STATE LAW SUMMARY
Overview of the State of Tennessee

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Overview of the State of Tennessee Court System

A. Trial Courts

Circuit and Chancery Courts. The circuit and chancery courts have unlimited monetary jurisdiction, however, both the circuit court and chancery courts have exclusive jurisdiction with respect to certain cases. Cases concerning torts with unliquidated damages for injuries to property not resulting from breach of an oral or written contract, eminent domain, the Uniform Residential Landlord Tenant Act ("URLTA"), and the Tennessee Governmental Tort Liability Act must be tried in circuit court. Cases concerning probate and administration of estates and boundary disputes must be tried in chancery court. Chancery courts also have exclusive original jurisdiction over most cases of an equitable nature, though circuit courts may hear

cases of equitable nature if no objection is raised. TENN. CODE ANN. § 16-10-111. In most other civil actions, jurisdiction is concurrent and suits filed in the wrong court are transferred, not dismissed. *See generally* TENN. CODE ANN. §§ 16-10-101, 16-11-101.

General Sessions Court. General Sessions Courts can award civil judgments up to $25,000.00 plus attorneys fees if justified. The jurisdictional maximum, however, does not apply to forcible entry and detainer actions or recovery of personal property. General Sessions courts also handle restraining orders and the enforcement of restraining orders and have jurisdiction to grant some injunctive relief. TENN. CODE ANN. § 16-15-501, 502.

Jury Demand. Under TENN. R. CIV. P. 38, a party may demand a jury by incorporating such demand in his merits pleading or by filing a written demand with the clerk within 15 days after service of the last pleading raising an issue of fact. A demand cannot be withdrawn except with the consent of all other parties. Caudill v. Mrs. Grissom's Salads, Inc., 541 S.W.2d 101 (Tenn. 1976). The right to twelve jurors in all jury cases is guaranteed unless waived by the demanding party. Norris v. Nationwide Mut. Fire Ins. Co., 728 S.W.2d 335, 338 (Tenn. Ct. App. 1986). However, TENN. R. CIV. P. 48 permits the parties to stipulate to a jury consisting of any number less than twelve. A party who does not object to the lesser number before trial is deemed to have waived the constitutional right to a twelve member jury. *Norris*, 728 S.W.2d at 338. Bifurcated jury trials are generally available only when necessary to avoid jury confusion, prejudice to a party, or judicial inefficiency; however, in cases where punitive damages are sought, a defendant may have a bifurcated trial as of right. Jury trials in chancery courts are available on timely demand but are limited by statute to a determination of a material fact in dispute and to cases that are not deemed "inappropriate." Moore v. Mitchell, 329 S.W.2d 821 (Tenn. 1959).

Court-ordered ADR under Tennessee Supreme Court Rule 31. TENN. SUP. CT. R. 31 ("Rule 31") governs Alternative Dispute Resolution. In certain instances, Rule 31 allows courts to order parties to an eligible civil action to participate in an ADR proceeding. *See* TENN. SUP. CT. R. 31 § 3. Eligible civil actions include "all civil actions except forfeitures of seized property, civil commitments, adoption proceedings, habeas corpus and extraordinary writs, or juvenile delinquency cases." TENN. SUP. CT. R. 31 § 2(f). ADR proceedings initiated by the court can include the following: (1) case evaluations, (2) mediation, (3) judicial settlement conferences, (4) non-binding arbitrations (5) summary jury trials, or (6) mini-trials. *See* TENN. SUP. CT. R. 31 § 2(n).

B. Appellate Courts

Intermediate Appellate Court. The Court of Appeals is Tennessee's intermediate appellate court, having only appellate jurisdiction, and only in civil matters. *See* TENN. CODE ANN. § 24-1-208. The court of appeals has no jurisdiction in workers' compensation cases. The court of appeals is divided into three grand divisions, which include the Eastern, Middle, and Western Divisions. In the Court of Appeals, there are

twelve elected judges, with a maximum of four judges per grand division. TENN. CODE ANN. § 16-4-102.

Supreme Court. The Tennessee Supreme Court is the court of last resort. Appeal is direct and is available as of right in workers' compensation cases, as to which the court may make a reference to a Special Workers' Compensation Appeals Panel for decision. Review of matters already considered by the court of appeals is discretionary, on grant of Appeal by Permission. TENN. R. APP. P. 11.

Modes of Review. Appellate review in Tennessee is governed by the Tennessee Rules of Appellate Procedure ("TRAP"). The modes of review in Tennessee are (1) an appeal as of right and (2) an appeal by permission. Appeal as of right is defined as any appeal that does not require the permission of the trial or appellate court. Generally, every final judgment in a civil action is appealable as of right. TENN. R. APP. P. 3. Appeals by permission requires the permission of the trial court, the appellate court, or both. Most such appeals will be pursuant to TRAP 9 applicable to interlocutory orders. Appeals by permission also include, however, efforts to have the Tennessee Supreme Court review final decisions of the Tennessee Court of Appeals under TRAP 11, and extraordinary appeals under TRAP 10.

Scope of Review. Any question of law may be raised by any party for review and relief. TENN. R. APP. P. 13. Review of the trial court's findings of fact is de novo upon the trial court record, and the finding is presumed correct unless the preponderance of the evidence suggests otherwise. *Id.* A jury's findings may be set aside only if there is no material evidence to support the verdict. *Id.*

Number of Supreme Court Judges. The Supreme Court consists of five judges, one of whom must reside in each grand division, with a maximum of two judges per grand division. TENN. CODE ANN. § 16-3-101. The Tennessee Constitution states that "[t]he Judges of the Supreme Court shall be elected by the qualified voters of the state." TENN. CONST. art. VI, § 3. To be eligible to serve on the Supreme Court, judges must be at least thirty-five years old and have resided in Tennessee for at least five years. TENN. CONST. art. VI, § 3. Judges serve for an eight-year term. TENN. CODE ANN. §§ 16-3-101, 16-4-102.

Bond Requirement. TENN. R. APP. P. 6 states that, unless exempted,

> in civil actions a bond for costs on appeal shall be filed by the appellant in the trial court with the notice of appeal. . . . A bond for costs on appeal shall have sufficient surety, and it shall be conditioned to secure the payment of costs if the appeal is finally dismissed or the judgment affirmed or the payment of such costs as the appellate court may direct if judgment is modified.

If an appellant fails to file a bond, the appellate court "may issue a show cause order as to why the appeal should not be dismissed for failure to file a bond." *Id.*

Post-Judgment Interest Rate. The recovery of post-judgment interest is governed by TENN. CODE ANN. § 47-14-121 and -122. Post-judgment interest accrues on every judgment from the day on which the jury or the court returns the verdict—without regard to a motion for a new trial. TENN. CODE ANN. § 47-14-122. Previously under Tennessee law "[i]nterest on judgments, including decrees and municipal court judgments, shall be computed at the effective rate of ten percent (10%) per annum, except as . . . otherwise provided . . . by statute." TENN. CODE ANN. § 47-14-121. Under recently enacted legislation amending TENN. CODE ANN. § 47-14-121 effective July 1, 2012, however, the interest rates shall:

> (1) For any judgment entered between July 1 and December 31, be equal to two percent (2%) less than the formula rate per annum published by the commissioner of financial institutions, as required by § 47–14–105, for June of the same year; or
>
> (2) For any judgment entered between January 1 and June 30, be equal to two percent (2%) less than the formula rate per annum published by the commissioner of financial institutions, as required by § 47–14–105, for December of the prior year.

2012 Tenn. Laws Pub. Ch. 1043 (H.B. 2982). Notwithstanding the above subsections, the enacted amendment states, "[W]here a judgment is based on a statute, note, contract, or other writing that fixes a rate of interest within the limits provided in § 47–14–103 for particular categories of creditors, lenders or transactions, the judgment shall bear interest at the rate so fixed." *Id.*

Procedural

A. Venue

Local actions. Local actions must be filed in the county where the land lies. TENN. CODE ANN. § 20-4-103.

Transitory actions. The venue of transitory actions brought in Tennessee courts is controlled, in general, by TENN. CODE ANN. § 20-4-101, which states in pertinent part,

> (a) In all civil actions of a transitory nature, unless venue is otherwise expressly provided for, the action may be brought in the county where the cause of action arose or in the county where the defendant resides.
>
> (b) If, however, the plaintiff and defendant both reside in the same county in this state, then such action shall be brought either in the county where the cause of action arose or in the county of their residence.

TENN. CODE ANN. § 20-4-101.

Defendant not natural person. If the defendant in a civil action is not a natural person then the action shall be brought in:

> (1) The county where all or a substantial part of the events or omissions giving rise to the cause of action accrued;
>
> (2) The county where any defendant organized under the laws of this state maintains its principal office; or
>
> (3)(A) If the defendant is not organized under the laws of this state, the county where the defendant's registered agent for service of process is located; or
>
> > (B) If the defendant does not maintain a registered agent within this state, the county where the person designated by statute as the defendant's agent for service of process is located.

TENN. CODE ANN. § 20-4-104.

Workers' compensation. Under Tennessee law, if parties are unable to reach an agreement at the benefits review conference, suit may be filed "in the circuit or chancery court in the county in which the employee resides or in which the alleged injury occurred." TENN. CODE ANN. § 50-6-225(a)(2)(A). If, however, the injury occurred outside the state of Tennessee and the employee resides outside Tennessee, then the complaint must be filed in any county where the employer maintains an office. *Id*

Transfer of venue. Tennessee law provides that

> when an original civil action . . . is filed in a state or county court of record or a general sessions court and such court determines that it lacks jurisdiction, the court shall, if it is in the interest of justice, transfer the action or appeal to any other such court in which the action or appeal could have been brought at the time it was originally filed . Upon such a transfer, the action or appeal shall proceed as if it had been originally filed in the court to which it is transferred on the date upon which it was actually filed in the court from which it was transferred.

TENN. CODE ANN. § 16-1-116.

Waiver of venue. Improper venue can be waived in transitory actions but not in local actions. TENN. R. CIV. P. 12.08; s*ee also* Howse v. Campbell, 2001 WL 459106, at *4 (Tenn. Ct. App. 2001) (stating that "waiver rule does not apply when transitory actions have been localized by statute. In those circumstances, venue is intertwined with the trial court's subject matter jurisdiction which cannot be conferred by waiver or consent").

B. Statute of Limitations

In General. The guiding principle for determining the selection of a statute of limitations is that the gravamen of an action, rather than its designation as an action for tort, contract, or other subject matter, is controlling. *See* Alexander v. Third Nat. Bank, 915 S.W.2d 797 (Tenn. 1996).

Personal injury. In Tennessee, there is a one (1) year statute of limitation for personal tort actions. *See* TENN. CODE ANN. §§ 28-3-104(a)(1), (3).

Wrongful death. Under Tennessee law, "actions . . . for injuries to person . . . shall be commenced within one (1) year after cause of action accrued." TENN. CODE ANN. § 28-3-104(a)(1). A cause of action for wrongful death accrues as of the date a cause of action for the injury which resulted in the death. Note that the discovery rule states that the statute of limitation commences to run when the injury occurs or is discovered, or when in the exercise of reasonable care and diligence, it should have been discovered. McCroskey v. Bryant Air Conditioning Co.,, 524 S.W.2d 487, 491 (Tenn. 1975).

Property damage. Under TENN. CODE ANN. § 28-3-105, there is a three (3) year statute of limitation for property damage. *See* Prescott v. Adams, 627 S.W.2d 134, 137 (Tenn. Ct. App. 1981) ("[S]ince the gravamen of the complaint . . . is for damage to real property, . . . all of the theories advanced by the plaintiffs are governed by the three year statute of limitations.").

Bad faith claims against insurer. Tennessee does not recognize a general common law tort for bad faith by an insurer against an insured; the exclusive remedy is statutory. Wynne v. Stonebridge Life Ins. Co., 694 F. Supp. 2d 871, 879 (W.D. Tenn. 2010). Any claims of bad faith, therefore, must be brought pursuant to Tennessee's bad faith statute, TENN. CODE ANN. § 56-7-105. *Id.* TENN. CODE ANN. § 28-3-104(a)(4) provides a one-year statute of limitations period applicable to "actions for statutory penalties." The bad faith statute is penal in nature. *See* Ginn v. Am. Heritage Life Ins. Co., 173 S.W.3d 433, 443 (Tenn. Ct. App. 2004). The one-year statute of limitations for bad faith claims against an insurer begins to run on the date the insurer denied the claim. *See Wynne*, 694 F. Supp. 2d at 879. Before filing suit under the bad faith statute, a plaintiff must make a formal demand of payment upon the insurer and must then wait 60 days after such demand before filing suit. TENN. CODE ANN. § 56-7-105(a); *Ginn*, 173 S.W.3d at 443. Tennessee courts have not currently recognized any circumstances under which the one-year limitations period would be extended; however, a good faith argument could be made that the period should be extended if the 60-day waiting period would lapse after the limitations period would have lapsed.

C. Time for Filing An Answer

Rule 12.01 of the Tennessee Rules of Civil Procedure requires that the defendant serve an answer within 30 days after being served with summons and complaint, and also allows the plaintiff 30 days in which to serve an answer to a counterclaim or a reply if one is required. If the defendant fails to plead, the plaintiff may take a judgment by default, as provided by Tennessee and Federal Rule 55.

D. Dismissal Re-Filing of Suit

Nonsuit Available. TENN. R. CIV. P. 41.01(1), subject to at least five exceptions, gives a plaintiff, without seeking leave of the court or consent of any other party, the right to

take a voluntary nonsuit, without prejudice. The five exceptions to which this virtually unlimited right of the plaintiff to take a voluntary nonsuit is subject are as follows:

(1) if suit is brought as a class action;
(2) if a receiver has been appointed;
(3) when the plaintiff is precluded from doing so by statute;
(4) when a motion for summary judgment by an adverse party is pending; and
(5) when the granting of the nonsuit would deprive the defendant of some right that became vested during the pendency of the action.

The first, second, and fourth exceptions are created by the text of Rule 41.01. The third is supported by Supreme Court dicta in *Stewart v. University of Tennessee*, 519 S.W.2d 591, 592–93 (Tenn. 1974). The fifth exception was added by the Supreme Court in *Anderson v. Smith*, 521 S.W.2d 787 (Tenn. 1975). To this list should also be added cases in which a compulsory counterclaim is pending. Once a party has dismissed a claim that arises from the same transaction or occurrence as a pending counterclaim, the dismissed claim becomes an unasserted compulsory counterclaim to the still-pending claim that was formerly a counterclaim. *See, e.g.*, Clements v. Austin, 673 S.W.2d 867, 868–69 (Tenn. Ct. App. 1983).

Limitations on Nonsuit. The most significant limitation on the right of voluntary nonsuit imposed by Rule 41.01 is that it limits a plaintiff to two voluntary nonsuits. When a plaintiff has previously, in any court, dismissed two actions based on the same claim or including the same claim, a third dismissal operates as an adjudication on the merits. *See* Stroupe v. Bacon,, 1997 WL 600146, at *5–7 (Tenn. Ct. App. Sept. 30, 1997). It is also important to note that this right to voluntary dismissal without prejudice does not override any applicable statute of limitations. Whether a re-filed action is barred by the statute of limitations is determined by the applicable statute of limitations and savings statute, if any, and not by Rule 41.01. For example, the one-year savings clause of TENN. CODE ANN. § 28-1-105(a) begins to run from the time of the first voluntary nonsuit and continues even though there is an intervening second dismissal. *See, e.g.*, Creed v. Valentine, 967 S.W.2d 325, 326 (Tenn. Ct. App. 1997).

Procedure. Under Rule 41, a nonsuit before trial is accomplished when the plaintiff files a written notice of dismissal, but during trial, it is accomplished by an oral notice in open court. Snell v. Leffew, 558 S.W.2d 849 (Tenn. Ct. App. 1977). A voluntary nonsuit to dismiss an action without prejudice must be followed by an order of voluntary dismissal signed by the court and entered by the clerk. The date of entry of the order will govern the running of pertinent time periods. TENN. R. CIV. P. 41.01(3).

Liability

A. Negligence

In *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992), the Tennessee Supreme Court abolished contributory negligence and adopted modified comparative fault. Comparative fault is an affirmative defense under the Rule 8.03 of the Tennessee Rules of Civil Procedure. Plaintiff must be less than fifty percent at fault. In modified comparative fault jurisdictions, a plaintiff is barred from recovery if he is fifty percent at fault. The plaintiff is not barred from recovery if he is less than fifty percent at fault, though his recovery will be reduced in proportion to his degree of fault. Comparative fault principles also apply in apportioning damages between a plaintiff and a defendant in product liability actions based on strict liability. Whitehead v. Toyota Motor Corp., 897 S.W.2d 684 (Tenn. 1995). In cases of multiple tortfeasors, plaintiff will be entitled to recover so long as plaintiff's fault is less than the combined fault of all tortfeasors. McNabb v. Highways, Inc., 98 S.W.3d 649 (Tenn. 2003).

B. Negligence Defenses

Assumption of Risk. The Tennessee Supreme Court, subsequent to its adoption of comparative fault in *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992), abolished the doctrine of implied assumption of risk as a complete bar to recovery because the types of issues raised by implied assumption of risk are readily susceptible to analysis in terms of the common-law concept of duty and the principles of comparative negligence law." Perez v. McConkey, 872 S.W.2d 897, 905 (Tenn. 1994). The doctrine "no longer ha[s] any independent existence, and thus cannot be invoked to completely bar recovery by the plaintiff." Eaton v. McLain, 891 S.W.2d 587, 592 (Tenn. 1994). The principles of assumption of risk, however, "are still to be considered by the jury in apportioning fault" under the system of comparative negligence. *Id.* Although it abolished the independent doctrine of implied assumption of risk, the Tennessee Supreme Court did not eliminate the contractually-oriented principle of express assumption of risk "primarily because it has never been used to refer to various, distinct, and overlapping legal concepts." *Perez*, 872 S.W.2d at 905–06.

Last Clear Chance Doctrine. The last clear chance doctrine once enabled a plaintiff to recover despite his or her contributory negligence. However, in Tennessee, many traditional, common-law tort concepts lost their independent existence after the Supreme Court embraced the doctrine of comparative fault in *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992). Thus, subsequent to the *McIntyre* decision, the last clear chance doctrine has been merged into the comparative fault scheme and is simply a factor to consider when apportioning fault among the parties. Eaton v. McLain, 891 S.W.2d 587, 592 (Tenn. 1994).

Unavoidable Accident. Tennessee has long recognized the doctrine of unavoidable accident. Nelson v. Richardson, 626 S.W.2d 702 (Tenn. Ct. App. 1981). An unavoidable accident has been defined as an event that, "under all attendant circumstances and conditions, could not have been foreseen or anticipated in the exercise of ordinary care as the proximate cause of injury by any of the parties concerned." Whitaker v. Harmon, 879 S.W.2d 865, 870 (Tenn. Ct. App. 1994). Since the adoption of comparative fault in Tennessee, however, a jury instruction on the

doctrine of unavoidable accident has become, in large part, unnecessary. *Id.* at 869. In *Whitaker*, the court stated, an "'unavoidable accident' in its simplest terms is nothing more than a lack of negligence on the part of any party." *Id.* Further, the *Whitaker* court stated, an "adequate instruction on negligence alone is sufficient and an 'unavoidable accident' charge is unnecessary except in, perhaps, the most unusual circumstance." *Id.* It has been ruled, however, that a plaintiff was not prejudiced by the giving of an unavoidable accident instruction in a negligence suit, where instructions as a whole thoroughly and fairly defined legal principles respecting comparative fault. Ricketts v. Robinson, 169 S.W.3d 642, 647 (Tenn. Ct. App. 2004).

Emergency Situation. The Tennessee Supreme Court has ruled that the sudden emergency doctrine has been "implicitly subsumed" by its adoption of comparative fault in in *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992). Eaton v. McLain, 891 S.W.2d 587, 592 (Tenn. 1994). Rather than existing independently, the principles of the emergency doctrine "should . . . impact the jury's apportionment of fault between the parties in an appropriate case." *Id.*

C. Gross Negligence, Recklessness, Willful and Wanton Conduct

Gross Negligence. In order to prevail on a claim of gross negligence, a plaintiff must first establish that the defendant engaged in conduct that amounts to ordinary negligence. Thrasher v. Riverbend Stables, LLC, 2009 WL 275767, at *4 (Tenn. Ct. App. 2009) (citing Menuskin v. Williams, 145 F.3d 755, 766 (6th Cir.1998)). Gross negligence is defined as "a conscious neglect of duty or a callous indifference to consequences" or "such entire want of care as would raise a presumption of a conscious indifference to consequences." Buckner v. Varner, 793 S.W.2d 939, 941 (Tenn. Ct. App. 1990) (citing Thomason v.. Wayne Cnty., 611 S.W.2d 585 (Tenn. Ct. App. 1980); Sampley v. Aulabaugh, 589 S.W.2d 666 (Tenn. Ct. App.1979)). For purposes of comparative fault analysis, gross negligence is not treated in the same way as intentional conduct. Accordingly, negligent acts that might have previously been denominated as "gross" can be compared with other negligent acts within the context of relative fault. Conroy v. City of Dickson, 49 S.W.3d 868 (Tenn. Ct. App. 2001).

Recklessness. In Tennessee, a court may award punitive damages only if it finds a defendant has acted either (1) intentionally, (2) fraudulently, (3) maliciously, or (4) recklessly. Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992). A person acts recklessly "when the person is aware of, but consciously disregards, a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances." *Id.* (adopting the criminal definition of "reckless" from TENN. CODE ANN. § 39-11-302(c) (1991)). This same definition of recklessness has frequently be used in negligence cases not involving a request for punitive damages. *See, e.g.*, Gardner v. Insura Prop. & Cas. Ins. Co., 956 S.W.2d 1, 3 (Tenn. Ct. App. 1997) (applying the *Hodges* definition to an action for damages for personal injuries suffered in a motor vehicle accident).

Willful and Wanton Conduct. Early Tennessee case law provided a clear definition of the term "willful and wanton" conduct. In *Schenk v. Gwaltney*, 309 S.W. 2d 424 (Tenn. Ct. App. 1957), the court adopted language from several jurisdictions to define the concept:

> In determining what constitutes a 'willful' or 'wanton act', we subscribe to the view that . . . it [is] sufficient if …the defendant intentionally acted in such a way that the natural and probable consequences of his act was [to] inju[re] the plaintiff. . . . To hold one guilty of 'willful' or 'wanton' conduct, it must be shown that he was conscious of his conduct and with knowledge of existing conditions that injury would probably result, and with reckless indifference to consequences, he consciously and intentionally did some wrongful act or omitted some duty which produced the injuries.

Id. at 432 (internal citations omitted). More recently, in *Fults v. Hastings*, 1988 WL 54306 (Tenn. Ct. App. 1988), the court outlined three fundamental categories of negligence including "(1) no negligence, (2) ordinary negligence, and (3) gross negligence." *Id*. at *3. The court noted that "[s]ome authorities recognize further classifications designated as 'willful or wanton conduct' . . . [this] special classification may be grouped with one or more of the three fundamental classes." *Id*. Thus, while Tennessee does not have an independent tort of willful and wanton conduct, case law indicates that such conduct likely falls somewhere within the realm of gross negligence and recklessness.

D. Negligent Hiring and Retention

Elements. Tennessee courts recognize the negligence of an employer in the selection and retention of employees and independent contractors. *See, e.g.*, Marshalls of Nashville, Tenn., Inc. v. Harding Mall Assocs., Ltd., 799 S.W.2d 239, 243 (Tenn. Ct. App. 1990). An employer must exercise the degree of care commensurate with the nature and danger of the business in which he is engaged. Gates v. McQuiddy Office Prods., 1995 WL 650128, at *1 (Tenn. Ct. App. Nov. 2, 1995) (citing Wishon v. Yellow Cab Co., 97 S.W.2d 452 (Tenn. Ct. App. 1936)). A plaintiff in Tennessee may recover for negligent hiring, supervision or retention of an employee if he establishes, in addition to the elements of a negligence claim, that the employer had knowledge of the employee's unfitness for the job. Doe v. Catholic Bishop for Diocese of Memphis, 306 S.W.3d 712, 717 (Tenn. Ct. App. 2008). In other words, the defendant would be liable only if it could first be shown that he had reason to know their employees did not possess the skill and expertise required in the profession and hired and retained the employees anyway. Shuler v. McGrew, 2012 WL 3260685, at *9 (W.D. Tenn. Aug. 8, 2012). A showing of past criminal conduct on the part of an employee is insufficient for a claim of negligent hiring or retention. *Gates*, 1995 WL 650128, at *2. There must be

> (1) evidence of unfitness for the particular job, (2) evidence that the applicant for employment, if hired, would pose an unreasonable risk to others, (3) evidence that the prospective employee knew or should have known that the historical criminality of the applicant would likely be repetitive.

Id.

Not duplicative if agency admitted. In Tennessee, a plaintiff can bring a claim for direct liability against an employer for negligent hiring and retention separate from any claim of vicarious liability based upon an agency relationship between the employer and employee. Doe v. Catholic Bishop for Diocese of Memphis, 306 S.W.3d 712, 717 (Tenn. Ct. App. 2008).

E. Negligent Entrustment

Elements. Tennessee courts recognize negligent entrustment claims. The cause of action has four elements: (1) an entrustment of a chattel (2) to a person incompetent to use it, (3) with knowledge that the person is incompetent, and (4) that it is the cause-in-fact and legal cause of injury or damage to another. Woodson v. Porter Brown Limestone Co., 916 S.W.2d 896, 907 (Tenn. 1996). Tennessee courts have recognized the tort of negligent entrustment in cases where automobiles or firearms have been supplied to incompetent users. *See* Nichols v. Atnip, 844 S.W.2d 655 (Tenn. Ct. App. 1992). While negligent entrustment claims usually arise in the context of a bailment, it is now widely agreed that the merchants may be considered to be suppliers of chattels. Rains v. Bend of the River, 124 S.W.3d 580, 597 (Tenn. Ct. App. 2003).

Relationship to comparative fault. In cases of negligent entrustment, a jury must allocate the fault between the defendants as provided in *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992), under the system of comparative fault. Allocation of fault by the jury between the entrustor and the entrustee is entirely consistent with the principal goal of *McIntyre*—to link one's liability to one's degree of fault in causing harm. Ali v. Fisher, 145 S.W.3d 557, 564 (Tenn. 2004).

Not duplicative if agency admitted. A claim for negligent entrustment is not duplicative when agency is admitted because Tennessee courts recognize that the tort of negligent entrustment does not create vicarious liability. *Ali*, 145 S.W.3d at 564–65. Negligent entrustment and vicarious liability are separate and distinct concepts. For example, a Tennessee court has stated that an automobile owner's liability "does not rest on imputed negligence but is based on his own negligence in entrusting his automobile to an incompetent driver. Mathis v. Stacy, 606 S.W.2d 290, 292 (Tenn. Ct. App. 1980) (ruling "[t]he issue of the owner's negligence is . . . independent from the issue of the driver's negligence"). Similarly in *Harper v. Churn*, 83 S.W.3d 142 (Tenn. Ct. App. 2001), the court did not treat negligent entrustment as a theory of vicarious liability. *Id.* at 146–48.

F. Dram Shop

The Tennessee General Assembly has declared "that the consumption of any alcoholic beverage or beer rather than the furnishing of any alcoholic beverage or beer is the proximate cause of injuries inflicted upon another by an intoxicated person." TENN.

CODE ANN. 57-10-101. There are, however, two statutory exceptions where someone who has sold any alcoholic beverage or beer may face civil liability to a third party:

> (1) Sold the alcoholic beverage or beer to a person known to be under the age of twenty-one (21) years and such person caused the personal injury or death as the direct result of the consumption of the alcoholic beverage or beer so sold; or
>
> (2) Sold the alcoholic beverage or beer to a visibly intoxicated person and such person caused the personal injury or death as the direct result of the consumption of the alcoholic beverage or beer so sold.

TENN. CODE ANN. 57-10-102. In relying upon either of these exceptions, a plaintiff must prove "beyond a reasonable doubt that the sale by such person of the alcoholic beverage or beer was the proximate cause of the personal injury or death sustained. *Id.*

Tennessee courts have narrowly construed these two statutes. For example, the statutory exceptions are limited to those circumstances where actual sales of alcohol are involved. Biscan v. Brown, 160 S.W.3d 462, 472–73 (Tenn. 2005). Consequently, if a person or vendor furnishes but does not sell alcohol to others, that person is shielded from liability. Further, sellers are shielded from liability in situations where the intoxicated person was not in the seller's establishment when the sale of the alcohol occurred and have no control over who consumes the alcoholic beverage after the product leaves the premises. Worley v. Weigels, Inc., 919 S.W.2d 589 (Tenn. 1996).

G. Joint and Several Liability

General principles. Tennessee's adoption of comparative fault in *McIntyre v. Balentine*, "render[ed] the doctrine of joint and several liability obsolete." *See* McIntyre v. Balentine, 833 S.W.2d 52, 58 (Tenn. 1992). As a matter of policy, the court noted that "[h]aving thus adopted a rule more closely linking liability and fault, it would be inconsistent to simultaneously retain a rule, joint and several liability, which may fortuitously impose a degree of liability that is out of all proportion to fault." *Id*. Where the separate, independent negligent acts of more than one tortfeasor combine to cause a single, indivisible injury, each tortfeasor will be liable only for that proportion of the damages attributable to its fault and when the liability is based on negligence, each of the defendants is severally liable only for the percentage of damages caused by its negligence. Owens v. Truckstops of Am., 915 S.W.2d 420, 430, 433 (Tenn. 1996).

Exceptions. Despite the Tennessee Supreme Court's decision in *McIntyre*, two exceptions to the abolition of joint and several liability exist. First, in an action for damages in which the tortfeasors act collectively, the defendants can be jointly and severally liable. Resolution Trust Corp. v. Block, 924 S.W.2d 354, 357 (Tenn. 2001). Second, if a defendant negligently fails to prevent foreseeable intentional conduct by another defendant, the defendants will be jointly and severally liable. Limbaugh v. Coffee Med. Ctr., 59 S.W.3d 73, 87 (Tenn. 2001).

Contribution. In cases where joint and several liability still applies, contribution can be obtained from other tortfeasors in proportion to their relative fault. TENN. CODE ANN. § 29-11-102.

Absent tortfeasor. Where the separate, independent negligent acts of more than one tortfeasor combine to cause a single, indivisible injury, all tortfeasors must be joined in the same action, unless joinder is specifically prohibited by law. Samuelson v. McMurty, 962 S.W.2d 473, 476 (Tenn. 1998). A defendant may not attribute fault to a non-party who is not identified sufficiently to allow the plaintiff to plead and serve process on such person. Brown v. Wal-Mart Discount Cities, 12 S.W.3d 785 (Tenn. 2000). To allow a defendant to attribute fault to an unidentified non-party would not only diminish a defendant's incentive to identify additional tortfeasors, but also would effectively impose a burden on the plaintiff to "defend" the unidentified nonparty. *Id.*

Settlement. A plaintiff's settling with one co-defendant under the comparative fault doctrine, which generally abolished joint and several liability, does not establish a basis for dismissal as to the remaining defendant(s). McNabb v. Highways, Inc., 98 S.W.3d 649, 655 (Tenn. 2003). The mere possibility that a plaintiff may, by settling with some defendants, receive more than his or her actual damages does not change the fact that non-settling defendants are obligated to pay damages based on the percentage of their fault. Williams Holding Co. v. Willis, 166 S.W.3d 707 (Tenn. 2005).

H. Wrongful Death and/or Survival Actions

Survival actions. At common law, every suit whether based on contract or tort abated by the death of either party to the suit. In Tennessee, survivability of a cause of action depends upon state survival statutes. A survival statute creates no new cause of action; rather, the Tennessee common law has been modified merely to preserve the cause of action upon the death of the injured party. In Tennessee, a statute provides: "Actions do not abate by the death or other disability of either party, or by the transfer of any interest in the action, if the cause of action survives or continues." TENN. CODE ANN. 20-5-101. Another statute provides:

> No civil action commenced, whether founded on wrongs or contracts, except actions for wrongs affecting the character of the plaintiff, shall abate by the death of either party, but may be revived; nor shall any right of action arising hereafter based on the wrongful act or omission of another, except actions for wrongs affecting the character, be abated by the death of the party wronged; but the right of action shall pass in like manner as the right of action described in § 20-5-106.

TENN. CODE ANN. § 20-5-102. These statutes permit the decedent's cause of action to survive the death, so that the decedent, through his or her estate, recovers damages that would have been recovered by the decedent had he or she lived to the resolution of the case. *See* Jordan v. Baptist Three Rivers Hosp., 984 S.W.2d 593, 597 (Tenn. 1999). An almost identical Tennessee statute exists for situations where the party committing the wrongful act dies before the suit is initiated. TENN. CODE ANN. § 20-5-

103. In such a situation, the cause of action may be prosecuted against the personal representative of the decedent.

Who can sue. Rather than abating, the cause of action passes to the person's surviving spouse and, in case there is no surviving spouse, to the person's children or next of kin. TENN. CODE ANN. § 20-5-106 to -107. Besides these parties, the cause of action may be instituted by the personal representative of the deceased. TENN. CODE ANN. § 20-5-107. The surviving spouse's right to institute and to collect from an action is waived if the children or next of kin establish the surviving spouse abandoned the deceased for a period of two years. *Id.*

Wrongful death actions. Tennessee's wrongful death statutes, TENN. CODE ANN. §§ 20-5-106 to -113, are also survival statutes. They are distinguished, however, from Tennessee's other survival statutes discussed above because, in addition to preserving whatever cause of action was vested in the decedent at the time of death, they also create a new cause of action that compensates survivors of the decedent for their losses. Timmins v. Lindsey, 310 S.W.3d 834, 841 (Tenn. Ct. App. 2009). The persons who can sue under Tennessee's wrongful death statutes are the same ones listed above pursuant to TENN. CODE ANN. § 20-5-106 and -107.

I. Vicarious Liability

Respondeat superior. The doctrine of vicarious liability continues to be viable after the Tennessee Supreme Court's adoption of comparative fault in *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992). Browder v. Morris, 975 S.W.2d 308, 312 (Tenn. 1998). It still applies, for example, where liability attaches under respondeat superior. *Id.*

In the typical case involving the doctrine of respondeat superior, an employer may be held liable for the torts committed by his or her employees while performing duties within the scope of employment. *See, e.g.*, Howard v. Haven, 281 S.W.2d 480, 484–85 (Tenn. 1955); Tenn. Farmers Mut. v. Am. Mut., 840 S.W.2d 933, 937 (Tenn. Ct. App. 1992). Agency theory, by way of contrast, recognizes that vicarious liability may properly arise under some situations even outside the scope of private employment. *See* Parker v. Warren Cnty. Util. Dist., 2 S.W.3d 170, 177 (Tenn. 1999). In order to impose liability under respondeat superior, it is necessary to show that the operator of a vehicle causing injury was, at the time of the accident, acting as a servant or employee of the owner, was engaged in the employer's business, and was acting within the scope of his employment. *See* Hamrick v. Spring City Motor Co., 708 S.W.2d 383, 386 (Tenn. 1986).

Agency. The doctrine of vicarious liability continues to be viable after the Tennessee Supreme Court's adoption of comparative fault in *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992). Browder v. Morris, 975 S.W.2d 308, 312 (Tenn. 1998). It still applies, for example, in circumstances where liability is vicarious due to an agency-type relationship between the active, or actual, wrongdoer and the one who is vicariously responsible. *Id.*

The concept of agency "includes every relation in which one person acts for or represents another." Kerney v. Aetna Cas. & Sur. Co., 648 S.W.2d 247, 253 (Tenn. Ct. App. 1982). An agency relationship does not require an explicit agreement, contract, or understanding between the parties, Warren v. Estate of Kirk, 954 S.W.2d 722, 725 (Tenn. 1997), and when "the facts establish the existence of an agency relationship, it will be found to exist whether the parties intended to create one or not." Harben v. Hutton, 739 S.W.2d 602, 606 (Tenn. Ct. App. 1987). Important in the concept of agency is that a principal is generally "bound by its agent's acts done in its behalf and within the actual or apparent scope of the agency." V.L. Nicholson Co. v. Transcon Inv. & Fin. Ltd., 595 S.W.2d 474, 483 (Tenn. 1980). The focus of this inquiry, however, is placed upon the actions and consent of the principal, rather than upon the agent's actions or the willingness of the agent to perform those actions. Haury & Smith Realty Co. v. Piccadilly Partners I, 802 S.W.2d 612, 615 (Tenn. Ct. App. 1990). Indeed, a principal may be held liable for an agent's tortious act, even if that act occurs outside of the scope of the agency, if the act was commanded or directed by the principal. *See* Kinnard v. Rock City Constr. Co., 286 S.W.2d 352, 354 (Tenn. 1955). Tennessee law does not impose vicarious liability when the agent is not subject to individual liability. Quality Tech. Co. v. Stone & Webster's Eng'g Co., 745 F. Supp. 1331 (E.D. Tenn. 1989).

Strict placard liability. There is no Tennessee case law specifically on point regarding the application of strict placard liability and, thus, there is uncertainty whether vicarious placard—or logo—liability is applicable in Tennessee. At least one Tennessee court, has endorsed the case law from other jurisdictions which holds a motor carrier liable under a theory of vicarious liability where its name and ICC number appear on a vehicle when an accident occurs despite whose business the vehicle may be on at the time. *See* Roadrunner Trucking, Inc. v. Howard Trucking Co., Inc., 1990 WL 19652, at *5 (Tenn. Ct. App. Mar. 6, 1990). The facts before the court were distinguishable from those cases because its case was one for indemnity rather than one involving an injured third party. *Id.* The court, however, stated that the cases to which plaintiff cited regarding strict placard liability "clearly apply to third party action." *Id.* This seems to be a hint that Tennessee courts may apply placard liability if confronted with the proper facts.

Under dispatch. In Tennessee there are neither statutes nor case law discussing the vicarious liability doctrine of "under dispatch."

Presumption of agency if ownership proven. Proof of ownership of a vehicle raises a presumption of owner-driver agency pursuant to TENN. CODE ANN. § 55-10-311. It is well-settled in Tennessee that the presumption of owner–driver agency created by ownership of a vehicle under TENN. CODE ANN. § 55-10-311 can be rebutted by credible proof that the driver was in fact operating the vehicle without authority of the owner. Ferguson v. Tomerlin, 656 S.W.2d 378, 381–82 (Tenn. Ct. App. 1983).

Independent contractor law. The mere placing of terms such as "agent" or "independent contractor" in a contract does not make them such in law, but the

surrounding facts and circumstances determine the relationship. United States v. Boyd, 363 S.W.2d 193 (Tenn. 1962). In determining whether the relationship is that of employer–employee or that of independent contractor, the Tennessee Supreme Court has stated that the following are factors to be considered and that no one factor is necessarily dispositive: (1) right to control the conduct of work; (2) right of termination; (3) method of payment; (4) whether alleged employee furnished his own helpers; and (5) whether alleged employee furnishes his own tools. Carver v. Sparta Elec. Syst., 690 S.W.2d 218, 220 (Tenn. 1985). Although no single fact is necessarily dispositive, the Supreme Court has repeatedly emphasized the importance of the right to control. Jones v. Crenshaw, 645 S.W.2d 238 (Tenn. 1983). Further, the right to terminate a contract at will is indicative of an employee–employer relationship. Masiers v. Arrow Transfer and Storage Co., 639 S.W.2d 654, 656 (Tenn. 1982). A principal is generally not liable for the tortious acts of an independent contractor. *See, e.g.*, Givens v. Mullikin ex rel. McElwaney, 75 S.W.3d 383, 394 (Tenn. 2002). The exceptions to the rule in general are: (1) Where the act contracted to be done is wrongful or tortious in itself; (2) where the thing to be done or the manner of its execution involves a duty to the public incumbent upon the employer; (3) when the work contracted for is intrinsically dangerous; (4) where the proprietor interferes with the contractor in the performance of the work; and (5) where the employer is independently negligent in engaging an incompetent contractor.

J. Exclusivity of Workers' Compensation

Exclusive remedy. One of the fundamental purposes of the Tennessee Workers' Compensation Law ("TWCL"), TENN. CODE ANN. § 50-6-101 *et seq.*, is to compensate employees for work-related injuries irrespective of fault. *See* TENN. CODE ANN. § 50-6-103(a). However, in exchange for no-fault recovery, employees have limited recovery and relinquish certain common law rights of action against their employers which they might otherwise have had. Lang v. Nissan N. Am., Inc., 170 S.W.3d 564 (Tenn. 2005). A delicate compromise between the interests of employers and employees thus lies at the heart of workers' compensation law. *See* Clanton v. Cain–Sloan Co., 677 S.W.2d 441, 443 (Tenn. 1984). In order to preserve this balance, workers' compensation law "constitutes a complete substitute for previous remedies in tort on the part of an employee." Liberty Mut. Ins. Co. v. Stevenson, 368 S.W.2d 760, 762 (Tenn. 1963). Consequently, with few exceptions workers' compensation law is the exclusive remedy for the work-related injuries which fall under its scope. *See* TENN. CODE ANN. § 50–6–108(a) (1999); *Liberty Mut. Ins. Co.*, 368 S.W.2d at 762.

Exceptions to exclusivity. Tennessee courts have created an exception to the exclusivity provision for intentional torts committed by the employer against an employee. Valencia v. Freeland Lemm Constr. Co., 108 S.W.3d 239 (Tenn. 2003). These torts give rise to a common law tort action for damages. *Id.* To take advantage of this exception, an employee–plaintiff must allege "actual intent" upon the part of the employer and allegations of gross or criminal negligence fall short of alleging actual intent to injure. *See* King v. Ross Coal Co., 684 S.W.2d 617, 619 (Tenn. Ct. App.

1984). This is the "only exception" to the exclusive remedy provision. Morris v. Johns Manville Int'l, Inc., 2010 WL 3825867, at *6 (E.D. Tenn. Sept. 24, 2010).

Suit between employees. TWCL is the exclusive remedy of an employee, except where his injury is proximately caused by a third party. *See* TENN. CODE ANN. § 50–6–112. Neither TENN. CODE ANN. § 50–6–108 nor TENN. CODE ANN. § 50–6–112(a) explicitly bars common law or statutory actions brought against co-employees. While § 50–6–108 declares the compensation laws are the exclusive remedy of the injured worker, § 50–6–112(a) preserves common law and statutory causes of action "[w]hen the injury . . . for which compensation is payable under the Workers' Compensation Law was caused under circumstances creating a legal liability against some person other than the employer." In interpreting § 50–6–112(a), Tennessee courts have held that a co-employee who, while acting within the course of his employment, causes an injury through his negligence is not "some person other than the employer." Taylor v. Linville, 656 S.W.2d 368, 370 (Tenn. 1983). However, when an employee is injured by a co-employee who intentionally inflicts injuries upon him, the employee–victim may maintain a common law action against his co-employee. *Id.* Similarly, where the injury is caused by an employee acting outside the scope of his employment, then the injured employee may properly maintain an action against his fellow employee. *Id.* Under these circumstances, an employee may take compensation under TWCL and pursue his remedy against his co-employee, and subrogation is afforded the employer to the extent of that recovery. This right of subrogation is a right that vests in every insurance company that pays benefits to an injured worker and attaches as a matter of statutory law to the recovery of the injured worker against tortfeasors. Aetna Cas. & Sur. Co. v. Gilreath, 625 S.W.2d 269 (Tenn. 1981).

Damages

A. Statutory Caps on Damages

Economic and non-economic damages. Damages in the area of personal injury are generally divided into two categories: economic and non-economic. The plaintiff may claim economic damages, such as loss of earning capacity, medical expenses, and future medical expenses. *See* Mercer v. Vanderbilt Univ., Inc., 134 S.W.3d 121, 131-32 (Tenn. 2004). The plaintiff may also claim non-economic damages for pain and suffering, permanent impairment, disfigurement, and loss of enjoyment of life, both past and future. Palanki ex rel. Palanki v. Vanderbilt Univ., 215 S.W.3d 380, 388 (Tenn. Ct. App. 2006). The distinction between economic and non-economic damages is important for purposes of the statutory caps under the Tennessee Civil Justice Act of 2011.

Tennessee Civil Justice Act of 2011. Effective October 1, 2011, the Tennessee Civil Justice Act of 2011 was enacted to cap jury awards of non-economic and punitive damages. Non-economic damages in personal injury and medical malpractice actions are capped at $750,000. TENN. CODE ANN. § 29-39-102(a)(2). The cap is increased to $1,000,000 for catastrophic injuries such as spinal cord injuries, amputation, third degree burns over 40% of the body, or wrongful deaths of a parent leaving a surviving

minor child. TENN. CODE ANN. 29-39-102(c) and (d). The cap is not applied in a case where the defendant intended to inflict serious physical injury, the defendant altered or destroyed records with the purpose of avoiding or evading liability, or the defendant's judgment was substantially impaired by alcohol or drugs. TENN. CODE ANN. § 29-39-102(h). The limitation of the amount of damages is not to be disclosed to the jury but is applied by the court to any award. TENN. CODE ANN. § 29-39-102(g). The constitutional validity of this Act has yet to be addressed by the Tennessee appellate courts.

Tennessee Governmental Tort Liability Act ("GTLA"). GTLA directs the manner in which governmental entities can be sued. GTLA states that all governmental entities are immune from suit except where otherwise provided within the GTLA. TENN. CODE ANN. § 29-20-201(a). This immunity protects governmental entities from suits arising from the exercise and discharge of any of the entity's functions, whether governmental or proprietary. *Id.* In addition, for suits that are allowed, the relevant liability of a governmental entity is capped at $130,000.00 per individual and $350,000.00 per "accident, occurrence, or act." TENN. CODE ANN. § 29-20-403(b)(2)(A).

B. Compensatory Damages for Bodily Injury

Recoverable damages. In Tennessee, a plaintiff bringing a cause of action for personal injuries may recover the following compensatory damages if proven by a preponderance of the evidence: (1) physical pain and mental suffering; (2) permanent injury (3) disfigurement; (4) loss of enjoyment of life; (5) medical expenses; (6) loss of earning capacity; (7) aggravation of pre-existing condition; and (8) loss of business profits. Tennessee Pattern Jury Instructions 14.01, 14.14, 14.15.

Pain and Suffering. Tennessee courts note that "[p]ain and suffering encompasses the physical and mental discomfort caused by an injury. It includes the 'wide array of mental and emotional responses' that accompany the pain, characterized as suffering; such as anguish, distress, fear, humiliation, grief, shame, or worry." Overstreet v. Shoney's, Inc., 4 S.W.3d 694, 715 (Tenn. Ct. App. 1999) (internal citations omitted).

Permanent Injury. A permanent injury is an injury that the plaintiff must live with for the rest of the plaintiff's life that may result in inconvenience or the loss of physical vigor. Damages for permanent injury may be awarded whether or not it causes any pain or inconvenience. Tennessee courts reason that "[a] permanent injury differs from pain and suffering in that it is an injury from which the plaintiff cannot completely recover." See Overstreet v. Shoney's, Inc., 4 S.W.3d 694, 715 (Tenn. Ct. App. 1999). This permanent injury leads to future pain and suffering which is a distinct element of personal injury damages.

Disfigurement. Tennessee courts reason that "[d]isfigurement is a specific type of permanent injury that impairs a plaintiff's beauty, symmetry, or appearance. Permanent injury may relate to earning capacity, pain, impairment of physical function or loss of the use of a body part, to a mental or psychological impairment." Overstreet v. Shoney's, Inc., 4 S.W.3d 694, 715 (Tenn. Ct. App. 1999) (citing Kerr v. Magic Chef, Inc., 793 S.W.2d 927, 929 (Tenn. 1990)).

Loss of Enjoyment of Life. Tennessee courts have "historically recognized loss of enjoyment of life as a distinct category of damages in personal injury cases." Lawrence v. Town of Brighton, 1998 WL 749418, at *5 (Tenn. Ct. App. 1998). Courts reason that

> [d]amages for loss of enjoyment of life compensate the injured person for the limitations placed on his or her ability to enjoy the pleasures and amenities of life. . . . The policy underlying the award of loss of enjoyment damages is of making the victim whole in the only way a court can-with an equivalent in money for each loss suffered.

Overstreet v. Shoney's, Inc., 4 S.W.3d 694, 715–16 (Tenn. Ct. App. 1999).

Medical Expenses. In Tennessee, "proof in any civil action that medical, hospital or doctor bills were paid or incurred because of any illness, disease, or injury may be itemized in the complaint or civil warrant with a copy of bills paid or incurred attached as an exhibit to the complaint or civil warrant." TENN. CODE ANN. § 24-5-113(a)(1)-(3) (2008). Under TENN. CODE ANN. § 24-5-113(a), plaintiffs are not forced to bring in expert medical proof of reasonableness and necessity where "the total amount of such bills does not exceed the sum of four thousand dollars ($4,000.00)." The injured party's future medical expenses are an element of damages in personal injury actions. See Newman v. Aluminum Co. of Am., 643 S.W.2d 109, 111 (Tenn. Ct. App. 1982).

Loss of Earning Capacity. Loss of earning capacity "is an element of damages in personal injury actions." Overstreet v. Shoney's, Inc., 4 S.W.3d 694, 703 (Tenn. Ct. App. 1999) (citing Wolfe v. Vaughn, 152 S.W.2d 631, 635 (1941)). Accordingly, evidence concerning lost income, wages and earnings would be relevant in a personal injury action. Mercer v. Vanderbilt Univ., Inc., 134 S.W.3d 121, 132 (Tenn. 2004).

Aggravation of Pre-Existing Condition. A person who has a condition or disability at the time of an injury is entitled to recover damages only for any aggravation of the pre-existing condition. Recovery is allowed even if the pre-existing condition made plaintiff more likely to be injured and even if a normal, healthy person would not have suffered substantial injury.

Loss of Business Profits. A plaintiff who is in a personal business may recover damages for profits lost as a direct result of plaintiff's inability, because of injury, to devote personal skill, talent or ability to the business.

C. Collateral Source

General points. Generally, in an action for damages in tort, the fact that a plaintiff has received payment from a collateral source—a source other than the defendant or a person on the defendant's behalf—does not reduce or mitigate the defendant's liability. Nance by Nance v. Westside Hosp., 750 S.W.2d 740, 742 (Tenn. 1988). Under the collateral source rule, money received by an injured person pursuant to an insurance

policy that was not procured by or for the benefit of the tortfeasor does not diminish the amount recoverable against the tortfeasor. Benson v. Tenn. Valley Elec. Co-op., 868 S.W.2d 630, 640 n.1 (Tenn. Ct. App. 1993). The injured party, however, does not generally receive a double recovery because most insurers, upon paying their insured, are subrogated to the insured's continuing rights against the responsible tortfeasor. Travelers Ins. Co. v. Williams, 541 S.W.2d 587 (Tenn. 1976).

Medical malpractice cases. In medical malpractice cases, however, the common law rule has been altered by statute: compensatory damages are limited to costs paid from the assets of the claimant, claimant's private insurance, or the assets of claimant's immediate family. TENN. CODE ANN. § 29-26-119. Workers' Compensation and Medicaid benefits are excluded from the scope of TENN. CODE ANN. § 29-26-119; thus, plaintiff in a medical malpractice action can recover from defendant the amount of plaintiff's medical expenses paid from these sources. Nance by Nance v. Westside Hosp., 750 S.W.2d 740 (Tenn. 1988); Hughlett v. Shelby Cnty. Health Care Corp., 940 S.W.2d 571 (Tenn. Ct. App. 1996).

D. Pre-Judgment/Post judgment Interest

Pre-Judgment Interest. The recovery of prejudgment interest is governed by TENN. CODE ANN. § 47-14-123. Under Tennessee law, pre-judgment interest may be awarded by courts or juries at any rate not in excess of a rate of ten percent (10%) per year. An award of prejudgment interest may be made in accordance with principles of equity and is matter of discretion of trial court. Myint v. Allstate Ins. Co., 970 S.W.2d 920, 928 (Tenn. 1998). However, Tennessee law does not allow recovery of prejudgment interest in certain instances, including a personal injury action not resulting in death. R.R. v. Wallace, 17 S.W. 882, 883 (Tenn. 1891). Tennessee decisions clearly state that the purpose of prejudgment interest is to provide full compensation for the plaintiff who has suffered "the loss of the use of the funds to which he or she was legally entitled, not to penalize the defendant for wrongdoing." *Myint*, 970 S.W.2d at 927.

Post-Judgment Interest. The recovery of post-judgment interest is governed by TENN. CODE ANN. § 47-14-121 and -122. Post-judgment interest accrues on every judgment from the day on which the jury or the court returns the verdict—without regard to a motion for a new trial. TENN. CODE ANN. § 47-14-122. Previously under Tennessee law "[i]nterest on judgments, including decrees and municipal court judgments, shall be computed at the effective rate of ten percent (10%) per annum, except as . . . otherwise provided . . . by statute." TENN. CODE ANN.§ 47-14-121. Under recently enacted legislation amending TENN. CODE ANN. § 47-14-121 effective July 1, 2012, however, the interest rates shall:

> (1) For any judgment entered between July 1 and December 31, be equal to two percent (2%) less than the formula rate per annum published by the commissioner of financial institutions, as required by § 47–14–105, for June of the same year; or

> (2) For any judgment entered between January 1 and June 30, be equal to two percent (2%) less than the formula rate per annum published by the commissioner of financial institutions, as required by § 47–14–105, for December of the prior year.

2012 Tenn. Laws Pub. Ch. 1043 (H.B. 2982). Notwithstanding the above subsections, the enacted amendment states, "[W]here a judgment is based on a statute, note, contract, or other writing that fixes a rate of interest within the limits provided in § 47–14–103 for particular categories of creditors, lenders or transactions, the judgment shall bear interest at the rate so fixed." *Id.*

E. Damages for Emotional Distress

Separate cause of action. Tennessee law recognizes separate causes of action for intentional infliction of emotional distress as well as negligent infliction of emotion distress.

Intentional infliction of emotional distress. An action for intentional infliction of emotional distress has three elements: (1) the conduct complained of must be intentional or reckless, (2) it must be so outrageous that it is not tolerated by a civilized society, and (3) it must result in serious mental injury. Lyons v. Farmers Ins. Exch., 26 S.W.3d 888 (Tenn. Ct. App. 2000). Expert proof is generally not necessary to establish the existence of a serious mental injury. Miller v. Willbanks, 8 S.W.3d 607 (Tenn. 1999).

Negligent infliction of emotional distress. In Tennessee, a claim for negligent infliction of emotional distress requires that the plaintiff establish the elements of a general negligence claim: (1) duty, (2) breach of duty, (3) injury or loss, (4) causation in fact, and (5) proximate causation. *See* Camper v. Minor, 915 S.W.2d 437, 446 (Tenn. 1996). In addition, the plaintiff must establish the existence of a serious or severe emotional injury that is supported by expert medical or scientific evidence. *Id.*; *see also* Ramsey v. Beavers, 931 S.W.2d 527, 531–532 (Tenn. 1996). A negligent infliction of emotional distress claim does not require proof of a physical injury. Camper v. Minor, 915 S.W.2d 437, 446 (Tenn. 1996). In *Ramsey v. Beavers*, 931 S.W.2d 527 (Tenn. 1996), the Tennessee Supreme Court clarified that a negligent infliction of emotional distress claim premised upon witnessing the death or injury of a third person requires a plaintiff to show that a "third person's death or injury and plaintiff's emotional injury were proximate and foreseeable results of defendant's negligence." *Id.* at 531. The *Ramsey* court commented that foreseeability required consideration of a number of relevant factors but that only two of them were essential: (1) the plaintiff's physical location showed "sufficient proximity to the injury-producing event to allow sensory observation" by the plaintiff, and (2) the injury "was, or reasonably was perceived to be, serious or fatal." *Id.* Still another factor relating to foreseeability is the plaintiff's relationship to the injured party. *Id.* at 531–32. This decision in *Ramsey* rejected the rigid "zone of danger" requirement. Lourcey v. Estate of Scarlett, 146 S.W.3d 48 (Tenn. 2004). In *Eskin v. Bartee*, 262 S.W.3d 727 (Tenn. 2008), the Tennessee Supreme Court stated

the elements of a cause of action for negligent infliction of emotional distress when the plaintiff did not witness the injury-producing event:

> (1) the actual or apparent death or serious physical injury of another caused by the defendant's negligence, (2) the existence of a close and intimate personal relationship between the plaintiff and the deceased or injured person, (3) the plaintiff's observation of the actual or apparent death or serious physical injury at the scene of the accident before the scene has been materially altered, and (4) the resulting serious or severe emotional injury to the plaintiff caused by the observation of the death or injury.

Id. at 739.

F. Wrongful Death and/or Survival Action Damages

Survival actions. A survival statute creates no new cause of action; rather, the Tennessee common law has been modified merely to preserve the cause of action upon the death of the injured party. The damages recoverable under the survival statute, therefore, are such as the deceased could have recovered if he had lived. Benton v. Knoxville News Sentinel Co., 174 Tenn. 658 (1939). Presumably, although not yet ruled upon by any Tennessee court, the statutory caps on non-economic damages under TENN. CODE ANN § 29-39-102(a)(2) would apply to any cause of action for non-economic damages.

Wrongful death damages. TENN. CODE ANN. § 20-5-113 describes the types of damages that may be obtained by the deceased's personal representative or by the deceased's surviving spouse and, in case there is no surviving spouse, to the person's children or next of kin. That statute states:

> [Such parties] have the right to recover for the mental and physical suffering, loss of time and necessary expenses resulting to the deceased from the personal injuries, and also the damages resulting to the parties for whose use and benefit the right of action survives from the death consequent upon the injuries received.

Id. In other words, there are two classes of wrongful death damages. First, there are those damages sustained immediately by the injured party including compensation for damages including (1) mental and physical suffering endured by the injured party between injury and death; (2) medical expenses; (3) reasonable funeral expenses; and (4) loss of earning capacity during the period from injury to death. The second class of wrongful death damages that may be awarded is the present cash value of the pecuniary value of the life of the deceased. In determining this value, several factors are taken into consideration including (1) age of deceased; (2) condition of health of deceased; (3) life expectancy; (4) strength and capacity of the deceased for work and for earning money; and (5) the reasonable value of the loss of filial consortium. Presumably, although not yet ruled upon by any Tennessee court, the statutory caps on non-economic damages under TENN. CODE ANN § 29-39-102(a)(2) would apply to any of the non-economic damage elements listed above.

G. Punitive Damages

General rule. In Tennessee, a court may award punitive damages only if it finds a defendant has acted either (1) intentionally, (2) fraudulently, (3) maliciously, or (4) recklessly. Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992). Plaintiff bears the burden of establishing that the defendant acted either intentionally, fraudulently, maliciously, or recklessly by "clear and convincing" evidence. *Hodges*, 833 S.W.2d at 901. Actual or compensatory damages must be found as a predicate for the recovery of punitive damages.

Factors to consider in determining amount of punitive damages. Evidence of a defendant's financial condition is inadmissible in the liability phase of a trial in which punitive damages are sought. *Hodges*, 833 S.W.2d at 901. Once liability has been established, the following factors may be considered in a separate, bifurcated proceeding to determine the amount of punitive damages (bifurcation is only necessary when requested by the defendant by motion):

> (1) The defendant's financial affairs, financial condition, and net worth; (2) The nature and reprehensibility of defendant's wrongdoing, for example: (A) The impact of defendant's conduct on the plaintiff, or (B) The relationship of defendant to plaintiff; (3) The defendant's awareness of the amount of harm being caused and defendant's motivation in causing the harm; (4) The duration of defendant's misconduct and whether defendant attempted to conceal the conduct; (5) The expense plaintiff has borne in the attempt to recover the losses; (6) Whether defendant profited from the activity, and if defendant did profit, whether the punitive award should be in excess of the profit in order to deter similar future behavior; (7) Whether, and the extent to which, defendant has been subjected to previous punitive damage awards based upon the same wrongful act; (8) Whether, once the misconduct became known to defendant, defendant took remedial action or attempted to make amends by offering a prompt and fair settlement for actual harm caused; and (9) Any other circumstances shown by the evidence that bear on determining the proper amount of the punitive award.

Id. at 901–02.

Statutory Cap on Punitive Damages. Effective October 1, 2011, the Tennessee Civil Justice Act of 2011 was enacted to cap jury awards of non-economic and punitive damages. An award of punitive damages cannot exceed the greater of an amount two times the total of compensatory damages or $500,000. TENN. CODE ANN. § 29-39-104(a)(5). However, the cap does not apply if it is shown that the defendant intended to inflict serious physical injury, the defendant altered or destroyed records with the purpose of avoiding or evading liability, or the defendant's judgment was substantially impaired by alcohol or drugs. TENN. CODE ANN. § 29-39-104(a)(7).

Legal basis for determining whether punitive damages are excessive. The governing authority in Tennessee on when punitive damages are excessive comes from the United States Supreme Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996) and *State FarmMutual Automobile Insurance Co. v. Campbell*, 538 U.S.

408, 419 (2003). The Tennessee Supreme Court has adopted three guideposts to be considered in determining whether the punitive damages award is excessive: (1) the degree of reprehensibility of the defendant's misconduct (most important guidepost); (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. Flax v. DaimlerChrysler Corp., 272 S.W.3d 521, 537 (Tenn. 2008) (citing *Gore* and *Campbell*). The Tennessee Supreme Court has consistently rejected the idea of imposing or creating a mathematical formula or ratio to determine if punitive damages are excessive. *Id.* at 539. However, the court does caution that few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process, and has also suggested that punitive awards more than four times the amount of compensatory damages may be close to the line. *Id.*

Covered by Insurance. It is well-settled in Tennessee that a policy of liability insurance covers punitive damages as well as compensatory damages. Mullins v. Miller, 683 S.W.2d 669, 671 (Tenn. 1984). Punitive damages are not covered in Tennessee under uninsured motorist coverage unless the carrier explicitly writes such coverage in the policy. TENN. CODE ANN. §56-7-201(a) ad (b); Carr v. Ford, 833 S.W.2d 68 (1992).

H. Diminution in Value of Damaged Vehicle

Under insurance policies. Tennessee law follows the majority of states in its rejection that "repair" under collision insurance does not require the insurer to pay for diminished value after repair. *See* Gov't Employees Ins. Co. v. Bloodworth, 2007 WL 1966022, at *36 (Tenn. Ct. App. June 29, 2007); *see also* Black v. State Farm Mut. Automobile Ins. Co., 101 S.W.3d 427, 429 (Tenn. Ct. App. 2002) (holding that the policy language was unambiguous and did not include payment for diminished value and specifically rejecting the contention that prior authority had established diminution of value as a doctrine to be applied by Tennessee courts to all motor vehicle policies).

Under tort measure of damages. In Tennessee, the measure of damages for injury to personal property is either the cost of repair or the difference in the property's market value immediately before and immediately after the injury. Irving Pulp and Paper, Ltd. v. Dunbar Transfer and Storage Co., 732 F.2d 511, 516 (6th Cir. 1984). Which of those two measures is to be applied depends upon the proof presented, primarily as to whether repairs will restore the property to its pre-accident function, appearance and value. If the property can be or has been repaired so as to substantially restore its function, appearance and value, then the reasonable cost of repair is the measure. If the property has not been so repaired or is not capable of such repair, then the proper measure is the pre-accident and post-accident difference in fair market value. Tire Shredders, Inc. v. ERM-North Central, Inc., 15 S.W.3d 849, 855 (Tenn. Ct. App. 1999). Accordingly, a plaintiff who seeks the difference in pre- and post-accident value of damaged property must prove both the pre-injury value and the post-injury value. Further, the plaintiff must prove that the property is not capable of repair that will substantially restore its condition, appearance, and value or that repairs made did not

substantially restore them. *See, e.g.*, Bickers v. Chrysler Motor Credit Corp., 1991 WL 18681 (Tenn. Ct. App. Feb. 20, 1991) (holding that if the property is capable of repair, repair costs are the proper measure of damages).

I. Loss of Use of Motor Vehicle

The law in Tennessee regarding loss of use damages in conversion cases is comparable to collision cases and is summarized in *Tire Shredders, Inc. v. ERM-North Central, Inc.*, 15 S.W.3d 849 (Tenn. Ct. App. 1999). In *Tire Shredders, Inc.*, and in the collision cases discussed therein, the measure of loss of use damages is for a reasonable time to repair or replace the vehicle. *Id.* at 854. The Tennessee Court of Appeals, in *Tire Shredders*, upheld the following jury instruction which most Tennessee courts consider to be the law in Tennessee on loss of use damages: "The measure of damages for loss of use is reasonable compensation to the plaintiff for being deprived of the use of the property during the time reasonably necessary for a reasonably prudent person to replace the property . . . ." *Id.* at 853.

Evidentiary Issues

A. Preventability Determination

There is no Tennessee case law directly on the issue of admissibility of preventability determinations in civil trials.

It is likely a defendant could successfully argue in Tennessee that evidence related to a post-accident preventability determination should be inadmissible as a subsequent remedial measure under Rule 407 of the Tennessee Rules of Evidence. Under Rule 407, subsequent remedial measures are inadmissible to prove "strict liability, negligence, or culpable conduct in connection with the event." The generally accepted purpose of Rule 407 is to encourage remedial measures in order to serve the public's interest in a safe environment. Thompson v. Thompson, 749 S.W.2d 468, 470 (Tenn. Ct. App. 1988). An act is "remedial" if it "changes a situation, usually an unsafe property or product, to prevent the situation from causing further injury." Martin v. Norfolk S. Ry. Co., 271 S.W.3d 76, 88 (Tenn. 2008). Presumably the purpose of most preventability determinations is to prevent further injury in the future and, thus, such evidence would likely be considered "remedial." Rule 407 does not bar proof of subsequent remedial measures for other purposes including "proving controverted ownership, control, or feasibility of precautionary measures or impeachment." It would likely be difficult for a plaintiff to argue that the purpose of preventability determination evidence falls under these type exceptions. It is likely, therefore, that in most situations, preventability determination evidence would be ruled inadmissible by Tennessee courts.

B. Traffic Citation from Accident

A traffic ticket is a misdemeanor. Usually, evidence of a prior misdemeanor conviction is inadmissible unless it involves dishonesty. State v. Butler, 626 S.W.2d 6, 11 (Tenn.

1981). For example, in *Straub v. Roberts*, 2000 WL 349905 (Tenn. Ct. App. 2000), the court ruled evidence that defendant received traffic citation for running red light was inadmissible in later civil suit. In addition, the Tennessee Supreme Court has held that evidence of payment of a traffic fine without contest is not admissible in a later action based on the underlying event resulting in the traffic citation. Williams v. Brown, 860 S.W.2d 854, 856–57 (Tenn. 1993). The *Williams* court analogized payment of a traffic fine in lieu of an appearance in court to a plea of nolo contendere which is not admissible in Tennessee. *Id.* at 586. The *Williams* court declined to answer the question of admissibility where the defendant personally appears in court and pleads guilty and, thus, it remains an open question in Tennessee. *Id.* Similarly, the admissibility of prior testimony at a traffic hearing has not been specifically addressed by Tennessee courts. Presumably, a court analyzing the issue would do so under Rule 613 of the Tennessee Rules of Evidence concerning prior statements of witnesses.

C. Failure to Wear a Seat Belt

Under TENN. CODE ANN. § 55-9-604, "[t]he failure to wear a safety belt or receipt of a citation . . . for failure to wear a safety belt shall not be admissible into evidence in a civil action." However, such evidence may be admissible in a civil action as to the causal relationship between non-compliance of the Tennessee Mandatory Safety Belt Act and the injuries alleged, if the following conditions have been satisfied:

> (1) The plaintiff has filed a products liability claim; (2) The defendant alleging non-compliance with this chapter shall raise this defense in its answer or by timely amendment thereto in accordance with the rules of civil procedure; and (3) Each defendant seeking to offer evidence alleging non-compliance with this chapter has the burden of proving non-compliance with this chapter, that compliance with this chapter would have reduced injuries and the extent of the reduction of the injuries.

Id. Evidence of failure to wear a seat belt, therefore, is admissible if offered for purposes of causation and if the above circumstances are met. There are no Tennessee cases regarding the admissibility of such evidence to mitigate damages; however, it does not appear that the use of evidence of failure to wear a seat belt to mitigate damages would fall under the above statutory exceptions.

D. Failure of Motorcyclist to Wear a Helmet

Under TENN. CODE ANN. § 55-9-302, "[t]he driver of a motorcycle . . . and any passenger . . . shall be required to wear . . . a crash helmet." Under TENN. CODE ANN. § 55-9-306, a violation of this statute is a Class C misdemeanor. Evidence of a prior misdemeanor is typically inadmissible unless it involves dishonesty. State v. Butler, 626 S.W.2d 6, 11 (Tenn. 1981). There are no Tennessee statutes or case law directly on point regarding the admissibility of evidence of failure to wear a motorcycle helmet in a subsequent civil trial. There are analogous statutes from which one may glean how Tennessee courts may rule on the subject. Under TENN. CODE ANN. § 55-52-106, "[i]n no event shall failure to wear a protective bicycle helmet . . . be admissible as evidence in a trial of any

civil action." Similarly, under TENN. CODE ANN. 55-52-202, "[i]n no event shall failure to wear an appropriate helmet for off-highway vehicles be admissible in a trial of any civil action."

E. Evidence of Alcohol or Drug Intoxication

Criminal Proceeding. A Tennessee statute provides for the admissibility of evidence of blood and breath tests in the criminal proceedings of persons suspected of driving while intoxicated. *See* TENN. CODE ANN. § 55-10-407. Under the statute, certain presumptions are established, including a criminal presumption of intoxication. In order to ensure the accuracy of the test results in these DUI cases involving a blood test administered upon a law enforcement officer's request, the blood sample must be taken by a nurse or specially trained person. TENN. CODE ANN. § 55-10-409(a). There must be a proper chain of custody between the time the blood was drawn and the time it was analyzed. State v. McKinney, 605 S.W.2d 842 (Tenn. Ct. App. 1980). In *State v. Sensing*, 843 S.W.2d 412 (Tenn. 1992), the Tennessee Supreme Court established six prerequisites to threshold admissibility of a breath alcohol test. If the state complies with these foundational requirements, it is entitled to the presumption that the test results are reliable and the results may be admitted into evidence without requiring expert testimony. State v. Deloit, 964 S.W.2d 909 (Tenn. Crim. App. 1997). If these foundational requirements are not complied with, the state may still use traditional rules of evidence to lay the foundation for admitting the evidence but there is no presumption of reliability.

Civil Trial. The criminal presumption of intoxication established by Tenn. Code Ann. § 55-10-408(b) is admissible in a civil case. McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992). The Tennessee Supreme Court ruled that

> [t]he results of a properly conducted blood test indicating [eight-hundredths] of one percent or more in a person's blood thus creates a presumption which assists a lay jury in determining whether a person was under the influence of an intoxicant. If the evidence is not rebutted, a jury may then permissibly find that the person was under the influence sufficiently to violate the criminal provisions regarding driving while intoxicated.

Id. at 58–59. The court added that "violation of a penal statute is negligence per se, and is admissible evidence in a civil action." *Id.* at 59. In an earlier case, the Tennessee Supreme Court held that Tennessee's implied consent statutes do not prevent the test results from being used as evidence in a civil case. Bankers Life & Cas. Co. v. Jenkins, 547 S.W.2d 237, 238 (Tenn. 1977). The court added that the results of blood alcohol tests have regularly been admitted and considered in civil cases. *Id.* The party seeking admission of the evidence of intoxication still must establish the causal connection between the opposing party's state of intoxication and the accident in which injuries were sustained. *Id.* There are no Tennessee cases on point regarding whether the possession of illegal narcotics is admissible if no proof of actual intoxication.

F. Testimony of Investigating Police Officer

In Tennessee, as a general proposition, the ordinary witness must confine his testimony to a narration of facts based on firsthand knowledge and avoid stating mere personal opinions. Walden v. Wylie, 645 S.W.2d 247, 251 (Tenn. Ct. App. 1982). Law enforcement officers, however, are permitted in Tennessee to testify as to matters outside of their personal knowledge and provide opinion testimony to the court so long as they are properly qualified as an expert witness. *See id.* (ruling that an investigating officer was not permitted to express an opinion about how the accident happened because he was not properly qualified as an accident reconstruction expert). Tennessee courts tend to apply a high standard as to when investigating officers may provide their opinion as to matters outside of their personal knowledge. *See* Johnson v. Attkisson, 722 S.W.2d 390, 392 (Tenn. Ct. App. 1986) (ruling a police officer who had training in accident reconstruction was not qualified to give an opinion as to the speed of a truck involved in an accident, absent a showing that the officer was in fact an expert in estimating speed from skid marks). Tennessee courts typically require that expert witnesses must show that they have some special as well as practical knowledge of the subject about which they are testifying. Fortune v. State, 277 S.W.2d 381 (Tenn. 1955). Tennessee courts have allowed investigating officers to provide their opinion as to matters outside of their personal knowledge so long as they provide ample evidence as to their qualifications as an expert. *See, e.g.*, Taylor v. State, 551 S.W.2d 331, 333 (Tenn. Crim. App. 1976) (deeming as an expert witness a police officer who had completed an FBI correspondence course on fingerprint comparison, had three years training under an expert's supervision, and had testified ten times). Thus, the focus of an investigating officer's qualification as an expert is superior expertise regarding the specific subject of his or her testimony.

G. Expert Testimony

In *McDaniel v. CSX Transportation*, 955 S.W.2d 257 (Tenn. 1997), the Tennessee Supreme Court followed the federal lead and rejected *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), in favor of an approach that resembles the one established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The *McDaniel* court redefined the standard for considering expert testimony in Tennessee courts. The court noted that Rules 702 and 703 of the Tennessee Rules of Evidence did not embrace the *Frye* standard. The court stated:

> In Tennessee, under the recent rules, a trial court must determine whether the evidence will substantially assist the trier of fact to determine a fact in issue and whether the facts and data underlying the evidence indicate a lack of trustworthiness. The rules together necessarily require a determination as to the scientific validity or reliability of the evidence. Simply put, unless the scientific evidence is valid, it will not substantially assist the trier of fact, nor will its underlying facts and data appear to be trustworthy, but there is no requirement in the rule that it be generally accepted.

Id. at 265. The *McDaniel* court declined to expressly adopt the list of factors suggested by the United States Supreme Court in *Daubert*. The *McDaniel* court did, however, list some factors to determine the reliability of scientific evidence under Rules 702 and 703:

> (1) whether scientific evidence has been tested and the methodology with which it has been tested; (2) whether the evidence has been subjected to peer review or publication; (3) whether a potential rate of error is known; (4) whether, as formerly required by Frye, the evidence is generally accepted in the scientific community; and (5) whether the expert's research in the field has been conducted independent of litigation.

Id. The Tennessee Supreme Court subsequently refined *McDaniel* in *Brown v. Crown Equipment Corp.*, 181 S.W.3d 268 (Tenn. 2005), and held that the *McDaniel* factors are not exhaustive and not necessarily even relevant in assessing the reliability of a particular expert's methodology. The trial court need not consider all of them in making a reliability determination.

H. Collateral Source

In a personal injury case, a plaintiff may recover, among other things, the reasonable and necessary expenses resulting from the personal injuries. An injured party's right to recover his or her "reasonable and necessary expenses" must be viewed in connection with the collateral source rule. Normally in an action for damages in tort, the fact that the plaintiff has received payments from a collateral source, other than the defendant, is not admissible in evidence. Fye v. Kennedy, 991 S.W.2d 754, 763 (Tenn. Ct. App. 1998) (citing Donnell v. Donnell, 415 S.W.2d 127, 134 (Tenn. 1967)). For example, proceeds from insurance policies are covered by the collateral source rule. *Id.* at 764. In Tennessee, the collateral source rule precludes a defendant from attempting to prove that a "reasonable" charge for a "necessary" service actually rendered, has been, or will be, paid by another—not the defendant or someone acting on his or her behalf—or has been forgiven, or that the service has been gratuitously rendered. *Id*. However, a defendant is permitted to introduce relevant evidence regarding necessity, reasonableness, and whether a claimed service was actually rendered. *Id.* The door may be opened for such evidence, therefore, by attempting to admit the evidence for a purpose other than reducing a defendant's liability. *See, e.g.,* Fowler v. Crews, 1995 WL 273668, at *1 (Tenn. Ct. App. May 10, 1995) (admitting evidence of the amount of plaintiff's insurance coverage because it was introduced to rebut the plaintiff's theory that the defendants conspired to burn down a hospital rather than for the purpose of reducing defendants' liability).

I. Recorded Statements

Tape and digital recordings. Tape and digital recordings, especially of telephone conversations, pose unique problems as evidence, but have been admissible in Tennessee for many years. Often the actual recording is played for the jury, and a transcript of the recording may also be made and introduced into evidence. State v. Coker, 746 S.W.2d 167, 172 (Tenn. 1987). Tape recordings have been admitted in

Tennessee even if they are of poor quality and somewhat inaudible. *See, e.g.*, State v. Elrod, 721 S.W.2d 820, 823 (Tenn. Crim. App. 1986). Under the Tennessee Rules of Evidence, tape and video recordings are subject to the best evidence rule, Rule 1001(1). Further, the recording is generally admissible if properly authenticated. Authentication requires a showing that the recording is an accurate reproduction of the matter recorded. Of course the conversation must be relevant under Rule 401 and not excluded as unfairly prejudicial or misleading under Rule 403.

Completeness. Rule 106 of the Tennessee Rules of Evidence permits a court to admit into evidence any other part of a recorded statement or any other written or recorded statement which out in fairness be considered contemporaneously with the writing or recorded statement initially introduced.

J. Prior Convictions

General principles. Evidence of prior convictions is only admissible to impeach the credibility of a witness. The jury will be instructed to consider the evidence only on the question of the defendant's credibility as a witness and not as evidence of guilt.

Standard and Scope. Evidence of prior convictions must involve crimes "punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, or, if not so punishable, the crime must have involved dishonesty or false statement." TENN. R. EVID. 609(a)(2). In the federal rule, "dishonesty and false statement" are meant to relate to "crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of a *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." State v. Walker, 29 S.W.3d 885, 890 (Tenn. Crim. App. 1999). Tennessee courts interpret the phrase more broadly than the federal courts and include a wider range of criminal offenses, including robbery, theft-related offenses, and burglary. State v. Galmore, 994 S.W.2d 120, 122 (Tenn. 1999); State v. Addison, 973 S.W.2d 260 (Tenn. Crim. App. 1997); State v. Blevins, 968 S.W.2d 888, 893 (Tenn. Crim. App. 1997).

Procedure. If the State desires to use a prior conviction of a criminal defendant for the purpose of impeaching the defendant, the State "must give the accused reasonable written notice of the impeaching conviction before trial." TENN. R. EVID. 609(a)(3). In addition, if the State desires to impeach the defendant with a conviction for which the defendant was released from custody more than 10 years prior to the commencement of the present action, the State must give to the defendant "sufficient advance notice of intent to use such evidence to provide the defendant with a fair opportunity to contest the use of such evidence." TENN. R. EVID. 609(b). In deciding whether to admit evidence of previous crimes, the court, upon request, must determine that "the conviction's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues." TENN. R. EVID. 609(a)(3).

K. Driving History

Accident reports. The Tennessee Financial Responsibility Act of 1977 requires, in certain circumstances, that the operator of a vehicle file an accident report, TENN. CODE ANN. § 55-10-107(a), and a report of financial responsibility, TENN. CODE ANN. § 55-12-120. This information is privileged on the issue of due care or negligence in any lawsuit to recover damages as a result of the related accident. TENN. CODE ANN. § 55-12-128. Another privilege related to motor vehicles bars admission of "[a]ll accident reports made by any person or by garages. Tenn. Code Ann. § 55-10-114. These reports generally may not be "used as evidence in any trial, civil or criminal, arising out of an accident." *Id.*

Driving record. As to the issue of the admissibility of driving records kept by the Tennessee Department of Safety, Tennessee courts have generally ruled as follows:

> [S]uch a driving record is admissible as substantive evidence under the public records hearsay exception, *see* TENN. R. EVID. 803(8), and may be introduced at any point prior to the close of the offering party's proof either by simply offering the document as an exhibit if the document contains no other objectionable material or, if the document does contain objectionable material, by reading the relevant and unobjectionable portions of the document into evidence. In either case, an authenticating witness is unnecessary. *See* TENN. R. EVID. 902(5).

State v. McGowan, 2003 WL 213778, at *3 (Tenn. Crim. App. Jan. 29, 2003); *see also* State v. Baker, 842 S.W.2d 261 (Tenn. Crim. App. 1992). Questions regarding the weight and value of this evidence are resolved by the trier of fact. *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). While a defendant's official driving record is admissible under TENN. R. EVID. 803(8), the rule does not allow for admission into evidence a bare affidavit stating what the record would show. State v. Parker, 2004 WL 1857100, at *3 (Tenn. Crim. App. 2004).

While a defendant's driving record has been held to be a hearsay exception, a defendant's driving record is frequently not admitted in negligence actions on the grounds of irrelevancy because it is evidence of a similar act or occurrence and its probative value is outweighed by considerations such as misleading the jury and confusing the issues. However, if negligent entrustment is an issue, the driver's record would be admissible to establish the owner's knowledge of the driver's poor safety record. Woodson v. Porter Brown Limestone Co., Inc., 916 S.W.2d 896 (Tenn. 1996).

L. Fatigue

In Tennessee there are neither statutes nor case law discussing the admissibility of HOS violations at trial.

M. Spoliation

Destructive Testing. To protect against the loss of tangible evidence to all parties to the action, Rule 34A.01 of the Tennessee Rules of Civil Procedure prohibits the use of destructive testing of evidentiary materials without court approval. Under Rule 34A.01,

> [b]efore a party or an agent of a party, including experts hired by a party or counsel, conducts a test materially altering the condition of tangible things that relate to a claim or defense in a civil action, the party shall move the court for an order so permitting and specifying the conditions.

This rule applies, however, only after the commencement of a civil action. In determining the appropriate sanction, under Rule 37.01 or the court's inherent powers, Tennessee courts typically consider the extent to which the party knew, or reasonably should have known, that the testing might result in some form of alteration and destruction.

Sanctions. Rule 34A.02 permits Rule 37 sanctions to be "imposed upon a party or an agent of a party who discards, destroys, mutilates, alters, or conceals evidence." A finding of intentional destruction of evidence is not required before a trial court can order sanctions under Rule 37 pursuant to Rule 34A. Cincinnati Ins. Co. v. Mid-South Drillers Supply, Inc., 2008 WL 220287, at *4 (Tenn. Ct. App. Jan. 25, 2008). The most severe sanctions, however, are typically reserved for situations when a party has intentionally concealed or destroyed important evidence. *Id.* For example, Tennessee permits a trial judge to grant an adverse inference against a party who spoliates evidence "intentionally, and for an improper purpose." *See* Leatherwood v. Wadley, 121 S.W.3d 682, 703 (Tenn. Ct. App. 2003).

Separate Cause of Action. Tennessee courts have yet to reach the issue of whether to recognize the spoliation of evidence as an independent tort. *See* Trumbo, Inc. v. Witco Corp., 2003 WL 21946734, at *6 (Tenn. Ct. App. Aug. 11, 2003).

Settlement

A. Offer of Judgment

In General. Rule 68 of the Tennessee Rules of Civil Procedure, patterned after the federal rule of the same number, authorizes service on an adverse party of an offer to permit entry of a judgment against the offering party for the money or property specified in the offer with costs then accrued. The Rule allows both a party prosecuting a claim and the party defending the claim to make an offer of judgment. *Id.* Unlike its federal counterpart, Tennessee Rule 68 also provides that if a complainant makes an offer to accept judgment in an amount less than the judgment the complainant obtains at trial, the defending party will be liable for costs accruing after the offer. In practice, courts have frequently ruled that the "with costs then accrued" language of Rule 68 is ambiguous. It is critical, therefore, that the offer be specific including whether it means to cover all recoverable costs and attorneys' fees, and how the "more favorable than" threshold is met.

Effect of rule on prejudgment interest. The Tennessee Court of Appeals has held that Rule 68 does not trigger prejudgment interest in personal injury actions, because such an allowance would undermine the Rule's purpose of promoting settlements. Francois v. Willis, 205 S.W.3d 915, 916-17 (Tenn. Ct. App. 2006).

Procedural requirements. The text of Rule 68 stipulates that an offer must be served more than 10 days before the trial begins, and the party to whom the offer is made may accept it within 10 days after service by serving written notice of acceptance. If the offer is accepted, the clerk enters judgment on the offer upon the filing of the offer, notice of acceptance, and proof of service thereof. If the offer is not accepted, it is deemed to be withdrawn. Evidence of it is not admissible at trial. Successive offers may be made. If a formal offer of judgment complying with the requirements of Rule 68 has not been accepted and the party declining does not obtain a judgment more favorable than the offer, he must pay all costs accruing after the offer.

B. Liens

Hospital lien. A hospital has a lien on a non-paying patient's potential insurance or personal injury claim recovery. TENN. CODE ANN. § 29-22-101(a). However, there are a number of limitations. The lien is limited to one-third of the amount recovered by the patient by way of judgment or settlement. TENN. CODE ANN. § 29-22-101(b). The lien does not apply to accidents or injuries within the purview of the Tennessee Workers' Compensation Law. TENN. CODE ANN. § 29-22-101(c). And the lien is subject and subordinate to any attorney's lien on the cause of action and to any mechanic's lien or prior recorded lien upon a motor vehicle involved in the accident. TENN. CODE ANN. § 29-22-101(c).

In order to perfect the lien, the hospital is required to file a verified statement in writing setting forth the name and address of the patient, the name and address of the operator of the hospital, the dates of the patient's admission and discharge, the amount claimed to be due for hospital care, and to the best of the claimant's knowledge, the names and addresses of those claimed by such patient to be liable for damages arising from the patient's illness or injuries. TENN. CODE ANN. § 29-22-102(a). The hospital has 120 days after a patient's discharge in which to file the statement in the office of the clerk of the circuit court of the county in which the hospital is located, and in the county where the patient resides, if a resident of Tennessee. *Id.* Then, within 10 days, a copy of the claim must be sent by registered mail, postage prepaid, to each person, firm or corporation claimed to be liable on account of such illness or injuries, and to the patient's attorney, if such attorney is known to the claimant or could, with reasonable diligence, be known to the claimant. TENN. CODE ANN. § 29-22-102(b). The filing of the claim shall be notice thereof to all persons, firms or corporations who may be liable on account of such illness or injuries, whether or not they are named in the claim or lien and whether or not a copy of the claim shall have been received by them. TENN. CODE ANN. § 29-22-102(c). Once the lien is filed, no release or satisfaction or any action, suit, claim, counterclaim, demand, judgment, settlement or settlement agreement is valid against such lien unless the lienholder joins in the settlement or executes a release of the lien. TENN. CODE ANN. § 29-22-104(a).

Workers' Compensation lien. When a compensable disability or death is caused by the tortious acts of a third party, the employee or the employee's surviving eligible dependents are entitled to accept compensation and to pursue an action for damages against the third party tortfeasor. TENN. CODE ANN. 50-6-112(a). In order to prevent or avoid a double recovery, the employer or insurer is given a subrogation lien against the employee's "net recovery" by "judgment, settlement or otherwise" from the third party, less the attorney's fees and expenses incurred by the employee, and is entitled to be reimbursed for his or her compensation outlay, with the employee retaining any additional amount. TENN. CODE ANN. § 50-6-112(c). The employee's counsel in the third party action has an implied duty to recognize and protect the employer's subrogation lien when no other attorney is protecting the employer's interest. Aetna Cas. & Sur. Co. v. Gilreath, 625 S.W.2d 269 (Tenn. 1981). The employer may intervene in the third party action to protect the lien. Ali v. Metro. Gov't of Nashville and Davidson Cnty., 1990 WL 112367 (Tenn. Ct. App. 1990) (ruling the employer may intervene at any time before "final judgment or settlement without judgment"). The employee must institute the third party action within one year from the date of injury. TENN. CODE ANN. § 50-6-112(d). If the employee fails to bring the action within one year, the cause of action is assigned by law to the subrogated employer, who then has six months to bring the action. *Id.*

C. Minor Settlement

General rule. Pursuant to Tennessee case law and statute, the settlement of a case involving a minor must be approved by the court, and the court must ensure that the settlement itself is in the best interests of the minor. *See* TENN. CODE ANN. § 34-1-121(b); *see also* Busby v. Massey, 686 S.W.2d 60 (Tenn. 1984).

Settlements under $10,000.00. TENN. CODE ANN. § 29-34-105 permits a judge or chancellor to sign an order approving any tort claim settlement involving a minor that is less than $10,000 by relying on affidavits from the legal guardian. TENN. CODE ANN. § 29-34-105. However, the statute requires the court to conduct a chambers hearing at which the minor and legal guardian are present to approve any tort claim settlement involving a minor that is $10,000.00 or more. *Id.*

Required contents of an affidavit. TENN. CODE ANN. § 29-34-105(b) requires that the affidavit from the legal guardian contain the following:

> (1) description of the tort; (2) description of the injuries to the minor involved; (3) statement that the affiant is the legal guardian; (4) amount of the settlement; (5) statement that it is in the best interest of the minor to settle the claim in the approved amount; and (6) statement of what the legal guardian intends to do with the settlement proceeds until the minor reaches the age of eighteen (18).

TENN. CODE ANN. § 29-34-105(b). Nonetheless, the court retains the discretion to determine whether the settlement proceeds are to be paid to the minor's legal guardian or held in trust by the court. TENN. CODE ANN. § 29-34-105.

D. Negotiating Directly With Attorneys

In Tennessee, a liability insurer has the virtually unrestricted right to investigate and settle claims against the insured, provided the settlement can be effected within the insured's policy limits. *See* Tenn. Code Ann. § 55-12-122(d)(3); *see also* Mullins v. Parkey, 874 S.W.2d 12 (Tenn. Ct. App. 1992) (enforcing settlement agreement which one of the parties later wished to rescind). In addition to the statutory authorization, the right to settle is contractually maintained by virtually all policies, as it provides an important limitation upon the insurer's otherwise unqualified duty to defend. For example, Tennessee courts have upheld insurance policy language which gave the insurer the right to settle any claim or suit it considered appropriate. Austin Co. v. Royal Ins. Co., 842 S.W.2d 608, 610 (Tenn. Ct. App. 1992). While the insurer was required to "consult" the insured for expensive claims, the court ruled that the unambiguous policy gave the insurer the right to take whatever action it deemed necessary with regard to any claim made against the insured. *Id.* at 609. When the insurer undertakes the process of settlement, the primary limitation upon its decision making authority is that the insurer cannot act in bad faith because a duty of good faith and fair dealing is implied in all contracts. *Id.* at 610. Tennessee cases discussing the issue of good faith between an insurer and insured assert the burden is on the insured to prove the insurer acted in bad faith. *See, e.g.*, Nelms v. Tenn. Farmers Mut. Ins. Co., 613 S.W.2d 481 (Tenn. Ct. App. 1978).

E. Confidentiality Agreements

Public entity. The question of whether a settlement agreement in litigation against a city is subject to disclosure under the Public Records Act, TENN. CODE ANN. § 10-7-501 et seq., was decided in *Contemporary Media, Inc. v. City of Memphis*, 1999 WL 292264 (Tenn. Ct. App. May 11, 1999). In that case, the court held:

> A governmental entity cannot enter into confidentiality agreements with regard to public records. The idea of entering into confidentiality agreements with respect to public records is repugnant to and would thwart the purpose and policy of the Act. Thus, the City could not lawfully enter into the agreement which it entered into with the . . . family to keep the terms of the public record confidential.

Id. at *5.

Private entity. A compromise and settlement agreement is merely a contract between parties to litigation and, as such, issues of enforceability of a settlement agreement are governed by contract law. *See* Sweeten v. Trade Envelopes, 938 S.W.2d 383, 385 (Tenn. 1996). As such, a primary limitation on settlement agreements is lack of consent. Harbour v. Brown for Ulrich, 732 S.W.2d 598, 599–600 (Tenn. 1987) ("[C]ourt may not enter judgment based on the compromise agreement, when it has notice that one of the parties is no longer consenting to the agreement for whatever reason."). There is no Tennessee case law directly on point regarding the validity of confidential settlement agreements in the context of private alternative dispute resolution; however,

presumably the law related to contract validity and construction would apply. Court-ordered mediation between private parties is governed by Rule 31 of the Tennessee Supreme Court Rules. Section ten of Rule 31 states, "Rule 31 Neutrals shall preserve and maintain the confidentiality of all information obtained during Rule 31 ADR Proceedings and shall not divulge information obtained by them during the course of Rule 31 ADR Proceedings without the consent of the parties, except as otherwise may be required by law."

F. Releases

Full release. In resolving a dispute, parties in Tennessee may agree to a release which discharges a right of action that one party has or might have against the other party. *See, e.g.*, Burks v. Belz-Wilson Props., 958 S.W.2d 773, 776 (Tenn. Ct. App. 1997) ("[R]eleases . . . are valid in Tennessee and are not against the public policy of this state."). A general release covers all claims in existence and within the contemplation of the parties at the time of execution, while a limited release covers only particular matters or claims that would fairly come within the terms of the agreement. J.D. Evans v. Tillet Bros. Constr. Co., 545 S.W.2d 8, 11 (Tenn. Ct. App. 1976). A corollary to this principle is that a claim of which a party was ignorant when the release was given is not as a rule embraced therein. Marlett v. Thomason, 2007 WL 1048950, at *6 (Tenn. Ct. App. Apr. 5, 2007). A release is considered a contract and the rules of contract construction are applicable. Richland Country Club, Inc. v. CRC Equities, Inc., 832 S.W.2d 554, 557 (Tenn. Ct. App. 1991). As with any contract, in construing a release, the "cardinal rule . . . is to ascertain the intention of the parties and to give effect to that intention, consistent with legal principles." Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc., 521 S.W.2d 578, 580 (Tenn. 1975). As such, the scope and extent of a release generally depends on the intent of the parties as expressed in the agreement. Cross v. Earls, 517 S.W.2d 751, 752 (Tenn. 1974).

Joint tortfeasor. The Uniform Contribution Among Tortfeasors Act, TENN. CODE ANN. §§ 29-11-101 et seq., provides that a release or a covenant not to sue in given in good faith to one of several persons liable in tort for the same injury does not discharge any other tortfeasor unless its terms so provide. TENN. CODE ANN. § 29-11-105. In *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992), the Tennessee Supreme Court replaced the common law defense of contributory negligence with a system of comparative fault. The court stated that its holding rendered the doctrine of joint and several liability obsolete and that the Uniform Contribution Among Tortfeasors Act will no longer determine the apportionment of liability among codefendants. In *McNabb v. Highways, Inc.*, 98 S.W.3d 649 (Tenn. 2003), the Tennessee Supreme Court considered the effect of releasing one of two alleged tortfeasors. The court concluded that under modified comparative fault, settlement with one tortfeasor does not require dismissal of the action against the other tortfeasor because nothing prevents the remaining tortfeasor from arguing that all or a portion of the fault should be allocated to the plaintiff or the settling tortfeasor. Further, under principles of comparative fault, a non-settling defendant is not entitled to a credit for amounts paid by a settling defendant because the non-settling defendant is required to pay damages based only on his or her percentage of fault. Williams Holding Co. v. Willis, 166 S.W.3d 707, 712 (Tenn. 2005).

Notary. There is nothing in the law of Tennessee requiring a notary to acknowledge a release.

Translation. There does not appear to be anything under the law of Tennessee requiring a release to be translated into the language of the releaser. However, as mentioned above, Tennessee courts apply contract law in determining the validity of releases. This should be taken into when parties are deciding whether to have a release translated.

G. Voidable Releases

There is no Tennessee law on point regarding whether an unrepresented injured individual can unilaterally void a release. In general, a release will be enforceable in Tennessee when the parties proceed in good faith on equal terms with opportunities to know their rights, even though in hindsight the agreement might reflect a bad bargain, a doubtful claim, or a misjudgment of the damages to which the party may be entitled. *See* Chattanooga Ry. & Light Co. v. Glaze, 239 S.W. 394 (Tenn. 1922). A release will not be enforceable, however, when the person did not know that it had certain rights and lacked the intent to release a particular claim. Tune v. Louisville & N. R. Co., 223 F. Supp. 928 (M.D. Tenn. 1963). As with any other contract, a release cannot be canceled or disregarded at the pleasure of only one side to the agreement; it cannot be validly repudiated except for cause. In this last respect, a party may challenge a release on the ground of mutual mistake of a material, past or present fact or on the basis of fraud or fraudulent representations, unconscionable advantage, or duress. *See* Evans v. Tillet Bros. Constr. Co., Inc., 545 S.W.2d 8, 11 (Tenn. Ct. App. 1976). A voidable release may be ratified by the affected party.

Transportation Law

A. State DOT Regulatory Requirements

Tennessee Department of Safety. Under TENN. COMP. R. & REGS. 1340-1-13-.23, the Tennessee Department of Safety, Division of Driver License Issuance adopted the federal motor carrier safety regulations, and all subsequent amendment adopted by the United States Department of Transportation contained in Title 49 of the C.F.R. §§ 383, 386, 390, and 391. Under TENN. COMP. R. & REGS. 1340-06-01-.08, the Commissioner of Safety and Homeland Security adopted the interstate motor carrier noise emission standards, federal motor carrier safety regulations, and all subsequent amendments adopted by the United State Department of Transportation contained in Title 49 of the C.F.R., Subtitle B, Chapter III, Sub-Chapters A and B, except C.F.R. § 391.11(b)(1) for Intrastate motor carriers and 49 C.F.R. § 398. Under TENN. COMP. R. & REGS. 1340-06-01-.28, the trailer safety rules and regulations to be applied to all homemade and/or materially reconstructed trailers subject to inspection by the Department of Safety are the federal motor carrier safety regulations adopted by the Department, particularly those provisions found in 49 C.F.R. Part 393, and the safety requirements for trailers found in TENN. CODE ANN. Title 55, Chapter 9. All other rules and regulations governing

motor carriers in Tennessee are promulgated by the Tennessee Department of Safety and can be found at http://www.tn.gov/sos/rules/1340/1340.htm.

B. State Speed Limits

The maximum speed limit on interstate highways in Tennessee is seventy miles per hour. TENN. CODE ANN. § 55-8-152(c). The maximum speed limit on all other highways and roads, including all four-lane controlled-access highways which are federal and state routes, is sixty-five miles per hour. TENN. CODE ANN. § 55-8-152(a). On interstate and four-lane controlled-access highways, it is unlawful for a person to operate a motor vehicle in the left lane at a speed less than fifty-five miles per hour. TENN. CODE ANN. § 55-8-152(c). The State Department of Transportation is authorized to lower the above speed limits on the State system of roads and highways. TENN. CODE ANN. § 55-8-152(f)(1)(A). Local governments may lower the maximum speed limits on roads and streets under their jurisdiction. TENN. CODE ANN. § 55-8-152(d)(1)(A).

C. Overview of State CDL Requirements

CDL requirements in Tennessee are governed by the Uniform Classified and Commercial Driver License Act of 1988, TENN. CODE ANN. §§ 55-50-101 et seq. "Commercial driver license" is defined as "a document issued by the [Department of Safety] that authorizes a driver to operate a class of motor vehicle. The certificate shall be issued in accordance with the standards contained in 49 C.F.R. Part 383." TENN. CODE ANN. § 55-50-102(10). "Commercial motor vehicle" is defined as a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the motor vehicle:

> (i) Has a gross vehicle weight rating or gross combination weight rating of twenty-six thousand one (26,001) or more pounds;
> (ii) Is designed to transport more than fifteen (15) passengers, including the driver; or
> iii) Is of any size and is used in the transportation of hazardous materials, as defined in this section;

TENN. CODE ANN. § 55-50-102(12)(A). A Tennessee classifies CDLs as, among others, Class A, B, or C. Class A license is for the operation of vehicles weighing more than 26,000 pounds provided the vehicle(s) being pulled weigh in excess of 10,000 pounds. TENN. CODE ANN. § 55-50-102(21)(A). Holders of Class A licenses may operate vehicles in Class B, C, and D. *Id.* Class B license is for the operation of vehicles weighing more 26,000 pounds or any such vehicle towing a vehicle not in excess of 10,000 pounds. TENN. CODE ANN. § 55-50-102(21)(B). Class C license is for the operation of a vehicle of 26,000 pounds or less, including those designed to transport more than fifteen passengers. TENN. CODE ANN. § 55-50-102(21)(C).

The basic requirements are listed in TENN. CODE ANN. § 55-50-302 as: (1) applicant must be at least twenty-one years of age; (2) applicant must not currently be under a driver license suspension or revocation; (3) applicant must certify in the license

application that all of the qualifications are met. However, persons nineteen years of age shall be permitted to apply for a Class A or B license if no special endorsements are required, the commercial vehicle will be operated solely in intrastate commerce, and there has been compliance with all other current provisions of 49 C.F.R. Parts 383 and 391. TENN. CODE ANN. § 55-50-303(a)(1)(B)(i). Further, persons eighteen years of age shall be permitted to apply for a Class B license if the same requirements are met. TENN. CODE ANN. § 55-50-303(a)(1)(B)(ii). TENN. CODE ANN. 55-50-303 contains an extensive list of factors that will make an applicant ineligible including a person who is an habitual drunkard, or is addicted to the use of narcotic drugs, person has previously been adjudged to be afflicted with or suffering from any mental disability or disease, and a person who is required by this chapter to take an examination, unless the person has successfully passed the examination. The examination for a CDL includes a written and driving test that complies with minimum federal standards. TENN. CODE ANN. §§ 55-50-322, 55-50-404.

Every CDL is issued for five years and there are various to be paid if renewed after thirty days and/or six months after expiration. TENN. CODE ANN. §§ 55-50-337 to -338. A CDL shall be suspended for at least one year for driving under the influence; leaving the scene of an accident; or operating a commercial vehicle in the commission of a felony. TENN. CODE ANN. § 55-50-405. The suspension shall be three years if any of the above are committed while carrying hazardous materials. *Id.* The suspension shall be at least 10 years for a second violation of any of the above. *Id.* Various other suspensions, fines, and penalties are detailed in TENN. CODE ANN. § 55-50-405.

Insurance Issues

A. State Minimum Limits of Financial Responsibility

Issues related to motor vehicle insurance in Tennessee are governed by the Tennessee Financial Responsibility Law of 1977, TENN. CODE ANN. §§ 55-12-101 et seq. The purpose of the Financial Responsibility Law is to protect innocent members of the public from the negligence of motorists on the roads and highways. Purkey v. Am. Home Assur. Co., 173 S.W.3d 703, 706 (Tenn. 2005). Specifically, "[t]he financial responsibility laws of this State are concerned with the ability of an automobile driver to pay for bodily injury and property damage for which he may be legally liable." Schultz v. Tenn. Farmers Mut. Ins. Co., 404 S.W.2d 480, 484 (Tenn. 1966). The Financial Responsibility Law is not, however, a compulsory insurance law. *Purkey*, 173 S.W.3d at 706. Although the law applies to "every vehicle subject to the registration and certificate of title provisions," TENN. CODE ANN. § 55-12-139(a), the sanctions of the statute are not involved unless and until the driver is charged with a moving violation. *Id.* at 706 & n.1. "Proof of financial responsibility" means:

> (a) A written proof of liability insurance coverage provided by a single limit policy with a limit of not less than sixty thousand dollars ($60,000) applicable to one (1) accident;
>
> (b) A split-limit policy with a limit of not less than twenty-five thousand dollars ($25,000) for bodily injury to or death of one (1) person, not less than fifty

> thousand dollars ($50,000) for bodily injury to or death of two (2)or more persons in any one (1) accident, and not less than fifteen thousand dollars ($15,000) for damage to property in any one (1) accident;
>
> (c) A deposit of cash with the commissioner in the amount of sixty thousand dollars ($60,000); or
>
> (d) The execution and filing of a bond with the commissioner in the amount of sixty thousand dollars ($60,000).

TENN. CODE ANN. § 55-12-102(D)(i)(a)–(d).

B. Uninsured Motorist Coverage

Generally. The statutes governing uninsured motorist coverage in Tennessee can be found at TENN. CODE ANN. §§ 56-7-1201 et seq. An "uninsured motor vehicle" is defined as

> a motor vehicle whose ownership, maintenance, or use has resulted in the bodily injury, death, or damage to property of an insured, and for which the sum of the limits of liability available to the insured under all valid and collectible insurance policies, bonds, and securities applicable to the bodily injury, death, or damage to property is less than the applicable limits of uninsured motorist coverage provided to the insured under the policy against which the claim is made . . . .

TENN. CODE ANN. § 56-7-1202(a)(1).

Mandatory vs. waivable. As a matter of law, all provisions of the Tennessee uninsured motorist statute are made a part of all insurance policies issued for delivery in Tennessee. TENN. CODE ANN. § 56-7-1201(a); Dunn v. Hackett, 833 S.W.2d 78 (Tenn. Ct. App. 1992). Uninsured motorist coverage is included in every automobile policy unless rejected by the insured in writing. Integrity Ins. Co. v. Dudney, 745 F. Supp. 1299 (M.D. Tenn. 1990).

Limits. By statutory amendment, coverage of uninsured motorist policies has been limited to compensatory damages only. Carr. v. Ford, 833 S.W.2d 68 (Tenn. 1992). Insurers who decide voluntarily to offer uninsured motorist coverage for punitive damages may do so. *Id.* The limits of the uninsured motorist coverage shall be equal to the bodily injury liability limits stated in the policy. TENN. CODE ANN. § 56-7-1201(a)(1). The named insured may select lower limits of the coverage but not less than the minimum coverage limits in TENN. CODE ANN. § 55-12-107.

Available to injured commercial drivers. There is no statutory provision or case law in Tennessee which would seem to make uninsured motorist coverage unavailable for a commercial driver injured by an uninsured tortfeasor.

Exemptions/ offsets. The limit of liability for an insurer providing uninsured motorist coverage is the amount of coverage as specified in the policy less the sum of the limits

collectible under all liability and/or primary uninsured motorist insurance policies, bonds, and securities applicable to the bodily injury or death of the insured. TENN. CODE ANN. § 56-7-1201(d). Further, the uninsured motorist insurance carrier shall be entitled to credit for the total amount of damages collected by the insured from all parties alleged to be liable for the bodily injury or death of the insured whether obtained by settlement or judgment and whether characterized as compensatory or punitive damages. TENN. CODE ANN. § 56-7-1206(i). The ability of the carrier to offset settlements or judgments from other liable parties was not affected by Tennessee's adoption of comparative negligence. Poper v. Rollins, 90 S.W.3d 682 (Tenn. 2002). Further, credits for medical payments coverage and for workers' compensation benefits have been specifically enforced in Tennessee. TENN. CODE ANN. § 55-7-1205 contains the provision, "The forms of coverage may include terms, exclusions, limitations, conditions, and offsets that are designed to avoid duplication of insurance and other benefits." Tennessee courts have specifically enforced offsets for (1) payments made under the liability or medical payments feature of the policy; (2) amounts paid under any workers' compensation law, disability law, or similar law; and (3) all sums paid by or on behalf of persons or organizations who may be legally responsible.

Settlement procedures. Pursuant to TENN. CODE ANN. 56-7-1206(c), "[t]he uninsured motorist provision shall not require arbitration of any claim arising thereunder." Notwithstanding subsection (c), subsection (f) states

> if a party or parties alleged to be liable for the bodily injury or death of the insured offers the limits of all liability insurance policies available to the party or parties in settlement of the insured's claim, the insured or the insured's personal representative may accept the offer, execute a full release of the party or parties on whose behalf the offer is made and preserve the right to seek additional compensation from the insured's uninsured motorist insurance carrier upon agreement of the insured or the insured's personal representative to submit the insured's uninsured motorist claim to binding arbitration of all issues of tort liability and damages.

The ability of the relevant parties to engage in settlement is subject to various requirements including

> (1)(A)The offer must be for the sum of the limits of all liability insurance policies providing coverage to the party or parties on whose behalf the offer is made and in an aggregate amount that is less than the uninsured motorist coverage applicable to the bodily injury or death of the insured.
>
> (2) If the settlement does not release all parties alleged to be liable to the insured, arbitration of the uninsured motorist claim shall not be conducted until the claims against all such other parties have been fully and finally disposed of by settlement, final judgment or otherwise.

TENN. CODE ANN. 56-7-1206(f)(1)(A) & (2).

Fellow employee exclusions. Tennessee courts have upheld provisions in automobile liability insurance policies denying coverage for bodily injuries to fellow employees of the named insured when the injury arises out of the use of the automobile in the employer's business. *See, e.g.*, Ohio Cas. Group of Ins. Cos. v. Forrest, 1995 WL 455954 (Tenn. Ct. App. 1995). The primary purpose is to absolve the insurer from liability for injuries which should be covered under workers' compensation.

Stacking. TENN. CODE ANN. § 56-7-1205 states, in part, that nothing in this part requires uninsured motorist coverage

> whether alone or in combination with similar coverage afforded under other automobile liability policies, to afford limits in excess of those that would be afforded had the insured under the policies been involved in an accident with a motorist who was insured under a policy of liability insurance with minimum limits described in § 55-12-107 . . . .

The effect of this provision is to permit the insurer to prevent stacking of uninsured motorist coverage and to limit total uninsured coverage to the minimum coverage required. Keeble v. Allstate Ins. Co., 342 F. Supp. 963, 967 (E.D. Tenn. 1971). Tennessee courts have interpreted the above provision as, under appropriate policy language, preventing stacking of coverages. Jones v. Mulkey, 620 S.W.2d 498, 499–500 (Tenn. Ct. App. 1981).

C. No Fault Insurance

No fault liability insurance is neither required nor available in Tennessee.

D. Disclosure of Limits and Layers of Coverage

There is no statute in Tennessee mandating that insurers disclosure policy limits and/or layers of coverage to claimant/plaintiff.

E. Unfair Claims Practices

Insurance Trade Practices Act. The purpose of the Tennessee Unfair Trade Practices and Unfair Claims Settlement Act of 2009, TENN. CODE ANN. §§ 56-8-101 et seq., is to regulate trade and claims settlement practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945, and the Gramm-Leach-Bailey Act. The Act defines and prohibits all practices in Tennessee that constitute unfair methods of competition or unfair or deceptive acts or practices. TENN. CODE ANN. § 56-8-101. Section 56-8-105 specifically lists the numerous acts which constitute unfair claims practice. The Act gives the Commissioner of Commerce and Insurance broad authority to investigate violations of the Act, issue cease and desist orders, impose civil penalties, and order suspension or revocation of insurance licenses. TENN. CODE ANN. §§ 56-8-107 & -109(a). No private right of action may be maintained under the Act. TENN. CODE ANN. § 56-8-101(c).

Bad faith statute. While the Unfair Claims Settlement Act detailed above focuses on the comprehensive regulation of insurance industry practices, Tennessee's bad faith statute, TENN. CODE ANN. § 56-7-105, focuses on specific instances of bad faith. The bad faith statute provides a private right of action to an individual injured by an insurance company's refusal to pay a claim, if the refusal "was not in good faith." Nothing in either the Unfair Claims Settlement Act or the bad faith statute limit an insured's remedies to those provided therein.

Consumer Protection Act. The Tennessee Consumer Protection Act, TENN. CODE ANN. §§ 47-18-101 et seq., provides a private right of action for any "[u]nfair or deceptive acts affecting the conduct of any trade or commerce." TENN. CODE ANN. § 47-18-104(a); Myint v. Allstate Ins. Co., 970 S.W.2d 920, 925 (Tenn. 1998). The Act does not specifically address the acts or practices of insurance companies, but it includes a general, "catch-all" provision which prohibits "[e]ngaging in any other act or practice which is deceptive to the consumer or to any other person." TENN. CODE ANN. § 47-18-104(b)(27). The Consumer Protection Act applies to the acts or practices of insurance companies. *Myint*, 970 S.W.2d at 926. The Tennessee legislature, therefore, has enacted a trilogy of statutes which apply to the unfair and deceptive acts and practices of insurance companies. *Id.*

F. Bad Faith Claims

Tennessee does not recognize a general common law tort for bad faith by an insured against an insurer and, thus, any claims of bad faith must be brought pursuant to Tennessee's bad faith statute. TENN. CODE ANN. § 56-7-105 provides that an insurance company refusing to pay a loss within sixty days after a demand by the policy holder shall be liable for a penalty not exceeding 25 per cent of the liability, provided it shall appear that the refusal was not in good faith and inflicted an additional expense on the plaintiff. The statute is penal in nature and must be strictly construed. Minton v. Tenn. Farmers Mut. Ins. Co., 832 S.W.2d 35, 38 (Tenn. Ct. App. 1992). The plaintiff has the burden of proving bad faith on the part of the insurer. Palmer v. Nationwide Mut. Fire Ins. Co., 723 S.W.2d 124, 126 (Tenn. Ct. App. 1986). The bad faith penalty is not recoverable in every refusal of an insurance company to pay a loss. An insurance company is entitled to rely upon available defenses and refuse payment if there are substantial legal grounds that the policy does not afford coverage for the alleged loss. Sisk v. Valley Forge Ins. Co., 640 S.W.2d 844, 852 (Tenn. Ct. App. 1982). The statutory bad faith penalty applies to first party coverages, and in the past it has not been applied to some automobile liability insurance policies. *See* Medley v. Cimmaron Ins. Co., Inc., 514 S.W.2d 426 (Tenn. 1974); *see also* Tenn. Farmers Mut. Ins. Co. v. Cherry, 374 S.W.2d 371 (Tenn. 1964); Manns v. Ind. Lumbermen's Mut. Ins. Co. of Indianapolis, 482 S.W.2d 557 (Tenn. Ct. App. 1971). However, a recent decision of the Tennessee Supreme Court held that the insurer's conduct in handling an underinsured motorist claim could trigger the statutory penalty. Gaston v. Tenn. Farmers Mut. Ins. Co., 120 S.W.3d 815 (Tenn. 2003).

G. Coverage – Duty of Insured

Tennessee courts have repeatedly upheld the validity of an insurance policy condition requiring the insured to cooperate with the insurance company. Thaxton v. Allstate Ins. Co., 1988 WL 23922, at *2 (Tenn. Ct. App. Mar. 18, 1988); Horton v. Employers Liability Assur. Corp., 164 S.W.2d 1016, 1017 (1942). The insured's lack of cooperation, however, must be substantial and material to result in a breach of the policy condition. *Thaxton*, 1988 WL 23922, at *2 (rejecting the "California rule" which presumes prejudice when cooperation clause is breached as well as the approach where proof of harm is immaterial). In Tennessee, the burden is on the insurer to show substantial prejudice from an insured's breach of his or her duty to cooperate. *Id.* Cooperation with the third party, as opposed to the carrier, in such particulars as the admission of liability or making of voluntary payments will clearly be a breach of the duty to cooperate. *See, e.g.*, Anderson v. Dudley L. Moore Ins. Co., 640 S.W.2d 556 (Tenn. Ct. App. 1982). Inadvertent or innocent deficiencies in the duty to cooperate will not defeat coverage. *Thaxton*, 1988 WL 23922, at *2.

H. Fellow Employee Exclusions

Tennessee courts have upheld provisions in liability insurance policies denying coverage for bodily injuries to fellow employees of the named insured when the injury arises out of the use of the automobile in the employer's business. *See, e.g.*, Ohio Cas. Group of Ins. Cos. v. Forrest, 1995 WL 455954 (Tenn. Ct. App. 1995). The primary purpose is to absolve the insurer from liability for injuries which should be covered under workers' compensation. These exclusions are generally enforceable to the extent the employees were operating within the scope of their employment at the time of the accident.