

Amendment No. 1 to HB2008

Watson  
Signature of Sponsor

AMEND Senate Bill No. 1522\*

House Bill No. 2008

by deleting all language after the enacting clause and by substituting instead the following:

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 section in its entirety and substituting instead the following:

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

- (1) The county where all or a substantial part of the events or omissions giving rise to the cause of action accrued, or
- (2) The county where any defendant organized under the laws of this state maintains its principal office; or
- (3)
  - (A) If the defendant is not organized under the laws of this state, the county where the defendant's registered agent for service of process is located; or
  - (B) If the defendant does not maintain a registered agent within this state, the county where the person designated by statute as the defendant's agent for service of process is located.

SECTION 3. Tennessee Code Annotated Section 20-4-101(a) is amended by deleting the language "defendant resides or is found" and substituting instead the language "individual defendant resides".

SECTION 4. Tennessee Code Annotated Section 20-4-102 is amended by deleting subsection (b) in its entirety and redesignating accordingly.

SECTION 5. Tennessee Code Annotated, Section 20-4-106, is amended by deleting the section in its entirety.

SECTION 6. Tennessee Code Annotated, Title 20, Chapter 4, Part 1, is amended by adding the following as an appropriately designated section:

( ) Nothing in this part shall be construed to repeal or modify any other specific or special venue provision of state law.

SECTION 7. Tennessee Code Annotated, Section 27-1-124 is amended by deleting the section in its entirety and substituting the following instead:

**27-1-124.**

(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 the lesser of (1) twenty-five million dollars (\$25,000,000) or (2) one hundred and twenty-five percent (125%) of the judgment amount.

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

(c) Notwithstanding subsections (a) and (b) if a party 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 are necessary to protect the appellee and establish the bond amount, which may include any punitive or exemplary damages.

(d) If the appellant establishes by clear and convincing evidence at a post judgment hearing that the cost of the bond and the obligation resulting from the surety's payment of the bond in an amount authorized

by this section will render the appellant insolvent, the court shall establish a security in an amount, and other terms and conditions it deems proper, that would allow the appeal of the judgment to proceed, without resulting in the appellant's insolvency. This subsection (d) should be narrowly construed.

(e) If 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 8. Tennessee Code Annotated, title 29, chapter 26, part 1, is amended by adding the following as a new section, to be designated as § 29-26-101:

**29-26-101.**

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, including but not limited to physicians, nurses, licensed practical nurses, orderlies, certified nursing assistants, technicians and those physicians and nurses employed by a governmental health facility; or

(5) A professional corporation or professional limited liability company established pursuant to title 48 or a registered limited liability partnership rendering professional services under title 61 and which consists of one or more health care practitioner(s) licensed, authorized, certified, registered, or regulated under any chapter of titles 63 or 68.

(b) "Health care liability action" means any civil action, including claims against the state or a political subdivision thereof, alleging that a health care provider or providers have caused an injury related to the provision of, or failure to provide, health care services to a person, regardless of the theory of liability on which the action is based.

(c) Health care services to persons includes, but is not limited to, care by physicians, nurses, licensed practical nurses, pharmacists, pharmacy interns or pharmacy technicians under the supervision of a pharmacist, orderlies, certified nursing assistants, technicians and other agents, employees and representatives of the provider, but also includes staffing, custodial or basic care, positioning, hydration and similar patient services.

(d) 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, codified in title 9, chapter 8, part 3.

SECTION 9. The code commission is requested to delete the terms "malpractice," "medical malpractice," "malpractice action," and "medical malpractice action" wherever they appear in the Tennessee Code Annotated and substitute instead the term "health care liability" or "health care liability action" as applicable.

SECTION 10. Tennessee Code Annotated, Title 29, is amended by adding the following as a new Chapter 39, Part 1:

**29-39-101.**

When used in this act, the following words, shall have the meanings set forth below, unless the context clearly requires otherwise:

(a) "Economic damages" means damages, to the extent they are provided by applicable law, for: objectively verifiable pecuniary damages arising from medical expenses and medical care, rehabilitation services, mental health treatment, custodial care, loss of earnings and earning capacity, loss of income, burial costs, loss of use of property, repair or replacement of property, obtaining substitute domestic services, loss of employment, loss of business or employment opportunities, and other objectively verifiable monetary losses.

(b) "Noneconomic damages" means damages, to the extent they are provided by applicable law, 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.

**29-39-102.**

- (a) In a civil action, each injured plaintiff may be awarded:
- (1) Compensation for economic damages suffered by each injured plaintiff; and
  - (2) Compensation for any noneconomic damages suffered by each injured plaintiff not to exceed seven hundred fifty thousand dollars (\$750,000) for all injuries and occurrences that

were or could have been asserted, regardless of whether the action is based on a single act or omission or a series of acts or omissions that allegedly caused the injuries or death.

(b) If multiple defendants are found liable under the principle of comparative fault, the amount of all noneconomic damages, not to exceed seven hundred fifty thousand dollars (\$750,000) for each injured plaintiff, shall be apportioned among the defendants based upon the percentage of fault for each defendant, so long as the plaintiff's comparative fault (or in a wrongful death action, the fault of the decedent) is not equal to or greater than fifty percent (50%), in which case recovery for any damages is barred.

(c) If an injury or loss is catastrophic in nature, as defined below, the seven hundred fifty thousand dollar (\$750,000) amount limiting noneconomic damages, as set forth in subsections (a)(2) through (b) is increased to, but the amount of damages awarded as noneconomic damages shall not exceed, one million dollars (\$1,000,000).

(d) "Catastrophic loss or injury" means one or more of the following:

- (1) Spinal cord injury resulting in paraplegia or quadriplegia;
- (2) Amputation of two hands, two feet or one of each;
- (3) Third degree burns over forty percent (40%) or more of the body as a whole or third degree burns up to forty percent (40%) percent or more of the face; or
- (4) Wrongful death of a parent leaving a surviving minor child or children for whom the deceased parent had lawful rights of custody or visitation.

(e) All noneconomic damages awarded to each injured plaintiff, including damages for pain and suffering, as well as any claims of a spouse or children for loss of consortium or any derivative claim for noneconomic damages, shall not exceed in the aggregate a total of seven hundred fifty thousand dollars (\$750,000), unless subdivision (c) applies, in which case the aggregate amount shall not exceed one million dollars (\$1,000,000).

(f) If there is a disputed issue of fact, the trier of fact, by special verdict, shall determine the existence of a catastrophic loss or injury as defined in subsection (d).

(g) The limitation on the amount of noneconomic damages imposed by subsections (a)(2) through (e) shall not be disclosed to the jury, but shall be applied by the court to any award of noneconomic damages.

(h) The limitation on the amount of noneconomic damages imposed by subsections (a)(2) through (e) shall not apply to personal injury and wrongful death actions:

(1) If the defendant's act or omission results in the defendant being convicted of a felony under the laws of this state, another state, or under federal law, and that act or omission caused the damages or injuries;

(2) If the defendant intentionally falsified, destroyed or concealed records containing material evidence with the purpose of wrongfully evading liability in the case at issue, provided, however, that this subsection does not apply to the good faith withholding of records pursuant to privileges and other laws applicable to discovery, nor does it apply to the management of records in the normal course of business or in compliance with the

defendant's document retention policy or state or federal regulations; or

(3) If the defendant was under the influence of alcohol, drugs or any other intoxicant or stimulant, resulting in his or her judgment being substantially impaired, and causing the injuries or death. For purposes of this subsection, a defendant shall not be deemed to be under the influence of drugs or any other intoxicant or stimulant, if the defendant was using lawfully prescribed drugs administered in accordance with a prescription or over-the-counter drugs in accordance with the written instructions of the manufacturer.

(i) If there is a dispute of fact, the trier of fact, by special verdict, shall determine whether the exceptions set forth in subsection (h) apply to the defendant and the cause of action.

(j) The liability of a defendant for noneconomic damages whose liability is alleged to be vicarious shall be determined separately from that of any alleged agent, employee or representative.

(k) Noneconomic damages are not permitted for any claim arising out of harm or loss of property, except as authorized by statute.

(l) No provision in this part shall apply to claims against the state of Tennessee to the extent that such provision is inconsistent with or conflicts with the provision of the Tennessee Claims Commission Act, codified in title 9, chapter 8, part 3. In addition, no provision in this part shall apply to claims against a governmental entity or its employees to the extent that such provision is inconsistent with or conflicts with the Governmental Tort Liability Act, codified in title 29, chapter 20.

(m) Nothing in this Act shall be construed to create or enhance any claim, right of action, civil liability, economic damage or noneconomic damage under Tennessee law.

**29-39-103.**

(a) If liability is found in a civil 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 for each of the following types of damages:

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

(b) If the plaintiff claims a catastrophic loss or injury has occurred, and if there is a disputed issue of fact regarding whether such loss or injury has occurred, the trier of fact must make a specific finding of fact, by special verdict, that the loss or injury suffered by the plaintiff is catastrophic as defined in § 29-39-102(d).

(c) 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. All such calculations of future losses shall be adjusted to reflect net present value.

**29-39-104.**

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

(1) Punitive damages may only be awarded if the claimant proves by clear and convincing evidence that the defendant against whom punitive damages are sought acted maliciously, intentionally, fraudulently or recklessly.

(2) In an 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 and by special verdict whether each defendant's conduct was malicious, intentional, fraudulent or reckless and whether subsection (a)(7) applies.

(3) If a jury finds that the defendant engaged in malicious, intentional, fraudulent, or reckless conduct, then the court shall promptly commence an evidentiary hearing in which the jury shall determine the amount of punitive damages, if any.

(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; the impact of the defendant's conduct on the plaintiff; 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 shall not exceed an amount equal to the greater of:

(A) Two (2) times the total amount of compensatory damages awarded; or

(B) Five hundred thousand dollars (\$500,000).

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

(7) The limitation on the amount of punitive damages imposed by subdivision (a)(5) shall not apply to actions brought for damages or an injury:

(A) If the defendant's act or omission results in the defendant being convicted of a felony under the laws of this state, another state, or under federal law, and that act or omission caused the damages or injuries;

(B) If the defendant intentionally falsified, destroyed or concealed records containing material evidence with the purpose

of wrongfully evading liability in the case at issue, provided, however, that this subsection does not apply to the good faith withholding of records pursuant to privileges and other laws applicable to discovery, nor does it apply to the management of records in the normal course of business or in compliance with the defendant's document retention policy or state or federal regulations; or

(C) If the defendant was under the influence of alcohol, drugs or any other intoxicant or stimulant, resulting in his or her judgment being substantially impaired, and causing the injuries or death. For purposes of this subsection, a defendant shall not be deemed to be under the influence of drugs or any other intoxicant or stimulant, if the defendant was using lawfully prescribed drugs administered in accordance with a prescription or over-the-counter drugs in accordance with the written instructions of the manufacturer.

(8) If there is a disputed issue of fact, the trier of fact, by special verdict, shall determine whether the exceptions set forth in subdivision (a)(7) apply to the defendant and the cause of action.

(9) The culpability of a defendant for punitive damages 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 the seller supplied the same.

(d)

(1) Except as provided in subdivision (2) of this subsection (d), 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 or device 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) Subdivision (d)(1) of this subsection (d) shall not apply in an action against a manufacturer of a drug or device, if, at any time before

the event alleged to have caused the harm, the manufacturer, in violation of applicable regulations of the food and drug administration:

(A) Withheld from the food and drug administration information known to be material and relevant to the harm that the claimant allegedly suffered; or

(B) Misrepresented to the food and drug administration information of that type.

(3) For purposes this subsection (d),

(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 in any civil action when a defendant demonstrates by a preponderance of the evidence that it was in substantial compliance with applicable federal and state regulations setting forth specific standards applicable to the activity in question and intended to protect a class of persons or entities that includes the plaintiff, if those regulations were in effect at the time the activity occurred.

(f) Nothing contained in this chapter shall be construed to limit a court's authority to enter judgment as a matter of law prior to or during a trial on a claim for punitive damages.

SECTION 11. Tennessee Code Annotated, Section 29-28-104, is amended by designating the existing language as subsection (a) and by adding the following new subsection (b):

(b) A manufacturer or seller, other than a manufacturer of a drug or device, 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.

(c) Subsection (b) shall not apply if the claimant establishes that the manufacturer or seller:

(1) 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

(2) 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.

(d) The award of punitive or exemplary damages against a manufacturer of a drug or device shall be governed by § 29-39-104.

SECTION 12. Tennessee Code Annotated, Section 29-28-106, is amended by deleting the section in its entirety and by substituting instead the following:

**29-28-106.**

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

(1) 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;

(2) 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;

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

(4) The 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

(5) The manufacturer has been judicially declared insolvent.

SECTION 13. Tennessee Code Annotated, Section 27-1-125 is amended by deleting the section in its entirety and by substituting instead the following:

The court of appeals shall hear appeals from orders of trial courts granting or denying class certification under Rule 23 of the Tennessee Rules of Civil Procedure, if a notice is filed within ten (10) days after entry of the order. All proceedings in the trial court shall be automatically stayed pending the appeal of the class certification ruling.

SECTION 14. Tennessee Code Annotated, Section 47-18-109, is amended by adding the following language as a new, appropriately designated subsection:

( ) No private right of action shall be commenced under this section for any alleged unfair or deceptive act or practice involving the marketing or sale of a security as defined in the Tennessee Securities Act, § 48-2-102(17).

SECTION 15. Tennessee Code Annotated, Section 47-18-104, is amended by adding the following language at the end of subdivision (b)(27):

provided, however, that enforcement of this subdivision (b)(27) is vested exclusively in the office of the Attorney General and Reporter and the director of the division.

SECTION 16. Tennessee Code Annotated, Section 47-18-104(b), is amended in the first sentence by deleting the language "Without limiting the scope of subsection (a)".

SECTION 17. Tennessee Code Annotated, Section 47-18-109(a)(1), is amended by inserting the language "described in § 47-18-104(b) and" before the language "declared to be unlawful by this part".

SECTION 18. Tennessee Code Annotated, Section 47-18-109, is amended by deleting the period "." at the end of subdivision (a)(3) and substituting instead the following:

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

SECTION 19. Tennessee Code Annotated, Section 47-18-109(f)(2) is amended by adding the following after the language "director of the division":

and Attorney General and Reporter

SECTION 20. Tennessee Code Annotated, Section 47-18-109, is amended by adding the following language to be designated 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 21. 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 22. For the avoidance of any doubt with respect to the intent of the legislature, if the noneconomic damages limits established in 29-39-102(a)(2) would be invalid due to the exceptions to the limits set forth in either 29-39-102(c) or 29-39-102(h), then 29-39-102(c) or 29-39-102(h) shall be severed to preserve the application of 29-39-102(a)(2).

SECTION 23. For the avoidance of any doubt with respect to the intent of the legislature, if the punitive damages limits established in 29-39-104(a)(5) would be invalid due to the exceptions to the limits set forth in 29-39-104(a)(7), then 29-39-104(a)(7) shall be severed to preserve the application of 29-39-104(a)(5).

SECTION 24. This act shall take effect October 1, 2011, the public welfare requiring it and shall apply to all liability actions for injuries, deaths and losses covered by this act which accrue on or after such date.