BORDER SHOWDOWN: WHY KANSAS SHOULD REFORM ITS PUNITIVE DAMAGES STATUTE TO EVEN THE PLAYING FIELD WITH MISSOURI

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I. INTRODUCTION

Imagine this scenario. A young girl is driving home from work late at night. She stops in traffic at a stoplight. While waiting, she notices a black truck rapidly approaching her from behind. Anticipating a collision, she tries to get out of the way, but it is too late. The truck slams into the back of her car, forcing her car into the rear of the vehicle in front of her. She sustains severe injuries and is transported to the hospital. When a police officer asks the driver of the truck for his license and registration, he smells alcohol and marijuana smoke emanating from the truck. A search of the truck reveals a marijuana pipe, nineteen bags of marijuana, empty cans of alcoholic beverages, prescription bottles under the driver’s name, and a digital scale with residue on it. The driver admits to using both marijuana and cocaine just hours before the accident. Now, assume the girl lives in Kansas but the accident occurred in Missouri where the truck driver resides. The girl has a decision to make – should she file her case in Missouri or Kansas? As the law stands now, the choice is relatively easy. All else being equal, if she believes she can recover punitive damages for the truck driver’s wanton and reckless behavior, she should file in Missouri where the law is friendlier to recovery of punitive damages.

The national tort reform wave of the 1980s resulted in substantive and procedural changes to the law that in some states restricted how plaintiffs plead for punitive damages. This Comment will examine the different approaches taken by Missouri and Kansas with regards to pleading for punitive damages. Part II will briefly describe the debate that led to tort reform and procedural changes in the pleading process in various states. Part III will discuss the different approaches adopted by Missouri and Kansas. Finally, Part IV will argue Kansas should reform its punitive damages statutes to follow the Missouri approach. This will make Kansas a more attractive location for filing a lawsuit and ensure defendants are punished for their reckless behavior and deterred from acting illegally in the future.

1 This scenario is based in part off the facts in Adamson v. Bicknell, 287 P.3d 274 (Kan. 2012).
II. THE PUNITIVE DAMAGES DEBATE

Although punitive damages are awarded in a small number of cases, they have become a hot topic in the public forum. For example, the $2.9M punitive damage award given to a woman who spilled McDonald's coffee on herself became a rallying point for tort reformers. No doubt, the issue of punitive damages is complex, adding to the controversial nature of the public discussion. Consider the following questions that must be asked and answered before a system for awarding punitive damages can be established: “When are punitive damages appropriate? Who should decide liability for punitive damages? What restrictions should be placed on the amount awarded? What are the public policy consequences of imposing punitive damages on civil defendants?” These are not easy questions to answer.

But, punitive damage awards serve a purpose. They are not awarded to compensate plaintiffs. Instead, punitive damages are awarded to punish defendants for their intentional or malicious misconduct and to deter similar misconduct in the future. Proponents of unlimited punitive damage awards argue that in some cases compensatory damages alone might not deter future misconduct. For instance, defendants are not always held liable and certain legal rules inherently prevent plaintiffs from complete recovery. On the other hand, critics argue “punitive damages are routinely awarded; they are awarded in large amounts; the frequency and size of those awards have been rapidly increasing; and these phenomena are national in scope.” Organizations such as the American Association for Tort Reform argue the system for awarding punitive damages should be reformed because “[t]he difficulty of predicting whether punitive damages will be awarded by a jury in any particular case, and the marked trend toward astronomically large amounts when they are awarded, have seriously distorted settlement and litigation processes and have led to wildly inconsistent outcomes in similar cases.” These criticisms of the punitive damages led Kansas to alter its process for pleading and awarding punitive damages. Missouri did not follow suit.

Kansas is not alone in changing its procedural process for pleading for punitive damages. Idaho, Oregon, Minnesota, North Dakota, Illinois, Colorado, and California have enacted similar procedural limitations on pleading for

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3 See Thomas H. Cohen & Kyle Harbacek, Punitiive Damage Awards in State Courts, 2005, Bureau of Just. Statistics, Mar. 24, 2011, available at http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&id=2376 (finding plaintiffs sought punitive damages in 12% of the estimated 25,000 civil cases filed in 2005, but were awarded punitive damages in just 30% of the 1,761 civil cases that went to trial and the plaintiff prevailed).
7 Id.
8 Klinck, supra note 4, at 471.
9 Id.
11 Punitive Damages Reform, supra note 6.
punitive damages in different types of cases. The net effect of these statutes is to require plaintiffs in certain cases to get the court’s permission before including a claim for punitive damages in the complaint. Though procedural in operation, these statutes also have a substantive effect: “by limiting unsubstantiated punitive damages claims, the laws seem designed to limit unwarranted punitive damages awards.” Thus, these state restrictions on the form of pleading for punitive damages “occupy a borderland where procedure and substance blend.” That distinction has a profound implication on federal diversity cases that is not considered in this Comment.

III. MISSOURI VS. KANSAS – AN UNEVEN PLAYING FIELD

A. Missouri Approach

Missouri courts award punitive damages to punish the defendant and to deter similar conduct by the defendant and others in the future. Punitive damages are not intended to compensate the plaintiff. “To make a submissible case for punitive damages, the evidence, and the inferences drawn therefrom must allow a reasonable juror to conclude that the plaintiff established with convincing clarity that the defendant’s conduct was outrageous because of evil motive or reckless indifference.” Thus, factual inferences that clearly and convincingly support the notion that the defendant acted with evil motive or reckless indifference to the rights of others are sufficient to meet the standard for submission of a claim for punitive damages. “It is not the commission of the tort that matters, but the conduct or motive that provides the basis for punitive damages.”

Because punitive damages are extraordinary and harsh, the clear and convincing evidentiary standard applies. Evidence is clear and convincing “if it instantly tilts the scales in the affirmative when weighed against the evidence in opposition and if it causes the fact finder to have an abiding conviction that the evidence is true.” This is a relatively high burden for the plaintiff to meet and consequently reduces the number of cases in which plaintiffs can plead for punitive damages.

Under Missouri law, a claim for punitive damages can be made at the outset of a case in the initial pleading. The applicable statute, Mo. Rev. Stat. § 12

12 See Seamon, supra note 2, at 61-76.
13 Id. at 39.
14 Id.
15 Id.
17 Id.
18 Gibbs v. Blockbuster, Inc., 318 S.W.3d 157, 171-72 (Mo. Ct. App. 2010) (holding to support an award of punitive damages in a claim for false imprisonment, a jury must find the defendant not only intended the plaintiff’s confinement, but knew the confinement to be unlawful at the time it occurred).
19 Id. at 172.
20 Id.
21 Id.
23 See id.
24 See MO. REV. STAT. § 509.050 (West 2012); MO. REV. STAT. § 509.200 (West 2012).
509.200, requires the plaintiff to state separately in his or her petition the amount of punitive damages sought. 25 “In actions for [punitive damages] based upon an alleged tort, no dollar amount or figure shall be included in the demand, but the prayer shall be for such damages as are fair and reasonable.” 26 Thus, the Missouri approach is straightforward: if the plaintiff believes he or she has a submissible claim for punitive damages based on the clear and convincing evidentiary standard, then he or she can plead for such damages upfront. 27 It is important to note that the trial judge determines whether punitive damages may be submitted to the jury under the law and facts of the case. 28 Once the claim is submitted to the jury, “the award of punitive damages is peculiarly a function of the jury and absent an abuse of discretion an appellate court is not justified in interfering with the assessment.” 29 Abuse of discretion is an act “so out of proportion to the factors involved as to reveal improper motives or a clear absence of the honest exercise of judgment.” 30 Consequently, juries are a powerful entity under the Missouri approach to pleading for punitive damages. Once the trial court has passed the case to the jury to award punitive damages, it is highly unlikely the jury’s award amount will be overturned on appeal under the abuse of discretion standard.

B. Kansas Approach

Kansas also awards punitive damages “to punish the wrongdoer for malicious, vindictive, or willful and wanton invasion of another’s rights, with the ultimate purpose being to restrain and deter others from the commission of similar wrongs.” 31 To make a submissible claim for punitive damages under Kansas law, the plaintiff must show by clear and convincing evidence that the defendant acted “with willful conduct, wanton conduct, fraud or malice.” 32 The Kansas Supreme Court has developed standards to define “willful conduct, wanton conduct, fraud, or malice” that will not be discussed here. 33 Clear and convincing evidence is evidence that is sufficient to establish that “the truth of the facts asserted is highly probable.” 34 Again, the clear and convincing standard adopted by Kansas is a relatively high burden for plaintiffs to meet. It likely reduces the number of claims made for punitive damage awards in Kansas courts.

In response to the national insurance crisis of the 1980s, Kansas changed from the common law scheme of allowing juries to decide the amount of punitive damages awarded to a statutory scheme that requires judges to decide whether punitive damages are allowed and in what amount. 35 This change overruled

25 § 509.200
26 MO. SUP. CT. R. 55.19.
30 Id.
32 KAN. STAT. ANN. § 60-3702 (West 2012).
35 Fowler, supra note 5, at 653.
more than a century of established common law. The state changed its law “to limit the number of punitive claims that may be pleaded, prevent undue delay in deciding whether such claims should be granted, and reduce the time and money spent in litigating an action.” Under Kansas law, no petition or initial pleading may include a claim for punitive damages. Instead, the plaintiff must petition the court to file an amended pleading that includes a claim for punitive damages. This extra step requires lawyers to spend additional time drafting an amended pleading and means an additional trip to the courthouse for the client and attorney. It also eliminates the jury’s role in determining what amount of punitive damages should be awarded.

The statute imposes two requirements the plaintiff must meet before the court will allow him or her to file an amended pleading that includes a claim for punitive damages. First, the plaintiff must file the motion to amend either on or before the date of the pretrial conference. If there is no pretrial conference, a motion seeking punitive damages may be filed at anytime so long as it is filed sufficiently in advance of trial to avoid prejudice to the defendant. Second, the plaintiff must show, through affidavits, there is a “probability that the plaintiff will prevail on the claim” for punitive damages. The moving party must serve all parties to the action with a copy of the punitive damages affidavit, allowing the other party to file affidavits opposing the amendment of the petition.

The term “probability,” as used in Kan. Stat. Ann. § 60-703, “means that it is more likely than not that the plaintiff will prevail on a claim of punitive damages upon the trial in the case.” “And while the ultimate inquiry is whether the plaintiff will probably prevail on the claim, the court must consider the “clear and convincing” evidentiary standard the plaintiff will eventually need to meet at trial.” In making this determination, the district court must consider the evidence in the light most favorable to the moving party, but it cannot make credibility determinations, weigh evidence, or draw inferences from the facts. Those decisions are still left to the jury under Kansas law. A trial court’s denial of a motion to amend to add a claim for punitive damages is reviewed for abuse of discretion. Abuse of discretion occurs where “judicial action is: (1) arbitrary, fanciful, or unreasonable…; (2) based on an error in law…; or (3) based on an error of fact.”

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36 Id. at 647-48.
38 See KAN. STAT. ANN. § 60-3703 (West 2012).
39 Id.
40 Id.
41 Gates v. Goodyear, 155 P.3d 1196, 1201 (Kan. 2007) (holding a motion for punitive damages not untimely when filed after case management conference, two months before trial, and plaintiff did not schedule a final pretrial conference).
42 K.S.A. § 60-3703 (West 2012).
46 Id.
47 Id.
49 Adamson, 287 P.3d at 280.
As a result of the changes made to Kansas’s punitive damages statute, the trial court judge serves as a gatekeeper. He or she has the power to grant or deny a motion to amend to add a claim for punitive damages. If the court grants a motion to amend, then the jury as the trier of fact determines whether punitive damages should be awarded. If the jury finds the plaintiff should be awarded punitive damages, a separate proceeding is held where the trial court judge determines the amount of punitive damages. Thus, the Kansas approach denies the jury the power to determine the amount of punitive damages awarded and vests that power in the trial court judge. Furthermore, it is highly unlikely the amount of punitive damages awarded by the trial judge would be overturned on appeal using the abuse of discretion standard. Consequently, the plaintiff is at the trial judge’s mercy – he or she decides whether punitive damages will be awarded and in what amount.

IV. WHY KANSAS SHOULD ADOPT THE MISSOURI APPROACH

Punitive damages serve two important purposes in the American judicial process: punishment and deterrence. When punitive damages are awarded, it is because the defendant has acted egregiously and someone has been harmed as a result. Bad actors should be punished for their behavior in some situations. Furthermore, an award of punitive damages alerts potential bad actors and citizens of a state that such reckless and wanton behavior will not be tolerated. For these reasons, Kansas should change its approach to pleading for and awarding punitive damages, and adopt a process similar to that of Missouri. If the state is serious about punishment and deterrence of egregious behavior, then it should be friendlier to plaintiffs seeking punitive damages.

First, Kansas should eliminate § 60-703 and allow plaintiffs to plead for punitive damages at the onset of a case. The current statutory framework diminishes the role of the jury and confers too much power in the judiciary as a gatekeeper. Historically, Kansas juries have decided whether or not punitive damages should be awarded in a case and in what amount. This statute takes that power away and vests it in the trial court judges. As a result, it is more difficult for the plaintiff to have claims for punitive damages heard since judges tend to be more conservative than juries.
Second, Kansas should amend § 60-3702(a) to allow the jury to decide what amount of punitive damages should be awarded in a particular case. The current statutory framework allows the judge to decide what amount of punitive damages, if any, should be awarded in a particular case. By their nature, judges are more conservative and it is likely this approach has led to lower damage awards than would have been made by a jury. But, if the stated purpose of punitive damages is punishment and deterrence, wouldn’t it be better to allow a jury to determine what is necessary to right a wrong?57 By reducing the role of the civil jury in pleading and awarding punitive damages, Kansas has “deprived society of a powerful procedural protection.”58

Now, let’s return to the girl who was seriously injured by a reckless person driving under the influence of marijuana and cocaine. Clearly, she faces fewer procedural hurdles if she files in Missouri. She is also more likely to be awarded punitive damages to punish the defendant. Because of it’s statutory framework, Kansas is forcing one of its own citizens to seek redress elsewhere. Morally, that does not seem right.

57 See Fowler, supra note 5, at 662-63.
58 Id. at 666.