I. DISCOVERABILITY OF DRIVERS’ HEALTH RECORDS – PRIVACY v. PUBLIC SAFETY

There is an implied contract of confidentiality between a physician and a patient where there is a contract of treatment for payment. *Givens v. Mullikin ex rel. Estate of McElwaney* 75 S.W.3d 383, 407 (Tenn. 2002). Tennessee General Assembly has also enacted several statutes that expressly require medical providers to keep a patient’s medical records and identifying information confidential. *See* T.C.A. §§ 63–2–101(b)(1); 68–11–1502; 68–11–1503. Despite this requirement of confidentiality, “a physician cannot withhold such information in the face of a subpoena or other request cloaked with the authority of the court.” *Givens*, 75 S.W.3d at 408. A driver’s health records are, therefore, discoverable pursuant to a Court’s Order or subpoena.

Commercial drivers, however, are regulated by federal regulations. *See* 49 C.F.R. § 382 *et seq.* These regulations preempt state law. 49 C.F.R. § 382.109. These regulations require employers of commercial drivers to test and maintain alcohol and drugs test records for their drivers. 49 C.F.R. § 382.401. These records are confidential and may only be disclosed to the driver or to a regulatory authority. 49 C.F.R. § 382.405. In order for a party – other than the driver or a regulatory authority – to obtain these test records, the driver must consent to this
disclosure via specific written consent. 49 C.F.R. § 382.405(h). The requirements of the specific written consent are found in 49 C.F.R. § 40.321(b).

Specific written consent” means a statement signed by the employee that he or she agrees to the release of a particular piece of information to a particular, explicitly identified, person or organization at a particular time. “Blanket releases,” in which an employee agrees to a release of a category of information (e.g., all test results) or to release information to a category of parties (e.g., other employers who are members of a C/TPA, companies to which the employee may apply for employment), are prohibited under this part.

II. ADMISSIONALITY OF BILLED VERSUS PAID MEDICALS

A plaintiff in a tort action is allowed to introduce medical expenses billed and prove the billed amount as reasonable and necessary. The defendant is not allowed to introduce evidence that the actual amount of medical expenses paid is lower than the amount billed.

In Fye v. Kennedy, 991 S.W.2d 754 (Tenn. Ct. App. 1998), the plaintiff proved a medical bill totaling $748,384.08, even though the portion of that bill actually paid by Medicaid amounted to only $75,264.00. The hospital forgave the remaining balance of the bill not paid by Medicaid ($673,120.08). See Fye, 991 S.W.2d at 762.

Normally, of course, in an action for damages in tort, the fact that the plaintiff has received payments from a collateral source, other than the defendant, is not admissible in evidence and does not reduce or mitigate the defendant’s liability.

Id. at 763 (quoting Donnell v. Donnell, 220 Tenn. 169, 415 S.W.2d 127, 134 (Tenn. 1967)).

The focus in Tennessee “has always been on the ‘reasonable’ value of ‘necessary’ services rendered … the collateral source rule precludes a defendant from attempting to prove that ‘reasonable’ charge for a ‘necessary’ service actually rendered, has been, or will be, paid by another … or has been forgiven, or that the service has been gratuitously rendered.” See Fye, 991 S.W.2d at 764 (emphasis in original). Therefore, the Fye Court held that the hospital bill of $748,384.08 was admissible (as well as reasonable and necessary), and held that evidence that the bill had been partially forgiven was not admissible. Id. at 764-65.

This rule does not apply to workers’ compensation and medical malpractice actions in Tennessee.

In West v. Shelby Cnty. Healthcare Corp., the Tennessee Supreme Court found that a hospital’s non-discounted charges should not be considered reasonable under the Hospital Lien Act because the non-discounted charges do not “reflect what is actually being paid in the market place” and stated that “a more realistic standard is what insurers actually pay and what the
hospitals are willing to accept.” West v. Shelby Cnty. Healthcare Corp., No. W2012-00044-SC-R11-CV, 2014 WL 7242746 (Tenn. Dec. 19, 2014) (other citations omitted). West is not a personal injury case, but the Supreme Court’s opinion that “reasonable charges” are “the charges agreed to by the insurance company and the hospital” could be a signal from the Supreme Court that the collateral source rule is on its way out.

III. ADMISSIONIBILITY OF “DAY-IN-THE-LIFE” VIDEOS AND DEFENSES TO THE SAME

A “day-in-the-life” video is admissible evidence in Tennessee courts as long as it is fair and accurate and does not present an incomplete portrayal of the plaintiff’s daily life.

In Burks By Burks v. Harris, No. 02A01-9110-CV-00253, 1992 WL 322375 (Tenn. Ct. App. 1992), the Court found no error in the trial court allowing a video depicting the “Day in the Life of John,” which showed the minor plaintiff’s daily routine in and about his home and was intended to show the extent and effect of his injuries on his everyday life and the medical care necessary to be rendered to him on a daily basis.

The trial judge considered the probative value of the video against its prejudicial effect. After privately viewing the video, he found it could be shown provided that the portion of the video dealing with the plaintiff receiving an enema was deleted and that the video be played without sound. The plaintiff’s mother was allowed to narrate the tape. The trial judge found, “there’s no better evidence of the nature and extent of his injuries than this video.” The video was relevant to the question of damages and the medical care that would be required for the plaintiff in the future.

To be admissible, however, the proponent of the video must establish that it is a “fair and accurate” depiction of the events it purports to portray, not based upon “inaccurate or incomplete information.” See State v. Farmer, 66 S.W.3d 188, 209 (Tenn. 2001) (excluding demonstrative evidence in the form of a computer animated visualization). Such a video is less likely to be admissible if it is extremely graphic and only used to evoke sympathy or prejudice, or if it omits or inaccurately portrays portions of the plaintiff’s daily routine. Thus the strongest defense for exclusion would likely be under Tennessee Rule of Evidence 403, that the video presents a substantial risk of unfairly prejudicing the defendant which outweighs the video’s probative value. The defendant might also raise objections based upon hearsay or relevance, or that the video has not been properly authenticated.

Note that trial courts in Tennessee have broad discretion in determining questions of admissibility of evidence based on considerations of probative value and unfair prejudice, and such a decision will not be overturned on appeal except upon a clear showing of an abuse of discretion. State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978).

IV. STATE-BY-STATE HANDLING OF ADJUDICATED CITATIONS (COURTS’ ANALYSIS AND INTERPRETATIONS OF DECISION BY FMCSA THAT A CSA SCORE CAN BE CHANGED BASED UPON THE OUTCOME OF AN ADJUDICATED CITATION).
There is no published Tennessee appellate authority grappling specifically with the FMCSA’s decision to include the outcomes of adjudicated citations in the data underlying CSA scores. However, Tennessee statutes and decisions do hold that commercial drivers cannot avoid adjudication of a citation in order to prevent a negative impact on their license. This should likewise prevent avoidance of impact on CSA scores.

Except for parking citations, Tennessee law prohibits courts from ordering drivers with a CDL to attend a driver education course in lieu of any portion of a penalty to be imposed in association with a citation. T.C.A. § 55-10-301(c). The rule applies irrespective of the type of motor vehicle being driven at the time. Section 55-10-301(c) brings Tennessee law into compliance with 49 C.F.R § 384.226, which prohibits states who want federal-aid highway funds from masking, deferring or diverting judgment on convictions for violations by drivers with CDL’s. See 49 C.F.R. § 384.401(a) – (b).

In an unpublished 2008 decision, the Tennessee Court of Appeals, in _Metro. Gov’t of Nashville & Davidson County v. Stark_, 2008 WL 276005 (Tenn. Ct. App. Jan. 31, 2008), held that a trial court had erred in ordering a driver with a CDL into traffic school in lieu of judgment, even though the driver was in his personal vehicle at the time of the moving violation at issue. The Court reasoned that 49 C.F.R. 384.226, implemented by T.C.A. § 55-10-201(c), makes clear that “[t]he State must not mask, defer imposition of judgment, or allow an individual to enter into a diversion program that would prevent a CDL driver's conviction for any violation, in any type of motor vehicle, of a State or local traffic control law (except a parking violation) from appearing on the CDLIS driver record, whether the driver was convicted for an offense committed in the State” See also _State v. James_, 2011 WL 303268 (Tenn. Crim. App. Jan. 26, 2011) (rejecting a constitutional challenge to 29 CFR 384.226 based on the Supremacy Clause).

V. SIGNIFICANT TRUCKING VERDICTS IN TENNESSEE OVER THE PAST YEAR.

There was only one trucking verdict in Tennessee during the 2014 calendar year; thus, we believed it would be prudent to include some second half 2013 verdicts.


This case concerned an accident that occurred on January 29, 2013 on an Interstate 40 ramp. The plaintiff, Alisa Beard, was on the interstate ramp when she was rear-ended by a tractor trailer being driven by Frank Colucci on behalf of Quail Transport. The evidence at trial indicated that the accident occurred as the result of the Quail Transport vehicle striking black ice. Specifically, Mr. Colucci was unable to control his vehicle after striking the black ice, and it slid into Ms. Beard’s vehicle. The trial testimony indicated that the impact to Ms. Beard’s vehicle was moderate. In the accident’s aftermath, Ms. Beard treated for an ankle sprain and other soft-tissue injuries.

Ms. Beard brought suit against Mr. Colucci and Quail Transport in the Knox County Circuit Court in Knoxville, Tennessee. Knox County is considered to be a moderate jurisdiction. At trial, the defendants contested liability. Specifically, Mr. Colucci contended that the accident
was unavoidable due to the black ice. The plaintiff acknowledged that it was icy, but contended that Mr. Colucci should have been driving more carefully so that he could have slowed down in light of the icy conditions and avoid the impact. The jury found that the defendants were not liable for this accident, and the plaintiff was awarded nothing at trial.

In the aftermath of the verdict, the plaintiff moved for a new trial on the grounds that the defense verdict was against the weight of the evidence. Specifically, the plaintiff argued that Mr. Colucci knew that the road was icy, but that he had hardly slowed down his truck. The trial judge granted the motion on October 2, 2014. At this time, no further information is known regarding this case.

*Fenner v. Gillespie and Dickson Carnival*, Montgomery County, Tennessee, October 8, 2013

The accident at issue in this case occurred on August 23, 2011 on a busy roadway in Clarksville, Tennessee. Clarksville is located adjacent to Fort Campbell, a large Army installation. William Fenner, 63 years old and a retired Army sergeant, was operating a late model Lexus sedan when he was struck on the driver’s side door by a tractor trailer being operated by Robert Gillespie on behalf of Dickson Carnival. The evidence indicated that Mr. Gillespie ran a red light and struck the Lexus while Mr. Fenner had the right of way. Fenner was trapped inside the vehicle, and first responders attempted to extricate him from the vehicle with the Jaws of Life. Unfortunately, by the time he was removed from the vehicle, he was pronounced dead at the scene. He was survived by his wife and two daughters.

His estate brought a wrongful death lawsuit against Mr. Gillespie and his employer, Dickson Carnival. This case was filed in the Montgomery County Circuit Court, which is considered to be a moderate (to conservative) jurisdiction. Importantly, many of the residents of Montgomery County have some affiliation with the nearby major Army installation, Fort Campbell, Kentucky. As such, many potential jurors in this jurisdiction have a natural conservative pre-disposition.

The estate sought recovery of compensatory damages for the loss of the pecuniary value of Mr. Fenner’s life, loss of consortium, and his funeral expenses. At the time of the accident, Mr. Gillespie had been working as a successful real estate agent earning more than $100,000 per year. Additionally, the estate also sought punitive damages on the grounds that Mr. Gillespie had operated his vehicle in a reckless manner as evidenced by him running the red light. Additionally, the plaintiff also alleged that Mr. Gillespie was reckless in that he was operating an overweight truck at a high rate of speed. The complaint sought total damages of $6 million.

At trial, the defendants admitted fault for the accident and instead focused on minimizing the claimed damages. Additionally, they also contested the allegation that Mr. Gillespie had acted recklessly and that punitive damages were not warranted. The jury awarded the estate $9,008 for funeral expenses; $315,598 for the loss of the pecuniary value of Mr. Fenner’s life; and $450,000 for the loss of consortium of his wife and two daughters. The total award for compensatory damages was $774,606. Importantly, the jury concluded that Mr. Gillespie’s actions did not rise to the level of reckless conduct. As such, punitive damages were not awarded.
The accident at issue took place on May 15, 2010. It occurred on Interstate 24 near Clarksville, Tennessee when the four (4) plaintiffs were travelling home to Chicago in an Acura SUV being operated by Ted Ogiela. Also traveling on I-24 was Kristin Slavinski, who was operating a fuel tanker for Eagle Transport. Mr. Ogiela testified that he was traveling at 55 mph when the fuel tanker started to pass him on the left. While attempting to execute the pass, the fuel tanker somehow rear-ended the Ogiela Acura. It was described as a moderate impact. All four occupants of the Acura SUV were injured. One plaintiff, Sofiya Rabinskaya, suffered a broken collarbone and minor rib fracture. The other plaintiffs (Mr. Ogiela, Ms. Julie Yarosh, and Mr. Anatoly Yarsoshevich) all suffered soft-tissue injuries.

The plaintiffs filed suit against Eagle Transport and its driver seeking damages for their injuries. As with the Fenner case discussed previously, this case was also filed in the Montgomery County Circuit Court, which is considered to be a moderate (to conservative) jurisdiction. Eagle Transport defended on liability, alleging that Ogiela caused the accident by suddenly slamming on the brakes of the Acura SUV. The jury rejected the defendant’s argument, and found the Eagle Transport driver entirely at fault for the accident (no fault was apportioned to Mr. Ogiela).

As to damages, Ms. Rabinskaya (broken collar bone) reported medical bills of $68,219. She received a total award of $224,619. This award consisted of her complete medical bills ($68,219); $6,400 for future care; and separate awards of $30,000 in the five (5) categories of past suffering, future suffering, permanent impairment, past loss of ability to enjoy life, and future loss of ability to enjoy life. The awards for the remaining plaintiffs (those with soft-tissue injuries) were lower. First, Mr. Yarsoshevich reported medical bills of $15,383. He was awarded his medical bills, and $10,000 each in the categories of past suffering, future suffering, and loss of ability to enjoy life. Thus, the total verdict for Mr. Yarsoshevich was $45,383. Next, Mr. Ogiela claimed medical bills of $8,498. He recovered his medical bills; $15,000 for past suffering; $2,500 each for future suffering and loss of ability to enjoy life; and an additional $7,500 for a loss of consortium claim (his wife is Ms. Yarosh). His total award at trial was $35,998. The last plaintiff, Ms. Yarosh, reported medical bills of $14,701. Ms. Yarosh was awarded her medical bills, and like her husband, she recovered $15,000 for past suffering; $2,500 each for future suffering and loss of ability to enjoy life; and an additional $7,500 for a loss of consortium claim. Her total award was $42,201.

This case concerned an accident between two commercial vehicles operating in Memphis, Tennessee on July 1, 2009. Donniel Borne was operating a tanker truck on I-55 in downtown Memphis when he came upon stopped traffic. Mr. Borne was able to bring his vehicle to a complete stop. At this time, Mr. Harold Foster was operating a Celadon Trucking tractor-trailer directly behind Mr. Borne. Mr. Borne was unable to bring his vehicle to a complete stop and he made impact with Mr. Borne’s tanker truck. The parties disputed the severity of the impact. At trial, Mr. Borne described it as a moderate impact while Celadon
contested this characterization and described it as a minor impact. Moreover, Celadon offered
the testimony of a biomechanical engineer who described the force at impact as being analogous
to the forces one would encounter walking down a set of stairs.

In the accident’s aftermath, Mr. Borne sought treatment with his family doctor for
apparent soft tissue issues and underwent a conservative course of treatment. Mr. Borne’s
condition did not improve with this treatment and he underwent an MRI. This diagnostic
imaging revealed a herniated disc at L4-5 and mild bulging at several other levels as well as a
facet joint injury. Mr. Borne consulted with a neurosurgeon for his injuries. This neurosurgeon
testified at trial that Mr. Borne was not a good surgical candidate. He further opined that Mr.
Borne’s ongoing pain was related to both the herniated disc injury and additional nerve root pain
related to the facet joint injury.

Mr. Borne filed suit in the Shelby County Circuit Court, which is located in Memphis.
Shelby County, Tennessee is widely considered as one of the most plaintiff-friendly jurisdictions
in Tennessee. At trial, Mr. Borne reported $27,000.00 in medical bills, but he surprisingly did
not seek to recover the amount of these bills at trial. Mr. Borne claimed at trial that he was no
longer able to work as a commercial driver because of the injuries he sustained in the July 1,
2009 accident. He offered vocational expert testimony that his economic loss was $1.3 million.

In its defense, Celadon initially disputed liability for the accident, but on the first day of
trial it conceded fault. Additionally, it had also initially asserted the comparative fault of a third
commercial vehicle that had impacted the Celadon tractor-trailer after the initial impact, but it
also abandoned this argument at trial. Celadon’s defense at trial then focused on minimizing Mr.
Borne’s claimed damages. It relied on the testimony of the previously mentioned biomechanical
engineer as well as on medical and vocational experts. Specifically, Celadon argued that the July
1, 2009 accident was not responsible for Mr. Borne’s pain. Moreover, Celadon elicited
testimony that Mr. Borne had been in a separate accident two weeks earlier.

The Shelby County jury returned a significant verdict in favor of Mr. Borne. Specifically, the jury awarded Mr. Borne $1.455 million for loss of earning capacity. It also
awarded noneconomic damages in three categories: (1) physical and mental pain and suffering;
(2) permanent injury; and (3) loss of enjoyment of life. For each of these three categories, Mr.
Borne was awarded $750,000.00 in damages. The total verdict returned against Celadon was for
$3.705 million.

Following trial, Celadon filed a motion for new trial, or in the alternative, for remittitur.
The Court denied the motion for a new trial, but granted a remittitur based on its finding that the
jury’s award was excessive. Specifically, the trial court reduced the total verdict by $1.605
million from $3.705 million to $2.1 million. It reduced the awards as follows: (1) loss of
earning capacity from $1.455 million to $1.1 million; (2) physical and mental pain and suffering
from $750,000 to $500,000; (3) permanent injury from $750,000 to $100,000; and (4) loss of
enjoyment of life from $750,000 to $400,000.

Celadon then appealed the verdict to the Tennessee Court of Appeals. On appeal, the
Court affirmed the trial court’s reduction of the physical and mental pain and suffering and
permanent injury awards. Additionally, the Court of Appeals further reduced the loss of enjoyment of life award from $400,000 to $50,000. However, the Court reversed the trial court’s suggested remittitur for the loss of earning capacity claim from $1.455 million to $1.1 million. As such, the Court approved a total award to plaintiff in the amount of $2.105 million.


The accident at issue in this case occurred on November 18, 2008 in Nashville on Interstate 40 near its intersection with Interstate 24. Traffic was congested and Michael Petty, a successful car dealer and operator of Music City Motor Sports, brought his vehicle to a complete stop. Almost immediately thereafter, he was rear-ended by a tractor-trailer being driven by Eduardo Gavino on behalf of Danny Herman Trucking. The accident was described as a significant impact. Following the accident, Mr. Petty treated for mild traumatic brain injury and soft-tissue type injuries.

Mr. Petty filed a lawsuit against Mr. Gavino and Danny Herman Trucking in the Davidson County Circuit Court in Nashville. Davidson County is considered to be a moderate jurisdiction. This case was a bench trial before Judge Thomas Brothers. The defendants conceded liability for the accident. Mr. Petty claimed that due to his brain injury, he was no longer effective in automobile sales or performing executive functions for the car dealership. Additionally, he claimed that the brain injury had affected his personality. Mr. Petty offered expert medical testimony to support his contentions. Interestingly, however, his medical bills were limited to $8,781.

Herman Trucking defended the case by minimizing the claimed injuries. Specifically, it focused on the fact that Mr. Petty did not lose consciousness at the scene and that he was not immediately diagnosed with a concussion. Moreover, Herman Trucking noted that despite Mr. Petty’s claims, his business continued to thrive in the accident’s aftermath. The defense argued to the court that an award of $25,000 was appropriate. Nevertheless, the Court issued a verdict for Mr. Petty and awarded him general damages of $90,000. Additionally, Mr. Petty’s wife received an award of $7,500 for loss of consortium.

VI. **VENUE MAP OF TENNESSEE NOTING COUNTIES OR AREAS WHERE JURIES HAVE BEEN LIBERAL, MODERATE AND CONSERVATIVE.**

SEE PDF.