

HOUSE BILL 2008

By McCormick

AN ACT to amend Tennessee Code Annotated, Title 20;
Title 27; Title 29 and Title 47, relative to the civil
justice system.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. This act shall be known and cited as the "Tennessee Civil Justice Act of 2011."

SECTION 2. Tennessee Code Annotated, Section 20-4-104, is amended by deleting the subdivision in its entirety and by substituting instead the following:

20-4-104. Business office or agency; location.

(a) For all civil actions, if the defendant is not a natural person, the claim shall be brought in:

(1) The county where the plaintiff resides,

(2) The county where all or a substantial part of the events or omissions giving rise to the claim occurred, or

(3)

(A) The county where the defendant's principal office in this state is located, or

(B) If the defendant does not maintain an office in this state, the county where the defendant's agent for service of process is located.

SECTION 3. Tennessee Code Annotated, Title 27, Chapter 1, Part 124, is amended by deleting the current subdivision in its entirety and substituting the following instead:

27-1-124. Stay of execution - Bond required in civil matters.

(a) If a plaintiff in a civil action obtains a judgment under any legal theory, the amount of the appeal bond necessary to stay execution during the course of all appeals

or discretionary reviews of that judgment by any appellate court shall not exceed \$25,000,000.

(b) Absent unusual circumstances, and subject to the \$25,000,000 limitation, the total amount of the required bond or equivalent security for any case shall not exceed 125% of the judgment amount.

(c) For purposes of determining the amount of the required bond, the court shall not include punitive or exemplary damages in the judgment amount.

(d) Notwithstanding subsections (a), (b) and (c), if an appellee proves by a preponderance of the evidence that an appellant is dissipating assets outside the ordinary course of business to avoid payment of a judgment, a court may enter orders that:

(1) Are necessary to protect the appellee; and

(2) Require the appellant to post a bond in an amount up to 125% of the judgment amount, which shall exclude any punitive or exemplary damages.

(e) If the appellant establishes by clear and convincing evidence at a post judgment hearing that obtaining a bond in an amount required by this section will render the appellant insolvent, the court shall establish a bond in an amount that would allow the appeal of the judgment to proceed. This subsection (e) authorizes action under extraordinary circumstances and should be narrowly construed.

(f) In the event this section is found to be in conflict with any rules prescribed by the Supreme Court, this section shall apply notwithstanding the provisions of § 16-3-406.

SECTION 4. Tennessee Code Annotated, Title 29, Chapter 26, Section 11, is amended by deleting the current subdivision in its entirety and substituting the following:

29-26-119. Damages. In any health care liability action, as deferred in Section 29-26-123, in which liability is admitted or established, the damages awarded may include, in addition

to other elements of damages authorized by law, actual economic losses incurred by the claimant by reason of the injury. Actual economic losses include, but are not limited to, the costs of reasonable and necessary medical care, rehabilitation services and custodial care, loss of services, and loss of earned income. Such recoverable damages shall not include charges to the extent that they have been discounted or forgiven or are subject to discounts or forgiveness for any reason, including, without limitation, discounts arising from a financial relationship with a health insurer or other payor.

SECTION 5. Tennessee Code Annotated, Title 29, Chapter 26, Part 1, is amended by adding the following as a new, appropriately designated section thereto.

29-26-123. Definitions.

As used in this part, unless the context otherwise requires:

(a) "Health care provider" means (1) a health care practitioner licensed, authorized, certified, registered, or regulated under any chapter of titles 63 or 68, including but not limited to medical resident physicians, interns, and fellows participating in a training program of one of the accredited medical schools or of one of such medical school's affiliated teaching hospitals in Tennessee, (2) a nongovernmental health care facility licensed under title 68, chapter 11, (3) a nongovernmental health facility licensed under title 33, chapter 2, part 4, (4) the employee of a health care provider involved in the provision of health care, or (5) a professional corporation or professional limited liability company as established pursuant to title 48.

(b) "Health care liability action" means any civil action, including claims against the state, alleging that a health care provider or providers have caused an injury related to the provision of or failure to provide health care services, regardless of the theory of liability on which the action is based. Health care services includes not only care by physicians, nurses, licensed practical nurses, orderlies, certified nursing assistants,

technicians and other agents, employees and representatives of the provider, but also includes staffing, custodial or basic care, positioning, hydration, grooming and similar patient services. Any such civil action or claim is subject to the provisions of this part regardless of any other claims, causes of action, or theories of liability alleged in the complaint, provided that no provision of this part shall apply to claims against the State of Tennessee to the extent that such provision is inconsistent with or conflicts with the provisions of the Tennessee Claims Commission Act, Tennessee Code Annotated § 9-8-301 et seq.

SECTION 6. Tennessee Code Annotated, Title 29, is amended by adding the following as a new chapter 39 and adding appropriately designated sections thereto.

29-39-101. Definitions.

The following words, as used in this Act, shall have the meanings set forth below, unless the context clearly requires otherwise:

(a) “Noneconomic damages” means damages for physical and emotional pain; suffering; inconvenience; physical impairment; disfigurement; mental anguish; emotional distress; loss of society, companionship, and consortium; injury to reputation; humiliation; noneconomic effects of disability, including loss of enjoyment of normal activities, benefits and pleasures of life and loss of mental or physical health, well-being or bodily functions; and all other nonpecuniary losses of any kind or nature.

(b) “Economic damages” means objectively verifiable pecuniary damages arising from medical expenses and medical care, rehabilitation services, custodial care, loss of earnings and earning capacity, loss of income, burial costs, loss of use of property, costs of repair or replacement of property, costs of obtaining substitute domestic services, loss of employment, loss of business or employment opportunities, and other objectively verifiable monetary losses.

29-39-102. Damage awards.

In any personal injury action, the prevailing plaintiff may be awarded:

- (a) Compensation for economic damages suffered by the injured plaintiff; and
- (b) If the action is a health care liability action, compensation for the noneconomic damages suffered not to exceed \$750,000 per occurrence.
- (c) If the action is not a health care liability action, compensation for noneconomic damages suffered by each injured plaintiff not to exceed \$750,000.

29-39-103. Special damages findings required.

(d) If liability is found in a personal injury or wrongful death action, then the trier of fact, in addition to other appropriate findings, shall make separate findings for each claimant specifying the amount of:

- (1) Any past damages; and
- (2) Any future damages and the periods over which they will accrue, on

an annual basis, for each of the following types of damages:

- (A) Medical and other costs of health care;
- (B) Other economic damages; and
- (C) Noneconomic damages.

(e) The calculation of all future medical care and other costs of health care and future noneconomic losses must reflect the costs and losses during the period of time the claimant will sustain those costs and losses. The calculation for other economic loss must be based on the losses during the period of time the claimant would have lived but for the injury upon which the claim is based.

(f) In any tort action in which liability is admitted or established, the damages awarded may include, in addition to other elements of damages authorized by law, economic losses incurred by the claimant by reason of the injury. Economic damages

shall not include charges to the extent that they have been discounted or forgiven or are subject to discounts or forgiveness for any reason, including, without limitation, discounts arising from a financial relationship with a health insurer or other payor.

29-39-104. Punitive damages.

(a) In any action in which punitive damages are sought:

(1) Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted maliciously, intentionally, fraudulently or recklessly.

(2) In any action in which the claimant seeks an award of punitive damages, the trier of fact in a bifurcated proceeding shall first determine whether compensatory damages are to be awarded and in what amount, before addressing any issues related to punitive damages.

(3) If, but only if, an award of compensatory damages has been made against a party, the court shall promptly commence an evidentiary hearing to determine whether punitive damages may be considered by the same trier of fact. The court shall determine whether the issue of punitive damages may be submitted to the trier of fact; and, if so, the trier of fact shall determine whether to award punitive damages and in what amount.

(4) In all cases involving an award of punitive damages, the trier of fact, in determining the amount of punitive damages, shall consider, to the extent relevant, the following: the defendant's financial condition and net worth; the nature and reprehensibility of the defendant's wrongdoing, for example, the impact of the defendant's conduct on the plaintiff, or the relationship of the defendant to the plaintiff; the defendant's awareness of the amount of harm being caused and the defendant's motivation in causing such harm; the duration of the

defendant's misconduct and whether the defendant attempted to conceal such misconduct; the expense plaintiff has borne in attempts to recover the losses; whether the defendant profited from the activity, and if defendant did profit, whether the punitive award should be in excess of the profit in order to deter similar future behavior; whether, and the extent to which, defendant has been subjected to previous punitive damage awards based upon the same wrongful act; whether, once the misconduct became known to defendant, defendant took remedial action or attempted to make amends by offering a prompt and fair settlement for actual harm caused; and any other circumstances shown by the evidence that bear on determining a proper amount of punitive damages. The trier of fact shall be instructed that the primary purpose of punitive damages is to punish the wrongdoer and deter similar misconduct in the future by the defendant and others while the purpose of compensatory damages is to make the plaintiff whole.

(5) Punitive or exemplary damages may be awarded in a civil action, but such damages shall not exceed an amount equal to the greater of (i) two times the total amount of compensatory damages awarded or (ii) \$500,000.

(6) The limitation on the amount of punitive damages imposed by subsection (a)(5) shall not be disclosed to the trier of fact, but shall be applied by the court to any punitive damages verdict.

(7) The limitation on the amount of punitive damages imposed by subsection (a)(5) shall not apply to actions brought for damages or an injury resulting from an act or failure to act by the defendant:

(i) If the defendant was convicted of a felony under the laws of this state or under federal law which caused the damages or injury; or

(ii) If the defendant was under the influence of alcohol or under the influence of drugs other than lawfully prescribed drugs administered in accordance with a prescription.

The culpability of a defendant whose liability is alleged to be vicarious shall be determined separately from that of any alleged agent, employee or representative.

(b) Nothing in this section shall be construed as creating a right to an award of punitive damages or to limit the duty of the court, or the appellate courts, to scrutinize all punitive damage awards, ensure that all punitive damage awards comply with applicable procedural, evidentiary and constitutional requirements, and to order remittitur when appropriate.

(c) The seller of a product other than the manufacturer shall not be liable for punitive damages, unless the seller exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought; the seller altered or modified the product and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; or the seller had actual knowledge of the defective condition of the product at the time he supplied the same.

(d)

(1) Except as provided below, punitive damages shall not be awarded in a civil action involving a drug or device if the drug or device which allegedly caused the claimant's harm:

(A) was manufactured and labeled in relevant and material respects in accordance with the terms of an approval or license issued by the federal food and drug administration under the "Federal Food, Drug,

and Cosmetic Act,” 52 Stat. 1040 (1938), 21 U.S.C. 301-392, as amended, or the “Public Health Service Act,” 53 Stat. 682 (1944). 42 U.S.C. 201-300cc-15, as amended; or

(B) was an over-the-counter drug marketed pursuant to federal regulations, was generally recognized as safe and effective and as not being misbranded pursuant to the applicable federal regulations, and satisfied in relevant and material respects each of the conditions contained in the applicable regulations and each of the conditions contained in an applicable monograph.

(2) Subsection (d)(1) shall not apply in an action against a manufacturer of a drug or device if the claimant establishes by clear and convincing evidence that the manufacturer in violation of applicable regulations of the food and drug administration withheld from the food and drug administration information known to be material and relevant to the harm that the claimant allegedly suffered or misrepresented to the food and drug administration information of that type.

(3) For purposes this subsection,

(A) “Drug” has the same meaning as in the “Federal Food, Drug, and Cosmetic Act,” 52 Stat. 1040, 1041 (1938), 21 U.S.C. 321(g)(1), as amended.

(B) “Device” has the same meaning as in the “Federal Food, Drug, and Cosmetic Act,” 52 Stat. 1040, 1041 (1938), 21 U.S.C. 321(h), as amended.

(e) Punitive damages shall not be awarded when a defendant in any civil action demonstrates by a preponderance of the evidence that it was in substantial compliance with applicable federal and state regulations at the time of the alleged wrongdoing.

SECTION 7. Tennessee Code Annotated, Title 29, Chapter 28, Section 104, is amended by deleting the section in its entirety and by substituting instead the following:

29-28-104. Government standard; compliance.

A manufacturer or seller shall not be liable for exemplary or punitive damages if:

(1) The product alleged to have caused the harm was designed, manufactured, packaged, labeled, sold, or represented in relevant and material respects in accordance with the terms of approval, license or similar determination of a government agency; or

(2) The product was in compliance with a statute of the State or the United States, or a standard, rule, regulation, order, or other action of a government agency pursuant to statutory authority, when such statute or agency action is relevant to the event or risk allegedly causing the harm and the product was in compliance at the time the product left the control of the manufacturer or seller.

This subsection shall not apply if the claimant establishes that (i) the manufacturer or seller, at any time before the event that allegedly caused the harm, sold the product after the effective date of an order of a government agency that ordered the removal of the product from the market or withdrew the agency's approval of the product, or (ii) the manufacturer or seller, in violation of applicable regulations, withheld or misrepresented to the government agency information material to the approval and such information is relevant to the harm which the claimant allegedly suffered.

SECTION 8. Tennessee Code Annotated, Title 29, Chapter 28, Section 106, is amended by deleting the section in its entirety and by substituting instead the following:

No "product liability action", as defined in § 29-28-102(6), shall be commenced or maintained against any seller, other than the manufacturer, unless:

(a) The seller exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the alleged harm for which recovery of damages is sought; or

(b) Altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; or

(c) The seller gave an express warranty as defined by Title 47, Chapter 2; or

(d) The United States manufacturer or distributor of the product or part in question is not subject to service of process in the state of Tennessee and the long-arm statutes of Tennessee do not serve as the basis for obtaining service of process; or

(e) The manufacturer has been judicially declared insolvent.

SECTION 9. Tennessee Code Annotated, Title 29, is amended by adding a new chapter. The following act shall be known and may be cited as the Class Action Improvements Act of 2011.

29-___-___. Appeals.

The court of appeals shall hear appeals from orders of trial courts granting or denying class action certification if a notice of appeal is filed within ten (10) days after entry of the order.

29-___-___. Stay.

All proceedings in the trial court shall be automatically stayed pending the appeal of the class certification ruling.

SECTION 10. Tennessee Code Annotated, Title 47, Chapter 18, Part 1, Section 103, is amended by adding the following language at the end of subdivision (7):

“, but does not include securities;”

SECTION 11. Tennessee Code Annotated, Section 47-18-103, is further amended by adding the following language at the end of subdivision (18):

“, but does not include the marketing or sale of securities;”

SECTION 12. Tennessee Code Annotated, Section 47-18-104, is amended by adding the following language at the end of subdivision (b)(27):

Enforcement of this section (b)(29) is vested solely in the office of the Attorney General and Reporter.

SECTION 13. Tennessee Code Annotated, Section 47-18-109, is amended by adding the following language at the end of subdivision (a)(3):

“, except that the court may not award exemplary or punitive damages for the same unfair or deceptive practice.”

SECTION 14. Tennessee Code Annotated, Section 47-18-109, subsection (f)(2) is amended by deleting the language “director of the division” and substituting instead the following:

“Attorney General and Reporter”

SECTION 15. Tennessee Code Annotated, Section 47-18-109, is further amended by adding the following new language as subsection (g):

(g) No class action lawsuit may be brought to recover damages for an unfair or deceptive act or practice declared to be unlawful by this part.

SECTION 16. Tennessee Code Annotated, Section 47-18-111, is amended by adding the following language at the end of subdivision (a)(1):

“, including, without limitation, the marketing and sale of securities;”

SECTION 17. Severability clause. If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or application, and to that end the provisions of this act are declared to be severable.

SECTION 18. This Act shall take effect July 1, 2011, the public welfare requiring it and shall apply to any liability action in which a complaint is filed on or after the effective date of this act.