

Approved March 28, 1988
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Senator Robert Frey at
Chairperson

10:00 a.m. ~~p.m.~~ on March 21, 1988 in room 514-S of the Capitol.

~~All~~ members ~~xxx~~ present ~~except~~: Senators Frey, Hoferer, Burke, Feleciano, Gaines, Langworthy, Parrish, Steineger, Talkington, Winter and Yost.

Committee staff present:

Gordon Self, Office of Revisor of Statutes
Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department

Conferees appearing before the committee: None

House Bill 2692 - Damages for noneconomic loss in personal injury actions limited to \$250,000.

Senator Yost moved to amend the bill in lines 99, 106 and 109 by reinstating "noneconomic loss". Senator Burke seconded the motion. Considerable committee discussion was held on the amendment. With seven voting in favor of the amendment, the motion passed. Senator Feleciano wished to be recorded as voting "no" on the amendment.

Senator Talkington moved to amend the bill in line 111, before the period, by adding "and amendments thereto". Senator Burke seconded the motion. The motion carried.

Senator Talkington moved to report the bill favorably as amended. Senator Gaines seconded the motion. The motion carried. Senator Feleciano wished to be recorded as voting "no" on the motion.

Senate Bill 627 - Pain and suffering damages in personal injury actions.

Senator Gaines moved to report the bill adversely. Senator Feleciano seconded the motion. The motion carried.

House Bill 2693 - Collateral Source benefits admissible.

Senator Talkington moved to amend the bill in lines 33 and 59 by reinserting "expected". Senator Burke seconded the motion. With five members voting in favor of the amendments and four opposed, the motion carried.

Senator Talkington moved to amend the bill in line 128 to insert a severability clause. Senator Parrish seconded the motion. The motion carried.

Senator Talkington moved to amend the bill by reinstating the stricken language in lines 126 and 127. Senator Yost seconded the motion. Committee discussion was held on the amendment. With a vote of five in favor of the amendment and four opposed the motion carried. Senator Feleciano wished to be recorded as voting "no" on the amendment.

Senator Winter moved to amend the bill by adopting the Kansas

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,
room 514-S, Statehouse, at 10:00 a.m.~~pm~~ on March 21, 1988

House Bill 2693 continued

Bar Association's proposed amendments. Senator Feleciano seconded the motion. Following committee discussion, the motion carried.

Discussion was held concerning holding an extra meeting to work on the tort bills.

The meeting adjourned.

A copy of the guest list is attached (See Attachment I).

A copy of a handout from staff is attached (See Attachment II).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE

DATE: 3-21-88

NAME (PLEASE PRINT) ADDRESS COMPANY/ORGANIZATION

Mike Ottard	1430 Topoka Ave	KACFT
Michael Wolf	Topoka	KTLA
L M CORNISH	"	Wessex P/C Co
Gerhard Metz	"	KCCD
Barbara Suedy	"	Political Party
Von Smith	"	KBA
Bob Ahrens	✓	KTLA
Julie Nelson	✓	KLSE
Don (Pellegrin)	Topoka	Am. Ind. Assn
William	"	ICTA
G. E. Benth	Lawrence	Sen. Parish Staff
Jim H. Briede	Topoka	observer
Card Remylli	Lawrence	N/A
Ed Reuert	Topoka	League women voters
Brath Wilbur	Topoka	Gifts
Barb Reuert	"	H.P.O.A
L. Linenberger	Topoka	UPT
Keweenaw Kelly	Overland Park	SUN
M. Hauser	Topoka	Country
Matt Travel	Topoka	AP
Matt Lynch	"	Jud. Council
PATRICIA HENSHALL	TOPOKA	OSD
P. I. Heath	Topoka	KWS/KWA
Ryn Todd	"	Imperial
Arnold Rubin	Topoka	RAOM

Att. I

PIK 9.44 PUNITIVE DAMAGES

CHANGE instruction to read:

If you find that plaintiff is entitled to recover, [and you also find that the conduct of the defendant was (wilful) (wanton) (malicious) or (constituted fraud),] then in addition to the actual damages to which you find plaintiff entitled, you may award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter others from like conduct.

If you do award punitive damages in this case, then in assessing the amount of such damages you may consider the following:

1. The amount of actual damages assessed;
2. The nature, extent and enormity of the wrong;
3. The intent of the party committing it;
4. The financial condition of that party;
5. The probable expenses of litigation;
6. Any mitigating circumstances tending to minimize the amount of such damages.

You may not award punitive damages unless you award actual damages.

Comment

ADD to second paragraph:
Young v Hecht, 3 Kan App 2d 510, 515, 597 P2d 682 (1979).

ADD to third paragraph:
Henderson v Hassur, 225 Kan 678, 694, 594 P2d 650 (1979);
Sanders v Park Towne, Ltd, 2 Kan App 2d 313, 319, 578 P2d 1131 (1978).

ADD to last paragraph:
Modern Air Conditioning, Inc. v Cinderella Homes, Inc., 226 Kan 70, 77, 596 P2d 816 (1979) (breach of fiduciary duty).

Att. II

PIK 3.02 WANTON CONDUCT DEFINED

An act performed with a realization of the imminence of danger and a reckless disregard or complete indifference to the probable consequences of the act is a wanton act.

Notes on Use

This instruction should be given in any case where a claim of wanton conduct is supported by evidence.

Comment

A definition of wanton conduct will be required in the following situations:

1. When punitive damages are claimed based on wantonness. *Lutz v Independent Constr. Co.*, 183 Kan 798, 332 P2d 269 (1958). See PIK 9.44 on punitive damages.
2. When the effect of contributory negligence may be overcome by wanton conduct of the opposing party. If conduct of defendant is wanton, contributory negligence of plaintiff will not bar the latter's recovery. *Kniffen v Hercules Powder Co.*, 164 Kan 196, 188 P2d 980 (1948). See PIK 4.09 to the effect that contributory negligence of the plaintiff is not a defense to wilful or wanton conduct on the part of the defendant.

In Kansas, degrees of negligence have been abolished. Wantonness is distinct from negligence and differs in kind. See *Kniffen v Hercules Powder Co.*, supra, and *Srajer v Schwartzman*, 164 Kan 241, 188 P2d 971 (1948).

PIK 3.02 is cited in *Roberts v Beebe*, 200 Kan 119, 126, 434 P2d 789 (1967), concerning the definition of wanton conduct. In the criminal code enacted in 1968, the original PIK definition of wanton conduct was adopted. See K.S.A. 21-3201(3).

Research References

ALR Annotations:

Liability insurance as covering accident, damage, or injury due to wanton or wilful misconduct or gross negligence. 20 ALR3d 320.

Prima facie tort. (Comment note) 16 ALR3d 1191.

Speed alone or in connection with other circumstances, as gross

PIK 3.03 WILFUL CONDUCT DEFINED

An act performed with a designed purpose or intent on the part of a person to do wrong or to cause an injury to another is a wilful act.

Notes on Use

This instruction should be given when there is evidence supporting wilful conduct.

Comment

A definition of wilful conduct will be required in the following situations:

1. When punitive damages are claimed based upon wilful conduct. *Lutz v Independent Const. Co.*, 183 Kan 798, 332 P2d 269 (1958). See PIK 9.44 on punitive damages.

2. When the effect of contributory negligence may be overcome by wilful conduct of the opposing party. If conduct of the defendant is wilful, contributory negligence of the plaintiff will not bar the latter's recovery. *Kniffen v Hercules Powder Co.* 164 Kan 196, 188 P2d 980 (1948). See PIK 4.09 to the effect that contributory negligence of the plaintiff is not a defense to wilful or wanton conduct on the part of defendant.

Authority for the instruction may be found in *Chicago, R. I. & P. R. Co. v Lacy*, 78 Kan 622, 97 P 1025 (1908). PIK 3.03 is cited in *Roberts v Beebe*, 200 Kan 119, 126, 434 P2d 789 (1967), concerning the definition of wilful conduct. In the criminal code enacted in 1969, the earlier PIK definition of wilful conduct was adopted. See K.S.A. 21-3201(2) (1973 Supp.).

Although the words "wilful and wanton" are often used together, the Committee is of the opinion that wilful conduct is different than wanton conduct, and that a separate instruction is justified.

Research References

See also research references under PIK 3.02.

ALR Annotations:

Questions as to the construction and effect of statutes which make a parent, custodian, or other person signing a minor's application for a vehicle operator's license liable for the licensee's negligence or wilful misconduct, see 26 ALR2d 1320.

PIK 3.04 MALICE DEFINED

Malice is a state of mind characterized by an intent to do a harmful act without a reasonable justification or excuse.

Comment

Malice is defined in State v Thomas, 157 Kan 526, 142 P2d 692 (1943), cert den 322 US 739, 88 L Ed 1578, 64 S Ct 1055, and Foltz v Buck, 89 Kan 381, 131 P 587 (1913) holding also that malice is not restricted to personal hatred, spite, or revenge. See also Blakely v Roanoke State Bank, 122 Kan 810, 253 P 544 (1927). For other definitions, see State v Hardisty, 121 Kan 576, 249 P 617 (1926), later app 122 Kan 527, 253 P2d 615, a homicide case, and Hammargren v Montgomery Ward & Co., 172 Kan 484, 241 P2d 1192 (1952), a false imprisonment case.

Malice may be inferred from want of probable cause. Bratton v Exchange State Bank, 129 Kan 82, 281 P 857 (1929).

Existence of malice is ordinarily a question of fact for the jury, but where the facts are not in dispute, it is a question of law for the court. Messinger v Fulton, 173 Kan 851, 252 P2d 904 (1953).

In Munsell v Ideal Food Stores, 208 Kan 909, 494 P2d 1063, 60 ALR3d 1059 (1972), the court considered what definition of malice should be given to cover "actual malice as it is defined under the law of libel and slander." The court held that it was necessary that there be "express malice." Express malice, the court held, would require communication with a wilful intention to do plaintiff an injury because of hatred or ill will. The trial court gave the definition contained in PIK 3.04, and the Supreme Court held that this definition was inappropriate under the circumstances of this case. Additionally, the court indicated that the phrase "actual evil-mindedness or specific intent to injure" would be proper language for instructing the jury under the facts of Munsell. This language was noticed with approval as being that language used in Stice v Beacon Newspaper Corp., 185 Kan 61, 65, 340 P2d 396, 76 ALR2d 687 (1959).

For additional definitions of malice, see PIK Supp. 14.55, Maliciously Communicating Defined.

Research References

Practice Aids:

See generally 19 Am Jur Trials 499, DEFAMATION.

PIK 3.0

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D. FRAUD

PIK 14.40 FRAUD—ELEMENTS

The essential elements required to sustain an action for fraud are:

1. That false (or untrue) representations were made as a statement of existing and material fact.
2. That the representations were known to be false (or untrue) by the party making them, or were recklessly made without knowledge concerning them.
3. That the representations were intentionally made for the purpose of inducing another party to act upon them.
4. That the other party reasonably relied and acted upon the representations made.
5. That the other party sustained damage by relying upon them.

A representation is material when it relates to some matter that is so substantial as to influence the party to whom it was made.

Notes on Use

Burden of proof is by clear and convincing evidence. See PIK 2.11.

Comment

Essential elements of fraud are stated in *Broberg v Boling*, 183 Kan 627, 331 P2d 570 (1958); *Sipes v Crum*, 204 Kan 591, 464 P2d 1 (1970); and *Minnesota Ave., Inc., v Automatic Packagers, Inc.*, 211 Kan 461, 507 P2d 268 (1973).

To constitute actionable fraud the representation must relate to past or present fact, as opposed to mere opinions or puffing or promised actions in the future. *Timi v Prescott State Bank*, 220 Kan 377, 553 P2d 315 (1976).

One of the essential elements of actionable fraud is reliance thereon by the party to whom the misrepresentation was made, to