

*Final lawyer info of other side*  
*Bring up attorney board - (former head)*

### Story Hooks and Anecdotes on Tort Reform

#### Lawsuits equal big business

- The costs of litigation and liability claims exploded from ~~0.6% of GDP in 1950 to 2% of GDP by 2001 - \$200 billion a year~~. The annual toll could hit \$300 billion by 2005. Lawyers typically pocket a third of the loot.

*restoring* → *① Tort - mult place*  
*② avoid what you want - (State Rules) (works Corp)*

- Houston Lawyer George Fleming has 8,500 lawsuits pending against Redux (fen-phen) maker Wyeth. They are valued at \$3.4 billion. Wyeth has already spent \$12 billion settling 50,000 lawsuits. (Forbes magazine)

*LLR* *③ need to clean own horse - hand deal*

#### South Carolina Medical Malpractice Awards:

- Beaufort County, 2000 – Post operational hernia complications. Verdict: \$14 million
- Oconee County, 2001 – Doctor allowed mother to transport ill baby to hospital. En route, baby suffered arrest and received brain damage. Verdict: \$17.3 million
- Williamsburg County, 2003 -- Plaintiff was visitor at hospital. Tripped on “uneven pavement” in parking lot. Sustained twisted ankle and knee contusion. Verdict: \$1.9 million

*④ Mults: 9445 - CARA - 1996*  
*Bow - (14 am)*

#### Insurer pulls out

- In Dec. 2001, St. Paul Cos., the nation's second-largest malpractice insurer, announced it was pulling out of the malpractice business after losing nearly \$1 billion in 2001. With the typical obstetrician likely to face 2.5 suits during a career and with jury awards in medical malpractice cases averaging \$3.5 million, doctors and insurers are running scared.

*⑤ Need to tie together - Court rules council - (PATENTS)*  
*↓*  
*+ research*  
*uncertain*

#### Non-medical -- The tort system takes down a 149-year-old ladder manufacturer.

- Since its founding in 1855 the family-owned John S. Tilley Ladders Co. has churned out ladders in Watervliet, N.Y. The nation's oldest ladder manufacturer filed for Chapter 11 bankruptcy protection last April, sold off most of its assets at a public auction last December and will soon close on its factory complex--one of the buildings was built by the Tilley family before the Civil War.
- Tilley was bearing the burden for the national jump in jury awards in all product-liability cases--from an average of \$1.7 million in 1994 to \$6.2 million in 2002.

#### Non-medical – Big money from junk faxes

- The website junkfax.org is an excellent example of the lawsuit industry created by trial lawyers. Essentially, anyone who receives a junk fax can sue in small claims court for \$500 under the provisions of the Telephone Consumer Protections Act - companies are being sued for each junk fax.

*Scattered*  
*FACTS -*  
*Argued?*

- The website includes a page entitled "How to sue people (general legal tips)" and the first line reads "How to get \$2,500 or more per junk fax you receive." Steve Kirsch, who runs this website, is suing fax.com for \$2.2 trillion.
- There is currently a case in Georgia where Carnett's car wash may face \$110 million in junk fax penalties. Attorney Stephen Zager was quoted in the National Law Review calling this legal niche "Powerball for the clever."

### **Over-Regulation a by-product of Tort System**

- From David Bernstein's *Procedural Tort Reform: Lessons from Other Nations*
- "The proliferation of such unfounded lawsuits has created an understandable fear of the tort system among businesspeople. This fear, in turn, affects their political priorities. Instead of concentrating on support of deregulation at the federal level, business lobbyists are far more concerned about reining in the tort system. They (correctly) see modern tort law as a particularly inefficient, irrational, and onerous form of state safety regulation. This leads many industry associations to favor giving federal agencies more regulatory authority, as long as it comes at the expense of the tort system."
- "Under the leadership of Mother Teresa, the nuns of the Missionaries of Charity acquired two fire-gutted buildings on 148th street and set aside \$500,000 to turn them into a homeless shelter. After forging their way through the bureaucracy and beginning construction, the nuns, who avoid the routine use of modern conveniences such as dishwashers, were informed that they must include an elevator to comply with city code. They abandoned the project due to the \$100,000 price tag of the unnecessary elevator saying, "The Sisters felt they could use the money much more usefully for soup and sandwiches." *The Death of Common Sense*

### **Tort System -- Other Countries**

- In England, Canada, and Australia judges alone handle personal injury cases – no juries. Australia is also loser pays.
- New Zealand replaced its tort system with a no-fault accident-compensation system, in which all taxpayers pay into an accident compensation fund (David Bernstein, who wrote about this for Cato, maintains this is probably not feasible in US.).

## Tort Reform -- Charleston Medical Society

### 1. What the House Passed Last Year

	House passed last year (H3744 & H4464)
Venue	Individual: where defendant resides or where cause of action arose. Corporations: either the principal place of business or where a substantial act, omission or event occurred.
Joint and Several Liability	Abolish joint and several liability in cases involving personal injury, property damage, or wrongful death.  Exception in negligence cases when defendant is found to be insolvent, in which liability would be distributed proportionately among remaining defendants
Non-Economic Damage	\$2 million  Pain and suffering -- additional \$300,000 cap with exceptions for disfigurement, permanent disfigurement, paralysis, or loss of a limb or organ.
Punitive Damages	9x actual damages

### -- What the Medical Community Wants vs. the House

#CASES HAMPTON?  
9

- **Venue** – More of a concern for non-resident corps; not a primary area of focus for the medical community, but they're supportive
- **Joint and Several – Abolish.**
  - The House provision contained an exemption if parties were found to be insolvent
- **Non-economic damages** – want \$250,000 cap, but could live with \$300,000 and no exceptions. Anything above \$300k would not impact rising malpractice insurance rates.
  - The House proposal contained an ineffective cap on total non-economic damages. It was made even worse by breaking pain and suffering out into another category and including exceptions for that cap.
- **Punitive damages** -- \$250,000 cap, but could live with a low single-digit multiplier (they have proposed 3x rather than the House 9x)

**Some Other Measures the Medical Community is Supportive of:**

- **Patient Compensation Fund** – doctors pay into system, and in some cases some portion of punitive awards go into this fund (in California, the state gets 75% of punitives). Any awards above and beyond a set amount would be paid out of this fund. Several states have this system in place.
  - **Examples:** Indiana also has a state run insurance fund that pays excess claims over \$250,000. The amounts that physicians pay into the fund are in addition to their regular medical liability coverage. The state is one of about a half-dozen states with a patient compensation fund. Indiana's patient compensation fund is financially sound.
  - In Louisiana, a health care provider covered by the state's Patient Compensation Fund is only liable for up to \$100,000. The fund will cover the excess awarded up to the cap (\$500,000 total in medical liability cases).
- **Arbitration/Mediation Panel** – screening panel to decide whether case has merit or is frivolous and whether it should be settled or go to trial. Composition of board and exact powers/duties could be negotiated
  - **Example:** In Indiana, there is a mandatory pre-trial screening by a panel of physicians, whose opinion is admissible at trial. Any unanimous determination that the name of the physician be forwarded to the state professional regulatory board is not admissible. The state fund can choose to defend the allegation of excess damages at a separate trial, and attorney fees are capped.
- **Expert Witness Affidavit** – One expert witness must file an affidavit concurring with the plaintiff's complaint in order to file suit

**2. What we're proposing**

We stood back and let the House and Senate work on this last year. This year, we're going to be pushing for the following –

**1. Abolish Venue Shopping**

**2. Establish "Fair Share Liability" and Eliminate Joint and Several Liability**

-- each defendant is only liable for damages caused

**3. Non-economic damage caps**

-- \$300k for medical mal with no exceptions

-- \$1 million in all other cases

**4. Punitive damages caps**

Why?

-- 3x actual damages

### 3. What other States Have Done:

#### States with \$250,000 Caps –

- **California** – no exceptions, no adjustments
- **Idaho** – adjusted each year based on wage increases
- **Texas** – cap applies to physicians only. Higher cap of \$250k-\$500k for healthcare institutions. *Texas cap was actually implemented through a constitutional amendment*
- **West Virginia** -- \$250,000 cap. Exception for cases involving wrongful death or permanent disability, in which case cap is \$500,000

D LEG? X Rep. HHS

#### Other States that Cap Total Damages –

- **Colorado** -- \$300k cap on non-economic, \$1 million cap on total damages
- **Indiana** -- \$1.25 million total cap. Physicians liable for no more than \$250k – the balance is paid from a special state fund financed by doctor surcharges
- **Louisiana** -- \$500,000 cap on total damages. Doctors only liable for first \$100k; balance is paid by the state's Patient Compensation Fund if the doctor has opted into that plan
- **Nebraska** -- \$1.75 million cap on total damages. Doctors who pay a surcharge to the state's coverage fund are only liable for the first \$200,000
- **New Mexico** -- \$600k cap on total damages, excluding punitive and future care. Doctors are only liable for the \$200,000 – any excess is paid by the state's patient compensation fund
- **Virginia** -- \$1.5 million cap on total damages. Cap will increase by \$50,000 annually, and in 2007 and 2008 will increase by \$75,000
- **Mississippi** -- \$500,000 in medical mal. Caps for punitive damages are based on net worth of defendant and range up to \$20 million (probably shouldn't highlight this)

D/D/D ✓

AS/DK

House/Senate

UNI-NP

SD HD

H/S R

Wesleyland?

S H/S D/D

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- **Louisiana** -- \$500,000 cap on total damages. Doctors only liable for first \$100k; balance is paid by the state's Patient Compensation Fund if the doctor has opted into that plan [**Dem. Gov., House and Senate**]
- **Nebraska** -- \$1.75 million cap on total damages. Doctors who pay a surcharge to the state's coverage fund are only liable for the first \$200,000 [**Rep. Gov., Non-partisan unicameral assembly**]
- **New Mexico** -- \$600k cap on total damages, excluding punitive and future care. Doctors are only liable for the \$200,000 – any excess is paid by the state's patient compensation fund [**Dem. Gov., House and Senate**]
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#### 4. We Need Your Help on Senate Rules:

- **Anecdote on the Senate and Tort Reform:** During the attempt to break the filibuster of Harry Gregory's nomination to the Workers Comp Commission, 12 Senators (almost 25%) had to abstain from voting because they represent clients before that body.
- **Filibuster** – Not a real filibuster. Can “filibuster” for several consecutive days for 3 hours at a time; no physical limitation on standing there
- **Request to be Present** – A senator can obstruct progress on a bill even if he's standing in the anteroom on a cell phone
- **Inability to take Legislation Out of Order** – Combined with these other impediments means little ability to get work done
- **Germaneness** – Loose Senate rules on germaneness allow unrelated items to be tacked on

② better and more accessible healthcare -  
(Dra) - (Hippocratic Oath)

→ practice for the patient / not courtroom

↑ In SC - obamacare premiums ↑ 378% gain (1999)  
Oceana Co - # of family practice divs delr bided (11-2)  
Since HB 4 Texas / premiums ↓ 12% , 13 new cov'ers

③ teamwork - SC Med Ass, Dr. Johnny Evans

(Frome  
SP4)

SC Hospital Ass

SC for Tort Reform -

Green / speaker pro tem -

Dr. Smith

Purpose - <sup>point</sup> highlight second half of tort reform package. <sup>could not</sup> ~~business~~ <sup>business</sup> ~~insurance~~ <sup>insurance</sup>  
~~business~~ <sup>business</sup> ~~insurance~~ <sup>insurance</sup> last month

↳ businesses more competitive

< Health care more affordable / accessible >

cap non-econ drugs @ 350,000 → <sup>multiple</sup> ~~provision~~ <sup>provision</sup> 1.05

(i) about big competitive - (Mirror GA)

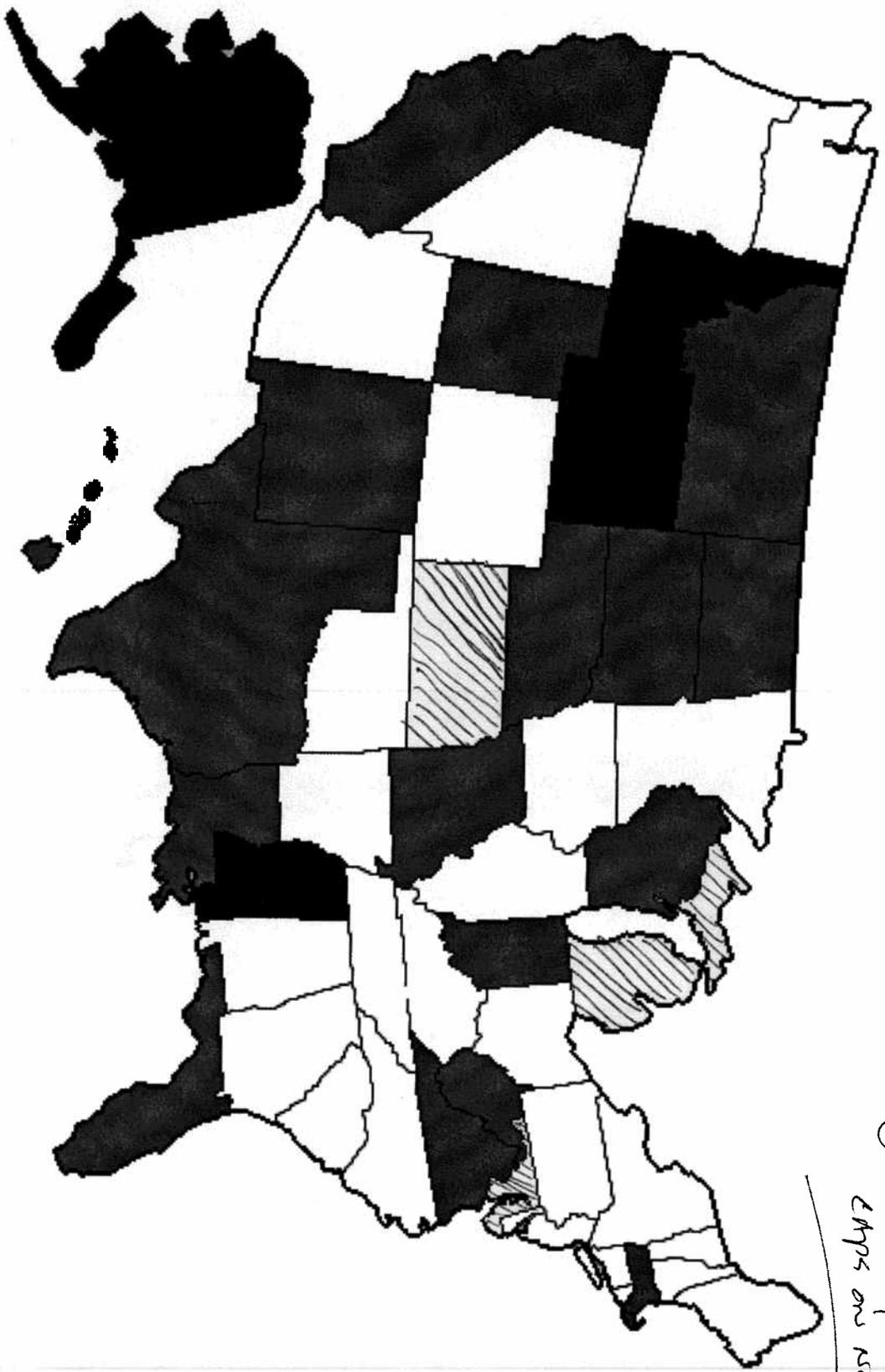
MISS, TX

( 290 other states non-economic )

# Tort Reform – State by State

① Since 2003 - 20 states -  
 passed some sort  
 of Tort Reform provision.

② Since last yr. 6 states -  
 have now recon.



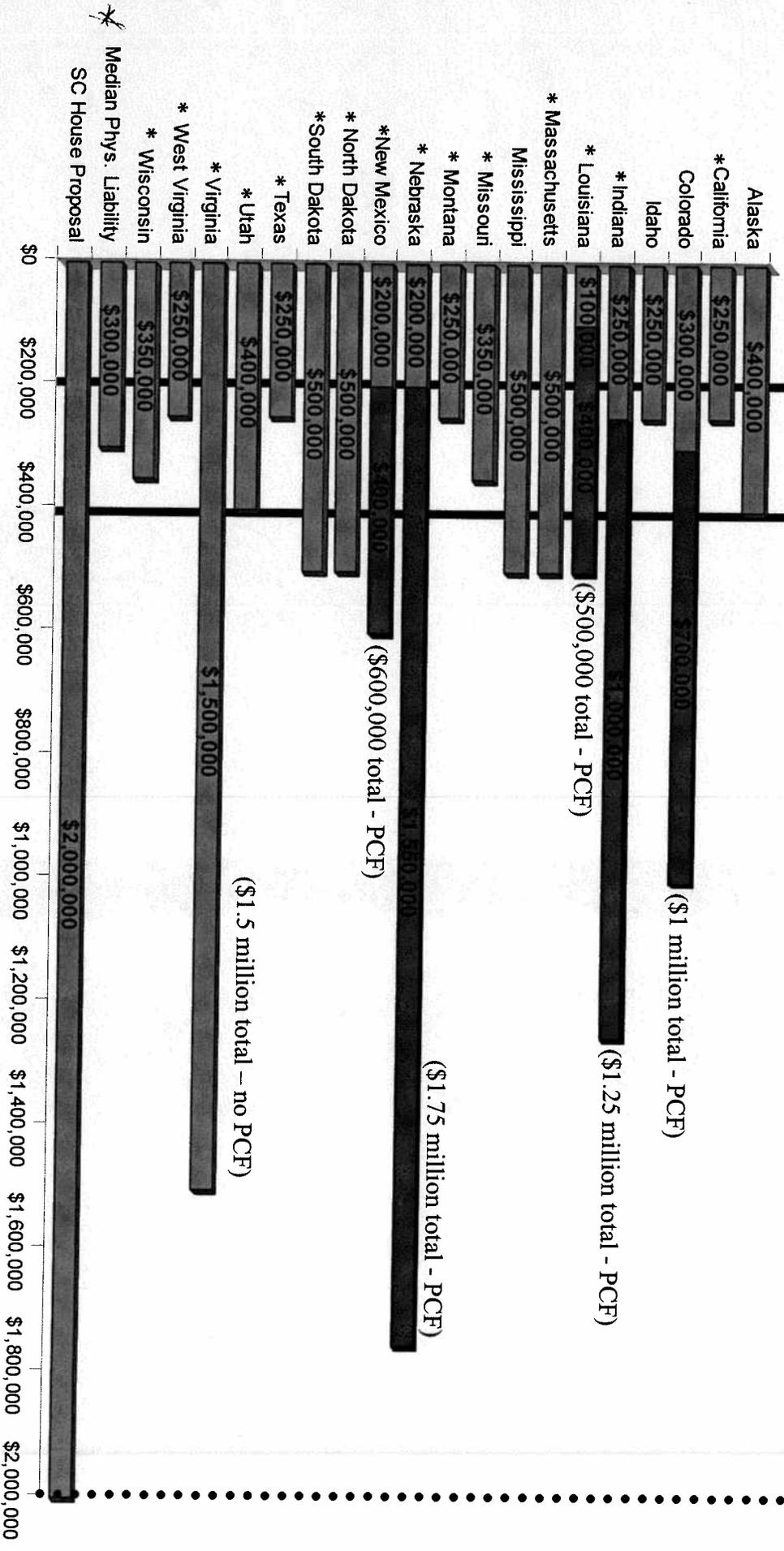
Medical Only
  Non - Medical Only
  Both Medical and Non-Medical

# Medical Tort Reform – A National Perspective

*Non-Econ Damages*

SC House Proposal  
\$2 million

\$200,000 to \$400,000



\* States whose tort provision applies to medical cases only

Cap on Physicians' Liability for Non-economic damages  
Cap on Total Liability

## BMW Car scratch story

## In 1990, a doctor in Alabama (Dr. Ira Gore Jr.) purchased a black BMW sports sedan for around \$40,000 from a dealer in Birmingham.

## After driving the car for approximately nine months, and without noticing any flaws in its appearance, Dr. Gore took the car to an independent detailer, to make it look "snazzier than it normally would appear." The proprietor of the detailing shop, found evidence the car had been repainted.

## Convinced that he had been cheated, Dr. Gore brought suit against BMW of North America. Dr. Gore alleged that the failure to disclose that the car had been repainted constituted suppression of a material fact and therefore fraud under Alabama law. Gore asked for \$500,000 in compensatory and punitive damages, plus costs.

## During the trial, BMW recognized they adopted a policy in 1983 of not notifying the dealer, and therefore the customer, if the repaired damages to any vehicle are less than 3 percent of the vehicle's value.

## A jury cited with the doctor, awarding \$4,000 in compensatory and \$4 million in punitive damages.

## BMW argued to the trial judge to set aside the punitive damages, saying the \$4 million was grossly excessive, and therefore in violation of their 14<sup>th</sup> Amendment right to due process. The trial judge refused BMW's request.

## The case was appealed to the Alabama Supreme Court, which upheld the trial judge's decision, but lowered the puni's to \$2 million.

## In 1996, by a 5-to-4 vote, the U.S. Supreme Court struck down the punitive damages, saying the amount was grossly excessive.

**Medical Ethics Story: was relayed to MS by another doctor in SC**

- LLR filed a complaint against an SC doctor who had received power of attorney from one of his patients. Upon her death, he stood to inherit a farm worth millions
- The complaint went before a three-doctor panel of the 36 member Medical Disciplinary Commission.
- LLR alleged that it was unethical for the doctor to receive something of great value from the patient, and further that there was a conflict of interest by him having her power of attorney
- LLR asked that the doctor merely receive a reprimand – nothing severe such as having his license revoked or suspended
- The Panel dismissed LLR's complaint that receiving this power of attorney and ultimately this farm was unethical
- Their reasoning was that because there was no evidence of bad care or maltreatment on the doctor's part, he had not done anything wrong.