

A security guard, dressed in plain clothes, was working for a discount store when a customer got into a heated argument with a cashier over the store's refund policy. Without identifying himself as a security guard, the security guard suddenly grabbed the customer's arm. The customer attempted to push the security guard away, and the security guard knocked the customer to the floor, causing him injuries.

The customer sued the store for battery on a theory of vicarious liability for the injuries caused by the security guard. The store filed an answer to the customer's complaint, asserting the affirmative defense of contributory negligence. The customer has moved to strike the affirmative defense. Traditional rules of contributory negligence apply.

Should the trial court grant the customer's motion?

- A. No, because contributory negligence is an affirmative defense to a cause of action based on vicarious liability.
- B. No, because the customer should have known that his argument with the cashier might provoke an action by a security guard.
- C. Yes, because contributory negligence is not a defense to battery.
- D. Yes, because the customer did not know that he was pushing away someone who was employed as a security guard.

### **Explanation:**

**Contributory negligence** is an affirmative defense that completely bars the plaintiff's recovery when his/her conduct falls below the standard of care persons should use for their own protection (ie, the plaintiff's own negligence contributed to the harm). However, under the traditional rules of contributory negligence, contributory negligence serves only as a defense to **negligence** claims—not **intentional tort** claims like **battery**.

Since the customer sued the store for battery—not negligence—contributory negligence is not a defense. Therefore, the court should grant the customer's motion to strike that defense.

**(Choice A)** A principal can only assert contributory negligence as a defense to a negligence cause of action based on a theory of vicarious liability. Here, the customer alleged that the store was vicariously liable for the guard's battery. Because the guard could not assert contributory negligence as a defense to battery, neither can the store.

**(Choices B & D)** If the store could assert the defense of contributory negligence, then the court would consider whether the customer should have known that a heated argument with the cashier might provoke the guard or did not know that he was pushing away a guard. But since contributory negligence is not a defense to battery, these factual issues do not matter.

### **Educational objective:**

Under the traditional rules of contributory negligence, contributory negligence completely bars the plaintiff's recovery when his/her own negligence was a contributing cause of the harm. This affirmative defense only applies to negligence claims.

### **References**

Fed. R. Civ. P. 12(f) (motion to strike).

Restatement (Second) of Torts § 463 (Am. Law Inst. 1965) (definition of contributory negligence).

Restatement (Second) of Torts § 467 (Am. Law Inst. 1965) (effect of contributory negligence).

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## Vicarious liability

Defenses limited to those agent could have raised for the underlying tort

