



# MARYLAND DEFENSE COUNSEL, INC.

*Promoting justice. Providing solutions.*

March 9, 2026

**PRESIDENT**

Zachary A. Miller  
Wilson Elser

**PRESIDENT-ELECT**

Rachel L. Gebhart  
Godwin Tirocchi, LLC

**SECRETARY**

Ashley Wetzel  
Nelson Mullins

**TREASURER**

Anthony M. Conti  
Conti Fenn, LLC

**IMMEDIATE PAST-PRESIDENT**

Amy E. Askew  
Kramon & Graham PA

**EXECUTIVE DIRECTOR**

Aimee Hiers

Chair William C. Smith, Jr.  
Senate Judicial Proceedings Committee  
2 East Miller Senate Office Building  
Annapolis, Maryland 21401

**RE: SB 871 - Civil Actions - Punitive Damage Awards -  
Surcharge - OPPOSE**

Dear Chair Smith, Vice Chair Waldstreicher, and Members of the Senate Judicial Proceedings Committee:

On behalf of Maryland Defense Counsel, Inc. (“MDC”) we oppose Senate Bill 871, which seeks to allow for the award of punitive damages in a civil action where the defendant acted with gross negligence, instead of actual malice, and requires the State Court Administrator to assess a certain surcharge on a defendant against whom a judgment for punitive damages is entered.

In Maryland, there is a large body of well-settled case law regarding the legal standard to allow for recovery of punitive damages in civil cases. The Supreme Court of Maryland “has imposed an onerous standard for plaintiffs seeking punitive damages.” *Odyssey Travel Ctr., Inc. v. RO Cruises, Inc.*, 262 F. Supp. 2d 618, 630 (D. Md. 2003). “Under Maryland law, a plaintiff seeking punitive damages must prove ‘**actual malice**’ on the part of the defendant, justifying an award of punitive damages based upon the ‘heinous nature of the defendant’s tortious conduct[.]’” *Id.* (quoting *Owens-Illinois v. Zenobia*, 325 Md. 420, 454, 460 (1992)) (emphasis added). “Actual malice” has been defined as “the performance of an unlawful act, intentionally or wantonly, without legal justification or excuse but **with an evil or rancorous motive influenced by hate; the purpose being to deliberately and wilfully injure the plaintiff.**” *Darcars Motors of Silver Spring, Inc. v. Borzym*, 150 Md. App. 18, 28 (2003) (quoting *Drug Fair of Md., Inc. v. Smith*, 263 Md. 341, 352 (1971)) (emphasis added). “The court stated in *Zenobia* that ‘punitive damages are awarded in an attempt to punish a defendant whose conduct is characterized by evil motive, intent to injure, or fraud, and to warn others contemplating similar conduct of the serious risk of monetary liability.’” *Odyssey Travel*, 262 F. Supp. 2d at 630 (quoting *Zenobia*, 325 Md. at 454). “Additionally, the court stated that ‘in any tort case a plaintiff must establish by clear and convincing evidence the basis for an award of punitive damages.’” *Id.* (quoting *Zenobia*, 325 Md. at 469) (emphasis in original).

SB 871 would fundamentally change Maryland’s common law on punitive damages by lowering the legal threshold for recovery of punitive damages from actual malice (*i.e.*, “evil motive, intent to injure, or fraud”) to mere gross negligence. As the Supreme Court of Maryland explained in *Stracke v. Estate of Butler*, “[i]ssues involving gross negligence are often more troublesome than those involving malice because a fine line exists between allegations of negligence and gross negligence.” 465 Md. 407, 420 (2019) (quoting *Barbre v. Pope*, 402 Md. 157, 187 (2007)). “Ordinary, simple negligence is ‘any conduct, except conduct recklessly disregarding of an interest of others, which falls below the standard established by law for protection of others against unreasonable risk of harm.’” *Id.* (quoting *Barbre*, 402 Md. at 187). On the other hand, gross negligence is “an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another, and also implies a thoughtless disregard of the consequences without the exertion of any effort to avoid them.” *Id.* at 420-421 (quoting *Barbre*, 402 Md. at 187).

From 1972 to 1992 the Supreme Court of Maryland grappled with the issue of whether to require proof of actual malice before recovery of punitive damages in negligence actions, or whether, in the context of automobile negligence cases, “implied malice” should suffice. “Implied malice” was different from actual malice, and was defined as “non-intentional conduct so reckless or wanton as to be ‘grossly negligent.’” *Scott v. Jenkins*, 345 Md. 21, 29 n.3 (1997).<sup>1</sup> Before 1972, the Supreme Court of Maryland held fast to a standard requiring “actual malice,” but then in 1972, the Court departed from that rule and held that “implied malice” would suffice in auto negligence cases. The consequence of that change was “an explosion of punitive damages litigation ..., fueled in part by two opinions which, in effect, severed punitive damage awards from their historical rationales of punishment and deterrence.” *Scott*, 345 Md. at 30 (*Schaefer v. Miller*, 322 Md. 297, 322 (1991)(Eldridge, J., concurring)).<sup>2</sup> In 1992, the Court in *Zenobia* rejected the implied malice standard and held that “in a non-intentional tort action, the trier of fact may not award punitive damages unless the plaintiff has established that the defendant’s conduct was characterized by evil motive, intent to injure, ill will, or fraud, *i.e.*, ‘actual malice.’” *Scott*, 345 Md. at 31 (quoting *Zenobia*, 325 Md. at 460).

In *Scott*, the Supreme Court of Maryland explained why the Court, in *Zenobia*, returned to requiring actual malice for recovery of punitive damages:

**[T]he prophetic warning in *Smith v. Gray Concrete, supra*, that the “implied malice” or as there used, “gross negligence,” standard “may be so flexible that it can become virtually unlimited in its application,” proved true. “Despite [that] Court’s [attempts to limit] the implied malice standard to torts involving the operation of motor vehicles, the standard [was] freely applied to other non-intentional torts.”**

---

<sup>1</sup> *Scott* was superseded on other grounds as stated in *Hoile v. State*, 404 Md. 591 (2008).

<sup>2</sup> Since *Zenobia*, the Supreme Court of Maryland has held that the “actual malice” standard applies to both intentional and non-intentional torts. See *Scott*, 345 Md. at 33.

**Perhaps the most compelling reason for casting aside the implied malice standard was its elusive nature.** Although the purported basis for assessing punitive damages is to punish and deter particularly reprehensible conduct motivated by a conscious and evil motive, the various formulations of “implied malice” reached conduct that was perhaps reprehensible, but otherwise free of the ill-will appropriately targeted by a punitive damages award. **Not only did this inconsistency expose individuals and companies alike to an ever changing legal landscape which more often concealed, rather than revealed, the conduct subject to a punitive damages award, it also “undermined the deterrent effect of [such] awards.”** *Id.*, 325 Md. 459 (citing 2 L. SCHLUETER AND K. REDDEN, PUNITIVE DAMAGES, Appendix B, at 418-19 (2d ed. 1989)(suggesting that under the “implied malice” standard, potential defendants may either refrain from socially beneficial behavior out of fear, or engage in conduct harmful to society).

*Scott*, 345 Md. at 32 (emphasis added) (internal quotations and footnote omitted).

SB 871 would undo decades of well-settled case law in which the Supreme Court of Maryland in its wisdom decided that allowing for recovery of punitive damages based upon mere gross negligence, rather than actual malice, was ill-advised because it created what essentially was too slippery of a slope between ordinary negligence claims and gross negligence claims. As occurred between 1972 and 1992, SB 871 will likely lead to an explosion of punitive damages litigation in Maryland. The Maryland General Assembly would be incentivizing individuals to tune up what really is a negligence claim into a gross negligence claim in seeking recovery of punitive damages, which are uncapped as damages.

For all these reasons, MDC urges an unfavorable report on SB 871.

Sincerely,

/s/ Christopher C. Jeffries

cjeffries@kg-law.com

(410) 347-7412

on behalf of Maryland Defense Counsel, Inc