

SENATE BILL No. 158

By Committee on Utilities

2-9

1 AN ACT concerning civil actions; relating to damages; enacting the full
2 and fair noneconomic damages act; amending K.S.A. 60-3702 and
3 repealing the existing section.

4
5 *Be it enacted by the Legislature of the State of Kansas:*

6 New Section 1. (a) This section may be cited as the full and fair
7 noneconomic damages act.

8 (b) The legislature of the state of Kansas hereby finds and declares
9 that:

10 (1) The purpose of this act is to ensure that individuals receive full
11 and fair compensatory damages, including damages for pain and
12 suffering.

13 (2) Pain and suffering awards are intended to provide an injured
14 person with compensation for the pain and suffering resulting from the
15 injury at issue in a particular lawsuit.

16 (3) Punitive damages are intended to punish a defendant for
17 wrongful conduct. Punitive damages are subject to certain statutory
18 requirements, must be based on the appropriate evidence, and must be in
19 accordance with the constitutional jurisprudence of the supreme court of
20 the United States.

21 (4) Pain and suffering awards are distinct from punitive damages.
22 Pain and suffering awards are intended to compensate a person for their
23 loss. They are not intended to punish a defendant for wrongful conduct.

24 (5) For that reason, evidence that juries may consider in awarding
25 pain and suffering damages is different from evidence courts may
26 consider for punitive damages. For example, the amount of a plaintiff's
27 pain and suffering is not relevant to a decision on wrongdoing, and the
28 degree of the defendant's wrongdoing is not relevant to the amount of
29 pain and suffering.

30 (6) The size of noneconomic damage awards, which includes pain
31 and suffering, has increased dramatically in recent years. While pain and
32 suffering awards are inherently subjective, it is believed that this inflation
33 of noneconomic damages is partially due to the improper consideration of
34 evidence of wrongdoing in assessing pain and suffering damages.

35 (7) Inflated damage awards create an improper resolution of civil
36 justice claims. The increased and improper costs of litigation and

1 resulting rise in insurance premiums is passed on to the general public
2 through higher prices for products and services.

3 (8) Therefore, courts should provide juries with clear instructions
4 about the purpose of pain and suffering damages. Courts should instruct
5 juries that evidence of misconduct is not to be considered in deciding
6 compensation for noneconomic damages. Rather, it is to be considered
7 solely for the purpose of deciding punitive damage awards.

8 (9) In cases in which punitive damages are requested, defendants
9 should have the right to request bifurcation of a trial to ensure that
10 evidence of misconduct is not inappropriately considered by the jury in
11 its determination of liability and compensatory damages.

12 (10) As an additional protection, trial and appellate courts should
13 rigorously review pain and suffering awards to ensure that they properly
14 serve compensatory purposes and are not excessive.

15 (c) As used in this section:

16 (1) "Noneconomic damages" which are recoverable in tort actions
17 include damages awarded for the purpose of compensating a claimant for
18 physical pain and suffering, mental or emotional pain or anguish, loss of
19 consortium, disfigurement, physical impairment, loss of companionship
20 and society, inconvenience, loss of enjoyment of life and all other
21 nonpecuniary losses other than exemplary or punitive damages.

22 (2) Pain and suffering is one type of noneconomic damage and
23 means the actual physical pain and suffering that is the proximate result
24 of a physical injury sustained by a person.

25 (3) "Exemplary damages" means any damages awarded as a penalty or
26 by way of punishment but not for compensatory purposes. Exemplary
27 damages are neither economic nor noneconomic damages. "Exemplary
28 damages" includes punitive damages.

29 (d) In determining noneconomic damages, the fact finder may not
30 consider:

31 (1) Evidence of a defendant's alleged wrongdoing, misconduct, or
32 guilt;

33 (2) evidence of the defendant's wealth or financial resources; or

34 (3) any other evidence that is offered for the purpose of punishing
35 the defendant, rather than offered for a compensatory purpose.

36 (e) (1) All actions tried before a jury involving punitive damages
37 shall, if requested by any defendant, be conducted in a bifurcated trial
38 before the same jury.

39 (2) In the first stage of a bifurcated trial, the jury shall determine
40 liability for compensatory damages and the amount of compensatory
41 damages or nominal damages. Evidence relevant only to the issues of
42 punitive damages shall not be admissible in this stage.

43 (3) Punitive damages may be awarded only if compensatory

1 damages have been awarded in the first stage of the trial. An award of
2 nominal damages cannot support an award of punitive damages.

3 (4) In the second stage of a bifurcated trial, the jury shall determine
4 if a defendant is liable for punitive damages. The jury may consider the
5 factors listed in subsection (b) of section 2, and amendments thereto.

6 (f) (1) Upon post-judgment motion, a trial court shall perform a
7 rigorous analysis of the evidence supporting a noneconomic damages
8 award challenged as excessive. Such analysis shall consider the following
9 nonexclusive factors:

10 (A) Whether the evidence presented or the arguments of counsel
11 resulted in one or more of the following events in the determination of a
12 noneconomic damage award:

13 (i) Inflamed the passion or prejudice of the trier of fact;

14 (ii) improper consideration of the wealth of the defendant; or

15 (iii) improper consideration of the misconduct of the defendant so as
16 to punish the defendant in circumvention of the limitation on punitive
17 damage awards provided by section 2, and amendments thereto, or
18 constitutional standards applicable to punitive damage awards;

19 (B) whether the verdict is in excess of verdicts involving comparable
20 injuries to similarly situated plaintiffs; and

21 (C) whether there were any extraordinary circumstances in the
22 record to account for an award in excess of what was granted by courts to
23 similarly situated plaintiffs, with consideration to the injury type, severity
24 of injury, and the plaintiff's age.

25 (2) A trial court upholding a noneconomic damages award
26 challenged as excessive shall set forth in writing its reasons for upholding
27 the award.

28 (3) A reviewing court shall use a de novo standard of review when
29 considering an appeal of a noneconomic damages award on the grounds
30 of excessiveness.

31 (g) The provisions of this section shall apply only to an action based
32 upon a cause of action accruing on or after July 1, 2011.

33 New Sec. 2. (a) Except as provided in section 1, and amendments
34 thereto:

35 (1) In any civil action in which exemplary or punitive damages are
36 recoverable, the trier of fact shall determine, concurrent with all other
37 issues presented, whether such damages shall be allowed.

38 (2) If such damages are allowed, a separate proceeding shall be
39 conducted by the court to determine the amount of such damages to be
40 awarded.

41 (b) At a proceeding to determine the amount of exemplary or
42 punitive damages to be awarded under this section, the court may
43 consider:

1 (1) The likelihood at the time of the alleged misconduct that serious
2 harm would arise from the defendant's misconduct;

3 (2) the degree of the defendant's awareness of that likelihood;

4 (3) the profitability of the defendant's misconduct;

5 (4) the duration of the misconduct and any intentional concealment
6 of it;

7 (5) the attitude and conduct of the defendant upon discovery of the
8 misconduct;

9 (6) the financial condition of the defendant; and

10 (7) the total deterrent effect of other damages and punishment
11 imposed upon the defendant as a result of the misconduct, including, but
12 not limited to, compensatory, exemplary and punitive damage awards to
13 persons in situations similar to those of the claimant and the severity of
14 the criminal penalties to which the defendant has been or may be
15 subjected.

16 At the conclusion of the proceeding, the court shall determine the
17 amount of exemplary or punitive damages to be awarded and shall enter
18 judgment for that amount.

19 (c) In any civil action where claims for exemplary or punitive
20 damages are included, the plaintiff shall have the burden of proving, by
21 clear and convincing evidence in the initial phase of the trial, that the
22 defendant acted toward the plaintiff with willful conduct, wanton
23 conduct, fraud or malice.

24 (d) In no case shall exemplary or punitive damages be assessed
25 pursuant to this section or section 1, and amendments thereto, against:

26 (1) A principal or employer for the acts of an agent or employee
27 unless the questioned conduct was authorized or ratified by a person
28 expressly empowered to do so on behalf of the principal or employer; or

29 (2) an association, partnership or corporation for the acts of a
30 member, partner or shareholder unless such association, partnership or
31 corporation authorized or ratified the questioned conduct.

32 (e) Except as provided by subsection (f), no award of exemplary or
33 punitive damages pursuant to this section or section 1, and amendments
34 thereto, shall exceed the lesser of:

35 (1) The annual gross income earned by the defendant, as determined
36 by the court based upon the defendant's highest gross annual income
37 earned for any one of the five years immediately before the act for which
38 such damages are awarded, unless the court determines such amount is
39 clearly inadequate to penalize the defendant, then the court may award up
40 to 50% of the net worth of the defendant, as determined by the court; or

41 (2) \$5 million.

42 (f) In lieu of the limitation provided by subsection (e), if the court,
43 pursuant to this section, or the jury, pursuant to section 1, and

1 amendments thereto, finds that the profitability of the defendant's
2 misconduct exceeds or is expected to exceed the limitation of subsection
3 (e), the limitation on the amount of exemplary or punitive damages which
4 the court or the jury may award shall be an amount equal to 1 1/2 times the
5 amount of profit which the defendant gained or is expected to gain as a
6 result of the defendant's misconduct.

7 (g) As used in this section the terms defined in K.S.A. 60-3401, and
8 amendments thereto, shall have the meaning provided by that statute.

9 (h) The provisions of this section shall apply only to an action based
10 upon a cause of action accruing on or after July 1, 2011.

11 Sec. 3. K.S.A. 60-3702 is hereby amended to read as follows: 60-
12 3702. (a) In any civil action in which exemplary or punitive damages are
13 recoverable, the trier of fact shall determine, concurrent with all other
14 issues presented, whether such damages shall be allowed. If such
15 damages are allowed, a separate proceeding shall be conducted by the
16 court to determine the amount of such damages to be awarded.

17 (b) At a proceeding to determine the amount of exemplary or
18 punitive damages to be awarded under this section, the court may
19 consider:

20 (1) The likelihood at the time of the alleged misconduct that serious
21 harm would arise from the defendant's misconduct;

22 (2) the degree of the defendant's awareness of that likelihood;

23 (3) the profitability of the defendant's misconduct;

24 (4) the duration of the misconduct and any intentional concealment
25 of it;

26 (5) the attitude and conduct of the defendant upon discovery of the
27 misconduct;

28 (6) the financial condition of the defendant; and

29 (7) the total deterrent effect of other damages and punishment
30 imposed upon the defendant as a result of the misconduct, including, but
31 not limited to, compensatory, exemplary and punitive damage awards to
32 persons in situations similar to those of the claimant and the severity of
33 the criminal penalties to which the defendant has been or may be
34 subjected.

35 At the conclusion of the proceeding, the court shall determine the
36 amount of exemplary or punitive damages to be awarded and shall enter
37 judgment for that amount.

38 (c) In any civil action where claims for exemplary or punitive
39 damages are included, the plaintiff shall have the burden of proving, by
40 clear and convincing evidence in the initial phase of the trial, that the
41 defendant acted toward the plaintiff with willful conduct, wanton
42 conduct, fraud or malice.

43 (d) In no case shall exemplary or punitive damages be assessed

1 pursuant to this section against:

2 (1) A principal or employer for the acts of an agent or employee
3 unless the questioned conduct was authorized or ratified by a person
4 expressly empowered to do so on behalf of the principal or employer; or

5 (2) an association, partnership or corporation for the acts of a
6 member, partner or shareholder unless such association, partnership or
7 corporation authorized or ratified the questioned conduct.

8 (e) Except as provided by subsection (f), no award of exemplary or
9 punitive damages pursuant to this section shall exceed the lesser of:

10 (1) The annual gross income earned by the defendant, as determined
11 by the court based upon the defendant's highest gross annual income
12 earned for any one of the five years immediately before the act for which
13 such damages are awarded, unless the court determines such amount is
14 clearly inadequate to penalize the defendant, then the court may award up
15 to 50% of the net worth of the defendant, as determined by the court; or

16 (2) \$5 million.

17 (f) In lieu of the limitation provided by subsection (e), if the court
18 finds that the profitability of the defendant's misconduct exceeds or is
19 expected to exceed the limitation of subsection (e), the limitation on the
20 amount of exemplary or punitive damages which the court may award
21 shall be an amount equal to 1 1/2 times the amount of profit which the
22 defendant gained or is expected to gain as a result of the defendant's
23 misconduct.

24 (g) As used in this section the terms defined in K.S.A. 60-3401, and
25 amendments thereto, shall have the meaning provided by that statute.

26 (h) The provisions of this section shall apply only to an action based
27 upon a cause of action accruing on or after July 1, 1988, *and before July*
28 *1, 2011.*

29 Sec. 4. K.S.A. 60-3702 is hereby repealed.

30 Sec. 5. This act shall take effect and be in force from and after its
31 publication in the statute book.

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