

Introduced by

Senators Dwyer, Sickler, Cleary

Representatives Klemin, Heinert, Schneider

1 A BILL for an Act to amend and reenact sections 32-03.2-01 and 32-03.2-11 of the North Dakota
2 Century Code, relating to when a court or jury may give exemplary damages.

3 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

4 **SECTION 1. AMENDMENT.** Section 32-03.2-01 of the North Dakota Century Code is
5 amended and reenacted as follows:

6 **32-03.2-01. Definition.**

7 As used in this chapter, ~~"fault"~~:

8 1. "Fault" includes acts or omissions that are in any measure negligent or reckless
9 toward the person or property of the actor or others, or that subject a person to tort
10 liability or dram shop liability. The term also includes strict liability for product defect,
11 breach of warranty, negligence or assumption of risk, misuse of a product for which
12 the defendant otherwise would be liable, and failure to exercise reasonable care to
13 avoid an injury or to mitigate damages. Legal requirements of causal relation apply
14 both to fault as the basis for liability and to contributory fault.

15 2. "Malice" means:

16 a. A direct intention to injure another; or

17 b. A reckless disregard of the rights of another and any consequences.

18 **SECTION 2. AMENDMENT.** Section 32-03.2-11 of the North Dakota Century Code is
19 amended and reenacted as follows:

20 **32-03.2-11. When court or jury may give exemplary damages.**

21 1. In any action for the breach of an obligation not arising from contract, when the
22 defendant has been guilty by clear and convincing evidence of oppression, fraud, or
23 ~~actual~~ malice, the court or jury, in addition to the actual damages, may give damages
24 for the sake of example and by way of punishing the defendant. Upon commencement

1 of the action, the complaint may not seek exemplary damages. After filing the suit, a
2 party may make a motion to amend the pleadings to claim exemplary damages. The
3 motion must allege an applicable legal basis for awarding exemplary damages and
4 must be accompanied by one or more affidavits or deposition testimony showing the
5 factual basis for the claim. The party opposing the motion may respond with affidavit
6 or deposition testimony. If the court finds, after considering all submitted evidence, that
7 there is sufficient evidence to support a finding by the trier of fact that a
8 preponderance of the evidence proves oppression, fraud, or actual malice, the court
9 shall grant the moving party permission to amend the pleadings to claim exemplary
10 damages. For purposes of tolling the statute of limitations, pleadings amended under
11 this section relate back to the time the action was commenced.

- 12 2. If either party so elects, the trier of fact shall first determine whether compensatory
13 damages are to be awarded before addressing any issues related to exemplary
14 damages. Evidence relevant only to the claim for exemplary damages is not
15 admissible in the proceeding on liability for compensatory damages. If an award of
16 compensatory damages has been made, the trier of fact shall determine whether
17 exemplary damages are to be awarded.
- 18 3. Evidence of a defendant's financial condition or net worth is not admissible in the
19 proceeding on exemplary damages.
- 20 4. If the trier of fact determines that exemplary damages are to be awarded, the amount
21 of exemplary damages may not exceed two times the amount of compensatory
22 damages or two hundred fifty thousand dollars, whichever is greater; provided,
23 however, that no award of exemplary damages may be made if the claimant is not
24 entitled to compensatory damages. In a jury trial, the jury may not be informed of the
25 limit on damages contained in this subsection. Any jury award in excess of this limit
26 must be reduced by the court.
- 27 5. In order for a party to recover exemplary damages, the finder of fact shall find by clear
28 and convincing evidence that the amount of exemplary damages awarded is
29 consistent with the following principles and factors:

- 1 a. Whether there is a reasonable relationship between the exemplary damage
2 award claimed and the harm likely to result from the defendant's conduct as well
3 as the harm that actually has occurred;
- 4 b. The degree of reprehensibility of the defendant's conduct and the duration of that
5 conduct; and
- 6 c. Any of the following factors as to which evidence is presented:
- 7 (1) The defendant's awareness of and any concealment of the conduct;
- 8 (2) The profitability to the defendant of the wrongful conduct and the desirability
9 of removing that profit and of having the defendant also sustain a loss; and
- 10 (3) Criminal sanctions imposed on the defendant for the same conduct that is
11 the basis for the exemplary damage claim, these to be taken into account if
12 offered in mitigation of the exemplary damage award.
- 13 6. Exemplary damages may not be awarded against a manufacturer or seller if the
14 product's manufacture, design, formulation, inspection, testing, packaging, labeling,
15 and warning complied with:
- 16 a. Federal statutes existing at the time the product was produced;
- 17 b. Administrative regulations existing at the time the product was produced that
18 were adopted by an agency of the federal government which had responsibility to
19 regulate the safety of the product or to establish safety standards for the product
20 pursuant to a federal statute; or
- 21 c. Premarket approval or certification by an agency of the federal government.
- 22 7. The defense in subsection 6 does not apply if the plaintiff proves by clear and
23 convincing evidence that the product manufacturer or product seller:
- 24 a. Knowingly and in violation of applicable agency regulations withheld or
25 misrepresented information required to be submitted to the agency, which
26 information was material and relevant to the harm in question; or
- 27 b. Made an illegal payment to an official of the federal agency for the purpose of
28 securing approval of the product.
- 29 8. Exemplary damages may be awarded against a principal because of an act by an
30 agent only if at least one of the following is proved by clear and convincing evidence to
31 be true:

- 1 a. The principal or a managerial agent authorized the doing and manner of the act;
- 2 b. The agent was unfit and the principal or a managerial agent was reckless in
- 3 employing or retaining the agent;
- 4 c. The agent was employed in a managerial capacity and was acting in the scope of
- 5 employment; or
- 6 d. The principal or managerial agent ratified or approved the doing and manner of
- 7 the act.
- 8 9. In a civil action involving a motor vehicle accident resulting in bodily injury, it is
- 9 sufficient for the trier of fact to consider an award of exemplary damages against the
- 10 driver under the motion procedures provided in subsection 1 if clear and convincing
- 11 evidence indicates that the accident was caused by a driver ~~who, within the five years-~~
- 12 ~~immediately preceding the accident has been convicted for violation of section-~~
- 13 ~~39-08-01 and~~ who was operating or in physical control of a motor vehicle:
- 14 a. With an alcohol concentration of at least eight one-hundredths of one percent by
- 15 weight;
- 16 b. Under the influence of a controlled substance unless a drug that predominantly
- 17 caused impairment was used only as directed or cautioned by a practitioner who
- 18 legally prescribed or dispensed the drug to the driver;
- 19 c. Under the influence of alcohol and refused to take a test required under chapter
- 20 39-20; or
- 21 d. Under the influence of a volatile chemical as listed in section 19-03.1-22.1.
- 22 At the trial in an action in which the trier of fact will consider an award of exemplary
- 23 damages, evidence that the driver has been convicted of violating section 39-08-01 or
- 24 an equivalent statute or ordinance is admissible into evidence.