ALFA International
The Global Legal Network
Local Relationships Worldwide

FOR MORE INFORMATION

LEITNER, WILLIAMS, DOOLEY & NAPOLITAN, PLLC
Chattanooga, Nashville, Tennessee
www.leitnerfirm.com

Alan B. Easterly
alan.easterly@leitnerfirm.com

Kenneth D. Veit
kenny.veit@leitnerfirm.com

Thomas J. Dement II
thomas.dement@leitnerfirm.com

LEWIS THOMASON, P.C.
Knoxville, Nashville, Tennessee
www.lewisthomason.com

Benjamin W. Jones
bjones@lewisthomason.com

David A. Chapman
dchapman@lewisthomason.com

Mary Beth White
mbwhite@lewisthomason.com

TENNESSEE

1. What are the legal considerations in your State governing the admissibility or preventability in utilizing the self-critical analysis privilege and how successful have those efforts been?

While Tennessee is not clear on the application of the self-critical privilege in any setting other than healthcare, Tennessee courts generally exclude preventability decisions under Tennessee Rules of Evidence 407, 701 and 704.

Tennessee Rule of Evidence 407 provides: "When after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent remedial measure is not admissible to prove strict liability, negligence, or culpable conduct in connection with the event." TENN. R. EVID. 407. The purpose of this Rule is to "encourage remedial measures in order to serve the public's interest in a safe environment." *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 87 (Tenn. 2008).

> Tennessee Rule of Evidence 701 limits a lay witness's testimony in forms of opinions or inferences "to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." TENN. R. EVID. 701. Further, Tennessee Rule of Evidence 704 provides "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." TENN. R. EVID. 704. Tennessee Courts have placed "limitations on lay witnesses testifying to some ultimate issues, such as whether an accident was unavoidable" and this rule should be applied broadly. *See* Advisory Commission Comment to Tennessee Rule of Evidence 704 (citing *Blackburn v. Murphy*, 737 S.W.2d 529 (Tenn. 1987)).

2. Does your State permit discovery of 3rd Party Litigation Funding files and, if so, what are the rules and regulations governing 3rd Party Litigation Funding?

Tennessee case law addressing discoverability of third party litigation funding files, including the agreements, documents, and correspondence between the third party litigation funder, plaintiff, and plaintiff's counsel, is sparse. As of the time of this writing, we have not located any reported or unreported Tennessee State Court cases addressing this issue. However, the United States District Court for the Eastern District of Tennessee has ruled on the admissibility of third party litigation funding documents. *See Manley v. SFS Trucking, Inc., et al.*, USDC, Eastern District of Tennessee 3:18-CV-00461-TAV-HBG (Docket No. 65).

In *Manley*, the plaintiff sought a copy of the litigation funding contract, documents, and correspondence between the litigation funding company and

@2021 ALFA INTERNATIONAL GLOBAL LEGAL NETWORK, INC. | ALL RIGHTS RESERVED.

plaintiff, or plaintiff's attorneys, and any document and communication concerning medical referrals and treatment between the plaintiff, plaintiff's attorneys and the litigation funding company. The plaintiff objected and defendants moved to compel production of the third party litigation funding file. The Court denied the motion to compel, and ruled that the documents were not discoverable because the requested documents were not relevant under Fed. R. Civ. P. 26(b). The Court found that defendants' argument that the requested documents would prove bias of plaintiff's treating physician, or that treatment received by plaintiff was neither reasonable nor necessary was speculative, and therefore production of the documents was beyond the scope of discovery. The Court reviewed the litigation funding file in camera prior to making its ruling. In reaching its conclusion, the Court stated:

> The court agrees with the United States Magistrate Judge Snyder as follows:
>
> To be sure, the Court is not ruling that litigation funding discovery is off limits in all instances. In cases where there is a showing that something untoward occurred, the discovery could be relevant. In other words, rather than directing carte blanche discovery of plaintiff's litigation funding, the Court will order the discovery only if good cause exists to show the discovery is relevant to claims and defenses in the case. For example, discovery will be ordered where there is sufficient showing that a non-party is making ultimate litigation or settlement decisions, the interests of the plaintiffs or the class are sacrificed or not being protected, or conflicts of interest exists. However, no such evidence has been raised by defendants and to date the Court has not seen anything of the sort. *Manley* at 5, citing *In re: Valsartan*, 405 F. Supp. 3d 612, 615 (D.N.J. 2019); *See Miller UK Ltd. v. Caterpillar, Inc.,* 17 F. Supp. 3d 7111 (N.D. Ill. 2017); *ML Healthcare v. Publix Supermarket*, 881 F.3d 1293 (11th Cir., 2018); and *Third Party Litigation Finance, Jayme Herschkoph Federal Judicial Center Pocket Guide*, available at WWFJC.gov. (2017).

The *Manley* court appears to follow the majority of jurisdictions that have analyzed this issue. Therefore, it is reasonable to assume the discoverability of third party litigation funding documents will be subject to relevancy analysis and privilege analysis prior to permitting or prohibiting discovery of the same.

Regulation of Litigation Financing Companies:

Tennessee regulates litigation funding agreements under its consumer protection laws. *See* T.C.A. § 47-16-101, et seq., Tennessee Litigation Financing Consumer Protection Act. Uplift Legal Funding, a litigation funding company, rates Tennessee, on a scale of 0 to 10, as a 0.8, meaning that Uplift Funding considers it "very tough for plaintiffs to get lawsuit loans in Tennessee." *See* www.upliftlegalfunding.com/states/tennessee-lawsuit-loans.

Tennessee's Litigation Financing Consumer Protection Act imposes stringent reporting and registration requirements on litigation funding companies. Furthermore, under T.C.A. § 47-16-105, the Act prohibits a litigation financer from receiving any commissions, referral fees, rebates or any other form of consideration from an attorney, law firm, medical provider, chiropractor, or physical therapist or any of their employees, and also prohibits a litigation financing company from referring any consumer or potential consumers to any specific attorney, medical provider, chiropractor or physical therapist. Prior to seeking discovery of third party litigation documents, practitioners should familiarize themselves with the Act.
Importantly, enforcement of the Act rests solely with the Attorney General of Tennessee.

3. **Who travels in your State with respect to a Rule 30(b)(6) witness deposition; the witness or the attorney and**

why?

Generally, the attorney. It is not a written rule but a basic understanding among attorneys. There is a statute in Tennessee that compels anyone involved in an accident (i.e., the truck driver) on Tennessee roadways to return to the state for testimony, whether it be a deposition or trial. However, with COVID and use of virtual depositions, we believe defense counsel can now argue (and potentially file appropriate motions) that a defendant truck driver living in a different state should not be required to travel back to Tennessee for a deposition.

4. What are the benefits or detriments in your State by admitting a driver was in the "course and scope" of employment for direct negligence claims?

The doctrine of vicarious or imputed liability is most frequently encountered in the master-servant relationship under the term "*respondeat superior*". Under this historic doctrine, a person who is injured as the result of an employee's tortious acts, whether intentional or negligent, while the employee is acting incidentally to and in the general scope of its employment, may bring an action against the employer, the employee, or both, under the theory of "joint and several" liability", even though the employer (master) has not been individually at fault. *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). See generally *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); *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).

The injured person may sue both the employer and employee in one action or it may file a separate action against each. Tenn. R. Civ. P. 19.01; *McGee v. Wilson County*, 574 S.W.2d 744, 746 (Tenn. Ct. App. 1978). 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. *Rankhorn v. Sealtest Foods*, 63 Tenn. App. 714, 479 S.W.2d 649 (1971).

An employer is not liable for injuries to third persons caused by an employee who is not acting within the scope of his employment nor, generally, by an independent contractor, unless the injury results from a nondelegable duty or from the employer's concurrent proximate acts. *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); *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); *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). 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. Tenn. R. Civ. P. 19.01.

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 at 937–38. 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).

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 amendments, including the 20 factors, are at T.C.A. §§ 50-2-111, 50-3-103, 50-7-207, and 50-9-103.

There remains some room for argument in Tennessee with regard to course and scope under 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 Tenn. App. LEXIS 619 at *24 (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.

In addition, arguments can be made with regard superseding to 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."

Therefore, under existing Tennessee law, the employer is most at risk for tort exposure when the employee is acting within the scope of his or her employment and is not engaged in any criminal behavior at the time of the accident.

5. Please describe any noteworthy nuclear verdicts in your State?

While Tennessee would definitely not be considered a judicial hellhole or a state that renders what one considers nuclear verdicts, a 2019 decision out of the Eastern District of Tennessee, Chattanooga division, is worth noting, as it would be considered "nuclear" in Tennessee.

Plaintiff was rear-ended by a truck on the Interstate in Chattanooga. Plaintiff did not complain of any injury at the scene and did not treat until a week later. She was then diagnosed as suffering from cervical disc injury and underwent a cervical discectomy and fusion at C4-5 about three months after the accident.

The trucking company and drive defended on liability and damages, arguing that Plaintiff slammed on her brakes and should be apportioned some fault. The jury found the trucking company and driver 100% at fault. Plaintiff had $138,000 in medical expenses. The jury awarded $500,000 each for pain and suffering and loss of enjoyment of life; and $1,000,000 in permanent injury. In total, the jury awarded $2,138,000 based on $138,000 in incurred medicals, where Plaintiff did not complain of an injury at the scene.

6. What are the current legal considerations in terms of obtaining discovery of the amounts actually billed or paid?

In Tennessee the amount actually paid is discoverable but not admissible. Tennessee follows the collateral source rule which excludes evidence of benefits to the plaintiff from sources collateral to the tortfeasor and precludes the reduction of the plaintiff's damage award by such collateral payments. The rule is based on the principles that tortfeasors should be responsible for all of the harm they cause and that payments from collateral sources intended to benefit an injured party should not be used to reduce the liability of the party who inflicted the injury. *Dedmon v. Steelman*, 535 S.W.3d 431, 433 (Tenn. 2017).

In *Dedmon v. Steelman*, 535 S.W.3d 431, (Tenn. 2017), the Tennessee Supreme Court examined the usefulness of the collateral source rule but ultimately left it unchanged. The Court stated, "the Defendants and Amicus ask this Court to take the opportunity to recognize the realities of our current health care system, particularly the growing disparity between what medical providers charge for their services and what they will

accept. In light of this changed environment, they urge the Court to adopt the law in jurisdictions that have chosen to limit the recovery of personal injury plaintiffs to the discounted amounts medical providers accept from insurers in payment for medical services." *Id.* at 466. However, the Court rationed that under the present law in Tennessee, plaintiffs in personal injury cases may use their full, undiscounted medical bills to satisfy the burden of proving the reasonable value of medical expenses. To rebut the plaintiffs' proof that those charges are reasonable, defendants are free to submit any competent evidence in rebuttal that does not run afoul of the collateral source rule. The jury then determines the "reasonable value" of the medical services in light of all of the evidence.

7. How successful have efforts been to obtain the amounts actually charged and accepted by a healthcare provider for certain procedures outside of a personal injury? (e.g. insurance contracts with major providers)

Tennessee recognizes the collateral source rule, which allows Plaintiffs to blackboard what was billed, not what was paid. Tennessee has upheld the collateral source rule, therefore the Plaintiff's may submit the undiscounted medical bills in their proof, and it then becomes the Defendant's burden to submit other competent evidence to rebut the reasonableness of the medical expenses. Treating providers generally will testify as to the reasonableness of the charges so it becomes incumbent on the Defendant to identify and use competent and qualified medical billing experts to contest the amount of the charged medical bills.

The collateral source rule excludes evidence of benefits to the plaintiff from other sources collateral to the tortfeasor and precludes the reduction of the plaintiff's damage award by such collateral payments. The rule is based on the principles that tortfeasors should be responsible for all of the harm they cause and that payments from collateral sources intended to benefit an injured party should not be used to reduce the liability of the party who inflicted the injury. After a thorough review of court decisions in Tennessee and across the country on the collateral source rule, the Tennessee Supreme Court declined to alter existing law in Tennessee holding that the collateral source rule applies in personal injury cases, in which the collateral benefit at issue is private insurance. Consequently, the plaintiffs may submit evidence of the injured party's full, undiscounted medical bills as proof of reasonable medical expenses. Furthermore, the defendants are precluded from submitting evidence of discounted rates accepted by medical providers from the insurer to rebut the plaintiffs' proof that the full, undiscounted charges are reasonable. The defendants remain free to submit any other competent evidence to rebut the plaintiffs' proof on the reasonableness of the medical expenses, so long as that evidence does not contravene the collateral. *Dedmond v. Steelman*, 535 S.W.3d 431 (Tenn. 2008).

8. What legal considerations does your State have in determining which jurisdiction applies when an employee is injured in your State?

Under Tennessee law, jurisdiction and choice of law for workers compensation benefits for employees injured in the State of Tennessee are governed by statute, codified at T.C.A. § 50-6-115. This section is applicable to injuries occurring prior to, on and after July 1, 2014.

This section exempts an employee from another state and the employee's employer from Tennessee's workers compensation law if the employee is temporarily working in the State of Tennessee performing work for an out-of-state employer if the employer has furnished workers compensation insurance coverage under the laws of another state that would cover an employee's employment while in Tennessee. Further, the foreign state under which workers compensation is provided must also recognize the extraterritorial provisions of Tennessee's workers compensation statute, and exempt Tennessee employers from the application of the workers' compensation insurance scheme of the foreign jurisdiction. *See* T.C.A. § 50-6-

115(c)(1).

In any appeal or other litigation concerning the construction of laws in another jurisdiction, Tennessee's workers compensation court is directed to take judicial notice of the construction of laws from the foreign jurisdiction. T.C.A. § 50-6-115(c)(4).

Further, if an employee from another state has a workers compensation claim in such other state, territory or province, the amount of compensation paid or awarded in the other state is credited against any compensation that would be due under Tennessee's Workers Compensation Act. T.C.A. § 50-6-115(c)(5). T.C.A. §50-6-115 does not apply to construction services providers as defined in T.C.A. § 50-6-901, performing work in Tennessee. T.C.A. § 50-6-115(a) and (c). For purposes of determining whether or not an employee from another state is temporarily working in the State of Tennessee, the statute states:

> An employee is considered to be temporarily in the state working for an employer if the employee is working for such employee's employer in a state other than the state that such employee is primarily employed for no more than fourteen (14) consecutive days, or not more than twenty-five (25) days total during the calendar year. *See* T.C.A. § 50-6-115(a).

Tennessee's workers compensation law covers Tennessee workers injured in another state, when the employee temporarily works in another state, if: (1)the employment was principally located in the State of Tennessee; (2) the contract of hire was made in the State of Tennessee; (3) or, Tennessee is the state of residency of the injured worker. T.C.A. § 50-6-115(b).

Additionally, Tennessee courts consider whether or not the injured employee has taken affirmative steps to obtain workers compensation benefits in another state. If, the injured employee seeks workers compensation benefits in a foreign jurisdiction, such employee may be barred under the doctrine of Election Remedies from receiving benefits under Tennessee's workers compensation statute. *See Bilbrey v. Active USA, LLC, et al.*, 2020 WL 4197392, Supreme Court of Tennessee, Special Workers Compensations Appeal Panel (Tenn. 2020).

9. What is your State's current position and standard in regards to taking pre-suit depositions?

In Tennessee, pre-suit depositions are allowed by Tennessee Rule of Civil Procedure 27, that provides:

(1) PETITION. A person who desires to perpetuate his or her own testimony or that of another person regarding any matter that may be cognizable in any court of Tennessee may file a verified petition in any court of record in the county of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of Tennessee but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and the petitioner's interest therein, 3, the facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it, 4, the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.
(2) NOTICE AND SERVICE. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served in the manner provided in Rule 4.04 for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in

the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4.04, an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17.03 apply.
(3) ORDER AND EXAMINATION. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written questions. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.
(4) USE OF DEPOSITION. If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, or in the courts of the United States, it may be used in any action involving the same subject matter subsequently brought in a court of this state, in accordance with the provisions of Rule 32.01. *Tenn. R. Civ. P. 27.01*

10. Does your State have any legal considerations regarding how long a vehicle/tractor-trailer must be held prior to release?

Tennessee has no set rule defining how long a vehicle must be held prior to release. This issue varies from venue to venue and court to court. Therefore, the major concern for owners of vehicles/ tractor-trailers is the risk of spoliation and potential sanctions that accompany a finding from the Court that the evidence was discarded in violation of a court order or preservation letter.

Tennessee Rule of Civil Procedure 34A.02 provides: “Rule 37 sanctions may be imposed upon a party or an agent of a party who discards, destroys, mutilates, alters, or conceals evidence.” Rule 37.02 provides for various sanctions that may be imposed for a party's failure to comply with a discovery order, including “[a]n order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.” *Gardner v. R & J Express, LLC*, 559 S.W.3d 462, 468 (Tenn. Ct. App. 2018).

The decision to impose sanctions for the spoliation of evidence is within the discretion of the trial court. The determination of whether a sanction should be imposed for the spoliation of evidence necessarily depends upon the unique circumstances of each case. Factors which are relevant to a trial court's consideration of what, if any, sanction should be imposed for the spoliation of evidence include:

> (1) the culpability of the spoliating party in causing the destruction of the evidence, including evidence of intentional misconduct or 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.

The Tennessee Court of Appeals examined issues surrounding spoliation. In *Gardner,* the Plaintiffs were on a highway, driving their over-the-road tractor and hauling a trailer owned by the defendant, when an axle on the trailer came loose, causing the tractor and trailer to overturn and injure the plaintiffs. *Gardner*, 559

S.W.3d at 463. The plaintiffs asserted that the trailer was the cause of the accident and that the defendant had been negligent in its inspection and maintenance of the trailer. *Id.* The defendant contended the plaintiffs caused the accident by failing to keep the tractor under control and driving too fast. *Id.* The defendant further argued that by allowing their insurance company to take possession of the tractor following the accident, the plaintiffs deprived the defendant of any opportunity to inspect it. *Id.* The defendant asked the trial court to sanction the plaintiffs for destroying evidence that was crucial to its ability to defend the case. *Id.*

The trial court granted the defendant's motion by dismissing the plaintiff's action. *Id.* at 464-66. In so doing, the trial court acknowledged that although there was "no evidence of intentional misconduct or fraudulent intent in Plaintiffs' destruction of the tractor," Plaintiffs knew when they signed the title of the tractor over to their insurer that they were going to be filing a lawsuit against the defendant and that the tractor would be a key piece of evidence. *Id.* at 465. The trial court noted that the defendant was unable to prove its theory of the case without being able to inspect the tractor. *Id.* at 466. Because the plaintiffs had destroyed "a critical piece of evidence" that resulted in "severe prejudice to the Defendant," the trial court in *Gardner* concluded that "dismissal [was] the only equitable remedy." *Id.*

11. What is your state's current standard to prove punitive or exemplary damages and is there any cap on same?

Punitive damages are controlled by statute in Tennessee. TENN. CODE ANN. § 29-28-104 provides that "[p]unitive damages may only be awarded if the claimant proves by clear and convincing evidence that the defendant against whom punitive damages are sought acted maliciously, intentionally, fraudulently or recklessly," and the claimant must do so in the course of a bifurcated proceeding in which the jury "shall first determine whether compensatory damages are to be awarded and in what amount and by special verdict whether each defendant's conduct was malicious, intentional, fraudulent or reckless . . ." TENN. CODE ANN. § 29-39-104(a)(1) – (3) (2011).

The amount of a punitive damages award is then determined by the jury in a separate evidentiary hearing during which the jury is permitted to consider:

> the defendant's financial condition and net worth; the nature and reprehensibility of the defendant's wrongdoing; the impact of the defendant's conduct on the plaintiff; the relationship of the defendant to the plaintiff; the defendant's awareness of the amount of harm being caused and the defendant's motivation in causing such harm; the duration of the defendant's misconduct and whether the defendant attempted to conceal such misconduct; the expense plaintiff has borne in attempts to recover the losses; whether the defendant profited from the activity, and if defendant did profit, whether the punitive award should be in excess of the profit in order to deter similar future behavior; whether, and the extent to which, defendant has been subjected to previous punitive damage awards based upon the same wrongful act; whether, once the misconduct became known to defendant, defendant took remedial action or attempted to make amends by offering a prompt and fair settlement for actual harm caused; and any other circumstances shown by the evidence that bear on determining a proper amount of punitive damages. TENN. CODE ANN. § 29-39-104(a)(4) (2011).

Punitive damages may not be awarded " when a defendant demonstrates by a preponderance of the evidence that it was in substantial compliance with applicable federal and state regulations setting forth specific standards applicable to the activity in question and intended to protect a class of persons or entities that includes the plaintiff, if those regulations were in effect at the time the activity occurred." TENN. CODE ANN. § 29-39-104(e) (2011). No Tennessee court, however, has held to date that the Federal Motor Carrier Safety Regulations constitute "specific standards" within the meaning of the statute. In addition, "punitive damages may be awarded against a defendant based on vicarious liability for the acts or omissions of an

agent or employee only if the finder of fact determines by special verdict based on clear and convincing evidence that one or more of the following has occurred:

(A) The act or omission was committed by a person employed in a management capacity while that person was acting within the scope of employment;

(B) The defendant was reckless in hiring, retaining, supervising or training the agent or employee and that recklessness was the proximate cause of the act or omission that caused the loss or injury; or

(C) The defendant authorized, ratified or approved the act or omission with knowledge or conscious or reckless disregard that the act or omission may result in the loss or injury. TENN. CODE ANN. § 29-39-104(g)(1) (2011) (emphasis added).

Punitive damages are likewise capped at the greater of two (2) times the total amount of compensatory damages awarded or five hundred thousand dollars ($500,000) absent proof that the defendant intended the harm, intentionally falsified, destroyed, or concealed evidence, was intoxicated, or was convicted of a felony. TENN. CODE ANN. § 29-39-104(a)(5) – (7) (2011).

12. Has your state mandated Zoom trials? If so, what have the results been and have there been any appeals.

Tennessee has not mandated Zoom trials. Through a series of Orders, all jury trials in Tennessee were to be suspended until March 31, 2021. All in person court proceedings, were likewise suspended. By Order of February 12, 2021, the Tennessee Supreme Court, will allow in person proceedings to resume on March 15, 2021, in accordance with the comprehensive written plan for the Judicial District in which the matter is pending.

On April 24, 2020, the Tennessee Supreme Court, by Order, directed each Judicial District to draft written Corona virus plans detailing how each District proposes to keep the Courts "open." Thus, each District determines when, if, and how hearings, including evidentiary hearings, are conducted. *See IN RE: Covid-19 Pandemic*, No. ADM-2020-00428. Zoom hearings and Zoom bench trials are not precluded and Courts are encouraged to use available technology to limit in person contact. Typically, a Zoom bench trial will occur only by consent.

13. Has your state had any noteworthy verdicts premised on punitive damages? If so, what kind of evidence has been used to establish the need for punitive damages? Finally, are any such verdicts currently up on appeal?

In *Poole v. Dealers Warehouse Corp*., No. No. E2017-02051-COA-R3-CV, 2018 Tenn. App. LEXIS 629 (Tenn. Ct. App. Oct. 29, 2018), a jury awarded punitive damages against a CMV operator who, at the time of the accident giving rise to the claim, was a temporary employee of the motor carrier to which he was assigned. The Tennessee Court of Appeals held that the driver's general employer had no vicarious liability for the driver's conduct because the temporary employment contract assigned complete supervisory responsibility for the driver to the motor carrier. The Court also held, however, that the motor carrier could not be held vicariously liable for punitive damages absent specific proof of one or more of the criteria outline in TENN. CODE ANN. § 29-39-104(g)(1). The Court likewise held that even if the Federal Motor Carrier Safety Regulations "intended" to create a framework in which a motor carrier and agent were jointly and severally liable for damages arising out an accident, the Court was "unconvinced that Tenn. Code Ann. § 29-39-104, in governing the manner in which punitive damages are assessed between principal and agent, conflicts in any way with federal law or regulations such that it is preempted." *Id*. at *31. Thus, the Court held that the FMCSRs did not preempt Tennessee state law and thus did not dictate the circumstances under which punitive damages could be assessed.