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1. Identify the venues/areas in your State that are considered dangerous or liberal.

In Tennessee, most of the state is fairly conservative; however, we would identify Benton County, Coffee County, Davidson County, Montgomery County; and Sevier County as more liberal (relatively speaking for the overall conservative nature of the state); and Shelby County as dangerous (again, that is relative to the conservative nature of the state). The liberal and dangerous counties would be considered conservative in most other states.

2. Identify any significant trucking verdicts in your State during 2017-2018, both favorable and unfavorable from the trucking company's perspective.

*Bleser v. Short Fuse Trucking*; 2018 TN Jury Verdicts & Sett. LEXIS 87

The plaintiff suffered a disc injury that will require a multi-level fusion (he has not had the surgery yet) while in the sleeper berth of a tractor-trailer. He was rear-ended by another trucker who failed to stop in time in construction traffic.

Result: Verdict: \$ 1,200,000 for plaintiff less 20% comparative fault.

*Hayworth v. BlueLinx Corporation*; 2018 TN Jury Verdicts & Sett. LEXIS 10

A TDOT worker was driving a truck backwards with emergency lights on the shoulder of the interstate to warn oncoming traffic of an impending slowdown. A trucker hit the TDOT truck without slowing down, and the TDOT worker suffered a fractured shoulder and compression fractures to his lower spine. A jury in Manchester awarded \$615,000 in non-economic damages.

Result: Verdict: \$ 1,100,000 for plaintiff assessed 90% to the defendant.

*Lambert v. Belz Investco GP*; 2018 TN Jury Verdicts & Sett. LEXIS 31

The plaintiff suffered soft-tissue injuries when she jerked and swerved her vehicle (she didn't actually crash) after an unsecured wooden chock flew from the back of a trailer and struck her windshield. A Memphis (Shelby County) jury awarded the plaintiff \$ 300,000 for her pain and suffering.

Result: Verdict: \$ 450,000 for plaintiff.

*Miler v. Transit Logistics*; 2018 TN Jury Verdicts & Sett. LEXIS 39

The plaintiff suffered a crush injury to his pelvis when pinned between a truck and a trailer at a loading dock at the GM plant in Spring Hill. A Columbia (Maury County) jury awarded the plaintiff \$ 1,623,096 in non-economic damages.

Result: Verdict: \$ 3,413,939 for plaintiff less 29% comparative fault.

*Coombs v. Big D Trucking*; 2017 TN Jury Verdicts & Sett. LEXIS 31

In an interstate merging crash, the jury found both drivers 50% at fault and the plaintiff took nothing. While the issue was moot, the defense had minimized the plaintiff's claimed damages, noting this was her 9th injury lawsuit in a 30-year period.

Result: Verdict: Defense verdict on comparative fault.

*Beasley v. Big G Express*; 2018 TN Jury Verdicts & Sett. LEXIS 47

A trucker was rear-ended by another trucker (it was very minor). A Lebanon (Wilson County) jury awarding the plaintiff special damages and nothing more.

Result: Verdict: \$ 6,781 for plaintiff.

3. Are accident animations and/or computer-generated evidence admissible in you State?

Yes, they are admissible as long as expert proof establishes the computer animation is a fair and accurate depiction of the event it purports to portray. *State v. Farner*, 66 S.W.3d 188, 208 (Tenn. 2001). The Court in *Farner* stated "because the jury may be so persuaded by its life-like nature that it becomes unable to visualize an opposing or differing version of the event, the

requirement that the animation fairly and accurately portray the event is particularly important when the evidence at issue is a computer animated recreation of an event.” *Id.*

The Court in *Farner* went on to say “[l]ike all evidence in Tennessee, 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. *Id.* (citing Tenn. R. Evid. 403). “If a computer animated portrayal is inaccurate, its probative value decreases and the likelihood that it will be subject to exclusion under Rule 403 increases.” *Id.* at 209. Ultimately, like other evidence, the admissibility of computer animations generally rests within the sound discretion of the trial court, with the rules of evidence governing the exercise of the trial court's discretion.

4. Identify any significant decisions or trends in your State in the past two (2) years regarding (a) retention and spoliation of in-cab videos and (b) admissibility of in-cab videos.

Tennessee courts have not addressed retention and spoliation in the context of in-cab videos specifically. Rather, at this time, in-cab videos are governed by existing spoliation rules. It is worth noting that in Tennessee, “intentional misconduct is not a prerequisite for a trial court to impose sanctions for the spoliation of evidence, including that of a negative inference.” *Tatham v. Bridgestone Ams. Holding, Inc.*, 473 S.W.3d 734, 746 (Tenn. 2015). Therefore, it is prudent to preserve all video footage that may be relevant to a potential claim to avoid the risk of spoliation sanctions.

Furthermore, Tennessee courts have not specifically discussed the admissibility of in-cab videos; however, based on recent rulings, it appears that they regularly are admitted as evidence in civil cases. For example, the case of *Trammell v. Peoples* centered around a video that was taken from the dashboard of the defendants’ box truck. No. M2016-02198-COA-R3-CV, 2017 Tenn. App. LEXIS 682 (Tenn. Ct. App. Oct. 11, 2017). In that case, the defendants filed a motion for summary judgment based on the dash video footage, which they submitted as an exhibit. The court noted that director of operations for the defendant company declared that he inspected the truck and the video camera mounted on the dashboard. *Id.* at \*3. He further declared that he initiated the upload of the video, downloaded the file onto his computer, and attached a true and correct copy of the video to his declaration. *Id.* As such, it seems that so long as a dash camera video is properly authenticated, Tennessee courts should allow it to be used as evidence.

5. What is your State’s applicable law and/or regulation regarding the retention of telematics data, including but not limited to, any identification of the time frames and/or scope for retention of telematics data and any requirement that third-party vendors be placed on notice of spoliation/retention letters.

Tennessee has not amended its discovery rules to address the retention of telematics data specifically; however, there is nothing to suggest that it would be treated any differently than

other types of electronically stored information. In 2009, Rule 34 of the Tennessee Rules of Civil Procedure was amended “to confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents.” Tenn. R. Civ. P. 34.01 advisory committee’s note (2009). Rule 34 applies to documents and things that are in the “possession, custody or control” of a party. Tenn. R. Civ. P. 34.01. While Tennessee state courts have not yet addressed whether data that is stored with a third-party vendor is still considered to be within the “control” of a party, federal case law suggests that a party has control over a document when it has a legal right to obtain that document. *See, e.g., John B. v. Goetz*, 879 F.Supp.2d 787, 858-59 (M.D. Tenn. 2010). As such, once the duty to preserve is triggered, it is best to notify any third-party vendors who may be storing any telematics or other electronically stored information to ensure that none of it is deleted.

6. Is a positive post-accident toxicology result admissible in a civil action?

In Tennessee, “[t]he results of blood alcohol tests have regularly been admitted and considered in civil cases.” *McIntyre v. Balentine*, No. 1, 1990 Tenn. App. LEXIS 626, at \*11 (Tenn. Ct. App. Sept. 4, 1990). However, such results must be properly authenticated. The Tennessee Supreme Court has noted that testing must be “conducted in the regular course of business by persons under a business duty to render accurate information.” *Overall v. Southern Subaru Star, Inc.*, 545 S.W.2d 1, 3 (Tenn. 1976). Likewise, the results of drug tests also have been admitted into evidence in Tennessee civil cases. *See, e.g., Blair v. Sullivan*, No. W2008-01649-COA-R3-CV (Tenn. Ct. App. Aug. 13, 2009) (holding that a defendant truck driver’s positive post-accident drug test was properly admitted as evidence).

7. Is post-accident investigation discoverable by adverse counsel?

Typically, post-accident investigations performed in anticipation of litigation constitute work product and are protected from discovery by the adverse party. However, this privilege is not absolute and may be overcome upon a showing of good cause. The Tennessee Supreme Court has held that “a party seeking to discover the investigation file or any of its parts which are the work product of the adversary party or his attorney must show good cause for the discovery; and that the party has used diligence to discover for himself those things which he seeks to have the adversary party produce for inspection and copying.” *Medic Ambulance Service, Inc. v. McAdams*, 392 S.W.2d 103, 110 (Tenn. 1965). Regarding the requisite good cause showing, the Court noted that “there must be a factual statement, not merely conclusions, as to the need for the data or material for the purposes of trial, and the motion should be supported by proper affidavit.” *Id.*

8. Describe any laws in your State which regulate automated driving systems (autonomous vehicles) or platooning.

Autonomous vehicles are addressed in Tenn. Code Ann. § 55-8-202. The statute prohibits local authorities from banning the use of autonomous vehicles within their jurisdiction if the autonomous vehicle otherwise complies with all safety regulations within that jurisdiction. An autonomous vehicle is defined by statute as having the ability to make dynamic driving task decisions without supervision of a human operator.

Platooning is allowed pursuant to Tenn. Code Ann. § 55-8-201. Before a person may operate a platoon there must be a plan for general platoon operations provided to the departments of transportation and safety at least thirty (30) days before the platoon is to occur. Further, an operator with the appropriate commercial license must be behind the wheel of each vehicle in the platoon.

9. Describe any laws or Court decisions in your State which would preclude a commercial driver from using a hands-free device to have a conversation over a cellphone.

There is no law in Tennessee which prevents drivers over eighteen (18) from operating a motor vehicle and using a hands-free device to have a conversation over a cell phone. See Tennessee Code Ann. § 55-8-199.

10. Identify any Court decisions in your State precluding Golden Rule and/ or Reptile style arguments by Plaintiffs' counsel.

There are few cases in which argument of counsel has been recognized as invoking the application of the "Golden Rule" by the jurors, with resultant prejudicial error necessitating a reversal of the judgment. *Ashdji v. Yardley*, No. CA 1188, 1988 WL 116498, at \*2 (Tenn. Ct. App. Nov. 4, 1988). The golden rule argument has been defined as:

[A]rguments by counsel suggesting to the jurors that they place themselves in the position of a party to the cause, or posing to them the question whether they would go through life in the condition of the injured Plaintiff, or would want members of their family to go through life [physically disabled].

*State v. Sanders*, No. M201402535CCAR3CD, 2015 WL 5461660, at \*6 (Tenn. Crim. App. Sept. 18, 2015)

There have been cases in which counsel's invocation of the "Golden Rule" has been regarded as improper, but not, under the circumstances, as amounting to reversible error. 1988 WL 116498, at \*2. Similarly, the existence of prejudicial effect has been denied in many cases in view of the trial court's instructions to the jury to disregard the argument, or by the withdrawal of such remark. *Id.* While this tactic, along with "Reptile Style" arguments, are not allowed in Tennessee courts, they rarely ever rise to the point of a reversible error – as most appellate courts review the trial court's decision using the clearly erroneous standard. *Id.*

11. Compare and Contrast the advantage and disadvantages of Federal Court versus State Court in your State.

Whether the differences in State and Federal Courts are advantages or disadvantages largely depends on the facts of the case and the familiarity of the attorney with each system. In jury trials the federal juries are comprised of six (6) individuals as opposed to twelve (12) in state. Assuming that the case meets the requirements of federal jurisdiction, the consideration of differences in damage caps may factor into the decision. These caps are statutory in Tennessee.<sup>1</sup>

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<sup>1</sup> For a further explanation of damage caps in Tennessee see question 14. Damage caps are addressed in Tenn. Code Ann. § 29-39-101 *et. seq.*

Federal Courts usually apply the *Erie* Doctrine and apply state law to the award of non-economic damages. Recently, in *Lindenberg v. Jackson Nat'l Life Ins. Co.*, 912 F.3d 348 (7<sup>th</sup> Cir. 2018), a divided panel of the U.S. Court of Appeals for the Sixth Circuit, struck down Tennessee's statutory caps on punitive damages, Tennessee Code Annotated § 29-39-104. To date, there has been no such ruling from a state appellate court. Speed of trial and familiarity with the rules of the separate courts is another factor to consider when deciding to file in State or Federal Court. This is largely venue specific.

12. How does your state handle the admissibility of traffic citations (guilty plea, pleas of no contest, etc.) in subsequent civil litigation?

Generally speaking, citations are not admissible in civil litigation, but there are aspects of this issue that have been resolved by the Tennessee Supreme Court. In *Williams v. Brown*, the Tennessee Supreme Court concluded 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." 860 S.W.2d 854, 857 (Tenn. 1993); see also *Straub v. Roberts*, Appeal No. W1998-00854-COA-R3-CV, 2000 Tenn. App. LEXIS 217 (Tenn. Ct. App. Mar. 31, 2000) (affirming trial court's exclusion of traffic citation where defendant "had signed the back of the ticket and mailed in the fine."). But, the court also noted that "[w]e do not reach and expressly reserve the question of admissibility where the defendant appears in court and pleads guilty." See *Williams*, 860 S.W.2d at 857.

Accordingly, citations are inadmissible when the recipient pays the fine without contesting the dispute in court, but Tennessee courts have not resolved whether citations are admissible when the defendant appears in court and pleads guilty. Further, based on *Williams*, and *Grange*, below, it seems to follow that a citation, which has been resolved through contest would be admissible, subject to the Tennessee Rules of Evidence.

- A. Guilty Plea: A guilty plea is generally not conclusive on the issues in a subsequent civil action, but it is competent evidence as an admission against interest. See *Grange Mut. Casualty Co. v. Walker*, 652 S.W.2d 908, 910 (Tenn. Ct. App. 1983) (citations omitted). Accordingly, a guilty plea is admissible, but that does not stop the individual against whom one may attempt to use the plea from testifying in a manner that is inconsistent with the plea. For example, in *McCain v. Vaughn*, the McCains argued that Vaughn should be judicially estopped from alleging that he did not strike or push Mrs. Cain because he pled guilty to assault in criminal court. See *McCain v. Vaughn*, Appeal No. 02A01-9707-CV-00154, 1999 Tenn. App. LEXIS 134, at \*10-11 (Tenn. Ct. App. Feb. 26, 1999). Based on *Grange*, however, the court concluded "the guilty plea was admissible and did not estop Vaughn from testifying that he did not assault Mrs. Cain." See *McCain v. Vaughn*, 1999 Tenn. App. LEXIS 134, at \*11.
- B. Verdict: Tennessee abolished the mutuality rule when dealing with estoppel in certain cases. *Bowen ex rel. Doe v. Arnold*, 502 S.W.3d 102, 116 (Tenn. 2016). In *Bowen*, the Tennessee Supreme Court stated, "with respect to the particular issue in this case—whether offensive collateral estoppel should apply in a civil action based on a prior criminal judgment—we conclude that Tennessee courts should

be guided by section 85 of the Restatement (Second) of Judgments.” *Id.* The general rule under section 85 is that “[a] judgment in favor of the prosecuting authority is preclusive in favor of a third person in a civil action ... [a]gainst the defendant in the criminal prosecution as stated in [section] 29.” Restatement (Second) of Judgments § 85.13 Because section 85 incorporates section 29, which in turn incorporates section 28, courts have considerable discretion to allow for relitigation if the circumstances enumerated in sections 28 and 29 convince the court that relitigation is warranted.<sup>2</sup> *Id.*

C. Pleas of no contest: “Pleas of *nolo contendere* are not admissible in Tennessee.” See *Williams*, 860 S.W.2d at 856 (citation omitted); see also Tenn. R. Evid. 410(2).

13. Describe the laws in your State which regulate whether medical bills stemming from an accident are recoupable. In other words, can a plaintiff seek to recover the amount charged by the medical provider or the amount paid to the medical provider? Is there a basis for post-verdict reductions or offsets?

Tennessee law allows for a plaintiff to claim medical bills stemming from an accident as economic damages. A plaintiff who is injured by another's negligence is entitled to recover two types of damages: economic (or pecuniary) damages and non-economic (or personal) damages. Economic damages include past medical expenses, future medical expenses, lost wages, and lost earning potential. A plaintiff may seek recovery for all “economic losses that naturally result from the defendant's wrongful conduct.” *Dedmon v. Steelman*, 535 S.W.3d 431, 437–38 (Tenn. 2017) (internal citations omitted). For this type of award, a plaintiff must prove that the medical bills paid or accrued because of the defendant's negligence were both “necessary and

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<sup>2</sup> Section 29 of the Restatement (Second) of Judgments deals with mutuality generally and provides: A party precluded from relitigating an issue with an opposing party, in accordance with [sections] 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue. The circumstances to which consideration should be given include those enumerated in [section] 28 and also whether:

- (1) Treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;
- (2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined;
- (3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;
- (4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;
- (5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding;
- (6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;
- (7) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based;
- (8) Other compelling circumstances make it appropriate that the party be permitted to relitigate the issue.

reasonable.” *Borner v. Autry*, 284 S.W.3d 216, 218 (Tenn. 2009). A physician who is familiar with the extent and nature of the medical treatment a party has received may give an opinion concerning the necessity of another physician's services and the reasonableness of the charges. See *Dedmon v. Steelman* at 438.

In Tennessee, the focus is on “the ‘reasonable’ *value* of ‘necessary’ services rendered. *Fye v. Kennedy*, 991 S.W.2d 754, 764 (Tenn. Ct. App. 1998) (emphasis in original). In other words, even if it is undisputed that the medical services were necessary, the plaintiff must prove “that the charges in question were ‘reasonable.’” *Id.* To rebut the plaintiff's proof on medical expenses, the “defendant is permitted to introduce relevant evidence regarding necessity, reasonableness, and whether a claimed service was actually rendered.” *Id.*

For small claims, Tennessee Code Annotated § 24-5-113(a) provides for a rebuttable presumption that medical bills of \$4,000 or less that are itemized and attached to the complaint create a *prima facie* presumption that the bills are both necessary and reasonable.

Tennessee also follows the collateral source doctrine, which has been adopted by almost all states. The collateral source rule as applied in Tennessee and elsewhere is succinctly articulated in the widely-cited Section 920A of the Restatement (Second) of Torts:

(1) A payment made by a tortfeasor or by a person acting for him to a person whom he has injured is credited against his tort liability, as are payments made by another who is, or believes he is, subject to the same tort liability.

(2) Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable.

Restatement (Second) of Torts Restatement (Second) of Torts § 920A (1977). Tennessee case law has stated, “[n]ormally, 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.” *Fye*, 991 S.W.2d at 763-64 (specifically adopting Section 920A as consistent with Tennessee law).

14. Describe any statutory caps in your State dealing with damage awards.

In Tennessee there is a statutory cap on noneconomic damages under Tenn. Code Ann. § 29-39-102 which limits the amount of noneconomic damages in a majority of cases to seven hundred fifty thousand (750,000) dollars. In cases involving catastrophic injury – defined as (1) or more of the following: (1) Spinal cord injury resulting in paraplegia or quadriplegia; (2) Amputation of two (2) hands, two (2) feet or one (1) of each; (3) Third degree burns over forty percent (40%) or more of the body as a whole or third degree burns up to forty percent (40%) percent or more of the face; or (4) Wrongful death of a parent leaving a surviving minor child or children for whom the deceased parent had lawful rights of custody or visitation – the damage cap is extended not to exceed one million (1,000,000) dollars.

The current state of Tennessee's punitive damage cap found in Tenn. Code Ann. § 29-39-104 is unclear. While the Tennessee Supreme Court has yet to rule on the constitutionality of the statute – which currently caps punitive damages to an amount equal to the greater of: (A) Two

(2) times the total amount of compensatory damages awarded; or (B) Five hundred thousand dollars (\$500,000) – the 6<sup>th</sup> Circuit held the statute to be unconstitutional in *Lindenberg v. Jackson Nat'l Life Ins. Co.*, 912 F.3d 348 (6th Cir. 2018). In *Lindenberg* the majority held that the cap violates the right to a jury trial found in the Tennessee Constitution. The Court states, “upon our assessment of Tennessee law, we find that the punitive damages bar set forth Tenn. Code Ann. § 29-39-104 violates the individual right to a trial by jury set forth in the Tennessee Constitution. The Declaration of Rights in the Tennessee Constitution provides that ‘the right of trial by jury shall remain inviolate ....’ Tenn. Const. art. I, § 6.” *Lindenberg* at 364.

Because there are no cases directly addressing the situation the Court turned to a historical view of interpretation of the Tennessee and North Carolina Constitutions because of the states’ shared history. The Court states, “our review of historical evidence from Tennessee and North Carolina demonstrates that punitive damages awards were part of the right to trial by jury at the time the Tennessee Constitution was adopted.” *Id.*

The overall impact of the 6<sup>th</sup> Circuit decision remains to be seen. The Court’s decision is not binding precedent on state courts and a state court has yet to cite *Lindenberg* in its ruling as to the constitutionality of § 29-39-104.