

quire under the circumstances as long as it is not inconsistent with the judgment of the appellate court.

In the same article § 1977, p. 614, is found the following:

After remand, the trial court has the power and duty, by execution or otherwise, to enforce a judgment which is in that court . . . which has been entered in pursuance of a mandate of the appellate court. . . .

In the same article, § 1979, p. 621, is found the following:

Interest may be allowed as authorized by statute. . . .

[11] Section 1980, page 623 of the same article states:

The right to have restitution of money or property which has been taken in the enforcement of a judgment or decree arises on the reversal of the judgment or decree; and such right of restitution may be enforced by the lower court without express mandate to that effect.

The foregoing specifically applies to property seized by execution pending appeal; but it applies with equal force to property retained and used pursuant to an erroneous judgment which has been modified or reversed on appeal.

Section 1985 of the same article states:

The right of restitution may be enforced by proper order of the appellate courts, summary proceedings in the lower court in the same cause, or by an independent action or suit.

Defendant insists correctly that the merits of plaintiff's motion and the appropriate relief are not before this Court for determination.

[12] Plaintiff's motion has been found to state a claim for which relief can be granted by the Trial Court. What relief is justified by the facts will await the presentation of the facts to the Trial Court and preservation of the evidence for review by this Court if required.

Plaintiff should be granted statutory interest on the \$100,000 judgment from December 29, 1988, until paid.

The Trial Court should hear evidence and render judgment in favor of plaintiff for the interest collected by defendant on the municipal bonds, one-fourth of the principal and interest collected by defendant on the note, the dividends collected on the corporate stock and the rent collected or other just compensation for diminution of value and/or defendant's possession, control or use of real estate, all from the date of the divorce decree until the delivery of each asset to the plaintiff, together with such pre-judgment interest as the Trial Judge may deem appropriate.

The judgment of the Trial Court "dismissing" (striking or overruling) the motion of plaintiff is reversed. All costs, including costs of this appeal, are taxed against the defendant. The cause is remanded to the Trial Court for enforcement of its divorce decree as modified by this Court and the Supreme Court.

Reversed and Remanded.

LEWIS and CANTRELL, JJ., concur.



TENNESSEE FARMERS MUTUAL INSURANCE COMPANY and Northland Insurance Company, Plaintiff/Appellee,

v.

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Defendant/Appellant.

Court of Appeals of Tennessee, Middle Section, at Nashville.

July 24, 1992.

Permission to Appeal Denied by Supreme Court Oct. 26, 1992.

An insurer which issued automobile owner's garage policy filed action seeking

ment (Second) of Agency § 228 (1957) provides:

(1) Conduct of a servant is within the scope of employment if, but only if:

(a) it is of the kind he is employed to perform;

(b) it occurs substantially within the authorized time and space limits;

(c) it is actuated, at least in part, by a purpose to serve the master; and

(d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.

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

In addition, Restatement (Second) of Agency § 229 (1957) states:

(1) To be within the scope of employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.

(2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered:

(a) whether or not the act is one commonly done by such servants;

(b) the time, place and purpose of the act;

(c) the previous relations between the master and the servant;

(d) the extent to which the business of the master is apportioned between different servants;

(e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;

(f) whether or not the master has reason to expect that such an act will be done;

(g) the similarity in quality of the act done to the act authorized;

(h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;

(i) the extent of departure from the normal method of accomplishing an authorized result; and

(j) whether or not the act is seriously criminal.

[8-10] When an employee's job requires travel, an employer may be vicariously liable for the employee's negligence while traveling. The threshold issue in cases involving travel is whether the employment created the necessity for travel. *Daniels v. White Consol. Indus., Inc.*, 692 S.W.2d 422, 424-25 (Tenn.Ct.App.1985); *Leeper Hardware Co. v. Kirk*, 58 Tenn.App. at 558, 434 S.W.2d at 624. If the employee's duties created a necessity for travel, then the employee is within the scope of employment while traveling, as long as the employee does not deviate from the employer's business and engage in conduct the employer had no reason to expect. If, however, the employee's work played no part in creating the reason for travel and was only incidental to the trip, then the trip was not within the scope of employment. *Cunningham v. Union Chevrolet Co.*, 177 Tenn. 214, 220, 147 S.W.2d 746, 748 (1941); *Bowers v. Potts*, 617 S.W.2d 149, 156 (Tenn.Ct.App.1981); *Pratt v. Duck*, 28 Tenn.App. 502, 512-13, 191 S.W.2d 562, 566-67 (1945). Travel that serves a dual purpose, the employer's and the employee's or a third person's, will still be considered to be within the scope of employment. *Leeper Hardware Co. v. Kirk*, 58 Tenn.App. at 557, 434 S.W.2d at 624; Restatement (Second) of Agency § 236 (1957).

[11] The courts have devised several helpful tests to determine whether a particular trip is within the scope of employment. If the trip would have taken place even without the business reasons, then the trip is personal and not within the scope of employment. *Pratt v. Duck*, 28 Tenn.App. at 512-13, 191 S.W.2d at 566-67. If, how-