STATE OF TENNESSEE COMPENDIUM OF LAW

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PRE-SUIT AND INITIAL CONSIDERATIONS

Pre-Suit Notice Requirements/Prerequisites to Suit

Pursuant to TENN. CODE ANN. § 29-26-121 (2016), any party initiating a health care liability case beginning October 1, 2008 must give sixty days advance notice to the implicated health care providers before filing suit. The court has discretion to excuse noncompliance with the pre-suit notice requirement only for "extraordinary cause" shown.

Relationship to the Federal Rules of Civil Procedure

Tennessee has its own Code of Civil Procedure. TENN. CODE ANN. §§ 20-1-102 to 119 (2016). Tennessee has adopted portions of certain Federal Rules.

Description and Organization of the State Court System

A) **Structure.** The Tennessee court system consists of the following courts: the Supreme Court, the Court of Appeals, the Court of Criminal Appeals, Circuit Court, Chancery Court, General Sessions Court, Probate Court, and Juvenile Court. Approximately 300 cities in the state also have municipal courts, which have jurisdiction in cases involving violations of city ordinances. TENN. CODE ANN. § 16-18-302 (2016). The Supreme Court, the Court of Appeals, and the Court of Criminal Appeals are divided into three grand divisions, which include the Eastern, Middle, and Western Divisions.

1) **Supreme Court.** 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 (2016).

2) **Court of Appeals.** 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 (2016).

3) **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 causes of action with unliquidated damages for injuries to property not resulting from breach of an oral or written contract, causes of action with unliquidated damages for injuries to person or character, eminent domain, the Uniform Residential Landlord Tenant Act ("URLTA"), and the Tennessee Governmental Tort Liability Act must be tried in circuit court. TENN. CODE ANN. § 16-11-102 (2016). Cases concerning probate and administration of estates and boundary disputes must be tried in chancery court. *See generally* TENN. CODE ANN. §§ 16-11-106, 16-16-201, -202 (2016). 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 (2016). 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, 16-10-111, 16-11-101, -102 (2016).

4) **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 (2016).

B) **Judicial selection**. The Tennessee Constitution states that "[j]udges of the Supreme Court or any intermediate appellate court shall be appointed for a full term or to fill a vacancy by and at the discretion of the governor; shall be confirmed by the Legislature; and thereafter, shall be elected in a retention election by the qualified voters of the state." TENN. CONST. art. VI, § 3. Inferior court judges "shall be elected by the qualified voters of the district or circuit to which they are to be assigned." *Id*. at § 4.

1) **Supreme Court and Court of Appeals.** 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. To be eligible to serve on the Court of Appeals, judges must be at least thirty years old and have resided in Tennessee for at least five years. In both the Supreme Court and the Court of Appeals, judges serve for an eight year term. TENN. CODE ANN. §§ 16-3-101, 16-4-103 (2016).

C) **Alternative dispute resolution.**

1) **Statutory provisions regarding ADR**. Tennessee law provides that "[a]ll causes of action, whether there be a suit pending therefore or not, may be submitted to the decision of one . . . or more arbitrators." TENN. CODE ANN. § 29-5-101 (2016). The statute, however, exempts two types of cases from arbitration, including: (1) cases in which one of the parties is an infant or of unsound mind, and (2) cases involving a claim "to an estate in real property, in fee or for life." *Id.*

a) **Uniform Arbitration Act.** Tennessee has adopted the Uniform Arbitration Act, as outlined in TENN. CODE ANN. §§ 29-5-301 to 320 (2016). The act states that a "written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract." TENN. CODE ANN. § 29-5-302(a) (2016). Further, the making of an agreement "confers jurisdiction on the court to enforce the agreement . . . ." TENN. CODE ANN. § 29-5-302(b) (2016). Thus, if the parties contractually agreed to arbitrate and

one party subsequently refuses to arbitrate, courts have the power to order the parties to arbitration. *See* TENN. CODE ANN. § 29-5-303 (2016).

2) **Court-ordered ADR under Tennessee Supreme Court Rule 31.** TENN. SUP. CT. R. 31 ("Rule 31") governs Alternative Dispute Resolution, as well as the selection and conduct of Tennessee mediators and other neutrals. This Compendium only summarizes the types of ADR proceedings governed by Rule 31 and the initiation of such proceedings, and it does not incorporate or address the sections of Rule 31 governing the conduct of mediators and other neutrals.

Rule 31 allows the parties to an eligible civil action to consent to participation in an ADR proceeding, and in certain instances, Rule 31 allows the 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. The term "extraordinary writs" does not encompass claims or applications for injunctive relief." TENN. SUP. CT. R. 31, § 2(g). ADR proceedings that may be initiated under Rule 31 include, but are not limited to the following: (1) case evaluations, (2) mediations, (3) judicial settlement conferences, (4) non-binding arbitrations (5) summary jury trials, or (6) mini-trials. *See generally* TENN. SUP. CT. R. 31, § 2(d), (i)–(j), (l), (n), (p), (s).

a) Pursuant to Rule 31, a court can enter an Order of Reference upon the motion by either party or on the court's own initiative requiring the parties to participate in a judicial settlement conference or mediation, and with the consent of the parties, a court may also order the parties to participate in a case evaluation. *See* TENN. SUP. CT. R. 31, § 3(b). Additionally, under Rule 31, a court can enter an Order of Reference, upon the motion by either party or on the court's own initiative and with the consent of all parties, requiring the parties to participate in non-binding arbitration, mini-trials, summary jury trials, and other appropriate ADR proceedings. *See* TENN. SUP. CT. R. 31, § 3(d).

b) Any Order of Reference made on the court's own initiative

> shall be subject to review on motion by any party and shall be vacated should the court determine in its sound discretion that the referred case is not appropriate for ADR or is not likely to benefit from submission to ADR. Pending disposition of any such motion, the ADR proceeding shall be stayed without the need for a court order.

TENN. SUP. CT. R. 31, § 3(c).

Service of Summons

A) **Persons.**

1) **Individuals.** Under the Tennessee Rules of Civil Procedure, service is good

> [u]pon an individual other than an unmarried infant or an incompetent person, by delivering a copy of the summons *and* of the complaint to the individual personally, or if he or she evades or attempts to evade service, by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, whose name shall appear on the proof of service, or by delivering the copies to an agent authorized by appointment or by law to receive service on behalf of the individual served.

TENN. R. CIV. P. 4.04(1) (emphasis added).

2) **Unmarried infants or incompetent persons.** Under the Tennessee Rules of Civil Procedure, service is good

> [u]pon an unmarried infant or an incompetent person, by delivering a copy of the summons and complaint to the person's resident guardian or conservator if there is one known to the plaintiff; or if no guardian or conservator is known, by delivering the copies to the individual's parent having custody within this state; or if no such person is within this state, then by delivering the copies to the person within this state having control of the individual. If none of the persons defined and enumerated above exist, the court shall appoint a practicing attorney as guardian ad litem to whom the copies shall be delivered. If any of the persons directed by this paragraph to be served is a plaintiff, then the person who is not a plaintiff who stands next in the order named above shall be served. In addition to the service provided in this paragraph, service shall also be made on an unmarried infant who is fourteen (14) years of age or more, and who is not otherwise incompetent.

TENN. R. CIV. P. 4.04(2).

3) **Non-resident individuals.** Under the Tennessee Rules of Civil Procedure, service is good

> [u]pon a nonresident individual who transacts business through an office or agency in this state, or a resident individual who transacts business through an office or agency in a county other than the county in which the resident individual resides, in any action growing out of or connected with the business of that office or agency, by delivering a copy of the summons and of the complaint to the person in charge of the office or agency.

TENN. R. CIV. P. 4.04(5).

B) **Public and private corporations**. Under the Tennessee Rules of Civil Procedure, service is good

> [u]pon a domestic corporation, or a foreign corporation doing business in this state, by delivering a copy of the summons and of the complaint to an officer or managing agent thereof, or to the chief agent in the county wherein the action is brought, or by delivering the copies to any other agent authorized by appointment or by law to receive service on behalf of the corporation.

TENN. R. CIV. P. 4.04(4).

C) **Waiver**.

1) Waiver of service of process does not waive an objection to venue or personal jurisdiction. Under the Tennessee Rules of Civil Procedure, "[a] defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant." TENN. R. CIV. P. 4.07.

2) **Duty to avoid unnecessary costs of serving the summons.** Under the Tennessee Rules of Civil Procedure,

> [a]n individual, corporation, or association that is subject to service and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons.

TENN. R. CIV. P. 4.07(2). The notice and request must comply with the requirements set forth in TENN. R. CIV. P. 4.07(2)(a)-(g).

3) **Failure to comply with a request for waiver.** Under the Tennessee Rules of Civil Procedure, "[i]f a defendant fails to comply with a request for waiver made by a plaintiff, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown." TENN. R. CIV. P. 4.07(2).

4) **Extended time to answer if defendant accepts waiver.** Under the Tennessee Rules of Civil Procedure, "[a] defendant that, before being served with process, timely returns a waiver so requested is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent." TENN. R. CIV. P. 4.07(3).

5) **Effect of filing a waiver with the court.** Under the Tennessee Rules of Civil Procedure, "[w]hen the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (3), as if a summons and complaint had been served at the time of filing the waiver, and no proof of service shall be required." TENN. R. CIV. P. 4.07(4).

6) **Costs imposed for failure to accept waiver.** Under the Tennessee Rules of Civil Procedure,

> [t]he costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.

TENN. R. CIV. P. 4.07(5).

D) **Other rules regarding service of process.**

1) **Partnerships and unincorporated entities.** Under the Tennessee Rules of Civil Procedure, service is good

> [u]pon a partnership or unincorporated association (including a limited liability company) which is named defendant under a common name, by delivering a copy of the summons and of the complaint to a partner or managing agent of the partnership or to an officer or managing agent of the association, or to an agent authorized by appointment or by law to receive service on behalf of the partnership or association.

TENN. R. CIV. P. 4.04(3).

2) **State of Tennessee or any state agency.** Under the Tennessee Rules of Civil Procedure, service is good "[u]pon the state of Tennessee or any agency thereof, by delivering a copy of the summons and of the complaint to the attorney general of the state or to any assistant attorney general." TENN. R. CIV. P. 4.04(6).

3) **Counties.** Under the Tennessee Rules of Civil Procedure, service is good "[u]pon a county, by delivering a copy of the summons and of the complaint to the chief executive officer of the county, or if absent from the county, to the county attorney if there is one designated; if not, by delivering the copies to the county court clerk." TENN. R. CIV. P. 4.04(7).

4) **Municipalities.** Under the Tennessee Rules of Civil Procedure, service is good "[u]pon a municipality, by delivering a copy of the summons and of the complaint to the chief executive officer thereof, or to the city attorney." TENN. R. CIV. P. 4.04(8). Service left at the mayor's office, without being personally delivered to the mayor, does not constitute service under TENN. R. CIV. P. 4.04(8). *See State ex rel. Barger v. City of Huntsville*, 63 S.W.3d 397, 399-400 (Tenn. Ct. App. 2001).

5) **Government or governmental type agencies.** Under the Tennessee Rules of Civil Procedure, service is good "[u]pon any other governmental or any quasi–governmental entity, by delivering a copy of the summons and of the complaint to any officer or managing agent thereof." TENN. R. CIV. P. 4.04(9).

6) **Defendants outside the territorial limits of Tennessee.** Under the Tennessee Rules of Civil Procedure,

> [w]henever the law of this state permits service of any process, notice, or demand, upon a defendant outside the territorial limits of this state, the secretary of state may be served as the agent for that defendant. Service shall be made by delivering to the secretary of state the original and one copy of such process, notice, or demand, duly certified by the clerk of the court in which the suit or action is pending or brought, together with the proper fee. A statement that identifies the grounds for which service on the secretary of state is applicable must be included.

TENN. R. CIV. P. 4B.

Statutes of Limitations. The Tennessee Supreme Court recently clarified the test for determining the applicable statute of limitations. In *Brenda Benz-Elliot v. Barrett Enter. LP*, 456 S.W.3d 140, 149 (Tenn. 2015), the Court held that, "in choosing the applicable statute of limitations, courts must ascertain the gravamen of each claim, not the gravamen of the complaint in its entirety." In undertaking this task, "a court must first consider the legal basis of the claim and then consider the type of injuries for which damages are sought." The analysis is "necessarily fact-intensive and requires a careful examination of the allegations of the complaint as to each claim for the types of injuries asserted and damages sought." *Id.* at 151.

A) **Construction.**

1) **Four-year statute of limitations.** Tennessee law states that

> [a]ll actions to recover damages for any deficiency in the design, planning, supervision, observation of construction, or construction of an improvement to real property, for injury to property, real or personal, arising out of any such deficiency, or for injury to the person or for wrongful death arising out of any such deficiency, shall be brought against any person performing or furnishing the design, planning, supervision, observation of construction, construction of, or land surveying in connection with, such an improvement within four (4) years after substantial completion of such an improvement.

TENN. CODE ANN. § 28-3-202 (2016).

2) **Substantial completion.** "Substantial completion" is defined as "that degree of completion of a project, improvement, or a specified area or portion thereof (in accordance with the contract documents, as modified by any change orders agreed to by the parties) upon attainment of which the owner can use the same for the purpose for which it was intended . . . ." TENN. CODE ANN. § 28-3-201(2) (2016).

3) **Parties can define substantial completion.** Tennessee law provides that the date of substantial completion "may be established by written agreement between the contractor and the owner." TENN. CODE ANN. § 28-3-201(2) (2016); s*ee also Brookridge Apartments, Ltd. v. Universal Constrs., Inc.*, 844 S.W.2d 637 (Tenn. Ct. App. 1992).

4) **Extension of four year statute of limitations.** The four-year deadline can be extended one additional year from the date of the injury if the injury occurred in the fourth year after substantial completion of the improvement. TENN. CODE ANN. § 28-3-203 (2016); *see also Chrisman v. Hill Home Dev., Inc.*, 978 S.W.2d 535, 540 (Tenn. 1998); *Holladay v. Speed*, 208 S.W.3d 408, 413 (Tenn. Ct. App. 2005).

B) **Contract.**

1) **Six year statute of limitations.** Tennessee law states that "action on contracts not otherwise expressly provided for" have a six (6) year statute of limitations after the cause of action accrues. TENN. CODE ANN. § 28-3-109(a)(3) (2016); *see Brenda Benz-Elliot*, 456 S.W.3d at 149.

2) **Written contracts.** This six (6) year statute of limitations applies to written contracts. TENN. CODE ANN. § 28-3-109 (2016).

3) **Oral contracts.** Oral contracts or agreements which are not to be performed within the space of one (1) year from the making of the agreement or contract fall within the statute of frauds which require some memorandum or note in writing to be enforced. *See* TENN. CODE ANN. § 29-2-101 (2016). Nonetheless, courts should not allow a person to use the statute of frauds to avoid contracts or to grant a privilege to a person to refuse to perform what has been agreed upon. *See Price v. Mercury Supply Co., Inc.*, 682 S.W.2d 924, 932 (Tenn. Ct. App. 1984). Tennessee courts also recognize a part performance exception to the Statute of Frauds which is applicable to oral contracts other than for the sale of land. *See Schnider v. Carlisle Corp.*, 65 S.W.3d 619, 621 (Tenn. Ct. App. 2001).

C) **Contribution.** The doctrine of comparative fault system abrogated the need to determine apportionment of liability between codefendants under TENN. CODE ANN. § 29-11-101 *et seq.* (2016), or the Uniform Contribution Among Tort-Feasors Act. *See McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992).

D) **Employment.**

1) **One year statute of limitations.**

i) **Petition for Workers' Compensation.** If an employer has not paid workers' compensation benefits, "the right to compensation under [the Tennessee Workers' Compensation Law] shall be forever barred, unless the notice required by § 50-6-201 is given to the employer *and* a petition for benefit determination is filed with the bureau on a form prescribed by the administrator within one (1) year after the accident resulting in injury." TENN. CODE ANN. § 50-6-203(b)(1) (2016) (emphasis added). While the language of the statute requires notice and petition to be filed one year "after the accident resulting in injury," the Tennessee Supreme Court held

that the discovery rule applies to the limitations period in § 50-6-203(b)(1), and that the one year statute of limitations governing a claim for workers' compensation benefits commences at the time the employee, by reasonable exercise of diligence and care, would have discovered that a compensable injury had been sustained. *Gerdau Ameristeel, Inc. v. Ratliff*, 368 S.W.3d 503 (Tenn. 2012).

ii) Actions against person other than employer. Tennessee law states that

> (1) The action against the other person by the injured worker, or those to whom [his] right of action survives, must be instituted in all cases within one (1) year from the date of the injury. (2) Failure on the part of the injured worker, or those to whom [his] right of action survives, to bring the action within the one year period shall operate as an assignment to the employer of any cause of action in tort that the worker, or those to whom [his] right of action survives, may have against any other person for the injury or death, and the employer may enforce [same] in [his] own name or in the name of the worker, or those to whom [his] right of action survives, for the employer's benefit, as the employer's interest may appear, and the employer shall have six (6) months after the assignment within which to commence suit.

TENN. CODE ANN. § 50-6-112(d)(1)-(2) (2016).

2) **Other considerations.** Note that there are specific statutes which may have a limitation built into the statute. An example is an age discrimination plaintiff must file a charge of discrimination with the EEOC or appropriate state agency within 300 days after the discrimination practice occurred, or "within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier." 29 U.S.C. § 626(d) (2016). Another example is that an action brought pursuant the Tennessee Human Rights Act must be filled within one year after the discriminatory practice ceases. *See* TENN. CODE ANN. § 4-21-311(d) (2016).

E) **Fraud**. Under Tennessee law, there is a five (5) year statute of limitations to remedy fraudulent conveyances before certain presumptions arise. Specifically,

> [p]ossession of goods and chattels continued for five (5) years, without demand made and pursued by due process of law, shall, as to the creditors of the possessor or purchasers from the possessor, be deemed conclusive evidence that the absolute property is in such possessor, unless the contrary appear by bill of sale, deed, will, or other instrument in writing, proved or acknowledged and registered.

TENN. CODE ANN. § 66-3-103 (2016).

F) **Governmental entities.**

1) **Actions brought by the State.** Tennessee Courts have consistently held that, "when the State of Tennessee, acting though its various departments, files a claim in a governmental capacity, statutes of limitations do not bar the state's claim

absent an express legislative directive to the contrary." *In re Estate of Daughrity*, 166 S.W.3d 185, 191 (Tenn. Ct. App. 2004).

2) **Actions brought against a governmental entity.** Tennessee passed the Tennessee Governmental Tort Liability Act ("GTLA") under the authority of article 1, § 17 of the Tennessee Constitution. *See* TENN. CODE ANN. § 29-20-101 *et seq* (2016); *see also Sutton v. Barnes*, 78 S.W.3d 908, 913 (Tenn. Ct. App. 2002) (stating that the Tennessee legislature passed GTLA under the authority of the Tennessee Constitution). GTLA carves out exceptions to the traditional rule that governmental entities are immune from suit. *Barnes*, 78 S.W.3d at 913. Under GTLA, claims must be brought within twelve months after the cause of action accrues. *See* TENN. CODE ANN. § 29-20-305(b) (2016). A cause of action accrues under GTLA when the plaintiff knew or should have known that the defendant's conduct caused him harm. *Barnes*, 78 S.W.3d at 916.

G) **Improvements to realty**. Tennessee law states that

> [a]ll actions to recover damages for any deficiency in the design, planning, supervision, observation of construction, or construction of an improvement to real property, for injury to property, real or personal, arising out of any such deficiency, or for injury to the person or for wrongful death arising out of any such deficiency, shall be brought against any person performing or furnishing the design, planning, supervision, observation of construction, construction of, or land surveying in connection with, such an improvement within four (4) years after substantial completion of such an improvement.

TENN. CODE ANN. § 28-3-202 (2016).

H) **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) (2016).

I) **Professional liability**. Under Tennessee law, actions and suits against attorneys, licensed public accountants, or certified public accountants for malpractice, whether the actions are grounded or based in contract or tort, must be brought within one (1) year. TENN. CODE ANN. § 28-3-104(c)(1) (2016).

J) **Property damage**. Under TENN. CODE ANN. § 28-3-105 (2015), there is a three (3) year statute of limitation for property damage. *See also Brenda Benz-Elliot v. Barrett Enter. LP*, 456 S.W.3d 140, 149 (Tenn. 2015).

K) **Tolling.**

1) **Injunction.** Under Tennessee law, "[w]hen the commencement of an action is stayed by injunction, the time of the continuance of the injunction is not to be counted." TENN. CODE ANN. § 28-1-109 (2016).

2) **Probate.** Under Tennessee law,

> [t]he time between the death of a person and the grant of letters of testamentary or of administration on such person's estate, not exceeding six (6) months, and the six (6) months within which a personal representative is exempt from suit, is not to be taken as a part of the time limited for commencing actions which lie against the personal representative.

TENN. CODE ANN. § 28-1-110 (2016).

3) **Absence from the State.** Under Tennessee law,

> [i]f at any time any cause of action shall accrue against any person who shall be out of the state, the action may be commenced within the time limited therefor, after such person shall have come into the state; and, after any cause of action shall have accrued, if the person against whom it has accrued shall be absent from or reside out of the state, the time of absence or residence out of the state shall not be taken as any part of the time limited for the commencement of the action.

TENN. CODE ANN. § 28-1-111 (2016).

L) **Wrongful death**. Under Tennessee law, civil actions for injury to the person shall be commenced within one (1) year after cause of action accrued. TENN. CODE ANN. § 28-3-104(a)(1)(B) (2016). A cause of action for wrongful death accrues as of the date a cause of action accrues for the injury which resulted in the death. *See Mosier v. Lucas*, 207 S.W.2d 1021, 1022-23 (Tenn. 1947); *see also Craig v. R.R. Street & Co., Inc.*, 794 S.W.2d 351, 354-55 (Tenn. Ct. App. 1990). 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).

Statutes of Repose

A) **Breach of corporate fiduciary duty**. In Tennessee, the statute of repose for breach of fiduciary duty of a for-profit and non-profit entity is three (3) years. *See* TENN. CODE ANN. §§ 48-18-601, 48-58-601 (2016).

B) **Consumer Protection Act**. In Tennessee, the statute of repose for breach of the Consumer Protection Act is five (5) years. *See* TENN. CODE ANN. § 47-18-110 (2016).

C) **Defective design or construction of real property improvements**. In Tennessee, the statute of repose for defective design or construction of real property improvements is four (4) years after substantial completion. *See* TENN. CODE ANN. § 28-3-202 (2016).

D) **Medical malpractice**. In Tennessee, the statute of repose for medical malpractice actions is three (3) years. *See* TENN. CODE ANN. § 29-26-116(a)(3) (2016).

E) **Products liability.**

1) **One year.** Products liability actions involving products with an expiration date must be commenced within one (1) year after the expiration date, even if the plaintiff was not aware of a product defect or injury by that date. *See* TENN. CODE ANN. § 29-28-103(a) (2016).

2) **Ten years or twenty-five years.** Products liability cases generally expire in ten (10) years from initial sale, and must be brought within six (6) years of the date of injury, but not if the product is asbestos, which has no repose period, or silicone breast implants, which has a twenty-five (25) year repose period commencing on the date the product was implanted. Actions for injuries relating to silicone breast implants must be brought within four (4) years from the date plaintiff should have discovered the injury. *See* TENN. CODE ANN. § 29-28-103(a)-(c)(1) (2016).

F) **Surveyor malpractice**. In Tennessee, the statute of repose for surveyor malpractice is four (4) years. *See* TENN. CODE ANN. § 28-3-114(a) (2016).

Venue

A) **Where to file.**

1) **Transitory actions.** The venue of transitory actions brought in Tennessee courts is controlled by TENN. CODE ANN. § 20-4-101 (2016), 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 individual 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 (2016).

2) **Defendant is not a natural person.** Under Tennessee law, if the defendant is not a natural person, the action must 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 (2016).

4) **Divorce actions.** In Tennessee, venue in a divorce case lies in any of the following counties: (1) the common county of parties' residence at the time of their separation; (2) the county in which the defendant resides, if a resident of Tennessee; or (3) if the defendant resides in another state or is a convict, in the county where the plaintiff resides. *See* TENN. CODE ANN. § 36-4-105(a) (2016).

5) **In rem actions.** Under Tennessee law,

> [i]n actions commenced by the attachment of property without personal service of process, and in cases where the suit is brought to obtain possession of personal property, or to enforce a lien or trust deed or mortgage, or where it relates to real property, the attachment may be sued out or suit brought in any county where the real property, or any portion of it, lies, or where any part of the personal property may be found.

TENN. CODE ANN. § 20-4-103 (2016).

6) **Workers' compensation.** In Tennessee, "the court of workers' compensation claims in the bureau of workers' compensation [has] original and exclusive jurisdiction over all contested claims for workers' compensation benefits when the date of the alleged injury is on or after July 1, 2014." TENN. CODE ANN. § 50-6-237 (2016).

B) **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 (2016).

C) **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 Curtis v. Garrison*, 364 S.W.2d 933, 935–36 (Tenn. 1963); *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").

NEGLIGENCE

Comparative Fault/Contributory Negligence

A) **Contributory negligence abolished.** In *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992), the Tennessee Supreme Court abolished contributory negligence and adopted modified comparative fault.

B) **Standard.** 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).

Exclusive Remedy – Worker's Compensation

A) **General principles.** The Tennessee Workers' Compensation Law (the "TWCL"), TENN. CODE ANN. § 50-6-101 *et seq.* (2016), governs any claim for workers' compensation benefits, when the injury occurred on or after July 1, 2014. The TWCL requires that any employer or employee subject to the law must, respectively, pay and receive compensation for personal injury or death by accident arising primarily out of and in the course and scope of employment without regard to fault. TENN. CODE ANN. § 50-6-103 (2016). The law does not bind corporate officers so long as, prior to any accident resulting in injury or death, such officers have consented to be exempt from the provision. TENN. CODE ANN. § 50-6-103 (2016).

B) **The "arising out of" and "in the course of business" requirements generally.** The phrases "arising out of" and "in the course of" in the TWCL are construed differently. "The 'in the course of employment' requirement refers to the time, place, and circumstances of the injury." *Shearon v. Seaman*, 198 S.W.3d 209, 214 (Tenn. Ct. App. 2005) (citations omitted). "The 'arising out of' employment requirement relates to the origin of the incident," and "[t]he question is one of causation." *Id.* Simply because an employee was at his place of work when the injury occurred is insufficient to conclude that the injury that he sustained arose out of his employment. *Id.* at 215.

C) **Arises out of employment.** Injury "arises out of . . . employment," for purposes of TWCL, if it

> "followed as a natural incident of [the] employee's work [,][was] contemplated by [a] reasonable person familiar with the whole situation as [a] result of [the] exposure occasioned by nature of [the] employment[,] . . . [appeared] to have had its origin in a risk connected with the employment and . . . flowed from that source as a rational consequence."

Medrano v. MCDR, Inc., 366 F. Supp. 2d 625, 632 (W.D. Tenn. 2005) (quoting *T.J. Moss Tie. Co. v. Rollins*, 235 S.W.2d 585, 586 (1951)).

D) **In the course of employment.** Whether a workers' compensation claimant's injury arose "in the course of employment," within the meaning of the TWCL, requires an

examination of the "time, place and circumstances in which the injury occurred." *McCurry v. Container Corp. of Am.*, 982 S.W.2d 841, 843 (Tenn. 1998) (quoting *McAdams v. Canale*, 294 S.W.2d 696, 699 (Tenn. 1956)). The injury occurs in the course of employment when the employee is injured while performing the work he was employed to perform. *Seaman*, 198 S.W.3d at 214.

E) **Exclusive remedy.** Benefits conferred by the TWCL are purely statutory and payments made under the Act are governed solely by statutory authority. *Leatherwood v. United Parcel Serv.*, 708 S.W.2d 396, 399 (Tenn. Ct. App. 1985). Thus, worker's compensation law preempts other remedies in tort. *Lang v. Nissan N. Am., Inc.*, 170 S.W.3d 564, 572 (Tenn. 2005).

Indemnification

A) **General principles**. In Tennessee indemnification rests on two key principles – (1) that all individuals should be held accountable for their own actions, and (2) that wrongdoers should be liable to individuals who have been ordered to pay damages that the wrongdoers should have paid. *Winter v. Smith*, 914 S.W.2d 527, 541 (Tenn. Ct. App. 1995). Indemnification effectuates these policy goals by requiring the complete shifting of loss from one party to another. *Id*. at 542.

B) **Express and implied indemnity**. An indemnity cause of action may be express or implied by law. *Smith*, 914 S.W.2d at 542. The *Smith* court summarized the difference between the two, noting that

> [e]xpress indemnity obligations arise from the contracts between the parties, and implied indemnity obligations, whether called equitable or contractual, are imposed by law without the consent or agreement of the parties. . . . In the absence of an express contract, an obligation to indemnify will be implied only if the party from who indemnification is sought breached a contract or engaged in some other related tortious conduct.

Id. at 541–42.

C) **Claim for indemnity precludes claim for contribution**. Under Tennessee statutory authority, "[w]here one tort-feasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of tort-feasor's indemnity obligation." TENN. CODE ANN. § 29-11-102(f) (2016).

Joint and Several Liability

A) **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*.

B) **Exception to the general rules.**

1) **Two primary 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. 1996). 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).

2) **Contribution exception.** Contribution still applies under the recognized exceptions to the abolition of joint and several liability. 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 (2016).

Strict Liability

A) **General principles**. Tennessee Courts recognize strict liability under the following two theories: (1) the Tennessee Products Liability Act; and (2) ultra-hazardous or abnormally dangerous activities.

B) **Strict liability in products liability actions.**

1) **Defective condition or unreasonably dangerous condition.** The Tennessee Products Liability Act, TENN. CODE ANN. § 29-28-101 *et seq*. (2016), establishes strict liability on the part of a manufacturer of goods if the item is placed in the stream of commerce in *either* a defective condition *or* an unreasonably dangerous condition. *Smith v. Detroit Marine Eng'g Corp*., 712 S.W.2d 472, 475 (Tenn. Ct. App. 1985).

2) **Limitations on actions against both a seller and a manufacturer.** Strict liability claims cannot be brought against the seller of defective goods unless: (1) the seller is also the manufacturer of the product or a component part of the product; (2) the manufacturer of the product has been judicially declared insolvent; (3) the manufacturer or distributor is beyond the personal jurisdiction of Tennessee courts; (4) the seller exercised substantial control over the aspect of the design, testing, manufacture, packaging or labeling of the product that caused the alleged harm for which recovery is sought; (5) the seller altered or modified the product, and such alteration or modification was a substantial factor in causing the harm for which recover is sought; or (6) the seller gave an express warranty. TENN. CODE ANN. § 29-28-106 (2016).

3) **Seller of goods.** Under the Tennessee Products Liability Act, the term "seller" includes chattel leases and bailment situations. In addition, in a products liability

action, a cause of action for breach of warranty can be maintained against a lessor or bailor of personal property. *Baker v. Promark Prods. W., Inc*., 692 S.W.2d 844, 847–48 (Tenn. 1985).

4) **Applicable test for "unreasonably dangerous" products.** Tennessee uses both the consumer expectation test and the reasonable manufacturer test to determine whether a product is "unreasonably dangerous." *Ray v. BIC Corp*., 925 S.W.2d 527, 530 (Tenn. 1996).

5) **Effect of government safety standards.** If a product is manufactured in accordance with government standards, it is presumed not to be unreasonably dangerous. However, such presumption is rebuttable. TENN. CODE ANN. § 29-28-104(a) (2016).

6) **Learned intermediary doctrine.** Tennessee has adopted the learned intermediary doctrine. *See, e.g*., *Pittman v. Upjohn Co*., 890 S.W.2d 425, 429 (Tenn. 1994). The doctrine stands for the proposition that manufactures of inherently unsafe products that normally have a duty to warn users of any potential dangers can reasonably rely on intermediaries to convey the necessary warnings. *Id.* at 424 (citing RESTATEMENT (SECOND) OF TORTS § 388 cmt. n). Physicians prescribing unavoidably unsafe prescription drugs can serve as learned intermediaries. *Id.* "[T]he manufacturer of an unavoidably unsafe prescription drug can discharge its duty to warn by providing the physician with adequate warnings of the risks associated with the use of its drug." *Id.* Failure to provide the physician with a full and complete disclosure regarding the side effects of the drug will not shield the manufacturer from liability under the learned intermediary doctrine. *Id*.

C) **Ultra-Hazardous or Abnormally Dangerous Activities**

1) **General principles.** Defendants engaged in ultra-hazardous activities can be held strictly liable for damages caused to the person or property of another individual by participation in the activity. *Leatherwood v. Wadley*, 121 S.W.3d 682, 699 (Tenn. Ct. App. 2003). The fact that the defendant exercised reasonable care is irrelevant. *Id*.

2) **Ultra-hazardous activities in Tennessee.** Tennessee Courts have traditionally defined ultra-hazardous activities as including "those presenting an abnormally dangerous risk of injury to persons or their property, including the carrying out of blasting operations, the storage of explosives or harmful chemicals, and the harboring of wild animals." *Leatherwood*, 121 S.W.3d at 699.

3) **Factors to consider when assessing whether an activity is ultra-hazardous.** Tennessee courts look to the RESTATEMENT (SECOND) OF TORTS § 520 when assessing whether an activity is abnormally dangerous. *Leatherwood*, 121 S.W.3d

at 699-700. Section 520 requires courts to assess a number of different factors including the

> (a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it would be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes.

Id. at 700 (quoting RESTATEMENT (SECOND) OF TORTS § 520). Tennessee courts do not look to a single factor in making determinations regarding whether an activity is abnormally dangerous; rather, courts balance all of the factors. *Id*. at n.12.

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:

> '[i]n 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.'

Schenk, 309 S.W.2d at 477-78 (internal citations omitted). More recently, in *Fults v. Hastings*, No. 87-376-II, 1988 WL 54306 (Tenn. Ct. App. May 31, 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.

DISCOVERY

Electronic Discovery Rules

In 2009, the Tennessee Supreme Court promulgated Rule 37.06 of the Tennessee Rules of Civil Procedure, delineating the standard for determining whether electronically stored information ("ESI") is amenable to discovery. Rule 37.06(1) requires judges to undertake a two-prong test. First, a judge must determine whether the ESI is "subject to production under the applicable standard of discovery." Second, if the ESI is subject to production,

> a judge should then weigh the benefits to the requesting party against the burden and expense of the discovery for the responding party, considering such factors as: the ease of accessing the requested information, the total cost of production compared to the amount in controversy; the materiality of the information to the requesting party; the availability of the information from other sources; the complexity of the case and the importance of the issues addressed; the need to protect privilege, proprietary, or confidential information, including trade secrets; whether the information or software needed to access the requested information is proprietary or constitutes confidential business information; the breadth of the request, including whether a subset (e.g., by date, author, recipient, or through use of a key-term search or other selection criteria) or representative sample of the contested electronically stored information can be provided initially to determine whether production of additional such information is warranted; the relative ability of each party to control costs and its incentive to do so; the resources of each party compared to the total cost of production; whether the requesting party has offered to pay some of all of the costs of identifying, reviewing, and producing the information; whether the electronically stored information is stored in a way that makes it costly or burdensome to access than is reasonably warranted by legitimate personal, business, or other no-litigation-related reasons; and whether the responding party has deleted, discarded or erased electronic information after litigation was commenced, or after the responding party was aware that litigation was probable.

TENN. R. CIV. P. 37.06(1)

Expert Witnesses

Under the Tennessee Rules of Civil Procedure:

> Discovery of facts known and opinions held by experts . . . acquired or developed in anticipation of litigation may be obtained as follows: (A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds of reach opinion. . . . (ii) A party may also depose any other party's expert witness expected to testify at trial. (B) A party may not discover the identity of, facts known by, or opinions held by an expert who has been consulted by another party in anticipation of litigation for trial and who is not to be called as a witness at trial except as provided in Rule 35.02 or upon a showing that the party seeking discovery cannot obtain facts or opinions on the same subject by other means. (C) Unless injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions 4(A)(ii) and 4(B) of the governing rule; and (ii) with respect to discovery obtained under subdivision 4(A)(ii) of the rule the court may require, and with respect to discovery obtained under subdivision 4(B) of the rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

TENN. R. CIV P. 26.02(4).

Non-Party Discovery

A) **Subpoenas are governed by Tennessee Rule of Civil Procedure 45.** Subpoenas are issued by the clerk of the court and command the person "to whom it is directed to attend and give testimony at the time and place and for the party therein specified." TENN. R. CIV. P. 45.01. In Tennessee, there is no general prohibition on discovery from non-parties to a lawsuit. *Allen v. Howmedica Leibinger, GmhH*, 190 F.R.D. 518, 521 (W. D.

Tenn. 1999). However, a nonparty is entitled to consideration of its nonparty status as one factor in the analysis of the burdens imposed upon it by compliance with a subpoena. *Id.*

B) **County of deposition under Rule 45.** Under Rule 45, "[a] resident of the state may be required to give a deposition only in the county wherein the person resides or is employed or transacts his or her business in person, or at such other convenient place as is fixed by an order of the court." TENN. R. CIV. P. 45.04(2).

Privileges

A) **Attorney-client privilege.** Tennessee law states that

> [n]o attorney, solicitor or counselor shall be permitted, in giving testimony against a client or person who consulted the attorney, solicitor or counselor professionally, to disclose any communication made to the attorney, solicitor or counselor as such by such person, during the pendency of the suit, before or afterward, to the person's injury.

TENN. CODE ANN. § 23-3-105 (2016).

1) **Exceptions.** Tennessee courts have reasoned that "[t]he attorney-client privilege [] is not absolute and does not protect all communications between an attorney and a client. . . . The communication must involve the subject matter of the representation and must be made with the intention that the communication will be kept confidential." *State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Group Trust*, 209 S.W.3d 602, 616 (Tenn. Ct. App. 2006). Courts further reason that "[t]he privilege applies not only to the client's communications but also to the attorney's communications to his or her client when the attorney's communications are specifically based on the client's confidential communications or when disclosing the attorney's communications would, directly or indirectly, reveal the substance of the client's confidential communications." *Boyd v. Comdata Network, Inc*., 88 S.W.3d 203, 213 (Tenn. Ct. App. 2002). The privilege "belongs" to the client; however, when the client testifies about alleged communications with his attorney or communicates in the presence of others who are not bound by the privilege, the attorney-client privilege is waived as to the reported communication. *Id.*; *see also Tenn. Trucking Ass'n Self Ins. Group Trust*, 209 S.W.3d at 616 n.14.

B) **Work product.** Under the Tennessee Rules of Civil Procedure:

> (3) Trial Preparation: Materials. Subject to the provisions of subdivision (4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions,

> conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.
>
> A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37.01(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.
>
> . . .
>
> (5) Claims of Privilege or Protection of Trial Preparation Materials: When a party withholds information otherwise discoverable under the rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege protection.
>
> . . .

TENN. R. CIV. P. 26.02(3), (5).

C) **Others privileges for consideration.** Other forms of privileged communications are governed by Tennessee statutes and rules. These communications are:

1) **Accident report privilege.** TENN. CODE ANN. § 55-10-114(b) (2016).

2) **Accountant-client privilege.** TENN. CODE ANN. § 62-1-116 (2016).

3) **Attorney-private detective privilege.** TENN. CODE ANN. § 24-1-209 (2016).

4) **Child sexual abuse exception to privileges.** TENN. CODE ANN. § 37-1-614 (2016).

5) **Clergy-penitent privilege.** TENN. CODE ANN. § 24-1-206 (2016).

6) **Deaf person-interpreter privilege.** TENN. CODE ANN. § 24-1-211(f) (2016).

7) **Disciplinary board—complaint privilege.** TENN. SUP. CT. R. 9, § 32.

8) **Grand jury—witness privilege.** TENN. R. CRIM. P. 6(k).

9) **Legislative committee—witness privilege.** TENN. CODE ANN. § 24-7-114 (2016).

10) **Medical review committee—informant privilege.** TENN. CODE ANN. § 63-1-150(d) (2016).

11) **News reporter's privilege.** TENN. CODE ANN. § 24-1-208 (2016).

12) **Professional counselor/marital and family therapist/clinical pastoral therapist-client privilege.** TENN. CODE ANN. § 63-22-114(a) (2016).

13) **Psychiatrist-patient privilege.** TENN. CODE ANN. § 24-1-207(a) (2016).

14) **Psychologist/psychological examiner-client privilege.** TENN. CODE ANN. § 63-11-213 (2016).

15) **Exceptions to evidentiary privilege of mental health professionals.** TENN. CODE ANN. § 33-3-114 (2016).

16) **Social worker-client privilege.** TENN. CODE ANN. § 63-23-109(a) (2016).

17) **Spousal privilege.** TENN. CODE ANN. § 24-1-201 (2016).

Requests to Admit

A) **Summary of key points under Rule 36.01.** The Tennessee Rules of Civil Procedure permit the plaintiff to serve requests for admissions upon the defendant with or after service of the summons and complaint. TENN. R. CIV. P. 36.01. The rule fixes the time within which responses or objections must be served. *Id.* The rule also imposes upon a party the duty to make a reasonable inquiry in an effort to ascertain the answer to a request for admissions. *Id.*

The Rule states:

> A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26.02 set forth in the request that relate to (a) facts, the application of law to fact, or opinions about either; and (b) the genuineness of any described documents. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.
>
> Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon the defendant. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when

> good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that he or she has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provision of Rule 37.03, deny the matter or set forth reasons why the party cannot admit or deny it.
>
> The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37.01(4) apply to the award of expenses incurred in relation to the motion.

Id.

EVIDENCE, PROOFS AND TRIAL ISSUES

A) Accident Reconstruction

1) **General points.** Secondary authority notes that

> [p]roof at trial may include substantive evidentiary exhibits and illustrative demonstrative exhibits. Evidentiary exhibits are tangibles that may be perceivable by the trier of facts through any of its senses and include documents (e.g. letters, insurance policies, business records), real evidence (e.g. the defective product in a products liability action), and demonstrative exhibits, be they machine-made (e.g. photographs), or man-made (e.g. diagrams, drawing scale). Illustrative demonstrative exhibits include those that can be used to represent, emphasize, and dramatize other evidence relevant to a case but which are not the substantive original, operative, tangible things upon which the case is founded.

2 LAWRENCE A. PIVNICK, TENN. CIR. CT. PRAC. § 24:12 (2017 ed.) (citations omitted).

2) **Computer generated evidence.** Secondary authority states that

> [c]omputer generated evidence, usually referred to as a computer animated visualization or recreation of an event, is an increasingly common form of demonstrative evidence, whose purpose is to illustrate and explain a witness's testimony, e.g. about how an accident occurred. A computer animation offered to illustrate an expert's opinion may be admitted in evidence where the expert testimony is itself admissible pursuant to McDaniel and the applicable Tennessee Rules of Evidence.

2 LAWRENCE A. PIVNICK, TENN. CIR. CT. PRAC. § 24:12 (2017 ed.) (citations omitted); *see also State v. Farner*, 66 S.W.3d 188, 208-09 (Tenn. 2001). "The proponent must further establish that the computer animation is a fair and accurate depiction of the event it purports to portray." PIVNICK, *supra*, § 24:12; *see also* TENN. R. EVID. 901; *see also Farner*, 66 S.W.3d at 192, 198; *see also Bronson v. Umphries*, 138 S.W.3d 844, 860-61 (Tenn. Ct. App. 2003). A computer animation is subject to exclusion if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." TENN. R. EVID. 403; *Farner*, 66 S.W.3d at 210.

3) **Qualifying witnesses.** In order to express an opinion as to how an automobile accident happened, a witness must be properly qualified as an accident reconstruction expert or must have been an eyewitness to the accident. *Walden v. Wylie*, 645 S.W.2d 247, 251 (Tenn. Ct. App. 1982). There may be many occasions when a properly qualified expert may arrive at his conclusion after hearing testimony from a live witness. ROBERT E. BURCH, TRIAL HANDBOOK FOR TENNESSEE LAWYERS § 24:21 (2016 ed. 2016). Expert opinion testimony reconstructing motor vehicle accidents from physical evidence are allowable provided the expert witness is "sufficiently qualified in the particular field, has before him enough physical evidence to provide him with the important variables involves, makes his reasoning processes clear to the trier of facts, and his conclusion is not contrary to the facts or in conflict with common observations and experiences of man." *Id. See generally* Joseph E. Badger, *Reconstruction of Traffic Accidents*, *in* 9 AM. JUR. PROOF OF FACTS 3d 115 (1990).

Appeals

A) **General principles.** Tennessee's Rules of Appellate Procedure makes the distinction between Appeals as of Right and Interlocutory Appeals by Permission.

B) **Appeals as of right.** Under Rule 4 of the Tennessee Rules of Appellate Procedure,

> an appeal as of right to the Supreme Court, Court of Appeals or Court of Criminal Appeals, the notice of appeal required by Rule 3 shall be filed with and received by the clerk of the trial court within 30 days after the date of entry of the judgment appealed from . . . .

TENN. R. APP. P. 4.

C) **Interlocutory appeals.** An interlocutory appeal by permission is governed by Rule 9 of the Tennessee Rules of Appellate Procedure, which states that

> (a) [e]xcept as provided in Rule 10, an appeal by permission may be taken from an interlocutory order of a trial court from which an appeal lies to the Supreme Court, Court of Appeals or Court of Criminal Appeals only upon application and in the discretion of the trial and appellate court. In determining whether to grant permission for appeal, the following, while neither controlling or fully measuring the courts discretion, indicate the

> character of the reasons that will be considered: (1) the need to prevent irreparable injury, giving consideration to the severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of final judgment will be ineffective; (2) the need to prevent needless, expensive, and protracted litigation, giving consideration to whether the challenged order would be a basis for reversal upon entry of a final judgment, the probability of reversal, and whether an interlocutory appeal will result in a net reduction in the duration and expense of the litigation if the challenged order is reversed; and (3) the need to develop a uniform body of law, giving consideration to the existence of inconsistent orders of other courts and whether the question presented by the challenged order will not otherwise be reviewable upon entry of final judgment. Failure to seek or obtain interlocutory review shall not limit the scope of review upon an appeal as of right from entry of the final judgment. (b) The party seeking an appeal must file and serve a motion requesting such relief within 30 days after the date of entry of the order appealed from. (c) The appeal is sought by filing an application for permission to appeal with the clerk of the appellate court within 10 days after the date of entry of the order in the trial court or the making of the prescribed statement by the trial court, whichever is later.

TENN. R. APP. P. 9.

Biomechanical Testimony

1) **Tennessee Rules of Evidence 702.** Tennessee Rules of Evidence 702 and 703 govern the admissibility of expert testimony, including biomechanical testimony. Rule 702 states that "[i]f scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise." TENN. R. EVID. 702.

2) **Tennessee Rules of Evidence 703.** Rule 703 states that

> [t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the opponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

TENN. R. EVID. 703.

3) **Other points.** The trial court, therefore, must determine that the expert testimony is reliable in that the evidence will substantially assist the trier of fact to determine a fact in issue and that the underlying facts and data appear to be trustworthy. In addition to these specific rules, evidence generally must be relevant to be admissible. *See* TENN. R. EVID. 401, 402.

Collateral Source Rule

A) **General points.** Like many states, Tennessee follows the collateral source rule. Under this rule, payments made voluntarily or by a third party who was not a joint tortfeasor do not diminish a tortfeasor's liability. RESTATEMENT (SECOND) OF TORTS § 920Acmt. b (AM. LAW. INST. 1977). The law allows recovery from a tortfeasor for medical expenses, even if forgiven by the provider, when such expenses were necessary and reasonable. *Fye v. Kennedy*, 991 S.W.2d 754, 763-64 (Tenn. Ct. App. 1998).

B) **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 (2016). Worker's Compensation and Medicaid benefits are excluded from the scope of T.C.A. § 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. *Id; 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).

Convictions

A) **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.

B) **Criminal.** 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. Addison*, 973 S.W.2d 260 (Tenn. Crim. App. 1997); *State v. Blevins*, 968 S.W.2d 888, 893 (Tenn. Crim. App. 1997); *State v. Galmore*, 994 S.W.2d 120, 122 (Tenn. 1999).

C) **Prior convictions used to impeach.** 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 ten 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).

D) **Traffic.** 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). In addition, the Supreme Court of Tennessee 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, 857 (Tenn. 1993). The *Williams* court declined to answer the question of admissibility where the defendant personally appears in court and pleads guilty. *Id. But see Patty v. Lane*, No. E2012-01787-COA-R3-CV, 2013 WL 341928, at * 7 (Tenn. Ct. App. July 3, 2013).

Day in the Life Videos

A) **Generally.** The admissibility of "day in the life" videos is an issue that falls under Tennessee Rule of Evidence 403, which states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." TENN. R. EVID. 403.

B) **Factors to consider.** In ruling on the admissibility of such a video, the court must weigh its probative value against its possible prejudicial effect. TENN. R. EVID. 403. The court may allow the video as is, mandate that the video be played without sound or be narrated "live" by another witness in the courtroom, or the court may disallow certain portions of the video. *See, e.g.*, *Burks by Burks v. Harris*, No. 02A01-9110-CV-00253, 1992 WL 322375, at *4 (Tenn. Ct. App. Nov. 10, 1992).

Dead Man's Statute

A) **Generally.** Tennessee's Dead Man Statute is governed by TENN. CODE ANN. § 24-1-203 and prevents parties from testifying to transactions with a deceased person in actions by or against estates. TENN. CODE ANN. § 24-1-203 (2016). Under the statute,

> [i]n actions or proceedings by or against executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party. If a corporation is a party, this disqualification shall extend to its officers of every grade and its directors.

Id.

B) **No common law rule of necessity.** There is no "common law rule of necessity" which permits a witness, disqualified under the Dead Man's Act, to testify because that witness

was necessary to establishing crucial elements of the case for either party. ROBERT E. BURCH, TRIAL HANDBOOK FOR TENNESSEE LAWYERS § 14:1 (2016 ed. 2016).

C) **Witnesses are excluded by the Dead Man's Statute.** A witness whose testimony is prohibited by the Dead Man's Statute is incompetent to testify. It is the witness, not the evidence, which is made incompetent by statute. Therefore, if the objecting party calls the witness to testify, even about matters not prohibited by the statute, the statutory prohibition is waived, and the witness may be questioned concerning his or her transactions with the deceased. *Burchett v. Stephens*, 794 S.W.2d 745, 749-50 (Tenn. Ct. App. 1990). This statutory incompetence may be waived even by taking the witness's deposition. *Thomas v. Irvin*, 16 S.W. 1045, 1045 (Tenn. 1891); *see also Burchett*, 794 S.W.2d at 750. The *Thomas* opinion refers to an evidentiary deposition, but language therein may apply to a discovery deposition as well. *Thomas*, 16 S.W. at 1045.

D) **Requirements.** In order to authorize exclusion of evidence pursuant to the Dead Man's Act: 1) the proposed witnesses must be parties to the suit and amenable to a judgment; and 2) the subject matter of their testimony must concern some transaction with, or statement by, the testator. *Leffew v. Mayes*, 685 S.W.2d 288, 293 (Tenn. Ct. App. 1984).

Medical Bills

A) Evidence of payment of medical bills and similar expenses is governed by Tennessee Rule of Evidence 409. TENN. R. EVID. 409. Under the rule, "[e]vidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury." *Id.*

B) **Proof that medical bills were paid.** However,

> [p]roof 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 the bills paid or incurred attached as an exhibit to the complaint or civil warrant. The bills itemized and attached as an exhibit shall be prima facie evidence that the bills so paid or incurred were necessary and reasonable.

TENN. CODE ANN. § 24-5-113(a)(1) (2016). Although itemizing and attaching bills constitutes prima facie evidence that the medical charges were necessary and reasonable, a plaintiff must also establish that the charges were incurred as a result of the defendant's negligent conduct. *Varner v. Perryman*, 969 S.W.2d 410, 412 (Tenn. Ct. App. 1997). The presumption only applies to itemized bills attached to the complaint so long as the total amount of such bills does not exceed the sum of four thousand dollars. § 113(a)(3). The statute only applies in personal injury actions. *Id.* § 113(a)(2).

C) **Other considerations.** Under subsection (b)(2) of the statute,

> [a]ny party desiring to offer evidence at trial to rebut the presumption shall serve upon the other parties, at least forty-five (45) days prior to the date set for trial, a statement of

> that party's intention to rebut the presumption. Such statement shall specify which bill or bills the party believes to be unreasonable.

TENN. CODE ANN. § 24-5-113(b)(2) (2016).

Offers of Judgment

A) Tennessee Rule 68, 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. TENN. R. CIV. P. 68. The Rule allows both a party prosecuting a claim and the party defending the claim to make an offer of judgment. *Id.*

B) **Effect of rule on prejudgment interest.** The Tennessee Court of Appeals has held that the Rule 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).

C) **Procedural requirements.** The text of the Rule stipulates that an offer must be served more than ten (10) days before the trial begins, and the party to whom the offer is made may accept it within ten (10) days after service by serving written notice of acceptance. TENN. R. CIV. P. 68. 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. *Id.* If the offer is not accepted, it is deemed to be withdrawn. *Id.* Evidence of the offer is not admissible at trial. *Id.* Successive offers may be made. *Id.* 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. *Id.*

Offers of Proof

A) **General rules.** When an objection to any witness or evidence is sustained, the party against whom such ruling is made may make an offer of proof of the excluded matter to preserve the record for purposes of appeal. TENN. R. EVID. 103(a)(2). If an offer of proof is not made, the exclusion generally cannot be the basis of an appeal, as the appellate court cannot determine the propriety of excluding the evidence. *Id.*

B) **Specific requirements regarding offers of proof.** A proffer of excluded evidence must be responsive to the questions to which the objection was sustained. TENN. R. EVID. 103(a)(2), (b); *Austin v. City of Memphis*, 684 S.W.2d 624, 630 (Tenn. Ct. App. 1984). In a jury action, this may be done by telling the court specifically what is expected to be proved by the evidence. While a narration of counsel meets the technical requirements of the Rules, the better practice is to actually make an offer of the evidence by question and answer form. TENN. R. EVID. 103(a)(2), (b). In jury cases, the offer of proof should be made outside the presence of the jury. TENN. R. EVID. 103(c); *see also Sikes v. Tidwell*, 622 S.W.2d 548, 552 (Tenn. Ct. App. 1981). The court may add such other or further statements as clearly show the character of the evidence, the form in which it is offered,

the objection made, and the ruling thereon. TENN. R. EVID. 103(b). If opposing counsel does not agree, he should put his position in the record. Formal exception to the court's order is not necessary where the aggrieved party at the time of the court's order has made known the action he desires from the court or has stated his objection to the court's action. TENN. R. CIV. P. 46; *see also Smith v. Williams*, 575 S.W.2d 503, 504 (Tenn. Ct. App. 1978).

C) **Nonjury actions.** In a nonjury action, a similar procedure is followed. The examining attorney proffers the testimony by asking the questions and the witness answers in the usual way. The court is presumed able to ignore the objectionable testimony.

D) **Excluding evidence.** Excluding evidence can be the basis of an appeal under certain circumstances. The Tennessee Rules of Evidence provide that trial court errors in excluding evidence, as a general rule, may not be the basis of appeal unless (a) the exclusion affects the proponent's substantial rights, (b) the substance of the evidence sought to be introduced and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context in which the questions were asked, and (c) the offer and the court's ruling are included in the record. TENN. R. EVID. 103(a), (b).

Prior Accidents

Evidence of prior accidents is admissible if it is held to be relevant. The Supreme Court of Tennessee has held that a plaintiff may introduce evidence of prior accidents if they occurred under substantially similar conditions. *John Gerber Co. v. Smith*, 263 S.W. 974, 977 (Tenn. 1924). Further, such evidence has been held admissible not only to show the dangerous character of the place but also to show that those responsible had been apprised of this information. *Ill. Cent. R. Co. v. Sigler*, 122 F.2d 279, 284 (6th Cir. 1941) (stating that this rule has been followed in Tennessee in *John Gerber Co. v. Smith*, 263 S.W. 974 (Tenn. 1924)).

Relationship to the Federal Rules of Evidence

Tennessee has its own Rules of Evidence. TENN. CODE ANN. §§ 24-1-201 *et seq.* (2014). Tennessee has adopted portions of certain Federal Rules of Evidence.

Admissibility of Seat Belt Non-Use

A) **General rule.** Under TENN. CODE ANN. § 55-9-604(a) , "the 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." TENN. CODE ANN. § 55-9-604(a) (2016).

B) **Admissible to show causation.** However, such evidence may be admissible in a civil action as to the causal relationship between noncompliance with the Tennessee Mandatory Safety Belt Act and the injuries alleged, if the following conditions have been satisfied:

> (1) [t]he plaintiff has filed a products liability claim; (2) [t]he 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) [e]ach 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.

TENN. CODE ANN. § 55-9-604(a)(1)-(3) (2016).

Spoliation of Evidence

The concern over destructive testing of real evidence prompted the addition of Rule 34A to the Tennessee Rules of Civil Procedure. TENN. R. CIV. P. 34A. 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.

TENN. R. CIV. P. 34A.01. This rule applies, however, only after the commencement of a civil action.

In addition, 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. TENN. R. CIV. P. 34A.02, 37. Intentional misconduct is not a prerequisite to the imposition of sanctions under Rule 34A.02. *Tatham v. Bridgestone Ams. Holding, Inc.*, 473 S.W.3d 734, 745-46 (Tenn. 2015). Rather, the presence or absence of intentional misconduct is but one of several factors the court considers in deciding, on a case-by-case basis, whether to sanction a party for spoliating evidence. *Id.* at 746-47. Other factors include prejudice to the nonspoliating party, actual or constructive knowledge on the part of the spoliating party of the evidence's relevance to the litigation, and whether a particular sanction is the least severe sanction to remedy any prejudice. *Id.*

Subsequent Remedial Measures

A) **General rule.** Subsequent remedial measures refer to measures which, "if taken previously, would have made [an] event less likely to occur . . . ." TENN. R. EVID. 407. Under Rule 407 of the Tennessee Rules of Evidence, evidence of a "subsequent remedial measure is not admissible to prove strict liability, negligence, or culpable conduct in connection with the event." *Id.* This approach reflects the majority federal view, including that of the Sixth Circuit. *See Hall v. Am. Steamship Co.*, 688 F.2d 1062, 1066-67 (6th Cir. 1982).

B) **Exception to the general rule.** Evidence of subsequent remedial measures may be admitted when offered for another purpose, however, such as proving controverted ownership, control, or feasibility of precautionary measures, or impeachment. TENN. R.

EVID. 407. A defendant who controverts ownership, control, or feasibility opens the door for the plaintiff to introduce subsequent remedial measures. *See id.* Similarly, an expert who opines that a design could not be improved upon invites attack by the impeachment exception to this otherwise exclusionary rule. *See id.*.

Use of Photographs

A) **General rule.** Authenticated relevant photographs, drawings, recordings, and videotapes may be introduced into evidence unless the trial court determines that the probative value of the evidence is substantially outweighed by its potential prejudicial effect. TENN. R. EVID. 403; *State v. Cazes*, 875 S.W.2d 253, 262 (Tenn. 1994); *State v. Caughron*, 855 S.W.2d 526, 536 (Tenn. 1993); *State v. Gray*, 960 S.W.2d 598, 607 (Tenn. Crim. App. 1997). This evidence, however, may not be introduced for the sole purpose of prejudicing the jury. *State v. Banks*, 564 S.W.2d 947, 951 (Tenn. 1978). A trial court's decision to admit such evidence will not be reversed unless the appellate court finds that the trial court abused its discretion. *Id.* at 949.

B) **Objections.** The failure to make a timely, specific objection in the trial court when evidence is offered for admission prevents a litigant from challenging the admissibility of the evidence for the first time on appeal. *In re Estate of Armstrong*, 859 S.W.2d 323, 328 (Tenn. Ct. App. 1993). Further, the failure of an appellant to include in the record all aspects of the trial material to the issue on appeal, precludes appellate review of that issue. *State v. Gray*, 960 S.W.2d 598, 607 (Tenn. Crim. App. 1997).

Summary Judgment.

A.) **General Rule.** Summary judgment is governed by Rule 56 of the Tennessee Rules of Civil Procedure. TENN. R. CIV. P. 56.

B.) **Standard.** Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." TENN. R. CIV. P. 56.04.

C.) **Burden of Proof.** In October 2015, the Supreme Court of Tennessee, in *Rye* overruled prior case law regarding the application of the summary judgment standard, and returned to a summary judgment standard consistent with Rule 56 of the Federal Rules of Civil Procedure. FED. R. CIV. P. 56; *Rye v. Women's Care Ctr. of Memphis, MPLLC,* 477 S.W.3d 235, 238 (Tenn. 2015). The Court held "that a moving party may satisfy its initial burden of production and shift the burden of production to the nonmoving party by demonstrating that the nonmoving party's evidence is insufficient as a matter of law *at the summary judgment stage* to establish the nonmoving party's claim or defense." *Rye*, 477 S.W.3d at 238 (emphasis added). The Court went on to explain the application of the standard as follows:

> Our overruling of *Hannan* means that in Tennessee, as in the federal system, when the moving party does not bear the burden of proof at trial, the moving party may satisfy its

> burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense. We reiterate that a moving party seeking summary judgment by attacking the nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis. Rather, Tennessee Rule 56.03 requires the moving party to support its motion with "a separate concise statement of material facts as to which the moving party contends there is no genuine issue for trial." Tenn. R. Civ. P. 56.03. "Each fact is to be set forth in a separate, numbered paragraph and supported by a specific citation to the record." *Id.* When such a motion is made, any party opposing summary judgment must file a response to each fact set forth by the movant in the manner provided in Tennessee Rule 56.03. "[W]hen a motion for summary judgment is made [and] ... supported as provided in [Tennessee Rule 56]," to survive summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleading," but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, "set forth specific facts" *at the summary judgment stage* "showing that there is a genuine issue for trial." Tenn. R. Civ. P. 56.06. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.,* 475 U.S. at 586, 106 S. Ct. 1348. The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party. If a summary judgment motion is filed before adequate time for discovery has been provided, the nonmoving party may seek a continuance to engage in additional discovery as provided in Tennessee Rule 56.07.

Id. at 264-65.[1]

DAMAGES

Caps on Damages

A) **General rule.** Statutory caps on damages limit the amount of recovery available in a cause of action. Traditionally, there were no statutory caps on damages in Tennessee for economic and noneconomic damages. However, in 2011, the Tennessee General Assembly enacted the Tennessee Civil Justice Act, which statutorily limits certain items of damages. Tennessee Civil Justice Act of 2011, ch. 510, § 10, 2011 Tenn. Pub. Acts 510 (codified at TENN. CODE ANN. § 29-39-102). Under TENN. CODE ANN. § 29-39-102, absent certain excepted circumstances, noneconomic damages in all civil cases accruing on or after October 1, 2011, are capped at $750,000, unless the injuries are catastrophic, in which case the cap on noneconomic damages is raised to $1 million. TENN. CODE ANN. § 29-39-102 (2016). *But cf. Clark v. Cain*, No. 12–C1147, 2015 WL 1137546, at *11 (Tenn. Cir. Ct. Hamilton Cnty. Mar. 9, 2015) (mem. op.) (ruling Tennessee's statutory damages cap unconstitutional), *vacated for lack of ripeness by Clark v. Cain*, 479 S.W.3d 830, 832 (Tenn. 2015).

[1] Prior to the Supreme Court of Tennesse's holding in *Rye*, Tennessee courts followed the "Hannan Standard" which required the movant seeking to shift the burden of production to the nonmoving party who bears the burden of proof at trial to either: (1) affirmatively negate an essential element of the nonmoving party's claim; or (2) show that the nonmoving party *cannot prove an essential element of the claim at trial. Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 6 (Tenn. 2008).

B) **Actions against governmental entities.** A separate statutory cap on damages applies in lawsuits against the state of Tennessee. The Governmental Tort Liability Act (the "GTLA") directs the manner in which governmental entities can be sued. TENN. CODE ANN. § 29-20-101 *et seq.* (2016). The GTLA states that all governmental entities are immune from suit except where otherwise provided within the GTLA. *Id.* § 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.* For suits that are allowed, the relevant liability of a governmental entity is capped at $130,000.00 per individual and $350,000.00 for bodily injury or death of all persons involved in any one accident, occurrence, or act. *Id.*403(b)(2)(A). In *Shaffer,* the Tennessee Court of Appeals held that the GTLA's statutory cap on damages does not violate the Tennessee Constitution. *Shaffer v. Shelby Cnty.*, No. W2000-02215-COA-R3-CV, 2002 WL 54389, at *6 (Tenn. Ct. App. 2002).

The GTLA is silent with regard to discretionary costs. Yet, in *Cox* , the Court of Appeals held that once the statutory maximum under the GTLA has been awarded, the trial court cannot assess discretionary costs over and above that amount. *Cox v. Anderson Cnty. Highway Dep*'t, No. E1999-01697-COA-R3-CV, 2000 WL 250126, at *8 (Tenn. Ct. App. 2000).

C) **Medical-malpractice cases.** The statutory cap on damages contained within the Tennessee Civil Justice Act applies in medical-malpractice (known in Tennessee as healthcare liability) cases the same as in any other civil actions. Tennessee Civil Justice Act, ch. 510, § 10, 2011 Tenn. Pub. Acts 510 (codified at TENN. CODE ANN. § 29-39-102 (2016)). Also, where the claimant and his attorney have entered into a contingent fee contract, the claimant's attorney's compensation may not "exceed thirty-three and one third percent ($33^{1/3}$%) of all damages awarded to the claimant." TENN. CODE ANN. § 29-26-120 (2016). The cap on attorneys' fees was held to be constitutional in *Newton v. Cox*, 878 S.W.2d 105, 112 (Tenn. 1994).

D) **Comparative fault.** Finally, in a personal-injury case, the court must first reduce the jury's award of noneconomic damages by the percentage of fault, and then, if the award as adjusted is above the statutory cap, reduce the award further to conform to the cap. *Monypeny v. Kheiv*, W2014-00656-COA-R3-CV, 2015 WL 1541333, at *26 (Tenn. Ct. App. Apr. 1, 2015).

Calculation of Damages

A) **Recoverable damages.** In Tennessee, a plaintiff bringing a cause of action for personal injuries may recover the following damages: (1) pain and suffering; (2) medical expenses; (3) loss of earning capacity; (4) aggravation of pre-existing condition; (5) loss of business profits; (6) loss of enjoyment of life; (7) damages for permanent injuries; and (8) negligent infliction of severe or serious emotional injury. 8 COMM. ON PATTERN JURY

INSTRUCTIONS, TENNESSEE PATTERN JURY INSTRUCTIONS-CIVIL §§ 14.01, 14.12-17 (16th ed. 2016).

B) **Economic and noneconomic damages.** Damages in the area of personal injury are generally divided into two categories: economic and noneconomic. The plaintiff may claim economic damages, such as loss of earning capacity, lost wages, medical expenses, and future medical expenses. *Meals ex rel. Meals v. Ford Motor Co.*, 417 S.W.3d 414, 419 (Tenn. 2013). The plaintiff may also claim noneconomic damages for pain and suffering, permanent impairment, disfigurement, and past as well as future loss of enjoyment of life. *Palanki ex rel. Palanki v. Vanderbilt Univ.*, 215 S.W.3d 380, 388 (Tenn. Ct. App. 2006). Damages for pain and suffering also include a "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 and quotation marks omitted). The Tennessee Pattern Jury Instructions is an effective resource that contains model jury instructions on damages, including value determinations. *See generally* 8 COMM. ON PATTERN JURY INSTRUCTIONS, TENNESSEE PATTERN JURY INSTRUCTIONS-CIVIL §§ 14.01-71 (16th ed. 2016).

Available Items of Personal-Injury Damages

A) **Past medical bills.** In Tennessee, "[p]roof 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) (2016). 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)." *Id.* § 113(a)(3).

B) **Future medical bills.** The injured party's future medical expenses are an element of damages in personal-injury actions. S*ee Meals ex rel. Meals v. Ford Motor Co.*, 417 S.W.3d 414, 419 (Tenn. 2013). Accordingly, evidence relating to this element would be relevant in a personal injury action. *Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 132 (Tenn. 2004).

C) **Hedonic damages.** "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*, No. 02A01–9801–CV–00020, 1998 WL 749418, at *5 (Tenn. Ct. App. Oct. 28, 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).

However, hedonic damages for the value of pleasure that humans derive from life, separate and apart from future earnings, are not recoverable in a wrongful death action. TENN. CODE ANN. § 20-5-113 (2016); *Spencer v. A-1 Crane Serv., Inc.*, 880 S.W.2d 938, 943-44 (Tenn. 1994). Similarly, Tennessee workers' compensation law does not recognize hedonic damages as a basis for recovery. *Lang v. Nissan N. Am., Inc.*, 170 S.W.3d 564, 567 (Tenn. 2005).

D) **Increased risk of harm.** Plaintiffs are precluded from recovering damages for loss of less than even chance of obtaining a better medical result, though plaintiffs can recover for damages resulting from aggravation of pre-existing medical condition. *Kilpatrick v. Bryant*, 868 S.W.2d 594, 602-03 (Tenn. 1993). As such, "a plaintiff who probably, i.e., more likely than not, would have suffered the same harm had proper medical treatment been rendered, is entitled to no recovery for the increase in the risk of harm or the loss of a chance of obtaining a more favorable medical result." *Id.* at 603.

E) **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)).

F) **Disability.** A tortfeasor "must 'accept the person as he finds him' and the person injured by the [tortfeasor] is entitled to recover all damages proximately caused by acts of the [tortfeasor]." *Haws v. Bullock*, 592 S.W.2d 588, 591 (Tenn. Ct. App. 1979). The tortfeasor is not liable for a pre-existing disability, but if defendant's negligence aggravates plaintiff's condition, he will be liable for any aggravation of such pre-existing condition or disability proximately resulting from the injuries. *Id.*

G) **Past 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 and quotation marks omitted).

H) **Future pain and suffering.** 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." *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. *Id.*

I) **Lost future income, wages, and earnings.** 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 future 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).

Last Clear Chance Doctrine

The last clear chance doctrine once enabled a plaintiff to recover despite his or her contributory negligence. However, in Tennessee, "[m]any traditional, common-law tort concepts lost their independent existence after the Tennessee Supreme Court embraced the doctrine of comparative fault in *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992)." *Deas v. State*, No. W2003-02891-COA-R3-CV, 2004 WL 2715318, at *6 (Tenn. Ct. App. Nov. 19, 2004); *McIntyre v. Balentine*, 833 S.W.2d 52, 57 (Tenn. 1992). Indeed, after the *McIntyre* decision, the last clear chance doctrine was merged into the comparative fault scheme and is now simply a factor to consider when apportioning fault among the parties. *Eaton v. McLain*, 891 S.W.2d 587, 592 (Tenn. 1994); *McIntyre v. Balentine*, 833 S.W.2d 52, 57 (Tenn. 1992).

Mitigation

A) **General rule.** The doctrine of mitigation of damages mandates that "one who is injured by the wrongful or negligent act of another, whether by tort or breach of contract, is bound to exercise reasonable care and diligence to avoid loss or to minimize or lessen the resulting damage . . . ." *Memphis Light, Gas & Water Div. v. Starkey*, 244 S.W.3d 344, 353 (Tenn. Ct. App. 2007) (quoting *Cook & Nichols, Inc. v. Peat, Marwick, Mitchell & Co.*, 480 S.W.2d 542, 545 (Tenn. Ct. App. 1971)). Relatedly, if damages are the result of an injured party's willful enhancement of the injury or failure to exercise due care, he cannot recover. *Id.*

B) **Burdens.** Under the doctrine of mitigation of damages, an injured party is not required to mitigate damages where the duty would impose an undue burden, risk, expense, or humiliation, or be impossible under the circumstances. *Memphis Light, Gas & Water Div. v. Starkey*, 244 S.W.3d 344, 353 (Tenn. Ct. App. 2007); *Kline v. Benefiel*, No. W1999-00918-COA-R3-CV, 2001 WL 25750, at *7 (Tenn. Ct. App. Jan. 9, 2001). However, the doctrine of mitigation does require plaintiffs to exercise reasonable care in obtaining medical care to treat an injury. 8 COMM. ON PATTERN JURY INSTRUCTIONS, TENNESSEE PATTERN JURY INSTRUCTIONS-CIVIL § 14.51 (16th ed. 2016).

C) **Plaintiffs must also mitigate property damage.** The same principles apply to a plaintiff's duty to mitigate damages to his property. 8 COMM. ON PATTERN JURY INSTRUCTIONS, TENNESSEE PATTERN JURY INSTRUCTIONS-CIVIL § 14.52 (16th ed. 2016).

D) **Failure to mitigate is an affirmative defense.** A plaintiff's failure to mitigate damages is an affirmative defense, such that the defendant has the burden of proof on whether the injured plaintiff has discharged the mitigation duty. *State ex rel. Chapdelaine v. Torrence*, 532 S.W.2d 542, 550 (Tenn. 1975), *superseded on other grounds by statute, as recognized in Wells v. Tenn. Bd. of Regents*, 231 S.W.3d 912 (Tenn. 2007).

Punitive Damages

A) **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).

B) **Clear and convincing evidence standard.** The Supreme Court of Tennessee has stated that the plaintiff bears the burden of establishing that the defendant acted either intentionally, fraudulently, maliciously, or recklessly by "clear and convincing" evidence. *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992).

C) **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 v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992). Once liability has been established, the following factors may be considered in a separate, bifurcated proceeding to determine the amount of punitive damages:

> [T]he defendant's financial condition and net worth; the nature and reprehensibility of the defendant's wrongdoing; the impact of the defendant's conduct on the plaintiff; the relationship of the defendant to the plaintiff; the defendant's awareness of the amount of harm being caused and the defendant's motivation in causing such harm; the duration of the defendant's misconduct and whether the defendant attempted to conceal such misconduct; the expense plaintiff has borne in attempts to recover the losses; whether the 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; whether, and the extent to which, defendant has been subjected to previous punitive damage awards based upon the same wrongful act; 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 any other circumstances shown by the evidence that bear on determining a proper amount of punitive damages.

TENN. CODE ANN. § 29-39-104(2)-(4) (2016).

D) **Instructions to the jury.** Courts should also instruct the jury that "the primary purpose of punitive damages is to punish the wrongdoer and deter similar misconduct in the future by the defendant and others while the purpose of compensatory damages is to make the plaintiff whole." TENN. CODE ANN. § 29-39-104(4) (2016). Finally,

> [a]fter a jury has made an award of punitive damages, the trial judge shall review the award, giving consideration to all matters on which the jury is required to be instructed. The judge shall clearly set forth the reasons for decreasing or approving all punitive awards in findings of fact and conclusions of law demonstrating a consideration of all factors on which the jury is instructed.

Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992).

E) **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 *Gore* and *Campbell*. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). The 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 (which is the 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, 556 (Tenn. 2008) (citing *Gore*, 517 U.S. at 574-575, 583, and *Campbell*, 538 U.S. at 419, 425, 428). The Supreme Court has consistently rejected the idea of imposing or creating a mathematical formula or ratio to determine if punitive damages are excessive. *See, e.g.*, *Flax*, 272 S.W.3d 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* at 537.

F) **Cap on punitive damages.** Under TENN. CODE ANN. § 29-39-104, absent certain excepted circumstances, punitive damages in all civil cases accruing on or after October 1, 2011, are capped at $500,000 or two times the amount of compensatory damages, whichever is greater. TENN. CODE ANN. § 29-39-104(a)(5) (2016).

Recovery of Pre- and Post-Judgment Interest

A) **General rule.** The recovery of prejudgment interest is governed by TENN. CODE ANN. § 47-14-123. TENN. CODE ANN. § 47-14-123 (2016). Under Tennessee law, prejudgment interest may be awarded by courts or juries at any rate not in excess of a rate of ten percent (10%) per year. *Id.* An award of prejudgment interest is made in accordance with principles of equity and is a matter of discretion of trial court. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927-28 (Tenn. 1998). However, Tennessee law does not allow recovery of prejudgment interest in certain instances, including a personal injury lawsuit such as a wrongful-death action. *Hollis v. Doerflinger*, 137 S.W.3d 625, 630 (Tenn. Ct. App. 2003); *R.R. v. Wallace*, 17 S.W. 882, 883 (Tenn. 1891).

B) **Policy for awarding prejudgment interest.** 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; *see generally* Betty Campbell, Note, *Prejudgment Interest in Tennessee: It's a Fine Mess We're In! Proposed Statutory Solution to the Inequitable Application of an Equitable Remedy*, 34 U. MEM. L. REV. 789 (2004).

C) **Post-judgment interest.** The recovery of post-judgment interest is governed by TENN. CODE ANN. § 47-14-121–122. TENN. CODE ANN. §§ 47-14-121–122 (2016). Under Tennessee law, "[f]or any judgment entered between July 1 and December 31, [the post-judgment interest rate] shall be equal to two percent (2%) less than the formula rate per annum published by the commissioner of financial institutions . . . *for June of the same year*." § 121(a)(1) (emphasis added). For judgments entered between January 1 and June 30, the rate shall "be equal to two percent (2%) less than the formula rate per annum published by the commissioner of financial institutions . . . *for December of the prior year*." *Id.* § 121(a)(2) (emphasis added). As such, no conflict exists between the post-judgment interest statute and Governmental Tort Liability Act's (the "GTLA") interest

statute except when a GTLA judgment is paid by installments, and in that situation, the GTLA provision trumps. *Lucius v. City of Memphis*, 925 S.W.2d 522, 526 (Tenn. 1996). *See generally* TENN. CODE ANN. § 29-20-1 *et seq.* (2016). Further, 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.

D) **Policy for awarding post-judgment interest.** Tennessee courts reason that "[t]he purpose of post-judgment interest is to compensate a successful plaintiff for being deprived of the compensation for its loss between the time of the entry of the judgment awarding the compensation until the payment of the judgment by the defendants." *State v. Thompson*, 197 S.W.3d 685, 693 (Tenn. 2006) (quoting *Varnadoe v. McGhee*, 149 S.W.3d 644, 650 (Tenn. Ct. App. 2004)) (citations omitted). Recovery of post-judgment interest is mandated by statute and may not be ignored by the trial courts. *Vooys v. Turner*, 49 S.W.3d 318, 321-22 (Tenn. Ct. App. 2001).

Recovery of Attorneys' Fees

A) **General rule.** In Tennessee, courts follow the American Rule, which provides that litigants must pay their own attorneys' fees unless a statute or a contractual provision provides for fee-shifting, or some other recognized exception to the Rule applies. *Cracker Barrel Old Country Store, Inc. v. Epperson*, 284 S.W.3d 303, 308 (Tenn. 2009). Tennessee courts may, under certain circumstances, award reasonable attorneys' fees against a non-prevailing party who has acted in bad faith. *See, e.g.*, TENN. CODE ANN. § 66-34-602(b)(2016); *Madden Phillips Constr. v. GGAT Dev. Corp.*, 315 S.W.3d 800, 827 (Tenn. Ct. App. 2009) (providing that, in a construction dispute involving nonpayment, "[r]easonable attorney's fees may be awarded against the non-prevailing party; provided, that such non-prevailing party has acted in bad faith"); TENN. R. CIV. P. 56.08 (stating that "the court shall . . . order the party [acting in bad faith] to pay to the other party . . . reasonable expenses . . . including reasonable attorneys' fees").

B) **Attorneys' fees must be reasonable.** A court may award only reasonable attorneys' fees. *Keith v. Howerton*, 165 S.W.3d 248, 250-53 (Tenn. Ct. App. 2004).

C) **Determination of fees is discretionary.** In all civil cases, the determination of reasonable attorney's fees and costs is within the trial court's discretion. *Keith*, 165 S.W.3d at 250-51.

D) **Guidelines for courts to consider in exercising their discretion.** The Supreme Court of Tennessee has directed that trial courts should consider the guidelines as delineated in *Connors v. Connors* and also the factors listed in TENN. S. CT. R. 8, RPC 1.5. TENN. SUP. CT. R. 8, RPC 1.5; *Kline v. Eyrich*, 69 S.W.3d 197, 209 (Tenn. 2002); 594 S.W.2d 672, 676 (Tenn. 1980). The *Connors* guidelines are:

> (1) [t]he time devoted to performing the legal service; (2) [t]he time limitations imposed by the circumstances; (3) [t]he novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly; (4) [t]he fee customarily charged in

> the locality for similar legal services; (5) [t]he amount involved and the results obtained; (6) [t]he experience, reputation and ability of the lawyer performing the legal service.

594 S.W.2d at 676.

Settlements Involving Minors

A) **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. TENN. CODE ANN. § 34-1-121(b) (2016); *Busby v. Massey*, 686 S.W.2d 60, 63 (Tenn. 1984).

B) **Settlements under $10,000.** TENN. CODE ANN. § 29-34-105 (2015) 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(a) (2016). As to any tort claim settlement involving a minor that is $10,000 or greater, however, the statute requires the court to conduct a chambers hearing at which the minor and legal guardian are present. *Id.*

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

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

Id. § 105(b).

D) 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. *Id.* § 105(d).

Taxation of Costs

TENN. R. CIV. P. 54.04 provides for the taxation of costs that are recoverable under TENN. CODE ANN. §§ 20-12-101 through -118. TENN. CODE ANN. §§ 20-12-101–118 (2016); TENN. R. CIV. P. 54.04. The trial judge may apportion the costs in his discretion as the equities of the case demand. TENN. R. CIV. P. 54.04(2). Ordinarily, the successful party is entitled to recover costs, including docketing fees, sheriff's fees, master's fees, receiver's fees, litigation tax, photo duplication fees, postage, and witness fees. §§ 102–105.

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