

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 08-CIV- 80893 – MARRA/JOHNSON

JANE DOE,

Plaintiff,

v.

JEFFREY EPSTEIN,

Defendants.

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**DEFENDANT EPSTEIN'S MOTION FOR SEPARATE TRIAL OR BIFURCATION  
OF PLAINTIFF'S PUNITIVE DAMAGES CLAIMS, Rule 42(b), Fed.R.Civ.P.,  
AND SUPPORTING MEMORANDUM OF LAW**

Defendant, Jeffrey Epstein, (hereinafter "EPSTEIN") by and through his undersigned attorneys, moves this Court for the entry of an order requiring separate trial or bifurcation of Plaintiff's claims for compensatory damages and any claim for punitive damages. Rule 42(b), Fed.R.Civ.P. (2010). In support of his motion, Defendant states:

Pursuant to Rule 42(b), Fed.R.Civ.P. (2010), Defendant EPSTEIN seeks a separate trial or bifurcation of Plaintiff's claim for punitive damages which are only plead and being sought in Plaintiff's state law claims alleged in Count I - *Sexual Battery upon a Minor*, and Count III - *Intentional Infliction of Emotional Distress* of Plaintiff JANE DOE's First Amended Complaint [D.E. 38]. Count II is a federal statutory claim brought pursuant to 18 U.S.C. 2255; no punitive damages are sought under this claim.<sup>1</sup> Count V is a state law claim brought pursuant to Florida Statute §796.09, *Coercion; civil cause of action; evidence; defenses; attorney's fees* (eff. Oct. 1,

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<sup>1</sup> Pursuant to this Court's Order, [D.E. 125, dated March 3, 2010], Plaintiff's claim for punitive damages in Count II brought pursuant to 18 U.S.C. §2255 was stricken. Count IV - Florida RICO claim has been dismissed with prejudice.

1993). No punitive damages are specifically plead for in the allegations of Count V or in the “*Wherefore*” clause. To the extent Plaintiff asserts that she is entitled to punitive damages if she proves the elements of her §796.09 claim, Defendant also seeks to bifurcate such punitive damages claim from the compensatory damages claim.

Related to this motion, Defendant is also filing a motion in limine seeking to exclude evidence at all stages of trial of this matter regarding other females who have brought separate civil actions or asserted claims against EPSTEIN (or other purported minors who performed “massages” for EPSTEIN) and what EPSTEIN allegedly did with other females (or minors) and what, if any, were their resulting damages, as such evidence is not relevant to any of the claims or defenses in this action and, in the alternative, if somehow found relevant, introduction of such evidence would result in undue prejudice to EPSTEIN in both the liability and damages portions of the trial on all of Plaintiff’s claims.

In this motion, should the Court grant Defendant’s motion in limine regarding evidence as to other Plaintiff’s or other purported females who had encounters with EPSTEIN, Defendant seeks at the first stage of the trial to have the *determination of liability* for punitive damages tried along with the determination of liability and amount of compensatory or actual damages, if any, on Plaintiff’s claims. Only if the jury determines at the first stage that Defendant is liable for punitive damages would the second stage of trial proceed as to whether punitive damages should be awarded. At this second stage, evidence not allowable in the first stage would if appropriate be presented. The same jury would hear and decide both stages.

In the alternative, and should the Court deny Defendant’s motion in limine presenting evidence as to other females who claim they had encounters with EPSTEIN, Defendant requests

that at the first stage of the trial only Plaintiff's claims be tried with respect to liability and resulting damages, if any. At the second stage of trial, Defendant requests that both liability for and any amount for punitive damages be determined. During the first stage, no mention should be made regarding Plaintiff's claim for punitive damages and regarding Defendant's financial worth and other punitive damages evidence. In other words, the first phase of trial would deal with liability for actual damages and the amount of actual damages, if any. If the jury finds for the plaintiff in the first trial phase, the matter would proceed to the second phase. The second phase would deal with punitive damages. The same jury would hear and decide both phases.

As discussed more fully below herein, Rule 42(b) allows for the separate trial of such claims and issues. In addition, the pronouncements by the United States Supreme Court regarding limitations on punitive damages requires separate trial of Plaintiff's underlying claims and her claim for punitive damages. Punitive damages are meant to punish a defendant based on the conduct directed to and the specific harm resulting to the particular plaintiff, not some other persons or nonparties to the litigation. (See also Defendant's separately and simultaneously filed motion in limine). Accordingly, under applicable law and the facts and circumstances of this case, Defendant Epstein is entitled to a separate trial of Plaintiff's claims for punitive damages as sought herein.

**Rule 42(b) – Separate Trials/Bifurcation**

Federal Rule 42(b) in allowing for separate trial provides in relevant part that –

For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, ... . When ordering a separate trial, the court must preserve any federal right to a jury trial.

The facts and circumstances of this action are such that extreme and undue prejudice would result to EPSTEIN if separate trials or bifurcation on the punitive damages claims is not granted. The ordering of bifurcation or separate trials to avoid prejudice lies within the sound discretion of the district court. See generally, Lusk v. Pennzoil United, Inc., 56 F.R.D. 645 (N.D. Miss. 1972)(The trial court is vested with broad discretion to order a separate trial of any claim, or third party claim or of any separate issue in order to further convenience or to avoid prejudice; the question is usually addressed to the sound discretion of the court.); Henan Oil Tools, Inc. v. Engineering Enterprises, Inc., 262 F.Supp. 629, 151 U.S.P.Q. 698 (S.D. Tex. 1966)(Trial court has broad discretion in granting separate trials under this rule (Rule 42(b)).); Scheufler v. General Host Corp., 895 F.Supp. 1411, 1414 (D. Kan. 1995)(The trial court has considerable discretion in determining how a trial is to be conducted, and a decision whether to bifurcate is subject to review for abuse of discretion. Citing Angelo v. Armstrong World Indus., Inc., 11 F.3d 957, 964 (10th Cir.1993).); and Huffmaster v. U. S., 186 F.Supp. 120 (N.D. Cal. 1960)(Federal district court has power to order a separate trial of issues, sua sponte, to further convenience, or to avoid prejudice.).

**Separate trials or bifurcation is necessary to avoid undue prejudice to Defendant if claims were tried together at one phase.**

Separate trials or bifurcation is granted whereas here Defendant's financial condition has no relevance to the elements of Plaintiff's state law claims for sexual battery and intentional infliction of emotional distress, in order to avoid the prejudice that would result in trying the compensatory and punitive damages claims together. Under Florida law, sexual battery is an intentional tort, Doe v. Celebrity Cruises, Inc., 394 F.3d 891, 917 (11<sup>th</sup> Cir. 2004). In general, a battery consists of:

the intentional infliction of a harmful or offensive contact upon the person of another, *see Chorak v. Naughton*, 409 So.2d 35 (Fla. 2d DCA 1981), but [t]he defendant must have done some positive and affirmative act ... which must cause, and must be intended to cause, an unpermitted contact.

Relevant evidence to prove the battery claim would be what EPSTEIN's conduct and actions were as to this Plaintiff, and what are the compensatory or actual damages, if any, to this Plaintiff as a direct and proximate result of EPSTEIN's conduct and actions involving her. EPSTEIN will not be testifying during the trial of this matter as, under the advice of counsel, he will be invoking the protections of the Fifth Amendment against self incrimination.

Also under Florida law, the elements of claim for intentional infliction of emotional distress (hereinafter "IIED") are:

- (1) the wrongdoer's conduct was intentional or reckless, that is, he intended his behavior when he knew or should have known that emotional distress would likely result;
- (2) the conduct was outrageous, that is, as to go beyond all bounds of decency, and to be regarded as odious and utterly intolerable in a civilized community;
- (3) the conduct caused emotional distress; and
- (4) the emotional distress was severe.

*Brown v. Brown*, 800 So.2d 359, 362 -363 (Fla. 4th DCA 2001).

"[T]he plaintiff must show 'conduct 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Byrd v. BT Foods, Inc.*, 948 So.2d 921, 928 (Fla. 4th DCA 2007). "Whether alleged conduct is outrageous enough to support a claim of intentional infliction of emotional distress is a matter of law, not a question of fact." *Id.* Again, Defendant's conduct as to this Plaintiff, not some other person.

Based on the elements of the state law claims, EPSTEIN's financial worth, (along with the claims of other plaintiffs or other females) has no relevance to this Plaintiff's claims for compensatory damages. (As more fully discussed in Defendant's motion in limine being filed, evidence regarding the claims of other Plaintiffs who have brought their own civil actions or other females and evidence regarding EPSTEIN alleged conduct involving them and the resulting damages, if any, is neither relevant to this Plaintiff's compensatory damages claim, nor is relevant to her punitive damages claims as such damages are awarded based upon the defendant's harm directed to and suffered by the particular plaintiff). Evidence as to what occurred between JANE DOE and EPSTEIN, and the resulting compensatory or actual damages, if any, is relevant.

Plaintiff will attempt to show that EPSTEIN's is a wealthy individual. See Plaintiff's First Amended Complaint wherein she alleges that EPSTEIN is a billionaire owning expensive homes in Palm Beach and elsewhere. There is a distinct difference between Plaintiff putting on evidence she went to EPSTEIN's Palm Beach home as part of her case and evidence which only would be relevant to his net worth. If such evidence of EPSTEIN's financial condition were put before a jury during the trial of the claims for compensatory damages, if and upon a finding of liability for the state law claims and the federal statutory claim, the jury would be prejudiced into determining an award of compensatory or actual damages to Plaintiff in an amount significantly greater than shown by the evidence supporting such damages claims. A higher compensatory damages award would in turn result in a higher punitive damages award. The same undue prejudice would result if this Court were to allow introduction of evidence at the compensatory (and punitive) damages stage as to other females who have alleged that EPSTEIN

engaged in improper sexual conduct with them. A jury would be greatly inclined to determine upon hearing evidence regarding the claims and allegations of other females that EPSTEIN is not only liable to this particular Plaintiff, but again to award a larger than merited compensatory and punitive damages award.

Again, during the trial of this matter, EPSTEIN, as he is entitled to under Constitutional law, will be pleading the Fifth. It is not difficult to imagine a jury wanting to punish EPSTEIN for not taking the stand. Bifurcation will help to alleviate this prejudice. (During the first phase, EPSTEIN will request a jury instruction to the effect that any award of compensatory damages is required to be based on the evidence presented during trial as to the actual damages incurred by Plaintiff as a result of EPSTEIN's conduct, and not based on him pleading the 5<sup>th</sup> Amendment).

Also, bifurcation would allow a jury to focus their deliberations on the evidence pertaining to elements of this particular Plaintiff's compensatory damages claims. Recognizing that damages for IIED have a somewhat subjective element built into them, a jury is still required to award damages, if any, that fairly and reasonably reflect the emotional harm suffered by the Plaintiff. Keeping the punitive damages claims and issues separate would avoid the prejudice of having a jury award a compensatory award based upon EPSTEIN's alleged great wealth and the fact there are numerous other plaintiffs who are also asserting civil claims against EPSTEIN instead of Plaintiff's actual damages. This and the other civil cases brought against EPSTEIN are the type of case in which the jury's emotions could easily control the outcome. EPSTEIN may be subject to multiple punitive damages claims; any damages, whether compensatory or punitive, should be based on the evidence specific to a particular plaintiff, and not on what may or may not have occurred as between EPSTEIN and other Plaintiffs or nonparties. It is well

within the Court's discretion to order bifurcation in order to ensure that the trial of this matter proceeds in a fair manner and to avoid undue prejudice.

As noted, EPSTEIN is potentially subject to multiple punitive damages awards based on the multiple civil actions brought against him by individual Plaintiffs. Advising a jury of any previous punitive damages awards or the fact that multiple punitive damages awards are being sought against EPSTEIN during a trial without bifurcation would be extremely prejudicial to EPSTEIN in his attempt to argue that punitives are not merited in a particular case, and in relying on the fact that a jury would base any punitive damages amount on the facts of a particular case as opposed to the facts of other cases. See W.R. Grace & Company v. Waters, 638 So.2d 502 (Fla. 1994), and Owens-Corning Fiberglass Corp. v. Ballard, 749 So.2d 483 (Fla. 1999)(recognizing the prejudice to a defendant who is subject to multiple punitive damage awards where the case is tried without bifurcation, and holding that trial courts are required to bifurcate upon a timely motion to bifurcate the determination of the amount of punitive damage from the remaining issues at trial). Evidence of other punitive damages awards is allowed to be considered in assessing the proper amount to be awarded against a defendant. See also Estate of Canavan v. National Healthcare Corp., 889 So.2d 825 (Fla. 4<sup>th</sup> DCA 2004)("In determining the amount of punitive damages, a jury is properly instructed to consider the existence of other civil awards against the defendants for the same conduct.").

See generally, Ferrarelli v. Federated Fin. Corp. of America, 253 F.R.D. 432 (S.D. Ohio 2008)(Bifurcation of action in which plaintiff sought punitive damages under the Fair Credit Reporting Act (FCRA) into trial on liability for punitive damages and subsequent trial on valuation of such damages immediately after liability was found was appropriate to avoid

prejudice from introduction of irrelevant evidence of defendant's financial condition during liability determination.); Scheufler v. General Host Corp., 895 F.Supp. 1411 (D. Kan. 1995), motion granted in part 895 F.Supp. 1416, affirmed 126 F.3d 1261 (Landowners' nuisance action against owner of salt plant in connection with salt pollution of creek aquifer which left its water unsuitable to use for irrigation would be bifurcated into two phases – the first addressing actual damages and the second addressing punitive damages; evidence for liability and actual damages, if any, differed from evidence for punitive damages, and bifurcation would avoid prejudice.).

#### **State and Federal Punitive Damages Law Supports Bifurcation**

In this action, Plaintiff asserts diversity jurisdiction, pursuant to 28 U.S.C. §1332(a), alleging that Plaintiff is a resident of Palm Beach County, Florida, and alleging EPSTEIN is a resident of the State of New York. (1<sup>st</sup> Am Comp. D.E. 38). As noted above, Plaintiff is seeking punitive damages based on her state law claims for battery and IIED. In general, when a federal court exercises its diversity jurisdiction, the court is bound to apply state substantive law (to state law claims) and federal procedural law. Ward v. Estaleiro Itajai, S/A, 541 F.Supp.2d 1344, 1346 (S.D. Fla. 2008), citing Walker v. Armco Steel Corp., 446 U.S. 740, 745 (1980). Thus, the liability for and amount of compensatory damages, if any, based on the claims of battery and IIED, would be evaluated under Florida substantive law. See Myers v. Central Fla. Inv., Inc., 592 F.3d 1201 (11<sup>th</sup> Cir. 2010), which gives an excellent discussion of the punitive damages analysis under Florida and U.S. Constitutional law as applied by this Circuit.

Significantly, the propriety of a punitive damages award (if any), including whether the amount awarded is excessive, is not only evaluated pursuant to state substantive law, but also in light of the constitutional requirements of the due process clause as pronounced by the United

States Supreme Court in B.M.W. of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589 (1996), and its progeny. State Farm Mutual Auto. Ins. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513 (2003); Myers, supra, at 1218-23.

As discussed above, trial of the Plaintiff's punitive damages claim along with her compensatory claims would surely result in undue prejudice to Defendant. It is not difficult to imagine that a jury upon hearing of EPSTEIN's extreme wealth and property holdings, and potentially hearing evidence regarding the claims of other females (again, Defendant is filing a motion in limine to exclude such evidence at all phases of the trial of this matter), would award not only a higher compensatory damage amount, which in turn adds to and results in an excessive punitive damages amount based on Florida and federal constitutional law. The Florida and federal protections against such excessive awards would be rendered meaningless for EPSTEIN.

Florida law provides in relevant part:

(2) A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence. As used in this section, the term:

(a) "Intentional misconduct" means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage.

§768.72, Fla. Stat. (eff. Oct. 1, 1999). (Emphasis added). The plaintiff must establish at trial, by clear and convincing evidence, its entitlement to an award of punitive damages. §768.725, Fla. Stat. (eff. Oct. 1, 1999).<sup>2</sup>

§768.73, Fla. Stat. places a statutory cap on the amount of punitive damages awarded and empowers the court to remit the award if it determines the amount is unreasonable. The statute provides in relevant part that –

(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.

(b) ...

(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.

(d) This subsection is not intended to prohibit an appropriate court from exercising its jurisdiction under s. 768.74 in determining the reasonableness of an award of punitive damages that is less than three times the amount of compensatory damages.

...

§768.73, Fla.Stat. (eff. Oct. 1, 1999), emphasis added. See also §768.735, Fla. Stat. (eff. May 15, 2001, which applies to “any civil action based upon child abuse” and “involving the award of punitive damages,” which provides “the judgment for the total amount of punitive damages awarded to a claimant may not exceed three times the amount of compensatory damages awarded to each person entitled thereto by the trier of fact.” “Child abuse” is defined in

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<sup>2</sup> In her First Amended Complaint, Plaintiff alleges that EPSTEIN’s “sexual misconduct against her” began “in approximately February 2003 and continuing until approximately June 2005.” (¶18 D.E. 38).

§827.03(1), Fla. Stat. Plaintiff in this action makes no direct reference to the child abuse statute (but has made that argument throughout this case), but the point is that Florida law also imposes a statutory cap on punitive damages of three times the amount of compensatory damages in such civil actions.

Thus, Florida statutory law places a cap of the greater of three (3) times the amount of compensatory damages awarded to a particular plaintiff or \$500,000, unless the statutory exception to a greater award is met. Regarding the excessiveness of a punitive damages award, under Florida law the court must review the amount "to make certain that the manifest weight of the evidence does not render the amount of punitive damages assessed out of all reasonable proportion to the malice, outrage, or wantonness of the tortuous conduct. Engle v. Liggett Group, Inc., 945 So.2d 1246, 1263 (Fla. 2006).

The purpose of compensatory damages is "to restore the injured party to the position it would have been [in] had the wrong not been committed," Engle v. Liggett Group, Inc., supra, at 1279, citing Laney v. Am. Equity Inv. Life Ins. Co., 243 F.Supp.2d 1347, 1354 (M.D.Fla.2003). The purpose of punitive damages "is not to further compensate the plaintiff, but to punish the defendant for its wrongful conduct and to deter similar misconduct by it and other actors in the future." Id. at 1280, citing Owens-Corning Fiberglas Corp. v. Ballard, 749 So.2d 483, 486 (Fla.1999).

Supreme Court pronouncements regarding the imposition of punitive damages make it clear that an award of punitive damages under state law is subject to an evaluation of excessiveness under the United States Constitutions due process principles. B.M.W. of No. Amer., Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589 (1996); Phillip Morris USA v. Williams, 127 S.Ct. 1057

(2007); State Farm v. Campbell, 123 S.Ct. 1513 (2003); Lawnwood Medical Center, Inc. v. Sadow, 2010 WL 1066833, 35 Fla.L.Weekly D655 (Fla. 4<sup>th</sup> DCA 2010). See also Engle v. Liggett Group, Inc., *supra*, (holding, consistent with United States Supreme Court decisions that recognize due process limits on punitive damages, that a review of the punitive damages award includes an evaluation of the punitive and compensatory amounts awarded to ensure a reasonable relationship between the two).

While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. BMW of NA v. Gore, 116 S.Ct. 1589, 1592 (1996), citing TXO Production Corp. v. Alliance Resources Corp., 113 S.Ct. 2711, 2718 (1993). When an award can fairly be categorized as “grossly excessive” in relation to the state interest(s) it is meant to serve, only then does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment. *Id.* For that reason, the federal excessiveness inquiry begins with an identification of the state interests that a punitive award is designed to serve. If the Court determines that the award is grossly excessive when compared to the state’s (Florida’s) legitimate interests in punishing the defendant and deterring him from future misconduct, then the constitutional due process analysis begins. See Myers v. Central Fla. Inv., Inc., 592 F.3d 1201 (11<sup>th</sup> Cir. 2010).

In Gore, supra, the U.S. Supreme Court instructs all courts reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive

damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. The Supreme Court reiterated the importance of these three guideposts in Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 121 S.Ct. 1678 (2001), and mandated appellate courts to conduct *de novo* review of a trial court's application of them to the jury's award. 532 U.S. 424, 121 S.Ct. 1678.

“[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.” Gore, 517 U.S., at 575, 116 S.Ct. 1589. Courts are instructed to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. Id., at 576-577, 116 S.Ct. 1589. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. Id., at 575, 116 S.Ct. 1589.

Significantly, **“a defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive**

**damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis.”** The United States Supreme Court held “that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance,” Gore, supra, at 577, 116 S.Ct. 1589, in the context of civil actions, courts must ensure the conduct in question replicates the prior transgressions.” TXO, 509 U.S., at 462, n. 28, 113 S.Ct. 2711 (noting that courts should look to “ ‘the existence and frequency of similar past conduct’ ” (quoting Haslip, 499 U.S., at 21-22, 111 S.Ct. 1032)). (Bold emphasis added).

As to the second Gore guidepost, the Supreme Court has been “reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. 517 U.S., at 582, 116 S.Ct. 1589. However, the Supreme Court noted that “in practice, **few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.** In Haslip, in upholding a punitive damages award, the Court concluded that an award of more than four times the amount of compensatory damages might be “close to the line of constitutional impropriety.” 499 U.S., at 23-24, 111 S.Ct. 1032. The Court cited the 4-to-1 ratio again in Gore. 517 U.S., at 581, 116 S.Ct. 1589. Referencing a “long legislative history, dating back over 700 years and going forward,” the Court noted that “**single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, *id.*, at 582, 116 S.Ct. 1589.** “The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct **and the harm to the plaintiff.**” Id. Courts “must ensure that the measure of punishment is **both**

reasonable and proportionate to the amount of **harm to the plaintiff** and to the general damages recovered.” (Emphasis added). Consistent with the constitutional guidepost, §768.73, Fla. Stat., quoted above, places a single digit multiplier of 3 times the amount of compensatory damages or \$500,000 for punitive damages.

The third guidepost in *Gore*, supra, is “the disparity between the punitive damages award and the “civil penalties authorized or imposed in comparable cases.” *Id.*, at 575, 116 S.Ct. 1589.” “Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.” *Gore*, supra; *Campbell*, supra.

Confirming that the due process protections against excessive punitive awards requires a jury to evaluate a defendant’s conduct directed to and the specific harm suffered by a the particular Plaintiff, as opposed to conduct direct to and the harm suffered by “strangers to the litigation,” the US Supreme Court, in *Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007), which dealt with a large state-court punitive damages award, addressed the issue of - “whether the Constitution’s Due Process Clause permits a jury to base that award in part upon its desire to *punish* the defendant for harming persons who are not before the court ( *e.g.*, victims whom the parties do not represent).” The Court held that that “such an award would amount to a taking of “property” from the defendant without due process.” *Id.*

This due process requirement of requiring that a jury evaluate the defendant’s conduct and the harm to the specific plaintiff before them is extremely material to the facts and circumstances

of this action. In other words, a jury in this action brought by this Plaintiff cannot punish EPSTEIN for conduct and the resulting harm, if any, directed to and involving plaintiffs in other actions brought against EPSTEIN or other females who have not brought actions. In analyzing this procedural safeguard, the Philip Morris Court, *supra* at 1063-64, stated:

In our view, the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation. For one thing, the Due Process Clause prohibits a State from punishing an individual without first providing that individual with "an opportunity to present every available defense." Lindsey v. Normet, 405 U.S. 56, 66, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972) (internal quotation marks omitted). Yet a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages . . . .

For another, to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty and lack of notice—will be magnified. State Farm, 538 U.S., at 416, 418, 123 S.Ct. 1513; BMW, 517 U.S., at 574, 116 S.Ct. 1589.

Finally, we can find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others. We have said that it may be appropriate to consider the reasonableness of a punitive damages award in light of the *potential* harm the defendant's conduct could have caused. But we have made clear that the potential harm at issue was harm potentially caused *the plaintiff*. See State Farm, *supra*, at 424, 123 S.Ct. 1513 ("[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, *to the plaintiff* and the punitive damages award" (emphasis added)). See also TXO, 509 U.S., at 460-462, 113 S.Ct. 2711 (plurality opinion) (using same kind of comparison as basis for finding a punitive award not unconstitutionally excessive). We did use the term "error-free" (in BMW) to describe a lower court punitive damages calculation that likely included harm to others in the equation. 517 U.S., at 568, n. 11, 116 S.Ct. 1589. But context makes clear that the term "error-free" in the BMW footnote referred to errors relevant to the case at hand. Although elsewhere in BMW we noted that there was no suggestion that the plaintiff "or any other BMW

purchaser was threatened with any additional potential harm” by the defendant's conduct, we did not purport to decide the question of harm to others. *Id.*, at 582, 116 S.Ct. 1589. Rather, the opinion appears to have left the question open.

Respondent argues that she is free to show harm to other victims because it is relevant to a different part of the punitive damages constitutional equation, namely, reprehensibility. That is to say, harm to others shows more reprehensible conduct. Philip Morris, in turn, does not deny that a plaintiff may show harm to others in order to demonstrate reprehensibility. Nor do we. Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.

Given the risks of unfairness that we have mentioned, it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one. And given the risks of arbitrariness, the concern for adequate notice, and the risk that punitive damages awards can, in practice, impose one State's (or one jury's) policies ( *e.g.*, banning cigarettes) upon other States—all of which accompany awards that, today, may be many times the size of such awards in the 18th and 19th centuries, see *id.*, at 594-595, 116 S.Ct. 1589 (BREYER, J., concurring)—it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance. **We therefore conclude that the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers.**

(Bold emphasis added).

In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered. See cases cited above herein. Thus, the amount of compensatory damages must be determined in advance of a determination of the amount of punitive damages awardable, if any, so that the relationship between the two may be reviewed for reasonableness under both Florida law and the due process protections as pronounced by the United States Supreme

Court. These state and Constitutional protections against arbitrarily excessive awards all support bifurcation under the facts and circumstances of this case – an individual Defendant, alleged to have committed personal, intentional torts against an individual Plaintiff, facing multiple civil actions brought by other individual plaintiffs, who also allege claims personal to them, and who all seek punitive damages.

Consistent with the Supreme Court’s pronouncements regarding due process, the Eleventh Circuit Pattern Jury Instruction – Civil (Thomson West 2005), 2.1, *Punitive Damages In General*, along with the *Annotation and Comments*, reads in part –

When assessing punitive damages, you must be mindful that punitive damages are meant to punish the Defendant for the specific conduct that harmed the Plaintiff in the case and only for that conduct. For example, you cannot assess punitive damages for the Defendant being a distasteful individual or business. Punitive damages are meant to punish the Defendant for this conduct only and not for the conduct that occurred at another time. Your only task is to punish the Defendant for the actions [he] took in this particular case.

#### **Annotations And Comments**

A major limitation on recovery of punitive damages is the Supreme Court’s recent announcement that “few awards exceeding a single digit ratio between punitive damages and compensatory damages ... will satisfy due process.” State Farm Mutual Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). Also in that case, the court further explained the guideposts set out in BMW of N.Am., Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) for courts reviewing punitive damages awards. Those three guideposts are: (1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *See id.* At 575.

Recent Florida Court opinions confirm its adherence to the United State Supreme Court pronouncements in awarding punitive damages under state law. See Florida case law discussed and cited herein. It is the harm suffered by the particular Plaintiff that is relevant to the amount

of punitive damages awarded in a particular case. See Philip Morris USA v. Williams, 549 U.S. 346 (2007). Punitive damages award based in part on jury's desire to punish defendant for harming nonparties amounts to a taking of property from defendant without due process. U.S. Const. 14<sup>th</sup> Am. Punitive damages, however, may properly be imposed to further legitimate state interests in punishing unlawful conduct and deterring its repetition. The harms alleged herein are personal harms to individual plaintiffs, not the type of public harm as, for example, in the tobacco cases. The jury may not go further and use punitive damages verdict to punish EPSTEIN directly on account of harms that he is alleged to have inflicted on nonparties. Even treatise material discussing the Supreme Court's Campbell decision confirms the application of the Constitutional Due Process guidelines to state law claims. 17 Fla.Jur.2d Damages §124. A punitive damage award must be limited to unlawful conduct that has a nexus to the specific harm suffered by the plaintiff, and based upon the facts and circumstances of defendant's conduct and the harm to the plaintiff. The punitive damages award must be proportionate to the amount of harm suffered by the particular plaintiff. Id.

#### **Conclusion**

Under applicable law, and the facts and circumstances of this case, bifurcation of Plaintiff's compensatory damages claims and her punitive damages claims are required. A separate trial of these claims is the only way to protect the Defendant from undue prejudice if the claims were to be tried together. As noted herein, rulings regarding the admissibility of evidence as to other civil actions brought by other plaintiffs or evidence regarding conduct involving other alleged minors impacts whether a complete bifurcation of the compensatory and punitive damages claims is required or whether bifurcation as to the amount of damages is required. If

the Court grants Defendant's motion in limine regarding evidence as to other Plaintiff's or other purported minors, Defendant seeks at the first stage of the trial to have the *determination of liability* for punitive damages tried along with the determination of liability and amount of compensatory or actual damages, if any, on Plaintiff's state law claims and federal statutory claim. At the second stage of the trial, should the jury determine at the first stage that Defendant is liable for punitive damages, the trial as to the proper amount of punitive damages would take place. At this second stage, evidence allowable under applicable law as to the proper amount to be awarded, including EPSTEIN's financial worth, would then come in. The same jury would hear and decide both phases.

If the Court denies Defendant's motion in limine, Defendant requests a complete bifurcation of the compensatory damages claims from the punitive damages claims. At the first stage of the trial only Plaintiff's state law claims and her claim pursuant to 18 U.S.C. §2255 would be tried with respect to liability and resulting damages, if any. At the second stage of trial, both liability for and the appropriate amount, if any, for punitive damages would be determined. During the first stage, no mention should be made regarding Plaintiff's claim for punitive damages and regarding Defendant's financial worth and other punitive damages evidence. The same jury would hear and decide both phases.

WHEREFORE, Defendant respectfully requests that this Court grant his motion for bifurcation.

**Local Rule 7.1 Statement**

/s/ Robert D. Critton, Jr.   
Robert D. Critton, Attorney for

Defendant Epstein

**Certificate of Service**

I HEREBY CERTIFY that a true copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the following service list in the manner specified via transmission of Notices of Electronic Filing generated by CM/ECF on this 25 day of June, 2010:

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