TENNESSEE

Statutes of Limitation

Tort

1 year personal injury. Tenn. Code Ann. §28-3-104. 3 year property damage. Tenn. Code Ann. §28-3-105. Note exceptions to the personal injury statute of limitations such as Tenn. Code Ann. §§28-3-102 (actions against personal representative), 283-103 (slander), 28-3-116 (injury based on child sexual abuse), etc.

Contract

6 years. Tenn. Code Ann. §28-3-109(a)(3)

Declaratory Judgment

"[W]hen a petition for declaratory judgment seeks the same relief that is otherwise available in another statutory proceeding, then the filing of the declaratory judgment is governed by the statute of limitations governing that statutory proceeding." Newsome v. White, No. M2001-03014-COA-R3-CV, 2003 Tenn. App. LEXIS 897, 2003 WL 22994288, at *4 (Tenn. Ct. App. Dec. 22, 2003) (citing *Dehoff v. Attorney General*, 564 S.W.2d 361, 363 (Tenn. 1978))." But be careful to determine whether the same relief that is otherwise available in another statutory proceeding is what is actually being sought.

Discovery Rule

The discovery rule is a limited exception to the statute of limitations. *Pero's Steak & Spaghetti House v. Lee,* 90 S.W.3d 614, 621 (Tenn. 2002) (characterizing the discovery rule as an "equitable exception" to the statute of limitations). It tolls the running of the statute of limitations until the plaintiff knows or, in the exercise of reasonable care and diligence, should know that the plaintiff has a legal cause of action against the defendant. *Terry v. Niblack,* 979 S.W.2d 583, 586 (Tenn. 1998); *Hunter v. Brown,* 955 S.W.2d 49, 51 (Tenn. 1997).

The rationale underlying the discovery rule is that injured parties should not be placed in the anomalous situation of being required to file suit before they know they have been injured. *McCroskey v. Bryant Air Conditioning Co.,* 524 S.W.2d 487, 490 (Tenn. 1975); *Teeters v. Currey,* 518 S.W.2d 512, 515 (Tenn. 1974). The rule alleviates the intolerable result of barring a cause of action by holding that it "accrued" before the plaintiff discovered the injury or the wrong. *Foster v. Harris,* 633 S.W.2d 304, 305 (Tenn. 1982). However, the rule applies only in cases where the plaintiff did not discover and reasonably could not have been expected to

discover the existence of a right of action, *Hunter v. Brown,* 955 S.W.2d at 51, and it tolls the running of the statute of limitations only as long as the plaintiff has no knowledge at all that a wrong has occurred and, as a reasonable person, would not have been put on inquiry. *Potts v. Celotex Corp.,* 796 S.W.2d 678, 680 (Tenn. 1990).

Duty to Defend

Standard- In Tennessee, like in many states, the duty to defend is more expansive than the general duty to indemnify. In fact, in the context of insurance law, the duty to defend is not affected by the facts of a case ascertained before, during, or after the suit. Tennessee employs what is known as the "pleading test." *St. Paul Fire & Marine Ins. Co. v. Torpoco,* 879 S.W.2d 831, 835 (Tenn. 1994). The court will only take into consideration the insurance policy at issue and the allegations set forth in the pleadings in order to determine whether an insurer has a duty to defend an insured. If the allegations are within the risk insured against and the insured has demonstrated that there is a potential basis for recovery, then the insurer must defend regardless of the actual facts or the ultimate grounds on which the liability to the injured parties may be predicated. *Id.* If the underlying petition does not allege facts within the scope of coverage, the insurer has no duty to defend. *Id.* However, the pleading test is based exclusively on the facts as they are alleged in the pleadings rather than on the facts as they actually are. *Id.*

Once coverage is found for any portion of a suit, an insurer must defend the entire suit. *See Am. Indem. Co. v. Iron City Lumber & Pallet, Inc.,* No. M2002-00650-COA-R3-CV, 2003 WL 724483 (Tenn. Ct. App., Mar. 4, 2003).

If there exists any dispute as to the meaning of a term/provision regarding what is covered in a contract, the court shall construe any ambiguity in favor of the insured, thereby triggering the insurance company's duty to defend. *Id.* Additionally, if the allegations in the pleadings are ambiguous and there is any doubt as to whether the pleadings sufficiently state a cause of action which would impose the insurer's duty to defend, the court shall construe any such ambiguity in favor of the insured. *Gordon Constr., Inc.,* No. M1999-00785-COA-R3-CV, 2001 WL 513884 (Tenn. Ct. App. May 15, 2001).

Insurance contracts are "subject to the same rules of construction as contracts generally" and in the absence of fraud or mistake, the contractual terms "should be given their plain and ordinary meaning, for the primary rule of contract interpretation is to ascertain and give effect to the intent of the parties." *U.S. Bank, N.A. v. Tenn. Farmers Mut. Ins. Co.,* 277 S.W3d at 386-87. Additionally, courts should construe insurance policies "'as a whole in a reasonable and logical manner.'" *Travelers Indem. Co. of Am. v. Moore & Assocs.,* 216 S.W.3d at 306 (quoting *Standard Fire Ins. Co. v. Chester-O'Donley & Assocs.,* 972 S.W.2d 1, 7 (Tenn. Ct. App. 1998)). "No

single clause in a contract is to be viewed in isolation; rather, the contract is to be `viewed from beginning to end and all its terms must pass in review, for one clause may modify, limit or illuminate another.'" *Frizzell Constr. Co., Inc. v. Gatlinburg, L.L.C.,* 9 S.W.3d 79, 85 (Tenn. 1999) (citing *Cocke County Bd. of Highway Comm'rs v. Newport Utils. Bd.,* 690 S.W.2d 231, 237 (Tenn. 1985)).

Limited Defense- See the Standard.

Insured Selection of Counsel- Based upon the following authority, it appears that an insured is not entitled to selection of independent counsel at present in Tennessee. The Tennessee Supreme Court has not held that an insured has a right to independent counsel. This is presumably because the Court has held that counsel hired by an insurer must "exercise professional judgment and devote complete loyalty to the insured regardless of the circumstances." *In re Youngblood, 895 S.W.2d 322, 328, 1995 Tenn. LEXIS 46, *14 (Tenn. 1995).* The employment of an attorney by an insurer to represent the insured does not create the relationship of attorney-client between the insurer and the attorney, nor does that employment necessarily impose upon the attorney any duty or loyalty to the insurer which impairs the attorney-client relationship between the attorney and the insured or impedes the performance of legal services for the insured by the attorney. *Id* at 1.

The Tennessee Supreme Court has also held that the insurer clearly possesses no right to "control the methods or means chosen by an attorney to defend the insured." *Givens v. Mullikin, 75 S.W.3d 383, 390, 2002 Tenn. LEXIS 153, *1 (Tenn. 2002).* "The insurer cannot control the details of the attorney's performance, dictate the strategy or tactics employed, or limit the attorney's professional discretion with regard to the representation of the insured." *Id.*

Further indication of the lack of an insured's entitlement to independent counsel is laid out in *Town of Bell Buckle v. Home Ins. Co.* In *Town of Bell Buckle,* the plaintiff town hired its own independently selected counsel to represent it despite the plaintiff's insurer offering representation by the insurer's retained counsel. At the case's end, the plaintiff requested reimbursement of $4,550 paid to its independently selected lawyer for defending the suit which was settled. The Court held, "The evidence is uncontradicted that the insurer offered the services of retained counsel to represent the Town... but the Town elected to defend through its own attorney, in cooperation with counsel retained by the insurer. Counsel retained by the insurer testified without contradiction that, had the Town not insisted upon its defense being handled by its own counsel; he (counsel retained by the insurer) would have handled the defense of [the Town]. Under these circumstances, the insurer has no liability to insured for attorney fees." *Town of Bell Buckle v. Home Ins. Co*., 1986 Tenn. App. LEXIS 2815, *9, 1986 WL 2583 (Tenn. Ct. App. Feb. 26, 1986).

Allocation of Fault Joint and Several Liability

The decisions of our appellate courts after *McIntyre* (see below under comparative fault) have set forth certain situations when joint and several liability survives, namely (1) to parties in the chain of distribution of a product when the theory of recovery is strict liability, *Owens v. Truckstops of America,* 915 S.W.2d 420, 431 n.13, 432 (Tenn. 1996); (2) to officers and directors who act not in concert, *Resolution Trust Corp. v. Block*, 924 S.W.2d 354, 355-56 (Tenn. 1996); and, (3) when harm arises from the tortious acts of an intentional tortfeasor which was a foreseeable risk created by a negligent defendant and all tortfeasors are parties to the suit, *Lim-baugh v. Coffee Medical Center,* 59 S.W.3d 73, 87 (Tenn. 2001).

Allocation of Fault Comparative Fault

We recognize that modified comparative fault systems have been criticized as merely shifting the arbitrary contributory negligence bar to a new ground. *See, e.g., Li v. Yellow Cab Co.,* 13 Ca1.3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). However, we feel the "49 percent rule" ameliorates the harshness of the common law rule while remaining compatible with a fault-based tort system. *Accord Bradley v. Appalachian Power Co.,* 163 W. Va. 332, 256 S.E.2d 879, 887 (1979). We therefore hold that so long as a plaintiff's negligence remains less than the defendant's negligence the plaintiff may recover; in such a case, plaintiff's damages are to be reduced in proportion to the percentage of the total negligence attributable to the plaintiff.

In all trials where the issue of comparative fault is before a jury, the trial court shall instruct the jury on the effect of the jury's finding as to the percentage of negligence as between the plaintiff or plaintiffs and the defendant or defendants. *Accord* Colo. Rev. Stat. § 13-21-111.5(5) (1987). The attorneys for each party shall be allowed to argue how this instruction affects a plaintiff's ability to recover. *McIntyre v. Balen-tine,* 833 S.W.2d 52 (Tenn. 1992).

Allocation of Fault Risk Transfer

Tennessee does not prohibit a party from requiring another party to indemnify, defend, or hold harmless for one's own negligence. However, such a requirement must be in specific terms. Tennessee has followed the majority principal that in order to indemnify a party against one's own negligence, the intent must be stated in "expressly clear and in unequivocal terms." *See Kellogg v. Sanitors, Inc.,* 496 S.W.2d 472, 474 (Tenn. 1973); *Kroger Co. v. Giem,* 215 Tenn. 459, 387 S.W.2d 620, 626 (Tenn. 1964)(held that unless the indemnity contract provides indemnification verbiage for one's own negligence by "clear and unequivocal terms," such a provision will not stand and "general words will not be read as expressing such an intent"). Further, "'[m]ere general, broad, and seemingly all-inclusive language in

the indemnifying agreement' is not sufficient to impose liability for the indemnitee's own negligence." *HMC Technologies Corp. v. Siebe, Inc.-Robertshaw Tenn. Div.,* No. E2000-01093-COA-R3-CV, 2000 Tenn. App. LEXIS 779, 2000 WL 1738860 at *2 (Tenn. Ct. App. Nov. 27, 2000)(quoting *Kellogg,* 496 S.W.2d at 474). The court in *Wajtasiak v. Morgan County,* 633 S.W.2d 488 (Tenn. Ct. App. 1982), determined that the majority principal is not unreasonable because "if negligent acts of the indemnitee are intended to be included in the coverage, it would only take a few seconds for the attorneys to use appropriate express language such as 'including indemnitees' acts of negligence." *Wajtasiak,* 633 S.W.2d at 490.

Bad Faith

First Party

In *Johnson v. Tenn. Farmers Mut. Ins. Co.,* 205 S.W.3d 365 (Tenn. 2006), the Tennessee Supreme Court stated that, while mere negligence is not sufficient to impose liability for failure to settle, it may be considered, and "an insurer having exclusive control over the investigation and settlement of a claim may be held liable to its insured for an amount in excess of its policy limits, if as a result of bad faith, it fails to effect a settlement within the policy limits. To discharge its duty to act in good faith, an insurer must exercise ordinary care and diligence in investigating the claim and the extent of damage for which the insured may be held liable." "The manner in which the insurer investigates the case 'has an important bearing upon the question of bad faith in refusing or failing to settle the claim.' Ordinary care and diligence in investigation require the insurer to investigate the claim to such an extent that it can exercise an honest judgment regarding whether the claim should be settled." The question of an insurance company's bad faith is for the jury if, from all of the evidence, it appears that there is a reasonable basis for disagreement among reasonable minds as to the bad faith of the insurance company in the handling of the claim.

The bad faith statute, Tenn. Code Ann. § 56-7-105, focuses on specific instances **of bad faith and provides a private right of action to an individual injured by** an insurance company's refusal to pay a claim, if the refusal "was not in good faith" and states in pertinent part as follows:

The insurance companies of this state . . . in all cases when a loss occurs and they refuse to pay the loss within sixty (60) days after a demand has been made by the holder of the policy . .. on which the loss occurred, shall be liable to pay the holder of the policy ... , in addition to the loss and interest on the bond, a sum not exceeding twenty-five percent (25%) on the liability for the loss; provided, that it is made to appear to the court or jury trying the case that the refusal to pay the loss was not in good faith, and that the failure to pay inflicted additional expense, loss, or injury

including attorney fees upon the holder of the policy . . . ; and provided, further, that the additional liability, within the limit prescribed, shall, in the discretion of the court or jury trying the case, be measured by the additional expense, loss, and injury including attorney fees thus entailed.

Term. Code Ann. § 56-7-105 (a) (emphasis added).

Third Party

A third-party beneficiary's contractual rights derive from and must be measured by the underlying contract between the original promisor and promisee. *Fulmer v. Goldfarb,* 171 Tenn. 218, 221-25, 101 S.W.2d 1108, 1109-10 (1937); 2 Samuel Williston, *A Treatise on the Law of Contracts 44* 364, 364A (3d ed. 1959) («Williston»). A third-party beneficiary's rights hinge upon the validity of the underlying contract and are subject to all the equitable defenses that the original **promisor** could assert against the original promisee. Williston, *supra, §* 394; 4 Arthur L. Corbin, *Corbin on Contracts §* 818 (1951). Accordingly, the general rule is that if a contract ceases to be binding in **whole or** in part because of impracticality, public policy, non-occurrence of a condition, or present or prospective failure of performance, the right of any beneficiary is to that extent discharged or modified.

Restatement (Second) of Contracts § 309(2) (1979). *Linehan v. Allstate Ins. Co.,* 1994 Tenn. App. LEXIS 247, 1994 WL 164113 (Term. Ct. App. May 4, 1994)

Late Notice and Prejudice

Prejudice Required- Yes as to Occurrence; No as to Claims-Made.

Standard-

OCCURRENCE POLICY

In the context of an occurrence policy, the Tennessee Supreme Court requires a demonstration of prejudice prior to denying a claim based on late notice. The Court holds "that it is inequitable for an insurer that has not been prejudiced by a delay in notice to reap the benefits flowing from the forfeiture of the insurance policy. In light of the adhesive nature of such contracts as well as our inclination to construe these contracts against the drafter/insurer, we believe that this State's public policy disfavors the ability of an insurer to escape its contractual duties due to a technicality." *Alcazar v. Hayes*, 982 S.W.2d 847, 852 (Tenn. 1998).

However, when an insured fails to provide timely notice to the insurer pursuant to the policy, a presumption of prejudice to the insurer is created. *Alcazar*, 856. The insured then has the burden of rebutting the presumption through evidence showing that the insurer was not prejudiced. *Alcazar*, 856.

CLAIMS-MADE POLICY

While the Tennessee Supreme Court has not addressed the issue, the Court of Appeals has specifically declined to extend the prejudice rule to claims-made policies: "We decline to venture where our Supreme Court chose not to go, and we will not extend its holdings ... to cases involving claims-made policies, even when those policies allow the insured some extra latitude in claiming the benefits of coverage." *Pope v. Leuty & Heath, PLLC*, 87 S.W.3d. 89, 95 (Tenn. App. 2002)

Choice of Law

A choice of law analysis must be conducted under the rules of the forum state. *Gov. Employees Ins. Co. v. Bloodworth,* 2007 WL 1966022, at *26 (Tenn. Ct. App. June 29, 2007). Before that can be done, however, it must first be determined whether a conflict, in fact, exists with respect to the two states' laws. *Hataway v. McKinley,* 830 S.W. 2d 53, 55 (Tenn. 1992) (identifying an actual conflict precedes choice of law analysis).

Tennessee has abandoned the former *lex loci delicti* test (which applied the law of the state where the injury occurred) in favor of the "most significant relationship" rule. *Hataway* at 54. (Court abandoned *lex loci delicti* and adopted "most significant relationships" test, such that Tennessee law applied where decedent died of complications from scuba dive in Arkansas rock quarry that was part of scuba class taught at Memphis State University by defendant and decedent and defendant were lifelong residents of Tennessee); *Lemons v. Cloer,* 206 S.W.3d 60, 62 (Tenn. Ct. App. 2006) (where a collision between a Georgia school bus and freight train occurred in Tennessee just above Georgia state line, and the bus driver and school children were Georgia residents, Georgia substantive law applied); *Sterchi v. Savard,* 2016 Tenn. App. LEXIS 184 * (Tenn. Ct. App. Mar. 11, 2016) (where a car accident occurred in Florida and all interested parties were domiciled in Tennessee, Tennessee law applied). Even under the "most significant relationship rule", it is still presumed that the law of the state where the injury occurred will be applied, unless it is shown that another state has a "more significant relationship to the litigation." *Hataway* at 59.

Tennessee has adopted the considerations set forth in the *Restatement (Second) of Conflict of Laws* to help determine which state has the most significant relationship to the subject matter at issue when there is a conflict of law. *Id.* These considerations include:

The place where the injury occurred,

The place where the conduct causing the injury occurred,

The domicile, residence, nationality, place of incorporation and place of business of the parties,

The place where the relationship, if any, between the parties is centered.

Insurability of Punitive Damages

With the exception of punitive damages for "intentionally" inflicted harm, punitive damages are insurable in the state of Tennessee. However, insurance carriers are not required to insure punitive damages, and may include provisions in the insurance contract that such damages will not be insured if they so desire.

The 1964 Tennessee Supreme Court case of *Lazenby v. Universal Underwriters Ins. Co.* established that punitive damages in Tennessee are in fact insurable. In *Lazenby,* a motorist-insured ("insured") was sued when his vehicle struck another vehicle, injuring the driver. The suit included claims for punitive damages for the insured's negligence in driving in an intoxicated state. The jury awarded a verdict against the insured for both compensatory and punitive damages. The insured's insurance carrier refused to pay the judgment for punitive damages, and the insured sued the carrier to enforce the policy which stated that it covered "all sums which the insured shall become legally obligated to pay as damages." *Lazenby v. Universal Underwriters Ins. Co*., 214 Tenn. 639, 642, 383 S.W.2d 1, 2, 1964 Tenn. LEXIS 517, *2 (Tenn. 1964).

The *Lazenby* Court ultimately held that, while there is a strong public policy against the insuring of punitive damages, they are insurable if so provided for in the insurance contract. In regard to the insurance contract at issue in the case and others like it that may exist, the *Lazenby* Court stated that the insurance contract language provided coverage for punitive damages resulting from harm "not intentionally inflicted," and that insured parties could normally expect coverage for "all claims not *intentionally* inflicted." Lazenby After Hodges — Insurability of Punitive Damage Awards in Tennessee: A Continuing Question of Public Policy, 36 U. Mem. L. Rev. 463, 485.