



***Fall 2022 Tennessee  
General Sessions Court  
Judicial Conference  
Residential Evictions  
Update***

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Topics for  
Today

By The Numbers

Appeal Changes

*West v. West*

Liquidated Damages

Domestic Violence Evictions

Potpourri

# Emergency Rental Assistance Program

- Funding Provided Through Two Separate Funding Bills:
  - ERAP 1 – Consolidated Appropriations Act of 2021 (December 2020)
  - ERAP 2 – American Rescue Plan Act of 2021 (March 2021)

By The  
Numbers –  
Nationwide  
June 2022

Total Rental  
Assistance:  
\$20.9 Billion

Total Households:  
4.2 million

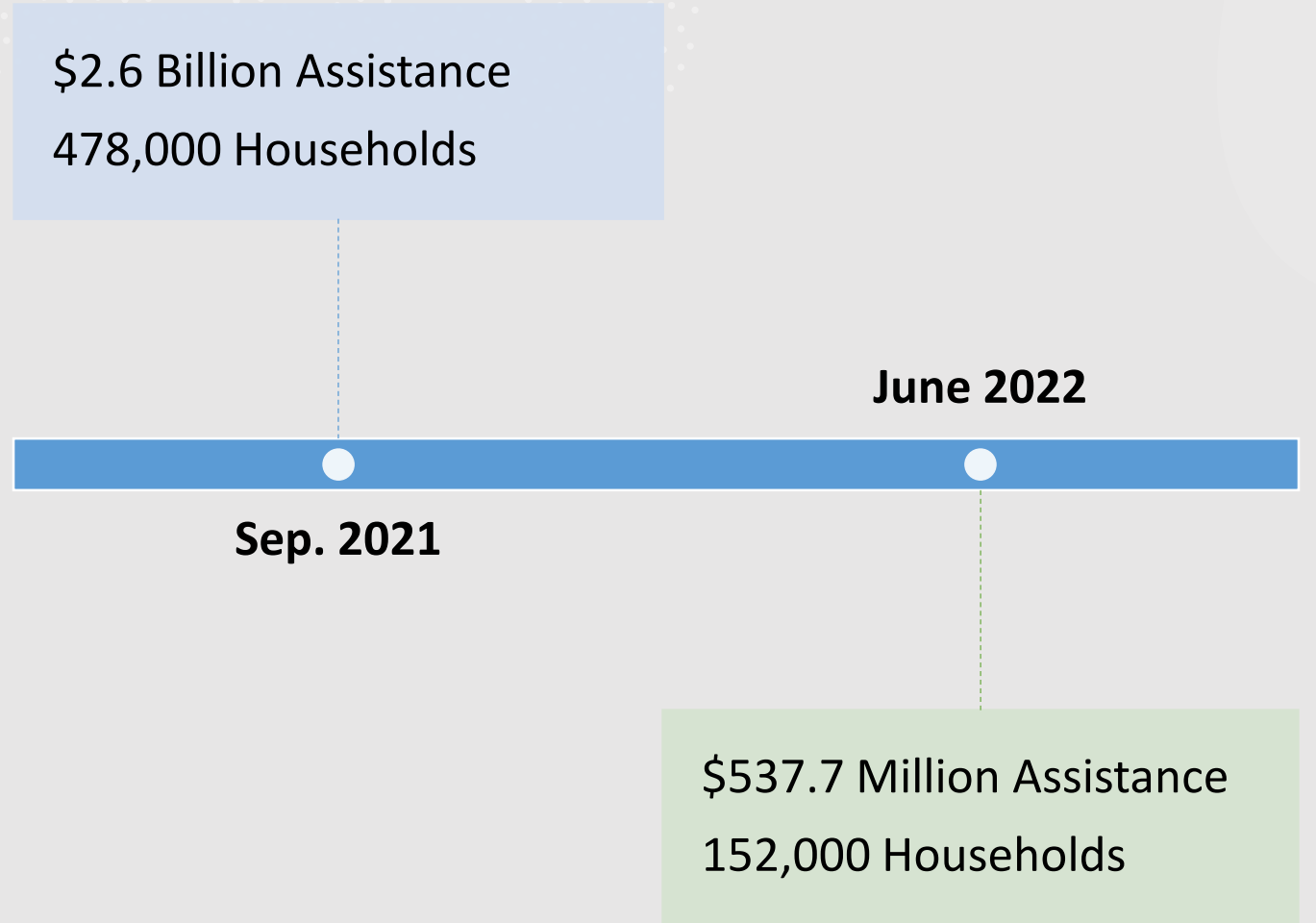
# By The Numbers Nationwide

\$2.6 Billion Assistance  
478,000 Households

Sep. 2021

June 2022

\$537.7 Million Assistance  
152,000 Households



# By The Numbers – ERAP 1

U.S. Department of the Treasury  
Emergency Rental Assistance Program (ERA1)  
Interim Report  
January 1, 2021 - June 30, 2022<sup>6</sup>

\$ Millions

Tennessee	\$385.0
State of Tennessee	\$160.0
Local Government	\$224.9
City of Memphis	\$63.9
Knox County	\$50.5
Nashville and Davidson County	\$51.5
Rutherford County	\$22.2
Shelby County	\$36.8



# By The Numbers – ERAP 2

U.S. Department of the Treasury  
Emergency Rental Assistance Program (ERA2) Interim  
Report  
American Rescue Plan Act, 2021  
April 1, 2021 - June 30, 2022<sup>5</sup>

\$ Millions

Tennessee	\$405.5
State of Tennessee	\$312.6
Local Government	\$92.9
City of Memphis	\$24.5
Hamilton County	\$8.8
Knox County	\$11.2
Montgomery County	\$5.0
Nashville-Davidson Metropolitan Government	\$23.0
Rutherford County	\$7.9
Shelby County	\$6.8
Williamson County	\$5.7

# ERAP Challenges

## Program Ending

- Funds Run Out
- December 31, 2022

## Lack of publicity

## Lack of participation by landlords

- Note: ERAP 2 specifically addresses this situation



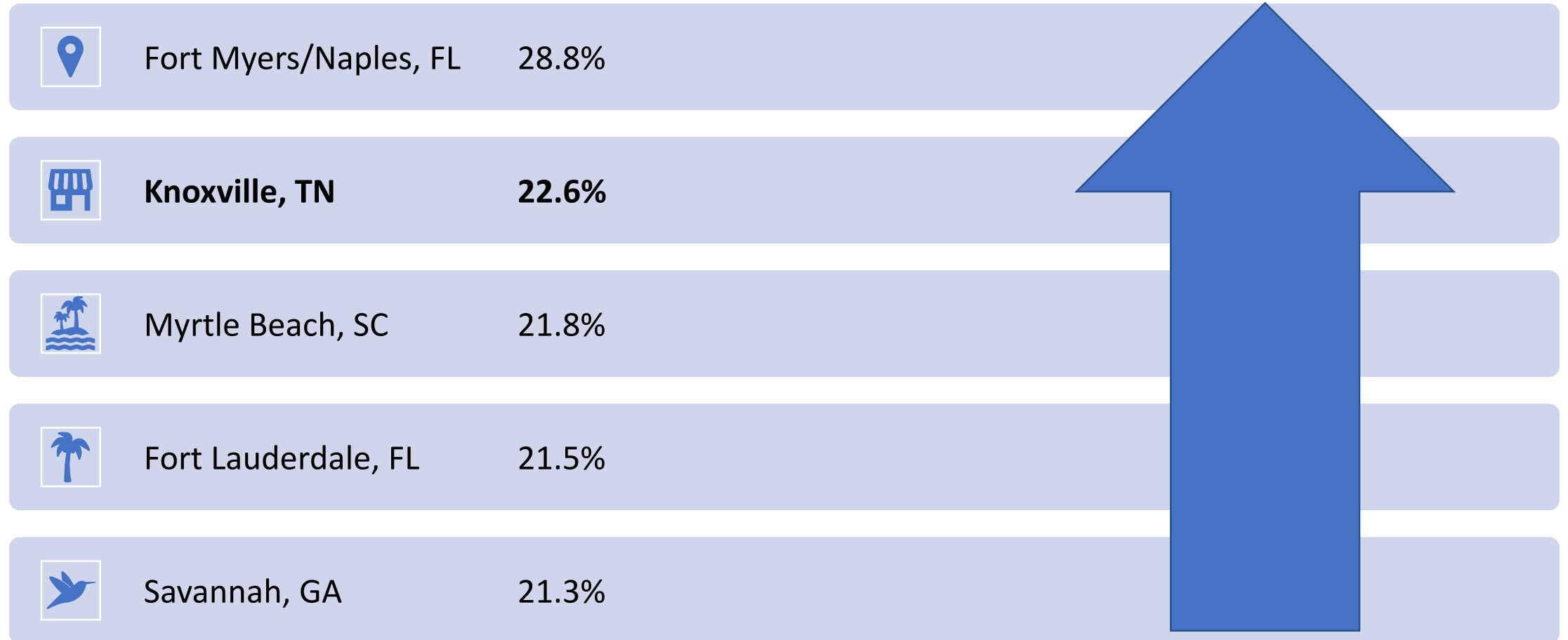
## Challenges For Tenants

Rent Increases

Limited Housing Supply

Landlords Less Tolerant of  
Delinquent Rent

# Largest Rent Gains – August 2022



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Rental  
Increases –  
Large Cities  
(300K+)

10. Raleigh, North Carolina:	20.9%
<b>9. Nashville, Tennessee:</b>	<b>21.5%</b>
8. Austin, Texas:	21.5%
7. Las Vegas:	21.9%
2. Tampa, Florida:	27.6%
1. New York :	31.8%

# Other Cities - Dwellsy

Memphis:  
72.9%

Knoxville:  
71.5%

Clarksville:  
30%

Columbia:  
28.6%

Kingsport-  
Bristol:  
24.1%

Chattanooga:  
21.1%

Johnson City:  
18.4%

Jackson:  
16.1%

# Appeals

TCA 29-18-128

APPEAL AND REVIEW

# Writ of Possession

When judgment is rendered in favor of the plaintiff, in any action of forcible entry and detainer, forcible detainer, or unlawful detainer, brought before a judge of the court of general sessions, and a writ of possession is awarded, the same shall be executed and the plaintiff restored to the possession immediately.

# Ten Day Appeal 29-18-129

An appeal will also lie in suits commenced before general sessions judges, under this chapter, within the ten (10) days allowed by [§ 27-5-108](#), as in other cases, the appellant, if the defendant, **giving bond as in the case of a certiorari.**



# LANDLORD BOND REQUIREMENTS



If the defendant pray an appeal, then, in that case, the **plaintiff** shall execute bond, with good and sufficient security, in **double the value of one (1) year's rent of the premises**, conditioned to pay all costs and damages accruing from the wrongful enforcement of such writ...



Defendant required to post bond in all cases

If Defendant appeals, Defendant must post a bond for one year of rent. If Defendant does not post bond, Plaintiff is not required to post bond to obtain possession.

# LANDLORD STILL HAS THE TRUMP CARD

In all cases, the Landlord shall not be required to post a bond to obtain possession in the event the defendant appeals without posting the requisite bond.

# Certiorari and Supersedeas 29-18-129

- Removed to Circuit Court within thirty (30) days
- Must set forth meritorious reason
- Bond, with security sufficient to cover all costs and damages;
- **If the defendant is the applicant, bond must also cover the value of the rent of the premises during the litigation.**

## Impact of Change

- Sessions Court – “Final” arbiter of landlord-tenant disputes

- Tenant cannot afford appeal

# Landlord Perspective

- Change has little impact – Landlord could always file bond for two years' rent
- Conduct evictions are the most serious violations – if Landlord prevails – Tenant needs to be removed ASAP

# Tenant Perspective

- Loss of housing during pendency of appeal
- Limits appeal issue to damages sustained by loss of housing



# Legal Issues

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- Expect challenge to statute in future
- Limits Tenant ability to exercise right to de novo appeal
- Impact on Tenants with limited financial means



## West v. West

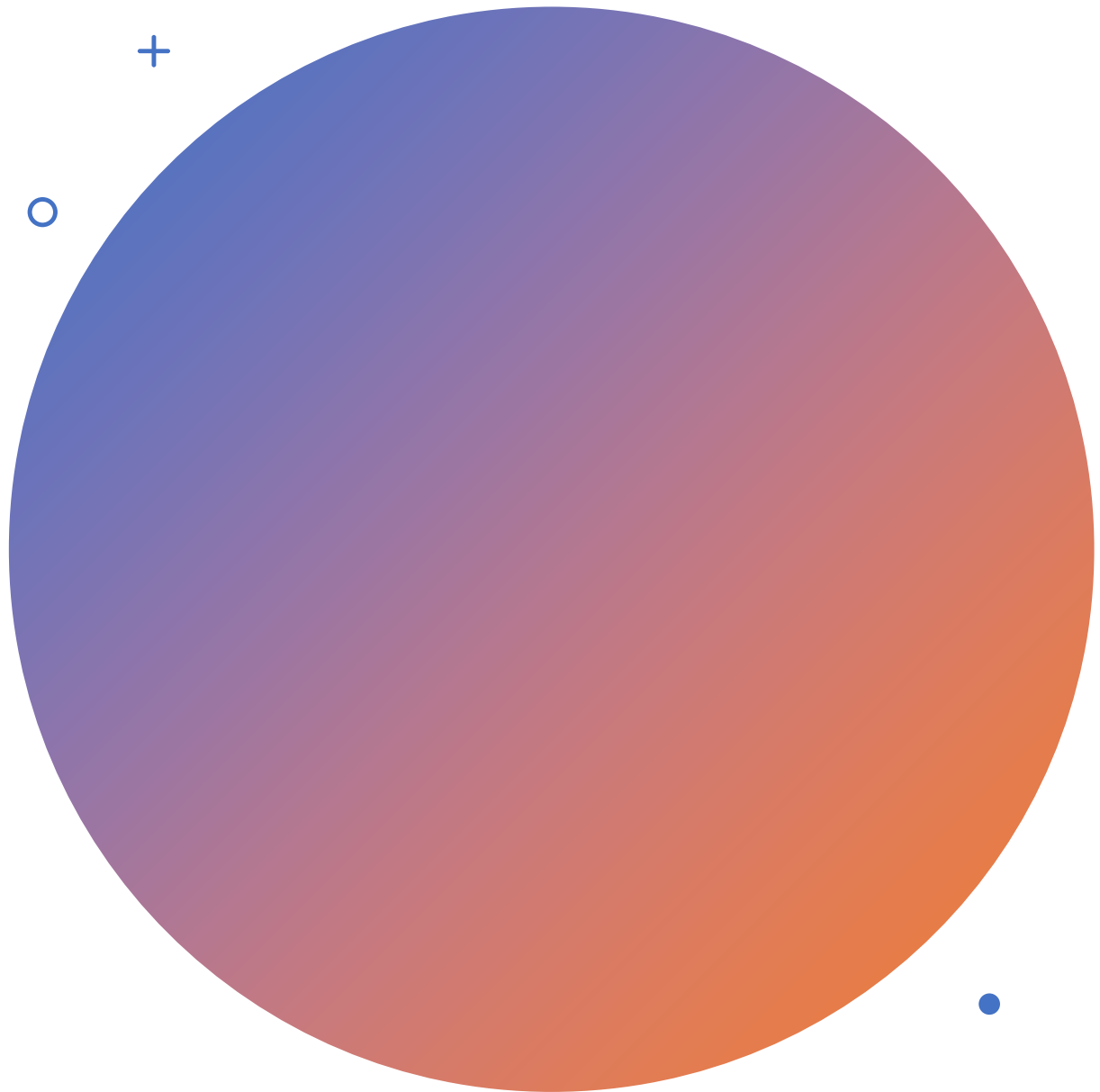
2021 WL 1426950 (Tenn Ct App Feb 23, 2021)

# Tale Of The Tape

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- William West, Jr.
- Son of Decedent
- Father's 2013 will left title to the property to William





# Tale Of The Tape

- Julie West
- Second Wife of Decedent
- Attempted probate of most recent will
- Initially named personal representative

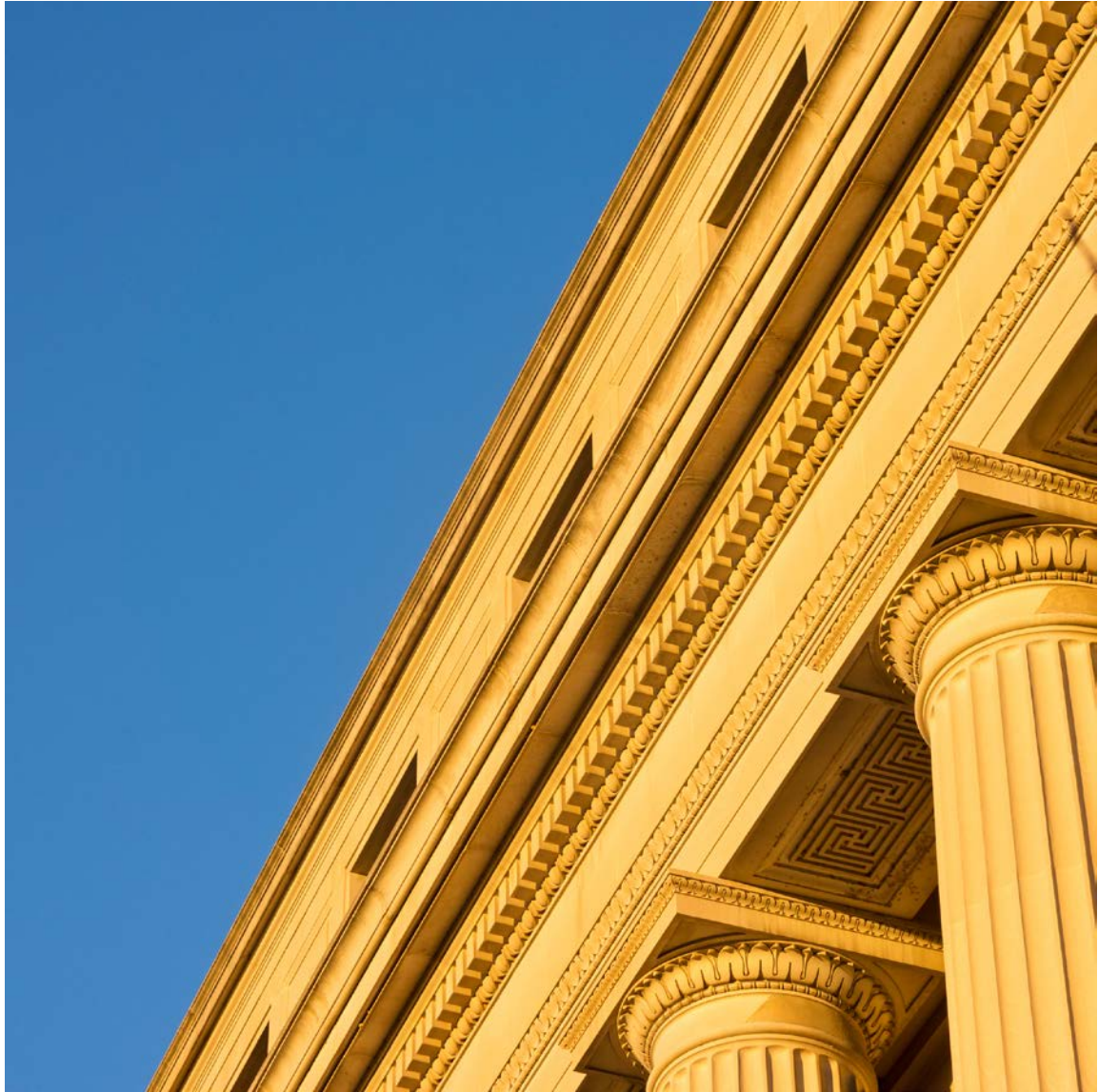


# West v. West

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- Decedent dies in 2013
- Widow sought to admit “recent” will
- Son filed will contest based upon 2003 will
- 2003 will left the real property that was occupied by Widow to Son.





# Procedural History

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- 2016: First Detainer Warrant
- Widow widow requested continuance and moved to dismiss
- Son's will contest still pending
- Case Placed On Hold



# Procedural History

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- 2018: Second Detainer Warrant
- Chancery Court Admitted 2013 Will
- Son Received Real Property
- Widow Claims Elective Share





# Rulings:

- Sessions Court
  - Dismissed both Detainer Warrants
  - Son appealed
- Circuit Court
  - Widow filed motion to dismiss
  - Trial Court entered judgment of possession in favor of Son



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## Appeal

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- General Sessions Court was without jurisdiction to decide the case because Son's complaint(s) did not state a cause of action for ***unlawful detainer***.



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## Appeal

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- “Widow did not come into possession of the Property by virtue of a contract establishing a landlord-tenant relationship.”
- “Thus, the general sessions court lacked subject matter jurisdiction to decide the case.”

# Types of Detainer Warrants

29-18-101:

Unlawful Entry

29-18-102:

Forcible Entry and Detainer

29-18-103:

Forcible Detainer

29-18-104:

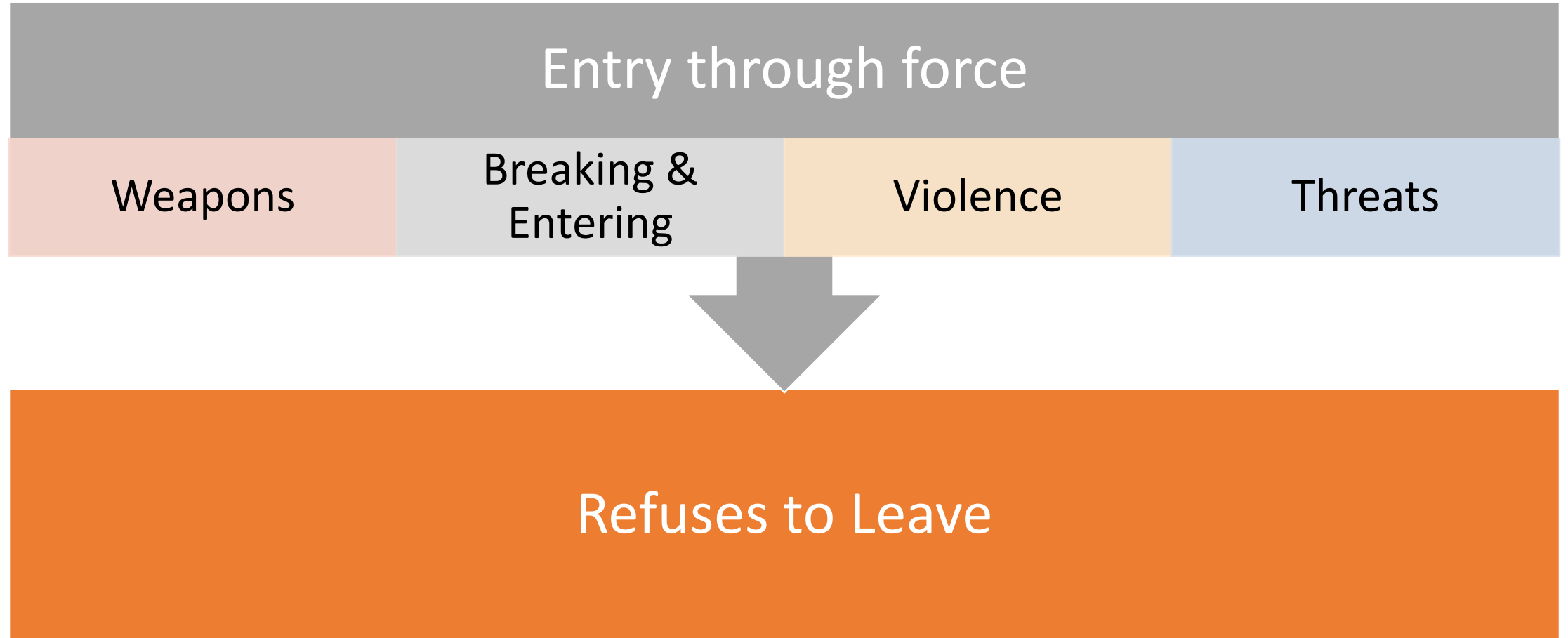
Unlawful Detainer

# Unlawful Entry

Entry is  
unauthorized

Obstruction  
of possession

# Forcible Entry



# Forcible Detainer

Person Enters  
Lawfully or  
Peaceably

Maintains Possession  
Unlawfully AND

Maintains Possession  
By Any Means That  
Constitutes Forcible  
Entry



# FORCIBLE DETAINER

- Actual violence is not necessary to constitute a forcible entry and detainer
- “If the actual possession of the plaintiff be invaded and held under circumstances that indicate it will not be surrendered without breach of the peace by one party or the other, it is sufficient entry and detainer to justify the writ.”
- *Foster v. Hill*, 510 S.W.2d 520 (Tenn. Ct. App. 1973)

# Forcible Entry & Detainer

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FED proceedings also serve the function of preventing violence and breaches of the peace that result from the inherent friction caused by repossessing property through self-help.

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*94<sup>th</sup> Aero Squadron*, 169 S.W.3d 627  
(Tenn. Ct. App. 2004)

# Unlawful Detainer

Defendant enters  
property by contract

Defendant is:

- Tenant
- Subtenant
- Assignee of Tenant
- Personal Representative of Tenant
- In Collusion with Tenant

Defendant  
willfully and  
without force,  
holds over  
possession

# Unlawful Detainer

- “A landlord/tenant relationship, established by contract, is the baseline requirement for maintaining an unlawful detainer action.”
- *CitiFinancial Mortg. Co., Inc. v. Beasley*, 2007 WL 77289 (Tenn. Ct. App. Jan. 11, 2007)
- “Unlawful detainer is where the defendant enters by contract, either as tenant or as assignee of a tenant, or as subtenant, or by collusion with a tenant, and, in either case, willfully and without force hold over possession from the landlord...”
- TCA Section 29-18-104

WEST ONLY APPLIES TO  
UNLAWFUL DETAINER  
ACTIONS!

# Forcible Detainer or Unlawful Detainer?

Estate Cases –  
Personal  
Representative seeks  
to remove occupant

Person who will not  
leave

Foreclosure –  
Removal of prior  
owner

## Estate Case

Executor vested with possession

Needs to sell house

Occupant refuses to leave

# Estate Case

No  
Lease/Contract –  
No Unlawful  
Detainer

Forcible Detainer?



*Childress v.  
Black*  
17 Tenn. 317  
(1836)

- To constitute this offence it is not necessary that violence and outrage upon person or property should in fact be resorted to. If the actual possession of another in a house or tenement be invaded, taken, and held under circumstances to show that it will not be surrendered without a breach of the peace on the one side or the other, this constitutes a case of forcible entry and detainer.

# Estate Case – Forcible Detainer

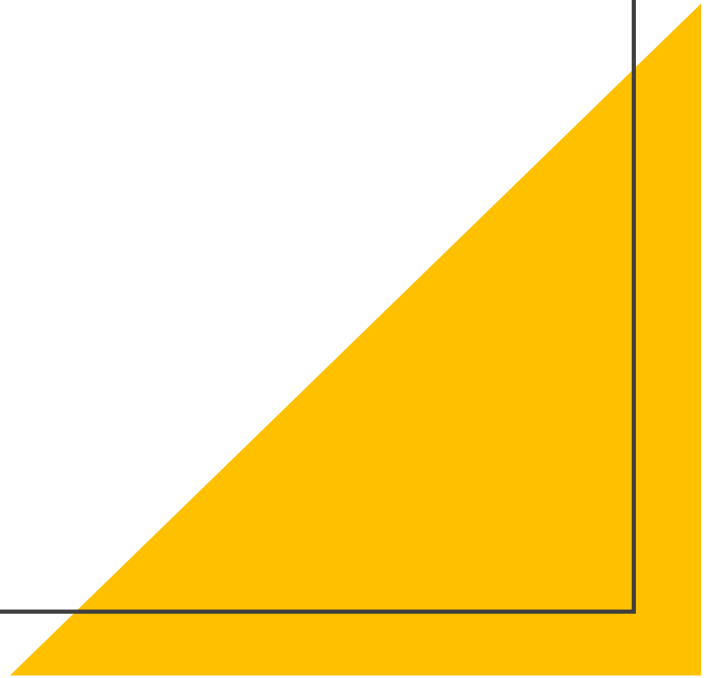
No issue of title  
between  
Executor/Beneficiary  
and Occupant

Occupant refuses to  
leave

Cannot recover  
possession without  
breach of peace

# The Person Who Will Not Leave

- Family Member
- House Guest



Vanhook v.  
Story, 23  
Tenn. 59  
(1843)

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Vanhook teacher at schoolhouse

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Schoolhouse owned by Story

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Vanhook fired

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Vanhook barricaded door, moves his  
personal belongings and family inside

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Threatened to shoot anyone who tried to  
remove him

# Van Hook

- “Defendant continued to hold the possession against [plaintiff’s] will, in such way as that their possession could not be regained without a breach of the peace, he would be guilty of a forcible detainer. “

## Foreclosure

*CitiFinancial Mortg. Co. v. Beasley*, 2007 WL 77289 (Tenn. Ct. App. Jan. 11. 2007)

- “Here, we consider a detainer action brought against the maker of a deed of trust who, after default and foreclosure, refused to surrender possession of the property. Under these facts, one seeking to regain possession by way of the summary FED proceeding must rely on the action of unlawful detainer”

**Foreclosure**  
*CitiFinancial*  
*Mortg. Co. v.*  
*Beasley*, 2007  
WL 77289  
(Tenn. Ct. App.  
Jan. 11. 2007)

- “If the trust deed establishes a landlord/tenant relationship between the mortgagor and foreclosure sale purchaser, then a constructive entry on the part of the purchaser attaches upon the passing of title; this constructive entry provides the basis for maintaining the unlawful detainer action.”

Foreclosure  
*CitiFinancial  
Mortg. Co. v.  
Beasley, 2007  
WL 77289  
(Tenn. Ct. App.  
Jan. 11. 2007)*

- “If the Property is sold pursuant to this paragraph 21, Borrower, or any person holding possession of the Property through Borrower, shall immediately surrender possession of the Property to the purchaser at the sale. If possession is not surrendered, Borrower or such person shall be a tenant at will of the purchaser and hereby agrees to pay the purchaser the reasonable rental value of the Property after sale.”



# Detainer vs. Ejectment

Ejectment: Resolve issues of title and resulting right of possession

Detainer: Only resolve issues of possession. The estates or merits of title “shall not be inquired into.”

# Foreclosure Exception

- “Even though the right to immediate possession does not generally hinge on title to the property, in the unique case of foreclosures conducted under a power of sale, however, the landlord/tenant relationship may not arise when the trustee has exercised the power of sale in violation of the deed of trust.”
- *CitiFinancial*

# Wrongful Foreclosure Defense

Did purchaser have legal right to foreclose?

If foreclosure resulted in the passage of void title and failed to place purchaser in constructive possession of the property, then it could not maintain an unlawful detainer action.

# Bottom Line

Unlawful Detainer can only be used where landlord-tenant relationship exists

Forcible Detainer is appropriate where ownership not at issue and occupant refuses to leave without disruption of the peace

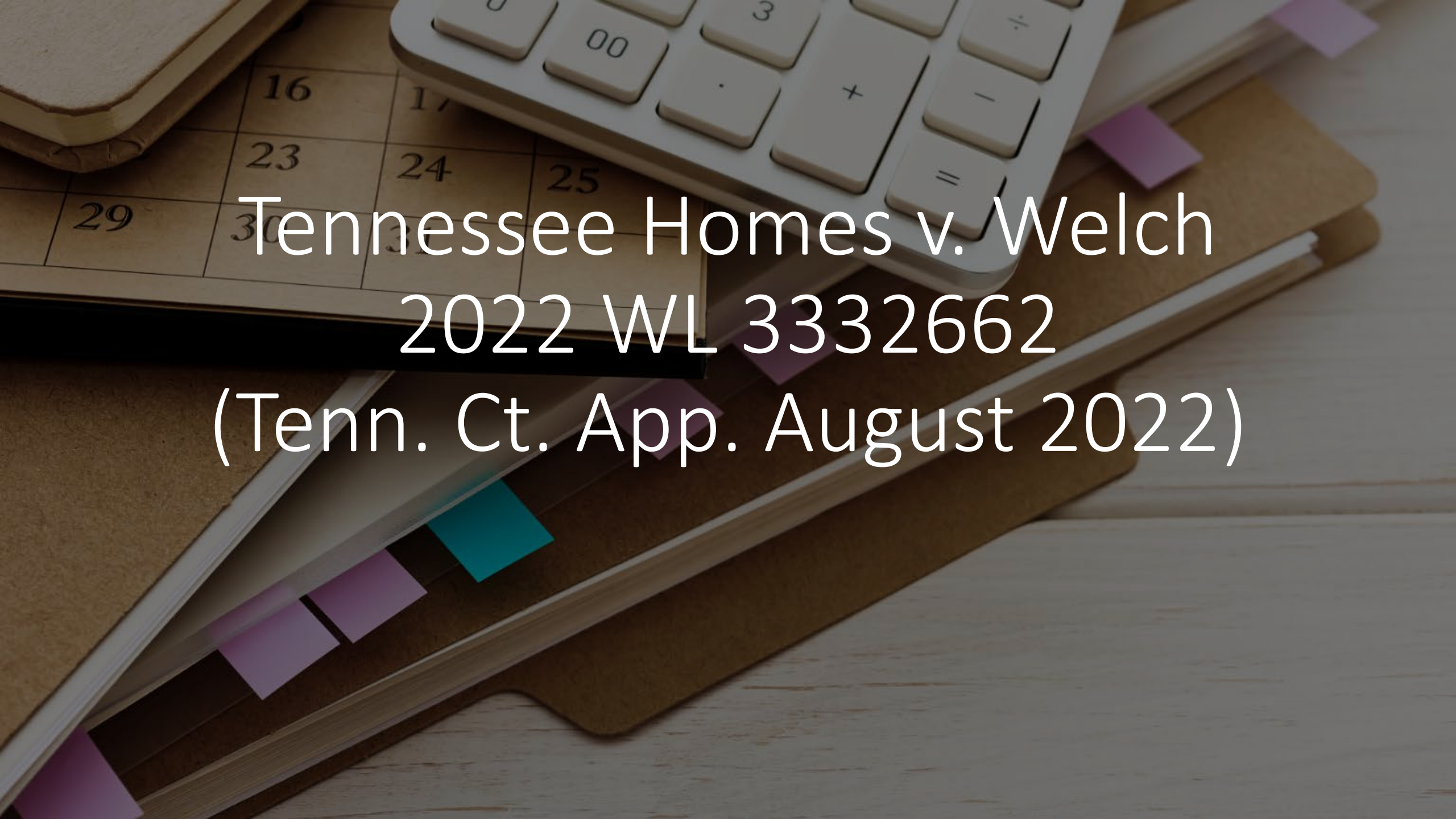
# Additional Thoughts - Ejectment

- *Harris v. Buchiganni*, 285 S.W.2d 108 (Tenn. 1955)
  - [A]n ejectment suit ... is strictly a legal remedy and one of which the Circuit Court had jurisdiction to hear. The Chancery Court is likewise given concurrent jurisdiction in such matters.
- *Newport Housing Authority v. Ballard*, 839 S.W.2d 86 (Tenn. 1992)
  - Ejectment is purely a legal action to be brought in circuit or chancery court with the only question being one of legal title and the right to possession in connection with the title.



Liquidated  
Damages



A desk setup featuring a white keyboard, a calendar with dates like 16, 23, 29, 24, and 25 visible, and a binder with several purple and teal sticky tabs. The text is overlaid on a semi-transparent dark rectangle.

Tennessee Homes v. Welch  
2022 WL 3332662  
(Tenn. Ct. App. August 2022)

## Liquidated Damages

### Lease Provision – Early Termination Fee

If this agreement terminates for nonpayment or other listed defaults . . . Tenant agrees to pay [\$1,000], in addition to all other fees, charges, and damages allowed, as an Early Termination Fee. The Early Termination Fee is not a penalty, but rather a charge to compensate Landlord for Tenant's failure to satisfy the terms of the agreement.



# Damages Sought By Landlord

Early Termination Fee:  
\$1,000

Remaining Rent:  
\$6,920 ( $\$865 \times 8$  months)

Damages:  
\$250

# Damages Awarded To Landlord By Circuit Court

Rent:

\$252

Damages:

\$50

Early Termination Fee:

\$1,000

# Tenant Argues Early Termination Fee Unenforceable

Damages not  
difficult to  
ascertain

Fee not a  
reasonable  
estimation of  
damages

Termination Fee is  
a penalty

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Court  
Analysis:  
Early  
Termination  
Fee is a  
Liquidated  
Damages  
Clause

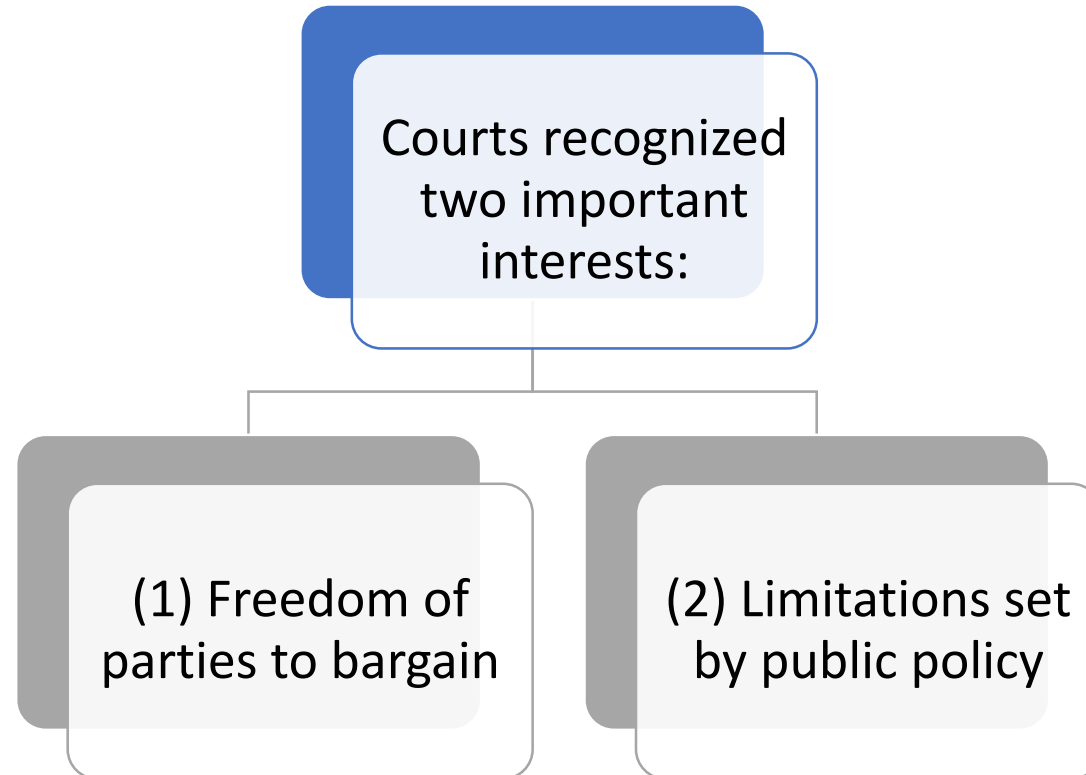
Lease does not need to explicitly use term  
“liquidated damages”

Clause used terms associated with liquidated  
damages:

Fee conditioned upon “termination  
for nonpayment or other defaults”

Fee is a “charge to compensate  
Landlord for Tenant’s failure to  
satisfy the terms of the agreement”

# Is a Liquidated Damages Clause Enforceable?



## Test for Enforceability

When viewed prospectively, is the liquidated damages sum a reasonable estimate of potential damages?

Are actual damages indeterminable or difficult to measure at the time the parties entered into the contract?

# Reasonable Estimate

Reasonable relationship to the amount of actual damages that would likely be sustained in the event of the breach

Measured at the time contract is signed

**Amount of actual damages at time of breach is of little to no significance to the recovery of liquidated damages**



Actual  
damages  
difficult to  
determine  
or prove

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How long apartment will be  
vacant?

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How much will be spent to relet?

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How many prospective long-term  
tenants turned away while unit  
occupied?

# Scope of Liquidated Damages Clause

- Contract must contain criteria for determining liquidated damages

## Scope – Language of Lease

- “[A] charge to compensate Landlord for Tenant[s]’ failure to satisfy the terms of the Agreement.”
- Tenant required to pay early termination fee “in addition to all other fees, charges and damages allowed . . .”



# Cannot Have Cake And Eat It Too

- Court found termination fee was an estimation of the actual damages Landlord would suffer for Tenant's failure to satisfy the lease agreement
- Landlord cannot recover additional damages for same breach covered by liquidated damages clause

# Cannot Have Cake And Eat It Too

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- Here, Landlord cannot recover liquidated damages and rent



# DOMESTIC VIOLENCE EVICTIONS

- VIOLENCE AGAINST WOMEN ACT
- DOMESTIC ABUSE – TENNESSEE LAW



Paine | Tarwater | Bickers, LLP

ATTORNEYS AT LAW

# VIOLENCE AGAINST WOMEN ACT (VAWA)

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APPLIED TO SUBSIDIZED  
HOUSING

SPECIFICALLY  
PERMITTED  
BIFURCATION OF THE  
LEASE IN CASES OF  
DOMESTIC ABUSE

TENNESSEE  
LAW  
DOMESTIC  
ABUSE



URLTA & NON-URLTA  
STATUTES ARE IDENTICAL



URLTA:

66-28-205 &  
66-28-517



NON-URLTA:

66-7-109 &  
66-7-112



# DOMESTIC ABUSE: EVICTIONS

If domestic abuse, as defined in 36-3-601, is the underlying offense for which a tenancy is terminated, only the perpetrator may be evicted.

Landlord shall not evict the victims, minor children under eighteen (18) years of age, or innocent occupants.

Perpetrator shall remain financially liable.

# DOMESTIC ABUSE: EVICTIONS

Landlord may remove the perpetrator from the lease agreement

Require the remaining adult tenants to qualify for and enter into a new agreement

Landlord shall not be responsible for any and all damages suffered by the perpetrator due to the bifurcation and termination of the lease agreement in accordance with this section.

# DOMESTIC ABUSE: EVICTIONS

If domestic abuse, as defined in [§ 36-3-601](#), is the underlying offense for which tenancy could be terminated, the victim and all adult tenants shall agree, in writing, not to allow the perpetrator to return to the subject premises or any part of the community property, and to immediately report the perpetrator's return to the proper authority, for the remainder of the tenancy. A violation of such agreement shall be cause to terminate tenancy as to any victim and all other tenants.

# STEPS VICTIM MUST FOLLOW

**(1) must be granted an order of protection,**

**(2) provide a copy to landlord and**

# STEPS VICTIM MUST FOLLOW

## (3) the order must:

- (A) Provide for the perpetrator to move out or vacate immediately;
- (B) Prohibit the perpetrator from coming by or to a shared residence;
- (C) Require that the perpetrator stay away from the victim's residence; or
- (D) Find that the perpetrator's continuing to reside in the rented or leased premises may jeopardize the life, health, and safety of the victim or the victim's minor children.



## CONSEQUENCES OF NOT FOLLOWING STEPS

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Failure to comply with this section, or dismissal of an order of protection that allows application of this section, abrogates the rights provided to the victim, minor children, and innocent occupants under this section.

# Landlord's Conflicting Obligation to Tenants

- Obligation to  
Victim

- Obligation to safety  
of other Tenants

*Giggers v.  
Memphis  
Housing 277  
S.W.3d 359  
(Tenn. 2009)*

- City housing authority owed a duty of care to its tenants to take reasonable steps to prevent tenants from suffering harm.



# DOMESTIC ABUSE: VICTIMS RIGHT TO TERMINATE LEASE

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Written notice to landlord that states:

Tenant is a domestic abuse victim, sexual assault victim or stalking victim

Requests release from rental agreement

Mutually agreed upon release date within 30 days of written notice

Copy of either:

- (1) Valid Order of Protection Following a Hearing; or
- (2) Documentation evidencing a criminal charge



# Potpourri

# Fair Housing Defenses

- Disability as defense to eviction:
  - Hoarding
  - Other Mental Health Defenses
- Raised in variety of cases:
  - Housekeeping
  - Noise
  - Assault/Threats of Violence

# POSTING

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(1) Attempt personal service of process on three (3) different dates;

(2) Document such attempts on the face of the warrant;

(3) After 3 attempts, unable to serve any defendant personally.

# Necessary Steps To Post

1

(A) Posting a copy of the warrant or summons on the door of the premises;

2

(B) Mail Warrant;

3

(C) Making an entry of this action on the face of the warrant or summons filed in the action; and

(D) Posted at least six days prior to hearing

*Scarlett v.*

AA

*Properties,*

616 S.W.3d

815 (Tenn.

Ct. App.



2020)

No specific language required on warrant to document three attempts made to serve

Six days between posting and hearing is measured in calendar days

Holidays and weekends are included in the computation

Six days means Six days!



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Maximum  
Continuance  
Is 15 Days  
Unless:

Parties Agree;

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Landlord Consents; or

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No Court Is Being Conducted

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***Fall 2022 Tennessee  
General Sessions Court  
Judicial Conference  
Residential Evictions  
Update***



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