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October 4, 2012

Via Hand Delivery

Christopher Allen Meyer, Esquire
Allen, Allen, Allen & Allen
1809 Staples Mill Road
Richmond, Virginia 23230

RE: Boyd-Graves Conference
Punitive Damages Study Committee

Dear Chris:

I enclose the revised Committee's report for inclusion in the conference booklet. Please discard the report previously provided that was dated September 25, 2012. Should you have any questions, please contact me.

Sincerely yours,

Stephen D. Busch

SDB/tjp
Enclosure
Cc: John S. Walk, Esquire (via e-mail)

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REPORT TO BOYD-GRAVES CONFERENCE
PUNITIVE DAMAGES STUDY COMMITTEE
OCTOBER 4, 2012

Committee Members:

Stephen D. Busch, Chair	Hon. Wyatt B. Durrette, Jr.
Thomas G. Bell, Jr.	Hon. Wiley F. Mitchell, Jr.
L.B. Chandler, Jr.	Steven W. Pearson
Professor James J. Duane	Stephen M. Sayers

The following is the report of the Punitive Damages Study Committee (the committee) of the Boyd Graves Conference appointed in March 2012, to further examine claims for punitive damages in the Commonwealth of Virginia, including the adequacy of the present statutory cap of $350,000. The statutory cap is set forth in Virginia Code Ann. Section 8.01-38.1, which provides as follows:

> **§ 8.01-38.1. Limitation on recovery of punitive damages.**
>
> In any action accruing on or after July 1, 1988, including an action for medical malpractice under Chapter 21.1 (§ 8.01-581.1 et seq.), the total amount awarded for punitive damages against all defendants found to be liable shall be determined by the trier of fact. In no event shall the total amount awarded for punitive damages exceed $350,000. The jury shall not be advised of the limitation prescribed by this section. However, if a jury returns a verdict for punitive damages in excess of the maximum amount specified in this section, the judge shall reduce the award and enter judgment for such damages in the maximum amount provided by this section. (1987, c. 255.)

For background, the committee's work this year follows its initial efforts in 2011. The first section of this report will provide a summary of our 2011 study in order to provide context for the committee's 2012 efforts.

2011 Committee Report

The conference[1] will recall that in October 2011, the committee reported on the results of its 2011 study efforts which examined two questions:

1. Should the current statutory cap of $350,000 on the recovery of punitive damages in the Commonwealth be raised, and if so, should the statute also be further amended to allow for an allocation of the punitive award between the plaintiff and the Commonwealth or one of its departments?

2. Should the $350,000 cap be raised independently of a statutory amendment to allow for some type of allocation of a punitive damages award?

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[1] The Boyd Graves Conference is referred to as "the conference."

The conference adopted the committee's 2011 recommendations on these issues. First, the conference adopted the recommendation to not propose any change to current law to allow for the allocation of any punitive award between the plaintiff and the Commonwealth of Virginia. Second, the conference adopted the recommendation to study punitive damages more comprehensively than the adequacy of the $350,000 cap by taking into account other substantive and procedural issues involving an award of punitive damages and whether other possible changes to the statute should accompany any such increase in the maximum allowable recovery.

More specifically, the committee outlined the following issues in its 2011 Committee Report as topics meriting study in 2012:

a. Punitive damages generally.

(1) Whether Virginia law should permit an assessment of punitive damages under any circumstances in a civil case?

(2) If so, under what circumstances and subject to what criteria should a recovery of punitive damages be permitted?

b. Punitive damages cap.

(1) Is the $350,000 cap too low to adequately punish willful and wanton misconduct, or to deter others from similar actions?

(2) If the Conference were to conclude that the $350,000 cap is too low to adequately punish willful and wanton misconduct, or to deter others from similar actions, then to what amount should it be raised? Instead of raising the cap, should it be eliminated completely?

(3) As a practical matter does exposure of defendants to the risk of a punitive damages award raise the amount of settlements and compensatory damage verdicts? Would raising the cap result in an increase in the size of settlements on average because of the risk of larger punitive damage awards?

(4) Is a "one-size-fits-all" cap inherently unfair? Does a $350,000 punitive damages verdict have a disproportional impact on an individual or a small business with limited or no insurance as contrasted to a verdict for the same amount against a multi-billion dollar company? Even if this is true, would it be inherently unfair to a create system that would allow for higher punitive damages verdicts to be rendered against businesses than individuals?

c. Potential restrictions/safeguards on punitive awards.

(1) What constitutional constraints have recent decisions by the United States Supreme Court placed on an award of punitive damages and do these constraints suggest the need for changes to Virginia law?

(2) What economic limitations, if any, should be placed on an award of punitive damages? If there is to be a cap, should the cap be fixed at a particular amount, or should the limitation be based on a maximum ratio between compensatory and punitive damages?

(3) Should evidence of a defendant's net worth be admitted in cases in which an issue of punitive damages is to be submitted to a jury? Inasmuch as punitive damages are not intended to compensate but instead to punish the defendant, to what degree if any, are the Federal Sentencing Guidelines (which prohibit a jury in a criminal case from considering the socio-economic status of the defendant) relevant to this question?

(4) In the absence of ratification or condonation, should a corporate defendant be subject to liability for punitive damages under the doctrine of *respondeat superior* based upon the misconduct of an employee who has intentionally violated the rules or instructions of the employer, or engaged in criminal conduct allegedly causing injury or damages to the plaintiff?

(5) To what extent, if any, should evidence of the defendant's out of state conduct be admitted in a Virginia action for punitive damages?

(6) If the cap were to be raised, should the amendment also allow for some type of safeguards that would protect defendants from being exposed to multiple punitive damage verdicts for the same or similar conduct? Should punitive damages be prohibited where the defendant has suffered a punitive damages verdict for the same or similar conduct? Should a jury be permitted to consider previous punitive damage awards as a factor in deciding whether to award punitive damages in the pending case? Should a defendant receive a credit for an amount paid on a previous punitive damages verdict for the same or similar conduct?

(7) What other procedural safeguards should be considered with respect to punitive damages awards? For example, should juries be provided with a specific list of factors that they may consider in evaluating whether to award punitive damages and if so, the amount of the verdict?

2012 Committee Work

In the committee's first conference this year, we discussed the issues we had been tasked to evaluate. We placed them into three broad categories:

- Punitive damages generally;
- The current cap on punitive damages awards; and,
- Potential restrictions/safeguards on punitive awards.

The first decision that the committee made was to commission research and to gather information in the following areas so that we would be sufficiently well informed to meaningfully evaluate the important issues that we were commissioned to analyze. We consolidated the questions raised in our 2011 report into the following topics.

a. Study topics.

(1) What are the "Rules of the Road" from the Supreme Court of the United States and the Supreme Court of Virginia on punitive damages?

(2) What procedural safeguards have been put in place by other states that permit the recovery of punitive damages? What safeguards should be considered in Virginia?

(3) What economic and other factors justify increasing the cap on punitive damages? What effect would an increase in the cap have, if any, on the cost of insurance, the amounts of settlements and verdicts or otherwise?

(4) Should Virginia retain the current "one-size-fits-all" cap?

(5) In cases in which a court is going to send the issue of punitive damages to a jury, should the jury be allowed to receive financial information about the defendant? At what point should such information be introduced -- before a decision has been made to allow the award, or at a later stage of the proceeding?

b. Work Product.

The committee was energetic again this year. Notwithstanding a few inevitable scheduling conflicts, almost everyone on the committee participated in each of our four committee conferences. A significant body of information was developed, some of which will be shared with the conference as noted below.

The most significant independent research was conducted by Evan Adams, a student at the University of Virginia Law School in the Class of 2014, during his summer clerkship with McGuireWoods LLP in Richmond. His excellent memorandum is attached as Attachment 1. However, much valuable information also was collected from third parties.

Wyatt Durrette obtained a 50-state survey of the standards and limitations on punitive damages awards from the American Legislative Exchange Council. Wiley Mitchell obtained a similar report prepared by the Property Casualty Insurers Association of America. Steve Busch contacted Dr. Nicole Waters of the National Center for State Courts and obtained various information including a report published by the Bureau of Justice Statistics of the U.S. Department of Justice, entitled "Punitive Damage Awards in State Courts, 2005," based upon data collected by the 2005 Civil Justice Survey Study of State Courts (the latest survey).[2]

[2] The committee will be happy to share these materials upon request.

c. Committee Discussions.

Each of the committee calls involved status reports on action items assigned in the earlier conferences. In addition, the committee engaged in substantive discussions of each of the study topics, and most of the topics were discussed and debated on multiple occasions.[3]

(1) Options considered by committee.

In order to focus the committee's discussions and to facilitate reaching consensus, a report was prepared and circulated before the committee's last conference listing a wide range of options for consideration. *See* Attachment 2, report entitled "Options for Committee Consideration on September 5, 2012."

To be true to our charge, the committee nominally considered whether to eliminate the right to recover punitive damages at all in the Commonwealth, and conversely whether to completely eliminate the cap (meaning there would be no specified maximum recovery). Six (6) states do not allow the recovery of punitive damages. Twenty-one (21) states do not cap punitive damages. There was no support within the committee to consider either of these possibilities, which for the purpose of the committee's charter, served as book-ends of the spectrum of potential changes to current law.

As the committee's work progressed, support grew for recommending to the conference that the statutory cap should be increased from the current level of $350,000. While this decision was relatively easy if for no other reason than the effect of inflation since 1988 when the cap was enacted,[4] the committee's deliberations on whether to fundamentally change the way punitive awards are capped in Virginia, and whether to recommend adding safeguards into the statute were quite thorny.

(2) Straight versus a hybrid cap.

The committee debated whether to maintain a "straight" cap versus a "hybrid" system. Of the twenty-four (24) states with punitive damages caps, Virginia joins one (1) other state (Georgia), in capping the recovery at a specific maximum dollar amount.[5] Of the twenty-four (24) states with punitive damages caps, three (3) states cap the awards as a set multiple of the compensatory damages award.

Perhaps more progressively, sixteen (16) of the twenty-four (24) states that have adopted some form of a cap have adopted a hybrid system that takes into account both a maximum dollar recovery and a set multiple of the compensatory damage award. The states with hybrid systems allow the plaintiff to recover the greater of either a specified dollar amount or a multiple of the compensatory award. The specified dollar amount ranges from a low of $50,000 to a high of $500,000. The multiple varies from one (1) times the compensatory award to five (5) times.

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[3] Minutes were kept of the committee's conferences and are available upon request.

[4] According to the CPI Inflation Calculator of the U.S. Bureau of Labor Statistics, the sum of $350,000 in 1988, when adjusted for inflation, would be worth $677,822 in 2012.

[5] Georgia's cap is $250,000, but it is inapplicable in product liability suits and intentional tort claims.

While the hybrid system has some attractive features, there was no support within the committee to recommend amending the statute to create a system in which the maximum recovery is not specified. Under most of the hybrid systems, the maximum recovery is not known because it necessarily depends upon the amount of the compensatory award and the statutory factor or multiplier (in various states this is one, three or five times the compensatory award). In addition to not having a specific maximum allowable recovery, these systems also can produce punitive damage awards that can be quite large. For example, if a plaintiff were to recover a compensatory award of $10 million, then with a hybrid system with a factor of three, the total award would be $40 million dollars ($10 million for compensatory damages, and $30 million for the punitive award).

(3) Fully adjusting for inflation.

As the discussions progressed, the committee's support for raising the cap remained strong. However, the majority of the committee concluded that raising the cap to fully adjust for inflation since the cap was set at $350,000 in 1988 would make the potential maximum recovery too high. As noted earlier, $350,000 in 1988 has the equivalent value in 2012 of $677,822.

(4) Effect of raising the cap.

In 2011, when the committee concluded that some adjustment of the cap should be considered, concern was voiced about the effect of raising the cap. Specifically, we wanted to know how this might impact insurance premiums. In 2012, Wiley Mitchell investigated this issue. He contacted the Virginia Department of Insurance, various insurance companies and an insurance trade association in an effort to determine whether there is any empirical information available on the effect of raising a statutory cap that otherwise limits a plaintiff's recovery

Wiley reported that he received a consistent answer to his inquiries. Insurance rates are predicated on overall tort recoveries, and not specific factors influencing the amounts of verdicts such as the availability of statutory caps as we have on punitive damages in Virginia, or the contributory negligence defense. The insurance underwriters examine the total risk in setting premiums.

After considering the information that he gathered, Wiley summarized his thoughts as follows, which reflect the committee's thinking as well:

- There is no credible evidence that if the cap were to be increased or even decreased that this would have a discernible impact on insurance rates;

- If the cap on punitive damages were to be raised, then inevitably there will be an increase in the average size of punitive damages awards; and,

- If the punitive damages cap were to be raised in Virginia then this would drive up the average amounts of settlement of claims in cases largely involving compensatory damages.

In summary, the committee concluded that raising the cap would not have a discernible impact on insurance premiums given the manner in which premiums are set by insurance underwriters.

(5) Procedural safeguards.

The committee also considered a wide variety of potential procedural safeguards adopted by various states. *See generally* Attachment 1, Evan Adams' memorandum, pp. 5 – 12; *See also* Attachment 2, report entitled "Options for Committee Consideration on September 5, 2012." Options 8 and 8A listed at pages 3 - 4 of the report list the procedural safeguards that were considered by the committee.

Beyond the merits of any specific proposal, the committee debated whether to tether any increase in the cap to the enactment of one or more procedural safeguards not available under existing Virginia law. The committee concluded that a number of the safeguards have substantial merit, but that trying to place too many new protections into a bill to amend the statute would ultimately jeopardize the opportunity to increase the cap. Thus, the committee decided to recommend only two new safeguards as a part of the bill to amend § 8.01-38.1. The first would be to change the standard of proof required to recover punitive damages. The second would be codification of the rule stated in *Hogg v. Plant,* 145 Va. 175, 180, 133 S.E. 759, 760 (1926), that punitive damages may not be recovered against a master or principal for the acts of his servant or agent unless plaintiff proves that the act was done in the scope of employment, with either actual or implied malice, and that the principal either expressly authorized, subsequently ratified, or participated himself in the act.[6]

For the sake of completeness however, the committee reports that another safeguard that was seriously considered was whether to exclude evidence of a defendants' financial condition, or to not permit the introduction of such evidence until after the court has decided to allow the punitive damages claim to be submitted to the jury, or, alternatively, until after the jury has decided whether to award such damages. No change will be recommended to address this issue.

The committee also was intrigued by whether to limit the circumstances in which punitive damages may be pursued if a punitive damage award previously has been entered against the defendant for the same act or course of conduct upon which plaintiff seeks recovery in the pending case. A final safeguard that drew some level of support was whether, in product liability litigation, to prohibit any claims for punitive damages if the defendant has complied with applicable state and federal statutes and regulations.
No action will be recommended on these issues either.

[6] To be clear, a majority of the committee does not support raising the cap unless certain safeguards also are adopted.

(a) Standard of Proof – Clear and Convincing Evidence.

As referenced above the committee feels strongly that Virginia should use a heightened standard of proof for punitive damages than the current one of preponderance of the evidence.[7] As noted in Evan's memorandum, proponents of an elevated standard note that punitive damages occupy a unique posture bordering criminal and civil law. Thirty-six states (36) have an elevated standard of clear and convincing evidence in order to support a claim for punitive damages. *See* Attachment 1, at pp. 4 – 5.

Notably, certain causes of action in the Commonwealth must be proven by clear and convincing evidence. Two such examples are claims for fraud and business conspiracy. (*SuperValu, Inc. v. Johnson*, 276 Va. 356, 367, 666 S.E.2d 335, 341-42 (2008); and, *N. Va. Real Estate, Inc. v. Martins*, 283 Va. 86, 110, 720 S.E.2d 121, 133 (2012)). The model jury instructions for punitive damages and the different burdens of proof are set forth below:

> **Instruction No. 9.080**
> **General Punitive Damages**
>
> If you find that the plaintiff is entitled to be compensated for his damages, and if you further believe by the greater weight of the evidence that the defendant acted with actual malice toward the plaintiff or acted under circumstances amounting to a willful and wanton disregard of the plaintiff's rights, then you may also award punitive damages to the plaintiff to punish the defendant for his actions and to serve as an example to prevent others from acting in a similar way.
>
> If you award punitive damages, you must state separately in your verdict the amount you allow as compensatory damages and the amount you allow as punitive damages.
>
> **Instruction No. 3.100**
> **Standard of Proof: Definition of Greater Weight of the Evidence**
>
> The greater weight of all the evidence is sometimes called the preponderance of the evidence. It is that evidence which you find more persuasive. The testimony of one witness whom you believe can be the greater weight of the evidence.
>
> **Instruction No. 3.110**
> **Standard of Proof: Definition of Clear and Convincing Evidence**
>
> When a party has the burden of proving an issue by clear and convincing evidence, he must produce evidence that creates in your minds a firm belief or conviction that he has proved the issue.

In terms of the scope of the application of the proposed heightened standard, the committee considered the provisions of Virginia Code Section 8.01-44.5, which applies to civil

[7] Committee member Steve Pearson disagrees with the majority of the committee and his dissent is made a part of the committee report as Attachment 3.

liability for punitive damages in drunken driving cases. In summary, this statute creates a presumption of willful and wanton misconduct as long as the plaintiff proves three things:

(1) when the incident causing the injury or death occurred, the defendant had a blood alcohol concentration of 0.15 percent or more by weight by volume or 0.15 grams or more per 210 liters of breath;

(2) at the time the defendant began drinking alcohol, or during the time he was drinking alcohol, he knew or should have known that his ability to operate a motor vehicle, engine or train would be impaired, or when he was operating a motor vehicle he knew or should have known that his ability to operate a motor vehicle was impaired; and

(3) the defendant's intoxication was a proximate cause of the injury to or death of the plaintiff.

The committee concluded that the current preponderance of the evidence standard should be left unchanged with respect to claims falling within the operation of § 8.01-44.5. The complete text of entire statute is found as Attachment 4.

Given the extraordinary circumstances required to make out a claim for punitive damages, e.g. actual malice or willful and wanton conduct, the committee concluded that it is incongruent to apply a preponderance of the evidence standard, rather than the heightened standard of clear and convincing evidence to punitive damage claims in the Commonwealth, except as noted above. Changing Virginia law in this regard will place the Commonwealth in line with the law of thirty-six other states.

(b) Codification of Rule in *Hogg v. Plant* Limiting Employer's Vicarious Liability For Punitive Damages.

As noted in the Adams' memorandum, a number of states have passed statutory limitations on claims for punitive damages against an employer based upon an employee's actions. *See* Attachment 1, at pp. 11-12. Most of the statutes in other states addressing this issue do not foreclose liability completely, but instead require heightened involvement on the part of the employer. These statutes are generally consistent with what is required in the Commonwealth under rather old but nonetheless good case law as mentioned above in *Hogg v. Plant*.

An example of a state that has passed a statute similar to the rule in *Hogg* is Kansas, which precludes punitive damages against "a principal or employer for the acts of an agent or employee unless the questioned conduct was authorized or ratified by a person expressly empowered to do so on behalf of the principal or employer." K.S.A. §60-3702(d). Alabama, Alaska, California, Minnesota, Nevada, North Dakota, and Tennessee have similar statutes. *See* Appendix 15 to Attachment 1, for text of statutes that limit employer's exposure to punitive damages based upon the acts of employees.

A copy of the Supreme Court of Virginia decision in *Hogg* is attached as Attachment 5. In deciding to limit the circumstances in which an employer can be liable for punitive damages

in cases involving egregious conduct on the part of the employee, the Court quoted *Hagan v. Providence R. Co.,* 3 R.I. 88, 62 Am. Dec. 377, as follows:

> "We do not see how such damages can be allowed, when the principal is prosecuted for the tortious act of his servant, unless there is proof in the case to implicate the principal and make him *particeps criminis* of the agent's act.
>
> No man should be punished for that of which he is not guilty. When the proof does not implicate the principal, and however wicked the servant may have been, the principal neither expressly nor implicitly authorizes or ratifies the act, and the criminality of it is as much against him as against any other member of society, we think it is quite enough that he shall be liable in compensatory damages for the injury sustained in consequence of the wrongful act of a person acting as his servant."

On this premise the Court stated what has been the rule in the Commonwealth since 1926, "it must be considered settled law in this State that punitive damages cannot be awarded against a master or principal for the wrongful act of his servant or agent in which he did not participate, and which he did not authorize or ratify." *Id.* at 761. (emphasis added).

The *Hogg* decision has been applied in at least 13 reported decisions by Virginia and federal courts for the proposition underlined in the preceding paragraph of this report, the most recent of which was in 2010. The only case reflecting potentially adverse treatment of *Hogg* is *Huffman v. Beverly California Corp.,* 42 Va. Cir. 204 (Rockingham County Cir. Ct., 1997), a case from the Circuit Court of Rockingham County. *See* Attachment 6. Based upon facts establishing sexual abuse and other poor treatment of an elderly gentleman with Parkinson's disease and other mental and physical problems in a geriatric facility, the jury returned a verdict for $518,000 in compensatory damages and $4.5 million in punitive damages.

The defendants moved to set aside the verdict in part based upon the rule in *Hogg.* The Court denied the motion finding that the evidence distinguished the *Hogg* decision, which if applicable, would have insulated the employer from vicarious liability. This result was due in large part to facts establishing that the employer's direct actions contributed to the injuries, such as the negligent hiring and negligent retention of the employee committing the abuse (Spitzer), and evidence implicating other employees with egregious acts and omissions besides the sexual abuse.

The committee observes that while the court's decision in *Huffman* appears to be generally consistent with *Hogg*, there is language in the decision suggesting that a major factor that the Court relied upon was that the employer had not taken the position that "Mr. Spitzer's acts were beyond the scope of his authority, or had not been ratified." *Id.* at 211, 14. However, *Hogg* did not turn on whether the employee acted outside of the scope of the employment, but instead whether the employer was implicated in the employee's wrongful conduct by authorizing the acts, or ratifying the conduct. For this reason the committee believes that codifying the rule in *Hogg* to remove doubt about the application of the rule is necessary and will serve to provide additional procedural safeguards in the law of the Commonwealth relating to punitive damages.

Conclusions and Recommendations

After extensive discussions, the committee has reached the conclusions stated below.

a. Conclusions.

(1) The present statutory cap of $350,000 is too low to effectively punish a person or entity whose willful and wanton conduct has harmed the plaintiff;

(2) Fairness dictates increasing the cap due to the effect of inflation;

(3) Increasing the cap to fully adjust for inflation since the cap was set at $350,000 in 1988 to $677,822 (or rounded to $675,000), would make the maximum recovery too high per the majority;

(4) Adding an automatic cost-of-living adjustment into the statute as have a number of other states to keep pace with inflation on an annual basis, or some other time frame such as every three years, is not good public policy as it would bypass the legislative process which normally would consider an adjustment in a broader context;

(5) Virginia law does not provide procedural protections implemented by many other states to govern claims for punitive damages and is lacking in this regard;

(6) While many of the procedural safeguards considered by the committee are meritorious, focusing law reform efforts on two issues that the committee found to be most important is the best course of action; and,

(7) There is minimal support within the committee to raise the cap without adding procedural safeguards.

b. Recommendations.

The committee recommends that the conference should propose a bill to amend Virginia Code Ann. Section 8.01-38.1, as follows:

(1) Increase the maximum punitive damage recovery to $500,000[8];

(2) Change the standard for the recovery of punitive damages from the current "preponderance of the evidence" standard to a "clear and convincing" standard;

(3) Codify the rule in Hogg.

[8] Committee member Brad Chandler urged the committee to increase the cap to $675,000 to fully adjust for inflation, rather than limiting the adjustment to $500,000, and he does not support the figure selected by the majority of the committee. Other than the amount he joins in the report in all other aspects.

The text of the proposed amendment is set forth below, and also as Attachment 7.

§ 8.01-38.1. Limitation on recovery of punitive damages.

In any action accruing on or after July 1, 2013, including an action for medical malpractice under Chapter 21.1 (§ 8.01-581.1 et seq.), the total amount awarded for punitive damages against all defendants found to be liable shall be determined by the trier of fact. In no event shall the total amount awarded for punitive damages exceed ~~$350,000~~ *$500,000*. The jury shall not be advised of the limitation prescribed by this section. However, if a jury returns a verdict for punitive damages in excess of the maximum amount specified in this section, the judge shall reduce the award and enter judgment for such damages in the maximum amount provided by this section.

1. The standard for the trier of fact's consideration of a punitive damages claim shall be clear and convincing evidence. However, this subsection shall have no application to a claim of punitive damages asserted under § 8.01-44.5.

2. Punitive damages may not be awarded against an employer or other principal for the wrongful act of his employee or agent in which the employer or other principal did not participate, and which he did not authorize or ratify.

Conclusion

As previously noted, the Committee concluded unanimously in 2011 that merely increasing the punitive damages cap, without engaging in a broader review of issues relating to punitive damages would very possibly perpetuate current deficiencies in Virginia law. The conference authorized a more in depth study of punitive damages in order to position the committee to recommend more comprehensive changes than simply to address the inequity of a twenty-four year-old statutory cap on a plaintiff's maximum recovery of punitive damages in the Commonwealth. The committee has completed its study, it looks forward to discussing its conclusions, and it is hopeful that its recommendation will be adopted by the conference.

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ATTACHMENT 1
TO
REPORT TO BOYD-GRAVES CONFERENCE
PUNITIVE DAMAGES STUDY COMMITTEE
OCTOBER 4, 2012

MEMORANDUM AND APPENDICES
PREPARED BY EVAN J. ADAMS
DATED JULY 12, 2012

McGUIREWOODS MEMORANDUM

TO: Stephen D. Busch

FROM: Evan J. Adams

DATE: July 12, 2012

RE: Boyd-Graves Conference: Punitive Damages Committee

This memorandum is written to support the Boyd-Graves Conference Committee on punitive damages in the Commonwealth of Virginia. The Committee's members are Stephen D. Busch (Chair), Thomas G. Bell, Jr., L.B. Chandler, Jr., Professor James J. Duane, Hon. Wyatt B. Durrette, Jr, Hon. Wiley F. Mitchell, Jr., Steven W. Pearson, and Stephen M. Sayers. The Committee will examine issues associated with the adequacy of Virginia's cap on punitive damages.

Many state courts and legislatures have instituted measures designed to protect defendants from punitive damage awards that might otherwise be unconstitutional or unfair. This memo gives a brief survey of those measures across the fifty states and the District of Columbia (which will be included among lists of "states" for convenience).

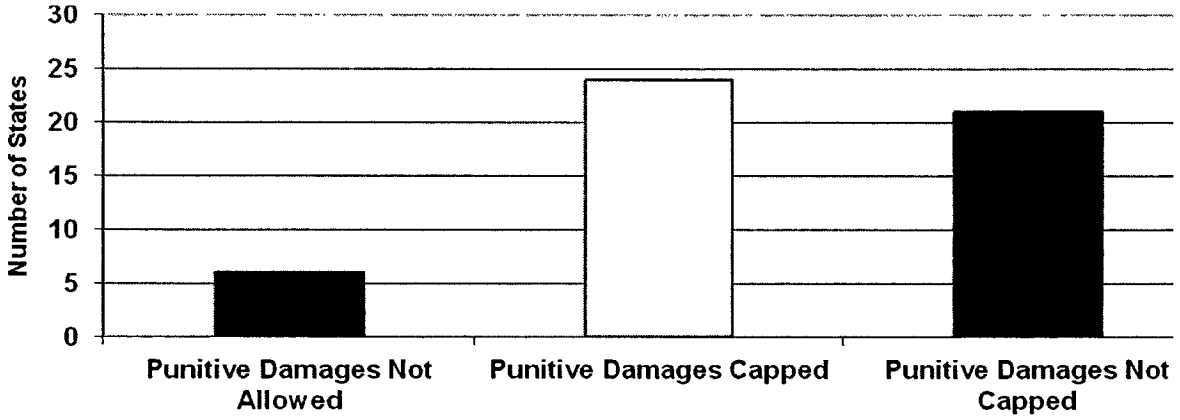
More specifically, this memorandum will address the following subjects:

I. Types of punitive damage caps
II. Features of punitive damage caps
III. Standard of proof required for an award of punitive damages
IV. Changes to model jury instructions
V. Protections for defendants in compliance with regulations
VI. Protections from multiple awards for the same conduct
VII. Financial information
VIII. Bifurcation
IX. Other protections
X. Conclusion

I. Types of Caps on Punitive Awards

Six (6) states do not generally allow punitive damages. Punitive damages are allowed but capped in 24 states. In 21 states, punitive damages are allowed and not capped. Connecticut's non-statutory scheme uniquely caps punitive awards in most cases at the cost of litigation. *Berry v. Loiseau*, 223 Conn. 786 (1992). The statutory punitive damage caps used by the other states can be divided into four basic categories: maximum dollar amounts, set multiples of compensatory damages, hybrid systems, and caps based on the defendant's financial condition.

Figure 1: Approach to Punitive Damages by Number of States



A. Maximum dollar amount:

Of the 24 states with punitive damage caps, two (2) states cap punitive awards at a maximum dollar amount. Virginia caps punitive damage awards at $350,000. Va. Code Ann. § 8.01-38.1. Georgia caps punitive damage awards at $250,000 except for intentional torts and product liability cases. Ga. Code Ann. § 51-12-5.1. *See* Appendix 1 for text of statutes that cap punitive damages at a dollar maximum.

B. Set multiple of compensatory damages

Of the 24 states with punitive damage caps, three (3) states cap awards at a set multiple of compensatory damages. Ohio's statute maintains that a "court shall not enter judgment for punitive or exemplary damages in excess of two times the amount of the compensatory damages awarded." ORC Ann. § 2315.21(C)(2)(a). Colorado's similar statute prohibits awards from exceeding the amount of compensatory damages. C.R.S. §13-21-102. *See* Appendix 2 for text of statutes that cap punitive damages at a set multiple of compensatory damages.

C. Hybrid systems

Sixteen (16) of the 24 states with punitive damage caps have a system that takes into account both a maximum dollar amount and a multiple of compensatory damages. These states follow a scheme similar to the Indiana statute, which decrees that a punitive damage award cannot exceed the greater of $50,000 or three times the amount of compensatory damages. Ind. Code §34-51-3-4. In Nevada, compensatory damages below $100,000 trigger a $300,000 cap, and compensatory damages above $100,000 trigger a cap of three times the compensatory damages. Nev. Rev. Stat. §42.005(1). *See* Appendix 3 for text of statutes that contain hybrid punitive damage caps.

Figure 2: Size of the caps used in hybrid cap systems.

State	*Dollar Cap*	*Set Multiple of Compensatory Award*	*State*	*Dollar Cap*	*Set Multiple of Compensatory Award*
Indiana	50,000	3	New Jersey	350,000	5
Oklahoma	100,000	1	Alabama	500,000	3
Texas	200,000	2	Alaska	500,000	3
Wisconsin	200,000	2	Florida	500,000	3
Arkansas	250,000	3	Idaho	500,000	3
North Carolina	250,000	3	Missouri	500,000	5
North Dakota	250,000	2	South Carolina	500,000	3
Nevada	300,000	3	Tennessee	500,000	2
The Median Dollar Cap is $350,000 and the median multiple is 3.					

D. Caps based on defendant's financial condition

Three (3) of the 24 states with punitive damage caps account for the wealth of the defendant in applying the cap. Kansas caps punitive awards at the lesser of $5 million or the defendant's annual gross income. K.S.A. §60-3702(e). Montana caps punitive damages at the lesser of $10 million or 3% of the defendant's net worth. Mont. Code. Ann. § 27-1-220(3). Mississippi applies six different caps that are graduated according to the defendant's net worth. Miss. Code Ann. § 11-1-65. *See* Appendix 4 for text of statutes that cap punitive damages based on a defendant's financial condition.

Three (3) states apply a more restrictive cap when the defendant is a small business. In Alabama, defendants which qualify as small businesses have their punitive damage liability capped at the greater of $50,000 or ten percent of net worth. Ala. Code Sec. § 6-11-21 (b).[1] In Ohio, punitive awards paid by small businesses and individuals are capped at the lesser of two times compensatory damages or 10 percent of net worth. ORC Ann. § 2315.21(C)(2)(b).[2] *See* Appendix 5 for text of statutes that contain small business exceptions to punitive damage caps.

[1] For the purposes of this statute, Alabama defines a "small business" as one with a net worth of two million dollars or less. Code of Ala. § 6-11-21(c).

[2] For the purposes of this statute, Ohio defines a small business as one which employs not more than 100 people full time, or a manufacturer which employs not more than 500 people full time. ORC Ann. 2315.21(A)(5).

Figure 3: Summary of the various systems used by states which cap punitive damages.

Scheme	Maximum Dollar Amount	Multiple of compensatory	Hybrid	Defendant's financials
States	Virginia, Georgia	Ohio, Colorado	Alabama, Alaska, Arkansas, Florida, Idaho, Indiana, Missouri, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma, South Carolina, Tennessee, Texas, Wisconsin	Kansas, Montana, Mississippi, (Alabama), (Ohio)

II. Features of Punitive Damage Caps

A. Cap increases for reprehensible conduct

Ten (10) of the 24 states that cap punitive damages have caps that either do not apply at all or increase in size when certain conduct is involved. For example, when physical injury is involved, Alabama increases its cap from the greater of $500,000 or three times compensatory damages to the greater of $1,500,000 or three times compensatory damages. Ala. Code Sec. § 6-11-21. Georgia's $250,000 cap does not apply to cases in which the defendant acted "with specific intent to cause harm." Ga. Code Ann. § 51-12-5.1. *See* Appendix 6 for text of statutes that increase the cap on punitive damages for reprehensible conduct.

B. Automatic adjustments for inflation

Three states (Alabama, Arkansas, and South Carolina) have statutory provisions automatically adjusting their caps for inflation. All operate similarly to the Arkansas statute, which requires the punitive damages cap to be adjusted "at three-year intervals thereafter, in accordance with the Consumer Price Index rate for the previous year as determined by the Administrative Office of the Courts." Ala. Code Sec. § 6-11-21(f). *See* Appendix .7 for text of statutes that automatically adjust caps on punitive damages for inflation.

III. Standard of Proof Required for Award of Punitive Damages

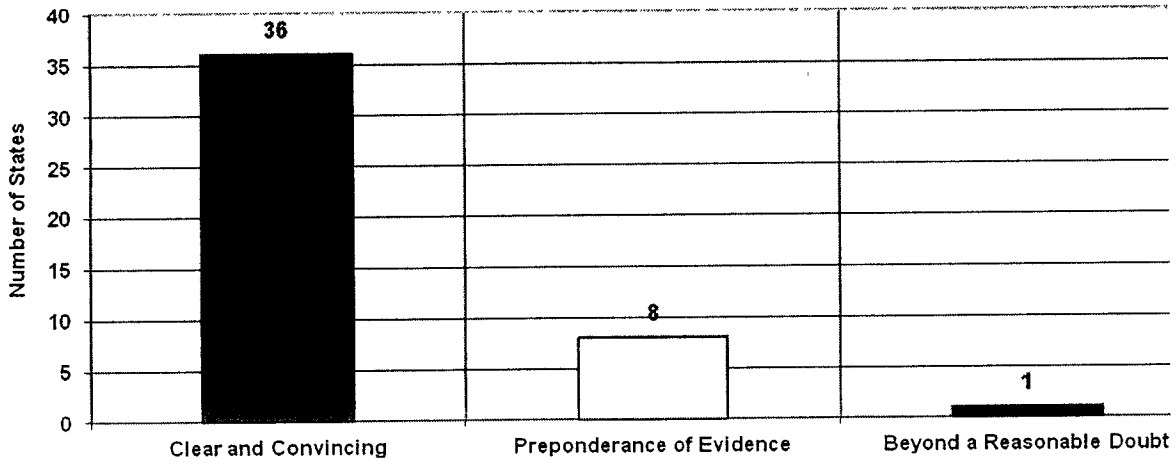
Under the default standard of proof in civil trials, the judge or jury must find the defendant liable by a "preponderance of the evidence." Either through statutes passed by legislatures or cases decided by high courts, most states now require an award of punitive damages to be supported by an elevated "clear and convincing" standard of proof.

Proponents of a heightened standard of proof argue that punitive damages occupy a unique position on the border between criminal and civil law. Jennifer Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for*

Reform, 50 Buffalo L. Rev. 103. 176 (2002). The purpose of punitive damages is to punish the defendant, a role typically reserved for the state. *Id.* However, they are assessed in cases between private parties. *Id.*

Thirty-six (36) states have addressed this ambiguity by requiring plaintiffs to make their case for punitive damages by a "clear and convincing" standard, which is more stringent than the civil "preponderance of the evidence" standard, but less stringent than the criminal "beyond a reasonable doubt" standard. Eight states, including Virginia, continue to require the plaintiff to establish entitlement to a punitive award by the old "preponderance of the evidence" standard. *Norfolk & W. R. Co. v. Neely,* 91 Va. 539. Colorado is the only state to apply the "beyond a reasonable doubt" standard to punitive damages. C.R.S. §13-25-127(2).

Figure 4: Standard of Proof Required for Punitive Award by Number of States



IV. Changes to Model Jury Instructions

Recent Supreme Court decisions have suggested that states must ensure juries are properly instructed in punitive damage cases. *See Williams v. Philip Morris Inc.*, 549 U.S. 346 (2007) ("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" and result in "an arbitrary determination of an award's amount"). Many states have responded by adjusting their model jury instructions to address potential due process issues and to make the jury's task more clear.

A. Instructions Against Punishing for Harm to Non-Parties

In response to *Philip Morris*, some states have amended model instructions so as to inform the jury that it is not allowed to punish the defendant for harm done to non-parties. For example, North Dakota's pattern instruction reads:

> 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. N.D. Pattern Jury Instr. § C-72.07 (2007)

California's pattern instructions simply say "Punitive damages may not be used to punish [name of defendant] for the impact of [his/her/its] alleged misconduct on persons other than [name of plaintiff]." Judicial Council of California Civil Jury Instructions, 2-3900 CACI 3940.

B. Instructions Against Punishing Extraterritorial Behavior

After the Supreme Court decisions in *BMW v. Gore* and *State Farm v. Campbell*, some states amended their pattern instructions to prevent juries from punishing defendants for conduct that occurred outside the forum state. One of these states is Georgia, which amended its instruction as follows:

> You may have heard evidence of conduct and procedures of the defendant in other states that you may properly consider on the issue of intent and reprehensibility. You may not, however, consider for the issue of punitive damages any conduct that was lawful where and when it occurred, nor in other states even though unlawful and which had no impact on (the victim) -- unless such conduct in the other state was related to the specific harm suffered by the plaintiff in this case.

A similar Arkansas pattern instruction stresses "You may not use evidence of _____'s conduct outside of Arkansas to punish _____ for conduct that was lawful in the state where it occurred and that has had no impact on Arkansas or its residents." Ark. Model Jury Instr., Civil AMI 2218A (2007).

C. Instructions on Reasonable Relation to Actual Harm

While no state has expressly adopted the single-digit multiple of compensatory damages suggested by *State Farm v. Campbell*, many have amended their model jury instructions to ensure juries know that the amount of punitive damages must bear a reasonable relation to the actual harm suffered by the plaintiff. Delaware's model instructs the jury that "Any award of punitive damages must bear a reasonable relationship to [*plaintiff's name*]'s compensatory damages." DEL. P.J.I. CIV. § 22.27 (2000). New Jersey's instructions direct the jury that "You must also make certain that there is a reasonable relationship between the actual injury and the punitive damages." NJ J.I. CIV 8.60 (2011).

V. Protections for Defendants in Compliance with Regulations

Some states provide a safe harbor from punitive damages for defendants who comply with statutes or regulations in producing a product. For example, a North Dakota statute states that punitive damages cannot be awarded against a manufacturer if the product's "manufacture, design, formulation, inspection, testing, packaging, labeling, and warning" complied with federal statutes, federal administrative regulations by the relevant regulatory agency, or premarket approval or certification by a federal agency. N.D. Cent. Code. §32-03. 2-11(6). An Arizona bill signed in to law by Governor Jan Brewer on May 11 of 2012 provides a safe harbor for products approved by either state agencies or federal agencies. 2012 Ariz. ALS 333.

Five states (Colorado, New Jersey, Ohio, Oregon, and Utah) restrict or limit punitive damages in cases involving drugs that have received regulatory approval. Plaintiffs in Ohio cannot seek punitive damages if the drug that harmed them "was manufactured and labeled in relevant and material respects in accordance with the terms of an approval or license issued by the federal food and drug administration." ORC Ann. 2307.80. Colorado protects health care providers from punitive damages when the harm to the plaintiff was caused by a "drug or product approved for use by any state or federal regulatory agency and used within the approved standards." C.R.S. § 13-64-302.5(5)(a). *See* Appendix 8 for text of statutes that restrict punitive damages for defendants that comply with regulations.

VI. Protections Against Multiple Awards for the Same Conduct

A. Prohibitions Against Multiple Awards

A small number of states have instituted measures to protect defendants from paying multiple punitive awards rising from the same act or course of conduct. In Florida:

> Punitive damages may not be awarded against a defendant in a civil action if that defendant establishes, before trial, that punitive damages have previously been awarded against that defendant in any state or federal court in any action alleging harm from the same act or single course of conduct for which the claimant seeks compensatory damages. Fla. Stat. Ann. § 768.73(2).

Ohio law also prohibits multiple awards for the same conduct, unless new evidence comes to light or the defendant was not sufficiently punished with the earlier award. ORC Ann. § 2315.21. In those cases, the defendant can credit the amount of his previous punitive liabilities against the award won by the plaintiff. *Id.* *See* Appendix 9 for text of statutes that protect defendants from paying multiple punitive awards for the same conduct.

Supporters say these kinds of statutes are necessary to prevent the "multiple punishments problem," which occurs when a defendant is forced to pay punitive

damages repeatedly for the same offense. Jim Gash, *The End of an Era: The Supreme Court (Finally) Butts out of Punitive Damages for Good*, 63 Fla. L. Rev. 525, 553 (2011). Punitive damages are meant to punish the defendant, and many argue that punishing the same person multiple times for the same conduct violates basic notions of fairness. *Id.* Despite this long recognized concern, the Supreme Court of the United States has not found the Double Jeopardy Clause of the Fifth Amendment to apply to civil trials. *United States v. Halper*, 490 U.S. 435, 451 (1989). Repeated punitive awards in mass tort cases can also bankrupt a defendant, a result that many agree goes beyond the punishment rationale. Michael L. Rustad, *The Closing of Punitive Damages Iron Cage*, 38 Loy. L. A. L. Rev. 1297, 1328 (2005).

Some oppose laws that limit multiple punitive awards for the same conduct because of the arbitrary results they cause. Precluding all but the first plaintiff from recovering punitive damages creates a windfall for the first plaintiff. Only awarding punitive damages to the first plaintiff may encourage frivolous lawsuits from plaintiffs trying to win the race to the courthouse. *Id* at 1359. Additionally, the first case might "produce a verdict before the full extent of the defendant's malice and the full scope of the harm that it caused are understood." Thomas Colby, *Beyond the Multiple Punishment Problem*, 87 Minn. L. Rev. 583, 659 (2003).

B. Trial Court's Discretion to Reduce Punitive Damages in Trial Court

Some states confront the multiple punishments problem by giving trial courts discretion to reduce unfair punitive awards. A Missouri statute allows the defendant to raise a post-trial motion "requesting the amount awarded by the jury as punitive damages be credited by the court with amounts previously paid by the defendant." Mo. Ann. Stat. § 510.263(4). The statute has a caveat that the judge can choose not to credit the award if the defendant unreasonably continued the conduct after learning it was dangerous. *Id.*

In Montana, a judge must review a jury's award of punitive damages while considering "previous awards of punitive or exemplary damages against the defendant based upon the same wrongful act." Mont. Code Ann. § 27-1-221. *See* Appendix 10 for text of statutes that enable a trial judge to reduce punitive damages when they have already been awarded in the past.

VII. Restrictions on evidence of financial condition

Because punitive damages are meant to punish, information about a defendant's wealth is helpful to reaching an amount of damages that actually punishes the defendant. Likewise, information about a defendant's past conduct may be relevant to the reprehensibility analysis that the United States Supreme Court determined is key in setting the level of punitive damages in *BMW v. Gore*. While this evidence is important to helping a jury decide the amount of punitive damages, some worry that it can unfairly prejudice a jury against the defendant on the issue of liability. *Rustad* at 1324. Some

states have reacted by placing restrictions on evidence of a defendant's financial condition.

A. Restrictions on admissibility

Some states directly restrict the admissibility of financial information. In Wisconsin, evidence of the wealth of the defendant is only admissible "if the plaintiff establishes a *prima facie* case for the allowance of punitive damages." Wis. Stat. Ann. § 895.043(4). In Maryland, financial condition evidence is inadmissible until a judge finds that punitive damages are "supportable under the facts." Md. Code Ann., Cts. & Jud. Proc. §10-913(a). In Colorado, evidence of the defendant's net worth or income cannot be considered, even in determining the amount of punitive damages. C.R.S. §13-21-102(6). *See* Appendix 11 for text of statutes that restrict the admissibility of information about a defendant's financial condition.

B. Restrictions on discoverability

Other states restrict the ability of a plaintiff to discover a defendant's financial information. These policies are usually instituted to protect a "defendant's right to privacy and his right to protection from harassment." *Larriva v. Montiel*, 143 Ariz. 23 (1984). In order to discover financial information in California, a defendant needs a ruling from the trial judge that he has a "substantial probability of success" on his punitive damage claim. Cal Civ Code § 3295. Iowa law prevents discovery of wealth until the plaintiff presents a *prima facie* case for punitive damages. Iowa Code §668A.1.3. Alabama only permits discovery of evidence of financial condition at a post-verdict review hearing after punitive damages have been awarded. Ala. Code Sec. § 6-11-23(b). *See* Appendix 12 for text of statutes that restrict the discoverability of information about a defendant's financial condition.

VIII. Mandatory bifurcation

Another common way courts restrict the admissibility of financial evidence is through bifurcation, in which a trial is divided into separate phases. Federal judges can bifurcate a trial according to Rule 42(b) of the Federal Rules of Civil Procedure, and a majority of states also give judges discretion to bifurcate. John P. Rowley III and Richard G. Moore, *Bifurcation of Civil Trials,* 45 U. Rich. L. Rev. 1 (2010). The Virginia Supreme Court endorsed this discretionary approach to bifurcation in civil trials with *Allstate Insurance Co. v. Wade*, 265 Va. 383, 393 (2003) ("a determination in a civil trial regarding the bifurcation of a jury's consideration of issues is a matter for the trial court's discretion").

A. Mandatory bifurcation regimes

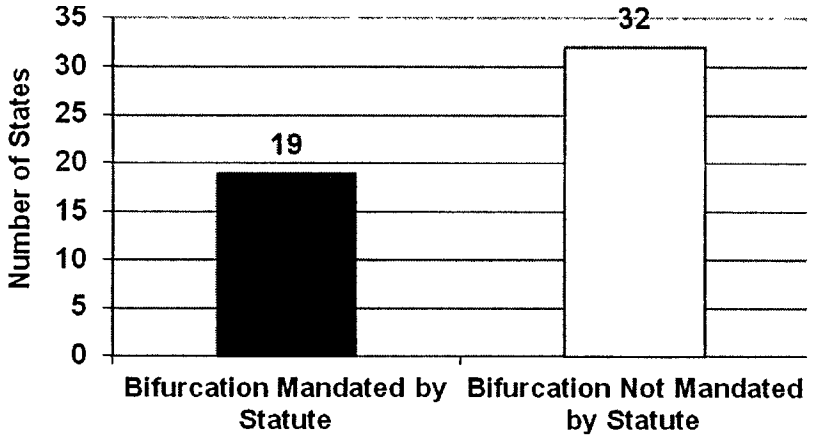
Nineteen (19) states have gone a step further by passing statutes that *require* a bifurcated trial when the plaintiff seeks punitive damages. In the typical bifurcated trial, the jury decides first whether the defendant is liable for the alleged wrong and whether the defendant's conduct met the standard required for an award of punitive damages.

In the second phase of the trial, the jury is limited to deciding the amount of the punitive award. For example, Utah law mandates that "evidence of a party's wealth or financial condition shall be admissible only after a finding of liability for punitive damages has been made." Utah Code Ann. § 78B-8-201.

Not every mandatory bifurcation scheme operates the same way. Some states require juries to decide both amount of punitive damages *and* whether the defendant is liable for punitive damages in the second phase of the trial. South Carolina law, for example, requires that "in the second stage of a bifurcated trial, the jury shall determine if a defendant is liable for punitive damages and, if determined to be liable, the amount of punitive damages." S.C. Code Ann. § 15-32-520.

The states have adopted varying procedures on who can call for a bifurcated trial. In Alaska, the court must *sua sponte* bifurcate a trial in every case involving punitive damages. Alaska Stat. § 09.17.020(c). In Texas, the court must bifurcate the trial upon request of either party. Tex. Civ. Prac. & Rem. Code. Ann. § 41.009. In New Jersey, the court must grant a request to bifurcate the trial only if it comes from the defendant. N.J.S.A. §2A:15-5.13. *See* Appendix 13 for text of statutes requiring bifurcation of punitive damages trials.

Figure 5: Number of States that Require Bifurcation of Punitive Damages by Statute



B. Benefits and drawbacks to bifurcation

The reasons for and against mandatory bifurcation in punitive damages cases mirror the rationales given in general bifurcation debates. Proponents of bifurcation maintain that it ensures the jury bases its liability decision and award of compensatory damages on the facts at hand and not on prejudicial information like the deep pockets of the defendant, or other information that is irrelevant. Rustad at 1324. Bifurcation also can promote judicial economy by preventing courts from wasting time on determining the amount of punitive damages when punitive damages ultimately are not warranted in a particular case. 9A Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc. Civ.* § 2388.

Bifurcation has its drawbacks as well. The process can confuse jurors and slow the proceedings in individual trials. Thomas J. Collin, *Punitive Damages and Business Torts*, 84 (1998). Bifurcation presents an additional dilemma. If the jury is not told about the bifurcation procedure, it will be unexpectedly tasked with hearing additional evidence and conducting additional deliberations upon returning its first phase verdict. But if the jury is told about the bifurcation procedure, it may be incentivized to find for the defendant in order to avoid the second phase of the trial. *Hamm v. American Home Prods. Corp.*, 888 F. Supp. 1037 (E.D. Cal. 1995).

IX. Other protections

A. Pleading Restrictions

Some states only allow punitive damages claims to be brought through an amendment to the original pleadings which must be approved by the court. For example, Idaho mandates that:

> No claim for damages shall be filed containing a prayer for relief seeking punitive damages. However, a party may, pursuant to a pretrial motion and after hearing before the court, amend the pleadings to include a prayer for relief seeking punitive damages. The court shall allow the motion to amend the pleadings if, after weighing the evidence presented, the court concludes that, the moving party has established at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages. Idaho Code §6-1604(2).

Other states impose these pleading restrictions only on certain types of cases. California plaintiffs must demonstrate a substantial probability of success before seeking punitive damages against religious corporations or health care providers. Cal Civ Code §§ 425.13, 425.14. *See* Appendix 14 for text of statutes requiring plaintiffs to amend pleadings to request punitive damages.

B. Restrictions on Punitive Damages in Vicarious Liability Situations

Under the doctrine of *respondeat superior*, employers can be found liable for torts committed by their employees. Many states have instituted statutory limitations on the situations in which a plaintiff can recover punitive damages based upon vicarious liability. Most of these statutes do not foreclose liability completely, but instead require heightened involvement on the part of the employer. For example, Kansas law precludes punitive damages against "a principal or employer for the acts of an agent or employee unless the questioned conduct was authorized or ratified by a person expressly empowered to do so on behalf of the principal or employer." K.S.A. §60-3702(d). Alabama, Alaska, California, Minnesota, Nevada, North Dakota, and Tennessee have similar statutes. *See* Appendix 15 for text of statutes that protect defendants from punitive damages in vicarious liability situations.

X. Conclusion

No two states approach punitive damages in the same way. However, almost every state has enacted measures to ensure that the punitive damages awarded by its courts are not unfair or unconstitutional. Regardless of which direction any potential change to Virginia's current punitive damages law takes, it has a varied array of examples from which to draw.

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APPENDICES TO ATTACHMENT 1
PUNITIVE DAMAGES STUDY COMMITTEE

Appendix 1 Fixed dollar amount caps

State	Statutory Text
Georgia O.C.G.A. § 51-12-5.1.	(g) For any tort action not provided for by subsection (e) or (f) of this Code section in which the trier of fact has determined that punitive damages are to be awarded, the amount which may be awarded in the case shall be limited to a maximum of $250,000.00.
Virginia Va. Code. Ann. § 8.01-38.1	In any action accruing on or after July 1, 1988, including an action for medical malpractice under Chapter 21.1 (§ 8.01-581.1 et seq.), the total amount awarded for punitive damages against all defendants found to be liable shall be determined by the trier of fact. In no event shall the total amount awarded for punitive damages exceed $ 350,000. The jury shall not be advised of the limitation prescribed by this section. However, if a jury returns a verdict for punitive damages in excess of the maximum amount specified in this section, the judge shall reduce the award and enter judgment for such damages in the maximum amount provided by this section.

Appendix 2 Set multiple of compensatory damage caps

State	Statutory Text
Colorado C.R.S. §13-21-102(1)(a).	(1) (a) In all civil actions in which damages are assessed by a jury for a wrong done to the person or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages. The amount of such reasonable exemplary damages shall not exceed an amount which is equal to the amount of the actual damages awarded to the injured party.
Ohio ORC Ann. 2315.21(D)(2)(a)	(a) The court shall not enter judgment for punitive or exemplary damages in excess of two times the amount of the compensatory damages awarded to the plaintiff from that defendant, as determined pursuant to division (B)(2) or (3) of this section.

Appendix 3 Hybrid cap systems

State	Statutory Text
Alabama Ala. Code Sec. § 6-11-21	(a) Except as provided in subsections (b), (d), and (j), in all civil actions where an entitlement to punitive damages shall have been established under applicable laws, no award of punitive damages shall exceed three times the compensatory damages of the party claiming punitive damages or five hundred thousand dollars ($500,000), whichever is greater.
Alaska Alaska Stat. § 09.17.020(f-g)	(f) Except as provided in (g) and (h) of this section, an award of punitive damages may not exceed the greater of (1) three times the amount of compensatory damages awarded to the plaintiff in the action; or (2) the sum of $ 500,000.
Arkansas Ark. Code. Ann. § 16-55-208	(a) Except as provided in subsection (b) of this section, a punitive damages award for each plaintiff shall not be more than the greater of the following: (1) Two hundred fifty thousand dollars ($250,000); or (2) Three (3) times the amount of compensatory damages awarded in the action, not to exceed one million dollars ($1,000,000)
Florida Fla. Stat. Ann. §768.73(1)(a)-(b)	(1) (a) Except as provided in paragraphs (b) and (c), an award of punitive damages may not exceed the greater of: 1. Three times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or 2. The sum of $ 500,000.
Idaho Idaho Code § 6-1604(3)	(3) No judgment for punitive damages shall exceed the greater of two hundred fifty thousand dollars ($ 250,000) or an amount which is three (3) times the compensatory damages contained in such judgment. If a case is tried to a jury, the jury shall not be informed of this limitation. The limitations on noneconomic damages contained in section 6-1603, Idaho Code, are not applicable to punitive damages.
Indiana Ind. Code §34-51-3-4	A punitive damage award may not be more than the greater of: (1) three (3) times the amount of compensatory damages awarded in the action; or (2) fifty thousand dollars ($50,000).

State	Statutory Text
Missouri Mo. Ann. Stat. § 510.265.1	1. No award of punitive damages against any defendant shall exceed the greater of: (1) Five hundred thousand dollars; or (2) Five times the net amount of the judgment awarded to the plaintiff against the defendant.
Nevada Nev. Rev. Stat. §42.005(1)	1. Except as otherwise provided in NRS 42.007, in an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied, the plaintiff, in addition to the compensatory damages, may recover damages for the sake of example and by way of punishing the defendant. Except as otherwise provided in this section or by specific statute, an award of exemplary or punitive damages made pursuant to this section may not exceed: (a) Three times the amount of compensatory damages awarded to the plaintiff if the amount of compensatory damages is $100,000 or more; or (b) Three hundred thousand dollars if the amount of compensatory damages awarded to the plaintiff is less than $100,000.
New Jersey N.J.S.A. §2A:15-5.14(b)	b. No defendant shall be liable for punitive damages in any action in an amount in excess of five times the liability of that defendant for compensatory damages or $ 350,000, whichever is greater.
North Carolina N.C. Gen. Stat. §1D-25	(b) Punitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars ($ 250,000), whichever is greater. If a trier of fact returns a verdict for punitive damages in excess of the maximum amount specified under this subsection, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount.
North Dakota N.D. Cent. Code. §32-03. 2-11(4)	4. If the trier of fact determines that exemplary damages are to be awarded, the amount of exemplary damages may not exceed two times the amount of compensatory damages or two hundred fifty thousand dollars, whichever is greater; provided, however, that no award of exemplary damages may be made if the claimant is not entitled to compensatory damages. In a jury trial, the jury may not be informed of the limit on damages contained in this subsection. Any jury award in excess of this limit must be reduced by the court.

State	Statutory Text
Oklahoma Okla. Stat. Ann. tit 23, § 9.1	B. Category I. Where the jury finds by clear and convincing evidence that: 1. The defendant has been guilty of reckless disregard for the rights of others; or 2. An insurer has recklessly disregarded its duty to deal fairly and act in good faith with its insured; the jury, in a separate proceeding conducted after the jury has made such finding and awarded actual damages, may award punitive damages in an amount not to exceed the greater of: a. One Hundred Thousand Dollars ($ 100,000.00), or b. the amount of the actual damages awarded.
South Carolina S.C. Code Ann. § 15-32-530	(A) Except as provided in subsections (B) and (C), an award of punitive damages may not exceed the greater of three times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of five hundred thousand dollars.
Tennessee Tenn. Code Ann. § 29-39-104(a)(5)	(5) Punitive or exemplary damages shall not exceed an amount equal to the greater of: (A) Two (2) times the total amount of compensatory damages awarded; or (B) Five hundred thousand dollars ($500,000);
Texas Tex. Civ. Prac. & Rem. Code Ann. § 41.008	(b) Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of: (1) (A) two times the amount of economic damages; plus (B) an amount equal to any noneconomic damages found by the jury, not to exceed $ 750,000; or (2) $ 200,000.
Wisconsin Wis. Stat. Ann. § 895.043(6)	(6) LIMITATION ON DAMAGES. Punitive damages received by the plaintiff may not exceed twice the amount of any compensatory damages recovered by the plaintiff or 200,000, whichever is greater.

Appendix 4 Caps based on defendant's financial condition

State	Statutory Text
Kansas K.S.A. §60-3702(e)	(e) Except as provided by subsection (f), no award of exemplary or punitive damages pursuant to this section shall exceed the lesser of: (1) The annual gross income earned by the defendant, as determined by the court based upon the defendant's highest gross annual income earned for any one of the five years immediately before the act for which such damages are awarded, unless the court determines such amount is clearly inadequate to penalize the defendant, then the court may award up to 50% of the net worth of the defendant, as determined by the court; or (2) $ 5 million.
Mississippi Miss. Code Ann. § 11-1-65	(3) (a) In any civil action where an entitlement to punitive damages shall have been established under applicable laws, no award of punitive damages shall exceed the following: (i) Twenty Million Dollars ($ 20,000,000.00) for a defendant with a net worth of more than One Billion Dollars ($ 1,000,000,000.00); (ii) Fifteen Million Dollars ($ 15,000,000.00) for a defendant with a net worth of more than Seven Hundred Fifty Million Dollars ($ 750,000,000.00) but not more than One Billion Dollars ($ 1,000,000,000.00); (iii) Five Million Dollars ($ 5,000,000.00) for a defendant with a net worth of more than Five Hundred Million Dollars ($ 500,000,000.00) but not more than Seven Hundred Fifty Million Dollars ($ 750,000,000.00); (iv) Three Million Seven Hundred Fifty Thousand Dollars ($ 3,750,000.00) for a defendant with a net worth of more than One Hundred Million Dollars ($ 100,000,000.00) but not more than Five Hundred Million Dollars ($ 500,000,000.00); (v) Two Million Five Hundred Thousand Dollars ($ 2,500,000.00) for a defendant with a net worth of more than Fifty Million Dollars ($ 50,000,000.00) but not more than One Hundred Million Dollars ($ 100,000,000.00); or (vi) Two percent (2%) of the defendant's net worth for a defendant with a net worth of Fifty Million Dollars ($ 50,000,000.00) or less.
Montana Mont. Code. Ann. § 27-1-220(3)	(3) An award for punitive damages may not exceed $ 10 million or 3% of a defendant's net worth, whichever is less. This subsection does not limit punitive damages that may be awarded in class action lawsuits.

Appendix 5 Small business exceptions

State	Statutory Text
Alabama Ala. Code Sec. § 6-11-21 (b-c)	(b) Except as provided in subsection (d) and (j), in all civil actions where entitlement to punitive damages shall have been established under applicable law against a defendant who is a small business, no award of punitive damages shall exceed fifty thousand dollars ($50,000) or 10 percent of the business' net worth, whichever is greater. (c) "Small business" for purposes of this section means a business having a net worth of two million dollars ($2,000,000) or less at the time of the occurrence made the basis of the suit.
Alaska Alaska Stat. § 09.17.020(h)	(h) Notwithstanding any other provision of law, in an action against an employer to recover damages for an unlawful employment practice prohibited by AS 18.80.220, the amount of punitive damages awarded by the court or jury may not exceed (1) $ 200,000 if the employer has less than 100 employees in this state; (2) $ 300,000 if the employer has 100 or more but less than 200 employees in this state; (3) $ 400,000 if the employer has 200 or more but less than 500 employees in this state; and (4) $ 500,000 if the employer has 500 or more employees in this state.
Ohio ORC Ann. §§ 2315.21(A)(5), 2315.21(C)(2)(b)	(5) "Small employer" means an employer who employs not more than one hundred persons on a full-time permanent basis, or, if the employer is classified as being in the manufacturing sector by the North American industrial classification system, "small employer" means an employer who employs not more than five hundred persons on a full-time permanent basis. (b) If the defendant is a small employer or individual, the court shall not enter judgment for punitive or exemplary damages in excess of the lesser of two times the amount of the compensatory damages awarded to the plaintiff from the defendant or ten percent of the employer's or individual's net worth when the tort was committed up to a maximum of three hundred fifty thousand dollars, as determined pursuant to division (B)(2) or (3) of this section.

Appendix 6 Cap increases for reprehensible conduct

State	Statutory Text
Alabama Ala. Code Sec. §§ 6-11-21(d), 6-11-21(j-k)	(d) Except as provided in subsection (j), in all civil actions for physical injury wherein entitlement to punitive damages shall have been established under applicable laws, no award of punitive damages shall exceed three times the compensatory damages of the party claiming punitive damages or one million five hundred thousand dollars ($1,500,000), whichever is greater. (j) This section shall not apply to actions for wrongful death or for intentional infliction of physical injury. (k) "Physical injury" for purposes of this section, means actual injury to the body of the claimant proximately caused by the act complained of and does not include physical symptoms of the mental anguish or emotional distress for which recovery is sought when such symptoms are caused by, rather than the cause of, the pain, distress, or other mental suffering.
Alaska Alaska Stat. § 09.17.020(g)	(g) Except as provided in (h) of this section, if the fact finder determines that the conduct proven under (b) of this section was motivated by financial gain and the adverse consequences of the conduct were actually known by the defendant or the person responsible for making policy decisions on behalf of the defendant, it may award an amount of punitive damages not to exceed the greatest of (1) four times the amount of compensatory damages awarded to the plaintiff in the action; (2) four times the aggregate amount of financial gain that the defendant received as a result of the defendant's misconduct; or (3) the sum of $ 7,000,000.
Arkansas Ark. Code. Ann. § 16-55-208(b)	(b) Subsection (a) of this section shall not apply when the finder of fact: (1) Determines by clear and convincing evidence that, at the time of the injury, the defendant intentionally pursued a course of conduct for the purpose of causing injury or damage; and (2) Determines that the defendant's conduct did, in fact, harm the plaintiff.
Colorado C.R.S. §13-21-102(1)(3)	(3) Notwithstanding the provisions of subsection (1) of this section, the court may increase any award of exemplary damages, to a sum not to exceed three times the amount of actual damages, if it is shown that: (a) The defendant has continued the behavior or repeated the action which is the subject of the claim against the defendant in a

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	willful and wanton manner, either against the plaintiff or another person or persons, during the pendency of the case; or (b) The defendant has acted in a willful and wanton manner during the pendency of the action in a manner which has further aggravated the damages of the plaintiff when the defendant knew or should have known such action would produce aggravation.
Florida Fla. Stat. Ann. §768.73(1)(b-c)	(b) Where the fact finder determines that the wrongful conduct proven under this section was motivated solely by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant, it may award an amount of punitive damages not to exceed the greater of: 1. Four times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or 2. The sum of $ 2 million. (c) Where the fact finder determines that at the time of injury the defendant had a specific intent to harm the claimant and determines that the defendant's conduct did in fact harm the claimant, there shall be no cap on punitive damages.
Georgia Ga. Code Ann. § 51-12-5.1	(f) In a tort case in which the cause of action does not arise from product liability, if it is found that the defendant acted, or failed to act, with the specific intent to cause harm, or that the defendant acted or failed to act while under the influence of alcohol, drugs other than lawfully prescribed drugs administered in accordance with prescription, or any intentionally consumed glue, aerosol, or other toxic vapor to that degree that his or her judgment is substantially impaired, there shall be no limitation regarding the amount which may be awarded as punitive damages against an active tort-feasor but such damages shall not be the liability of any defendant other than an active tort-feasor.
Nevada Nev. Rev. Stat. §42.005(1)	2. The limitations on the amount of an award of exemplary or punitive damages prescribed in subsection 1 do not apply to an action brought against: (a) A manufacturer, distributor or seller of a defective product; (b) An insurer who acts in bad faith regarding its obligations to provide insurance coverage; (c) A person for violating a state or federal law prohibiting discriminatory housing practices, if the law provides for a remedy of exemplary or punitive damages in excess of the limitations

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	prescribed in subsection 1; (d) A person for damages or an injury caused by the emission, disposal or spilling of a toxic, radioactive or hazardous material or waste; or (e) A person for defamation.
Oklahoma Okla. Stat. Ann. tit 23, § 9.1(c-d)	C. Category II. Where the jury finds by clear and convincing evidence that: 1. The defendant has acted intentionally and with malice towards others; or 2. An insurer has intentionally and with malice breached its duty to deal fairly and act in good faith with its insured; the jury, in a separate proceeding conducted after the jury has made such finding and awarded actual damages, may award punitive damages in an amount not to exceed the greatest of: a. Five Hundred Thousand Dollars ($ 500,000.00), b. twice the amount of actual damages awarded, or c. the increased financial benefit derived by the defendant or insurer as a direct result of the conduct causing the injury to the plaintiff and other persons or entities. D. Category III. Where the jury finds by clear and convincing evidence that: 1. The defendant has acted intentionally and with malice towards others; or 2. An insurer has intentionally and with malice breached its duty to deal fairly and act in good faith with its insured; and the court finds, on the record and out of the presence of the jury, that there is evidence beyond a reasonable doubt that the defendant or insurer acted intentionally and with malice and engaged in conduct life-threatening to humans, the jury, in a separate proceeding conducted after the jury has made such finding and awarded actual damages, may award punitive damages in any amount the jury deems appropriate, without regard to the limitations set forth in subsections B and C of this section. Any award of punitive damages under this subsection awarded in any manner other than as required in this subsection shall be void and reversible error.
South Carolina S.C. Code Ann. § 15-32-530(B-C)	(B) The limitation provided in subsection (A) may not be disclosed to the jury. If the jury returns a verdict for punitive damages in excess of the maximum amount specified in subsection (A), the trial court should first determine whether: (1) the wrongful conduct proven under this section was motivated primarily by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was known or

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	approved by the managing agent, director, officer, or the person responsible for making policy decisions on behalf of the defendant; or (2) the defendant's actions could subject the defendant to conviction of a felony and that act or course of conduct is a proximate cause of the plaintiff's damages; If the trial court determines that either item (1) or (2) apply, then punitive damages must not exceed the greater of four times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of two million dollars and, if necessary, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount allowed by this subsection. If the trial court determines that neither item (1) or (2) apply, then the award of punitive damages shall be subject to the maximum amount provided by subsection (A) and the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount allowed by subsection (A). (C) However, when the trial court determines one of the following apply, there shall be no cap on punitive damages: (1) at the time of injury the defendant had an intent to harm and determines that the defendant's conduct did in fact harm the claimant; or (2) the defendant has pled guilty to or been convicted of a felony arising out of the same act or course of conduct complained of by the plaintiff and that act or course of conduct is a proximate cause of the plaintiff's damages; or (3) the defendant acted or failed to act while under the influence of alcohol, drugs, other than lawfully prescribed drugs administered in accordance with a prescription, or any intentionally consumed glue, aerosol, or other toxic vapor to the degree that the defendant's judgment is substantially impaired.
Tennessee Tenn. Code Ann. § 29-39-104(a)(7)	(7) The limitation on the amount of punitive damages imposed by subdivision (a)(5) shall not apply to actions brought for damages or an injury: (A) If the defendant had a specific intent to inflict serious physical injury, and the defendant's intentional conduct did, in fact, injure the plaintiff; (B) If the defendant intentionally falsified, destroyed or concealed records containing material evidence with the purpose of wrongfully evading liability in the case at issue; provided, however, that this subsection (a) does not apply to the good faith withholding of records pursuant to privileges and other laws applicable to discovery, nor does it apply to the management of records in the normal course of business or in compliance with the defendant's

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	document retention policy or state or federal regulations; or (C) If the defendant was under the influence of alcohol, drugs or any other intoxicant or stimulant, resulting in the defendant's judgment being substantially impaired, and causing the injuries or death. For purposes of this subsection (a), a defendant shall not be deemed to be under the influence of drugs or any other intoxicant or stimulant, if the defendant was using lawfully prescribed drugs administered in accordance with a prescription or over-the-counter drugs in accordance with the written instructions of the manufacturer;

Appendix 7 Automatic adjustments for inflation

State	Statutory Text
Alabama Ala. Code Sec. § 6-11-21 (f)	(f) As to all the fixed sums for punitive damage limitations set out herein in subsections (a), (b), and (d), those sums shall be adjusted as of January 1, 2003, and as of January 1 at three-year intervals thereafter, at an annual rate in accordance with the Consumer Price Index rate.
Arkansas Ark. Code. Ann. § 16-55-208(c)	(c) As to the punitive damages limitations established in subsection (a) of this section, the fixed sums of two hundred fifty thousand dollars ($250,000) set forth in subdivision (a)(1) of this section and one million dollars ($1,000,000) set forth in subdivision (a)(2) of this section shall be adjusted as of January 1, 2006, and at three-year intervals thereafter, in accordance with the Consumer Price Index rate for the previous year as determined by the Administrative Office of the Courts.
South Carolina S.C. Code Ann. § 15-32-530(D)	(D) At the end of each calendar year, the State Budget and Control Board, Board of Economic Advisors must determine the increase or decrease in the ratio of the Consumer Price Index to the index as of December thirty-one of the previous year, and the maximum amount recoverable for punitive damages pursuant to subsection (A) must be increased or decreased accordingly. As soon as practicable after this adjustment is calculated, the Director of the State Budget and Control Board shall submit the revised maximum amount recoverable for punitive damages to the State Register for publication, pursuant to Section 1-23-40(2), and the revised maximum amount recoverable for punitive damages becomes effective upon publication in the State Register. For purposes of this subsection, "Consumer Price Index" means the Consumer Price Index for All Urban Consumers as published by the United States Department of Labor, Bureau of Labor Statistics.

Appendix 8 Protections for defendants in compliance with regulations

State	Statutory Text
Arizona 2012 Ariz. ALS 333	A. A manufacturer or seller shall not be liable for exemplary or punitive damages if: 1. The product alleged to have caused the harm was designed, manufactured, packaged, labeled, sold, or represented in relevant and material respects in accordance with the terms of an approval, license or similar determination of a government agency; or 2. The product was in compliance with a statute of this State or the United States, or a standard, rule, regulation, order, or other action of a government agency pursuant to statutory authority, where such statute or agency action is relevant to the event or risk allegedly causing the harm and the product was in compliance at the time the product left the control of the manufacturer or seller. 3. The act or transaction forming the basis of the claim involves terms of service, contract provisions, representations, or other practices authorized by, or in compliance with, the rules, regulations, standards, or orders of, or a statute administered by, a government agency.
Colorado C.R.S. § 13-64-302.5(5)(a-b)	(5) (a) No exemplary damages shall be imposed under subsection (4) of this section which were the result of the use of any drug or product approved for use by any state or federal regulatory agency and used within the approved standards therefor, or used in accordance with standards of prudent health care professionals. (b) No exemplary damages shall be imposed under subsection (4) of this section which were the result of the use of any drug or product subject to the provisions of paragraph (a) of this subsection (5) when the clinically justified use of such drug or product is beyond the regulatory approvals or standards therefor and is in accordance with standards of prudent health care professionals, and when such use has been agreed to pursuant to the written informed consent of the recipient.
New Jersey N.J.S.A. §2A:58C-5(c)	c. Punitive damages shall not be awarded if a drug or device or food or food additive which caused the claimant's harm was subject to premarket approval or licensure by the federal Food and Drug Administration under the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040, 21 U.S.C. § 301 et seq. or the "Public Health Service Act," 58 Stat. 682, 42 U.S.C. § 201 et seq. and was approved or licensed; or is generally recognized as safe and effective pursuant to conditions established by the federal Food and Drug Administration and applicable regulations, including packaging and labeling regulations.

State	Statutory Text
	However, where the product manufacturer knowingly withheld or misrepresented information required to be submitted under the agency's regulations, which information was material and relevant to the harm in question, punitive damages may be awarded. For purposes of this subsection, the terms "drug," "device," "food," and "food additive" have the meanings defined in the "Federal Food, Drug, and Cosmetic Act."
North Dakota N.D. Cent. Code. §32-03. 2-11(6)	6. Exemplary damages may not be awarded against a manufacturer or seller if the product's manufacture, design, formulation, inspection, testing, packaging, labeling, and warning complied with: a. Federal statutes existing at the time the product was produced; b. Administrative regulations existing at the time the product was produced that were adopted by an agency of the federal government which had responsibility to regulate the safety of the product or to establish safety standards for the product pursuant to a federal statute; or c. Premarket approval or certification by an agency of the federal government.
Ohio ORC Ann. §§ 2307.80(c)(1)(a -b), 2307.80(d)(1)	(C) (1) Except as provided in division (C)(2) of this section, if a claimant alleges in a product liability claim that a drug or device caused harm to the claimant, the manufacturer of the drug or device shall not be liable for punitive or exemplary damages in connection with that product liability claim if the drug or device that allegedly caused the harm satisfies either of the following: (a) It was manufactured and labeled in relevant and material respects in accordance with the terms of an approval or license issued by the federal food and drug administration under the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040 (1938), 21 U.S.C. 301-392, as amended, or the "Public Health Service Act," 58 Stat. 682 (1944), 42 U.S.C. 201-300cc-15, as amended. (b) It was an over-the-counter drug marketed pursuant to federal regulations, was generally recognized as safe and effective and as not being misbranded pursuant to the applicable federal regulations, and satisfied in relevant and material respects each of the conditions contained in the applicable regulations and each of the conditions contained in an applicable monograph. (D) (1) If a claimant alleges in a product liability claim that a product other than a drug or device caused harm to the claimant, the manufacturer or supplier of the product shall not be liable for punitive or exemplary damages in connection with the claim if the manufacturer or supplier fully complied with all applicable government safety and performance standards, whether or not designated as such by the government, relative to the product's manufacture or

State	Statutory Text
	construction, the product's design or formulation, adequate warnings or instructions, and representations when the product left the control of the manufacturer or supplier, and the claimant's injury results from an alleged defect of a product's manufacture or construction, the product's design or formulation, adequate warnings or instructions, and representations for which there is an applicable government safety or performance standard.
Oregon ORS § 30.927(1)	(1) Where a drug allegedly caused the plaintiff harm, the manufacturer of the drug shall not be liable for punitive damages if the drug product alleged to have caused the harm: (a) Was manufactured and labeled in relevant and material respects in accordance with the terms of an approval or license issued by the federal Food and Drug Administration under the Federal Food, Drug and Cosmetic Act or the Public Health Service Act; or (b) Is generally recognized as safe and effective pursuant to conditions established by the federal Food and Drug Administration and applicable regulations, including packaging and labeling regulations.
Utah Utah Code Ann. § 78B-8-201	(1) Punitive damages may not be awarded if a drug causing the claimant's harm: (a) received premarket approval or licensure by the Federal Food and Drug Administration under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. Section 301 et seq. or the Public Health Service Act, 42 U.S.C. Section 201 et seq.; (b) is generally recognized as safe and effective under conditions established by the Federal Food and Drug Administration and applicable regulations, including packaging and labeling regulations. (2) This limitation on liability for punitive damages does not apply if it is shown by clear and convincing evidence that the drug manufacturer knowingly withheld or misrepresented information required to be submitted to the Federal Food and Drug Administration under its regulations, which information was material and relevant to the claimant's harm.

Appendix 9 Prohibitions against multiple awards for the same conduct

State	Statutory Text
Florida Fla. Stat. Ann. § 768.73(2)	(2) (a) Except as provided in paragraph (b), punitive damages may not be awarded against a defendant in a civil action if that defendant establishes, before trial, that punitive damages have previously been awarded against that defendant in any state or federal court in any action alleging harm from the same act or single course of conduct for which the claimant seeks compensatory damages. For purposes of a civil action, the term "the same act or single course of conduct" includes acts resulting in the same manufacturing defects, acts resulting in the same defects in design, or failure to warn of the same hazards, with respect to similar units of a product. (b) In subsequent civil actions involving the same act or single course of conduct for which punitive damages have already been awarded, if the court determines by clear and convincing evidence that the amount of prior punitive damages awarded was insufficient to punish that defendant's behavior, the court may permit a jury to consider an award of subsequent punitive damages. In permitting a jury to consider awarding subsequent punitive damages, the court shall make specific findings of fact in the record to support its conclusion. In addition, the court may consider whether the defendant's act or course of conduct has ceased. Any subsequent punitive damage awards must be reduced by the amount of any earlier punitive damage awards rendered in state or federal court.
Georgia Ga. Code Ann. § 51-12-5.1(e)(1)	(e) (1) In a tort case in which the cause of action arises from product liability, there shall be no limitation regarding the amount which may be awarded as punitive damages. Only one award of punitive damages may be recovered in a court in this state from a defendant for any act or omission if the cause of action arises from product liability, regardless of the number of causes of action which may arise from such act or omission.

State	Statutory Text
Ohio ORC Ann. § 2315.21(D)(5)	(5) (a) In any tort action, except as provided in division (D)(5)(b) or (6) of this section, punitive or exemplary damages shall not be awarded against a defendant if that defendant files with the court a certified judgment, judgment entries, or other evidence showing that punitive or exemplary damages have already been awarded and have been collected, in any state or federal court, against that defendant based on the same act or course of conduct that is alleged to have caused the injury or loss to person or property for which the plaintiff seeks compensatory damages and that the aggregate of those previous punitive or exemplary damage awards exceeds the maximum amount of punitive or exemplary damages that may be awarded under division (D)(2) of this section against that defendant in the tort action. (b) Notwithstanding division (D)(5)(a) of this section and except as provided in division (D)(6) of this section, punitive or exemplary damages may be awarded against a defendant in either of the following types of tort actions: (i) In subsequent tort actions involving the same act or course of conduct for which punitive or exemplary damages have already been awarded, if the court determines by clear and convincing evidence that the plaintiff will offer new and substantial evidence of previously undiscovered, additional behavior of a type described in division (C) of this section on the part of that defendant, other than the injury or loss for which the plaintiff seeks compensatory damages. In that case, the court shall make specific findings of fact in the record to support its conclusion. The court shall reduce the amount of any punitive or exemplary damages otherwise awardable pursuant to this section by the sum of the punitive or exemplary damages awards previously rendered against that defendant in any state or federal court. The court shall not inform the jury about the court's determination and action under division (D)(5)(b)(i) of this section. (ii) In subsequent tort actions involving the same act or course of conduct for which punitive or exemplary damages have already been awarded, if the court determines by clear and convincing evidence that the total amount of prior punitive or exemplary damages awards was totally insufficient to punish that defendant's behavior of a type described in division (C) of this section and to deter that defendant and others from similar behavior in the future. In that case, the court shall make specific findings of fact in the record to support its conclusion. The court shall reduce the amount of any punitive or exemplary damages otherwise awardable pursuant to this section by the sum of the punitive or exemplary damages awards previously rendered against that defendant in any state or federal court. The court shall not inform the jury about the court's determination and action under division (D)(5)(b)(ii) of this section.

Appendix 10 Trial court's discretion to reduce punitive damages

State	Statutory Text
Missouri Mo. Ann. Stat. § 510.263(4)	4. Within the time for filing a motion for new trial, a defendant may file a post-trial motion requesting the amount awarded by the jury as punitive damages be credited by the court with amounts previously paid by the defendant for punitive damages arising out of the same conduct on which the imposition of punitive damages is based. At any hearing, the burden on all issues relating to such a credit shall be on the defendant and either party may introduce relevant evidence on such motion. Such a motion shall be determined by the trial court within the time and according to procedures applicable to motions for new trial. If the trial court sustains such a motion the trial court shall credit the jury award of punitive damages by the amount found by the trial court to have been previously paid by the defendant arising out of the same conduct and enter judgment accordingly. If the defendant fails to establish entitlement to a credit under the provisions of this section, or the trial court finds from the evidence that the defendant's conduct out of which the prior punitive damages award arose was not the same conduct on which the imposition of punitive damages is based in the pending action, or the trial court finds the defendant unreasonably continued the conduct after acquiring actual knowledge of the dangerous nature of such conduct, the trial court shall disallow such credit, or, if the trial court finds that the laws regarding punitive damages in the state in which the prior award of punitive damages was entered substantially and materially deviate from the law of the state of Missouri and that the nature of such deviation provides good cause for disallowance of the credit based on the public policy of Missouri, then the trial court may disallow all or any part of the credit provided by this section.
Montana Mont. Code Ann. § 27-1-221(7)(b-c)	(b) When an award of punitive damages is made by the judge, the judge shall clearly state the reasons for making the award in findings of fact and conclusions of law, demonstrating consideration of each of the following matters: (i) the nature and reprehensibility of the defendant's wrongdoing; (ii) the extent of the defendant's wrongdoing; (iii) the intent of the defendant in committing the wrong; (iv) the profitability of the defendant's wrongdoing, if applicable; (v) the amount of actual damages awarded by the jury; (vi) the defendant's net worth; *(vii) previous awards of punitive or exemplary damages against the defendant based upon the same wrongful act;*

State	Statutory Text
	(viii) potential or prior criminal sanctions against the defendant based upon the same wrongful act; and (ix) any other circumstances that may operate to increase or reduce, without wholly defeating, punitive damages. (c) The judge shall review a jury award of punitive damages, giving consideration to each of the matters listed in subsection (7)(b). If after review the judge determines that the jury award of punitive damages should be increased or decreased, the judge may do so. The judge shall clearly state the reasons for increasing, decreasing, or not increasing or decreasing the punitive damages award of the jury in findings of fact and conclusions of law, demonstrating consideration of each of the factors listed in subsection (7)(b). [emphasis added]

Appendix 11 Restrictions on admissibility of evidence of the defendant's financial condition

State	Statutory Text
Colorado C.R.S. §13-21-102(6)	(6) In any civil action in which exemplary damages may be awarded, evidence of the income or net worth of a party shall not be considered in determining the appropriateness or amount of such damages.
Maryland Md. Code Ann., Cts. & Jud. Proc. §10-913(a)	(a) Evidence of defendant's financial means. -- In any action for punitive damages for personal injury, evidence of the defendant's financial means is not admissible until there has been a finding of liability and that punitive damages are supportable under the facts.
Wisconsin Wis. Stat. Ann. § 895.043(4)	If the plaintiff establishes a prima facie case for the allowance of punitive damages: (a) The plaintiff may introduce evidence of the wealth of a defendant; and(b) The judge shall submit to the jury a special verdict as to punitive damages or, if the case is tried to the court, the judge shall issue a special verdict as to punitive damages.

Appendix 12: Restrictions on discovery of evidence of the defendant's financial condition

State	Statutory Text
Alabama Ala. Code Sec. § 6-11-23(b)	(b) In all cases wherein a verdict for punitive damages is awarded, the trial court shall, upon motion of any party, either conduct hearings or receive additional evidence, or both, concerning the amount of punitive damages. Any relevant evidence, including but not limited to the economic impact of the verdict on the defendant or the plaintiff, the amount of compensatory damages awarded, whether or not the defendant has been guilty of the same or similar acts in the past, the nature and the extent of any effort the defendant made to remedy the wrong and the opportunity or lack of opportunity the plaintiff gave the defendant to remedy the wrong complained of shall be admissible; however, such information shall not be subject to discovery, unless otherwise discoverable, until after a verdict for punitive damages has been rendered. After such post verdict hearing the trial court shall independently (without any presumption that the award of punitive damages is correct) reassess the nature, extent, and economic impact of such an award of punitive damages, and reduce or increase the award if appropriate in light of all the evidence.
California Cal Civ Code § 3295(a-c)	(a) The court may, for good cause, grant any defendant a protective order requiring the plaintiff to produce evidence of a prima facie case of liability for damages pursuant to Section 3294, prior to the introduction of evidence of: (1) The profits the defendant has gained by virtue of the wrongful course of conduct of the nature and type shown by the evidence. (2) The financial condition of the defendant. (b) Nothing in this section shall prohibit the introduction of prima facie evidence to establish a case for damages pursuant to Section 3294. (c) No pretrial discovery by the plaintiff shall be permitted with respect to the evidence referred to in paragraphs (1) and (2) of subdivision (a) unless the court enters an order permitting such discovery pursuant to this subdivision. However, the plaintiff may subpoena documents or witnesses to be available at the trial for the purpose of establishing the profits or financial condition referred to in subdivision (a), and the defendant may be required to identify documents in the defendant's possession which are relevant and admissible for that purpose and the witnesses employed by or related to the defendant who would be most competent to testify to those facts. Upon motion by the plaintiff supported by appropriate affidavits and after a hearing, if the court deems a hearing to be necessary, the court may at any time enter an order permitting the

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	discovery otherwise prohibited by this subdivision if the court finds, on the basis of the supporting and opposing affidavits presented, that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to Section 3294. Such order shall not be considered to be a determination on the merits of the claim or any defense thereto and shall not be given in evidence or referred to at the trial.
Florida Fla. Stat. Ann. § 768.72(1)	(1) 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.*[emphasis added]
Iowa Iowa Code § 668A.1.3(1)	3. The mere allegation or assertion of a claim for punitive damages shall not form the basis for discovery of the wealth or ability to respond in damages on behalf of the party from whom punitive damages are claimed until such time as the claimant has established that sufficient admissible evidence exists to support a prima facie case establishing the requirements of subsection 1, paragraph "a".
Utah Utah Code Ann. § 78B-8-201(2)(a)	(a) Discovery concerning a party's wealth or financial condition may only be allowed after the party seeking punitive damages has established a prima facie case on the record that an award of punitive damages is reasonably likely against the party about whom discovery is sought and, if disputed, the court is satisfied that the discovery is not sought for the purpose of harassment.

Appendix 13 Mandatory bifurcation

State	Statutory Text
Alaska Alaska Stat. §§ 09.17.020(a), 09.17.020(d-e)	(a) In an action in which a claim of punitive damages is presented to the fact finder, the fact finder shall determine, concurrently with all other issues presented, whether punitive damages shall be allowed by using the standards set out in (b) of this section. If punitive damages are allowed, a separate proceeding under (c) of this section shall be conducted before the same fact finder to determine the amount of punitive damages to be awarded. (d) At the conclusion of the separate proceeding under (c) of this section, the fact finder shall determine the amount of punitive damages to be awarded, and the court shall enter judgment for that amount. (e) Unless that evidence is relevant to another issue in the case, discovery of evidence that is relevant to the amount of punitive damages to be determined under (c)(3) or (6) of this section may not be conducted until after the fact finder has determined that an award of punitive damages is allowed under (a) and (b) of this section. The court may issue orders as necessary, including directing the parties to have the information relevant to the amount of punitive damages to be determined under (c)(3) or (6) of this section available for production immediately at the close of the initial trial in order to minimize the delay between the initial trial and the separate proceeding to determine the amount of punitive damages.
Arkansas Ark. Code. Ann. § 16-55-211	(a) (1) In any case in which punitive damages are sought, any party may request a bifurcated proceeding at least ten (10) days prior to trial. (2) If a bifurcated proceeding has been requested by either party, then: (A) The finder of fact first shall determine whether compensatory damages are to be awarded; and (B) After a compensatory damages award determination, the finder of fact then shall determine whether and in what amount punitive damages will be awarded. (b) Evidence of the financial condition of the defendant and other evidence relevant only to punitive damages is not admissible with regard to any compensatory damages determination.
California Cal Civ Code § 3295(d)	(d) The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294.

State	Statutory Text
	Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud.
Georgia Ga. Code Ann. § 51-12-5. 1(d)	(d) (1) An award of punitive damages must be specifically prayed for in a complaint. In any case in which punitive damages are claimed, the trier of fact shall first resolve from the evidence produced at trial whether an award of punitive damages shall be made. This finding shall be made specially through an appropriate form of verdict, along with the other required findings. (2) If it is found that punitive damages are to be awarded, the trial shall immediately be recommenced in order to receive such evidence as is relevant to a decision regarding what amount of damages will be sufficient to deter, penalize, or punish the defendant in light of the circumstances of the case. It shall then be the duty of the trier of fact to set the amount to be awarded according to subsection (e), (f), or (g) of this Code section, as applicable.
Kansas K.S.A. §60-3702(a)	(a) In any civil action in which exemplary or punitive damages are recoverable, the trier of fact shall determine, concurrent with all other issues presented, whether such damages shall be allowed. If such damages are allowed, a separate proceeding shall be conducted by the court to determine the amount of such damages to be awarded.
Minnesota Minn. Stat. § 549.20(4)	Subd. 4. *Separate proceeding.* --In a civil action in which punitive damages are sought, the trier of fact shall, if requested by any of the parties, first determine whether compensatory damages are to be awarded. Evidence of the financial condition of the defendant and other evidence relevant only to punitive damages is not admissible in that proceeding. After a determination has been made, the trier of fact shall, in a separate proceeding, determine whether and in what amount punitive damages will be awarded.
Mississippi Miss. Code Ann. §11-1-65(1)(b-d)	(b) In any action in which the claimant seeks an award of punitive damages, the trier of fact shall first determine whether compensatory damages are to be awarded and in what amount, before addressing any issues related to punitive damages. (c) If, but only if, an award of compensatory damages has been made against a party, the court shall promptly commence an evidentiary hearing to determine whether punitive damages may be considered by the same trier of fact. (d) The court shall determine whether the issue of punitive

State	Statutory Text
	damages may be submitted to the trier of fact; and, if so, the trier of fact shall determine whether to award punitive damages and in what amount.
Missouri Mo. Ann. Stat. § 510.263(1-3)	1. All actions tried before a jury involving punitive damages, including tort actions based upon improper health care, shall be conducted in a bifurcated trial before the same jury if requested by any party. 2. In the first stage of a bifurcated trial, in which the issue of punitive damages is submissible, the jury shall determine liability for compensatory damages, the amount of compensatory damages, including nominal damages, and the liability of a defendant for punitive damages. Evidence of defendant's financial condition shall not be admissible in the first stage of such trial unless admissible for a proper purpose other than the amount of punitive damages. 3. If during the first stage of a bifurcated trial the jury determines that a defendant is liable for punitive damages, that jury shall determine, in a second stage of trial, the amount of punitive damages to be awarded against such defendant. Evidence of such defendant's net worth shall be admissible during the second stage of such trial.
Montana Mont. Code. Ann. §27-1-221(7)(a)	(7) (a) Evidence regarding a defendant's financial affairs, financial condition, and net worth is not admissible in a trial to determine whether a defendant is liable for punitive damages. When the jury returns a verdict finding a defendant liable for punitive damages, the amount of punitive damages must then be determined by the jury in an immediate, separate proceeding and be submitted to the judge for review as provided in subsection (7)(c). In the separate proceeding to determine the amount of punitive damages to be awarded, the defendant's financial affairs, financial condition, and net worth must be considered.
Nevada Nev. Rev. Stat. §42.005(3-4)	3. If punitive damages are claimed pursuant to this section, the trier of fact shall make a finding of whether such damages will be assessed. If such damages are to be assessed, a subsequent proceeding must be conducted before the same trier of fact to determine the amount of such damages to be assessed. The trier of fact shall make a finding of the amount to be assessed according to the provisions of this section. The findings required by this section, if made by a jury, must be made by special verdict along with any other required findings. The jury must not be instructed, or otherwise advised, of the limitations on the amount of an award of punitive damages prescribed in subsection 1. 4. Evidence of the financial condition of the defendant is not admissible for the purpose of determining the amount of punitive

State	Statutory Text
	damages to be assessed until the commencement of the subsequent proceeding to determine the amount of exemplary or punitive damages to be assessed.
New Jersey N.J.S.A. §2A:15-5.13(a-d)	a. Any actions involving punitive damages shall, if requested by any defendant, be conducted in a bifurcated trial. b. In the first stage of a bifurcated trial, the trier of fact shall determine liability for compensatory damages and the amount of compensatory damages or nominal damages. Evidence relevant only to the issues of punitive damages shall not be admissible in this stage. c. Punitive damages may be awarded only if compensatory damages have been awarded in the first stage of the trial. An award of nominal damages cannot support an award of punitive damages. d. In the second stage of a bifurcated trial, the trier of fact shall determine if a defendant is liable for punitive damages.
North Carolina N.C. Gen. Stat. §1D-30	Upon the motion of a defendant, the issues of liability for compensatory damages and the amount of compensatory damages, if any, shall be tried separately from the issues of liability for punitive damages and the amount of punitive damages, if any. Evidence relating solely to punitive damages shall not be admissible until the trier of fact has determined that the defendant is liable for compensatory damages and has determined the amount of compensatory damages. The same trier of fact that tried the issues relating to compensatory damages shall try the issues relating to punitive damages.
North Dakota N.D. Cent. Code. §32-03. 2-11(2-3)	2. If either party so elects, the trier of fact shall first determine whether compensatory damages are to be awarded before addressing any issues related to exemplary damages. Evidence relevant only to the claim for exemplary damages is not admissible in the proceeding on liability for compensatory damages. If an award of compensatory damages has been made, the trier of fact shall determine whether exemplary damages are to be awarded. 3. Evidence of a defendant's financial condition or net worth is not admissible in the proceeding on exemplary damages.
Ohio ORC Ann. § 2315.21(B)	(B) (1) In a tort action that is tried to a jury and in which a plaintiff makes a claim for compensatory damages and a claim for punitive or exemplary damages, upon the motion of any party, the trial of the tort action shall be bifurcated as follows: (a) The initial stage of the trial shall relate only to the presentation of evidence, and a determination by the jury, with respect to whether the plaintiff is entitled to recover compensatory damages for the

State	Statutory Text
	injury or loss to person or property from the defendant. During this stage, no party to the tort action shall present, and the court shall not permit a party to present, evidence that relates solely to the issue of whether the plaintiff is entitled to recover punitive or exemplary damages for the injury or loss to person or property from the defendant. (b) If the jury determines in the initial stage of the trial that the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant, evidence may be presented in the second stage of the trial, and a determination by that jury shall be made, with respect to whether the plaintiff additionally is entitled to recover punitive or exemplary damages for the injury or loss to person or property from the defendant. (2) In a tort action that is tried to a jury and in which a plaintiff makes a claim for both compensatory damages and punitive or exemplary damages, the court shall instruct the jury to return, and the jury shall return, a general verdict and, if that verdict is in favor of the plaintiff, answers to an interrogatory that specifies the total compensatory damages recoverable by the plaintiff from each defendant. (3) In a tort action that is tried to a court and in which a plaintiff makes a claim for both compensatory damages and punitive or exemplary damages, the court shall make its determination with respect to whether the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant and, if that determination is in favor of the plaintiff, shall make findings of fact that specify the total compensatory damages recoverable by the plaintiff from the defendant.
Oklahoma Okla. Stat. Ann. tit 23, § 9.1	the jury, in a separate proceeding conducted after the jury has made such finding and awarded actual damages, may award punitive damages
South Carolina S.C. Code Ann. § 15-32-520(A-E)	A) All actions tried before a jury involving punitive damages, if requested by any defendant against whom punitive damages are sought, must be conducted in a bifurcated manner before the same jury. (B) In the first stage of a bifurcated trial, the jury shall determine liability for compensatory damages and the amount of compensatory or nominal damages. Evidence relevant only to the issues of punitive damages is not admissible at this stage. (C) Punitive damages may be considered if compensatory or nominal damages have been awarded in the first stage of the trial. (D) Punitive damages may be awarded only if the plaintiff proves by clear and convincing evidence that his harm was the result of the

State	Statutory Text
	defendant's willful, wanton, or reckless conduct. (E) In the second stage of a bifurcated trial, the jury shall determine if a defendant is liable for punitive damages and, if determined to be liable, the amount of punitive damages.
Tennessee Tenn. Code Ann. § 29-39-104(a)(2)	(2) In an action in which the claimant seeks an award of punitive damages, the trier of fact in a bifurcated proceeding shall first determine whether compensatory damages are to be awarded and in what amount and by special verdict whether each defendant's conduct was malicious, intentional, fraudulent or reckless and whether subdivision (a)(7) applies; (3) If a jury finds that the defendant engaged in malicious, intentional, fraudulent, or reckless conduct, then the court shall promptly commence an evidentiary hearing in which the jury shall determine the amount of punitive damages, if any;
Texas Tex. Civ. Prac. & Rem. Code Ann. § 41.009	(a) On motion by a defendant, the court shall provide for a bifurcated trial under this section. A motion under this subsection shall be made prior to voir dire examination of the jury or at a time specified by a pretrial court order issued under Rule 166, Texas Rules of Civil Procedure. (b) In an action with more than one defendant, the court shall provide for a bifurcated trial on motion of any defendant. (c) In the first phase of a bifurcated trial, the trier of fact shall determine: (1) liability for compensatory and exemplary damages; and (2) the amount of compensatory damages. (d) If liability for exemplary damages is established during the first phase of a bifurcated trial, the trier of fact shall, in the second phase of the trial, determine the amount of exemplary damages to be awarded, if any.
Utah Utah Code Ann. § 78B-8-201(2)	(2) Evidence of a party's wealth or financial condition shall be admissible only after a finding of liability for punitive damages has been made.

Appendix 14 Requirement that plaintiffs amend pleadings to include punitive damages

State	Statutory Text
California Cal Civ Proc Code §§ 425.13, 425.14	(a) In any action for damages arising out of the professional negligence of a health care provider, no claim for punitive damages shall be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed. The court may allow the filing of an amended pleading claiming punitive damages on a motion by the party seeking the amended pleading and on the basis of the supporting and opposing affidavits presented that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to Section 3294 of the Civil Code. The court shall not grant a motion allowing the filing of an amended pleading that includes a claim for punitive damages if the motion for such an order is not filed within two years after the complaint or initial pleading is filed or not less than nine months before the date the matter is first set for trial, whichever is earlier. No claim for punitive or exemplary damages against a religious corporation or religious corporation sole shall be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive or exemplary damages to be filed. The court may allow the filing of an amended pleading claiming punitive or exemplary damages on a motion by the party seeking the amended pleading and upon a finding, on the basis of the supporting and opposing affidavits presented, that the plaintiff has established evidence which substantiates that plaintiff will meet the clear and convincing standard of proof under Section 3294 of the Civil Code.
Florida Fla. Stat. Ann. § 768.72(1)	(1) 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.

State	Statutory Text
Idaho Idaho Code §6-1604(2)	(2) In all civil actions in which punitive damages are permitted, no claim for damages shall be filed containing a prayer for relief seeking punitive damages. However, a party may, pursuant to a pretrial motion and after hearing before the court, amend the pleadings to include a prayer for relief seeking punitive damages. The court shall allow the motion to amend the pleadings if, after weighing the evidence presented, the court concludes that, the moving party has established at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages. A prayer for relief added pursuant to this section shall not be barred by lapse of time under any applicable limitation on the time in which an action may be brought or claim asserted, if the time prescribed or limited had not expired when the original pleading was filed.
Illinois 735 ILCS 5/2-604.1	Sec. 2-604.1. In all actions on account of bodily injury or physical damage to property, based on negligence, or product liability based on any theory or doctrine, where punitive damages are permitted no complaint shall be filed containing a prayer for relief seeking punitive damages. However, a plaintiff may, pursuant to a pretrial motion and after a hearing before the court, amend the complaint to include a prayer for relief seeking punitive damages. The court shall allow the motion to amend the complaint if the plaintiff establishes at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages. Any motion to amend the complaint to include a prayer for relief seeking punitive damages shall be made not later than 30 days after the close of discovery. A prayer for relief added pursuant to this Section shall not be barred by lapse of time under any statute prescribing or limiting the time within which an action may be brought or right asserted if the time prescribed or limited had not expired when the original pleading was filed.
Minnesota Minn. Stat. §549.191	Upon commencement of a civil action, the complaint must not seek punitive damages. After filing the suit a party may make a motion to amend the pleadings to claim punitive damages. The motion must allege the applicable legal basis under section 549.20 or other law for awarding punitive damages in the action and must be accompanied by one or more affidavits showing the factual basis for the claim. At the hearing on the motion, if the court finds prima facie evidence in support of the motion, the court shall grant the moving party permission to amend the pleadings to claim punitive damages. For purposes of tolling the statute of limitations, pleadings amended under this section relate back to the time the action was commenced.

Appendix 15 Vicarious liability

State	Statutory Text
Alabama Ala. Code Sec. §6-11-27	(a) A principal, employer, or other master shall not be liable for punitive damages for intentional wrongful conduct or conduct involving malice based upon acts or omissions of an agent, employee, or servant of said principal, employer, or master unless the principal, employer, or master either: (i) knew or should have known of the unfitness of the agent, employee, or servant, and employed him or continued to employ him, or used his services without proper instruction with a disregard of the rights or safety of others; or (ii) authorized the wrongful conduct; or (iii) ratified the wrongful conduct; or unless the acts of the agent, servant or employee were calculated to or did benefit the principal, employer or other master, except where the plaintiff knowingly participated with the agent, servant, or employee to commit fraud or wrongful conduct with full knowledge of the import of his act.
Alaska Alaska Stat. § 09.17.020(k)	(k) In a civil action in which an employer is determined to be vicariously liable for the act or omission of an employee, punitive damages may not be awarded against the employer under principles of vicarious liability unless (1) the employer or the employer's managerial agent (A) authorized the act or omission and the manner in which the act was performed or omission occurred; or (B) ratified or approved the act or omission after the act or omission occurred; or (2) the employee (A) was unfit to perform the act or avoid the omission and the employer or the employer's managerial agent acted recklessly in employing or retaining the employee; or (B) was employed in a managerial capacity and was acting within the scope of employment. In this subsection, "managerial agent" means a management level employee with the stature and authority to exercise control, discretion, and independent judgment over a certain area of the employer's business and with some power to set policy for the employer.

State	Statutory Text
California Cal Civ Code § 3294(b)	(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.
Kansas K.S.A. §60-3702(d)	(d) In no case shall exemplary or punitive damages be assessed pursuant to this section against: (1) A principal or employer for the acts of an agent or employee unless the questioned conduct was authorized or ratified by a person expressly empowered to do so on behalf of the principal or employer; or
Minnesota Minn. Stat. § 549.20(2)	Subd. 2. *Master and principal.* --Punitive damages can properly be awarded against a master or principal because of an act done by an agent only if: (a) the principal authorized the doing and the manner of the act; (b) the agent was unfit and the principal deliberately disregarded a high probability that the agent was unfit; (c) the agent was employed in a managerial capacity with authority to establish policy and make planning level decisions for the principal and was acting in the scope of that employment; or (d) the principal or a managerial agent of the principal, described in clause (c), ratified or approved the act while knowing of its character and probable consequences.

State	Statutory Text
Nevada Nev. Rev. Stat. §42.007(1)	1. Except as otherwise provided in subsection 2, in an action for the breach of an obligation in which exemplary or punitive damages are sought pursuant to subsection 1 of NRS 42.005 from an employer for the wrongful act of his or her employee, the employer is not liable for the exemplary or punitive damages unless: (a) The employer had advance knowledge that the employee was unfit for the purposes of the employment and employed the employee with a conscious disregard of the rights or safety of others; (b) The employer expressly authorized or ratified the wrongful act of the employee for which the damages are awarded; or (c) The employer is personally guilty of oppression, fraud or malice, express or implied. If the employer is a corporation, the employer is not liable for exemplary or punitive damages unless the elements of paragraph (a), (b) or (c) are met by an officer, director or managing agent of the corporation who was expressly authorized to direct or ratify the employee's conduct on behalf of the corporation.
North Dakota N.D. Cent. Code. §32-03. 2-11(8)	8. Exemplary damages may be awarded against a principal because of an act by an agent only if at least one of the following is proved by clear and convincing evidence to be true: a. The principal or a managerial agent authorized the doing and manner of the act; b. The agent was unfit and the principal or a managerial agent was reckless in employing or retaining the agent; c. The agent was employed in a managerial capacity and was acting in the scope of employment; or d. The principal or managerial agent ratified or approved the doing and manner of the act.
Tennessee Tenn. Code Ann. § 29-39-104(a)(9)	(9) The culpability of a defendant for punitive damages whose liability is alleged to be vicarious shall be determined separately from that of any alleged agent, employee or representative.

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ATTACHMENT 2
TO
REPORT TO BOYD-GRAVES CONFERENCE
PUNITIVE DAMAGES STUDY COMMITTEE
OCTOBER 4, 2012

OPTIONS FOR CONSIDERATION
ON SEPTEMBER 5, 2012
COMMITTEE CONFERENCE

BOYD-GRAVES CONFERENCE
PUNITIVE DAMAGES STUDY COMMITTEE
OPTIONS FOR COMMITTEE CONSIDERATION
ON SEPTEMBER 5, 2012

During the committee conference on July 17, 2012, the committee agreed that it would be helpful to conclude our work by reviewing specific options as a method to attempt to reach consensus in order to make a recommendation to the conference.

The following options have been drafted with the intention of addressing a broad range of possibilities if not a complete list. The first option would be to take no action. The second and third options reflect the ends of the spectrum of possibilities. At one extreme would be the elimination of the right to recover punitive damages at all, which would be consistent with the law of six (6) states. At the other end of the spectrum would be eliminating the cap as would be consistent with the law of twenty-one (21) other states. This would leave a punitive damages recovery unfettered except for other existing limitations under Virginia law and those imposed by U.S. Supreme Court jurisprudence.

In between these extremes are a number of options that for various reasons depending upon one's perspective may reflect an improvement on the existing statutory provisions of the Commonwealth pertaining to punitive damages.

Option 1 - No action.

PROPOSAL: The committee does not recommend making any change to existing Virginia law governing the recovery of punitive damages.

Option 2 - No recovery.

PROPOSAL: Amend VA. Code § 8.01-38.1 to eliminate the right to recover punitive damages in Virginia.

Option 3 - Eliminate cap.

PROPOSAL: Amend VA. Code § 8.01-38.1 to remove the cap on punitive damages. No other change to existing Virginia law would be substituted.

Option 4 - Increase Cap to fully adjust for inflation.

PROPOSAL: Amend VA. Code § 8.01-38.1 to increase the cap to the inflation-adjusted dollar equivalent in 2012 of $350,000 in 1988, when the cap became effective. (According to the CPI Inflation Calculator of the U.S. Bureau of Labor Statistics the sum of $350,000 in 1988, when adjusted for inflation, would be worth $677,822 in 2012).

Option 4A - Increase Cap to fully adjust for inflation, with periodic COL adjustments thereafter.

PROPOSAL: Amend VA. Code § 8.01-38.1 to increase the cap to $675,000 (rounded inflation adjustment of $350,000 in 1988 in 2012 dollars). Every three years thereafter the cap would be adjusted for COL increases based upon the Consumer Price Index for All Urban Consumers as published by the United States Department of Labor, Bureau of Labor Statistics (COL source adopted by South Carolina).

Option 5 - Increase Cap to $500,000 to partially adjust for inflation.

PROPOSAL: Amend VA. Code § 8.01-38.1 to increase the cap to $500,000 to partially offset for inflation since the $350,000 cap was enacted effective July 1, 1988.

Option 5A - Increase Cap to $500,000 to partially adjust for inflation, with periodic COL adjustments thereafter.

PROPOSAL: Amend VA. Code § 8.01-38.1 to increase the cap to $500,000 to partially adjust for inflation since 1988, when the cap became effective. Every three years thereafter the cap would be adjusted for COL increases based upon the Consumer Price Index for All Urban Consumers as published by the United States Department of Labor, Bureau of Labor Statistics (COL source adopted by South Carolina).

Option 6 - Greater of the $350,000 cap, or a multiple of 3 times the compensatory award without limitation.

PROPOSAL: Amend VA. Code § 8.01-38.1 to allow a plaintiff to recover the greater of the statutory cap, or three (3) times the compensatory award without limitation.

Option 6A - Greater of the $350,000 cap, or a multiple of 5 times the compensatory award without limitation.

PROPOSAL: Amend VA. Code § 8.01-38.1 to allow a plaintiff to recover the greater of the statutory cap, or five (5) times the compensatory award without limitation.

Option 7 - Greater of the $350,000 cap, or a multiple of 3 times the compensatory award, but with limitation of $3 million.

PROPOSAL: Amend VA. Code § 8.01-38.1 to allow a plaintiff to recover the greater of the statutory cap, or three (3) times the compensatory award, but in no event may the recovery exceed Three Million Dollars ($3,000,000).

Option 7A - Greater of the cap, or a multiple of 3 times the compensatory award, but with limitation of $5 million.

PROPOSAL: Amend VA. Code § 8.01-38.1 to allow a plaintiff to recover the greater of an increased statutory cap of $500,000, or three times the compensatory award, but in no event may the recovery exceed Five Million Dollars $5,000,000.

Option 8 - Balanced approach to increase cap, with procedural safeguards.

PROPOSAL: Amend VA. Code § 8.01-38.1 to increase the cap to $500,000 to partially offset for inflation, and to add procedural safeguards, including:

a. Increase standard of proof from preponderance of the evidence to "clear and convincing." (Forty-two (42) states use this standard).

b. Evidence of the defendant's financial condition is inadmissible. (Colorado; Adams' memo pp. 8-9; App. 11).

c. Punitive damages may not awarded against a principal or employer for the acts of an agent or employee unless the questioned conduct was authorized or ratified by a person expressly empowered to do so on behalf of the principal or employer. (Kansas; Adams' memo pp. 11-12; App. 15).

d. No punitive damages may be awarded against a manufacturer, distributor or seller of a product if the product's manufacture, design, formulation, inspection, testing, packaging, labeling and warning complied with state and federal statutes, administrative regulations by the relevant agency at the time the product was produced. (North Dakota; Adams memo p. 7; App. 8).

e. No punitive damages verdict can be rendered against a defendant in a civil action if that defendant establishes before trial that punitive damages previously have been awarded against that defendant in any state or federal court in any action alleging harm from the same act or single course of conduct for which the claimant seeks compensatory damages. (Similar to Florida's statute, but without subsection (b), which gives the court discretion to allow punitive damages if it finds that previous awards were not sufficient to punish the defendant's conduct; Adams' memo pp. 7 -18; App. 9).

Option 8A - Balanced approach to increase cap, with less restrictive procedural safeguards than Option 8 above.

PROPOSAL: Amend VA. Code § 8.01-38.1 to increase the cap to $500,000 to partially offset for inflation, and to add procedural safeguards, including,

a. Increase standard of proof from preponderance of the evidence to "clear and convincing."

b. CHANGED FROM ABOVE: Bifurcate punitive damages such that evidence of the defendant's financial condition is inadmissible until after the jury has decided

to award punitive damages. In the second phase the jury receives evidence concerning the defendant's financial condition before setting the amount of the award. (Maryland; Adams' memo p. 9; App. 11).

c. Punitive damages may not awarded against a principal or employer for the acts of an agent or employee unless the questioned conduct was authorized or ratified by a person expressly empowered to do so on behalf of the principal or employer.

d. No punitive damages may be awarded against a manufacturer, distributor or seller of a product if the product's manufacture, design, formulation, inspection, testing, packaging, labeling and warning complied with state and federal statutes, administrative regulations by the relevant agency at the time the product was produced.

e. CHANGED FROM ABOVE: In a tort case in which the cause of action arises from product liability, there shall be no limitation regarding the amount which may be awarded as punitive damages. Only one award of punitive damages may be recovered in a court in this state from a defendant for any act or omission if the cause of action arises from product liability, regardless of the number of causes of action which may arise from such act or omission. (Georgia; Adams' memo pp. 7-8; App. 9).

(1) Alternatively: No punitive damages verdict can be rendered against a defendant that has had a previous award of punitive damages in the Commonwealth based upon the same act or single course of conduct for which the claimant seeks compensatory damages.

(2) Alternatively: Any defendant subject to a punitive damages verdict would receive an offset for the amount of all previous awards of punitive damages in any state or federal court based upon the same act or single course of conduct for which the claimant seeks compensatory damages.

(3) Alternatively: Any defendants subject to a punitive damages verdict would receive an offset for the amount of all previous awards in Virginia of punitive damages based upon the same act or single course of conduct for which the claimant seeks compensatory damages.

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ATTACHMENT 3
TO
REPORT TO BOYD-GRAVES CONFERENCE
PUNITIVE DAMAGES STUDY COMMITTEE
OCTOBER 4, 2012

LETTER OF DISSENT
PREPARED BY STEVEN W. PEARSON
DATED OCTOBER 3, 2012

LAW OFFICE OF
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October 3, 2012

Stephen D. Busch, Esquire
McGuire Woods LLP
One James Center
901 E. Cary St.
Richmond, VA 23219

Re: Boyd Graves Punitive Damages Committee Report Dissent

Dear Steve;

I want to thank you, and each of the other members of the punitive damages committee for all the hard work which has gone into the comprehensive review of the state of punitive damages law in Virginia. We have come a long way from last year's examination of the question of whether awards of punitive damages should be shared with the Commonwealth, through this year's exhaustive survey of US Supreme Court punitive damages jurisprudence, laws of other states with respect to caps and all manner of "procedural safeguards".

Unfortunately, as you will recall, I was unable to participate in our final conference call due to a conflict, and I appreciate your spending time on the phone with me talking about the issues, and your communication of my thoughts to the remainder of the committee. Having reviewed the committee report and its recommendations, I have reluctantly concluded that I must dissent from these recommendations.

There are three committee recommendations, and I find myself in disagreement with each of them. First, I believe we can all agree that an increase in the cap is necessary, if only to adjust for inflation since its inception. That is not to say that I agree with the current cap; I do not. Rather, simply moving to $500,000, as proposed, is less than the effect of inflation since the establishment of the cap, and has no rational basis.

Second, I don't believe that any justification has been shown for increasing the standard of proof to "clear and convincing evidence", and I believe that requiring

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this level of proof would place a very high burden on plaintiffs, which is not justified by any showing of need. This point is the most important reason for my dissent, and it is explained further, below.

The last point is that the limitations placed upon the use of respondeat superior in punitive damages cases have been in case law in the Commonwealth since the 1920's. They are clear and well-understood; indeed, they were applied by the circuit court in Huffman v. Beverly California Corp., 42 Va. Cir. 204 (Rockingham County Cir. Ct., 1997). Therefore, if the committee recommendations are not accepted by the Conference and passed by the General Assembly, there is no need for the enactment of the respondeat superior piece of the committee recommendation, which would simply place current law into statutory form.

As I noted above, I view the most serious problem with the committee's recommendation as the move to a clear and convincing evidence standard of proof. This standard will make it much more difficult to prove the facts underlying an award of punitive damages. The Supreme Court notes that a standard of proof of clear and convincing evidence places a "heavy burden" on the party seeking relief. Commonwealth v. Allen, 296 Va. 262 (2005). But an award of punitive damages already faces an elevated standard--a plaintiff must prove actual malice or willful and wanton disregard of the rights of others. The difficulties of proving entitlement to punitives under this standard is plain. To further require the proof be by clear and convincing evidence of what amounts to mental elements--state of mind--may make this burden insurmountable in meritorious cases. I conclude that adoption of the standard would unnecessarily shelter egregious conduct from appropriate judicial redress.

Our committee deliberations on the subject of punitive damages were extensive, over at least four conference calls this year, and were supported by exhaustive research. But the committee never heard that there were cases in Virginia in which punitive damages were unjustly awarded. Indeed, as I recall, this was never discussed. Because we had trouble getting data, the evidence the committee did hear of punitive damages awards was very sketchy, covering only the calendar year 2005 in only 6 jurisdictions (Fairfax, Chesapeake, Suffolk, Accomack, Giles and Louisa), and only 137 cases won by plaintiffs. The only punitive damages awarded were 10 cases in Fairfax (median punitive award of $24,500), and one award of $2500 in Chesapeake. Though not a substantial sample, it is hard to find within this group of cases any indication of unjust awards of punitive damages.

My own review of cases and issues which have appeared over the past 10 years in Virginia Lawyers Weekly does not reveal that allegations of unjust awards of punitive damages have been made, nor does it reveal that there are any problems with punitive damages awards. I found about 100 cases reported which dealt with punitive damages. Of this number, about half the cases appear to have resulted in an award. I just don't believe that the evidence shows that there is any problem in Virginia with the punitive damage process that a toughening of proof requirements would address. In my view, Virginia does not need to change its standard of proof to reflect the standard of other states because it has not been shown that we have any problem with unjust awards of punitive damages. Accordingly, I don't believe that legislation suggested by the committee is necessary or desirable.

I have enjoyed working with the committee on this matter. Thank you again for all of your courtesies during this process.

Sincerely,

Steven W. Pearson

Cc: Thomas G. Bell, Jr., Esquire
L.B. Chandler, Jr., Esquire
Professor James J. Duane
The Honorable Wyatt B. Durrette, Jr.
The Honorable Wiley F. Mitchell, Jr.
Stephen M. Sayers, esquire
John R. Walk, Esquire

LAW OFFICE OF
STEVEN W. PEARSON, P.C.
ONE MONUMENT AVENUE
413 STUART CIRCLE, SUITE 130
RICHMOND, VIRGINIA 23220

October 3, 2012

Stephen D. Busch, Esquire
McGuire Woods LLP
One James Center
901 E. Cary St.
Richmond, VA 23219

Re: Boyd Graves Punitive Damages Committee Report Dissent

Dear Steve;

I want to thank you, and each of the other members of the punitive damages committee for all the hard work which has gone into the comprehensive review of the state of punitive damages law in Virginia. We have come a long way from last year's examination of the question of whether awards of punitive damages should be shared with the Commonwealth, through this year's exhaustive survey of US Supreme Court punitive damages jurisprudence, laws of other states with respect to caps and all manner of "procedural safeguards".

Unfortunately, as you will recall, I was unable to participate in our final conference call due to a conflict, and I appreciate your spending time on the phone with me talking about the issues, and your communication of my thoughts to the remainder of the committee. Having reviewed the committee report and its recommendations, I have reluctantly concluded that I must dissent from these recommendations.

There are three committee recommendations, and I find myself in disagreement with each of them. First, I believe we can all agree that an increase in the cap is necessary, if only to adjust for inflation since its inception. That is not to say that I agree with the current cap; I do not. Rather, simply moving to $500,000, as proposed, is less than the effect of inflation since the establishment of the cap, and has no rational basis.

Second, I don't believe that any justification has been shown for increasing the standard of proof to "clear and convincing evidence", and I believe that requiring

Legal and Government Relations Services
TELEPHONE: 804-342-8989 EMAIL: STEVE@SWPEARSON.COM FACSIMILE: 804-237-8905

this level of proof would place a very high burden on plaintiffs, which is not justified by any showing of need. This point is the most important reason for my dissent, and it is explained further, below.

The last point is that the limitations placed upon the use of respondeat superior in punitive damages cases have been in case law in the Commonwealth since the 1920's. They are clear and well-understood; indeed, they were applied by the circuit court in Huffman v. Beverly California Corp., 42 Va. Cir. 204 (Rockingham County Cir. Ct., 1997). Therefore, if the committee recommendations are not accepted by the Conference and passed by the General Assembly, there is no need for the enactment of the respondeat superior piece of the committee recommendation, which would simply place current law into statutory form.

As I noted above, I view the most serious problem with the committee's recommendation as the move to a clear and convincing evidence standard of proof. This standard will make it much more difficult to prove the facts underlying an award of punitive damages. The Supreme Court notes that a standard of proof of clear and convincing evidence places a "heavy burden" on the party seeking relief. Commonwealth v. Allen, 296 Va. 262 (2005). But an award of punitive damages already faces an elevated standard--a plaintiff must prove actual malice or willful and wanton disregard of the rights of others. The difficulties of proving entitlement to punitives under this standard is plain. To further require the proof be by clear and convincing evidence of what amounts to mental elements--state of mind--may make this burden insurmountable in meritorious cases. I conclude that adoption of the standard would unnecessarily shelter egregious conduct from appropriate judicial redress.

Our committee deliberations on the subject of punitive damages were extensive, over at least four conference calls this year, and were supported by exhaustive research. But the committee never heard that there were cases in Virginia in which punitive damages were unjustly awarded. Indeed, as I recall, this was never discussed. Because we had trouble getting data, the evidence the committee did hear of punitive damages awards was very sketchy, covering only the calendar year 2005 in only 6 jurisdictions (Fairfax, Chesapeake, Suffolk, Accomack, Giles and Louisa), and only 137 cases won by plaintiffs. The only punitive damages awarded were 10 cases in Fairfax (median punitive award of $24,500), and one award of $2500 in Chesapeake. Though not a substantial sample, it is hard to find within this group of cases any indication of unjust awards of punitive damages.

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I have enjoyed working with the committee on this matter. Thank you again for all of your courtesies during this process.

Sincerely,

Steven W. Pearson

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The Honorable Wiley F. Mitchell, Jr.
Stephen M. Sayers, esquire
John R. Walk, Esquire

ATTACHMENT 4
TO
REPORT TO BOYD-GRAVES CONFERENCE
PUNITIVE DAMAGES STUDY COMMITTEE
OCTOBER 4, 2012

VIRGINIA CODE ANN. SECTION 8.01-44.5

§ 8.01-44.5.
Exemplary Damages For Persons Injured By Intoxicated Drivers.

In any action for personal injury or death arising from the operation of a motor vehicle, engine or train, the finder of fact may, in its discretion, award exemplary damages to the plaintiff if the evidence proves that the defendant acted with malice toward the plaintiff or the defendant's conduct was so willful or wanton as to show a conscious disregard for the rights of others.

A defendant's conduct shall be deemed sufficiently willful or wanton as to show a conscious disregard for the rights of others when the evidence proves that (i) when the incident causing the injury or death occurred, the defendant had a blood alcohol concentration of 0.15 percent or more by weight by volume or 0.15 grams or more per 210 liters of breath; (ii) at the time the defendant began drinking alcohol, or during the time he was drinking alcohol, he knew or should have known that his ability to operate a motor vehicle, engine or train would be impaired, or when he was operating a motor vehicle he knew or should have known that his ability to operate a motor vehicle was impaired; and (iii) the defendant's intoxication was a proximate cause of the injury to or death of the plaintiff.

However, when a defendant has unreasonably refused to submit to a test of his blood alcohol content as required by § 18.2-268.2, a defendant's conduct shall be deemed sufficiently willful or wanton as to show a conscious disregard for the rights of others when the evidence proves that (i) when the incident causing the injury or death occurred the defendant was intoxicated, which may be established by evidence concerning the conduct or condition of the defendant; (ii) at the time the defendant began drinking alcohol, or during the time he was drinking alcohol, he knew or should have known that his ability to operate a motor vehicle was impaired; and (iii) the defendant's intoxication was a proximate cause of the injury to the plaintiff or death of the plaintiff's decedent. A certified copy of a court's determination of unreasonable refusal pursuant to § 18.2-268.3 shall be prima facie evidence that the defendant unreasonably refused to submit to the test.

(1994, c. 570; 1998, c. 722; 1999, c. 324; 2002, c. 879.)

ATTACHMENT 5
TO
REPORT TO BOYD-GRAVES CONFERENCE
PUNITIVE DAMAGES STUDY COMMITTEE
OCTOBER 4, 2012

***Hogg v. Plant,* 145 Va. 175, 133 S.E. 759 (1926)**

Caution
As of: Sep 11, 2012

HOGG, BY, ETC. v. PLANT

Supreme Court of Virginia

145 Va. 175*; *133 S.E. 759*; *1926 Va. LEXIS 383*; *47 A.L.R. 308

June 17, 1926

PRIOR HISTORY: [***1] Error to a judgment of the Circuit Court of the city of Norfolk, in a proceeding by motion for a judgment for damages. Judgment for defendants. Plaintiff assigns error.

DISPOSITION: *Affirmed.*

HEADNOTES

1. MASTER AND SERVANT -- *Existence of Relationship -- Watchman and His Employer.* -- The relationship of master and his servant exists between a watchman employed to guard a store house and his employers.

2. MASTER AND SERVANT -- *Wrongful Arrest by Watchman -- Liability of Master for Punitive Damages -- Case at Bar.* -- The instant case was an action by plaintiff against the employers of a watchman for the illegal arrest of plaintiff by the watchman.

Held: That defendants could not be held liable for punitive damages unless the watchman did some act warranting punitive damages, and such act was previously authorized or subsequently ratified by the defendants.

3. AGENCY -- *Exemplary Damages -- Liability of Principal for Exemplary Damages.* -- Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer but by way of punishment of the offender and as a warning to others, can only be awarded against one who has participated in the offense. [***2] A principal, therefore, though of course liable to make compensation for the injury done by his agent, within the scope of his employment, cannot be held for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious intent on the part of the agent, unless the principal participated in the wrongful act.

4. FALSE IMPRISONMENT -- *Illegal Arrest -- Damages -- Compensatory Damages -- Excessive Damages.* -- While there is no measure of compensatory damages in cases of false imprisonment or illegal arrest, yet the amount may be so large as to exceed any compensation that a jury could reasonably allow under the circumstances of the case. In such case, the verdict is excessive.

5. NEW TRIAL -- *Excessive Damages -- Remedy.* -- The remedy for an excessive verdict is either to set it aside and award a new trial, or to put the successful party upon terms to release the excess or else submit to a new trial. In cases where there is no measure of damages but

the damages are excessive, it is entirely proper to set aside the verdict and have a new assessment of damages by a jury, which is the more appropriate tribunal for that purpose.

6. FALSE IMPRISONMENT [***3] -- *Damages -- Excessive Damages -- Case at Bar.* -- In the instant case, an action for false imprisonment, where defendants' watchman arrested plaintiff on the charge of an attempt to break into defendants' storehouse, the verdict for plaintiff for $2,500 exceeded any compensatory limit and could only be accounted for on the theory that the jury, under an erroneous instruction given by the court, gave plaintiff exemplary damages.

7. FALSE IMPRISONMENT -- *Master and Servant -- Exemplary Damages -- Instructions.* -- In an action for false imprisonment against the employers of a watchman, instructions that the plaintiff might recover punitive damages if the unlawful act was committed with malice, and that malice might be inferred from wrongful act based upon no reasonable ground, were erroneous because if the instructions referred to personal acts of defendants, they were without evidence to support them, and if to the acts of their servant, they were plainly wrong where there was no evidence that the servant's acts were authorized or ratified by defendants.

8. NEW TRIAL -- *Wrong Reason Assigned for Setting Aside of Verdict.* -- It is immaterial that in setting aside [***4] a verdict the court gave a wrong reason if for any reason the verdict should have been set aside.

9. APPEAL AND ERROR -- *Two Trials in Lower Court -- Verdict set Aside for some Reason Other than that it was Contradicted by or was without Evidence to Support it -- Rule of Practice in the Supreme Court of Appeals.* -- Neither section 6251 nor section 6363 of the Code of 1919 has any application except where there has been a motion to set aside the verdict because it is contrary to the evidence, or is without evidence to support it. If the verdict is set aside for some other reason, or if no final judgment has been entered under section 6251, and, in either case, a new trial has been awarded, the Supreme Court of Appeals has adopted as a rule of practice what was formerly provided by section 3484 of the Code of 1887, that when there have been two trials in the lower court it will look first to the evidence and proceedings on the first trial, and if it discovers that the court erred in setting aside the verdict on that trial, it will set aside and annul all proceedings subsequent to the said verdict and enter judgment.

SYLLABUS

The opinion states the case.

COUNSEL: *A. A. Bangel,* [***5] for the plaintiff in error.

Herman A. Sacks, for the defendants in error.

OPINION BY: BURKS

OPINION

[*177] [**759] BURKS, J., delivered the opinion of the court.

This was an action for false imprisonment brought against the defendants for the conduct of a watchman whom they had employed to guard their storehouse at night. There were two trials of the case. On the first trial there was a verdict for the plaintiff for $2,500, which the trial court set aside. On the second trial there was a verdict and judgment for the defendants. The case is before us now on exception to the judgment of the trial court setting aside the first verdict. None of the proceedings on the second trial is before us. If any exception was taken to the proceeding or judgment in the second trial it does not appear from the record before us.

The grounds of the motion to set aside the first verdict were: (1) That the verdict was contrary to the law and the evidence; (2) That it was excessive; (3) That the size of the verdict clearly showed that punitive damages were allowed, and that no such damages could have been awarded against the defendants; (4) That the court erred in granting the instructions [***6] tendered by the plaintiff; and (5) That the court erred in amending instruction "A" offered by the defendants. The trial court sustained the motion and set aside the verdict, "giving as a reason therefor that the size of the verdict clearly indicated that [**760] the jury was influenced by a passion or prejudice," and stating that it "did not pass upon any other grounds urged by the defendants in support of their motion for a new trial."

[*178] The defendants had a junk yard in the city of Norfolk, and adjoining it on the same lot an Army and Navy store, which had been broken into thirteen times in eleven months, and three or four times in the eighteen

days immediately preceding the present controversy. They employed Edward Stevenson as a watchman to guard their property at night and, if possible, to break up these depredations.

The plaintiff is a young man, twenty years of age, and resides in the city of Portsmouth across the Elizabeth river from the city of Norfolk. On Sunday afternoon, January 18, 1925, he went to call on a lady friend, Miss Mary Owens, in the city of Norfolk. He remained there until about nine o'clock, and left for home going down Front street [***7] on which is located the defendants' plant. There is serious conflict in the testimony as to whether he entered the plant. He says that he did not. At all events, immediately after he passed the plant, the watchman pursued him and overtook and arrested him, charging him with entering the plant, and at the point of a pistol brought him back to the plant of Johns Brothers, Inc., which adjoins the plant of the defendants. When they got to the defendants' plant, the watchman said to the plaintiff, "that is where you tried to get in," and the plaintiff replied that he did not, and the watchman said, "You are a God damn liar," and repeated it three times. When they got to the Johns Brothers' plant the watchman called up police headquarters and the Plant residence. Several police detectives responded promptly, and while the watchman was giving the detectives his version of what had occurred, Marvin Plant, one of the defendants and the junior member of the firm of Plant and Son, came in. The watchman was making his report to the detectives. [*179] Nothing was said about the watchman having cursed the plaintiff, and he denied on the witness stand that he had done so. Marvin Plant [***8] did not speak a word to anyone. All who were present testify that they could get nothing out of the plaintiff. Marvin Plant says: "The chap was crying and couldn't give him (detective) any suitable reply." The detective said: "Come go to the police station," and took him to detective headquarters in an automobile. The detective testified that, in answer to questions, the plaintiff stated that he had been visiting Miss Owen, and that on his way home he had stepped into the plant to urinate. He was then taken to Miss Owen's home and his account of his visit was fully verified by her mother, and they returned to the detective headquarters and the plaintiff was discharged. Neither the watchman nor Marvin Plant, nor the police, knew the plaintiff or had ever seen him before.

A witness for the plaintiff testified that he knew that the plaintiff had been visiting that day at the Owen residence and that he suggested to the watchman to go there and verify the statement, but that the watchman rebuffed him and asked him what he had to do with it. Several witnesses for the plaintiff also testified that they saw the plaintiff pass the defendants' plant and that he did not go in. On this [***9] question, the evidence was conflicting; but there is no conflict as to the part taken by the defendants in what was done.

There was some testimony about Miss Owen refusing to go with the plaintiff afterwards, but it is not claimed that he was engaged to her, nor is any special damage claimed in the declaration in consequence thereof. In the view we take of the case, it will be unnecessary to refer further to this testimony.

[1, 2] It is very plain that the relation of the defendants [*180] and the watchman was that of master and servant, and it is equally plain that the defendants cannot be held liable for punitive damages, unless the watchman did some act warranting punitive damages, and that such act was previously authorized or subsequently ratified by the defendants. *Norfolk & W. R. Co. v. Neely, 91 Va. 539, 22 S.E. 367*; *Southern R. Co. v. Grubbs, 115 Va. 876, 80 S.E. 749*; *Hines v. Gravins, 136 Va. 313, 112 S.E. 869, 118 S.E. 114*; *Lake Shore R. Co. v. Prentice, 147 U.S. 101, 13 S. Ct. 261, 37 L. Ed. 97.* If any such act was done, the record discloses no evidence of previous authorization or subsequent ratification.

[3] In the [***10] *Prentice Case* it was said: "Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though of course liable to make compensation for the injury done by his agent, within the scope of his employment, cannot be held for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious intent on the part of the agent."

In *Hagan v. Providence R. Co., 3 R.I. 88, 62 Am. Dec. 377*, it was said: "We do not see how such damages can be allowed, when the principal is prosecuted for the tortious act of his servant, unless there is proof in the case to implicate the principal and make him *particeps criminis* of the agent's act.

"No man should be punished for that of which he is not guilty. When the proof does not implicate the

principal, and however wicked the servant may have been, the principal neither expressly nor impliedly authorizes or ratifies the act, and the criminality of [*181] it is as much against him as against any other member of society, we think [***11] it is quite enough that he shall be liable in compensatory damages for the injury sustained in consequence of the wrongful act of a person acting as his servant."

[**761] It must be considered as the settled law of this State that punitive damages cannot be awarded against a master or principal for the wrongful act of his servant or agent in which he did not participate, and which he did not authorize or ratify.

[4, 5] It is true that there is no measure of compensatory damages in a case of this kind, and yet the amount may be so large as to exceed any compensation that a jury could reasonably allow under the circumstances of the case. In such case, the verdict is excessive. The remedy for an excessive verdict is either to set it aside and award a new trial, or to put the successful party upon terms to release the excess or else submit to a new trial. In cases where there is no measure of damages, but the damages are excessive, it is entirely proper to set aside the verdict and have a new assessment of damages by a jury, which is the more appropriate tribunal for that purpose.

[6] It may be said of the verdict in the instant case, as was said of the verdict in [***12] *Norfolk & W. R. Co. v. Neely, supra:* "The verdict exceeded any compensatory limit, and can only be accounted for upon the theory that the jury, under erroneous instructions of the court, gave to him exemplary damages."

[7] The defendant in error assigns as cross-error the giving of certain instructions for the plaintiff, among them instructions (1) and (3). These instructions were as follows:

1. "* * * And if the jury believe from the evidence the said wrongful act or acts to have been [*182] committed by the defendants with malice, they may also award to the plaintiff punitive damages."

3. "The court instructs the jury that an improper motive may be inferred from a wrongful act based upon no reasonable ground, and that such improper motive constitutes malice in law, and to constitute such malice it is not necessary that such wrongful act should be prompted by anger, malevolence or vindictiveness; but such inference or malice may be removed by the evidence in the case."

There was no evidence of any wrongful act done by either of the defendants, and Instruction 1 could only have had reference to acts of the watchman as servant of the defendants. If the instruction [***13] referred to personal acts of the defendants, it was without evidence to support it; if to the acts of their servant, it was plainly wrong. In any view of the case, it was error to have given it. The verdict, therefore, should have been set aside for error in the instructions. The excessive verdict must have been brought about by the instructions.

[8] The trial court committed no error in setting aside the verdict. It is immaterial that it gave a wrong reason for a correct judgment.

This ends the case, as there is no exception to the proceedings and the judgment on the second trial.

[9] Neither section 6251 nor section 6363 of the Code has any application except where there has been a motion to set aside the verdict because it is contrary to the evidence, or is without evidence to support it. If the verdict is set aside for some other reason, or if no final judgment has been entered under section 6251, and, in either case, a new trial has been awarded, we have adopted as a rule of practice what was formerly provided by section 3484 of the Code of 1887, [*183] that when there have been two trials in the lower court we will look first to the evidence and proceedings [***14] on the first trial, and if we discover that the court erred in setting aside the verdict on that trial, we will set aside and annul all proceedings subsequent to the said verdict and enter judgment here. *Clark v. Hugo, 130 Va. 99, 107 S.E. 730.*

Affirmed.

ATTACHMENT 6
TO
REPORT TO BOYD-GRAVES CONFERENCE
PUNITIVE DAMAGES STUDY COMMITTEE
OCTOBER 4, 2012

***Huffman v. Beverly California Corp.*, 42 Va. Cir. 204**
(Rockingham County Cir. Ct., 1997)

Positive
As of: Sep 11, 2012

Eugene Huffman, Executor of the Estate of William Parker, deceased v. Beverly California Corp., Beverly Enterprises, Inc., Liberty Nursing Homes, Inc., d/b/a Liberty House Nursing Home, and Michael Spitzer

Case No. (Law) 9734

CIRCUIT COURT OF ROCKINGHAM COUNTY, VIRGINIA

42 Va. Cir. 205*; *1997 Va. Cir. LEXIS 113

April 22, 1997, Decided

HEADNOTES

[**1] Headnote: The amount of corroboration required to support a verdict for a deceased person need only be slight and need not prove every element of the cause of action.

The punitive damages cap set forth in *§ 8.01-38.1* is constitutional and valid.

Any fact, however remote, that tends to establish the probability or improbability of a fact in issue is admissible.

Evidence of prior bad acts can be introduced to show the conduct and feeling of an accused towards his victim, to prove opportunity for the commission of the offenses charged, and to demonstrate a common plan or scheme where these bad acts show a certain pattern.

Simple, factual reports made by staff concerning incidents are ordinary hospital records, which are specifically exempted from the provisions of *§ 8.01-581.17.*

Section 8.01-581.17 covers nursing home records.

There need not be expert testimony concerning the violation of a health care provider's standard of care if the alleged acts of malpractice fall within the jury's common knowledge.

Where attorney's fees cannot be determined until the litigation is substantially concluded, a second jury can be empaneled to determine them.

JUDGES: [**2] By Judge John J. McGrath, Jr.

OPINION BY: McGrath

OPINION

[*205] This case was brought by the plaintiff, Eugene Huffman, as the Executor of his father-in-law, William Parker, against the corporate defendants who collectively operated the Liberty House Nursing Home in Harrisonburg, [*206] Virginia, and one of its former

employees, Michael Spitzer. The suit alleges, inter alia, that the late Mr. Parker had been injured because of defendants' providing inadequate and inappropriate care for Mr. Parker while he was a resident of the nursing home from August 22, 1991, to March 4-6, 1992.

Included in the allegations of improper care were assertions that the defendant, Michael Spitzer, while acting within the scope of his employment and providing geriatric nursing care to Mr. Parker (who was eighty years old) sexually molested Mr. Parker on numerous occasions, physically assaulted Mr. Parker, and generally treated him in a demeaning fashion. The sexual abuse allegations relating to Mr. Parker's stay at Liberty House included allegations that he was anally raped, that the nursing aid, Spitzer, masturbated upon Mr. Parker and forced Mr. Parker to engage in acts of oral sodomy upon Spitzer. The suit also alleged that [**3] Spitzer stuffed food in Mr. Parker's mouth in an inappropriate fashion, cut Mr. Parker numerous times with a razor, and impermissibly restrained him in his bed and in his Gerry-chair.

Liability of the corporate defendants was premised upon their providing a generally inadequately staffed facility and improperly training their personnel, the improper and excessive use of physical restraints, permitting Mr. Parker to roam and to escape from the facility without having proper safeguards, their alteration of nursing records, and in their negligent hiring and retaining of Michael Spitzer. The Plaintiff asserted that the corporate defendants had violated industry norms in failing to check any references before Spitzer was hired and therefore failed to discover that Mr. Spitzer was terminated from his previous employment for inappropriate conduct with patients and fellow workers and that the corporate defendants retained Mr. Spitzer on their payroll after they had become aware that he had sexually assaulted other patients and engaged in other inappropriate and bizarre conduct while on duty at Liberty House.

After a six-day jury trial, the jury returned with a joint and several verdict against [**4] all of the defendants for $ 518,000.00 in compensatory damages and $ 4.5 million dollars in punitive damages. After the verdict was returned and the jury polled, the jury was discharged.

The Defendants have filed a broad based and comprehensive Motion to Set Aside the Verdict on nine separate grounds. In turn, the plaintiff has filed a Motion for an allowance of attorneys' fees based upon the contractual provision providing that attorneys' fees shall be awarded to the prevailing party of any action which was brought to enforce the contract entered into between the corporate defendants and Mr. Parker. The Defendants have opposed this request for attorneys' fees on the ground that (a) the contract action should never have been permitted to go to the jury in the first place, and [*207] (b) even if the contract action was properly before the jury, the reasonable amount of attorneys' fees is a jury question and since the plaintiff did not put on any evidence concerning his attorneys' fees in his case-in-chief before the discharge of the jury, he has waived any claim to attorneys' fees.

Background

Before taking up the various legal issues posed by the defendants' Motion to Set Aside the [**5] Verdict, it is helpful for an understanding of the various issues to provide a short factual background of the case.

The decedent, Mr. Parker, who was eighty years old when he was placed into the Liberty House Nursing Home by his daughter and son-in-law in the belief that they would be able to contend with his problems of advancing Parkinson's Disease and other mental and physical difficulties that he was experiencing because of his age. During the course of Mr. Parker's stay at Liberty House, his daughter, Thelma Huffman and her husband, the Plaintiff, Eugene Huffman, became concerned as to the quality of care that Mr. Parker was receiving at the facility. Although they dealt extensively with the staff and the management, their concerns increased. Finally, on about January 21, 1992, they became extremely concerned that Mr. Parker was reporting aberrant sexual behavior and abusive physical behavior by at least one of the staff members. After Mr. and Mrs. Huffman confronted the staff with the various allegations concerning Mr. Spitzer, Mr. Spitzer was placed on suspension. Shortly thereafter, he was terminated by the corporate defendants. Mr. Parker remained a resident at Liberty House [**6] until March 5, 1992.

After Mr. Parker's removal from the facility, Mrs. Huffman arranged for her father to be diagnosed and treated and debriefed by a local psychiatrist, Dr. N. McLean-Rice. She also made a report to a local organization known as CASA (Citizens Against Sexual Assault) who assigned Heidi Weimer, one of their

program directors, to work with Mr. Parker to see if they could help him deal with the apparent traumatic consequences of the treatment he received at the nursing home. The interview[ounseling process with Mrs. Weimer went on for an extended period of time as did the consultations with Dr. McLean-Rice. Also at or about the time that Mr. Parker made his accusations, his daughter also notified the Harrisonburg Police Department who assigned Detective Sparts to the case. Detective Sparts and other law enforcement officials conducted an investigation concerning Mr. Parker's treatment at Liberty House.

Ultimately, Mr. Parker testified before a Grand Jury that was impaneled in Harrisonburg. After his testimony and that of other witnesses, the Grand Jury [*208] on June 15, 1992, returned a nine-count felony indictment against Michael Spitzer charging him with four counts of [**7] forcible sodomy (§ 18.2-67.1(A)(2)), two counts of aggravated sexual battery (§ 18.2-67.3(A)(2)(b)), and three counts of assault and battery (§ 18.2-57) against William Parker while he was a patient at the Liberty House Nursing Home. On September 24, 1992, shortly after the indictments were issued, Mr. Parker suffered a debilitating stroke which rendered him incapable of any speech or communication. Shortly thereafter, the Commonwealth moved an Order permitting the use of Mr. Parker's out-of-court statements at the criminal trial because he was "unavailable" because of his stroke. When this motion was denied on October 22, 1992, the Commonwealth moved for and was granted an order of nolle prosequi. Mr. Parker never regained the use of his faculties from the time of the stroke until he died on January 7, 1994.

I. Defendants' Motion to Set Aside the Verdict Based Upon Inadmissible Hearsay Statements

Defendants move to set aside the verdict because a number of statements, particularly those pertaining to the sexual and physical abuse by Michael Spitzer, which were made by Mr. Parker when he was alive to various individuals, including, but not limited to, his daughter, his son-in-law, [**8] his psychiatrist, the case worker from CASA, and Detective Sparts, were admitted into evidence pursuant to the provisions of *§ 8.01-397 of the Code* (the so-called Dead Man's Statute). The basis of the attack by the Defendants on the admission of Mr. Parker's statements is two-fold. They first assert that *§ 8.01-397*, even if it were applicable, requires that the statements of the deceased individual must have been made at a time while he was "capable." Defendants believe that at all pertinent times Mr. Parker was so demented that he was incapable of recalling basic facts and was incapable of distinguishing truth from fiction. The second argument offered by Defendants is that *§ 8.01-397* was not intended to cover situations such as are presented here and that the estate of a deceased person should not be able to recover based upon the out-of-court statements of the decedent.

Addressing the first issue, this Court conducted at the request of the Defendants a preliminary evidentiary hearing in which the Defendants called a Dr. James Levinson, a Board certified psychiatrist from the Medical College of Virginia, who testified that, although he had never met Mr. Parker, based upon his [**9] medical records and other evidence that he had reviewed, he did not believe that Mr. Parker was "capable" at the relevant times of distinguishing truth from fiction, and, therefore, was not "capable" of rendering reliable [*209] testimony. After this evidentiary hearing, the Court concluded that there was a sufficient factual basis (particularly the contrary conclusions reached by Dr. McLean-Rice concerning the reliability of Mr. Parker's recall and articulation capabilities), that the statements were made while Mr. Parker was "capable" and should be permitted to go before the jury to be evaluated by them.

In fact, during the course of the trial, a number of individuals, including Dr. McLean-Rice, Mrs. Heidi Weimer, Dr. O. Douglas Smith (one of Mr. Parker's treating physicians), and numerous other individuals testified that during the relevant periods of time Mr. Parker did have problems with dementia but could frequently be in his own way articulate and could distinguish fact from fiction. In short, there was ample evidence in this record to establish that, although Mr. Parker may have been impaired in many ways, he was capable of relating to the individuals the statements which were admitted [**10] into evidence, and their reliability and weight were to be determined by the jury. Therefore, to the extent Defendants' motion is premised upon his incompetency to testify, it is denied.

The second basis of the Defendants' motion on this point is simply the assertion that *§ 8.01-397 of the Code* does not apply to hearsay statements of a decedent whose administrator is bringing a suit to recover damages. This argument is contrary to the plain wording of the statute which provides that: "In any action by or against

sc85,153[a decedent], all . . . declarations by the [deceased] . . . may be received as evidence in all proceedings . . .." Therefore, to the extent the Defendants' motion is based upon the mistaken belief that *§ 8.01-397* does not apply to a suit brought on behalf of a decedent, it is overruled.

The more pertinent issue, however, is that *§ 8.01-397* does provide that no judgment shall be entered for or against a deceased person on "uncorroborated" testimony. Therefore, the more appropriate question is whether there is sufficient corroborating evidence in the record to support a judgment in favor of the Plaintiff and against the Defendants. The law in Virginia has been consistent [**11] that the amount of corroboration required to support such a verdict need only be slight and need not prove every element of the cause of action. See, e.g. *Penn v. Manns, 221 Va. 88, 267 S.E.2d 126 (1980)*; *Brooks v. Worthington, 206 Va. 352, 143 S.E.2d 841 (1965)*; *Morrison v. Morrison, 174 Va. 58, 4 S.E.2d 776 (1939)*; *Krikorian v. Dailey, 171 Va. 16, 197 S.E. 442 (1938)*; *Cannon v. Cannon, 158 Va. 12, 163 S.E. 405 (1932)*; and *Arwood v. Hill's, Adm'r, 135 Va. 235, 117 S.E. 603 (1923)*. There was substantial non-hearsay evidence which corroborated the general allegations of the inadequate level of treatment provided to Mr. Parker including unnecessary restraints, failure to protect him from leaving the building, permitting him to remain dirty, unbathed, and in his own urine for inappropriate lengths of time, and being force fed. This evidence came in [*210] through a number of eyewitnesses who observed the condition of Mr. Parker and the treatment he received.

There was non-hearsay testimony providing corroborating evidence to support the verdict on behalf of Mr. Parker's estate in that there was physical evidence of unexplained bruising upon Mr. Parker, and there was evidence of numerous small [**12] cuts to his face which clearly appeared to be beyond the normal amount of nicks incurred by any individual who was being shaved. All of this evidence would tend to corroborate the statements made by Mr. Parker which were admitted into evidence. It is true, however, that the core allegations concerning the sexually abusive conduct by Mr. Spitzer are supported almost wholly upon the out-of-court statements of Mr. Parker. While some of this testimony may have been admitted under various exceptions to the hearsay rule, there nevertheless needs to be some corroboration of this evidence in order to support a verdict.

Corroboration of Mr. Parker's out-of-court statements relating to the sexually motivated assaults by Mr. Spitzer was provided by the in court testimony of Keith Kroll, a wheelchair bound individual suffering from cerebral palsy, who testified that Michael Spitzer had sexually molested him while he was a resident of Liberty House and that he reported that fact to Mr. Spitzer's supervisors and nothing was done about it. Mr. Kroll also testified that he saw Spitzer "force feed" other patients.

Additionally, there appears to be strong scientific corroboration of the statements [**13] of the sexual abuse of Mr. Parker by the diagnosis of Dr. McLean-Rice. The jury was presented with extensive testimony from Dr. McLean-Rice that the characteristic behavior of Mr. Parker when he was being interviewed, diagnosed, and treated was that of an individual suffering a post-traumatic stress reaction secondary to sexually abusive conduct. Although it is clear that psychiatric diagnoses and analysis is not necessarily an "objective" science, it certainly is some corroborating evidence of the statements of Mr. Parker and is able to satisfy the corroboration requirements set forth in *Code § 8.01-397*. Therefore, the Motion to Set Aside the Verdict on the basis of *§ 8.01-397* is denied.

II. Defendants' Motion to Set Aside the Punitive Damage Award Against the Corporate Defendants

The Corporate Defendants rely upon the holding in *Hogg v. Plant, 145 Va. 175, 133 S.E. 759 (1926)*, for the proposition that punitive damages cannot be awarded against a corporation for the acts of its agents which are outside the scope of [*211] their authority and which the corporation did not authorize or ratify. The Supreme Court's statement in Hogg v. Plant is precise and to the point:

It must be considered [**14] as the settled law of this state that punitive damages cannot be awarded against a master or principal for the wrongful act of his servant or agent in which he did not participate and which he did not authorize or ratify.

Although this may be a perfectly valid statement of the applicable law, it does not deal with the situation that was presented in this case. First, the same lawyers represented Michael Spitzer and all of the Corporate Defendants. They never took the position in the trial that Mr. Spitzer's acts were beyond the scope of his authority

or had not been ratified by the corporation, but insisted that the position of all of the defendants in the case was that the acts of abuse did not occur. Secondly, punitive damages have been awarded against the corporation for many acts which did not necessarily involve Michael Spitzer. For example, there was repeated evidence concerning the unnecessary use of physical restraints, the force feeding of Mr. Parker, the failure to remove Mr. Parker from sitting in his own urine and feces, and similar other conduct which implicated other members of the corporate staff and Mr. Spitzer.

Also, the Defendants do not take into account the fact [**15] that there was also a negligent hiring and retention claim in the case and that the evidence presented by the Plaintiff in the case and which was permitted to go to the jury was that the Corporate Defendants had failed to check any of Mr. Spitzer's references before he was employed and that such references would have disclosed aberrant behavior at his prior nursing home employment. Secondly, there is also evidence that the agents of the Corporate Defendant had knowledge of Mr. Spitzer's sexually molesting another resident, Keith Kroll, and took no steps to remove or discipline Mr. Spitzer. In short, there was ample evidence that the jury could consider in making a determination that acts of the Corporate Defendants were willful, wanton, and in complete disregard of the rights of Mr. Parker. Therefore, the Motion to Set Aside the Verdict of Punitive Damages Against the Corporate Defendants is denied.

III. Defendants' Motion to Reduce Punitive Damages to $ 350,000.00

The provisions of *§ 8.01-38.1 of the Code of Virginia* are clear and are explicit and have been repeatedly upheld by the Federal Courts and inferentially by the Supreme Court of Virginia. See, *Wackenhut Applied Technologies* [**16] *v. Sygnetron, 979 F.2d 980 (4th Cir. 1992)*; [*212] see also *Etheridge v. Medical Ctr. Hosps., 237 Va. 87, 376 S.E.2d 525 (1989)*.

The Plaintiff's response to this motion is a broadside attack against the constitutionality of the Virginia statutory cap on punitive damages. It ranges from an allegation that the punitive damage cap violates the United States Constitution to the fact that the punitive damage cap violates the separation of powers doctrine, the equal protection clause of the United States and Virginia Constitutions, and the fact that the punitive damage cap should not be applied in this case because the Defendants allegedly used a fraudulent corporation in an unsuccessful attempt to shield themselves from liability.

Although the Plaintiff makes every argument that could be made to challenge the cap and cites a number of non-Virginia authorities in support of his position, it is the position of this Court that the punitive damages cap set forth in *§ 8.01-38.1* is constitutional and valid, and it requires the Court to reduce the amount of total punitive damages awarded in this case to $ 350,000.00. Therefore, the punitive damage award will be so reduced.

IV. Defendants' Motion [**17] for a Mistrial Based Upon Comments on the Evidence

The Defendants allege that a comment made by the Court during the course of this jury trial, which consists of over two thousand pages of trial transcript, prejudiced their case to the extent that a mistrial is warranted. At page 835 of the transcript, the Court, in response to argument presented on an objection to questions being asked by Defendants' counsel stated:

There is no evidence there was any incident involving anyone named "Skinny." There's no evidence of the incident in the Army related in any way to sexual abuse or sexual perversion. The testimony has been consistent here that the only person this gentlemen allegedly referred to as "Skinny" was the Defendant, Michael Spitzer.

Immediately after this statement (at page 836) defense counsel objected to the Court's comment as not being appropriate. A side-bar conference then ensued concerning what the evidence had been in the case and the Court stated at the side-bar that it would give a cautionary instruction.

The Court then returned to the record and immediately gave the following cautionary instruction to the jury (at transcript 837):

The Court: Ladies and gentlemen [**18] of the jury, any comment that I may have made that may be interpreted to be a comment on the evidence [*213] and the response to something by counsel should be disregarded by you. You are the sole determiners of what the evidence in this case has shown and proven. Thank you.

At the beginning of the trial, the Court gave the following cautionary instruction to the jury (at Tr. 116):

No statement, ruling, or remark I may make during the course of the trial is intended to indicate my opinion as to what the facts are. It is the function of the jury to consider the evidence and determine the facts in this case.

The Court is of the opinion that the comments it made were not prejudicial to the defendants and that to the extent any prejudice could theoretically have been created, it was cured by the immediate cautionary instruction given to the jury and by the general instruction given to the jury at the beginning of the trial.

Therefore, Defendants' Motion to Set Aside the Verdict Because of the Court's Comments on the Evidence is denied.

V. Defendants' Motion to Set Aside the Verdict is Based Upon Inadmissible Evidence of the Defendant Michael Spitzer's Sexual Orientation

The allegations [**19] in this lawsuit that related to sexual abuse of Mr. Parker related to acts of oral and anal sodomy allegedly committed upon Mr. Parker by Mr. Spitzer while Mr. Spitzer was providing geriatric care for Mr. Parker at the Liberty House Nursing Home. While it is clear that the sexual orientation of a party or a witness in civil or criminal litigation is normally absolutely irrelevant to any issue in a trial, there is no hard and fast rule in Virginia mandating that evidence concerning an individual's sexual orientation is never admissible into evidence. In certain cases in the Commonwealth of Virginia, where because of the unique fact pattern, the sexual orientation of a party or witness was relevant and such evidence has been admitted. See, e.g., *Moore v. Commonwealth, 222 Va. 72, 278 S.E.2d 822 (1981)*; *Kirk v. Commonwealth, 21 Va. App. 291, 464 S.E.2d 162 (1995)*. Jurisdictions outside of Virginia have also, under limited circumstances, approved of the admission of evidence relating to the sexual orientation of a party. See, e.g., *Wilcoxen v. State, 162 Ga. App. 800, 292 S.E.2d 905 (1982)*; *Davis v. State, 196 Ga. App. 390, 396 S.E.2d 301 (Ga. App. 1990)*.

Therefore, the decision of the [**20] Court of whether evidence of sexual orientation should be admitted needs to be analyzed in terms of whether the [*214] evidence is relevant and whether its probity outweighs any prejudicial value. The general rule in Virginia is that "any fact, however remote, that tends to establish the probability or improbability of a fact in issue is admissible." *Horne v. Milgrim, 226 Va. 133, 306 S.E.2d 893 (1983)*. Given the fact that some jurors may find that the sexual activity of which Michael Spitzer is charged perpetrating upon Mr. Parker would be very unlikely because of a perceived notion that one male would not engage in such sexual conduct with another male, the Georgia Court of Appeals in *Wilcoxen v. State, 162 Ga. App. 800, 292 S.E.2d 905 (Ga. App. 1982)*, decided:

Exceptions to the general rules governing the conditions under which evidence of other crimes is admissible to show plan, motive and intent have been applied in sex cases, the reason being that a tendency toward sexual deviancy, if relevant to the crime for which the defendant is on trial, is admissible because it is out of the ordinary in that it supplies a motive and makes credible what would otherwise be difficult of belief. [**21] *Wilcoxen, 292 S.E.2d at 907.*

The fact of Mr. Spitzer's homosexuality could be considered by the jury in this case as some evidence that "tends to cast any light" upon the material issues in the case. See, e.g., *McNeir v. Greer-Hale Chinchilla Ranch, 194 Va. 623, 74 S.E.2d 165 (1953)*. The Court, therefore, has determined that this evidence was relevant and was suitable to be submitted to the jury. Therefore, Defendants' Motion to Set Aside the Verdict because the Plaintiff was allowed to bring out in cross-examination Mr. Spitzer's sexual orientation is denied.

VI. Defendants' Motion to Set Aside the Verdict to the Extent Based Upon Inadmissible Evidence of Prior Bad Acts

Although there was a substantial amount of evidence introduced at the trial concerning the aberrant behavior of Mr. Spitzer at his prior place of employment and during his tenure at the Liberty House Nursing Home, all of this evidence was admissible under the generally accepted principles that prior bad acts can be introduced to show the conduct and feeling of the accused towards his victim, to prove opportunity for the commission of the offenses charged, and to demonstrate a common plan or scheme where these bad acts show a certain [**22] pattern. See, e.g., *Sutphin v. Commonwealth, 1 Va. App. 241, 337 S.E.2d 897 (1985)*. In addition, a number of these so-called "bad acts" were merely evidence that demonstrated the behavior of Michael Spitzer that either

was actually known to his supervisors and the management of the Corporate [*215] Defendants and/or conduct which should have been known if they had made an appropriate check of his references before hiring him. Therefore, this evidence was admissible to prove the liability of the Corporate Defendants for the negligent hiring and retention of Mr. Spitzer.

Therefore, the Motion of the Defendant to Set Aside the Verdict because of this evidence is denied.

VII. Defendants' Motion to Set Aside the Verdict as Based Upon Evidence Inadmissible Under *Virginia Code § 8.01-401.1*

Defendants move to set aside the verdict because they allege that Dr. McLean-Rice was permitted to "read" from a medical treatise and that the Defendants had not been provided the thirty-day notice required by *§ 8.01-401.1 of the Code of Virginia.* The incident that is referred to by the Defendants was during the testimony of Dr. McLean-Rice. When he was describing the symptoms of post-traumatic stress disorder, [**23] he was asked on direct whether such a diagnosis had criteria which was set out in an authority recognized by him and by the Defendants' expert Dr. Levinson as an authoritative source in the field of psychiatry known as the Diagnostic Statistics Manual. Dr. McLean-Rice responded that the manual did contain a two and a half page definition of the criteria for a post-traumatic stress disorder diagnosis.

However, a complete review of the record (Transcript, pp. 951-975) shows that Dr. McLean-Rice quoted exactly two words from the manual, i.e., "A person," before he went off on his own explanation of what the criteria were and how they were applied in this case. In short, there was no significant or substantial reading from any learned treatise in violation of the procedural rules of *§ 8.01-401.1*; therefore, the Defendants' Motion to Set Aside the Verdict under this statute is denied.

VIII. Defendants' Motion to Set Aside the Verdict as Based Upon Inadmissible Incident Reports Under *Virginia Code § 8.01-581.16* and *§ 8.01-581.17*

Throughout the extensive pretrial proceedings in this case, the Defendants had consistently taken the position that all incident reports which were filed concerning [**24] any accident or mishap at their facilities were protected by the privileges set forth in this statute as being reports which were prepared for a quality assurance review procedure. The evidence that was adduced at pretrial and the evidence that was apparent from the face of the documents referred to is that the Liberty House Nursing Home and its corporate parents, the Beverly [*216] Defendants, had a procedure whereby virtually all of the day-to-day reporting of small incidents that occurred, such as injuries to the inhabitants or slips and falls which occurred in the nursing home, were reported on a form which was eventually provided to a quality assurance panel. These reports do not contain any deliberative processes of the quality assurance panel or any recommendations concerning remedies that are to be instituted or new procedures that are to be adopted.

It has been this Court's position, and other Courts' which have dealt with this issue (see, e.g., *Messerley v. Avante Group, Inc., et al., 42 Va. Cir. 26* (Rockingham Circuit Court) (McGrath, J.); *Benedict v. Community Hospital, 10 Va. Cir. 430 (1988)* (Coulter, J.)), that these type documents are not shielded from discovery nor are they [**25] precluded from being admitted into evidence simply because they may be marked as ultimately destined for a quality review committee or panel. The fact of the matter is these are simple, factual reports made by the staff concerning incidents which occurred at the home. As such, they certainly do not rise to the level, as contemplated by the statute, of being quality assurance or deliberative type documents. They are much more akin and they can be considered more akin to ordinary hospital records, which are specifically exempted from the provisions of *§ 8.01-581.17.* The statute provides in pertinent part that:

Nothing in this section shall be construed as providing any privilege to hospital medical records kept with respect to any patient in the ordinary course of business of operating a hospital nor to any facts or information contained in such records, nor shall this section preclude or affect discovery of or production of evidence relating to hospitalization or treatment of any patient in the ordinary course of hospitalization of such patient.

Although the above-cited provision of *§ 8.01-581.17* does not specifically refer to nursing homes, it is this Court's view that this provision [**26] clearly covers nursing home records which would be analogous to similar records maintained by a hospital concerning a patient.

As stated by the Court in Benedict:

The argument that all field work, the incident reports, the questions concerning falls that might precede a peer review meeting should be free from discovery . . . must yield to the more compelling mandate of the statute's last sentence. Otherwise, all documents could become privileged simply by the committee requiring their production or [*217] attaching them to the minutes. As stated in Johnson: "Almost anything could come within such broad and limitless sweep." *Id. at p. 436.*

Therefore, the Defendants' Motion to Set Aside the Verdict based upon evidence which was admitted in alleged violation of *§ 8.01-581.17* is denied.

IX. Motion to Set Aside the Verdict Based on Insufficient Evidence of Medical Negligence

The Defendants relying upon *Raines v. Lutz, 231 Va. 110, 341 S.E.2d 194 (1986)*, take the position that there was insufficient evidence of medical negligence upon which a verdict could be entered against them. First of all, there was expert testimony offered by the plaintiff from a nursing home administrator concerning [**27] the standard of care applicable in Virginia to nursing homes and testimony that the Corporate Defendants breached this standard of care. That standing alone is a sufficient basis upon which a verdict could be rendered against the Defendants on the grounds of negligence in providing an appropriate standard of nursing home care.

In addition, there is a well accepted principle in Virginia that there need not be expert testimony concerning the violation of a health care provider's standard of care if the alleged acts of malpractice fall within the jury's common knowledge. See, e.g., *Jefferson Hospital, Inc. v. Van Lear, 186 Va. 74, 41 S.E.2d 441 (1947)*, and *Beverly Enterprises, Inc. v. Nichols, 247 Va. 264, 441 S.E.2d 1 (1994)*. In light of these cases, it is clear that a number of the alleged acts of malpractice against these defendants involved things that are so patently and obviously beyond the arguable standard of care that a jury would be perfectly capable of determining that the defendants had committed malpractice without any expert testimony to assist them. Therefore, the Defendants' Motion to Set Aside the Verdict for insufficient evidence of malpractice of the nursing home is [**28] denied.

X. Defendants' Motion to Set Aside the Plaintiff's Breach of Contract Claim and Plaintiff's Motion for an Award of Attorneys' Fees

The issue of the contract claim which was submitted to the jury and the Plaintiff's request for an allowance of attorneys' fees are so closely related that they will be discussed together. In short, the Defendants assert (1) that the contract claim never should have been submitted to the jury and (2) that even if the contract claim was validly submitted to the jury, that the Plaintiff has waived any claim to attorneys' fees because he failed to present evidence [*218] before the jury as to the quantum and reasonableness of his attorneys' fees. The Defendants' position is not well taken on either count.

First, a fair reading of the Supreme Court's decision in *Glisson v. Loxley, 235 Va. 62, 366 S.E.2d 68 (1988)*, is that a medical malpractice action may be premised on both contract and/or tort so long as the claim under contract includes something in addition to and greater than the duty of care implied in a tort action. In this case, the contract entered into between the Defendant corporations and Mr. Parker through the holder of his power of attorney [**29] involved a number of obligations assumed by the nursing home in addition to those that would be implied by a tort cause of action for nursing home malpractice. (See, e.g., Plaintiff's Exhibit 8, pp. 1-10.) For example, the contract entered into by the parties specifically provided in Section 8 that if the facility is "certified by the Medicare or Medicaid Programs" (and there was evidence that it was certified by both programs), the facility shall provide the beneficiaries with all services required to be provided by state and/or federal law. The testimony at the trial was that the Virginia standard of care for nursing homes essentially incorporates and parallels the various provisions required under the Medicare and Medicaid regulations. Thus, the Corporate Defendants have contractually obligated themselves to provide these services. Probably the most significant item in the contract, however, which is not contained in a standard tort action for nursing home malpractice is the provision in Plaintiff's Exhibit 8 at page 8 (Section XVI-B) which reads as follows:

Attorneys' Fees. If a legal action is commenced by any party to this agreement, including any disputes arising from the agreement, [**30] the prevailing party shall be entitled to recover his or her reasonable costs

including reasonable attorneys' fees incurred in defending or prosecuting such action.

Thus, the contract clearly provides a contractually agreed upon shifting of the costs of litigation arising out of the contract and/or out of a patient's stay at the covered facility. Given that this is clearly an obligation above and beyond that implied in a tort action, it standing alone would provide a basis for a contract claim to be submitted to the jury.

Therefore, the Plaintiff's claim that the contract claim should not have been submitted to the jury because the contract claim was merely the mirror image of the tort cause of action is denied.

The Plaintiff has, in accordance with the above quoted provision of the contract, submitted a motion on October 3, 1996, requesting an allowance of [*219] attorneys' fees and litigation costs. The Corporate Defendants have opposed this on the grounds that a question of the reasonableness of attorneys' fees is a fact question that a jury must decide and since the evidence was not presented to the jury, the Plaintiff has waived any claim for this element of recovery.

It is clear [**31] in the early cases in Virginia that the question of reasonable attorneys' fees may be decided by a jury. See *Conway v. American National Bank, 146 Va. 357, 131 S.E. 803 (1926)*; *Cox v. Hagan, 125 Va. 656, 100 S.E. 666 (1919)*. The more recent cases concerning the appropriate method of determining the reasonable amount of attorneys' fees do not address the question of whether or not this matter must be submitted to a jury and if so, if it need be the same jury that decided the underlying issue of liability. See, e.g., *Mullins v. Richlands National Bank, 241 Va. 447, 403 S.E.2d 334 (1991)* (a non-jury trial); *Beale v. King, 204 Va. 443, 132 S.E 2d 476 (1963)* (a non-jury trial); *Rappold v. Indiana Lumbermens Mut. Ins. Co., 246 Va. 10, 431 S.E.2d 302 (1993)* (a non-jury trial).

Although this issue is not discussed at length in any reported Virginia case, the Court is of the view that the more reasoned approach to the determination of disputed attorneys' fees is set forth in the recent case of *Tazewell Oil Co. v. United Va. Bank/Crestar Bank, 243 Va. 94, 413 S.E.2d 611 (1992)*. In that case, there was a jury trial on a multiple count motion for judgment for compensatory and punitive damages [**32] under *§ 18.2-500 of the Code of Virginia*. In that case, the Court sent to the jury the question concerning the compensatory and punitive damages issues. After the jury returned a verdict in favor of the plaintiff, the Court then took evidence concerning the appropriate amount of attorneys' fees. The Supreme Court discussed the procedure as follows:

Where, as here, a statute authorizes recovery of attorneys' fees and expenses, the fact finder is required to determine from the evidence the amount of the reasonable fees under the facts and circumstances of each particular case. *Mullins v. Richlands National Bank, 241 Va. 447, 403 S.E.2d 334 (1991)*. "In determining a reasonable attorney's fee, the fact finder should consider such circumstances as the time consumed, the effort expended, the nature of the services rendered and other attending circumstances." Id. While expert testimony ordinarily is necessary to assist the fact finder, such testimony is not required in every case. See Id. In this case, expert testimony was not necessary because of the affidavits and detailed time records which were wholly unrefuted by any evidence offered by UVB. Accordingly, we hold that the amount fixed [**33] by the trial court was amply supported by the [*220] evidence and we find no error in the trial court's allowance.

[Emphasis added.] *Tazewell Oil Co., 243 Va. at 111-12.*

In complex litigation it is self evident that this is the only procedure which is suitable for an orderly submission of evidence. Obviously the best evidence (and probably the only admissible evidence) of the amount of time put in by the Plaintiff's attorneys and what was done during that time are the Plaintiff's attorneys themselves. It would be impossible to have an orderly trial, if at the closing of the trial, the attorneys for the plaintiff would need to be disqualified from the case so that they could testify in the proceeding. This would give rise to untold confusion on the part of the jury and be unnecessarily disruptive of the litigation process.

The Court believes that the appropriate procedure to be followed and the one that will be followed here and which is inferentially recognized in the Supreme Court's opinion in *Conway v. American National Bank, 146 Va. 357, 131 S.E. 803 (1926)*, is for the Plaintiff to now submit a detailed claim for his attorneys' fees with all supporting documentation and receipts together with affidavits [**34] of expert witnesses attesting to the reasonableness of the charges. After these have been

submitted to the Court, the Corporate Defendants will have twenty-one days in which to file any objections under oath they care to file concerning the quantum of fees. If there is a dispute at that time as to the amount of the fees, the reasonableness of the fees, or any other factual issues, the Court will then consider empaneling a new jury for the purposes of making the factual determination desired by the Defendants.

The Plaintiff is directed to file a detailed claim for attorneys' fees and costs with supporting affidavits on or before May 23, 1997. The Corporate Defendants are directed to file any objection to this claim, together with supporting affidavits, on or before June 16, 1997.

The Plaintiff's counsel are directed to prepare a trial order incorporating this opinion. The order to be prepared is not a final order and it will note that the cause is continued for the submission of evidence material to attorneys' fees and further proceedings to determine the quantum of attorneys' fees. After determination of the appropriate amount of attorneys' fees and costs to be awarded Plaintiff, [**35] a final trial order will be entered in the case.

ATTACHMENT 7
TO
REPORT TO BOYD-GRAVES CONFERENCE
PUNITIVE DAMAGES STUDY COMMITTEE
OCTOBER 4, 2012

PROPOSED AMENDMENT TO
Virginia Code Ann. Section 8.01-38.1

PROPOSED AMENDMENT TO
Virginia Code Ann. Section 8.01-38.1

§ 8.01-38.1. Limitation on recovery of punitive damages.

In any action accruing on or after July 1, 2013, including an action for medical malpractice under Chapter 21.1 (§ 8.01-581.1 et seq.), the total amount awarded for punitive damages against all defendants found to be liable shall be determined by the trier of fact. In no event shall the total amount awarded for punitive damages exceed ~~$350,000~~ *$500,000*. The jury shall not be advised of the limitation prescribed by this section. However, if a jury returns a verdict for punitive damages in excess of the maximum amount specified in this section, the judge shall reduce the award and enter judgment for such damages in the maximum amount provided by this section.

1. The standard for the trier of fact's consideration of a punitive damages claim shall be clear and convincing evidence. However, this subsection shall have no application to a claim of punitive damages asserted under § 8.01-44.5.

2. Punitive damages may not be awarded against an employer or other principal for the wrongful act of his employee or agent in which the employer or other principal did not participate, and which he did not authorize or ratify.

Attachment 7
to Committee Report

Attachment 8

LAW OFFICE OF
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September 27, 2012

Stephen D. Busch, Esquire
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Re: Boyd Graves Punitive Damages Committee Report

Dear Steve;

I want to thank you, and each of the other members of the punitive damages committee for all of the hard work which has gone into the comprehensive review of the state of punitive damages law in Virginia. We have come a long way from last year's examination of the question of whether awards of punitive damages should be shared with the Commonwealth, through this year's exhaustive survey of US Supreme Court punitive damages jurisprudence, laws of other states with respect to caps and all manner of "procedural safeguards"

Unfortunately, as you will recall, I was unable to participate in our final conference call due to a conflict, and I appreciate your spending time on the phone with me talking about the issues, and your communication of my thoughts to the remainder of the committee. Having reviewed the committee report and its recommendations, I have reluctantly concluded that I must dissent from these recommendations.

There are three committee recommendations, and I find myself in disagreement with each of them. First, I believe we can all agree that an increase in the cap is necessary, if only to adjust for inflation since its inception. That is not to say that I agree with the current cap; I do not. Rather, simply moving to $500,000, as proposed, is less than the effect of inflation since the establishment of the cap, and has no rational basis.

Second, I don't believe that any justification has been shown for increasing the standard of proof to "clear and convincing evidence", and I believe that requiring

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this level of proof would place a very high burden on plaintiffs, which is not justified by any showing of need. This point is the most important reason for my dissent, and it is explained further, below.

The last point is that the limitations placed upon the use of respondeat superior in punitive damage cases have been in case law in the Commonwealth since the 1920s. They are clear and well-understood; therefore, if the committee recommendations are not accepted by the Conference and passed by the General Assembly, there is no need for the enactment which would place this into statutory form.

As noted above, I view the most serious problem with the committee's recommendation as the move to a clear and convincing evidence standard of proof. This standard will make it much more difficult to prove the facts underlying an award of punitive damages. The Supreme Court notes that a standard of proof of clear and convincing evidence places a "heavy burden" on the party seeking relief. Commonwealth v. Allen, 296 Va 262 (2005). But an award of punitive damages already faces an elevated standard--a plaintiff must prove actual malice or willful and wanton disregard of the rights of others. The difficulties of proving entitlement to punitives is plain under this standard, and to further require the proof be by clear and convincing evidence of what amounts to mental elements--state of mind--may make this burden insurmountable in meritorious cases. I conclude that adoption of the standard would unnecessarily shelter egregious conduct from appropriate judicial redress.

Our committee deliberations on the subject of punitive damages were extensive, over at least four conference calls this year, and were supported by exhaustive research. But the committee never heard that there were cases in Virginia in which punitive damages were unjustly awarded. Indeed, as I recall, this was never discussed. My own review of cases and issue-related reports over the past 10 years in Virginia Lawyers Weekly does not reveal that such sentiments have been raised. And it shows only about 100 cases reported which even dealt with punitive damages. Of this number, about half the cases appear to have resulted in an award. I just don't believe that the evidence shows that there is any problem in Virginia with the punitive damage process that a toughening of the proof requirements would address. In my view, Virginia does not need to change its standard of proof to reflect the standard of other states because it has not been shown that we have any problem with unjust awards of punitive damages.

Finally, there is a serious deficiency in the committee's report, in that it does not address Virginia's statutory treatment of punitive damages in death and injury cases caused by drunk driving. Virginia Code section 8.01-44.5 (copy attached, along with the jury instruction) provides that punitives may be awarded for actions taken with malice or with willful or wanton conduct showing a conscious disregard of the rights of others. It further provides (paraphrased) that a defendant's conduct will be deemed "sufficiently willful or wanton" when the evidence proves (i) that the defendant had a BAC of .15%; (ii) that the defendant knew or should have known that his ability to operate a motor vehicle was impaired; and (iii) that defendant's intoxication was a proximate cause of the injury or death. Application of a clear and convincing standard to these factual elements would cause great difficulty in proof, making it more difficult to obtain punitive damages. This is the opposite effect of the intent of the General Assembly, as evidenced in three separate changes to this statute, since it was first enacted in 1994. Indeed, the General Assembly has sought to make it easier to obtain punitive damages, rather than more difficult. In my view, the General Assembly has the correct view of this issue. The standard should not be changed.

In light of the date, I have taken the liberty of forwarding a copy of this letter to Chris Meyer, so that it might accompany the report of the committee in the Conference package. Thank you for all of your courtesies during our discussion of these issues.

Sincerely,

Steven W. Pearson

Cc. Thomas G. Bell, Jr., Esquire
L.B. Chandler, Jr., Esquire
Professor James J. Duane
The Honorable Wyatt B. Durrette, Jr.
The Honorable Wiley F. Mitchell, Jr.
Stephen M. Sayers, Esquire
John R. Walk, Esquire

§ 8.01-44.5. Exemplary damages for persons injured by intoxicated drivers.

In any action for personal injury or death arising from the operation of a motor vehicle, engine or train, the finder of fact may, in its discretion, award exemplary damages to the plaintiff if the evidence proves that the defendant acted with malice toward the plaintiff or the defendant's conduct was so willful or wanton as to show a conscious disregard for the rights of others.

A defendant's conduct shall be deemed sufficiently willful or wanton as to show a conscious disregard for the rights of others when the evidence proves that (i) when the incident causing the injury or death occurred, the defendant had a blood alcohol concentration of 0.15 percent or more by weight by volume or 0.15 grams or more per 210 liters of breath; (ii) at the time the defendant began drinking alcohol, or during the time he was drinking alcohol, he knew or should have known that his ability to operate a motor vehicle, engine or train would be impaired, or when he was operating a motor vehicle he knew or should have known that his ability to operate a motor vehicle was impaired; and (iii) the defendant's intoxication was a proximate cause of the injury to or death of the plaintiff.

However, when a defendant has unreasonably refused to submit to a test of his blood alcohol content as required by § [illegible], a defendant's conduct shall be deemed sufficiently willful or wanton as to show a conscious disregard for the rights of others when the evidence proves that (i) when the incident causing the injury or death occurred the defendant was intoxicated, which may be established by evidence concerning the conduct or condition of the defendant; (ii) at the time the defendant began drinking alcohol, or during the time he was drinking alcohol, he knew or should have known that his ability to operate a motor vehicle was impaired; and (iii) the defendant's intoxication was a proximate cause of the injury to the plaintiff or death of the plaintiff's decedent. A certified copy of a court's determination of unreasonable refusal pursuant to § [illegible] shall be prima facie evidence that the defendant unreasonably refused to submit to the test.

(1994, c. [illegible]; 1998, c. [illegible]; 1999, c. [illegible]; 2002, c. [illegible].)

VIRGINIA MODEL JURY INSTRUCTIONS— CIVIL

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Prepared by
The Model Jury Instructions Committee
Honorable F. Michael Gamble, Chairman

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Instruction No. 15.005
Punitive Damages: Intoxicated Driver

If you find your verdict for the plaintiff and if you further find by the greater weight of the evidence that:

Blood test

(1) **when the incident causing the injury or death occurred, the defendant had a blood alcohol concentration of 0.15 percent or more by weight by volume (0.15 grams or more per 210 liters of breath); and**

(2) **at the time the defendant began drinking alcohol, or during the time he was drinking alcohol, he knew or should have known that his ability to operate a motor vehicle** [an engine; a train] **would be impaired, or when he was operating a motor vehicle he knew or should have known that his ability to operate a motor vehicle was impaired; and**

Unlawful refusal

(1) **when the incident causing injury or death occurred, the defendant was intoxicated and unreasonably refused to submit to a test of his blood alcohol content; and**

(2) **at the time the defendant began drinking alcohol, or during the time he was drinking alcohol, he knew or should have known that his ability to operate a motor vehicle was impaired; and**

(3) **the defendant's intoxication was a proximate cause of the injury** [death] **of the plaintiff,**

then you may award punitive damages. If you do so, you must state separately the amount allowed as punitive damages.

SOURCES & AUTHORITY

GOVERNING STATUTES: *Va. Code Ann. § 8.01-44.5*

CASE AUTHORITY: *Allstate Ins. Co. v. Wade, 265 Va. 383, 396, 579 S.E.2d 180, 187 (2003); Doe v. Isaacs, 265 Va. 531, 532, 579 S.E.2d 174, 176 (2003); Woods v. Mendez, 265 Va. 68, 75, 574 S.E.2d 263, 267 (2003); Webb v. Rivers, 256 Va. 460, 463, 507 S.E.2d 360, 362 (1998); Puent v. Dickens, 245 Va. 217, 219, 427 S.E.2d 340, 342 (1993); Huffman v. Love, 245 Va. 311, 313-14, 427 S.E.2d 387, 390 (1993); Hack v. Nester, 241 Va. 499, 500, 404 S.E.2d 42, 43 (1991); Booth v. Robertson, 236 Va. 269, 273, 374 S.E.2d 1, 3 (1988)*

PRACTICE COMMENTARY

Driving while intoxicated does not, in itself, allow recovery of punitive damages. *Woods, 265 Va. at 77, 574 S.E.2d at 268.* Actual malice or willful disregard for others must be proved. Intoxication may serve to elevate defendant's conduct to a level of negligence so gross, wanton and culpable as to show reckless disregard for human life. *Booth, 236 Va. at 273, 374 S.E.2d at 3; Puent, 245 Va. at 219, 427 S.E.2d at 342; Huffman, 245 Va. at 313-14, 275 S.E.2d at 360.* See *Webb, 256 Va. at 463, 507 S.E.2d at 362,* for a discussion about the difference between common law and statutory grounds for the award of punitive damages.

PRACTICE POINTER: When the defendant has refused to submit to a blood alcohol test, use the alternative for the first and second numbered paragraph of the instruction. This alternative is not available where the defendant was operating a train or an engine because the implied consent statute only applies to one who "operates a motor vehicle upon a highway." *Va. Code Ann. § 18.2-268.2.* This alternative also lacks a disjunctive clause found in the primary instruction. See *Va. Code Ann. § 8.01-44.5.*

ALERTS: This Instruction embodies statutory grounds for imposing punitive damages. The statutory basis for punitive damages, however, does not preclude the fact finder from awarding, under common law principles "exemplary damages to the plaintiff if the evidence proves that the defendant acted with malice toward the plaintiff or the defendant's conduct was so willful or wanton as to show a conscious disregard for the rights of others." *Webb, 256 Va. at 462-63, 507 S.E.2d at 362 (quoting Va. Code Ann. § 8.01-44.5);* see also Instruction Nos. I-203 and I-209

RESEARCH REFERENCES:

John L. Costello, VIRGINIA REMEDIES, Chapter 21 (3rd ed. 2005)

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 13 & 14 (3rd ed. 2003)

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 2 (2d ed. 2007).

MICHIE'S JURISPRUDENCE OF VIRGINIA & WEST VIRGINIA, "*Automobiles*" (2004)