

Tennessee

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A. Adoption of the UCC

Tennessee adopted the Uniform Commercial Code, including the subsequent amendments thereto, to govern commercial disputes. Tennessee's adoption is codified at Tennessee Code Sections 47-9-101 through 47-9-709.¹

B. Compensatory Damages

In Tennessee, an injured party may recover damages that will place the plaintiff, as nearly as possible, in

the same position he would have had if the contract had been performed, and no more.² Similarly, in business tort cases, a plaintiff may recover all losses resulting from the wrongful conduct in an effort to make the inquired party whole.³ In the business context, a common measure of damages is lost profits.⁴ The fact of damages must be proven with reasonable certainty, and where there is uncertainty as to whether damages have been

¹ *Regions Bank v. Thomas*, 422 S.W.3d 550 (Tenn. Ct. App. 2013).

² *BancorpSouth Bank, Inc. v. Hatchel*, 223 S.W.3d 223 (Tenn. Ct. App. 2006).

³ *Techmatic, Inc. v. Plating Specialists, Inc.*, 637 F. Supp.3d 519 (M.D. Tenn. 2022) (applying Tennessee law).

⁴ *Baker v. Hooper*, 50 S.W.3d 463, 470 (Tenn. Ct. App. 2001); *Tire Shredders, Inc. v. ERM-North Cent., Inc.*, 15 S.W.3d 849, 857 (Tenn. Ct. App. 1999); 1 RECOVERY OF DAMAGES FOR LOST PROFITS § 1.4, at 9.

sustained, damages are deemed too speculative to recover.⁵

However, Tennessee applies a flexible standard regarding compensatory damages, and courts are permitted to take into consideration the particular facts of a case when evaluating harm to an injured party.⁶ Although the existence of damages must be proven with reasonable certainty, the amount of damages may be based on estimates.⁷ Compensatory damages is interpreted broadly and includes all damages other than punitive or exemplary damages – it is used synonymously with “actual damages” and “substantial damages.”⁸ While an injured party

also has a duty to minimize and/or mitigate its damages, the injured party is not required to mitigate its damages where doing so would impose an undue or impossible burden on the party.⁹

Compensatory damages also are available for a variety of business torts including, but not limited to, breach of warranty,¹⁰ fraud,¹¹ misappropriation of trade secrets,¹² defamation,¹³ civil conspiracy,¹⁴ tortious interference with a contract or business relations, relation¹⁵ procurement of a

⁵ *Provident Life & Accident Ins. Co. v. Globe Indem. Co.*, 156 Tenn. 571, 576, 3 S.W.2d 1057, 1058 (Tenn. 1928); *Pinson & Assocs. Ins. Agency, Inc. v. Kreal*, 800 S.W.2d 486, 488 (Tenn. Ct. App. 1990); *Church v. Perales*, 39 S.W.3d 149, 172 (Tenn. Ct. App. 2000); *Wright Med. Tech., Inc. v. Grisoni*, 135 S.W.3d 561, 595 (Tenn. Ct. App. 2001).

⁶ *Waggoner Motors, Inc. v. Waverly Church of Christ*, 159 S.W.3d 42 (Tenn. Ct. App. 2004).

⁷ *Id.*

⁸ *Gifford v. Premier Mfg. Corp.*, 1989 WL 85752 (Tenn. Ct. App. Aug. 1, 1989)(quoting 25 C.J.S. Damages, § 2 (1966)).

⁹ *Memphis Light, Gas & Water Div. v. Starkey*, 244 S.W.3d 344 (Tenn. Ct. App. 2007).

¹⁰ *Aquascene, Inc. v. Noritsu American Corp.*, 831 F. Supp. 602 (M.D.Tenn.1993) (applying Tennessee law).

¹¹ *Harrogate Corp. v. Systems Sales Corp.*, 915 S.W.2d 812 (Tenn. Ct. App. 1995).

¹² *Williams-Sonoma Direct, Inc. v. Arhaus, LLC*, 109 F. Supp.3d 1009 (W.D. Tenn. 2015) (applying Tennessee law) (Tennessee Uniform Trade Secrets Act provides for both actual loss caused by the misappropriation as well as the unjust enrichment caused by misappropriation that is not included in the actual loss calculation).

¹³ *Hibdon v. Grabowski*, 195 S.W.3d 48 (Tenn. Ct. App. 2005) (in a defamation case, actual damages must be proven but, where there are actual damages, they are recoverable).

¹⁴ *Daily v. Gusto Records, Inc.*, 14 Fed. Appx. 579 (6th Cir. 2001) (applying Tennessee law).

¹⁵ *Trau-Med of America, Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691 (Tenn. 2002).

breach,¹⁶ and breach of fiduciary duty.¹⁷

C. Consequential Damages

Consequential damages are permitted in Tennessee and they include any provable damages that flow from a breach.¹⁸ Such damages could include, among other things, lost profits and diminution of value so long as a double recovery is not had.¹⁹ In essence, regardless of the label attached to the type of damages, Tennessee allows as consequential damages any direct out of pocket expense incurred by a party as a direct and proximate result of the defendant's wrongdoing.²⁰

Despite Tennessee's allowance for consequential damages, in a commercial dispute those damages can be limited or excluded by contract unless the exclusion or limitation provision is unconscionable.²¹ Whether a contract term is unconscionable is a question of law, and a presumption of permissible dealings exists between commercial parties.²²

D. Incidental Damages

Tennessee, as a general matter, recognizes incidental damages in commercial transactions as a means of making an injured party whole.²³ Incidental damages for a seller are defined as "any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach in connection with the return or resale of the goods or otherwise resulting from the breach."²⁴ Likewise, incidental damages for a buyer means "damages resulting from the seller's breach" and include "expenses reasonably incurred in inspection, receipt, transportation and care and

¹⁶ *Testerman v. Tragresser*, 789 S.W.2d 553 (Tenn. Ct. App. 1989).

¹⁷ *Pridemore v. Cherry*, 903 S.W.2d 705 (Tenn. Ct. App. 1995).

¹⁸ T.C.A. §§ 47-2-714 and 47-2-715; *First Tennessee Nat. Ass'n v. Hurd Lock & Mfg. Co.*, 816 S.W.2d 38 (Tenn. Ct. App. 1991).

¹⁹ *Ford Motor Co. v. Taylor*, 60 Tenn. App. 271, 446 S.W.2d 521 (Tenn. Ct. App. 1969).

²⁰ *Hurd Lock & Mfg.*, 816 S.W.2d at 43 (citing *American Buildings Company v. DBH Attachments, Inc.*, 676 S.W.2d 558 (Tenn. Ct. App. 1984)).

²¹ T.C.A. § 47-2-719.

²² *Aquascene*, 831 F. Supp. at 605.

²³ *Morrow v. Jones*, 165 S.W.3d 254 (Tenn. Ct. App. 2004).

²⁴ T.C.A. § 47-2-710.

custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.”²⁵ Incidental damages include any other damage, including liquidated damages, that has not already been compensated for so that a full recovery can be had by the injured party.²⁶

E. Punitive Damages

Punitive damages are generally not recoverable in a commercial dispute in Tennessee unless the conduct resulting from a breach of contract also constitutes an independent tort, such as fraud.²⁷ As is common in other states, the purpose of a punitive damages award is to punish the wrongdoer and to deter future misconduct.²⁸

The burden of proof for punitive damages is a heightened standard which requires proof by clear and convincing evidence.²⁹ To establish a right to punitive damages, a plaintiff must show that the defendant “acted maliciously, intentionally, fraudulently or recklessly.”³⁰ In deciding the amount of punitive damages that are appropriate, the finder of fact shall consider, among other things, the defendant’s financial condition, the relationship of the defendant to the plaintiff, the nature and reprehensibility of the defendant’s acts, the impact of the conduct on the plaintiff, the defendant’s awareness of the harm being caused, and whether the defendant profited from its actions.³¹

Tennessee law caps the amount of punitive damages that can be recovered to two times the total amount of the compensatory damages award, or \$500,000, whichever is greater.³² The punitive damages cap is to be applied by the court, and the jury should not be told that the award will be capped.³³

²⁵ T.C.A. § 47-2-715.

²⁶ *Suitt Const. Co., Inc. Ripley’s Aquarium, LLC*, 108 Fed. Appx. 209 (6th Cir. 2004) (applying Tennessee law).

²⁷ *Rogers v. Louisville Land Co.*, 367 S.W.3d 196, 211-212 and n.14 (Tenn. 2012)).

²⁸ *Id.*

²⁹ T.C.A. § 29-39-104.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

F. Liquidated Damages

Liquidated damages are permitted in Tennessee. The definition of liquidated damages, which was developed in the common law over time, is the sum stipulated and agreed to by the parties at the time they enter into a contract in the event of a breach by either party.³⁴ The contract does not have to set forth a specific dollar amount to constitute liquidated damages, nor does the contract need to explicitly use the term “liquidated damages” to constitute a liquidated damages provision.³⁵ Further, a liquidated damages provision will not be enforced if it, in reality, serves to penalize the breaching party.³⁶ To be enforceable, the provision must serve as a measure of compensation for the breach in lieu of actual damages which damages might be indeterminable or otherwise difficult to prove.³⁷

G. Pre- and Post-Judgment Interest

Prejudgment interest is allowed as compensation for damages wrongfully withheld from the time of loss until the judgment.³⁸ It is not

permitted where the loss is not immediately ascertainable with reasonable certainty.³⁹ Although prejudgment interest is awarded in equity, it also can be based in contract, and where a contract provides for prejudgment interest, it, rather than equity, will govern.⁴⁰ Unless a contract sets the rate at a higher amount, prejudgment interest may not exceed 10% per annum.⁴¹

Post-judgment interest is provided for by statute at the rate of 2% less than the formula rate published by the commissioner of financial institutions.⁴² However, where a judgment is based on a statute, note, contract, or other writing that fixes a rate of interest, the judgment shall bear interest at the rate so fixed.⁴³

H. Attorney’s Fees

In Tennessee, in the absence of a statute, contractual provision, or other recognized ground for allowing recovery attorney’s fees, each party to a civil action bears its

³⁴ Kendrick v. Alexander, 844 S.W.2d 187 (Tenn. Ct. App. 1992).

³⁵ V.L. Nicholson Co. v. Transcon Inv. & Fin. Ltd., Inc., 595 S.W.2d 474, 484 (Tenn. 1980).

³⁶ *Id.*

³⁷ *Id.*

³⁸ Brandt v. Bib Enterprises, Ltd., 986 S.W.2d 586 (Tenn. Ct. App. 1998).

³⁹ *Id.*

⁴⁰ Mitchell v. Mitchell, 876 S.W.2d 830, 832 (Tenn. 1994); Fisher v. Klippstatter, 689 S.W.2d 870 (Tenn. Ct. App. 1985); T.C.A. § 47-14-123.

⁴¹ T.C.A. § 47-14-123.

⁴² T.C.A. § 47-14-121(a).

⁴³ T.C.A. § 47-14-121(c).

own fees.⁴⁴ When the recovery is provided for by contract, the prevailing party clause must be sufficiently clear that attorney's fees were contemplated by the parties.⁴⁵ However, a trial court must evaluate the reasonableness of the fees to be recovered.⁴⁶ In doing so, the court should consider the time and labor required, the novelty and difficulty of the questions involved, the requisite skill to perform the work, the customary fee for similar legal services in the locality, and the experience and reputation of the lawyer(s) performing the work.⁴⁷ Because a trial court has broad discretion when awarding the amount of attorney's fees, the court's decision is reviewed for an abuse of discretion.⁴⁸

I. Reliance Damages and Unjust Enrichment

The goal of reliance damages is to allow recovery for efforts

undertaken to a party's detriment based on the representations or inducement of another.⁴⁹ Reliance damages can include the expenses incurred by the injured party in preparation and part performance of a contract,⁵⁰ fraud,⁵¹ and promissory estoppel.⁵² In Tennessee, the most common example of a recovery for reliance damages is found in unjust enrichment claims, also known as detrimental reliance claims.⁵³ Unjust enrichment is an equitable claim in which a party may recover if there exists a contract implied in law.⁵⁴ Equitable relief is not available if there exists a contract implied in fact.⁵⁵ Where a contract implied in fact is one which is supported by mutual intent or assent to contract, a contract implied in law "are a class of obligations which are imposed or created by law without the assent of the party bound, on the ground that

⁴⁴ See *Cracker Barrel Old Country Store, Inc. v. Epperson*, 284 S.W.3d 303, 308 (Tenn. 2009).

⁴⁵ *Pullman Standard, Inc. v. Abex Corp.*, 693 S.W.2d 336, 338 (Tenn. 1985)

⁴⁶ *Ellis v. Ellis*, 621 S.W.3d 700, 708 (Tenn. Ct. App. 2019) (citing *Wright ex rel. Wright*, 337 S.W.3d 166, 185 (Tenn. 2011))

⁴⁷ Tennessee Supreme Court Rule 8, RPC 1.5; *Ellis v. Ellis*, 621 S.W.3d 700, 708 (Tenn. Ct. App. 2019) (citing *Wright ex rel. Wright*, 337 S.W.3d 166, 185 (Tenn. 2011)).

⁴⁸ *Cookeville Platinum, LLC v. Satellite M.D., LLC*, 2021 WL 5276846 (Tenn. Ct. App. 2021).

⁴⁹ *PSC Metals, Inc. v. Southern Recycling, LLC*, 371 F. Supp.3d 443 (M.D. Tenn. 2019) (applying Tennessee law).

⁵⁰ *Id.*

⁵¹ *Harrogate*, 915 S.W.2d at 818.

⁵² *Foster & Creighton Co., v. Wilson Contracting Co., Inc.*, 579 S.W.2d 422 (Tenn. Ct. App. 1978).

⁵³ *EnGenius Entertainment, Inc. v. Herenton*, 971 S.W.2d 12 (Tenn. Ct. App. 1997).

⁵⁴ *Metropolitan Gov't of Nashville and Davidson Cty. V. Cigna Healthcare of Tennessee, Inc.*, 195 S.W.3d 28 (Tenn. Ct. App. 2005).

⁵⁵ *Id.*

they are dictated by reason and justice.”⁵⁶

J. Public Policy Prohibitions

Tennessee does not have any policy prohibitions specific to commercial claims as it does in other areas of the law.⁵⁷

⁵⁶ *Weatherly v. American Agric. Chem. Co.*, 16 Tenn. App. 613, 65 S.W.2d 592, 598 (Tenn. Ct. App. 1933).

⁵⁷ *In re Baby*, 447 S.W.3d 807 (Tenn. 2014) (public policy imposes certain restrictions in surrogacy contracts); *Can Do. Inc. Pension and Profit Sharing Plan and Successor Plans v. Marnier, Herod, Hollabaugh & Smith*, 922 S.W.2d 865 (Tenn. 1996) (public policy prohibits assignment of legal malpractice claims).