

MARYLAND EMPLOYERS FOR CIVIL JUSTICE REFORM COALITION

OPPOSES SB 871

Civil Actions – Punitive Damage Awards - Surcharge

Maryland Employers for Civil Justice Reform Coalition, comprised of many of the largest employers, businesses, and health care providers in Maryland, opposes SB 871. For the apparent purpose of addressing the State's fiscal challenges, the bill calls for a substantial relaxation of Maryland's long-held standard for the award of punitive damages. Under the bill, the standard would be profoundly reduced to a contrived and illusory gross negligence standard, under which practically every tort claim in Maryland would qualify for punitive damages, an unjustified and costly policy.

It is long settled law that the standard for the award of punitive damages in Maryland is actual malice. This means that the trier of fact may not award punitive damages unless the plaintiff has established by clear and convincing evidence that the defendant's conduct was characterized by evil motive, intent to injure, ill will, or fraud. This current standard is appropriate - - it is an extraordinary standard because punitive damages, which are unlimited in Maryland, are an extraordinary remedy.

The Supreme Court of Maryland explained why the lower standard of implied malice (i.e., gross negligence), which had been the standard for a short time in 1972-1992, was a mistake that needed to be overruled:

The implied malice test adopted in *Smith v. Gray Concrete Pipe Co.* has been overbroad in its application and has resulted in inconsistent jury verdicts involving similar facts. It provides little guidance for individuals and companies to enable them to predict behavior that will either trigger or avoid punitive damages liability, and it undermines the deterrent effect of these awards.

Maryland's high court went on to emphasize the penal nature and serious consequences of punitive damages, noting that such awards are to be made *judiciously and only in the most egregious cases*. By requiring actual knowledge and deliberate disregard, the court aligned the punitive damages standard with the underlying objectives of punishment and deterrence. The court's 1992 decision -- to abandon the implied malice (gross negligence) standard and return to the prior standard of actual malice -- clarified and tightened the criteria for awarding punitive damages, aiming to avoid inconsistent and unpredictable application. The return to actual malice was also based on the court's finding of "a literal explosion of punitive damage awards and practice" under the lesser implied malice standard.¹

¹ *Owens-Illinois v. Zenobia*, 325 Md. 420, 456-459 (1992).

Significantly, SB 871 does not stop at the previously-abandoned standard of implied malice (gross negligence). It goes even lower, and lower than the interpretation by any Maryland court, so as to allow punitive damages for such minimal and arbitrary infractions as “a failure to exercise even slight care.” Such a low standard could include someone’s forgetfulness. Other minimal standards include “a pattern of repeated conduct” or “indifference to legal obligations.” Such low and arbitrary standards would expose practically every claim of negligence, including simple negligence claims, to a punitive damage award. SB 871 contains a total of six of these low and arbitrary standards, and under the bill meeting any of them triggers a punitive damage award, an absurdly low bar to such a high and extraordinary remedy.

SB 871 requires that a plaintiff meet an evidentiary standard, “clear and convincing evidence,” to prove implied malice (gross negligence). This standard is already the evidentiary standard for the award of punitive damages. Any notion by the proponents that SB 871 establishes a high threshold or a similar safeguard for the award of punitive damages because of this high evidentiary standard is patently false, as this bill language is already enacted law in Maryland.

A final provision of the bill creates a surcharge on defendants who are found liable for punitive damages, with the proceeds of the surcharge to be directed to K-12 public education. While the Coalition takes no position on how monies are directed to meet the State’s funding priorities, it does note that proceeds from punitive damage awards cannot be quantified. Specifically, in the event of an appeal of a punitive damage verdict, the result could modify, overturn or delay for years an award of punitive damages, producing volatility and unpredictability in the amount of funds that the State could expect to receive. A revenue source dependent upon a surcharge on punitive damage awards affords no financial certainty, and therefore no budgeting, planning, or even estimating of revenues is possible under such a scheme. In addition, the experience in another state, Georgia, where 75% of certain punitive damage awards go to the State, has been that such payments are hardly ever paid as parties have circumvented around punitive damages. Accordingly, the enactment of this legislation for fiscal reasons will not provide any fiscal relief to the State.

While the State’s fiscal outlook will not benefit from such legislation, there is one group of beneficiaries -- plaintiffs’ lawyers – who will benefit from an extraordinary windfall of higher legal fees. This is because their fees are based on a percentage of punitive damage awards. As plaintiffs’ lawyers are the only proponents of this bill, such a nakedly self-serving attempt to enrich plaintiffs’ lawyers has no place in the public policy of Maryland.

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

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