

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 378

SPONSOR: Judiciary Committee and Senator Webster

SUBJECT: Civil Actions (Punitive Damages)

DATE: February 18, 1999 REVISED: \_\_\_\_\_

|    | ANALYST       | STAFF DIRECTOR | REFERENCE | ACTION              |
|----|---------------|----------------|-----------|---------------------|
| 1. | <u>Forgas</u> | <u>Johnson</u> | <u>JU</u> | <u>Favorable/CS</u> |
| 2. | _____         | _____          | <u>RC</u> | _____               |
| 3. | _____         | _____          | _____     | _____               |
| 4. | _____         | _____          | _____     | _____               |
| 5. | _____         | _____          | _____     | _____               |

## I. Summary:

This bill is based on a portion of the 1998 conference committee report of the Conference Committee on Litigation Reform which reviewed the impact of the civil litigation system on Florida's business climate. The bill makes modifications and additions to both the procedural and the substantive aspects of the civil litigation system in Florida. Some of the major provisions:

- Revise the burden of proof standard and the conditions for recovery of punitive damages;
- Revise the current cap on punitive damages; and
- Revise the threshold for holding an employer vicariously liable for punitive damages.

This bill substantially amends the following sections of the Florida Statutes: 768.72 and 768.73. The bill also creates the following sections: 768.725, 768.735, and 768.736.

## II. Present Situation:

### Background

#### *Select Senate Committee on Litigation Reform*

In August 1997, the Senate President appointed an 11-member Select Senate Committee on Litigation Reform to conduct hearings to assess the manner and extent to which the current civil litigation environment is affecting economic development and job-creation efforts in the state. The select committee was additionally charged with ascertaining what civil litigation reforms, if any, would enhance the economic development climate of the state while continuing to preserve the rights of citizens to seek redress through the judicial system.

The select committee conducted a series of public meetings from September 1997 through early 1998. Testimony was solicited on key litigation topics from a variety of civil legal practitioners, representatives of interests in the area of civil litigation, and representatives of a judicial task force

created by the Supreme Court to monitor the Legislature's efforts on litigation reform. The select committee developed and discussed specific issues within each topic. In February 1998, the select committee issued its report and recommendations on litigation reform to the Senate President, which included corresponding draft legislation.

Punitive damages was one of the principal topics explored by the committee.

## **Current Statutory and Common Law**

### ***Punitive Damages***

From 1986 to 1995, section 768.73, F.S., provided that an award of punitive damages in certain cases was to be split between the claimant and the state. In 1995, the statute was repealed. The Florida Comptroller's Office has indicated that, during the period when the statute was in force, there was a total of 179 cases with punitive damages awarded. The total punitive damages awarded was almost \$130 million, of which about \$58.7 million was collectible by the state. Collections were made in 70 of the 179 cases in the total amount of about \$8.8 million.

Currently, the character of negligence necessary to sustain an award of punitive damages must be one of the following:

- 1) Conduct of a gross and flagrant character which evinces a reckless disregard of human life or safety;
- 2) Conduct which exhibits an entire want of care which raises the presumption of a conscious indifference to consequences;
- 3) Conduct which shows wantonness, recklessness or a grossly careless disregard of the safety and welfare of the public; or
- 4) Conduct exhibiting a reckless indifference to the rights of others which is equivalent to an intentional violation of them.

*White Construction Co., Inc. v. Dupont*, 455 So.2d 1026 (Fla 1984).

As far as corporations are concerned, Florida case law has established two methods by which corporations 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. *See Mercury Motors Express, Inc., v. Smith*, 393 So.2d 545 (Fla. 1981); *Bankers Multiple Line Insurance Co. v. Farish*, 464 So.2d 530 (Fla. 1985).

Section 768.73, F.S., relating to limitations on punitive damages, currently provides that a punitive damages award in certain types of cases is capped at three times compensatory damages. A punitive damages award which exceeds the cap is presumed excessive, unless the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive. There is no prohibition against multiple punitive damages awards. *W.R. Grace & Co. - Conn v. Waters*, 638 So.2d 502 (Fla. 1994).

### III. Effect of Proposed Changes:

This bill reflects the consensus legislation submitted as part of the 1998 final report of the Conference Committee on Litigation Reform. The bill makes wide-ranging and substantial modifications to the law as it pertains to punitive damages in Florida. Through its principal provisions, the bill:

- Raises the standard of evidence by which a plaintiff must establish entitlement to punitive damages;
- Revises the current cap on punitive damages;
- Stiffens the common law standard of conduct necessary to hold a defendant liable for punitive damages;
- Revises the threshold for holding an employer vicariously liable for punitive damages;
- Prohibits application of punitive damages limitations to certain abuse actions or actions relating to nursing homes under ch. 400, F.S.; and
- Prohibits application of punitive damages limitations to defendants impaired by drugs or alcohol.

A section-by-section description follows:

**Section 1** creates s. 768.725, F.S., to raise the common law burden of proof to establish an entitlement to an award of punitive damages from “preponderance of evidence” to “clear and convincing evidence.” The “clear and convincing evidence” standard is greater than the “preponderance of evidence” standard but less than the “beyond a reasonable doubt” standard applied in criminal law. The greater weight of the evidence burden of proof remains applicable to the determination of the amount of punitive damages.

**Section 2** amends s. 768.72, F.S., relating to claims for punitive damages. This section adds subsection (2) to stiffen the common law standard of conduct necessary to hold a defendant liable for punitive damages. A defendant may only be liable for punitive damages if shown by clear and convincing evidence that the defendant was guilty of intentional misconduct or gross negligence. The term “intentional misconduct” means the defendant had actual knowledge of the wrongfulness of the conduct and of the high probability that injury or damage to the claimant would result but intentionally pursued it anyway. The term “gross negligence” is defined as conduct so reckless or wanting in care that it constitutes a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

This section also adds subsection (3) to revise substantially the common law threshold for holding an employer vicariously liable. This section specifies the criteria necessary to hold an employer, principal, corporation, or other legal entity liable for punitive damages based on the conduct of an employee or agent. The conduct of the employee must rise to the level of gross negligence or intentional misconduct, and either: a) the employer, principal, corporation or other legal entity actively and knowingly participated in such conduct, b) the officers, directors, or managers thereof knowingly condoned, ratified, or consented to such conduct; or c) the employer, principal, corporation, or other legal entity engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant.

**Section 3** amends s. 768.73, F.S., relating to caps on punitive damages, to revise the current cap set at three times the amount of compensatory damages. This section imposes a cap of \$250,000 in punitive damages for judgments of \$50,000 or less in compensatory damages, and a cap of three times the amount of compensatory damages or \$250,000, whichever is higher, for judgments of more than \$50,000 in compensatory damages. This section eliminates the presumption that an award exceeding the cap is excessive but adds that, in order for an award of punitive damages to exceed the cap, the claimant must prove by clear and convincing evidence that the defendant engaged in intentional misconduct, in addition to the existing requirement that the award not be excessive in light of the facts and circumstances of the case.

The amendments in this section apply to all civil actions pending on October 1, 1999, in which the initial trial or retrial of the action has not commenced and to all civil actions commenced on or after that date.

**Section 4** creates s. 768.735, F.S., to exempt certain abuse actions or actions arising under ch. 400, F.S., relating to nursing homes and other health related facilities, from a number of the new punitive damages provisions. Any civil action based upon child abuse, abuse of an elderly person or abuse of a developmentally disabled person, or any civil action arising under ch. 400, F.S., are exempt from the new provisions in s. 768.72(2)-(4), F.S. (relating to types of conduct necessary for an award of punitive damages, and vicarious liability by employers), s. 768.725, F.S., (relating to caps on punitive damages), and s. 768.73, F.S. (relating to the burden of proof required for an award of punitive damages).

The term “developmentally disabled” is not defined. A definition exists for the term “disabled adult” that is defined in ch. 415, F.S., to mean any person 18 years or older who suffers from physical or mental incapacitation due to a developmental disability, organic brain damage, or mental illness, or who has one or more physical or mental limitations substantially affecting the performance of normal activities. A definition for the term “developmental disability” exists in ch. 393, F.S., to mean a disorder or syndrome that is attributable to retardation, cerebral palsy, autism, spina bifida, or Prader-Will syndrome and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely. In addition, actions based upon neglect or exploitation of a child, an elderly person, or a disabled adult (as defined in ch. 415, F.S.) would not likely be covered by the term “abuse” and thus, would not be exempt from the new limitations on punitive damages provisions.

**Section 5** creates s. 768.736, F.S., to prohibit application of ss. 768.725 and 768.73, F.S., to any defendant who, at the time of the act or omission, was under the influence of any alcoholic beverage or drug to the extent that the defendant’s normal faculties were impaired, or who had a blood or breath alcohol level of 0.08 percent or higher. This would mean that the provisions on burden of proof and limitation of punitive damages would not apply.

**Section 6** provides a severability clause.

**Section 7** provides that the act shall take effect October 1, 1999.

**IV. Constitutional Issues:**

## A. Municipality/County Mandates Restrictions:

None.

## B. Public Records/Open Meetings Issues:

None.

## C. Trust Funds Restrictions:

None.

**V. Economic Impact and Fiscal Note:**

## A. Tax/Fee Issues:

None.

## B. Private Sector Impact:

This bill substantially affects a wide variety of procedures and standards governing punitive damages in civil actions in Florida, from the perspective of both plaintiffs and defendants. However, the precise impact of this bill on the private and business sector is indeterminate. Further insight into the impact of these measures may be available upon passage of SB 374, which provides for an actuarial study report on expected reductions in settlements, judgments, and related costs, due in March 2001, and of the Department of Insurance's review of certain insurers' rate filings.

## C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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