

March 9, 2026

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

Re: **SB 871 – Civil Actions – Punitive Damage Awards – Surcharge**

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

Throughout history, a critical function of the civil justice system has been to deter unreasonably unsafe conduct by imposing financial liability on wrongdoers. In a civil action for money damages, a plaintiff may recover compensatory damages, which are intended to compensate the plaintiff for the harms and losses caused by the defendant's wrongful conduct.

In addition to compensatory damages, *punitive damages* are an effective tool of the civil justice system in many states. Where such a remedy is available, punitive damages are intended (a) to punish egregious conduct and (b) to deter others from engaging in such conduct in the future.

In states that allow their recovery, punitive damages protect residents by deterring conduct that is "grossly negligent," *i.e.*, conduct that recklessly disregards the rights and safety of the public at large, or is characterized by malicious, oppressive, or fraudulent intent.

Prior to 1992, Maryland law allowed punitive damages if the jury found, by clear and convincing evidence, that the defendant acted with gross negligence (also referred to as "implied malice"), defined by a "wanton and reckless disregard for human life." *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 167 (1972).

In 1992, a divided Supreme Court of Maryland decided that punitive damages no longer should be available to punish or deter defendants who would act with a "wanton and reckless disregard for human life" in Maryland. *Owens-Illinois v. Zenobia*, 325 Md. 420 (1992). In a separate opinion, Judge Robert M. Bell (later Chief Judge of the Court of Appeals) warned against the "actual malice" standard:

Permitting punitive damages when one acts with actual malice, but not when, given the totality of the circumstances, that same person acts in total disregard for the safety of others, has *no reasoned basis*. . . .

Insulating a defendant from an award of punitive damages except when he or she acts with actual malice . . . provides a disincentive for that defendant to act reasonably. Since, from the standpoint of a defendant's pocketbook, it makes no difference in the award of damages, whether he or she is negligent or grossly negligent, that is, his or her conduct is extreme to a point just short of being intentional, requiring that defendant to pay compensatory damages

for the victims' injuries is not likely to have a deterrent effect; it is not likely to cause him or her to consider, not to mention, change, his or her conduct.

Id. at 482 (Bell, J., concurring and dissenting) (emphasis added). Judge Bell further criticized the Court's "two-prong standard, one applicable to non-intentional torts and the other, containing an aspect [of "implied malice"], applicable to products liability cases." *Id.* at 485.

Notwithstanding the decision in *Zenobia*, punitive damages are not a disfavored tool for public policy in Maryland. A House Workgroup Report on Punitive Damages in 2017 identified more than 40 instances in the Maryland Code where punitive damages were allowed for certain specific conduct. .

SB 871 would overturn *Zenobia* and bring Maryland back into the mainstream, allowing punitive damages in non-intentional tort actions (including wrongful death actions) according to a standard drawn from case law followed by a majority of states (including AL, AK, AZ, AR, CA, CO, CT, DE, FL, GA, IA, ID, IN, KY, ME, MN, MO, MS, MT, ND, NJ, NM, NV, NY, OH, OK, PA, SC, TX, UT, VA, and WI). In all of those states, punitive damages are available to punish and deter conduct that disregards the rights and safety of the public at large.

Marylanders deserve no less protection than the residents of other states. SB 871 finally restores a legal deterrent in Maryland against wanton and reckless disregard for human life – a legal deterrent that has been missing since the Court in *Zenobia* abolished it 35 years ago.

Because the recovery of punitive damages represents a public determination that conduct should be punished, the law in some jurisdictions allocates a portion of punitive damage awards to the state. That allocation may take the form of a share of the award or a surcharge.

I propose several amendments to SB 871 for the Committee's consideration.

The first proposed amendment would clarify that punitive damages are available, under the same standard of "gross negligence," in wrongful death actions:

At page 2, line 18, after **NEGLIGENCE**, insert "**OR A WRONGFUL ACT,**"

Maryland's Wrongful Death Act, Md. Cts. & Jud. Procs. Code §§ 3-902(a), establishes that an action for wrongful death "may be maintained against a person whose wrongful act causes the death of another." It would be incongruent to allow punitive damages in all cases *except* where gross negligence causes death.

The second proposed amendment would clarify the manner in which punitive damages are shared between the plaintiff and the State:

Strike page 2, line 17 through page 3, line 11, and insert:

(C) (1) UPON A VERDICT INCLUDING AN AWARD OF PUNITIVE DAMAGES, THE STATE BECOMES A JUDGMENT CREDITOR AS TO THE AMOUNTS PAYABLE UNDER SUB-PARAGRAPH (II) OF THIS SUBSECTION, AND THE PUNITIVE DAMAGES PORTION OF THE AWARD SHALL BE ALLOCATED AS FOLLOWS:

(I) ONE-HALF ALLOCATED TO THE PREVAILING PARTY OR PARTIES, AND

(II) ONE-HALF ALLOCATED TO THE STATE OF MARYLAND.

(2) UPON THE ENTRY OF JUDGMENT ON A VERDICT INCLUDING AN AWARD OF PUNITIVE DAMAGES GOVERNED BY THIS SECTION, THE PREVAILING PARTY SHALL PROVIDE WRITTEN NOTICE OF THE ENTRY OF JUDGMENT TO THE OFFICE OF THE ATTORNEY GENERAL.

(3) ANY JUDGMENT ENTERED ON A VERDICT INCLUDING AN AWARD OF PUNITIVE DAMAGES, AND ANY REVISED JUDGMENT INCLUDING AN AWARD OF PUNITIVE DAMAGES ENTERED THEREAFTER, SHALL IDENTIFY THE JUDGMENT CREDITORS SPECIFIED IN SUBSECTION (1).

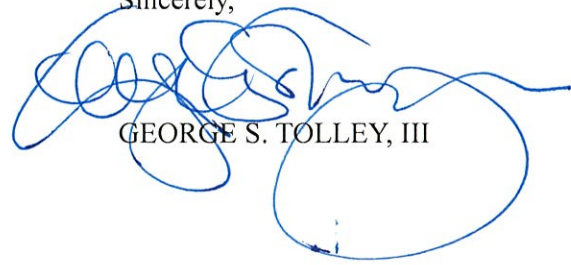
(4) WHENEVER A JUDGMENT INCLUDES BOTH COMPENSATORY AND PUNITIVE DAMAGES, ANY PAYMENT ON THE JUDGMENT BY OR ON BEHALF OF ANY DEFENDANT, WHETHER VOLUNTARY OR BY EXECUTION OR OTHERWISE, SHALL BE APPLIED FIRST TO COMPENSATORY DAMAGES, COSTS AND COURT-AWARDED ATTORNEYS FEES, IF ANY, AND THEN TO PUNITIVE DAMAGES AWARDED AGAINST THAT DEFENDANT UNLESS ALL AFFECTED PARTIES, INCLUDING THE STATE OF MARYLAND, EXPRESSLY AGREE OTHERWISE, OR UNLESS THAT APPLICATION IS CONTRARY TO THE EXPRESS TERMS OF THE JUDGMENT.

(5) WHENEVER ANY JUDGMENT CREDITOR OF A JUDGMENT WHICH INCLUDES PUNITIVE DAMAGES GOVERNED BY THIS SECTION RECEIVES ANY PAYMENT ON THE JUDGMENT BY OR ON BEHALF OF ANY DEFENDANT, THE JUDGMENT CREDITOR RECEIVING THE PAYMENT SHALL NOTIFY ALL OTHER JUDGMENT CREDITORS AND ALL SUMS SHALL BE APPLIED AS REQUIRED BY THIS SECTION, UNLESS ALL AFFECTED PARTIES, INCLUDING THE STATE OF MARYLAND, EXPRESSLY AGREE OTHERWISE, OR UNLESS THAT APPLICATION IS CONTRARY TO THE EXPRESS TERMS OF THE JUDGMENT.

This proposed amendment tracks Oregon's statutory punitive damages law, ORS § 31.735, with half of any punitive damages award being allocated to the State of Maryland and half of the award allocated to the prevailing party or parties.

Subject to these proposed amendments, I respectfully ask for a FAVORABLE report on SB 871.

Sincerely,

A handwritten signature in blue ink, appearing to read "George S. Tolley, III", is written over the typed name. The signature is highly stylized and cursive.

GEORGE S. TOLLEY, III

GSTIII