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## Punitive Damages in Florida Negligence Cases: How Much Negligence Is Enough?

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# Punitive Damages in Florida Negligence Cases: How Much Negligence Is Enough?

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## I. INTRODUCTION

The issue of whether plaintiffs in negligence cases may be entitled to punitive damages has long been the subject of controversy.<sup>1</sup> Many commentators have argued against the propriety of punitive damages and have concluded that this category of damages should be abolished.<sup>2</sup> Others, without necessarily conceding the validity of punitive damages, have argued that their availability should be limited to a narrow range of conduct.<sup>3</sup> Notwithstanding the views of commentators, the doctrine is well entrenched in our legal system.<sup>4</sup> The contro-

1. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1263-64 (1976); Comment, *Punitive Damages Insurance: Why Some Courts Take the Smart Out of "Smart Money"*, 40 U. MIAMI L. REV. 979, 987 (1986).

2. Compare Carsey, *The Case Against Punitive Damages: An Annotated Argumentative Outline*, 11 FORUM 57, 57-63 (1975) (arguing that punitive damages should be abolished) and Ghiardi, *The Case Against Punitive Damages*, 8 FORUM 411, 417-19 (1972) (same) with Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 647 (1980) (arguing for the retention of the doctrine of punitive damages) and Note, *In Defense of Punitive Damages*, 55 N.Y.U. L. REV. 303, 327-45 (1980) (same).

3. See Comment, *supra* note 1, at 987 (arguing that jurists disagree over the propriety, scope, and purposes of the doctrine); see also Levit, *Punitive Damages: Yesterday, Today and Tomorrow*, 1980 INS. L.J. 257, 261 (arguing that it is "more constructive" to focus on "clear abuses" of the doctrine than to advocate its abolition).

4. Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851); see Mallor & Roberts, *supra* note 2, at 639; Owen, *supra* note 1, at 1263. Punitive damages are currently available in all but five states. Ausness, *Punitive Damages in Products Liability*, 74 KY. L.J. 1, 4 & n.9 (1985-86). Louisiana, Nebraska, and Puerto Rico prohibit punitive damages entirely. *Id.* Massachusetts

versy in the various jurisdictions thus has centered around the conduct and state of mind requirements that must be satisfied before a jury may award punitive damages. Although virtually all jurisdictions recognize the propriety of punitive damages, courts have expressed disagreement over the "quantum of culpability"<sup>5</sup> that must be demonstrated to support such an award.<sup>6</sup>

Florida has not escaped this controversy.<sup>7</sup> The disagreement has manifested itself in the Supreme Court of Florida's numerous attempts to formulate a standard that governs whether the issue of punitive damages should be submitted to a jury. Under the current standard, the character of negligence necessary to justify an award of punitive damages is the same as that required to sustain a conviction for manslaughter.<sup>8</sup> Trial courts, however, have experienced difficulty in determining what kind of conduct would satisfy this standard because, as recent cases have revealed, the standard is subject to two interpretations. Under the first interpretation, recklessness as defined in the Second Restatement of Torts would be sufficient to justify an award of punitive damages; under the second, some undefined element or aggravating circumstance must also be present.<sup>9</sup> Furthermore, once judges allow the jury to consider the issue of punitive damages, two difficulties arise that prevent it from effectively evaluating whether a defendant's conduct merits such damages: One prob-

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and Washington prohibit punitive damages unless a statute specifically allows their award, and Connecticut limits punitive damages to the expenses of litigation. *Id.*

5. Comment, *supra* note 1, at 989.

6. This disagreement is demonstrated by the variety of terms that jurisdictions have utilized in formulating their punitive damages standards. Some states, for example, have required a defendant to commit a tort "maliciously" before allowing punitive damages to be awarded. *See, e.g.,* Kirksey v. Jernigan, 45 So. 2d 188, 189 (Fla. 1950) (stating that the malice that would support an award of punitive damages can be inferred from an entire want of care to duty); Bennett v. Howard, 141 Tex. 101, 107, 170 S.W.2d 709, 712 (1942) (noting that the rule is almost universally recognized that punitive damages may be recovered only for injuries resulting from wrongs that are accompanied by some aggravating circumstances of malice or fraud). Other states have allowed punitive damages when "willful and wanton" conduct is involved. *See, e.g.,* Unfried v. Libert, 20 Idaho 708, 728, 119 P. 885, 891 (1911) (predicating punitive damages on the "wanton, malicious, or gross and outrageous" conduct of the wrongdoer). Finally, other states have allowed punitive damages when a defendant acts in "conscious disregard for the rights of others." *See, e.g.,* Honaker v. Leonard, 325 F. Supp. 212, 214 (E.D. Tenn. 1971) (allowing punitive damages for conduct that raises a presumption of conscious indifference to consequences); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 267, 294 N.W.2d 437, 442 (1977) (requiring "reckless indifference for others' rights and conscious deliberate disregard of them").

7. *See infra* Section II.

8. *See, e.g.,* Chrysler Corp. v. Wolmer, 499 So. 2d 823, 825 (Fla. 1986); Como Oil Co. v. O'Loughlin, 466 So. 2d 1061, 1062 (Fla. 1985); White Constr. Co. v. Dupont, 455 So. 2d 1026, 1028 (Fla. 1984).

9. *See infra* Section IIIA.

lem relates to the lack of conformity between the standard jury instruction on punitive damages and the criminal manslaughter standard, which judges apply to determine if there is any basis in the evidence to support the imposition of punitive damages. The other problem arises because even if a jury were to apply the criminal manslaughter standard, the standard, as currently formulated, lacks sufficient guidelines to inform the jury whether it may award punitive damages.

This Comment traces the development of the punitive damages standard in the context of Florida cases involving negligent conduct. Section II explores the evolution of the current punitive damages standard as articulated by the principal Supreme Court of Florida cases. Section IIIA analyzes recent cases in which the supreme court has applied the current standard. In so doing, the Section attempts to discover what kind of conduct would satisfy the standard, and considers whether the standard's most recent formulation can assist trial courts in deciding if a defendant's conduct is sufficiently culpable to create a jury question on the issue of punitive damages. Section IIIB addresses the question of which of the two interpretations of the current standard better promotes the purposes of punitive damages. Finally, Section IIIC examines the respective roles of the judge and jury in applying the current punitive damages standard.

## II. EVOLUTION OF THE FLORIDA STANDARD FOR SUBMITTING THE ISSUE OF PUNITIVE DAMAGES TO THE JURY IN NEGLIGENCE CASES

Courts and commentators have suggested that punitive damages serve several purposes.<sup>10</sup> The two principal justifications<sup>11</sup> that they have articulated are that punitive damages serve to punish an individ-

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10. See Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3-12 (1982); see also *Wangen v. Ford Motor Co.*, 97 Wis. 260, 280, 294 N.W.2d 437, 448 (1980) (stating that the doctrine of punitive damages "discourages private reprisals, restrains the strong, influential and unscrupulous, vindicates the right[s] of the weak, and encourages recourse to and confidence in the courts").

11. These justifications find support in the notion that reckless conduct may be so wrongful that it should be sanctioned regardless of whether the community has defined the conduct as criminal. See, e.g., Mallor & Roberts, *supra* note 2, at 644-45. One observer disagrees with this notion:

If the defendant's conduct has not been of a nature to invoke society's sanctions, if his entire community has not previously seen fit to call out for punishment of such acts, there is clearly no reason why a given jury may . . . in an emotion-ridden court room, enact and enforce punitive measures on an *ad hoc* basis.

Conrad, *Punitive Damages: A Challenge to the Defense*, 5 FOR THE DEFENSE 9, 10-11 (1964). This argument, however, overlooks the fact that a community cannot possibly foresee and precisely define all conduct that may be morally reprehensible.

ual for his reckless conduct and to deter him and others from engaging in similar acts in the future.<sup>12</sup> Other justifications for punitive damages look to their effect on the victim rather than on the wrongdoer. Punitive damages, for example, help to maintain public order by offering victims of serious misconduct an alternative to private acts of vengeance.<sup>13</sup> Closely related to the concept of vengeance is the concept of vindication. Punitive damages vindicate the rights of injured persons by acting as an "official declaration that they were wronged by the defendant."<sup>14</sup> In addition to these justifications, some courts have recognized the "spur-to-litigation"<sup>15</sup> rationale. According to this argument, the availability of punitive damages is necessary to induce injured persons to act as private attorneys general to stop misconduct.<sup>16</sup>

Relying upon the first two justifications—punishment and deterrence—Florida courts over the years have embraced the doctrine of

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12. See, e.g., *Campbell v. Government Employees Ins. Co.*, 306 So. 2d 525, 531 (Fla. 1974) (stating that punitive damages are imposed "to serve the predominant function of deterrence and punishment"); RESTATEMENT (SECOND) OF TORTS § 908(1) (1979) (Punitive damages are "awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future."); D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9, at 204 (1973) (noting that punitive damages are usually awarded as a punishment or deterrent); see also *Wangen*, 97 Wis. 2d at 281, 294 N.W.2d at 449 (stating that an award of punitive damages "has the effect of bringing to punishment types of conduct that though oppressive and hurtful to the individual almost invariably go unpunished by the public prosecutor"). Some businesses, after weighing the risk of paying compensatory damages against the cost of changing reckless business practices, may accept the risk of future litigation rather than change their business practices. See *Wangen*, 97 Wis. 2d at 285-86, 294 N.W.2d at 451; see also *Funk v. Kerbaugh*, 222 Pa. 18, 70 A. 953 (1908) (per curiam) (upholding an award of punitive damages against a defendant who was involved in the construction of a railroad and decided it would be less expensive to pay damages than to alter its blasting method). This cost-benefit balance, however, may be affected if punitive damages are injected into the equation. The possibility that potential defendants will be liable for sums amounting to more than the amount that would be necessary to compensate injured plaintiffs might provide a strong disincentive to the continuation of such conduct in the future. *Wangen*, 97 Wis. 2d at 286, 294 N.W.2d at 451. Any benefit derived from such a business practice might be outweighed by the risk of having to pay punitive damages. The business entity, therefore, would be encouraged to change its behavior, to the ultimate benefit of the public.

13. See *Campbell*, 306 So. 2d at 531 (stating that punitive damages help "to maintain public tranquillity by permitting the wronged plaintiff to take his revenge in the courtroom and not by self-help"); Owen, *supra* note 1, at 1282-83 (arguing that "punishment satisfies the individual's and society's need for vengeance, and thus serves to rectify some of the negative effects of prior misconduct"); see also Mallor & Roberts, *supra* note 2, at 650 (asserting that "[a]lthough revenge is not a civilized basis for imposing punitive damages, the prevention of private vengeance clearly is"); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 521-22 (1957) (suggesting that punitive damages serve the purpose of revenge).

14. Ellis, *supra* note 10, at 9.

15. Comment, *supra* note 1, at 988.

16. See, e.g., *Wangen*, 97 Wis. 2d at 281, 294 N.W.2d at 449; *Campbell*, 306 So. 2d at 531; Ellis, *supra* note 10, at 10.

punitive damages.<sup>17</sup> More recently, however, courts have taken a decidedly less favorable view. But before examining the evolution of the punitive damages standard in Florida, it is necessary to begin with a general discussion of the various categories of culpable behavior set out in the Second Restatement of Torts. The Restatement will also serve as a useful tort framework against which the current Florida standard will later be analyzed.<sup>18</sup>

Under the Restatement, culpable behavior falls into one of three categories that differ according to the extent of the risk of harm and the actor's knowledge of that risk. These categories include intentional, reckless, and negligent conduct. Intentional behavior represents the highest level of culpability and exists if the actor knows that the harm his behavior may produce is substantially certain to occur.<sup>19</sup> Reckless behavior, the intermediate level of culpability, exists if the actor knows or has reason to know of a "strong probability" of harm.<sup>20</sup> For recklessness, therefore, it is enough that the actor "realizes or, from facts which he knows, should realize"<sup>21</sup> that there is a strong probability that his behavior will result in harm.<sup>22</sup> The lowest degree of culpability, ordinary negligence, exists if an actor engages in

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17. Punishment and deterrence are the only justifications for punitive damages that Florida courts have accepted. *See, e.g.*, *Celotex Corp. v. Pickett*, 490 So. 2d 35, 38 (Fla. 1986) (holding that punitive damages "are imposed as a punishment of the defendant and as a deterrent to others"); *Mercury Motors Express, Inc. v. Smith*, 393 So. 2d 545, 549 (Fla. 1981) (holding that punishment and deterrence are the only purposes of punitive damages); *see also* *Winn & Lovett Grocery Co. v. Archer*, 126 Fla. 308, 327, 171 So. 214, 221 (1936) (stating that punitive damages act as "smart money" against the defendant "by way of punishment or example as a deterrent to others").

18. *See infra* Section IIIA.

19. According to the Restatement, the actor is engaging in intentional conduct if he "desires to cause consequences of his act, or [if] he believes that the consequences are substantially certain to result from [the act]." RESTATEMENT (SECOND) OF TORTS § 8A (1965).

20. *See id.* § 500 comment f. The Restatement defines recklessness as follows:

The Actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

*Id.* § 500. Comment a to section 500 further explains that recklessness may consist of one of two types of conduct. In one, the actor knows or has reason to know of facts that create a high degree of risk of physical harm to another and deliberately proceeds to act, or fails to act, in conscious disregard of that risk. In the other type of conduct, the actor knows or has reason to know of those facts, but fails to appreciate the high degree of risk involved. Under this second category, the actor is held to the realization of the aggravated risk even though he himself was not aware of it. *Id.* comment a.

21. *Id.* comment f.

22. *Id.*

conduct that creates an unreasonable risk.<sup>23</sup> Negligent conduct is characterized by mere inadvertence, incompetence, unskillfulness, or failure to take adequate precautions.<sup>24</sup> It is important to note, however, that the Restatement allows punitive damages to be awarded if the defendant acts recklessly.<sup>25</sup>

A. *The Standard Under Early Decisions: Gross Negligence*

In the late 1800's, Florida courts permitted the recovery of punitive damages for certain degrees of gross negligence. In *Florida Southern Railway v. Hirst*,<sup>26</sup> a passenger on a train sued a railroad company for injuries he suffered as a result of a train collision that allegedly occurred because of the railroad company's negligence.<sup>27</sup> The Supreme Court of Florida held that the trial court erred in instructing the jury "simply" that gross negligence was sufficient to warrant an award of punitive damages.<sup>28</sup> The trial court, instead, should have "confined" the term gross negligence to that extreme degree of negligence that would be present if the "negligence [was] of a gross and flagrant character, evincing reckless disregard of human life . . . or a grossly careless disregard of the safety and welfare of the public."<sup>29</sup> Under this reasoning, punitive damages would be considered appropriate if a case involved an extreme degree of gross negligence.

Shortly before establishing the criminal manslaughter standard,<sup>30</sup> the Supreme Court of Florida, in *Griffith v. Shamrock Village, Inc.*,<sup>31</sup> again allowed punitive damages to be imposed for gross negligence.

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23. See *id.* § 282 & comment e. As compared to recklessness, negligence involves conduct that subjects another to an unreasonable risk that falls below the level of a strong probability of harm. See *id.* § 500 comments f & g.

24. *Id.* comment g.

25. The Restatement provides that "[p]unitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." RESTATEMENT (SECOND) OF TORTS § 908(2) (1979).

26. 30 Fla. 1, 11 So. 506 (1892).

27. *Id.* at 13-15, 11 So. at 507.

28. *Id.* at 39, 11 So. at 513. According to the supreme court, the instruction was defective because it left the jury "to its own ideas, whatever they [were], as to what want of care constitutes the gross negligence authorizing the allowance of [punitive] damages." *Id.*

29. *Id.* As support for this standard, the court relied on *Florida Railway & Navigation Co. v. Webster*, in which an injured train passenger sued a railroad company for failure to maintain its track. 25 Fla. 394, 416, 420-21, 5 So. 714, 718, 719-20 (1889). In *Webster*, the Supreme Court of Florida held that a jury could award punitive damages if the "negligence was so gross as to amount to misconduct and recklessness." *Id.* at 419, 5 So. at 719.

30. The Supreme Court of Florida established the criminal manslaughter standard for punitive damages in *Carraway v. Revell*, 116 So. 2d 16 (Fla. 1959). For a discussion of *Carraway*, see *infra* notes 35-44 and accompanying text.

31. 94 So. 2d 854 (Fla. 1957).

In *Griffith*, a tenant sued his landlord to recover compensatory and punitive damages, contending that the landlord had voluntarily assumed the duty of receiving telephone messages for his tenants and that, by failing to deliver a message, the landlord evidenced a lack of care and inattention to his duty that constituted gross negligence.<sup>32</sup> The supreme court reversed the trial court's directed verdict, holding that there was sufficient evidence to support this contention.<sup>33</sup> In what appeared to be a relaxation of the *Hirst* standard, the court stated: "[P]unitive damages can be recovered in actions such as this and . . . malice may be imputed to defendant from gross negligence, i.e., a want of slight care."<sup>34</sup>

B. *The Emergence of the Criminal Manslaughter Standard:*  
*Carraway v. Revell*

In 1959, the Supreme Court of Florida seized upon an opportunity to revise the standard that governs whether punitive damages may be awarded even though the particular case, *Carraway v. Revell*,<sup>35</sup> did not involve a punitive damages issue. In *Carraway*, the plaintiff sued the driver of an automobile under a Florida guest statute<sup>36</sup> to recover compensatory damages for the death of his son, a passenger in the vehicle.<sup>37</sup> The trial judge granted judgment for the defendant, reasoning that because the requirement of gross negligence under the guest statute was the same as the element of culpable negligence under the criminal manslaughter statute, compensatory damages could not be recovered unless the negligence was of a degree that would be sufficient to warrant a manslaughter conviction.<sup>38</sup> Under

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32. *Id.* at 855.

33. *Id.* at 858.

34. *Id.* (emphasis added). At least two district courts of appeal differ over whether *Griffith* represents the current state of the law. Compare *Paterson v. Deeb*, 472 So. 2d 1210, 1221 (Fla. 1st DCA 1985) ("We find nothing in *Como Oil* . . . and *White Construction* . . . which suggests that the supreme court has overruled or otherwise limited the rule in [*Griffith*]."), *revs. denied*, 484 So. 2d 8 (Fla.), 484 So. 2d 9 (Fla. 1986) with *Ten Assocs. v. Brunson*, 492 So. 2d 1149, 1151 & n.1 (Fla. 3d DCA) (dicta) (disagreeing with the *Paterson* court's view of *Griffith*), *rev. denied*, 501 So. 2d 1281 (Fla. 1986).

35. 116 So. 2d 16 (Fla. 1959).

36. The Florida guest statute provided in part as follows:

No person transported by the owner or operator of a motor vehicle as his guest or passenger, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been caused by the gross negligence or willful and wanton misconduct of the owner or operator of such motor vehicle . . . .

FLA. STAT. § 320.59 (1971), *repealed by* Ch. 72-1, §§ 1-2, Laws of Fla. (1972).

37. *Carraway*, 116 So. 2d at 18.

38. *Id.* Section 782.07 of the Florida Statutes defines manslaughter as the "killing of a



this view, therefore, gross negligence and culpable negligence were treated as synonymous. On certiorari, the supreme court rejected this reasoning and defined gross negligence under the guest statute as "that kind or degree of negligence which lies in the area between ordinary negligence"<sup>39</sup> and the kind of misconduct that would warrant a conviction for manslaughter.<sup>40</sup> In dicta, the court attempted to explain the distinction between gross negligence and the culpable negligence element of criminal manslaughter by noting that "the character of negligence necessary to sustain a conviction for manslaughter is the same as that required to sustain a recovery for punitive damages."<sup>41</sup> In its opinion, the *Carraway* court defined the type of conduct that would justify an award of punitive damages:

The character of negligence necessary to sustain an award of punitive damages must be of "a gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them."<sup>42</sup>

According to the court, therefore, this standard encompassed conduct that went beyond gross negligence, which was the required degree of negligence under the guest statute.

The supreme court's decision in *Carraway* had the potential for producing far reaching effects. The case might have marked a watershed in Florida tort law by once and for all eliminating gross negligence as a basis for awarding punitive damages.<sup>43</sup> On the other hand, *Carraway* might have simply represented an aberration, a peculiar case limited to a now defunct guest statute.<sup>44</sup>

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human being by act, procurement or culpable negligence of another, without lawful justification." FLA. STAT. § 782.07 (1987).

39. *Carraway*, 116 So. 2d at 22.

40. *Id.*

41. *Id.* at 20 (quoting *Carraway v. Revell*, 112 So. 2d 71, 75 (Fla. 1st DCA), *rev'd on other grounds*, 116 So. 2d 16 (Fla. 1959)).

42. *Id.* at 20 n.12.

43. The punitive damages standards that the supreme court articulated in *Carraway* and *Florida Southern Railway v. Hirst*, 30 Fla. 1, 11 So. 506 (1892), were virtually identical. See *Carraway*, 116 So. 2d at 20 n.12; *Hirst*, 30 Fla. at 38-39, 11 So. at 513. Yet the court's interpretation of what conduct would fulfill the standards in these two cases was inconsistent. *Hirst* provided for punitive damages to be awarded in cases involving certain extreme degrees of gross negligence. See *supra* notes 26-29 and accompanying text. *Carraway*, in contrast, separated gross negligence and the negligence necessary to support an award of punitive damages into two mutually exclusive categories. See *Carraway*, 116 So. 2d at 22.

44. The court could have confined the criminal manslaughter standard for punitive

### C. *The Departure from Carraway*

Following *Carraway*, Florida courts applied a number of punitive damages standards, and as a result, *Carraway* proved to have little effect on Florida tort law.<sup>45</sup> Although some district courts of appeal followed *Carraway* by requiring conduct more severe than gross negligence for punitive damages to be awarded,<sup>46</sup> others continued to allow punitive damages for extreme degrees of gross negligence.<sup>47</sup> Subsequently, the supreme court added to this assortment of standards by introducing the "public wrong" theory for punitive damages.<sup>48</sup>

In *Ingram v. Pettit*,<sup>49</sup> for example, the supreme court used this theory to declare drunk driving to be reckless conduct.<sup>50</sup> *Ingram* involved a suit for compensatory and punitive damages against an automobile driver who caused a collision. Although the defendant

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damages to guest statute cases only. Because the guest statute already required gross negligence for compensatory damages, the court had to require something more for punitive damages. Otherwise, as the *Carraway* court itself recognized, a successful claimant under the guest statute would necessarily have been entitled to recover both punitive damages and compensatory damages. 116 So. 2d at 21.

45. See, e.g., *Atlas Properties, Inc. v. Didich*, 226 So. 2d 684 (Fla. 1968) (upholding an award of punitive damages without making reference to either the criminal manslaughter standard or *Carraway*); see also *Piper Aircraft Corp. v. Coulter*, 426 So. 2d 1108 (Fla. 4th DCA) (same), *rev. denied*, 436 So. 2d 100 (Fla. 1983); *American Motors Corp. v. Ellis*, 403 So. 2d 459 (Fla. 1st DCA 1981) (same), *rev. denied*, 415 So. 2d 1359 (Fla. 1982). *But cf.* *Castlewood Int'l Corp. v. LaFleur*, 322 So. 2d 520, 521 n.1 (Fla. 1975) (suggesting that the lower court's opinion would have conflicted with *Carraway* if it had upheld a punitive damages award by a jury that had been clearly instructed that it could award punitive damages for gross negligence). In *Atlas*, a plaintiff brought a wrongful death action against his landlord for the loss of his daughter who drowned as a result of having had her arm caught in an uncovered pool drain. The Supreme Court of Florida held that the evidence introduced at trial was sufficient to sustain an award of punitive damages. *Atlas*, 226 So. 2d at 690. The evidence showed that the pool was unsupervised; the drain was missing a cover in violation of safety statutes; the landlord was repeatedly warned of dangers involved in operating a pool without a drain cover; the landlord failed to warn its tenants of the condition; and the landlord chose to save money rather than remedy the dangerous condition. *Atlas Properties, Inc. v. Didich*, 213 So. 2d 278, 279 (Fla. 3d DCA), *aff'd*, 226 So. 2d 684 (Fla. 1968). It is far from certain that these facts would have been sufficient to support a punitive damage award if *Atlas* had been decided after *White Construction Co. v. Dupont*, 455 So. 2d 1026 (Fla. 1984).

46. See, e.g., *Ellis v. Golconda Corp.*, 352 So. 2d 1221, 1225 (Fla. 1st DCA 1977), *cert. denied sub nom.* *Peterson v. McKenzie Tank Lines*, 365 So. 2d 715 (Fla. 1978); *Florida Power Corp. v. Scudder*, 350 So. 2d 106, 110 (Fla. 2d DCA 1977), *cert. denied*, 362 So. 2d 1056 (Fla.), *appeal dismissed*, 439 U.S. 922 (1978); *Carter v. Lake Wales Hosp. Ass'n*, 213 So. 2d 898, 900 (Fla. 2d DCA 1968).

47. See, e.g., *Monty v. Hayward*, 451 So. 2d 938, 938 (Fla. 4th DCA 1984), *rev. denied*, 461 So. 2d 115 (Fla. 1985); *K.D. Lewis Enters. Corp. v. Smith*, 445 So. 2d 1032, 1038 (Fla. 5th DCA 1984).

48. See *Arab Termite & Pest Control of Fla., Inc. v. Jenkins*, 409 So. 2d 1039, 1042 (Fla. 1982); *Ingram v. Pettit*, 340 So. 2d 922, 923-24 (Fla. 1976).

49. 340 So. 2d 922 (Fla. 1976).

50. *Id.* at 924-25.

was legally intoxicated at the time of the accident, there was no evidence that he was operating the vehicle abnormally.<sup>51</sup> Citing *Carraway*, the defendant contended that punitive damages could be awarded only if there was willful conduct equivalent to that in a criminal manslaughter case.<sup>52</sup> The supreme court rejected this contention because it focused exclusively on semantic distinctions between degrees of negligence rather than on the policies that the distinctions were intended to further.<sup>53</sup> Instead, the court advocated an approach that emphasizes the policy of deterring future harm to the public and thus concluded that punitive damages should be awarded only in those cases in which "private injuries partake of public wrongs."<sup>54</sup> In light of the state's policy against highway accidents, driving while intoxicated constitutes a public menace that should be deterred by punishment.<sup>55</sup> The court therefore held that a jury may award punitive damages against an intoxicated driver who was involved in an accident regardless of whether there was "external proof of carelessness or abnormal driving," because driving while intoxicated "evinces, without more, a sufficiently reckless attitude."<sup>56</sup> Despite the court's statement to the contrary,<sup>57</sup> this holding appears to undermine the traditional requirement of proof of proximate cause. That is, by not requiring any external manifestation of reckless driving, the court was allowing punitive damages to be awarded even if a plaintiff was unable to trace the injury arising from an automobile accident to the alleged reckless act—driving while intoxicated.<sup>58</sup> In contrast, *Carraway* suggested that the conduct allegedly warranting punitive damages must itself be of a "gross and flagrant character" before punitive damages may be properly awarded.<sup>59</sup> Thus, driven by social policy considerations against drunk driving,<sup>60</sup> *Ingram* marked a significant retreat from the *Carraway* criminal manslaughter standard.

In later cases, the Supreme Court of Florida, without making

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51. *Id.* at 923.

52. *Id.*

53. *Id.* at 924.

54. *Id.* at 923-24.

55. *Id.* at 924-25. The supreme court relied heavily on the public policy evidenced by laws outlawing drunk driving. See *id.* at 925 & n.12.

56. *Id.* at 924 (emphasis added).

57. *Id.*

58. As Justice Sundberg argued in dissent, the majority was "totally emasculating the principle of proximate causation" at least in situations such as the one at bar "where there [was] no evidence at all that the intoxication caused any irregularities in the operation of the vehicle." *Id.* at 926 (Sundberg, J., dissenting).

59. See *Carraway v. Revell*, 116 So. 2d 16, 20 & n.12 (Fla. 1959). For a discussion of *Carraway*, see *supra* notes 35-42 and accompanying text.

60. See *supra* note 55 and accompanying text.

reference to *Carraway* or the criminal manslaughter standard, passed over the issue of when punitive damages may properly be considered by the jury.<sup>61</sup> In *Arab Termite & Pest Control of Florida, Inc. v. Jenkins*,<sup>62</sup> for example, a jury awarded the plaintiff both compensatory and punitive damages for the wrongful death of her husband.<sup>63</sup> The plaintiff's husband died after he reentered his fumigated house, which the defendant, a pest control service, had negligently aerated.<sup>64</sup> The Second District Court of Appeal reversed a remittitur granted by the trial court, holding that the trial court had erred in finding the award excessive.<sup>65</sup> The supreme court reversed the district court's decision,<sup>66</sup> and ruled that a legal basis for punitive damages existed if a tort was committed "in an outrageous manner or with fraud, malice, wantonness or oppression."<sup>67</sup>

This standard represents an abandonment of the *Carraway* approach. The *Arab Termite* standard focused on the subjective state of mind of the defendant.<sup>68</sup> The *Carraway* standard, in contrast,

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61. See *Arab Termite & Pest Control of Fla., Inc. v. Jenkins*, 409 So. 2d 1039 (Fla. 1982); *Wackenhut Corp. v. Canty*, 359 So. 2d 430 (Fla. 1978); cases cited *supra* note 45.

62. 409 So. 2d 1039 (Fla. 1982). *Wackenhut Corp. v. Canty*, 359 So. 2d 430 (Fla. 1978), an earlier case, also marked a departure by the supreme court from *Carraway*. In *Wackenhut*, the plaintiff, a customer, brought a battery and negligence action against a store to recover compensatory and punitive damages for injuries he sustained when the store's security guard pulled on his colostomy bag. *Id.* at 431. At trial, the jury awarded the plaintiff \$180,000 in punitive damages in addition to \$50,000 in compensatory damages. *Id.* at 432. The trial judge granted the defendant's motion for a new trial on the issue of punitive damages after the plaintiff refused to accept a remittitur. *Id.* On appeal, the Third District Court of Appeal reversed the trial court and reinstated the punitive damage award. *Id.* The Supreme Court of Florida affirmed the Third District's decision, holding that the \$180,000 punitive damage award was proper, not excessive. *Id.* at 435. Making no reference to *Carraway*, the supreme court ruled that it was proper to submit the issue of punitive damages to the jury if a tort was committed "in an outrageous manner or with fraud, malice, wantonness, or oppression," and that punitive damages were thereafter left to the jury's discretion. *Id.* at 435-36.

63. *Arab Termite*, 409 So. 2d at 1040.

64. *Id.*

65. *Jenkins v. Arab Termite & Pest Control Serv. of Fla., Inc.*, 388 So. 2d 44, 45 (Fla. 2d DCA 1980), *rev'd*, 409 So. 2d 1039 (Fla. 1982).

66. The supreme court held that the trial judge could find the amount of the jury verdict to be excessive if it bore an insufficient relationship to the degree of the defendant's misconduct. *Arab Termite*, 409 So. 2d at 1043.

67. *Id.* at 1041 (citing *Winn & Lovett Grocery Co. v. Archer*, 126 Fla. 308, 327, 171 So. 214, 221 (1936)). Relying on *Ingram*, the supreme court in *Arab Termite* also restated the "public wrong" theory of punitive damages. *Id.* at 1042. It is interesting to note that the wrongful conduct that the court confronted in *Arab Termite*—negligent ventilation of a fumigated house—affected the public in an entirely different manner than the wrongful act in *Ingram*—driving while intoxicated.

68. The *Arab Termite* standard focuses on the defendant's subjective state of mind rather than on the nature of his conduct because, in paraphrasing the *Winn & Lovett* opinion, the *Arab Termite* court failed to include from that opinion the following language that would require conduct that could be objectively ascertained: Punitive damages are awarded in cases

related to objective acts and required that the defendant's conduct be "gross and flagrant" or demonstrate an "entire want of care which would raise the presumption of a conscious indifference to consequences or which shows wantonness."<sup>69</sup> Moreover, it is unlikely that the pest control service's conduct in *Arab Termite* would have warranted punitive damages if the court had applied the criminal manslaughter standard because the exterminators lacked sufficient knowledge of the risk created by their conduct to satisfy the knowledge element of recklessness.<sup>70</sup>

D. *The Return to Carraway: White Construction Co. v. Dupont*

In the 1984 case of *White Construction Co. v. Dupont*,<sup>71</sup> the Supreme Court of Florida attempted to resolve the controversy regarding the appropriate punitive damages standard by readopting the *Carraway* criminal manslaughter standard, and thus requiring more than gross negligence for punitive damages to be awarded. In this case, the plaintiff, an independent truck driver, sued the defendants, which respectively owned a loader and a mine,<sup>72</sup> to recover for injuries he sustained at the mining site.<sup>73</sup> The litigation arose after one of the defendant's employees drove the forty ton loader "at top speed"<sup>74</sup> and collided with the plaintiff's truck, causing it to run him over.<sup>75</sup> The evidence showed that the loader's brakes had not been working for some time and that the defendants were aware of this

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in which torts are committed "with such gross negligence as to indicate a wanton disregard of the rights of others." *Winn & Lovett*, 126 Fla. at 327, 171 So. at 221 (emphasis added). This omission might have been more significant (by foreshadowing a higher standard) if it were not for the fact that the *Arab Termite* court allowed punitive damages for conduct that appeared to be at most grossly negligent. See *infra* note 70 and accompanying text.

69. *Carraway v. Revell*, 116 So. 2d 16, 20 & n.12 (Fla. 1959); *supra* text accompanying notes 41-42.

70. As reported by the supreme court, the evidence merely showed that the pest control service used a pesticide that was not specified in the contract and that the exterminator's employees "negligently aerated the house." *Arab Termite*, 409 So. 2d at 1040. This conduct probably would not fulfill the definition of recklessness contained in the Restatement. See RESTATEMENT (SECOND) OF TORTS § 500 (1965). Although this evidence might suggest that the exterminator's conduct created a strong probability of harm, it does not show that the exterminator knew or had reason to know of this risk, i.e., no facts showed that the exterminator had any reason to believe that anyone would reenter the fumigated house before it was safe to do so.

71. 455 So. 2d 1026 (Fla. 1984).

72. The defendant White Construction Co., which owned the loader, leased it to the other defendant, Limerock Industries, Inc. *Id.* at 1027. Both defendants were closely held corporations with a common controlling shareholder. *White Constr. Co. v. Dupont*, 430 So. 2d 915, 916 n.2 (Fla. 1st DCA 1983), *rev'd*, 455 So. 2d 1026 (Fla. 1984).

73. *White*, 455 So. 2d at 1027.

74. *Id.*

75. *Id.*

condition.<sup>76</sup> According to the supreme court, *Carraway v. Revell*<sup>77</sup> set forth the appropriate standard for the judge to apply in determining whether the jury may consider the issue of punitive damages:<sup>78</sup> "[T]he character of negligence necessary to sustain a conviction for manslaughter is the same as that required to sustain a recovery of punitive damages."<sup>79</sup> Under this standard, "something more than gross negligence is needed to justify the imposition of punitive damages."<sup>80</sup> In the words of the court:

The character of negligence necessary to sustain an award of punitive damages must be of a "gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them."<sup>81</sup>

Without articulating its reasoning, the supreme court held that although the evidence "would be sufficient to show that the [defendants] were negligent," it was insufficient, "as a matter of law," to raise a triable issue of punitive damages.<sup>82</sup>

### III. COMMENT

#### A. *The Two Alternative Interpretations of the Current Standard for Submitting the Issue of Punitive Damages to the Jury in Negligence Cases*

The *White* criminal manslaughter standard cannot be understood without recognizing a distinction between the way the court verbally formulated the standard and the way the court apparently meant it to be applied. The *White* criminal manslaughter standard purports to be a more stringent standard than the earlier standards, which had allowed recovery for gross negligence. Ironically, however, the stan-

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76. *Id.* at 1028.

77. 116 So. 2d 16 (Fla. 1959).

78. Subsequent cases reveal that the supreme court intended the appellate courts to apply this standard in reviewing both actual jury awards and directed verdicts. See, e.g., *Como Oil Co. v. O'Loughlin*, 466 So. 2d 1061, 1062 (Fla. 1985) (upholding the trial court's directed verdict on the issue of punitive damages under the criminal manslaughter standard).

79. *White*, 455 So. 2d at 1028 (quoting *Carraway*, 116 So. 2d at 20). In adopting the criminal manslaughter standard, the court gave no indication that it intended to limit punitive damages to only those situations in which deaths had occurred.

80. *Id.*

81. *Id.* (quoting *Carraway*, 116 So. 2d at 20 n.12).

82. *Id.*

dard that the court articulated in *White* actually originated in an earlier case, *Florida Southern Railway v. Hirst*,<sup>83</sup> that had allowed punitive damages to be recovered for certain kinds of gross negligence.

*White* reaffirmed the punitive damages standard set forth in *Carraway v. Revell*,<sup>84</sup> which had adopted the standard that appeared in the criminal manslaughter case of *Cannon v. State*.<sup>85</sup> *Cannon*, however, borrowed its standard from *Hirst*, in which the court allowed punitive damages to be recovered for certain extreme degrees of gross negligence.<sup>86</sup> Thus, although the supreme court in *White* stated that it was adopting a standard that would permit judges to submit the issue of punitive damages to a jury in cases in which the defendant's conduct would satisfy the criminal manslaughter standard, and thus constituted more than gross negligence, the court actually defined that conduct in terms that it had earlier construed as including some degrees of gross negligence. The court's verbal formulation of the kind of conduct that would merit punitive damages in *White*, therefore, was no more stringent than the standard established in earlier cases.

The seeming contradiction between the supreme court's purported adoption of a criminal manslaughter standard and its reliance on a definition that it had previously interpreted to include gross negligence can be adequately explained only if the supreme court intended lower courts to follow its actions, and ignore what the court explicitly said. Thus, to figure out what the standard means, lower courts have had to watch the manner in which the supreme court has applied the standard. Yet even a focus on the court's actions provides incomplete guidance because, in promulgating the standard, the court has failed to set forth any kind of coherent approach for determining what conduct merits punitive damages. Observers and lower courts thus have been left only to guess why the supreme court arrives at any given result.

The Restatement, however, offers a useful theoretical framework that focuses the discussion of when punitive damages may be awarded

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83. 30 Fla. 1, 11 So. 506 (1892).

84. 116 So. 2d 16, 20 n.12 (Fla. 1959).

85. 91 Fla. 214, 221, 107 So. 360, 363 (1926). *Cannon* involved a prosecution brought under the manslaughter statute. For the relevant text of the current version of this statute, see *supra* note 38. In attempting to define the term "culpable negligence" in the statute, the supreme court stated in dicta that the degree of negligence necessary to justify a conviction should be at least as high as that required for an award of punitive damages in a civil case. *Id.* at 222, 107 So. at 362-63.

86. *Hirst*, 30 Fla. at 39, 11 So. at 513; see *supra* notes 26-29 and accompanying text.

to two factors. As discussed earlier, the Restatement defines conduct as reckless and therefore suitable for punitive damages if (1) it creates a strong probability of harm, and (2) the actor knows or has reason to know of this risk.<sup>87</sup> In analyzing the recent supreme court cases under the Restatement criteria, the question that must be addressed is whether conduct that would fulfill the Restatement definition of recklessness would be sufficient under the *White* criminal manslaughter standard to create a jury question on the issue of punitive damages, or whether something more is also required.

Of all the cases decided under the criminal manslaughter standard, *White* is the most perplexing. Because the court failed to articulate any reasoning, the case may be interpreted in two ways: As requiring only Restatement recklessness or as requiring, in addition to Restatement recklessness, some undefined element or aggravating circumstance, such as flagrant misconduct. As it was fairly likely that the defendants' conduct in *White* created a strong probability of harm,<sup>88</sup> the critical issue, in determining which of these two interpretations is correct, is whether the defendants knew or had reason to know of the strong probability of harm that their conduct created.

*White* may be interpreted as being consistent with the Restatement definition of recklessness if the defendants had no actual or constructive knowledge that their conduct was creating a high risk of harm. The facts showed that the defendants knew that the loader's brakes had not been working for some time.<sup>89</sup> Knowledge of this fact alone, however, would not be sufficient to establish the knowledge

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87. RESTATEMENT (SECOND) OF TORTS § 500 & comment f (1965); see *supra* notes 20-25 and accompanying text.

88. This conclusion can be reached only after engaging in a proximate cause analysis because another actor, the driver of the loader, also contributed to the creation of the risk. The defendants' conduct, allowing the loader to be operated with defective brakes, by itself, probably did not create a risk that amounted to a strong probability of harm. Rather, the act of the driver of the loader, by driving at top speed, raised the risk to a much greater likelihood of harm. The question therefore is whether the defendants' conduct, and not that of the driver, created a strong probability of harm. To resolve this question it is necessary to consider whether the defendants could have foreseen the possibility that the driver of the loader might contribute to the risk of harm. See *Florida Dep't of Transp. v. Anglin*, 502 So. 2d 896, 898 (Fla. 1987); *Gibson v. Avis Rent-A-Car Sys.*, 386 So. 2d 520, 522 (Fla. 1980); *Waters v. ITT Rayonier, Inc.*, 493 So. 2d 67, 68-69 (Fla. 1st DCA 1986); see also RESTATEMENT (SECOND) OF TORTS § 501 (1965) (stating that the rules for determining if an actor is liable for recklessness "are the same as those which determine his liability for negligent misconduct"). Although few facts are reported in *White*, it seems reasonably foreseeable that the driver of a loader that hauls material at a mining site on occasion might drive at excessive speeds to satisfy relevant working quotas or timetables. Because the intervening cause, the employee's act of driving the loader at top speed, was reasonably foreseeable, the defendants' failure to maintain the loader's brakes could have created a strong probability of harm.

89. *White Constr. Co. v. Dupont*, 455 So. 2d 1026, 1028 (Fla. 1984).



required under the Restatement (i.e., knowledge of a strong probability of harm) because the defective brakes, by themselves, probably did not create a strong probability of harm.<sup>90</sup> They merely created an unreasonable risk. Rather, the existence of defective brakes coupled with the fact that the loader was driven "at top speed"<sup>91</sup> raised the risk to a strong probability of harm.

The crucial question in determining whether the defendants were aware of a strong probability of harm, therefore, is whether, in addition to being aware that the loader's brakes were defective, they knew or had reason to know that the loader would be driven at top speed. Given the court's failure to articulate any reasoning, a definitive answer to this question is impossible. Nevertheless, the court's opinion can support an argument that the defendants were not aware that the loader would be driven at high speeds:

The evidence in this case showed that the loader's brakes had not been working for some time, and that the [defendants] were aware of this fact. Although this evidence would be sufficient to show that the [defendants] were negligent, it is not sufficient as a matter of law, to submit the issue of punitive damages to the jury.<sup>92</sup>

The direct implication of this passage is that the evidence did not show that the defendants were aware that the loaders would be driven at top speed.<sup>93</sup> Thus, the defendants had no knowledge or reason to know that their failure to repair the brakes caused a strong probability of harm. The supreme court's denial of punitive damages was therefore consistent with the Restatement's definition of recklessness.

*White*, however, contains some language that supports the contrary argument: The court is requiring more than the Restatement definition of recklessness because the defendants did have knowledge that their behavior was creating a strong probability of harm. The basis of this argument lies in the court's rather cryptic statement that

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90. See *supra* note 88.

91. *White*, 455 So. 2d at 1027.

92. *Id.* at 1028.

93. The First District Court of Appeal rejected the argument that *White* stood for the proposition that "punitive damages cannot be recovered even when the defendant has actual knowledge of a hazard and yet fails to warn or take corrective action." *Johns-Manville Sales Corp. v. Janssens*, 463 So. 2d 242, 263 (Fla. 1st DCA 1984), *rev. denied*, 467 So. 2d 999 (Fla. 1985). Instead, the First District distinguished *White* as a case that involved "nothing more than a single isolated instance of negligence, i.e., the defendant operated the loader even though aware that its brakes were defective." *Id.* In offering this distinction, the court may have been suggesting that the defendants in *White* lacked the sufficient level of knowledge for punitive damages to be imposed.

it did not need to address the defendants' argument that the trial court erred in allowing the plaintiffs' "safety expert to testify that [the defendants] were 'knowingly exposing people to injury or death.'" <sup>94</sup> The existence of this testimony would indicate that the record contained some evidence that could have shown that the defendants knew of a strong probability of harm. In light of this evidence, the court's ruling that punitive damages should not have been awarded as a matter of law suggests that the court was requiring something more than Restatement recklessness.

With one exception,<sup>95</sup> the cases decided since *White* do little to resolve the issue left open by that case: Whether the *White* criminal manslaughter standard requires something more than the Restatement's requirements for recklessness before the judge may submit the issue of punitive damages to the jury. The court in these cases did not reach this question because the conduct at issue did not meet even the threshold of the Restatement requirements.

The conduct in *Como Oil Co. v. O'Loughlin*,<sup>96</sup> the first case that the Supreme Court of Florida decided after *White* that is relevant to this issue, rose, at most, to the level of gross negligence. In *Como Oil*, the plaintiff sought punitive damages against an oil company for injuries she suffered in a gasoline explosion and fire that resulted from the negligence of the defendant's employee.<sup>97</sup> The explosion occurred after the employee, a truck driver, overfilled a gasoline storage tank.<sup>98</sup> The evidence merely showed that the driver failed to check the amount of gasoline in the tank before pumping the gasoline and that he "watched the flow meter on the truck rather than the actual filling operation."<sup>99</sup> The supreme court held that this evidence did not satisfy the *White* criminal manslaughter standard.<sup>100</sup> Although the court did not fully articulate its reasoning, it appears certain that the driver's conduct failed to satisfy the Restatement's definition of recklessness. The driver was "simply careless,"<sup>101</sup> and thus had no knowl-

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94. *White*, 455 So. 2d at 1029.

95. See *Chrysler Corp. v. Wolmer*, 499 So. 2d 823 (Fla. 1986). For a discussion of *Wolmer*, see *infra* notes 108-14 and accompanying text.

96. 466 So. 2d 1061 (Fla. 1985).

97. *Id.* at 1061.

98. *Id.* The driver permitted between 50 and 350 gallons of gasoline to be introduced into an underground tank, and as a result, the tank overflowed. *Id.* at 1061-62.

99. *Id.* at 1062. According to the dissenting opinion, there was also evidence that the truck driver left the truck unattended while pumping was in progress "even though it was pointed out to him that the equipment and truck were leaking." *Id.* at 1063 (Shaw & Erlich, JJ., concurring and dissenting).

100. *Id.* at 1062.

101. Respondent's Brief on the Merits at 42, *Chrysler Corp. v. Wolmer*, 499 So. 2d 823 (Fla. 1986) (No. 67761).

edge that his conduct was creating a risk of harm.<sup>102</sup>

Similarly, the Supreme Court of Florida, in *American Cyanamid Co. v. Roy*,<sup>103</sup> was unable to answer whether the *White* criminal manslaughter standard requires something more than Restatement recklessness because the conduct involved in that case did not create a strong probability of harm. In *American Cyanamid*, the plaintiff brought suit against Cyanamid to recover compensatory and punitive damages for injuries he suffered after being exposed to a toxic chemical contained in one of the company's products.<sup>104</sup> The supreme court rejected the argument that Cyanamid's negligence in failing to warn users of the chemical's dangers rose to the level necessary to support an award of punitive damages.<sup>105</sup> Rather, the content of the warning<sup>106</sup> and Cyanamid's behavior in submitting information of the product's dangerous propensities to the product's suppliers in no way suggested "even gross negligence, much less intentional misconduct."<sup>107</sup> Under a Restatement analysis, it appears that if Cyanamid had apprised potential users of the product's dangers, the risk would have been reduced to something less than a strong probability of harm. Cyanamid's conduct therefore did not even meet the Restatement's definition of recklessness.

*Chrysler Corp. v. Wolmer*,<sup>108</sup> the most recent of the supreme court's decisions concerning the appropriate punitive damages standard, may offer some insight as to what the *White* criminal manslaughter standard requires. The basis of the court's jurisdiction in *Wolmer* suggests that the criminal manslaughter standard requires something more than Restatement recklessness, but the court's manner of deciding the merits of the case reduces the likelihood that this is a definitive interpretation. In *Wolmer*, the plaintiff, an owner of a Chrysler automobile, brought a wrongful death action against Chrysler for the loss of his wife, alleging that the company's negligent design of the vehicle's fuel system caused his wife's death in an automobile accident.<sup>109</sup> The Fourth District Court of Appeal reversed the

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102. Nor would he have had any reason to know that he was creating a risk if the truck's flow meter gave him no indication that the tank was overflowing.

103. 498 So. 2d 859 (Fla. 1986).

104. *Id.* at 860. Acrylamide, the toxic chemical in the product, had been linked to a variety of conditions ranging from neuropathy and atasia to severe skin eruptions. *Id.*

105. *Id.* at 862.

106. The warning label noted that the product contained acrylamide and stated that "[r]epeated skin contact, inhalation or swallowing may cause nervous system disturbances." *Id.*

107. *Id.*

108. 499 So. 2d 823 (Fla. 1986).

109. *Id.* at 824.

trial court's directed verdict on the issue of punitive damages.<sup>110</sup> The supreme court granted review under its conflict jurisdiction, finding that because the Fourth District applied a standard that the First District had formulated in *Johns-Manville Sales Corp. v. Janssens*,<sup>111</sup> the lower court's opinion "expressly and directly conflict[ed]" with the court's criminal manslaughter standard cases of *Como Oil* and *White*.<sup>112</sup>

The source of conflict, the *Johns-Manville* standard, bears a close resemblance to the Restatement recklessness standard. The *Johns-Manville* standard allows punitive damages if the plaintiff can show that the manufacturer had "knowledge that its product [was] inherently dangerous . . . and that its continued use [was] likely to cause injury or death, but nevertheless continue[d] to market the product."<sup>113</sup> Thus, the *Johns-Manville* standard, like the Restatement, requires knowledge of a likelihood of harm. By ruling that this standard conflicts with *White*, the court in effect suggested that the criminal manslaughter standard requires conduct more severe than Restatement recklessness. The court, however, by deciding on the merits that Chrysler was not liable for punitive damages because it lacked actual knowledge of the risk,<sup>114</sup> was relieved of the necessity of explaining exactly how the *Johns-Manville* standard conflicted with *White*, that is, what element is needed in addition to knowledge of a likelihood of harm. Consequently, Florida law today remains unclear as to whether the *White* criminal manslaughter standard requires something more than traditional Restatement recklessness. If in fact such an additional element is required, its identity remains uncertain.<sup>115</sup>

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110. *Chrysler Corp. v. Wolmer*, 474 So. 2d 834, 839 (Fla. 4th DCA 1985), *rev'd*, 499 So. 2d 823 (Fla. 1986).

111. 463 So. 2d 242 (Fla. 1st DCA 1984), *rev. denied*, 467 So. 2d 999 (Fla. 1985).

112. *Wolmer*, 499 So. 2d at 824-25.

113. *Wolmer*, 474 So. 2d at 836 (quoting *Johns-Manville Sales Corp. v. Janssens*, 463 So. 2d 242, 249 (Fla. 1st DCA 1984), *rev. denied*, 467 So. 2d 999 (Fla. 1985)).

114. *Wolmer*, 499 So. 2d at 826. The court also suggested that Chrysler lacked constructive knowledge (i.e., had no reason to know) of the fuel system's danger. *See id.* (stating that "a closer reading of [the crash] test results" did not support the district court of appeal's interpretation that Chrysler was put "on notice of the fuel system defects").

115. The extra factor may be flagrant misconduct. In *American Cyanamid*, the supreme court suggested that flagrant misconduct must be present before punitive damages may be awarded. *See American Cyanamid Co. v. Roy*, 498 So. 2d 859, 863 (Fla. 1986). In holding that an award of punitive damages was inappropriate, the court stated, "[T]he facts simply do not reflect the kind of flagrant misconduct that would justify a finding of willful and wanton disregard for the safety of persons." *Id.* (quoting *American Cyanamid v. Roy*, 466 So. 2d 1079, 1085 (Fla. 4th DCA 1984) (Anstead, C.J., dissenting), *rev'd*, 498 So. 2d 859 (Fla. 1986)).

A possible explanation of why the court would require flagrant misconduct in addition to the Restatement definition of recklessness may rest in the court's frequent use of the "public

B. *An Assessment of the Two Interpretations and the Policies Underlying Punitive Damages*

In Florida, the policies that justify the award of punitive damages in negligence cases are punishment and deterrence.<sup>116</sup> These policies would be frustrated significantly if the Supreme Court of Florida adopts a standard that requires, in addition to Restatement recklessness, some kind of flagrant conduct or other aggravating circumstance because such an additional requirement would inject greater subjectivity and unpredictability into the punitive damages inquiry. Accordingly, the court in future cases should construe the *White* criminal manslaughter standard as requiring only knowledge of a strong probability of harm, not aggravating circumstances, to support an award of punitive damages.<sup>117</sup>

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wrong" theory. See, e.g., *Chrysler Corp. v. Wolmer*, 499 So. 2d 823, 825 (Fla. 1986); *American Cyanamid Co. v. Roy*, 498 So. 2d 859, 861 (Fla. 1986); *Ingram v. Pettit*, 340 So. 2d 922, 923-24 (Fla. 1976). Under this theory, a tort must create a risk to the public and not just to individuals before it merits punitive damages. Thus, the scope of the tort, or in other words, the number of people affected by it, determines whether punitive damages are appropriate. The application of the public wrong rationale, however, is extremely difficult. On the one hand, it could be argued that the conduct in *White* satisfies this theory, as the defective brakes endangered the public as a whole. On the other hand, one could argue that the loader's defective brakes posed a danger to only a limited number of construction workers. Hence, not only is it difficult to determine whether a tort affects the public, but a competent lawyer can almost always argue that a defendant exposed the public to harm in some way. In addition, it is unclear why individuals should not receive protection from reckless conduct to the same extent as would the public. Despite the uncertainties as to exactly what element beyond that of Restatement recklessness is necessary before punitive damages are merited under the supreme court's manslaughter standard, it is clear that a standard requiring flagrant misconduct would represent a policy statement to the lower courts that punitive damages should be awarded sparingly.

116. See *supra* note 17 and accompanying text.

117. It remains unclear whether the Florida Tort and Insurance Reform Act of 1986 will have any effect on the punitive damages standard. See Ch. 86-160, Laws of Fla. (codified in scattered sections of FLA. STAT. chs. 110, 120, 458-59, 624, 626-27, 629, 768 (1987)) [hereinafter FTIRA]. For a general discussion of the Act's provisions, see Fort, Granger, Polston & Wilkes, *Florida's Tort Reform: Response to a Persistent Problem*, 14 FLA. ST. U.L. REV. 505 (1986) [hereinafter *Tort Reform*]. Section 52 of the Act limits the amount of punitive damages that may be awarded to three times the amount of actual damages awarded in any case based on negligence, strict liability, products liability, professional liability, or breach of warranty "that involves willful, wanton, or gross misconduct." FTIRA § 52, FLA. STAT. § 768.73(1)(a) (1987). Because the supreme court has held that gross negligence alone is insufficient to support an award of punitive damages, the legislature's inclusion of the term "gross misconduct" in the act "could be considered either excess verbiage or as modifying the standard under which punitive damages may be awarded." STAFF OF THE FLA. S. COMM. ON COMMERCE, FLA. MED. MALPRACTICE REFORM AND A REV. OF COURT-ORDERED ARBITRATION 32-33 (January 1988). In any event, the legislature's use of the term "gross misconduct" to lower the punitive damages standard is not necessarily inconsistent with the basic purposes of the Act. The principal purpose of the Act is to alleviate a crisis in the insurance industry. See FTIRA preamble. In furtherance of this purpose, the Act limited the amount of noneconomic damages that a claimant could recover to a total of \$450,000. *Id.*

The policies of punishment and deterrence are furthered only if persons are able to avoid conduct that would lead to sanctions. One of the most deeply rooted notions in American jurisprudence is that punishment for an act is unfair if a person is not on notice that the act is wrong.<sup>118</sup> Thus, the clearer the punitive damages standard, the fairer it is to impose punishment. Moreover, the deterrent value of a sanction is likely to be diminished if persons are not put on reasonable notice that their conduct will result in punishment. Again, the clearer the punitive damages standard, the more effective it is as a deterrent.<sup>119</sup> By offering some degree of notice and predictability, the Restatement standard for recklessness is better suited to promote the policies of punishment and deterrence than a standard that focuses on an undefined requirement of aggravating circumstances or flagrant misconduct.

Although the Restatement, concededly, does not completely

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§ 59, FLA. STAT. § 768.80 (1987). The Supreme Court of Florida recently ruled that this cap violated the provision in the Constitution of Florida that guarantees access to the courts for the redress of grievances. See *Smith v. Department of Ins.*, 507 So. 2d 1080, 1087-89 (Fla. 1987) (striking down section 768.80 as violating article I, section 21 of the Constitution of Florida). If the court interprets the term "gross misconduct" as lowering the punitive damages standard, any frustration of the Act's legislative intent by *Smith* may be partially mitigated. Some observers have argued that juries will award punitive damages under the name "mental injuries" if they cannot award them in the form of punitive damages. See, e.g., Mallor & Roberts, *supra* note 2, at 645-46; Note, *supra* note 2, at 331 & n.149. With a lower punitive damages standard, juries would be more likely to award a greater amount of damages under the category of punitive damages rather than that of noneconomic, compensatory damages. The public policy of Florida prohibits insurance for punitive damages. *U.S. Concrete Pipe Co. v. Bould*, 437 So. 2d 1061, 1064 (Fla. 1983). Insurance companies, therefore, would end up paying less in compensatory damages overall. Thus, even though the legislature was unable to address the insurance crisis by establishing a cap on noneconomic damages, it may be successful in combating the crisis by allowing juries to move damages into a category for which insurance companies are not responsible—punitive damages.

118. See, e.g., *Rose v. Locke*, 423 U.S. 48, 49 (1975) (per curiam); *Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964); *United States v. Harriss*, 347 U.S. 612, 617 (1954); *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926); see also H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 79-80 (1968) (noting the "conventional" view "that people are entitled to know what they are forbidden to do so that they may shape their conduct accordingly").

119. See Ellis, *supra* note 10, at 5-6 & n.19 (arguing that one should not be punished for his act "unless it has been authoritatively declared to be wrongful before its commission or unless the actor has otherwise been given prior notice that the act is wrong"); *Tort Reform*, *supra* note 117, at 521 (arguing that "[d]eterrence is facilitated by predictability, which punitive damage awards are lacking"); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 308-09 (1983) (arguing that the "greatest danger of underdeterrence arises from the fact that most punitive damages laws do not provide juries with guidance as to whether punitive damages should be awarded"). But cf. Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U. L. REV. 1158, 1179 (arguing that "[i]t is doubtful whether there is a constitutional right to precise punitive standards").

eliminate subjectivity as to what conduct is sufficiently culpable to merit punitive damages,<sup>120</sup> it does provide guidelines that give some measure of predictability. The Restatement regime focuses on two factors—the actor's knowledge and the degree of risk. These factors are quantifiable, although imprecise, and allow a person to avoid engaging in conduct that he knows is likely to create a serious risk of harm to others. In contrast, a standard that focuses on aggravating circumstances or flagrant misconduct is subjective to a far greater degree.<sup>121</sup> In applying such a standard, a judge would have little restraint beyond the dictates of his conscience in deciding whether a defendant's conduct strikes him as egregious or in some other way more aggravated than recklessness.<sup>122</sup> In light of its adverse effect on the policies of punishment and deterrence,<sup>123</sup> a requirement under the

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120. Comment, *supra* note 1, at 995 & n.65. Courts historically have struggled to minimize subjectivity in resolving controversies. The Supreme Court of the United States' attempt to define obscenity serves as a well-known example of this difficulty. See generally *Miller v. California*, 413 U.S. 15, 37 (1973) (Douglas, J., dissenting) ("The Court has worked hard to define obscenity and concededly has failed."); *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (arguing that the Court, in the obscenity cases, has been "faced with the task of trying to define what may be indefinable"). Yet despite the difficulty of defining obscenity, the Court has refused to abandon this task. See *Jacobellis*, 378 U.S. at 197 (Stewart, J., concurring) ("I know [hard-core pornography] when I see it."). The Court instead has endeavored to formulate standards that provide some measure of predictability. See *Miller*, 413 U.S. at 37. Similarly, the Supreme Court of Florida should adopt a punitive damages standard that affords potential litigants some degree of predictability.

121. One may argue that so long as the supreme court maintains the Restatement standard as a threshold requirement, the defendant can be said to be on fair notice of what conduct will result in sanctions and the policy of deterrence therefore will not be compromised. Such an argument, however, fails to recognize the practical reality that upon hearing such language as "flagrant conduct" or "aggravating circumstances," the jury is likely to emphasize this part of the standard over any part that sets forth the more legalistic terminology similar to that of the Restatement: knowledge of a "strong probability of harm." See *RESTATEMENT (SECOND) OF TORTS* § 500 comment f (1965). Thus, in actual practice the standard is likely to be applied in a highly subjective manner.

122. Indeed, such an approach shares some of the same disadvantages as the much-criticized "outrageous" standard used in cases involving the tort of intentional infliction of emotional distress. See generally Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 51-54 (1982) (arguing that the outrageousness "concept . . . fails to provide clear guidance either to those whose conduct it purports to regulate, or to those who must evaluate that conduct"). Florida courts have accepted the Restatement's formulation of the elements for the tort of intentional infliction of emotional distress. See *Metropolitan Life Ins. Co. v. McCarsen*, 467 So. 2d 277, 278-79 (Fla. 1985).

123. By requiring aggravating circumstances in addition to Restatement recklessness, the court would be inviting another problem: the conversion of the punitive damages inquiry into a battle over semantics. This is because in alleging an aggravating factor, the plaintiff in reality may be doing nothing more than attempting to restate in a grandiose manner facts that form an essential element of the Restatement definition of recklessness. In such a case, the additional requirement of aggravating circumstances would be illusory. For example, an amicus curiae brief in the supreme court case of *American Cyanamid Co. v. Roy* suggested

*White* criminal manslaughter standard that some aggravating circumstance exist before the judge may submit the issue of punitive damages to the jury should not be imposed.

C. *The Roles of the Judge and the Jury in Applying the Criminal Manslaughter Standard*

Once the trial judge determines that there is a sufficient basis in the evidence to support a demand for punitive damages, he then presents the issue to the jury.<sup>124</sup> Juries, however, face two major obstacles that prevent them from effectively evaluating whether a defendant's conduct warrants punitive damages. First, in considering whether a defendant's conduct merits punitive damages, the jury applies a different standard from the one that the judge applies to determine whether there is a basis for a punitive damages claim. Second, even if the jury were to apply the same standard as does the judge (i.e., the *White* criminal manslaughter standard), it would be hampered by the standard's lack of guidelines as to whether the defendant's conduct merits punitive damages.

The *White* criminal manslaughter standard and the standard jury instruction on punitive damages represent markedly different formulations of when punitive damages are justified.<sup>125</sup> Since *White* was decided, a judge allows the jury to consider the issue of punitive damages if, after viewing the evidence in a light most favorable to the plaintiff, he finds that the character of negligence exhibited by the

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that, at least in the area of products liability, a "criminal coverup" is a requisite aggravating factor for an award of punitive damages. See Brief of Amicus Curiae Florida Defense Lawyers Association in Support of Petitioner at 2, *American Cyanamid Co. v. Roy*, 498 So. 2d 859 (Fla. 1986) (No. 67124). Yet a "criminal coverup" might amount simply to a failure to warn after becoming aware of a defect.

124. See, e.g., *Wackenhut Corp. v. Canty*, 359 So. 2d 430, 435-36 (Fla. 1978); *Winn & Lovett Grocery Co. v. Archer*, 126 Fla. 306, 328-29, 171 So. 214, 222 (1936); *Hospital Corp. of Lake Worth v. Romaguera*, 511 So. 2d 559, 564-65 (Fla. 4th DCA 1986). For a general discussion of *Wackenhut*, see *supra* note 62.

125. Before *White*, judges and juries applied essentially the same standard. During this time, a sufficient basis for a punitive damages claim existed if a tort was committed "in an outrageous manner or with fraud, malice, wantonness or oppression." *Arab Termite & Pest Control of Fla., Inc. v. Jenkins*, 409 So. 2d 1039, 1041 (Fla. 1982) (quoting *Wackenhut*, 359 So. 2d at 435-36). This standard was materially the same as the standard jury instruction on punitive damages, which allows the jury to award punitive damages if it finds that the defendant "acted with malice, moral turpitude, wantonness, willfulness, or reckless indifference to the rights of others." FLA. STD. JURY INSTR. (CIV.) 6.12 (February 1987). Although the jury instruction contains reference to recklessness and the standard applied by the judge did not, this difference was inconsequential because the term recklessness is usually considered to be synonymous with the term "wantonness," a form of conduct that would create a sufficient basis for punitive damages. See *RESTATEMENT (SECOND) OF TORTS* § 500 special note (1965).



defendant was equivalent to the type of negligence that would justify a conviction for manslaughter.<sup>126</sup> If a judge finds such a basis to be present, he then instructs the jury that it may award punitive damages if it finds that the defendant "acted with malice, moral turpitude, wantonness, willfulness, or reckless indifference to the rights of others."<sup>127</sup> In addition to representing entirely different formulations<sup>128</sup> of whether punitive damages may be awarded, the two standards focus on entirely different criteria. Unlike the jury instruction, which relates to the defendant's subjective state of mind, the criminal manslaughter standard focuses on acts of the defendant and the consequences of those acts.<sup>129</sup>

Because the jury is instructed to apply a different standard, it never receives the opportunity to fulfill its traditional role as the trier of fact: to decide whether the defendant's conduct in fact warrants punitive damages. In other words, a jury might have reservations about awarding punitive damages if it were able to consider the defendant's conduct under the criminal manslaughter standard.<sup>130</sup> Therefore, to restore the jury to its proper role as the ultimate finder of fact, the Florida standard jury instruction on punitive damages should be revised to conform to *White*.<sup>131</sup>

Even if the standard instruction were revised to conform to the *White* criminal manslaughter standard, another obstacle would still confront the jury. The jury would continue to lack guidelines that would permit it to properly decide whether the defendant's conduct merits punitive damages. As discussed above, the trial judge himself cannot be entirely certain what the standard means because recent supreme court cases can be subjected to two interpretations.<sup>132</sup> Yet the difficulties facing juries are even greater than those facing trial judges in applying *White*. Unlike a judge, a jury is unable to compare

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126. See *supra* text accompanying notes 77-81.

127. FLA. STD. JURY INSTR. (CIV.) 6.12 (February 1987).

128. For example, although the standard jury instruction allows a jury to award punitive damages when a defendant has acted with malice, the criminal manslaughter standard does not even apply to this conduct.

129. See *supra* notes 68-69 and accompanying text.

130. The difficulties continue to the appellate level. Because appellate courts, like trial judges, review the evidence under the *White* criminal manslaughter standard, they will also be applying a different standard than that applied by juries.

131. The Supreme Court of Florida authorized the Supreme Court Committee on Standard Jury Instructions and The Florida Bar to publish and distribute standard jury instructions. *In re Use by the Trial Courts of the Standard Jury Instructions*, 198 So. 2d 319, 319 (Fla. 1967). The court, however, recognized that a litigant's right to object to the use of a standard instruction has been maintained. *Id.*

132. See *supra* Section IIIA.

the conduct before it to conduct in prior cases. Rather, the jury's only tool is the vague language of the criminal manslaughter standard.

The jury instruction should be revised to provide the jury with more precise guidelines to the question of what kind of conduct warrants punitive damages. The instructions should inform juries that the key factors in determining whether the defendant was reckless are the degree of the risk created by the defendant's conduct and the defendant's knowledge of that risk.<sup>133</sup> The jury instruction, for example, could include the criteria contained in the Restatement, that is, whether the defendant knew or had reason to know that his conduct created a strong probability of harm.<sup>134</sup> Until jury instructions on punitive damages are revised to include language that is understandable to laymen, many juries will continue to award punitive damages in an uninformed manner—and many appellate courts will continue to reverse them.<sup>135</sup>

#### IV. CONCLUSION

The Supreme Court of Florida has failed to explain what kind of conduct actually fulfills the criminal manslaughter standard for punitive damages. The court should interpret the standard as allowing the issue of punitive damages to be submitted to the jury when the defendant acts with actual or constructive knowledge that his conduct is creating a strong probability of harm. An additional requirement of aggravating circumstances or flagrant misconduct should not be imposed because it would increase the subjectivity of punitive damages awards and thereby undermine the goals of punishment and deterrence. Furthermore, the standard jury instruction on punitive damages should be revised to conform to such an interpretation to

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133. See *supra* notes 19-25 and accompanying text.

134. See *supra* notes 20-22 and accompanying text. Ironically, the standard jury instruction that defines the element of "culpable negligence" in criminal manslaughter provides the jury with greater guidance than the current punitive damages instruction: "Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known, or reasonably should have known, was likely to cause death or great bodily injury." FLA. STD. JURY INSTR. (CRIM.) 68-68a (May 1987).

135. Recently, litigants recovering punitive damages from juries often have had little success in preserving their awards on appeal. See, e.g., *Chrysler Corp. v. Wolmer*, 499 So. 2d 823 (Fla. 1986) (upholding the trial court's granting of a renewed motion for a directed verdict after the jury had awarded \$3 million in punitive damages); *American Cyanamid Co. v. Roy*, 498 So. 2d 859 (Fla. 1986) (reversing a punitive damages verdict of \$45,000); *White Constr. Co. v. Dupont*, 455 So. 2d 1026 (Fla. 1984) (reversing a punitive damages award of \$2.5 million); *Pantry Pride Enters., Inc. v. Velazquez*, 503 So. 2d 429 (Fla. 3d DCA 1987) (reversing an award of punitive damages); *Ten Assocs. v. Brunson*, 492 So. 2d 1149 (Fla. 3d DCA) (same), *rev. denied*, 501 So. 2d 1281 (Fla. 1986).

ensure that juries can rationally decide whether to subject a defendant to liability for punitive damages.

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