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"TENNESSEE LIMITS JOINT AND SEVERAL LIABILITY"

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Tennessee's legislature has overturned the state common law rule that an intentional actor and a negligent actor, both named as defendants and both responsible for a plaintiff's injuries, will be jointly and severally responsible for the plaintiff's total damages. See Tenn. Code Ann. Sec. 29-11-107, applying to all actions accruing on or after July 1, 2013. The 2001 Limbaugh decision by the Tennessee Supreme Court that this statute overturns had several grounds. First, negligent and intentional torts are different "in degree, in kind, and in society's view of the relative culpability of each act." Second, if fault is compared between an intentional actor and a negligent actor, the negligent person's incentive to act reasonably would be reduced. Third, the negligent actor should not be allowed to reduce his liability by pushing fault onto someone whose actions he had a duty to prevent.

The sponsor of the legislation in the House argued during committee hearings that negligent actors should be responsible only for their "fair share" of liability and that the Limbaugh decision took away from juries the ability to allocate fault and responsibility as they saw fit.

The typical subrogation fact pattern to which this change in the law would apply would involve an employee (or agent) committing an intentional tort with the employer (or principal) being sued for negligently failing to prevent the intentional act. For example, a worker on a construction site might destroy property. If the worker's employer had known of the worker's dangerous propensities, then that employer might have been held liable jointly and severally with the worker. That will generally no longer be true for cases to which the new statute applies.

The statute states that it does not affect vicarious liability and multiple other common law doctrines such as indemnity. So if an employee negligently causes an accident, then the injured party may still pursue the employer for that employee's negligence.

The new statute also redefines, but does not eliminate, joint and several liability for certain civil conspiracies and for manufacturers in products liability actions based on strict liability or breach of warranty.

Finally, the statute does not stop parties from allocating fault contractually. The House sponsor provided the following hypothetical example that may be relevant to subrogators: an agreement that three tenants would be jointly and severally liable could make each of them 100% liable for a fire even if the jury allocated fault among them as follows: 40%, 40%, and 20%.

Because comparative fault has such broad application, this statute should be read for possible application to any negligence action accruing on or after July 1, 2013.

The impact of this overturning of Limbaugh on subrogators is that negligent defendants may be able to avoid or lessen their liability by persuading the jury to allocate fault to an intentional tortfeasor.