1. Requirements for use of hands free devices in each state

Tennessee currently does not have any laws regulating the use of hands-free devices, although several have been proposed in the past. Section 55-8-199 of the Tennessee Code Annotated provides that it is a Class C misdemeanor to transmit or read a written message on a mobile telephone or other such device while driving a motor vehicle on any public road or highway in the state. The statute does, however, allow for drivers to dial telephone numbers while operating a vehicle.

2. Discovery and admissibility of preventability determinations

Although there is no case directly on point, preventability determinations are likely discoverable given the broad scope of discovery permitted by Rule 26.02(1) of the Tennessee Rules of Civil Procedure. In pertinent part, Rule 26.02(1) provides: “Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action ...It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” As such, a party seeking information concerning a preventability determination made
following an accident will likely be able to articulate a reason as to why this information could lead to the discovery of admissible evidence.

While likely discoverable, preventability determinations are likely not admissible at trial. Again, there is not case directly on point, but preventability determinations would likely not be admissible pursuant to Tennessee Rule of Evidence 407. This Rule provides that subsequent remedial measures are not “admissible to prove strict liability, negligence, or culpable conduct in connection with the event.” One of the main purposes of preventability determinations is for trucking companies to learn more about the causes of accidents, and if preventable, to take steps to prevent similar occurrences in the future. Obviously, there are strong policy reasons not to deter trucking companies from taking such steps to protect the public. Again, while there is no case directly on point, Tennessee Rule of Evidence 407 provides a solid basis for excluding preventability determinations from being introduced into evidence at trial.

3. **Spoliation of evidence, specifically related to electronic data and whether there is a duty to preserve evidence absent a specific demand**

Spoliation of evidence is addressed by Rule 34A of the Tennessee Rules of Civil Procedure. Specifically, Rule 34A.02 provides that Rule 37 discovery sanctions “may be imposed upon a party or an agent of a party who discards, destroys, mutilates, alters, or conceals evidence.”

In Tennessee, “the decision to impose sanctions for the spoliation of evidence is within the wide discretion of the trial court.” *Tatham v. Bridgestone Ams. Holding, Inc.*, 473 S.W.3d 734, 746 (Tenn. 2015). As part of this broad discretion, trial courts are free to impose sanctions for the spoliation of evidence, including that of a negative inference, even without the presence of intentional misconduct. *Tatham*, 473 S.W.3d at 745-46. In Tennessee, “the analysis for the possible imposition of any sanction for the spoliation of evidence should be based upon a consideration of the totality of the circumstances . . . [and] “on a case-by-case basis considered all relevant circumstances.” *Id.* at 746. Whether the destruction arises from intentional misconduct is simply one of the factors to be considered by the court. *Id.*

There is no Tennessee case directly on point concerning the retention of electronic data and whether there is a duty to preserve evidence absent a specific demand. However, Tennessee courts have concluded that trucking companies are required to maintain records, such as driver logs, pursuant to the requirements of the FMCSA regulations. *See Darling v. J.B. Expedited Servs.*, 2006 U.S. Dist. LEXIS 54000 (U.S. M.D. Tenn., Aug. 3, 2006). As such, even without a specific demand from opposing counsel, it is a prudent practice in Tennessee maintain all records within the time requirements set forth in the FMCSA regulations to avoid the possibility of sanctions, including a negative inference.

4. **Broker exposure or liability for motor carrier negligence**

In Tennessee, causes of action in defending a broker generally arise under theories of vicarious liability and direct liability.
At the outset of evaluating broker exposure or liability for motor carrier negligence, one must remember that Tennessee follows a rule of several liability in most cases and this type of case should fall within the several liability rule. Thus, each defendant bears only its proportionate share of fault. In that regard, the presence of a number of defendants may serve to reduce potential exposure to the extent those parties are allocated a portion of fault.

A preliminary consideration in any claim brought surrounding an incident will be whether the client was acting as a “broker” versus a “motor carrier” within the meanings ascribed those terms under federal motor carrier law. Plaintiff attorneys often seek to define the defendant client as a motor carrier, even when it was not acting as such, thus subjecting it to potential increased liability. While cases have not held this issue determinative to third-party liability, arguing that defendant client was acting as merely a broker could have three positive impacts on the defense.

First, it would circumvent any allegations of negligence per se for violations of federal motor carrier safety regulations applicable to motor carriers only.

Second, in the vicarious liability context, a company acting purely as a broker may be less likely to be held to be the employer of the driver transporting the goods. See Youngblood v. Wall, 815 S.W.2d 512, 517 (Tenn. Ct. App. 1991) (considering “whether or not the work was part of the regular business of the employer” in determination whether individual is independent contractor or employee); compare Sperl v. C.H. Robinson Worldwide, Inc., 946 N.E.2d 463 (Ill. App. Ct. 3d Dist. 2011) (holding “broker” not licensed as motor carrier was employer of driver, driving on behalf of carrier broker had retained, reasoning that it was of “great significance” that the broker was in essentially the same business as the driver and her company).

Third, being classified as a broker rather than a motor carrier could impact the level of pre-retention inquiry a court would expect of the company in the negligent hiring context (i.e., limiting the scope of duty). See Schramm v. Foster, 341 F. Supp. 2d 536 (D. Md. 2004) (basing duty of freight broker in part on the fact it was a “self-proclaimed … 'third party logistics company' providing 'one point of contact' service to its shipper clients …”).

Vicarious Liability

As a general rule, vicarious liability does not attach to independent contractors. See Marshalls of Nashville v. Harding Mall, 799 S.W.2d 239, 243 (Tenn. Ct. App. 1990). So, a first line of defense to vicarious liability for the defendant client will be arguing that motor carrier and its driver were acting as independent contractors and not agents or employees of the defendant client. To further support the defendant client’s position, consideration should be given to the broker motor carrier agreement to see how it defines the relationship. Tennessee courts, however, like most all other jurisdictions, look beyond labels to the substance of the agreement itself in defining the relationship.

a. Factors considered

The primary consideration in determining whether vicarious liability attaches is whether the principal controls the details or the means of the work to be performed (suggesting an employer-
employee relationship) as opposed to merely the end result of the work. *Howell v. Shepherd*, 196 S.W.2d 849, 852-53 (Tenn. Ct. App. 1945); *Jolly Motor Livery Corp. v. Allenberg*, 221 S.W.2d 513, 515 (Tenn. 1949).

Courts also consider a number of other factors, including (1) whether or not the one employed is engaged in a distinct occupation or business; (2) the kind of occupation with reference to whether the work is usually done under the direction of an employer or by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the employer or workman supplies the instruments, tools and place of work of the person doing the work; (5) the length of time for which the person is employed; (6) method of payment, whether by time or by job (the latter suggesting independent contractor status); (7) whether or not the work is part of the regular business of the employer; (8) whether or not the parties believe they are creating the relationship of employer and employee; and whether the principal is or is not in business. *Youngblood, supra*, 815 S.W.2d at 517 (Tenn. Ct. App. 1991).


b. Case examples

While Tennessee is somewhat sparse on decisional authority directly related to vicarious liability in the sub-haul or brokered transportation context, *Misco, supra*, provides an apposite general example of Tennessee’s application of the independent contractor / employee factors. In that case, a Tennessee appellate court held summary judgment was proper in favor of a principal arguing the worker at issue was an independent contractor. The worker was driving a truck filled with the principal’s siding material for installation on the principal’s behalf. He collided with the plaintiff’s vehicle. The Court agreed that the worker was an independent contractor. He ran jobs the way he “thought they were supposed to be run,” and believed he was an independent contractor. He operated his own business, and was paid by the job. Payroll and income taxes were not withheld. He chose his own work locations, set his own schedule and hired his own employees, and he provided his own tools and equipment.

Authority from other states with very similar vicarious liability law also provides insight into how a Tennessee courts might approach the issue. One favorable case is *Schramm v. Foster*, 341 F. Supp. 2d 536 (D. Md. 2003). A food company contacted defendant C.H. Robinson Worldwide, Inc. (“CHR”), who had authority to contract as a motor carrier, and requested it “arrange for transportation” of products to a customer. CHR contracted the work to defendant Goff Brothers, who assigned the job to one of its drivers. The driver caused an accident. The plaintiffs claimed CHR was vicariously liable because the driver was effectively its employee. CHR had dispatched the driver, directed him to pick up and deliver the load in question, gave him directions from the shipper’s to its customer’s warehouse, and gave the driver specific instructions regarding the load (e.g. to use locks on the trailer). CHR monitored the driver’s performance, requiring him to call when he had successfully picked up the load, and periodically throughout the trip.
However, the Court held that the driver was not CHR’s employee. The parties (CHR and Goff Brothers) had defined their relationship as independent contractor, and required Goff to employ drivers, stating they were not the agents of CHR or its customers. Goff paid the driver’s salary and expenses and provided equipment necessary to ship the goods. Notably, elsewhere in the opinion, the Court suggested CHR was a broker rather than a motor carrier; but the distinction was not deemed relevant to the vicarious liability issue in the particular case. See also Jones v. C.H. Robinson Worldwide, Inc., 558 F. Supp. 630 (W.D. Va. 2008).

Sperl v. C.H. Robinson Worldwide, Inc., 408 Ill. App. 3d 1051 (Ill. App. Ct. 3d Dist. 2011), provides a contrary example. That case also involved CHR. At the time of the vehicle incident in question, CHR was not a licensed motor carrier, but was a federally licensed freight broker. Jewel Food Stores, undergoing a remodel, contacted CHR to utilize CHR’s cold storage warehouse to temporarily distribute perishable products. It entered a contract with CHR whereby CHR purchased produce for Jewel, stored it, and then arranged for transportation to Jewel’s grocery stores. CHR hired Dragonfly to transport the goods. Dragonfly leased a tractor-trailer from driver DeAn Henry who was authorized to transport loads under Dragonfly’s motor carrier authority. If Henry booked a load, she kept all profit; but she gave Dragonfly 5% of loads it dispatched. CHR dispatched the load, and gave Dragonfly a number of instructions, including a requirement Henry “Stay in constant communication” with CHR dispatch, call after each pick up, and maintain certain temperatures. CHR gave her certain driving directions, and had she completed the delivery (rather than been involved in an accident), CHR would have deposited money directly into her bank account. Of note to the Court, CHR actually owned the produce being transported (which it had purchased on Jewel’s behalf).

The jury held that there was an employer-employee relationship between Henry and CHR. In affirming the trial court’s ruling, the appellate court held a factor of “great significance” was that although CHR may have been a broker (expert testimony was offered in this regard), the driver’s services were “closely aligned with” and “directly related to, if not the same as” CHR’s business. Id. at 1058 – 59.

Potential Direct Liability (Negligent Hiring, Retention and/or Supervision)

In these types of cases, a plaintiff will likely also assert direct liability in the form of negligent retention, against the broker defendant client.

Both employers and those retaining independent contractors can be held liable for negligence in retention of workers. See Marshalls of Nashville, supra, 799 S.W.2d at 243 (independent contractors); Brown v. Christian Bros. Univ., 428 S.W.3d 38, 56 (Tenn. Ct. App. 2013) (employees). To establish such negligence, there must be (1) evidence of unfitness for the particular job, (2) evidence that the applicant for employment, if hired, would pose an unreasonable risk to others, and (3) evidence that the prospective employer knew or should have known of the unfitness. See Brown v. Walmart Stores, Inc., 976 F. Supp. 729, 723 (W.D. Tenn. 1997); Rest. 2d Agency, § 213. Negligent supervision claims are based on a duty to adequately supervise a worker. See Wicks v. Vanderbilt Univ., No. M2006-00613-COA-R3-CV, 2007 Tenn.App. LEXIS 146 (Tenn. Ct. App. Nov. 15, 2006).
If a claim or cause of action is brought against the broker defendant client, it will be important to carefully analyze and evaluate any agreement between the broker and the motor carrier. Careful consideration should be given to provisions related to whether the broker was acting in any type of supervisory role with respect to the motor carrier. Moreover, the agreement should be evaluated for potential risk transfer options under defense and indemnity provisions and/or additional insured provisions.

5. Logo or placard liability - whether motor carrier is liable for any vehicle bearing its Department of Transportation identification placard, company name, or business logo

A motor carrier can be liable to injured third parties when its name appears on a leased vehicle for an accident. This is true even though the vehicle may not have been operating for the company identified on the equipment at the time. This rule does not apply to indemnity claims of one carrier against another. See Roadrunner Trucking, Inc. v. Howard Trucking Co., CA No. 917, 1990 Tenn. App. LEXIS 164, at *13-14 (Tenn. Ct. App. Mar. 6, 1990) (other citations omitted).

6. Offers of Judgment

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property, or to the effect specified in the offer, with costs then accrued. Likewise a party prosecuting a claim may serve upon the adverse party an offer to allow judgment to be taken against that adverse party for the money or property or to the effect specified in the offer with costs then accrued. If within 10 days after service of the offer the adverse party serves written notice that the offer is accepted, either party may file the offer and notice of acceptance, together with proof of service thereof, with the court and thereupon judgment shall be rendered accordingly. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in the proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree shall pay all costs accruing after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. Tenn. R. Civ. P. 68

7. Punitive Damages

a. Are punitive damages insurable?

Yes, except if the conduct is found to be intentional, directly assessed punitive damages are insurable in Tennessee. See Lazenby v. Universal Underwriters Ins. Co., 383 S.W.2d 1, 4-6 (Tenn. 1964). In Lazenby, the Tennessee Supreme Court construed the policy language at issue as providing coverage for punitive damages, but the Court further noted that coverage would be unavailable for punitive damages arising from intentional conduct. Id. The Court has also held that in the absence of a provision to the contrary, an insurer must satisfy a compensatory damage award, to the extent of its limits, before
paying any part of a punitive damage award. *West v. Pratt*, 871 S.W.2d 477, 480 (Tenn. 1994).

Finally, vicariously assessed punitive damages based upon non-intentional conduct also would likely be insurable in Tennessee because directly assessed punitive damages based upon such conduct are insurable.

b. **Any limitations or how much may be awarded as punitive damages?**

With some limitations set forth in Tenn. Code Ann. § 29-34-104:

Punitive or exemplary damages shall not exceed an amount equal to the greater of:

Two (2) times the total amount of compensatory damages awarded; or
Five hundred thousand dollars ($500,000);

The limitation on the amount of punitive damages shall not be disclosed to the jury, but shall be applied by the court to any punitive damages verdict;

Additionally, the limitation on the amount of punitive damages imposed shall not apply to actions brought for damages or an injury:

(1) If the defendant had a specific intent to inflict serious physical injury, and the defendant's intentional conduct did, in fact, injure the plaintiff;

(2) If the defendant intentionally falsified, destroyed or concealed records containing material evidence with the purpose of wrongfully evading liability in the case at issue; provided, however, that this subsection (a) does not apply to the good faith withholding of records pursuant to privileges and other laws applicable to discovery, nor does it apply to the management of records in the normal course of business or in compliance with the defendant's document retention policy or state or federal regulations;

(3) If the defendant was under the influence of alcohol, drugs or any other intoxicant or stimulant, resulting in the defendant's judgment being substantially impaired, and causing the injuries or death. For purposes of this subsection (a), a defendant shall not be deemed to be under the influence of drugs or any other intoxicant or stimulant, if the defendant was using lawfully prescribed drugs administered in accordance with a prescription or over-the-counter drugs in accordance with the written instructions of the manufacturer; or

(4) If the defendant's act or omission results in the defendant being convicted of a felony under the laws of this state, another state, or under federal law, and that act or omission caused the damages or injuries.

8. **Citations or criminal convictions resulting from a motor vehicle accident**

a. **Are citations admissible in the civil litigation?**
b. **How does a guilty plea or verdict impact civil litigation? Plea of no contest?**

Evidence of a final judgment adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year is admissible to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal case for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility. Tenn. R. Evid. 803. *See also Bowen v. Arnold*, 502 S.W.3d 102, 104 (Tenn. 2016) (holding that the trial court properly granted the victim's mother partial summary judgment applying the collateral estoppel doctrine offensively regarding the mentor/defendant’s prior conviction of rape and sexually battery of the victim/plaintiff because the mentor/defendant had a full and fair opportunity to litigate the issue in his criminal trial).

The Supreme Court of Tennessee has held that evidence of payment of a traffic fine, without contesting it, is not admissible in a later action based on the underlying event resulting in the traffic citation. The Supreme Court did not reach and expressly reserved the question of admissibility where the defendant personally appears in court and pleads guilty. *See Williams v. Brown*, 860 S.W.2d 854, 857, 1993 Tenn. LEXIS 298, *9 (Tenn. 1993).

A footnote from *Williams* acknowledged that many states do admit evidence of a defendant's guilty plea to a traffic citation if it were entered in open court. The *Williams* Court also noted, however, that commentators have criticized the practice of admitting guilty pleas to misdemeanor offenses as admissions of a party-opponent because it tends to frustrate the policy of the hearsay exception for judgments of previous convictions, excluding misdemeanor convictions, because of their unreliability.

9. **Recent, significant trucking or transportation verdicts in each state**

*Parker v. U.S. Eagle Express*
Source: 2016 TN Jury Verdicts & Sett. LEXIS 38
Docket: 14-4150; March 9, 2016
A trucker suffered disabling injuries (a shoulder dislocation, broken ribs and a thoracic compression fracture) when he crashed into another tractor-trailer that had spun out of control. The plaintiff's medical bills (paid by workers’ compensation) totaled just $7,000; however, the jury found for the plaintiff and awarded $600,000 in various forms of damages.

*Smith v. Davis Express*
Source: 2016 TN Jury Verdicts & Sett. LEXIS 83
Docket: 12-1753; January 13, 2016
A third-party crossed the centerline and into the path of an oncoming tractor-trailer. The driver of the tractor-trailer swerved to avoid that third-party and struck the plaintiff head on. The plaintiff blamed the trucker for his reaction, while the trucker countered and blamed the third-party. A
The defense verdict was returned at trial, but the plaintiff still took $100,000 pursuant to a Hi-Lo agreement.

Ward v. TMC Transportation
Source: 2015 TN Jury Verdicts & Sett. LEXIS 162
Docket: CT-001912-13; November 5, 2015
The plaintiff complained of radiating neck pain after a lane incursion crash involving a tractor-trailer. The trucking company admitted fault and defended on damages. A Memphis jury awarded the plaintiff $300,000 in noneconomic damages, which was reduced to $200,000 since the plaintiff’s ad damnum was only $200,000.

10. Admissible evidence regarding medical damages - can plaintiff seek to recover the amount charged by the medical providers or the amount actually paid, and is there a basis for post-verdict reductions or off-sets

Currently, Tennessee law allows plaintiffs to seek medical bills charged, but this issue is contested among the courts, and at least one Federal Court in Tennessee ruled that only medical bills paid are admissible. State Courts have held either way, and jurors often ask the Court in trial whether insurance paid for a plaintiff’s medical damages, and if so, the amount.

11. Driver criminal history and how it affects negligent hiring and supervision claims

An action for negligent hiring requires something more than a showing of past criminal conduct. There must be (1) evidence of unfitness for the particular job, (2) evidence that the applicant for employment, if hired, would pose an unreasonable risk to others, (3) evidence that the prospective employee knew or should have known that the historical criminality of the applicant would likely be repetitive. Gates v. McQuiddy Office Prods., 1995 Tenn. App. LEXIS 715, *1, 131 Lab. Cas. (CCH) P58,095 (Tenn. Ct. App. Nov. 2, 1995)