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## Overview of the Law in Georgia and Tennessee

May 1, 2009

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## Tort & Statutory Employer Immunity under Georgia & Tennessee Law

May 1, 2009

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## Introductory Notes

- This presentation is a broad overview of the law in Georgia & Tennessee
  - Remember, every case is determined by its particular facts
  - Feel free to ask questions when you have them or at the end of each topic
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## Statutory Employer Immunity in Georgia

### **O.C.G.A. §34-9-8**

A principal, intermediate, or subcontractor shall be liable for compensation to an employee injured while in the employ of any of his subcontractors engaged upon the subject matter of the contract to the same extent as the immediate employer. . . .This code section shall apply only in cases where the injury occurred on, in, or about the premises on which the principal contractor has undertaken to execute work or which or otherwise under his control or management.

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## Statutory Employer Immunity in Georgia

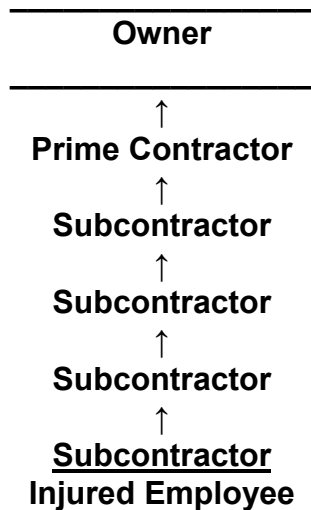
### **O.C.G.A. 34-9-11(a)**

The rights and remedies granted to an employee by this chapter shall exclude all other rights and remedies of such employee . . .

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## The “Chain of Command”



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## The Exclusive Remedy Doctrine in Tennessee

### **T.C.A. §50-6-108(a)**

The rights and remedies granted to an employee subject to this chapter, on account of personal injury or death by accident, including a minor whether lawfully or unlawfully employed, shall exclude all other rights and remedies of the employee, the employee's personal representative, dependents or next of kin, at common law or otherwise, on account of the injury or death.

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## Statutory Employer Immunity in Tennessee

### **T.C.A. 50-6-113**

A principal contractor, intermediate contractor or subcontractor shall be liable for compensation to any employee injured while in the employ of any of the subcontractors of the principal contractor, intermediate contractor or subcontractor and engaged upon the subject matter of the contract to the same extent as the immediate employer.

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## Statutes of Limitations in Georgia

- Torts – 2 years
- Injury to Property – 4 years
- Breach of Warranty – 4/6 years
- Indemnification (common law)/Contribution – 20 years
- Contracts
  - Verbal – 4 years
  - Written – 6 years
  - Under Seal – 20 years

### Exceptions:

Injuries to Minors

Fraud

Statute of Repose – 10 years from date first introduced into the  
“stream of commerce.”

## Indemnification under Georgia & Tennessee Law

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## GEORGIA – INDEMNIFICATION

### General Rule – long established

- A party may by a valid contract relieve himself from liability to another party for particular injuries or damages or for ordinary negligence, and such an agreement is not void as against public policy.
  - See Hearn v. Central Ga. R. Co., 22 Ga. App. 1 (1918).

## O.C.G.A. § 51-12-32 - Contribution, right of; right of indemnity continued

- (c) Without the necessity of being charged by an action or judgment, the right of indemnity, express or implied, from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death and release there from.

## Indemnitee's Own Negligence

- It is against public policy in Georgia for a party to contractually indemnify himself from his own negligence UNLESS the contract expressly states that the negligence of the indemnitee is covered
  - Contract is strictly construed, and there is a presumption that the language does not extend to losses caused by the indemnitee's own negligence
  - See *Ryder Integrated Logistics, Inc. v. Bellsouth Telecommunications, Inc.*, 281 Ga. 736 (2007)

## EXCEPTION - Construction Contracts

- O.C.G.A. § 13-8-2
  - § (b) - [An] ... agreement ... in connection with or collateral to a contract or agreement relative to the construction, alteration, repair, or maintenance of a building structure ... purporting to indemnify or hold harmless the promisee against liability for damages arising out of bodily injury to persons ... resulting from the sole negligence of the promisee ... is against public policy and is void and unenforceable.

## EXCEPTION - Gross Negligence and Willful or Wanton Conduct

- Exculpatory clauses in contracts which purport to relieve a business from gross negligence or willful or wanton conduct are void as being against public policy
  - Holmes v. Clear Channel Outdoor, Inc., 284 Ga. App. 474 (2007)

## TENNESSEE – INDEMNIFICATION

- **Structured Like Georgia**
- **General Rule**
  - A party may enter into a binding and effective contract to be indemnified against his own negligence, as long as the language in the indemnification agreement is expressed in clear and unequivocal terms.
    - See Pitt v. Tyree Organization, Ltd., 90 S.W.3d 244 (2002)

## **T.C.A. § 62-6-123 – Void Contracts; Indemnification or Hold Harmless Provisions**

- A covenant promise, agreement or understanding in or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, the promisee's agents or employees, or indemnitee, is against public policy and is void and unenforceable.

## **Gross Negligence and Willful or Wanton Conduct – Exception**

- Exculpatory clauses in contracts which purport to relieve a business from gross negligence or willful or wanton conduct are against public policy.
  - Perez v. McConkey, 872 S.W.2d 897 (1994)

## Workers' Compensation – Exclusive Remedy Statute

- T.C.A. § 50-6-108
  - a) employee's exclusive remedy is Workers' Compensation
  - b) Indemnity – “This section shall not be construed to preclude third party indemnity actions against an employer who has expressly contracted to indemnify the third party

## Waiver of Subrogation - Tennessee

- Tennessee has only extended this concept to Commercial Lease cases
- Tate v. Trialco Scrap, Inc., 745 F.Supp. 458, 470 (M.D.Tenn. 1989)
  - cited to Tuxedo Plumbing Co., Inc. v. Lie-Nielsen (Georgia case)
  - lease between the owner of an industrial building and a tenant scrap company.
  - “where parties to a business transaction mutually agree that insurance will be provided as a part of the bargain, such agreement must be construed as providing mutual exculpation to the bargaining parties who must be deemed to have agreed to look solely to the insurance in the event of loss and not to liability on the part of the opposing party.”

## Waiver of Subrogation - Tennessee

- Allstate Ins. Co. v. Watson, 2005 WL 457846, \*7 (Tenn. Ct. App. Feb. 25, 2005)
  - Cited to Tate v. Trialco Scrap, Inc.,
  - “absent an express agreement to the contrary in a lease, a tenant and his or her landlord are implied coinsureds under the landlord's fire insurance policy, and the landlord's liability insurer is precluded from bringing a subrogation action against the negligent tenant.”

## Waiver of Subrogation - Tennessee

- Dattel Family Ltd. Partnership v. Wintz, 250 S.W.3d 883, 887 (Tenn. Ct. App. 2007)
  - A court may consider a tenant to be an “implied co-insured” under a landlord's insurance policy if it finds that the landlord's insurance coverage was intended for the mutual benefit of the landlord and the tenant, even if the tenant is not a named co-insured.

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## Waiver of Subrogation - Tennessee

- Travelers Property Cas. Co. of America v. Terry, 2007 WL 49558, \*3 (Tenn. Ct. App. Jan 5, 2007)
    - absent an express agreement to the contrary, a tenant and landlord "are implied co-insureds under the landlord's fire insurance policy, and the landlord's liability insurer is precluded from bringing a subrogation action against the negligent tenant.
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## Waiver of Subrogation - Georgia

- Tuxedo Plumbing v. Lie-Nielsen, 245 Ga. 27 (1980).
  - Clause in Contract: "Owner shall be responsible for procuring and maintaining fire insurance with extended coverage upon the structures and improvements of the Property in such amount(s) as determined solely by Owner."
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## Waiver of Subrogation - Georgia

- Contractor contended that this was a “waiver of subrogation clause” such that the owner and contractor waived their claims against each other regarding fire loss resulting from the work and agreed to look solely to the insurance to be procured and maintained in behalf of the owner and contractor by the owner at the owner’s expense.
- Georgia Supreme Court – AGREED
- Therefore, owner’s insurance carrier could NOT sue contractor for recovery of the sums it paid.
- Reasoning – the parties bargained for it – construed to have a mutually exculpatory effect.

## Exception to Waiver of Subrogation

- Dueling “Banjos”
- Indemnification Clause and Waiver of Subrogation Clause
- The Indemnification clause can offer “deliverance” from the restrictive waiver of subrogation clause
- Alimenta Processing Corp. v. South Ga. Pecan Co., 185 Ga. App. 330 – both clauses must be construed “so as to harmonize them.” (the banjo reference is further justified).



## Exception to Waiver of Subrogation

- Cardinal rule of contract interpretation is to ascertain the intention of the parties and such intention is to be gathered from the entire contract, considering each provision in connection with the others, and not giving the contract a construction which entirely neutralizes one provision if it is susceptible of another which gives effect to all of its provisions.

## Exception to Waiver of Subrogation

- Executive Development Properties v. Andrews Plumbing Co., 134 Ga. App. 618 (1975).
  - Contract had a waiver of subrogation clause with provision for sub-contractor to obtain insurance.
  - Contract also had an indemnification provision which required sub-contractor to indemnify contractor.
  - Georgia Court of Appeals held that sub-contractor was required to indemnify contractor (reversed the trial court's granting of summary judgment to sub-contractor).

## Exception to Waiver of Subrogation

- ❑ Personal example – UGA Student Learning Center Sprinkler damage
  - ❑ Indemnification and waiver of subrogation clauses
  - ❑ Pursued indemnification prior to going to our GL carrier
  - ❑ Sub refused to honor indemnification
  - ❑ GL carrier paid and pursued subrogation action
  - ❑ Cross Motions for Summary Judgment DENIED – Jury Question
  - ❑ Settled for over full amount of subro claim PLUS \$50,000 in attorneys' fees
  - ❑ We had the better argument to a jury – Contractor honored its promises to UGA; GL carrier honored its promises to GC
  - ❑ The only party who refused to live by their promises was sprinkler sub-contractor – and that, ladies and gentlemen, is the only reason why you are here today.

## Statutes of Limitations In Tennessee

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## Statutes of Limitation in TN

- Limitation periods usually begin running in favor of the defendant when the plaintiff discovers or should have discovered that a cause of action exists
- Some limitation periods run from an event, and this discovery rule is inapplicable.
  - For example, Slander carries a limitations period of only 6 months and no discovery rule applies.

## The burden of proof in Tennessee

- In *Carr v. Borchers*, the court stated:
  - Since, under Rule 8.03 of the Tennessee Rules of Civil Procedure, a statute of limitations defense is an affirmative defense . . . the burden of establishing that the statute has run **is upon the defendant**.

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## One Year Period

- The following actions must be commenced within ONE YEAR:
    - Personal injury
    - Wrongful death
    - Workers' compensation
    - Retaliatory discharge
    - Professional malpractice by
      - Doctors
      - Lawyers
      - Accountants
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## One Year Period

- The following actions must be commenced within ONE YEAR:
    - Libel
    - Malicious prosecution
    - False imprisonment
    - Breach of fiduciary duty by corporate officers or directors
    - Actions brought under:
      - Tennessee's Consumer Protection Act
      - Tennessee's Human Rights Act
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## Two Year Period

- A will contest is required to be filed within two years from the entry of an order admitting the will to probate.
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## Three Year Period

- The following actions must be commenced within THREE YEARS:
    - Property damage
    - Economic loss from fraud or negligent misrepresentation
    - Conversion or detention of personalty
      - NOTE: no discovery rule applies to conversion in Tennessee
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## Four Year Period

- Actions for breach of contract for a sale of goods must be brought FOUR YEARS from the date of the initial sale
  - Also, if there was an express warranty of future performance, then within FOUR YEARS from breach of that warranty
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## Four Year Period

- (a) All actions to recover damages against any person engaged in the practice of surveying for any deficiency, defect, omission, error or miscalculation shall be brought **within four (4) years** from the date the survey is recorded on the plat. Any such action not instituted **within this four (4) year** period shall be forever barred. The cause of action in such cases shall accrue when the services are performed.
  - (b) "Practice of land surveying" as used in this section includes, but is limited to, those activities set forth in [§ 62-18-102\(3\)](#), and the establishment or reestablishment of corners, boundaries, and locations of lots, parcels, tracts, or divisions of land, including distances, directions, and acreage, or fractional parts thereof; and also including, but not limited to, the correct determination and description of the same for the purpose of furnishing a legal description of any land surveyed to be used in deeds or other instruments of conveyances for the purpose of conveying title to the area surveyed.
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## Six Year Period

- The following actions must be commenced within SIX YEARS:
    - Breach of contract for services
    - Breach of contract for realty
    - Forcible entry and detainer
    - Promissory notes WITH due dates stated therein
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## Tenn. Code Ann. §

### 28-3-110

- The following actions shall be commenced within **ten (10) years** after the cause of action accrued:
    - (1) Actions against guardians, executors, administrators, sheriffs, clerks, and other public officers on their bonds;
    - (2) Actions on judgments and decrees of courts of record of this or any other state or government; and
    - (3) **All other cases not expressly provided for.**
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## Disputes over which statute applies

- In Tennessee, “It is well settled in this state that the gravamen of an action, rather than its designation as an action for tort or contract, determines the applicable statute of limitations.”
    - Frequently, a property damage or economic loss complaint will be pleaded in breach of contract language.
      - The gravamen of the action determines whether the one year or three year statute of limitations applies!
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## Limitations on Actions for Defective Improvement of Real Estate

- TCA § 28-3-201: Definitions
    - “Person” means an individual, corporation, partnership, business, trust, unincorporated organization, association or joint stock company.
    - “Substantial completion” means that degree of completion of a project, improvement, or a specified area or portion thereof (in accordance with the contract documents, as modified by any change orders agreed to by the parties) upon attainment of which the owner can use the same for the purpose for which it was intended; the date of substantial completion may be established by written agreement between the contractor and the owner.
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## Tenn. Code Ann. § 28-3-202

- All actions to recover damages for any deficiency in the design, planning, supervision, observation of construction, or construction of an improvement to real property, for injury to property, real or personal, arising out of any such deficiency, or for injury to the person or for wrongful death arising out of any such deficiency, shall be brought against any person performing or furnishing the design, planning, supervision, observation of construction, construction of, or land surveying in connection with, such an improvement within four (4) years after substantial completion of such an improvement.

## Interpretation

- In Chrisman v. Hill Home Development, Inc., the Tennessee Supreme Court held:
  - **regardless** of the procedural remedy, all actions to recover damages for injury to person or property caused by improvements to real property come within the ambit of the **four year statute of repose** at TCA § 28-3-302.

## TCA § 28-3-203

- (a) Notwithstanding the provisions of § 28-3-202, in the case of such an injury to property or person or such injury causing wrongful death, which injury occurred **during the fourth year after such substantial completion**, an action in court to recover damages for such injury or wrongful death shall be brought **within one (1) year after the date on which such injury occurred**, without respect to the date of death of such injured person.
- (b) Such action shall, in all events, be brought **within five (5) years** after the substantial completion of such an improvement.

## Vicarious Liability for Employees & Independent Contractors In Tennessee

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## Today's Roadmap:

- Vicarious Liability
    - Governing Relationships
    - General Rules and Important Exceptions
  
  - Independent Contractors
    - The Loaned Servant Doctrine
  
  - Important Recent Cases in TN
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## Respondeat Superior:

- Is a term that Tennessee courts use to describe vicarious liability in the employer/employee context.
  
  - Respondeat superior liability is generally imposed on an employer when the relationship between the employer and the actual tortfeasor implicates the principles of agency.
  
  - Under the doctrine of respondeat superior, if an agent commits a tort while acting within the scope of his employment, the plaintiff can bring a tort action against the principal of the tortfeasor.
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## Negligence

- In Tennessee, a plaintiff suing for negligence must prove the following elements:
  - (1) the defendant owed the plaintiff a duty of care;
  - (2) by engaging in conduct which fell below that standard of care, the defendant breached that duty;
  - (3) plaintiff suffered an injury;
  - (4) defendant's conduct was the cause in fact of the injury; and
  - (5) defendant's conduct was the legal, or proximate, cause of the injury.
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## Vicarious Liability

- Remember, the doctrine of respondeat superior holds that an employer may be held **vicariously liable** for the acts of its employee done within the scope of its employment.
  - The historical justification behind the principle of respondeat superior is the notion that a master who “does a thing through another does it himself.”
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## Employer Liability

- The master who is subject to respondeat superior liability is typically an employer who has engaged in and profited from business which, through the torts of its employees, inevitably results in harm to others.
  - The employer is typically financially responsible and capable of satisfying a judgment.
  - The doctrine allows the plaintiff to recover for damages by skirting the typically insolvent employee and proceeding against the more solvent employer.
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## Elements of Proof

- Generally speaking, a plaintiff in Tennessee is required to prove:
  - **(1)** that the person who caused the injury was an employee,
  - **(2)** that the employee was on the employer's business, and
  - **(3)** that the employee was acting within the scope of his employment when the injury occurred.
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## Important Relationships

- Master & Servant
  - Employer & Employee
  - Agent & Principal
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## Master & Servant

Tennessee follows the Restatement:

- (1) A MASTER is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.
  - (2) A SERVANT is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.
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## The Master/Servant relationship applied to Tennessee Employers

- In Tennessee, the doctrine of respondeat superior permits the master/principal to be held liable for the negligent actions of his servant/agent.
  - An employer is liable for the negligent acts of an employee if the employee is on the employer's business and acting within the scope of his employment at the time the negligent act occurs.
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## Scope of Employment

Tennessee courts have recognized:

- (1) Conduct of a servant is within the scope of employment if, but only if:
    - (a) it is of the kind he is employed to perform;
    - (b) it occurs substantially within the authorized time and space limits;
    - (c) it is actuated, at least in part, by a purpose to serve the master; and
    - (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.
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## Outside Scope of Employment

- (2) Conduct of a servant is **not** within the scope of employment if it is different in kind from that authorized, far beyond the authorized time and space limits, or too little actuated by a purpose to serve the master.

## Important Considerations in TN

- (a) whether or not the act is one commonly done by such servants;
- (b) the time, place and purpose of the act;
- (c) the previous relations between the master and the servant;
- (d) the extent to which the business of the master is apportioned between different servants;
- (e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;
- (f) whether or not the master has reason to expect that such an act will be done;
- (g) the similarity in quality of the act done to the act authorized;
- (h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;
- (i) the extent of departure from the normal method of accomplishing an authorized result; and
- (j) whether or not the act is seriously criminal.

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## Scope of Employment

- Most Important Overall Consideration:
    - PROMOTING THE EMPLOYER'S INTERESTS
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## Principal & Agent

- Agency is a relationship founded upon the mutual consent of two parties:
  - 1) consent by the **principal** that the agent shall act on the principal's behalf and subject to the principal's control
  - 2) consent by the **agent** that she shall act on the principal's behalf and subject to the principal's control
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## Roles of Principal & Agent

- The one for whom the action is taken is the **principal**.
  - The one who is to act is the **agent**.
  - General Rule: when the principal directs, orders, or knowingly authorizes another to perform an act, then the principal is liable for the harm proximately caused by those acts.
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## The Agency Relationship in Tennessee

- In its broadest sense, the concept of agency includes every relation in which one person acts for or represents another.
  - An agency relationship does **not** require an explicit agreement, contract, or understanding between the parties, and when the facts establish the existence of an agency relationship, it will be found to exist whether the parties intended to create one or not.
  - Whether an agency exists is a question of fact under the circumstances of the particular case; and whether an agency has been created is to be determined by the relation of the parties as they in fact exist under their agreement or acts.
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## Particular Applications

- While the principles embodied in the respondeat superior doctrine are relatively easy to articulate, they are not always easy to apply.
  - The doctrine does not lend itself to bright line rules, but rather requires the weighing and balancing of the facts and circumstances of each case.
  - Whether a servant's act may reasonably be held within scope of his employment is ordinarily a "question of fact" for the jury except where departure from master's business is **of marked and decided character**.
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## TRAVEL

- When an employee's job requires travel, an employer *may* be vicariously liable for the employee's negligence while traveling.
  - The threshold issue in cases involving travel is **whether the employment created the necessity for travel**.
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## Travel

- If the employee's duties created a necessity for travel, then the employee is within the scope of employment while traveling, as long as the employee does not deviate from the employer's business and engage in conduct the employer had no reason to expect.
  - If, however, the employee's work played no part in creating the reason for travel and was only incidental to the trip, then the trip was **not** within the scope of employment.
  - Travel that serves a dual purpose, the employer's and the employee's or a third person's, will still be considered to be **within** the scope of employment.
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## Travel Tests in Tennessee

- If the trip would have taken place even without the business reasons, then the trip is personal and **not** within the scope of employment.
  - If, however, the trip was one that would have required the employer to send another employee over the same route or to perform the same function if the trip had not been made, then the trip is **within** the scope of employment.
  - If a trip is authorized by an employer for business purposes, then the return trip is **also** within the scope of employment as long as the employee has not deviated from the employer's business.
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## Temporary Suspension of Liability: Frolic/Detour

- If an employee who is supposed to perform certain work for his employer steps or turns aside from his employer's work or business to serve some purpose of his own, unconnected with the employer's business, or if he deviates or departs from his work to accomplish some purpose of his own that is unconnected with his employment, the relationship of employer and employee or master and servant is thereby temporarily suspended.
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## Temporary Suspension of Liability: Frolic/Detour

- The master or employer is not liable for the acts of the servant or employee during the period of such suspension, because the employee is then acting upon his own volition, obeying his own will, not as a servant or agent, but as an independent person, even though he may intend and does return to his employer's business after he has accomplished the purpose of his detour from duty.
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## General Rule: Frolic/Detour

- Where a servant or employee deviates from his line of duty and engages in a mission of his own, or from some third person, the master or employer cannot be held liable or responsible for the acts of the servant or employee.
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## Express orders or directions

- A master **is** liable for the tort of his servant where the tortious act is done in obedience to his express orders or directions, even though the service is not within the line of the servant's usual duties, if the injury to the third person occurs as the natural, direct, and proximate result of the directed or authorized act.
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## Kinnard v. Rock City Const. Co.

- A construction worker parked his car on the street in front of the construction project
- When a lumber truck came to drop off a delivery, it could not maneuver into the site because the worker's car was blocking the way in
- The superintendent instructed the worker to move his car, and when he did, he negligently struck the Plaintiff's automobile
- Admittedly, the construction worker was not hired to move parked cars but as general construction laborer
- Regardless, the court held that it was a question for the jury whether the construction worker was acting as a servant for Rock City Const. Co. when moving his vehicle

## INDEPENDENT CONTRACTORS

- Liability for Independent Contractors under Tennessee law



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## Independent Contractors

- The term “independent contractor” is generally used to describe a person who does work for another under conditions which are not sufficient to make him a servant of the other.
  - So, who exactly is an “independent contractor” under Tennessee law?
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## Independent Contractors

- An **independent contractor** is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to control of his employer, except as to the result of his work.
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## And Further...

- The employer of such a contractor, if he be a fit and proper person, and the work be not in itself unlawful, or a nuisance in itself, or necessarily attended with danger to others, will **not** be responsible for his negligence or that of his subcontractors or his servants.
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## General Rule

- As a general rule: an employer is **not** liable for the negligence of an independent contractor.
  - Since the employer has no power of control over the manner in which the work is to be done by the contractor, it is to be regarded as the contractor's own enterprise, and the contractor, rather than the employer, is the proper party to be charged with the responsibility of bearing the risk of injury.
-

## Exceptions to General Rule

- Exceptions, where the employer retains liability, may be said to fall into three very broad categories:
  - 1) Negligence of the employer in selecting, instructing, or supervising the contractor.
  - 2) Non-delegable duties of the employer, arising out of some relation toward the public or the particular plaintiff.
  - 3) Work which is specially, peculiarly, or “inherently” dangerous.

## The Seven Factors

- (1) the right to control the conduct of the work,
- (2) the right of termination,
- (3) the method of payment,
- (4) the freedom to select and hire helpers,
- (5) the furnishing of tools and equipment,
- (6) the self-scheduling of work hours, and
- (7) the freedom to render services to other entities.

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## Control

- The most indicative factor is the right to control the conduct of the work.
  - Control is a key element in the creation of a principal-agent relationship.
  - In Tennessee, it is **not** the right to control the result that is determinative of the existence of an agency relationship; it is the right to control the actual conduct of the work.
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## The Determinative Factor

- The primary test for determining a party's status as employee or independent contractor is the right to control.
  - The right to control the 'result' is not determinative of the existence of the relation of master and servant, but the actual control of means and method **is**.
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## Important Recent Cases in TN

- Now that we have covered the important concepts in vicarious liability and independent contractors, we will examine some recent examples of how Tennessee courts have applied these concepts and also discuss some of the more advanced legal doctrines within this framework.
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## Arrow Electronics v. Adecco Employment Services, Inc.

- **Basic Facts:**
    - Plaintiff used temporary workers from Defendant's temporary employment service.
    - Plaintiff sued Defendant for property damages caused by temporary worker's negligence while working in Plaintiff's warehouse.
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## Arrow Electronics v. Adecco Employment Services, Inc.

- LOANED SERVANT DOCTRINE:
    - Tennessee recognizes the “loaned servant” doctrine, under which “an employee of one employer may become the servant of another and shift the liability for his negligent acts to the second employer.”
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## Arrow Electronics v. Adecco Employment Services, Inc.

- A servant at a particular time may remain under the control of his general employer for some purposes and yet be under the control of a special employer for others.
  - Likewise it sometimes happens that a particular work in which the servant is engaged may be properly considered as the work or business of both the general employer and the special employer.
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## Arrow Electronics v. Adecco Employment Services, Inc.

- Since the question of liability is always raised because of some specific act done, the important question is not whether or not he remains the servant of the general employer as to matters generally, but whether or not, as to the act in question, he is acting in the business of and under the direction of one or the other.
  - It is not conclusive that in practice he would be likely to obey the directions of the general employer in case of conflict of orders.
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## Arrow Electronics v. Adecco Employment Services, Inc.

- The question is whether it is understood between him and his employers that he is to remain in the allegiance of the first as to a specific act, or is to be employed in the business of and subject to the direction of the temporary employer as to the details of such act.
    - This is a question of fact in each case.
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## Armoneit v. Elliot Crane Service, Inc.

- **Basic Facts:**
    - Plaintiff was injured while building a house.
    - He said he fell because he was almost hit by a truss being moved by a crane operated by Elliot Crane Service.
    - Elliot maintained that although it employed the crane operator, it was not responsible for the operator's negligence, if there was any.
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## Armoneit v. Elliot Crane Service, Inc.

- The plaintiff's employer rented a crane to aid in a construction project, and as a result, the plaintiff was injured on the jobsite.
  - The plaintiff was helping to attach trusses being lifted by the crane to the roof of a house when the crane's operator negligently caused him to fall from the roof.
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## Armoneit v. Elliot Crane Service

- Fox Ridge Homes, Inc. (“Fox Ridge”) was the general contractor with the overall responsibility for constructing the homes in the River Glen subdivision in Madison, TN.
  - Fox Ridge subcontracted framing work to Alvin Fritscher, d/b/a Superior Framing.
  - In early February 1996, Fox Ridge's construction manager rented a crane and operator from Elliott Crane Service, Inc. to assist in setting prefabricated roof trusses on two houses that were under construction.
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## Armoneit v. Elliot Crane Service

- On February 9, 1996, the crane operator, and the crane arrived on the site.
  - Mr. Fritscher (Fox Ridge's framing subcontractor) signed Elliott Crane's standard rental agreement.
  - The agreement provided that the lessee (Fox Ridge) exclusively controlled the crane's operator and that the lessee would indemnify Elliott Crane against claims arising from the crane's operation.
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## Armoneit v. Elliot Crane Service

- The crane operator provided with the crane was the only person operating the crane.
  - However, Mr. Fritscher and his employees gave the crane operator directions concerning where and how to move the trusses.
  - Plaintiff was one of the workers standing on top of the partially framed houses and was responsible for attaching the roof trusses after the crane operator lifted them into place.
  - Plaintiff alleged that crane operator negligently lifted one of the trusses, causing plaintiff to fall off the roof.
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## Armoneit v. Elliot Crane Service

- The Court stated, “Under the doctrine of respondeat superior, a master faces liability for its servant's negligence if the servant is acting within the scope of his or her employment, even if the master itself is not negligent.”
  - The Court also explained, “One rationale for this rule is that masters are in the best position to avoid the risk of harm their enterprise may cause and can spread the burden of potential harm by insuring against it and by adjusting prices accordingly.”
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## Armoneit v. Elliot Crane Service

- Where a general employer rents out a machine and an employee to operate it, the courts generally infer that the operator remains in the service of his or her general employer on the assumption that the temporary employers only control what the servants do, not how they do it.
- Nevertheless, the equipment operator becomes the temporary employer's servant for the purposes of a specific act when the temporary employer directs the servant on the details of how to accomplish the act.

## Armoneit v. Elliot Crane Service

- REMEMBER: “In Tennessee, the right to control the result is not determinative of the existence of the relation of master and servant, but the actual control of means and method is.”
- Accordingly, the Court of Appeals held that a jury could find that the crane operator was the borrowed servant of either Fox Ridge or Superior Framing.

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## Armoneit v. Elliot Crane Service

- This case also discusses an important TN statute on the issue of subrogation in the construction industry:
  - In relevant part, [Tenn.Code Ann. § 62-6-123](#) provides that an agreement concerning “the construction, alteration, repair or maintenance of a building ... purporting to indemnify or hold harmless the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, the promisee's agents or employees, or indemnitee, is **against public policy and is void and unenforceable.**”
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## Armoneit v. Elliot Crane Service

- The contract stated that the lessee need not indemnify Elliott Crane for Elliott Crane's “sole negligence, but, [Elliott Crane's] liability for damage caused by the sole negligence of [Elliott Crane], ... shall be limited to the amount of [Elliott Crane's] liability insurance.”
  - The court found this language in the rental agreement violated [Tenn.Code Ann. § 62-6-123](#).
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## White v. Revco Discount Drug Centers, Inc.

- ISSUE:

- Whether a private employer may be held liable for the negligent actions of an off-duty police officer who was hired by the employer for private security purposes.
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## White v. Revco Discount Drug Centers, Inc.

- Private employers may be held vicariously liable for the acts of an off-duty police officer employed as a private security guard under any of the following circumstances:
    - (1) the action taken by the off-duty officer occurred within the scope of private employment;
    - (2) the action taken by the off-duty officer occurred outside of the regular scope of employment, if the action giving rise to the tort was taken in obedience to orders or directions of the employer and the harm proximately resulted from the order or direction; or
    - (3) the action was taken by the officer with the consent or ratification of the private employer and with an intent to benefit the private employer.
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## White v. Revco Discount Drug Centers, Inc.

- An agent may serve two masters simultaneously, so long as the objectives of one master are not contrary to the objectives of the other.
    - Typically, an employer may be held liable, under the doctrine of respondeat superior, for the torts committed by his employees while performing duties within the scope of employment.
    - A private employer is not immune from liability, under the doctrine of respondeat superior, for the negligent or wanton acts of an employee for the reason that the employee has official status as a police officer.
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## White v. Revco Discount Drug Centers, Inc.

- REMEMBER:
    - An agency relationship does not require an explicit agreement, contract, or understanding between the parties, and when the facts establish the existence of an agency relationship, it will be found to exist whether the parties intended to create one or not.
    - Whether an agency exists is a question of fact under the circumstances of the particular case; and whether an agency has been created is to be determined by the relation of the parties as they in fact exist under their agreement or acts.
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## White v. Revco Discount Drug Centers, Inc.

- Although the principal's right to control the actions of the agent is an important factor in finding the existence of an agency relationship, the right of control is not necessarily as important as the principal's exercise of actual control over the agent.
    - A principal may be held liable for an agent's tortious act, even if that act occurs outside of the scope of the agency, if the act was commanded or directed by the principal.
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## Vicarious Liability for Employees & Independent Contractors In Georgia

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May 1, 2009

MOORE INGRAM JOHNSON & STEELE  
A LIMITED LIABILITY PARTNERSHIP

## GEORGIA – VICARIOUS LIABILITY

### ■ Introduction

#### □ *Concept*

- Holding an employer liable for the acts of those under his control

- Idea = if employer has control over how another does what he is doing, then the employer is the proper party to be charged with the responsibility of preventing the risk, and thus bearing the risk.

#### □ *Vicarious Liability*

- Definition - Black's Law Dictionary
  - "Liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties."
  - *Also referred to as "Respondeat Superior"*
    - Latin for "let the superior make answer"
    - Definition - Black's Law Dictionary
    - "The doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency."

## Vicarious Liability for Employees

- ❑ Liability for negligent acts of people directly employed by employer
- ❑ *Straight forward*
  - if employee committed tort while he was in the scope of this employment, then the employer can be held liable under vicarious liability
    - ❑ Employee must be acting in furtherance of his employer's business
    - ❑ Employee must be acting within the scope of his employer's business

## Vicarious Liability for Employees

- ❑ O.C.G.A. § 51-2-4
  - "An employer generally is not responsible for torts committed by his employee when the employee exercises an independent business and in it is not subject to the immediate direction and control of the employer."
- ❑ "*Scope of employment*" = *issue most often litigated*
  - If you can show that the employee was acting in furtherance of the business, or outside the scope of employment, no vicarious liability
  - Just because the event occurs during the time of employment does not automatically mean that the act was performed in the scope of employment

## Vicarious Liability for Employees

### ■ Examples

- Restaurant not liable for cashier's fight with patron because act of fighting was not in furtherance of cashier's duties
  - See Dowdell v. Krystal Co., 291 Ga. App. 469 (2008)
  - Employer of security guard not liable for security guard's actions of shooting apartment resident where incident occurred off apartment grounds and arose via a personal incident between the resident and the security guard
  - See New Madison South Ltd. Partnership v. Gardner, 231 Ga. App. 730 (1998)

## Vicarious Liability for Employees

- Employer of broker not liable where investors bought nonexistent funds from broker which broker represented were funds of the employer; employer did not know about or approve of brokers' actions before they happened
  - See Hobbs v. Principal Financial Group, Inc., 230 Ga. App. 410 (1998)
- Employer not liable for employees acts of attacking a limousine driver on the way home from a corporate Christmas party
  - See Ihsiaba v. Pelletier, 214 Ga. App. 721 (1994)

## Vicarious Liability for Subcontractors

- *The law - "Independent Contractor"*
  - Definition - Black's Law Dictionary
    - "One who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it."
  - General Rule = per definition, no vicarious liability on a party for the acts of an independent contractor that the party hired because the party did not control the "time, method, and manner" of the independent contractor's work

## Vicarious Liability for Subcontractors

- *Reality*
  - In Georgia, General Contractors are almost always found to some degree liable for their subcontractor's actions
  - Quote: with regard to the concept of an " independent contractor"
    - "the rule of non-liability is now primarily important as a preamble to the catalog of its exceptions"
      - See Peachtree-Cain Co. v. McBee, 254 Ga. 91 (1985) (quoting Restatement of Torts, 2d, § 409, Comment b)
      - **The exceptions have become the rule**

## *O.C.G.A. § 51-2-5 - Statutory Exceptions*

- lists several statutory exceptions where an employer can be held liable for the negligence of an independent contractor
  - (1) When the work is wrongful in itself or, if done in the ordinary manner, would result in a nuisance;
    - Ex) Builder hires Demo Corp as an independent contractor to demolish John Doe's house. If Builder had no right to demolish John Doe's house then, even though Builder did not control how Demo Corp did their work, Builder can be held liable
  - See Azar v. General Motors Acceptance Corp., 134 Ga. App. 176 (1975)

## *O.C.G.A. § 51-2-5 - Statutory Exceptions*

- (2) If, according to the employer's previous knowledge and experience, the work to be done is in its nature dangerous to others however carefully performed;
  - Ex) Natural Gas Co. hires independent contractor to unload natural gas for customer. Customer is injured in explosion. Natural Gas Co. is liable for independent contractor's actions because the unloading of natural gas is inherently dangerous.
    - See Community Gas Co. v. Williams, 87 Ga. App. 68 (1952)

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## *O.C.G.A. § 51-2-5 - Statutory Exceptions*

- (3) If the wrongful act is the violation of a duty imposed by express contract upon the employer;
    - Ex) Homeowner enters into contract with Builder for Builder to erect a retaining wall. Builder hires independent contractor construct the wall. Builder is liable for defects in wall because Builder contracted with Homeowner to provide the wall.
      - See Crispens Enterprise, Inc. v. Halstead, 209 Ga. App. 133 (1993)
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## *O.C.G.A. § 51-2-5 - Statutory Exceptions*

- (4) If the wrongful act is the violation of a duty imposed by statute;
    - Ex) Grocery store hires janitor as an independent contractor to clean floors. Grocery store can be held liable for janitor's negligent act of leaving water on floor and causing customer to fall because grocery store has a statutory duty to keep its premises safe.
      - See Kelley v. Piggly Wiggly Southern, Inc., 230 Ga. App. 508 (1997)
-

## *O.C.G.A. § 51-2-5 - Statutory Exceptions*

- (5) If the employer retains the right to direct or control the time and manner of executing the work or interferes and assumes control so as to create the relation of master and servant or so that an injury results which is traceable to his interference;
  - Ex) Telephone company found liable for subcontractor installer's negligent telephone pole installation despite fact that contract stated installer was an "independent contractor." Telephone company retained right to direct order in which work was to be done, time work was to be done, reserved right to remove installer's employees, and have right to have a representative continuously at the site.
    - See Bellsouth Telecommunications, Inc. v. Helton, 215 Ga. App. 435 (1994)

## *O.C.G.A. § 51-2-5 - Statutory Exceptions*

- (6) If the employer ratifies the unauthorized wrong of the independent contractor.
  - Plaintiff sued neighbor and builder of neighbor's home for surface water runoff damages. Defendant neighbor argued he was not responsible for acts of independent contractor builder for construction work which caused runoff. However, defendant neighbor held liable because he ratified and accepted the work performed by the builder.
    - Greenwald v. Kersh, 265 Ga. App. 196 (2004)

## Joint & Several Liability and Comparative Fault in Georgia and Tennessee

May 1, 2009

MOORE INGRAM JOHNSON & STEELE  
A LIMITED LIABILITY PARTNERSHIP

### JOINT & SEVERAL LIABILITY & COMPARATIVE FAULT - Concepts

#### ■ Joint & Several Liability vs. Comparative Fault

- *Joint & Several Liability*
  - Black's Law Dictionary
    - "Liability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary's discretion. • Thus, each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from nonpaying parties."
  - Pro Plaintiff
    - Plaintiff can recover her entire verdict against one of several defendants regardless of that defendant's proportion of fault
      - Entire verdict can be obtained against a defendant who was only 1% liable
- Allows plaintiff to go after deep pockets

## Concepts (cont'd.)

- *Comparative Fault/Appportionment of Liability*
  - Black's Law Dictionary – “Comparative Fault”
    - “A plaintiff's own negligence that proportionally reduces the damages recoverable from a defendant”
  - Black's Law Dictionary – “Apportionment of Liability”
    - “The parceling out of liability for an injury among multiple tortfeasors, and possibly the plaintiff as well.”
  - Pro Defense
    - Each defendant is only liable for the amount he is actually at fault
    - Ex) jury finds Defendant A 95% at fault Defendant B 5% at fault
- If Defendant A is judgment proof, Plaintiff only recovers 5% of her damages.

## Joint & Several Liability and Comparative Fault in Tennessee

- **McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992)**
  - Supreme Court of Tennessee judicially created Tennessee's comparative fault system
  - Facts
    - Accident between plaintiff automobile driver and defendant tractor trailer driver
    - Plaintiff and defendant had both been drinking
    - Under old law, Plaintiff could not recover because he was to some degree at fault
      - Old Tennessee Law = Contributory Negligence
        - If plaintiff was found to be at some degree responsible for her injuries, Plaintiff could not recover against the defendants

## Tennessee (cont'd.)

- Holding
  - Tennessee adopts modified comparative fault
    - Modified = “49% rule” = Plaintiff cannot recover if his negligence is equal to or greater than the combined Defendants negligence
  - In addition to assigning the plaintiff’s percentage of fault, the jury must also determine each defendant’s percentage of fault
  - “We recognize that today’s decision affects numerous legal principles surrounding tort litigation. For the most part, harmonizing these principals with comparative fault must await another day.”
- Tennessee Supreme Court did provide some guidance:
  - Specifically stated Joint and Several liability is “obsolete”
  - No more contribution among joint tortfeasors because apportioning fault
  - Fault of nonparties can be considered by the jury

## Tennessee (cont'd.)

- **TCA § 20-1-119 - Comparative fault; additional defendants; limitations of actions**
  - Tennessee legislature, following McIntyre, codified the procedure for asserting fault against nonparties
  - In defendants answer or amended answer, defendant must assert that a nonparty caused or contributed to the injury or damage
  - Statute of Limitation
    - If plaintiff’s statute of limitations for bringing suit against that non party has expired, plaintiff gets an additional 90 days to either:
      - 1) amend the complaint to add the nonparty as a defendant; or
      - 2) file a separate action against the nonparty

## Tennessee (cont'd.)

### ■ **Several Tennessee opinions struggled with Comparative Fault after McIntyre**

#### □ *Strict Products Liability Carve Out*

##### ■ Owens v. Truckstops of America, 915 S.W.2d 420 (Tenn. 1996)

- Joint and several liability is essential to strict products liability
  - All you have to prove in strict liability is that the product was defective or dangerous; no proof of negligence needed
  - Liability can be found against multiple parties in the “chain” of the product
  - Manufacture, seller, etc.

## Tennessee (cont'd.)

- Parties in chain of distribution must be treated as a single unit when allocating fault
- If plaintiff sues several defendants, and of the defendants at least two are “products liability” defendants, then the products liability defendants are treated as a single unit when assessing fault
  - When fault is assessed against the single products liability unit (which is comprised of multiple defendants), judgment against the multiple products liability defendants is joint and several.
  - Apportionment of fault among remaining parties is normal

## Tennessee (cont'd.)

- Ex)
  - P sues A, B, Product Liability Defendant (“PLD”) # 1 and PLD # 2.
  - Jury could hypothetically apportion fault as follows:
    - P – 10%
    - A – 20%
    - B – 20%
    - PLD #1 & PLD #2 – 50%
  - The 50% judgment against the product liability defendants is joint and several
  - The judgment against A and B is only several

## Tennessee (cont'd.)

- *Workers’ Compensation Immunity Trumps Comparative Fault*
  - Ridings v. Parsons, 914 S.W.2d 79 (Tenn. 1996)
    - Employee fell off a ladder during the course of his employment, sued several parties, including the manufacture of the ladder
      - Could not sue employer because of Tennessee’s Workers’ Compensation Immunity
    - Defendants amended answer to assert fault against Plaintiff’s employer – arguing jury should assert fault against employer

## Tennessee (cont'd.)

- Holding = Defendants cannot assert fault against the plaintiff's employer because, pursuant to McIntyre and TCA § 20-1-119, Tennessee policy is to only allow a defendant to assert fault against a parties who are subject to liability
- Court disregarded concept that a defendant is only liable for his own share
  - Employer's share of liability is distributed among the defendants where Workers' Compensation Immunity applies
- The holding of Ridings broadly applied to all potential defendants, a jury could only apportion fault against defendants who the plaintiff could actually sue
  - Greatly undermined McIntyre

## Tennessee (cont'd.)

- Carroll v. Whitney, 29 S.W.3d 14 (Tenn. 2000)
  - Tennessee Supreme Court limited Ridings
  - A defendant can properly assert fault against nonparties, regardless of whether the plaintiff could recover against them, EXCEPT Workers' Compensation Immunity
    - Ex) Jury could apportion fault against nonparty state employed physician who was immune from direct suit from the plaintiff
    - BUT – cannot apportion fault against an employer who enjoys Workers' Compensation Immunity

## Tennessee (cont'd.)

- Rational for singling out Workers' Compensation Immunity
  - Ex) facts of Ridings
  - Plaintiff employee sued manufacturer, manufacturer tries to assert fault against nonparty employer of plaintiff
  - If Workers' Compensation Immunity carve out was not allowed:
    - Jury could apportion fault against employer, which would reduce the employee's total recovery
    - Then employer could exercise its right of subrogation against the employee to recover the amounts obtained from the manufacturer
  - Court refused to take it that far

## Tennessee (cont'd.)

- *Intentional Torts*
  - Intentional acting defendant and negligent acting defendant are jointly and severally liable if the act of negligence was a breach of a duty to prevent a foreseeable injury
  - Limbaugh v. Coffee Medical Center, 59 S.W.3d 73 (Tenn. 2001)
    - Facts
    - Nursing home employee assaulted a 90 year old woman who was confined to wheelchair
    - Assaulted woman and her son sued the nursing home and the employee for damages
    - Employee had a history of violent acts and her actions were foreseeable to employer

## Tennessee (cont'd.)

- Holding
  - Where a plaintiff sues all parties whose actions caused the injuries, and one party acted intentionally, and the other party was negligently tortious for failing to account for foreseeable actions of the employee, each defendant is held jointly and severally liable
  - Reasoning
  - Negligent and intentional torts are regarded as different degrees of culpability
  - If apportionment was allowed, the negligent person's incentive to comply with the duty of care to prevent future wrongdoing would be diminished
- Negligent tortfeasor should not be able to reduce his liability by relying of the foreseeable risk of harm that he had a duty to prevent.

## Tennessee (cont'd.)

- Cannot apportion fault against a nonparty whose foreseeable intentional act caused the damage
  - Turner v. Jordan, 957 S.W.2d 815 (Tenn. 1997)
  - Similar facts to Limbaugh
  - Mental patient attacked the plaintiff
  - Plaintiff sued the Doctor because the doctor released the patient when it was foreseeable that the patient would cause harm to someone.
  - Doctor was not allowed to apportion fault against nonparty mental patient

## Joint & Several Liability and Comparative Fault in Georgia

### ■ Georgia's Tort Reform Legislation

- Unlike Tennessee, Georgia adopted comparative fault via statute
- February 16, 2005 = effective date
  - Applies to all causes of action accruing February 15, 2005 and later
- No Georgia Appellate decision has addressed the specifics of the statute
  - Causes of action which accrued after the law came into effect are just now making their way to the Georgia Court of Appeals

## Georgia (cont'd.)

### ■ Old Law – Pre-Tort Reform

- If plaintiff not at fault – joint tortfeasors were held jointly and severally liable
  - See former O.C.G.A. § 51-12-31
- If plaintiff was found to be some degree at fault – jury “*may*” apportion its award of damages against liable defendants if the defendants degree of fault was greater than the plaintiff's
  - See former O.C.G.A. § 51-12-31
  - “*may*” = Not mandatory
    - use of word may = permissive
- Apportionment of fault was not an entirely new concept in Georgia

## Georgia (cont'd.)

- **New Statute – O.C.G.A § 51-12-33**
  - Generally regarded to completely abolish joint and several liability
  - *Subsection (a) – Comparative Negligence*
    - If plaintiff is to some degree responsible for damages or injury, trier of fact “*shall*” determine percentage of fault of the plaintiff
      - “*Shall*” = Mandatory
    - After trier of fact determines the plaintiff’s percentage of fault, judge reduces the amount of damages available to plaintiff by that percentage
    - Example
      - Jury determines plaintiff is 20% at fault, only 80% of the “pot” remains as an available award to the plaintiff

## Georgia (cont'd.)

- *Subsection (b) – Apportionment of Fault*
  - After reduction of total “pot” amount, if any, trier of fact “*shall* . . . apportion its award of damages among the persons who are liable according to the percentage of fault of each person.”
    - apportion fault among defendants pursuant to each defendant’s percentage of fault
  - Damages apportioned among defendants “*shall* not be subject to any right of contribution.”

## Georgia (cont'd.)

- Common law contribution not logical because the defendant's fault has already been determined
  - No "if I am found liable, then he is liable argument"
  - Defendant not "overcharged" with any liability to seek from another party
- NOTE: Statute only says contribution, not indemnification
  - Presumably, no effect on contractual indemnification

## Georgia (cont'd.)

- *Subsections (c) and (d) – Fault of Non-Parties*
  - §(c)
    - "In assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages, *regardless of whether the person or entity was or could have been named as a party to the suit.*"
      - Arguably covers all immune parties
      - Sovereign Immunity
      - Workers' Compensation Immunity

## Georgia (cont'd.)

- §(d) – states the two scenarios where negligence or fault of a nonparty “*shall*” be considered:
  - 1) Settlement Agreement
    - if plaintiff entered into a settlement agreement with the nonparty; OR
  - 2) Notice
    - if a defendant gives notice no later than 120 days before trial that a nonparty was wholly or partially at fault

## Georgia (cont'd.)

- Notice requirement - file a pleading which states
- nonparty's name
- nonparty's last known address
- brief statement of the basis for believing nonparty to be at fault
- Notice can be stated as a defense in an Answer, or later filed as a separate pleading
- NOTE – notice requirement is a very low threshold
- Once defendant files notice – ball is in plaintiff's court to either name the party, or risk an unrecoverable percentage of fault being assessed against that party at trial

## Georgia (cont'd.)

- *Subsection (f)*
  - Assessments of percentage of fault against nonparties is only used to determine what percent the named parties are at fault
  - Findings of fault against a non party by a jury do not subject that nonparty to liability
    - Apportionment of fault ≠ a judgment against a nonparty

## Georgia (cont'd.)

- *Subsection (g) – 49% rule*
  - No matter what – if plaintiff is 50% liable or more in step one, then the plaintiff is not entitled to receive any damages
  - 50% or greater liability on the part of the plaintiff = defense verdict

## Georgia (cont'd.)

- **Issues with Georgia's new apportionment of fault system**
  - *Its New*
    - No case law has interpreted the statute
  - *Breach of Contract?*
    - Statute is in tort title in Official Georgia Code
- **Not clear if joint and several liability still exists in breach of contract actions**

## Georgia (cont'd.)

- *Confusing Language in Statute*
  - "plaintiff is to some degree responsible"
    - Referenced in title of statute ; subsections (a)
    - Plain language argument = statute does not apply unless plaintiff is some degree responsible
      - BUT – subsection (b), discusses procedure after a reduction of the plaintiff's damages, "IF ANY"
      - "If any" language contemplates apportionment even where plaintiff is found to be 0% liable
  - At least one State Court Order has found that the apportionment of fault statute applies even if the plaintiff is not to some degree at fault

## Georgia (cont'd.)

- “actions against more than one person”
  - Referenced in title of statute ; subsection (b)
    - Note –
    - subsection (a) (which deals with determining plaintiff’s percentage of fault) references actions brought against “one or more persons”
    - subsection (b) (which deals with apportioning fault among “persons who are liable”) references actions brought against “more than one person”

## Georgia (cont'd.)

- Plain language argument = statute does not apply unless the action is brought against more than one defendant
  - BUT – with consideration of fault of nonparties, it does not make sense that statute would not equally apply where the plaintiff sued only one defendant
  - Goal of statute is to only apportion fault against a defendant for that defendant’s actual liability

## Georgia (cont'd.)

- *Unanswered Questions* – Georgia courts will have to eventually address several issues which other jurisdictions have struggled with
  - Intentional torts
    - Ex) apartment complex battery
      - Criminal's liability v. Apartment complex liability for failing to provide safe premises
      - Criminal is the one who is truly responsible for the act
      - But apartment complex should still be held to some duty to provide a safe premises
  - Strict Products Liability carve out?
  - Workers' Compensation Immunity carve out?

## Georgia (cont'd.)

- **Big Differences Between Tennessee and Georgia Apportionment of Fault Systems**
  - *Statute of Limitations*
    - TN – permits an extension of the Statute of Limitations
    - GA – does not
  - *Notice of Fault of Nonparty*
    - TN – Must be in answer or amended Answer
    - GA – can be asserted in a separate pleading
      - Can be in an answer, or a separate document

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## Georgia (cont'd.)

- **Big Differences Between Tennessee and Georgia Apportionment of Fault Systems**

- ***Established Precedent***

- **TN – Concept has been applied since 1992**
    - **Several decisions have been issued explaining statute, and creating “carve outs”**
  - **GA – no published decision on the new statute**
    - **Unanswered questions remain**
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## Repossession Law

May 1, 2009

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## Repossession Law in Georgia

- Creation of Valid Security Interest. In Georgia, a motor vehicle Certificate of title is mailed or delivered to the holder of a first lien named on it. If there is no security interest holder or lienholder named, the certificate of title is held directly by the owner. If the certificate of title is mailed to a security interest holder or lienholder, such person shall notify by mail all other lien or security interest holders that such person has received the certificate of title. The notice shall inform the security interest holder or lienholder of the contents and information reflected on such certificate of title. Such mailing or delivery shall be within five days, exclusive of holidays, after the receipt of the certificate by the holder of any security interest or lien. (O.C.G.A. §40-3-26)
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## Repossession Law in Georgia

- Custody of Title. The security interest holder or lienholder may retain custody of the certificate of title until its claim has been satisfied. The security interest holder must then deliver the certificate to the next lienholder within ten days after its interest has been satisfied. If there are no other security interests, the certificate of title is delivered to the owner. (O.C.G.A. §40-3-26)
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## Repossession Law in Georgia

- Repossession of Collateral. Unless otherwise agreed, and subject to compliance with other applicable laws, a secured party has, on default, the right to take possession of collateral. In taking possession a secured party may proceed without judicial process only if this can be done without a breach of the peace. If not, a legal action may proceed to recover possession. (O.C.G.A. §11-9-609)

## Repossession Law in Georgia

- Redemption of Collateral - At any time before a secured party has disposed of collateral, entered into contract for disposition of the collateral, or accepted the collateral in full or partial satisfaction of the obligation it secures, the debtor or any other secured party may, unless otherwise agreed in writing after default, redeem the collateral by tendering fulfillment of all obligations secured by the collateral, expenses reasonably incurred by the secured party in retaking, holding, and preparing collateral for disposition, arranging for sale, and to extent provided in agreement and not prohibited by law, reasonable attorneys' fees and legal expenses. (O.C.G.A. §11-9-623)

## Repossession Law in Georgia

- Deficiency. When a motor vehicle has been repossessed after default in accordance with Part 6 of Article 9 of the Uniform Commercial Code, the secured party may not recover a deficiency against the debtor **unless, within ten days after repossession, he forwards by registered, certified or statutory overnight delivery to the address of the debtor shown on the contract or later designated by debtor, a notice of the intention of the secured party to pursue a deficiency claim against the debtor. The notice must also advise the debtor of its right of redemption, and right to demand a public sale** of the repossessed vehicle. In the event the debtor exercises its right to demand a public sale, he must advise holder in writing of the election by registered, certified or statutory overnight delivery, addressed to the holder at the address from which holder's notice emanated, within ten days after the posting of the original notice. With election by the debtor, holder must dispose of the vehicle at a public sale as provided by law, in the state and county where the original sale took place, or the state and county where the vehicle was repossessed, or the state and county of the debtor's residence, at holder's election. This provides cumulative additional rights and remedies to the Uniform Commercial Code Provisions which must be fulfilled before a deficiency claim will lie against a debtor. (O.C.G.A. §10-1-36)

## Repossession Law in Georgia

- Sale of Collateral. Disposition of collateral may be by public or private sale, and may be at any time and place and on any terms, but every aspect including method, manner, time, place, and terms must be commercially reasonable. (O.C.G.A. §11-9-610) Unless collateral is perishable, reasonable notice of time and place of any public sale, or reasonable notice of time after which any private sale is to be made, must be sent by secured party to the debtor and any secondary obligor. (O.C.G.A. §11-9-611)

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## Repossession Law in Georgia

- Personal Property. Any person who lawfully repossesses a motor vehicle shall be an involuntary, gratuitous, or naked depository of any personal property found in such motor vehicle and has a lien on such property for any reasonable expenses incurred in storing such property or in giving notice to such owner. O.C.G.A. §44-14-411.1
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## Repossession Law in Georgia

- Disposition of Personal Property. Within **ten days** of the date of repossession, the person repossessing a vehicle **must notify the owner of the intent to dispose of personal property.** Notice must be actual notice, but may be by personal service or by service by certified mail. **If the personal property is not redeemed within 30 days from the date of the first notice, a second notice must be sent in the same manner.** If the personal property is not redeemed within 30 days from the date of the second notice, the personal property may be disposed of in a manner most expeditious, without further liability and the proceeds shall be disbursed as provided in Code Section 44-14-412. O.C.G.A. §44-14-411.1
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## Repossession Law in Tennessee

- “Tennessee has long recognized that secured parties have a legitimate interest in obtaining their collateral from a defaulting debtor.”
- Davenport v. Chrysler Credit Corp., 818 S.W.2d 23, 27 (Tenn. Ct. App. 1991).

## Repossession Law in Tennessee

- Secured Transactions
  - Article 9 of the Uniform Commercial Code as enacted in Tennessee applies to any transaction intended to create a security interest.
  - You are typically dealing with credit transactions: one party (**the debtor**) buys something from another (**the secured party**) but does not pay immediately.

## Repossession Law in Tennessee

- Security Interest
  - Under Tennessee law, a **security interest** is an interest in personal property or fixtures that secures payment or performance of an obligation.
  - A security interest attaches to collateral only when it becomes enforceable against the debtor.

## Repossession Law in Tennessee

- Written Security Agreements
  - Security interests under Article 9 are created by agreement.
    - In Tennessee:
      - the agreement **must** be evidenced by a record, and it must show an intent to create a security interest;
      - the agreement **must** be authenticated by the debtor; and
  - the agreement **must** contain a description which reasonably identifies the collateral

## Repossession Law in Tennessee

- Creation/Enforcement of Security Interests in Tennessee
  - There are three requisites to the existence of an enforceable security interest:
    - the parties must have an agreement that the security interest attach;
    - value must be given by the secured party; and
    - the debtor must have rights in the collateral
  - Attachment occurs at the instant of creation of an enforceable security interest.
    - Attachment of the secured party's security interest has two consequences:
      - the security agreement is enforceable against debtor; and
      - the security agreement becomes enforceable against third parties.

## Repossession Law in Tennessee

- **Default**
  - In General
    - Revised Article 9 does not define "default" in the context of a security interest, it leaves to the parties' agreement the question of what events allow the secured party to resort to its remedies.
    - Similarly, the drafters chose not to address the much-litigated question of whether effect is to be given to a clause in a security agreement that seeks to preclude the debtor from relying on conduct that might constitute a waiver of the secured party's right to declare a default.

## Repossession Law in Tennessee

- This latter omission is not particularly important in Tennessee, because a Tennessee statute already provides that such clauses shall be enforced.
  - T. C. A. § 47-50-112(c)→
  - “(c) If any such security agreement, note, deed of trust, or other contract contains a provision to the effect that no waiver of any terms or provisions thereof shall be valid unless such waiver is in writing, **no court shall give effect to any such waiver unless it is in writing.**”

## Repossession Law in Tennessee

- Recovery of the Collateral
  - The secured party “may take possession of the collateral” if this can be done “**without breach of the peace.**”
  - Comment 3 to UCC section 9-609 states, “In considering whether a secured party has engaged in a breach of the peace, however, courts should hold the secured party responsible for the actions of others taken on the secured party’s behalf, including independent contractors engaged by the secured party to take possession of the collateral.”
  - Tennessee courts have already held that the duty to repossess without breach of the peace is a **non-delegable duty**, and secured parties **are** therefore **liable** for breaches of the peace committed by their **independent contractors**.

## Repossession Law in Tennessee

- Notice of Sale
  - According to UCC § 9-614(1)(A), the following form meets the statutory requirements for giving reasonable notice: See Next Slide

## Repossession Law in Tennessee

- **NOTIFICATION OF DISPOSITION OF COLLATERAL**
- To: *[Name of debtor, obligor, or other person to whom the notification is sent]*
- From: *[Name, address, and telephone number of secured party]*
- Name of Debtor(s): *[Include only if debtor(s) are not an addressee]*
- *[For a public disposition]*
- We will sell [or lease or license, as applicable] the *[describe collateral]* [to the highest qualified bidder] in public as follows:
  - Day and Date: \_\_\_\_
  - Time: \_\_\_\_
  - Place: \_\_\_\_
- *[For a private disposition]*
- We will sell [or lease or license, as applicable] the *[describe collateral]* privately sometime after *[day and date]*.
- You are entitled to an accounting of the unpaid indebtedness secured by the property that we intend to sell [or lease or license, as applicable] [for a charge of \$\_\_\_\_]. You may request an accounting by calling us at *[telephone number]*.

## Repossession Law in Tennessee

- Redemption of the Collateral
  - Article 9 gives the debtor the right to redeem the collateral at any time before the secured party disposes of it.
  - UCC 9-623 states that the person redeeming must tender “all obligations secured by the collateral” plus “reasonable expenses and attorney’s fees” incurred by the secured party.
  - If the secured party is making collections on the collateral, the redemption must occur before the collateral has been collected.
    - Merely beginning to collect will not, however, cut off the right to redeem.

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## Repossession Law in Tennessee

- Disposition of the Collateral
  - Methods of Disposition
    - A secured party may sell the collateral at a public sale or a private sale.
  - Commercial Reasonableness
    - Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable
      - According to one Tennessee court, “The requirement that the property be disposed of in a ‘commercially reasonable’ manner seems to us to signify that the disposition shall be made in keeping with the prevailing trade practices among reputable and responsible business and commercial enterprises engaged in the same or a similar business.”

## Repossession Law in Tennessee

- Tennessee case law has specified **six** factors by which the statute requirements may be measured:
- the type of collateral involved; and
- the condition of the collateral; and
- the number of bids solicited; and
- the time and place of the sale; and
- the purchase price received or the terms of sale; and
- any special circumstances involved.

## Repossession Law in Tennessee

- While these factors are relevant to the determination of whether a particular sale was conducted in a commercially reasonable manner, they are neither the only factors to be taken into account nor the most important factors in any particular case.
- The elements of manner, method, time, place and terms cited by the Uniform Commercial Code are to be viewed as necessary and interrelated parts of the whole transaction.
- In other words, a court should not look at any particular aspect of the transaction in isolation.

## Repossession Law in Tennessee

- Rights of the Buyer
  - When the secured party sells the collateral, the buyer takes it free of the security interest being foreclosed and free of any liens and security interests subordinate to the lien being foreclosed.

## Repossession Law in Tennessee

- Sanctions for Creditor Misbehavior
  - Tennessee courts along with those of a majority of other jurisdictions have generally adopted the so-called “rebuttable presumption rule.”
  - The rebuttable presumption rule provides that if the secured party fails to give proper notice before selling the collateral, or if it fails to sell the collateral in a commercially reasonable manner, there arises a presumption that the value of the collateral was equal to the amount of the debt, and that the secured party is therefore not entitled to a deficiency judgment.

## Repossession Law in Tennessee

- Wrongful Repossession in Tennessee
  - In 1989, a Knoxville jury awarded Boyce McCall a half-million dollars because a lender wrongfully repossessed his truck.
    - Although the award was later reversed on appeal on the ground that the jury verdicts were inconsistent, the case served notice on lenders that if they are going to repossess a vehicle in Tennessee, they have to follow the rules.
    - The award also informed plaintiffs' lawyers that wrongful repossession cases are not the dogs they are sometimes thought to be.
  - Secured parties get into trouble either by repossessing when they are not entitled to do so or by breaching the peace in the course of the repossession.

## Repossession Law in Tennessee

- Repossession When the Secured Party Is Not Entitled to Repossess
- Debtor Not in Default
  - Tennessee has adopted provisions of the UCC which require, as a condition to exercising an insecurity clause, that the lender have a good faith belief that the prospect of payment is impaired

## Repossession Law in Tennessee

- Acceptance of Late Payments
  - The course of dealing between the parties will effect whether the secured party is allowed to accelerate payments under the original terms of the loan
    - When the secured party has established a pattern of accepting late payments, it often sends the debtor a letter informing him or her that even though late payments have been accepted in the past, the secured party will repossess the collateral if future payments are late.
      - The purpose of the letter is to retract any waiver and preclude the debtor from claiming reliance on the secured party's prior practice of accepting late payments.
      - *HOWEVER*, if the secured party accepts another late payment, regardless of the reasons, the effect of the strict compliance letter is undone.
      - Therefore, the best way for the secured party to protect itself against the waiver problem is to **include in the contract** an "antiwaiver" or "non-waiver" clause, which provides that the failure of the secured party to exercise its remedies on one default will not waive its right to exercise them on any subsequent default.

## Repossession Law in Tennessee

- Breaches of the peace
  - In general
    - The UCC does not define "breach of the peace," and the Tennessee General Assembly made no attempt to add a definition when it enacted Tennessee's version of the UCC.
    - Although the term "breach of the peace" is widely used in Tennessee statutes and common law, the Tennessee courts have never been able to establish the exact contours of this amorphous concept.
    - In fact, the Tennessee Supreme Court has indicated that the term may not be susceptible of precise definition: "It must be remembered that the term 'breach of the peace' is not used to describe any specific crime or offense. It is generic and embraces many acts which are indictable as separate offenses."

## Repossession Law in Tennessee

- Confrontations with the Debtor
- **Any** confrontation between the debtor and the reposessor which results in violence or the threat of violence will be a breach of the peace.
- It does not matter whether the debtor or the reposessor instigates the violence or makes the threat.
- Once there is a breach of the peace, the reposessor must cease the repossession and withdraw.

## Repossession Law in Tennessee

- Trespass
- The secured party may not enter into a dwelling to effect a repossession unless the occupants of the dwelling are present and freely consent to the repossession.
  - Even if the security agreement contains a clause purporting to grant permission to enter the debtor's dwelling, courts will not give effect to such clauses.
  - If the consent to enter on the debtor's premises is implied from the grant of the security interest, the consent is "limited to those acts that are within a fair and reasonable interpretation of the terms of the grant."
  - If the court is balancing the secured party's interest in recovering the collateral against the trespass, the secured party's interest will outweigh only limited and relatively harmless trespasses, not an entry into a dwelling.

## Repossession Law in Tennessee

- ❑ Theories of Recovery and Remedies
- ❑ Conversion
- ❑ Other Torts
- ❑ The UCC Statutory Penalty
- ❑ Fair Debt Collection Practices Act
- ❑ Recovery for Torts of Independent Contractors
- ❑ Punitive Damages

## Recent Developments in TN

### Repossession Law:

- Auto Credit of Nashville v. Wimmer, 231 S.W.3d 896 (Tenn. 2007).
- **Holding:** statute requiring notification of the disposition of collateral only requires the creditor to send proper notification and **does not** require the creditor to take additional steps to determine whether or not that notification has been received; abrogating *R & J of Tenn., Inc. v. Blankenship-Melton Real Estate, Inc.*, 166 S.W.3d 195, and *Nationsbank v. Clegg*, 1996 WL 165513.

## Recent Developments in TN

### Repossession Law:

- Davenport v. Bates, 2006 WL 3627875 (Tenn. Ct. App. Dec. 12, 2006).  
Appellate court refused to extend the Tennessee Consumer Protection Act to cover repossessions without a clear expression of the TN legislature's intention to cover these transactions.
- *Reasoning:*
  - From our reading of the Consumer Protection Act, it does not cover repossessions.
  - Repossessions do not affect the “advertising, offering for sale, lease, rental, or distribution of any goods, services, or property.”