

DIGEST OF INSURANCE LAW

TENNESSEE

Courtesy of
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Knoxville, Tennessee

CIVIL JUDICIAL SYSTEM

Courts of Original Jurisdiction

Courts are Supreme Court, Court of Appeals, Trial Court of General Jurisdiction known as the Circuit Court, Court of Equitable Jurisdiction known as Chancery Court, General Sessions Court and Courts created by private act known as Trial Justice Courts.

General Sessions Courts. Each county has established Court of General Sessions vested with all the jurisdiction and authority conferred by law upon Justices of Peace in civil and criminal cases, suits, and actions. Tenn. Code Ann. §16-15-501(a). Judges of said courts have same authority as Circuit Court Judges or Chancellors to grant fiats for writs of injunction, attachments and other extraordinary process. Tenn. Code Ann. §16-15-401(b). Jurisdiction of said courts, with certain exceptions, is generally limited to \$25,000, in all civil cases, both law and equity, except for cases of forcible entry and detainer, and actions to recovery personal property, in which courts have unlimited original jurisdiction; general sessions courts also have jurisdiction to award alternative money judgments not to exceed \$25,000. Tenn. Code Ann. §16-15-501(d)(1). General Sessions Judges have jurisdiction to issue restraining orders and to enforce penalties for violations of such orders. *Id.*

By private act, General Sessions Courts have been replaced by Trial Justice Courts in certain counties. These courts have concurrent jurisdiction with General Sessions Courts and, in addition, some also have domestic relations and workers’ compensation jurisdiction, depending upon terms of particular act. Tenn. Code Ann. §16-15-501.

Except in those counties which have specially constituted Juvenile Court, General Sessions Courts have assumed jurisdiction of Juvenile Courts, with abolition of County Court. Tenn. Code Ann. §37-1-203.

Chancery Court. Chancery Courts are courts of equity having exclusive original jurisdiction as to all matters in equity wherein value exceeds \$50.00. Tenn. Code Ann. §16-11-103, unless otherwise provided in this

code. Jurisdiction is concurrent with Circuit Court except as outlined in Tenn. Code Ann. §16-11-102(a).

Chancery Courts have exclusive probate jurisdiction except where otherwise provided by Tenn. Code Ann. §16-16-201(a).

Circuit Courts. Circuit Courts are courts of general, original jurisdiction, having appellate jurisdiction from Justice of Peace, General Sessions, and Trial Justice Courts. Tenn. Code Ann. §§16-10-101, 112. Their jurisdiction is concurrent with those above-named courts, and appeals from those courts to Circuit Courts are heard de novo.

Law and Equity Courts. By private legislation, certain counties also have either Law and Equity or Common Law and Chancery Court. These are courts of general, original jurisdiction having concurrent jurisdiction with Chancery and Circuit Courts.

Appellate Courts

Court of Appeals. Jurisdiction of Court of Appeals is appellate only, and extends to all civil cases except those involving workers’ compensation appeals, appeals pursuant to Tenn. Code Ann. §37-10-304(g), and constitutionality of statute or city ordinance which is sole determinative question. All cases within appellate court jurisdiction shall, for purposes of review, be taken directly to Court of Appeals in Division within which case arose, whereby Eastern Division includes Hamilton County and Western Division includes Shelby County. As to all other cases, exclusive right of removal and review is in Supreme Court. Any case removed by mistake to wrong court shall by such court be directly transferred to court having appropriate jurisdiction. *See* Tenn. Code Ann. §16-4-108(a)(2).

Supreme Court. Supreme Court consists of five (5) judges, one whom resides in each grand division, and not more than two (2) in the same grand division. Tenn. Code Ann. §16-3-101(a). Supreme Court has no original jurisdiction, but appellate jurisdiction in proceedings for correction of errors wherein Court of Appeals has no jurisdiction, or in cases removed from Court of Appeals



by grant of Application for Permission to Appeal. Tenn. Code Ann. §16-3-201.

LAW

Abbreviations

ALR – American Law Reports.
 A.S.R. – American State Reports.
 F. Supp. – Federal Supplement.
 L.R.A. – Lawyers' Reports Annotated.
 S. Ct. – Supreme Court Reporter.
 S.W. – South Western Reporter.
 S.W.2d – South Western Reporter, Second series.
 Tenn. – Tennessee Reports.
 Tenn. App. – Tennessee Appeals Reports.
 Tenn. Code Ann. – Tennessee Code Annotated.
 Tenn. Ch. – Tennessee Chancery Reports.
 Tenn. R. Evid. – Tennessee Rules of Evidence.
 Tenn. R. Civ. P. – Tennessee Rules of Civil Procedure.
 U.S. – United States Reports.
 Wright Ch. – Wright Chancery Reports.

ACCIDENT AND HEALTH INSURANCE

See “ACCIDENTAL MEANS” and “DISABILITY.”

Creditors. Proceeds exempt from all debts. Tenn. Code Ann. §§26-2-110(a) - 110(b).

Disease induced by accident. Under policy which provides against disability or death resulting directly and independently of all other causes from bodily injuries sustained through external, violent and accidental means, infection and injury of eye caused by germ entering eye is accidental injury when insured has never been afflicted with particular disease. Recovery may be had under such standard clause as above in cases of infection or similar disease where means, that is, infection, was accidental as distinguished from unexpected result of intentional act of insured. *McFarland v. Mass. Bonding*, 160 Tenn. 546, 26 S.W.2d 159 (1930).

Damages. Double Indemnity. Policy provision voiding double indemnity for accidental death if total and permanent disability payments are being made is valid. Hence, payment of face amount of policy for accidental death not in violation of statute forbidding settlement for less than value of policy. *General American Life v. Armstrong*, 182 Tenn. 181, 185 S.W.2d 505 (1945). But this policy provision may be altered by oral agreement at time of total disability settlement. *Travelers Ins. Co. v. Sides*, 184 Tenn. 663, 202 S.W.2d 815 (1947).

Notice and Proof of Loss. Within 90 days of loss or within reasonable time. Tenn. Code Ann. §56-26-108. Condition precedent to recovery. *Massachusetts Mut. Life v. England*, 171 Tenn. 104, 100 S.W.2d 982 (1937). See also *United States Fire Ins. Co. v. Vanderbilt Univ.*, 267 F.3d 465 (6th Cir. 2001); *Chattem v. Provident Life & Acc. Ins. Co.*, 676 S.W.2d 953 (Tenn. 1984); *Munal Clinic v. Applegate*, 38 Tenn. App. 280, 273 S.W.2d 712 (1954).

Declination Letter. Unfair or deceptive acts and practices includes wrongfully issuing a letter of declination of accident and health insurance to a consumer. Tenn. Code Ann. §56-8-104(14).

Ignorance of existence of disability clause in policy may excuse delay in giving notice and furnishing proof of loss if same are furnished within reasonable time after discovery of disability clause. *Henderson v. New York Life*, 194 Tenn. 46, 250 S.W.2d 11 (1952). Any doubt as to whether or not notice and proof of loss under insurance policy is given within reasonable time should be resolved in favor of insured. *Id.*

ACCIDENTAL MEANS

General rule is that in accident insurance, proximate cause of injury without which injury would not have occurred, must have been accident over which insured had no control. It is not sufficient for injury to have been unexpected result of voluntary and intentional act on part of insured. *Southern v. Graham*, 152 Tenn. 578, 280 S.W. 30 (1926). But cf. *McCandless v. Equitable Life Ins. Co.*, 721 S.W.2d 809 (Tenn. Ct. App. 1986). The Tennessee Supreme Court has abandoned the distinction between “accidental means” and “accidental results.” *Harrell v. Minnesota Mutual Life*, 937 S.W.2d 809 (Tenn. 1996). But see *Cates v. Metro Life Ins. Co.*, 14 F. Supp. 2d 1024 (E.D. Tenn. 1996) (declining to follow Tennessee’s abolition of “accidental means” and “accidental results”). Intentional assumption of hazard negates accident. *Winton v. Metropolitan Life*, 174 Tenn. 252, 124 S.W.2d 712 (1939). Ptomaine Poisoning. *Hahn v. Home Life Ins.*, 169 Tenn. 232, 84 S.W.2d 361 (1935); Hernia. *Providential Life & Acc. Ins. Co. v. Wallace*, 23 Tenn. App. 697, 137 S.W.2d 888 (1939). Intoxication. Tenn. Code Ann. §55-10-408 (creating a presumption that the defendant’s ability to drive was sufficiently impaired when there is evidence that BAC is .08% or more). See also *Barr v. Charley*, 215 Tenn. 445, 387 S.W.2d 614 (1965).

Burden to prove accidental death rests with plaintiff; proof of external violent means under seemingly accidental circumstances meets burden, and if doubt remains in proof, presumption of accident arises and burden of proof of suicide is cast on defendant. *Mutual*



Benefit Health v. Denton, 22 Tenn. App. 495, 124 S.W.2d 278 (1938). See also, *Elrod v. J.C. Penney Life Ins. Co.*, No. M1999-02195-COA-R3-CV, 2000 WL 798651 (Tenn. Ct. App. June 22, 2000).

ADJUSTERS

Definition. Agent of insurer who investigates claim and stands in financial relationship to principal which he represents. *Gay & Taylor v. American Cas.*, 53 Tenn. App. 120, 381 S.W.2d 304 (1964).

Adjusting firm liable for its failure to forward claim file to insurer's attorney where default judgments were entered against insured. *Id.*

False representations and coercive inducements by adjuster avoid settlement. *Bowers v. Springfield Fire*, 21 Tenn. App. 227, 108 S.W.2d 798 (1937).

Company bound by adjuster's promise to pay claims in written or oral contract of settlement. *Mazikowski v. Central Mut.*, 44 Tenn. App. 128, 312 S.W.2d 867 (1958); *Jackson v. Kemp*, 211 Tenn. 438, 365 S.W.2d 437 (Tenn. 1963).

AGE

See "AUTOMOBILES"; "LIABILITY" and "NEGLIGENCE."

Age of Majority. 18, except when purchasing, consuming or possessing alcoholic beverages for which age of majority is 21. "Minor" means any person who has not attained the age of 18. Tenn. Code Ann. §1-3-105.

AGENTS AND BROKERS

Agent. One may rely on words and acts of agent as being those of insurer. *Britt v. Fidelity & Cas.*, 235 F. Supp. 150 (E.D. Tenn. 1964). Principal is bound by the knowledge of the agent in the mind of the agent at the time he is acting for the principal. *Interstate Life & Acc. Co. v. Potter*, 17 Tenn. App. 381, 68 S.W.2d 119 (1933); *Tagg v. Tennessee Nat'l Bank*, 56 Tenn. 479, 1872 WL 3878 (1872).

Where agent's powers are limited to receiving and forwarding applications for insurance, he cannot bind company by contract. *Epstein v. Great American Ins. Co.*, 54 Tenn. App. 447, 392 S.W.2d 331 (1965); *West v. Aetna*, 11 Tenn. App. 118, 1930 WL 1637 (1930).

Policy forfeited where insured knowingly allows agent of insurer to send in false answers in application thereof. *Lane v. Traveler's Indem. Co.*, 499 S.W.2d 643, (Tenn. Ct. App. 1973); *Robbins v. New York Life*, 18 Tenn. App. 70, 72 S.W.2d 788 (1934). When it is determined that answers contained in application for insur-

ance are untrue, it becomes a question of law for the court as to whether such misrepresentations materially increased risk of loss, and thus may defeat or void policy under Tenn. Code Ann. §56-7-103. *Clingan v. Vulcan Life Ins. Co.*, 694 S.W.2d 327 (Tenn. Ct. App. 1985). Further, failure to disclose information on application for insurance will be considered "material misrepresentation" and thus may void policy, if the misrepresentation is sufficient to deny insurer information necessary for honest appraisal of insurability. *Id.* at 330. Policy cannot be voided based on falsehoods or errors in the application, even though they materially increased risk of loss, where insured signed blank application and agent filled out application containing the erroneous information. *Bland v. Allstate Ins. Co.*, 944 S.W.2d 372 (Tenn. Ct. App. 1996).

Knowledge of Agent. Knowledge of insurer's agents as to mistake in face amount of policy, imputed to insurer. *American Nat'l Ins. Co. v. McPhetridge*, 28 Tenn. App. 145, 187 S.W.2d 640 (1945).

Licensing and Personal Liability of Agent. A person is personally liable on all contracts of insurance unlawfully made within state by or through such person directly or indirectly, for or on behalf of an insurance company, not authorized to do business in state. Tenn. Code Ann. §56-6-114. See Tenn. Code Ann. §§56-1-101-106; Tenn. Code Ann. §§56-22-101-134.

ARBITRATION

Uniform Arbitration Act. Tenn. Code Ann. §§29-5-301-320. Not intended to permit insurance carrier to make arbitration a condition precedent, thereby, cutting off or precluding insured's right to seek relief through courts. *Cavalier Ins. Corp. v. Osment*, 538 S.W.2d 399 (Tenn. 1976). Where, however, insured is unable to obtain service of process or otherwise prosecute such action, he may invoke arbitration provisions of policy. *Id.* at 404. Insurance policy's arbitration clause must be separately signed and in writing to be enforceable under Tenn. Code Ann. §29-5-302(a). *Merrimack Mut. Fire Ins. Co. v. Batts*, 59 S.W.3d 142 (Tenn. Ct. App. 2001).

See also Tenn. Code Ann. §56-7-1206(g)(4) (settlement with tort-feasor and preservation of right to seek additional compensation against an uninsured motorist insurance carrier through binding arbitration).

ATTORNEYS

Conflict of Interest. See Tenn. Sup. Ct. Rule 8, Tenn. Rules of Prof. Conduct, Rule 1.7 - Conflict of Interest: General Rule.

Legal Malpractice. Standard of care is the particular duty owed client under the circumstances of the repre-

sentation, which may or may not be the standard contemplated by the Code of Prof. Responsibility. *Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.*, 813 S.W.2d 400 (1991). The Code, however, may be relevant as evidence in a subsequent civil case. *Roy v. Diamond*, 16 S.W.3d 783 (Tenn. Ct. App. 1999).

Discovery Rule. The discovery rule in legal malpractice cases operates in essentially the same way that the discovery rule in medical malpractice cases operates. *Cherry v. Williams*, 36 S.W.3d 78 (Tenn. Ct. App. 2000).

Fees. Client has right to discharge attorney with or without cause, but upon discharge attorney is entitled to just and adequate compensation for services rendered. *Adams v. Mellen*, 618 S.W.2d 485 (1981).

AUTOMOBILES

See Law Digest Tables.

See "NEGLIGENCE"; "FINANCIAL RESPONSIBILITY LAW."

Age. Application of any person under age of 18 years for instruction permit or operator's license shall be signed and verified by parent or guardian, or if no parent or guardian exists, then by another responsible adult who is willing to assume obligation. Tenn. Code Ann. §55-50-312(a)(1). In the event applicant is married, spouse may sign and verify application if spouse is person capable of legally entering into contractual relationships. *Id.* Minors withdrawn from secondary school-denial of motor vehicle license of permit. Tenn. Code Ann. §§55-50-502(a)(10).

While driving motor vehicle upon highway or street, any negligence or wilful misconduct or violation of any motor vehicle law of this state or municipality by a minor shall be imputed to person who signed application for permit or license. Such person shall be vicariously liable for any damage or fines occasioned by such negligence, wilful misconduct or violation in absence of compliance with financial responsibility requirements. Tenn. Code Ann. §55-50-312(b).

Agency. Prima Facie Evidence of Ownership of owner's business. Tenn. Code Ann. §55-10-312; *Godfrey v. Ruiz*, 90 S.W.3d 692 (Tenn. 2002); *Long v. Mattingly*, 797 S.W.2d 889 (Tenn. Ct. App. 1990). In actions for negligence, proof of ownership is prima facie evidence of operation with authority and consent of owner. It is necessary, however, to prove operation in owner's business at time of accident if plaintiff fails to prove registration under Tenn. Code Ann. §55-10-312; *Godfrey*, 90 S.W.3d at 692; *Long*, 797 S.W.2d at 889.

Family Purpose Doctrine. *Camper v. Minor*, 915 S.W.2d 437 (Tenn. 1996). See also *Matthews v. Story*, No. E2002-00517-COA-R3-CV, 2003 WL 179978, at *4 (Tenn. Ct. App. Jan. 28, 2003) (family purpose doctrine not implicated when family member is merely a passenger and is not driving the vehicle).

Guest Cases. Guest may sue host. However, guests in motor vehicles have duty to exercise reasonable care for their own safety. *Mansfield v. Colonial Freight Sys.*, 862 S.W.2d 527 (Tenn. Ct. App. 1993). Modified Comparative fault applies in Tennessee. *McIntyre v. Valentine*, 833 S.W.2d 52 (Tenn. 1992).

Service of Process Upon Non-resident Motorists. Owner or operator of automobile not registered in Tennessee, or non-resident who, while in state, procures use of vehicle registered under laws of Tennessee, or, any such vehicle in this state makes Secretary of State his agent for service of process in any actions for personal injury or property damage accruing in this state in which automobile is involved. Such service on Secretary of State has effect of personal service. Term nonresident includes any person who though resident of this state or owner or operator of vehicle registered in this state when accident occurred has been absent from state 30 days. Plaintiff or his attorney must lodge with Secretary of State original summons and copy certified by clerk of court in which action is brought. Secretary of State shall send copy to defendant by registered mail. Tenn. Code Ann. §§20-2-203, 205.

Title Registration. Required. Tenn. Code Ann. §§55-1-101-123.

AVIATION

Tenn. Code Ann. §42-2-201 authorizes the Department of Transportation to administer all provisions of Title 42, Chapter 2, of Tennessee Aeronautics Law. Tennessee Aeronautics Commission shall serve in an advisory capacity to Commissioner of Transportation. Tenn. Code Ann. §42-2-301.

Action for Wrongful Death. Tenn. Code Ann. §§20-5-106, 107, 113. Provide for action and its limitations. See also *Jordan v. Baptist Three Rivers Hosp.*, 984 S.W.2d 593 (Tenn. 1999); *Robinson v. City of Memphis*, 340 F. Supp. 2d 864 (W.D. Tenn. 2004). But see *Kizer v. Metro. Gov't of Nashville*, 451 F. Supp. 2d 931, 943 (M.D. Tenn. 2006) (stating that plaintiffs can recover loss of consortium damages to extent liability established based on state tort law).

BROKERS

See "AGENTS AND BROKERS."



BURGLARY INSURANCE

Insurer is relieved of liability where proof is shown that person who knew combination or had opportunity to enter safe when it was not locked is shown. *Gracey v. American Auto. Ins. Co.*, 188 Tenn. 230, 218 S.W.2d 735 (1949). Lack of evidence showing marks on automobile and forcible entry will preclude personal property loss recovery from insurer. *Artress v. State Farm*, 221 Tenn. 636, 429 S.W.2d 430 (1968). Pulling loose or breaking of transparent tape placed across front door and frame of insured's business did not constitute physical damage to exterior of the premises such as would have afforded coverage under burglary provision of insurance policy. *Hopson v. Southern Am.*, 618 S.W.2d 745 (Tenn. Ct. App. 1980).

CANCELLATION

See "ACCIDENT AND HEALTH INSURANCE, Contracts"; "LIABILITY INSURANCE"; "FIRE INSURANCE, Contracts."

Parties can mutually agree to cancellation. Beneficiary's consent necessary to cancel policy. Letter from company not enough. *Humpston v. State Mut.*, 148 Tenn. 439, 256 S.W. 438 (1923). See also *Blurton v. Grange Ins. & Cas. Co.*, 159 S.W.3d 1 (Tenn. Ct. App. 2004) (unless policy requires actual notice, insured need not actually receive notice of cancellation in order for cancellation to be effective).

Post office receipt is evidence. *Cherokee Ins. v. Hardin*, 202 Tenn. 110, 302 S.W.2d 817 (1957); *Stooksbury v. American Nat. Prop. & Cas. Co.*, 126 S.W.3d 505 (Tenn. Ct. App. 2003); *Quintana v. Tennessee Farmers Mut. Ins.*, 774 S.W.2d 630 (Tenn. Ct. App. 1989). To rescind, company should institute action within contestable period. *Thistle v. Equitable Life*, 149 Tenn. 667, 261 S.W. 667 (1924). Where insurer cancels policy without fault on part of insured, insurer is liable for full amount of premiums paid on contract. *Life & Cas. Ins. v. Baber*, 168 Tenn. 347, 79 S.W.2d 36 (1935). Auto policy cancellation requirements Tenn. Code Ann. §§56-7-1302-1305. Loss payee clauses. *Reeves v. Granite State Ins. Co.*, 36 S.W.3d 58 (Tenn. 2001).

CHATTEL MORTGAGE

See "FIRE INSURANCE."

CONSTRUCTION OF POLICY

More Than One Policy. In all cases arising out of use of motor vehicle on which owner of motor vehicle has liability insurance coverage, owner's policy is primary if vehicle is being operated with permission of

owner and within scope of permission granted, except situations involving permittee's applicable garage policy. Any other liability coverage which may be available to permittee is not applicable unless and until limits of all coverage provided by owner's policy first are exhausted. When claim arises out of operation of motor vehicle which is leased under written lease agreement, and pursuant to which agreement the lessee provides liability coverage for vehicle, then any other liability coverage which may be available for vehicle through lessor is not applicable unless and until limits of all coverage provided by lessee for vehicle first are exhausted. Tenn. Code Ann. §56-7-1101.

With respect to bodily injury to insured while occupying automobile not owned by said insured, uninsured motorist coverage on vehicle in which injured party was occupant shall be primary. Tenn. Code Ann. §56-7-1201(b)(1).

Inconsistent policy terms and endorsements. Provisions construed in favor of insured. *Pacific Mut. Life Ins. v. Walt*, 198 Tenn. 59, 277 S.W.2d 434 (1955); *Brandt v. Mut. Benefit Health*, 30 Tenn. App. 14, 202 S.W.2d 827 (1947). Neither party favored in interpretation of unambiguous words. *Wallace v. State Farm Mut.*, 187 Tenn. 692, 216 S.W.2d 697 (1949). Intent of parties prevails. *Blue Diamond Coal Co. v. Holland-America Ins. Co.*, 671 S.W.2d 829 (Tenn. 1984). Conflicting, repugnant "other insurance clauses" cancel each other and affect proration of each policy; however, clear language in two or more policies providing for primary and excess coverage will be recognized and not prorated. *Shelter Mut. Ins. Co. v. State Farm*, 930 S.W.2d 570 (Tenn. Ct. App. 1996). See also *United Services Auto. Ass'n v. Hartford*, 220 Tenn. 120, 414 S.W.2d 836 (1967).

CONTRIBUTION

See "FIRE INSURANCE"; "LIABILITY INSURANCE."

DAMAGES

See "MALPRACTICE, Medical."

Appellate Review. Amount of compensation under personal injury case is primarily for the jury and secondarily for the trial judge, who heard the case and the evidence presented. *Owen v. Locke*, 650 S.W.2d 51 (Tenn. Ct. App. 1983). Where defendant conditionally accepts additur rather than agreeing to a new trial, he can not raise issue of trial court's discretion on appeal. *Id.* at 53.

Arbitration Awards. When parties enter into a binding arbitration agreement, a contract is formed and contours of arbitration authority in a given case are set by agreement. *Bowater N. Am. Corp. v. Murray Mach.*, 604



F. Supp. 821 (E.D. Tenn. 1984). It is the responsibility of the courts to give broad construction to words and intentions of parties. *Wachtel v. Shoney's*, 830 S.W.2d 905 (Tenn. Ct. App. 1991).

Comparative Negligence. Under modified comparative fault system adopted in Tennessee, plaintiff may recover so long as plaintiff's negligence remains less than defendants. *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992).

Contribution. Contribution among tort-feasors may still be viable in certain circumstances. *General Elec. Co. v. Process Control Co.*, Prod. Liab. Rep. (CCH) P 15, 228, 969 S.W.2d 914 (Tenn. 1998); *Smith v. Methodist Hosps. of Memphis*, 995 S.W.2d 584 (Tenn. Ct. App. 1999).

Indemnification. Contracts of indemnification can be express or implied by relationship of parties. *Houseboating Corp. v. Marshall*, 553 S.W.2d 588 (Tenn. 1977).

Psychic damages suffered as a result of injury to third party. Party may recover for emotional injury if party can prove that emotional injury was foreseeable result of driver's negligence. Party must establish "serious or severe emotional injury." Claim must be supported by expert medical or scientific proof. *Ramsey v. Beavers*, 931 S.W.2d 527 (Tenn. 1996). *But see, Miller v. Willbanks*, 8 S.W.3d 607 (Tenn. 1999) (Plaintiff normally will not be required to support claim of serious mental injury by expert proof in order to recover damages in a suit based upon intentional infliction of emotional distress.)

Punitive Damages. Must prove intentional, fraudulent, malicious or reckless conduct by clear and convincing evidence. Upon motion amount of punitive damages is determined in second phase of a bifurcated trial. *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992).

Collateral Source Rule. Recognizes collateral sources which may reduce recovery in medical malpractice actions under certain circumstances if insurance provided by employer, or coverage provided by governmental benefit programs. Tenn. Code Ann. §29-26-119. If claimant does not have health insurance, only damages recoverable are actual economic losses. *Id.* See also, *Nance v. Westside Hosp.*, 750 S.W.2d 740 (Tenn. 1988). Fact that medical bill has been partially forgiven cannot be proven. *Fye v. Kennedy*, 991 S.W.2d 754 (Tenn. Ct. App. 1998).

DEATH

Abatement and survival. Actions do not abate by death or other disability of either party, or by transfer of any interest therein, if the cause of action survives or continues. Tenn. Code Ann. §20-5-101.

Wrongful Death. Damages are recoverable including loss of spousal and parental consortium. Tenn. Code Ann. §20-5-113; *Jordan v. Baptist Three Rivers Hosp.*, 984 S.W.2d 593 (Tenn. 1999). See also *Robinson v. City of Memphis*, 340 F. Supp. 2d 864 (W.D. Tenn. 2004) (federal loss of consortium claim did not belong to decedent; loss of consortium was suffered by decedent's heirs). Filial consortium damages are recoverable. *Hancock v. Chattanooga-Hamilton County Hosp. Auth.*, 54 S.W.3d 234 (Tenn. 2001).

Unexplained absence. Absence creates no presumption of death. It is matter for court or jury to decide considering all evidence, including any peril to which absentee may have been exposed. However, if any funds belonging to absentee come into hands of clerk of court of record, or any administrator or executor of absentee, who is determined to be dead by court order, there is rebuttable presumption of death. Tenn. Code Ann. §30-3-102. Such funds, shall be distributed according to the law at the date of death as determined by the court. The validity and the effect of the distribution of the property shall be determined by the court having probate jurisdiction administering the estate. Tenn. Code Ann. §30-3-102(c).

Simultaneous Death Act. Tenn. Code Ann. §31-3-103.

DISABILITY

Total Disability. "[A]s condition of recovery, it must appear that the insured is incapacitated to earn, not only in his chosen...occupation, but in any other to which he may be reasonably fitted...[T]o defeat recovery on the ground of earning capacity, it must appear that the remaining capacity to earn, despite disability, is a capacity to earn substantially. No scintilla rule applies. [E]arning capacity remaining must bear some reasonable relation to natural or previous capacity to earn, against loss of which it is the purpose of the policy contract to insure." *Principi v. Columbian Mut. Life Ins. Co.*, 169 Tenn. 276, 84 S.W.2d 587 (1935); *Allen v. Paul Revere Life Ins. Co.*, 57 Tenn. App. 650, 423 S.W.2d 504 (1967). Where insured with excellent general health and normal vision suffered infection of eyes producing pain and requiring rest and treatment when eyes were used for extended period in reading, driving, etc., held not "total and permanent disability" within policy. *Patton v. Prudential Ins. Co.*, 181 Tenn. 138, 178 S.W.2d 760



(1944). Absolute helplessness need not be shown. *Huffman v. Equitable Life Assur.*, 192 Tenn. 476, 241 S.W.2d 536 (1951).

Accidental. Gunshot injuries suffered by disability insurance policy claimant were not accidental. *Pedigo v. UNUM Life Ins.*, 145 F.3d 804 (6th Cir. 1998).

“Confining Illness.” Coverage lies within this term where insured was totally disabled and substantially confined continuously within doors, and continuity of confinement not broken when insured went out for treatment, for short walks on advice of doctor and to town with regard to his claim. *Brandt v. Mut. Benefit*, 30 Tenn. App. 14, 202 S.W.2d 827 (1947).

Partial Disability. Where partial disability to arm of iron molder permanently incapacitated him from former occupation, held, “total” disability could not be construed to cover permanent “partial” disability. *U.S. Stove Corp. v. Aetna Life Ins. Co.*, 169 Tenn. 264, 84 S.W.2d 582 (1935).

Inebriety causing disability no defense where policy incontestable and no provision against intoxicants. *Massachusetts Mut. v. England*, 171 Tenn. 104, 100 S.W.2d 982 (1937).

FINANCIAL RESPONSIBILITY LAW

See “AUTOMOBILES, Compulsory Coverage”; “HUSBAND AND WIFE”; “LIMITATION OF TIME.”

Tenn. Code Ann. §§55-12-101-140 (as amended 2007).

FIRE INSURANCE

Application. Misrepresentation in application will not void policy unless the misrepresentation is made with actual intent to deceive or increase the risk of loss by reasonably affecting insurer’s judgment necessary to an honest appraisal. Tenn. Code Ann. §56-7-103; *Vermont Mut. Ins. Co. v. Chiu*, 21 S.W.3d 232 (Tenn. Ct. App. 2000).

Assignment. Fire policy is assignable before loss where policy does not forbid it but such assignment shall not be of value to assignee unless subject matter or interest therein be also assigned. *Duluth Nat’l Bank v. Knoxville Fire Ins. Co.*, 85 Tenn. 76, 1 S.W. 689 (1886).

Assignment of claim after loss is valid. *Metro. Life Ins. Co. v. Brown*, 25 Tenn. App. 514, 160 S.W.2d 434 (1941).

Cancellation. Fire insurer must give 10 days notice of desire to cancel policy to mortgagee, trustee or assignee, Tenn. Code Ann. §56-7-804, and must be given in sufficient time to permit insured to obtain other insur-

ance or make necessary repairs. *Hill v. Home Ins. Co.*, 22 Tenn. App. 635, 125 S.W.2d 189 (1938).

Question of reasonable time is for jury. *Patton v. Farmers Mut. Fire Ins. Co.*, 22 Tenn. App. 664, 125 S.W.2d 498 (1938).

Chattel Mortgage. Mortgages, encumbrances and conditional or retained title sales do not increase risk and do not void policy. *Hughes Bros. v. Aetna Ins. Co.*, 148 Tenn. 293, 255 S.W. 363 (1923).

Contract is purely personal; it does not attach to or run with title. Mortgagee not entitled to proceeds in absence of agreement by mortgagor to insure for former’s benefit. *John Weis, Inc. v. Reed*, 22 Tenn. App. 90, 118 S.W.2d 677 (1938). Protection is provided to a mortgage loss payee only where the policy specifically names the mortgage loss payee or where the policy has been validly assigned according to its assignment provisions. *Citizens Tri-County Bank v. Georgia Mut. Ins. Co.*, 11 S.W.3d 120 (Tenn. Ct. App. 1999).

Measure of Damages. Insured reimbursed. Where there is total fire loss, company shall not be liable beyond actual value of insured property at time of loss, but if insured has paid premiums on amount in excess of actual value, he shall be reimbursed that proportionate amount of premiums paid on excess. Tenn. Code Ann. 56-7-802. If agent fails to place reasonable value on property within 90 days, however agreed to by insured, and loss occurs, value as shown by policy is conclusively presumed to be reasonable. Tenn. Code Ann. §56-7-803. See *Riddick v. Yorkshire Ins. Co.*, 165 Tenn. 105, 52 S.W.2d 166 (1932). Cf. *Commercial Union Ins. Co. v. Sneed*, 541 S.W.2d 943 (Tenn. 1976).

Lost Profits. Recoverable when destroyed property is commercial property that cannot be replaced within a reasonable time after the loss/injury. *Tire Shredders, Inc. v. ERM-N. Cent., Inc.*, 15 S.W.3d 849 (Tenn. Ct. App. 1999).

Actual Cash Value. May mean “market value” or more elastic term of “value to owner”; if there is no market, or if market value is inadequate, measure will be value to owner or loss suffered in being deprived of goods. *Clift v. Fulton Fire Ins. Co.*, 44 Tenn. App. 483, 315 S.W.2d 9 (1958). See *Merritt v. Nationwide Warehouse Co.*, 605 S.W.2d 250 (Tenn. Ct. App. 1980).

Mortgage Clause. Fire policy which protects interest of trustee, mortgagee, assignee, etc., not invalidated by negligent acts of mortgagor, nor by any foreclosure or other proceedings or notice of sale relating to property so insured, nor by occupation of premises for purposes more hazardous than are permitted by policy. Provided that in case mortgagor does not pay premiums on policy,

mortgagee, etc., shall pay same on demand, and provided further that mortgagee, etc., shall notify company of all changes and unless provided by policy said mortgagee, etc., shall pay increased premiums; in event insurer determines to cancel policy under terms must give ten days' notice to mortgagee. Tenn. Code Ann. §56-7-804. This section is part of policy and supersedes any provision contrary thereto in mortgagee interest rider attached.

Penalty. Bad faith refusal to pay loss. Tenn. Code Ann. §56-7-105. Policyholder's actions brought in bad faith. Tenn. Code Ann. §56-7-106.

Co-Insureds. An innocent co-insured may recover under an insurance policy for the loss of jointly owned property, provided the specific language of the insurance contract does not expressly exclude such coverage so that the reasonable person purchasing insurance would expect to be covered in the event of property loss caused intentionally by a co-insured. *Finch v. Tennessee Farmers Mut.*, 1997 WL 92073 (Tenn. Ct. App. Mar. 5, 1997). See *Spence v. Allstate Ins. Co.*, 883 S.W.2d 586 (Tenn. 1994) (discussing "innocent co-insured doctrine").

Proof of Loss. No statutory provisions directly on this question. Policy to contain whole contract which is to be construed as Tennessee contract. Tenn. Code Ann. §56-7-102. False and fraudulent proofs of loss do not void a policy unless as to some material matter. *Boston Marine Ins. Co. v. Scales*, 101 Tenn. 628, 49 S.W. 743 (1899); *Nix v. Sentry Ins.*, 666 S.W.2d 462 (Tenn. Ct. App. 1983). Condition in the policy that fraud or attempt to defraud or false swearing on part of assured should cause forfeiture of policy is valid but fraud must be actual and intentional. *Phoenix Ins. Co. v. Munday*, 45 Tenn. 547, 1868 WL 2152 (1868). See also *Joyner v. Omaha Prop. & Cas. Ins. Co.*, 1993 WL 295049 (Tenn. Ct. App. Aug. 4, 1993); and see *Wassom v. State Farm Mut. Auto. Ins. Co.*, 173 S.W.3d 775 (Tenn. Ct. App. 2005) and published decisions cited therein. The burden to prove such rests with the insurer. *Clift v. Fulton Fire Ins. Co.*, 44 Tenn. App. 483, 315 S.W.2d 9 (1958). Notice of loss is not fulfillment of requirement of proof of loss; but proof may be waived by conduct of insurer. *Georgia Home Ins. Co. v. Jones*, 23 Tenn. App. 582, 135 S.W.2d 947 (1939). See *Cent. Nat'l Ins. Co. v. Mfrs. Acceptance Corp.*, 544 S.W.2d 362 (Tenn. 1976).

Repairs and Replacement. Where liability is limited under policy to "actual value" of property at time of loss or damage, not to exceed cost to repair or replace with like materials, replacement cost less depreciation is most potent factor in fixing amount of loss under policy. *Braddock v. Memphis Fire Ins. Corp.*, 493 S.W.2d 453

(Tenn. 1973); *Third Nat'l Bank v. American Equitable Ins.*, 27 Tenn. App. 249, 178 S.W.2d 915 (1943).

Severable Contracts. Question of divisibility of policy is dependent on whether risk affects both species of property. Breach of sole ownership clause held to void policy covering dwelling house and contents. *Payne v. Eureka-Sec. Fire & Marine Ins. Co.*, 173 Tenn. 659, 122 S.W.2d 431 (1938). Encumbered fixtures held severable from unencumbered stock of goods covered by same policy. *Lloyds Am. v. Duck*, 174 Tenn. 520, 128 S.W.2d 625 (1939).

FRAUD

See "AGENTS AND BROKERS"; "FIRE INSURANCE, Proof of Loss"; "REPRESENTATIONS AND WARRANTIES."

GUEST CASES

See "AUTOMOBILES."

HOSPITALS

Evidence. Where proper foundation has been laid, record made in regular course of hospital business is admissible. Tenn. Code Ann. §§68-11-401-408; Tenn. R. Evid. 803(6).

Immunity. Sovereign immunity bars claims against State of Tennessee, except as described in Tenn. Code Ann. §9-8-307. Immunity of state officers and employees (state hospital employees). Tenn. Code Ann. §9-8-307(h). Monetary claims against the state based on the alleged medical malpractice of state employees may be brought in the Tennessee Claims Commission. Tenn. Code Ann. §§9-8-305, 307(a)(1)(D). Claims against any political subdivision of the State of Tennessee or any instrumentality of government thereof. See Tenn. Code Ann. §§29-20-101-111.

Peer Review Privilege and Qualified Immunity. Tenn. Code Ann. §63-6-219; *Eyring v. Fort Sanders Parkwest Med. Ctr.*, 991 S.W.2d 230 (Tenn. 1999).

HUSBAND AND WIFE

See "FINANCIAL RESPONSIBILITY LAW."

Interspousal tort immunity has been abolished. *Davis v. Davis*, 657 S.W.2d 753 (Tenn. 1983).

A property settlement agreement did not extinguish former wife's rights as named beneficiary of a life insurance policy. *Bowers v. Bowers*, 637 S.W.2d 456 (Tenn. 1982). But see *Deckard v. Middleton*, 01-A-01-9502-CH-0005, 1995 WL 428677 (Tenn. Ct. App. Jul. 21,



1995) (where policy did not designate decedent's spouse by name).

Property Rights of Spouses. Tenn. Code Ann. §§36-3-501-505.

Disability benefits from a private insurance policy acquired with marital funds replace lost income and are not marital property subject to division upon divorce, but may be considered for child support and alimony. *Gragg v. Gragg*, 12 S.W.3d 412 (Tenn. 2000).

A wife's desire to remain in a marriage after a catastrophic injury in order to retain her husband's employer-provided group medical insurance should not influence the decision on whether to grant a divorce but should be considered in dividing property and establishing alimony. *Earls v. Earls*, 42 S.W.3d 877 (Tenn. Ct. App. 2000)

INFANTS

See "AUTOMOBILES, Age"; "NEGLIGENCE, Age."

Parental immunity limited. *Broadwell v. Holmes*, 871 S.W.2d 471, (Tenn. 1994). *But see Setters v. Permanent Gen. Assur. Corp.*, 937 S.W.2d 950 (Tenn. Ct. App. 1996) (not reading *Broadwell* to require invalidation of exclusionary provision on public policy grounds). Infant can sue parent for negligence. Infant must sue by guardian, conservator or next friend. Tenn. R. Civ. P. 17.03. Attains majority at eighteen. Tenn. Code Ann. §1-3-105(1).

Unemancipated minors living in same household can sue each other in tort. *See Herrell v. Haney*, 207 Tenn. 532, 341 S.W.2d 574 (1960).

Guardianship and conservatorship. Tenn. Code Ann. §§34-1-101-131, 34-2-101-206, and 34-3-101-413. *See also In re: Conservatorship of Groves*, 109 S.W.3d 317 (Tenn. Ct. App. 2003).

LIABILITY INSURANCE

Compromise of Claims. Insurer assuming under its policy to control litigation against insured must act in good faith and with reasonable diligence and caution. *Aycock Hosiery Mills v. Maryland Cas. Co.*, 157 Tenn. 559, 11 S.W.2d 889 (1928). *See Nat'l Serv. Fire Ins. Co. v. Williams*, 61 Tenn. App. 362, 454 S.W.2d 362 (1969).

Question of bad faith is for jury. In order to discharge duty, insurer must exercise ordinary care and diligence in investigation of accident and extent of damage for which insured may be liable. *S. Fire & Cas. Co. v. Norris*, 35 Tenn. App. 657, 250 S.W.2d 785 (1952).

Demand for payment of claim may be oral. *Hampton v. Allstate Ins. Co.*, 48 F. Supp. 2d 739 (M.D. Tenn. 1999).

Contribution Between Joint Tort-feasors. Recognized. Tenn. Code Ann. §29-11-101. Extremely limited by comparative fault. *See Smith v. Methodist Hospitals*, 995 S.W.2d 584 (Tenn. Ct. App. 1999). Consider the effect of comparative negligence and the abolition of joint liability. *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992).

Third party practice allowed. Tenn. R. Civ. P. 14.01, 14.02.

Cooperation of Insured. Failure of insured to cooperate where policy operates to relieve insurer of liability both as to insured and third parties. *Hartford v. Patridge*, 183 Tenn. 310, 192 S.W.2d 701 (1946). Later case law suggests prejudice must be shown. *See Talley v. State Farm Fire & Cas. Co.*, 223 F.3d 323 (6th Cir. 2000).

Prejudice to insurer from failure of insured to comply with notice provision of policy is a prerequisite to forfeiture, but breach of a notice provision establishes a rebuttable presumption of prejudice. *American Justice Ins. Reciprocal v. Hutchison*, 15 S.W.3d 811 (Tenn. 2000). *But see Gaston v. Tennessee Farmers Mut. Ins. Co.*, 120 S.W.3d 815 (Tenn. 2003); *State Industries, Inc. v. Twin City Fire Ins. Co.*, 158 Fed. Appx. 694 (6th Cir. 2005) (analysis of prejudice not relevant when notice is not at issue). Holding not extended to claims based policies. *Pope v. Leuty & Heath*, 87 S.W.3d 89 (Tenn. Ct. App. 2002).

LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See "FINANCIAL RESPONSIBILITY LAW."

General statute of limitations applies, limiting actions on contracts generally to six years; actions for property damage to three years; and actions for personal injury to one year. Tenn. Code Ann. Title 28 Chs. 1-3. Contractual limitations of actions upon policies, other than life, are valid and enforceable, if reasonable. *Guthrie v. Connecticut Indem. Ass'n*, 101 Tenn. 643, 49 S.W. 829 (1898). Eight months limitation in industrial policy held valid. *Johnson v. Life & Cas. Ins. Co.*, 168 Tenn. 358, 79 S.W.2d 39 (1935). Contractual limitation not affected by statute tolling limitation for period of non-residence (Tenn. Code Ann. §28-1-111). *Guthrie*, 49 S.W. at 829. Nor is it affected by saving statute where original action brought and dismissed within limitation period. *Id.*

Contractual limitation of actions in insurance policies does not begin until cause of action has accrued under other provisions of policy. *Boston Marine Ins. Co. v.*



Scales, 101 Tenn. 628, 49 S.W. 743 (1899); *Phoenix Ins. Co. of Hartford v. Fid. & Deposit Co.*, 162 Tenn. 427, 37 S.W.2d 119 (1931). Action accrues on denial of liability by insurer, regardless of sixty-day proof of loss requirement. *Hill v. Home Ins.*, 22 Tenn. App. 635, 125 S.W.2d 189 (1938). See also *Das v. State Farm Fire & Cas. Co.*, 713 S.W.2d 318 (Tenn. Ct. App. 1986); *Phoenix Ins. Co. v. Brown*, 53 Tenn. App. 240, 381 S.W.2d 573 (1964). No policy of life insurance shall be issued in this state if it contains provision limiting time within which any action may be commenced to less than five years after cause of action shall accrue. Tenn. Code Ann. §56-7-2308(2).

MALPRACTICE

Medical. Statute of limitations is one year from date of discovery. Tenn. Code Ann. §29-26-116. Claimant has burden of proof through evidence that defendant acted with less than ordinary and reasonable care in accordance with recognized standard of acceptable professional practice, and that claimant suffered injuries as proximate result of defendant's negligence. Tenn. Code Ann. §29-26-115(a). No person who is not licensed in profession requiring license or practicing in Tennessee or a contiguous state shall be competent to testify. Tenn. Code Ann. §29-26-115(b). Plaintiff must also prove that defendant did not supply appropriate information to patient in obtaining his informed consent. Tenn. Code Ann. §29-26-118. *But see Blanchard v. Kellum*, 975 S.W.2d 522 (Tenn. 1998) (expert testimony unnecessary on medical battery claim). Courts use an objective test to determine if consent is informed, *Ashe v. Radiation Oncology Assoc's*, 9 S.W.3d 119 (Tenn. 1999). Wrongful pregnancy is action by parents for damages for failure of pregnancy avoidance techniques performed by doctor. *Smith v. Gore*, 728 S.W.2d 738 (Tenn. 1987). Wrongful birth is action by child for being born with defects due to actions or omissions of defendant. *Id.*

Doctrine of *res ipsa loquitur* is applicable in medical malpractice cases where plaintiffs must rely upon expert testimony if negligence is within common knowledge of lay person. Use of experts can assist jury in the inference of negligence. *Seavers v. Methodist Med. Ctr. of Oak Ridge*, 9 S.W.3d 86 (Tenn. 1999). *But see Burton v. Warren Farmers Co-op.*, 129 S.W.3d 513 (Tenn. Ct. App. 2002) (doctrine cannot be invoked unless circumstances surrounding injury demonstrate: 1) injury was probably the result of negligence and 2) defendant was probably negligent).

Notice. Any person asserting a potential claim for medical malpractice must give written actual notice of potential claim to all health care providers against whom potential claim is being made at least sixty days prior to

filing a complaint based on medical malpractice. Tenn. Code Ann. §29-26-121(a). The complaint must provide evidence of compliance with subsection (a). Tenn. Code Ann. §29-26-121(b). If notice is given, the applicable statute of limitations and repose will be extended for ninety days. Tenn. Code Ann. §29-26-121(c). The notice requirement shall not apply when parties are added after a defendant alleges the comparative fault of non-parties. *Id.*

Certificate of Good Faith. Plaintiff must provide a certificate of good faith within ninety days of filing a medical malpractice complaint. Tenn. Code Ann. §29-26-122(a). If a defendant alleges comparative fault in an answer, then defendant must file a certificate of good faith within thirty days of answer. Tenn. Code Ann. §29-26-122(b).

The Governmental Tort Liability Act (Tenn. Code Ann. §29-20-310(b)) allows medical malpractice claims against some governmental employees who are health care practitioners, which historically have included physicians, dentists, clinical psychologists and psychiatrists, pharmacists, optometrists, nurses, physicians' assistants, chiropractors, physical therapists, nurse anesthetists, emergency medical technicians, hospitals, nursing homes, and extended care facilities. *Mooney v. Sneed*, 30 S.W.3d 304 (Tenn. 2000); Tenn. Code Ann. §29-20-201-206.

Hospital. Tenn. Code Ann. §29-26-115 (as amended 2005) describes duty owed by hospital and its employees, and other health care providers, where acts or omissions complained of involve a matter of medical science or art requiring specialized skills. Proof of elements of professional malpractice not required where claim is for ordinary negligence. *Peete v. Shelby County Health Care Corp.*, 938 S.W.2d 693 (Tenn. Ct. App. 1996). Tenn. Code Ann. §29-26-118 generally does not require a hospital to procure a patient's informed consent to a surgical procedure ordered or preformed by a non-employee doctor. *Bryant v. HCA Health Servs.*, 15 S.W.3d 804 (Tenn. 2000)

Accountants. One year statute of limitations applies to malpractice actions against licensed public accountants or CPAs regardless of whether brought in tort or contract. Tenn. Code Ann. §28-3-104(a)(2). The discovery rule applies to accountant malpractice limitation of actions. *Dunlap v. Ayers*, No. 02A01-9801-CV-00025, 1999 WL 236514 (Tenn. Ct. App. Apr. 23, 1999).

Legal. See "ATTORNEYS."

NEGLIGENCE

See "AUTOMOBILES."



Attractive Nuisance. Recognized. *McCulley v. Cherokee*, 182 Tenn. 68, 184 S.W.2d 170 (1944). Whether condition creates attractive nuisance is question of law for court. *Gouger v. Tennessee Valley Auth.*, 188 Tenn. 96, 216 S.W.2d 739 (1949); *Williams v. Town of Morristown*, 32 Tenn. App. 274, 222 S.W.2d 607 (1949). Playground rule applied, limited. *Williams v. Williams*, 63 Tenn. App. 252, 470 S.W.2d 368 (1971); *Gatlinburg Constr. v. McKinney*, 263 S.W.2d 765 (Tenn. Ct. App. 1953).

Comparative Negligence. The doctrine of modified comparative fault has replaced the doctrines of contributory negligence and remote contributory negligence in Tennessee *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992).

Phantom Tort-feasor. In cases not involving motor vehicles, defendant cannot attribute fault to a non-party, "phantom tort-feasor," who is not identified sufficiently to allow plaintiff to plead and serve process on such person, even if the defendant establishes the phantom's existence by clear and convincing evidence. *Brown v. Wal-Mart Discount Cities*, 12 S.W.3d 785 (Tenn. 2000). However, in a motor vehicle accident, fault may be assigned to a "phantom motorist" if certain requirements are met. *See Marler v. Scoggins*, 105 S.W.3d 596 (Tenn. Ct. App. 2002); *Resor v. Graves*, 108 F. Supp. 2d 929 (E.D. Tenn. 2000).

Contributory Negligence. The doctrine of contributory negligence has been rendered obsolete. *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992).

Violation of statute is negligence per se. *Null v. Elec. Power Bd. of Nashville*, 30 Tenn. App. 696, 210 S.W.2d 490 (1948); *Inter-City Trucking Co. v. Daniels*, 181 Tenn. 126, 178 S.W.2d 756 (Tenn. 1944).

Definition and discussion of negligence. *Inter-City Trucking Co. v. Daniels*, 181 Tenn. 126, 178 S.W.2d 756 (1944); *Vertrees v. Tennessee Auto Corp.*, 5 Tenn. App. 140, 1927 WL 2119 (1927).

Duty of Motor Vehicle Passenger. *Grandstaff v. Hawks*, 36 S.W.3d 482 (Tenn. Ct. App. 2000). *See also Lanier v. Bane*, No. M2000-03199-COA-R3-CV, 2004 WL 1268956 (Tenn. Ct. App. June 8, 2004).

Premises Liability. Open or obvious danger does not, ipso facto relieve defendant of duty or care. *Clifford v. Crye-Leike Commercial, Inc.*, 213 S.W.3d 849 (Tenn. Ct. App. 2006). While no absolute duty exists, businesses have a duty of reasonable care to protect patrons from foreseeable tortious or criminal acts of third parties committed on premises. Courts balance the foreseeability and gravity of potential harm against burden imposed on the businesses to prevent the harm. *Staples v. CBL &*

Assocs., Inc., 15 S.W.3d 83 (Tenn. 2000); *McClung v. Delta Square Ltd. P'ship*, 937 S.W.2d 891 (Tenn. 1996). *See also Z-Gem Co. v. Dollar Rent-A-Car*, 406 F. Supp. 2d 867 (W.D. Tenn. 2005) (holding that proof of specific, prior crimes at defendant's location is an important factor in establishing duty when plaintiff alleges prior criminal acts rendered premises unsafe).

Sudden Emergency and Last Clear Chance. Not recognized as separate doctrines but circumstances taken into account by these doctrines will be addressed when assessing relative degrees of fault. *Eaton v. McLain*, 891 S.W.2d 587 (Tenn. 1994); *Ross v. Vanderbilt Univ. Med. Ctr.*, 27 S.W.3d 523 (Tenn. Ct. App. 2000)

Proximate Cause. The Tennessee Supreme Court has described proximate causation as the act or omission which immediately causes or fails to prevent the injury. *Tennessee Trailways, Inc. v. Ervin*, 222 Tenn. 523, 438 S.W.2d 733 (1969); *Kroger Co. v. Giem*, 215 Tenn. 459, 387 S.W.2d 620 (1965); *Roberts v. Robertson County Bd. of Educ.*, 692 S.W.2d 863 (Tenn. Ct. App. 1985). *See also Mason v. Metro. Gov't of Nashville*, 189 S.W.3d 217 (Tenn. Ct. App. 2005).

PENALTY AND ATTORNEYS' FEES

Penalty up to 25%. In addition to loss and interest thereon, upon showing bad faith on part of insurance company, measured by insured's additional expense, loss and injury thus entailed. Tenn. Code Ann. §56-7-105(a). Requisites to allowance of penalty given in *Third Nat'l Co. v. Thompson*, 28 Tenn. App. 436, 191 S.W.2d 190 (1945). *See Rice v. VanWagoner Cos.*, 738 F. Supp. 252 (M.D. Tenn. 1990). Insured must make demand, and insurer must refuse to pay within sixty days after demand. Tenn. Code Ann. §56-7-105(a). In order to recover bad faith penalties, plaintiff must prove that policy of insurance had become due and payable, formal demand for payment had been made, insured waited sixty days after demand before filing suit, and refusal to pay was not in good faith. *Ginn v. American Heritage Life Ins. Co.*, 173 S.W.3d 433 (Tenn. Ct. App. 2004). Similar penalty against insured who sues in bad faith. Tenn. Code Ann. § 56-7-106. *See Harrison v. Nat'l Life & Accident Ins.*, 24 Tenn. App. 449, 145 S.W.2d 1023 (1940).

Insurer paid into court what it maintained was due under policy and commenced proceeding for reformation. Held, no bad faith and no liability for penalty. *Industrial Life v. Trinkle*, 30 Tenn. App. 243, 204 S.W.2d 827 (1947); *American Nat'l Ins. v. McPhetridge*, 28 Tenn. App. 145, 187 S.W.2d 640 (1945).

Attorney's fee not to exceed 12½% of amount of loss and in no event less than \$25 to be paid by insurer refusing to pay loss if loss is determined to be covered



and if insurer's refusal to pay was without reasonable cause. Tenn. Code Ann. §56-7-105(b).

PRIVILEGED COMMUNICATIONS

Attorney/Client, Tenn. Code Ann. §23-3-105. Husband and wife, Tenn. Code Ann. §24-1-201. C.P.A. and client, excepting criminal and bankruptcy laws. Tenn. Code Ann. §62-1-116. Personal to the client not the accountant. *Federal Ins. Co. v. Arthur Anderson & Co.*, 816 S.W.2d 328 (Tenn. 1991).

Psychologist or Psychiatrist/Patient. Tenn. Code Ann. §24-1-207. Clergy/Parishioner, Tenn. Code Ann. §24-1-206. Communications made to psychiatrist/psychologist are privileged even when spouse is present, but the privilege does not extend when the parties themselves testify as to statements made by the other spouse. *Guity v. Kandilakis*, 821 S.W.2d 595 (Tenn. Ct. App. 1991); *Ellis v. Ellis*, 472 S.W.2d 741, (Tenn. Ct. App. 1971).

Physician and others to keep a patient's medical records and identifying information confidential. Tenn. Code Ann. §63-2-101(b)(1); Tenn. Code Ann. §§68-11-1502-1503. Absent certain circumstances, a physician breaches his or her implied covenant of confidentiality by divulging medical information, without the patient's consent through informal conversations with others. *See Givens v. Mullikin*, 75 S.W.3d 383, 409 (Tenn. 2002).

Husband/Wife. *Jackson v. Jackson*, 186 Tenn. 337, 210 S.W.2d 332 (1948).

Marital privilege does not apply to an insured's obligations under an insurance contract in civil proceedings. Tenn. Code Ann. §24-1-201(a).

Marital privilege does not apply to proceedings between spouses or in spousal or child abuse proceedings. Tenn. Code Ann. §24-1-201(c)(2).

The communication privilege is limited in criminal proceedings. Tenn. Code Ann. §24-1-201(c)(1).

PRODUCTS LIABILITY

Tennessee products liability actions are controlled by "Tennessee Products Liability Act of 1978," Tenn. Code Ann. §29-28-101-108. Statute broadly defines "products liability actions" to include all actions brought on account of personal injury, death or property damage caused by or resulting from manufacture, construction, design, formula, preparation, assembly, testing, service, warning, instructions, marketing, packaging or labeling of any product regardless of theory relied upon. Tenn. Code Ann. §29-28-102(6). Under statute, manufacturer or, in certain instances, seller, of product may be held

liable for damages proximately caused by product if product is found to have been defective or unreasonably dangerous at time it left control of manufacturer or seller. Tenn. Code Ann. §29-28-105(a). Tennessee follows the component parts doctrine, which imposes liability on the component manufacturer only if the component is defective and causes harm or the component manufacturer substantially participates in the integration of the non-defective component into the final product if the integration causes the product to be defective and cause harm. *Davis v. Komatsu Am. Indus. Corp.*, 42 S.W.3d 34 (Tenn. 2001). Act provides for two tests; the consumer expectation test and the prudent manufacturer test. *Ray v. BIC Corp.*, 925 S.W.2d 527 (Tenn. 1996).

Act establishes several statutes of limitations which may be applicable in products liability actions. Tenn. Code Ann. §29-28-103. Generally, in actions based upon common law theories, including strict products liability and negligence, statute of limitations of personal injuries runs one year from date of plaintiff's injury, Tenn. Code Ann. §28-3-104(a)(1), or, under "Discovery Doctrine," one year from date plaintiff discovered or reasonably could have discovered injury. *McCroskey v. Bryant Air Conditioning Co.*, 524 S.W.2d 487 (Tenn. 1975). In actions based upon common law theories and brought for property damage statute of limitations runs three years from date damage occurred. Tenn. Code Ann. §28-3-105(1). Three years from date damage was discovered or reasonably should have been discovered by plaintiff. *Prescott v. Adams*, 627 S.W.2d 134 (Tenn. Ct. App. 1981). In warranty actions arising under Uniform Commercial Code, statute of limitations runs four years from tender of delivery of goods regardless of aggrieved parties' knowledge of breach. *McCroskey v. Bryant Air Conditioning Co.*, 524 S.W.2d 487 (Tenn. 1975). *See also* Tenn. Code Ann. §47-2-725. In actions arising out of deficiency in design, planning, supervision, observation of construction or construction of improvement to real property statute of repose runs four years from date of "substantial completion" of improvement. Tenn. Code Ann. §28-3-202.

Regardless of applicable statute of limitations act places "caps" (statutes of repose) on products liability actions beyond which time such actions are absolutely time barred. Products liability action must be brought within six years from date of injury, within ten years from date product was first purchased or for use or consumption or within one year after expiration of anticipated life of product, whichever of three limitations period is shorter. *See* Tenn. Code Ann. §29-28-103(a). There are two exceptions to absolute time limitations in statute. Minor may bring products liability action, regardless of time limitations of act, within one year of reaching age of majority. Tenn. Code Ann. §29-28-

103(a). In addition, absolute time limitations of statute do not apply to cases arising from exposure to asbestos or from human implantation of silicone gel breast implants. Tenn. Code Ann. §29-28-103(b). Ten-year statute of repose in Tenn. Code Ann. §29-28-103(a) is not tolled by plaintiff's mental incompetency. *Penley v. Honda Motor Co.*, 31 S.W.3d 181 (Tenn. 2000).

Act expressly establishes number of defenses in products liability actions. Manufacturer or seller may not be held liable if product is made unreasonably dangerous after it leaves control of manufacturer or seller by subsequent unforeseeable alteration, change, use or maintenance. Tenn. Code Ann. §29-28-108. In addition, product is not unreasonably dangerous because of failure to warn of hazard apparent to ordinary user of product. Tenn. Code Ann. §29-28-105(d). Manufacturer or seller who establishes that its product complied with applicable federal or state statutes or regulations at time product was manufactured establishes rebuttable presumption that its product was not unreasonably dangerous as to matters covered by standards. Tenn. Code Ann. §29-28-104. Tenn. Code Ann. §29-28-108 describes defenses available. Defendant, however, may not seek assignment of fault to employer for alteration, change, improper maintenance or abnormal use. Employer's alteration may be considered by jury as cause in fact but jury may not assess fault against employer. *Snyder v. LTG Luft-technische GmbH*, 955 S.W.2d 252 (Tenn. 1997). *But see Carroll v. Whitney*, 29 S.W.3d 14 (Tenn. 2000) (limiting the allocation of fault to employers in workers' compensation cases).

"Seller" of products, *see* Tenn. Code Ann. §29-28-102(7), are entitled to special defenses under Act. Sellers may not be held liable for damage caused by defective product if product is acquired and sold in sealed container or if product is acquired and sold under circumstances which afford seller no opportunity to inspect the product. Tenn. Code Ann. §29-28-106(a). However, seller of product may not rely upon this defense in actions based upon expressed or implied warranties of seller, *see* Tenn. Code Ann. §29-28-106(a), where manufacturer cannot be served by plaintiff, *Id.* Where manufacturer has been judicially declared insolvent, *Id.*, or where seller is also manufacturer of product. Tenn. Code Ann. §29-28-106(b).

Recent decisions indicate that "economic loss" is not a proper element of damage in actions based upon theory of strict products liability. *Corp. Air Fleet of Tenn. v. Gates Learjet*, 589 F. Supp. 1076 (M.D. Tenn. 1984). At least one recent decision also indicates that punitive damages may not be recoverable in strict products liability actions. *Sanford v. Celotex Corp.*, 598 F. Supp. 529 (M.D. Tenn. 1984).

RELEASE

Contract Law. Party seeking to affirm contract and sue for damages under release agreement are not required to return consideration, but party rescinding contract must return consideration. *Solomon v. FloWarr Mgmt.*, 777 S.W.2d 701 (Tenn. Ct. App. 1989). Accord is agreement where one party agrees to take something other than what was originally bargained for and satisfaction is execution of that agreement. *R.J. Betterton Mgmt Servs. v. Whittemore*, 733 S.W.2d 880 (Tenn. Ct. App. 1987). *See also, Rogersvill Inv. Corp. v. Meridian Ins. Croup*, No E2007-00600-COA-R3-CV, 2007 WL 2480221, at *3 (Tenn. Ct. App. Sept. 4, 2007).

Covenant Not To Sue. Must be clear and unambiguous to be valid. *Horner v. Town of Cookeville*, 36 Tenn. App. 535, 259 S.W.2d 561 (1953). Covenant not to sue one party does not release others from liability. *Id.*

Infants. Release signed by parent is effective to release liability as to parent, but not as to child. *Childress v. Madison County*, 777 S.W.2d 1 (1989). Minor's settlements must be court approved. Tenn. Code Ann. §34-1-121.

Mistake. Mutual mistake as to nature and extent of injuries is good cause for avoidance of settlement, but mistake must relate to a past or present fact, not an opinion as to the result for a known fact. *Collier v. Walls*, 51 Tenn. App. 467, 369 S.W.2d 747 (1962).

Torts Generally. Tenn. Code Ann. §29-34-101. Express Consent required for settlements. Tenn. Code Ann. §29-34-102. Rescission of fraudulent or erroneous settlements.

REPRESENTATIONS AND WARRANTIES

Statutory Provisions. Life insurance policy must contain clauses stating that statements by insured are "statements and not warranties." Tenn. Code Ann. §56-7-2307(4).

Misrepresentation. Claims of misrepresentation as grounds for rescission of contract are valid, but will bar subsequent actions for termination of benefits. *Trew v. Wayne-Gossard Corp.*, 694 S.W.2d 956 (Tenn. Ct. App. 1985).

SERVICE OF PROCESS

Tenn. R. Civ. P. 4 as amended July 1, 2004.

Corporation. Registered agent of foreign corporation authorized to do business in this state is corporations' agent for service of process. Tenn. Code Ann. §48-65-110(a). When Secretary of State is corporation



agent, service of process may be obtained through Tenn. Code Ann. §48-55-105(c).

Superintendent of Insurance. Insurance companies incorporated under laws of the state shall constitute and appoint commissioner as agent for service of process. Tenn. Code Ann. §56-2-501.

Non-resident motorists. Tenn. Code Ann. §20-2-203(a)(3).

Uninsured motorist carrier. Tenn. Code Ann. §56-7-1206(a); *Griffin v. Shelter Mut. Ins. Co.*, 18 S.W.3d 195 (Tenn. 2000).

SUBROGATION

Action may be maintained for wrongful destruction of property by owner in his name though he has been fully compensated by insurer who may be entitled to subrogation. *Globe & Rutgers Fire Ins. Co. v. Cleveland*, 162 Tenn. 83, 34 S.W.2d 1059 (1931). Where insurer paid to father medical expenses incurred by him for benefit of insured son, and entered separate indemnity contract, insurer was entitled to subrogation to settlement fund paid into court by third-party, though policy specifically limited insurer to subrogation only as to rights of insured. *Tennessee Farmers' Mut. Ins. v. Rader*, 219 Tenn. 384, 410 S.W.2d 171 (1966).

But when action is brought in name of insured, insurer is real plaintiff and should insurer desire to prosecute all claims under subrogation, it should be done in one action. *Travelers Ins. Co. v. Williams*, 541 S.W.2d 587 (Tenn. 1976); *Nat'l Cordova Corp. v. City of Memphis*, 214 Tenn. 371, 380 S.W.2d 793 (Tenn. 1964).

Recovery by subrogee may be limited by "made whole" doctrine. *York v. Sevier County Ambulance Auth.*, 8 S.W.3d 616 (Tenn. 1999). *But see Graves v. Cocke County*, 24 S.W.3d 285 (Tenn. 2000) ("made whole" doctrine does not extend to workers' compensation claims). Subrogation distinguished from reimbursement. *York*, 8 S.W.3d at 616. "Made Whole" doctrine does not apply to TennCare. Tenn. Code Ann. §71-5-117.

Insurer having paid under "uninsured motorist" clause is subrogated to all rights of percentage of person to whom payment is made and such payment by insurer shall not constitute satisfaction of liability of party or parties responsible for injury under Tennessee's Financial Responsibility Laws. Tenn. Code Ann. §56-7-1204.

UNINSURED MOTORIST

Applicable in Tennessee except where rejected by insured. Tenn. Code Ann. §56-7-1201 *et seq.* Arbitration. Tenn. Code Ann. §56-7-1206.

Workers' Compensation benefits deducted from uninsured motorist policy limits. *Sims v. Stewart*, No. W1998-00560-COA-R3-CV, 1999 WL 1336056 (Tenn. Ct. App. Dec. 15, 1999).

WAIVER AND ESTOPPEL

As agent for insurance company having ostensibly general authority to solicit applications, make contracts for insurance, and to receive premiums, his principal is bound by any acts or contracts within the general scope of his apparent authority, notwithstanding actual excess of authority. *Norris v. Monarch Fire Ins.*, 180 Tenn. 660, 177 S.W.2d 831 (1944).

Insurer not bound where insured has knowledge that special or general agent's acts transcend his powers. *Arnold v. Locomotive Eng'rs Mut. Life & Accident Ins. Ass'n*, 30 Tenn. App. 166, 204 S.W.2d 191 (1947). *See Rule v. Bhd.'s Relief & Comp. Fund*, 36 Tenn. App. 20, 251 S.W.2d 309 (1952).

Insurer estopped to take advantage of condition its agent failed to handle properly in policy. But estoppel only protects rights, it does not create them and it cannot be basis of recovery for losses not within insuring clause of contract. *E.K. Hardison Seed Co. v. Cont'l Cas.*, 56 Tenn. App. 644, 410 S.W.2d 729 (1967). *But see Bill Brown Constr. v. Glens Falls Ins.*, 818 S.W.2d 1 (Tenn. 1991).

Written provision that conditions of policy of insurance shall not be waived except by certain officer of company may itself be waived by parol. *Rolane Sportswear, Inc. v. U.S. Fid. & Guar. Co.*, 407 F.2d 1091 (6th Cir. 1969); *Commercial Standard Ins. v. Gordon's Transps.*, 154 F.2d 390 (6th Cir. 1946); *American Life Ins. Co. of Ala. v. Hutcheson*, 109 F.2d 424 (6th Cir. 1940); *Industrial Life & Health Ins. v. Trinkle*, 185 Tenn. 434, 206 S.W.2d 414 (1947); *Maryland Cas. v. McTyier*, 150 Tenn. 691, 266 S.W. 767 (1924); *Dale v. Cont'l Ins.*, 95 Tenn. 38, 31 S.W. 266 (1895); *Bailey v. Life & Cas. Ins. Co of Tenn.*, 35 Tenn. App. 574, 250 S.W.2d 99 (1952); *Duncan v. Peebles*, 28 Tenn. App. 592, 192 S.W.2d 235 (1946).

Issuance and delivery of policy without objection, where insurer has knowledge of existing facts, estops insurer from relying on those facts as defense and knowledge of the agent of those facts is imputable to the insurer. *Life & Cas. Ins. v. King*, 137 Tenn. 685, 195 S.W. 585 (1917); *State Farm Life Ins. Co. v. Lawless*, 586 S.W.2d 468 (Tenn. Ct. App. 1979).

Failure to assert forfeiture or to cancel or rescind after knowledge of facts estops insurer. *Watkins v. U.S. Cas.*, 141 Tenn. 583, 214 S.W. 78 (1919).



Demand acceptance or retention of premiums or assessments after knowledge estops insurer. *Taylor v. Nat'l Union Fire Ins. Co.*, 140 Tenn. 150, 203 S.W. 830 (1918). But recovery limited to premiums paid because of terms of policy. See *Kizer v. Life & Cas. Ins.*, 169 Tenn. 605, 90 S.W.2d 513 (1936).

WORKERS' COMPENSATION

See "UNINSURED MOTORIST."

See Law Digest Tables. (Workers Compensation Reform Act of 1992, as amended eff. July 1, 2004).

Statutory references. "Tennessee Workers' Compensation Law" is covered by Tenn. Code Ann. §50-6-101 *et seq.* Most recent amendments to become effective July 1, 2004. (see 2004 Tenn. Laws Pub. Ch. 962 (H.B. 3531)). The Circuit and Chancery courts have concurrent jurisdiction. Venue lies in the county where the accident arose or where the employee resides. Appeal from the trial court is directly to the Supreme Court through a special "Workers' Compensation Panel" comprised primarily of retired judges.

Benefits. Temporary benefits, total or partial, are payable while the employee is receiving medical treatment until either the employee returns to work or attains maximum medical improvement. If there is a permanent disability, the employee is entitled to permanent partial or permanent total benefits. The rate is based upon 66 2/3% of the average weekly wage based upon the 52 weeks immediately preceding the date of injury. Tenn. Code Ann. §50-6-207(1)-(2).

Awards. Generally, benefits are calculated on the percentage of permanent partial disability based on a maximum of four hundred (400) weeks for injuries to the body as a whole. Scheduled members are based on the number of weeks set forth in Tenn. Code Ann. §50-6-207(4)(A)(i). Tenn. Code Ann. §50-6-207(4)(A)(i) limits awards for permanent total disability benefits for injuries which occur after 60 years of age to 260 weeks, and otherwise provides benefits until the employee is, by age, eligible for full Social Security benefits, in permanent and total disability cases.

Mandatory Mediation. The 1992 Act created the Benefit Review Division within the Tennessee Department of Labor to act as an alternative to the court system. Tenn. Code Ann. §50-6-236 *et seq.* The primary focus is on mediation conducted by state employees without charge to the parties. In 1996, mediation became mandatory for injuries occurring on or after January 1, 1997. Benefit review specialists also have statutory authority to order temporary disability and medical benefits through an administrative process initiated by the filing of a "Request for Assistance Form." Assistance may be sought by calling a workers' compensation representative at 1-800-332-COMP.

Pre-existing Injury. A prior disabling condition does not preclude a workers' compensation award where a work related injury aggravates a pre-existing condition. *White v. Werthan Indus.*, 824 S.W.2d 158 (Tenn. 1992). If the employee is permanently and totally disabled or with prior workers' compensation awards becomes 100% disabled, the Second Injury Fund of the Tennessee Department of Labor is a responsible party for previously sustained injury ratable under the American Medical Association Guides to the Evaluation of Permanent Impairment. Tenn. Code Ann. §50-6-208.

Attorney's Fees. Attorney's fees may not exceed twenty percent (20%) of the employee's recovery, and are subject to review by the court. Tenn. Code Ann. §50-6-226. However, the 1996 legislature changed Tenn. Code Ann. §50-6-226 to limit fees to \$10,000 except in specific instances subject to court approval.

Subrogation. Workers' compensation insurance carrier was entitled to enforce subrogation claim for all of workers' compensation benefits paid even though some fault was attributed to employer. *Castleman v. Ross Eng'r Inc.*, 958 S.W.2d 720 (Tenn. 1997). Employer's statutory right to subrogation does not extend to settlement amounts recovered from third-party tortfeasor by claimant's wife for loss of consortium. *Hunley v. Silver Furniture Mfg. Co.*, 38 S.W.3d 555 (Tenn. 2001).