning only NADA value, had Marion Auto Sales, Inc. had the money to do so, it would have had to fund the difference, and the business would have proceeded until it had succeeded in enforcing its rights. The record is clear that Marion Auto Sales, Inc. did, in fact, have the money. [FN3] Thus, although in a proper case, the bank's failure to loan as promised *could* destroy such a business entirely, there is no record basis for a finding that the entire value of this business could have been lost based on the refusal to loan at black book value from March to October. Because of these errors, it is appropriate to remand for a new trial on the issue of damages for breach of the first agreement. Barnett is entitled to a directed verdict on the issue of the breach of the second agreement.

> FN2. There was much discussion below and on appeal about the identity of the borrowers on the two loan agreements, which, given our disposition on the issues, is immaterial. We are puzzled, however, based on our understanding of the Shireys' expert's valuation of the business, as to whether it included or assumed the ownership of the business premises. The $65,000 loss upon sale was included by the expert but the recovery of equity from the sale of the business was not included. After reviewing the testimony, however, we simply cannot determine whether this was a mistake, much less an error.

> FN3. Q: Are you going to answer my question whether you had the money in the business to pay the difference between black book and NADA loan?
> A: Yes, sir. I had the money to do that.

As for the issue of the jury trial waiver, although the record is sparse, there is evidence in the record that would have justified the lower court's ruling.

AFFIRMED IN PART; REVERSED IN PART and REMANDED.

DAUKSCH, J., concurs.

THOMPSON, J., concurs in part; dissents in part, with opinion.

THOMPSON, Judge, concurring in part, dissenting in part.

I agree with the opinion of this court except for the holding that "there is no record basis for a finding that the entire value of this business could have been lost based on the refusal to loan at black book value from March to October." This holding is the basis for the reversal of count one for a new trial on the issue of damages. I disagree because there was competent substantial evidence to prove that the Shireys suffered damages and that the damages flowed from Barnett's breach.

The Shireys presented expert testimony from Dr. Hank Fishkind as to the valuation of the business. He used the income approach to estimate Marion Auto's value as an ongoing business because the income approach was the most appropriate to the situation. *Trailer Ranch, Inc. v. Levine*, 523 So.2d 629, 631 (Fla. 4th DCA 1988) (recovery ***1161** for loss of business venture is to be measured either by

lost profits or loss of business value, but not both). Using the income approach, he estimated that the value of Marion Auto at a point in time just prior to the alleged breach of the first agreement was $812,000. As Dr. Fishkind was qualified as an expert, the jury could accept or reject his testimony. *See* § 90.702, Fla.Stat. (1991). Dr. Fishkind testified to the valuation of the business and the resulting loss because of Barnett's failure to provide the additional $22,000 under the black book loan value of the first agreement. Evidently, the jury accepted his testimony.

Further, the Shireys presented evidence that Barnett froze all of their bank accounts. Thus, the Shireys were forced to satisfy the floor plan agreement with funds from selling the automobiles remaining in the inventory, borrowing money from relatives, and using money from the balance of a CD in Barnett's possession. The jury could consider this additional information to determine that Barnett caused the Shireys to lose their business. I would hold that there was a basis for the award of $406,000 in damages for the loss of the entire business. The figure represents only one-half the value of Marion Auto as an ongoing business just prior to the breach of the first agreement.

It could be anticipated that damages would flow from Barnett's breach of the agreement. Here, the Shireys proved that Barnett's actions caused their damages, and Dr. Fishkind presented a standard by which the amount of damages could be measured. Because there is a reasonable relationship between the jury award of damages and the damages proved and the injuries sustained, the jury verdict should not be disturbed. *Ilfeld v. Chittenden Pool Supply, Inc.*, 298 So.2d 361 (Fla.1974); *accord* *Saporito v. Madras*, 576 So.2d 1342 (Fla. 5th DCA 1991). Therefore, I would affirm the jury's verdict as to count one because there is competent substantial evidence that Barnett's actions destroyed the Shireys' business and that the damages were $406,000.

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520 So.2d 624
520 So.2d 624, 13 Fla. L. Weekly 349
(Cite as: 520 So.2d 624)

H

District Court of Appeal of Florida,
First District.
Joel P. TAYLOR, Jr., Appellant,
v.
GUNTER TRUCKING CO., INC., and Tyrone Alex Peoples, Appellees.
No. BO-239.

Feb. 4, 1988.
Rehearing Denied March 16, 1988.

Motorist sued for injuries he sustained while attempting to avoid disabled truck that driver had left parked in traveled portion of four-lane urban roadway. The Circuit Court, Okaloosa County, Clyde B. Wells, J., granted defendants' motion for partial summary judgment on motorist's punitive damages claim, and motorist appealed. The District Court of Appeal, Thompson, J., held that: (1) truck driver was not guilty of any "willful or wanton misconduct," such as would warrant punitive damages award, and (2) trucking company was not liable in punitive damages absent showing of some negligence or fault on its part.

Affirmed.

Zehmer, J., dissented and filed opinion.

West Headnotes

[1] **Damages** 208(8)
115k208(8) Most Cited Cases
Whether facts of particular case bring case within rule allowing punitive damages is for court, and only when there is evidence that punitive damages can properly be awarded must issue be sent to jury.

[2] **Automobiles** 249.2
48Ak249.2 Most Cited Cases
(Formerly 48Ak249, 115k91(3))
Truck driver was not liable in punitive damages for injuries that motorist sustained while attempting to avoid disabled vehicle that driver had left in traveled portion of four-lane urban roadway; at least two vehicles traveling in lane in which truck was parked had safely avoided truck without crossing center line.

[3] **Corporations** 498
101k498 Most Cited Cases
Trucking company was not liable in punitive damages for truck driver's alleged misconduct in leaving truck in traveled portion of roadway, absent showing of fault on company's part.

***624** Ferrin C. Campbell, Sr., Crestview, for appellant.

T. Harrison Duke, of Bell, Hahn & Schuster, Pensacola, for appellees.

THOMPSON, Judge.

This is an appeal from a partial summary final judgment in favor of the defendants on plaintiff's claim for punitive damages. We affirm.

[1] The appellant contends the trial court erred in granting a summary final judgment in favor of both defendants on his claim for punitive damages. With respect to both the corporate and individual defendants, the trial judge correctly entered summary judgment on the plaintiff's punitive damage claim because there is insufficient evidence to support an award of punitive damages to the plaintiff. Whether the facts of a particular case will bring the case within the rule allowing punitive damages is for the court, and only when there is evidence that punitive damages could properly be awarded must the issue be sent to the jury. The following decisions of the Florida Supreme Court support the trial judge's entry of a summary judgment in favor of the defendants on the punitive damage claim. *Como Oil Co., Inc. v. O'Loughlin*, 466 So.2d 1061 (Fla.1985); *White Construction, Co., Inc. v. Dupont*, 455 So.2d 1026 (Fla.1984); *Carraway v. Revell*, 116 So.2d 16 (Fla.1959); and *Thompson v. State*, 146 So. 201 (Fla.1933).

[2] In *Thompson* the court reversed a manslaughter conviction. Thompson had a flat tire and parked his truck in his lane of travel on a two-lane highway at night without lights. In order to avoid colliding with Thompson's truck, another vehicle was required to swerve into the opposite lane, where it collided with a third vehicle, resulting in two deaths. Although Thompson had a flat tire, there was no evidence why his truck could not have been pulled off of ***625** the road onto the shoulder, leaving both lanes of the highway clear. In the instant case, instead of a two-lane highway with traffic totally blocked in one direction, there was another traffic lane, as well as a

turn lane, in which vehicles could proceed safely avoiding both the parked truck and oncoming vehicles. The evidence in this case shows that at least two vehicles traveling in the right lane in which the truck was parked had safely avoided the truck and were not required to move into the oncoming lane. In addition, in the instant case the truck was in a 35 mile per hour speed zone in an urban area, and not on a highway with higher speed limits.

[3] With respect to corporate defendant Gunter Trucking Co., Inc., there is not one iota of evidence in the record that there was any negligence or fault on the part of the corporate defendant and "in the absence of some fault on the part of the corporate employer, it is not punitively liable for the willful and wanton misconduct of its employees." *Mercury Motors Express, Inc. v. Smith*, 393 So.2d 545, 547 (Fla.1981). Furthermore, the facts in this case do not bring it within the exception to the *Mercury Motors* rule. The only evidence in the record regarding the relationship of the defendant Peoples to the defendant Gunter is that he was a truck driver, a mere employee. There is no evidence that he was president, primary owner, managing agent of the corporation or that he held any other position with the corporation which might result in his acts being deemed the acts of the corporation.

Accordingly, the partial summary final judgment in favor of the defendants/appellees is AFFIRMED.

BARFIELD, J., concurs.

ZEHMER, J., dissents.

ZEHMER, Judge (dissenting).

This is an appeal from a summary judgment for both defendants on the plaintiff's claim for punitive damages. As we are reviewing an order granting summary judgment, the sole issue is whether the jury is precluded from finding, as a matter of law under any permissible view of the evidence, that the defendants' conduct was willful or wanton, or evinced a reckless disregard for human life and safety amounting to total indifference to the rights of others, and thus does not present a jury issue on punitive damages under the legal standards recognized in *White Construction Co., Inc. v. Dupont*, 455 So.2d 1026 (Fla.1984); *Carraway v. Revell*, 116 So.2d 16 (Fla.1959); and *Mills v. Cone Bros. Contracting Co.*, 265 So.2d 739 (Fla. 2d DCA 1972).

The record demonstrates the following facts for purposes of this motion for summary judgment, drawing all inferences most favorably for appellant. Joel Taylor was injured when he drove his father's pickup truck into the rear end of the corporate defendant's truck, which was parked in a traffic lane of Highway 85. The accident occurred inside the Crestview city limits at approximately 6:15 P.M. on November 10, 1982. At the time of the accident the highway at this point had four lanes for traffic and a fifth "turn lane" in the center. The outside (right-hand) southbound lane was a traffic lane in which parking was prohibited by law. The speed limit was 35 miles per hour. Defendant Peoples was driving a truck owned by defendant Gunter Trucking and had deliberately parked it in this right-hand traffic lane while he went to purchase some food at a restaurant across the highway. There was an open-for-business service station immediately north of the place the truck was parked and its lights were on, but the lights of open businesses in the vicinity did not illuminate the parked truck. No hills or curves that would prevent the plaintiff from seeing the parked truck were at this location. When Peoples parked the truck and left it in the highway, he did not turn on any of the truck's lights that would be visible to those approaching the truck. The rear of the truck was dark and non-reflective, and the truck was the same or similar color as a stand of woods just beyond and thus blended with the woods, making it difficult for one to see the truck. At least two other drivers failed to see the parked truck until ***626** the last second and had to swerve suddenly to avoid colliding with it.

The record is silent as to whether Gunter Trucking had set any policy or issued any instructions to its drivers, including Peoples, directing that its trucks should not be parked in traffic lanes absent an emergency or disability that precluded the driver from moving and stopping the truck off the highway, and for aught that appears in this record, Gunter Trucking may well have implicitly sanctioned the practice followed by Peoples in this instance. There is nothing of record to show that Peoples' conduct in parking the truck on the highway was not in fact consistent with his instructions from the trucking company or practices approved by the company.

Whether the facts of a particular case are legally sufficient to warrant submitting the punitive damages issue to the jury is for the court to decide, much as it would decide other issues of liability on motion for directed verdict; but where the evidence is sufficient to support a finding of conduct amounting to wanton and reckless disregard of the rights and safety of others in violation of the standards of culpable

negligence set forth in the decisions cited above, the punitive damages issue must be submitted to the jury. *E.g.*, *Doral Country Club, Inc. v. Lindgren Plumbing Co.*, 175 So.2d 570 (Fla. 3d DCA 1965), *cert. denied*, 179 So.2d 212 (Fla.1965). It is always for the jury, not the court, to decide whether punitive damages should be awarded once the legal threshhold has been proven by the evidence. Certainly the punitive damages issue must always go to the jury when the degree of negligent conduct permissibly inferrable from the evidence would support a conviction for manslaughter. *Carraway v. Revell*, 116 So. 2d 16; *Mills v. Cone Bros. Contracting Co.*, 265 So.2d 739.

Appellant contends that had young Joel been killed in this accident, the defendant driver's conduct as described above would have supported his conviction for manslaughter. I agree, and for that reason the court below erred in granting summary judgment for the defendants on the punitive damages issue. *Mills v. Cone Bros. Contracting Co.*, 265 So.2d 739. *Cf. Thompson v. State*, 108 Fla. 370, 146 So. 201 (1933); *Austin v. State*, 101 Fla. 990, 132 So. 491 (1931).

In *Mills v. Cone Brothers* the court reversed a partial summary judgment for the defendant on the issue of punitive damages. The record established that the plaintiff drove her vehicle at night into a dark green heavy road paving machine that defendant's employee had left in a lane where parking was prohibited, without setting out any signaling or other warning device to indicate the presence of the machine in the lane of travel. I reject the argument that *Mills* is distinguishable because the roadway in that case had only two lanes for traffic, one for each direction of travel, while the instant roadway was four-laned, with two lanes in each direction. The crux of the wanton negligence charged against the instant defendants, as well as the defendant in *Mills*, lies in the fact that the truck was deliberately parked in a traffic lane where it should not have been parked, contrary to traffic regulations, [FN1] and under circumstances that made it difficult to see without leaving any emergency flasher or other lights on, or taking other precautions such as placing lanterns or reflective devices to warn approaching motorists that the lane of travel was blocked. [FN2] Because the defendants have not shown that the vehicle was so parked due to an emergency or the disability of the vehicle, that vehicle lights were not turned on because they were disabled, or that the driver took even minimal steps to warn approaching drivers of the imminent danger, this case clearly satisfies the legal test set forth *627 in *Thompson v. State* and *Austin v. State* to sustain a conviction of manslaughter.

FN1. Parking a non-disabled vehicle in a traffic lane of a state highway purely as a matter of personal convenience is not only contrary to common sense, but prohibited by the state's uniform traffic control law. *See* § § 316.194 and 316.1945, Fla. Stat. (1985).

FN2. Such precautions are mandated by the state uniform traffic control law. *See* § 316.301, Fla. Stat. (1985).

The decisions in *Como Oil Co., Inc. v. O'Loughlin*, 466 So.2d 1061 (Fla.1985), and *Ten Associates v. Brunson*, 492 So.2d 1149 (Fla. 3d DCA 1986), *rev. denied*, 501 So.2d 1281 (Fla.1986), are cited by appellees and the majority opinion as authority supporting the legal insufficiency of the evidence to warrant punitive damages in this case. But those cases are obviously distinguishable because neither *Como* nor *Ten Associates* involved a deliberate act in direct violation of law that created an obvious and imminent danger of serious injury to the traveling public. Yet that is precisely what defendant Peoples did in this case by deliberately parking his vehicle without taking any precautions to alert others that the travel lane was blocked, in clear violation of the law. It is difficult to imagine conduct that could be more willful and wanton.

The majority also finds no basis of liability on the part of Gunter Trucking for punitive damages under *Mercury Motors Express, Inc. v. Smith*, 393 So.2d 545 (Fla.1981), saying that "there is not one iota of evidence in the record that there was any negligence or fault on the part of the corporate defendant." *Supra* at p. 625. But on motion for summary judgment it is the burden of the movant to conclusively establish that the nonmoving party cannot prove any basis under the allegations of the complaint and evidence that the corporate defendant was guilty of any fault or wrongdoing. Gunter Trucking did not adduce any proof in support of its motion for summary judgment that it had trained or issued instructions to its drivers concerning safe practices and not engaging in the obviously dangerous practice here involved, which proof would preclude a finding of guilty of negligent failure to supervise its employees in the carrying out of their assigned duties. Since the present state of the record does not demonstrate as a matter of law that plaintiff could not prove negligent supervision, I cannot join with the majority in the conclusion that Gunter Trucking must be held absolutely free of any fault.

I would reverse and remand for further proceedings.

520 So.2d 624, 13 Fla. L. Weekly 349

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PUNITIVE DAMAGES

CARLTON FIELDS

MEMORANDUM

To: Tracy Gunn
Chair, Florida Standard Jury Instructions/Punitive Damages Subcommittee

From: Joseph H. Lang, Jr.

Date: July 10, 2007

Re: Proposed Jury Instruction based on *Philip Morris USA Inc. v. Williams*

I write to flag a recent opinion from the United States Supreme Court that may require attention from your subcommittee. Specifically, on February 20, 2007, the United States Supreme Court issued its decision in *Philip Morris USA v. Williams*, 549 U.S. ___, 127 S. Ct. 1057 (2007). The Court held that, while harm to others may be considered with respect to reprehensibility, a defendant may not be punished for harm to others. The decision strongly emphasizes the need for adequate instructions and procedures.

Background

The widow of Jesse Williams brought suit against Philip Morris USA Inc. Plaintiff claimed that Philip Morris intentionally made false representations about the health risks of smoking on which Jesse Williams relied and, as a result, suffered his fatal lung cancer. In 1999, the jury awarded $21,485 in economic damages, $821,000 in noneconomic damages and $79.5 million in punitive damages. The trial court reduced the noneconomic damages to $500,000 (capped by statute) and reduced the punitive damages to $32 million.

The Oregon Court of Appeals reinstated the jury's $79.5 million punitive damages award. In 2003, the United States Supreme Court granted *certiorari*, vacated the decision of the Court of Appeals, and remanded for reconsideration in the light of *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003). On remand, the Oregon Court of Appeals adhered to its previous decision reinstating the jury's punitive damages award of $79.5 million. The Oregon Supreme Court granted review and, in 2005, affirmed the $79.5 million in punitive damages. The U.S. Supreme Court then again granted a petition for writ of *certiorari*.

Supreme Court Decision

In *Williams*, the United States Supreme Court squarely held that harm to others (and risk of harm to others) may be considered with respect to reprehensibility, but a defendant may not be punished for harm to others. Specifically, the Court ruled:

> The question we address today concerns a large state-court punitive damages award. We are asked whether the Constitution's Due Process Clause permits a jury to base that award in part upon its desire to punish the defendant for harming persons who are not before the court (e.g., victims whom the parties do not represent). We hold that such an award would amount to a taking of "property" from the defendant without due process.
>
> . . . .
>
> In our view, the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation.
>
> . . . .
>
> Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible – although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.

127 S. Ct. at 1060, 1063, 1064.

Need for Adequate Jury Instructions

In its previous decisions, the Court indicated that adequate instructions were important. *See, e.g., Campbell*, 123 S. Ct. at 1520. The *Williams* opinion, however, emphasizes even more strongly the need for guidance for the jury:

> At the same time, we have emphasized the need to avoid an arbitrary determination of an award's amount. Unless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive

damages system may deprive a defendant of "fair notice . . . of the severity of the penalty that a State may impose . . . ."

. . . .

Given the risks of unfairness that we have mentioned, it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one. And given the risks of arbitrariness, the concern for adequate notice, and the risk that punitive damages awards can, in practice, impose one State's (or one jury's) policies (*e.g.*, banning cigarettes) upon other States-all of which accompany awards that, today, may be many times the size of such awards in the 18th and 19th centuries, it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance. We therefore conclude that the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers.

. . . .

How can we know whether a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to *punish* the defendant for having caused injury to others? Our answer is that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring. In particular, we believe that where the risk of that misunderstanding is a significant one – because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury – a court, upon request, must protect against that risk. Although the States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases.

127 S. Ct. at 1062, 1064 (citation omitted), 1065.

Proposal for Discussion

The subcommittee should consider an instruction that communicates the holding of *Williams*. I have come across the following draft from the pattern instructions committee in North Dakota (I am still trying to get my hands on an official copy) that may serve to start your discussion:

> In considering an award of exemplary or punitive damages, you may, in determining the reprehensibility of the Defendant's conduct, consider the

harm the Defendant's conduct has caused to others. You may not, however, punish the Defendant for harm caused to others whose cases are not before you. You may punish the Defendant only for harm done to the Plaintiff.

Further Examination

After the subcommittee grapples with the idea of a *Williams* instruction as such, it may also want to examine whether any of the current standard instructions are inconsistent with the message of *Williams*. For instance, the pre-1999 entitlement instructions (and case law) allow consideration of reckless disregard "of the safety of persons exposed to the effects of such conduct," reckless disregard of "the safety and welfare of the public," or "reckless indifference to the rights of others." Similarly, the post-1999 standard entitlement instructions (based on section 768.72) expressly allow for the consideration of "a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct." These concepts may be in tension with the *Williams* prohibition against punishment for harm to others.

Philip Morris USA v. Williams
U.S.Or.,2007.

Supreme Court of the United States
PHILIP MORRIS USA, Petitioner,
v.
Mayola WILLIAMS, Personal Representative of Estate of Jesse D. Williams, Deceased.
No. 05-1256.

Argued Oct. 31, 2006.
Decided Feb. 20, 2007.

Background: Heavy cigarette smoker's widow brought state lawsuit against cigarette manufacturer for negligence and deceit and seeking compensatory and punitive damages for smoking-related lung cancer death of her husband. After jury found in widow's favor, the Circuit Court, Multnomah County, Anna J. Brown, J., reduced punitive damages award from $79.5 million to $32 million, and award of noneconomic damages from $800,000 to $500,000. Widow appealed, and manufacturer cross-appealed. The Court of Appeals of Oregon reinstated jury's verdict and affirmed on cross-appeal, 182 Or.App. 44, 48 P.3d 824, and adhered to its ruling on reconsideration, 183 Or.App. 192, 51 P.3d 670, but the United States Supreme Court granted certiorari, vacated Court of Appeals decision, and remanded for reconsideration in light of intervening opinion, 540 U.S. 801, 124 S.Ct. 56, 157 L.Ed.2d 12.On remand, the Court of Appeals reversed and remanded and affirmed on cross-appeal, 193 Or.App. 527, 92 P.3d 126, and after allowing review the Supreme Court of Oregon, W. Michael Gillette, J., 340 Or. 35, 127 P.3d 1165, affirmed. Certiorari was granted in part.

Holdings: The Supreme Court, Justice Breyer, held that:

(1) punitive damages award based in part on jury's desire to punish defendant for harming nonparties amounted to a taking of property from defendant without due process, and

(2) because Oregon Supreme Court's application of the correct legal standard might lead to new trial or change in level of punitive damages award, United States Supreme Court would not consider question of whether the existing award was constitutionally "grossly excessive."

Vacated and remanded.

Justice Stevens filed dissenting opinion.

Justice Thomas filed dissenting opinion.

Justice Ginsburg filed dissenting opinion in which Justices Scalia and Thomas joined.

West Headnotes

[1] Constitutional Law 92 4427

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4427 k. Punitive Damages. Most Cited Cases
(Formerly 92k303)

Punitive damages award based in part on jury's desire to punish defendant for harming nonparties amounts to a taking of property from defendant without due process. U.S.C.A. Const.Amend. 14.

[2] Damages 115 87(1)

115 Damages
115V Exemplary Damages
115k87 Nature and Theory of Damages Additional to Compensation
115k87(1) k. In General. Most Cited Cases

Punitive damages may properly be imposed to further State's legitimate interests in punishing unlawful conduct and deterring its repetition.

[3] Damages 115 94.1

115 Damages
115V Exemplary Damages

115k94 Measure and Amount of Exemplary Damages
115k94.1 k. In General. Most Cited Cases
Unless State insists upon proper standards that will cabin jury's discretionary authority, its punitive damages system may deprive defendant of fair notice of severity of penalty that State may impose, may threaten arbitrary punishments, and, where amounts are sufficiently large, may impose one State's or one jury's policy choice upon neighboring States with different public policies.

[4] Damages 115 94.1

115 Damages
115V Exemplary Damages
115k94 Measure and Amount of Exemplary Damages
115k94.1 k. In General. Most Cited Cases
Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as grossly excessive.

[5] Constitutional Law 92 4427

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4427 k. Punitive Damages. Most Cited Cases
(Formerly 92k303)
Due Process Clause forbids state's use of punitive damages award to punish defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are essentially strangers to the litigation; defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, and permitting punishment for injuring nonparty victim would add near standardless dimension to the punitive damages equation and magnify fundamental due process concerns of arbitrariness, uncertainty and lack of notice. U.S.C.A. Const.Amend. 14.

[6] Damages 115 87(1)

115 Damages
115V Exemplary Damages
115k87 Nature and Theory of Damages Additional to Compensation
115k87(1) k. In General. Most Cited Cases
Punitive damages awards may not be used for the purpose of punishing a defendant for harming others.

[7] Damages 115 94.2

115 Damages
115V Exemplary Damages
115k94 Measure and Amount of Exemplary Damages
115k94.2 k. Nature of Act or Conduct. Most Cited Cases

Damages 115 94.6

115 Damages
115V Exemplary Damages
115k94 Measure and Amount of Exemplary Damages
115k94.6 k. Actual Damage or Compensatory Damages; Relationship and Ratio. Most Cited Cases
While evidence of actual harm to nonparties can help to show that conduct that harmed plaintiff also posed a substantial risk of harm to general public and so was particularly reprehensible, jury may not go further and use punitive damages verdict to punish defendant directly on account of harms it is alleged to have visited on nonparties.

[8] Damages 115 94.1

115 Damages
115V Exemplary Damages
115k94 Measure and Amount of Exemplary Damages
115k94.1 k. In General. Most Cited Cases
Given risks of unfairness, it is constitutionally important for court to provide assurance that jury awarding punitive damages will ask the right question, and given the risks of arbitrariness, concern for adequate notice, and risk that punitive damages awards can in practice impose one State's or one jury's policies upon other States, it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance.

[9] Damages 115 94.2

115 Damages
115V Exemplary Damages
115k94 Measure and Amount of Exemplary Damages
115k94.2 k. Nature of Act or Conduct. Most

Cited Cases

Damages 115 94.6

115 Damages
115V Exemplary Damages
115k94 Measure and Amount of Exemplary Damages
115k94.6 k. Actual Damage or Compensatory Damages; Relationship and Ratio. Most Cited Cases
State courts cannot authorize procedures that create an unreasonable and unnecessary risk of confusion which leads jury, in awarding punitive damages, to impermissibly punish defendant for harm caused others rather than permissibly taking that conduct into account in determining reprehensibility.

[10] Federal Courts 170B 511.1

170B Federal Courts
170BVII Supreme Court
170BVII(E) Review of Decisions of State Courts
170Bk511 Scope and Extent of Review
170Bk511.1 k. In General. Most Cited Cases
Because Oregon Supreme Court's application of correct legal standard in state negligence and deceit lawsuit might lead to new trial or change in level of punitive damages award, United States Supreme Court would not consider question of whether the existing award was constitutionally "grossly excessive."
***1058** *Syllabus*[FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

In this state negligence and deceit lawsuit, a jury found that Jesse Williams' death was caused by smoking and that petitioner Philip Morris, which manufactured the cigarettes he favored, knowingly and falsely led him to believe that smoking was safe. In respect to deceit, it awarded $821,000 in compensatory damages and $79.5 million in punitive damages to respondent, the personal representative of Williams' estate. The trial court reduced the latter award, but it was restored by the Oregon Court of Appeals. The State Supreme Court rejected Philip Morris' arguments that the trial court should have instructed the jury that it could not punish Philip Morris for injury to persons not before the court, and that the roughly 100-to-1 ratio the $79.5 million award bore to ***1059** the compensatory damages amount indicated a "grossly excessive" punitive award.

Held:

1. A punitive damages award based in part on a jury's desire to punish a defendant for harming nonparties amounts to a taking of property from the defendant without due process. Pp. 1060-1065.

(a) While "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition," *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568, 116 S.Ct. 1589, 134 L.Ed.2d 809, unless a State insists upon proper standards to cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of "fair notice ... of the severity of the penalty that a State may impose," *id.*, at 574, 116 S.Ct. 1589; may threaten "arbitrary punishments," *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 416, 123 S.Ct. 1513, 155 L.Ed.2d 585; and, where the amounts are sufficiently large, may impose one State's (or one jury's) "policy choice" upon "neighboring States" with different public policies, *BMW, supra*, at 571-572, 116 S.Ct. 1589. Thus, the Constitution imposes limits on both the procedures for awarding punitive damages and amounts forbidden as "grossly excessive." See *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432, 114 S.Ct. 2331, 129 L.Ed.2d 336. The Constitution's procedural limitations are considered here. Pp. 1062-1063.

(b) The Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury inflicted on strangers to the litigation. For one thing, a defendant threatened with punishment for such injury has no opportunity to defend against the charge. See *Lindsey v. Normet*, 405 U.S. 56, 66, 92 S.Ct. 862, 31 L.Ed.2d 36. For another, permitting such punishment would add a near standardless dimension to the punitive damages equation and magnify the fundamental due process concerns of this Court's pertinent cases-arbitrariness, uncertainty, and lack of notice. Finally, the Court finds no authority to support using punitive damages awards to punish a defendant for harming others. *BMW, supra*, at 568, n. 11, 116 S.Ct. 1589, distinguished. Respondent argues that showing harm to others is relevant to a

different part of the punitive damages constitutional equation, namely, reprehensibility. While evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk to the general public, and so was particularly reprehensible, a jury may not go further and use a punitive damages verdict to punish a defendant directly for harms to those nonparties. Given the risks of unfairness, it is constitutionally important for a court to provide assurance that a jury is asking the right question; and given the risks of arbitrariness, inadequate notice, and imposing one State's policies on other States, it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance. Pp. 1062-1064.

(c) The Oregon Supreme Court's opinion focused on more than reprehensibility. In rejecting Philip Morris' claim that the Constitution prohibits using punitive damages to punish a defendant for harm to nonparties, it made three statements. The first-that this Court held in *State Farm* only that a jury could not base an award on dissimilar acts of a defendant-was correct, but this Court now explicitly holds that a jury may not punish for harm to others. This Court disagrees with the second statement-that if a jury cannot punish for the conduct, there is no reason to consider it-since the Due Process Clause prohibits a State's inflicting ***1060** punishment for harm to nonparties, but permits a jury to consider such harm in determining reprehensibility. The third statement-that it is unclear how a jury could consider harm to nonparties and then withhold that consideration from the punishment calculus-raises the practical problem of how to know whether a jury punished the defendant for causing injury to others rather than just took such injury into account under the rubric of reprehensibility. The answer is that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring. Although States have some flexibility in determining what kind of procedures to implement to protect against that risk, federal constitutional law obligates them to provide some form of protection where the risk of misunderstanding is a significant one. Pp. 1064-1065.

2. Because the Oregon Supreme Court's application of the correct standard may lead to a new trial, or a change in the level of the punitive damages award, this Court will not consider the question whether the award is constitutionally "grossly excessive." P. 1065.

340 Or. 35, 127 P.3d 1165, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, SOUTER, and ALITO, JJ., joined. STEVENS, J., and THOMAS, J., filed dissenting opinions. GINSBURG, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.

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James S. Coon, Raymond F. Thomas, Swanson Thomas & Coon, Portland, OR, William A. Gaylord, Gaylord Eyerman Bradley, P.C., Portland, OR, Robert S. Peck, Ned Miltenberg Center for Constitutional Litigation, P.C., Washington, DC, Charles S. Tauman, Charles S. Tauman, P.C., Portland, OR, Maureen Leonard, Portland, OR, Kathryn H. Clarke, Portland, OR, for Respondent.For U.S. Supreme Court briefs, see:2006 WL 2190746 (Pet.Brief)2006 WL 2668158 (Resp.Brief)2006 WL 2966602 (Reply.Brief)
Justice BREYER delivered the opinion of the Court.
[1] The question we address today concerns a large state-court punitive damages award. We are asked whether the Constitution's Due Process Clause permits a jury to base that award in part upon its desire to *punish* the defendant for harming persons who are not before the court (*e.g.*, victims whom the parties do not represent). We hold that such an award would amount to a taking of "property" from the defendant without due process.

I

This lawsuit arises out of the death of Jesse Williams, a heavy cigarette smoker. Respondent, Williams' widow, represents his estate in this state lawsuit for negligence and deceit against Philip Morris, the manufacturer of Marlboro, the brand that Williams favored. A jury found that ***1061** Williams' death was caused by smoking; that Williams smoked in significant part because he thought it was safe to do

so; and that Philip Morris knowingly and falsely led him to believe that this was so. The jury ultimately found that Philip Morris was negligent (as was Williams) and that Philip Morris had engaged in deceit. In respect to deceit, the claim at issue here, it awarded compensatory damages of about $821,000 (about $21,000 economic and $800,000 noneconomic) along with $79.5 million in punitive damages.

The trial judge subsequently found the $79.5 million punitive damages award "excessive," see, *e.g.*, *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), and reduced it to $32 million. Both sides appealed. The Oregon Court of Appeals rejected Philip Morris' arguments and restored the $79.5 million jury award. Subsequently, Philip Morris sought review in the Oregon Supreme Court (which denied review) and then here. We remanded the case in light of *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). 540 U.S. 801, 124 S.Ct. 56, 157 L.Ed.2d 12 (2003). The Oregon Court of Appeals adhered to its original views. And Philip Morris sought, and this time obtained, review in the Oregon Supreme Court.

Philip Morris then made two arguments relevant here. First, it said that the trial court should have accepted, but did not accept, a proposed "punitive damages" instruction that specified the jury could not seek to punish Philip Morris for injury to other persons not before the court. In particular, Philip Morris pointed out that the plaintiff's attorney had told the jury to "think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been. ... In Oregon, how many people do we see outside, driving home ... smoking cigarettes? ... [C]igarettes ... are going to kill ten [of every hundred]. [And] the market share of Marlboros [*i.e.*, Philip Morris] is one-third [*i.e.*, one of every three killed]." App. 197a, 199a. In light of this argument, Philip Morris asked the trial court to tell the jury that "you may consider the extent of harm suffered by others in determining what [the] reasonable relationship is" between any punitive award and "the harm caused to Jesse Williams" by Philip Morris' misconduct, "[but] you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims ...." *Id.*, at 280a. The judge rejected this proposal and instead told the jury that "[p]unitive damages are awarded against a defendant to punish misconduct and to deter misconduct," and "are not intended to compensate the plaintiff or anyone else for damages caused by the defendant's conduct." *Id.*, at 283a. In Philip Morris' view, the result was a significant likelihood that a portion of the $79.5 million award represented punishment for its having harmed others, a punishment that the Due Process Clause would here forbid.

Second, Philip Morris pointed to the roughly 100-to-1 ratio the $79.5 million punitive damages award bears to $821,000 in compensatory damages. Philip Morris noted that this Court in *BMW* emphasized the constitutional need for punitive damages awards to reflect (1) the "reprehensibility" of the defendant's conduct, (2) a "reasonable relationship" to the harm the plaintiff (or related victim) suffered, and (3) the presence (or absence) of "sanctions," *e.g.*, criminal penalties, that state law provided for comparable conduct, 517 U.S., at 575-585, 116 S.Ct. 1589. And in *State Farm*, this Court said that the longstanding historical practice of setting punitive damages at two, three, or four times ***1062** the size of compensatory damages, while "not binding," is "instructive," and that "[s]ingle-digit multipliers are more likely to comport with due process." 538 U.S., at 425, 123 S.Ct. 1513. Philip Morris claimed that, in light of this case law, the punitive award was "grossly excessive." See *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 458, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) (plurality opinion); *BMW*, *supra*, at 574-575, 116 S.Ct. 1589; *State Farm*, *supra*, at 416-417, 123 S.Ct. 1513.

The Oregon Supreme Court rejected these and other Philip Morris arguments. In particular, it rejected Philip Morris' claim that the Constitution prohibits a state jury "from using punitive damages to punish a defendant for harm to nonparties." 340 Or. 35, 51-52, 127 P.3d 1165, 1175 (2006). And in light of Philip Morris' reprehensible conduct, it found that the $79.5 million award was not "grossly excessive." *Id.*, at 63-64, 127 P.3d, at 1181-1182.

Philip Morris then sought certiorari. It asked us to consider, among other things, (1) its claim that Oregon had unconstitutionally permitted it to be punished for harming nonparty victims; and (2) whether Oregon had in effect disregarded "the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm." Pet. for Cert. (I). We granted certiorari limited to these two questions.

For reasons we shall set forth, we consider only the first of these questions. We vacate the Oregon

Supreme Court's judgment, and we remand the case for further proceedings.

II

[2][3] This Court has long made clear that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW, supra,* at 568, 116 S.Ct. 1589. See also *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 350, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); *Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 266-267, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981); *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 22, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). At the same time, we have emphasized the need to avoid an arbitrary determination of an award's amount. Unless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of "fair notice ... of the severity of the penalty that a State may impose," *BMW, supra,* at 574, 116 S.Ct. 1589; it may threaten "arbitrary punishments," *i.e.,* punishments that reflect not an "application of law" but "a decisionmaker's caprice," *State Farm, supra,* at 416, 418, 123 S.Ct. 1513 (internal quotation marks omitted); and, where the amounts are sufficiently large, it may impose one State's (or one jury's) "policy choice," say as to the conditions under which (or even whether) certain products can be sold, upon "neighboring States" with different public policies, *BMW, supra,* at 571-572, 116 S.Ct. 1589.

[4] For these and similar reasons, this Court has found that the Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as "grossly excessive." See *Honda Motor Co. v. Oberg,* 512 U.S. 415, 432, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994) (requiring judicial review of the size of punitive awards); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 443, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001) (review must be *de novo*); *BMW, supra,* at 574-585, 116 S.Ct. 1589 (excessiveness decision depends upon the reprehensibility of the defendant's ***1063** conduct, whether the award bears a reasonable relationship to the actual and potential harm caused by the defendant to the plaintiff, and the difference between the award and sanctions "authorized or imposed in comparable cases"); *State Farm, supra,* at 425, 123 S.Ct. 1513 (excessiveness more likely where ratio exceeds single digits). Because we shall not decide whether the award here at issue is "grossly excessive," we need now only consider the Constitution's procedural limitations.

III

[5] In our view, the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.,* injury that it inflicts upon those who are, essentially, strangers to the litigation. For one thing, the Due Process Clause prohibits a State from punishing an individual without first providing that individual with "an opportunity to present every available defense." *Lindsey v. Normet,* 405 U.S. 56, 66, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972) (internal quotation marks omitted). Yet a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary.

For another, to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer-risks of arbitrariness, uncertainty and lack of notice-will be magnified. *State Farm,* 538 U.S., at 416, 418, 123 S.Ct. 1513; *BMW,* 517 U.S., at 574, 116 S.Ct. 1589.

[6] Finally, we can find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others. We have said that it may be appropriate to consider the reasonableness of a punitive damages award in light of the *potential* harm the defendant's conduct could have caused. But we have made clear that the potential harm at issue was harm potentially caused *the plaintiff.* See *State Farm, supra,* at 424, 123 S.Ct. 1513 ("[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, *to the plaintiff* and the punitive damages award" (emphasis added)). See also *TXO,* 509 U.S., at 460-462, 113 S.Ct. 2711 (plurality opinion) (using same kind of comparison as

basis for finding a punitive award not unconstitutionally excessive). We did use the term "error-free" (in *BMW*) to describe a lower court punitive damages calculation that likely included harm to others in the equation. 517 U.S., at 568, n. 11, 116 S.Ct. 1589. But context makes clear that the term "error-free" in the *BMW* footnote referred to errors relevant to the case at hand. Although elsewhere in *BMW* we noted that there was no suggestion that the plaintiff "or any other BMW purchaser was threatened with any additional potential harm" by the defendant's conduct, we did not purport to decide the question of harm to others. *Id.*, at 582, 116 S.Ct. 1589. Rather, the opinion appears to have left the question open.

[7] Respondent argues that she is free to show harm to other victims because it is relevant to a different part of the punitive ***1064** damages constitutional equation, namely, reprehensibility. That is to say, harm to others shows more reprehensible conduct. Philip Morris, in turn, does not deny that a plaintiff may show harm to others in order to demonstrate reprehensibility. Nor do we. Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible-although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.

[8] Given the risks of unfairness that we have mentioned, it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one. And given the risks of arbitrariness, the concern for adequate notice, and the risk that punitive damages awards can, in practice, impose one State's (or one jury's) policies (*e.g.*, banning cigarettes) upon other States-all of which accompany awards that, today, may be many times the size of such awards in the 18th and 19th centuries, see *id.*, at 594-595, 116 S.Ct. 1589 (BREYER, J., concurring)-it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance. We therefore conclude that the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers.

IV

Respondent suggests as well that the Oregon Supreme Court, in essence, agreed with us, that it did not authorize punitive damages awards based upon punishment for harm caused to nonparties. We concede that one might read some portions of the Oregon Supreme Court's opinion as focusing only upon reprehensibility. See, *e.g.*, 340 Ore., at 51, 127 P.3d, at 1175 ("[T]he jury could consider whether Williams and his misfortune were merely exemplars of the harm that Philip Morris was prepared to inflict on the smoking public at large"). But the Oregon court's opinion elsewhere makes clear that that court held more than these few phrases might suggest.

The instruction that Philip Morris said the trial court should have given distinguishes between using harm to others as part of the "reasonable relationship" equation (which it would allow) and using it directly as a basis for punishment. The instruction asked the trial court to tell the jury that "you *may* consider the extent of harm suffered by others *in determining what [the] reasonable relationship is*" between Philip Morris' punishable misconduct and harm caused to Jesse Williams, "*[but] you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own* in which other juries can resolve their claims ...." App. 280a (emphasis added). And as the Oregon Supreme Court explicitly recognized, Philip Morris argued that the Constitution "prohibits the state, acting through a civil jury, from using punitive damages to punish a defendant for harm to nonparties." 340 Ore., at 51-52, 127 P.3d, at 1175.

The court rejected that claim. In doing so, it pointed out (1) that this Court in *State Farm* had held only that a jury could not base its award upon "dissimilar" acts of a defendant. 340 Ore., at 52-53, 127 P.3d, at 1175-1176. It added (2) that "[i]f ***1065** a jury cannot punish for the conduct, then it is difficult to see why it may consider it at all." *Id.*, at 52, n. 3, 127 P.3d, at 1175, n. 3. And it stated (3) that "[i]t is unclear to us how a jury could 'consider' harm to others, yet withhold that consideration from the punishment calculus." *Ibid.*

The Oregon court's first statement is correct. We did not previously hold explicitly that a jury may not punish for the harm caused others. But we do so hold now. We do not agree with the Oregon court's second statement. We have explained why we

believe the Due Process Clause prohibits a State's inflicting punishment for harm caused strangers to the litigation. At the same time we recognize that conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few. And a jury consequently may take this fact into account in determining reprehensibility. Cf., *e.g.*, *Witte v. United States*, 515 U.S. 389, 400, 115 S.Ct. 2199, 132 L.Ed.2d 351 (1995) (recidivism statutes taking into account a criminal defendant's other misconduct do not impose an " 'additional penalty for the earlier crimes,' but instead ...'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one' " (quoting *Gryger v. Burke*, 334 U.S. 728, 732, 68 S.Ct. 1256, 92 L.Ed. 1683 (1948))).

[9] The Oregon court's third statement raises a practical problem. How can we know whether a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to *punish* the defendant for having caused injury to others? Our answer is that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring. In particular, we believe that where the risk of that misunderstanding is a significant one-because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury-a court, upon request, must protect against that risk. Although the States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases.

V

[10] As the preceding discussion makes clear, we believe that the Oregon Supreme Court applied the wrong constitutional standard when considering Philip Morris' appeal. We remand this case so that the Oregon Supreme Court can apply the standard we have set forth. Because the application of this standard may lead to the need for a new trial, or a change in the level of the punitive damages award, we shall not consider whether the award is constitutionally "grossly excessive." We vacate the Oregon Supreme Court's judgment and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice STEVENS, dissenting.

The Due Process Clause of the Fourteenth Amendment imposes both substantive and procedural constraints on the power of the States to impose punitive damages on tortfeasors. See *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); ***1066***TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993). I remain firmly convinced that the cases announcing those constraints were correctly decided. In my view the Oregon Supreme Court faithfully applied the reasoning in those opinions to the egregious facts disclosed by this record. I agree with Justice GINSBURG's explanation of why no procedural error even arguably justifying reversal occurred at the trial in this case. See *post*, p. 1068-1069.

Of greater importance to me, however, is the Court's imposition of a novel limit on the State's power to impose punishment in civil litigation. Unlike the Court, I see no reason why an interest in punishing a wrongdoer "for harming persons who are not before the court," *ante*, at 1060, should not be taken into consideration when assessing the appropriate sanction for reprehensible conduct.

Whereas compensatory damages are measured by the harm the defendant has caused the plaintiff, punitive damages are a sanction for the public harm the defendant's conduct has caused or threatened. There is little difference between the justification for a criminal sanction, such as a fine or a term of imprisonment, and an award of punitive damages. See *Cooper Industries*, 532 U.S., at 432, 121 S.Ct. 1678. In our early history either type of sanction might have been imposed in litigation prosecuted by a private citizen. See *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 127-128, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (STEVENS, J., concurring in judgment). And while in neither context would the sanction typically include a pecuniary award measured by the harm that the conduct had caused to any third parties, in both contexts the harm to third parties would surely be a relevant factor to consider in evaluating the reprehensibility of the defendant's wrongdoing. We have never held otherwise.

In the case before us, evidence attesting to the

possible harm the defendant's extensive deceitful conduct caused other Oregonians was properly presented to the jury. No evidence was offered to establish an appropriate measure of damages to compensate such third parties for their injuries, and no one argued that the punitive damages award would serve any such purpose. To award compensatory damages to remedy such third-party harm might well constitute a taking of property from the defendant without due process, see *ante,* at 1060. But a punitive damages award, instead of serving a compensatory purpose, serves the entirely different purposes of retribution and deterrence that underlie every criminal sanction. *State Farm,* 538 U.S., at 416, 123 S.Ct. 1513. This justification for punitive damages has even greater salience when, as in this case, see Ore.Rev.Stat. § 31.735(1) (2003), the award is payable in whole or in part to the State rather than to the private litigant.[FN1]

FN1. The Court's holding in *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989), distinguished, for the purposes of appellate review under the Excessive Fines Clause of the Eighth Amendment, between criminal sanctions and civil fines awarded entirely to the plaintiff. The fact that part of the award in this case is payable to the State lends further support to my conclusion that it should be treated as the functional equivalent of a criminal sanction. See *id.,* at 263-264, 109 S.Ct. 2909. I continue to agree with Justice O'Connor and those scholars who have concluded that the Excessive Fines Clause is applicable to punitive damages awards regardless of who receives the ultimate payout. See *id.,* at 286-299, 109 S.Ct. 2909 (O'Connor, J., concurring in part and dissenting in part).

While apparently recognizing the novelty of its holding, *ante,* at 1065, the majority relies on a distinction between taking ***1067** third-party harm into account in order to assess the reprehensibility of the defendant's conduct-which is permitted-from doing so in order to punish the defendant "directly"-which is forbidden. *Ante,* at 1064. This nuance eludes me. When a jury increases a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant's conduct, the jury is by definition punishing the defendant-directly-for third-party harm.[FN2] A murderer who kills his victim by throwing a bomb that injures dozens of bystanders should be punished more severely than one who harms no one other than his intended victim. Similarly, there is no reason why the measure of the appropriate punishment for engaging in a campaign of deceit in distributing a poisonous and addictive substance to thousands of cigarette smokers statewide should not include consideration of the harm to those "bystanders" as well as the harm to the individual plaintiff. The Court endorses a contrary conclusion without providing us with any reasoned justification.

FN2. It is no answer to refer, as the majority does, to recidivism statutes. *Ante,* at 1065. In that context, we have distinguished between taking prior crimes into account as an aggravating factor in penalizing the conduct before the court versus doing so to punish for the earlier crimes. *Ibid.* But if enhancing a penalty for a present crime because of prior conduct that has already been punished is permissible, it is certainly proper to enhance a penalty because the conduct before the court, which has never been punished, injured multiple victims.

It is far too late in the day to argue that the Due Process Clause merely guarantees fair procedure and imposes no substantive limits on a State's lawmaking power. See, *e.g., Moore v. East Cleveland,* 431 U.S. 494, 544, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (White, J., dissenting); *Poe v. Ullman,* 367 U.S. 497, 540-541, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting); *Whitney v. California,* 274 U.S. 357, 373, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring). It remains true, however, that the Court should be "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. Harker Heights,* 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). Judicial restraint counsels us to "exercise the utmost care whenever we are asked to break new ground in this field." *Ibid.* Today the majority ignores that sound advice when it announces its new rule of substantive law.

Essentially for the reasons stated in the opinion of the Supreme Court of Oregon, I would affirm its judgment.

Justice THOMAS, dissenting.
I join Justice GINSBURG's dissent in full. I write

separately to reiterate my view that " 'the Constitution does not constrain the size of punitive damages awards.' " *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 429-430, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) (THOMAS, J., dissenting) (quoting *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 443, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001) (THOMAS, J., concurring)). It matters not that the Court styles today's holding as "procedural" because the "procedural" rule is simply a confusing implementation of the substantive due process regime this Court has created for punitive damages. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 26-27, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) (SCALIA, J., concurring in judgment) ("In 1868 ... punitive damages were undoubtedly an established part of the American common law of torts. It is ... clear that ***1068** no particular procedures were deemed necessary to circumscribe a jury's discretion regarding the award of such damages, or their amount"). Today's opinion proves once again that this Court's punitive damages jurisprudence is "insusceptible of principled application." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 599, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (SCALIA, J., joined by THOMAS, J., dissenting).

Justice GINSBURG, with whom Justice SCALIA and Justice THOMAS join, dissenting.

The purpose of punitive damages, it can hardly be denied, is not to compensate, but to punish. Punish for what? Not for harm actually caused "strangers to the litigation," *ante,* at 1063, the Court states, but for the *reprehensibility* of defendant's conduct, *ante,* at 1063-1064. "[C]onduct that risks harm to many," the Court observes, "is likely more reprehensible than conduct that risks harm to only a few." *Ante,* at 1065. The Court thus conveys that, when punitive damages are at issue, a jury is properly instructed to consider the extent of harm suffered by others as a measure of reprehensibility, but not to mete out punishment for injuries in fact sustained by nonparties. *Ante,* at 1063-1065. The Oregon courts did not rule otherwise. They have endeavored to follow our decisions, most recently in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), and *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), and have "deprive[d] [no jury] of proper legal guidance,"*ante,* at 1064. Vacation of the Oregon Supreme Court's judgment, I am convinced, is unwarranted.

The right question regarding reprehensibility, the Court acknowledges, *ante,* at ----8, would train on "the harm that Philip Morris was prepared to inflict on the smoking public at large." *Ibid.* (quoting 340 Or. 35, 51, 127 P.3d 1165, 1175 (2006)). See also 340 Ore., at 55, 127 P.3d, at 1177 ("[T]he jury, *in assessing the reprehensibility of Philip Morris's actions,* could consider evidence of similar harm to other Oregonians caused (or threatened) by the same conduct."(emphasis added)). The Court identifies no evidence introduced and no charge delivered inconsistent with that inquiry.

The Court's order vacating the Oregon Supreme Court's judgment is all the more inexplicable considering that Philip Morris did not preserve any objection to the charges in fact delivered to the jury, to the evidence introduced at trial, or to opposing counsel's argument. The sole objection Philip Morris preserved was to the trial court's refusal to give defendant's requested charge number 34. See *id.*, at 54, 127 P.3d, at 1176. The proposed instruction read in pertinent part:

"If you determine that some amount of punitive damages should be imposed on the defendant, it will then be your task to set an amount that is appropriate. This should be such amount as you believe is necessary to achieve the objectives of deterrence and punishment. While there is no set formula to be applied in reaching an appropriate amount, I will now advise you of some of the factors that you may wish to consider in this connection.

"(1) The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other***1069** persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit.

.....

"(2) The size of the punishment may appropriately reflect the degree of reprehensibility of the defendant's conduct-that is, how far the defendant has departed from accepted societal norms of conduct." App. 280a.

Under that charge, just what use could the jury properly make of "the extent of harm suffered by others"? The answer slips from my grasp. A judge seeking to enlighten rather than confuse surely would resist delivering the requested charge.

The Court ventures no opinion on the propriety of the charge proposed by Philip Morris, though Philip Morris preserved no other objection to the trial proceedings. Rather than addressing the one objection Philip Morris properly preserved, the Court reaches outside the bounds of the case as postured when the trial court entered its judgment. I would accord more respectful treatment to the proceedings and dispositions of state courts that sought diligently to adhere to our changing, less than crystalline precedent.

* * *

For the reasons stated, and in light of the abundant evidence of "the potential harm [Philip Morris'] conduct could have caused," *ante,* at 1063 (emphasis deleted), I would affirm the decision of the Oregon Supreme Court.

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