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Tennessee

1. What are the statute of limitations for tort and contract actions as they relate to the transportation industry?

A. Tort

a. Personal Injury – 1 (one) year from date of loss or injury.

Under Tennessee law, a plaintiff has one year within which to file suit from the date the cause of action accrued, which is the date the injury occurred or the date the injury was discovered or reasonably should have been discovered. See T.C.A.§ 28—3-104(a)(1)(A).

This limitation period is extended for two years if:

i. criminal charges are brough against any person alleged to have caused or contributed to cause the injury;

ii. the conduct, transaction, or occurrence that gives rise to the cause of action for civil damages is the subject of a criminal prosecution commenced within one (1) year by:

1. a law enforcement officer;
2. a district attorney general; or
3. a grand jury; and

iii. the cause of action is brought by the person injured by the criminal conduct against the party prosecuted for such conduct.

b. Property Damage Caused by a Tort – three (3) years from date of loss.

Under Tennessee law, damage to personal or real property is subject to a three (3) year statute of limitations, codified at T.C.A. § 28-3-105. Tennessee law also imposes a three (3) year statute of limitations for actions based on the alleged violation of any federal or state statute creating monetary liability for personal services rendered. See T.C.A. 28-3-105(3).

c. Products Liability – one (1) year personal injury; 3 years for damages to property; 4 years for breach of warranty.

Tennessee's Product Liability Act, codified at T.C.A. § 29-28-101,

et seq., incorporates the above enumerated statutes of limitation for torts to the person and property, saying:

(a) Any action against a manufacturer or seller of a product for injury to person or property caused by its defective or unreasonably dangerous condition must be brought within the period fixed by §§ 28-3-104, 28-3-105, 28-3-202 and 47-2-725, but notwithstanding any exceptions to these provisions, it must be brought within six (6) years of the date of injury, in any event, the action must be brought within ten (10) years from the date on which the product was first purchased for use or consumption, or within one (1) year after the expiration of the anticipated life of the product, whichever is the shorter, except in the case of injury to minors whose action must be brought within a period of one (1) year after attaining the age of majority, whichever occurs sooner.

See T.C.A. § 29-28-103.

Therefore, Tennessee's Product Liability Act applies a three (3) year statute of limitation for damage to personal property or real property caused by a defective product and a one (1) year statute of limitation for personal injury actions. T.C.A. § 29-28-103. However, note that the statute of response for personal injury actions under the 'Tennessee Products Labiality Act of 1978" is six (6) years from the date of injury and in any event, such actions must be brought within ten (10) years from the date when the product was first purchased for use or consumption.

B. Statute of Limitations Pertaining to Contracts

Breach of contract actions are generally subject to a six (6) statute of limitations. See T.C.A. § 28-3-109.

However, contractual actions based on a breach of warranty may be subject to the four (4) year statute of limitations for breach of a contract for the sale of goods. T.C.A. § 47-2-725 (Also applicable to Breach of Warranty).

2. What effects, if any, has the COVID Pandemic had on tolling or extending the statute of limitation for filing a transportation suit and the number of jurors that are sat on a jury trial.

A. Tolling and Extension of Statute of Limitations; COVID-19 Pandemic

As of the time of this writing, any extensions to deadlines, statutes of limitations, statutes of repose, or the tolling of the same because of the Covid pandemic have expired. From March 13, 2020, to June 15, 2020, all deadlines, statutes of limitations, and statutes repose, which were set to expire during that time were tolled and/or extended until June 5, 2020. See *In RE: Covid-19 Pandemic* Adm. 2020-00428, Administrative Order. This tolling provision has expired.

B. Number of Jurors and Procedure for ensuring a Jury of twelve (12) persons is empaneled.

Tennessee law has never guaranteed that a jury must be comprised of twelve (12) people. Prior to the Covid pandemic, parties wishing to insure that a jury of twelve (12) is empaneled to hear their case should specifically demand a jury of twelve (12) persons in the initial pleading as defined in Tenn. R. Civ. P. 7.01, which includes a Complaint and an Answer, a Counter-Claim, Answer to a Cross-Claim, a Third-Party

Complaint, or Answer to the same. See also, Tenn. R. Civ. P. 38.02. The Rule further allows a party to demand a jury, within fifteen (15) days after the service of the last pleading raising an issue of fact.

Currently, jury trials will proceed with six (6) jurors, unless one of the parties to an action files a specific, written request asking that a jury of twelve (12) hear the matter. This request must be filed separate from the demand in the pleadings enumerated above no later than twenty (20) days prior to trial. See In RE: Covid-19 Pandemic ADM2020-00428.

3. Does your state recognize comparative negligence and if so, explain the law.

Tennessee adopted modified comparative fault in the 1992 Supreme Court case *McIntyre v. Balentine*, 833 S.W. 2d 52, 57-58 (Tenn. 1992).

Under Tennessee's modified comparative fault scheme, if a plaintiff is found to be 50% or more at fault, then the plaintiff cannot recover. If the plaintiff is 49% or less at fault, plaintiff's recovery is reduced by that percentage of fault. For example, if a defendant is found to be 51% at fault, and the plaintiff is found to be 49% at fault, and the jury awards plaintiff damages in the amount of $100,000, the plaintiff will only recover 51% of the award, or $51,000.

The effect of the assertion of comparative fault on the applicable statutes of limitation and repose was subsequently codified by the Tennessee General Assembly and may be found at T.C.A. § 20-1-119. It reads:

> (a) In civil actions where comparative fault is or becomes an issue, if a defendant named in an original complaint initiating a suit filed within the applicable statute of limitations, or named in an amended complaint filed within the applicable statute of limitations, alleges in an answer or amended answer to the original or amended complaint that a person not a party to the suit caused or contributed to the injury or damage for which the plaintiff seeks recovery, and if the plaintiff's cause or causes of action against that person would be barred by any applicable statute of limitations but for the operation of this section, the plaintiff may, within ninety (90) days of the filing of the first answer or first amended answer alleging that person's fault, either:
>
> > (1) Amend the complaint to add the person as a defendant pursuant to Tenn. R. Civ. P. 15 and cause process to be issued for that person; or
> >
> > (2) Institute a separate action against that person by filing a summons and complaint. If the plaintiff elects to proceed under this section by filing a separate action, the complaint so filed shall not be considered an original complaint initiating the suit or an amended complaint for purposes of this subsection (a).
>
> (b) A cause of action brought within ninety (90) days pursuant to subsection (a) shall not be barred by any statute of limitations. This section shall not extend any applicable statute of repose, nor shall this section permit the plaintiff to maintain an action against a person when such an action is barred by an applicable statute of repose.
>
> (c) This section shall neither shorten nor lengthen the applicable statute of limitations for any cause of action, other than as provided in subsection (a).
>
> (d) Subsections (a) and (b) shall not apply to any civil action commenced pursuant to § 28-1-105, except an action originally commenced in general sessions court and subsequently recommenced in circuit or chancery court.
>
> (e) This section shall not limit the right of any defendant to allege in an answer or

amended answer that a person not a party to the suit caused or contributed to the injury for which the plaintiff seeks recovery.

(f) As used in this section, "person" means any individual or legal entity.

(g) Notwithstanding any law to the contrary, this section applies to suits involving governmental entities.

See T.C.A 20-1-119.

4. Does your state recognize joint tortfeasor liability and if so, explain the law.

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 and 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).

5. Are either insurers and/or insureds obligated to provide insurance limit information pre-suit and if so, what is required.

No. Under Tennessee laws, parties are not required to provide their insurance limit information pre-suit.

In the State courts of Tennessee, insurance information is not discoverable. See *Thomas v. Oldfield*, 279 S.W. 3d 259, 264 (Tenn. 2009). In reaching this conclusion, the Tennessee Supreme Court noted that Tennessee has never amended the Tennessee Rules of Civil Procedure rules conform with Federal Rule of Civil Procedure. This distinction is important because the Federal Rules of Civil Procedure expressly require a party to provide for inspection or copying of "any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment." Fed. R. Civ. P. 26(a)(1)(A)(iv). In addition, no Tennessee case has construed the Tennessee Rules of Civil Procedure to expressly provide the discovery of a defendant's liability coverage, with few exceptions.

6. Does your state have any monetary caps on compensatory, exemplary or punitive damages.

A. Statutory cap on Non-Economic Damages, codified at T.C.A. § 29-39-102.

In Tennessee there is a statutory cap on noneconomic damages under T.C.A. § 29-39-102 which limits the amount of noneconomic damages in a majority of cases to Seven Hundred Fifty Thousand ($750,000) Dollars. In cases involving catastrophic injury – defined as one or more of the following: (1) spinal cord

injury resulting in paraplegia or quadriplegia; (2) amputation of two hands or two feet or one of each; (3) third degree burns over forty percent (40%) or more of the body as a whole or third degree burns up to forty percent (40%) or more of the face; or (4) wrongful death of a parent leaving a surviving minor child or children for whom the deceased parent had lawful rights of custody or visitation – the damage cap is extended not to exceed One Million ($1,000,000) Dollars.

For many years, parties attempted to challenge the constitutionality of the cap, but 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.

B. Statutory cap on Punitive Damages, codified at T.C.A. § 29-39-104.

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 (2) times the compensatory damages or $500,000.00, whichever is greater. However, there is federal case law declaring the cap on punitive damages unconstitutional. The case was decided before *Jodi v. McClay*, but may be binding precedent in federal court. Below is a detailed discussion of this complication.

a. 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.

b. 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.

c. 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[1]; the cap also does not apply if the defendant was under the influence of

[1] 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

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.

7. **Has your state recently implemented any tort reforms which may affect transportation lawsuits or is your state planning to, and if so explain the reforms.**

No except for the statutory caps on non-economic damages and punitive damages noted above in question to number 6.

8. **How many months generally transpire between the filing of a transportation related complaint and a jury trial.**

This is largely dependent on whether the matter is pending in state court or federal court. In federal court, 18 to 24 months generally transpire between the filing of a complaint and a jury trial. State court cases proceed much more slowly, and it is not uncommon for there to be 24 to 36 months between the filing of a complaint and a jury trial.

9. **When does pre-judgment interest begin accumulating and at what percent rate of interest.**

Pre-judgment interest is not available in personal injury cases in Tennessee. Francois v. Willis, 205 S.W.3d 915 (Tenn. Ct. App. 2006).

10. What evidence at trial are the parties allowed to enter into evidence concerning medical expense related damages.

In Tennessee, "(1) A payment made by a tortfeasor or by a person acting for him to a person whom he has injured is credited against his tort liability, as are payments made by another who is, or believes he is, subject to the same tort liability; (2) Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable. Benefits received by a plaintiff from a source wholly independent of and collateral to the tortfeasor, as a result of the injury inflicted, will not diminish the damages otherwise recoverable from the defendant. Normally, of course, in an action for damages in tort, the fact that the plaintiff has received payments from a collateral source, other than the defendant, is not admissible in evidence and does not reduce or mitigate the defendant's liability." *Dedmon v. Steelman*, 535 S.W.3d 431, 433 (Tenn. 2017). In other words, "[t]he collateral source rule permits plaintiffs to prove and recover medical expenses, whether paid by insurance or not. Any payment the plaintiff receives from a collateral source is not normally admissible in evidence and does not reduce or mitigate the defendant's liability in tort cases." *Id.*

The collateral source in Tennessee has likewise been construed to require the exclusion of expert testimony that the amount of medical expenses billed is not the amount paid due, in part, to private contracts between a medical provider and a health insurer. *Doty v. City of Johnson City*, No. E2020-00054-COA-R3-CV, 2021 Tenn. App. LEXIS 269 (Tenn. Ct. App. July 7, 2021).

11. Does your state recognize a self-critical analysis or similar privilege that shields internal accident investigations from discovery?

Tennessee does not expressly recognize a self-critical analysis privilege in any setting other than healthcare. However, Tennessee courts have excluded preventability determinations 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)).

12. Does your state allow independent negligence claims against a motor carrier (i.e. negligent hiring, retention, training) if the motor carrier admits that it is vicariously liable for any fault or liability assigned to the driver?

There is currently a split of authority in Tennessee state courts as to whether independent negligence claims against a motor carrier may proceed following the motor carrier's admission that it is vicariously liable for any fault attributed to the driver. Known generally as the "preemption rule," the issue has come before the

Tennessee Court of Appeals only once and the Court held that independent negligence claims were allowed to proceed. That ruling, however, was vacated by the Tennessee Supreme Court. *Jones v. Windham*, No. W2015-00973-COA-R10-CV, 2016 Tenn. App. LEXIS 182 (Tenn. Ct. App. Mar. 11, 2016) (vacated by *Jones v. Windham*, 2016 Tenn. LEXIS 538 (Tenn. Aug. 19, 2016). Currently, there are at least four state and federal decisions holding that the preemption rule applies, but the issue is hotly contested. *See, e.g.*, *Ryans v. Koch Foods, LLC*, No. 1:13-cv-234-SKL, 2015 U.S. Dist. LEXIS 193054 (E.D. Tenn. July 8, 2015); *Freeman v. Paddock Heavy Transp., Inc.*, No. 3:20-cv-00505, 2020 U.S. Sist. LEXIS 237024 (M.D. Tenn. Dec. 16, 2020).

13. Does your jurisdiction have an independent claim for spoliation? If not, what are the sanctions or repercussions for spoliation?

Tennessee does not recognize an independent claim for spoliation; however, spoliation of evidence is a sanctionable offense under Tennessee law, and sanctions are imposed at the discretion of the trial court in order to remedy the prejudice imposed on the non-spoliating party. *Tatham v. Bridgestone Ams. Holding, Inc.*, 473 S.W.3d 734, 747 (citing *Mercer v. Vanderbilt University, Inc.*, 134 S.W.3d 121, 133 (Tenn. 2004); *Gross v. McKenna*, No. E2005-02488-COA-R3-CV, 2007 Tenn. App. LEXIS 659 (Tenn. Ct. App. Oct. 30, 2007)).

The court's express authority originates from Rule 37 and Rule 34A.02 of the Tennessee Rules of Civil Procedure. Rule 37 grants courts the power to issue sanctions a to parties who fail to obey discovery orders. Tenn. R. Civ. P. 37. This rule enumerates a range of potential sanctions, including but not limited to the following:

- dismissal of the action,
- rendering a judgment by default,
- limiting the introduction of certain claims or evidence,
- entering an order designating that certain facts shall be taken as established, and
- striking out pleadings or parts of pleadings.

Tatham, 473 S.W.3d at 744; *see* Tenn. R. Civ. P. 37.02(A)-(D).

On July 1, 2006, Tennessee expanded the express authority of the Courts with the adoption of Rule 34A.02, which permits sanctions if a party causes spoliation of evidence by discarding, destroying, mutilating, altering, or concealing evidence – without requiring the violation of a prior discovery order. Tenn. R. Civ. P. 34A.02. The adoption of Rule 34A.02 effectively codified the inherent authority already recognized by Tennessee courts to impose sanctions during the discovery process, even if the destruction occurred prior to filing of the lawsuit. *Tatham*, 473 S.W.3d at 744 (citing *Gross*, 2007 Tenn. App. LEXIS 659 at *6). Additionally, Rule 34A.02 expressly allows for the same sanctions as enumerated in Rule 37. Tenn. R. Civ. P. 34A.02.

"[I]ntentional misconduct is not a prerequisite for a trial court to impose sanctions for the spoliation of evidence" regardless of "whether the sanction be imposed under the common law doctrine, under [the] inherent authority of the court, or under Rule 34A.02." *Tatham*, 473 S.W.3d at 745 – 746. Instead, a court's assessment of whether sanctions should be imposed for spoliation of evidence should be based on a "case-by-case basis" under "the totality of the circumstances", with intent serving as only one factor to be considered. *Id.* at 746-747. The determinative factors to be evaluated in the totality of the circumstances analysis in spoliation cases, include:

- the culpability of the spoliating party in causing the destruction of the evidence, including evidence of intentional misconduct or fraudulent intent;
- the degree of prejudice suffered by the non-spoliating party as a result of the absence of the evidence;

- 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
- the least severe sanction available to remedy any prejudice caused to the non-spoliating party.

Id.; *see also Gardner v. R & J Express, LLC*, 559 S.W.3d 462, 465 (Tenn. Ct. App. 2018).