NINE TENNESSEE COMMERCIAL LEASING ISSUES

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Any transactional lawyer in Tennessee has clients, whether landlords, tenants, or lenders, who require assistance in the evaluation, drafting, and negotiating of commercial leases. In this article we intend to emphasize a few of the unique leasing issues attorneys may face in Tennessee. We specifically do not address the Uniform Residential Landlord and Tenant Act, which can be found in the Tennessee Code.[1]

Most leasing lawyers have a variety of forms that they will use to create a first draft of the lease matching the letter of intent or notes from discussions with their client. The problem with these forms of leases is that they are often not updated to conform to changes in the law, custom, or practice. Or worse, at times these standard forms are negotiated forms and thus not a true "form" at all but one that includes pro-landlord or pro-tenant concessions. These concessions are often slight and therefore potentially not properly identified. Thus, the control of the initial draft can be crucially important to the client. Most landlords have a standard form lease,[2] but in the event there is none, a tenant may have an opportunity to even the playing field, so to speak.

In fairness, depending on the relative size of the lease, it may not be practical to address every issue or risk in a lease. It would not make much sense for a tenant to spend months' worth of rent in attorneys' fees negotiating a small lease. Accordingly, we include here a few commercial lease specific issues that can cause problems, and provide some general suggestive provisions.

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[1] TENN. CODE ANN. §§ 66-28-101 to -521.

[2] In fact, most reasonably sophisticated lenders will require a form of lease be included within their loan documentation diligence.

The relevant conclusion of our review of Tennessee law is that the courts defer to the parties and to the writing incorporated within the lease agreement. Words are given their ordinary and customary usage: mean what you say and say what you mean.

Caveat Habitator or Tenant Beware

Absent fraudulent statements to the contrary made by the landlord, specific misrepresentations as to relevant conditions of the leased premises, or the express assumption of responsibility and duty to repair by a landlord, a landlord generally has no obligation to repair the leased premises in Tennessee.[3] The Tennessee Supreme Court has held that, "in the ordinary contract of letting, it does not imply any warranty on the part of the landlord that the leased premises are in a safe and habitable condition, since the tenant ordinarily has it in his power to inspect the premises, and so accepts them at his own risk."[4] Over 110 years later, the Court of Appeals affirmed this concept even when the landlord, regarding a leaky roof, said that she would talk about fixing the leaky roof in the second year of the lease.[5] However, stating the general rule, "in the absence of an express agreement, a landlord is not obligated to repair or to keep in repair a leased building."[6]

From the tenant's perspective, a suggested provision might look like the following. However, specific issues should be addressed carefully and clearly.

> CONDITION OF PREMISES. Notwithstanding anything to the contrary herein contained, at the time possession is delivered to Tenant, the Premises shall comply with all laws, rules, regulations, orders, ordinances, and requirements of all federal, state, and municipal government departments, commissions,

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[3] C.F. Prop., LLC v. Scott, No. E2010-01981-COA-R3-CV, 2011 WL 4446995, at *1 (Tenn. Ct. App. 2011) (citing Evco Corp. v. Ross, 528 S.W.2d 20, 23 (Tenn. 1975); Boyd v. McCarty, 222 S.W. 528, 529 (Tenn. 1920); Gooch-Edenton Hardware Co. v. Long, 69 S.W.2d 254, 257 (Tenn. Ct. App. 1933)).

[4] Schmalzreid v. White, 36 S.W. 393, 394 (Tenn. 1896).

[5] *C.F. Prop.*, No. E2010-01981-COA-R3-CV, 2011 WL 4446995, at *1.

[6] *C.F. Prop.*, No. E2010-01981-COA-R3-C, 2011 WL 4446995, at *4-5; *see also*, EVCO Corp. v. Ross, 528 S.W.2d 20, 23-24 (Tenn. 1975).

> boards, and officers, and all orders, rules, and regulations of the National Board of Fire Underwriters, the local Board of Fire Underwriters, or any other agency or agencies, body or bodies exercising similar functions that may be applicable to the Premises, including but not limited to, compliance with all building, fire and electrical codes required for Tenant's contemplated use of the Premises as set forth in this Lease, and compliance with all federal and state environmental laws. Landlord's obligations under this provision shall survive Tenant's acceptance of the Premises.

Constructive Eviction

> Under Tennessee law, constructive eviction of a commercial tenant
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> > [M]ay arise from the improper conduct of the landlord in interfering with the beneficial enjoyment of the premises by threats of expulsion, attempts to lease the premises to others, or unreasonable demands, insults, or assaults . . . [which] must substantially interfere with the tenant's beneficial enjoyment of the premises, and the interference must be of a permanent nature.[7]

Whether a landlord's action constitutes a substantial and permanent interference is a question of fact.[8] Furthermore, a tenant must abandon the leased premises within a reasonable amount of time after the incident triggering the constructive eviction takes place.[9]

There are examples of situations where Tennessee courts have found that constructive evictions have taken place. For example, in *Tenn-Tex Properties v. Brownell-Electro, Inc.*, the landlord and tenant were unsuccessful in negotiating a renewal to the lease, but the original lease

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[7] Tenn-Tex Props. v. Brownell-Electro, Inc., 778 S.W.2d 423, 428 (Tenn. 1989).

[8] Dairy Gold, Inc. v. Thomas, No. E2001-02463-COA-R3-CV, 2002 WL 1751193, at *3 (Tenn. Ct. App. 2002).

[9] Couch v. Hall, 412 S.W.2d 635, 638 (Tenn. 1967).

had not yet expired.[10] The Tennessee Supreme Court held that a constructive eviction occurred when the landlord thereafter demanded that the tenant pay amounts not due under the lease and wrongfully declared the tenant in default.[11] Furthermore, in *Dairy Gold, Inc. v. Thomas*, a constructive eviction occurred when the landlord was notified by the Tennessee Department of Environment and Conservation that underground storage tanks were contaminating the premises and that the area would have to be remediated.[12] Finally, in *Hogan v. Coyne International Enterprises, Corp.*, the Tennessee Court of Appeals found that there was a constructive eviction where the landlord refused to repair the roof of the premises, even though the roof leaked so much that an expert deemed the building unsafe.[13]

Tenant's Right of Offset

The law in Tennessee is that the landlord's and tenant's obligations are independent of one another.[14] Accordingly, if the landlord defaults, the tenant does not have the right to unilaterally offset against rent.[15] For example, in *Jaffe v. Bolton*, the tenant made significant improvements to the leased premises at tenant's expense, with no right of offset.[16]

The Jaffe tenant invested significant personal and borrowed funds to repair and rehabilitate a building for the purpose of opening a restaurant in the rehabilitated leased premises.[17] The tenant conducted significant clean up and demolition prior to executing a lease agreement.[18] When the restaurant failed just months after opening, the tenant filed bankruptcy, and the landlord sought recovery of past due

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[10] *Tenn-Tex Props.*, 778 S.W.2d at 424.

[11] *Id.* at 428.

[12] *Dairy Gold* 2002 WL 1751193, at *3.

[13] Hogan v. Coyne Int'l Enters. Corp.,996 S.W.2d 195, 202 (Tenn. Ct. App. 1998).

[14] Smith v. Wiley, 60 Tenn. 418, 419-20 (1872).

[15] Smith, 60 Tenn. at 419-20; *see also* Estabrook v. Club Chalet of Gatlinburg, Inc., No. C.A. 133, 1988 WL 1736, at *6 (Tenn. Ct. App. 1988).

[16] Jaffe v. Bolton, 817 S.W.2d 19, 24-26 (Tenn. Ct. App. 1991).

[17] *Id.* at 21.

[18] *Id.*

rents, among other damages.[19] The tenant argued that the repairs and improvements made by tenant should offset against the past due rents.[20] The Court of Appeals did not agree, restating the general rule that "a tenant who voluntarily makes improvements on leased property is not entitled to reimbursement."[21] Because the leased premises were leased to tenant "as is," the lease agreement manifested the parties' intentions, and when "the tenant voluntarily assumes the responsibility for making these necessary repairs, he cannot thereafter seek recoupment, set-off or damages for his expenses incurred."[22]

Practically, it would be unusual for a landlord to agree to allow a right of offset. If there is a loan encumbering the property, the likelihood of the landlord being able to allow a right of offset is even less. However, a suggested provision for a tenant to insert might be the following:

> SELF-HELP RIGHTS. If Landlord neglects to make any such repairs following Tenant's reasonable written notice thereof, then Tenant shall have the right, but not be obligated, to make any such repairs on behalf of Landlord, and thereafter demand payment from Landlord, and Landlord shall promptly reimburse Tenant for any and all such reasonable costs. If Landlord does not promptly reimburse Tenant for such costs or for any buildout allowance that Landlord may owe to Tenant, Tenant shall have the right to deduct such amount from the rent and other sums payable under this Lease.

Landlord's Self Help and Right of Reentry

Tennessee law does not provide for a landlord to exercise self-help in the event of a default by the tenant.[23] There are obvious reasons

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[19] *Id.* at 22.

[20] *Id.*

[21] *Id.* at 23 (quoting Parsons v. Hall, 199 S.W.2d 2d 99 (Tenn. 1947)).

[22] Jaffe, 817 S.W.2d at 26.

[23] 94th Aero Squadron of Memphis v. Memphis-Shelby Cnty. Airport Authority, 169 S.W.3d 627, 636-37 (Tenn. Ct. App. 2004).

for this – the primary one being the importance of keeping the peace.[24] Tennessee Code provides the basis for forcible entry:

> Forcible entry and detainer; exceptions
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> (a) A forcible entry and detainer is where a person, by force or with weapons, or by breaking open the doors, windows, or other parts of the house, whether any person be in it or not, or by any kind of violence whatsoever, enters upon land, tenement, or possession, in the occupation of another, and detains and holds the same; or by threatening to kill, maim, or beat the party in possession; or by such words, circumstances, or actions, as have a natural tendency to excite fear or apprehension of danger; or by putting out of doors or carrying away the goods of the party in possession; or by entering peaceably and then turning or keeping the party out of possession by force or threat or other circumstances of terror.
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> (b) No action for forcible entry and detainer shall lie against any tenant who has paid all rent due for current occupancy of the premises and who is not in violation of any law nor otherwise in breach of the tenant's written lease, but this subsection shall not apply in any manner to farm property, nor shall the provisions of this subsection be construed to alter or amend any valid lease agreement in effect on May 31, 1979.[25]

"[A]bsent abandonment or surrender of the premises by the tenant, the landlord is required to seek a writ of possession before reentering the land."[26] Although some other states allow a commercial

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[24] *See 94th Aero Squadron*, 169 S.W.3d at 637 (Tenn. Ct. App. 2004) (citing Childress v. Black, 17 Tenn. 317, 320 (1836); 35A AM. JUR.2D *Forcible Entry and Detainer* § 6 (2001)).

[25] TENN. CODE ANN. § 29-18-102 (2012).

[26] *94th Aero Squadron*, 169 S.W.3d at 636-38 (citing Cain P'ship v. Pioneer Inv. Servs. Co., 914 S.W.2d 452, 456 (Tenn. 1996); Matthews v. Crofford, 167 S.W. 695, 698 (Tenn. 1914); Hayes v. Schweikart's Upholstering Co., 402 S.W.2d 472, 484 (Tenn. Ct. App. 1965); Cutshaw v. Campbell, 3 Tenn. App. 668, 688 (Tenn. Ct. App. 1925); William B. Tanner Co. v. United States, No. C-75-337, 1976 WL 1065, at *4 (W.D. Tenn. 1976)).

tenant to waive its statutory protection from self-help repossession through a right-of-reentry clause, in Tennessee, "the action of unlawful detainer is the legal substitute for personal entry."[27] In *Cutshaw v. Campbell*, this Court stated, "the jurisdiction of the courts to determine these questions of disputed sovereignty cannot be delegated to individuals."[28] The court further stated that even if the right-of-reentry provision undertook to allow for self-help, "it was right in the teeth of the law, subversive of its peaceful process, and void."[29]

Another case, *94th Aero Squadron of Memphis, Inc. v. Memphis-Shelby County Airport Authority*, is interesting because it is a case in which a tenant is in default for failure to pay rent, but after a landlord improperly exercised its right of reentry, the Court of Appeals limited the damages assessed to landlord to nominal damages.[30]

The salient point is that even if your lease provides a right of reentry in the event of default, that provision is not enforceable in Tennessee.[31]

A tenant may wish to clarify a landlord's rights of access to the leased premises. There are multiple provisions which address landlord's access in a variety of ways. Two complicating factors are bank privacy issues with tenant's who manage or control or house financial information, and also with medical leases the impact of HIPPA and the need for the protection of health information. Nonetheless, a suggested provision might look like the following:

> LANDLORD'S ACCESS. In the exercise of the rights of Landlord set forth in this Lease Agreement, Landlord will use its best efforts to minimize interference with Tenant's business operations at the Premises and inconvenience to Tenant. Landlord shall pay for any damage caused by Landlord to Tenant's leasehold improvements or property in the Premises as a result of

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[27] *Matthews*, 167 S.W. at 698.

[28] *Cutshaw*, 3 Tenn. App. at 688.

[29] *Id.*

[30] *94th Aero Squadron of Memphis, Inc. v. Memphis-Shelby County Airport Authority*, 169 S.W.3d 627 (Tenn. Ct. App. 2004).

[31] *Id.*

> the exercise of such rights. In addition, Landlord agrees to obtain such non-disclosure agreements from visitors as Tenant may reasonably require prior to Landlord's entry.

Holdover

A typical holdover provision provides that a tenant who has not surrendered possession of the premises at or after the expiration of the term of the lease must pay a multiple of the previously agreed upon rent. These provisions are enforced for a multitude of reasons. Before discussing the strategic implications of a holdover provision, the first question that must be addressed is whether holdover provisions are enforceable under Tennessee law.

Generally, Tennessee law disfavors penalties and damages provisions that are unreasonable will not be enforced, regardless of an agreement by the parties.[32] However, the Tennessee Court of Appeals has held that a double rent holdover provision does not constitute an unenforceable penalty.[33]

In *Brooks,* the Court of Appeals reaffirmed that "[w]here a tenant receives reasonable notice of a change in rental, his continuance in possession beyond the rent period renders him liable for the new rent notwithstanding any protest he may make."[34] The Court of Appeals went on to hold that it would be axiomatic to allow a landlord to increase the rent upon reasonable notice, based upon the holding in *Russells*, and to not allow an increase expressly contracted for in a written contract.[35] For those reasons, the *Brooks* court found that the double rent holdover provision was enforceable and was not an unenforceable penalty.[36] It should be noted that in the absence of a well-drafted holdover provision, if a tenant refuses to surrender possession, the tenant will be liable for

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[32] *See* Beasley v. Horrell, 864 S.W.2d 45, 48 (Tenn. Ct. App.1993); *see also* Harmon v. Eggers, 699 S.W.2d 159, 163 (Tenn. Ct. App.1985).

[33] *See* Brooks v. Networks of Chattanooga, Inc., 946 S.W.2d 321 (Tenn. Ct. App. 1996).

[34] *Id.* at 325 (quoting Russells Factory Stores, Inc. v. Fielden Furniture Co., 232 S.W.2d 592 (Tenn. Ct. App. 1950)).

[35] *Id.*

[36] *Brooks,* 946 S.W.2d at 321.

the fair market rental value.[37] Specifically, the Tennessee Supreme Court has stated:

> In summary, the rule as enunciated in *Brinkley* and *Russells* continues to be the law in Tennessee in situations where the landlord gives a reasonable notice of the rent increase in the form of a definite demand. Where there is no agreement between the parties, the tenant becomes liable for the fair market rental value for the period that it occupies the premises beyond the term of the lease.[38]

Now that we know that holdover provisions are enforceable, the discussion of the strategic implications may ensue. Holdover provisions can benefit a landlord in a multitude of ways.

First, and the most obvious, is that if a tenant holds over, a well-drafted holdover provision provides the basis to recover a multiple of the rent. Absent any such provision, the tenant would only be liable for the fair market rental value.

Second, the multiplier can create obvious leverage when a landlord is seeking to extricate a tenant from the premises. Obviously, if a tenant has an impending increase of rent to the tune of two times its immediately previous rental rate, the tenant is financially motivated to surrender the premises. It should be noted that any holdover provision should provide that it applies in the cases including the expiration of the term or earlier termination of the lease pursuant to landlord's right to terminate, whether that be upon an event of default by the tenant or earlier termination provision.

Third, when the term of a lease expires, there is oftentimes a situation in which the tenant leaves the premises in a condition that is not compliant with the turnover provision contained in the lease. A well-drafted holdover provision combined with a well-drafted surrender provision can provide a landlord leverage to force the tenant to repair the premises to an acceptable condition. If a tenant does not surrender the property in compliance with the turnover provision, the landlord can take the position that no surrender has occurred. Therefore, the

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[37] *See* AHCI, Inc. v. Lamar Advert. of Tenn., Inc., 898 S.W.2d 191 (Tenn. 1995).

[38] *Id.* at195.

holdover provision, applies, and the tenant is liable for the increased rent up to and including the day that the property in surrender is in compliance with the turnover provision.

These are just three examples of how important a holdover provision can be in lease management. Accordingly, a holdover provision should never be viewed as simply a toss in provision but instead should be highly scrutinized when drafting leases.

A sample provision is as follows:

> HOLDING OVER. If Tenant remains in possession of the Premises after the expiration or termination of the term hereof, without the execution of a new lease, Tenant shall be a tenant at will, and Landlord shall have no obligation to notify Tenant of any termination of Tenant's possession. Commencing on the date following the date of such expiration or termination, the Minimum Rent shall, for each month or fraction thereof that Tenant so remains in possession, be one and one-half (150%) of the Minimum Rent in effect at the expiration or termination of this Lease, subject to all the other terms and provisions of this Lease. Tenant shall indemnify and hold Landlord harmless from all loss or liability, including any claim made by any successor tenant founded upon Tenant's failure to surrender the Premises on a timely basis.

Non-Waiver

Typically, a "Non-Waiver Provision" is an overlooked standard provision in a commercial lease. A non-waiver provision is rarely a point of contention in commercial lease negotiations. However, a well-drafted non-waiver provision can form the basis of a well-designed and executed eviction or litigation strategy. Therefore, these provisions should not be neglected, and should be highly scrutinized.

For example, in *Brooks*, the term of the lease had expired.[39] The landlord and the tenant were negotiating a new lease.[40] During that time the tenant was paying, and landlord was accepting, rent payments equal to the amount due under the standard rent provision.[41] Once the lease

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[39] *Brooks,* 946 S.W.2d at 323.

[40] *Id.*

[41] *Id.*

negotiations broke down, the tenant moved out, eight months after the expiration of the term.[42] The landlord filed suit against the tenant and sought double rent under the holdover provision for the eight months that the tenant was in possession after the expiration of the term of the lease.[43]

The non-waiver provision stated:

> Non–Waiver Provisions. The failure of Landlord to insist on a strict performance of any of the terms, conditions and covenants herein shall not be deemed to be a waiver of any subsequent breach or default in the terms, conditions and covenants herein contained except as may be expressly waived in writing.[44]

The tenant argued that by the landlord's failure to demand the double rent during the holdover and accepting the standard rent, the landlord had waived any right to such assertions.[45] Relying upon the non-waiver provision, the *Brooks* court ruled that the tenant was liable for the double rent.[46]

The *Brooks* case demonstrates the value of a well-drafted non-waiver provision. In many cases, whether it be a situation in which a landlord is attempting to negotiate a new lease, attempting to enforce a termination, or a situation in which a landlord is attempting to enforce a separate and distinct provision of the lease, tenants typically try to argue that acceptance of rent constitutes a waiver. For example, it is very common for landlords to have rent lockboxes whereby tenants simply mail in rent payments, which are directly deposited in landlord's bank account. Tenants will often mail in rent that is deposited in landlord's account without landlord's direct knowledge. Absent a non-waiver provision, tenant can successfully argue that landlord has accepted the rent and waived potential breaches or alternatively established a new

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[42] *Id.*

[43] *Id.*

[44] *Id.* at 326.

[45] *Id.*

[46] *Id.; see also* Hill v. Osborne, 2000 WL 337550, at * 4 (Tenn. Ct. App. 2000) (holding that due to non-waiver provision, accepting monthly payments did not waive landlord's right to enforce annual rent increase).

term. A well-drafted non-waiver provision can protect landlord from this argument. For these reasons, non-waiver provisions must not be overlooked and should be carefully crafted to protect the respective parties to the lease.

Renewal Provisions

Renewal Provisions are typically highly negotiated, but this does not mean that all renewal provisions are drafted well. A well-drafted renewal provision will provide the following: (1) whether the renewal is automatic or optional; (2) whether the landlord and/or tenant has the option to renew; (3) how the renewal shall be exercised; (4) the rent terms for the new lease term; (5) the length of the new term; and (6) when the renewal must be exercised. Absent all of these terms, the parties are left to the vagaries of the court system, which does not necessarily lead to predictable outcomes.

For example, in *Carhart v. White Mantel & Tile Co.,* the parties had a renewal provision that failed to provide how and when the tenant was required to exercise the renewal option.[47] In that case, after the expiration of the new term, the tenant held over and continued to make the rental payments under the now expired term.[48] A dispute arose over the tenant's failure to pay the increased rent provided for in the renewal provision.[49] The landlord argued that by holding over, the tenant had exercised the renewal provision and was liable for the increased rent.[50] The tenant, on the other hand, argued that he had not exercised the renewal provision and was simply a month-to-month tenant.[51] The court sided with the lessee because, while the lessee held over, he had also not paid the increased rent required by the lease.[52] Specifically, the court reasoned:

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[47] Carhart v. White Mantel & Tile Co., 123 S.W. 747 (Tenn. 1909).

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

> [W]e are of [the] opinion that the mere continuance of occupancy by the tenant or lessee after the expiration of the lease period is ordinarily accepted as the exercise of the option reserved in the lease to occupy the premises for an additional term. This is the presumption that ordinarily arises from the mere fact of holding over; but it is not conclusive of the lessee's intention to accept the lease for an additional term. If the lease, as in this case, provides for an additional term at an increased rental, and after the expiration of the lease period the tenant holds over and pays the increased rental, this is affirmative evidence on his part that he has exercised the option to take the lease for an additional term; but where, under a lease like the present, the tenant holds over after the expiration of the original term, and does not pay the increased rental as provided by the lease, but continues to pay the original rental, which is accepted by the lessor, this negatives the idea of the acceptance of the privilege of an additional term. Under such circumstances, the lessee holding over will occupy the status of a tenant at will.[53]

The following principle was recognized in *Carhart* —the holding over and the continuing payment and acceptance of the agreed-upon rent creates a presumption that the lessee has effectively exercised an option to extend a lease that does not require the lessee to give notice of its decision to extend the lease.

The Tennessee Supreme Court has continued to follow this principle. For example, in *Ellis v. Pauline S. Sprouse Residuary Trust et al.*, the Supreme Court held that if a lease does not contain a specific provision regarding how and when the lessee may execute its option to extend the term of the lease, yet the lessee retains possession of the premises after the expiration of the original lease and pays in accordance with the terms of the renewal, the option to renew has been exercised even absent notification of renewal.[54] The Supreme Court further stated if the landlord had wanted such a provision, it should have "bargained for and agreed to a more specific provision relating to the time and

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[53] *Id.* at 750.

[54] Ellis v. Pauline S. Sprouse Residuary Tr. et al., 280 S.W.3d 806, 814-15 (Tenn. 2009).

manner for [tenant] to exercise his option to extend the lease beyond its initial term. [Landlord] was not prevented from bargaining for a more specific provision regarding the exercise of the option."[55]

In all situations, certainty is the desired outcome. Certainty, while never certain, can be approached through well-drafted lease provisions. Specifically, if tenant and landlord do not wish to leave their futures in the hands of a well-intentioned judge, a well-drafted renewal provision is necessary. Once again, a well drafted renewal provision will provide the following: (1) whether the renewal is automatic or optional; (2) whether the landlord and/or tenant has the option to renew; (3) how the renewal shall be exercised; (4) the rent terms for the new lease term; (5) the length of the new term; and (6) when the renewal must be exercised.

Damages

There are two general theories with respect to damages that can be awarded to landlords in the event of a default by a tenant.[56] The first is the *conveyance theory*, whereby Landlord "conveys" the property to the tenant for a set period of time and the tenant is responsible for the payment for the conveyance.[57] The payment by monthly payments is convenient for the tenant, and under the conveyance theory analysis, if the tenant breaches the lease, the tenant is responsible for paying all of the rent.[58] Tennessee does not abide by this conveyance theory.[59] Rather, Tennessee utilizes, the *contract theory* to determine what damages are owed to whom.[60] Under the contract theory, upon a breach of the lease by the

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[55] *Id.; see* also Four Eights, LLC v. Salem, 194 S.W.3d 484 (Tenn. Ct. App. 2005) (holding that lease which contained an option to renew which did not require the lessee do anything to renew, combined with the lessee's continued possession of the premises and payment of rent after the expiration of the term – effectively exercised option to renew).

[56] *See* 49 AM. JUR. 2D *Landlord and Tenant* § 19 (2015).

[57] Michael Madison, *The Real Properties of Contract Law*, 82 B.U. L. REV. 405, 410 (2002).

[58] *Id.*

[59] Kahn v. Penczner, 2008 WL 2894827, at *4 (Tenn. Ct. App. 2008).

[60] *Id.*

tenant, the landlord is entitled to damages to compensate it for what it expected to receive.[61]

The Court of Appeals has stated Tennessee's position on this issue well:

> It is well settled that the measure and elements of damages upon the breach of a lease is governed by the general principles that determine the measure of damages on claims arising from breaches of other kinds of contracts. The general rule of contracts, to the effect that the plaintiff may recover damages only to the extent of its injury, applies to leases. Damages for breach of a lease should, as a general rule, reflect a compensation reasonably determined to place the injured party in the same position as he or she would have been in had the breach not occurred and the contract been fully performed, taking into account, however, the duty to mitigate damages. In addition, damages resulting from a breach of a lease must have been within a contemplation of the parties; must have been proximately caused by the breach; and must be ascertainable with reasonable certainty without resort to speculation or conjecture.[62]

Unlike the conveyance theory, under contract theory the landlord has an obligation to mitigate its damages, in that the landlord has the obligation to try to find a replacement tenant.[63] What effort the landlord must exert is largely dependent on the circumstances.[64] Under the doctrine of mitigation of damages, an injured party has a duty to exercise reasonable care and due diligence to avoid loss or minimize damages after suffering injury.[65]

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[61] *Id.*

[62] *Kahn*, 2008 WL 2894827, at 4 (citing 49 AM. JUR. 2D *Landlord & Tenant* § 96 (2003).

[63] 49 AM. JUR.2D *Landlord and Tenant* § 87 (2015).

[64] Action Ads, Inc. v. William B. Tanner Co.,592 S.W.2d 572, 575 (Tenn. Ct. App. 1979).

[65] *See* Cook & Nichols, Inc. v. Peat, Marwick, Mitchell & Co., 480 S.W.2d 542, 545 (Tenn. Ct. App. 1971); Gilson v. Gillia, 321 S.W.2d 855, 865 (Tenn. Ct. App. 1958).

> Generally, one who is injured by the wrongful or negligent act of another, whether by tort or breach of contract, is bound to exercise reasonable care and diligence to avoid loss or to minimize or lessen the resulting damage, and to the extent that his damages are the result of his active and unreasonable enhancement thereof, or due to his failure to exercise such care and diligence, he cannot recover.[66]

In determining whether an injured party has fulfilled its duty to mitigate, a court must examine "whether the method which he employed to avoid consequential injury was reasonable under the circumstances existing at the time."[67] Despite this duty, an injured party is not required to mitigate damages where such a duty would constitute an undue burden.[68]

Attorney Fees

Like most states, Tennessee follows the "American rule" for awarding attorney fees.[69] The American rule provides that "a party in a civil action may recover attorney fees only if: (1) a contractual or statutory provision creates a right to recover attorney fees; or (2) some other recognized exception to the American rule applies, allowing for recovery of such fees in a particular case."[70] In the context of a contractual provision, a party may recover its attorney fees "only when a contract *specifically* or *expressly* provides for the recovery of attorney fees."[71] Therefore, "[i]f a contract does not specifically or expressly provide for attorney fees, the recovery of fees is not authorized."[72]

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[66] *Cook & Nichols, Inc.*, 480 S.W.2d at 545.

[67] *Action Ads, Inc.*, 592 S.W.2d at 575.

[68] Cummins v. Brodie, 667 S.W.2d 759, 766 (Tenn. Ct. App. 1983).

[69] Cracker Barrel Old Country Store, Inc. v. Epperson, 284 S.W.3d 303, 308 (Tenn. 2009) (citations omitted) (emphasis in original).

[70] *Id.*

[71] *Id.* at 309 (*citing* House v. Estate of Edmondson, 245 S.W.3d 372, 377 (Tenn. 2008)).

[72] *Id.* at 309 (noting that the Tennessee Supreme Court "has adhered strictly to the guiding principle that the American rule, prohibiting an award of attorney fees, will apply unless a contract specifically and expressly creates a right to recover 'attorney fees' or some other recognized exception to the American rule is present.") (citation omitted).

Applying this "bright line rule,"[73] Tennessee courts have held that parties were not entitled to recover attorney fees under contractual language providing for the recovery of the following: "all costs and expenses of any suit or proceeding,"[74] "any loss,"[75] all "expenses,"[76] or "any cost, loss, damage, or expense"[77] because such language did not "specifically and expressly provide[]" for attorney fees.[78] The Tennessee Supreme Court has stated that "[t]he only way parties to a contract have been able to specifically and expressly create a right to recover attorney fees has been by incorporating the phrase 'including reasonable attorney fees' or some other similar, yet equally specific, contractual language."[79]

Assuming that the parties' agreement "specifically and expressly" provides for the recovery of attorney fees, the next questions to consider are who is entitled to recover attorney fees under the contract provision and under what circumstances can they recover.[80] Depending upon the scope of an attorney fees provision, which will likely be the product of contract negotiations, a party to the contract may or may not be entitled to recover its attorney fees.[81] For example, the scope of the attorney fees provision may be one-sided, providing that, in the event Party A to the contract is required to bring a legal action against Party B in order to enforce the terms of the contract, Party B shall be obligated to pay Party A's attorney fees, even if Party A is not the prevailing party, and providing no reciprocal right to Party B.[82] Courts in Tennessee have

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[73] *Id.* at 311.

[74] *Id.* at 309-10.

[75] Kultura, Inc. v. S. Leasing Corp., 923 S.W.2d 536, 540 (Tenn. 1996).

[76] *Cracker Barrel*, 284 S.W.3d at 310 (holding that "the term 'expenses,' without more, also does not include an award of attorney fees.").

[77] Holcomb v. Cagle, 277 S.W.3d 393, 397 (Tenn. Ct. App. 2008).

[78] *Cracker Barrel*, 284 S.W.3d at 310.

[79] *Id.*

[80] *See generally* BKB Prop., LLC v. SunTrust Bank, 2010 WL 200750, at *3-5 (M.D. Tenn. 2010).

[81] *Id.* at *5.

[82] *Id.* at *3.

upheld such one-sided attorneys' fee provisions; particularly where the contract involved sophisticated parties on both sides.[83]

Perhaps the most common type of contractual attorneys' fee provision is a "prevailing party" provision. As a general matter, this type of provision states that if one party to the contract brings a lawsuit against another party to enforce the terms of the contract, then the "prevailing party" is entitled to recover its attorneys' fees from the non-prevailing party.[84] The question of which party is the prevailing party is not always clear-cut, and there are no bright line rules in Tennessee for making the prevailing party determination.[85] The Tennessee Supreme Court has noted that "a party need not attain complete success on the merits of a lawsuit in order to prevail," but instead "a prevailing party is

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[83] *See, e.g.*, *BKB Properties,* 2010 WL 200750, at *3–5 (where the plaintiff BKB challenged as unconscionable the "one-sided" attorneys' fee provision in the parties' loan agreement, which "obligate[d] BKB to pay and all of SunTrust's reasonable attorneys' fees and expenses incurred in litigation related to the loan transaction, even if BKB is the prevailing party in the litigation" and "[did] not impose a reciprocal obligation on SunTrust," the district court held that the provision was not unconscionable under Tennessee law, reasoning that BKB was a "sophisticated corporate entity" that "entered into the contract containing the [attorneys' fee] provision willingly, while represented by counsel, after many months of negotiation"), *aff'd* 453 Fed. App'x. 582, 588–89 (6th Cir. 2011); Guesthouse Intern. Franchise Systems, Inc. v. British American Properties MacArthur Inn, LLC, 2009 WL 792570, at *8 n. 4 (M.D. Tenn. 2009) (where the defendants challenged the enforceability of a "one-sided" attorneys' fee provision that only provided for an award of attorneys' fees to the plaintiff if it prevailed and no award to the defendants if they prevailed, the district court noted that "the defendants can direct the court to no law that states that such attorneys' fee provisions are unenforceable," and that, "[w]hile the court could certainly envision a circumstance where such a clause, combined with other factors could be problematic, it is not so here, where . . . sophisticated businesspeople were present on both sides"); Carrington v. W.A. Soefker & Son, Inc., 624 S.W.2d 894, 897 (Tenn. Ct. App. 1981) (upholding a one-sided contractual attorneys' fee provision and an award of attorneys' fees thereunder and holding that "courts do not re-write contracts merely because a party was unwise to agree to a term therein" and that although the one-sided attorneys' fee provision was "burdensome" to the appellant, it was "not unconscionable.").

[84] *E.g.,* Isaac v. Ctr. for Spine, Joint, & Neuromuscular Rehab., P.C., 2011 WL 2176578, at *8 (Tenn. Ct. App. 2011).

[85] Williams v. Williams, 2015 WL 412985, at *13 (Tenn. Ct. App. 2015) (citing RCK Joint Venture v. Garrison Cove Homeowners Ass'n, 2014 1632147, at *5 (Tenn. Ct. App. 2014)) ("[T]here are no bright-line rules in a prevailing party determination; as such, these determinations are necessarily fact-intensive and fact specific.").

one who has succeeded 'on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'"[86] Overall, "[t]he 'prevailing party' determination is necessarily fact-intensive."[87]

After determining the issues of whether attorneys' fees are recoverable under the contract and, if so, which party is entitled to recover attorneys' fees, the next step is determining the amount of attorneys' fees that will be recovered.[88] Where a contract provides for attorneys' fees, "the amount of the fee must be reasonable, even if the contract does not so require."[89] The determination of whether an award of attorneys' fees is reasonable is within the discretion of the trial court.[90] "There is no fixed mathematical rule in [Tennessee] for determining reasonable fees and costs."[91] In determining the reasonableness of attorneys' fees , courts "must consider the factors enumerated in *Connors v. Connors* . . . ,) and in Tennessee Supreme Court Rule 8," and " the circumstances of the particular case in light of the relevant factors."[92] A

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[86] Fannon v. City of Lafollette, 329 S.W.3d 418, 431 (Tenn. 2010) (quoting Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)). For recent cases conducting a "prevailing party" analysis under a contractual attorneys' fee provision, see Williams, 2015 WL 412985, at *13 (citing *Fannon* and noting that "the 'prevailing party' is the party 'who obtains some relief on the merits of the case *or* a material alteration in the legal relationship of the parties.'" (quoting *Isaac*, 2011 WL 2176578, at *8)) (emphasis added); RCK Joint Venture, 2014 1632147, at *5 (relying upon *Fannon* and holding that the question of prevailing party in that case would be "determined by the outcome of the primary issue or the primary relief requested).

[87] *Fannon*, 329 S.W.3d at 432.

[88] First Peoples Bank of Tennessee v. Hill, 340 S.W.3d 398, 409 (Tenn. Ct. App. 2010).

[89] *First Peoples Bank*, 340 S.W.3d at 410 (noting the *Beech Concrete* case where "the contract at issue provided a right to fees but did not state that the fees must be reasonable," but the court of appeals held that the trial was required to determine a "reasonable fee" under the contract provision).

[90] Killingsworth v. Ted Russell Ford, Inc., 104 S.W.3d 530, 534 (Tenn. Ct. App. 2002).

[91] *Id.*

[92] Chafflin v. Ellis, 211 S.W.3d 264, 290–91 (Tenn. Ct. App. 2006) (citations omitted); *see* Ferguson Harbour Inc. v. Flash Market, Inc., 124 S.W.3d 541, 553 (Tenn. Ct. App. 2003) ("Where the attorney's fee is based upon a contractual obligation expressly providing for reasonable attorney's fees, the award must be based upon the guidelines by which a reasonable fee is determined." (citations omitted)); *see also* Fell v. Rambo, 36 S.W.3d 837, 852 (Tenn. Ct. App. 2000) ("A fee is clearly excessive if, 'after a review of

trial court's award of attorneys' fees will generally be upheld on appeal unless the trial court abused its discretion.[93]

A comprehensive attorneys' fee provision might look like the following:

> ATTORNEYS' FEES. If any action or proceeding between the Parties arises related to this Lease Agreement, whether to enforce the obligations of the Parties hereto or to interpret the provisions contained herein, the prevailing party in such action or proceeding shall be entitled to recover from the non-prevailing party, in addition to damages or other relief, all attorneys' and other fees from the non-prevailing party therein. The term "attorneys' and other fees" shall mean and include reasonable attorneys' fees, accountants fees, expert witness fees, and any and all consultants and other similar fees incurred in connection with the action or proceeding and preparations therefor, including all expenses through all appellate levels. The term "action or proceeding" shall mean and include actions, proceedings, claims, suits, arbitrations, appeals, and other similar proceedings. As used herein, the term "prevailing party" shall mean the party that obtains the principal relief it has sought, whether by compromise, settlement, or judgment. If the party which commenced or instituted the action or proceeding shall dismiss or discontinue such action or proceeding without the concurrence of the other party, such other party shall be deemed the prevailing party.

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the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.'" (citations omitted)).

[93] *Killingsworth*, 104 S.W.3d at 534 (citations omitted); *see also First Peoples Bank*, 340 S.W.3d at 410 (quoting *Ferguson Harbour*, 124 S.W.3d at 553) ("Where a trial courts awards a fee, but there is nothing in the record to indicate that the trial court actually evaluated the amount of the fee to see if it is reasonable in light of the appropriate factors, the correct approach is to vacate the award and 'remand [the] case to the trial court for a new determination of an attorney's fee award under [Supreme Court Rule 8 and RPC 1.5] [sic] and the applicable case law.").

Conclusion

Tennessee courts are significantly deferential to the intent of the parties as evidenced by the written lease agreement. When we say, "say what you mean and mean what you say," it is not a cliché, but a practically relevant and necessary analysis in any written document, as Tennessee courts will interpret the plain meaning of what is in writing. Thus, careful drafting of lease documents should eliminate unwanted surprises, and the imposition of unexpected burdens to either party.