TENNESSEE

Benjamin W. Jones
David A. Chapman
Mary Beth White
LEWIS THOMASON
620 Market Street, Suite 5
Knoxville, TN 37902
Phone: (865) 546-4646
Fax: (865) 523-6529

424 Church Street, Suite 2500
Nashville, TN 37219
Phone: (615) 259-1366
Fax: (615) 259-1389
E-Mail: bjones@lewisthomason.com
E-Mail: dchapman@lewisthomason.com
E-Mail: mbwhite@lewisthomason.com
www.lewisthomason.com

Alan B. Easterly
Thomas J. Dement II
LEITNER, WILLIAMS, DOOLEY & NAPOLITAN, PLLC
200 W. ML King Blvd., Suite 500
Chattanooga, TN 37402-2566
Phone: (423) 424-3905
Fax: (423) 308-0905

201 4th Avenue North, Suite 1100
Nashville, TN 37219
Phone: (615) 255-7722
Fax: (615) 780-2210
Email: alan.easterly@leitnerfirm.com
E-Mail: thomas.dement@leitnerfirm.com
www.leitnerfirm.com

1. Provide an update on current black box technology and simulations in your State and the legal issues surrounding these advancements.

I. Unlike other jurisdictions, Tennessee currently has no legislation or significant case law specific to EDR data admissibility or use at trial. Tennessee appellate courts, however, have previously drawn a distinction between the admissibility of a computer "animation" using EDR data and physical evidence versus a computer "simulation." In *State v. Drake*, No. E2004-00247-CCA-R3-CD, 2005 Tenn. Crim. App. LEXIS 559, *30-34 (Tenn. Ct. Crim. App. June 6, 2005), the Tennessee Court of Criminal Appeals explained this contrast as follows:

a. If the purpose of the computer evidence is to illustrate and explain a witness's testimony, courts usually refer to the evidence as an animation. . . . In contrast, a simulation is based on scientific or physical principles and data entered into a computer, which is programmed to analyze the data and draw a conclusion from it, and courts generally require proof to show the validity of the science before the simulation evidence is admitted.

II. In the computer animation context, the proponent must establish that the computer animation is a fair and accurate depiction of the event it purports to portray. Because the jury may be so persuaded by [the animation's] 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. . . A simulation . . . requires much more specific foundational proof to show the validity of the science before the simulation evidence is admitted." *Id*. (citing *State v. Farner*, 66 S.W.3d 188 (Tenn. 2001) (internal quotes omitted). Evidence of a vehicle occupant's failure to wear a seatbelt is also not admissible in Tennessee outside of a products liability case. Tenn. Code Ann. § 55-9-604. Thus, EDR data sets that contain a seatbelt use data element may require redaction before being admitted into evidence.

2. Besides black box data, what other sources of technological evidence can be used in evaluating accidents and describe the legal issues in your State involving the use of such evidence.

I. Tennessee courts generally allow evidence involving photogrammetry, surveillance footage regardless of source, GPS tracking, cell phone data, and vehicle telematics so long as the evidence is properly authenticated and admitted through the testimony of a qualified expert. Tennessee Rule of Evidence 702, however, differs from its federal counterpart in that the Tennessee rule requires that "scientific, technical, or other specialized knowledge" "*substantially* assist the trier of fact to understand the evidence or to determine a fact in issue" in order to be admissible. Tenn. R. Evid. Rule 702. Rule 702(a) of the Federal Rules of Evidence, by contrast, only requires that "scientific, technical, or other specialized knowledge" "*help* the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). The Tennessee standard therefore creates a technically higher threshold for the admissibility of technological evidence.

II. Rule 703 of the Tennessee Rules of Evidence allows an expert to rely on facts and data that are not independently admissible into evidence, but precludes the disclosure of the facts and data to the jury unless "the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." Tenn. R. Evid. Rule 703. Therefore, to the extent that an expert relies on inadmissible evidence such as a vehicle occupant's failure to wear a seatbelt or an unauthenticated EDR data set, it is necessary in Tennessee to file a separate motion *in limine* before trial to allow the court to evaluate the probative value of the inadmissible evidence.

3. Describe the legal issues in your State involving the handling of post-accident claims with an emphasis on preservation / spoliation of evidence, claims documents, dealing with law enforcement early and social media?

Spoliation of Evidence

a. Legal Standard in Tennessee

Under Tennessee Rule of Civil Procedure 34A.02, "sanctions may 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. In turn, Tennessee Rule of Civil Procedure 37.02 provides a wide range of potential sanctions, including: "dismissal of the action, rendering a judgment by default, limiting the introduction of certain claims or evidence, entering an order designating that certain facts be taken as established, and striking out pleadings or parts of pleadings." *Tatham v. Bridgestone Ams. Holding, Inc.*, 473 S.W.3d 734, 739 (Tenn. 2015) (citing Tenn. R. Civ. P. 37.02(A)-(D)).

A trial court has broad discretion in determining whether to impose sanctions in response to the spoliation of evidence, and the court's decision will be set aside on appeal only when "the trial court has misconstrued or misapplied the controlling legal principles or has acted inconsistently with the substantial weight of evidence." *Id*. at 746, 747 (internal quotations omitted). What is more, the determination is made on a "case-by-case basis" and "should be based upon a consideration of the totality of the circumstances." *Id*. at 746.

In *Tatham v. Bridgestone Ams. Holding, Inc.*—the current, seminal case in Tennessee regarding the imposition of sanctions for the spoliation of evidence—the Tennessee Supreme Court provided four factors which are "relevant" to the trial courts analysis:

> (1) the ***culpability of the spoliating party*** in causing the destruction of the evidence, including evidence of intentional misconduct of fraudulent intent;
> (2) the ***degree of prejudice*** suffered by the non-spoliating party as a result of the absence of the evidence;
> (3) whether, at the time the evidence was destroyed, the ***spoliating party knew or should have known that the evidence was relevant*** to pending or reasonably foreseeable litigation; and
> (4) the ***least severe sanction available*** to remedy any prejudice caused to the non-spoliating party.

Id. at 747-46 (emphasis added). As noted, the court's holding in *Tatham* determined that "intentional misconduct" was no longer a prerequisite to impose sanctions for the spoliation of evidence. *Id*. As these factors also demonstrate, spoliation of evidence is not a sperate, distinct cause-of-action, but, rather, it is an application of the trial court's authority to "preserve the integrity of the discovery process." *Id*. 742.

b. Application in Trucking Case – *Gardner v. R&J Express, LLC*

As of the drafting of this compendium, only one reported case in Tennessee has applied the *Tatham* factors outlined above; however, the case involves a lawsuit that arose out of a tractor-trailer accident— *Gardner v. R&J Express, LLC*, 559 S.W.3d 462 (Tenn. Ct. App. 2018).

In *Gardner*, a truck driver who owned an over-the-road tractor, which he was using to haul a trailer owned by a motor carrier, sued the motor carrier when an axle on the trailer came lose, causing the tractor-trailer to overturn. *Id*. at 463. The driver asserted that the motor carrier was negligent in its inspection and maintenance of the trailer. *Id*. In response, the motor carrier argued that the causes of the accident where the truck driver's failure to keep the tractor under control, his failure to exercise due care, and his operation of the tractor-trailer at an excessive rate of speed. *Id*.

Prior to the start of litigation, however, the truck driver had signed over ownership of the tractor to his insurance company, and the tractor was subsequently sold for salvage. *Id*. at 463-64. Accordingly, the motor carrier filed a motion for sanctions, asking the court to dismiss the action. *Id*. at 463.

The trial court dismissed the action, and the Tennessee Court of Appeals agreed with trial court's decision. *Id*. at 462, 464. The court of appeals noted that that trial court had conducted a thorough analysis of the *Tatham* factors and affirmed the decision based on two primary points:

1. The truck driver retained counsel prior to disposing of the truck and even sent a preservation letter to the defendant motor carrier—i.e. the truck driver and his counsel should have known that the tractor was relevant to the foreseeable litigation; and
2. The tractor had been in the truck driver's possession while he was establishing his theory of the case, but the motor carrier now had no way to refute the truck driver's theory—i.e., the motor carrier was severely prejudiced by the loss of the evidence.

4. Describe the legal considerations in your State when defending an action involving truck drivers who may be considered Independent Contractors, Borrowed Servants or Additional Insureds?

I. Course and Scope Generally

The most common application of the doctrine of vicarious or imputed liability is in the master-servant relationship, or "respondeat superior". Generally, a person who is injured as the result of an employee's tortious acts, intentional or negligent, while the employee is acting within the course and scope of its employment, may bring an action against the employer, the employee,

or both, under the theory of joint and several liability,[1] even though the employer is not individually at fault. [2]

The injured person may sue both the employer and employee in one action or it may file a separate action against each.[3] Thus, if the injured person sues the employer, but not the employee, within the statute of limitations, it may obtain a judgment against the employer if it proves the employee's fault.[4]

An employer is not liable for injuries to third persons caused by an employee who is not acting within the scope of his employment[5] or, generally, by an independent contractor,[6] unless the injury results from breach of a nondelegable duty[7] or from the employer's concurrent proximate acts.[8] In the latter cases, Tennessee cases have historically held that both the employer and employee are jointly and severally liable and may be sued in one or separate actions.[9]

Where a general employer rents out a machine and employee to operate it, the courts generally infer that the operator remains in the service of his or her general employer on the assumption that the temporary employers only control what the servants do, not how they do it. Where, however, the temporary employer directs the servant on the details of how to accomplish the act, the equipment operator becomes the temporary employer's "borrowed servant" for the purposes of a specific act, and the temporary employer is vicariously liable for the operator's

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[1] Anderson v. Covert, 193 Tenn. 238, 245 S.W.2d 770 (1952), citing Terry v. Burford, 131 Tenn. 451, 175 S.W. 538 (1915); Odom v. Gray, 508 S.W.2d 526 (Tenn. 1974); Carter v. Baker's Food Rite Store, 787 S.W.2d 4, 7 (Tenn. Ct. App. 1989); McCall v. Owens, 820 S.W.2d 748, 752, 17 U.C.C. Rep. Serv. 2d 301 (Tenn. Ct. App. 1991); Abshure v. Methodist Healthcare-Memphis Hospitals, 325 S.W.3d 98 (Tenn. 2010); White v. Revco Discount Drug Centers, Inc., 33 S.W.3d 713 (Tenn. 2000); Doe v. Catholic Bishop for Diocese of Memphis, 306 S.W.3d 712, 729 (Tenn. Ct. App. 2008); Thurmon v. Sellers, 62 S.W.3d 145, 152 (Tenn. Ct. App. 2001).

[2] See generally Rankhorn v. Sealtest Foods, 63 Tenn. App. 714, 479 S.W.2d 649 (1971); Abshure v. Methodist Healthcare-Memphis Hospitals, 325 S.W.3d 98, 105 (Tenn. 2010); Johnson v. LeBonheur Children's Medical Center, 74 S.W.3d 338, 343 (Tenn. 2002); Willis v. Settle, 162 S.W.3d 169, 182-83 (Tenn. Ct. App. 2004); Russell v. City of Memphis, 106 S.W.3d 655, 657 (Tenn. Ct. App. 2002).

[3] Tenn. R. Civ. P. 19.01; McGee v. Wilson County, 574 S.W.2d 744, 746 (Tenn. Ct. App. 1978); Rankhorn v. Sealtest Foods, 63 Tenn. App. 714, 479 S.W.2d 649, 652 (1971); Williams v. Pritchard, 43 Tenn. App. 140, 306 S.W.2d 46 (1957); Creech v. Addington, 281 S.W.3d 363, 373–74 (Tenn. 2009); Johnson v. LeBonheur Children's Medical Center; Givens v. Mullikin ex rel. Estate of McElwaney, 75 S.W.3d 383, 398 n.8 (Tenn. 2002).

[4] Rankhorn v. Sealtest Foods, 63 Tenn. App. 714, 479 S.W.2d 649 (1971).

[5] Bowers v. Potts, 617 S.W.2d 149 (Tenn. Ct. App. 1981); Thurmon v. Sellers, 62 S.W.3d 145 (Tenn. Ct. App. 2001); Russell v. City of Memphis, 106 S.W.3d 655, 657 (Tenn. Ct. App. 2002).

[6] Jones v. Crenshaw, 645 S.W.2d 238, 240–41 (Tenn. 1983); Bowman v. Benouttas, 519 S.W.3d 586, 597–99 (Tenn. Ct. App. 2016), appeal denied, (Jan. 19, 2017); Goodale v. Langenberg, 243 S.W.3d 575 (Tenn. Ct. App. 2007); Carver v. Sparta Elec. System, 690 S.W.2d 218 (Tenn. 1985) (discussing the criteria for determining whether a person is an independent contractor or an employee); Ford v. Reeder Chevrolet Co., 663 S.W.2d 803 (Tenn. Ct. App. 1983).

[7] Parker v. Holiday Hospitality Franchising, Inc., 446 S.W.3d 341 (Tenn. 2014).
Hutchison v. Teeter, 687 S.W.2d 286, 288 (Tenn. 1985); Potter v. Tucker, 688 S.W.2d 833, 836 (Tenn. Ct. App. 1985); Cooper v. Metropolitan Government of Nashville and Davidson County, 628 S.W.2d 30 (Tenn. Ct. App. 1981); McCall v. Owens, 820 S.W.2d 748, 752, 17 U.C.C. Rep. Serv. 2d 301 (Tenn. Ct. App. 1991); Waggoner Motors, Inc. v. Waverly Church of Christ, 159 S.W.3d 42, 52-57 (Tenn. Ct. App. 2004).

[8] Parker v. Holiday Hospitality Franchising, Inc., 446 S.W.3d 341 (Tenn. 2014); Tutton v. Patterson, 714 S.W.2d 268 (Tenn. 1986); Creech v. Addington, 281 S.W.3d 363, 384 (Tenn. 2009).

[9] Tenn. R. Civ. P. 19.01.

negligent acts.[10]

§ 5:5.Master and servant, 1 Tenn. Cir. Ct. Prac. § 5:5

II. Vehicle ownership and On Call Employees:

The *Thurmon* case is a personal injury and wrongful death case arising from a collision between a pickup truck and a tractor trailer truck. The five-year-old son of plaintiffs Dana Scott and Shane Thurmon died as a result of the accident. The driver of the car was an "on call" employee of his father's business at the time. The plaintiffs sued the driver of the car and his father, alleging vicarious liability under the doctrine of respondeat superior.

Generally, the phrase "within the course and scope of employment" refers to acts of an employee committed while engaged in the service of the employer or while about the employer's business. *See generally Tennessee Farmers Mut. Ins. Co.,* 840 S.W.2d 933, 937–38 (Tenn. Ct. App. 1992). However, sections 55–10–311 and 55–10–312 of the Tennessee Code provide that proof of ownership and registration of a motor vehicle constitutes prima facie evidence that the vehicle was being operated for the vehicle owner's use and benefit and within the course and scope of employment.

The prima facie case in these two code sections may be overcome by uncontradicted evidence to the contrary coming from witnesses whose credibility is not in issue. *See Haggard v. Jim Clayton Motors, Inc.,* 216 Tenn. 625, 393 S.W.2d 292, 294 (1965). If the prima facie case is overcome by evidence so strong that reasonable minds could not differ, then a directed verdict for the owner may be proper. *See Hamrick,* 708 S.W.2d at 387.

Generally, the issue of scope of employment is a question of fact, but it becomes a question of law when the facts are undisputed and no conflicting inferences are possible. *See Tennessee Farmers Mut. Ins. Co.,* 840 S.W.2d at 936–37.

At trial, the certificate of title for the 1995 pickup truck was introduced, which showed the owner of the vehicle as Donald E. Sellers. Testimony deduced at trial established that the Donald E. Sellers named as owner of the truck was Mr. Sellers, Eddie's father. Based upon this evidence alone, a prima facie case was established under sections 55–10–311 and 55–10–312 of the Tennessee Code. Additionally, the plaintiffs established that the pickup truck driven by Eddie on the day of the accident was leased through Donnie's Deli and Amoco and that the insurance, gas, and license for the pickup was paid through Mr. Sellers' business. However, uncontradicted countervailing evidence exists in the record. Mr. Thurmon, as well as Eddie, testified that the purpose of the trip was to drop off some golf clubs at Mr. Thurmon's father's house and then to go to Memphis to look for golf clubs for Dalton. Furthermore, Mr. Thurmon testified that once Eddie came to get them, they never stopped by Donnie's Deli and Amoco before going about their personal business.

Although the plaintiffs in the instant case were able to establish a prima facie case under sections 55–10–311 and 55–10–312 of the Tennessee Code, the prima facie case was sufficiently

[10] Armoneit v. Elliott Crane Service, Inc., 65 S.W.3d 623, 629 (Tenn. Ct. App. 2001); Arrow Electronics v. Adecco Employment Services, Inc., 195 S.W.3d 646 (Tenn. Ct. App. 2005).

overcome by the uncontradicted testimony of Mr. Thurmon and Eddie which established that Eddie Sellers was using the pickup truck solely for his own personal endeavors. Accordingly, the Court found that Mr. Sellers cannot be held liable under the theory of respondeat superior as it is based on sections 55–10–311 and 55–10–312 of the Tennessee Code. Thus, the Court affirmed the trial court's ruling on this issue.

In determining whether an "on call" employee is acting within the course and scope of his employment, thus casting liability on his employer, the following factors are helpful: (1) whether, at the time of the accident, the employee's use of the vehicle benefitted the employer, (2) whether the employee was subject to the employer's control at the time of the accident, (3) whether the employee's after-hour activities were restricted while on call, (4) whether the use of the vehicle at the time of the accident was authorized by the employer, and (5) what the employee's primary reason for using the vehicle was at the time of the injury-producing accident.

The plaintiffs next argued liability under the doctrine of respondeat superior based upon Eddie's being an "on call" employee of Mr. Sellers' business, Donnie's Deli and Amoco. This scenario presented an issue of first impression in Tennessee. Thus, for guidance, the Court considered the reasoning and analysis of similar cases from courts in sister jurisdictions.

In the cases dealing with the issue of vicarious liability for an "on call" employee that the Court reviewed, the underlying principle was that the mere fact that an employee is "on call" does not automatically give rise to employer liability. Rather, an employee's "on call" status gives rise to a question of fact as to whether the employee was acting within the scope of his employment at the time of the accident. *See Gullett by Gullett v. Smith,* 637 N.E.2d 172, 175 (Ind.Ct.App.1994).

As the court reasoned in *Le Elder v. Rice,* 21 Cal.App.4th 1604, 26 Cal.Rptr.2d 749 (1994):

> Public policy would be ill-served by a rule establishing 24–hour employer liability for on-call employees, regardless of the nature of the employee's activities at the time of an accident. Respondeat superior is imposed for three policy reasons: "(1) to prevent recurrence of the tortious conduct; (2) to give greater assurance of compensation for the victim; and (3) to ensure that the victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury." [citations omitted] None of these goals would be legitimately accomplished by a rule establishing automatic 24–hour employer liability for 24–hour on-call employees. First, employer liability would not prevent a recurrence of the tortious conduct because an employer has no right to control the purely personal conduct of an employee. Second, although the deep pocket of an employer might give greater assurance of compensation for the victim, that desired economic end would be achieved inequitably because the victim's losses would not be borne by the person who benefitted from the injury-producing activity. Modern technology has changed the means by which we communicate. Beepers, pagers, facsimile machines and cellular phones keep us literally at a fingertip's distance from one another. But on-call accessibility or availability of an employee does not transform his or her

> private activity into company business. The first question must always focus on scope of employment. Where the injury-producing activity is beyond that scope, no totality of other circumstances will result in respondeat superior liability.
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> *Id.* at 753. *See also Pruden v. United States,* 399 F.Supp. 22, 27 (E.D.N.C.1973) ("It would be grossly unfair to hold an employer liable for all actions of his employees while they were off duty and on personal missions, even if they were subject to call, unless of course they were called or were performing a specific service for their employer while on call.").

The law in Tennessee is clear that "when a servant deviates from his line of duty and engages in a mission of his own or for some third person, the master cannot be held [liable] under the rule of respondeat superior." *Craig v. Gentry,* 792 S.W.2d 77, 79 (Tenn.Ct.App.1990). The Court chose to extend this line of reasoning to situations involving "on call" employees. In determining whether an "on call" employee is acting within the course and scope of his employment, thus casting liability on his employer, we find the following factors helpful:

> 1. Whether, at the time of the accident, the employee's use of the vehicle benefitted the employer;
>
> 2. Whether the employee was subject to the employer's control at the time of the accident;
>
> 3. Whether the employee's after-hour activities were restricted while on call;
>
> 4. Whether the use of the vehicle at the time of the accident was authorized by the employer; and
>
> 5. What the employee's primary reason for using the vehicle was at the time of the injury-producing accident.

This list is not meant to be exclusive but is rather provided for guidance in future cases. It should be remembered, however, that the primary focus should be on whether the use of the vehicle at the time of the collision was within the course and scope of employment, and, as the *Johnson* court stated, each case should be determined upon its unique facts.

In the case, Eddie Sellers was driving the Ford F–150 pickup truck for the sole purpose of going to look at golf clubs with Mr. Thurmon and Dalton. At the time of the accident, he had not been called to perform a service for Donnie's Deli and Amoco, nor was he furthering the business of Donnie's Deli and Amoco. Accordingly, Eddie Sellers' use of the pickup truck at the time of the accident did not, in any way, benefit Mr. Sellers.

In *Tennessee Farmers Mutual Insurance Company,* 840 S.W.2d at 938–39, the Court analyzed when a trip could be considered within the scope of employment, and it determined that if the trip would have taken place, regardless of the business reasons, then the trip is personal in nature and is not within the scope of employment. In contrast, if the trip would require the employer to send another employee to perform the same function if the trip had not been made or if the trip is authorized by an employer for business purposes and the employee has not deviated

therefrom, then the trip is business in nature and is within the scope of employment. Here, Eddie's trip was solely for personal reasons—going to look at golf clubs with Mr. Thurmon and Dalton. As such, his trip was personal in nature and outside of the scope of his employment. Based upon the foregoing, it is the opinion of this court that, as a matter of law, Mr. Sellers is not vicariously liable for the act of Eddie Sellers because the injury-producing activity was beyond the scope of Eddie's employment. To hold otherwise would extend the doctrine of respondeat superior to unimaginable and inequitable lengths.

Thurmon v. Sellers, 62 S.W.3d 145, 153–54 (Tenn. Ct. App. 2001).

As of January 1, 2020, a new law went into effect in Tennessee which codifies the IRS 20 Factor Test as to the determination of whether or not a worker is an employee or an independent contractor under certain laws. This generally applies to determinations with regard to wage regulations, the application of the Tennessee Occupational Safety and Health Act, Tennessee Employment Security Law, and the Drug-Free Workplace Program. While this may have little impact on the employer/employee determination in the motor carrier/driver third party accident circumstance, that is yet to be seen. The 20 Factor Test is included, by amendment in T.C.A. §§ 50-2-111, 50-3-103, 50-7-207, and 50-9-103.

Plaintiffs continue to rely on insurance coverage opinions in their attempts to expand course and scope in third party tort law. There is support in Tennessee, as in several jurisdictions, to distinguish insurance coverage opinions of course and scope of employment, the employer/employee relationship, the principal/agent relationship, and independent contractor, and avoid application of such cases to the determination of the extent of such relationships in transportation cases. The door remains open for the more restrictive common law approach as to finding a driver, or not, in the course and scope of employment in the tort, vicarious liability context. See, for instance, *Carolina Casualty Insurance Company v. Panther II Transportation*, 402 Fed. Appx. 62 (6th Cir. 2010), and *Insurance Company of the State of Pennsylvania v. Continental National Indemnity Company*, 7 Fed. Appx. 503 (6th Cir. 2001). These cases originate out of the Ohio with discussions of Tennessee law.

In *Holliday v. Epperson*, 2003 WL 23407496 (U.S. Dist. Ct. W.D. Tenn. 2003), the United States District Court for the Western District of Tennessee, Eastern Division, commented that while the Sixth Circuit has not directly addressed the issue, many courts have concluded, as a matter of federal law, that, in the carrier-lessee realm, the regulatory scheme "imposes an irrebuttable statutory employment relationship between the driver and the carrier-lessee". The court, quoting *Gilstorff v. Top Line Express, Inc.*, 106 F.3d 400 (table) 1997 WL14378 at 7, n6(6th Cir. January 14, 1997), stated that the Sixth Circuit "seems to have" adopted the majority view that a carrier-lessee is the statutory employer of a driver. Further, in *Darling v. JB Expedited Services, Inc., et al.*, 2006 WL 2238913 (U.S Dist. Ct. M.D. Tenn. August 3, 2006), the court agreed with its prior ruling in *Holliday*, and the Sixth Circuit dicta in *Gilstorff*. In *Darling*, however, the court went further to suggest that the irrebuttable statutory employment relationship between a driver and the carrier-lessee does not mean that **only** the statutory employer can be held liable in negligence for the actions of a driver. The *Darling* court admits that while there is no Tennessee law on point, it chooses to follow *Wyckoff Trucking, Inc. v.*

Marsh Brothers Trucking Services, 58 Ohio St. 3rd 261, 269 N.E. 2d 1049, 1053 (Ohio 1991), in determining that the doctrine of statutory employment does not eliminate the common-law liability of parties other than the statutory employer. It found that that there is no reason to believe that the Interstate Commerce Commission Regulations were intended to set exclusive parameters on liability. The court went on, however, to discuss principles of Tennessee common law and the factors for agency determination, including the discussion of the importance of the right to control, as opposed to the exercise of control, under Tennessee law.

Despite the scope of the statutory employer doctrine adopted by the *Epperson* and *Darling* courts of the Western and Middle Districts of Tennessee, a Kentucky District Court, in *Bays v. Summitt Trucking, LLC*, 691 F. Supp. 2d 725 (W.D.Ky. 2010), distinguishes those cases, with a discussion of the Tennessee decisions, and their flawed reliance upon Sixth Circuit dicta. In *Bays*, the court noted that the Sixth Circuit has said, specifically, in *Gilstorff*, that it had not yet determined whether or not ICC regulations imposed an irrebuttable statutory employment relationship between the driver and the carrier-lessee. The *Bays* court called the footnote in the *Gilstorff* opinion regarding same an "oblique discussion." Further, the *Bays* court found it important that both *Gilstorff* and *Wyckoff* predated the 1992 ICC amendments. Specifically, the *Bays* court stated that it would not ignore the prior Sixth Circuit opinion of *Wilcox v. TransAmerican Freightlines, Inc.*, 371 F.2d 403 (6th Cir. 1967), which found that the carrier-lessee regulations simply create a rebuttable presumption of employment. *Bays* found that despite *Gilstorff* and *Holliday*, *Wilcox* continues to be the law of the Sixth Circuit. The court determined that the statutory employer doctrine, in the carrier-lessee context, creates a rebuttable presumption of agency. Typically, a rebuttable presumption shifts the burden of proof, and may be rebutted by appropriate evidence of lack of agency through state common law principles.

There also remains room for argument in Tennessee with regard to course and scope in circumstances where the driver's actions are "seriously criminal" under the Restatement standard. *Hughes v. Metro. Gov't of Nashville and Davidson Cty.*, 340 S.W.3d 352, 363 (Tenn. 2011) (quoting Restatement (Second) of Agency, Section 229(2)). In *Gleaves v. Checker Cab Transit Corp.*, 1998 WL 639109 (Sept. 14, 1998), reversed on other grounds 15 S.W.3d 799 (Tenn. 2000), the Tennessee Court of Appeals affirmed a summary judgment ruling, and found:

> [a] reasonable jury simply could not find that a driver of a passenger-less taxi cab who attempts to out run a police car while on his way home was acting within the scope of his employment.

Arguments can be made with regard to superseding or intervening causes such as a criminal act. In *Potter v. Ford Motor Co.*, 2013 S.W.3d 264, 273 (Tenn. Ct. App. 2006). In *Rains v. Bend of the River*, 124 S.W.3d 580, 593, (Tenn. Ct. App. 2003), the court stated: "Foreseeability is the key here because no person is expected to protect against harms from events that he or she cannot reasonably anticipate or foresee or which are so unlikely to occur that the risk, although recognizable, would commonly be disregarded."

III. Employee leaving work prior to end of shift:

Plaintiff Gunter sued the Employer Envision, for injuries sustained from a collision with the Employee Jaime Armstrong. Armstrong was employed with Envision at the time of the accident. Envision denied that the Employee was engaged within the course and scope of her employment at the time of the accident.

The Court reviewed the evidence, and found that the undisputed facts of the accident showed that the employee left her job duties thirty minutes before her shift ended and she was in route to visit her paramour. Even if she was technically "on the clock," there was no connection between getting coffee for her paramour and her responsibilities to her employer, Envision. Employee's departure from Envision's business was marked and decided. Although the undisputed facts showed that it was not unusual for employees to leave their shift early if their replacements arrived, the mere fact that Envision would not fire an employee for leaving work early did not bring the employee's acts within the course and scope of her employment. There was no dual purpose to the employee's travels. If the employee's travel had been partially motivated by a work obligation, such as taking a client to a doctor's appointment, then there might have been a question of fact to present to the jury. In the case at bar, the employee's employment played no part in creating the reason for travel. She was on a trip motivated by personal desires. Crediting all facts in the Plaintiff's favor, the Court found that there was insufficient evidence to invoke the doctrine of respondeat superior.

Gunter v. Estate of Armstrong, No. E201801473COAR3CV, 2019 WL 3781724, at *2 (Tenn. Ct. App. Aug. 12, 2019), appeal denied (Jan. 15, 2020)

5. What is the legal standard in your state for allowing expert testimony on mild traumatic brain injury (mTBI) claims and in what instances have you had success striking experts or claims?

Expert testimony on mild traumatic brain injury claims is required and can be established by a preponderance of the evidence, more likely than not, and within a reasonable degree of medical certainty to be caused/related by the underlying accident.

a. TRE 702 – Testimony by Experts: If 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 may testify in the form of an opinion or otherwise.

b. TRE 703 - Bases of Opinion Testimony by Experts: The 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 proponent 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.

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

A positive post-accident toxicology result may be admissible in a civil action in the State of Tennessee. In Tennessee, the admissibility of toxicology reports is governed by case law and the Tennessee Rules of Evidence. The positive toxicology result will be admissible if the toxicology report is relevant under Tennessee Rule of Evidence 402, is not subject to exclusion under Tennessee Rule of Evidence 403, and can satisfy an exception to Tennessee's rule against hearsay found at T.R.E. 801 – 803. Further, the evidence should be authenticated pursuant to T.R.E. 901(a), and the test administered and the ensuing analysis must satisfy the indicia of reliability as set forth in *McDaniel v. CSX*, 955 S.W.2d 257, 264 (Tenn. 1997).

Regarding the relevancy of the evidence, in addition to traditional scenarios in which the impairment of a party is relevant, such as in any employer/employee context, in 2011 Tennessee enacted the Tennessee Civil Justice Act, which placed caps and limits on non-economic damages as well as punitive damages. See T.C.A. §§ 29-39-102 and 29-39-104. The caps for non-economic damages as well as punitive damages are lifted or otherwise waived if a 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." See T.C.A. § 29-39-102(h)(3) and T.C.A. § 29-39-104(a)(7)(C).

Unlike many states that have adopted statutes in both the employer/employee context and criminal context in which toxicology reports are automatically admissible provided that statutorily enumerated steps are followed, Tennessee follows the traditional evidence analysis.[11] The party wishing to attack or defend the admissibility of a toxicology report should look to the foundation regarding the identity or qualifications of the person performing the test, the chain of custody, and other indicia of reliability, indicating that the party to whom the test purportedly applies is in fact the individual tested, and indicia of reliability regarding the steps followed when collecting the specimen.

Finally, parties wishing to challenge the admissibility of the toxicology report or wishing to offer a toxicology report into evidence should also satisfy the *McDaniel v. CSX Transportation* factors laid out at TRE 7.02 and 7.03.

In other words, in the State of Tennessee, the grounds for objecting to the admissibility of a toxicology report as well as for entering the same into evidence are numerous as no single statute offers a definitive method for admissibility of the same.

[11] Tennessee has enacted at least two statutes that govern the administration of toxicology tests and codifying the process for performing the same, in its "Drug Free Workplace Act (T.C.A§ 50-9-107) and its Motor Vehicle Statutes (T.C.A§ 55-10-406). However, neither statute has been construed to allow for the automatic admissibility of a toxicology report nor has a violation of either statue been found to cause automatic exclusion of toxicology reports.

7. What are some considerations for federally-mandated testing when drivers are Independent Contractors, Borrowed Servants, or Additional Insureds?

I. In Tennessee, there are a number of indicia to be considered by a trier of fact in determining the existence or non-existence of an independent contractor relationship, such as, (1) the right to control the conduct of the work, (2) the right of termination, (3) the method of payment, (4) the freedom to select and hire helpers, (5) the furnishing of tools and equipment, (6) self-scheduling of working hours, and (7) being free to render services to other entities. *Masiers v. Arrow Transfer & Storage Co*., 639 S.W.2d 654, 656 (Tenn. 1982) (citing Jackson Sawmill v. West, 619 S.W.2d 105 (Tenn. 1981)).

II. "Although no indicia is 'infallible or entirely indicative,' it has generally been recognized by this court that 'the primary test for determining claimant's status as employee or independent contractor is the 'right to control.'" *Id*. (citing Lindsey v. Smith & Johnson, Inc., 601 S.W.2d 923 (Tenn. 1980). Another factor that has gained controlling significance in the cases is the right of termination. *Id*. (citing Wooten Transports, Inc. v. Hunter, 535 S.W.2d 858 (Tenn. 1976)). The power of a party to a work contract to terminate the relationship at will is contrary to the full control of work activities usually enjoyed by an independent contractor. *Id*.

Employers have a responsibility to implement and conduct drug and alcohol testing programs of their employees to ensure that regulations and rules are followed. Though many times companies hire drivers as independent contractors/owner-operators, it is likely a good idea to even have these drivers tested periodically to ensure their compliance. When hiring independent contractors/owner-operators, employers should have written procedures on how drug testing will be implemented to these independent contractors/owner-operators and force those persons to sign such procedures prior to agreeing to contract to drive for the company.

8. Is there a mandatory ADR requirement in your State and are any local jurisdictions mandating cases to binding or non-binding arbitration?

There is a mandatory requirement in Tennessee for all divorce cases involving children to be mediated prior to trial, and most judges will require mediation in divorces that do not involve children as well. For cases that are not domestic cases, the requirements for mediation primarily depend on the local rules of the county where the matter is pending. It can be court ordered and is, generally, encouraged. You can find the Local Rules here: https://www.tncourts.gov/courts/court-rules2/local-rules-practice.

The Eastern, Middle and Western Districts of the United States District Court also have ADR Plan preferences which may be found at https://tned.uscourts.gov; https://tnmd.uscourts.gov.; and https://tnwd.uscourts.gov.

Nearly three decades ago, the Tennessee Supreme Court created a commission to study dispute resolution in Tennessee "with a view toward the implementation of procedures to expedite and enhance the efforts of the court to secure the just, speedy, and inexpensive determination of disputes." The recommendations of the commission resulted in the enactment of Supreme Court Rule 31 in 1996. Rule 31 mediators completed a training program that is

approved for use by the courts. The purpose of Rule 31 is to assist the court in obtaining a mediator when the court or the parties want one. There is no restriction preventing parties from using other mediation or arbitration programs. https://www.tncourts.gov/programs/mediation

9. Can corporate deposition testimony be used in support of a motion for summary judgment or other dispositive motion?

Yes. Corporate deposition testimony is admissible for such motions. *See* Fed. R. Civ. P. 56 (c)(1)(A); Tenn. R. Civ. P. 56.

10. What are the rules in your State for contribution claims and does the doctrine of joint and several liability apply?

Tennessee significantly limited the doctrine of joint and several liability in the 1992 Supreme Court case *McIntyre v. Balentine*, 833 S.W.2d 52, 57–58 (Tenn. 1992). In *McIntyre*, the Tennessee Supreme Court adopted the doctrine of modified comparative fault, moving away from the long recognized contributory negligence theory which allowed for the doctrine of joint and several liability to impose a degree of liability that was potentially out of proportion to fault.

In *McIntyre*, the plaintiff, Harry Douglas McIntyre, and Defendant, Clifford Balentine, were involved in a motor vehicle accident resulting in severe injuries to Mr. McIntyre. 833 S.W.2d at 53. As Defendant Balentine was traveling south on Highway 69, Plaintiff entered the highway (also traveling south) from the truck stop parking lot. *Id*. Both men had consumed alcohol the evening of the accident. Plaintiff brought a negligence action against Balentine and Defendants answered that Plaintiff was contributorily negligent, in part due to operating his vehicle while intoxicated. After trial, the jury found the plaintiff and the defendant equally at fault in this accident and ruled in favor of the defendant. *McIntyre v. Balentine*, 833 S.W.2d 52, 53–54 (Tenn. 1992).

The Tennessee Supreme Court, in weighing the issues regarding contributory negligence concluded that "it is time to abandon the outmoded and unjust common law doctrine of contributory negligence and adopt in its place a system of comparative fault." 833 S.W.2d at 56. The Court went further to clarify, "[w]e recognize that today's decision affects numerous legal principles surrounding tort litigation. […] However, we feel compelled to provide some guidance to the trial courts charged with implementing this new system. First, and most obviously, the new rule makes the doctrines of remote contributory negligence and last clear chance obsolete. The circumstances formerly taken into account by those two doctrines will henceforth be addressed when assessing relative degrees of fault. […] Third, today's holding renders the doctrine of joint and several liability obsolete. Having 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*.

In the years that followed, Tennessee courts wrestled with the Tennessee Supreme Court's determination that the doctrine of joint and several liability was completely obsolete. This eventually led Tennessee courts to embrace an approach in which a tortfeasor may seek to

reduce its proportional share of the damages by successfully asserting as an affirmative defense that a portion of the fault for the plaintiff's damages should be allocated to another tortfeasor. *Banks v. Elks Club Pride of Tennessee 1102*, 301 S.W.3d 214, 220 (Tenn. 2010).

The Court, in *Banks*, sought to clarify the status of joint and several liability that had been muddied over the 18 years since they decided *McIntyre*. Specially, the Court listed enumerated instances in which the doctrine still applies, such as the liability of tortfeasors for injuries caused by subsequent medical treatment for the injuries they cause,301 S.W.3d 214, 220, for defendants in the chain of distribution of a product in a products liability action, *Owens v. Truckstops of Am.,* 915 S.W.2d at 433, in cases involving injury caused by multiple defendants who have breached a common duty, *Resolution Trust Corp. v. Block,* 924 S.W.2d 354, 355, 357 (Tenn.1996), in cases wherein the plaintiff's injury was caused by the concerted actions of the defendants, *Gen. Elec. Co. v. Process Control Co.,* 969 S.W.2d 914, 916 (Tenn.1998).

To the extent that the doctrine of vicarious liability can be considered a species of joint and several liability, the Court held that the adoption of comparative fault in *McIntyre v. Balentine* did not undermine the continuing viability of various vicarious liability doctrines, including the family purpose doctrine, *Camper v. Minor,* 915 S.W.2d 437, 447–48 (Tenn.1996), "respondeat superior, or similar circumstance where liability is vicarious due to an agency-type relationship between the active, or actual wrongdoer and the one who is vicariously responsible." *Browder v. Morris,* 975 S.W.2d 308, 311–12 (Tenn.1998). Finally, the Court determined that tortfeasors who have a duty to protect others from the foreseeable intentional acts of third persons are jointly and severally liable with the third person for the injuries caused by the third person's intentional acts. *Limbaugh v. Coffee Med. Ctr.,* 59 S.W.3d 73, 87 (Tenn. 2001).

In 2013 the Tennessee General Assembly enacted T.C.A§ 29-11-107—Joint and Several Liability; exceptions and applications—which in essence codifies Tennessee case law. Joint ad several liability is statutorily abolished and subsumed under comparative fault, but remains in effect:

> (1) To apportion financial responsibility in a civil conspiracy among two (2) or more at-fault defendants who, each having the intent and knowledge of the other's intent, accomplish by concert an unlawful purpose, or accomplish by concert a lawful purpose by unlawful means, which results in damage to the plaintiff; and
>
> (2) Among manufacturers only in a product liability action as defined in § 29-28-102, but only if such action is based upon a theory of strict liability or breach of warranty. Nothing in this subsection (b) eliminates or affects the limitations on product liability actions found in § 29-28-106.
>
> T.C.A§29-11-107(b) (1) &(2).

11. What are the most dangerous/plaintiff-friendly venues in your State?

Shelby County, Tennessee (Memphis) in West Tennessee is generally considered the most dangerous/plaintiff friendly venue in the State. In September, 2019, a jury returned a $2.5+

million-dollar verdict against a trucking company in a sideswipe incident. The medical expenses incurred are not known. The jury awarded $400,000 in future medical and $375,000 in loss of earning capacity. The non-economic damages were $1.74 million (subsequently reduced to the $750,000 statutory cap). Plaintiff did not treat at the scene and was able to drive away on his own. He originally complained of soft tissue injuries. Liability was not at issue.

With that said, Shelby County is still considered moderate, and perhaps even conservative, when compared with the rest of the country. Davidson County, Tennessee (Nashville), due its increasing size, is becoming more moderate and less conservative but we would still not consider it a dangerous/plaintiff-friendly venue. Even so, most people remember the Erin Andrews $55 million verdict (recall peephole incident at hotel where man spied on Erin Andrews and then posted videos on the internet) in 2016. Finally, and although generally considered a conservative venue, a jury in federal court in the Eastern District of Tennessee, Chattanooga Division, awarded a plaintiff $2.138 million in damages based on medical expenses of $138,000. This verdict came down in August 2019 and was against a trucking company.

12. Is there a cap on punitive damages in your State?

I. Statute

In 2011, the Tennessee General Assembly enacted T.C.A. § 29-39-104, part of the Tennessee Civil Justice Act, which caps punitive damages, in most cases, at two times the compensatory damages or $500,000.00, whichever is greater.

II. Case law

In 2018, the United States Court of Appeals for the Sixth Circuit, in Lindenburg v. Jackson National, 912 F.R.3d 348 (U.S. 6th Cir. Ct. App 2018) ruled that under the Tennessee Constitution, Tennessee's cap on punitive damages is unconstitutional as it violates Article I, Section 6, of the Tennessee Constitution, and invades the proper province of the jury. There is no Tennessee Supreme Court decision ruling on the constitutionality of this statute. However, on February 26, 2020, in the case of Jodi McClay v. Airport Management Services, LLC, Case No. M2019-00511-SC-R23-CV (Tenn. Feb.26,2020),the Tennessee Supreme Court upon certified questions from the United States District Court for the Middle District of Tennessee, upheld the constitutionality of the cap on non-economic damages found at T.C.A. § 29-39-102. This statute, like the punitive damages cap statute, is part of Tennessee's 2011 Civil Justice Act and is substantially similar. In response to the Lindenburg Court, Tennessee's highest Court said:

> While the instant case involves the statutory cap on noneconomic damages in Tennessee Code Annotated section 29-39-102, we acknowledge that the United State Court of Appeals for the Sixth Circuit in Lindenberg v. Jackson National Life Insurance Company, 912 F.3d 348 (6th Cir. 2018), held that the statutory cap on punitive damages in Tennessee Code Annotated section 29-39-104 violates the right to a jury trial under the Tennessee Constitution. As a preliminary matter, we note that decisions by federal circuit court of appeals are not binding on this Court. Frazier v. E. Tenn. Baptist Hosp., Inc., 55 S.W.3d 925, 928 (Tenn. 2001). **We also find the reasoning of the majority**

> **in Lindenberg unpersuasive in this case.** [emph. added]. Moreover, in Lindenberg, we declined to accept a certified question from the federal district court regarding the constitutionality of the statutory cap on punitive damages because antecedent questions regarding the availability of those damages had not also been certified. Lindenberg v. Jackson Nat'l Life Ins. Co., No. M2015-02349-SC-R23-CV (Tenn. June 23, 2016) (per curiam). In our order declining to answer the certified questions, we stated: "Nothing in the Court's Order is intended to suggest any predisposition by the Court with respect to the United States Court of Appeals for the Sixth Circuit's possible certification to this Court of both the question of the availability of the remedy of common law punitive damages in addition to the remedy of the statutory bad faith penalty and the question of the constitutionality of the statutory caps on punitive damages, in the event of an appeal from the final judgment in this case." Id. The Sixth Circuit majority, however, chose not to certify such questions to this Court, and, instead, held that the statutory cap on punitive damages violates the right to trial by jury under the Tennessee Constitution. We simply point out that the procedure for certifying questions of state law to this Court is designed to promote judicial efficiency and comity, and to protect this State's sovereignty. See Yardley, 470 S.W.3d at 803; see also Lindenberg, 912 F.3d at 371-72 (observing that the constitutionality of the punitive damages cap is an unsettled question on which there is no Tennessee Supreme Court authority and is ideally suited for certification) (Larson, J., dissenting). However, we note that the statutory cap on punitive damages in Tennessee Code Annotated section 29-39-104 is not at issue in this case, and we express no opinion on this issue.

Thus, while Tennessee's cap on punitive damages was not at issue in McClay, Tennessee's Supreme Court will take up this statute in the foreseeable future, and, given the similarity between the statutes capping both punitive damages and non-economic damages, it is likely that the punitive damages cap will be deemed constitutional and upheld.

III. Discussion

As a practical matter, there are no punitive damages caps in the federal courts of Tennessee due to the ruling in Lindenburg, however, in light of the reasoning and holding in McClay , the state courts of Tennessee will likely continue to apply the punitive damages cap.

IV. Statutory framework

T.C.A. § 29-39-104 places a cap on punitive damages. Under the terms of that statute, in order to prevail on a cause of action for punitive damages, the claimant must prove, by clear and convincing evidence, that the defendant against whom punitive damages are sought acted maliciously, intentionally, fraudulently, or recklessly. See T.C.A. § 29-39-104(a)(1). The statute at (a)(5) limits punitive damages the fact finder may award to approximately two (2) times the total amount of compensatory damages awarded, or $500,000, whichever is greater.

The punitive damages cap does not apply in statutorily enumerated exceptions. See T.C.A§ 29-39-104(a)(7). The punitive damage cap will not apply when: a defendant had a specific intent to inflict serious physical injury and such intentional conduct in fact caused an injury; if a defendant intentionally falsifies, destroys, or conceals records containing material evidence for the purpose of wrongfully evading liability[12]; the cap also does not apply if the defendant was under the influence of any intoxicant or stimulant which caused the defendant's judgment to be substantially impaired, which subsequently caused the injury or death complained of. And lastly, the cap on punitive damages does not apply if a defendant has been convicted of a felony under the laws of Tennessee or another state or federal law and the felonious act caused the damages and/or injuries.

The statute also bars a fact finder from awarding punitive damages in statutorily enumerated instances. Specifically, sellers of a product, other than the manufacturer, cannot be liable for punitive damages unless such seller exercised substantial control over the aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery is sought or the seller altered or modified the product and such alteration or modification was a substantial factor in causing the harm for which the recovery is sought, and the seller had actual knowledge of the defective condition. Furthermore, punitive damages, as a general rule, are not allowable in civil actions involving a drug or device, if the drug or device, which allegedly caused the harm was, manufactured and labeled in accordance with the terms of approval and/or license issued by the FDA, or was an over-the-counter drug or device marketed pursuant to federal regulations and was generally recognized as safe and effective and was not misbranded.

However, as indicated above, the constitutionality of this statute has been questioned by the United States Court of Appeals for the Sixth Circuit. Therefore, in Tennessee's Federal Courts, for now, the statutory cap on punitive damages does not apply. See Lindenburg v. Jackson National, 912 F.R.3d 348, 370 (U.S. 6th Cir. Ct. App 2018) finding that "The statutory cap on punitive damages set forth in T.C.A. § 29-39-104 violates the Tennessee Constitution." No Tennessee state court has ruled on the constitutionality of the punitive damages cap. The arguments advanced by the parties in the McClay case are similar to those advanced by the parties in the Lindenburg case. In both cases, the constitutionality of the statute was attacked on grounds that it invaded the proper province of the jury and/or was a violation of the separation of powers. The Sixth Circuit Court of Appeals did not reach the question on the separation of powers, because it found that the cap on punitive damages improperly violated the right to a trial by jury and held this factor to be dispositive.

13. Admissible evidence regarding medical damages – can the plaintiff seek to recover the amount charged or the amount paid?

Under Tennessee law, plaintiffs in personal injury cases may seek to recover medical damages based upon the amount charged, not what was actually paid. *Dedmon v. Steelman*, 535

[12] This exception does not apply if the materials were withheld in good faith, pursuant to privileges and applicable discovery laws and/or a good faith compliance with the management of records in the normal course of business and/or retention policy and/or state and federal regulations

S.W.3d 431, 466 (Tenn. 2017). Tennessee law provides that the introduction into evidence of a personal injury plaintiff's medical bills creates a rebuttable presumption that such medical, hospital or doctor bills are reasonable. *Dedmon,* 535 S.W.3d at 462 (citing Tenn. Code Ann. § 24-5-113). To rebut this presumption, defendants are free to submit any competing evidence that does not run afoul of the collateral source rule. *Id*. Defendants are precluded from submitting evidence of the discounted rates actually paid to medical providers from an insurance company to rebut the plaintiffs' proof that the full, undiscounted charges are reasonable