

TORTS: Comparative Fault

I. The Tennessee Rule.

A. Tennessee has adopted a modified version of comparative fault, abandoning the previous system of contributory negligence. *McIntyre v. Balentine*, 833 S.W.2d 52, 57 (Tenn. 1992).

B. Under the Tennessee rule:

1. a tort plaintiff may recover against tortfeasors if the plaintiff's fault is less than fifty percent.
2. the liability allocated to multiple tortfeasors is proportional to their fault as determined by the trier of fact.

C. The goal of this rule is "a fair and tight fit" between fault and liability, which is achieved when all participants to an act of negligence are included in an apportionment of fault. *Carroll v. Whitney*, 29 S.W.3d 14, 21 (Tenn. 2000).

D. The Tennessee Supreme Court determined: "[W]e feel the '49 percent rule' ameliorates the harshness of the common law rule while remaining compatible with a fault-based tort system. . . . We therefore hold that so long as a plaintiff's negligence remains less than the defendant's negligence the plaintiff may recover; in such a case, plaintiff's damages are to be reduced in proportion to the percentage of the total negligence attributable to the plaintiff." *McIntyre*, 833 S.W.2d at 57.

E. Rationale for the Rule. By closely linking liability to fault, Tennessee seeks to strike the proper balance between a plaintiff's interest in being made whole and a defendant's interest in paying only those damages for which the defendant is responsible. *Brown v. Wal-Mart Discount Cities*, 12 S.W.3d 785, 787 (Tenn. 2000). That balance is sought by linking liability to fault. *Biscan v. Brown*, 160 S.W.3d 462, 474 (Tenn. 2005).

F. Allocation to Third Parties. Comparative fault may be allocated to all of those responsible, including third parties. *Carroll*, 29 S.W.3d at 21 (noting Tennessee "broadly permit[s] allocation of fault to all persons involved in an injury-causing event"). The same standard of proof exists: "A jury can apportion fault to a nonparty only after it is convinced that the defendant's burden of establishing that a nonparty caused or contributed to the plaintiff's injury has been met." *Id.* A jury may also generally apportion fault to immune, or "effectively immune," nonparties. *Dotson v. Blake*, 29 S.W.3d 26, 29 (Tenn. 2000).

- Example. Party A sustains a personal injury and pursues an action claiming parties B and C caused the injury. At trial the jury determines that each of the three parties contributed to causing the injury. If A is 30% at fault while B is 30% at fault and C is 40% at fault, A can recover 30% from B and 40% from C because A is less than

50% at fault. However, if A is 60% at fault while B and C are each 20% at fault, A cannot recover because A's fault is equal to or greater than that of the tortfeasors.

G. Raised as Affirmative Defense. Modified comparative fault is recognized as an affirmative defense under Tennessee procedural law. *See* Tenn. R. Civ. P. 8.03. In a tort action, a defendant may "allege, as an affirmative defense, that a nonparty caused or contributed to the [plaintiff's] injury." *McIntyre*, 833 S.W.2d at 58.

II. Timely Inclusion of Third Party.

Tenn. Code Ann. § 20-1-119, *Comparative fault; additional defendants; limitation of actions*, governs how a third party may be brought into an action involving comparative fault:

"(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 [Tenn. Code Ann.] § 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.”

III. Core Principles of Comparative Fault in Tennessee.

A. The Tennessee Supreme Court outlined the following as the core principles of modified comparative fault:

1. that when “the separate, independent negligent acts of more than one tortfeasor combine to cause a single, indivisible injury, all tortfeasors must be joined in the same action, unless joinder is specifically prohibited by law”;
2. that when “the separate, independent negligent acts of more than one tortfeasor combine to cause a single, indivisible injury, each tortfeasor will be liable only for that proportion of the damages attributed to its fault”;
3. that the goal of linking liability with fault is not furthered by a rule that allows a defendant's liability to be determined by the happenstance of the financial wherewithall of the other defendants; and
4. that the purpose of the comparative fault regime is to prevent fortuitously imposing a degree of liability that is out of all proportion to fault.

Banks v. Elks Club Pride of Tennessee 1102, 301 S.W.3d 214, 220 (Tenn. 2010).

B. Sudden Emergency Doctrine. The sudden emergency doctrine has been subsumed into Tennessee’s comparative fault rule. The doctrine recognizes that a person confronted with an unexpected emergency that requires immediate action is not expected to exercise the same judgment as one who has time for reflection. *McCall v. Wilder*, 913 S.W.2d 150, 157 (Tenn. 1995). The doctrine is considered as a factor in the total comparative fault analysis.

C. Implied Assumption of Risk. Implied assumption of the risk originally served as a complete bar to recovery for negligence for certain activities when the risks are inherent in the activity. Cases now involving implied assumption of the risk are analyzed under the principles of comparative fault and the common law concept of duty. *Perez v. McConkey*, 872 S.W.2d 897 (Tenn. 1994) (stating that “the reasonableness of a party's conduct in confronting a risk should be determined under the principles of comparative fault”).

D. Open and Obvious Doctrine. The open and obvious doctrine has also been subsumed by the comparative fault rule. The “open or obvious” nature of a condition no longer “ipso facto[] relieves a defendant of a duty of care.” *Coln v. City of Savannah*, 966 S.W.2d 34, 43 (Tenn. 1998). Duty can still arise where a condition is open and obvious. “When an invitee is injured because of dangers that are obvious, reasonably apparent, or as well known to the injured party as to the owner or operator of the premises, liability, if any, should be determined in accordance with the principles of comparative fault analysis[.]” *Green v. Roberts*, 398 S.W.3d 172, 178 (Tenn. Ct. App. 2012).

E. Subsequent Harm. *McIntyre* did not alter Tennessee’s common-law rules with regard to liability of tortfeasors for injuries caused by subsequent medical treatment for the injuries they cause. Thus, “an actor whose tortious conduct causes physical harm to another is liable for any enhanced harm the other suffers due to the efforts of third persons to render aid reasonably required by the other's injury, as long as the enhanced harm arises from a risk that inheres in the effort to render aid.” *Banks*, 301 S.W.3d at 223.

IV. Exceptions and Qualifiers.

C. Workers Compensation. In tort cases involving work-related injuries, a jury cannot apportion fault to the plaintiff’s employer due to the unique workings of the workers’ compensation recovery principles. *Snyder v. LTG Lufttechnische GmbH*, 955 S.W.2d 252, 256 (Tenn. 1997).

D. Dram Shop Act. The Tennessee Supreme Court has recognized an exception to the comparative fault rule based on an explicit legislative finding in the Dram Shop Act. *Biscan*, 160 S.W.3d at 474.

E. Contribution.

1. *McIntyre* did not “completely abolish the remedy of contribution.” *Bervoets v. Harde Ralls Pontiac–Olds, Inc.*, 891 S.W.2d 905, 907 (Tenn.1994).

2. Contribution may still be available in limited circumstances, including cases in which “joint and several liability continues to apply under doctrines such as the family purpose doctrine, cases in which tortfeasors act in concert or collectively with one another, cases in which the doctrine of respondeat superior permits vicarious liability due to an agency-type relationship, or in the “appropriate” products liability case.” *Gen. Elec. Co. v. Process Control Co.*, 969 S.W.2d 914, 916 (Tenn. 1998).

3. It is also available in the “appropriate case” in which “fairness demands”; however, this is not a catch-all provision and is not meant to defeat “the fundamental concepts of our comparative fault law.” *Id.*

V. Uniform Contribution Among Tortfeasors Act, Tenn. Code Ann. § 29-11-101 et seq.

A. The Act applies only to those situations where “two (2) or more persons are jointly or severally liable in tort for the same injury to person or property or for the same wrongful death.” Tenn. Code Ann. § 29-11-102. *McIntyre* ended joint and several liability for the concurrent acts of tortfeasors, but *General Electric*, quoted above, explains those instances where the statute would apply.

B. Determination of Statutory Contribution, Tenn. Code Ann. § 29-11-103, *Determination of proportionate share of shared liability*, provides:

In determining the proportionate share of the shared liability between two (2) or more tort-feasors for the same injury or wrongful death, for purposes of pursuit of contribution among tort-feasors:

(1) The reasonable amount of the settlement and the relative degree of fault of the tort-feasors and the injured party or parties in bringing about the injury or wrongful death shall be compared, and the party seeking contribution shall be entitled to recover only to the extent that the party has paid more than the proportionate share of the common liability, with the proportionate share to be determined solely by comparison of the relative degrees of fault of the parties;

(2) If equity requires, the collective liability of some as a group shall constitute a single proportionate share; and

(3) Principles of equity applicable to contribution generally shall apply.

C. Joint and Several Liability. Joint and several liability still exists under Tennessee law.

1. The Tennessee Supreme Court has held that the doctrine has “continued to be an integral part of the law, except where specifically abrogated.” *Owens v. Truckstops of Am.*, 915 S.W.2d 420, 431 n. 13 (Tenn.1996). The Court had only “disapproved joint and several liability in a particular sense, that is, where the defendants were charged with separate, independent acts of negligence” which “combine to cause a single, indivisible injury.” *Id.* at 430-31.

2. Examples of Joint and Several Liability.

a) Chain of distribution of a product in a products liability action. *Owens*, 915 S.W.2d at 433.

b) Injury caused by multiple tortfeasors breaching a common duty. *Resolution Trust Corp. v. Block*, 924 S.W.2d 354, 355, 357 (Tenn. 1996).

- c) Injury was caused by the concerted actions tortfeasors. *Gen. Elec. Co. v. Process Control Co.*, 969 S.W.2d 914, 916 (Tenn. 1998).
- d) Vicarious liability doctrines, including the family purpose. *Camper v. Minor*, 915 S.W.2d 437, 447–48 (Tenn. 1996).
- e) Respondeat superior, where there is an agency relationship with the actual tortfeasor. *Browder v. Morris*, 975 S.W.2d 308, 311–12 (Tenn. 1998).
- f) Foreseeable intentional acts of third persons when a duty exists to prevent or warn. *Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d 73, 87 (Tenn. 2001).

D. Tennessee Statute. Tenn. Code Ann. § 29-11-107. *Joint and several liability; exceptions and applications*. This section states:

“(a) If multiple defendants are found liable in a civil action governed by comparative fault, a defendant shall only be severally liable for the percentage of damages for which fault is attributed to such defendant by the trier of fact, and no defendant shall be held jointly liable for any damages.

(b) Notwithstanding subsection (a), the doctrine of joint and several liability 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.

(c) Nothing in this section eliminates or affects the doctrines of vicarious liability or respondeat superior.

(d) Nothing in this section limits the ability of the trier of fact to allocate fault to a nonparty to the suit, including, but not limited to, an immune third party or a settling party, person, or entity. Allocations of fault to nonparties shall be used only to determine the liability of named parties and shall not subject nonparties to liability in the action in which the allocation occurred or in any other action.

(e) Nothing in this section eliminates or diminishes:

(1) The filing of cross-claims or counterclaims against any party or third party under Tennessee Rules of Civil Procedure 13 and 14;

(2) The assertion by a party of rights to contribution or indemnity;

(3) The assertion by a party of comparative fault under Tennessee Rule of Civil Procedure 8.03;

(4) The doctrine of superseding and independent intervening cause; or

(5) Any defenses or immunities that exist as of July 1, 2013.

(f) This section shall not prevent parties from entering into a legally enforceable contract that allocates fault in a civil action among the parties to the contract.”

TORTS: DAMAGES CAP

I. Generally.

A. Tennessee Civil Justice Act of 2011

B. Noneconomic Damages: “Physical and emotional pain; suffering; inconvenience; physical impairment; disfigurement; mental anguish; emotional distress; loss of society, companionship, and consortium; injury to reputation; humiliation; noneconomic effects of disability, including loss of enjoyment of normal activities, benefits and pleasures of life and loss of mental or physical health, well-being or bodily functions; and all other nonpecuniary losses of any kind or nature.” TN Code § 29-39-101(2).

C. Economic Damages: Damages for “objectively verifiable pecuniary damages arising from medical expenses and medical care, rehabilitation services, mental health treatment, custodial care, loss of earnings and earning capacity, loss of income, burial costs, loss of use of property, repair or replacement of property, obtaining substitute domestic services, loss of employment, loss of business or employment opportunities, and other objectively verifiable monetary losses.” TN Code § 29-39-101(1).

D. Punitive Damages: Punitive damages are intended “to punish a defendant, to deter him from committing acts of a similar nature, and to make a public example of him.” *Goff v. Elmo Greer & Sons Construction Co.*, 297 S.W.3d 175, 187 (Tenn. 2009).

E. Ad Damnum Clauses: “A judgment or decree in excess of the amount pleaded is void,” but only “to the extent of the excess.” *Gaylor v. Miller*, 59 S.W.2d 502, 504 (Tenn. 1933).

II. Cap on Noneconomic Damages

A. \$750,000 Cap on Noneconomic Damages: per each “injured plaintiff.” TN Code § 29-39-102(a)(2).

B. \$1,000,000 Cap for “Catastrophic Loss or Injury”: (1) a spinal cord injury resulting in paraplegia or quadriplegia; (2) amputation of two hands, two feet, or one of each; (3) third degree burns over 40% or more of the body, or third degree burns up to 40% or more of the face; or (4) wrongful death of the parent leaving a surviving minor child of a deceased parent with custody or visitation rights. TN Code § 29-39-102(c).

C. Exceptions to the cap (TN Code § 29-39-102(h):

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

2. If the defendant intentionally falsified, destroyed or concealed records containing material evidence with the purpose of wrongfully evading liability in the case at issue.
3. If the defendant was under the influence of alcohol, drugs or
 - a) any other intoxicant or stimulant, resulting in the defendant's judgment being substantially impaired, and causing the injuries or death.
4. If the defendant's act or omission results in the defendant being convicted of a felony under Tennessee law, another state, or under federal law, and that act or omission caused the damages or injuries.

D. Other features

1. Comparative fault applies. In the case of multiple defendants, the amount of noneconomic damages is apportioned on the basis of fault. The total liability of co-defendants at fault to an injured plaintiff cannot exceed the aggregate total of the cap. TN Code § 29-39-102(b).
2. The damage cap is not disclosed to the jury. The court will apply the cap after the jury returns its verdict. TN Code § 29-39-102(g).

III. Cap On Punitive Damages (TN Code § 29-39-104)

A. Two times compensatory/\$500,000 cap: Punitive damages are limited to the greater of two times the total amount of compensatory damages, or \$500,000. TN Code § 29-39-104(a)(5). *Note:* This cap was recently held to violate the individual right to a trial by jury set forth in the Tennessee Constitution. *Lindenberg v. Jackson National Life Insurance Company*, 912 F.3d 348 (6th Cir. 2018).

B. Clear and convincing standard: Punitive damages must be proven by clear and convincing evidence that the defendant acted maliciously, intentionally, fraudulently or recklessly. TN Code § 29-39-104(a)(1); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992); *Goff v. Elmo Greer & Sons Const. Co., Inc.*, 297 S.W.3d 175 (Tenn. 2009).

C. Considerations: In determining the amount of punitive damages, the trier of fact must consider the following factors to the extent relevant:

1. the defendant's financial condition and net worth;
2. the nature and reprehensibility of the defendant's wrongdoing;
3. the impact of the defendant's conduct on the plaintiff;
4. the relationship of the defendant to the plaintiff;
5. the defendant's awareness of the amount of harm being caused and the defendant's motivation in causing such harm;

6. the duration of the defendant's misconduct and whether the defendant attempted to conceal such misconduct;
7. the expense plaintiff has borne in attempts to recover the losses;
8. 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;
9. whether, and the extent to which, defendant has been subjected to previous punitive damage awards based upon the same wrongful act;
10. 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
11. any other circumstances shown by the evidence that bear on determining a proper amount of punitive damages. TN Code § 29-39-104(a)(4).

D. Examples

1. *Levy v. Franks*, 159 S.W.3d 66 (Tenn. 2004) (holding that defendant's conduct that was extreme and outrageous enough to support an IIED claim was sufficiently malicious to support a punitive damages award).
2. *Pruett v. Skouteris*, 743 F.Supp.2d 718, 727 (W.D. Tenn. 2010) (holding that attorney's intentional conversion of client funds justified a punitive damages award).

E. Exceptions to the cap (TN Code § 29-39-104(a)(7)):

1. If the defendant had a specific intent to inflict serious physical injury, and the defendant's intentional conduct did, in fact, injure the plaintiff.
2. If the defendant intentionally falsified, destroyed or concealed records containing material evidence with the purpose of wrongfully evading liability in the case at issue.
3. If the defendant was under the influence of alcohol, drugs or
 - a) any other intoxicant or stimulant, resulting in the defendant's judgment being substantially impaired, and causing the injuries or death.
4. If the defendant's act or omission results in the defendant being convicted of a felony under Tennessee law, another state, or under federal law, and that act or omission caused the damages or injuries.

F. Other features

1. The trier of fact shall be instructed that the primary purpose of punitive damages is to punish the wrongdoer and deter similar misconduct in the future by the defendant and others while the purpose of compensatory damages is to make the plaintiff whole. TN Code § 29-39-104(a)(4).
2. The punitive damages cap is not disclosed to the jury. The court will apply the cap after the jury returns its verdict. TN Code § 29-39-104(a)(6).
3. Limitations in products liability cases:
 - a) The seller of a product other than the manufacturer shall not be liable for punitive damages, unless the seller exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought; the seller altered or modified the product and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; or the seller had actual knowledge of the defective condition of the product at the time the seller supplied the same. TN Code § 29-39-104(c).
 - b) Punitive damages shall not be awarded in a civil action involving a drug or device if the drug or device which allegedly caused the claimant's harm (TN Code § 29-39-104(d)):
 - (1) Was manufactured and labeled in relevant and material respects in accordance with the terms of an approval or license issued by the federal food and drug administration under the Federal Food, Drug, and Cosmetic Act
 - (2) Was an over-the-counter drug or device marketed pursuant to federal regulations, was generally recognized as safe and effective and as not being misbranded pursuant to the applicable federal regulations, and satisfied in relevant and material respects each of the conditions contained in the applicable regulations and each of the conditions contained in an applicable monograph.
4. Other limitation: Punitive damages shall not be awarded in any civil action 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. TN Code § 29-39-104(e).

TORTS – GOVERNMENTAL ENTITIES

I. Sovereign Immunity

Sovereign immunity is “embodied in the Tennessee Constitution, which provides that ‘[s]uits may be brought against the State in such manner and in such courts as the Legislature may by law direct.’ Tenn. Const. art. I., § 17.” *Sneed v. City of Red Bank, Tennessee*, 459 S.W.3d 17, 23 (Tenn. 2014).

II. State of Tennessee

A. “[T]he legislature created the Tennessee Claims Commission in 1984 to hear and adjudicate certain monetary claims against the State of Tennessee. *See* Tenn. Code Ann. §§ 9-8-301 to 307 (1999).” *Stewart v. State*, 33 S.W.3d 785, 790 (Tenn. 2000).

B. The Tennessee Claims Commission has exclusive jurisdiction to hear claims against the State. *Id.* *See* <http://treasury.tn.gov/claims/index.html>

C. Claims are limited to the specific claims set forth in Tenn. Code Ann. § 9-8-307(a)(1). *Id.*

D. “[T]he Claims Commission lacks subject matter jurisdiction and has no authority to hear any claims that fall outside the categories enumerated in section 9-8-307(a).” *Mullins v. State*, 320 S.W.3d 273, 279 (Tenn. 2010).

E. Specific notice of the claim (complying with the statutory requirements) must be provided to the Division of Claims and Risk Management (“Division of Claims Administration”) within the statute of limitations. Tenn. Code Ann. § 9-8-402 (2014). *See* <http://treasury.tn.gov/ClaimsAdmin/index.html>

F. Filing a claim with the Claims Commission acts as a waiver of any other cause of action against a state officer or employee. Tenn. Code Ann. § 9-8-307(b). *See Haley v. University of Tennessee-Knoxville*, 188 S.W.3d 518, 524 (Tenn. 2006).

III. Local Governmental Entities

A. The Governmental Tort Liability Act (“GTLA”) established that counties, municipalities and other local governmental entities remain immune from suit for torts under Tennessee law unless that immunity has been lifted by the Legislature. Tenn. Code Ann. § 29-20-201.

B. Immunity is removed for certain types of claims.

1. Injury from negligent operation of motor vehicles. Tenn. Code Ann. § 29-20-202.

2. Injury from unsafe streets and highways. Tenn. Code Ann. § 29-20-203.

3. Injury from dangerous structures. Tenn. Code Ann. § 29-20-204.

4. Injury caused by negligent act or omission of employees. Tenn. Code Ann. § 29-20-205.

- a) Multiple exceptions apply. Tenn. Code Ann. § 29-20-205 (1)-(9).
- b) Employees specifically defined. Tenn. Code Ann. § 29-20-107.

C. Circuit court has exclusive jurisdiction (unless county's population is greater than 850,000 which allows the general sessions court to have concurrent jurisdiction). Tenn. Code Ann. § 29-20-307.

D. Employees of governmental entities are generally immune from suit and damages if the entity's immunity is removed (unless the claim is against a physician or nurse). Tenn. Code Ann. § 29-20-310(b).

E. An employee who is sued individually and later dismissed shall be awarded attorney's fees. Tenn. Code Ann. § 29-20-113.

F. Damages under the GTLA are generally capped at \$300,000 per person for bodily injury or death, \$700,000 per accident for bodily injury or death, and \$100,000 per accident for property damages. Tenn. Code Ann. § 29-20-403 and -404.

G. Counties can also be liable for the reckless or intentional conduct of deputies and jailers for damages up to an amount equivalent to the Sheriff's Bond. Tenn. Code Ann. § 8-8-301 to -303; § 8-8-103.

IV. Tennessee Human Rights Act ("THRA") and Tennessee Disability Act ("TDA")

A. Claims for employment discrimination and retaliation can also be asserted against the State and local governmental entities pursuant to the THRA, Tenn. Code Ann. § 4-21-102(5), and for disability discrimination pursuant to the TDA, Tenn. Code Ann. § 8-50-103(d).

B. Claims against local governmental entities brought pursuant to the THRA are not subject to the conditions imposed by the GTLA. *Sneed v. City of Red Bank, Tennessee*, 459 S.W.3d 17, 27 (Tenn. 2014).

C. Claims brought pursuant to the THRA can be made by filing the claim with the Tennessee Human Rights Commission or by filing suit in chancery or circuit court. Tenn. Code Ann. § 4-21-302 and § 4-21-311(a).

D. Claims brought pursuant to the TDA may be filed with the Tennessee Human Rights Commission. Tenn. Code Ann. § 8-5-103(c)(1).

TORTS - PRODUCTS LIABILITY

I. Generally

A. Tenn. Code Ann. § 29-28-102: This chapter shall be known and may be cited as the Tennessee Products Liability Act of 1978.”

B. Tenn. Code Ann. § 29-28-102: Paragraph (6) “Product liability action” for purposes of this chapter includes all actions brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formula, preparation, assembly, testing, service, warning, instruction, marketing, packaging or labeling of any product. “Product liability action” includes, but is not limited to, all actions based upon the following theories: strict liability in tort; negligence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether negligent, or innocent; misrepresentation, concealment, or nondisclosure, whether negligent, or innocent; or under any other substantive legal theory in tort or contract whatsoever.

C. Tenn. Code Ann. § 29-28-105

1. Paragraph (a) A manufacturer or seller of a product shall not be liable for any injury to a person or property caused by the product unless the product is determined to be *in a defective condition or unreasonably dangerous* at the time it left the control of the manufacturer or seller.

2. Paragraph (b) In making this determination, the state of scientific and technological knowledge available to the manufacturer or seller at the time the product was placed on the market, rather than at the time of injury, is applicable. Consideration is given also to the customary designs, methods, standards and techniques of manufacturing, inspecting and testing by other manufacturers or sellers of similar products.

3. Paragraph (c) The provisions of this section do not apply to an action based on express warranty or misrepresentation regarding the chattel.

4. Paragraph (d) A product is not unreasonably dangerous because of a failure to adequately warn of a danger or hazard that is apparent to the ordinary user.

D. Tenn. Code Ann. § 29-28-102(8): Paragraph (8) “Unreasonably dangerous” means that a product is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, or a product [that] because of its dangerous condition would not be put on the market by a reasonably prudent manufacturer or seller assuming that [the manufacturer or seller] knew of its dangerous condition.

II. Design Defects

A. The Tennessee Products Liability Act provides for both a consumer expectation test and a prudent manufacturer test. Ray by Holman v. Bic Corp., 925 S.W.2d 527, 533 (Tenn. 1996).

1. Consumer expectation test: Under this test, the product must be “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it.” Tenn. Code Ann. § 29-28-102(8).

a) “In order to be successful under the consumer expectation test, the plaintiff must present evidence that the ordinary consumer has an expectation regarding the safety of the product.” Jackson v. Gen. Motors Corp., 60 S.W.3d 800, 804 (Tenn. 2001).

b) Examples:

(1) Seat belts. Jackson v. Gen. Motors Corp., 60 S.W.3d 800, 804 (Tenn. 2001).

(2) Tires. Tatham v. Bridgestone Americas Holding, Inc., 473 S.W.3d 734 (Tenn. 2015).

2. Prudent manufacturer test: The Act explains that a product is in an unreasonably dangerous condition if the product “because of its dangerous condition would not be put on the market by a reasonably prudent manufacturer or seller assuming that the manufacturer or seller knew of its dangerous condition.” Tenn. Code Ann. § 29-28-102(8). The Tennessee Supreme Court has explained that a risk/utility test applies to this portion of the definition. Ray by Holman v. Bic Corp., 925 S.W.2d 527, 532 (Tenn. 1996).

a) This test “imposes liability in circumstances in which a reasonably prudent manufacturer with knowledge of a product's dangerousness would not place the product in the stream of commerce.” Ray by Holman v. Bic Corp., 925 S.W.2d 527, 532 (Tenn. 1996).

b) Involves "establishing the unreasonable dangerousness of a *complex product* about which an ordinary consumer has no reasonable expectation." Ray by Holman v. Bic Corp., 925 S.W.2d 527, 531 (Tenn. 1996) (emphasis added) Therefore, expert testimony is essential.

c) Requires a balancing of factors to determine whether a reasonably prudent manufacturer would have placed the product in the stream of commerce. Factors include “the usefulness and desirability of the product, the safety aspects of the product, the availability of a substitute product which would meet the same need, the manufacturer's ability to eliminate the unsafe character, the user's ability to avoid danger, the user's awareness of the danger, and the feasibility of spreading the loss.” Ray by Holman v. Bic Corp., 925 S.W.2d 527, 532 (Tenn. 1996).

d) Judged at the time the product was placed on the market:

In making this determination, the state of scientific and technological knowledge available to the manufacturer or seller at the time the product was placed on the market, rather than at the time of injury, is applicable. Consideration is given also to the customary designs, methods, standards and techniques of manufacturing, inspecting and testing by other manufacturers or sellers of similar products.

Tenn. Code Ann. § 29-28-105(b)(5).

e) Examples:

(1) Truck-mounted cranes: Johnson v. Manitowoc Boom Trucks, Inc., 484 F.3d 426, 428-29 (6th Cir. 2007).

(2) Fork lifts: Brown v. Raymond Corp., 432 F.3d 640, 643-47 (6th Cir. 2005)

III. Warning Defects

A. Generally: The plaintiff bears the burden of establishing that a product was in a defective condition or otherwise unreasonably dangerous by reason of the manufacturer's failure to provide an adequate warning informing users of the dangers of that product. Goins v. Clorox Co., 926 F.2d 559, 561 (6th Cir. 1991). "An adequate warning is one calculated to bring home to a reasonably prudent user of the product the nature and the extent of the danger involved in using the product." Evridge v. American Honda Motor Co., 685 S.W.2d 632 (Tenn. 1985).

B. Warnings about apparent dangers: A product is not unreasonably dangerous because of a failure to adequately warn of a danger or hazard that is apparent to the ordinary user. Tenn. Code Ann. § 29-28-105(d).

C. Learned intermediary rule: A pharmaceutical manufacturer can discharge its duty to warn by providing the physician with adequate warnings of the drug's risks. Pittman v. Upjohn Co., 890 S.W.2d 425, 429 (Tenn. 1994). The doctrine is limited to the medical arena. See Nye v. Bayer Cropscience, Inc., 347 S.W.3d 686 (Tenn. 2011) (rejecting rule in products liability case involving exposure to asbestos).

IV. Subsequent Unforeseeable Alteration, Change, Improper Maintenance or

Abnormal Use: If a product is not unreasonably dangerous at the time it leaves the control of the manufacturer or seller but was made unreasonably dangerous by subsequent unforeseeable alteration, change, improper maintenance or abnormal use, the manufacturer or seller is not liable.

Tenn. Code Ann. § 29-28-108.

V. **Economic loss rule**: A products liability claim does not lie for pure economic loss caused to the product itself due to a defect. Lincoln Gen. Ins. Co. v. Detroit Diesel Corp., 293 S.W.3d 487, 489 (Tenn. 2009).

VI. Compliance with government standard

A. Rebuttable presumption: compliance with any federal or state statute or administrative regulation existing at the time a product was manufactured and prescribing standards for design, inspection, testing, manufacture, labeling, warning or instructions for use of a product, shall raise a rebuttable presumption that the product is not in an unreasonably dangerous condition. Tenn. Code Ann. § 29-28-104(a).

B. Punitive damages limitation: Section 29-28-104(b) prohibits an award of exemplary or punitive damages if a product was in compliance with state or federal statutes.

VII. Statutes of Limitation and Repose

A. Statute of Limitations: The statute of limitations for a product liability cause of action is the same as for a personal injury or injury to property cause of action. Tenn. Code Ann. § 29-28-103. Therefore, products liability claims must be brought within one year after the cause of action accrues. Tenn. Code Ann. § 28-3-104.

B. Statute of Repose:

1. 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.**
Tenn. Code Ann. § 29-28-103 (emphasis added)

2. Example: Standard Fire Ins. Co. v. Ford Motor Co., 723 F.3d 690 (6th Cir. 2013) (barring claim where car was purchased by original purchaser more than ten years before the date of the injury)

VIII. Limits on Product Liability Actions: Any product liability action must be brought against the manufacturer not the seller unless the seller exercised substantial control over the design, testing, manufacturing or packaging of the product, altered or modified the product, gave an express warranty, or the manufacturer is not subject to service of process in Tennessee or the manufacturer is insolvent. Tenn. Code Ann. § 29-28-106.

IX. Joint and Several Liability: There is no joint and several liability in products liability actions except among manufacturers (not sellers) in actions based upon a theory of strict liability or breach of warranty. Tenn. Code Ann. § 29-11-107(b).

X. Warranty Liability: A products liability action may also be based on a breach of warranty.

A. Express Warranty: Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description. TN Code § 47-2-313(b).

B. Implied Warranty of Merchantability: Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. TN Code § 47-2-314.

C. Implied Warranty for a Particular Purpose. Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose. TN Code § 47-2-313

TORTS - STATUTES OF LIMITATIONS AND REPOSE

I. Statutes of limitations

“All statutes of limitations are intended to ensure fairness and justice. Such statutes prevent undue delay in filing lawsuits and thereby ensure that evidence is preserved and facts are not obscured by the lapse of time or the defective memory or death of a witness.” *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 621 (Tenn. 2002).

A. Personal injury – Tenn. Code Ann. § 28-3-104

1. A lawsuit based upon personal injury must be filed within **one year** after the cause of action “accrued.”
2. The “discovery rule” is applied to determine when the cause of action “accrued.”
3. “The discovery rule is an equitable exception that tolls the running of the statute of limitations until the plaintiff knows, or in the exercise of reasonable care and diligence, should know that an injury has been sustained. The discovery rule does not, however, toll the statute of limitations until the plaintiff *actually* knows that he or she has a cause of action. The plaintiff is deemed to have discovered the right of action when the plaintiff becomes aware of facts sufficient to put a reasonable person on notice that he or she has suffered an injury as a result of the defendant's wrongful conduct.” *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 621 (Tenn. 2002) (internal citations omitted).
4. The lawsuit may be filed within **two years** if the defendant was also criminally charged and prosecuted within one year for the conduct at issue. Tenn. Code Ann. § 28-3-104(a)(2).

B. Property - Tenn. Code Ann. § 28-3-105: A lawsuit based upon injury to property must be filed within **three years** after the cause of action accrued.

C. Health Care Liability – Tenn. Code Ann. § 29-26-116

1. The statute of limitations for health care liability actions is **one year** from the discovery of the injury.
2. Pre-suit notice must be given within the statute of limitations and proper pre-suit notice extends the statute of limitations and statute of repose by **120 days**. Tenn. Code Ann. § 29-26-121(c).

D. Governmental Entities

1. For a claim against the State of Tennessee, notice of the claim (complying with the statutory requirements) must be provided to the division of claims and risk management within the statute of limitations generally applicable for the type of claim. Tenn. Code Ann. § 9-8-402.

2. A tort action against a local governmental entity generally must be commenced within **twelve months** regardless of whether it is based upon personal injury or property damages. Tenn. Code Ann. § 29-20-305(b)

3. The savings statute will not apply to actions against governmental entities. *Lynn v. City of Jackson*, 63 S.W.332, 337-38 (Tenn. 2001).

4. The discovery rule will apply to actions against governmental entities. *Sutton v. Barnes*, 78 S.W.3d 908, 917 (Tenn. App. 2002).

E. Products Liability: The action must be filed within **one year** of the injury. Tenn. Code Ann. § 28-3-104(b)(1).

F. Malpractice: Malpractice actions against attorneys and licensed or certified public accountants must be filed within **one year** of accrual of the action regardless of whether the claim is based upon tort or contract. Tenn. Code Ann. § 28-3-104(c)(1).

G. Defamation

1. **Libel**: A lawsuit based upon libel must be filed within **one year** after the cause of action accrued. Tenn. Code Ann. § 28-3-104(A)(1)(a).

2. Accrual occurs on the date that the libelous statement is published in the county where the lawsuit is filed. *Applewhite v. Memphis State Univ.*, 495 S.W.2d 190, 195 (Tenn. 1973).

3. The discovery rule may apply if the publication was private or confidential. *Ali v. Moore*, 984 S.W.224, 228 (Tenn. App. 1998) *perm. app. denied* (Tenn. 1998); *Leedom v. Bell*, 1997 WL 671918, *7 (Tenn. App. 1997).

4. **Slander**: A lawsuit based upon slander must be filed within **six months** after the words are uttered. Tenn. Code Ann. § 28-3-103.

5. The discovery rule does not apply to slander. *Quality Auto Parts Co. v. Bluff City Buick Co.*, 876 S.W.2d 818, 820-22 (Tenn. 1994).

II. Statutes of Repose

Statutes of repose typically set an absolute deadline for bringing a claim without regard to the date of discovery. Statutes of repose are deemed to be substantive while statutes of limitations are considered procedural. *Calaway ex rel. Calaway v. Schuker*, 193 S.W.3d 509, 515 (Tenn. 2005).

A. Products Liability

1. An action against a manufacturer or seller of a product must be filed within the **six years** of the injury or **ten years** of when the product was purchased or first consumed or **one year** after the expiration of the anticipated life of the product. Tenn. Code Ann. § 29-28-103(a).

2. An action based upon a construction defect or improvement of real property must be filed within **four years** of the substantial completion of the construction – unless

the injury occurred in the fourth year after substantial completion and then the action must be filed within **five years** of the substantial completion. Tenn. Code Ann. § 28-3-202 and 203; 29-28-103

3. The savings statute still applies. *Sharp v. Richardson*, 937 S.W.2d 846, 850 (Tenn. 1996).

4. The statute of repose is tolled by minority. Tenn. Code Ann. § 29-28-103(a).

5. The statute of repose is not tolled by mental incompetency. *Penley v. Honda Motor Co., Ltd.*, 31 S.W.3d 181 (Tenn. 2000)

B. Health Care Liability – Tenn. Code Ann. § 29-26-116 (a)(3) and (a)(4)

1. An action must be filed within three years of the negligent act or omission - regardless of when discovered.

2. Unless fraudulent concealment occurred or unless the action is based upon a retained foreign object, then it still must be filed within one year of discovery.

3. The savings statute still applies. *Cronin v. Howe*, 906 S.W.2d 910, 914-15 (Tenn. 1995).

4. The statute of repose is not tolled by minority, disability or mental incompetency. *See Calaway ex. rel. Calaway v. Schucker*, 193 S.W.3d 509 (Tenn. 2005); *Mills v. Wong*, 155 S.W.3d 916 (Tenn. 2005).

C. Malpractice: Malpractice actions against attorneys and licensed or certified public accountants must be filed within **five years** after act or omission unless fraudulent concealment. Tenn. Code Ann. § 28-3-104(c)(2).

III. Affirmative Defenses

In Tennessee, statutes of limitations and repose are affirmative defenses that must be raised by the defendant. *See* Tenn. R. Civ. P. 8.03; *Pratcher v. Methodist Healthcare Memphis Hospitals*, 407 S.W.3d 727, 739-40 (Tenn. 2013); *Sherrill v. Souder*, 325 S.W.3d 584, 596 (Tenn. 2010).

IV. Savings Statute - Tenn. Code Ann. § 28-1-105

A. An action that is dismissed without prejudice can be refiled within one year of the dismissal.

B. Rule 41.01 of the Tennessee Rules of Civil Procedure permits a plaintiff to voluntarily dismiss a case.

C. Although a plaintiff can voluntarily dismiss an action twice without prejudice, the saving statute will only provide the one-year extension once. *Payne v. Matthews*, 633 S.W.2d 494, 496 (Tenn. App. 1982) *perm. app. denied* (Tenn. 1992).

TORTS - HEALTHCARE LIABILITY

I. **Tennessee Healthcare Liability Act:**

A. A medical malpractice case in Tennessee is a statutory cause of action.

1. The Tennessee legislature passed the Tennessee Healthcare Liability Act to govern such cases. Tennessee Healthcare Liability Act (THLA). Tenn. Code Ann. § 29-26-101 et seq.

2. A health care liability plaintiff generally must prove, by expert testimony, the recognized standard of acceptable professional practice, that the defendant failed to act with ordinary and reasonable care in accordance with that standard, and that the negligence proximately caused injury.

B. Professionals Covered. The THLA covers health care providers. Tenn. Code Ann. § 29-26-101(a)(2) defines a “health care provider” as “[a] health care practitioner licensed, authorized, certified, registered, or regulated under any chapter of title 63 or title 68” of the Code.

C. Act Codifies Common Law Negligence Elements. Tennessee Courts have recognized that the Act “codifies the common law elements of negligence—duty, breach of duty, causation, proximate cause, and damages” against a healthcare provider. *Kilpatrick v. Bryant*, 868 S.W.2d 594, 598 (Tenn. 1993) (citing *Cardwell v. Bechtol*, 724 S.W.2d 739, 753 (Tenn. 1987)).

D. Elements of Cause of Action. Tenn. Code Ann. § 29-26-115(a) requires:

1. To prevail in a health care liability action, a plaintiff must prove:

a) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred;

b) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and

c) As a proximate result of the defendant’s negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

2. Locality Rule. The requirement in Tenn. Code Ann. § 29-26-115(a)(1) requiring knowledge of the community in which the defendant practices or in a similar community is known as the locality rule.

E. Expert Testimony Requirement. These elements in Section 115(a) must generally be proved by expert testimony, and the expert must satisfy the three components of Tenn. Code Ann. § 29-26-115(b). The proposed expert must:

1. be licensed to practice in Tennessee or one of its eight contiguous bordering states;

2. practice a profession or specialty which would make the individual's expert testimony relevant to the issues in the case; and
3. have practiced this profession or specialty in one of these states during the year preceding the date of the alleged injury or wrongful act.

Mitchell v. Jackson Clinic, P.A., 420 S.W.3d 1, 7 (Tenn. Ct. App. 2013) (citing *Shiple v. Williams*, 350 S.W.3d 527, 550 (Tenn. 2011)).

F. Res Ipsa Loquitur. When unable to allege a specific act of negligence, a plaintiff may rely on the doctrine of res ipsa loquitur ("the thing speaks for itself") to create a rebuttable presumption of a defendant's negligence:

1. In a health care liability action as described in subsection (a)[of Tenn. Code Ann. § 29-26-115], there shall be no presumption of negligence on the part of the defendant; provided, that there shall be a rebuttable presumption that the defendant was negligent where it is shown by the proof that the instrumentality causing injury was in the defendant's (or defendants') exclusive control and that the accident or injury was one which ordinarily doesn't occur in the absence of negligence.

Tenn. Code Ann. § 29-26-115(c).

2. Historically, res ipsa in medical malpractice was reserved for cases in which an act or omission in care was so obviously negligent that a layperson applying common knowledge would infer fault. *German v. Nichopoulos*, 577 S.W.2d 197, 202 (Tenn. Ct. App. 1978). Now in Tennessee, the doctrine includes cases involving complex medical issues beyond a layperson's understanding that require expert testimony to establish causation, standard of care, or injury. *Seavers v. Methodist Med. Ctr. of Oak Ridge*, 9 S.W.3d 86, 97 (Tenn. 1999).

G. Statute of Limitations and Discovery Rule.

1. Tenn. Code Ann. § 29-26-116 sets forth the statute of limitations under the Act:
 - a) § 29-26-116(a)(1): The statute of limitations in health care liability actions shall be one (1) year as set forth in § 28-3-104.
 - b) § 29-26-116(a)(2) In the event the alleged injury is not discovered within such one-year period, the period of limitation shall be one (1) year from the date of such discovery.
2. The discovery rule is a reasonable person standard based on information sufficient to put a patient on notice of a claim or potential claim:
 - a) [A] medical malpractice cause of action accrues when one discovers, or in the exercise of reasonable diligence should have discovered, both (1) that he or she has been injured by wrongful or tortious conduct and (2) the identity of the person or persons whose wrongful conduct caused the injury. A claimant need not actually know of the commission of a wrongful action in order for the limitations period to begin, but need only be aware of facts sufficient to place a

reasonable person on notice that the injury was the result of the wrongful conduct of another. If enough information exists for discovery of the wrongful act through reasonable care and diligence, then the cause of action accrues and the tolling of the limitations period ceases. Neither actual knowledge of a breach of the relevant legal standard nor diagnosis of the injury by another medical professional is a prerequisite to the accrual of a medical malpractice cause of action.

b) *Sherrill v. Souder*, 325 S.W.3d 584, 595 (Tenn. 2010). A plaintiff is charged “with knowledge of those facts that a reasonable investigation would have disclosed.” *Id.* at 593 n.7.

H. Notice of Intent to Sue. Under the Act, a claimant must provide written pre-suit notice to a potential defendant before pursuing a claim:

1. Any person, or that person’s authorized agent, asserting a potential claim for health care liability shall give written notice of the potential claim to each health care provider that will be a named defendant at least sixty (60) days before the filing of a complaint based upon health care liability in any court of this state.

Tenn. Code Ann. § 29-26-121(a)(1).

2. This pre-suit notice must also enclose a “HIPAA compliant medical authorization permitting the provider receiving the notice to obtain complete medical records from each other provider being sent a notice.” Tenn. Code Ann. § 29-26-121(a)(2)(E). This requirement is designed to allow investigation and possible resolution of claims prior to their filing.

3. The Tennessee Supreme Court has determined that plaintiffs must substantially comply with the authorization requirement. Substantial compliance requires “a degree of compliance that provides the defendant with the ability to access and use the medical records for the purpose of mounting a defense.” *Lawson v. Knoxville Dermatology Grp., P.C.*, 544 S.W.3d 704, 711 (Tenn. Ct. App. 2017). The statute provides: “The court has discretion to excuse compliance with this section only for extraordinary cause shown.” Tenn. Code Ann. § 29-26-121(b).

I. Extension of Limitations Period. Once a plaintiff provides an appropriate pre-suit notice, the one-year statute of limitations is extended by 120 days. Tenn. Code Ann. § 29-26-121(c).

J. Certificate of Good Faith. Under the Act, a plaintiff must file a certificate of good faith with the Complaint in a case in which expert testimony is required by § 29-26-115. If the certificate is not filed, the complaint is to be dismissed unless the provider did not timely provide records as required by the Act or there is “demonstrated extraordinary cause.”

K. Tenn. Code Ann. § 29-26-122(a) requires that the certificate state:

1. The plaintiff or plaintiff’s counsel has consulted with one (1) or more experts who have provided a signed written statement confirming that upon information and belief they:

- a) Are competent under § 29-26-115 to express an opinion or opinions in the case; and
 - b) Believe, based on the information available from the medical records concerning the care and treatment of the plaintiff for the incident or incidents at issue, that there is a good faith basis to maintain the action consistent with the requirements of § 29-26-115; or
2. The plaintiff or plaintiff's counsel has consulted with one (1) or more experts who have provided a signed written statement confirming that upon information and belief they:
- a) Are competent under § 29-26-115 to express an opinion or opinions in the case; and
 - b) Believe, based on the information available from the medical records reviewed concerning the care and treatment of the plaintiff for the incident or incidents at issue and, as appropriate, information from the plaintiff or others with knowledge of the incident or incidents at issue, that there are facts material to the resolution of the case that cannot be reasonably ascertained from the medical records or information reasonably available to the plaintiff or plaintiff's counsel; and that, despite the absence of this information, there is a good faith basis for maintaining the action as to each defendant consistent with the requirements of § 29-26-115. Refusal of the defendant to release the medical records in a timely fashion or where it is impossible for the plaintiff to obtain the medical records shall waive the requirement that the expert review the medical record prior to expert certification.

II. Damages. Damages under the Act are outlined in Tenn. Code Ann. § 29-26-119:

In a health care liability action in which liability is admitted or established, the damages awarded may include (in addition to other elements of damages authorized by law) actual economic losses suffered by the claimant by reason of the personal injury, including, but not limited to, cost of reasonable and necessary medical care, rehabilitation services, and custodial care, loss of services and loss of earned income, but only to the extent that such costs are not paid or payable and such losses are not replaced, or indemnified in whole or in part, by insurance provided by an employer either governmental or private, by social security benefits, service benefit programs, unemployment benefits, or any other source except the assets of the claimant or of the members of the claimant's immediate family and insurance purchased in whole or in part, privately and individually.

III. Other Considerations.

A. Informed Consent. A patient has a right to understand the circumstances surrounding treatment decisions. If a healthcare provider fails to inform a patient of the "risks or aspects associated with a procedure," then patient may have a claim for lack of informed consent. *Blanchard v. Kellum*, 975 S.W.2d 522, 524 (Tenn. 1998). For informed consent, "the inquiry focuses on whether the doctor provided any or adequate information to allow a patient to formulate an intelligent and informed decision when

authorizing or consenting to a procedure.” *Id.* Misrepresentation of a material fact by a provider vitiates consent. *Holt v. Alexander*, 2005 WL 94370, at *6 (Tenn. Ct. App. Jan. 13, 2005).

B. Medical Battery. Medical battery cases involve two questions: (1) “was the patient aware that the doctor was going to perform the procedure”; if so, (2) “did the patient authorize performance of the procedure?” *Blanchard*, 975 S.W.2d at 524. The “answers to these questions focus on the patient's knowledge and awareness.” *Church v. Perales*, 39 S.W.3d 149, 159 (Tenn. Ct. App. 2000). If the answer to either question is “no,” then plaintiff may pursue a claim for battery.

C. Presumption for Signed Documents. Generally, Tennessee law presumes that people who sign documents are bound by the signatures because they have read and understood the nature of the documents. This rule applies in medical battery and informed consent cases. In healthcare cases, there is a presumption that the patient understands the nature, terms, and general meaning of executed consent forms involving medical treatment in most cases. *Church*, 39 S.W.3d at 161.

TORTS - Wrongful Death

I. Generally: “Tennessee’s wrongful death statutes form a patchwork of sorts.” Beard v. Branson, 528 S.W.3d 487, 496 (Tenn. 2017).

A. “The right of action that a person who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrongdoer ... shall not abate or be extinguished by the person's death but shall pass to the person's surviving spouse and, in case there is no surviving spouse, to the person's children or next of kin; to the person's personal representative, for the benefit of the person's surviving spouse or next of kin.” Tenn. Code Ann. § 20-5-106(a).

B. “The action may be instituted by the personal representative of the deceased or by the surviving spouse in the surviving spouse's own name, or, if there is no surviving spouse, by the children of the deceased or by the next of kin.” Id. § 20-5-107(a).

C. “Where a person's death is caused by the wrongful act, fault or omission of another and suit is brought for damages, as provided for by §§ 20-5-106 and 20-5-107, the party suing shall, if entitled to damages, have the right to recover for the mental and physical suffering, loss of time and necessary expenses resulting to the deceased from the personal injuries, and also the damages resulting to the parties for whose use and benefit the right of action survives from the death consequent upon the injuries received. Id. § 20-5-113.

II. Priorities:

A. A surviving spouse has priority to bring a claim above others listed in the statute.

1. A surviving spouse waives his or her rank in the event the surviving spouse abandons the other spouse. Tenn Code Ann. § 20-5-106(c)(1).

2. The statute does not provide an exception to the spousal priority rule for a surviving spouse who negligently killed their spouse. Nelson v. Myres, 545 S.W.3d 428 (Tenn. 2018).

B. The administrator may bring an action for the benefit of the persons with statutory priority. The rank of the administrator is determined by the rank of the beneficiary whose rights he is representing. Johnson v. Metropolitan Government of Nashville and Davidson County, 665 S.W.2d 717 (Tenn. 1984).

1. An adult beneficiary has priority over an administrator in prosecuting his or her own action. Busby v. Massey, 686 S.W.2d 60 (Tenn. 1984).

2. A party may waive his or her statutory right. Waiver may be effected by absolute action or inaction inconsistent with the claim or right in question. Koontz v. Fleming, 65 S.W.2d 821 (Tenn. 1933); Foster v. Jeffers, 813 S.W.2d 449 (Tenn. Ct. App. 1991).

III. Damages recoverable: “Survivors of the deceased may recover damages for their losses suffered as a result of the death as well as damages sustained by the deceased from the time of injury to the time of death.” Jordan v. Baptist Three Rivers Hosp., 984 S.W.2d 593, 598 (Tenn. 1999).

A. Damages sustained by the decedent: Damages include “medical expenses, physical and mental pain and suffering, funeral expenses, lost wages, and loss of earning capacity. Id. at 600.

B. Damages sustained by the survivors: Damages include incidental damages, which includes the pecuniary value of the decedent’s life. Id.

1. “Pecuniary value has been judicially defined to include 'the expectancy of life, the age, condition of health and strength, capacity for labor and earning money through skill, any art, trade, profession and occupation or business, and personal habits as to sobriety and industry.' Pecuniary value also takes into account the decedent's probable living expenses had the decedent lived.” Id.

2. “[T]he statute's plain language appears to encompass consortium damages.” Id.

a) Loss of consortium damages encompass “not only tangible services provided by a family member, but also intangible benefits each family member receives from the continued existence of other family members. Such benefits include attention, guidance, care, protection, training, companionship, cooperation, affection, love, and in the case of a spouse, sexual relations.” Id. at 602.

b) Spouses and children may sue for loss of consortium. Id. at 601.

c) Parents may sue for loss of consortium resulting from the death of a minor child. Thurmon v. Sellers, 62 S.W.3d 145, 161 (Tenn. Ct. App. 2001). However, parents cannot recover for the sorrow and anguish endured as a result of the child's death. Id.