TORT AND COMPARATIVE FAULT LAW UPDATE

Presenter: JOHN A. DAY

This paper includes a summary of what in my opinion are the most important tort opinions issued by Tennessee appellate courts in the last year. Every word of substance in this paper is taken directly from the opinion of the court. Brackets are used to show any deviation from the actual words from the opinion. Only the headings are my creation. Quotation marks are omitted to save time and enhance readability.

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I. ARBITRATION CASES

A. DOROTHY OWENS, as Conservator of Mary Francis King, *et al*. v. NATIONAL HEALTH CORPORATION, *et al.*, No. M2005-01272-SC-R11-CV (November 8, 2007)

The Court's Summary:

In this appeal, the primary issue is whether a durable power of attorney for health care authorized the attorney-in-fact to enter into an arbitration agreement as part of a contract admitting the principal to a nursing home and thereby to waive the principal's right to trial by jury. The case also presents secondary issues relating to the arbitration agreement, including whether this case is governed by the Tennessee Uniform Arbitration Act or the Federal Arbitration Act. We hold that the arbitration agreement is to be interpreted pursuant to the Tennessee Uniform Arbitration Act and that the power of attorney authorized the attorney-in-fact to enter into the arbitration agreement on behalf of the principal. In addition, we reject the plaintiff's arguments that: 1) the arbitration agreement is unenforceable because a material term of the agreement is incapable of performance; 2) the arbitration agreement violates federal law; and 3) pre-dispute arbitration agreements in nursing-home contracts violate public policy. However, we remand the case to the trial court for further proceedings on the question of whether the arbitration agreement is an unconscionable, and thus unenforceable, contract of adhesion.

Key Language from the Court's Opinion:

- We need not belabor our analysis on this point because Section H(3), the arbitration provision within the nursing-home contract, expressly provides that this agreement for binding arbitration shall be governed by and interpreted in accordance with the laws of the state where the Center is licensed. It is undisputed that NHC Healthcare, Murfreesboro is licensed in Tennessee. Therefore, that language does not merely provide that issues of substantive law are to be determined by reference to Tennessee law; it clearly provides that the arbitration agreement itself "shall be governed by and interpreted" in accordance with the laws of Tennessee. Applying *Volt*, we must conclude that this case is governed by the Tennessee Uniform Arbitration Act and not the Federal Arbitration Act.

- The phrase "to the same extent as the principal" as used in section 34-6-204(b) clearly indicates that, absent a limitation in the power of attorney, an attorney-in-fact can make exactly the same types of health care decisions that the principal could make if he or she had the mental capacity to do so. That statute, read in light of the statutory definitions mentioned above, leads to the conclusion that an attorney-in-fact acting pursuant to a durable power of attorney for health care may sign a nursing-home contract that contains an arbitration provision because this action is necessary to consent . . . to health care. Tenn. Code Ann. § 34-6-201(3). Because King herself could have decided to sign the nursing-home contract containing the arbitration provision had she been capable, section 34-6-204(b) leads us to conclude that Daniel was authorized to sign the arbitration provision on King's behalf. As a result, the plaintiff's argument that the power of attorney did not authorize Daniel to sign the arbitration agreement is without merit.

- For the reasons stated above, we must reject the plaintiff's argument that King's power of attorney does not authorize Daniel to sign the arbitration agreement and thereby to waive King's right to trial by jury. We hold that Daniel was authorized to sign the nursing-home contract, including its arbitration provision. This holding, however, does not resolve the plaintiff's other issues as to whether the arbitration agreement is enforceable.

- Notwithstanding section 29-5-304, the plaintiff argues that the specification of the two arbitration organizations was such a material term of the contract that the contract itself must fail if neither of those organizations is available to conduct the arbitration. The plaintiff's argument on this issue is without merit. First, there simply is no factual basis for the plaintiff's assertion that the specification of the two organizations was so material to the contract that it must fail if they are unavailable. Second, it appears that at least one of the two specified organizations *will* conduct the arbitration *if ordered by a court to do so*.

- Thus, the plaintiff's argument is based upon the false factual premise that neither organization is available to conduct an arbitration in this case. It appears that the AHLA will conduct the arbitration if ordered by a court to do so. For the foregoing reasons, the plaintiff's argument that the contract is void because a material term is incapable of performance is without merit.

- The plaintiff argues that the arbitration agreement in the nursing-home contract violates federal law. The plaintiff argues that the waiver of a right to trial by jury constitutes a form of "other consideration" prohibited by the federal statute and regulation. The plaintiff therefore contends that it is illegal to require a patient to sign an arbitration agreement waiving the right to a jury trial as a precondition for being admitted to a nursing home.

- Relying on *Coosa Valley Health Care*, *Broughsville*, and *Sanford*, the Court of Appeals concluded that requiring a nursing-home admittee to agree to arbitrate a dispute with the nursing home is not equivalent to charging an additional fee or other consideration. We agree with the intermediate appellate court's analysis and hold that the arbitration agreement in King's nursing-home contract did not violate either the federal statute or the federal regulation.

- In arguing that pre-dispute arbitration agreements in nursing home contracts violate public policy, the plaintiff relies primarily upon the "Heathcare Due Process Protocol" adopted by the American Arbitration Association. *See* "Healthcare Due Process Protocol," American Arbitration Association/American Bar Association/American Medical Association Commission on Healthcare Dispute Resolution, Final Report, July 27, 1998, *available at* http://www.adr.org/sp.asp?id=28633 (last visited August 1, 2007). In support of her argument on this issue, the plaintiff quotes several portions of the Due Process Protocol that state that binding forms of alternative dispute resolution ("ADR") should be used only where the parties agree to do so *after* a dispute arises and that consent to use an ADR process should not be a requirement for receiving emergency care or treatment. The plaintiff goes on to assert that the admission of patients to nursing homes is analogous to "emergency care or treatment" and that consent to use arbitration therefore should not be a requirement for admission to a nursing home.

- The Due Process Protocol relied upon by the plaintiff does not apply to nursing-home contracts. By its express terms, the Due Process Protocol applies only in the context of disputes arising between patients and their *private managed-care plans*. Due Process Protocol, Paragraphs I ("Introduction") and II ("Summary of Recommendations"). Notwithstanding the limited scope of the Due Process Protocol, one could argue that one or more of the general principles stated in the Protocol might be equally applicable in health care settings other than the managed-care setting. None of those general principles, however, would support a holding that pre-dispute arbitration agreements in nursing-home contracts are per se invalid on public policy grounds. Such a holding would amount to a public-policy "exception" to the Tennessee Uniform Arbitration Act, a matter more properly within the purview of the General Assembly. For the foregoing reasons, we reject the plaintiff's assertion that pre-dispute arbitration agreements in nursing-home contracts are per se invalid because they violate public policy.

- We are unable to resolve the question of whether the arbitration agreement is unconscionable due to the limited nature of the factual record. We therefore conclude that the case should be remanded to the trial court for further proceedings on that issue. The trial court, in its discretion, may allow the parties to conduct discovery. *See Berger v. Cantor Fitzgerald Sec*., 942 F. Supp. 963,4 966 (S.D.N.Y. 1996) (allowing discovery concerning arbitration agreement and enforceability issues). We express no opinion, however, as to the ultimate resolution of the unconscionability issue.

- The record discloses no facts supporting a fiduciary relationship, contractual or otherwise, between King and the nursing home prior to the time King, through Daniel, signed the nursing-home contract. We therefore agree with the intermediate appellate court that the arbitration agreement is not unenforceable on the breach-of- fiduciary-duty ground asserted by the plaintiff. Given our holding that this issue is without merit, any discovery allowed by the trial court on remand should not include discovery on the breach-of- fiduciary-duty issue.

- For the reasons stated above, we affirm the holdings of the Court of Appeals that the agreement is governed by the Tennessee Uniform Arbitration Act and that the power of attorney authorized Daniel to sign the arbitration agreement on behalf of King. We also affirm the intermediate appellate court's holding that the arbitration agreement is not unenforceable on the ground that a material term of the agreement is incapable of performance. We likewise affirm the Court of Appeals' holding that the arbitration agreement does not violate federal law. We further hold that a pre-dispute arbitration agreement in a nursing-home contract is not per se invalid as against public policy. In addition, we affirm the intermediate appellate court's holding that the agreement is not unenforceable on the ground that requiring King to sign an arbitration agreement breached a purported fiduciary duty owed to King by the defendants. We vacate, however, the Court of Appeals' judgment insofar as it holds that the arbitration agreement is not an unconscionable contract of adhesion, and we remand for further proceedings on that issue. In light of our remand for further proceedings on the unconscionability issue, we also vacate the intermediate appellate court's instruction to the trial court to enter an order compelling arbitration.

- We affirm in part and vacate in part the judgment of the Court of Appeals and remand the case to the trial court for further proceedings consistent with this opinion.

B. EVA HENDRIX, et al. vs. LIFE CARE CENTERS OF AMERICA, INC., et al., No. E2006-02288-COA-R3-CV (December 21, 2007)

The Court's Summary:

In this wrongful death case, Eva Hendrix ("Daughter"), acting individually and as administratrix of the estate of her mother, the decedent Edith Beck ("Mother"), sued Life Center Centers of America, Inc. ("Nursing Home") among others. Nursing Home filed a "Motion to Compel Arbitration" based upon an arbitration clause signed by Daughter when Mother was admitted to Nursing Home's facility approximately four months before her death. Daughter responds that she was not actually authorized to act as Mother's attorney-in-fact at that time because Mother was still able to make her own medical decisions and therefore the power of attorney never became effective. The trial court agreed. Nursing Home appeals, arguing that Daughter's power of attorney was effective when she signed the arbitration clause, and that, in any event, an actual or apparent agency relationship existed between Mother and Daughter, and Mother and Daughter "treated the [power of attorney] document as though it was

effective." We find that the evidence does not preponderate against the trial court's conclusion that the power of attorney was not in effect when Daughter signed the various documents handed to her by Nursing Home. We further hold that Nursing Home's alternative theories must fail as a matter of law. We therefore affirm.

Key Language from the Court's Opinion:

- As an initial matter, we must decide which Power of Attorney document controls this case. Mother executed two separate POAs: a Tennessee Healthcare Durable Power of Attorney and a broader Durable Power of Attorney. The healthcare POA was executed in August 2002; the general POA was executed in June 2003. Both documents name Daughter as Mother's attorney-in-fact, but the circumstances under which Daughter's authority becomes effective are different under language found in the two documents.

- If the general POA, as interpreted by Nursing Home, controls, it would follow that Daughter's POA powers were active at the time of Mother's admission, and therefore the arbitration clause would be valid. However, the general POA also contains this important language, in the section on medical care:

> In the event I have executed a valid Durable Power of Attorney for Health Care and in the event there is any conflict between the two documents, it is my intention that the Durable Power of Attorney for Health Care shall be controlling.

- The general POA states that the healthcare POA controls "[i]n the event I have *executed a valid* [healthcare POA]" (emphases added). If we were to accept Nursing Home's logic, we would essentially be rewriting that clause and declaring, in effect, that the healthcare POA takes precedence *only upon becoming effective*, contrary to the expressed intent of the parties that it take precedence upon being validly executed. This would mean that, in any case with similar language where the general POA has a broader definition of incapacity than the healthcare POA, the general POA's more permissive standards for effectiveness would take precedence over the healthcare POA's more stringent standards. We think, based on the text of the document in question, that this is clearly not what is intended by the phrase "[i]n the event I have executed a valid Durable Power of Attorney for Health Care and in the event there is *any conflict* between the two documents" (emphasis added). Where the matter at issue relates to health care, and there is a conflict between the general POA and the healthcare POA over the question of whether the attorney-in-fact had POA authority at the time in question, the healthcare POA, by the general POA's own terms, controls.

- Having determined that the healthcare POA controls, the next question is whether the trial court erred in ruling that "[t]here is no evidence before the Court that the decedent was incapacitated at the time of her admission to Life Care" and therefore "there has been no showing that the power of attorney became active." We believe the context of the trial court's opinion, particularly the reference to Mother signing the Do Not Resuscitate order, makes clear that the court was referring to the concept of mental incapacity (as opposed to physical incapacity). We interpret the court's order as declaring, as a factual matter, that Mother was not mentally incapacitated, and thus was able to make her own medical decisions and give informed consent with respect to medical and other healthcare decisions.

- Because Mother was not incapacitated to the point of being unable to make her own decisions, it is clear that Daughter's POA authority, by the terms of the document creating it, was not effective at the time she signed the arbitration clause. It is not dispositive that the purported attorney-in-fact who invalidly signed the arbitration agreement is the same person as the plaintiff in this case. The arbitration clause purported to relinquish Mother's rights, not Daughter's, and it is not valid – it never was valid – unless its execution was validly authorized by Mother. This remains true regardless of Daughter's role in subsequent litigation.

- We note that Nursing Home cannot prevail on an apparent agency theory. Nursing Home's brief contains considerable discussion of Daughter's beliefs, understandings and representations, but these alone cannot create apparent agency because they relate to acts and statements of the purported agent, not the purported principal (in this case, Mother). "Apparent agency is essentially agency by estoppel; its creation and existence depend upon such conduct by the apparent principal as will preclude him from denying another's agency." White v. Methodist Hosp. S., 844 S.W.2d 642, 646 (Tenn. Ct. App. 1992) (emphasis added). Nursing Home simply does not make out a case that it relied on any conduct or representations by Mother that Daughter was her agent for the purpose in question. Daughter's testimony establishes only that she believed she had the authority to act on Mother's behalf because of the POA document – the very document that we have already found to be ineffective for purposes of this case.

- Nursing Home is not entitled to simply "rely upon someone who comes in and says, 'I'm the POA. I have the authority. Here's the Power of Attorney. Let me sign the documents.'" By signing the arbitration agreement, Daughter sought to bind Mother to a course of action that altered her legal rights. Unless Mother's power-of-attorney documents were in effect at the time – and we have already affirmed the trial court's ruling that they were not – Daughter did not have the power to do this. That her retrospective powerlessness now accrues to her own benefit is an odd quirk of this case's facts, and is undoubtedly frustrating to Nursing Home, but it does not alter the pertinent legal doctrines nor the proper outcome of this case. The arbitration agreement was not validly agreed to by Mother, and therefore it cannot bind her or her estate. For the foregoing reasons, we affirm the trial court's ruling.

C. IRA LYNN REAGAN, As Conservator of the property and person of Hazel Rayborn, an incapacitated person, v. KINDRED HC OPERATING INC., et al., No. M2006-02191-COA-R3-CV (December 20, 2007)

The Court's Summary:

This appeal involves an arbitration agreement that was executed by a nursing home resident when she was admitted to the nursing home. The resident's estate has filed an action against the nursing home in circuit court and demanded a trial by jury on all issues. The defendants filed a motion to compel arbitration. The administrator of the resident's estate argued that (i) the arbitration agreement was incapable of performance for failure of an essential term; (ii) the nursing home breached fiduciary duties it owed to the resident by obtaining her signature on the agreement; (iii) the agreement was an unconscionable contract of adhesion; and (iv) the resident was unable to knowingly agree to arbitrate disputes, thereby waiving her right to a jury trial. The trial court dismissed the motion to compel arbitration without making any findings of fact or conclusions of law. The defendants appeal. For the following reasons, we reverse and remand for entry of an order compelling arbitration.

Key Language from the Court's Opinion:

- Arbitration agreements in contracts are favored in Tennessee both by statute and existing case law. Benton v. Vanderbilt University, 137 S.W.3d 614, 617 (Tenn. 2004). The Tennessee Legislature, by enacting the Uniform Arbitration Act, embraced a legislative policy favoring enforcement of agreements to arbitrate. Buraczynski v. Eyring, 919 S.W.2d 314, 317 (Tenn. 1996). Under the Tennessee act, "a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract ...." Tenn. Code Ann. § 29-5-302(a) (2000). "Accordingly, under the terms of the statute, arbitration agreements generally are enforceable unless grounds for their revocation exist in equity or in contract law." Buraczynski, 919 S.W.2d at 318. In determining whether there is a valid agreement to arbitrate, courts should apply ordinary state-law principles that govern formation of contracts. Taylor v. Butler, 142 S.W.3d 277, 284 (Tenn. 2004).

- There is simply no evidence to support Mr. Reagan's contention that the entire ADR Agreement must fail if ADR Associates, LLC, is unavailable to serve as the Administrator. In fact, the ADR Agreement expressly recognized that ADR Associates, LLC, might become unwilling or unable to serve as the Administrator, and it provided that the parties would select "another independent and impartial entity that is regularly engaged in providing mediation and arbitration services to serve as Administrator."

- Here, the arbitration agreement was a separate, stand-alone document. Still, the ADR Agreement was presented along with the admissions contract, in the same stack of documents, during the same presentation and process of admitting Ms. Rayborn to Masters. Even assuming arguendo that a fiduciary duty might have arisen once Ms. Rayborn was admitted to Masters, we find that no such relationship existed during the admissions process. Thus, the ADR Agreement is not unenforceable on the ground that Masters breached a purported fiduciary duty owed to Ms. Rayborn by presenting it for her acceptance.

- Although there are some factors in this case that weigh in favor of a finding of procedural unconscionability, we believe they are outweighed by the factors that do not support such a finding. Mr. Reagan did testify that Ms. Rayborn had only completed the eighth grade and some homeschooling, and he did not think she had a high school diploma. He also testified that she could not see well, and he did not know whether or not she was able to read the admissions documents that she signed. However, Mr. Reagan acknowledged Ms. Rayborn's ability to understand the documents if they were explained to her. Mr. Reagan testified that when the first insurance documents were presented in Ms. Rayborn's room, "the situation was explained to me what each paperwork was about, as well as with my mother." Mr. Reagan explained that it would be hard for his mother to read documents "without someone actually reading it to her." Mr. Reagan said that he generally explained some of the documents to her, but not in depth. Mr. Reagan did not voice any concerns he had about his mother's ability to sign documents to any Masters employees, and he apparently expected her to sign the documents herself during these initial discussions with Masters employees.

- Even assuming that Ms. Rayborn did give Mr. Reagan permission to sign, and Masters employees heard her, we see no reason why Ms. Rayborn would have thereby deprived herself of authority to also sign documents. As previously discussed, Mr. Reagan never told anyone at Masters that he was acting as Ms. Rayborn's legal representative. Furthermore, when Ms. Gibbons was explaining the admissions paperwork, Ms. Rayborn never told her about her son. Mr. Reagan

admits that he had no legal authority to prevent Ms. Rayborn from signing the arbitration agreement. Ms. Rayborn had never been diagnosed or adjudicated mentally incompetent, and no one had been appointed as her conservator or executed a power of attorney.

- Here, the resident, Ms. Rayborn, signed the ADR Agreement herself, and it was proper for her to do so. In short, even if Mr. Reagan had oral express authority from Ms. Rayborn to sign documents on her behalf, we see no reason why Ms. Rayborn thereby became unable to contract.

- The ADR Agreement was not a contract of adhesion. Ms. Rayborn could have been admitted to Masters even if she refused to sign it. The signature page clearly provides that execution of the Agreement is "not a precondition to the furnishing of services to the Resident by the Facility." Assuming that Ms. Rayborn did not read the ADR Agreement, Ms. Gibbons explained to her that it was voluntary for her to sign. Ms. Rayborn was not forced to choose between forever waiving the right to a trial by jury or foregoing necessary medical treatment.

- There is nothing in the record to suggest that Ms. Rayborn was coerced into signing the ADR Agreement, or that she was denied an opportunity for a meaningful choice. There is similarly nothing to indicate that Ms. Rayborn felt uncomfortable signing the admissions documents as Ms. Gibbons explained them to her. Ms. Rayborn simply mentioned to her son that she had signed more admissions documents after he left, that he had not signed, without further elaboration. Mr. Reagan stated that he was not upset when he learned that Ms. Rayborn had signed the admissions documents, implicitly recognizing her authority to do so. The ADR Agreement is not a contract of adhesion, and Mr. Reagan does not contend that the substantive terms of the agreement are unreasonably harsh. Considering all the facts and circumstances of this case, we conclude that the ADR Agreement is not unconscionable, oppressive, or unenforceable.

- Finally, Mr. Reagan contends that Ms. Rayborn did not knowingly and voluntarily waive her right of access to the courts and a jury trial by signing the arbitration agreement. Mr. Reagan first argues that in the nursing home context, one cannot comprehend the significance of an arbitration agreement when admitting a family member because the facility makes assurances that the resident will be taken care of, and the resident cannot foresee the mistreatment or abuse that may occur. To the extent that Mr. Reagan suggests that it is impossible to knowingly and freely agree to arbitrate disputes "in the nursing home context," we find his argument to be without merit.

- The fact that Ms. Rayborn became confused five days after being admitted to Masters does not demonstrate that she was incompetent on October 14, 2003, when she was admitted. Ms. Bilbrey testified that Ms. Rayborn seemed oriented, that she knew who she was and where she was, and she recalled being a former employee of Masters. According to the Nursing Assessment performed when Ms. Rayborn was admitted, her verbal responses were oriented, appropriate, and not confused. She was also described as alert and not lethargic, and her mental status was listed as "Not disoriented." Ms. Rayborn only missed one question on the mental state exam that she was given.

- By Mr. Reagan's own account, Ms. Rayborn was able to weigh her options and determine which course of action she felt would be in her best interest, also taking into account the consequences that other options would have on her family.

- From our careful review of the record, considering all the facts and circumstances of this case, we find Mr. Reagan has failed to demonstrate that Ms. Rayborn was unable to understand, in a reasonable manner, the nature and consequences of executing the ADR Agreement or unable to

act in a reasonable manner in relation to the transaction. Keeping in mind that adults are presumed competent to enter contracts and make health care decisions, we do not find sufficient evidence indicating that Ms. Rayborn was incapable of agreeing to arbitrate disputes, thereby waiving her right to a jury trial. Finding no grounds for revocation of the arbitration agreement in equity or in contract law, we reverse the decision of the circuit court and remand for the entry of an order compelling arbitration.

D. GARY PHILPOT v. TENNESSEE HEALTH MANAGEMENT, INC., et al., No. M2006-01278-COA-R3-CV (December 12, 2007)

The Court's Summary:

In this wrongful death action, five defendants contest the trial court's denial of their Motion to Compel Arbitration and Stay Proceedings. At issue on appeal is the validity of the arbitration agreement signed by the plaintiff on behalf of his mother, the deceased, on the day of her admission to the defendants' nursing home. The trial court denied the defendants' Motion to Compel Arbitration and Stay Proceedings finding "the agreement to arbitrate unenforceable as it is one of adhesion, oppressive, and unconscionable." We have determined that, based on the evidence in the record, the arbitration agreement is enforceable. Therefore, we reverse the decision of the trial court and remand to the trial court for the entry of an order compelling arbitration.

Key Language from the Court's Opinion:

- The plaintiff contends the circumstances surrounding the signing of the agreement render it unconscionable due to what he characterizes as an urgency to find a facility for his mother. As the trial court recognized in its order, the arbitration agreement was signed by the plaintiff on the day Ms. Miller was to be released from the hospital, and the record indicates the plaintiff was told that he had to decide whether to take the open spot at the NHC facility or the bed would be filled by someone else. The record, however, reflects the fact the NHC facility was not the only nursing home facility in the area, and that the plaintiff knew that there was another facility. Moreover, the record reflects the "urgency" was due in principal part to the plaintiff's desire to attend to this matter during his lunch break.

- The plaintiff argues that he was presented with an admissions packet containing a number of lengthy documents and the NHC staffer "quickly flipped through the pages," essentially summarized the contents, and did not explain that signing the arbitration agreement meant that the plaintiff was giving up his right to a jury trial. The affidavit of the NHC staffer, however, contradicted the plaintiff's testimony.

- Nothing in the record suggests that the plaintiff's educational background or abilities prohibited him from comprehending the agreement he signed. Moreover, the plaintiff does not argue that the agreement is unclear, nor does he argue that he requested additional time to read the agreement, nor did he ask questions.

- The agreement reveals that the arbitration provision and the jury trial waiver were not hidden in the contract. To the contrary, they were prominently disclosed in the contract documents in several places. On its face, the agreement states, in bold all capital letters, that the document is a jury trial waiver and dispute resolution procedure and that both parties are waiving the right to a jury trial for all disputes and claims between the parties. In addition, the relevant provisions were set apart from the rest of the admission documents and clearly labeled "Arbitration Agreement"

on a separate cover sheet, followed by a two-page document clearly stating that this agreement contained a "Jury Trial Waiver." The acknowledgment and signature block was also set apart, which emphasized that by signing the agreement, the plaintiff was agreeing to the Jury Trial Waiver and Dispute Resolution Procedure, that the provisions had been explained and he had been provided the opportunity to ask questions, and that, explicitly, the plaintiff was waiving his right to trial by jury. Thus, the plaintiff was clearly informed of the terms of the agreement and the waiving of the jury trial right.

- The plaintiff contends the arbitration agreement lacks mutuality, that it only requires the plaintiff to arbitrate, not the NHC defendants, which was one of the reasons stated by the trial court for finding the arbitration agreement unenforceable. We, however, are unable to reach the same conclusion as the trial court. The arbitration agreement expressly states that *the parties* mutually waive the right to a jury trial for all disputes and claims between the parties. The agreement also provides that all disputes shall be submitted to binding arbitration with the exception of claims not exceeding the jurisdictional limit of the general sessions court. Thus, the parties could file suit in general sessions court, without going to arbitration, provided the amount in controversy was within the jurisdictional limits of that court.

- The plaintiff contends the arbitration procedure specified in the agreement would be cost prohibitive. The trial court agreed with the plaintiff on this point and made a finding to that effect. We, however, have determined that the evidence in the record is insufficient to support this finding. When a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, the burden of showing the likelihood of incurring prohibitively expensive costs is on that party. *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 363 (Tenn. Ct. App. 2001) (*quoting Alabama v. Randolph*, 531 U.S. 79 (2000)). Thus the burden was on the plaintiff to show the costs would be prohibitively expensive. The only evidence the plaintiff provided pertains to a fee schedule of the American Arbitration Association; however, the agreement does not require the services of the AAA to arbitrate the parties' disputes and the parties were free to select any arbitrator they agree upon. The agreement merely provides that the arbitrator selected by the parties shall use the procedures of the AAA as guidelines in the event the parties cannot agree upon the governing rules and procedures to arbitrate their dispute. Moreover, the transcript reflects the acknowledgment of the trial court that the AAA "will not honor these types of pre-dispute arbitration agreements in the context of the medical services contract." Accordingly, because the AAA would not agree to arbitrate a dispute among the parties, its fee schedule is not material.

- The final issue to address is the plaintiff's challenge to the revocation provision, which affords the plaintiff the right to revoke the arbitration provisions within ten business days of signing the agreement. The trial court found the revocation procedure "problematic" and expressed concern it would lead to the discharge of the resident from the nursing facility if the right were exercised. Had the plaintiff invoked his right to revoke the arbitration provision, he and his mother may have been presented with the adverse circumstance contemplated by the trial court. That circumstance, however, would be no more problematic than the termination of the physician-patient relationship and interruption of the course of the patient's treatment contemplated in *Buraczynski*. With the Supreme Court having found the revocation provision in the arbitration and waiver of jury trial agreement enforceable in *Buraczynski*, which is substantially similar to the agreement at issue here, we find no basis upon which to rule otherwise.

- Having determined the arbitration and jury trial waiver provisions of the agreement at issue are valid and enforceable, we respectfully reverse the decision of the trial court and remand with instructions to enter an order compelling arbitration pursuant to the parties' agreement.

E. CHARLIE RAINES, as Administrator of the Estate of Zelma Raines, deceased v. NATIONAL HEALTH CORPORATION d/b/a NHC Healthcare, et al., No. M2006-01280-COA-R3-CV (December 6, 2007)

The Court's Summary:

This case was filed as a nursing home neglect case. The issue before the Court relates to the enforceability of an arbitration agreement signed during the nursing home admissions process by the holder of a durable power of attorney. The trial court denied the appellants' motion to compel arbitration. It held that the arbitration agreement was beyond the authority of the attorney-in-fact, and, therefore, it did not reach questions related to the capacity of the decedent to execute the durable power of attorney; nor did it address the unconscionability of the agreement. We reverse the trial court as to its ruling on the authority of the attorney-in-fact and remand for a hearing and decision on the other issues not previously reached below.

Key Language from the Court's Opinion:

- At the time the trial court ruled in this case it was unclear whether a person with a power of attorney could enter into an arbitration agreement with a healthcare facility and thereby waive the principal's right to a trial by jury. This issue has now been decided. A power of attorney covering health care decisions does authorize the attorney-in-fact to enter into an arbitration agreement on behalf of the principal as part of a contract admitting the principal to a nursing home, and it thereby also authorizes the attorney-in-fact to waive the principal's right to a jury trial. *Owens v. Nat'l Health Corp*., ___ S.W.3d ___, 2007 WL 3284669 (Tenn. Nov. 8, 2007). Thus, the trial court erred when it ruled that the attorney-in-fact in this case could not have possessed authority under the power of attorney to enter into the arbitration agreement with NHC.

- Because the trial court ruled that the power of attorney could not have authorized the attorney-in-fact to enter into the arbitration agreement, it did not decide the two other issues which were before it: (1) Whether Ms. Raines was mentally incapable of executing the power of attorney; and (2) Whether the agreement was unconscionable and therefore unenforceable. The defendants ask us to decide these issues without remand. They argue that the record is such that the Court can find that Ms. Raines had the mental capacity to enter into a binding power of attorney; they also argue that this Court can find that the arbitration agreement was not unconscionable. The Court disagrees. Often when a trial court's decision rests upon an improper legal standard and omits necessary factual and legal analysis, it is appropriate to remand the case to the trial court for reconsideration. *See, e.g., Dandridge v. Williams*, 397 U.S. 472, 475 n. 6, 90 S.Ct. 1153 (1970) (citation omitted); *Reynolds v. Giuliani,* ___ F.3d ___, 2007 WL 3171314, at *13 (2d Cir. Oct. 31, 2007); *First Tennessee Bank v. Hurdlock*, 816 S.W.2d 38, 40 (Tenn. Ct. App. 1991) (remand within judicial discretion when issues have been left undecided by the trial court).

- Accordingly, this Court is of the opinion that this matter should be remanded to the trial court for it to consider these two remaining defenses and for it to also make findings of fact and conclusions of law as to whether the arbitration agreement is enforceable.

- The trial court's decision is reversed on the issue of whether the arbitration agreement was beyond the authority of the attorney-in-fact. *See Owens*, ___ S.W.3d ___, 2007 WL 3284669 (Tenn. Nov. 8, 2007). This case is remanded, however, for the trial court to determine the validity of the two other asserted defenses and for it to otherwise rule on the enforceability of the arbitration agreement.

F. DOROTHY NECESSARY v. LIFE CARE CENTERS OF AMERICA, INC. D/B/A LIFE CARE CENTER OF JEFFERSON CITY, No. E2006-00453-COA-R3-CV (November 16, 2007)

The Court's Summary:

This appeal involves the validity of an arbitration agreement entered into by Dorothy Necessary ("Plaintiff") while signing documents on her husband's behalf to have him admitted to a skilled nursing facility. Plaintiff had her husband's oral express authority to sign all paperwork necessary for his admission to the facility. Plaintiff claims, however, that this express authority did not include the power to enter into an arbitration agreement on her husband's behalf. The Trial Court agreed and refused to enforce the arbitration agreement in this wrongful death action filed by Plaintiff on her deceased husband's behalf. We vacate the judgment of the Trial Court and remand for further proceedings.

Key Language from the Court's Opinion:

- Although the present case does not involve a written power of attorney, we think the rationale and holding of *Owens* is nevertheless dispositive of this appeal. In the present case, Plaintiff essentially argues that she had express authority from the Decedent, who was competent to give her that authority, to sign all of the admission documents and make all of the decisions regarding his admission to Life Care's facility - except one: she did not have his authority to sign an arbitration agreement, even though he did not withhold such authority. Such a conclusion would result in the type of "untenable" situation described in *Owens*, *supra*. Therefore, we hold that Plaintiff, who had the Decedent's express authority to sign the admission documents at the healthcare facility, also had the authority to sign the arbitration agreement on the Decedent's behalf as one of those admission documents.

- The judgment of the Trial Court that Plaintiff lacked authority to sign the arbitration agreement on the Decedent's behalf is vacated. This cause is remanded to the Trial Court for further proceedings consistent with this Opinion and the Supreme Court's opinion in *Owens*, *supra*. The judgment of the Trial Court is vacated and this case is remanded to the Trial Court for further proceedings consistent with this Opinion and the Supreme Court opinion in *Owens v. National Health Corp*., — S.W.3d — , 2007 WL 3284669 (Tenn. Nov. 8, 2007), and for collection of the costs below.

G. JANIE CABANY v. MAYFIELD REHABILITATION AND SPECIAL CARE CENTER et al., No. M2006-00594-COA-R3-CV (November 15, 2007)

The Court's Summary:

This appeal involves the enforceability of an arbitration clause in a nursing home's admission contract. The resident was admitted to the nursing home following hospitalization for unsatisfactory care at another nursing home. Upon admission, the resident's spouse signed an admission contract containing an arbitration clause. After the resident's death, his spouse filed suit in the Circuit Court for Rutherford County against her husband's healthcare providers, including the nursing home. When the nursing home

moved to compel arbitration in accordance with its admission contract, the resident's spouse asserted that the arbitration clause was unenforceable because (1) she did not have actual authority to waive her spouse's right to a jury trial, (2) the arbitration clause was a contract of adhesion, and (3) the arbitration clause violated a federal law prohibiting nursing homes from receiving additional consideration apart from Medicare or Medicaid in the admissions process. The trial court declined to compel arbitration after concluding that the resident's durable power of attorney for healthcare applied only to medical decisions and that the decision to waive the right to a jury trial was a legal, not a medical, decision. The nursing home has appealed. We have determined that the trial court's interpretation of the scope of the resident's power of attorney for healthcare was too narrow and that the trial court also erred by failing to determine first whether the conditions authorizing the spouse to act under the power of attorney for healthcare existed when she executed the admission contract.

Key Language from the Court's Opinion:

- In their rush to address the interesting legal question regarding the efficacy of a binding arbitration provision in a contract for admission to a nursing home, the parties and the trial court overlooked a basic foundational issue. They did not ascertain whether, at the time Ms. Cabany executed NHC's contract of admission, she was validly exercising the authority vested in her by Mr. Cabany's September 22, 2003 power of attorney for healthcare.

- Mr. Cabany's power of attorney for healthcare clearly empowered Ms. Cabany to act for him only "when I can't make my own medical decisions." By plain language of the power of attorney for healthcare, Ms. Cabany was not authorized to sign NHC's contract of admission on January 9, 2004 unless Mr. Cabany was unable to do so. This record contains absolutely no evidence regarding Mr. Cabany's ability to make medical decisions on January 9, 2004 when Ms. Cabany signed NHC's admissions contract or any evidence regarding any steps that NHC may have taken to ascertain whether Mr. Cabany was competent to make his own decisions.

- Mr. Cabany availed himself of the option of creating a durable power of attorney for healthcare to empower Ms. Cabany to make decisions on his behalf in the event that he became incapacitated. The document, however, expressly provides that it does not become effective until Mr. Cabany is no longer capable of making decisions for himself. Mr. Cabany retained in his healthcare power attorney "the right to make medical and other healthcare decisions for [himself] so long as [he] [could] give informed consent with respect to the particular decision." The determination of whether Mr. Cabany retained the capacity to make decisions for himself was to be made by his "agent and [his] attending physician." In other words, unless Mr. Cabany was incapable of making healthcare decisions for himself, he remained the sole authorized decision-maker.

- Upon this record, NHC cannot meet its burden of demonstrating that Mr. Cabany lacked capacity to execute its admission contract and agree to binding arbitration in January 2004. Responding to an inquiry during oral argument, counsel for NHC stated that there is no evidence in the record indicating Mr. Cabany was unable on January 9, 2004 to decide for himself whether to waive his right to a jury trial in the event of a dispute. Questioned as to whether there had been any prior determination that Mr. Cabany was incapable of making decisions on his own behalf, NHC's counsel answered, "No, your honor, not that I am aware of." Simply stated, there is no evidence in the record as to what Mr. Cabany's mental capacity was when Mr. Cabany executed NHC's admission contract.

- There is no evidence in the record before us that would allow this court to conclude that NHC has met its burden of showing that Mr. Cabany was incapacitated in January 2004 and that his right to

autonomous decision-making had been transferred under his durable healthcare power of attorney to Ms. Cabany.

- We vacate the May 17, 2006 order denying NHC's motion to compel arbitration first because the trial court had not addressed the threshold question regarding Mr. Cabany's decision-making capacity in January 2004, and second because the trial court erred by concluding that the power of attorney for healthcare that Mr. Cabany executed on September 22, 2003 did not authorize Ms. Cabany to waive her husband's right to a jury trial and agree to binding arbitration. We remand the case to the trial court for further proceedings consistent with this opinion.

H. STATE FARM FIRE AND CASUALTY COMPANY, as subrogee of, GERALD SCOTT NEWELL, et al. v. EASYHEAT, INC., et al., No. M2006-02363-COA-R3-CV (November 7, 2007)

The Court's Summary:

The trial court denied Defendant Tennessee Heritage Enterprises's motion to compel arbitration under the Federal Arbitration Act notwithstanding the arbitration clause contained in the construction contract executed by Plaintiff homeowner and Defendant. The trial court denied arbitration on the basis of insufficient interstate commerce. Defendant appeals; we reverse and remand.

Key Language from the Court's Opinion:

- In its brief to this Court, State Farm asserts the arbitration clause contained in the contract for construction in this case is not binding under Tennessee Code Annotated § 29-5-302(a) because the arbitration provision contained in the contract for construction of residential property was not separately signed or initialed by the parties. State Farm further asserts the FAA is inapplicable because the transaction between the parties did not have a "substantial relation" to interstate commerce. It asserts that the interstate commerce in this case is insufficient to permit application of the FAA because THE is a Tennessee corporation with its principal place of business in Tennessee; THE has never done business outside this state; all subcontractors engaged by THE were from Tennessee; and where, although many products used in the construction of the home were manufactured out-of-state, they were not purchased from an out-of-state vendor.

- THE, on the other hand, asserts the contract involves interstate commerce where the Defendants named on the complaint, corporations responsible for the manufacture, design, testing and marketing of the floor warming system, are Delaware and Missouri Corporations with principal places of business in Indiana, Illinois, Missouri, and North Carolina. It cites *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995), in support of its argument that the contract evidences interstate commerce for the purposes of the FAA where a significant number of materials and systems used in the construction of the home were manufactured outside Tennessee. We must agree.

- In this case, it is undisputed that a substantial number of the materials used by THE in the construction of the Newell home, including the roof shingles, lumber, windows, tile, carpet, insulation, appliances, mortar, HVAC units, wood trim, flooring, and the floor warming system at the center of this dispute, were manufactured outside of Tennessee. Further, although State Farm asserts these materials were purchased by THE after leaving the flow of commerce, the FAA clearly reaches beyond the "flow" of commerce and is applicable even where interstate commerce was not contemplated by the parties at the time the contract was executed.

- We must agree that the contract here involves interstate commerce where a substantial amount of materials used in the Newell home were manufactured out of Tennessee by non-Tennessee entities. We agree with THE that the FAA is applicable in this case.

- The arbitration provision contained in the contract executed by THE and the Newells is enforceable under the FAA where the transaction "involves" interstate commerce. In light of this holding, it is unnecessary for us to address State Farm's assertion that the provision would not be enforceable under section 302(a) of the Tennessee Arbitration Act as codified at Tennessee Code Annotated § 29-5-301, et. seq. if the FAA were inapplicable. We accordingly reverse the judgment of the trial court. This matter is remanded for entry of an order compelling arbitration and staying litigation of the action against THE.

I. BRIDGETT HILL, et al. v. NHC HEALTHCARE/NASHVILLE, LLC, et al., No. M2005-01818-COA-R3-CV (April 30, 2008)

The Court's Summary:

The administrators of the estate of a woman who died after being transported by ambulance from a nursing home to a hospital filed a wrongful death suit which named the nursing home and the ambulance service as defendants. The nursing home responded with a motion to compel arbitration, citing a provision in the admissions agreement which the decedent had signed, requiring both parties to submit any disputes to arbitration and to waive their rights to jury trial. The trial court found the arbitration clause to be unconscionable and denied the motion. The nursing home then filed a direct appeal to this court pursuant to Tenn. Code Ann. § 29-5-319. We affirm.

Key Language from the Court's Opinion:

- The contract in *Owens* included the same language as the contract herein stating that arbitrations of disputes would be done by the American Arbitration Association or the American Health Lawyers Association. Since neither of those organizations any longer conducts arbitrations of health care claims in which the agreement to arbitrate pre-dates the dispute, the plaintiff in *Owens* asserted that the contract was unenforceable. The plaintiff in this case makes the same argument. In *Owens*, the Supreme Court rejected that argument on the basis that Tennessee Code Annotated § 29-5-304 provides that when an agreed-upon arbitrator is unavailable, the court may appoint an arbitrator. *Id*., at *8. The Court also rejected the plaintiff's claim that the specification of the two arbitration organizations was a material term of the contract requiring failure of the contract if those organizations are unavailable. *Id*. This court is, of course, bound by the holdings of the Tennessee Supreme Court in Owens. Consequently, we must reject the same arguments put forth herein.

- The plaintiffs herein argue that the FAA and the Tennessee Arbitration Act are similar in the relevant provisions, and the trial court found there was not much difference in the application of the two statutes. In any event, both federal and state law allows courts to apply state law defenses to contract enforcement of arbitration provisions and to decline to enforce such a provision "upon such grounds as exist at law or inequity for the revocation of any contract." Tenn. Code Ann. § 29-5-302; *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (holding that generally applicable contract defenses, including unconscionability, may be applied to invalidate arbitration agreements without contravening the FAA). The trial court herein based its decision on the generally applicable contract defense of unconscionability. Consequently, the unequal state law

argument under the FAA does not apply. We find no error in the trial court's consideration of the defense of unconscionability.

- The contract in the present case contains identical language to the choice of law provision in *Owens*, quoted above, and the defendant does not dispute that it is licensed to do business in Tennessee. Accordingly, we hold that the Tennessee Arbitration Act is to be applied herein.

- The admissions contract herein containing the arbitration provision is a contract of adhesion. It was a standard form contract drafted by the nursing home and was presented to the patient on a take-it or leave-it basis. She clearly had no bargaining power, needed the care the nursing home offered, and would not have been admitted if she did not sign… The conclusion that the admissions contract herein was an adhesion contract does not, however, end the inquiry. Contracts of adhesion are not favored and must be closely scrutinized to determine if unconscionable or oppressive terms are imposed which prevent enforcement of the agreement. *Id*. at 316. Nevertheless, such contracts are enforceable unless they are found to be "beyond the reasonable expectations of an ordinary person, or oppressive or unconscionable." *Id*. at 320.

- Thus, we conclude that an agreement to arbitrate that places excessive costs on the claimant as a precondition to arbitration may be unconscionable because of the inequality of the bargain, the oppressiveness of the terms, or the one-sided advantage to the drafter. Consequently, the costs to initiate or pursue arbitration of the wrongful death claim in the case before us is a factor to be considered in determining whether the agreement to arbitrate is enforceable.

- The proof shows that the likely costs to simply initiate an arbitration under the agreement are very high, perhaps reaching $18,000. We, like the trial court, find this troubling. The cost to initiate litigation would be considerably less. The arbitration agreement, an adhesion contract, is of a distinct benefit to its drafter, NHC, if its cost provisions serve to deter claims. A party who has been damaged by the actions of NHC cannot seek redress in the courts if the arbitration agreement is enforced, but may, due to expense that would not accompany the initiation of litigation, be precluded from seeking relief in the arbitral forum. We do not disagree that a party who was fully informed of the potential costs, having weighed all the risks and benefits, may agree to arbitrate disputes, as many businesses have done. However, in the situation where the arbitration agreement is a contract of adhesion and there is no proof that the claimant had any information upon which to make a fully informed choice, or that any other meaningful choice was available, benefit to the drafter calls into question the enforcement of the agreement.

- In the case before us, the agreement to arbitrate and waive the right to judicial determination of any dispute was contained within a multi-page agreement for admission to the nursing home, unlike cases where the arbitration agreement was a separate, clearly identified document. The provision in the case before us did not explain arbitration in any detail, and no such explanation was otherwise offered. The provisions are less than clear in several particulars, and certainly did not place a patient on notice that large fees might be required as a prerequisite to pursuing any claim against the nursing home.

- Ms. Hill lacked bargaining power. Neither Ms. Hill nor her children were given time after admission to seek clarification of the arbitration provision, such as determining the amount of up-front costs, or to later revoke agreement to the arbitration provision.

- As set out earlier, the question of unconscionability requires courts to consider all the facts relating to a contract's purpose and effect as well as to the setting in which it was signed. One

particular fact may not be the determinative factor; instead, it is the overall situation that must be considered. Under all the facts and circumstances of this case, we agree with the trial court that the arbitration provision was unconscionable and should not be enforced… The order of the trial court is affirmed.

J. VICKY JONES, INDIVIDUALLY AND AS THE DAUGHTER OF MARIE HURST, DECEASED, ALSO AS REPRESENTATIVE OF THE HEIRS OF THE ESTATE OF MARIE HURST AND/OR FOR THE USE AND BENEFIT OF THE HEIRS AND ESTATE OF MARIE HURST, DECEASED v. KINDRED HEALTHCARE OPERATING, INC. et al., No. W2007-02568-COA-R3-CV (August 20, 2008)

The Court's Summary:

We here review a trial court's denial of the defendants' motion to compel arbitration. Each defendant is alleged to have been involved in the ownership and operation of a nursing home facility at which the mother of the plaintiff was a resident prior to her death. The mother had, several years earlier, executed a general durable power of attorney naming one of her daughters as her attorney-in- fact. Later that daughter signed a letter purporting to give another of the mother's daughters certain powers. This daughter then secured the admission of their mother to the nursing facility in question here and in the admissions process signed an arbitration agreement. The defendants contend that her signature is effective to require arbitration of the claims raised in this suit. We conclude that the signing daughter did not possess the requisite authority to enter into a binding arbitration agreement. Accordingly, we affirm the trial court's decision and remand for further proceedings.

Key Language from the Court's Opinion:

- Here, Ms. Blackard—apparently occupied with other matters—asked Ms. Sawyer to assist their mother in obtaining admission to a nursing home. Ms. Blackard gave Ms. Sawyer a notarized letter stating that Ms. Sawyer was thereby entrusted with the "right to make medical and financial decisions in and for the well being of Marie Hurst." Kindred argues forcefully that, under Tenn. Code Ann. § 34-6-109(9), Ms. Blackard possessed the authority to delegate her powers to Ms. Sawyer and that, therefore, Ms. Sawyer could enter into the ADR Agreement with Kindred. Ms. Jones responds that Kindred's interpretation of this provision is overly expansive. We agree with Ms. Jones.

- The authority conferred on the attorney-in-fact in Tenn. Code Ann. § 34-6-109(9) is that necessary to carry out the duties delegated by the principal. These would include the authority to hire lawyers, accountants, real estate agents, and the like. Hiring these individuals would be necessarily related to Ms. Blackard's handing of Ms. Hurst's "financial and personal affairs." Ms. Hurst chose Ms. Blackard to act on her behalf, and there is nothing in the language of the power of attorney document she signed or in Tenn. Code Ann. § 34-6-109(9) which would allow Ms. Blackard to choose what would effectively be a substitute attorney-in-fact. It is one thing for the attorney-in-fact to employ agents to carry out her duties; it is quite another for the attorney-in-fact to delegate her powers to another not chosen by the principal.

- Ms. Hurst selected Ms. Blackard to act as her attorney-in-fact. She did not select Ms. Sawyer to so act, and Ms. Blackard had no power to appoint Ms. Sawyer as a substitute attorney-in-fact. Wherever one draws the line between powers conferred on the attorney-in-fact that may not be delegated and powers of the attorney-in-fact that may be delegated because they are ministerial in nature or delegable under Tenn. Code Ann. § 34-6-109(9), obtaining admission to a nursing home

and signing an arbitration agreement which includes a waiver of the right to a jury trial must fall on the side of the nondelegable powers. Ms. Blackard thus had no authority to delegate this power. Therefore, the ADR Agreement signed by Ms. Sawyer is unenforceable.

- Such a delegation was never contemplated by the law governing powers of attorney, and it is antithetical to the singular authority of the principal to designate her attorney-in-fact. The power of a principal to choose her attorney-in-fact is personal and inalienable. Only the principal or the courts can replace the selected attorney-in-fact.

- We wish to make clear that the decision here is narrow and that there are several things which we have not decided in this case. Our opinion only addresses the ability of an attorney-in-fact to delegate to another the ability to enter into an arbitration agreement. Because it is unnecessary for this Court to reach the question, we express no opinion as to whether or not the durable power of attorney signed by Ms. Hurst in 2001—which was not a power of attorney for healthcare—carried with it the power to make medical decisions… For the reasons stated above, the decision of the trial court denying arbitration is affirmed, and this case is remanded for further proceedings consistent with this opinion.

K. NINA MCKEY, Administratrix of the estate of Ruby Irene Brewer, Deceased v. NATIONAL HEALTHCARE CORP. et al., No. M2007-02341-COA-R3-CV (August 15, 2008)

The Court's Summary:

This appeal concerns the enforceability of an arbitration agreement included in a nursing home's admission documents. The trial court denied the defendants' motion to compel arbitration based upon its finding that the defendants had not proven that the family members who signed the arbitration agreement had authority to do so under the Tennessee Healthcare Decisions Act. We affirm the decision of the trial court.

Key Language from the Court's Opinion:

- In order to bind Ms. Brewer to the Arbitration Agreement, Ms. Fletcher and/or Ms. McKey had to have authority to act as her agent or surrogate. *See Thornton v. Allenbrooke Nursing & Rehab. Ctr., LLC*, No. W2007-00950-COA-R3-CV, 2008 WL 2687697, *5 (Tenn. Ct. App. July 3, 2008); *Raiteri ex rel Cox. v. NHC Healthcare/Knoxville, Inc*., No. E2003-00068-COA-R9-CV, 2003 WL 23094413, *9 (Tenn. Ct. App. Dec. 30, 2003). It is undisputed that neither daughter possessed a power of attorney or guardianship over her mother's affairs. NHC asserts that Ms. Fletcher and Ms. McKey had authority to act for their mother under the Tennessee Health Care Decisions Act, Tenn. Code Ann. § 68-11-1801, *et seq*.

- Thus, with respect to a patient who, like Ms. Brewer, has not designated a health care surrogate, Tenn. Code Ann. § 68-11-1806(b) and (c) require that certain conditions be met in order to authorize a surrogate to act on behalf of the patient. These conditions include (1) a prior determination by the designated physician that the patient lacks capacity and (2) identification of the surrogate by the supervising health care provider with documentation in the current clinical record.

- At oral argument, Ms. McKey conceded that Ms. Brewer was incompetent at the time of admission. NHC argues that this concession satisfies the statutory requirement of a finding of incapacity. We cannot agree.

- As to the prior determination of incapacity, there is nothing in the record to establish that Ms. Brewer's designated physician determined that she lacked capacity. A "designated physician" is defined as "a physician designated by an individual or the individual's agent, guardian, or surrogate, to have primary responsibility for the individual's health care or, in the absence of a designation or if the designated physician is not reasonably available, a physician who undertakes such responsibility." Tenn. Code Ann. § 68-11-1802(a)(4). In this case, the nursing home admission agreement named Dr. Khatri as Ms. Brewer's attending physician. As Ms. Brewer's attending physician, Dr. Khatri qualifies as "a physician who undertakes such responsibility [for Ms. Brewer's health care]." Therefore, in the absence of a previous designation by Ms. Brewer or her agent, Dr. Khatri is her designated physician under the statute.

- NHC argues that the nursing home was the supervising health care provider because it was the health care provider that had assumed primary responsibility for Ms. Brewer's care. The language of the statute, however, specifically provides that the supervising health care provider shall be the designated physician if there is one and if he or is she is available. As discussed above, Dr. Khatri qualifies as Ms. Brewer's designated physician. In light of the statutory requirement that the designated physician identify the surrogate, NHC was obligated to obtain such identification from Dr. Khatri if he was reasonably available. There is no evidence in the record that Dr. Khatri was not reasonably available.

- The Tennessee Health Care Decisions Act affects a person's fundamental right to personal autonomy. *Cabany*, 2007 WL 3445550, at *5. In light of the important interests at stake, we have concluded that it is essential that the requirements of the Tennessee Health Care Decisions Act be met before a person can be deprived of the right to make his or her own health care decisions. The statutory requirements were not satisfied in this case… The decision of the trial court is affirmed.

L. VIRGINIA L. RICKETTS et al. v. CHRISTIAN CARE CENTER OF CHEATHAM COUNTY, INC. et al., No. M2007-02036-COA-R9-CV (August 15, 2008)

The Court's Summary:

This is an interlocutory appeal concerning the enforceability of an arbitration agreement included in a nursing home's admission agreement. The trial court ruled that the arbitration agreement was enforceable. Because we find that the person who signed the admission agreement did not have the authority to act for the decedent, we reverse the decision of the trial court.

Key Language from the Court's Opinion:

- In order to bind Ms. Williamson to the arbitration agreement, Ms. Ricketts must have had authority to act as her agent or surrogate. *See Thornton v. Allenbrook Nursing & Rehab. Ctr., LLC,* No. W2007-00950-COA-R3-CV, 2008 WL 2687697, *5 (Tenn. Ct. App. July 3, 2008); *Raiteri*, 2003 WL 23094413, at *9. It is undisputed that Ms. Ricketts did not possess a power of attorney or guardianship over her mother's affairs.

- The defendants argue that *Raiteri* is distinguishable because the patient in *Raiteri* was still mentally competent and Ms. Williamson was not. Even if we assume that Ms. Williamson was not competent at the time that Ms. Ricketts signed the agreement, that fact does not make a difference in the result. Ms. Ricketts must have some basis of authority… If Ms. [Williamson] was not competent at the time she was readmitted, she no longer had the ability to give authority to her daughter.

- A major problem with this argument is that the Tennessee Health Care Decisions Act did not take effect until July 1, 2004. 2004 Tenn. Pub. Acts ch. 862. The agreement at issue was signed by Ms. Ricketts in August 2003. The defendants maintain that the trial court did not err in applying the Tennessee Health Care Decisions Act retroactively… We find nothing in the Tennessee Health Care Decisions Act evidencing an intent for the statute to operate retroactively. We further find that this statute is neither remedial nor procedural. Rather, the Tennessee Health Care Decisions Act affects what our courts have described as a fundamental right: personal autonomy, which includes the ability to make one's own decisions about health care. *Cabany*, 2007 WL 3445550, at *5. Moreover, as a matter of contract law, retroactive application of the surrogacy provisions of the statute could lead to the anomalous result of validating the contract even though, at the time when the contract was signed, Ms. Ricketts did not have authority to act for her mother.

- The defendants also argue that Ms. Williamson was a third party beneficiary of the admission agreement and is therefore bound by the agreement… The defendants' argument appears to be based upon the premise that, even if Ms. Ricketts lacked authority to act on behalf of her mother, there was a contract between Ms. Ricketts and Christian Care… We do not find these authorities persuasive here. Third party beneficiary concepts should not be used to circumvent the threshold requirement that there be a valid arbitration agreement. Ms. Ricketts signed the admission agreement as Ms. Williamson's "representative." She was not entering into a contract on her own behalf, but as her mother's representative. The issue in this case is whether Ms. Ricketts had authority to act as her mother's agent and to enter into a contract on her behalf. If she did not have authority, there is no valid contract. Without a valid contract, there can be no third party beneficiary.

- Because Ms. Ricketts did not have authority to sign the admission agreement on her mother's behalf, the arbitration provisions are not enforceable against Ms. Williamson's estate and wrongful death beneficiaries. We therefore reverse the decision of the trial court.

M. CANNON COUNTY BOARD OF EDUCATION v. GOLDY WADE and CANNON COUNTY EDUCATION ASSOCIATION, No. M2006-02001-COA-R3-CV (July 31, 2008)

The Court's Summary:

Plaintiff's employment contract as a probationary teacher was not renewed. He filed a grievance under the agreement existing between the local board of education and the local professional employees' association. As the last step in the grievance procedure, the teacher sought binding arbitration. The board filed an action seeking a declaratory judgment that it was not required to arbitrate the former employee's grievance. The trial court dismissed that action, and on appeal this court reversed and remanded for further consideration by the trial court. The trial court then ruled that the issues raised by the teacher were subject to arbitration, and the board again appealed to this court. We hold that a locally negotiated agreement cannot be interpreted to delegate to an arbitrator the decision of whether to renew a

probationary teacher's contract because state statutes clearly give that decision to local school officials. Consequently, we reverse the trial court.

Key Language from the Court's Opinion:

- Under the trial court's ruling the decision not to renew Mr. Wade's employment is subject to review by an arbitrator as a dispute over the interpretation of, application of, or compliance with certain provisions of the locally negotiated agreement. The provisions that are the basis of Mr. Wade's grievance are not provisions specifically dealing with non-renewal of untenured teachers. The parties did not include in the agreement any specific limitations on the decision not to renew a probationary teacher's contract. Instead, the provisions at issue relate to procedures surrounding, and motivation for, a variety of decisions or conduct by the system administration that are described somewhat generally in those provisions. The Association and Mr. Wade assert those provisions apply to non-renewal decisions, thereby contractually limiting the discretion of local school administrators.

- The arbitration provision in the locally negotiated agreement in this case is not specific as to the procedures to be used in the actual arbitration. Neither is it specific as to available remedies. It simply provides that the arbitrator's decision shall be in writing and that the arbitrator is "without power or authority to make any decision which requires the commission of an act prohibited by law or which is violative of the terms of this agreement." It further states that the arbitrator's decision is binding. It contains no limitations on the scope of relief that can be included in the decision. Submission of Mr. Wade's grievance to binding arbitration without any limitation on the scope of remedies available to an arbitrator creates the possibility that an arbitrator could make employment decisions that are assigned by statute to local school administrators. It also creates the possibility that the decision not to renew a nontenured teacher's employment would be subjected to a set of standards that is different from that employed by courts under existing law. We find no authority in the EPNA for that result. *See Arnwine*, 120 S.W.3d at 808.

- In the case before us, however, the agreement calls for "binding arbitration" as the last step in the grievance procedure, coming after the board has decided the grievance.

- In the case before us, the agreement provides for binding arbitration without limitation on remedies, and the grievance is based on provisions not directly addressing non-renewals of probationary employment. These provisions cannot be enforced or applied to delegate to an arbitrator the decision of whether a probationary teacher's one-year contract should be renewed.

- In their appellate brief, the Association and Mr. Wade assert that the arbitration provision is an agreed contractual modification of the statutory rights of the board of education or director of schools and that such modifications are not only allowed but are the essential purpose of the EPNA. We respectfully disagree. While private parties have freedom to agree to almost any legal term, including a dispute resolution method, local school administration, employment in local schools, and even the collective bargaining process are governed by state statute. Statutory provisions cannot be rendered ineffective by contract, and contracts may not be enforced to effectuate a result that is contrary to statute. Accordingly, we conclude that the question of the non-renewal of Mr. Wade's employment contract cannot be subjected to binding arbitration.

N. MATTHEW THORNTON, et al. v. ALLENBROOKE NURSING AND REHABILITATION CENTER, LLC, et al., No. W2007-00950-COA-R3-CV (July 3, 2008)

The Court's Summary:

This appeal involves a dispute over an arbitration agreement, and stems from a nursing home abuse and neglect case. The decedent's daughter signed all the paperwork associated with the decedent's admission to the nursing home. An arbitration agreement was included in the admissions agreement. Decedent's daughter, as next of kin, filed a complaint alleging nursing home abuse and neglect. The nursing home moved to stay the case and compel the matter to arbitration. The trial court held that daughter did not have authority to waive decedent's constitutional right to a jury trial, and denied the nursing home's motion. The nursing home appeals. We affirm the trial court's decision.

Key Language from the Court's Opinion:

- We agree with Nursing Home that if the contract is valid and enforceable, that the forum selection clause is binding. However, first we must determine whether the Decedent is, indeed, bound to the Arbitration Agreement. Accordingly, we turn to a discussion of agency law.

- Here, Nursing Home contends that Daughter's participation in handling Decedent's medical matters is proof of a principal/ agent relationship between Decedent and Daughter. As support for its argument, Nursing Home argues that Daughter made medical decisions with the doctors during Decedent's hospital stay in 2004, signed paperwork admitting Decedent to another nursing home prior to Decedent's admittance to Defendant Nursing Home, met with Mr. Wells, and signed Nursing Home's admissions paperwork.

- At her deposition, Daughter testified that: Daughter told Mr. Wells that she did not have "Power of Attorney" for her mother, Daughter's aunt and uncle made the decision to admit Decedent to Nursing Home because the uncle's daughter worked there; Daughter knew only one of Decedent's doctors, and was not familiar with Decedent's other doctors; Daughter did not know of any significant event in 2004 where her mother, Decedent, relied on Daughter's assistance; and Daughter did not sign checks for Decedent, sell or buy property for Decedent, obtain a residence for Decedent, acquire government aid for Decedent, secure insurance for Decedent, or acquire or dispose of property for Decedent prior to Decedent's admission to Nursing Home.

- Daughter was not appointed to be Decedent's attorney-in-fact until May 11, 2005, five (5) months after Decedent's admission to Nursing Home… Further, our review of the record reveals that, at the time of admission to Nursing Home, Decedent had not been informed by anyone, including her family, that she was being admitted to a nursing home. At the time of admission, Nursing Home concedes that Decedent was a mentally competent person at all relevant times; however, Nursing Home never asked Decedent if she wanted to sign the Admissions paperwork or review the instruments thereafter.

- Based on the record before us and the trial court's findings of fact, we conclude that no actual or apparent agency relationship existed between Decedent and Daughter. Although Daughter assisted Decedent in being admitted to both nursing care facilities, her involvement in most aspects of the Decedent's life was quite limited, as Decedent managed her own personal affairs. No Power of Attorney existed at the time Daughter signed the Admissions Agreement, and she did not purport to be Decedent's attorney-in-fact.

- Nursing Home also argues that, regardless of whether Daughter had authority to bind Decedent to the Arbitration Agreement, Decedent ratified the contracts signed by Daughter through her inaction… Nursing Home argues that Decedent's failure to protest, dissent, or otherwise disaffirm her daughter's acts constitutes ratification.

- We are hard-pressed to find that this or any other portion of Daughter's testimony shows that Decedent had full knowledge of all material facts and circumstances related to Daughter signing the admission instruments. The material terms of the transaction are not discussed, the circumstances of the signing are not set forth, and nothing indicates when this discussion took place… Accordingly, we find that the trial court did not err by finding that no ratification occurred under these facts.

- Daughter executed the forms in the Admissions Agreement necessary to obtain the Medicaid and Medicare payments, and Decedent received the benefits of healthcare and a residence from Nursing Home. Accordingly, Nursing Home argues, Decedent manifested her assent to the Admission Agreement… We have already held that Daughter did not have the authority to sign the Arbitration Agreement on Decedent's behalf, and that, because Decedent did not have knowledge of the material facts and circumstances surrounding the instrument, she did not ratify the Arbitration Agreement by her inaction. Accordingly, we cannot find that Decedent manifested assent to Daughter's contracting on her behalf. Due to our decision regarding the agency, ratification, and mutual assent issues, all other issues are pretermitted.

O. BILL HEATH, as Administrator of the estate of Hazel Christine Heath, Deceased, and on behalf of the wrongful death beneficiaries of Hazel Christine Heath v. NATIONAL HEALTH CORPORATION, et al., No. M2008-00960-COA-R9-CV (July 1, 2008)

The Court's Summary:

This application for an interlocutory appeal concerns the enforceability of an arbitration agreement allegedly signed by the decedent upon her admission to the defendants' nursing facility. The trial court granted the defendants' motion to compel arbitration, but granted the plaintiff permission to appeal pursuant to Tenn. R. App. P. 9. We concur with the trial court that this is an appropriate case for an interlocutory appeal. We vacate the trial court's order and remand the case to the trial court to allow the parties to conduct discovery and for an evidentiary hearing on the issue of the validity and enforceability of the arbitration agreement.

Key Language from the Court's Opinion:

- The administrator challenges the enforceability of the arbitration agreement on several grounds including unconscionability and the authenticity of Ms. Heath's signature. The Tennessee Supreme Court has recognized the viability of unconscionability as a defense to an agreement to arbitrate within a nursing home services contract. *Owens v. National Health Corporation et al*, No. M2005-01272-SC-R11-CV, 2007 WL 3284669 at *11 (Tenn. Nov. 8, 2007). The issue of unconscionability is an intensely fact-driven inquiry. *Hill v. NHC HealthCare/Nashville, LLC*, No. M2005-01818-COA-R3-CV, 2008 WL 1901198 at *6 (Tenn. Ct. App. April 30, 2008)… A proper factual record is likewise necessary to resolve issues concerning the authenticity of a signature.

- The parties in this case were not allowed to conduct discovery on the issue of unconscionability or the authenticity of Ms. Heath's signature. This court cannot review the trial court's decision on these issues without a proper factual record. Accordingly, the case should be remanded to the trial court for an evidentiary hearing on the issues related to the validity and enforceability of the agreement and for discovery related to those issues subject to an appropriate scope as determined by the trial court.

- The Tenn. R. App. P. 9 application for permission to appeal is hereby granted. The trial court's orders entered on January 24, 2008, and July 20, 2007, are vacated and the case is remanded to the trial court for an evidentiary hearing on the issue of the validity and enforceability of the arbitration agreement and for relevant discovery.

II. AUTOMOBILE CASES

A. MARK MIDGETTE, et al. v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al., No. M2007-00556-COA-R3-CV, (December 20, 2007)

The Court's Summary:

This is an appeal of three consolidated lawsuits involving an automobile accident in Davidson County. Following a non-jury trial, the Trial Court found that Chad Lankford, who was driving an ambulance for the Metropolitan Government of Nashville and Davidson County (the "Metropolitan Government"), was 67% at fault for the accident. The Trial Court assigned 33% of the fault to Carolyn Murphy, the driver of the automobile which struck the ambulance. The Metropolitan Government appeals claiming the Trial Court erred when it determined that Chad Lankford was negligent, and it further erred when it assigned 67% of the fault to Lankford. We affirm.

Key Language from the Court's Opinion:

- On appeal, the Metropolitan Government initially claims that because the Trial Court did not incorporate its findings announced after trial into the final judgments, those findings cannot be considered by this Court. We disagree. The oral pronouncement of the Trial Court was transcribed and included in the transcript on appeal and is as much a part of the record as the testimony of the various witnesses. Therefore, we will consider the factual findings of the Trial Court announced after the trial and accord those findings the proper weight on appeal.

- Since there is no clear and convincing evidence to the contrary, we must accept the Trial Court's credibility determination and the factual findings flowing from that determination. This leads us to the inevitable conclusion that the facts do not preponderate against the Trial Court's finding that Lankford was 67% at fault. There is ample proof in the record that, for whatever reason, Lankford did not timely make the left hand turn onto Broadmoor and was in the process of making that turn when the light changed green for the oncoming traffic proceeding southbound on Gallatin Pike. The judgment of the Trial Court is affirmed and this cause is remanded to the Trial Court for collection of the costs below.

B. TRENT WATROUS, Individually, and as the surviving spouse and next of kin of VALERIE WATROUS v. JACK L. JOHNSON, et al., No. W2007-00814-COA-R3-CV (November 21, 2007)

The Court's Summary:

The trial court awarded summary judgment in favor of Defendants on Plaintiff's claim of negligent entrustment. We reverse and remand for further proceedings.

Key Language from the Court's Opinion:

- We agree with Mr. Watrous that a genuine issue of material fact exists in this case with respect to whether the Johnsons purchased the Concorde for Jack. Despite the Johnsons' and Ms. King's assertions that the Concorde was a gift, the title indicates a purchase price of $200. The resolution of this question is, we believe, largely a matter of witness credibility. The resolution of matters based on credibility determinations are properly within the province of the jury, and are not matters to be resolved by summary judgment. *Helderman v. Smolin*, 179 S.W.3d 493, 505 (Tenn. Ct. App. 2005).

- The Johnsons rely on *Nichols v. Atnip*, 844 S.W.2d 655 (Tenn. Ct. App. 1992), for the proposition that their purchase of gasoline and provision of maintenance and insurance for the vehicle does not support a claim for negligent entrustment. Unlike *Nichols v. Atnip*, in this case, Mr. Watrous has presented a prima facie case that, like the seller of the fuel in *West*, the Johnsons supplied Jack with the essential means by which he was able to operate the vehicle causing injury. Further, unlike the defendant in *Nicholas v. Atnip*, the Johnsons essentially repurchased the Concorde for Jack when they repaid the title loan on his behalf. Whether the Johnsons' actions were the proximate cause of the injury to Ms. Watrous is a question of fact for the jury.

- In light of the foregoing, the trial court's award of summary judgment to the Johnsons is reversed. This matter is remanded to the trial court for further proceedings.

C. SARA HUTCHISON v. GREGORY L. RUTT, et al., No. M2006-02255-COA-R3-CV (February 25, 2008)

The Court's Summary:

In this personal injury action arising from an automobile accident, the defendants, who conceded liability, contest the trial judge's award to plaintiff of $104,043.29 in damages. Having determined the evidence preponderates against the trial judge's determination that the accident caused the plaintiff's migraine headaches and the amount of the award, we modify the judgment by reducing the award of damages to $51,043.29.

Key Language from the Court's Opinion:

- To establish the causation of her medical condition, Plaintiff relied upon the deposition testimony of Dr. Thuy Ngo and Dr. Walter W. Wheelhouse. In reviewing their testimony, we find that both doctors attributed her shoulder and neck pain to the accident at issue, although Dr. Wheelhouse admitted that the second accident could have attributed to or exacerbated her shoulder and neck pain. Significantly, however, neither of Plaintiff's expert witnesses testified that the wreck with Mr. Rutt, the wreck at issue, more likely than not caused Plaintiff's migraine headaches or would

cause her to experience migraine headaches in the future. Neither of Plaintiff's expert witnesses opined as to the cause of her migraines.

- Although Plaintiff testified at trial that she did not have a history of migraines prior to the accident at issue, the medical records strongly indicate she had a long history of migraines, as did several other members of her family. In fact, on seven different occasions prior to the July 21, 2003 accident with Mr. Rutt, Plaintiff had informed her previous healthcare providers that she suffered from headaches and migraines. Furthermore, Dr. Ngo acknowledged that during her initial visit with him she informed him that she had a history of migraines.

- In contrast to her claim that the accident caused her migraines, there is expert testimony in the record that the accident with Mr. Rutt caused her to suffer neck and shoulder injuries and pain. Dr. Wheelhouse, who had evaluated Plaintiff "primarily for her orthopedic injuries" on February 7, 2006, assigned Plaintiff an "eight percent whole person impairment" as a result of her shoulder and neck injuries, explaining that he derived that rating from "the history of the injury, the asymmetric loss of motion of her neck, persistent pain and radicular pain in her right arm." Moreover, he specifically stated that he did not give her any impairment rating for the headaches. In his letter of evaluation, Dr. Wheelhouse wrote that "based upon a reasonable degree of medical certainty . . . [Plaintiff] suffered a significant injury to her head, neck and back and right arm as a result of a rear- end motor vehicle accident collision on 07/21/03." There being no credible evidence in the record to controvert Dr. Wheelhouse's testimony, we find the record supports the finding that Plaintiff's neck and shoulder injuries were caused by the accident with Mr. Rutt.

- Having determined that Plaintiff failed to establish that her migraine headaches were caused by the accident at issue, there is no basis upon which to award Plaintiff damages for her migraine headaches. Accordingly, we must modify the award of damages, awarding her only damages to which she is entitled for shoulder and neck injuries sustained as a result of the accident at issue. The judgment of the trial court is modified as stated above, for which Plaintiff is awarded damages in the aggregate of $51,043.29. This matter is remanded to the trial court with instructions to enter judgment consistent with this opinion, and for such other proceedings as may be necessary.

D. JOHN B. GREEN, JR. v. BILLY H. SMITH, JR., No. M2006-01729-COA-R3-CV (April 30, 2008)

The Court's Summary:

The issues on appeal pertain to the exclusion of evidence concerning the condition of tires on a vehicle involved in a one-car accident. An injured passenger filed this action against the driver alleging that he sustained injuries as a result of the defendant's negligent operation of the vehicle. At trial, the plaintiff attempted to introduce evidence that the tires on the defendant's vehicle were so worn that the defendant's failure to conduct proper maintenance, replacing the tires, was a proximate cause of the accident. The trial court excluded the evidence on two grounds. One, evidence concerning the maintenance of the vehicle was outside of the pleadings. Two, the causal connection between the condition of the tires and the wreck required testimony of an expert. At the conclusion of the trial, the jury returned a verdict for the defendant. Finding no reversible error, we affirm.

Key Language from the Court's Opinion:

- The trial court permitted the plaintiff to introduce into evidence the fact that three of the tires on Smith's vehicle had been driven more than 80,000 miles. With this fact in evidence, there is little doubt the jury was aware that the high mileage tires were worn and in poor condition. In addition to the fact that Smith was driving on high mileage tires, evidence was introduced to show the weather, road and traffic conditions, Smith's speed of travel, and the fact the accident occurred just before dawn. These facts provided the jurors with sufficient relevant information upon which to draw their own lay person inferences and conclusions as to the effect of the various factors, including the high mileage, worn tires. We can only speculate as to what may have resulted from the jury knowing more details concerning the worn condition of the tires, especially due to the fact the plaintiff did not make an offer of proof of the evidence he had hoped to introduce.

- The record does reveal that the plaintiff had not retained an expert witness to testify concerning the condition of the tires or the causal relationship between the worn tires and the accident. Thus, other than introducing the lay testimony or photographs of the condition of the tires, the only other evidence available to the plaintiff would have been the "opinion" testimony of lay witnesses as to the combined effect of high mileage, worn tires in relation to the existing road conditions and the amount of water on the road, and the cause of the accident. The plaintiff and his lay witnesses should have been permitted to testify as to "the facts"; however, they would not have been permitted to opine as to such complex matters. This is because a non-expert witness must ordinarily "confine his testimony to a narration of facts based on first-hand knowledge and avoid stating a mere personal opinion." Bandeian v. Wagner, 970 S.W.2d 460, 461 (Tenn. Ct. App. 1997).

- For such an error to require reversal, it must be established that the excluded evidence would have affected the outcome of the trial had it been admitted. Pankow v. Mitchell, 737 S.W.2d 293, 298 (Tenn. Ct. App. 1987). The plaintiff has not established that the excluded evidence, the specifics of which remain unknown due to the fact an offer of proof was not made, would have affected the outcome of the trial had it been admitted. Therefore, assuming, arguendo, the trial court erred by excluding evidence concerning the condition of the tires, the error, if any, was not reversible error.

E. CHERYL L. GRAY v. ALEX V. MITSKY, et al., No. M2007-01414-COA-R3-CV (July 29, 2008)

The Court's Summary:

Following a two-vehicle collision, Cheryl L. Gray ("the plaintiff") brought an action for damages against the other driver, Alex V. Mitsky ("Son"), and the registered owner of the other driver's vehicle, Val P. Mitsky ("Father"). Son stipulated that he was at fault in the accident. The plaintiff alleged that Father was vicariously liable under the provisions of Tenn. Code Ann. §§ 55-10-311 and -312 (2004). Father's motion for dismissal was denied by the trial court, and judgment was entered for the plaintiff against both Father and Son. Father appeals. We affirm.

Key Language from the Court's Opinion:

- In summary, Tenn. Code Ann. § 55-10-312 states that "proof of . . . registration" of a vehicle is "prima facie evidence of ownership" while Tenn. Code Ann. § 55-1-311 provides that "proof of ownership" is prima facie evidence that the vehicle, at the time of the accident, was being

operated "with authority, consent and knowledge of the owner" and "within the course and scope of the servant's [i.e., in this case, the driver's] employment."

- The testimony at trial established that Father was the registered owner of the vehicle involved in the collision with the plaintiff. This evidence, without more, established a prima facie case of Father's liability under the above-quoted two statutes.

- The Mitskys argue on this appeal that the testimony at trial revealed that Son – not Father – was, as of the precise time of the accident, the owner of the vehicle at issue and was, therefore, fully responsible. The Mitskys contend that the proof of Father's non-ownership of the subject vehicle was unrefuted and uncontradicted and sufficient to defeat the prima facie case established under Tenn. Code Ann. §§ 55-10-311 and -312. They submit, therefore, that it was error for the trial court to find Father vicariously liable to Gray under any theory.

- The evidence provided to rebut the plaintiff's prima facie case was the testimony of Father, Son and Mother – all interested witnesses – that, despite the vehicle's registration, Father was not the owner of the subject vehicle at the time of the collision. The testimony received by the trial court apparently did not persuade the court to rule in Father's favor on the issue of ownership… The trial court in the case before us recited that its judgment against Father and Son was made after "weighing the credibility of the testimony of each witness." When we show the appropriate deference to the trial court's role in determining credibility, we are unable to say that the evidence preponderates against the trial court's findings underpinning its judgment. Accordingly, we find no abuse of discretion in this case.

F. PATTY J. CHEATWOOD v. CRYSTAL D. CURLE and BUD DAVIS LINCOLN MERCURY, LLC, No. W2007-02204-COA-R3-CV (July 7, 2008)

The Court's Summary:

This appeal concerns the scope of an employer's liability for its employee's allegedly negligent operation of a motor vehicle owned by the employer. In this case both the employer and the employee were sued after the employee became involved in an automobile accident with another motorist. Arguing that there was no basis for holding it vicariously liable for any negligence on the part of its employee, the employer moved the trial court for summary judgment. The employer's motion was granted. We affirm and remand for further proceedings.

Key Language from the Court's Opinion:

- There is no dispute in this case that Ms. Curle was an employee of BDLM at the time of the accident at issue. The question is whether the trial court properly held that Ms. Curle's use of the vehicle was unrelated to her employment.

- Travel by employees is particularly amenable to disputes over whether the employer should be held vicariously liable for the negligence of its employee… This Court has further acknowledged that, "[w]hile the principles embodied in the respondeat superior doctrine are relatively easy to articulate, they are not always easy to apply." Tennessee Farmers, 840 S.W.2d at 937 (citation omitted). "The doctrine does not lend itself to bright line rules . . . but rather requires the weighing and balancing of the facts and circumstances of each case." Id. (citations omitted).

- Ms. Curle drove the car to her home approximately eight miles away. She left for her home in order to obtain some personal documents that she admits did not relate to her work at BDLM. Following the accident, Ms. Curle was terminated for unauthorized use of a BDLM vehicle. Ms. Curle does not dispute that this was the reason for her termination.

- We conclude that the motion for summary judgment was properly granted. While the ultimate determination of agency is normally reserved for the finder of fact at trial, it may be decided earlier by the court when "the departure from the master's business is of marked and decided character." Craig, 792 S.W.2d at 80 (citing Home Stores, Inc. v. Parker, 179 Tenn. 372, 166 S.W.2d 619 (1942)).

- All of the evidence in the record indicates that, as a service advisor, Ms. Curle was not authorized to drive cars from BDLM's property. This was not only BDLM's official policy, but there is also no evidence to indicate that in practice BDLM nonetheless acquiesced in the driving of its vehicles by formally unauthorized persons. It was the responsibility of others, not Ms. Curle, to drive BDLM's vehicles in order to conduct inspections on them. Instead, she took a BDLM car without permission in order to perform a wholly personal errand. The fact that she may have subjectively felt that this could be of assistance to a BDLM mechanic is by itself of no consequence.

- Accordingly, we conclude that this is one of those instances in which summary judgment is appropriate to relieve the employer of potential responsibility for its employee's allegedly negligent operation of a motor vehicle. For the reasons stated above, the judgment of the trial court is affirmed, and this case is remanded for further proceedings not inconsistent with this opinion.

G. PHYLLIS A. RICE v. AMIT S. PATEL et al., No. M2007-02388-COA-R3-CV (June 30, 2008)

The Court's Summary:

Plaintiff appeals from an adverse judgment rendered in a negligence case in which the trial court recalled the jury to the courtroom to give a supplemental instruction on comparative fault it had erroneously omitted. In her complaint, the plaintiff alleged the defendants negligently operated a vehicle causing her injuries. The defendants answered the complaint denying any wrongdoing and pleading the affirmative defense of comparative fault. The matter went to a jury trial, and the court instructed the jury on the issue of negligence but failed to instruct the jury on the issue of comparative fault. Immediately after the jury retired for deliberations, the defense counsel requested that the trial court call the jury back to the courtroom and give the omitted instruction. Plaintiff's counsel agreed to recall the jury on the condition the trial court also give a curative instruction. Three minutes after the jury originally left the courtroom, the trial court recalled the jury to the courtroom and gave the requested instructions, following which the jury returned to deliberate. Three hours later, the jury returned a verdict for the defendants. Plaintiff appeals, contending the omission of the instruction of comparative fault and subsequently giving the omitted instruction after the jury had been excused to deliberate, constitutes reversible error. We agree it was error but Plaintiff has failed to establish that the error more probably than not affected the judgment or resulted in prejudice to the judicial process. Therefore, the error does not constitute reversible error. Accordingly, we affirm.

Key Language from the Court's Opinion:

- It is well settled that the "trial court's instructions should be complete and accurate and should fairly reflect the parties' theories of the case." Ladd by Ladd v. Honda Motor Co., Ltd., 939 S.W.2d 83, 102 (Tenn. Ct. App. 1996). Accordingly, the trial court has the duty to "instruct on every issue of fact or theory of the case raised by the pleadings and supported by the proof." Cole v. Woods, 548 S.W.2d 640, 642 (Tenn. 1977) (citations omitted).

- Nevertheless, we do not measure a trial court's jury instruction against the standard of perfection. Grissom v. Metro. Gov't of Nashville, 817 S.W.2d 679, 685 (Tenn. Ct. App. 1991) (citing Davis v. Wilson, 522 S.W.2d 872, 884 (Tenn. Ct. App. 1974)). "Instead, we review the entire charge just as the jury would, Memphis St. Ry. v. Wilson, 69 S.W. 265, 265 (Tenn. 1901); Abbott v. American Honda Motor Co., 682 S.W.2d 206, 209 (Tenn. Ct. App. 1984), and we will not invalidate it as long as it fairly defines the legal issues involved in the case and does not mislead the jury." Grissom, 817 S.W.2d at 685 (citing Smith v. Parker, 373 S.W.2d 205, 209 (Tenn. 1963); Illinois Cent. R. Co. v. Spence, 23 S.W. 211, 215 (Tenn.1893)).

- Defendants properly pled the affirmative defense of comparative fault in their Answer to the Complaint. The defense was put at issue during the trial of the case, and therefore, Defendants had the right to have the jury instructed on comparative fault. The trial court admittedly failed to instruct the jury on the issue of comparative fault.

- When a trial court fails to instruct the jury on every issue of fact and theory of the case that is raised and supported by the proof, it has erred; however, a jury verdict will not be reversed unless it is shown that the failure to give the instruction or the manner in which the instruction was given more likely than not affected the verdict. Bara v. Clarksville Mem'l Health Sys., Inc., 104 S.W.3d 1, 3 (Tenn. Ct. App. 2002); see also Richardson v. Miller, 44 S.W.3d 1, 26 (Tenn. Ct. App. 2000); Helms v. Weaver, 770 S.W.2d 552, 553 (Tenn. Ct. App. 1989).

- We acknowledge that the trial court erred by omitting the instruction on comparative fault; however, we find no basis upon which to conclude that the error, which was corrected, constituted reversible error.

- The error, omitting the instruction on comparative fault when the court initially instructed the jury, was subsequently and promptly corrected by the trial court recalling the jury and giving the requested and proper instruction on the issue of comparative fault. Finding no reversible error, we affirm the trial court.

H. RONALD PHILLIPS V. STRANGE TRUCK LINES, No. E2007-00160-COA-R3-CV (March 27, 2008)

The Court's Summary:

This suit arose out of a two-vehicle collision in Cocke County on September 15, 2005. Ronald Phillips ("the plaintiff") initiated this action by filing a civil warrant in General Sessions Court. The sole defendant was Strange Truck Lines ("the defendant"). Following a bench trial, the General Sessions Court entered judgment for the defendant. The plaintiff appealed to the trial court. In the trial court, the defendant filed a motion for summary judgment with supporting material. The plaintiff responded. The trial court granted the defendant summary judgment. The plaintiff appeals. We affirm.

Key Language from the Court's Opinion:

- The evidence in the record fails to establish any negligent driving on the part of the defendant's driver that proximately caused the subject collision. At the time of the collision, both the plaintiff's automobile and the defendant's tractor and fully-loaded flatbed trailer were proceeding on U.S. Highway 25-70 toward Newport. Prior to the collision, the plaintiff's vehicle was to the rear of the defendant's vehicle. As the plaintiff's vehicle was attempting to overtake the defendant's vehicle, the two vehicles collided, side-to-side, resulting in the property damage and personal injuries for which the plaintiff seeks to be compensated in his civil warrant.

- However, in the last paragraph of the affidavit, the plaintiff attempts to create a genuine issue of material fact by stating the following:

> After viewing the accident site following the accident, hearing the truck driver state that the tractor-trailer was loaded with 80,000 pounds, not seeing the tractor-trailer until it struck my vehicle and experiencing the sudden hard knock or jolt that I did when the accident occurred, it appears to me that the tractor-trailer driver tried to enter the road I was traveling on without stopping, while pulling onto the road I was traveling.

- He is unsuccessful in his attempt to create a material factual issue. This is nothing more than the plaintiff's opinion as to what happened or, stated another way, his theory of how the collision occurred. One's opinion or theory does not create a genuine issue of material fact. Based upon the record before us, we conclude there is no genuine issue of material fact to be submitted to a jury for resolution. The trial court correctly granted summary judgment in this case.

I. DEBORAH JENKINS as Personal Representative of THE ESTATE OF MALCOM WILLIAMS, JR. and in her individual capacity; MALCOM WILLIAMS, SR., as Parent and Next Friend of MALCOM WILLIAMS, JR. and in his individual capacity; MARIA AKPOTU as Personal Representative of THE ESTATE OF EDGAR AKPOTU, and in her individual capacity; CAROL AND JAMES OVERZET, Individually and as Parents and Next Friend of JACOB OVERZET, a Minor v. SOUTHLAND CAPITAL CORPORATION, SOUTHLAND EQUITY CORPORATION, TERRY LYNCH and BRADFORD FARMS LLC, No. W2007-01180-COA-R3-CV (September 23, 2008)

The Court's Summary:

This is a consolidated wrongful death and personal injury case. In May 2002, three young boys walking beside the road were struck by a drunken driver in a residential subdivision. Two were killed, the third severely injured. The plaintiffs sued the developers of the subdivision, arguing that the absence of sidewalks in the area where the boys were walking was a cause of the accident. The trial court granted summary judgment in favor of the developers on grounds that the plaintiffs' lawsuit was time-barred under the four-year statute of repose for improvements to real property, T.C.A. § 28-3-202. We agree with the trial court that the improvements to the real property on which the accident occurred were substantially completed more than four years prior to the filing of the lawsuits under the statutory definition at T.C.A. § 28-3-201(2), and therefore affirm.

Key Language from the Court's Opinion:

- Here, it is undisputed that the lots at issue were residential lots in a subdivision of homes. Analogous to the argument of the plaintiffs in *Meyer*, the Plaintiffs in this case argue that the "improvement to real property" at issue was installation of the sidewalks, which had not been done as of the date of the accident and thus was not "substantially completed" until after the accident. In the alternative, the Plaintiffs interpret the statute expansively, arguing that there is no "substantial completion" until in essence the *entire subdivision* is complete, including the required sidewalks throughout.

- We must reject both arguments. To focus only on the defect at issue – here, the absence of sidewalks on the two lots – is too circumscribed an interpretation of the statute. Concomitantly, defining the "real property" at issue to mean the entire subdivision is overly broad. Both interpretations defeat the essential purpose of Section 28-3-202, that is, to limit claims to those arising within four years after substantial completion of the improvements to the real property at issue.

- Under the facts of this case, however, it is undisputed that the homes were transferred to individual homeowners the same year, 1995, and had been occupied as residences thereafter. The Plaintiffs put forth no evidence, save the absence of sidewalks, indicating that the lots had not been used for their intended purpose, as residences, since the transfer to individual homeowners.

- Here, the defect focused on by the Plaintiffs is the absence of sidewalks on these lots. However important that defect may be in the context of the Plaintiffs' claims, it is not a defect that would prevent the lots from being used for their intended purpose, as residences. Thus, we must hold that the trial court did not err in finding as a matter of law that the "improvement to real property" was substantially completed more than four years prior to the filing of the Plaintiffs' consolidated lawsuits.

J. STELLENA MARIE MORELOCK, Individually and as next of kin of DELMUS HOLMER McCARTER, v. The Estate of RHIANNON R. GALFORD and DANNY McKEE, No. E2007-02254-COA-R3-CV (September 8, 2008)

The Court's Summary:

In this wrongful death action the Trial Court granted defendants summary judgment on the grounds that plaintiff was not a proper party to maintain the action. On appeal, we affirm.

Key Language from the Court's Opinion:

- Plaintiff/Appellant, individually and as next of kin to Delmus Homer McCarter, brought this action against the Estate of Rhiannon R. Galford, et al., for the wrongful death of her biological father, Delmus Homer McCarter. The Complaint avers that McCarter and Galford were both killed when their vehicles were involved in an accident, and further, that the accident was the fault of Galford.

- Defendants responded by filing a Motion for Summary Judgment, and submitted the affidavit of Stella Rickles, the mother of Ms. Morelock, to the fact that Morelock was born in 1966 while the affiant was married to D. H. McCarter. She further stated that she and McCarter were divorced and that she later married Robert D. Newman who adopted Ms. Morelock in 1971 in Tennessee.

Defendants contended that the parent-child relationship between Morelock and McCarter was terminated and she had no interest as "next of kin" in the wrongful death of McCarter.

- Plaintiff filed a response to the Motion supported by her own affidavit, arguing that "[d]efendants have failed to produce any documentation or other competent evidence that any adoption of plaintiff occurred".

- Plaintiff contends the Trial Court had no authority to order her to obtain the sealed adoption records or to permit defendants to compel her to obtain the records under Tenn. Code Ann. § 36-1-120(h). The record does not support this statement. The Trial Court did not order the unsealing of the adoption records pursuant to that statute. The Trial Court ordered that either plaintiff or defendants could request the adoption records but the order did not indicate the Court was relying on any particular statute. Tenn. Code Ann. § 36-1- 138 provided the authority for the Court to enter the order which permitted defendants to obtain the adoption records. Defendants complied with the statute by properly making a motion to the Trial Court, and demonstrated the need for the adoption papers. This issue is without merit.

- The remaining issues on appeal by plaintiff essentially consist of a collateral attack on the decree of adoption because service of process on McCarter by publication was improper as the biological mother knew his whereabouts… If service of process was inadequate as to Mr. McCarter, the Court that issued the decree of adoption would not have acquired personal jurisdiction over Mr. McCarter. West v. Vought Aircraft Industries, Inc., 256 SW3d 618, 625 (Tenn. 2008). A court order is void if the court that issued the order lacked subject matter or personal jurisdiction, or there was a violation of due process. Baggett v. Baggett, 541 SW2d at 411 (Tenn. 1976).

- The record pertaining to adoption, which was attached to defendants' Motion for Summary Judgment, does not show on its face that service of process on McCarter was improper, thus depriving the Court of jurisdiction over him. While the affidavit of Stella Rickles suggests that McCarter did not know about the proceedings, such evidence of lack of personal jurisdiction is not evident on the face of the record, and the decree of adoption is not subject to this collateral attack. In sum, the Trial Court was correct in sustaining defendants' motion for summary judgment.

K. DIANE DOWNS ex rel. RYAN CODY DOWNS v. MARK BUSH et al., No. M2005-01498-SC-R11-CV (September 10, 2008)

The Court's Summary:

We granted the plaintiff's application for permission to appeal in this wrongful death case to determine whether the trial court properly granted summary judgment to each of the defendants. The Court of Appeals affirmed the grant of summary judgment. Although the parties have raised several issues in this appeal, the central issue is the nature of the legal duty, if any, owed by the defendants to the plaintiff's decedent. The decedent was socializing and consuming alcohol with the defendants. While riding in a four-door pick-up truck with the defendants, he became ill. The defendants stopped the truck on the side of an interstate highway so the decedent could vomit. After resuming the trip, the decedent rode in the bed of the truck and, for reasons unknown, exited it. After exiting the truck, he was struck by two vehicles and subsequently died. Upon careful review of the record and applicable authority, we conclude that there are genuine issues of material fact as to whether the defendants placed the decedent in the bed of the truck. Similarly, we conclude that there are genuine issues of material fact as to whether the decedent was helpless and whether the defendants took charge of him. Lastly, we hold that none of the defendants

stood in any special relationship with the plaintiff's decedent and consequently they did not assume any affirmative duty to aid or protect him. We therefore reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings.

Key Language from the Court's Opinion:

- Tennessee courts determine whether a defendant owes or assumes a duty of care to a particular plaintiff by considering public policy and whether the risk of harm is unreasonable. Burroughs v. Magee, 118 S.W.3d 323, 329 (Tenn. 2003); Turner, 957 S.W.2d at 818. Public policy considerations are relevant because "the imposition of a legal duty reflects society's contemporary policies and social requirements concerning the right of individuals and the general public to be protected from another's act or conduct." Bradshaw, 854 S.W.2d at 870.

- The foreseeability of the harm is a key factor in the equation because, in general terms, "[f]oreseeability is the test of negligence." West, 172 S.W.3d at 552 (quoting Linder Constr. Co., 845 S.W.2d at 178); Hale v. Ostrow, 166 S.W.3d 713, 716-17 (Tenn. 2005). "'A risk is foreseeable if a reasonable person could foresee the probability of its occurrence or if the person was on notice that the likelihood of danger to the party to whom is owed a duty is probable.'" West, 172 S.W.3d at 551 (quoting Linder Constr. Co., 845 S.W.2d at 178).

- Turning to the case at bar, the plaintiff argues that all of the defendants helped "put" Mr. Downs in the bed of the truck and this act created a foreseeable and unreasonable risk of harm. The defendants counter that Mr. Downs climbed into the bed of the truck under his own strength and consented to ride there. The Court of Appeals stated that as a matter of law the fact that Mr. Downs was riding in the bed of the truck was of no significance because there is no statutory or common law prohibition against this act. We respectfully disagree with the lower court's rationale. A jury could easily conclude that the dangers of riding unrestrained in the bed of a pick-up truck on an interstate highway are foreseeable and obvious. Indeed, it is common knowledge that riding unrestrained in a vehicle can result in preventable injuries and deaths.

- With respect to the plaintiff's first affirmative duty argument, we conclude that whether Mr. Downs was "helpless" and whether the defendants "took charge of" him are genuine issues of material fact that must be resolved by the jury. If a jury finds that Mr. Downs' level of intoxication rendered him "helpless" and that the defendants "took charge of" him, then the defendants owed him a duty to exercise reasonable care in aiding or protecting him. Conversely, if the jury concludes that Mr. Downs was not "helpless" or that none of the defendants "took charge of" him, then section 324 of the Restatement (Second) of Torts has no application.

- However, being intoxicated does not necessarily mean that he was "helpless." For example, the record also indicates that he was able to enter and exit both apartments and the truck's bed under his own strength. Thus, we conclude that whether Mr. Downs was "helpless" is a genuine issue of material fact that must be resolved by the jury.

- Regarding the question of whether the defendants "took charge of" Mr. Downs, the record contains evidence that the defendants decided that Mr. Downs should ride in the bed of the truck, and there is evidence that at least Mr. Britt helped him into the bed. On the other hand, the record also indicates that Mr. Downs did not object to riding in the bed of the truck and that he climbed into it under his own strength. Thus, we conclude that whether the defendants "took charge of" Mr. Downs is a genuine issue of material fact that must be resolved by the jury.

- After reviewing the facts in this case, we conclude that it is not in the public's best interest to impose on Mr. Britt an affirmative duty to aid or protect Mr. Downs solely because he was Mr. Downs' best friend and roommate. These two young men did not stand in any special relationship that we have previously recognized, and there is no evidence that Mr. Downs was dependent on Mr. Britt. Thus, we conclude as a matter of law that Mr. Britt did not assume an affirmative duty by virtue of being Mr. Downs' best friend and roommate.

- The plaintiff argues that "[t]here should be a duty for designated drivers to take affirmative actions to keep intoxicated passengers inside the passenger compartment of the vehicle and to ensure that the intoxicated passenger is not abandoned in a position of peril along the journey." We disagree with such a broad imposition of an affirmative duty of care because the public is better served by encouraging individuals to serve as designated drivers rather than adopting a policy that could potentially discourage the practice.

- Based on these public policy reasons, we hold as a matter of law that Mr. Eller owed a duty to exercise reasonable care in driving the vehicle and remaining sober while performing this service. Mr. Eller did not, however, assume an affirmative duty to aid or protect Mr. Downs merely because of his status as designated driver.

- Lastly, the plaintiff avers that Mr. Hurdle assumed an affirmative duty to aid or protect Mr. Downs because he was the owner of the truck and Mr. Downs was a passenger. The group rode in Mr. Hurdle's truck to the Cool Springs mall-area. Because he consumed alcohol, Mr. Hurdle allowed Mr. Eller, who had not consumed alcohol, to drive his truck. Mr. Hurdle rode as a passenger. As a general rule, passengers do not owe a duty of care "to the public to control, or even attempt to control, the operation of a vehicle unless they have a right to do so, either through their relationship to the vehicle itself or to the driver." Grandstaff v. Hawks, 36 S.W.3d 482, 492 (Tenn. Ct. App. 2000).

- However, an owner of a vehicle is not one of the special relationships that this Court has previously recognized, and we see no reason to impose such a duty under these circumstances. Mr. Hurdle only had the right to control the driver of the truck and not the other passengers. Mr. Hurdle's duty should not be greater than the duty owed by Mr. Eller. The record does not reveal that Mr. Hurdle acted to benefit or render aid to Mr. Downs. Based upon the facts of this case, we conclude as a matter of law that Mr. Hurdle did not assume an affirmative duty to aid or protect Mr. Downs.

- In summary, we conclude that there are genuine issues of material fact that preclude summary judgment. Specifically, there are genuine issues of fact relating to how Mr. Downs came to be in the bed of the truck after he became ill. In addition, there are genuine issues of material fact with respect to whether Mr. Downs was "helpless" and whether the defendants "took charge of" him.

III. MEDICAL MALPRACTICE CASES

A. MARVIN M. BOREN, as husband of Dorothy Faye Boren v. MARK T. WEEKS, M.D., d/b/a Emergency Medicine Associates and Sterling, No. M2007-00628-SC-R11-CV (May 6, 2008)

The Court's Summary:

In this medical malpractice appeal, the trial court denied the hospital's motion for summary judgment finding that a factual dispute exists as to whether the hospital may be held vicariously liable for the alleged negligence of an independent contractor emergency room physician based on a theory of apparent agency. The Court of Appeals reversed the trial court and granted summary judgment to the hospital on all grounds, concluding that the hospital's "efforts to disavow that the emergency department physicians were agents of the hospital were sufficient to preclude the plaintiff's claims based on apparent agency." Upon thorough consideration of the record and of the applicable law, we hold that summary judgment was inappropriate because genuine issues of material fact exist concerning whether the hospital may be held vicariously liable under an apparent agency theory, and in particular whether the hospital provided its patient with adequate notice that the emergency room physicians were independent contractors rather than employees. Therefore, we reverse the Court of Appeals' decision granting summary judgment and remand this case to the trial court for further proceedings consistent with this opinion.

Key Language from the Court's Opinion:

- Mr. Boren argues that the intermediate appellate court erred in granting River Park summary judgment because genuine issues of material fact exist as to whether apparent agency and/or agency by estoppel apply to make River Park vicariously liable for the negligence of Dr. Weeks. "In its broadest sense, the concept of agency 'includes every relation in which one person acts for or represents another.'" White v. Revco Disc. Drug Ctrs., Inc., 33 S.W.3d 713, 723 (Tenn. 2000) (hereinafter "Revco") (quoting Kerney v. Aetna Cas. & Sur. Co., 648 S.W.2d 247, 253 (Tenn. Ct. App. 1982)). The existence of an agency relationship is "'a question of fact under the circumstances of the particular case,'" and is determined by examining the agreement between the parties or the parties' actions. Revco, 33 S.W.3d at 723 (quoting McCay v. Mitchell, 463 S.W.2d 710, 715 (Tenn. Ct. App. 1970)).

- We agree with and adopt the analysis derived from the Restatement (Second) of Torts § 429. To hold a hospital vicariously liable for the negligent or wrongful acts of an independent contractor physician, a plaintiff must show that (1) the hospital held itself out to the public as providing medical services; (2) the plaintiff looked to the hospital rather than to the individual physician to perform those services; and (3) the patient accepted those services in the reasonable belief that the services were provided by the hospital or a hospital employee.

- We are unable to hold in this case that the hospital, as a matter of law, sufficiently notified Mr. and Mrs. Boren that Dr. Weeks was not its employee. The acknowledgment in the consent form was found in the second half of one paragraph of a three-page form initialed and signed by Mr. Boren. There is nothing in the record that indicates that the hospital called attention to that acknowledgment. In fact, several registration and admission hospital staff members testified that the form was completed in an electronic format, that patients and their representatives were simply asked if they consented to treatment, and hospital staff did not as a matter of practice explain that the physicians were independent contractors rather than employees or agents.

- The Borens relied on the hospital to provide emergency care instead of relying on any particular physician. They accepted the services of the emergency room physicians with the belief that those physicians were employees of the hospital. While the hospital included a disclaimer in the consent form, we cannot say as a matter of law that the disclaimer provided the Borens with adequate notice under the circumstances. We hold that the requirements for summary judgment have not been met because genuine issues of material fact exist regarding the issue of River Park's vicarious liability. River Park held itself out as providing emergency care to the public, and Mr. Boren testified that he and his wife relied on River Park to provide such emergency medical care and that they did not have the option to choose Mrs. Boren's emergency room physician. Thus, we reverse the Court of Appeals' grant of summary judgment and remand this case to the trial court for further proceedings consistent with this opinion.

B. SANDRA YEVETTE TURNER, et al. v. STERILTEK, INC., The Vanderbilt University d/b/a Vanderbilt Univ. Med. Center, et al., No. M2006-01816-COA-R3-CV (December 20, 2007)

The Court's Summary:

This appeal involves negligence and medical malpractice. The defendant corporation does off-site sterilization of surgical instruments for the defendant medical center. On July 12, 2002, the defendant physicians were performing surgery on the plaintiff's daughter at the defendant medical center, using instruments sterilized by the defendant corporation. During the surgery, an agent of the corporation informed the physicians that some of the instruments they were using might be contaminated. After receiving this information, the physicians stopped the surgery before it was completed. As a result, the plaintiff's daughter had to return to the medical center at a later date, at which time the defendant physicians successfully completed the necessary surgical procedure. The plaintiff filed this lawsuit against the corporation, the medical center, and the physicians, seeking damages for alleged negligence and medical malpractice. The defendants filed motions for summary judgment supported by expert affidavits. The trial court granted the defendants' motions for summary judgment on all claims. The plaintiff appeals. We affirm in part and reverse in part. We affirm the trial court's grant of summary judgment as to the plaintiff's claims against both of the defendant physicians and, accordingly, as to the plaintiff's claim that the defendant medical center is vicariously liable for the actions of the physicians. We also affirm the grant of summary judgment as to the plaintiff's claim against the defendant corporation for failure to provide sterilized instruments and batteries, and as to the plaintiff's claim as a third-party beneficiary to the contract between the corporation and the medical center. As to the remaining claims against the corporation and the medical center, we reverse the trial court's grant of summary judgment.

Key Language from the Court's Opinion:

- Clearly, the Plaintiff's claims as to Drs. Schwartz and Glenn sound in medical malpractice; these physicians exercised their medical judgment in deciding which instruments to use, and in making the decision to abort Jessica's surgery. Their decisions related only to Jessica's care, not to an entire group of patients or persons. See *Peete*, 938 S.W.2d at 696; *Estate of Doe*, 958 S.W.2d at 121. Dr. Schwartz's testimony made it clear that the physician does not have the responsibility of sterilizing the instruments; rather, the instruments are provided at the operating room already sterilized, in sealed containers. The Plaintiff failed to provide contradictory expert proof in response and therefore failed to establish a genuine issue of material fact as to the elements of her claim

- Certainly, Vanderbilt's allegedly negligent act or omission relates to an aspect of medical care: the provision of sterile batteries and instruments for surgery. The effects of Vanderbilt's decision to put sterilized instruments into circulation before expiration of the 48-hour biological test period are felt by the patient at the time of the treatment, when Vanderbilt has an existing relationship with the patient. In addition, medical expert testimony may be important for a jury to determine whether Vanderbilt was negligent in not having a policy of waiting forty-eight hours to make sterilized batteries and instruments available for surgery, to ensure that they were not contaminated. However, the policy decision as to how soon to use freshly sterilized instruments was made well before Jessica was a Vanderbilt patient.

- Moreover, Vanderbilt's decision is not one of medical diagnosis or treatment. It does not involve assessment of the risks or benefits to Jessica in particular, but rather to the entire group of patients facing surgery at Vanderbilt. It affects every Vanderbilt surgical patient, regardless of his or her condition, similar to Vanderbilt's duty to provide clean surgical linens or a clean operating table. We must conclude that the Plaintiff's complaint against Vanderbilt states a claim of ordinary negligence, not medical malpractice.

- Because Vanderbilt provided no evidence on the issue of the adequacy of its procedures for providing sterilized instruments, Vanderbilt failed to establish the absence of a genuine dispute on this material fact. Therefore, summary judgment in favor of Vanderbilt on this claim was improper.

- It is clear that the process of sterilizing surgical instruments is complex indeed, involving interactions between chemicals and biological agents and between chemicals and surgical materials, complicated machinery, and chemical-sensing synthetic materials. It was certainly appropriate for the trial court to determine that, in order to rebut Steriltek's motion and supporting expert testimony on this issue, the Plaintiff was required to proffer expert testimony. Steriltek submitted expert proof that, despite the biological "grow-out" test that prompted Dr. Schwartz's decision to abort Jessica's surgery, the batteries and instruments were in fact sterile and the biological test produced a "false positive" result. The Plaintiff refused to concede this point, but offered no expert proof to the contrary. Summary judgment in favor of Steriltek on this issue was proper.

- The Plaintiff alleges that it would be necessary to have a 48-hour waiting period between sterilization of the batteries and instruments and use of the batteries and instruments to allow time to see the results of the biological test pack. Steriltek's failure to provide a warning that the 48-hour test period had not elapsed may be actionable despite appropriate sterilization. That is, regardless of whether the instruments and batteries were properly sterilized, the Plaintiff's alleged injury occurred as a result of the interruption of Jessica's surgery. Accordingly, Steriltek's showing that the batteries and instruments were in fact properly sterilized does not abrogate the Plaintiff's claim that Steriltek breached a duty to warn that the instruments and batteries were unsafe to use prior to the expiration of the 48-hour biological test period.

- The trial court's grant of Steriltek's motion for summary judgment was therefore in error insofar as it dismissed the Plaintiff's claim that Steriltek was negligent in failing to warn that the instruments and batteries may have been unsafe to use.

- To summarize, the grant of summary judgment in favor of Dr. Schwartz and Dr. Glenn is affirmed. The grant of summary judgment in favor of Vanderbilt on the Plaintiff's claim that Vanderbilt is vicariously liable for the medical malpractice of Drs. Schwartz or Glenn is also

affirmed. The grant of summary judgment on the Plaintiff's remaining claims against Vanderbilt is reversed. As to Steriltek, the grant of summary judgment is affirmed on the Plaintiff's claim that the surgical batteries and instruments were not sterilized, and on the Plaintiff's claim as a third-party beneficiary of the contract between Steriltek and Vanderbilt. As to the Plaintiff's remaining claims against Steriltek, the grant of summary judgment is reversed.

C. BESSIE L. WHITE, et al. v. PREMIER MEDICAL GROUP, et al., No. M2006-01196-COA-R3-CV (November 28, 2007)

The Court's Summary:

In this medical malpractice action against a treating physician, his medical group, and several hospital entities, the plaintiffs contend the trial court erred by including in the jury instructions the defense of superseding cause requested by the treating physician and his medical group. The plaintiffs argue the evidence was insufficient to justify the instruction. It is proper to charge the law upon an issue of fact within the scope of the pleadings upon which there is material evidence sufficient to sustain a verdict. The record contains material evidence regarding each of the essential elements of the defense of superseding cause sufficient to sustain a verdict of superseding cause; therefore, an instruction as to superseding cause was appropriate.

Key Language from the Court's Opinion:

- Plaintiffs contend the evidence was insufficient to justify an instruction on the issue of superseding cause. We have determined it was sufficient. It is proper for a court to charge the law upon an issue of fact within the scope of the pleadings upon which there is evidence, which even though slight, is "sufficient to sustain a verdict."

- Without weighing the evidence, as we are instructed by *Reynolds*, 887 S.W.2d at 823, we find there is material evidence upon which a jury could find the following: harmful effects resulted from the care or lack of care Ms. Jones received in the ICU after the alleged negligence of Dr. McLain, the care or lack of care Ms. Jones received in the ICU actively worked to bring about a result which would not have followed from Dr. McLain's original negligence, and the alleged negligent care Ms. Jones received in the ICU could not have been reasonably foreseen by Dr. McLain. We therefore find there is material evidence concerning each element of the superseding cause contended by Defendants.

- Based upon the foregoing, we therefore conclude the record contains material evidence sufficient to support a jury verdict for Defendants based upon the superseding cause defense at issue here. Accordingly, we find no error with the trial court instructing the jury as to the defense of superseding cause.

- Although the trial court prohibited Plaintiffs from addressing the fact that Dr. McLain had taken but failed to pass the requisite certification tests, we find it more significant that Plaintiffs were not prevented from introducing the fact that he was not board certified. Indeed, it may be relevant whether a physician is or is not board certified in a specialty; however, we are unable to find any significance to the fact that a physician attempted to obtain board certification or for that matter never made the attempt. Moreover, the decision to admit or exclude the disputed evidence was a discretionary decision of the trial court. *See Biscan v. Brown*, 160 S.W.3d 462, 468 (Tenn. 2005). Such decisions are reviewed under the abuse of discretion standard. Id. For the reasons stated above, we find no error with the trial court's decision to exclude the disputed evidence.

- Thus, the credibility of Dr. McLain is of no consequence as it pertains to what did or did not occur in the ICU. Accordingly, Plaintiffs cannot demonstrate that the exclusion of evidence concerning Dr. McLain's credibility involved a substantial right that probably affected the judgment and resulted in prejudice to the judicial process. The judgment of the trial court is in all respects affirmed.

D. HEATHER HILL, et al. v. ANDREA GIDDENS, M.D., et al., No. W2006-02496-COA-R3-CV (November 29, 2007)

The Court's Summary:

Patient filed a complaint against Doctors, OB/GYN Group, and Hospital (together "Defendants") alleging medical malpractice for failing to obtain informed consent and failing to properly care for Patient during and after her hospitalization. The trial court granted summary judgment in favor of the defendants on the grounds that Patient failed to provide a competent medical expert as required by T.C.A. § 29-25-115 (Supp. 2006). Patient appeals. We affirm.

Key Language from the Court's Opinion:

- The Patient first argues that the trial court abused its discretion in disqualifying the proffered expert Dr. Phelps. Specifically, the Patient contends that no expert was needed for her claims. In the alternative, the Patient argues that Dr. Phelps was qualified to testify as a medical expert under the T.C.A. § 29-26-115.

- Here, the Patient bears the burden of proving, *inter alia*, that she did not give informed consent for the C-section; that Dr. Stinson caused the fistula; that such action constitutes malpractice; and that Dr. Giddens and MOGA's postnatal care was below the standard of care. Because the alleged malpractice in this case is not "within the common knowledge of laymen," the trial court did not abuse its discretion in requiring the Patient to obtain a medical expert.

- On appeal, the Patient argues that, although Dr. Phelps did not know the specific answers to the Healthcare Providers' questions, he practices in an area similar to Memphis. This Court has carefully reviewed the appellate record and finds no place in the record where the Patient attempts to prove that either Chattanooga or Houston is a community similar to Memphis.

- From the record before us, we cannot conclude that the trial court abused its discretion in disqualifying Dr. Phelps from testifying as an expert witness in this case.

- Having found above that the trial court did not err in its conclusion that Dr. Phelps was not a competent medical expert in this case, the Patient did not satisfy the requirements put forth in the Order. Consequently, the trial court could have granted summary judgment at that time, pursuant to its Order. In what we perceive to be an abundance of leniency toward the Patient; however, the trial court extended more time for finding an expert and, as noted above, held a series of hearings to that end. Because it is within the purview of the trial court to determine how it runs its court and because the many delays here only served to help the Patient, we do not find an abuse of discretion in allowing the Healthcare Providers' Motions for Summary Judgment to be pending until it was ultimately granted by the September 1, 2006 Order. Also, because the facts and causes of action in this case have not been amended during the pendency of the litigation, we likewise find that a refiling of the Motions for Summary Judgment was not necessary here.

- This Court finds that the trial court was more than lenient in giving the Patient multiple opportunities to qualify an expert. We note that the Patient had almost five months to submit a new expert affidavit from the time she filed her Motion for Extension of Time to Name New Expert until the trial court's final decision. In short, the trial court did consider the Patient's Motion. Furthermore, and especially in light of the fact that the Patient was granted opportunity after opportunity to satisfy the expert requirement, we find that there was no error in the trial court's decision.

- As discussed above, the trial court did not err in finding that Dr. Phelps was not competent to testify as an expert pursuant to the "locality rule." In the instant case, the Healthcare Providers filed Motions for Summary Judgment supported by Dr. Giddens' and Dr. Stinson's Affidavits stating that their actions conformed with the applicable standard of care. The burden then shifted to the Patient to respond with an expert affidavit sufficient to refute Dr. Giddens' and Dr. Stinson's Affidavits, thus creating a dispute of material fact.

- Aside from Dr. Phelps' Affidavit, the Patient has presented no other affidavit or documentation evidencing expert proof supporting her claim of malpractice. As such, there are no genuine issues of material fact disputed in this case, and summary judgment was properly awarded in favor of the Healthcare Providers.

- The Patient raises one final issue of whether the trial court erred in granting summary judgment when the Patient had a notice of voluntary nonsuit pending. The Patient argues that the trial court should have granted the nonsuit absent some showing of legal prejudice. We have already held that the trial court did not abuse its discretion in treating the Healthcare Providers' Motions for Summary Judgment as pending.

- The Patient was permitted to apply for interlocutory appeal at this Court's and the Supreme Court's level, and had numerous opportunities to retain a competent expert. It appears to this Court that the Patient's filing of her Notice of Voluntary Dismissal was merely a final effort to avoid an impending adverse result. We find no abuse of discretion in the trial court's decision. For the foregoing reasons, we affirm the judgment of the trial court.

E. DOYLE H. BRANDT et al. v. DAVID H. MCCORD, M.D. et al., No. M2007-00312-COA-R3-CV (March 26, 2008)

The Court's Summary:

The issue on appeal in this medical malpractice action is whether the plaintiffs' lawsuit was timely filed. The plaintiffs, husband and wife, filed this medical malpractice action on December 5, 2003, against three healthcare providers for a surgical procedure performed on husband on December 8, 2000. All defendants filed a Motion to Dismiss and/or for Summary Judgment based on the statute of limitations. The trial court summarily dismissed the complaint finding the plaintiffs had knowledge of enough facts more than one year before filing the lawsuit to put a reasonable person on notice that an injury had been suffered as a result of wrongful conduct by the defendants. The trial court also found that the doctrine of fraudulent concealment did not apply to toll the statute of limitations. The plaintiffs appealed. Finding no error, we affirm.

Key Language from the Court's Opinion:

- It is not necessary that the plaintiffs "actually know that the injury constitutes a breach of the appropriate legal standard" in order to discover that they have a right of action against the defendants. *Stanbury v. Bacardi*, 953 S.W.2d 671, 677 (Tenn. 1997). The relevant inquiry is when the plaintiffs became aware of facts sufficient to put a reasonable person on notice that he or she has suffered an injury as a result of the defendants' wrongful conduct. *Pero's Steak & Spaghetti House*, 90 S.W.3d at 621 (citing Shadrick, 963 S.W.2d at 733; Roe, 875 S.W.2d 653).

- The record makes it crystal clear that when Mr. Brandt was examined by Dr. Rupert on June 18, 2002, that Dr. Rupert became very concerned when he determined the pedicle screws were extending into Mr. Brandt's spinal canal. Moreover, the plaintiffs were well aware of Dr. Rupert's concern because they were sitting with Dr. Rupert when he called to consult with Dr. Kern and during the conversation he expressed his concern.

- However, that circumstance changed when Mr. Brandt was examined and informed by Dr. Rupert and Dr. Kern on June 18, 2002, of the fact the screws were extending into Mr. Brandt's spinal canal, that this was not normal, and that Mr. Brandt's back pain may be related to the screws protruding into the spinal canal. As Dr. Rupert explained, "you don't have a pedicle screw in your spinal canal and think it's normal." Moreover, Dr. Kern explained that the placement of the screws was, as he described it, "the most badly placed screws" he had ever seen. The information provided to the plaintiffs by Dr. Kern and Dr. Rupert distinguishes this case from *Shadrick* because the plaintiffs had the benefit of significant medical information a layperson could understand in contrast to Mr. Shadrick who had no such information.

- Having distinguished the facts of this case with *Shadrick*, we have concluded that *Shadrick* does not compel reversal in this case. We have also determined that the plaintiffs had knowledge of facts that were sufficient to put a reasonable person on notice by September 18, 2002, as a matter of law, that Mr. Brandt had suffered an injury as a result of the wrongful conduct of the defendants.

- The plaintiffs' second argument on appeal is that the one-year statute of limitations was tolled due to fraudulent concealment on the part of the defendants. The plaintiffs contend that the combination of Dr. McCord's "silence" since the surgery, along with what they characterize as "overt misrepresentations" in the June 18, 2002 letter constitute fraudulent concealment.

- Although we find no evidence of "misrepresentations" in the letter, overt or otherwise, that fact is rendered immaterial because the plaintiffs were receiving independent medical advice from a number of doctors during the relevant time period, June of 2002 through September of 2002. Thus, whether Dr. McCord was silent or not, or whether he "misrepresented" the facts is negated by the fact that at least two other doctors provided the plaintiffs with more than sufficient information upon which a reasonable person would conclude that Mr. Brandt had suffered an injury as a result of a wrongful act by Dr. McCord and/or Dr. Fournier on December 8, 2000.

- Based upon our review of the record, we find the record demonstrates that the plaintiffs had sufficient information to discover their cause of action as early as June of 2002, but in no event later than September 18, 2002. Having discovered the cause of action no later than September of 2002, the plaintiffs, therefore, cannot establish the essential element that they "could not have discovered the cause of action despite exercising reasonable care and diligence." Therefore, the plaintiffs failed to prove the essential elements required to establish fraudulent concealment. For

the foregoing reasons, we affirm the judgment of the trial court. This case is remanded for further proceedings consistent with this opinion and costs of this appeal are assessed against the plaintiffs.

F. JOHN S. BRIGHT v. CRYSTAL L. GUE, M.D., et al., No. E2007-00127-COA-R3-CV (February 19, 2008)

The Court's Summary:

In this medical malpractice case, the trial court granted summary judgment in favor of the hospital and a treating physician. Subsequently, the trial court denied the plaintiff's motion to set aside the summary judgment in favor of the physician. We vacate the trial court's judgment denying the motion to set aside its summary judgment in favor of the physician upon our finding that the plaintiff was denied adequate notice of the hearing on the motion for summary judgment. We vacate the summary judgment in favor of the hospital upon our determination that the hospital did not negate the claimed basis of the plaintiff's suit or demonstrate that the plaintiff's complaint was time barred under the applicable statutes of limitation.

Key Language from the Court's Opinion:

- First, we address Mr. Bright's argument that the trial court abused its discretion in denying his motion to set aside its grant of summary judgment in favor of Dr. Smith… Mr. Bright contends that the trial court should have set aside its judgment because of the court's failure to send notice of the hearing on the motion for summary judgment to his correct address. He asserts that as result of this mistake, he was absent from the hearing and was deprived of a filing deadline under Tenn. R. Civ. P. 56.04, which provides that a party opposing a motion for summary judgment has until five days before the hearing on such a motion to file opposing affidavits. Upon our review of the record and the applicable law, we are compelled to conclude that the trial court abused its discretion in failing to set aside its summary judgment.

- Dr. Smith contends that even if Mr. Bright is excused from having failed to attend and submit evidence in opposition at the initial hearing on the motion for summary judgment, he should not be further excused for failing to respond to such motion by the time of the later hearing on the motion to set aside the summary judgment. We do not agree and find a clear distinction between the case before us and *Donnelly*. In *Donnelly*, it was undisputed that the plaintiff received proper notice of the initial hearing on the motion for summary judgment, whereas in the instant matter, it is clear from the record that, as a result of the Circuit Court clerk's negligence and/or mistake and due to no fault or mistake of Mr. Bright or his counsel, Mr. Bright did not receive proper notice of the hearing on the motion for summary judgment. As a consequence, there was failure to comply with Tenn. R. Civ. P. 6.04(1), which provides in pertinent part that "[a] written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five (5) days before the time specified for the hearing." The fact that Mr. Bright was given adequate notice of the hearing on the motion to set aside the summary judgment is irrelevant. The only issue before the trial court at the hearing on the motion to set aside its prior judgment was "Should summary judgment be set aside because the plaintiff did not receive adequate notice of the hearing on the motion for summary judgment?" It is undisputed that the clerk sent the notice of the hearing to the wrong address, and therefore, due to no fault of his own, Mr. Bright did not receive notice and therefore did not appear. Because notice of the hearing was required pursuant to Tenn. R. Civ. P. 6.04(1), the summary judgment should have been set aside. The issue of whether Dr. Smith was entitled to summary judgment was not before the court at the hearing on Mr. Bright's motion to set aside the summary judgment. Quite simply, Mr. Bright's obligation to raise a meritorious defense to the motion for summary judgment was not triggered

because he was not provided with adequate notice of the hearing on the motion for summary judgment, and he was thereby denied due process. *See Mayes v. Jamco-KW, LLC*, No. E2005-01425-COA-R3-CV, 2006 WL 468766 at *2 (Tenn. Ct. App. E. S., filed Feb. 28, 2006). Accordingly, we hold that the trial court abused its discretion in failing to grant Mr. Bright's motion to set aside summary judgment in favor of Dr. Smith.

- Review of the medical records which formed the basis for Ms. Bozeman's opinion reveals that the alleged incident of the mishandled biopsy sample was not included in such records, and UTMC does not assert that Ms. Bozeman was otherwise aware of this event or that she considered it in forming her opinion. It has not been indicated that Ms. Bozeman was aware of the dropping of the biopsy sample and that she considered that event in reaching her conclusions nor has UTMC demonstrated that the dropping of the biopsy sample did not occur, did not violate the applicable standard of care or did not cause Mr. Bright's injuries. Therefore, it is our determination that UTMC's motion for summary judgment should not have been granted on this ground. While we recognize that, pursuant to Tenn. Code Ann. § 29-26-115(a) and (b), if Mr. Bright is to prevail at trial he must submit expert testimony that the alleged mishandling of the biopsy sample constituted a violation of the standard of care and caused his injuries, UTMC did not, either in its motion for summary judgment or by subsequent pleading, raise Mr. Bright's failure to support this allegation with expert testimony as a ground for summary judgment, and we do not agree that the obligation to present such expert testimony was triggered by UTMC's motion for summary judgment. Under the circumstances presented, we do not agree that Mr. Bright's failure to include an expert affidavit in his response to the motion for summary judgment warranted judgment against him.

- Thus, in the instant matter, the trial court was obliged to take as true the statement in Mr. Bright's complaint that "[o]n or about the 22 day of January, 2004, [he] was informed that he did not suffer from a 'flesh eating bacteria' as diagnosed by [UTMC], but was diagnosed with a much less severe condition which was successfully treated with an ointment." "Discovery of injury" under Tenn. Code Ann. § 29-26-116 "means the discovery of the existence of a right of action, that is, facts which would support an action for tort against the tort-feasor. Such facts include not only the existence of an injury, but the tortious origin of the injury." *Hathaway v. Middle Tenn. Anesthesiology*, 724 S.W.2d 355, 359 (Tenn. Ct. App. 1986). Mr. Bright's complaint apparently asserts that the "tortious origin" of his injuries was UTMC's misdiagnosis of his condition and commensurate treatment of his condition. His attestation that he discovered such misdiagnosis on or about January 22, 2004, within one year of the time his complaint was filed, was not refuted by UTMC and accordingly, summary judgment should not have been granted on the ground that his suit violated the statute of limitations.

G. CARLA MARIE WALL et al. v. HILLSIDE HOSPITAL, INC. et al., No. M2005-02529-COA-R3-CV (January 31, 2008)

The Court's Summary:

This appeal arises from a medical malpractice action brought by a patient and her family. The plaintiffs claimed that the defendants, a hospital, treating nurses, treating physician, and the treating physician's medical group, committed medical malpractice by giving the patient a medication dosage ten times higher than the correct dose, thereby causing her respiratory arrest. The defendants moved for summary judgment, insisting, among other things, that although the dosage was initially incorrectly entered on the chart, the patient never received the incorrect dosage. The plaintiffs offered no evidence in response but, instead, filed a notice of voluntary dismissal without prejudice and asserted their expert witness had become uncooperative. The trial court denied their request for a voluntary dismissal without prejudice

and awarded summary judgment to the defendants. The plaintiffs appealed, arguing that the trial court abused its discretion by not allowing them to non-suit their action without prejudice. We conclude that the trial court did not abuse its discretion, and we affirm the dismissal.

Key Language from the Court's Opinion:

- The only theory of negligence in this case is the allegedly incorrect dosage of Dilaudid, and it is unclear how an expert would be able to contradict the factual proof presented by the Defendants showing that Ms. Walls was never given the incorrect dosage. Plaintiffs' counsel conceded at oral argument that there was not any significant further information that the Walls could have provided to the court with regard to the facts of what happened. The only way an expert's testimony would create a dispute of fact as to what dosage Ms. Walls was administered would be testimony that the respiratory arrest was attributable to a 30 mg. dosage of Dilaudid or that it would not have happened with a 3mg. dosage, or if the expert could dispute the Defendants' evidence that a 30 mg. dosage would have likely killed Ms. Walls.

- From the record before us, it appears the Walls failed to indicate what efforts they had made at securing an expert witness, what testimony they expected such a witness to provide, how close they were to securing a new expert, or what evidence they expected an expert witness would be able to present. It also appears that the only reason the Walls sought a voluntary dismissal was to avoid having summary judgment awarded to the Defendants. Accordingly, from the record available to us, the *Wishon* factors appeared to weigh against a finding that the circuit court abused its discretion.

- In summary, we conclude that the trial court appropriately exercised its discretion in denying the plaintiffs a dismissal without prejudice in light of all the circumstances.

- The Walls did not submit any evidence to refute the Defendants' evidence that Ms. Wall was only given 3 mgs. of Dilaudid rather than the 30 mgs. that the plaintiffs allege. Thus, the filings in the record show that there is no genuine issue of material fact and that the Defendants are entitled to judgment as a matter of law.

- Summary judgment was accordingly warranted in this case. As the trial court stated that "[t]here is nothing in this case to litigate. The entire case would rise or fall on the allegations of negligence by the Defendants' resulting in [Ms. Wall] being injected with 30 mgs. of Dilaudid which would probably have killed her. This just did not happen."

H. PHILIP LATIFF, as Executor of the Estate of Mary Woods Latiff v. TRACY W. DOBBS, M.D., et al., No. E2006-02395-COA-R3-CV (January 29, 2008)

The Court's Summary:

In this medical malpractice action, Mary Woods Latiff ("Ms. Latiff") was a patient of Dr. Tracy Dobbs, an oncologist employed by East Tennessee Oncology and Hematology, P.C., ("East Tennessee Oncology") (collectively "Defendants"). Ms. Latiff underwent chemotherapy to reduce her chance of a recurrence of cancer. After her fourth chemotherapy session, Ms. Latiff developed complications, including vomiting, diarrhea, nausea, and abdominal pain. Ms. Latiff's family made numerous phone calls to Defendants over the next few days. A nurse at Defendants' office called in a prescription to treat Ms. Latiff's symptoms, but the additional medications did not resolve Ms. Latiff's problems. The next day, the nurse advised Ms. Latiff's family to take her to the emergency room, but a family member stated

that Ms. Latiff was too weak to go to the emergency room. As a result, home health services were ordered for Ms. Latiff for lab work and assessment. After the lab results were available, Dr. Dobbs ordered IV fluids with potassium to treat Ms. Latiff's dehydration and low potassium level. Several hours later, Ms. Latiff's family called an ambulance to transport her to the hospital because her condition had not improved. Ms. Latiff suffered a cardiac arrest before arriving at the hospital. She was revived, but died the following day. Ms. Latiff's family filed this lawsuit alleging negligence in Defendants' treatment of Ms. Latiff. The jury returned a verdict in favor of Defendants, and judgment was entered accordingly. Plaintiff's motion for new trial was denied, and an appeal was taken to this Court, raising numerous issues regarding exclusion of evidence, expert witness testimony, and jury instructions. After careful review, we hold that the Trial Court did not commit reversible error. We affirm and remand.

Key Language from the Court's Opinion:

- Plaintiff first alleges that the Trial Court erred in referencing the standard for "oncology nurses" in its jury instructions because Nurse Phillips was not an oncology certified nurse. Plaintiff alleges that "the instruction to the jury was misleading and implied a higher requisite standard of skill and learning, and a higher standard of care." We are unable to comprehend how this, even if so, could prejudice Plaintiff's case. If such a charge did indeed cause the jury to assign a higher standard of care to the conduct of Nurse Phillips, that would benefit Plaintiff's case and not Defendants'. Plaintiff also alleges that because Plaintiff's nursing expert was not oncology certified, "the erroneous charge also necessarily shifted a greater weight to the testimony of the defendants' nursing expert." We disagree. Nurse Phillips, although not oncology certified, worked at East Tennessee Oncology, an oncology practice, for nearly a decade before Ms. Latiff's death. We find no error in the Trial Court's instruction that she was an oncology nurse, despite her lack of oncology certification, and we do not think this aspect of the jury charge affected the weight to be given to the testimony of any of the expert witnesses in this trial.

- Regarding Plaintiff's request for a Tennessee Pattern Jury Instruction about negligence per se, we believe that a negligence per se instruction would not have been appropriate in this medical malpractice action. Tennessee Code Annotated §§ 29-26-115(a) and (b) specify that both the standard of care and any breach of that standard of care, with only very limited exceptions, must be established by expert testimony.

- In a similar case, the U.S. District Court for the Eastern District of Tennessee, relying on *Conley*, dismissed a plaintiff's negligence per se claims that were based on violation of state and federal nursing home regulations. *Brown v. Sun Healthcare Group, Inc.*, 476 F. Supp. 2d 848 (E.D. Tenn. 2007). In doing so, the District Court stated, "Because the acts fall under the purview of the [Tennessee Medical Malpractice Act], the plaintiff's negligence per se claims must fail, as there can be no presumption of negligence under the TMMA unless the plaintiff establishes *res ipsa loquitor* [sic], which she has not done. See Tenn. Code Ann. § 29-26-115(c)." Id. at 852. We believe this is a correct statement of Tennessee law under our Medical Malpractice Act, and therefore, the Trial Court did not err in refusing instruct the jury on negligence per se.

- This Court has already rejected the premise of Plaintiff's argument. In *Patton v. Rose*, we held that an error in judgment charge, also known as an honest mistake charge or a mistake in judgment charge, is a correct statement of the law. *Patton v. Rose*, 892 S.W.2d 410, 415 (Tenn. Ct. App. 1994). As we noted in *Ward v. Glover*, Tennessee courts have "consistently held that this charge is appropriate." *Ward v. Glover*, 206 S.W.3d 17, 41 (Tenn. Ct. App. 2006). We note that both of these cases were decided under our current medical malpractice laws as set forth in

Tenn. Code Ann. § 29-26-115, et seq. Therefore, we find Plaintiff's assertion that the Trial Court's "error in judgment" charge was inconsistent with Tennessee law to be without merit.

- Plaintiff is correct in stating that Defendants did not assert any error in judgment by either Dr. Dobbs or Nurse Phillips, and Defendants did not defend on that basis. Therefore, we conclude that the Trial Court erred by giving an "error in judgment" charge. However, we do not find that such a charge constituted reversible error, as we do not believe, and Plaintiff has presented no evidence, that the "error in judgment" charge "more probably than not affected the judgment or would result in prejudice to the judicial process." See Tenn. R. App. P. 36(b).

I. JUANITA MULLINS, individually and as Executor of the Estate of DANIEL v. MULLINS, deceased v. STATE OF TENNESSEE, No. E2007-01113-COA-R9-CV (January 24, 2008)

The Court's Summary:

Juanita Mullins ("Plaintiff") and her husband, Daniel Mullins, filed a medical malpractice lawsuit in federal court against several doctors, including Dr. Jose Mejia. Dr. Mejia was a fourth-year resident at East Tennessee State University at the relevant time. The lawsuit was brought after Plaintiff's husband had serious complications and injuries following surgery. Plaintiff's husband eventually died. Plaintiff and her husband were residents of Virginia and filed suit in the United States District Court for the Eastern District of Tennessee based upon diversity of citizenship. Plaintiff voluntarily dismissed Dr. Mejia and then filed this lawsuit based upon the alleged medical malpractice of Dr. Mejia against the State of Tennessee (the "State") in the Division of Claims. A jury trial was held in the federal court case, and the jury ruled in favor of all remaining defendants. Although neither Dr. Mejia nor the State were parties to the federal court action, the jury was asked if Dr. Mejia was at fault for comparative fault purposes, and the jury responded "no." After the present case was transferred to the Claims Commission, the State filed a motion to dismiss claiming Plaintiff was collaterally estopped from pursuing the present claim due to the federal court jury's determination that Dr. Mejia was not at fault. The Claims Commissioner denied the motion, and the State appealed. We affirm.

Key Language from the Court's Opinion:

- We conclude that, at a minimum, the State has failed to satisfy the second and the fifth factors set forth in *Beaty*. The second factor requires the State to show " that the issue sought to be precluded was actually litigated and decided on its merits in the earlier suit." The fifth factor the State must establish is "that the party against whom collateral estoppel is asserted had a full and fair opportunity in the earlier suit to litigate the issue now sought to be precluded." Even though the jury verdict form asked the jury to assign fault to Dr. Mejia, neither Dr. Mejia nor the State were parties to that lawsuit.

- The State has the burden of proof to show that the issue sought to be precluded, Dr. Mejia's fault, was both "actually litigated and decided on its merits...." The State has failed to meet this burden to show that this issue was "actually litigated" notwithstanding the jury's answer on the verdict form as to Dr. Mejia's fault. While this issue may have been "decided" for purposes of the federal court lawsuit, the State has failed to present any proof that it was "actually litigated" as required.

- All parties agree that the Plaintiff's claim against the State could not be maintained in federal court and that Plaintiff was required to assert that claim in the Claims Commission. Because Plaintiff was prohibited from bringing her claim against the State in the federal court lawsuit,

Plaintiff never had "a full and fair opportunity" to litigate the issue of Dr. Mejia's fault in the federal court lawsuit.

- We agree that trying all of the claims together would be preferable for various reasons. However, we find no legal support for the State's position that citizens of other states are required to forego their right to file a lawsuit in federal court based upon diversity of citizenship in order to possibly be able to consolidate all of their claims together at a later date in one state court action.

J. KATHERINE DELORIESE OLINGER, et al. v. UNIVERSITY MEDICAL CENTER, et al., No. M2006-02312-COA-R3-CV (January 17, 2008)

The Court's Summary:

This medical malpractice action was filed by Katherine Deloriese Olinger and Perry Michael Hale ("Plaintiffs") after their son was born with brachial plexus palsy. Plaintiffs claim the injury occurred because the defendants failed to take the proper medical steps to resolve a delivery complication known as shoulder dystocia. Following a trial, the jury returned a verdict in favor of all of the defendants. Plaintiffs appeal claiming the Trial Court erred when it gave a jury instruction on the sudden emergency doctrine, and further erred by refusing to permit cross-examination of a witness by the use of medical literature which Plaintiffs maintain had been established as a reliable authority pursuant to Tenn. R. Evid. 618. We affirm.

Key Language from the Court's Opinion:

- As stated, the defendants argue that the sudden emergency occurred when the McRoberts maneuver and suprapubic pressure failed to resolve the shoulder dystocia. Plaintiffs contend that as a trained physician, Dr. Lanning should have anticipated those initial steps not working and his then having to undertake additional maneuvers and, therefore, it was not a sudden emergency.

- The point being, the issue on appeal is not whether there actually was or was not a sudden emergency, only whether there was sufficient proof in the record to support the Trial Court's decision to so charge the jury. All of the medical proof at trial was that shoulder dystocia is a somewhat rare but known occurrence, and shoulder dystocia not being resolved by the McRoberts maneuver and suprapubic pressure is considerably more rare. Even Plaintiffs' expert witness testified that, on average, shoulder dystocia occurs in 3% of all deliveries, and 90% of the time it is resolved by the initial maneuvers. Thus, based on Plaintiffs' proof, a typical physician will encounter shoulder dystocia that is not relieved by the initial maneuvers approximately 0.3% of the time. Dr. Lanning testified that in his 21 years as an obstetrician, he delivered roughly 4,000 babies, he encountered shoulder dystocia 100 times, and the present case was the first time that it was not resolved with the initial maneuvers.

- We agree with Plaintiffs' argument that because of a physician's training and background, the sudden emergency doctrine has a limited application in medical malpractice cases. Simply because there is a medical complication does not necessarily mean that there is a sudden emergency. We are not, however, willing to go as far as argued by Plaintiffs and hold that the sudden emergency doctrine never is applicable in a medical emergency situation.

- Having said that, we conclude that there was sufficient proof presented at trial that the circumstance underlying the sudden emergency doctrine, i.e., the existence of a sudden or unexpected emergency, was present in this case when there was material evidence presented to

the jury that the shoulder dystocia did not resolve after application of the McRoberts maneuver and suprapubic pressure, something not seen or experienced by Dr. Lanning in his twenty-one years as an obstetrician delivering roughly 4,000 babies. We, therefore, find no error in the Trial Court's decision that there was sufficient proof presented at trial to justify charging the jury on sudden emergency so as to allow the jury to find whether there was or was not a sudden emergency in its comparative fault analysis.

K. JAMES G. THOMAS, JR., ex rel. KAREN G. THOMAS v. ELIZABETH OLDFIELD, M.D., et al., No. M2007-01693-COA-R3-CV (June 2, 2008)

The Court's Summary:

The issue on appeal in this medical malpractice action is whether the hospital is vicariously liable for the acts or omissions of an emergency room physician. The trial court summarily dismissed all claims against the hospital finding that it was not vicariously liable for the conduct of the emergency room physician because he was neither its actual or apparent agent. We find the trial court correctly granted summary judgment to the hospital on the issue of actual agency because there are no material facts in dispute and the hospital is entitled to summary judgment on the issue of actual agency as a matter of law. We, however, find that material facts are in dispute concerning whether the hospital held itself out to the public as providing medical services; whether the plaintiff looked to the hospital rather than to the individual physician to perform those services; whether the patient accepted those services in the reasonable belief that the services were provided by the hospital or a hospital employee; and, if so, whether the hospital provided meaningful notice to the plaintiff at the time of admission that the emergency room physician was not its agent. Accordingly, we have determined the hospital was not entitled to summary judgment on the issue of apparent agency. Therefore, we remand to the trial court the issue of apparent agency for further proceedings consistent with this opinion.

Key Language from the Court's Opinion:

- There is no evidence in the record that Dr. Love was an actual agent of the hospital. It is undisputed that Dr. Love was employed by Emergency Coverage Corporation (ECC), ECC provided Dr. Love's malpractice insurance, and ECC determined his schedule while working at the hospital. There is no evidence in the record that the hospital directed Dr. Love's treatment of his patients. To the contrary, hospitals in Tennessee are legally precluded from controlling the means and methods by which physicians render medical care and treatment to hospital patients, see Tenn. Code Ann. §§63-6-204(f)(1)(A) and 68-11-205(b)(1)(A). Moreover, hospitals are specifically precluded from employing emergency physicians. See Tenn. Code Ann. §§ 63-6-204(f)(1) and 68-11-205(b)(6). There being no evidence upon which to find that Dr. Love was an actual agent of the hospital, we affirm the summary dismissal of the plaintiff's claim against the hospital based on the theory of actual agency.

- Using the *Cooper* analysis, the Tennessee Supreme Court reasoned that while the hospital included a disclaimer in the consent form, it was not sufficient, as a matter of law, to provide adequate notice that the physician was not its employee. *Boren*, 2008 WL 1945985, at *10. Further, our Supreme Court found it significant that the acknowledgment in the consent form was in the second half of one paragraph of a three-page form, there was no evidence that the hospital called attention to the disclaimer, and that the hospital staff did not as a matter of practice explain that the physicians were independent contractors rather than employees or agents. *Id*.

- As was the case in *Boren*, we are unable to hold that the hospital in this case, as a matter of law, sufficiently notified Ms. Thomas that Dr. Love was not its agent. The Conditions of Admission

and Authorization for Medical Treatment form signed by Ms. Thomas contained a clause stating that the emergency room physicians were independent contractors; however, that clause was merely number nine of twelve clauses, it was not set out in any way from the rest of the form language, and it was not separately acknowledged, as was the case in Boren. Nothing in this record suggests that this clause was brought to Ms. Thomas' attention.

- Based upon these facts, we find there exists a dispute of a material fact, that being whether the disclaimer provided to Ms. Thomas in the emergency room constituted meaningful notice that Dr. Love was not an agent of the hospital. Accordingly, the hospital was not entitled to summary judgment on the issue of apparent agency.

L. EMILE V. HAMM, MD and ANGELA HAMM, v. SCOTT D. HODGES, DO, CHATTANOOGA ORTHOPAEDIC GROUP, PC, ROGER W. CATLIN, MD, SUZANNE E. BENSON, MD, GREGORY WHITE, MD, THE CHATTANOOGA CENTER FOR PAIN MANAGEMENT, No. E2007-01626-COA-R3-CV (May 8, 2008)

The Court's Summary:

Plaintiff, a physician, brought a malpractice action against several defendant doctors and medical groups for damages which he averred resulted from negligent medical treatment. Defendants moved for summary judgment and filed their personal affidavits that their medical treatment met the standard of care in the communities where they practiced. Plaintiff answered and filed his personal affidavit disputing that defendants met the community standard of care. The Trial Court held that plaintiff's affidavit was deficient in that it did not comply with the statutory requirements to make his testimony admissible and granted summary judgment. On appeal, we affirm the Trial Court.

Key Language from the Court's Opinion:

- The Trial Court found that the affidavit filed by Dr. Hamm established that he was an internal medicine specialist, and did not specialize in either orthopedics or pain management, and that Tenn. Code Ann. §29-26-115 required the expert be qualified to testify as to the standard of care in the community in which the defendants practiced, and also required the expert to be familiar with the standard of care for the defendants' specialties. The Court held that Dr. Hamm's affidavit was insufficient as to both points.

- Plaintiffs argue that the Trial Court erred in granting summary judgment because the affidavits filed by Drs. Hodges, White, and the Chattanooga Orthopaedic Group, do not address whether Drs. Hodges and White had any special training in reviewing x-rays and diagnostic studies for the presence of infections, and thus do not address plaintiffs' claims that these defendants were negligent in failing to recognize the presence of an infection via such x-rays and diagnostic studies.

- While the Trial Court found that Dr. Hamm was not knowledgeable of the specialty practiced by the defendants, which arguably would not impact on his ability to testify regarding x- rays and diagnostic tests, the Court also found that Dr. Hamm had not satisfied the "locality rule" contained within the statute, as he had not shown that he was familiar with the standard of care "in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred".

- Based upon the foregoing, we find the Trial Court did not abuse its discretion in holding Dr. Hamm's affidavit did not satisfy the requirements of the statute because, regardless of his specialty or his experience in reviewing x-rays and diagnostic tests, he did not state that he was familiar with the standard of care in the Chattanooga community. As such, Dr. Hamm's affidavit failed to satisfy the locality rule, and summary judgment was appropriate because plaintiffs were unable to establish a disputed issue of material fact. *See Kenyon*, *also see Robinson v. LeCorps*, 83 S.W.3d 718 (Tenn. 2002); *Allen v. Methodist Healthcare Memphis Hospitals*, 237 S.W.3d 293 (Tenn. Ct. App. 2007).

M. GILBERT WATERS, et al. v. WESLEY COKER, M.D., No. M2007-01867-COA-RM-CV (August 28, 2008)

The Court's Summary:

In this medical malpractice action, both parties appeal from a jury verdict entered in favor of the defendant. The plaintiffs appeal the trial court's denial of the plaintiffs' motion to amend the Complaint to add a claim for informed consent and the denial of the plaintiffs' motions in limine to exclude two of the defendant's expert witnesses. In addition, the plaintiffs contend the trial court committed reversible error by failing to properly instruct the jury. We have determined the trial court applied the correct legal standard when it considered the plaintiffs' motion to amend and that reasonable minds could disagree as to the propriety of the trial court's decision; therefore, the trial court did not abuse it discretion in denying the late filed motion to amend. We also find no error with the trial court's decision to deny the plaintiff's motions in limine, thus allowing the defendant's expert witnesses to testify. Further, we find the plaintiffs failed to request an additional jury instruction after an incomplete charge was given, thus the issue has been waived. Accordingly, we affirm the trial court.

Key Language from the Court's Opinion:

- The trial court identified undue delay and undue prejudice to Dr. Coker as reasons for denying the Motion to Amend. Undue delay and undue prejudice are factors to be considered when deciding whether to deny a motion to amend. *Green*, 2008 WL 624860, at * 9; *Gardiner*, 731 S.W.2d at 891-92. Accordingly, the trial court applied the correct legal standard. Considering the fact that the case had been pending for three years when the motion was filed, that a two-week jury trial was to commence three weeks after the motion was filed, that numerous depositions had been taken, and the fact the plaintiffs' explanation why the motion to amend had not been filed previously was excusable neglect, we have determined that reasonable minds could disagree as to the propriety of the decision to deny the motion to amend.

- The plaintiffs contend the trial court abused its discretion in denying their motions in limine to exclude two of Dr. Coker's expert witnesses, Dr. Alfred Callahan and Dr. Theodore Larson… The fact that an expert witness who has responded to a request for discovery subsequently changes the substance of that testimony during the course of litigation is not uncommon. To the contrary, it occurs with such regularity that such a circumstance is contemplated under Tennessee Rule of Civil Procedure 26.05.

- Although Dr. Callahan changed the substance of his testimony, and the facts upon which it was based, on more than one occasion prior to trial, and as the plaintiffs categorized it, his testimony constituted "a moving target," the trial court did not find the "underlying facts or data" upon which his opinion was based untrustworthy. Such a determination constitutes a discretionary decision, which will be upheld so long as reasonable minds can disagree as to the propriety of the

decision. *See Ballard*, 855 S.W.2d at 562; *see also Eldridge*, 42 S.W.3d at 85. We have examined the responses to the Rule 26 interrogatories and the subsequent pre-trial changes to Dr. Callahan's testimony. We agree with the plaintiffs that there are inconsistencies in his testimony, and the changes thereto, but we also find that Dr. Callahan explained the inconsistencies to the plaintiffs' counsel prior to trial. More importantly, we do not find the underlying facts or data to be untrustworthy, and therefore, we find no error with the trial court's decision.

- As for the other expert witness, Dr. Theodore Larson, the plaintiffs insist that Dr. Larson should not have been permitted to testify because his deposition was taken after the scheduling deadline had passed, which, the plaintiffs contend, caused undue prejudice to the plaintiffs by leaving them with "no time to prepare their own experts for trial. Matters pertaining to scheduling orders are within the sound discretion of the trial court. Tenn. R. Civ. P. 16.01; *see Clarksville-Montgomery County School Sys. v. United States Gypsum Co*., 925 F.2d 993, 998 (6th Cir. 1991) (stating the court has wide latitude to impose sanctions for a party's failure to comply with the scheduling orders). If a party fails to obey a scheduling order, Tennessee Rule of Civil Procedure 16.06 states the trial judge "*may* make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37.02." (emphasis added)… The trial court's action is reviewable under the abuse of discretion standard. *Clarksville-Montgomery County School System*, 925 F.2d at 998 (citing *Nat'l Hockey League v. Metro. Hockey Club, Inc*., 427 U.S. 639, 642 (1976)). We find no error with the trial court's decision to allow Dr. Larson to testify at trial.

- The plaintiffs raise two issues concerning the jury instructions given in this case: (1) the trial court failed to properly instruct the jury on the burden of proof and preponderance of the evidence and by failing to give the jury charge that was announced as the approved charge and (2) the trial court erred in allegedly giving that portion of the jury instruction at issue outside the presence of the parties and their counsel. We find these issues to be related and will address them accordingly.

- In instructing the jury, the trial court read the applicable medical malpractice statute. By reading this statute, the trial court instructed the jury on the claimant's burden in a medical malpractice action and briefly explained the preponderance of the evidence standard. However, as the trial judge correctly noted after the dismissal of the jury, the jury had not been fully and properly instructed on burden of proof and preponderance of the evidence as set out in the Tennessee Pattern Jury Instruction Civil 2.40 (3d ed. 1997). After the trial court recognized this omission, the plaintiffs' counsel acknowledged that he also noted the omission and yet failed to request an appropriate instruction. In fact, the plaintiffs never further mentioned the omission of the trial court or requested an appropriate instruction even though fully aware of the deficiency moments after the jury had retired to deliberate.

- The plaintiffs are not permitted to wait until after an adverse verdict to complain about known omissions in the jury instruction. Because the jury charge was not incorrect or misleading but merely incomplete, it was the plaintiffs' duty to submit a special request for additional instructions on burden of proof and preponderance of the evidence. *Rule*, 563 S.W.2d at 554. Their failure to do so constitutes a waiver of the inadequacy of the jury instruction. *See Id*.

- Lastly, there is no evidence in the record that the trial judge gave any instruction to the jury outside the presence of the parties and their counsel. The only reference to this in the record is in a pleading filed by the plaintiffs in support of their motion for a new trial, and is unsupported by affidavits or other competent evidence. Accordingly, we find no merit to this issue on appeal.

- Rule 54.04 expressly provides that discretionary costs are only allowable "*in the court's discretion*." Tenn. R. Civ. P. 54.04(2) (emphasis added). There is nothing in the record to suggest that the trial court applied an incorrect legal standard, and we find nothing illogical about the trial court's decision to deny Dr. Coker motion for discretionary costs. To the contrary, we believe reasonable minds could disagree as to the propriety of the trial court's decision and, as the reviewing court, we are not permitted to substitute our own judgment for that of the trial court in discretionary matters. Therefore, we find no error in the trial court's denial of Dr. Coker's motion for discretionary costs.

N. STANLEY A. DUMBAUGH, et al. v. DR. GEORGE E. THOMAS, INDIVIDUALLY AND AS AN EMPLOYEE OF TRANSSOUTH HEALTHCARE, P.C., et al., No. W2007-01814-COA-R3-CV (July 28, 2008)

The Court's Summary:

In this medical malpractice action, the trial court granted summary judgment in favor of the defendant doctor because the plaintiff had not personally served the defendant doctor; was put on notice of this insufficiency in the defendant's answer; and took no action to re-issue the summons and serve the doctor. Following entry of summary judgment, the plaintiff sought relief from this judgment pursuant to Rule 60.02 (1), arguing that the statements of the trial court and the actions of the parties implied that service was proper and led his counsel to believe there was no need to re- serve the defendant doctor. The trial court denied plaintiff's motion, and the plaintiff appealed. Finding no abuse of discretion, we affirm.

Key Language from the Court's Opinion:

- On appeal, Mr. Dumbaugh seeks to re-argue the propriety of the service upon Vera Tillman, but we must confine our review to the parameters Mr. Dumbaugh himself set in seeking this extraordinary remedy. We further note that, despite the surprise of Mr. Dumbaugh's counsel following the entry of summary judgment, Mr. Dumbaugh neither sought to alter or amend the judgment via Tennessee Rule of Civil Procedure 59, nor did he appeal it to this Court. Accordingly, we shall address only the facts set forth in Mr. Dumbaugh's Rule 60 filing to determine if the trial court erred in denying him relief.

- The trial court's order denying Mr. Dumbaugh's motion states that he failed to meet the "high burden associated with such relief." In reviewing this judgment under an abuse of discretion standard, we must consider whether (1) there existed a sufficient evidentiary foundation; (2) the trial court correctly applied the appropriate legal principles; and (3) the trial court's decision falls within the spectrum of acceptable alternatives. *Thompson v. Chafetz*, 164 S.W.3d 571, 574 (Tenn. Ct. App. 2004). We are unable to find an abuse of discretion in this case for the following reasons.

- The crux of the question before the trial court was whether Mr. Dumbaugh's counsel was justified in believing the dispute about service of process had been resolved. Mr. Dumbaugh points us to the transcript of the default judgment hearing in which the parties discussed service of process. We note, first, that the trial court made clear to counsel for Mr. Dumbaugh that, even if service were proper, his decision to award a default judgment would still be a matter of discretion.

- Counsel for Mr. Dumbaugh did not request a clarification from the trial court even though the first defense listed in Dr. Thomas's answer was the insufficiency of service of process. Indeed,

the only question before the trial court that day was whether to award Mr. Dumbaugh a default judgment. It did not consider or decide an affirmative request for relief from Dr. Thomas.

- Mr. Dumbaugh also contends that the trial court's decision not to hear testimony from the process server indicated that service was proper. At the outset of the hearing, the trial court asked Mr. Dumbaugh's counsel if her witnesses had anything more to add to their statements in the affidavit. She answered in the negative, and the trial court then requested that she proceed with her argument. Moreover, in light of the fact that the trial judge expressly stated he would not render a finding on service of process, we cannot understand how one might conclude that the court's failure to hear testimony from the process server would indicate that service was proper.

- Without more, we cannot conclude that Mr. Dumbaugh met his burden of proof on the Rule 60 motion. Indeed, although Mr. Dumbaugh's counsel's belief may have been sincere, we cannot conclude that it was justifiably held with any degree of certainty, particularly when she could have requested clarification from the court or, as an added safety measure, simply re-served Dr. Thomas.

O. KATHY HUBER, et al. vs. DOUGLAS MARLOW, et al., No. E2007-01879-COA-R9-CV (May 28, 2008)

The Court's Summary:

In this interlocutory appeal of a medical malpractice case, the issue presented is whether the trial court erred in granting partial summary judgment to the employer because it could not be held vicariously liable for the actions of its nonparty employee when the statute of repose had run as to the nonparty employee before the plaintiffs amended their complaint to include allegations based on the nonparty employee's actions. We hold that because the statute of repose extinguished the plaintiffs' cause of action against the nonparty employee, the employer cannot be held liable for allegations of medical negligence based solely on the actions of the nonparty employee. The trial court's partial summary judgment is affirmed.

Key Language from the Court's Opinion:

- The Plaintiffs did not oppose Dr. Marlow's motion for partial summary judgment; it was granted and has not been appealed. As to Internists of Knoxville, the Plaintiffs argued that the amendments to their complaint were proper and timely under the "relation back" doctrine provided by Tenn. R. Civ. P. 15.03. The trial court ruled that as a matter of law, Internists of Knoxville was entitled to summary judgment on the allegations of Plaintiffs' amended complaint regarding the discontinuance of heparin because the three-year statute of repose found at Tenn. Code Ann. § 29- 26-116(a)(3) had extinguished the Plaintiffs' malpractice cause of action against the agent/employee Dr. Rankin. The trial court and this court granted Plaintiffs permission to take an interlocutory appeal pursuant to Tenn. R. App. P. 9.

- In this action, the sole theory or source of liability for Internists of Knoxville is the *respondeat superior* doctrine, which, generally speaking, "permits the master/principal to be held liable for the negligent acts of his servant/agent." *Johnson v. LeBonheur Children's Med. Ctr.*, 74 S.W.3d 338, 343 (Tenn. 2002). In *Johnson*, the Supreme Court was presented with the question of whether a physician resident's personal immunity from a lawsuit prohibited the hospital where the resident worked from being held vicariously liable under the *respondeat superior* doctrine based upon the resident's actions. The Court answered in the negative and further stated as follows:

> *[A] principal may not be held vicariously liable under the doctrine of respondeat superior based upon the acts of its agent in three instances*: (1) when the agent has been exonerated by an adjudication of non-liability, (2) *when the right of action against the agent is extinguished by operation of law*, or (3) when the injured party extinguishes the agent's liability by conferring an affirmative, substantive right upon the agent that precludes assessment of liability against the agent.

Johnson, 74 S.W.3d at 345 (emphasis added). The Supreme Court reiterated this principle a year later in *Shelburne v. Frontier Health*, 126 S.W.3d 838, 844 (Tenn. 2003). *See also Grigsby v. Univ. of Tenn. Med. Ctr*., No. E2005-01099-COA-R3-CV, 2006 WL 408053, at *5 (Tenn. Ct. App. E.S., filed Feb. 22, 2006).

- Internists of Knoxville argues that the second circumstance listed by *Johnson* and *Shelburne* is present here, i.e., that the right of action against the agent, Dr. Rankin, was "extinguished by operation of law" when the statute of repose for a medical malpractice action ran. We agree.

- Moreover, the Supreme Court has repeatedly described the fate of a medical malpractice right of action once the three-year repose period has passed as being "extinguished." *Id*. at 515; *Mills v. Wong*, 155 S.W.3d 916, 925 (Tenn. 2005) (stating "[j]ust as the medical malpractice statute of repose validly extinguishes undiscovered causes of action which have yet to accrue, it also validly extinguishes even accrued and vested rights of action."); *Penley v. Honda Motor Co*., 31 S.W.3d 181, 184 (Tenn. 2000); *Cronin v. Howe*, 906 S.W.2d 910, 913 (Tenn. 1995).

- In this case, Ms. Chenoweth was admitted to the hospital on June 4, 2003, and died on June 10, 2003. The statute of repose for claims based on medical malpractice ran no later than June 10, 2006. The Plaintiffs did not amend their complaint to include the allegations regarding the failure to timely discontinue heparin until September 18, 2006. The original complaint made no allegations, general or otherwise, against Dr. Rankin or any other employee of Internists of Knoxville besides Dr. Marlow. Significantly, the undisputed facts here make it clear that Dr. Rankin was the physician responsible for Ms. Chenoweth's care during the time of her fall and during the relevant time period thereafter, and it was Dr. Rankin who ordered the discontinuance of heparin. Although the Plaintiffs have not sued Dr. Rankin and the statute of repose has extinguished their cause of action against Dr. Rankin, they have sought to hold his employer, Internists of Knoxville, vicariously liable for his actions, through an action initiated more than three years after the alleged malpractice and injury. Under the statute of repose, Tenn. Code Ann. § 29-26-116(a)(3), and the *Johnson* and *Shelbourne* decisions as discussed above, the trial court was correct in finding this impermissible and granting Internists of Knoxville partial summary judgment.

- The Plaintiffs argue, however, that the "relation back" doctrine found in Tenn. R. Civ. P. 15.03 operates to save their cause of action against Internists of Knoxville for Dr. Rankin's actions under the *respondeat superio*r doctrine. We disagree.

- In the *Hawk* decision, this court held that under the facts presented, "since the original complaint was filed within one year of surgery and since the amendments relate back to that date, the amendments are not barred by the statute of limitations and obviously not by the statute of repose." *Hawk*, 45 S.W.3d at 33. But the *Hawk* opinion was careful to state that in that case, no new defendant was being added after the running of the statutes of limitations and repose. *Id*. at 30, 31, 33. In the present case, although Plaintiffs did not add Dr. Rankin as a defendant, they

have, for all practical purposes and effect, tried to add a new party defendant more than three years after the alleged negligence and injury – Internists of Knoxville, *in its capacity as Dr. Rankin's employer* – based solely upon the actions of Dr. Rankin, a nonparty employee against whom the Plaintiffs' cause of action has been extinguished by the statute of repose. The relation back doctrine of Tenn. R. Civ. P. 15.03 does not contemplate nor permit such a result.

P. TRACY M. LUNA, Individually and as the Surviving Spouse of James D. Luna, the Decedent v. ST. THOMAS HOSPITAL, No. M2006-01728-COA-R3-CV (December 4, 2007)

The Court's Summary:

In this medical malpractice action, the trial court awarded summary judgment to defendant hospital on the basis of the statute of limitations. It later denied plaintiff's motion to alter or amend the judgment. Finding that the plaintiff established the existence of a disputed material fact regarding when she should have discovered her cause of action against the hospital, we reverse and remand the matter for further proceedings consistent with this opinion.

Key Language from the Court's Opinion:

- The pivotal issue in this appeal involves the application of the discovery rule to Mrs. Luna's action. The Tennessee Code provides for the application of the discovery rule to medical malpractice actions as follows:

  > (a)(1) The statute of limitations in malpractice actions shall be one (1) year as set forth in § 28-3-104.
  >
  > (2) In the event the alleged injury is not discovered within such one (1) year period, the period of limitation shall be one (1) year from the date of such discovery.

  Tenn. Code Ann. § 29-26-116(a)(1)(2)(2000).

- In reviewing the trial court's award of summary judgment to St. Thomas Hospital on the basis of the statute of limitations, we must consider whether Mrs. Luna established the existence of a disputed material fact. If she succeeded in doing so, then the trial court should have denied the hospital's motion. Because the evidence supports more than one reasonable conclusion, we conclude that the issue of Mrs. Luna's constructive knowledge of her cause of action presents a question of disputed, material fact.

- Here, Mrs. Luna faced a known time period of continuous care during which the alleged wrongful conduct occurred; thus, the universe of potential tortfeasors was necessarily limited.

- The more appropriate question to consider is whether a reasonable person in Mrs. Luna's circumstances would have investigated the possibility of the residents' alleged wrongful conduct after reviewing her husband's medical records. Whether, more than a year before filing suit, a plaintiff had constructive knowledge of the injury, the wrongful conduct, and the tortfeasor's identity is generally a question for the trier of fact. *See McClellan*, 978 S.W.2d at 945.

- St. Thomas Hospital would have this Court hold that Mrs. Luna had constructive notice of the hospital's potential negligence by virtue of the fact that the alleged tortious conduct occurred while her husband was a patient there. We decline to conclude as a matter of law that this information, without more, commenced the running of the statute of limitations.

- On the other hand, we find error in the trial court's conclusion after having considered the affidavit. If a board certified general surgeon detected nothing in the medical records themselves to suggest wrongful conduct on the part of the residents, we find it difficult to expect Mrs. Luna to have done so. We hold that the affidavit placed into dispute the factual question of Mrs. Luna's constructive knowledge of her cause of action against the hospital. The trial court should have denied the hospital's motion for summary judgment and allowed the trier of fact to determine whether or not Mrs. Luna should have discovered her cause of action against the hospital more than a year before she filed suit against it.

Q. AMANDA LYNN DEWALD, and husband, THOMAS B. DEWALD v. HCA HEALTH SERVICES OF TENNESSEE, INC., d/b/a Stonecrest Medical Center, and Adrian Lamballe, No. M2006-02369-SC-R11-CV (May 6, 2008)

The Court's Summary:

In this medical malpractice appeal, the trial court denied the hospital's motion for summary judgment finding that a factual dispute exists as to whether the hospital may be held vicariously liable for the alleged negligence of an independent contractor radiologist based on a theory of apparent agency. The Court of Appeals reversed the trial court and granted summary judgment to the hospital on all grounds. We granted permission to appeal and consolidated this case for argument with Boren v. Weeks, No. M2007-00628-SC-R11-CV, — S.W.3d — (Tenn. April –, 2008). In Boren, in an opinion filed contemporaneously herewith, we adopted the analysis derived from the Restatement (Second) of Torts § 429 for determining when a hospital may be held vicariously liable for the negligence of independent contractor physicians. Therefore, we reverse the Court of Appeals' grant of summary judgment and remand to the trial court for further proceedings and for reconsideration of the hospital's motion for summary judgment consistent with the analysis and new standard adopted in *Boren*.

Key Language from the Court's Opinion:

- This case presents the same issue that this Court addressed in an opinion filed today in the companion case of *Boren v. Weeks*, 251 S.W.3d 426 (Tenn., 2008): did the Court of Appeals err in concluding that there are no issues of material fact in dispute with respect to the plaintiffs' theory of apparent agency between the hospital and the physician? Upon review, we conclude that the Court of Appeals erred in holding that StoneCrest was entitled to summary judgment.

- In *Boren*, we adopted the analysis derived from the Restatement (Second) of Torts § 429 and held:

> To hold a hospital vicariously liable for the negligent or wrongful acts of an independent contractor physician, a plaintiff must show that (1) the hospital held itself out to the public as providing medical services; (2) the plaintiff looked to the hospital rather than to the individual physician to perform those services; and (3) the patient accepted those services in the reasonable belief that the services were provided by the hospital or a hospital employee.

Boren, 251 S.W.3d at 436. With respect to the third factor, we held that "[a] hospital generally will be able to avoid liability by providing meaningful written notice to the patient, acknowledged at the time of admission." *Id*. at 434 (quoting *Sword v. NKC Hosps., Inc*., 714 N.E.2d 142, 152 (Ind.1999)). We then concluded that factual disputes existed as to whether River Park provided the Borens with adequate notice of the contractual arrangement between River Park and the emergency room physicians, thereby rendering summary judgment inappropriate. *Id*. at 437.

- In the case before us, the Court of Appeals held that "StoneCrest's liability is not ... based on whether Mrs. Dewald read the disclaimer, but rather on whether StoneCrest held Dr. Lamballe out as its agent." In light of our decision in *Boren*, including the adoption of the Restatement (Second) of Torts § 429, we now reverse the Court of Appeals' decision granting summary judgment to StoneCrest. We remand this case to the trial court for further proceedings and for reconsideration of StoneCrest's summary judgment motion consistent with the analysis and new standard set forth in Boren.

R. ELGA JEAN HINSON, et al. v. CLAIBORNE & HUGHES HEALTH CENTER, No. M2006-02306-COA-R3-CV (February 26, 2008)

The Court's Summary:

A ninety-one year old man died a month after he was admitted to the hospital. Almost a year after his death, two of his daughters filed a complaint against the nursing home where he had resided prior to his hospital admission. They alleged that the nursing home's employees had been guilty of negligence which caused or contributed to their father's death. The trial court granted summary judgment to the nursing home on the wrongful death claim because Plaintiffs were unable to successfully refute the affidavit of the defendant's medical expert, who testified that the medical records showed that Plaintiffs' father had died from causes unrelated to any act or omission on the part of the nursing home or its employees. The court also dismissed all other claims based on general allegations of negligence by the nursing home because Plaintiffs' affidavits failed to allege any injuries with specificity and because of the passing of Tennessee's one-year statute of limitations period. We affirm.

Key Language from the Court's Opinion:

- In the present case, Plaintiffs presented additional evidence, in the form of the affidavit of Rosemary Cox, R.N., and Mr. Epley's death certificate, which they contend create a material factual dispute as to the cause of his death. As we noted above, Nurse Cox testified that she was familiar with the standard of care at nursing homes and that, in her opinion, the care Mr. Epley received fell below the standard of care and "did contribute to his diminished quality of life with a subsequent poor resident outcome." She further stated that "Mr. Epley's hospitalization on February 26, 2005, and subsequent death were more likely than not directly *impacted* by the failure of Claiborne-Hughes to comply with acceptable standards of practice." (Emphasis added).

- A nurse is not an expert who can testify as to medical causation. Tennessee Code Annotated § 29-26-115(b), quoted above, requires expert testimony from a health care professional who is licensed to practice and has practiced a profession or specialty "which would make the person's expert testimony relevant to the issues in the case." In *Richberger v. West Clinic, P.C*., 152 S.W.3d 505 (Tenn. Ct. App. 2004), this court held that since a nurse is prohibited by statute from making a medical diagnosis, he or she is likewise prohibited from testifying as to medical causation. *See* Tenn. Code Ann. § 63-7-103(b); *Bishop v. Smith Nephew Richards, Inc.,* No. 02A01-9405-CV-00108, 1995 WL 99222 at *5 (Tenn. Ct. App. Mar. 10, 1995); *Nash v. Goodlark Hospital*, 1990 WL 56192 at *2 (Tenn. Ct. App. May 4, 1990).

- Whether Plaintiffs' claim is for medical malpractice or for negligence based on failure to adhere to some other standard of care, the defendant nursing home presented evidence negating any causal link between its care of Mr. Epley and his later death. Plaintiffs did not present expert testimony from a doctor of any specialty to contradict Dr. Wright's conclusion regarding the lack of causation between Mr. Epley's death and any conduct or care by the nursing home. In fact, they presented no competent evidence to create a dispute of fact regarding the cause of Mr. Epley's death. Consequently, Plaintiffs' claims against Claiborne & Hughes for their father's death must fail.

- We hold that Claiborne & Hughes was entitled to summary judgment on Plaintiffs' wrongful death claim. Accordingly, we affirm the trial court's grant of summary judgment on this issue.

- The trial court gave Plaintiffs an opportunity to more specifically allege any injuries that Mr. Epley might have suffered while under the care of the defendant nursing home and to present reasons why claims for those injuries should not be barred by the expiration of the one year statute of limitations. Plaintiffs responded with identical affidavits which asserted that no health care professional had ever informed them that the nursing home had caused injury to Mr. Epley, that they did not consult with a lawyer and a nurse who agreed to investigate the case until May of 2005, and that they did not see their father's death certificate until August of 2005. Neither the amended complaint nor the affidavits identify any specific injuries, the date of those injuries, or the acts or omissions by nursing home employees alleged to have caused such injuries.

- Although their complaint was filed more than one year after Mr. Epley left the defendant nursing home, Plaintiffs argued that they are entitled to have the benefit of Tenn. Code Ann. § 29-6-116(a)(2), which creates a possible exception to the strict requirements of the one year limitations period: "In the event the alleged injury is not discovered within such one (1) year period, the period of limitation shall be one (1) year from the date of such discovery."

- Our courts have consistently held that under the discovery rule the applicable statute of limitations begins to run when the plaintiff discovers, or in the exercise of reasonable care should have discovered, that an injury was sustained as a result of wrongful conduct by the defendant. *Shadrick v. Coker*, 963 S.W.2d 726, 733 (Tenn. 1998); *Roe v. Jefferson*, 875 S.W.2d 653 (Tenn. 1994). The statute is tolled only during the period when the plaintiff has no knowledge at all that a wrong has occurred and as a reasonable person is not put on inquiry. *Hoffman v. Hospital Affiliates, Inc*., 652 S.W.2d 341, 344 (Tenn. 1983). "[M]ere ignorance and failure of the plaintiff to discover the existence of a cause of action is not sufficient to toll the running of the statute of limitations." *Soldano v. Owens-Corning Fiberglass Corp., et al*., 696 S.W.2d 887, 889 (Tenn. 1985) (quoting 18 TENN JURISPRUDENCE 92); *Vance v. Schulder*, 547 S.W.2d 927, 930 (Tenn. 1977); *Cavalier Metal Corp. v. Finch & McBroom*, No. W2004-01536-COA-R3-CV, 2005 WL 645201, at *9 (Tenn. Ct. App. Mar. 17, 2005) (Tenn. R. App. P. 11 application denied October 17, 2005).

- The trial court granted Plaintiffs the opportunity "to demonstrate to the Court that there were causes of action for other injuries of Plaintiff's decedent that were not barred by the one-year statute of limitations." Plaintiffs' affidavits are insufficient to establish why, in the exercise of reasonable care they did not discover that their father's injuries were the result of wrongful care, or at least why they were not put on inquiry as to that possibility.

- We agree with the trial court's findings, and they are supported by the record. Accordingly, Plaintiffs' claims for negligence unrelated to the death of Mr. Epley were properly dismissed under Tenn. R. Civ. P. 12.02(6).

S. FREDERICK BERTRAND, a citizen and resident of Benton County, Tennessee v. THE REGIONAL MEDICAL CENTER AT MEMPHIS, a Tennessee Corporation, et al., No. W2008-00025-COA-R3-CV (September 23, 2008)

The Court's Summary:

This appeal arises from an October 2003 medical malpractice action filed against The Regional Medical Center at Memphis ("the Med") and several physicians. Plaintiff voluntarily non-suited his action and re-filed it within the one-year period provided by the savings statute codified at Tennessee Code Annotated § 28-1-105. The trial court awarded summary judgment to the Med upon determining Plaintiff could not rely on the savings statute where the General Assembly had amended the Governmental Tort Liability Act ("the GTLA"), bringing the Med within the scope of the GTLA as codified at Tennessee Code Annotated § 29-20-101 (2007 Supp.), et seq. The amendment became effective July 1, 2003. On November 26, 2007, the trial court entered final judgment in favor of the Med pursuant to Tennessee Rule of Civil Procedure 54.02. Plaintiff filed a timely notice of appeal to this Court. We affirm.

Key Language from the Court's Opinion:

- In his brief to this Court, Mr. Bertrand asserts that the law applicable to his action is the law in effect on the date of the injury. He argues that, although the Med was within the purview of the GTLA when he filed his claim, the GTLA was not applicable to the Med in October 2002, when he was allegedly injured. He argues that to apply the provisions of the GTLA to his cause of action results in a retroactive application of the statute. He further argues that his right to bring an action against the Med accrued at the time of injury and before the effective date of the amendment to section 102, and that the Med could not be protected by the GTLA when it was not within its purview in October 2002.

- The Med, on the other hand, asserts that it clearly was within the purview of the GTLA when Mr. Bertrand filed his claim against it, and that section 102, as amended, applies to all actions brought on or after July 1, 2003. Although the Med devotes a considerable part of its brief to demonstrating that the savings statute is not applicable to actions against entities within the gambit of the GTLA, Mr. Bertrand does not assert otherwise. Rather, the determinative issue in this case is whether the 2003 amendment bars an action brought after the effective date, July 1, 2003, where the injury occurred before the amendment became effective.

- Clearly, the legislature intended that the 2003 amendments to section 29-20-103(3)(B) apply not only to actions arising from injuries sustained after July 1, 2003, but to "all claims filed" on or after that date. The amended statute was applicable to Mr. Bertrand's action when it was filed in October 2003.

- We must disagree with Mr. Bertrand's assertion that the 2003 amendment retroactively impairs a vested right to bring an action against entities such as the Med. It does not. The 2003 amendment brings actions against such entities within the limitations of the GTLA, it does not remove the right to a cause of action. Further, contrary to Mr. Bertrand's argument, application of the GTLA as amended to all claims filed on or after July 1, 2003, offends no constitutional consideration in this case.

- However, reliance on the savings statute is not a constitutional right. The savings statute is a creation of the General Assembly, and it simply does not apply to actions brought against entities within the purview of the GTLA. *Lynn v. City of Jackson*, 63 S.W.3d 332, 337 (Tenn. 2001). Section 29-20-102(3)(B) undisputedly applies to all claims filed on or before July 1, 2003, and Mr. Bertrand undisputedly filed his claim after that date. We affirm.

T. BARSHA BATES LAND et al. v. LARRY W. BARNES et al., No. M2008-00191-COA-R3-CV (September 10, 2008)

The Court's Summary:

The trial court dismissed this medical malpractice case after granting motions to exclude the testimony of both of the plaintiffs' expert witnesses. Based upon our conclusion that the trial court did not abuse its discretion in excluding the testimony of either expert witness, we affirm the decision of the trial court.

Key Language from the Court's Opinion:

- Dr. Polow testified that, since 1984, she had practiced family medicine and worked in the emergency room in Chatsworth, a town in Murray County, Georgia, and that she used nurse practitioners in her family medical practice… Based upon this testimony, we disagree with the trial court's conclusion that Dr. Polow failed to provide a sufficient factual basis for her belief that Murray County, Georgia, was a similar community to Lincoln County, Tennessee… Dr. Polow's testimony concerning her understanding of the standard of care calls into question the reliability of her testimony regarding the applicable standard of care.

- We acknowledge that the admissibility of Dr. Polow's testimony is a close question. The plaintiffs had the burden of proof to establish the elements under Tenn. Code Ann. § 29-26-115(a). Given the issues discussed above, we cannot find that the trial court abused its discretion in excluding Dr. Polow's testimony. In light of this conclusion, we need not address the sufficiency of Dr. Polow's testimony on the issue of causation.

- The court was asked to disqualify Mr. Stevens as an expert witness based upon his deposition testimony. Thus, unlike with Dr. Polow, the plaintiffs would have had the opportunity to cure some deficiencies in Mr. Stevens' deposition testimony at the hearing–for example, the failure to establish a similarity between his community of practice and Lincoln County, Tennessee. We have found, however, that Mr. Stevens' testimony failed to show he was competent to testify as to the standard of care for nurse practitioners.

- We start by noting that, without the testimony of Dr. Polow, the plaintiffs likely could not have proven causation… Even apart from the lack of evidence of causation, however, we find no abuse of discretion in the trial court's decision to exclude Mr. Stevens' testimony.

- Based upon this testimony, it does not appear that Mr. Stevens was sufficiently familiar with the standard of care for a nurse practitioner to provide relevant testimony. *See Eckler v. Allen*, 231 S.W.3d 379, 387 (Tenn. Ct. App. 2006) (stating that the expert need not practice in the same specialized field but must be sufficiently familiar with the standard of care in the specialty to give relevant testimony). Moreover, the testimony of a medical expert as to what he or she would have done does not establish the standard of care. *Jennings v. Case*, 10 S.W.3d 625, 632 (Tenn. Ct. App. 1999); *Roddy v. Volunteer Med. Clinic, Inc.*, 926 S.W.2d 572, 578 (Tenn. Ct. App.

1996). We thus conclude that the trial court did not abuse its discretion in excluding the testimony of Dr. Polow and Mr. Stevens.

IV. NEGLIGENCE CASES

A. JEFF MILLER and wife, JANICE MILLER, et al. v. BEATY LUMBER, INC., No. M2007-00253-COA-R3-CV (December 20, 2007)

The Court's Summary:

This is a negligence case that resulted in a directed verdict for the defendant. The plaintiff's minor son was killed when the truck he was riding in collided with a logging truck pulling the defendant's load of logs. All parties involved in the accident died, and there were no eyewitnesses. The plaintiffs filed suit against the defendant on behalf of their deceased son. At trial, the defendant moved for a directed verdict, which the court granted. The plaintiffs now appeal, alleging that the trial court applied the wrong standard when it granted the directed verdict. Next, the plaintiffs argue that the court should have applied the theory of joint and several liability because the case involved concurrent negligence resulting in an indivisible harm. Finally, the plaintiffs argue that the court erred by excluding evidence relating to the defendant's liability insurance. We affirm.

Key Language from the Court's Opinion:

- We find that a directed verdict in this case is appropriate. Reasonable minds could only draw but one conclusion that there is absolutely no evidence of a causal connection between Smith's purported negligent conduct and the accident. Absent pure speculation, there is no evidence what, if any, negligent conduct caused the accident or which party's negligent conduct caused the accident. The plaintiff's evidence must go beyond mere speculation that the defendant's conduct caused the harm. *See Edwards v. Miller*, NO. 03A01-9512-CV-00457, 1996 WL 200634, at *2 (Tenn. Ct. App. Apr. 26, 1996).

- At trial, the Millers did raise the issue of the deficient brakes, but they failed to link the deficiency to the accident. The Millers argue that "evidence of a vehicle's deficient brakes at the time of a collision calls for a jury's consideration, and is not a matter upon which the trial Court may properly direct a verdict." They cite to *Getz v. Weiss*, but the Millers' attorney has misstated that holding. In that case, there was evidence of a causal connection between the defective brakes and the accident:

  > And there was some evidence that tended to show that the defendant's brakes were not in good state of repair. They had not been examined within a year, and *there was evidence that a car running 30 miles per hour could have been stopped within 28 feet if its brakes were in good order.* The street was 32 feet wide. The *[skid] marks* began 9 feet west of the intersection and led across the intersection a distance of 62 feet to the point where the car stopped; hence we are of the opinion that the court erred in striking these counts with respect to the brakes, as they may be shown by circumstantial evidence to have been defective.

  Getz v. Weiss, 25 Tenn. App. 520, 160 S.W.2d 438, 443 (Tenn. Ct. App. 1941) (emphasis added). We agree with Beaty Lumber that the Miller's expert witness, Stopper, failed to testify that the deficient brake condition in any way contributed to or caused the accident.

- The Millers must point to some negligent conduct – such as defective brakes or the failure to keep a proper lookout – and but for that conduct, the injury would not have occurred. "While there may be different degrees of liability or fault, specific conduct is either a cause in fact, or it is not." *Waste Management, Inc. of Tennessee v. South Central Bell Telephone Co.*, 15 S.W.3d 425, 433 (Tenn. Ct. App. 1997). The fact that Smith was operating his vehicle and the accident occurred is simply not enough. "[I]t is well to recall the rule that negligence cannot be inferred from the mere fact of the occurrence of the injury alone. . . . Further, it is well-settled that the mere fact that an accident resulted in an injury to a plaintiff does not raise a presumption that a defendant was guilty of negligence . . . ." *Edwards v. Miller*, NO. 03A01-9512-CV-00457, 1996 WL 200634, at *2 (Tenn. Ct. App. Apr. 26, 1996). While this is a tragic case, there simply was not enough evidence produced at trial to survive a motion for a directed verdict.

- The Millers argue in their brief that the trial court "improperly removed the issue of proximate cause from the sacred province of the jury," but we point out that there is a great difference between causation and proximate cause:

> Causation and proximate cause are distinct elements of negligence, and both must be proven by the plaintiff by a preponderance of the evidence. "Causation (or cause in fact) is a very different concept from that of proximate cause. Causation refers to the cause and effect relationship between the tortious conduct and the injury. The doctrine of proximate cause encompasses the whole panoply of rules that may deny liability for otherwise actionable causes of harm." Thus, proximate cause, or legal cause, concerns a determination of whether legal liability should be imposed where cause in fact has been established. "Cause in fact, on the other hand, deals with the 'but for' consequences of an act. 'The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct.'" (internal citations and quotations omitted).

Smith v. Cherry, No. M2005-01168-COA-R3-CV, 2006 WL 1724629, at *4 (Tenn. Ct. App. Nov. 6, 2006). And while we agree that the issue of proximate cause is generally a question for the jury, *Kim v. Boucher*, 55 S.W.3d 551, 556 (Tenn. Ct. App. 2001), the Millers failed to establish a causal connection. Thus, the issue of proximate cause is not even reached. *See Waste Management, Inc. of Tennessee v. South Central Bell Telephone Co.,* 15 S.W.3d 425, 430 (Tenn. Ct. App.1997) ("no negligence claim can succeed unless the plaintiff can first prove that the defendant's conduct was the cause in fact of the plaintiff's loss.").

- Based upon the record, we find that the plaintiff failed to produce any evidence relating to causation, a necessary element of negligence. Thus, we need not address the issue of joint and several liability, or the issue raised by the Tennessee Association for Justice in their amicus curiae brief that joint and several liability should apply when the plaintiff is without fault. Nor do we need to address whether the exclusion of evidence relating to Beaty Lumber's insurance was error. For the aforementioned reasons, we affirm.

B. JONATHAN FORD et al. vs. STEVE CORBIN et al., No. W2006-02616-COA-R9-CV (December 12, 2007)

The Court's Summary:

This interlocutory appeal concerns the liability of a municipality. Pursuant to the municipality's ordinances, a municipal inspector inspected a church building. The inspector sent a letter to the owners of

the building notifying them that, due to the dilapidated condition of the building, they were in violation of a city ordinance. Over a year later, the building collapsed, killing four people, including three children, and injuring a fifth. The plaintiffs filed suit against the municipality for negligence based on the initial inspection and the municipality's failure to take appropriate action after the initial inspection. Three separate lawsuits were consolidated into this action. The municipality filed a motion for summary judgment, arguing that it was immune from liability. The motion was denied. The municipality was then granted permission for this interlocutory appeal. On appeal, we affirm in part and reverse in part the trial court's denial of summary judgment, holding that the defendant municipality may not be immune from liability for some claims under the facts presented in this case.

Key Language from the Court's Opinion:

- On appeal, the City raises three issues for review, namely, whether it has immunity from liability in this case under (1) Tennessee's Slum Clearance and Redevelopment Act ("Slum Clearance Act"), Tennessee Code Annotated §§ 13-21-10 through -314; (2) the Tennessee Governmental Tort Liability Act ("GTLA"), Tennessee Code Annotated §§ 29-20-101 through -408; and (3) the common law public duty doctrine.

- The Plaintiffs counter that the phrase "person affected" must be read in the context of the entire Slum Clearance Act. If this is done, they contend, it is clear that the General Assembly intended for the meaning of "person affected" to be limited to property owners and their tenants, and not to include bystanders such as the Plaintiffs in this action. This issue is one of first impression.

- The Slum Clearance Act states that once the City inspects the subject property, notices and orders are sent to the record owner of the property. *See generally* T.C.A. § 13-21-103 (1999). After notices or orders are sent to the owner, the Act provides that "[a]ny person affected by an order issued" under the Act may seek the specified remedies. T.C.A. § 13-21-106(a) (1999). Based on the Act's use of the broad phrase "person affected by an order," as opposed to a simple reference to the owner of the property, we gather that the General Assembly intended this provision to have application beyond the owner of an affected property.

- Viewing the Act as a whole, the exclusion of damages from the available remedies should not apply to a party for whom the statutory remedies are not available. Despite the breadth of the phrase "[a]ny person affected by an order," it is hard to imagine a circumstance in which a person sitting in a vehicle outside a building could obtain an order in chancery court enjoining the City public officer from enforcing his order requiring the building owner to repair his building. If the statutory remedies are unavailable to the Plaintiffs, then the statutory limitations on the remedies should not be applicable to them. We therefore conclude that Tennessee Code Annotated § 13-21- 106(b) does not give the City immunity from liability to the Plaintiffs in this case.

- Some of the Plaintiffs' allegations are based on the City's alleged failure to make proper inspections prior to the date of the Church collapse. Insofar as the Plaintiffs' claims against the City are based on negligent inspection or failure to inspect, the City is immune from liability pursuant to Tennessee Code Annotated § 29-20-205(4). The remainder of the allegations in the Amended Complaint, however, do not stem from an alleged negligent inspection or failure to inspect. Rather, they are based on the City's decisions and its failure to act after the inspections were done; specifically, the remaining allegations pertain to the City's alleged failure to either require proper repair of the Church building or post "Do Not Occupy" warnings.

- We decline to extend the definition of "inspection" to include the actions that the City took or did not take after performing the inspection. Therefore, to the extent that the Plaintiffs' claims are based on the City's decisions and actions after inspecting the Church building, and not on negligent inspection or failure to inspect, we hold that Tennessee Code Annotated § 29- 20-205(4) does not provide the City with immunity from liability.

- The City asserts that the public duty doctrine shields it from liability in this case because the Plaintiffs have failed to allege an injury that is not common to the public at large. The City also contends that none of the three elements of the special duty exception operate in this case to remove immunity under the public duty doctrine. The Plaintiffs respond that the facts in this case implicate the first and third types of special duty; they argue that City officials affirmatively undertook to protect the Plaintiffs and that the City's actions involved intent, malice, or reckless misconduct.

- After examining the appellate record, we find no evidence indicating that the City affirmatively undertook to protect the Plaintiffs' decedents or that the Plaintiffs' decedents relied upon any such undertaking by the City. Likewise, we find no evidence in the record that would allow a reasonable fact-finder to conclude that the City, through its employee Newson, acted with intent or malice.

- We must, however, examine the "reckless misconduct" prong of the special duty exception. In this context, a person is deemed to have engaged in reckless conduct if he is "aware of, but consciously disregards, a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances." *Gardner v. Insura Prop. & Cas. Ins. Co*., 956 S.W.2d 1, 3 (Tenn. Ct. App. 1997) (*citing Hodges v. S.C. Toof & Co*., 833 S.W.2d 896, 901 (Tenn. 1992)). Tennessee courts have also found recklessness where "[t]he preponderance of evidence in the record point[ed] to extreme dereliction by the County in the operation of its [misdemeanant] program, and such neglect of duty substantially and unjustifiably increased the risk that harm would occur." *Brown v. Hamilton County*, 126 S.W.3d 43, 50 (Tenn. Ct. App. 2003). Viewing the evidence before us in the light most favorable to the Plaintiffs, we find that there is sufficient evidence to support a factual finding that the City's conduct was reckless.

- The record reveals that Newson made several observations concerning the Church property that, according to his own deposition, gave him reason to believe that the Church was in danger of imminent collapse. Nevertheless, Newson allowed the December 15, 2001 rehabilitation target date to pass without demanding an engineer's report on the structural integrity of the building or issuing a "Do Not Occupy" warning. After the rehabilitation target date passed, another seven months elapsed before the Church collapsed; in that time, the City took no protective action on a building that had been identified as possibly having serious structural problems. These factual allegations are sufficient to permit a finding that the City consciously disregarded a substantial and unjustifiable risk "of such a nature that its disregard constitutes a gross deviation" from the standard of ordinary care, and would therefore fall within the reckless misconduct prong of the special duty exception to the public duty doctrine. Therefore, to the extent that the Plaintiffs allege conduct by City officials that could be deemed reckless, the City is not immune from liability under the public duty doctrine.

- In sum, we hold that the City is not immune from liability under the Slum Clearance Act. To the extent that the Plaintiffs' allegations against the City are based on negligent inspection or failure to inspect, the City is immune from liability under Tennessee Code Annotated § 29-20- 2051(4).

As to the remainder of the Plaintiffs' allegations, the City has no immunity under the GTLA. In addition, as to the remaining allegations, insofar as the Plaintiffs allege misconduct by City officials that could be deemed reckless, the City is not immune from liability under the public duty doctrine. The decision of the trial court is affirmed in part and reversed in part as set forth above.

C. HELEN C. SWANSON v. KNOX COUNTY, TENNESSEE, No. E2007-00871-COA-R3-CV (November 20, 2007)

The Court's Summary:

This case presents the issue of the applicability of Tenn. Code Ann. § 8-8-302 to a suit against a county government based on the failure of one or more of its deputy sheriffs to perform an administrative task. Ms. Swanson applied for a job with a hospital, and at the request of the hospital, the county sheriff's department issued a criminal background report on Ms. Swanson which contained some erroneous information. The sheriff's department corrected and reissued the report but failed to send the hospital a letter of explanation. Ms Swanson sued the county for damages pursuant to Tenn. Code Ann. § 8-8-302. The trial court granted the county's motion for summary judgment. Upon review, we affirm. Ms. Swanson's suit for the "inaction" of various sheriff's deputies is a suit for negligence, which is controlled by the Tennessee Governmental Tort Liability Act, not Tenn. Code Ann. §§ 8-8-301, et seq. No relief is available under Tenn. Code Ann. § 8-8-
302, because the "act" complained of, i.e. failure to write an explanatory letter, is not an intentional act of misconduct for which the statute affords relief.

Key Language from the Court's Opinion:

- The issue we must resolve is whether Tenn. Code Ann. § 8-8-302 affords relief to a plaintiff who has been harmed by a deputy sheriff's failure to write an explanatory letter to a prospective employer upon request.

- This issue then becomes whether the action complained of is an act of negligence or an intentional act of misconduct. Based on the reasoning of *O'Neal*, *Jenkins*, *Hensley*, and *Warnick*, we hold that the plaintiff's suit for the "inaction" of various sheriff's deputies is a suit for negligence, which is controlled by the GTLA, not Tenn. Code Ann. §§ 8-8-301, et seq. No relief is available under Tenn. Code Ann. § 8-8-302 because the "act" complained of, i.e. failure to write an explanatory letter, is not an intentional act for which the statute affords relief. Cases of official misconduct where Tenn. Code Ann. § 8-8-302 has provided a basis for relief include those involving a school resource officer who purchased alcohol and drugs then sexually assaulted a student, *Watts v. Maury County*, No. M2001-02768-COA-R3-CV, 2003 WL 1018138, at *1 (Tenn. Ct. App. M.S., Sept. 2, 2003), and a county medical examiner who drugged a young man that was accompanying him to observe his job in order to photograph him in the nude, *Doe v. Pedigo*, No. E2002-01311- COA-R3-CV, 2003 WL 21516220, (Tenn. Ct. App. E.S., Jan. 26, 2004). The case before us does not involve a "non-negligent" act, but rather a negligent act or omission to act, and therefore, Tenn. Code Ann. § 8-8-302 is not applicable.

- Ms. Swanson did not pursue relief under the GTLA and even if she had, her cause of action would have been time-barred. See Tenn. Code Ann. § 29-20-305(b). The alleged wrongful conduct of Knox County occurred in February of 2004. Suit was filed on July 22, 2005, well beyond the statutory one-year period of limitations for suits under the GTLA.

- The intent of the General Assembly was not to make counties strictly liable for every "wrong, injury, loss, damage or expense" resulting from actions or inactions for which the deputy does not have an official duty, but rather to shift liability from the sheriff to the county which effectively was only a "partial revocation of the [c]ounty's absolute immunity for the acts of its officers in the discharge of their official duties." *Doe v. May*, No. E2003-1642-COA-R3-CV, 2004 WL 1459402, at *2 (Tenn. Ct. App. E.S., filed on June 29, 2004). If Tenn. Code Ann. § 8-8-302 imposed strict liability on the Sheriff's Department, the deputies would be charged with being the absolute insurer of every citizen's job, finances, and welfare. In construing the General Assembly's intent, courts should presume that the General Assembly did not intend an absurdity and thus, should avoid construing statutes to produce absurd results.

- Ms. Swanson also argues that since a deputy promised her an explanatory letter, he was under an affirmative duty to act and immunity is removed under the public duty doctrine. We disagree. The public duty doctrine originated at common-law and shields a public employee from suits for injuries that are caused by the public employee's breach of a duty owed to the public at large. The public duty exception does not come into play because Ms. Swanson did not proceed with a negligence theory under the GTLA, and in any event, the exception does not afford her a basis for relief. For the reasons stated herein, the judgment of the trial court is affirmed.

D. WILLIAM H. LIGGETT, JR. et al. v. BRENTWOOD BUILDERS, LLC, No. M2007-00444-COA-R3-CV (March 27, 2008)

The Court's Summary:

Home buyers brought suit against home builder alleging fraud, breach of contract, consumer protection violations, negligent misrepresentation, and negligence. The trial court granted the builder's motion for summary judgment based upon the statute of limitations and statute of repose. We affirm.

Key Language from the Court's Opinion:

- The circumstances in the present case differ significantly from those in *Prescott*. The Liggetts filed their complaint on March 2, 2004. Under the statute of limitations of Tenn. Code Ann. 28-3-105, any cause of action that accrued prior to March 2, 2001 would be barred because the complaint would not be filed within three years of the accrual of the cause of action. The undisputed evidence establishes that the Liggetts had actual knowledge of significant problems and damage prior to March 2001. The uncontroverted facts show that, as of February 2001, the Liggetts had noticed and reported to the builder leakage problems affecting the French doors, kitchen door, and windows; roof leaks; cracks in the kitchen tile; large brick cracks; kitchen dry wall damage; nail pops in several locations; and drywall cracks in several locations. In deposition testimony, the Liggetts further detailed problems that were discovered during their first year in the house, from March 2000 through March 2001: cracking in the edges and discoloration in the kitchen and hearth room windows; a window askew in a child's bedroom; problems with windows in the master bedroom and study (which they thought were merely cosmetic); and irregular mortar by a south window.

- Based upon all of the damage known to the Liggetts prior to March 2, 2001, we have concluded that the trial court could properly have found, as a matter of law, that their claims were time-barred by the three-year statute of limitations set out in Tenn. Code Ann. § 28-3-105… In light of the overall picture of the information known to the Liggetts prior to March 2001, however, this

Court has reached the conclusion that they were on notice that there were significant and pervasive problems with the construction of their home.

- The same reasoning applies with respect to the Liggetts' causes of action for fraud and negligent misrepresentation. They allege that they were induced to purchase the home by Brentwood Builders' false and fraudulent representations that "the home was solidly constructed, was in good and sound condition, that the home was built to conform to the code, that the home was built using high quality materials, that the home had been built by skilled professionals, that the home would meet the Builder's exacting standards, that the Builder was committed to providing the highest quality product and that any defects would be covered by the warranty." In the alternative, the Liggetts allege that the same representations were negligently made and that they relied on those representations to their detriment.

- Under the rule stated in *Prescott*, a cause of action for fraud (or intentional misrepresentation) accrues within the meaning of Tenn. Code Ann. § 28-3-105 "at the time the injury occurs, or when it is discovered, or when in the exercise of reasonable care and diligence the injury should have been discovered." *Prescott*, 627 S.W.2d at 138. Viewing the evidence in the light most favorable to the Liggetts, we must conclude that they knew of significant defects prior to March 2001 and either knew or should have known that they had a cause of action against Brentwood Builders for fraud and/or negligent misrepresentation. Given their knowledge of persistent leakage through the windows, doors, and roof, cracks in the kitchen floor tile, drywall cracks, and other problems, the Liggetts had reason to know that at least some of the representations upon which they had relied in purchasing the house were not true.

- As discussed above, with respect to many of their claims, the Liggetts knew that there were problems before March 2, 2001. The Liggetts have not pointed to any evidence that Brentwood Builders somehow induced them to delay filing suit by assuring them that it would take care of the alleged defects… The trial court did not err in granting summary judgment to Brentwood Builders on the basis that the Liggetts' claims were barred by the statute of limitations.

E. STANLEY M. HERRING, et al. v. COCA-COLA ENTERPRISES, et al., No. E2007-01295-COA-R3-CV (March 26, 2008)

The Court's Summary:

Stanley M. Herring ("Plaintiff") was employed as a truck driver for U.S. Express. U.S. Express contracted with Coca-Cola Enterprises to deliver soft drinks. In October of 2002, Plaintiff was at Coca-Cola Enterprises' facility in Bradley County, Tennessee, to pick up soft drinks for delivery to Georgia. Toward the end of the loading process, Plaintiff expressed to Coca-Cola Enterprises' employees his concern that the soft drinks had not been loaded properly. Despite repeated complaints made by Plaintiff as to the improper loading, Plaintiff nevertheless accepted the products as loaded and drove to Georgia. Upon his arrival in Georgia, Plaintiff discovered that several cases of soft drinks had fallen to the floor of the truck. While picking up the fallen soft drinks, Plaintiff was injured. Plaintiff sued Coca-Cola Enterprises for negligence. Coca-Cola Enterprises filed a motion for summary judgment claiming Plaintiff's claim was barred under Georgia law because Plaintiff had violated 49 C.F.R. § 392.9 by failing to ensure that his cargo was properly distributed and adequately secured. The Trial Court agreed and further held that Plaintiff's claim also failed because he had assumed the risk under Georgia law. Plaintiff appeals, and we affirm.

Key Language from the Court's Opinion:

- Defendant filed Plaintiff's deposition in support of its motion for summary judgment. This deposition leaves no doubt that Plaintiff knew before leaving the Defendant's facility that the cargo had been improperly loaded. Specifically, Plaintiff testified that the soft drinks were not loaded onto his truck properly because some of the pallets of soft drinks were only single wrapped prior to transport, and they should have been double wrapped.

- Furthermore, the Trial Court stated toward the conclusion of its order that it was Plaintiff who had "the duty to ensure safe loading and [he] chose to carry the cargo with the known risk that it was negligently loaded." Accordingly, we conclude that Plaintiff's alleged violation of 49 C.F.R. 392.9 formed one basis upon which the Trial Court believed summary judgment was appropriate.

- At oral argument before this Court, Plaintiff argued that assumption of the risk was not explicitly raised in Defendant's motion for summary judgment and, therefore, the Trial Court erred when it relied on that doctrine when dismissing this case. We reject this argument because Plaintiff never raised this argument anywhere in his brief. This argument is, therefore, waived. Since Plaintiff has waived this argument, in resolving this appeal we also will consider whether, under Georgia law, Plaintiff's claim is barred by his assumption of the risk.

- In the present case, it is undisputed that Plaintiff had actual knowledge that his truck had been improperly loaded. As evident by his comments that the soft drinks were "not going to ride" and he was "going to have a down load" if the pallets were not properly wrapped, Plaintiff certainly understood and appreciated the risk of the improper loading. Notwithstanding this knowledge and appreciation of the risk, Plaintiff nevertheless proceeded to accept the soft drinks as loaded and travel to Georgia, in violation of 49 C.F.R. § 392.9.

- Plaintiff, without question, knew before leaving Defendant's business that the load was unsafe. Despite this knowledge, Plaintiff chose to drive his truck to Georgia with this unsafe load. We conclude that the present case is such a "plain, palpable and indisputable" case of assumption of the risk. The judgment of the Trial Court that Plaintiff's claim is barred because he assumed the risk is, therefore, affirmed.

- We further conclude that even if Plaintiff did not assume the risk, his claim must nevertheless fail because of his clear violation of 49 C.F.R. § 392.9. As set forth in *Franklin*, *supra*, the responsibility for improper loading rests generally with the carrier and it is the carrier who has the "primary duty" to ensure safe loading. *Franklin*, 748 F.2d at 868. Because the improper loading of the soft drinks was readily apparent to Plaintiff, the responsibility for improper loading, as between Plaintiff and Defendant, does not shift to Defendant, even though it was Defendant's employees who loaded the cargo… Because Plaintiff had the primary responsibility, his negligence, in essence, trumps any negligence by Defendant, at least with respect to the present lawsuit.

- Thus, we likewise affirm the Trial Court's conclusion that Plaintiff's violation of 49 C.F.R. § 392.9 bars his claim against Defendant.

F. THOMAS MORROW, et al. v. RONNIE BULL, et al., No. E2007-00606-COA-R3-CV (February 27, 2008)

The Court's Summary:

The tenants, who leased a newly-constructed house from the builder/owner, sued the builder/owner alleging, among other things, that the house was negligently constructed in that it was built on a site that unreasonably exposed the house to excessive moisture and with a deficient water runoff and drainage system. The tenants sought compensation for personal injury and property damage allegedly caused by toxic mold in the house due to excessively wet basement walls. The trial court granted the builder/owner summary judgment. Upon review, we vacate the trial court's summary judgment based on our finding that genuine issues of material fact exist.

Key Language from the Court's Opinion:

- The Morrows' assertion that areas of the basement walls were frequently wet is supported by their deposition and affidavit testimony and the affidavit of their expert. Bull did not dispute the alleged existence and extent of the mold infestation in the house. Mrs. Morrow testified that the mold was a result of the excessive moisture in the underground basement walls, which came from ground moisture.

- The trial court ruled that Mr. Tiano's affidavit was insufficient to create a genuine issue of material fact, stating that "the affidavit does not point to any one condition which did cause the mold and, therefore, deals in possibilities, not probabilities." While Mr. Tiano's opinion as to potential causation of the mold infestation could have been stated with more certainty, it is clearly not so vague as to be completely discounted on a summary judgment determination. We note in this regard that all nine of the possible causes identified by Mr. Tiano involve defective or insufficient construction of the house. Generally speaking, "proximate causation is a jury question unless the uncontroverted facts and inferences to be drawn from them make it so clear that all reasonable persons must agree on the proper outcome." *McClenahan v. Cooley*, 806 S.W.2d 767, 775 (Tenn. 1991); *Hale v. Ostrow*, 166 S.W.3d 713, 718 (Tenn. 2005) (stating "[g]iven that the evidence on summary judgment must be viewed in the light most favorable to the plaintiff, however, the issue of causation, as well as the allocation of comparative fault, are determinations of fact to be made by the jury.").

- We reach a similar conclusion here – that upon this record, summary judgment was inappropriate. The proof presented by the Morrows is sufficient to raise a genuine issue of material fact as to whether the newly-built house was negligently constructed, resulting in excessive moisture in the basement and the resultant toxic mold infestation.

G. DANIEL PANTOJA GARCIA v. NORFOLK SOUTHERN RAILWAY COMPANY, No. E2006-02674-COA-R3-CV (February 22, 2008)

The Court's Summary:

In this appeal of a directed verdict in a wrongful death case, Daniel Pantoja Garcia ("Husband") claims that Norfolk Southern Railway Company ("Norfolk Southern") was negligent in failing to warn his now-deceased wife, Lydia Garcia ("Wife"), of the presence of diesel fuel inside a fuel tank that Wife, as an employee of Progress Rail Services Corporation ("Progress Rail"), was assigned to dismantle. As Wife was cutting the tank with a torch-cutter on Norfolk Southern's property, the tank exploded, killing Wife.

The trial court granted a directed verdict because it found no evidence that Norfolk Southern owed any duty in this case. We affirm.

Key Language from the Court's Opinion:

- "For a negligence case to go before a jury, the plaintiff has the burden to present facts sufficient to establish the necessary elements of negligence." *Doe v. Linder Const. Co., Inc.*, 845 S.W.2d 173, 183 (Tenn. 1992). "If, as a matter of law, the plaintiff has failed to allege or prove facts sufficient to establish notice, the existence of the duty to act, breach of the duty, or proximate cause, dismissal, summary judgment, or a directed verdict would be appropriate." *Id*. (quoting *Tedder v. Raskin*, 728 S.W.2d 343, 349 (Tenn. Ct. App. 1987).

- Husband argues that the evidence is sufficient to support three separate theories of duty. We will address these theories in turn, in the following order: first, whether Norfolk Southern voluntarily assumed a duty to clean the tank; second, whether Norfolk Southern had a common-law duty to warn Wife about a danger of which it allegedly had superior knowledge, namely the presence of diesel fuel in the fuel tank; and third, whether Norfolk Southern violated OSHA regulations and thus committed negligence per se.

- Husband cites two separate factual bases for his claim that Norfolk Southern voluntarily assumed a duty to clean the tank. First, he argues that Norfolk Southern undertook to clean the tank prior to the arrival of the Progress Rail team. Second, he argues that Husband saw actions that indicated to him that Norfolk Southern employees were again cleaning the tank during the two days prior to the accident. Having thoroughly reviewed the record, we find no evidence to support either argument.

- If Norfolk Southern only undertook to pump out a "majority" of the fuel – not all of it – and did so as part of a "salvaging process," as opposed to a cleaning operation, that directly contradicts Husband's theory that Norfolk Southern assumed a duty to thoroughly clean the tank.

- Taking at face value the evidence relied upon by Husband to support his first "duty" argument, with all reasonable inferences in his favor, the facts simply do not support the conclusion that Norfolk Southern undertook to completely clean the fuel tank of all fuel and fuel residue. In addition, we note that even if Norfolk Southern had undertaken such a duty, Husband's own testimony establishes that he and Wife cannot have been relying on the fulfillment of that purported duty when they decided to proceed with the torch-cutting. By the morning of the accident, they already knew that the tank had contained fuel after their arrival on site, as they had seen Foreman test the tank for fuel and discover four to five inches of it in the bottom. Husband testified that he saw this, and that Wife was "standing right next to him." Thus, the factual predicate underlying the testimony of Husband's expert, Dr. Tyler Kress, that "this [tank] had been in the diesel shop for weeks previous to this . . . and that hazard was there and *unknown to the – undetected by the supervisor [i.e., Foreman] and the workers*" (emphasis added) is flatly contradicted by the evidence before us.

- These facts simply are not enough to meet Husband's evidentiary burden. A single overheard word accompanied by extremely ambiguous conduct does not establish anything of significant value or relevance. Taking all of Husband's testimony as true, the facts do not give rise to a reasonable inference that Norfolk Southern assumed a duty to clean the tank. They support the conclusion that Husband believed Norfolk Southern had assumed such a duty, but it appears, on these facts, to have been an unreasonable and unjustified belief. In any event, Husband's beliefs

are not at issue here; the issue is Norfolk Southern's actions, specifically their alleged assumption of a duty. On that count, there simply is no evidence to justify submitting this question to a jury.

- As a separate ground for relief, Husband argues that Norfolk Southern had superior knowledge of a dangerous condition and therefore had a common-law duty to warn Wife of that condition. However, the facts clearly do not bear out this contention. Husband offers no evidence that Norfolk Southern was aware of the Progress Rail team's intention to cut the fuel tank with a torch-cutter. In fact, the evidence is undisputed that Norfolk Southern was never specifically made aware, in advance of the actual cutting, that Progress Rail planned to cut the tank on site… In sum, Husband has not introduced evidence from which a jury could reasonably conclude or infer that Norfolk Southern should have foreseen Progress Rail's last-minute decision to torch-cut the fuel tank, and without such foreseeability, Norfolk Southern cannot truly be said to have had knowledge of the dangerous condition, since there was no danger unless the torch-cutter was to be used.

- Secondly, and perhaps even more importantly, the record in this case does not convince us that a jury could reasonably conclude that Wife lacked knowledge of the existence of some fuel or residue in the tank. The possibility that there might be fuel in a fuel tank is fairly self-evident. It seems to us that a reasonable jury would have to conclude that any person aware of a previously-used fuel tank's intrinsic nature would be on constructive notice that it might potentially contain fuel. This is especially true in light of the business of Progress Rail and the work that Husband and Wife were engaged in.

- Finally, Husband claims that Norfolk Southern violated federal health and safety regulations regarding the safe use of cutting and welding equipment, and, as a consequence, was guilty of negligence per se. Specifically, he cites OSHA regulation 1910.252(a), concerning fire safety in welding and cutting operations… Although "management" is nowhere defined in the OSHA regulations, it appears to refer here to the operator of the property on which the cutting or welding is taking place, not necessarily to the employer of either the supervisor or the workers. Indeed, as the regulation explicitly states that "outside contractors" can be "supervisors," it would seem to follow necessarily that "management" need not directly employ such "supervisors." As such, and having found no helpful precedent to help us define "management" in this context, we are disinclined to decide against Husband on this ground.

- However, even if Norfolk Southern is "management" for OSHA purposes, it still did not violate § 1910.252(a)(2)(xiii)(D), for the same reasons noted in a previous section: on the facts of this case, fuel in a fuel tank does not constitute "flammable materials or hazardous conditions of which [contractors] may not be aware." On the contrary, Husband's testimony clearly states that Foreman measured the fuel with a stick and then showed that stick to two Norfolk Southern employees. Put another way, according to Husband's own version of events, Norfolk Southern knew that Progress Rail's supervisor was aware of the fuel prior to the accident; thus, both from Norfolk Southern's perspective and in point of fact, it was not a "hazardous condition of which [contractors] may not be aware."

- In sum, the evidence establishes that, as far as Norfolk Southern was concerned, Progress Rail's employees, including Wife, were not just constructively aware of the hazard (in the sense that fuel tanks tend to contain fuel), they were also actually, subjectively aware of the hazard, and had no valid reason to believe it had been removed. Therefore, even if § 1910.252(a)(2)(xiii) applies on these facts, and even if Norfolk Southern is "management," no OSHA violation occurred, and

therefore negligence per se does not arise. This claim is without merit. The judgment of the trial court is affirmed.

H. HOLLY THRASHER v. RIVERBEND STABLES, LLC, et al., No. M2007-01237-COA-R3-CV (May 21, 2008)

The Court's Summary:

Plaintiff appeals the summary dismissal of her complaint arising out of the death of her Tennessee Walking Horse while the horse was being trained at Riverbend Stables, LLC. Plaintiff filed suit claiming the horse died as a result of the defendants' negligence and gross negligence. The trial court dismissed the complaint upon a finding that the claims of negligence were barred by the exculpatory provisions in the parties' written agreement and Plaintiff had failed to make out a prima facie claim of gross negligence. Finding the exculpatory agreement enforceable and the evidence fails to establish a genuine issue of material fact concerning the claims for gross negligence or recklessness, we affirm.

Key Language from the Court's Opinion:

- It is well established in Tennessee that "subject to certain exceptions, parties may contract that one shall not be liable for his negligence to another." *Olson v. Molzen*, 558 S.W.2d 429, 430 (Tenn. 1977) (citing *Moss v. Fortune*, 340 S.W.2d 902 (Tenn. 1960)). There are, however, public policy exceptions to this general rule. *Id*. As the Supreme Court explained in *Olson*, certain professional relationships, such as those with doctors or lawyers, require a greater responsibility and, therefore, a release from liability of the professional's negligence would be "obnoxious." *Henderson v. Quest Expeditions, Inc*., 174 S.W.3d 730 (Tenn. Ct. App. 2005) (citing *Olson*, 558 S.W.2d at 430).

- Plaintiff contends the *Olson* public policy exception to the enforceability of an exculpatory provision applies in this case because Defendants are professionals. This contention is based primarily on the holding in *Russell v. Bray* that a "home inspector" is a professional, not a tradesman, and the exculpatory provision was held to be unenforceable. 116 S.W.3d at 6… We, however, believe the public policy exception does not apply to this case. Although Defendants may possess a great deal of expertise in boarding and training horses, we find the duty owed by Defendants for the services at issue here is not equivalent to the public duty a doctor owes her patient or a lawyer owes his client.

- We, therefore, conclude that the services at issue here do not fall under the exception prohibiting exculpatory clauses. Accordingly, we affirm the trial court's determination that the exculpatory clause contained in the agreement between Plaintiff and Riverbend Stables, LLC, is enforceable. As a consequence, Plaintiff's claim of ordinary negligence is barred by the parties' agreement.

- In addition to asserting a claim of ordinary negligence, Plaintiff asserted a claim that Defendants were "grossly negligent, and reckless in the training and boarding of her horse."… Plaintiff contends the summary dismissal of her claim of gross negligence was error because there exists a genuine issue of material fact as to whether Defendants' conduct constituted gross negligence.

- An act which otherwise would be nothing more than simple negligence may amount to gross negligence if the defendant's negligent conduct also involves a dangerous instrumentality. *Cook v. Spinnaker's of Rivergate, Inc*., 878 S.W.2d 934, 938 (Tenn. 1994) (driving while intoxicated); *accord Phelps v. Magnavox Co*., 497 S.W.2d 898, 906 (Tenn. Ct. App. 1972) (supplying

electricity). Here, Plaintiff has presented proof that the hot walker was inherently dangerous. There is, however, no proof in the record that Defendants conduct, other than the mere use of the hot walker, was negligent in any manner. Thus, Plaintiff contends that Defendants were grossly negligent because they used the hot walker to train Lola. Thus, Plaintiff is asking this court to hold, as a matter of law, that Defendants' non-negligent use of an inherently dangerous device constitutes gross negligence. If we obliged Plaintiff in this manner, we would set a precedent that persons are strictly liable for injuries resulting from the non-negligent use of an inherently dangerous device. We decline the invitation to establish such a precedent.

- There is, however, no known authority in Tennessee that stands for the proposition that a person is strictly liable to those injured as a result of the defendant's non- negligent use of an inherently dangerous device.

- Plaintiff has presented sufficient evidence to create a dispute of material fact concerning the inherent danger posed by Defendants' use of the hot walker to train Lola; however, Plaintiff has provided no evidence of any other negligent conduct by Defendants. As we stated earlier, to prevail on her claim of gross negligence, Plaintiff must first establish, or in this case create a dispute of fact, that the defendant engaged in conduct that amounts to ordinary negligence. *See Menuskin*, 145 F.3d at 766. Because Plaintiff has failed to create a dispute of fact concerning the first element of a claim of gross negligence, by failing to provide evidence upon which to base a finding that Defendants engaged in negligent conduct, Defendants are entitled to summary judgment as a matter of law. We therefore affirm the summary dismissal of Plaintiff's claim of gross negligence.

I. BART KINCADE v. JIFFY LUBE, No. W2007-00995-COA-R3-CV (May 8, 2008)

The Court's Summary:

Appellant appeals the trial court's grant of Appellee's motion for involuntary dismissal. Appellant brought suit against Appellee under Tennessee Code Annotated § 24-5-111 for damage to his vehicle's engine allegedly caused by Appellee's negligent performance of an engine flush procedure. Following Plaintiff/Appellant's proof, the trial court granted an involuntary dismissal in favor of Defendant/Appellee. Appellant appeals. Finding no error, we affirm.

Key Language from the Court's Opinion:

- Under Tennessee Code Annotated § 24-5-111, the burden is on the plaintiff to establish, *inter alia*, that the property delivered to the bailee is in good condition. In the instant case, it is uncontested that Mr. Kincade drove the Vehicle to Jiffy Lube, and that the Vehicle was, in fact, running at that point. While the fact that a vehicle may be running does not, *ipso facto*, prove that the vehicle is operating "in good condition," we are willing to concede that Mr. Kincade met his burden on this one criterion. However, a plaintiff must also prove that the loss or damage complained of "was not due to the inherent nature of the property bailed." Here, Mr. Kincade's case begins to falter. There are no records of this Vehicle's history, nor any records of the actual condition of the Vehicle upon purchase, or at any time thereafter, until it arrived at Landers' Ford. Again, the fact that a Vehicle runs does not necessarily show that there are no inherent, or latent, defects in the mechanism. The question, then, becomes whether Mr. Kincade has satisfied his burden to show that there were, in fact, no existing problems, independent of the engine flush procedure, which could have caused the timing belt to malfunction.

- From the evidence before us, it appears that the loss of oil pressure (absent some other problem with the vehicle) could not have caused this particular type of timing belt to jump. Mr. Kincade's failure to provide any proof whatsoever to show that there were, in fact, no other problems with the Vehicle, is the demise of his case.

- Even if Mr. Kincade's evidence were sufficient to shift the burden to Jiffy Lube to prove that it was not negligent, the record suggests that the only way Jiffy Lube could make such a showing would be for it to have someone dismantle the engine. Because Mr. Kincade had the engine replaced during the course of these proceedings, and did not preserve the damaged engine, Jiffy Lube could not conduct such inquiries as would be necessary to support its case… Because Mr. Kincade testified that he does not know the present location of the engine, neither he nor Jiffy Lube can meet their respective burdens in this matter.

J. JAMES CARSON v. WASTE CONNECTIONS OF TENNESSEE, INC., No. W2006-02019-COA-R3-CV (April 30, 2008)

The Court's Summary:

This is the second appeal of a damage award for negligence. The plaintiff owned a house with a detached carport. During a delivery, the defendant company's driver backed the delivery truck into one of the four columns supporting the carport structure, causing it to partially collapse. The plaintiff homeowner filed a lawsuit against the defendant company, alleging negligence and seeking damages. Liability was conceded and a trial proceeded on the amount of damages. There was disputed testimony on the condition of the roof structure of the carport before the defendant's driver hit it. After the trial, the trial court found that the carport did not have a "roof" at the time of the accident, and so it deducted the cost of the "roof" of the carport from the damage award. The defendant company appealed. In the first appeal, we found that the record did not clearly indicate the trial court's findings underlying the award of damages, and remanded the case for clarification. On remand, the trial court explained its damage award. The defendant company appeals again in light of the trial court's clarification of the record. Finding that the preponderance of the evidence does not weigh against the trial court's findings, we affirm.

Key Language from the Court's Opinion:

- Waste Connections first argues that the trial court erred by finding that part of the roof—at least the decking and rafters—was in place at the time of the accident. The thrust of this argument is that the trial court erred in its express finding that all of the trial witnesses were credible. As it argued in the first appeal before remand, Waste Connections' contends that the trial court clearly credited Walton's testimony because it commented on his lack of motive to give untrue testimony, and that Carson's testimony directly contradicts Burkhalter's testimony. Relying on the premise, "*to be one thing is not to be the other*," Waste Connections again asks this Court to credit all of Walton's testimony and discredit all of the testimony of Burkhalter and Carson, contending that the inconsistencies cannot logically be reconciled. We decline to do so.

- Here, after remand, the trial court found expressly that, prior to the accident, the shingles on the roof were missing but the remainder of the roof structure, such as the rafters and decking, were largely intact. Giving due deference to the trial court's apparent determinations on the witnesses' credibility, we find that the evidence in the record does not preponderate against this finding of fact.

- Carson seeks damages for injury to his real property. *See Fuller v. Orkin Exterminating Co., Inc.*, 545 S.W.2d 103, 108 (Tenn. Ct. App. 1975). The proper measure of such damages is the lesser of either (1) the difference in the "reasonable market value of the premises immediately prior to and immediately after the injury," or (2) the "cost of repairing the injury." *Id*. (citing *Williams v. S. Ry. Co*., 396 S.W.2d 98 (Tenn. Ct. App. 1965)).

- On remand, the trial court indicated that it relied on Newcomb's testimony and estimate of the cost to reconstruct the carport, i.e., the cost of repairing the damage. Newcomb estimated that the cost of repair would be $20,044.20 and Ward estimated it to be $24,214.06. This showed that the cost of repair was less than the difference in fair market value. Based on its finding on the condition of the carport structure prior to the accident, the trial court found that Waste Connections' negligence caused injury to Carson's property in the amount of $20,000. This damage award is well within the range of the evidence of the cost of repair. Therefore, we affirm the trial court's finding and its award of damages.

- Finally, Carson requests that we find Waste Connections' appeal to be "frivolous or taken solely for delay," under Tennessee Code Annotated § 27-1-122. Carson asks for an award of damages against Waste Connections in the amount of his costs and attorneys' fees on appeal. These requests are denied. The decision of the trial court is affirmed.

K. BOBBY J. BURGESS v. KONE, INC., No. M2007-02529-COA-R3-CV (July 18, 2008)

The Court's Summary:

A state maintenance worker was injured while cleaning water out of an elevator pit in the Legislative Plaza. The worker sued the contractor that provided elevator maintenance and repair services to the state. He claimed that the contractor was responsible for his injuries because the contractor violated its contract with the state by refusing to remove the water from the elevator pit and because it was negligent in not locking down the elevator when its employee knew people would be working in the pit. The trial court granted summary judgment in favor of the contractor. The worker appealed. We affirm.

Key Language from the Court's Opinion:

- Burgess maintains that Kone breached its contractual duty to the state to clean the elevator pit, thereby causing Burgess's injury.

- It appears that the parties placed a practical construction on the contract that Kone handled mechanical issues and the state or other contractors handled other physical and structural issues relating to the elevator shafts. Thus, the state was responsible for removing water from the elevator pits. This interpretation is consistent with the actions the state's employees took leading up to Burgess's injury.

- We are not aware of any genuine issues of material fact as to the duty of Kone under the contract to clean water from the elevator pits. In light of the contract's provisions and the parties' course of dealing, we find that Kone did not violate the contract with the state of Tennessee and affirm the trial court's ruling in this regard.

- In searching for a duty, courts have looked at action and at inaction. As to action, the Tennessee Supreme Court has said that a "'risk is unreasonable and gives rise to a duty to act with due care

if the foreseeable probability and gravity of harm posed *by defendant's conduct* outweigh the burden upon defendant to engage in alternative conduct that would have prevented the harm.'" *Staples v. CBL & Assocs., Inc*., 15 S.W.3d 83, 89 (Tenn. 2000) (quoting *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995)) (emphasis added). In this case, as the trial court observed, there is no evidence that Rollins, acting on behalf of Kone, did anything to create the dangerous situation that gave rise to Burgess's injury.

- As to inaction, persons "do not ordinarily have a duty to act affirmatively to protect others from conduct other than their own." *Nichols v. Atnip*, 844 S.W.2d 655, 661 (Tenn. Ct. App.1992). The exception to this rule arises "'when certain socially recognized relations exist which constitute the basis for such legal duty.'" *Id*. at 661 (quoting *Fowler v. Harper* and Posey M. Kime, *The Duty to Control the Conduct of Another*, 43 Yale L.J. 886, 887 (1934)). No such relationship exists between Kone and Burgess. Kone was an independent contractor who had no contractual duty to undertake the activity which state employee Burgess had been instructed by his superiors to perform. So, even if Rollins, Kone's employee, knew that state employees would be cleaning out the elevator pit, Kone was under no legal duty to take any action to make their work safer.

- "The essential inquiry in any negligence case is whether the particular defendant is under a legally recognized duty to a particular plaintiff." *Id*. at 662. Since we find that Kone had no legal duty to Burgess, we affirm the summary judgment on the negligence claim.

L. JOANN J. SUGG, et vir. v. MAPCO EXPRESS, INC., No. M2007-01503-COA-R3-CV (July 9, 2008)

The Court's Summary:

In this negligence action, Plaintiff appeals the award of summary judgment in favor of Defendant business owner. While exiting Defendant's convenience store, Plaintiff fell from the curb and sustained injuries. She and her husband filed a complaint against Defendant business owner, alleging that its failure to mark the curb properly and to light the area sufficiently caused her to fall. Defendant filed a motion for summary judgment along with a statement of undisputed facts. In her deposition, Plaintiff testified that (1) she had entered the store by way of the curb and knew a step was there; (2) she, nonetheless, got panicked when she could not see her husband and focused on finding him while she was exiting the store; (3) she would not have fallen if she had looked down; (4) she would not have noticed fluorescent marking on the curb in any event, due to her state of mind; and (5) she had no problem with the lighting. Finding that Defendant successfully negated the essential elements of Plaintiff's claim, we hold that the entry of judgment for the Defendant was proper. Affirmed.

Key Language from the Court's Opinion:

- In its motion for summary judgment and attached papers, Mapco affirmatively negated the essential elements of breach and cause in fact. It first established that the Suggs could not prove a breach of its duty to light the area. The record makes abundantly clear that there was plenty of light there and that Mrs. Sugg had no complaint with it. Mapco also showed that the Suggs could not establish its purported negligence as the cause in fact of her injuries. Causation, or cause in fact, pertains to the causal relationship between the tortious conduct and the injury; it means that "the injury or harm would not have occurred 'but for' the defendant's negligent conduct." *Kilpatrick v. Bryant*, 868 S.W.2d 594, 598 (Tenn. 1993). In essence, Mrs. Sugg testified that nothing blocked her view of the sidewalk, that she wasn't paying attention to where she was stepping, and that she would not have seen any markings highlighting the sidewalk step-down had they been there. She all but conceded that her failure to look down caused her fall.

- The burden shifted to the Suggs to establish the existence of disputed material facts regarding Mapco's breach of duty as to the lighting and the causation of Mrs. Sugg's injuries. They did not offer any evidence showing the breach of Mapco's duty to light the area properly, nor did they establish some other basis for causation. In their lengthy statement of undisputed facts, the Suggs attempted to1 assert that Mapco's ADA violations formed the basis for its negligence per se. Even though the Suggs never amended their complaint to include these allegations, we note that negligence per se is not tantamount to liability per se. *Id*. at 590. Plaintiffs who proceed under a negligence per se theory must still prove causation in fact, legal cause, and injury. *Id*. (citing, *inter alia*, *McIntyre v. Balentine*, 833 S.W.2d 52, 59 (Tenn. 1992)).

- The trial court's finding that Ms. Sugg was more than 50% at fault for her injuries was unnecessary, as the Suggs could not establish the essential elements of their claim. We nonetheless affirm the trial court's award of summary judgment in favor of Mapco.

M. VIRGINIA ELROD v. CONTINENTAL APARTMENTS, et al., No. M2007-01117-COA-R3-CV (February 13, 2008)

The Court's Summary:

The unsuccessful plaintiff appeals the summary dismissal of her slip and fall claim against an apartment complex and its owner. During the second day of a winter storm, the plaintiff traveled along icy roads to make a security deposit at the apartment complex. Although she had carefully exited her vehicle and walked to the office to make the deposit, she chose to "trot" back along the same path to her car. While trotting to her car, she slipped on the icy parking lot, breaking her ankle. The trial court summarily dismissed the plaintiff's complaint. Viewing the facts in a light most favorable to the plaintiff, we find that reasonable minds could not differ that the plaintiff's fault was greater than that of the defendants. We, therefore, affirm.

Key Language from the Court's Opinion:

- The defendants, as property owners, are not insurers of the safety of the common elements under their control; however, they do have a duty to exercise ordinary care with regard to the condition of the common areas and common passageways under their control. *Tedder v. Raskin*, 728 S.W.2d 343, 348 (Tenn. Ct. App. 1987). Conversely, Ms. Elrod had a duty to exercise reasonable care for her own safety, *McClung v. Delta Square Ltd. Partnership*, 937 S.W.2d 891, 904 (Tenn. 1996), and a duty to see what was in plain sight, which in this case was an icy parking lot. *See Easley v. Baker*, No. M2003-02752-COA-R3-CV, 2005 WL 697525, at *8 (Tenn. Ct. App. Mar. 24, 2005).

- Under Tennessee's system of modified comparative fault, liability may be allocated in proportion to degree of fault so long as the fault attributable to the plaintiff is less than that attributable to the defendant(s). *McIntyre v. Balentine*, 833 S.W.2d 52, 57 (Tenn. 1992).

- Ms. Elrod was well aware that snow and ice had accumulated on the parking lot due in part to the fact her car slid as she was parking. As she exited her vehicle, she saw that snow and ice was all around her. She explained that she took reasonable precautions to prevent injury to herself by "tiptoeing" from her car to the deposit box. However, and for reasons that defy logic, as she returned to her car, she moved in a "little trot like" manner on pavement she knew was slippery due to ice and snow, she fell and fractured her ankle.

- In the case at bar, it is indisputable that Ms. Elrod failed to exercise reasonable care in the face of a known hazard. Her car slid in the parking lot, she saw the snow and ice on the ground, and when she walked toward the deposit box she proceeded in a most cautious manner; however, when she walked back to her car along the same path, she abandoned caution by "trotting" over snow and ice. Viewing the facts in a light most favorable to Ms. Elrod, we find that reasonable minds could not differ that her fault was greater than any of the defendants and therefore, the defendants are entitled to summary judgment.

N. ROBERT A. WARD and wife, SALLY WARD, v. CITY OF LEBANON, TENNESSEE; CITY OF LEBANON GAS DEPARTMENT; JAMES N. BUSH CONSTRUCTION, INC.; FOSTER ENGINEERING & ENERGY, INC.; and WATER MANAGEMENT SERVICES, LLC., No. M2006-02520-COA-R3-CV (April 25, 2008)

The Court's Summary:

Plaintiff, while excavating, struck a gas line which resulted in an explosion and fire, seriously injuring plaintiff. Plaintiffs brought this action against several defendants and the case went to trial against the City of Lebanon and Bush Construction Company, Inc. A jury returned a verdict for the plaintiffs and allocated percentages of fault as to both defendants and the plaintiff. The Trial Court entered Judgment in favor of the plaintiffs and defendants appealed. We reverse the Trial Court Judgment and remand for a new trial on the grounds that a part of the charge to the jury was erroneous.

Key Language from the Court's Opinion:

- Both defendants argue that the Wards' claims were largely centered around defendants' failure to tell Ward that the subject gas line had been re-connected, when they knew that he would be doing further work at the site. This issue is interwoven with the provisions of the UUDPA and the question of whether Ward violated the Act.

- The Underground Utility Damage Prevention Act (also known as the Tennessee One- Call statute), codified at Tenn. Code Ann. §65-31-*101 et seq*., states that "no person may excavate in a street, highway, public space, a private easement of an operator or within one hundred feet (100') of the edge of the pavement of a street or highway, or demolish a building, without giving the notice required by §65-31-106 in the manner provided by such section." Tenn. Code Ann. §65-31-106 states that before beginning any excavation, a person shall serve written or telephonic notice of intent to excavate at least three working days prior to the actual date of excavation, and that if 15 calendar days expire and the excavation is not complete, then the person shall serve an additional notice at least three working days prior to the expiration of time on the fifteenth day. There is no dispute in this case that Ward did not comply with the provisions of the One-Call statute.

- Since the applicable statute requires notice to the One-Call system, which was clearly not given in this case, the trial court erred in instructing the jury regarding the holding in *South Central Bell*, and in asking the jury to determine what type of notice was required. The trial court decides the questions of law, and the law clearly imposes a duty upon excavators to give notice to One-Call, which was not done. As a result, the jury instructions were confusing and misleading to the jury, and did not accurately reflect the law.

- While Ward's conduct in failing to comply with the One-Call statute amounts to negligence per se, the question of whether defendants could also have been found to be negligent, and whether such negligence was the cause of Ward's injuries, remains. To bring a successful negligence claim, a plaintiff must establish each of the following elements: a duty of care owed by the defendants to the plaintiff; conduct by the defendants falling below the applicable standard of care that amounts to a breach of that duty; an injury or loss; causation in fact; and proximate, or legal, causation. *See Staples v. CBL & Associates*, 15 S.W.3d 83, 89 (Tenn. 2000).

- As stated above, a "risk is unreasonable and gives rise to a duty to act with due care if the foreseeable probability and gravity of harm posed by defendant's conduct outweigh the burden upon defendant to engage in alternative conduct that would have prevented the harm." *Id*. In this case, the foreseeable probability and gravity of harm to plaintiff posed by defendants' re-connection of the subject gas line, with the knowledge that plaintiff would be excavating in the area, outweigh the burden upon defendant to warn plaintiff that the gas line had been re-connected.

- Here, this gas line which the defendants had agreed to remove and cap per plaintiff's request was put back into service and made "hot", without plaintiff's knowledge, and both defendants knew plaintiff would have to return and perform further excavation. As such, it was reasonably foreseeable that an accident such as this could occur, and negated the City's immunity.

- Based upon the erroneous jury instructions, we remand the case for a new trial… The record substantiates that the charges made impacted on the jury as evidenced by the jury's question about that portion of the charge during deliberations.

O. VICKY BERRY v. HOUCHENS MARKET OF TENNESSEE, INC., d/b/a Save-a-Lot Stores, and J.D. EATHERLY PROPERTIES, No. M2006-02103-COA-R3-CV (November 15, 2007)

The Court's Summary:

Plaintiff fell in a puddle of oil in the parking lot near the Save-a-Lot Market. The Trial Court granted the market and the owner of the parking lot summary judgment. On appeal, we affirm.

Key Language from the Court's Opinion:

- Eatherly also addressed the issue of whether Eatherly caused or had notice of the puddle of oil. He stated that neither Eatherly nor its employees had notice of the puddle of oil or of any dangerous or defective condition at the lot on the day of the accident; neither Eatherly nor its employees caused the oil spill and that Eatherly had no knowledge that any employee of Houchens caused the oil spill. Plaintiff's deposition, considered in its most favorable light, together with Eatherly's affidavit, does not establish a material issue of material fact as to actual notice of the puddle of oil.

- Defendant Houchens claims that as lessee of the premises, it owed no duty to Ms. Berry to maintain the parking lot in a reasonably safe condition. The issue of whether a defendant owed a duty to plaintiff is a question of law for the court. *Blair v. Campbell*, 924 S.W.2d 75, 78 (Tenn. 1996); *Carson v. Headrick*, 900 S.W.2d 685, 690 (Tenn. 1995). It is undisputed that Houchens leased the building in which the Save-A-Lot was located from Eatherly, and that under the terms

of the lease, Eatherly, the landlord, was responsible for keeping the parking area and other common areas of the property in "orderly condition, clear of dirt, debris, or snow".

- It is well established that a landlord is responsible for the common areas under his control and that "where [a] landlord retains possession of a part of the premises for use in common by different tenants, the landlord is under a continuing duty imposed by law to exercise reasonable care to keep the common areas in good repair and safe condition. *Tedder v. Raskin*, 728 S.W.2d 343, 347- 48 (Tenn. Ct. App. 1987). Although the landlord has the duty to keep common areas safe and in good repair, a lessee also has a "duty to see that the leased premises and its approach is in a reasonably safe condition." *Thompson v. Ruby Tuesday, Inc.,* No. M2004-01869-COA-R3-CV, 2006WL468724 at *3 (Tenn. Ct. App. Feb. 27, 2006)(citing *Gladman v. Revco Disc. Drug Ctrs., Inc*. 669 S.W.2d 677, 678-79 (Tenn. Ct. App. 1984).

- Plaintiff clearly stated that she fell in the parking lot and not on the sidewalk, and there is no evidence that she fell in front of the door of the Save-a-Lot. This is not an ingress/egress circumstance. Based on the principles set forth in *Thompson* and *Gladman*, the undisputed facts presented regarding the relationship between Houchens and Eatherly, the terms of the lease and the location of the fall, establish Houchens, the moving party, has negated an essential element of plaintiff's claim, i.e., duty. Plaintiff did not present any evidence that Houchens ever exercised any control over the lot, and as Houchens no duty to Ms. Berry to maintain the parking lot in a reasonable safe condition, the Trial Court correctly granted summary judgment to defendant Houchens.

- Despite Eatherly's failure to affirmatively negate the element of constructive notice, the Trial Court's granting of summary judgment was proper, as Eatherly's motion for summary judgment conclusively established an affirmative defense. Based on plaintiff's deposition testimony and comparative fault principals, plaintiff was fifty percent or more at fault for her accident and injuries. *See, McIntyre v. Balentine*, 833 S.W. 2d 52 (Tenn. 1992); *Lewis v. State*, 73 S.W.3d 88, 94-95. *Also see, Eaton v. McLain*, 891 S.W.2d. 587-592 (Tenn. 1994).

- Like the plaintiff in *Easley*, she had a duty to see what was in plain sight, a large, black puddle of what was clearly slippery oil, and to avoid walking into it. While Eatherly clearly had a duty to maintain the parking lot in a reasonably safe condition, reasonable minds would not differ because of plaintiff's absolute lack of attention to where she was walking she was at least fifty percent responsible for her fall and subsequent injury.

P. LILLIE WALKER v. COLLEGETOWN MOBILE ESTATES, INC., No. E2007-01153-COA-R3-CV (January 28, 2008)

The Court's Summary:

Plaintiff who fell in a mobile home sued the lessor owner for damages for injuries. The Trial Court granted summary judgment to defendant. On appeal, we vacate the summary judgment and remand.

Key Language from the Court's Opinion:

- The issue thus becomes, whether the Trial Court properly granted summary judgment on the issue of liability for the defective condition. It has long been the rule in Tennessee that a landlord is liable to his tenant or a guest for any injury resulting from unsafe or dangerous conditions of the leased premises existing at the date of the lease, if the landlord, by the exercise of reasonable care

and diligence, should have known of the condition and failed to disclose it. *See Bishop v. Botto*, 65 S.W.2d 834 (Tenn. Ct. App. 1932); *Boyce v. Shankman*, 292 S.W.2d 229 (Tenn. Ct. App. 1953); *Glassman v. Martin*, 269 S.W.2d 908 (Tenn. 1954).

- On this record, we do not believe summary judgment was appropriate. The issue presented by this record is whether defendant knew or should have known of the allegedly dangerous conditions in the mobile home prior to the tenant moving in, and failed to remedy the condition. Taking the strongest legitimate view of the evidence in favor of the plaintiff and all favorable inferences, this record presents a disputed issue of material fact as to whether the lessor owner knew or should have known of any dangerous condition in the mobile home at the time of the lease.

Q. PATTI T. HEATON v. SENTRY INSURANCE CO., et al., No. M2006-02104-COA-R3-CV (January 9, 2008)

The Court's Summary:

In this personal injury action, the sole issue raised on appeal is whether the trial court abused its discretion when it refused to exclude the testimony of a medical expert as untrustworthy under Tenn. R. Evid. 703. We conclude that the trial court did not abuse its discretion and that the expert's opinion was based on sufficient credible facts and data to satisfy the trustworthy requirement of Tenn. R. Evid. 703. We therefore affirm the trial court judgment.

Key Language from the Court's Opinion:

- Heaton contends that the testimony of Dr. Wagner in this case was untrustworthy since he admittedly overlooked a notation in Heaton's medical records indicating that she experienced numbness in her hands following the accident. Heaton argues that "[i]f an expert relies on unreliable foundational data, any opinion drawn from that data is likewise unreliable," *Waggoner Motors, Inc. v. Waverly Church of Christ*, 159 S.W.3d 42, 61 (Tenn.Ct.App.2004), and accordingly contends that Dr. Wagner's entire testimony should have been excluded as untrustworthy under Tenn. R. Evid. 703.

- In this case, it is undisputed that Dr. Wagner reviewed a number of Heaton's medical records, including those of both her primary care physician Dr. Michael Helton and Dr. Harold Smith, and also conducted an independent medical examination of Heaton prior to preparing a comprehensive medical report and giving his opinions via video deposition… Dr. Wagner admittedly overlooked the notation in Dr. Smith's report indicating that Heaton felt her hands were numb and did not include it in his written report. Dr. Wagner explained that he did not consider the hand numbness complaint significant because it was not accompanied by complaint of neck pain and that the first complaint of neck pain found in any of the medical records was nine months after the accident.

- We find that Dr. Wagner's failure to recognize a single notation in Ms. Heaton's medical records did not render his entire opinion untrustworthy, rather, the failure more properly went to his credibility as a witness and to the weight afforded to his testimony. The trial court appropriately entrusted the weight and resolution of the expert's opposing views to the jury.

- We have determined that the testimony of Defendant's medical expert was based on sufficient credible facts to satisfy the trustworthy requirement of Tenn. R. Evid. 703. We conclude that the

trial court did not abuse its discretion when it refused to exclude the testimony of Defendant's medical expert as untrustworthy under Tenn. R. Evid. 703.

R. THE ESTATE OF ROBYN BUTLER, et al. v. LAMPLIGHTER APARTMENTS, et al., No. M2007-02508-COA-R3-CV (August 20, 2008)

The Court's Summary:

This wrongful death and personal injury action arises from a fatal fire at an apartment complex. The defendants are Nashville Electric Service and the owner and operator of the apartment complex. A Complaint, filed on behalf of the plaintiffs, the estates of two deceased children, the decedents' mother, and her fiancé, was filed on the anniversary of the fire, and the Clerk of the Circuit Court immediately issued the summons to be served on each defendant and handed them to the plaintiffs' counsel as requested. Counsel for the plaintiffs, however, made a deliberate decision to prevent service of summons on any of the defendants for more than eleven months after the Complaint was filed. Thereafter, the defendants filed motions for summary judgment on multiple grounds including the defense that the claims were barred by the one-year statute of limitations. The trial court granted the defendants' motions for summary judgment. We affirm finding the claims are barred by the applicable statutes of limitations due to the fact that counsel for the plaintiffs intentionally caused the delay of prompt service of summons, which rendered the initial filing of the Complaint ineffective.

Key Language from the Court's Opinion:

- The statute of limitations for claims of personal injuries against the Raskin defendants is one year. *See* Tenn. Code Ann. § 28-3-104(a). The statute of limitations for claims against NES pursuant to the Governmental Tort Liability Act is also one year. *See* Tenn. Code Ann. § 29-20-305(b). The plaintiffs' claims accrued on October 13, 2004, the day of the fire at the Lamplighter Apartments. Accordingly, unless the plaintiffs *effectively* filed their complaint on or before October 13, 2005, the claims are time barred.

- The plaintiffs filed a Complaint and obtained issuance of summons for service on each defendant prior to October 14, 2005. The filing of the initial Complaint, however, was not effective because counsel for Plaintiffs *intentionally* caused the delay of prompt service of a summons. *See* Tenn. R. Civ. P. 4.01(3). The plaintiffs did not effectively file a complaint until after the statute of limitations had expired. Accordingly, all of the plaintiffs' claims are time barred.

S. AMELIA STEWART v. SETON CORPORATION d/b/a BAPTIST HOSPITAL, et al., No. M2007-00715-COA-R3-CV (February 12, 2008)

The Court's Summary:

This is a premises liability case stemming from a fall by Amelia Stewart over an unpainted curb near one of the entrances to the defendant's hospital. Plaintiff alleges in her complaint that the curb over which the plaintiff fell was unsafe, dangerous and defective. The hospital moved for summary judgment arguing that (1) there was no evidence of an unsafe, dangerous, or defective condition, (2) the condition of the curb was "open and obvious," and (3) that plaintiff could not establish that her injury was foreseeable or the feasibility of alternative conduct. The trial court granted the motion and the plaintiff appealed. We affirm.

Key Language from the Court's Opinion:

- The duty imposed upon a premises owner does not include the responsibility to remove or warrant against conditions for which no unreasonable risk is anticipated or which the owner neither knew about or should have discovered with reasonable care. *Rice*, 979 S.W. 2d at 309 (Tenn. 1998). A condition will be considered dangerous only if it is reasonably foreseeable that the condition could probably cause harm or injury and that a reasonably prudent property owner would not maintain the premises in such a state. *McCall*, 913 S.W. 2d at 153 (Tenn. 1995). A trier of fact cannot conclude that an owner failed to exercise reasonable care to prevent injury to persons on their property if there is no evidence of a dangerous or defective condition. *Nee v. Big Creek Partners*, 106 S.W. 2d 650, 654 (Tenn. Ct. App. 2002). The law does not impose a duty on property owners and businesses to use care to maintain areas where it is not reasonably foreseeable that visitors will be present. *Plunk v. Nat'l Health Investors, Inc.*, 92 S.W. 3d 409, 415 (Tenn. Ct. App. 2002), which refused to hold defendant to a duty of "anticipating that its visitors...might leave the sidewalk and paved surfaces provided for their convenience and venture into the landscaping" (Citations omitted). If injuries of the type that occurred could not have been reasonably foreseen, a duty of care never arises. *Dillard v. Vanderbilt Univ.*, 970 S.W. 2d 958, 960 (Tenn. Ct. App. 1998).

- Plaintiff argues that summary judgment was improper because there are genuine issues of material fact regarding whether the unpainted curb is a defective or dangerous condition. However, plaintiff cites no material facts in the record to support her claim… Plaintiff simply failed to set forth specific facts, through use of affidavits or other discovery materials to establish that there is indeed a disputed material fact as required by *Byrd* and its progeny. The hospital therefore successfully negated the duty and breach of duty elements of the plaintiff's claim and the trial court properly granted summary judgment in favor of the hospital.

- There were multiple designated routes to the entrances of the north tower. The dirt embankment chosen by the plaintiff as a route to the building was not intended as a means of access to the building. The hospital had no reason to foresee that the plaintiff would choose to access the building by venturing through parked cars, in an area that was not designated for public parking to "climb" an embankment instead of utilizing the sidewalks and driveways designated for public access. Nor was it foreseeable that the plaintiff would fall off a standard parking lot curb while existing the embankment since that area was not designated as a walkway or means of access to the building.

- There is no evidence that the harm to plaintiff was foreseeable and her claim that foreseeability created a duty on the part of the defendants must fail. Furthermore, there is no evidence that had the curb been painted, plaintiff would have seen it and the outcome have been any different. Plaintiff had departed from the designated walkway, had taken the shortest route she could possibly take and was "glancing around" rather than watching her step when she fell.

- We find that the trial court properly analyzed the issue of the hospital's duty based upon the foreseeability and gravity of harm and whether alternative conduct could have prevented the harm. The plaintiff also asserts that the trial court erred in considering the issues of notice and plaintiff's comparative fault. Having found that the trial court properly determined that there were no genuine issues of material fact with regard to the duty and breach of duty elements of plaintiff's claim, and having determined that the trial court utilized the proper balancing approach in analyzing the hospital's duty to the plaintiff, it is not necessary for this court to address the additional issue raised by the plaintiff.

T. DENISE R. CARDELLA v. VINCENT R. CARDELLA, Jr., No. M2007-01522-COA-R3-CV (September 17, 2008)

The Court's Summary:

This is a divorce and tort action. Wife filed a complaint for divorce against husband, alleging, as grounds, inappropriate marital conduct, adultery, and irreconcilable differences. Husband counter- claimed for an absolute divorce. In her amended complaint, Wife also claimed that Husband had negligently infected her with a sexually transmitted disease, and sought monetary damages. A full trial on the merits was held. The trial court awarded the divorce to Wife on the stipulated ground of adultery, approved the stipulated division of personal property and debts, named wife as primary residential parent, set shared parenting time, and awarded attorney fees and costs. In addition, the trial court granted alimony *in solido* and alimony *in futuro* to Wife and awarded her damages in the amount of $288,000.00 for the negligence claim. Husband appeals, asserting that the trial court erred in finding him liable for negligently transmitting a sexually transmitted disease to the wife and in awarding $288,000.00 to wife for the negligence. Husband also appeals the propriety of the trial court's awards of alimony *in solido* and alimony *in futuro*. We reverse the trial court's award of alimony *in futuro*. We affirm the trial court on all other issues.

Key Language from the Court's Opinion:

- The Husband asserts that the trial court erred in finding that he negligently infected the Wife with herpes simplex II virus. For the reasons set forth herein, we find that the trial court did not err and affirm its decision.

- Although this is an unusual issue, it is not an issue of first impression. The question of whether Tennessee recognizes a claim for negligent transmission of a venereal disease was answered in the affirmative by this Court in *Hamblen v. Davidson*, 50 S.W.3d 433 (Tenn. Ct. App. 2000).

- The trial court, specifically found the Wife's testimony to be credible in all aspects. The trial court found Husband's testimony to be credible regarding how much he loved his child, but did not find him to be credible when testifying about his sexual activities. The record reveals numerous inconsistencies in the Husband's testimony when compared to his answers to Wife's interrogatories and his deposition.

- Based on the record and the trial court's credibility findings, we find that the trial court properly determined that the Husband owed a duty to the Wife, and that the Husband knew or should have known that he was placing his wife at risk for STDs by his conduct.

- The trial court determined that Husband's extramarital activity was the cause in fact of the Wife contracting the disease. We agree, finding that the expert testimony and all the facts presented at trial support this causal connection. Accordingly, we find that the trial court did not err in determining that Husband negligently transmitted a STD to Wife.

- Next, we address whether the trial court erred in awarding the wife damages in the amount of $288,000 for her tort claim… Considering the prescription costs, medical care costs, and Wife's pain, suffering, and loss of enjoyment of life, we find that the evidence supports the trial court's award of compensatory damages, and affirm the award.

U. JOHN DOE v. CATHOLIC BISHOP FOR THE DIOCESE OF MEMPHIS, No. W2007-01575-COA-R9-CV (September 16, 2008)

The Court's Summary:

This appeal involves the denial of a motion to dismiss based on the statute of limitations. The plaintiff, a thirty-seven year old man, filed a lawsuit against the defendant Catholic diocese. His complaint alleged that, as an adolescent, he was sexually abused by a Catholic priest employed by the defendant diocese. The lawsuit alleged that the diocese was negligent in hiring, retaining, and supervising the priest, and that the diocese breached its fiduciary duty to the plaintiff by failing to disclose to him its knowledge that the priest had abused other young boys. The diocese filed a motion to dismiss, arguing that the lawsuit was barred by the statute of limitations. In response, the plaintiff argued that the statute of limitations was tolled under the discovery rule, the doctrine of fraudulent concealment, and the doctrine of equitable estoppel. The trial court denied the motion to dismiss. The diocese was granted permission for this interlocutory appeal. On appeal, we reverse, finding that the plaintiff's complaint is time-barred, and cannot be saved by the discovery rule, the doctrine of fraudulent concealment, or the doctrine of equitable estoppel.

Key Language from the Court's Opinion:

- The conduct alleged in Doe's complaint constitutes an "invidious breach" of the relationship of a parishioner with his priest and his church, which "warrants the severest possible condemnation by all right thinking persons of compassion." *Doe v. Coffee County Bd. of Educ.*, 852 S.W.2d 899, 903 (Tenn. Ct. App. 1993). We are obligated, however, to examine dispassionately the timeliness of Doe's claims, respecting the important function of statutes of limitation in ensuring the prompt prosecution of claims and fairness to all parties.

- Tennessee courts recognize the negligence of an employer in the selection and retention of employees and independent contractors. *See, e.g., Marshalls of Nashville, Tenn., Inc. v. Harding Mall Associates, Ltd*., 799 S.W.2d 239,243 (Tenn. Ct. App. 1990); *Phipps v. Walker*, No. 03A01-9508-CV-00294, 1996 WL 155258, at *2 (Tenn. Ct. App. Apr. 4, 1996). A plaintiff in Tennessee may recover for negligent hiring, supervision or retention of an employee if he establishes, in addition to the elements of a negligence claim, that the employer had knowledge of the employee's unfitness for the job. *See Phipps*, 1996 WL 155258, at *3. At this point in the litigation, we assume *arguendo* that a claim for negligent hiring, supervision, and retention may be asserted in the context of a diocese-priest relationship.

- It is undisputed that the applicable statute of limitations is one year, under Tennessee Code Annotated § 28-3-104, and that Doe's cause of action accrued when he reached majority in 1987, unless the statute of limitations was tolled under one of the theories asserted by Doe. With these facts in mind, we review the trial court's denial of the Diocese's motion to dismiss… Thus, under the discovery rule, we must determine whether, at the time he reached majority, Doe had "inquiry notice" of the fact that the Diocese had knowledge of Father DuPree's prior child sexual abuse.

- The Diocese's failure to speak in the face of such a duty is the wrongful act of which it is accused, and also the equivalent of an affirmative act of fraudulent concealment. For purposes of the motion to dismiss, the Diocese does not appear to dispute the existence of such a fiduciary relationship. Thus, for purposes of this appeal, we assume *arguendo* that the Diocese knew of Father DuPree's propensities before Father DuPree began abusing Doe, had a duty to disclose such to Doe, and failed to do so.

- For purposes of this appeal, we assume that the Diocese had knowledge of instances of child sexual abuse by Father DuPree prior to his abuse of Doe, and that the Diocese failed to share this information with Doe. Doe relied on the resulting perception that Father DuPree was safe, acted by continuing to come in contact with Father DuPree, and as a consequence endured sexual molestation by him. We must determine, however, whether Doe had "the means of knowledge of the truth as to the facts in question" when he reached majority in 1987. *Consumer Credit Union*, 801 S.W.2d at 825.

- Thus, the majority of courts appear to have found that plaintiffs in Doe's position had inquiry notice, and that their claims were time-barred. These courts have emphasized that, even if the plaintiff did not know that the church was a cause of the injury, the plaintiff knew that he had been injured by the clergy member and was obligated to investigate the responsibility of the cleric's employer. At that point in the analysis, most of these courts simply concluded that the plaintiff would have discovered the church's prior knowledge. However, the *Cevenini* court took its analysis one step further, finding that because the priest and the church were clearly connected, a reasonable plaintiff would have investigated claims against the predator priest, and against the church.

- In contrast, some courts considering the issue of the plaintiff's inquiry notice in comparable cases have denied the defendant's motion to dismiss, finding that it was for the jury to decide whether the plaintiff, in the exercise of reasonable diligence, would have discovered that the church was a cause of his injury… Thus, some courts have concluded that it was for the jury to decide whether the plaintiff, at the time he reached majority and in the exercise of reasonable diligence, would have discovered the church's alleged knowledge of prior instances of child sexual abuse by the offending cleric. On this basis, these courts denied the defendants' motions for dismissal on the pleadings. The *A.L.M.* court did so by finding that, had the plaintiff filed a lawsuit against the church for vicarious liability, its lawsuit would have been dismissed on the pleadings, without benefit of discovery.

- Doe insists that the statute of limitations should be tolled because, "regardless of what other information Plaintiff may have possessed at the time of his abuse, Plaintiff did not have sufficient facts to bring a negligence claim against the Diocese . . . as he did not know the facts demonstrating that the Diocese was negligent." We must reject this argument.

- We cannot, however, simply accept the Diocese's repeated conclusory assertion that Doe's knowledge of his abuse, the identity of his abuser, and the relationship between the abuser and the Diocese gave Doe sufficient knowledge to put him on inquiry notice of a possible claim against the Diocese. In a number of the cases cited above, the court adopted precisely this analysis. This equates to a finding in essence that, had Doe pursued any claim against the Diocese at the time he reached majority, he would have learned through discovery that there were prior instances of child sexual molestation by Father DuPree and that the Diocese had knowledge of such instances. This analysis, however, seems insufficient…

- In 1987, Doe knew that he had been abused by Father DuPree as a minor, and either knew or could have easily ascertained that Father DuPree was employed by the Diocese. Doe had no actual knowledge that, at the time of Doe's abuse, the Diocese had information on Father DuPree's proclivities and failed to inform Doe or protect him from Father DuPree. With this set of facts, the only claim that Doe could have asserted against the *Diocese* at the time was for vicarious liability, under the doctrine of *respondeat superior*… We find no reported Tennessee

cases applying the doctrine of *respondeat superior* to a clergy member accused of child sexual abuse.

- We need not decide at this juncture whether, in 1987, a Tennessee court would have held that Father DuPree's alleged sexual abuse of Doe was outside the course and scope of Father DuPree's employment. It is enough that the issue is unclear, and there is a substantial possibility that, had Doe asserted a claim of *respondeat superior* against the Diocese in 1987, the Diocese would have been granted a judgment on the pleadings, precluding Doe from conducting discovery which could have led to other possible claims. Absent such discovery, there would have been no way for Doe to learn that the Diocese had been aware that Father DuPree was a sexual predator. Therefore, we are unwilling to hold that, as a matter of law, had Doe filed a lawsuit only against the Diocese, he would have learned of the Diocese's knowledge of prior instances of child abuse.

- We are unwilling to hold that knowledge of misconduct on the part of one defendant automatically results in a finding of inquiry notice of claims against a potential co- defendant. However, in appropriate circumstances, the plaintiff should be charged with inquiry notice of what an investigation of the potential co-defendant would have revealed. This is appropriate where the potential co-defendants are closely connected, as with an employer/employee relationship. We therefore adopt the rationale set forth in *Cevenini*, *supra*, and *Diamond*, *supra*.

- Therefore, under all of these circumstances, we find that plaintiff Doe, in the exercise of reasonable diligence, would have learned in 1987 about his right of action against the Diocese for negligent supervision and retention of Father DuPree. Consequently, we must conclude that Doe's complaint against the Diocese is barred under the one-year statute of limitations, and that the trial court erred in denying the Diocese's Rule 12.02(6) motion to dismiss.

V. DOUG SATTERFIELD v. BREEDING INSULATION COMPANY et al., No. E2006-00903-SC-R11-CV (September 9, 2008)

The Court's Summary:

This appeal involves the efforts of the estate of a twenty-five-year-old woman who contracted mesothelioma to recover damages for her death. While she was alive, the woman filed a negligence action against her father's employer, alleging that the employer had negligently permitted her father to wear his asbestos-contaminated work clothes home from work, thereby regularly and repeatedly exposing her to asbestos fibers over an extended period of time. After the woman died, the Circuit Court for Blount County permitted her father to be substituted as the personal representative of her estate. The employer moved for a judgment on the pleadings on the narrow ground that it owed no duty to its employee's daughter. The trial court granted the motion. The deceased woman's father appealed the dismissal of his daughter's wrongful death claim. The Tennessee Court of Appeals reversed the trial court. *Satterfield v. Breeding Insulation Co.*, No. E2006-00903-COA-R3-CV, 2007 WL 1159416 (Tenn. Ct. App. Apr. 19, 2007). We granted the employer's application for permission to appeal to determine whether the deceased woman's complaint can withstand a motion for judgment on the pleadings. We have determined that it does because, under the facts alleged in the complaint, the employer owed a duty to those who regularly and for extended periods of time came into close contact with the asbestos-contaminated work clothes of its employees to prevent them from being exposed to a foreseeable and unreasonable risk of harm.

Key Language from the Court's Opinion:

- While the courts, like the Michigan Supreme Court, that have found, as a matter of law, that employers have no duty in take-home asbestos exposure cases, rely upon the absence of a special relationship, this argument is misplaced under Tennessee tort law as it has developed over the years. This Court has recognized that a duty of reasonable care arises whenever a defendant's conduct poses an unreasonable and foreseeable risk of harm to persons or property. *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995).

- According to Ms. Satterfield's complaint, Alcoa's employees worked with materials containing asbestos on a daily basis. Employees, including Mr. Satterfield, worked under improper and unsafe conditions which violated internal safety requirements and OSHA standards. As a result, the employees' clothes collected significant amounts of asbestos fibers. Even though Alcoa was aware of the dangerous amounts of asbestos on its employees' clothes, Alcoa did not inform its employees that the materials that they were handling contained asbestos or of the risks posed by asbestos fibers to the employees or to others. The danger was compounded even further because Alcoa dissuaded its employees from using on-site bathhouse facilities, and it failed to provide coveralls or to wash its employees' work clothes at the factory. Under the facts alleged in Ms. Satterfield's complaint, Alcoa's alleged misfeasance created a significant risk of harm to Ms. Satterfield.

- Despite Alcoa's protestations to the contrary, this is not a failure to act case wherein a defendant "declined to interfere, . . . was in no way responsible for the perilous situation, . . . did not increase the peril, . . . took away nothing from the person in jeopardy, [but instead] . . . simply failed to confer a benefit." The rules establishing no duty to protect, to rescue, or to control the conduct of third parties, the underlying basis of Alcoa's argument, are all subsets of the same no affirmative duty to act absent a special relationship rule. That rule, however, is inapplicable to this case. Instead, this case involves a risk created through misfeasance.

- As illustrated by *West v. East Tennessee Pioneer Oil Co*., liability for misfeasance is not cabined within the confines of boxes created by particular relationships. To the contrary, "[l]iability for 'misfeasance' . . . may extend to any person to whom harm may reasonably be anticipated as a result of the defendant's conduct . . . ; while for 'nonfeasance' it is necessary to find some definite relation between the parties, of such a character that social policy justifies the imposition of a duty to act." *Prosser and Keeton* § 56, at 374. Alcoa engaged in misfeasance that set in motion a risk of harm to Ms. Satterfield. Because Ms. Satterfield's complaint rests on the basic tort claim of misfeasance, it is not necessary to analyze in detail whether Alcoa also had duties arising from special relationships with third parties.

- Viewing the allegations in Ms. Satterfield's complaint in the light most favorable to her, it is not difficult to conclude that Ms. Satterfield falls within a class of persons that could, with reasonable foreseeability, be harmed by exposure to asbestos. That class includes persons who regularly and for extended periods of time came into close contact with the asbestos-contaminated work clothes of Alcoa's employees.

- Under the facts alleged in Ms. Satterfield's complaint, Alcoa was aware of the presence of significant quantities of asbestos fibers on its employees' work clothes. It was also aware of the dangers posed by even small quantities of asbestos and that asbestos fibers were being transmitted by its employees to others. Nevertheless, despite its extensive and superior knowledge of the dangers of asbestos, Alcoa allegedly (1) failed to inform its employees that they were working

with materials containing asbestos; (2) failed to provide its employees with or to require them to wear protective covering on their clothes; (3) actively discouraged its employees' use of on-site bathhouse facilities for changing or cleaning; and (4) failed to inform its employees of the dangers posed by the asbestos fibers on their work clothes. Under these circumstances, it was foreseeable that Ms. Satterfield would come into close contact with Mr. Satterfield's work clothes on an extended and repeated basis.

- While the facts alleged in Ms. Satterfield's complaint may not permit a precise assessment of the full extent of the risk to Ms. Satterfield, they certainly support a conclusion that the risk to her was real and substantial. In light of the debilitating and fatal illnesses that can be caused by exposure to asbestos fibers, the magnitude of the potential harm to Ms. Satterfield was great.

- Based on the present record, many of the measures described in Ms. Satterfield's complaint to protect workers and their families from exposure to asbestos appear to be feasible and efficacious without imposing prohibitive costs or burdens on Alcoa. For its part, however, Alcoa has offered no explanation why any or all of these precautions were not feasible or how they would have had a deleterious effect on its ability to provide jobs or to produce useful products… In light of this knowledge, Alcoa had a duty to use reasonable care to prevent exposure to asbestos fibers not only to its employees but also to those who came into close regular contact with its employees' contaminated work clothes over an extended period of time.

- Alcoa's argument that liability should be foreclosed as a matter of law because of the current asbestos litigation crisis might have resonance with regard to recognizing a duty to unimpaired claimants where the magnitude of the harm is significantly less. However, it rings hollow with regard to a claimant, like Ms. Satterfield, who has died of mesothelioma.

- Alcoa also contends that it does not manufacture asbestos and that the manufacturers who use materials containing asbestos in their manufacturing process will face enormous financial burdens if they are exposed to liability for illnesses caused by exposure to asbestos fibers in their manufacturing processes. We find this argument unpersuasive. If the financial burden of compensating these injuries is lifted from the employers' shoulders, it does not vanish into the ether. Rather, the burden will fall on persons like Ms. Satterfield. We see no particular public policy reason to favor imposing these costs upon the persons who have been harmed by exposure to asbestos rather than upon the manufacturers who used asbestos in their manufacturing processes. Furthermore, based on the facts alleged in Ms. Satterfield's complaint, Alcoa is far from an uninformed manufacturer who had the misfortune of using materials containing asbestos in its manufacturing process.

- Based on our review of the opinions of the courts in other states addressing the issue before us in this case, we are not persuaded that the weight of authority supports Alcoa in this case. While we have the greatest respect for the courts that have declined to recognize the duty we recognize today, we have determined that their decisions rest on negligence principles that are not consistent with ours or that they arise from facts that are significantly dissimilar from the factual allegations in Ms. Satterfield's complaint.

- Recognizing the existence of a duty to exercise reasonable care to avoid the risk of harm to another involves considerations of fairness and public policy. Under Tennessee law, Alcoa has a duty to prevent foreseeable injury from an unreasonable risk of harm that it had itself created. Under the facts alleged in Ms. Satterfield's complaint, Alcoa failed to inform its employees, including Mr. Satterfield, of the risks associated with asbestos and failed to provide them with

meaningful alternatives to wearing home their contaminated work clothes. Based on these allegations, Alcoa created a risk that persons who came into close and regular contact over an extended period of time with its employees' work clothes would be exposed to the asbestos fibers on the clothes. The fair and proportional duty we recognize today is neither limitless nor impractical.

- We have determined that Ms. Satterfield's complaint states a claim upon which relief can be granted. Accordingly, the trial court erred by granting Alcoa a judgment on the pleadings, and the Court of Appeals correctly reversed that order. Based on the facts in Ms. Satterfield's complaint, we cannot conclude, as a matter of law, that Alcoa did not owe a duty to Ms. Satterfield.

V. INSURANCE CASES

A. LISA DAWN GREEN and husband, et al. v. VICKI RENEE JOHNSON, et al., No. E2006-02666-SC-R11-CV (March 13, 2008)

The Court's Summary:

We granted permission to appeal in this case to determine whether an uninsured motorist carrier may reduce amounts owed under an uninsured motorist provision by the amount of settlement proceeds an insured receives from a non-motorist defendant. Because the uninsured motorist statutes, codified at Tennessee Code Annotated sections 56-7-1201 to -1206, unambiguously allow an uninsured motorist carrier to limit its liability by "the sum of the limits collectible under all liability and/or primary uninsured motorist insurance polices, bonds, and securities applicable to the bodily injury or death of the insured," Tenn. Code Ann. § 56-7-1201(d), and to receive an offset or credit for "the total amount of damages collected by the insured from all parties alleged to be liable for the bodily injury or death of the insured," id. §1206(i), we conclude that the uninsured motorist carrier in this case is entitled to an offset for the monies the insured received from the non-motorist defendants. Accordingly, we affirm the decisions of the trial court and Court of Appeals.

Key Language from the Court's Opinion:

- The Greens alleged that, under the doctrines of negligence, agency, and comparative fault and pursuant to the Dram Shop statutes, Tenn. Code Ann. §§ 57-10-101, -102 (2004), The Pub, its employees, Vicki Johnson, Tabatha Connor, and Carroll Blankenship were all liable for their injuries. The trial court determined that Ms. Johnson and Ms. Connor were 65% at fault and The Pub, Mr. Corcoran, and Mr. Myers were 35% at fault.

- The Greens first cite to this Court's holding in Sherer that the uninsured motorist coverage provisions are for "the protection of persons insured thereunder who are legally entitled to recover compensatory damages from owners or operators of uninsured motor vehicles because of bodily injury." Sherer, 90 S.W.3d at 454 (citing Tenn. Code Ann. § 56-7-1201(a)) (emphasis added). As the Greens reason, because the amounts they received from the Settlement are not from owners or operators of uninsured motor vehicles, it would be contrary to the intent of the General Assembly to allow State Farm to offset its liability by those amounts.

- The Greens' reliance on Sherer is misplaced. First, Sherer dealt with an insurer's subrogation rights pursuant to Tennessee Code Annotated section 56-7-1204. Id. The instant case does not

involve subrogation; therefore, section 1204 is not applicable. Second, Sherer dealt with damages recoverable in a products liability action for "enhanced injuries." Id. at 453. Such injuries are not at issue in the instant case. For these reasons, Sherer is not helpful to our resolution of this case.

- The Court stated that the language of the uninsured motorist statutes was unambiguous at the time Poper was decided, and it is unambiguous now. The General Assembly has made no distinction between motorist and non-motorist tortfeasors in determining what offsets uninsured motorist carriers are entitled to receive. Contrary to the Greens' argument, subsection 56-7-1201(d) specifically entitles uninsured motorist carriers to limit their liability by "the sum of the limits collectible under all liability and/or primary uninsured motorist insurance policies, bonds, and securities applicable to the bodily injury or death of the insured." Tenn. Code Ann. § 56-7-1201(d) (emphasis added). Therefore, applying the plain meaning of section 56-7-1201(d) to this case, State Farm clearly and unambiguously is allowed to offset any amounts the Greens received from the Settlement against the amounts owed under the Policy. And, because the Greens' settlement proceeds were equal to or greater than State Farm's limit of liability under the Policy, State Farm has no remaining liability. Accordingly, the trial court and Court of Appeals correctly granted State Farms' motion for summary judgment.

- The legislature's clear intent is to allow uninsured motorist carriers to limit their liability when an insured is able to collect monies elsewhere, no matter the source. We do not agree with the Greens' argument that section 56-7-1205 prevents State Farm from providing in the Policy a provision allowing it to offset its liability by the amounts the Greens received from the Settlement. Rather, in light of our legislature's intent, the monies the Greens received in the Settlement from the non-motorist defendants, which arose out of an accident caused by an uninsured motor vehicle, are "duplicative" of the monies owed by State Farm under the Policy, and therefore, are subject to setoff.

- Tennessee Code Annotated section 56-7-1201(d) unambiguously allows an uninsured motorist carrier to limit its liability by "the sum of the limits collectible under all liability and/or primary uninsured motorist insurance polices, bonds, and securities applicable to the bodily injury or death of the insured." Tennessee Code Annotated section 56-7-1206(i) clearly allows for an offset or credit for "the total amount of damages" received by the insured from "all parties alleged to be liable." Therefore, pursuant to the uninsured motorist statutes, Tennessee Code Annotated sections 56-7-1201 to -1206, State Farm is entitled to a credit or offset equal to the Greens' Settlement proceeds. Because the Settlement proceeds are equal to or greater than State Farm's limit of liability under the Policy, State Farm's liability in this case is extinguished.

B. STATE FARM FIRE & CASUALTY COMPANY v. DARRELL SPARKS, et al., No. W2006-01036-COA-R3-CV (December 7, 2007)

The Court's Summary:

This appeal arises out of an action for declaratory judgment brought by an insurer. The insurer asked the court to determine whether its homeowners' and personal liability umbrella policies afforded coverage and required defense of a tort action filed against its insured. The tort action involved an accident that occurred at the site of an oil well, which was owned and operated by a partnership in which the insured parties were partners. The insureds' insurance policies excluded coverage for losses arising out of their "business pursuits." The trial court granted partial summary judgment to the insureds and ordered the insurer to defend and indemnify the insureds in the underlying tort action. For the following reasons, we reverse.

Key Language from the Court's Opinion:

- On appeal, State Farm presents the following issue for review: Whether the business pursuits exclusions in the insurance policies at issue bar coverage for the defendants Sparks and Cook for their alleged vicarious liability in the Arkansas litigation, arising out of their ownership in the oil well that exploded, causing injury.

- An "insurer has a duty to defend when the underlying complaint alleges damages that are within the risk covered by the insurance contract and for which there is a potential basis for recovery." Travelers Indem. Co., 216 S.W.3d at 305 (citing St. Paul Fire & Marine Ins. Co. v. Torpoco, 879 S.W.2d 831, 835 (Tenn. 1994)). An insurer's duty to defend is broader than its duty to indemnify "because the duty to defend is based on the facts alleged, while the duty to indemnify is based upon the facts found by the trier of fact." Id. "Any doubt as to whether the claimant has stated a cause of action within the coverage of the policy is resolved in favor of the insured." Id. (citing Dempster Bros., Inc. v. U.S. Fid. & Guar. Co., 54 Tenn.App. 65, 388 S.W.2d 153, 156 (1964)). The issue for us, then, is to determine whether the damages sought in the Arkansas litigation are within the risk covered by the homeowners' and umbrella policies issued by State Farm.

- More recently, in Mid-Century Ins. Co. v. Williams, 174 S.W.3d 230, 237 (Tenn. Ct. App. 2005) perm. app. denied (Tenn. Sept. 6, 2005), this Court considered a business pursuits exclusion that excluded coverage for damages arising "from or during the course of business pursuits of an insured." We concluded that such language is not ambiguous. Id. at 240. See also White v. State Farm Mut. Auto. Ins. Co., 59 Tenn.App. 707, 720, 443 S.W.2d 661, 667 (1969) perm. app. denied (Tenn. July 22, 1969) (holding that a business pursuits exclusion in a farm liability policy was not ambiguous). Likewise, we find that the business pursuits exclusions in this case are not ambiguous.

- Mr. Sparks and Mr. Cook stipulated to the fact that they "[b]oth invested in the Well to make money." Mr. Cook explained in his deposition that when their friend approached him about the opportunity, he agreed to invest because "[i]t was an investment, and it was a chance to make some money . . . ." Mr. Sparks similarly stated that they believed they had "an opportunity to make some money on an investment." However, on appeal, they argue that any profit motive they had "is belied by the fact that the tax returns [Forms K-1] reflected 8 years of losses" during the time that they were partners in T & A Oil, and they do not know whether it produced an overall profit or loss. They also urge us to consider the fact that when the well did produce a profit, it only accounted for 1% of Mr. Cook's annual income, and 2.9% of Mr. Spark's income. They contend that the business was more like a tax shelter than a profitable business. We find these arguments to be unconvincing.

- According to Godsey, Mid-Century, and the rule applied in a majority of states, we look to whether the parties were motivated by profit, not whether they were ultimately successful in their business.

- We similarly conclude that a "business pursuit" only requires a motivation for profit, not any particular degree of success in achieving profitability. A business that suffers a loss is still a business, and a business pursuit that is unsuccessful is nonetheless a business pursuit. Here, Mr. Sparks and Mr. Cook do not deny that their investment in the partnership was for the purpose of earning a profit.

- We also believe that construing the business pursuits exclusion to only encompass the primary occupation of an insured strains the common understanding of the term "business pursuits," which is not so limited. The majority rule, which we find convincing, is that the term "business pursuits" includes even part-time or supplemental income-producing activities that are carried on continuously or regularly.

- Mr. Sparks and Mr. Cook contend that their involvement in T & A Oil was limited to a single "passive" investment in 1985, when they executed the partnership agreements, and one trip to the oil well for a groundbreaking party. Mr. Sparks also minimizes his involvement in the financial affairs of T & A Oil, characterizing himself as a "paper shuffler." Thus, they claim that they were not customarily "engaged" in a business with regard to T & A Oil. For purposes of this issue, we find that their interpretation of what it means to be engaged in a business is too narrow.

- We agree with the reasoning of these courts and find that Mr. Sparks and Mr. Cook were continuously and regularly engaged in T & A Oil at all times relevant to this proceeding, for purposes of the business pursuits exclusions in their insurance policies. They have been partners and owners of the business since 1985. This was not an isolated, singular transaction or a "one-time" deal, but a continuous and ongoing business pursuit.

- We conclude that the insureds in this case did not have a reasonable expectation of coverage under these policies for accidents arising out of T & A Oil's operations, and State Farm surely did not intend to cover such losses.

- In sum, we find that the rules followed by the majority of states in defining "business pursuits" lead to the most reasonable interpretation of the exclusion and best carry out the intention of the parties. In addition, the rules we have applied today are in accordance with the only existing Tennessee case law addressing this issue. The business pursuits exclusion contemplates a continuous or regular activity engaged in by the insured for the purpose of earning a profit. The activity must be the stated occupation or a customary engagement of the insured. However, the pursuit need only be motivated by profit, and it need not be the insured's sole or primary means of earning income. Applying those principles to this case, Mr. Sparks and Mr. Cook's involvement with T & A Oil clearly constituted a business pursuit. Therefore, there is no coverage under their homeowners' and umbrella policies for losses arising out of such involvement, and State Farm has no duty to defend or indemnify the insureds in the Arkansas litigation.

C. NATIONWIDE ASSURANCE COMPANY v. RUSSELL BROWN, et al., No. E2007-02203-COA-R3-CV (June 17, 2008)

The Court's Summary:

The issue presented in this appeal is whether the trial court correctly granted summary judgment against the insurance company on the ground that Rebecca Neal, who was riding as a passenger in a car driven by her boyfriend at the time of an accident, was not an "insured" as defined by the applicable policy. We agree with the trial court's ruling that the policy's definition of "insured" does not include Ms. Neal under the circumstances, and accordingly, her minor son, who was injured in the accident, is not excluded from coverage for his bodily injuries under the policy. The summary judgment of the trial court is affirmed.

Key Language from the Court's Opinion:

- Nationwide conceded that Ms. Neal does not fall within the provided definitions of the terms "you," "a relative," or "a resident." Nationwide's position is that Ms. Neal was an "other insured person under the policy." It is undisputed that Kieran Brown was a member of Ms. Neal's family residing in the same household with her, so the question of whether Kieran is covered for bodily injury turns on whether Ms. Neal fell within the definition of "insured."

- Nationwide argues, however, that Ms. Neal is also an "insured" as "described as entitled to protection" under the above provision because *if she had been* driving the PT Cruiser at the time of the accident, she *would have been* covered, and also because Christine Neal bought the automobile for Ms. Neal's primary use and Ms. Neal is described (though not named) in the policy's declarations. We do not agree.

- Ms. Neal was not "liable for the use of" the automobile at the time of the accident because she was sitting in the passenger's seat and not driving the vehicle. We cannot agree with Nationwide's argument that Ms. Neal is an "insured" because she would have been insured if she had been driving because, in addition to the fact that this is not what the policy says, under this interpretation *any* guest passenger would be excluded from bodily injury coverage for the same reason, i.e., that they would have been insured had they been driving the vehicle with permission at the time of an accident.

- In the present case, the policy expressly defines the term "insured" as "one who is described as entitled to protection under each coverage." As we have discussed, nowhere in the policy is Ms. Neal described as entitled to protection under the circumstances presented. The insurance contract "may not be rewritten by the Court." *Naifeh*, 204 S.W.3d at 768; *Christenberry*, 160 S.W.3d at 494. We are of the opinion that to accept Nationwide's position in this case would not only result in a rewriting of the term "insured," but would be rewriting it in favor of the insurer who drafted it, resulting in a denial of coverage.

D. BRIAN E. HARRIS, M.D. v. PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, et al., No. E2007-00157-COA-R3-CV (April 30, 2008)

The Court's Summary:

Dr. Brian E. Harris ("Doctor"), the insured, brought this action for breach of contract and on the basis of various torts. He alleged that UnumProvident Corporation ("Insurance Company" or "the company") had wrongfully canceled his disability policy and retroactively rejected his disability claim. The trial court granted Insurance Company summary judgment. The court found that Doctor had filed his suit outside the applicable limitations periods. Doctor appeals, claiming that his suit was timely filed. We affirm.

Key Language from the Court's Opinion:

- Doctor argues that Insurance Company, in pleading the affirmative defense of untimeliness, has failed to prove that Doctor's "fraud based claims" – by which Doctor apparently means his claims for fraud, suppression, misrepresentation, conspiracy and violation of the New Jersey consumer protection statute – arose prior to April 13, 2001, i.e., three years before he filed suit. Indeed, Doctor's reply brief asserts that "[t]he record is devoid of <u>any</u> evidence of when Dr. Harris discovered his fraud based claims." (Underlining in original.) The company has, according to Doctor, "presented <u>no</u> evidence that Dr. Harris discovered or should have discovered his cause of

action for fraud on the same day when their 'final decision' was rendered." (Underlining in original.) Insurance Company, for its part, notes that "[a]lthough [Doctor] includes in certain of his tort claims broad and generic accusations of 'fraud,' 'suppression' and the like, the only factual allegations he cites in his complaint in support [of] each of these claims is [the company's] rescission of the policies and termination of [Doctor's] benefits."

- The only misrepresentation alleged by Doctor is his claim that Insurance Company promised, "in exchange for payment of the required premiums, . . . [to] provide [Doctor] with disability policies that would pay monthly disability benefits in the event the [Doctor] were to become disabled." In other words, they promised to honor his insurance policies, a promise that they never intended to keep, according to Doctor. Even if this is a proper allegation of fraud, which we doubt, it is difficult to see how Doctor can claim that he became aware of this "fraud" at some later date than March 26, 2001, when the company announced that it did not intend to honor his policies.

- To whatever extent these tort claims make out causes of action at all, they are most certainly causes of action that accrued when Doctor received final notice that his policies had been rescinded and no further payments would be made – i.e., upon receipt of the company's March 26, 2001, letter, at the latest. Nothing in the complaint suggests that any discrete event occurred after March 26, 2001, that put Doctor on notice of the company's alleged "pattern and practice of fraudulent conduct" or its supposed "secret corporate policy." Nor, indeed, are any actual facts related to "fraudulent" or "secret" conduct alleged at all. Doctor is correct that Insurance Company has the burden of proving its affirmative defenses. However, the company cannot defend itself, affirmatively or otherwise, against that which has not been alleged. Doctor simply did not allege any causes of action that accrued, if at all, later than the date his contract claim accrued. Accordingly, we hold that Insurance Company has conclusively established the affirmative defense of untimeliness with regard to all of Doctor's claims, including the "fraud based" ones.

E. TENNESSEE FARMERS MUTUAL INS. CO. v. KENT CHERRY, et al., No. W2007-00342-COA-R3-CV (April 7, 2008)

The Court's Summary:

In this appeal we must determine whether an injured party was a "farm employee" within the meaning of a farm owner's liability insurance policy. The alleged employee is the farm owner's father. He was grinding corn to feed the farm owner's cattle when he was injured. The father and his wife filed suit against the son and his wife seeking to recover damages as a result of the accident. The son's farm owner's liability policy provided coverage for occurrences to "farm employees" in certain instances. The insurer filed this declaratory judgment action seeking a declaration that it had no duty to defend or indemnify the insureds because the father was not a farm employee. The trial court held that the father was a farm employee and ordered the insurer to defend and indemnify the insureds in the underlying lawsuit. We affirm.

Key Language from the Court's Opinion:

- Applying the Court's reasoning to this case, we conclude that the definition of "employee" provided in the Workers' Compensation Law does not control the issues before us. In fact, there are several other statutory definitions of the term "employee" that are applicable to specific areas of the law. *See, e.g., Bredesen v. Tenn. Judicial Selection Comm'n*, 214 S.W.3d 419, 430 (Tenn. 2007) (quoting the definition of "employee" provided in 42 U.S.C. § 2000e(f) for purposes of the Tennessee Human Rights Act and Title VII of the Federal Civil Rights Act); *Eatherly Constr. Co.*

v. Tenn. Dep't of Labor and Workforce Dev., 232 S.W.3d 731, 735 (Tenn. Ct. App. 2006) (discussing the definition of "employee" in Tenn. Code Ann. § 50-3-103 for the Occupational Safety and Health Act and various other definitions in construction industry regulations); *Hensley v. Fowler*, 920 S.W.2d 649, 652 (Tenn. Ct. App. 1995) (referring to the Governmental Tort Liability Act's definition of "employee" located at Tenn. Code Ann. § 29-20-102(2)). However, as previously discussed, we must apply the plain, ordinary meaning of the term "employee" when interpreting the policy language.

- "When called upon to interpret a term used in an insurance policy that is not defined therein, courts in Tennessee sometimes refer to dictionary definitions." *American Justice Ins. Reciprocal v. Hutchison*, 15 S.W.3d 811, 815 (Tenn. 2000). Webster's II New College Dictionary (1995) defines an "employee" as "[a] person who works for another in exchange for financial compensation." *Black's Law Dictionary* (8th ed. 2004) defines an "employee" as "[a] person who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance."

- In the case at bar, it is undisputed that Gerald was working for Kent and/or Cherry Cattle and Land Company when he was injured, and he was being compensated from the business account. Kent had instructed Gerald to grind the corn, which would be used to feed cattle owned by Cherry Cattle and Land Company. Gerald was working alongside Marvin Fisk, who was indisputably an employee of Cherry Cattle and Land Company, using equipment owned by Cherry Cattle and Land Company. The land where the accident occurred was owned by Kent and his brother Doug. Gerald had no ownership interest in the business, the land, or the equipment. Nevertheless, Tennessee Farmers points to various aspects of the relationship between Gerald and Kent Cherry to support its contention that Gerald was not an employee of Kent or Cherry Cattle and Land Company.

- However, both Kent and Gerald agreed that Kent was the boss and had the "ultimate say so" in the business. Kent could control the work and ultimately terminate the work relationship with Gerald if he wished. Counsel for Tennessee Farmers did ask Gerald whether Kent had "the power to make [Gerald] do things for him," and Gerald replied that he did not think Kent had the "power" to make him do things that he did not want to do.

- Tennessee Farmers contends that this testimony demonstrates Kent's lack of "control" over Gerald, but we disagree. We interpret Gerald's statement as simply recognizing that he was an at-will employee who could quit working if and when he desired. This does not mean that Gerald was not an employee.

- In fact, Kent testified that Doug received money from the business because the business was profiting off land that Doug owned. Although the arrangement between Kent and Gerald was not a typical method of compensation, both parties, along with Kent's wife, testified that the money Gerald received from the account was compensation for the work he performed for Kent's cattle business.

- When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's factual findings. *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 732 (Tenn. 2002). The evidence supports the trial court's finding that Gerald and Kent had agreed to have some of Gerald's bills paid by the company as a substitute for wages.

- We recognize that the parties' failure to classify Gerald as an employee in some instances may be evidence of the true employment relationship between the parties. However, we do not believe that the parties' tax returns are conclusive of whether Gerald was, in fact, an employee of Cherry Cattle and Land.

- From our careful review of the record, considering all the facts and circumstances involved, we conclude that Gerald Cherry was a "farm employee" within the meaning of the insurance policy… We hold that the alleged damages are within the risk covered by the policy Tennessee Farmers issued to Kent and Cathy Cherry, and accordingly, Tennessee Farmers has a duty to defend the insureds in the underlying lawsuit.

F. MECHICO HILL v. JOHN DOE, et al., No. M2007-01139-COA-R3-CV (June 30, 2008)

The Court's Summary:

The issue on appeal in this subrogation action is whether the insurance company's subrogation claim is barred by the doctrine of collateral estoppel due to the fact its insured's previous general sessions action against the same defendant concerning the same vehicular accident was dismissed and is a final judgment. The circuit court judge denied the defendant's motion for summary judgment, which was on the issue of collateral estoppel, due to the fact it could not determine from the scant general sessions' record that the issue the defendant sought to preclude was litigated and decided on its merits in the previous action in general sessions court. We affirm the decision of the circuit court.

Key Language from the Court's Opinion:

- The doctrine of collateral estoppel, as our courts explain, "bars the same parties or their privies from relitigating in a second suit issues that were actually *raised* and *determined* in an earlier suit." Beaty v. McGraw, 15 S.W.3d 819, 824 (Tenn. Ct. App. 1998) (citations omitted) (emphasis added). In other words, "when an issue has been actually and necessarily *determined* in a former action between the parties, that determination is conclusive against them in subsequent litigation." *Id*. (emphasis added). The doctrine of collateral estoppel may be used defensively or offensively. *Id*. at 825-26. Therefore, the doctrine of collateral estoppel may be asserted as a defense to foreclose relitigating an issue the same parties previously determined in another action. *Id*. at 825.

- Tri-Star contends that the question of its negligence was resolved in its favor by the first general sessions court judgment. Indeed, it is clear from the record that judgment was entered in favor of Tri-Star and that the case was dismissed with prejudice following trial; however, we have no way of knowing whether the issue of Tri-Star's alleged negligence was determined at trial or whether the case was dismissed on other grounds.

- The judgment tells us that Nationwide's case was dismissed with prejudice following trial but it does not tell us the basis upon which the court decided to dismiss the case. It is entirely possible that the general sessions court determined that Tri-Star was not negligent and the case was dismissed on that determination; however, it is also possible that the court dismissed the case for other meritorious reasons.

- For Tri-Star to prevail on the basis of the doctrine of collateral estoppel, it had the burden to establish that the issue at the center of the controversy, whether Tri-Star's negligence contributed to the cause of the accident, was actually litigated and determined by the general sessions court in

the first general sessions action brought by Nationwide. The record before us fails to establish that the issue of Tri-Star's negligence was actually litigated and decided by the general sessions court in the first case. Thus, Tri-Star was not entitled to summary judgment on the issue of collateral estoppel.

VI. TENNESSEE CONSUMER PROTECTION ACT & FRAUD AND MISREPRESENTATION

A. BILL WALKER, on behalf of himself and all others similarly situated v. SUNRISE PONTIAC-GMC TRUCK, INC., et al., No. W2006-01162-SC-S09-CV (February 13, 2008)

The Court's Summary:

We granted the defendant's application for permission to appeal in this case to determine whether a class action may be certified in a claim brought under the Tennessee Consumer Protection Act ("TCPA"), Tennessee Code Annotated sections 47-18-101–125 (2001), or in a claim for common law misrepresentation and fraud. The plaintiff, on his own behalf and on behalf of similarly situated individuals, filed a complaint against Sunrise Pontiac-GMC Truck, Inc., challenging sales transactions in which buyers were charged "dealer incurred costs" as part of the purchase price. The complaint alleged class action claims for, among other things, Tennessee Consumer Protection Act violations and common law misrepresentation and fraud. The trial court denied the defendant's motion for summary judgment with respect to the class certification of the TCPA, misrepresentation and fraud claims. The court granted the defendant's motion for a Rule 9 interlocutory appeal and to stay discovery. The Court of Appeals denied the motion for a Rule 9 appeal on the basis that we would soon be addressing the same issues in a different case. We granted the defendant's application for permission to appeal when the issue remained unresolved. Upon thorough review of the record and the legal issues presented, we hold that class certification is unavailable under the TCPA and that class certification was not appropriate in the plaintiff's claims for common law fraud and misrepresentation due to the individual nature of those claims.

Key Language from the Court's Opinion:

- Tennessee Code Annotated section 47-18-109(a)(1) is unambiguous. It states that "[a]ny person . . . may bring an action individually to recover actual damages." Id. (emphasis added). Review of multiple dictionaries supports the interpretation that the word "individual" refers to a single person instead of a class or group of people. See Black's Law Dictionary 773 (6th ed. 1990) ("a single person as distinguished from a group or class"); Webster's II, New College Dictionary 578 (3rd ed. 2005) ("[o]f or relating to a single human"); The Random House Dictionary of the English Language 974 (2d ed. 1987) ("a single human being, as distinguished form a group"). Furthermore, the TCPA uses the singular terms "individual" and "person" throughout. See Tenn. Code Ann. § 47-18-103(2) (defining "[c]onsumer" as "any natural person . . . ."); Tenn. Code Ann. § 47-18-103(9) (defining "[p]erson" as "a natural person, individual . . . ."). When a statute is unambiguous, as this one is, it is enforced as written. See Eastman Chem. Co., 151 S.W.3d at 507.

- It is Mr. Walker's contention that the legislature meant to allow class actions when it amended the TCPA in 1991. Prior to 1991, section 47-18-109(a)(1) provided that a person may bring an action for damages "individually, but not in a representative capacity . . . ." In 1991, the TCPA was amended to remove the phrase "but not in a representative capacity." See 1991 Tenn. Pub.

Acts Ch. 468. Mr. Walker contends that the prior prohibition against action "in a representative capacity" applied to class actions, and by removing that language, the Legislature was lifting the prohibition of class actions under the TCPA.

- However, the mere removal of the phrase "not in a representative capacity" does not change the meaning of the word "individually." The phrase "in a representative capacity" does not necessarily apply to class actions. It can refer to a variety of instances in which one individual brings an action on behalf of another individual, including those brought by executors of estates, trustees of trusts, parents on behalf of minor children, or legal guardians on behalf of disabled persons. Prior to 1991, actions had two limits placed on them: they had to be brought individually and they could not be brought in a representative capacity. At that time, actions brought on behalf of others were prohibited. Following the amendment, actions are allowed to be brought "in a representative capacity," but the qualifier of that action being brought "individually" still applies. In other words, the present statute allows the type of case in which an individual, i.e. a next friend or executor, brings an action on behalf of another individual. Class actions are still prohibited because they are not actions brought "individually."

- Mr. Walker also argues that the court should allow class actions under the TCPA as a matter of public policy. He contends that allowing class actions would be consistent with the TCPA's goal of protecting the consumer by making it easier for the consumer to bring smaller, but common claims against parties who violate the Act. While we recognize that the TCPA must be construed liberally, see Tenn. Code Ann. § 47-18-102 (2001), we will not extend the statute's provisions beyond its obvious meaning. The TCPA provides consumers with numerous avenues to seek and receive relief, fully satisfying the statute's stated purpose of protecting consumers without including class actions.

- Mr. Walker also alleges that Sunrise Pontiac committed fraud and misrepresentation in falsifying the true nature of the DIC. In order to prove a claim based on fraudulent or intentional misrepresentation, a plaintiff must show that:

- 1) the defendant made a representation of an existing or past fact; 2) the representation was false when made; 3) the representation was in regard to a material fact; 4) the false representation was made either knowingly or without belief in its truth or recklessly; 5) plaintiff reasonably relied on the misrepresented material fact; and 6) plaintiff suffered damage as a result of the misrepresentation.

- Sunrise Pontiac argues that class certification is inappropriate because there are material variations among class members, including unique representations about the nature of the DIC, reliance by the purchasers, causation, and damages. While the trial court found that class certification was appropriate, we hold that the evidence preponderates against the trial court's decision.

- There was no uniform representation about the DIC. Every transaction to buy an automobile is unique, and according to Mr. Walker's own witness, statements made to customers varied from negotiation to negotiation. Without hearing from each customer and salesperson, it is unknowable whether DIC were the subject of discussion between them and if so, what representations, if any, were made by the salesperson. They were not part of a standardized written contract, nor were they even part of a canned sales pitch where every customer heard the same explanation from the salesperson.

- Given the individual nature of each transaction, questions of law or fact common to the members of the class do not predominate over any questions affecting only individual members. See Tenn. R. Civ. P. 23.02(3). The TCPA does not provide for class certification of claims brought thereunder. Furthermore, we hold that due to the individualized nature of the alleged common law fraud and misrepresentation claims, class certification should not have been granted by the trial court.

B. ROBERT JENKINS & wife SHARON JENKINS v. CHASE BROWN, et al., No. M2005-02022-COA-R3-CV (December 14, 2007)

The Court's Summary:

This appeal involves a dispute regarding the liability for the structural defects in a four-year-old house in a Mt. Juliet subdivision. Shortly after purchasing the house from its original owners, the property owners discovered that the house had been constructed on improperly compacted fill and other debris. When additional structural problems manifested themselves, the property owners filed suit in the Chancery Court for Wilson County seeking compensatory and punitive damages against the contractor who built the house and his wife, the original owners, the original owners' real estate agent and broker, their own real estate agent and broker, and their home inspector. Following an eight-day trial, the jury determined that the contractor and the original owners had engaged in intentional and reckless misrepresentation by concealing the house's structural problems. The jury also determined that both real estate agents and the developer of the subdivision were at fault. The jury awarded the property owners $58,720.80 in compensatory damages to be apportioned among the parties at fault. The jury also awarded the property owners $20,000 in punitive damages against one of the original owners and $50,000 in punitive damages against the contractor. The trial court reduced the punitive damage award against the original property owner to $14,000, and granted a judgment notwithstanding the verdict for the two real estate agents with regard to the property owners' Tennessee Consumer Protection Act claims. On this appeal, the property owners take issue with the dismissal of their claims against the real estate agents and their brokers based on their use of an outdated and incomplete real property disclosure form. The contractor also takes issue with the judgments awarded against him for compensatory and punitive damages. We have determined that the trial court did not err by dismissing the property owners' claims against the real estate agents and their brokers based on the use of the incomplete and outdated disclosure form. We have also concluded that the property owners presented insufficient evidence to establish their common-law fraud claim against the contractor who built the house. Accordingly, we reverse the portion of the judgment requiring the contractor to pay compensatory and punitive damages.

Key Language from the Court's Opinion:

- On this appeal, the Jenkinses assert that the trial court applied an incorrect legal standard when it granted the judgment notwithstanding the verdict and that their evidence made out a jury question on their consumer protection claims. We concur with their first point but not with their second.

- Ruling on a motion for a judgment notwithstanding the verdict is not an occasion to weigh the evidence. *Conatser v. Clarksville Coca-Cola Bottling Co.*, 920 S.W.2d at 647. The court's role is limited to reviewing the evidence to determine whether the moving party is entitled to a judgment as a matter of law. The moving party is entitled to a judgment as a matter of law only when the evidence, viewed in the light most favorable to the opposing party, will permit reasonable persons to reach only one conclusion. *Johnson v. Tenn. Farmers Mut. Ins. Co.*, 205 S.W.3d 365, 370 (Tenn. 2006); *Childress v. Currie*, 74 S.W.3d 324, 328 (Tenn. 2002). The language in the July 18, 2005 order referring to the "preponderance of the evidence" reflects that the trial court committed error by weighing the evidence. However, notwithstanding this error,

we can address the question regarding Ms. Palmer's, Ms. Garner's, and their brokers' entitlement to a summary judgment using the correct standards. We have determined that the trial court reached the correct result even if its reasoning was flawed.

- The Tennessee Consumer Protection Act permits recovery for some acts or practices that are not fraudulent or willful misrepresentations. *Smith v. Scott Lewis Chevrolet, Inc*., 843 S.W.2d 9, 12-13 (Tenn. Ct. App. 1992). But it does not necessarily follow that evidence of actionable fault (guilty intent or knowledge) is never required. The Tennessee Supreme Court has noted that the Act does not establish a single standard applicable in all cases for determining whether an act or practice is unfair or deceptive. After reviewing Tenn. Code Ann. § 47-18-104(b), the court observed that "though in most situations actionable fault is not a prerequisite to liability, in others, knowledge is a prerequisite, and in still others, intent to deceive is the standard." *Ganzevoort v. Russell*, 949 S.W.2d at 300.

- There is no evidence in this record that either Ms. Palmer or Ms. Garner were aware of the Browns' problems with the house between 1994 and 1998 or of the fact that the Browns had filed an administrative complaint and a lawsuit against Mr. Wright based on numerous alleged instances of faulty construction. There is likewise no evidence that Ms. Palmer or Ms. Garner decided not to require the Browns to complete the updated real property disclosure form because they had a financial interest in closing the sale of the Browns' house. While the decision to wait to use updated statutorily mandated disclosure forms until they were provided by a professional association might have been negligent, as the trial court found, it was not done for the purpose of withholding important information about the house that either real estate agent had a duty to disclose. Accordingly, while the trial court chose the wrong analytical path, it arrived at the correct result when it granted the judgment notwithstanding the verdict and dismissed the Jenkinses' consumer protection claims against Ms. Palmer, Ms. Garner, and their brokers.

- We have determined that the evidence supports the trial court's conclusion that Mr. Wright could not take advantage of the four-year statute of repose in Tenn. Code Ann. § 28-3- 202. However, we have also determined that the record does not contain material evidence to substantiate the Jenkinses' common-law fraud claim against Mr. Wright. Accordingly, the judgment against him for compensatory and punitive damages must be reversed.

- Based on our review of the record, we have concluded that it contains sufficient material evidence to support the jury's conclusion that Mr. Wright had committed "fraud" with regard to his dealings with the Browns by concealing the extent to which fill material had been used on the lot and by asserting that the house had been constructed on "original dirt." This conduct amounts to "fraud . . . in performing the . . . construction of" the house for the purpose of Tenn. Code Ann. § 28-3-205(b). Therefore, Mr. Wright was not entitled to assert the four-year statute of repose in Tenn. Code Ann. § 28-3-202 in this case.

- This case requires us to determine whether a remote purchaser may assert a common- law fraud claim against a contractor based on fraudulent misrepresentations to or concealment of information from someone other than the remote purchaser. This court has held that privity does not prevent remote purchasers from asserting a fraud claim against developers who represent to the public that their development is suitable for residential construction when they know of latent conditions that could result in economic injury to the purchasers and subsequent purchasers. *Cooper v. Cordova Sand & Gravel Co*., 485 S.W.2d 261, 267 (Tenn. Ct. App. 1971). We have determined that this precedent does not authorize the Jenkinses to pursue a common-law fraud claim against Mr. Wright.

- The Jenkinses concede that they never talked with Mr. Wright about the house. Likewise, there is no evidence in the record that the Jenkinses were privy to any of the misrepresentations that Mr. Wright may have made to the Browns regarding the structural stability of the house. Accordingly, there is no evidence upon which the jury could have concluded that the Jenkinses relied on any misrepresentations that Mr. Wright may have made. There is likewise no evidence that when Mr. Wright represented to Mr. Brown that the house was constructed on "original dirt" that he intended or understood that anyone other than Mr. Brown would rely on the statement. Thus, in light of the essentially undisputed evidence that Mr. Wright had no role in the Browns sale of the house to the Jenkinses, the Jenkinses cannot recover from Mr. Wright for fraud.

- Our conclusion that the Jenkinses cannot recover compensatory damages against Mr. Wright provides the answer to Mr. Wright's challenge to the punitive damage award. In Tennessee, there can be no claim for punitive damages alone. Thus, without an award of compensatory damages or any other sort of remedial relief, an award of punitive damages cannot stand. *Liberty Mut. Ins. Co. v. Stevenson*, 212 Tenn. 178, 180, 368 S.W.2d 760, 761 (1963) (punitive damages cannot be awarded in the absence of actual damages); *B & L Corp. v. Thomas & Thorngren, Inc*., 162 S.W.3d 189, 223 (Tenn. Ct. App. 2004) (punitive damages cannot be awarded in the absence of actual damages); *Oakley v. Simmons*, 799 S.W.2d 669, 672 (Tenn. Ct. App. 1990) (injunctive relief can support an award for punitive damages). Because the Jenkinses have not succeeded in obtaining compensatory damages from Mr. Wright on their fraud claim, they cannot recover punitive damages from him either.

C. STATE OF TENNESSEE v. BILLY L. COUCH, M.D. a/k/a Dr. B. L. COUCH, et al., No. W2007-01059-COA-R3-CV (December 7, 2007)

The Court's Summary:

Defendant doctor appeals an award of summary judgment to the State in this action brought pursuant to the Tennessee Consumer Protection Act (TCPA) in connection with the sale and administration of flu vaccine. The trial court found the defendant doctor guilty of two hundred seventy (270) violations of the TCPA for vaccinating fifty-four (54) patients with serum manufactured for the previous flu season while representing it would protect them in the upcoming flu season; awarded restitution to the patients, imposed a civil penalty of $50 per violation, and awarded $10,500 in attorney's fees and costs for investigation; and issued permanent injunction prohibiting doctor from selling or administering a flu vaccine manufactured for a previous flu season. On appeal, defendant doctor contends he established that two material facts were in dispute. We affirm.

Key Language from the Court's Opinion:

- On appeal, Dr. Couch limits his challenge of the trial court's judgment to two points. He contends that he demonstrated a genuine dispute regarding the following two facts: that he represented the flu vaccine as being for the 2004-2005 flu season, and that the flu vaccine had an expiration date of June 2004.

- The State sufficiently supported each of the above allegations. Dr. Couch, on the other hand, failed to controvert them because he merely issued general denials or gave unresponsive explanations to well-supported statements. When viewed together, these facts amply support the trial court's findings regarding Dr. Couch's omissions and misrepresentations regarding the subject flu vaccine. We find no error in the trial court's determination that these facts were undisputed.

- In raising the issue of the vaccine's expiration date on appeal, Dr. Couch contends that the trial court erred in finding that the serum had an expiration date of June 2004. This argument lacks merit for two fundamental reasons. First, nowhere in the trial court's findings or order is an expiration date mentioned. We cannot find error in a factual finding the trial court never made. Second, the expiration date of the serum is immaterial to the State's case and to the trial court's judgment. The gravamen of the State's claim is that Dr. Couch's representations, omissions, and/or actions misled his patients to believe that the vaccinations would protect them against the new flu strains likely to surface in the upcoming flu season. Even assuming the serum had not expired at the time Dr. Couch vaccinated these patients, the State's case and the trial court's judgment would remain unaffected. We cannot concur in Dr. Couch's conclusions on this point.

D. GWINN FAYNE and ALFRED FAYNE v. TERESA VINCENT and DAVID VINCENT, No. E2007-00642-COA-R3-CV (March 12, 2008)

The Court's Summary:

In this dispute over the sale of a home, the Trial Court initially granted purchasers a rescission of the sale, but purchasers appealed to this Court. We ruled that the Trial Court had failed to put the purchasers in the position they would have occupied had the sale never occurred, and remanded the issues of various costs, pre-judgment interest and the fair rental of the property to take into consideration in placing the parties in a pre-contract status quo position. Also, remanded was the issue of attorney's fees and whether the sellers had violated the Tennessee Consumer Protection Act. On remand, the Trial Court ruled that sellers had violated the Tennessee Consumer Protection Act and awarded attorney's fees and pre-judgment interest, as well as adjusting the Judgment to place the parties in status quo upon rescission. The appeal ensued by the sellers, and we affirm the Judgment of the Trial Court, as well as an award of attorney's fees to the purchasers for their representation on appeal.

Key Language from the Court's Opinion:

- The Faynes were deprived of the use of the money they used to purchase the house for approximately ten years. Fairness required that they be awarded prejudgment interest in the effort to return them to the position they would have occupied if the sale had not occurred. We hold the Court did not abuse its discretion by awarding prejudgment interest.

- The Faynes allege that the Vincents violated the Tennessee Consumer Protection Act (TCPA), Tenn. Code Ann. § 47-18-104(b)(27), by not disclosing the problems with the septic system at the time of the sale of the house… The Vincents continue to argue that there was no intentional misrepresentation, and that the Faynes failed to prove the septic system was in fact defective. Their argument as to fraud or intentional misrepresentation is misplaced. Recovery under the Act is not limited to fraudulent or willful acts; it also contemplates recovery for negligent conduct. *Smith v. Scott Lewis Chevrolet, Inc.,* 843 S.W.2d 9, 12 (Tenn. Ct. App. 1992).

- Defendants cannot now argue that they did not know of the septic system problem or that the Faynes never proved that there was a defect in the system. Based upon the Chancellor's finding that the Vincents knew of and failed to disclose the problem, the Vincents did violate the TCPA as their actions constituted "unfair or deceptive acts or practices in the conduct" of commerce. On remand, the Trial Court held that the acts or omissions were unfair and deceptive to the consumers, and we affirm the Judgment of the Trial Court on this issue.

E. ROBIN LEE STANFILL, et al. v. JOHN T. MOUNTAIN, et al., No. M2006-01072-COA-R3-CV (February 12, 2008)

The Court's Summary:

This appeal arises out of a real estate transaction in Maury County, Tennessee, wherein the Plaintiffs/Appellants purchased property from Defendants/Appellees John T. Mountain and Melody Mountain. Defendant/Appellee Carl Brooks served as an independent real estate agent for the transaction. Plaintiffs filed suit against the Defendants alleging fraud, misrepresentation and violation of the Consumer Protection Act. Both Defendants filed motions for summary judgment. By Order dated April 19, 2006, the trial court granted summary judgment in favor of the Defendants. Subsequently, the trial court awarded discretionary costs against the Plaintiffs. For the following reasons we affirm the judgment of the trial court.

Key Language from the Court's Opinion:

- An essential element of Plaintiffs' claim is causation. The Plaintiffs have the burden of proving by a preponderance of the evidence that the groundwater well was contaminated by petroleum caused by the presence of the underground storage tank. The testimony of Dr. Crowder negates this essential element of Plaintiffs' claim.

- Mr. Quarles' Affidavit stated that there was a possibility that compounds found in petroleum hydrocarbons had been dissipated by bio degradation. Mr. Quarles does not state to any degree of professional certainty that the underground storage tanks more likely than not caused the contamination of the well. The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when speculation or conjecture or the possibilities are at best evenly balanced, it becomes the duty of the court to direct a verdict in favor of the defendant. *Lindsey v. Miami Development Corporation*, 689 S.W.2d 856 (Tenn. 1985). The Affidavit of Mark Quarles is insufficient to establish causation.

- In summary, the Plaintiffs have failed to establish that the underground storage tanks caused the contamination of the well water.

- "For a seller of real estate to be liable under the theories of either fraudulent misrepresentation or failure to disclose, he must have actual knowledge of the defect." *West v. Logan*, 1992 WL 64780 (Tenn. Ct. App.). The Plaintiffs have failed to show that Defendants John T. Mountain and Melody Mountain had actual knowledge of the alleged defects. Therefore, we affirm the trial court's Order granting summary judgment for Defendants John T. Mountain and Melody Mountain.

- Defendant Carl Brooks filed an Affidavit indicating that he had no actual knowledge of the alleged defects located on the property. Tennessee Code Annotated § 62-13-403(2) provides that real estate brokers have a duty to disclose to each party to the transaction any adverse facts to which the licensee has actual notice or knowledge. The Plaintiffs have offered no proof to rebut the lack of knowledge of the alleged defects on the part of Defendant Carl Brooks.

F. GARY FLANARY, on behalf of himself and all other similarly situated, v. CARL GREGORY DODGE OF JOHNSON CITY, L.L.C., No. E2007-01433-COA-R3-CV (June 17, 2008)

The Court's Summary:

This action charged the defendant with engaging in unfair and deceptive practices in violation of the Tennessee Consumer Protection Act, and engaging in the unauthorized practice of law. The Trial Court granted defendant summary judgment on the grounds that plaintiff failed to establish that he suffered a loss of money or property. On appeal, we affirm the summary judgment.

Key Language from the Court's Opinion:

- Plaintiff argues that the Trial Court erred in granting summary judgment on his claim that defendant violated the Tennessee Consumer Protection Act. To state a claim under the Act, plaintiff must show that defendant engaged in unfair or deceptive acts or practices and that the defendant's conduct caused an "ascertainable loss of money or property" to plaintiff. *Tucker v. Sierra Builders*, 180 S.W.3d 109, 115 (Tenn. Ct. App. 2005).

- In this case, plaintiff did not show injury by listing the additional fees on the sales agreement and the sticker of the vehicle. He testified that he negotiated an "out the door" price with the salesman for the vehicle, and that is evidenced by the work sheet that was filed with the Court. He agreed to pay $12,000.00 between the vehicles, which is precisely what he paid. He testified that he agreed to the price for the vehicle, and thus did not question the charge listed as an "administrative fee" on the contract, but simply looked at the bottom line number. As such, there was no showing that plaintiff was injured or suffered an "ascertainable loss of money or property", as is required to state a claim under the TCPA. This issue is without merit.

- In this case, the plaintiff's claim that defendant engaged in the unauthorized practice of business of law was not supported by proof that defendant did anything akin to advising or representing plaintiff in any capacity, nor that defendant did anything that would require the professional judgment of a lawyer. The simple act of filling in the blanks on form documents that have been prepared for a business use does not constitute the unauthorized practice of law. This issue is also without merit.

- Next, plaintiff argues the Trial Court erred in granting summary judgment on his claim of intentional misrepresentation/fraudulent inducement, as the unexplained "administrative fee" and "ADM" charge were misrepresented to plaintiff as legitimate/non-negotiable charges. In order for plaintiff to proceed on a claim of fraud/misrepresentation, he or she must show damage/injury. *See Lamb v. Megaflight, Inc*., 26 S.W.3d 627 (Tenn. Ct. App. 2000); *Metro Gov't v. McKinney*, 852 S.W.2d 233 (Tenn. Ct. App. 1992). Since plaintiff did not offer evidence that he was injured in this transaction, this claim also fails.

- Finally, plaintiff seeks to proceed with a claim of unjust enrichment/money had and received (which plaintiff conceded are essentially the same cause of action), but plaintiff must show that defendant received a benefit, under circumstances rendering it inequitable to retain it. *Bennett v. Visa USA, Inc*., 198 S.W.3d 747 (Tenn. Ct. App. 2006); *CPB Mgmt., Inc. v. Everly*, 939 S.W.2d 78 (Tenn. Ct. App. 1996). As we previously observed, the proof was undisputed that plaintiff paid a price for the vehicle that was his "out the door" figure, that is a bottom line price that plaintiff agreed to pay, and as such, he cannot show that defendant was unjustly enriched.

G. JESSE RAYMOND PROCTOR, et al. v. CHATTANOOGA ORTHOPAEDIC GROUP, P.C., et al., No. E2007-02469-COA-R3-CV (June 10, 2008)

The Court's Summary:

Jesse Raymond Proctor and Janie Kay Proctor ("Plaintiffs"), husband and wife, sued Chattanooga Orthopaedic Group, P.C. and Center for Sports Medicine & Orthopaedics, LLC ("Defendants") alleging violations of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18- 101 *et seq*., concerning certain business practices of Defendants related to surgery performed on Mr. Proctor. Defendants filed a motion to dismiss. After a hearing, the Trial Court entered an order finding and holding, *inter alia*, that the gravamen of Plaintiffs' claim sounded in alleged deceptive business practices under the Tennessee Consumer Protection Act of 1977; that the complaint was dismissed for failure to state a claim upon which relief could be granted; that Defendants' affirmative defenses contending that Plaintiffs' claims sound in medical malpractice should be denied; and that Plaintiffs were barred from amending their pleadings to raise medical malpractice claims. Plaintiffs appeal to this Court. We reverse and hold that the Tennessee Consumer Protection Act of 1977 can apply to the entrepreneurial, commercial, or business aspects of a medical practice, and since Plaintiffs' complaint sounds in alleged deceptive business practices under the Tennessee Consumer Protection Act of 1977, Plaintiffs have stated a claim upon which relief could be granted.

Key Language from the Court's Opinion:

- We agree that medical malpractice claims may not be recast as Tennessee Consumer Protection Act of 1977 claims. These two types of claims are wholly separate and distinct claims governed by separate statutory schemes. Tenn. Code Ann. § 29-26-115 *et seq*.; Tenn. Code Ann. § 47-18-101 *et seq*. The *Constant* plaintiff pled a claim for medical malpractice and then attempted to also allege that this very same claim constituted a violation of the consumer protection law. *Constant*, 352 F. Supp. 2d at 853. This is distinguishable from the case now before us. Here, the Trial Court found and held that the gravamen of Plaintiffs' claim sounded in alleged deceptive business practices under the Tennessee Consumer Protection Act of 1977, not in medical malpractice. Simply put, Plaintiffs did not allege that Defendants had deviated from the acceptable standard of professional practice in either the decision to perform the surgery that was performed or in the manner in which the actual surgery was performed. Plaintiffs instead alleged that Defendants had misled them in order to keep Mr. Proctor's business, and that Defendants charged for a more expensive procedure than the one actually performed. We agree with the Trial Court that Plaintiffs' complaint attempts to state a claim for alleged deceptive business practices under the Tennessee Consumer Protection Act of 1977, and not a claim for medical malpractice.

- Given the clear directions and intent of our General Assembly as expressed in the statute along with the relevant Federal and Tennessee case law, we hold that Defendants are not exempt because they are learned professionals from claims relating to their business practices brought under the Tennessee Consumer Protection Act of 1977.

- Construing the complaint liberally in favor of Plaintiffs and taking all allegations of fact as true, as we must, we hold that Plaintiffs have stated a claim against Defendants under the Tennessee Consumer Protection Act of 1977 for alleged deceptive business practices upon which relief could be granted.

H. CATHERINE SMITH BOWLING, et al. v. TODD JONES, et al., No. E2007-01581-COA-R3-CV (May 16, 2008)

The Court's Summary:

Plaintiff homeowners sued defendant residential building contractors for breach of a home construction contract upon allegations of defective workmanship and abandonment of contract. The trial court entered judgment in favor of plaintiffs and awarded actual damages in an amount based upon the finding that the house was of no value. The trial court also awarded damages under the Tennessee Consumer Protection Act upon a finding that the defendants violated the Act by willfully and knowingly misrepresenting that they were bonded. Upon appeal, we find no error in the judgment of the trial court, and accordingly, the judgment is affirmed in all respects.

Key Language from the Court's Opinion:

- Next, the Jones brothers contend that they were improperly held liable for what was actually the defective workmanship of various subcontractors they hired to assist in construction of the house. In their appellate brief, the Jones brothers "contend that the subcontractors used in construction of the home were that of independent contractor status and therefore [the Jones brothers] were not ordinarily liable for the negligence of an independent contractor." Apparently, the Jones brothers argue that if there were problems with the work performed by the individuals they employed, the Andersons recourse is to sue those individuals, and the Jones brothers themselves are not contractually liable. We find no merit in this argument.

- In the instant matter, the trial court found that the Jones brothers violated the TCPA by falsely representing to the Andersons that they were bonded when in fact, they were not. Although the trial court also determined that this violation was willful and knowing, it did not grant the Andersons an award of treble damages, as it was authorized to do under the statute, but instead, awarded damages in the significantly lesser amount of $7,500, as was its discretion. *See Keith v. Howerton*, No. E2002- 00704-COA-R3-CV, 2002 WL 31840683 at *3 (Tenn. Ct. App. E.S., filed Dec. 19, 2002) (upon a finding of willful violation of the TCPA, a trial court may award less than treble damages under appropriate circumstances).

- The Jones brothers contend that insufficient evidence was presented to support the trial court's finding that their violation of the TCPA was willful and knowing. They do not deny that they were not bonded, nor do they deny that they misrepresented to the Andersons that they were bonded and that the Andersons relied upon this misrepresentation. However, the Jones brothers insist that such misrepresentation was unintentional and that the record does not show otherwise. We disagree.

- We believe that under circumstances wherein the [business] card's inaccuracies were the subject of discussion, it would have been natural to apprise the customer that the bonding information was inaccurate given the importance of that information. We believe the fact that this was not done is indicative of an intent to deceive.

- The Jones brothers next contend that even if there was a violation of the TCPA, the trial court erred in awarding punitive damages because an award of punitive damages is precluded under the TCPA.

- While *Paty* does provide that an award of punitive damages per se is precluded under the TCPA, in *Killingsworth v. Ted Russell Ford, Inc.*, 205 S.W.3d 406 (Tenn. 2006) our own Supreme Court indicated in dicta that the treble damages allowed under the TCPA are punitive damages. Noting the right of a plaintiff to collect actual damages and treble damages under the respective statutory subsections (a)(1) and (e)(1), the Supreme Court stated that "[i]n addition to actual and punitive damages, the TCPA provides that . . . the court may . . . award reasonable attorney's fees . . ." *Id*. at 409.

- In any event, it is clear from the record in the instant matter that, however termed by the trial court, the $7,500 damage award at issue was an award within the purview of the treble damage award allowed under subsection (e)(1) and intended as such.

- Notwithstanding the trial court's designation of the award, we believe it is clear from the record that the $7,500 award under the TCPA was properly awarded pursuant to subsection (e)(1) of the TCPA in lieu of an award of treble damages and to the extent that the trial court erred in designating this award to be an award of "punitive" damages, such error was harmless. In sum, we find the trial court's award of damages in this case was proper, both as to the $95,485.47 awarded for monies spent by the Andersons in constructing the house and the $7,500 awarded under the TCPA.

I. LORI SCHMANK v. SONIC AUTOMOTIVE, INC., et al., No. E2007-01857-COA-R3-CV (May 16, 2008)

The Court's Summary:

The plaintiff brought this claim under the Tennessee Consumer Protection Act ("TCPA") against an automobile dealer, its owner, and Automobile Protection Corporation ("APCO"), alleging that the sale of an anti-theft product called "Easy Care ETCH," which she purchased with vehicles from the dealer, violated the TCPA. We affirm the trial court's ruling that this action, filed over four years after the plaintiff's first purchase and nearly three years after her second purchase, was not timely brought under the applicable one-year statute of limitations. Accepting the plaintiff's allegations in her complaint as true, we do not agree with her argument that the application of the discovery rule operates to toll the limitations period under the facts presented, and therefore, we affirm the trial court's dismissal of the complaint on the pleadings pursuant to Tenn. R. Civ. P. 12.02(6) and 12.03.

Key Language from the Court's Opinion:

- The Tennessee Consumer Protection Act provides that an individual or private action commenced for injury resulting from an unfair or deceptive act or practice "shall be brought within one (1) year from a person's discovery of the unlawful act or practice . . ." Tenn. Code Ann. § 47- 18-110. Thus, the Tennessee legislature has determined that a plaintiff's TCPA claim accrues at time of the "discovery of the unlawful act or practice," thereby making applicable the "discovery rule" first applied over thirty years ago in *Teeters v. Currey*, 518 S.W.2d 512 (Tenn. 1974). *Id*.; *Heatherly v. Merrimack Mut. Fire Ins. Co*., 43 S.W.3d 911, 916 (Tenn. Ct. App. 2000).

- Ms. Schmank argues that the trial court erred in ruling that the discovery rule did not toll the statute of limitations under the facts as pleaded and the reasonable inferences drawn therefrom in her favor. We disagree. Assuming (without deciding) that the allegations in her complaint state a cause of action under the TCPA, all of the facts sufficient to put a reasonable person on notice that she had suffered injury resulting from the Defendants' allegedly wrongful conduct were

known or readily available to Ms. Schmank at the time she entered into the agreement to purchase her vehicles.

- We are of the opinion that these allegations also pertain to facts that are either irrelevant to the cause of action or readily discoverable at the time of purchase. We do not agree with Ms. Schmank's legal argument that the Easy Care ETCH product is an insurance product.

- Simply stated, Ms. Schmank has alleged no new "discovery" of additional relevant facts suggesting injury resulting from the Defendants' wrongful conduct that were not already readily available to her at the time of purchase.

- Ms. Schmank's complaint does not allege any false or misleading statement or assertion by any Defendant regarding the sale of the Easy Care ETCH product, nor any concealment of material facts surrounding the sale. Ms. Schmank was aware of the price of the product she was buying and was provided a full description of its terms and warranties at the time of sale. Her claim that she later discovered that the product was "worthless" is not sufficient to toll the statute of limitations contained in the TCPA, either by operation of the discovery rule or the fraudulent concealment doctrine.

J. SHIRLEY J. ELLIOT V. LIFE OF THE SOUTH INSURANCE CO., et al., No. E2006-02332-COA-R3-CV (March 31, 2008)

The Court's Summary:

The Plaintiff was issued a credit disability insurance policy based upon an application she executed when she purchased a vehicle from an auto dealership. Thereafter, the Plaintiff was diagnosed with cancer which prevented her from working, and she applied for benefits under the policy. The insurer refused to pay, and the Plaintiff filed suit against the insurer, the bank that financed the vehicle purchase, the auto dealership, and the dealership employee who assisted the Plaintiff in preparing the insurance application. The Plaintiff's suit sought recovery on the policy and asserted various other causes of action, including alleged violations of the Tennessee Consumer Protection Act and the Americans With Disabilities Act. Upon the Defendants' motions for summary judgment, the trial court dismissed the case. After reviewing the record, we find that none of the Defendants' motions for summary judgment addressed the issue of whether the auto dealership employee engaged in deceptive practices in assisting the Plaintiff in her application for the credit disability insurance. Accordingly, we reverse the trial court's ruling as to the Plaintiff's causes of action against all of the Defendants for violation of the Tennessee Consumer Protection Act and as to Life of the South for violation of the Americans With Disabilities Act, and we affirm summary judgment in favor of the Defendants as to all of the Plaintiff's remaining causes of action.

Key Language from the Court's Opinion:

- Our conclusion with respect to claims asserted under the policy is based upon the well supported motions filed by Life of the South, East Tennessee Dodge, and Dave Lawson, which requested summary judgment upon proof that the application as executed by Ms. Elliot contained information regarding her prior medical history which she later admitted was untrue and that this was a material misrepresentation. Tennessee case law holds that an insurance policy is void ab initio if the applicant executed the application for the policy and such application contained a material misrepresentation and this law applies even where the agent of the insurer intentionally prepared the policy to contain false information in place of accurate information provided to him

by the applicant. *See Giles v. Allstate Ins. Co.*, 871 S.W.2d 154 (Tenn. Ct. App. 1993); *Hardin v. Combined Ins. Co. of Amer.*, 528 S.W.2d 31 (Tenn. Ct. App. 1975).

- There is no genuine issue of disputed fact that Ms. Elliot's application for insurance contained a material factual misrepresentation in that she represented that she had not seen been diagnosed, treated, consulted or received advice from a doctor for a condition or disorder of the neck or back within two years when in fact she had been to the doctor within two years of the application complaining of neck pain and overall body pain. In addition, Life of the South filed an affidavit wherein its vice-president attested that Life of the South considers the question in the application regarding prior medical history to be the most important question in the application and material to its decision regarding whether the application will be accepted. Accordingly, we conclude that the credit disability insurance policy between Ms. Elliot and Life of the South was void ab initio.

- Although some of the allegations made by Ms. Elliot in her complaint were challenged by the Defendants in their motions for summary judgment and were properly dismissed, the Defendants' motions for summary judgment did not deal with all the issues raised by Ms. Elliot in her complaint and amended complaint. Therefore, dismissal of her entire case was not warranted. The Defendants' motions for summary judgment did not raise any issue regarding the Defendants' alleged violations of the TCPA and Life of the South's alleged violation of the ADA. Since these issues were not raised, they were not before the court, and Ms. Elliot's obligation to respond was never triggered.

- Since none of the Defendants' motions for summary judgment raised any issue as to these grounds of recovery, the trial court erred in granting summary judgment on these claims. In reaching this conclusion, we would emphasize that we make no determination that the charges at issue have merit, but only that the pleadings and proof do not support their dismissal by summary judgment.

- For the foregoing reasons, we affirm the trial court's orders for summary judgment as to all of the Defendants except that, as to Dave Lawson, Cappo Management d/b/a East Tennessee Dodge, and Life of the South, the trial court's orders for summary judgment are reversed to the extent that they pertain to claims for violation of the Tennessee Consumer Protection Act and the Americans with Disabilities Act as the result of the allegedly fraudulent conduct of Mr. Lawson in assisting Ms. Elliot in the preparation of the insurance application form.

K. STEVE L. ELCHLEPP, JR., et al. v. EMOL HATFIELD, et al., No. E2007-01154-COA-R3-CV (July 30, 2008)

The Court's Summary:

The buyers of a house and real property brought this action against the sellers and a termite control company, alleging that the house was completely infested with termites to the extent that it was worthless and unsalvageable. The buyers charged the sellers with fraudulent and negligent misrepresentation, fraudulent concealment of the extent of termite damage, and breach of contract. The buyers alleged that the termite control company was negligent in its inspection of the house. Following a six-day jury trial, the jury found in favor of the buyers, holding the sellers 70% at fault and the termite control company 30% at fault and awarding the buyers $55,000 in damages. The trial court also awarded the buyers $25,000 in attorney's fees pursuant to the real estate sales contract. We find that the jury verdict is supported by material evidence and that the trial court committed no reversible error in its jury instructions and evidentiary rulings, and consequently affirm the trial court's judgment.

Key Language from the Court's Opinion:

- The trial court instructed the jury to apply the preponderance of the evidence standard of proof, the standard ordinarily applied in a civil lawsuit. *Teter v. Republic Parking System, Inc.*, 181 S.W.3d 330, 341 (Tenn. 2005). The Hatfields argue that this instruction was erroneous and that the trial court should have instructed the jury to apply the clear and convincing evidence standard to the Elchlepps' claims of fraud and misrepresentation. We disagree, because Tennessee case law supports the conclusion that the preponderance standard applies in a case where the plaintiff does not seek rescission or reformation of a written instrument due to fraud, as in the present case… In the present case, the Elchlepps are seeking damages only, not to reform or rescind a written instrument due to the alleged fraud or intentional misrepresentation of the Hatfields. Therefore, the trial court correctly instructed the jury to apply the ordinary preponderance of the evidence standard of proof in this case.

- The Hatfields argue that the trial court erred in excluding the testimony of their proffered real estate appraiser regarding his evaluation of the entire real estate parcel at the time of the trial. In their appellate brief, the Hatfields state that "the essential testimony of [their] real estate expert was to the effect that the parcel of real estate property was more valuable at the time of the trial than when it was purchased, whether or not it had a structure on it, or whether or not there was termite infestation damage to the structure." From this argument, it appears that the Hatfields were attempting to offset the amount of damage from the house's termite infestation by the amount of appreciation in value of the real estate from the time of the closing until the time of trial. The trial court was correct in rejecting this argument because the appreciation of the underlying land over time is entirely irrelevant to the calculation of the damages the Elchlepps suffered as a result of the misrepresentations concerning the termite damage to the house. The Elchlepps did not allege damage to the underlying land; their action only alleges damages to the house.

- Our review of the record under the appropriate standard finds an abundance of material evidence supporting the jury verdict… The Elchlepps provided material evidence from which the jury could have reasonably concluded that all the elements of a fraud or misrepresentation claim were met. Simply stated, the central factual issue in this case was the credibility of the Hatfields' assertion that they were unaware that the house was infested with termites. There is an abundance of evidence supporting the conclusion, obviously drawn by the jury, that the Hatfields were not believable on this point.

L. PACTECH, INC., et al. v. AUTO-OWNERS INSURANCE CO., et al., No. E2007-01480-COA-R3-CV (September 22, 2008)

The Court's Summary:

Commercial equipment belonging to the insured was destroyed in a fire, and the insured sought to recover proceeds under its insurance policy, submitting a sworn statement in proof of loss to the insurer. A third party, holding a security interest in the destroyed property, also filed a claim with the insurer to recover for the loss of its collateral in the fire as loss payee, pursuant to a mortgage holders clause in the policy. Alleging that the fire was the result of arson by the insured and that the insured materially misrepresented information on the sworn statement with intent to deceive, the insurer denied coverage. The insurer also denied coverage of the lienholder's claim, asserting that the lienholder's right to recover was no greater than that of the insured. The insured filed suit against the insurer, seeking recovery under the policy and requesting damages for violation of the Tennessee Consumer Protection Act ("TCPA") and, in the alternative, for assessment of a bad faith penalty against the insured under state statutory law. The

lienholder's motion for summary judgment was granted, and the lienholder was awarded recovery in the full amount of the debt owed by the insured. The insured's motion for directed verdict to recover under the policy and the insurer's motion for directed verdict as to the claim for bad faith penalty were both denied. A jury trial resulted in findings that the insurer had not violated the TCPA and that the insured had not committed arson, but had materially misrepresented information on the sworn statement in proof of loss with the intent to deceive. The insured's motion to set aside the jury verdict was denied. On appeal, we vacate the trial court's summary judgment in favor of the lienholder upon the ground that the mortgage holders clause in the policy did not extend to coverage of personal property. We affirm the trial court's denial of the insured's motion for directed verdict and motion to set aside the jury verdict upon the ground that there was material evidence to support the jury's finding that the insured materially misrepresented information on the sworn statement in proof of loss with intent to deceive. We reverse the trial court's denial of the insurer's motion for directed verdict upon the ground that the insured failed to make a formal demand with respect to its claim of bad faith. Finally, we affirm the jury's verdict as to the insured's claim that the insurer violated the TCPA upon the ground that the insured failed to present evidence showing that it suffered an ascertainable loss as a consequence of alleged unfair and deceptive acts of the insurer.

Key Language from the Court's Opinion:

- While the exact basis of the jury's conclusion that PacTech materially misrepresented information on the proof of loss form is not given, Auto-Owners argued at trial that, in completing the proof of loss form, Pac Tech listed and sought recovery for items which were not actually destroyed in the fire and listed inflated values for items for which it sought recovery. Thus, should we find any material evidence showing that PacTech either listed items on the sworn statement in proof of loss that were not destroyed in the fire or knowingly overvalued items for which it sought recovery, we must affirm the trial court's decision. Our inquiry ends upon our finding of material evidence in either regard. After careful review, we find material evidence in support of the argument that PacTech falsely listed items on the sworn statement in proof of loss as having been destroyed in the fire.

- Finally, PacTech observes that Auto-Owners admitted in its answer that PacTech's "loss was complete" and contends that, as a result of this admission, Auto-Owners is precluded from arguing that PacTech did not lose all of its insured personal property in the fire. The statement that PacTech's "loss was complete" merely concedes that all items that were in the building at the time of the fire were completely destroyed; it does not concede that all of the items listed by PacTech were actually among the items destroyed in the fire.

- The inference that PacTech intended to deceive Auto-Owners arose upon establishment of the fact that PacTech falsely listed items on the sworn statement in proof of loss that were not actually destroyed in the fire. In support of its argument that Auto-Owners was required to present evidence that PacTech intended to deceive Auto-Owners when it presented a false listing of destroyed property, PacTech cites *Wilder v. Tennessee Farmers Mut. Ins. Co.*, 912 S.W.2d 722 (Tenn. Ct. App. 1995). In *Wilder*, we reviewed a trial court's decision that an insurance company had failed to establish that the insured had intentionally misrepresented facts in the claims process. We affirmed such decision upon our determination that, while the record showed that many statements that the insured made to the insurer appeared to be false, the evidence did not preponderate in favor of a finding that the statements were made with the intent to deceive. However, *Wilder* is distinguished from the instant matter by the fact that in *Wilder*, we reviewed a decision reached after a bench trial, whereas we now review a jury decision.

- In the matter before us, as we have stated, we do not review the jury's decision by seeking to determine where the preponderance of the evidence lies. Instead our review is limited to determining whether there is any material evidence to support the jury's verdict and in so doing, as we have noted, we must allow all reasonable inferences. As we have discussed, there was material evidence that PacTech falsified information in the claims process, and we must allow that the jury reasonably inferred that this falsification was done with the intent to deceive. If nothing more, the above cited statement from our decision in *McConkey* underlines the reasonableness of such an inference.

- While PacTech alleges various actions/omissions by Auto-Owners that PacTech contends constituted unfair and deceptive practices under the TCPA, PacTech references no evidence presented at trial showing that it suffered "an ascertainable loss" as a consequence of any of these alleged actions/omissions, and our independent review of the record reveals no such evidence. For this reason alone, the jury could have reasonably concluded that there was no violation of the TCPA, and therefore, we find no error in its verdict in favor of Auto-Owners on the issue.

- Alleging the same acts/omissions upon which it argued that Auto-Owners violated the TCPA, along with Auto-Owners' failure to pay PacTech's loss within 60 days after demand was made, PacTech argues in the alternative that Auto-Owners' should be assessed a bad faith penalty pursuant to Tenn. Code Ann. § 56-7-105… Auto-Owners contends that PacTech's claim under this statute should have been dismissed by the trial court upon Auto-Owners' motion for directed verdict. We agree.

- There being no evidence that PacTech at any time made formal demand for payment such as would have apprised Auto-Owners of PacTech's bad faith claim, we believe Auto-Owners' motion for directed verdict at the close of proof was well taken and should have been granted.

- We acknowledge that issues other than those specifically addressed were raised in this appeal; however, it is our determination that all such additional issues are pretermitted by our decision herein. For the reasons stated in this opinion, the trial court's judgment denying PacTech's motions for directed verdict and to set aside the jury verdict is affirmed; the trial court's summary judgment in favor of Arthur H. Black is vacated; the trial courts denial of Auto-Owner's motion for directed verdict on the issue of the assessment of a bad faith penalty is reversed; and the verdict of the jury is affirmed in all respects.

M. JOSEPH AND KIMBERLI DAVIS v. PATRICK J. MCGUIGAN, et al., No. M2007-02242-COA-R3-CV (September 10, 2008)

The Court's Summary:

Homeowners filed suit against Appraiser for intentional and negligent misrepresentation and violation of the Tennessee Consumer Protection Act. Appraiser moved for summary judgment on all claims. The trial court denied Appraiser's motion on the negligent misrepresentation claim, but dismissed the intentional misrepresentation claim and the Tennessee Consumer Act claim. During the course of the proceedings, the trial court also excluded certain witnesses who were tendered as experts. Both parties appeal. We affirm the trial court's grant of summary judgment on both claims, and decline to address the remaining issues for lack of justiciability.

Key Language from the Court's Opinion:

- We initially address the granting of summary judgment on the Homeowners' claim of intentional misrepresentation. To succeed on a motion for summary judgment, the moving party must either "affirmatively negate an essential element of the nonmoving party's claim" or "conclusively establish an affirmative defense that defeats the nonmoving party's claim." *Byrd v. Hall*, 847 S.W.2d 208, 215 n.5 (Tenn. 1993).

- In Tennessee, "the misrepresentation must consist of a statement of a material fact, past or present; statements of opinion or intention are not actionable and conjecture or representations concerning future events are not actionable even though they may later prove to be false." *McElroy v. Boise Cascade Corp*., 632 S.W.2d 127, 130 (Tenn. 1982). Generally, claims of value made during commercial transactions are considered statements of opinion and do not provide a basis for a fraud claim. *Sunderhaus v. Perel & Lowenstein*, 388 S.W.2d 140, 142 (Tenn. 1965).

- The Tennessee legislature defines a real estate appraisal as "the act or process of developing an opinion of value of identified real estate." Tenn. Code Ann. § 62-39-102(3) (2008). Tennessee courts consider the appraisal of real estate as an opinion, and, generally, an appraisal does not provide a basis for a fraudulent misrepresentation claim. *See First Tennessee Bank Nat'l Assoc. v. C.T. Resort Co., Inc*., No. 03A01-9704-CH-00134, 1997 WL 67795, at *2 (Tenn. Ct. App. Nov. 3, 1997).

- Although Homeowners' argument applies to the fourth element for fraudulent misrepresentation, their contention does not change the requirement of the first element - that the defendant make a representation of an existing or past fact. In Tennessee, appraisals are not considered facts, but rather estimates or opinions.

- Further, we note that when the Appraiser conducted the Appraisal, he was appraising a home that had not yet been constructed. The Appraiser used the "cost approach" analysis, and referred to, among other resources, the specifications and building plans provided by the Homeowners. At that point, the Appraiser only had plans for the future Home on which to base his appraisal; he could not verify that the materials planned for in the Home were actually used in the construction or examine the workmanship of the construction… For the reasons discussed above, we find that the trial court's award of summary judgment on this claim proper.

- Next, we turn to the dismissal of the claim that the Appraiser's conduct violated the TCPA… Under the circumstances of this case, where the Homeowners voluntarily elected to list the Home for several thousand dollars less than the Appraisal with full knowledge of the Appraisal amount, the Homeowners cannot establish the required causative link between the alleged misrepresentation and their alleged injury. We affirm the trial court's dismissal of the Homeowners' cause of action alleging a violation of the TCPA.

VII. DEFAMATION CASES

A. ANTHONY ROBERTSON v. THE LEAF CHRONICLE, No. M2007-01025-COA-R3-CV (December 20, 2007)

The Court's Summary:

The plaintiff appeals the summary dismissal of his defamation action against the defendant. The cause of action arose out of a newspaper article appearing in the defendant's newspaper, which pertained to the criminal prosecution of the plaintiff on charges for aggravated rape and assault. Contending the Complaint failed to state a cause of action, the defendant newspaper filed a motion for summary judgment. The trial court found there was no material issue of disputed fact and that the plaintiff failed to plead the minimum requirements to state any cause of action. The court also found that he sustained no damages. Finding no error we affirm.

Key Language from the Court's Opinion:

- As the non-moving party, Plaintiff had the burden to establish that there were sufficient factual disputes to warrant a trial: (1) by identifying evidence ignored by Defendant that creates a factual dispute; (2) by rehabilitating evidence challenged by Defendant; or (3) by producing additional evidence that creates a material factual dispute. *See McCarley v. West Quality Food Serv*., 960 S.W.2d 585, 588 (Tenn. 1998); *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993). If Plaintiff needed more time to prepare a response, he could have submitted an affidavit in accordance with Tenn. R. Civ. P. 56.07 requesting additional time for discovery. *Pendleton v. Mills*, 73 S.W.3d 115, 121 (Tenn. Ct. App. 2001). Plaintiff, however, did none of the above.

- A plaintiff's inability to prove an essential element of a cause of action renders all other facts immaterial. *Alexander v. Memphis Individual Practice Ass'n*, 870 S.W.2d 278, 280 (Tenn. 1993); *Strauss v. Wyatt, Tarrant, Combs, Gilbert & Milom*, 911 S.W.2d 727, 729 (Tenn. Ct. App. 1995). In the instant case, Defendant met the requirements of Tenn. R. Civ. P. 56. As a result, the burden shifted to Plaintiff, but Plaintiff failed to carry his burden, that being to create a dispute of material fact as to an essential element of the cause of action.

B. JOY L. RANGE v. JENNIE E. BAESE, et al., No. M2006-00120-COA-R3-CV (January 22, 2008)

The Court's Summary:

This appeal stems from the trial court's granting of summary judgment in favor of two defendants in a lawsuit alleging defamation and tortious interference with employment. Because the record does not allow this Court to determine the basis for the trial court's decision, we vacate and remand for further proceedings.

Key Language from the Court's Opinion:

- Following the reasoning of *Jennings* and *Svacha*, we are inclined to conclude that, given the failure of the appellant to provide an adequate record, the appellees should have made sure that the record contained all proof considered by the court in granting their motions for summary judgment. This evidence would then be part of the record on appeal, so this court could perform its duty. The record on appeal does not contain the motion for summary judgment of defendant Baese or defendant Anderson. There is a memorandum in support of a motion for summary

judgment from Ms. Anderson, but none for Ms. Baese. There are two affidavits labeled Exhibits 4 and 5 that are not associated with any motion. Furthermore, at the hearing, the attorneys and the trial judge made reference to facts gleaned from depositions, but no depositions are included in the record on appeal. The court's orders refer to affidavits, but this Court cannot assume from the fragmented state of the record that all of the affidavits are before us. Moreover, the appellants' brief cites to the depositions of Ms. Range, Ms. Baese, and Ms. Anderson; "Pl.'s Stmt.," and an affidavit of Ms. Range. None of these documents are contained in the record on appeal.

- The record in this case prevents the court from evaluating the propriety of the trial court's decision to grant summary judgment. We cannot determine whether there were issues of material fact or whether the defendants were entitled to judgment as a matter of law.

- Normally, we would remand this matter for supplementation of the record; however, as previously noted, we have determined that the trial judge erred by failing to state the legal basis for the grant of summary judgment. We, therefore, vacate the trial court's orders granting summary judgment and remand for the trial court to state the legal grounds for the ruling and for the preparation of a fair, accurate and complete record on appeal.

C. BETTY ROSE v. COOKEVILLE REGIONAL MEDICAL CENTER, et al., No. M2007-02368-COA-R3-CV (May 14, 2008)

The Court's Summary:

This appeal arises from a claim for defamation brought by a terminated hospital employee against several parties, including a doctor who had allegedly made slanderous remarks about her work performance. The trial court granted the doctor's motion to dismiss for failure to state a claim under Tenn. R. Civ. P. 12. Following the trial court's dismissal of the case against the doctor, the plaintiff moved to alter or amend the order of dismissal and also moved for the trial judge's recusal due to an alleged business relationship between the judge's son and the defendant doctor. We agree that the complaint fails to state a claim for slander because it does not specify sufficiently the time and place of the alleged statements. We further conclude that the plaintiff's motion to recuse was properly denied. Accordingly, we affirm the trial court's dismissal and remand for further proceedings.

Key Language from the Court's Opinion:

- This Court is of the opinion that the allegation of slander against Dr. Gleason is not well pled and is, on its face, violative of the six month statute of limitations. *See* Tenn. Code Ann. § 28-3-103. At common law, a complaint for slander had to set out the exact language of the defamatory statement. *See Lackey v. Metro. Life Ins. Co*., 26 Tenn. App. 564, 581, 174 S.W.2d 575, 582 (1943). With the adoption of the Rules of Civil Procedure, that requirement was relaxed, and the complaint was deemed valid if it set forth the substance of the slanderous statement. *Handley v. May*, 588 S.W.2d 772, 774-75 (Tenn. Ct. App. 1979). The *Handley* court, however, made clear that, in addition to the substance of the statement, a plaintiff must plead the "time and place of the utterance" so as to apprise the defendant "of the allegations that he must defend against." *Id*. at 775.

- Ms. Rose contends that this rule does not apply in the instant case. She concedes that the remarks alleged in the "spring of 2005" are outside the six month statute of limitations, but she then argues that, since she alleges a "continuing course of conduct" lasting until April of 2006, she can

rely on the continuing tort doctrine to fit within the limitations period. Tennessee courts have never recognized a "continuing defamation." In fact, this Court has previously commented on the dubiousness of the very concept of a "continuing defamation." *Edmondson v. Church of God*, 1988 WL 123955, at *4 (Tenn. Ct. App. Nov. 23, 1988).

- If Ms. Rose knew of repeated slanderous statements that occurred within the limitations period, then there is no reason why those statements should not have been pled as previously noted. The trial court afforded her an opportunity to amend her complaint to be more specific, but she declined.

D. FRANCIS ROY, M.D. v. THE CITY OF HARRIMAN, et al., No. E2007-00785-COA-R3-CV (June 30, 2008)

The Court's Summary:

This cause of action arises out of statements made by Dr. William E. Bennett to PHP Companies, Inc. ("PHP"), a health insurance company, regarding Dr. Francis Roy. Dr. Roy alleges that, in connection with PHP's review of Dr. Roy's application to become an approved PHP provider, Dr. Bennett made written statements that reflected poorly on Dr. Roy's work history and qualifications. Dr. Roy claims that these statements were false and defamatory. In response to Dr. Roy's complaint, Dr. Bennett filed a motion for summary judgment, contending, among other things, that the document containing the allegedly defamatory statements is privileged and inadmissible under the Tennessee Peer Review Law, Tenn. Code Ann. § 63-6-219 (2004). The court granted Dr. Bennett's motion. We affirm.

Key Language from the Court's Opinion:

- Because Dr. Roy's claim against Dr. Bennett explicitly depends upon the contents of the document in question, a threshold issue is whether either the document itself, or testimony about its contents, would be admissible.

- In essence, if Dr. Bennett demonstrates that Dr. Roy cannot use the document or obtain testimony about its contents, he has negated Dr. Roy's cause of action, because he has affirmatively demonstrated that an essential element of Dr. Roy's complaint, i.e., that the allegedly defamatory information was actually communicated, is totally lacking by virtue of the Tennessee Peer Review Law.

- The Peer Review Law is designed to "encourage committees made up of Tennessee's licensed physicians to candidly, conscientiously, and objectively evaluate and review their peers' professional conduct, competence, and ability to practice medicine." Tenn. Code Ann. § 63-6-219(b)(1). In furtherance of this goal, the legislature has declared that "peer review committees must be protected from liability for their good-faith efforts." Tenn. Code Ann. § 63-6-219(b)(2). Dr. Roy does not dispute that PHP's review of Dr. Roy's application qualifies as a "peer review" process under the statute. In fact, he stated at the summary judgment hearing that "I have no reason to doubt" the applicability of the Peer Review Law to this case.

- It is clear that the document submitted to PHP by Dr. Bennett constitutes "information, interviews, incident or other reports, statements, memoranda or other data furnished to" a peer review committee, and is thus "declared to be privileged."

- We reject Dr. Roy's contention that the conditional nature of immunity under § 63-6-219(d)(2) creates an implied exception to the privilege rule of § 63-6-219(e), allowing plaintiffs to support claims of knowing falsity by introducing evidence that would otherwise be privileged.

- Here, the statute pronounces that the information in question is "declared to be privileged" and "shall be privileged," without immediately elaborating on what that "privilege" entails… It suggests that the statute not only bars the discovery of privileged information, but also makes any such information inadmissible, even if obtained outside the discovery process.

- We concur with Logan's interpretation of the statute, and hold that the Peer Review Law creates a privilege that bars the discovery or use of "[a]ll information, interviews, incident or other reports, statements, memoranda or other data furnished to any committee as defined in [the statute], and any findings, conclusions or recommendations resulting from the proceedings of such committee," unless the information in question falls under an exception to the privilege. Tenn. Code Ann. § 63-6-219(e).

- For all of the reasons stated above, we conclude that Dr. Bennett has affirmatively negated Dr. Roy's cause of action by demonstrating the inadmissibility of a critical piece of evidence, without which Dr. Roy's counsel correctly concedes that he cannot hope to prove his case. Dr. Roy has failed to rehabilitate his evidence or otherwise save his case. Summary judgment was therefore appropriate.

VIII. CLAIMS AGAINST THE STATE OF TENNESSEE

A. DANIEL FRANCOUER and HEATHER HALL v. STATE OF TENNESSEE, No. W2007-00853-COA-R3-CV (December 18, 2007)

The Court's Summary:

This appeal involves a motorcycle rider and his passenger who were injured in an accident when they hit a large pothole on a state route highway. The rider and the passenger each filed claims with the Tennessee Claims Commission asserting that the State of Tennessee had failed to maintain the highway in a safe and proper condition. A Claims Commissioner determined that the pothole did constitute a dangerous condition on a state maintained highway pursuant to Tennessee Code Annotated section 9-8-307(a)(1)(J), but she determined that the State was not liable under that subsection because there was no proof that it had notice of existence of the pothole. The Commissioner then found that the State was negligent in maintaining the highway under Tennessee Code Annotated section 9-8-307(a)(1)(I), and therefore it was liable for the plaintiffs' injuries. The State appeals. We reverse.

Key Language from the Court's Opinion:

- The State of Tennessee presents the following issue for our review: Whether the Claims Commission erred in finding that the State of Tennessee was negligent in failing to repair an allegedly dangerous condition, a pothole, where there was no evidence of actual or constructive notice of the pothole prior to the claimants' injuries and no evidence that the State had time to repair the pothole prior to the claimants' injuries.

- Specifically, the State claims that the Commissioner erred in considering the cases under Tennessee Code Annotated section 9-8-307(a)(1)(I), which involves negligent maintenance of

state highways, rather than limiting its review to section 9-8-307(a)(1)(J), addressing dangerous conditions on state maintained highways. Also, the State claims that under either section, "notice and time to repair must be a prerequisite for recovery." For the following reasons, we reverse the Commissioner's decision.

- We first address the State's argument that it was improper for the Commissioner to decide these claims under Tennessee Code Annotated section 9-8-307(a)(1)(I) rather than limiting its analysis to section 9-8-307(a)(1)(J). On appeal, the State does not cite any authority to support its contention that these claims could not be considered under both subsection (I) and subsection (J). We find no merit in the State's contentions. Tennessee Code Annotated section 9-8- 307(a)(1) clearly contemplates that a plaintiff's claim may fall within more than one of the jurisdictional categories, as it authorizes the Commission to determine all monetary claims against the State "falling within one (1) *or more* of the following categories." (emphasis added).

- This brings us to the State's second assignment of error in this case, that under either subsection (I) or (J), "notice and time to repair must be a prerequisite for recovery." We find no merit in the State's assertion. The statute clearly provides that a claimant under subsection (J) must establish the foreseeability of the risk and that notice was given to the proper state officials at a time sufficiently prior to the injury for the State to have taken appropriate measures. Tenn. Code Ann. § 9-8-307(a)(1)(J) (Supp. 2007). There is no such requirement in subsection (I). Cases interpreting these two subsections have clearly held that "[t]he provisions requiring 'notice' are only applicable to subsection (J) and not to subsection (I)." *Allen v. State*, No. M2003-00905-COA-R3-CV, 2004 WL 1745357, at *8 (Tenn. Ct. App. Aug. 3, 2004). Contrary to the State's assertions, "[t]he notice issue is applicable only as a prerequisite to liability of the state under Tennessee Code Annotated section 9-8-307(a)(1)(J)." *Id*. at *4.

- It is clear that proving notice is not a "prerequisite for recovery" under Tennessee Code Annotated section 9-8-307(a)(1)(I), as the State contends. *Allen*, 2004 WL 1745357, at *4. However, the State's lack of notice is still relevant to the negligence analysis. Under general principles of the law of negligence, a plaintiff must establish that the defendant owed a duty of care to the plaintiff, injury or loss, conduct of the defendant falling below the applicable standard of care which amounted to a breach of the duty, causation in fact, and proximate, or legal, cause. *Goodermote v. State*, 856 S.W.2d 715, 720 (Tenn. Ct. App. 1993) (citing *McClenahan v. Cooley*, 806 S.W.2d 767 (Tenn. 1991)).

- It is well-settled that the State has a duty to exercise reasonable care, under all the attendant circumstances, in planning, designing, constructing, and maintaining the state system of highways, and it owes this duty to persons lawfully traveling Tennessee highways. *Id*. (citing Tenn. Code Ann. § 9-8-307(a)(1)(I)). However, the State is not the insurer of the safety of persons who travel the highways. *Cf. Bowman v. State*, 206 S.W.3d 467, 472 (Tenn. Ct. App. 2006) (discussing State liability under section 9-8-307(a)(1)(C) for injuries caused by negligently created or maintained conditions on state controlled real property). In other words, the bare fact that a pothole existed on a state road is not sufficient to prove that the State was negligent in maintaining the road. Plaintiffs must establish that the State's conduct fell below the applicable standard of care, which amounted to a breach of its duty to exercise reasonable care in maintaining the highways.

- Considering all the evidence, we find that Plaintiffs failed to establish that the State breached its duty to exercise reasonable care, under all the attendant circumstances, in maintaining the highway. The simple fact that Plaintiffs hit a pothole is not sufficient to impose liability on the

State pursuant to Tennessee Code Annotated section 9-8-307(a)(1)(I). Plaintiffs failed to prove that the State was negligent in inspecting the highway or failing to discover and repair the pothole. In sum, we conclude that the Claims Commissioner did not err in considering Plaintiffs' claims under Tennessee Code Annotated section 9-8-307(a)(1)(I) after she concluded that section 9-8-307(a)(1)(J) was inapplicable. However, we further conclude that Plaintiffs did not establish the State's "negligence in maintenance" of the highway under subsection (I) to impose State liability for Plaintiffs' injuries.

B. JESSICA L. SMITH, et al. v. STATE OF TENNESSEE, No. E2007-00809-COA-R3-CV (March 17, 2008)

The Court's Summary:

In November of 2002, Ms. Jessica Smith was savagely beaten on the head with a brick after she exited the Lake Avenue Parking Garage on the University of Tennessee campus on her way to her dorm. Ms. Smith and her parents brought this lawsuit against the University of Tennessee pursuant to Tenn. Code Ann. § 9-8-307(a)(1)(C), claiming that the University negligently created or maintained a dangerous condition on state controlled real property. Following a trial, the Claims Commission determined that due to improper lighting at the site of the attack, the State was liable pursuant to that statutory provision. The State requested and was granted an en banc review by the full Claims Commission. Following the en banc review, a majority of the Commissioners affirmed the judgment in favor of Ms. Smith. The State appeals. We conclude that the evidence does not preponderate against the Commission's findings and ultimate conclusions that, among others, the State negligently created or maintained a dangerous condition on state controlled real property, that the attack on Ms. Smith was foreseeable, and that the State had adequate notice of the dangerous condition. We, therefore, affirm the en banc majority decision of the Claims Commission.

Key Language from the Court's Opinion:

- In the present case, the State claims that Tenn. Code Ann. § 9-8-307(a)(1)(C) is not applicable for two reasons. First, the dangerous condition Plaintiffs complain of (inadequate lighting) was not dangerous in and of itself. Second, there is no liability because a third party, Gann, used the property for a criminal use that was not intended. We disagree with both assertions. As set forth in *Morgan*, pursuant to Tenn. Code Ann. § 9-8-307(a)(1)(C), the state is liable "to the same extent that private owners and occupiers of land are liable." *Morgan*, 2004 WL 170352, at * 6. And, "like any private property owner, [the State] has the duty to use reasonable care to protect persons on its property from unreasonable risks of harm." *Bowman*, 206 S.W.3d at 473.

- This brings us squarely back to *McClung*, where the Supreme Court determined when a business owner or occupier can be held liable for the foreseeable criminal acts of a third party. We see no reason under the statute and case law why the state should be held to a different standard than private business owners. Such a result would be contrary to the General Assembly's stated intent found in Tenn. Code Ann. § 9-8-301(c) and the general purpose behind § 9-8-307(a)(1)(C).

- After a thorough review of the record, we conclude that the evidence does not preponderate against the en banc Commission's findings and resulting decision affirming Commissioner Cheek's findings that the lighting at the site of the attack was inadequate for the reasons stated by Commissioner Cheek as set forth previously in this opinion, and that this constituted a negligently created or maintained dangerous condition on state controlled real property.

- When considering the location, nature, and extent of the crimes in the immediate vicinity of the Parking Garage and the site where Ms. Smith was attacked in an attempt to steal her car, we do not find that the evidence preponderates against the Commission's finding and conclusion that the attack on Ms. Smith was foreseeable.

- We conclude that the magnitude of foreseeability and potential harm to students in the immediate vicinity of the Parking Garage was relatively high, and the burden imposed on the University must correspond accordingly.

- The present case is a good example of how some cost effective measures taken by the University could have reduced the potential threat to its students. Among other things, the University could have "installed improved lighting" to help reduce the risk. This is not to suggest that the University is under an obligation to light up the entire campus, and our decision should not be taken as such. However, we do conclude that it was foreseeable that Ms. Smith or any student in the immediate vicinity of the Parking Garage could be the victim of a crime at the hands of a third party. The University, therefore, had a duty to take further steps to reduce the threat of harm, and the University failed to do so in this case.

- The next issue is whether the State was provided adequate notice… In light of *Hamby* and *Sanders*, because the State in the present case was responsible for constructing and maintaining the light at issue, we conclude that Plaintiffs established that the State had adequate notice pursuant to Tenn. Code Ann. § 9-8-307(a)(1)(C). This result is consistent with the overall liberal construction to be given to the jurisdictional grant to the Claims Commission, as well as the General Assembly's stated intent in Tenn. Code Ann. §9-8-301(c)("The determination of the state's liability in tort shall be based on the traditional tort concepts of duty and the reasonably prudent persons' standard of care.").

- We have already determined that the State owed a duty of care to Ms. Smith. We also have concluded that the University's conduct amounted to a breach of that duty, satisfying the second element in a negligence case. There is no doubt that Ms. Smith suffered an injury or loss, and the third element is easily established.

- The State cites us to no proof in the record, nor could we find any, that the inadequate lighting as found by the Commission was not "a substantial factor in producing the end result." In light of Harris' testimony, as well as the inferences to be drawn from the facts of this case, the evidence does not preponderate against the Commission's finding of causation. We, therefore, cannot conclude that the Commission erred when it determined that Plaintiffs had satisfied the last two elements of their negligence claim.

C. LYNDA SMITH, Individually and as the Conservator for Terry Crouch V. STATE OF TENNESSEE, No. M2007-00282-COA-R3-CV (February 5, 2008)

The Court's Summary:

In this personal injury case, plaintiff, the mother of a prison inmate, sued the State for damages her son is alleged to have sustained because of negligent medical care provided by the State resulting in the delayed diagnosis of his brain tumor. Plaintiff also sued the State for her son's injuries sustained as the result of falls he experienced while in the State's care and custody after surgery to remove his brain tumor. The plaintiff's case was tried before the Tennessee Claims Commission which ruled that the plaintiff failed to prove that an earlier diagnosis of her son's tumor would have produced a different outcome, but that her

son did sustain injuries as a result of the State's negligent care after surgery and awarded damages in the amount of $15,000. Plaintiff appealed. Upon our finding that the evidence does not preponderate to the contrary, we affirm the judgment of the Commission.

Key Language from the Court's Opinion:

- Given these requirements, we believe that it would be premature in this case to address any arguments that the defendant was negligent in the diagnosis and treatment of Mr. Crouch until we have first determined whether the evidence before the Commission was sufficient to establish the element of causation to a reasonable degree of medical certainty.

- The sole proof presented by Ms. Smith regarding causation consisted of the testimony of Dr. Cushman who was deposed on three occasions - June 10, 2005; September 23, 2005; and February 17, 2006. Upon our review of these depositions, we find Dr. Cushman's testimony to be either contradictory or of insufficient certainty to establish causation. And therefore, while recognizing the tragic circumstances of this case, we are compelled to conclude that the evidence does not preponderate against the ruling of the Commission that Ms. Smith failed to establish causation.

- First, with respect to Dr. Cushman's response to the hypothetical question based upon Mr. Crouch's asserted condition at the end of February 2003, we do not agree that his rather general response indicating that the prognosis would have been "much better" if Mr. Crouch's tumor had been diagnosed and treated at that time suffices to prove that Mr. Crouch would not still have suffered at least some of the same injuries.

- Further, Dr. Cushman indicates that his opinion is speculative as to whether Mr. Crouch would have been able to live independently had he received diagnosis and treatment before loss of autoregulation, and as this Court has noted, speculative testimony is not sufficient to establish causation. *Miller v. Choo Choo Partners, L.P.*, 73 S.W.3d 897, 901 (Tenn. Ct. App. 2001).

- Finally, while Dr. Cushman testified at this deposition that the other craniopharyngioma patients he had treated during the course of his career did better because they were diagnosed "relatively early," this assertion does not of itself prove that a two month delay in the diagnosis and treatment of any of these patients would have compromised their recovery.

- Even if it were conceded that Mr. Crouch's symptoms were worse at the time of diagnosis than they were two months earlier, given the above testimony, it is unclear what difference a diagnosis of the tumor at that time would have made. In other words, if the same treatment, including surgery, would have been implemented even had the tumor been discovered two months earlier, and the surgery itself was a contributing factor to Mr. Crouch's present condition to an unknown degree, it appears that it would not be possible to determine to what degree Mr. Crouch's present condition would have been changed by an earlier diagnosis. For all of the reasons stated above, we are compelled to conclude that the evidence does not preponderate against the conclusion that a correct diagnosis of Mr. Crouch's brain tumor in February of 2003 would not have resulted in avoidance of the injuries for which he seeks compensation.

IX. COMPARATIVE FAULT CASES

A. GORDON C. COLLINS v. BARRY L. ARNOLD, et al., No. M2004-02513-COA-R3-CV (November 20, 2007)

The Court's Summary:

The plaintiff was severely injured when the automobile he was driving was struck by a car driven by an impaired driver who was killed in the collision. The plaintiff's suit named as defendants the estate of the deceased driver, the nightclub from which the driver departed immediately before the accident, and the company which provided security services to the bar. The jury declined to find the nightclub liable for serving alcoholic beverages, thereby making the only available basis for liability negligence in controlling the conduct of the deceased driver so as to prevent harm to others. The jury heard evidence that employees of the club and the security company had made efforts, albeit unsuccessful, to prevent the driver from leaving the premises in an intoxicated state. The jury found the plaintiff's damages resulted from negligence and amounted to over $1,162,000. They allocated 30% of the fault to the deceased driver, 30% to the security company, and 40% to the club's owner. The jury also awarded punitive damages of $1.5 million against the club's owner and $500,000 against the security company. The club owner appealed. Because the jury was not instructed as to the conditions for liability under an assumed, rather than imposed, duty of care as established in Section 324A of the Restatement of Torts, we must reverse the verdict and judgment thereon. For separate and independent reasons, we reverse the award of punitive damages, because the conduct of the bar's personnel in attempting to prevent its adult customer from driving while impaired did not reach the level of recklessness necessary to sustain a punitive award. Additionally, we find no error in evidentiary rulings or other procedures in the trial court that justify reversal.

Key Language from the Court's Opinion:

- In other words, if a special relationship exists, the defendant may have a duty to control the conduct of the party who is the subject of the relationship so as to protect others from foreseeable harm. In the case before us, the party seeking to use the special relationship exception is Mr. Collins, who had no relationship to Denim & Diamonds and was simply a member of the general public.

- Mr. Collins asserts that Denim & Diamonds had a legally recognized special relationship with both himself and Brett Arnold on the basis of two other sections of the Restatement of Torts. He argues that §318 of the Restatement "recognizes a special relationship between a possessor of land and a licensee where the possessor of land had the 'ability to control' the licensee and knows of the 'necessity and opportunity for exercising such control.'" Section 318 establishes that a possessor of land or chattel has a duty to use reasonable care to control the conduct of a party whom the possessor allows to use the land or chattel so as to avoid harm to others. However, that duty relates to controlling the use of the chattel or the activity on the land. RESTATEMENT (SECOND) OF TORTS § 318 cmt. *a* and *b*. It is not applicable in the case before us.

- Similarly, Mr. Collins argues that Section 319 recognizes a special relationship "where a person 'takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled.'" Again, that section creates a duty in specific situations, and those situations are not present in the case before us. According to the comments, the rule in Section 319 applies in two situations: (1) where the actor has charge of a class of persons to whom the tendency to act injuriously is normal and (2) where the actor has charge of a person not in such a

class but who has a peculiar tendency so to act that the actor knows or should know of. RESTATEMENT (SECOND) OF TORTS § 319 cmt. *a*.

- We agree with Mr. Collins that the foreseeability of harm and the seriousness of potential harm associated with an intoxicated driver operating a vehicle on public streets is obvious. *East Tenn. Pioneer Oil Co*., 172 S.W.3d at 551-52; *Burroughs v. Magee*, 118 S.W.3d 323, 332 (Tenn. 2003). In fact, the employees of Denim & Diamonds recognized that risk and gravity. Additionally, there is certainly a public policy against operating a vehicle while under the influence of intoxicants, as evidenced by legislation criminalizing such conduct. However, we can find no authority for the proposition that the owners or employees of a commercial establishment have a special relationship with a customer or with the public that would impose upon that establishment a duty to control the conduct of an adult customer to prevent his leaving the premises or driving while intoxicated.

- We conclude that Denim & Diamonds did not owe a duty to Mr. Collins or to other members of the motoring public to protect them from the actions of Brett Arnold by virtue of any special relationship. Additionally, we can find no other basis for deciding that Denim & Diamonds was under a legally-imposed duty to control the conduct of Mr. Arnold by physical restraint or otherwise.

- Regardless of whether it had a duty to try to control Mr. Arnold's conduct for the protection of others, Denim & Diamonds did, in fact, try to stop Mr. Arnold from driving and does not dispute that once it made those attempts it was under a duty to use reasonable care. Once the management of the club determined that Mr. Arnold was so intoxicated that it would be unsafe to allow him to drive, and once they took steps to prevent him from doing so, they assumed the duty to act reasonably to accomplish that purpose. Denim & Diamonds itself acknowledges that it undertook to prevent Mr. Arnold from driving, detained him, and thereby assumed a duty to act with reasonable care to prevent him from harming others by driving. Even though the law may not impose a duty to act, once a party voluntarily assumes a duty to act for the protection of others, he or she must then act reasonably. *Draper v. Westerfield*, 181 S.W.3d 283, 291 (Tenn. 2005) (distinguishing between a duty based on a special relationship and a duty that is assumed).

- Denim & Diamonds agrees that it assumed a duty once it detained Brett Arnold and that "its duty to do so with reasonable care has never been disputed." However, it argues that it was only required to exercise reasonable care and that the trial court misstated the extent of that duty in instructing the jury.

- Denim & Diamonds contends that the instruction that was given subjected them to a duty of extraordinary care and "more or less makes Denim & Diamonds the absolute guarantor of Plaintiff's safety." We do not agree with this characterization of the instruction. We see nothing in the language of the instruction that would have required the jury to impose a duty of extraordinary care, rather than reasonable care, on Denim & Diamonds. To the contrary, it specifically uses the phrase "duty to exercise reasonable care." Nothing in this language would require a defendant to guarantee the safety of another, nor does it establish strict liability.

- Herein, Section 324A(a) would require proof that Denim & Diamonds' conduct in certainly delaying and attempting to prevent Mr. Arnold from driving in his impaired condition made the risk of harm to the motoring public greater or more likely than if Denim & Diamonds had done nothing. More to the point, had the jury been instructed on Section 324A (a), it would have been required to determine whether the conduct of Denim & Diamonds' employees in detaining Mr.

Arnold while trying to arrange a ride for him increased the risk that he would drive in an impaired condition and harm others. The jury was not given that instruction, and therefore did not make the analysis necessary to finding Denim & Diamonds liable under Section 324A. Based on the record before us, we cannot conclude that the jury's finding of liability for negligence on the part of Denim & Diamonds would not have been different had it been given the instruction requested by Denim & Diamonds. To the contrary, we hold that the failure to give the requested instruction, more likely than not, affected the outcome of the trial. We must, therefore, reverse the verdict and the judgment based thereon.

- Having thoroughly reviewed the record, we find that it contains material, albeit disputed, evidence to support the jury's verdict finding Denim & Diamonds liable for negligence as instructed by the trial court. The testimony set out earlier in this opinion details some of that evidence. Among other things, the jury could have found the following acts or omissions as falling below the standard of reasonable care and contributing to the accident: the failure to require that more than one security officer escort him to his car; the failure to advise the security officer of all the circumstances; and the failure to notify the police that an impaired and potentially dangerous driver had left the parking lot.

- While these facts are undisputed, Denim & Diamonds ignores other facts which show the role it played in the sequence of events that led to the plaintiff's injuries. Mark Gangwer, the bar's manager, exercised the ultimate responsibility over the daily operation of the club and had authority over both Denim & Diamonds' own employees and the employees of TPA. Mr. Gangwer determined how many security guards to ask TPA for, and he had the authority to deploy them as needed. He also had superior knowledge of Brett Arnold's condition and behavior, having observed him for forty-five minutes in his office. Finally, Denim & Diamonds and its manager were in the position to alert police to the danger posed by Mr. Arnold, thereby having a final opportunity to prevent injuries.

- Under the facts presented, it is conceivable that the jury could have allocated fault among the defendants in different proportions than it did. But there was nothing illogical or "incomprehensible" about the jury's allocation of fault.

B. JAY S. GORBAN v. DAVID HARRIS, No. M2007-01908-COA-R3-CV (May 28, 2008)

The Court's Summary:

This is a dispute between a homeowner and the contractor he hired to build a sunroom onto his home. We have concluded that the evidence does not preponderate against the trial court's award of a judgment in favor of the homeowner for 60% of the requested damages, based upon its allocation of 40% of the fault to the homeowner.

Key Language from the Court's Opinion:

- Mr. Harris essentially argues that the proof did not establish that improper construction of the sunroom, rather than foundation problems with the house, caused all of the damages to the sunroom. As Mr. Harris points out, there was evidence that Mr. Bowman did work on the foundation at the front of Dr. Gorban's house after he finished the sunroom repairs. There was testimony from Mr. Harris of a sink hole in the area. However, there was also significant evidence in support of the trial court's conclusions.

- We cannot say that the evidence preponderates against the trial court's findings regarding the cause of the sunroom damages. The trial court was in the best position to assess the credibility of the witnesses, and we give that assessment great weight. *Rice*, 983 S.W.2d at 682.

- Mr. Harris argues that Dr. Gorban "would have spent half the sum that he paid Mr. Bowman if he had purchased a new sunroom kit and started construction from the ground up." There is, however, no proof in the record to support this assertion. When the case was heard, Mr. Harris did not elicit any testimony or put on any proof to call into question the figures given by Dr. Gorban. The evidence does not preponderate against the trial court's determination that the total amount of damages resulting from the improper construction of the sunroom was $48,290.00.

- The trial court's comparative fault determination was predicated upon its finding that Dr. Gorban did not provide Mr. Harris with the manufacturer's instructions regarding the foundation requirements. On that issue, the trial court found "that it's not clear to the Court that the instructions with regard to the foundation itself were, in fact, provided to Mr. Harris." The evidence does not preponderate against the trial court's finding on this issue, especially since it required the court to resolve the factual discrepancies by assessing the credibility of the witnesses.

- Dr. Gorban further argues that, even if he did not have the foundation instructions, Mr. Harris should have contacted the manufacturer himself. There is no proof that Mr. Harris was aware that additional instructions existed. While Mr. Harris could have contacted the manufacturer, we cannot say that the trial court erred in finding Dr. Gorban at fault for failing to provide the relevant instructions that were in his possession to Mr. Harris.

C. BILL F. GRINDSTAFF, et al. v. JOHN P. BOWMAN, et al., No. E2007-00135-COA-R3-CV (May 29, 2008)

The Court's Summary:

This litigation arises out of a collision between a vehicle operated by the plaintiff Bill F. Grindstaff and one driven by the defendant John P. Bowman. Mr. Grindstaff and his wife, the plaintiff Connie Grindstaff, timely filed suit against the defendant Bowman. Some 28 months after the accident, the plaintiffs sought to amend their complaint to add Hardee's Food Systems, Inc. – the employer of the defendant Bowman – as an additional party defendant. After an order was entered allowing the amendment, Hardee's filed a motion for summary judgment predicated upon the bar of the one-year statute of limitations. The trial court granted the motion. The plaintiffs appeal, contending that (1) the discovery rule saves their cause of action against Hardee's and, in any event, (2) the claim was timely filed pursuant to the provisions of Tenn. Code Ann. § 20-1-119(a) (Supp. 2007). We affirm.

Key Language from the Court's Opinion:

- Thus, despite the statute's "caused or contributed" language, the Court has held that § 20-1- 119 may be used to add a defendant whose liability is premised solely upon vicarious principles. Id. The Supreme Court has also held that § 20-1-119 applies even where the party defendant does not "allege the fault of the nonparty explicitly or use the words 'comparative fault,' " so long as the "defendant's answer gives a plaintiff notice of the identity of a potential nonparty tortfeasor and alleges facts that reasonably support a conclusion that the nonparty caused or contributed to the plaintiff's injury." Austin v. State, 222 S.W.3d 354, 358 (Tenn. 2007). The statute is implicated

regardless of "whether the nonparty is alleged to be partially responsible or totally responsible for the plaintiff's injuries." Id. at 355.

- The plaintiffs acknowledge, as they must, that "Defendant Bowman did not identify Defendant Hardee's as a responsible non-party in his Answer to the Plaintiffs' original Complaint," but rather identified Hardee's in a separate letter to the plaintiffs' attorney "at or around the time he filed his Answer." However, the plaintiffs argue that this should be enough to satisfy the requirements of § 20-1-119. To hold otherwise, they contend, "would construe the statute too narrowly and would create an inequitable result." We disagree.

- By its own terms, § 20-1-119 applies only where "a defendant . . . 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." (Emphasis added.) This language is clear and unambiguous.

- A letter from Bowman's attorney to the plaintiffs' attorney, which was not made a part of Bowman's formal answer and only became part of the record when the plaintiffs offered it as an exhibit in opposition to summary judgment, simply is not the same thing as an "answer." If the legislature wishes to expand the scope of § 20-1-119 to include, generally, off-the-record letters or, more specifically, correspondence sent "at or around the time" of the filing of an answer or amended answer, it is, of course, at liberty to do so, but in the meantime we are bound by the current language of the statute… For the foregoing reasons, Tenn. Code Ann. § 20-1-119 is inapplicable to the facts of the instant case.

- The record before us, viewed in the light most favorable to the plaintiffs, demonstrates a lack of due diligence by the plaintiffs in investigating their case during the 28 months between the car accident with Bowman and the discovery that Bowman was allegedly acting within the scope and course of his employment with Hardee's. The plaintiffs' affidavits indicate that Bowman's employment status was not immediately apparent from the circumstances of the accident, and that Bowman did not volunteer any information about this issue while conversing with the plaintiffs after the crash. However, there is no indication that the plaintiffs ever asked him whether he was "on the job," either in the accident's immediate aftermath or at any subsequent time. In fact, the facts in this record show no effort by the plaintiffs to ask Bowman or his counsel any pertinent questions during the nearly 2 1/2 years between the accident and the receipt of the letter implicating Hardee's.

- In the instant case, by contrast, the plaintiffs knew about the tort immediately, yet apparently did essentially nothing to investigate it for 28 months, even while availing themselves of the legal system to file a complaint against the primary tortfeasor. Under those circumstances, we hold that a jury could not reasonably conclude that the plaintiffs exercised due diligence on these facts.

- Yet, even giving the plaintiffs the benefit of all reasonable inferences, as we must, we find no facts from which we can reasonably infer that the plaintiffs undertook to investigate this accident in a diligent fashion. We will not reward the plaintiffs' failure to investigate their case by extending the statute of limitations simply because they subsequently discovered facts that could easily have been unearthed months earlier. To do so would defeat the purpose of the statute of limitations without advancing the purpose of the discovery rule. Accordingly, we hold that summary judgment was properly granted. The judgment of the trial court is affirmed.

X. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS/OUTRAGEOUS CONDUCT CASES

A. ROBERT H. CRAWFORD, SR. et al. v. J. AVERY BRYAN FUNERAL HOME, INC. et al., No. E2006-00987-COA-R3-CV (November 21, 2007)

The Court's Summary:

This appeal involves one of numerous civil lawsuits filed against T. Ray Brent Marsh and his former business, Tri-State Crematory, Inc., and others. The plaintiffs in this case are the parents and siblings of Robert H. Crawford, Jr., whose body was sent to the Tri-State Crematory for cremation. The body, however, was not cremated and to this day the plaintiffs do not know what happened to their loved ones' body. The trial court dismissed the lawsuit after finding that the decedent's surviving spouse was the only person with standing to bring the various tort claims asserted by the plaintiffs. The decedent's sister, Teri Crawford, appeals that determination. We affirm.

Key Language from the Court's Opinion:

- When considering all of the above, we conclude that, in Tennessee, any tort claims for negligent, reckless or intentional interference with a dead body and the like can be brought only by the person or persons who have the right to control disposition of the body. Pursuant to *Hill*, it is the surviving spouse who has the superior right to control disposition of the body. Therefore, in the present case, the Trial Court correctly held that because Wife had the right to control disposition of the decedent's body, she alone had the right to bring the various tort claims against the Funeral Home and Tri-State. These claims were properly dismissed for lack of standing.

- There are two final points worth emphasizing. First, section 868, by definition, only applies to cases involving conduct committed upon dead bodies. It necessarily follows that any limitation imposed by section 868 does not apply to tortious conduct committed upon live persons, such as that addressed by our Supreme Court in *Doe v. Roman Catholic Diocese of Nashville*, 154 S.W.3d 22 (Tenn. 2005). Second, we are not holding that someone who does not have control over disposition of a decedent's body never can bring a tort claim for emotional distress and the like. For example, if the body was mutilated in the presence of a family member, then our holding in this case would not prevent that family member from filing a lawsuit, even if that family member did not have control over the body's disposition. *See* comment g to the Restatement (Second) of Torts, § 868, *supra*.

B. RONDAL AKERS, et al. v. BUCKNER-RUSH ENTERPRISES, INC., et al., No. E2006-01513-COA-R3-CV (November 21, 2007)

The Court's Summary:

This is an appeal from three consolidated lawsuits filed against T. Ray Brent Marsh, Marsh's former business, Tri-State Crematory, and Buckner-Rush Enterprises, Inc. The plaintiffs are relatives and a girlfriend of three deceased individuals whose bodies were sent by Buckner-Rush Funeral Home to Tri-State Crematory for cremation. The bodies were not cremated and either were dumped or buried by Marsh on the Tri-State premises. The Trial Court dismissed all three lawsuits after holding that the plaintiffs did not have standing to bring any of the tort, contract, or statutory claims at issue. We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

Key Language from the Court's Opinion:

- Consistent with *Crawford*, we now must determine whether the Trial Court correctly determined that none of the plaintiffs in the three consolidated cases now before this Court had control over disposition of their loved ones' body and, therefore, lacked standing to proceed with the tort claims. We have been unable to locate any Tennessee authority directly on point which discusses who has control over disposition of a body when there is no surviving spouse. However, Tenn. Code Ann. § 68-30-109(a) comes very close. This particular statute addresses the order of priority among relatives of a deceased individual with regard to making anatomical gifts. While this statute does not necessarily mandate a particular result in the present case, it does give us strong insight into how the General Assembly would craft an order of priority if passing a statute directly addressing the current situation.

- In *Akers*, the deceased was not survived by a spouse and his daughter, Lindsey, was only 12 years old. Since there was no surviving spouse or adult child, the decedent's parents were next in line in the order of priority. As noted previously, the *Akers* lawsuit was filed by the decedent's parents, Rondal D. Akers, Jr., and Lucinda Akers. Therefore, with regard to the various tort claims asserted in *Akers*, we conclude that the Trial Court erred when it determined that the decedent's parents lacked standing. The Trial Court's judgment in this regard is vacated.

- The *Burns* lawsuit was filed originally by the decedent's wife, Linda Burns, and the decedent's daughter, Donna Burns. However, Linda Burns eventually settled her claims in the Georgia class action lawsuit and dismissed all of her claims in the present case. The only remaining claims are those of the decedent's daughter. Because the decedent's wife had exclusive control over disposition of the body, only she had standing to bring the various tort claims. Accordingly, we conclude that the Trial Court correctly dismissed Donna Burns' tort claims based on her lack of standing. The judgment of the Trial Court dismissing the tort claims filed by Donna Burns is affirmed.

- The *Hall* lawsuit was filed by the decedent's five siblings and his girlfriend. At the time of the decedent's death, he was not married and had no adult children. The decedent was, however, survived by his mother, who is not and never has been a party to this lawsuit. Therefore, we conclude that the decedent's mother was the person with standing to bring the various tort claims.

C. WILMA WILSON, et al. v. HARRY OURS, et al., No. M2006-02703-COA-R3-CV (September 3, 2008)

The Court's Summary:

This action arises from the owner of a cemetery mistakenly selling burial lots to members of the plaintiffs' family that belonged to others, the resulting burial of two members of the plaintiffs' family in plots that belonged to others, and the resulting disinterment and re-interment of one of the two decedents. The plaintiffs, six surviving family members of the two decedents, filed this action against the owner of the cemetery, the City of Lebanon, and several of its employees in which they asserted claims for trespass, negligence, nuisance, and outrageous conduct. Prior to trial, the trial court dismissed all but two claims. The only claims that went to trial were a claim for general negligence and a claim for nuisance. Following a bench trial, the trial court dismissed the nuisance claims of all plaintiffs and dismissed the claims by three of the six plaintiffs for negligence. The trial court awarded three of the plaintiffs damages totaling $45,000 for the negligent burial of the decedents. The plaintiffs and the City of Lebanon appeal. We have determined that the trial court did not err by dismissing the plaintiffs' claims for nuisance. As

for the plaintiffs' claims of negligence, we have determined that the trial court erred by awarding any of the plaintiffs' damages. This is because the plaintiffs' claims for infliction of emotional distress were dismissed prior to trial, and the dismissal of those claims was not appealed. Further, the plaintiffs presented no proof of physical or personal injuries associated with the emotional damages alleged and they presented no proof of property damage. The only proof of damages presented by the plaintiffs pertained to emotional suffering related to the news that their loved ones would be disinterred and re-interred. Accordingly, we reverse the trial court's award of damages to three of the plaintiffs. We affirm the trial court in all other respects.

Key Language from the Court's Opinion:

- The foregoing notwithstanding, the plaintiffs contend they presented viable claims and sufficient proof to recover damages because the matters at issue pertain to the burial of a loved one and the City's conduct constitutes outrageous or extreme conduct. We respectfully disagree.

- We acknowledge, as did the court in *Wood*, that the burial of a beloved relative is a highly emotional issue as is the disinterment and re-interment of that loved one. Nevertheless, the errors and omissions of the City do not constitute extreme or outrageous conduct and, as was the case in *Wood*, the plaintiffs may not recovery damages for emotional distress arising from the defendant's mere negligence. *Id*. at *5; *Medlin*, 398 S.W.2d at 274. Accordingly, we must vacate the award of damages in this case.

- We, therefore, vacate the monetary judgments awarded in favor of Wilma Wilson, John Wilson and Nancy Wilson. The judgment of the trial court is affirmed in part and reversed in part, the monetary judgments awarded the plaintiffs are vacated, and this matter is remanded with costs of appeal assessed against the plaintiffs, jointly and severally, and their surety.

XI. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CASES

A. MARC ESKIN and KAREN ESKIN, each individually & as parents & next friends to Brendan Eskin and Logan Eskin v. ALICE B. BARTEE, et al., No. W2006-01336-SC-R11-CV (August 14, 2008)

The Court's Summary:

This appeal involves claims for negligent infliction of emotional distress made by two family members of a child who was seriously injured in an automobile accident. In their complaint filed in the Circuit Court for Shelby County, the injured child's mother and brother alleged that they had sustained severe emotional injuries after they observed him lying on the pavement in a pool of blood. The injured child's parents served a copy of the complaint on their automobile insurance company because the driver of the automobile that struck their son lacked adequate insurance. The insurance company moved for a partial summary judgment on the negligent infliction of emotional distress claim because neither the injured child's mother nor his brother had seen or heard the injury-producing accident. The trial court granted the insurance company's motion, and the injured child's mother and brother appealed to the Tennessee Court of Appeals. The appellate court reversed the summary judgment and remanded the case for further proceedings. We granted the insurance company's Tenn. R. App. P. 11 application for permission to appeal to determine whether the Court of Appeals correctly permitted these negligent infliction of emotional distress claims to proceed. We have determined that persons who observe an injured family member shortly after an injury-producing accident may pursue a claim for negligent infliction of emotional distress.

Key Language from the Court's Opinion:

- On this appeal, USAA argues that Ms. Eskin and Logan Eskin cannot recover damages for negligent infliction of emotional distress because they did not see or hear the accident that caused Brendan Eskin's injuries. We have determined that a family member's allegation of a sensory observation of the immediate aftermath of an injury-producing event can provide the basis for a claim of negligent infliction of emotional distress.

- The courts have not hesitated to permit the recovery of damages for negligent infliction of emotional distress when justice and fairness require it. In Tennessee, as in other states, the courts have moved from completely denying bystanders the right to assert negligent infliction of emotional distress claims, to approving these claims if the bystander saw the injury-producing incident, and then to approving these claims if the bystander heard or had some other sort of sensory perception of the incident. In this circumstance, we have determined that it is appropriate and fair to permit recovery of damages for the negligent infliction of emotional distress by plaintiffs who have a close personal relationship with an injured party and who arrive at the scene of the accident while the scene is in essentially the same condition it was in immediately after the accident.

- The required relationship between the plaintiff and the deceased or injured person is not necessarily limited to relationships by blood or marriage. While a parent-child relationship, a spousal relationship, a sibling relationship, or the relationship among immediate family members provides sufficient basis for a claim, other intimate relationships such as engaged parties or step-parents and step-children will also suffice. The burden is on the plaintiff to prove the existence of the close and intimate personal relationship, and the defendant may contest the existence of the relationship.

- Based on these facts, we have determined that both Ms. Eskin and Logan Eskin have made out a prima facie negligent infliction of emotional distress claim. Accordingly, we have determined that the Court of Appeals correctly reversed the summary judgment dismissing Ms. Eskin's and Logan Eskin's claims and properly remanded the case to the trial court for further proceedings. We affirm the judgment of the Court of Appeals reversing the partial summary judgment dismissing the negligent infliction of emotional distress claims filed by Ms. Eskin and Logan Eskin and remanding the case to the trial court for further proceedings.

B. JEREMY FLAX and RACHEL SPARKMAN, as the Natural Parents of Joshua Flax, deceased; Rachel Sparkman, Individually v. DAIMLYERCHRYSLER CORPORATION; and LOUIS A. STOCKELL, JR., No. M2005-01768-SC-R11-CV (July 24, 2008)

The Court's Summary:

This appeal comes from a wrongful death action brought by the parents of an infant child who died from injuries suffered in an automobile accident. In 2001, the mother was one of several passengers involved in a collision in which a man, driving his pickup truck and speeding, rear-ended the minivan occupied by mother and her infant son. The plaintiff parents' infant son suffered a fatal injury when his head collided with the head of another occupant of the vehicle, who was seated in the passenger seat directly in front of the child and whose seat fell backwards during the accident. The mother and father of the deceased child brought suit against the manufacturer of the minivan and the man who drove the truck that struck the minivan. The parents' claims against the manufacturer were for wrongful death of their son as a result of

the manufacturer's defective design of the front seat backs in the minivan and failure to warn of the defect, and the mother also brought a claim against the manufacturer for negligent infliction of emotional distress as a result of witnessing her son's injury. The plaintiffs also sought punitive damages. We granted review to determine: 1) whether a negligent infliction of emotional distress claim brought simultaneously with a wrongful death claim is a "stand-alone" claim that requires expert medical or scientific proof of a severe emotional injury; 2) whether the evidence presented at trial was sufficient to support an award of punitive damages; 3) whether the punitive damages awarded by the trial court were excessive; and 4) whether the trial court erred by recognizing the plaintiffs' second failure to warn claim. We hold that the simultaneous filing of a wrongful death suit does not prevent a negligent infliction of emotional distress claim from being a "stand-alone" claim. Therefore, negligent infliction of emotional distress claims brought under these circumstances must be supported by expert medical or scientific proof of a severe emotional injury. In addition, we conclude that the punitive damages awarded by the trial court were adequately supported by the evidence and were not excessive. Finally, we hold that the trial court erred by recognizing the plaintiffs' second failure to warn claim but conclude that the error did not prejudice the judicial process or more probably than not affect the jury's verdict. Accordingly, we affirm the Court of Appeals' reversal of the compensatory and punitive damage awards based on the negligent infliction of emotional distress claim and reverse the Court of Appeals' decision to overturn the punitive damage award related to the plaintiffs' wrongful death claim.

Key Language from the Court's Opinion:

- The plaintiffs failed to present expert medical or scientific proof that Ms. Sparkman suffered severe emotional injuries. DCC filed motions for directed verdict and judgment notwithstanding the verdict, arguing that Ms. Sparkman's NIED claim was invalid because plaintiffs failed to meet the Camper requirements. Plaintiffs argued that the heightened proof requirements of Camper were inapplicable because Ms. Sparkman's NIED claim was filed with a wrongful death claim and was therefore not a "stand-alone" claim. The trial court agreed with the plaintiffs and upheld the jury's verdict with respect to Ms. Sparkman's NIED claim. We disagree. It is well settled that a wrongful death action is a claim belonging to the decedent, not the decedent's beneficiaries. Ki v. State, 78 S.W.3d 876, 880 (Tenn. 2002). Accordingly, the wrongful death claim in the instant case belongs to Joshua Flax rather than to the plaintiffs.

- We held in Estate of Amos v. Vanderbilt University, 62 S.W.3d 133 (Tenn. 2001) that "[t]he special proof requirements in Camper are a unique safeguard to ensure the reliability of 'stand-alone' negligent infliction of emotional distress claims." Amos, 62 S.W.3d at 136-37. Because "the risk of fraudulent claims is less . . . in a case in which a claim for emotional injury damages is one of multiple claims for damages[,]" we held that the heightened proof requirements set forth in Camper are inapplicable "[w]hen emotional damages are a 'parasitic' consequence of negligent conduct that results in multiple types of damages." Id. at 137. In other words, we recognized a distinction between traditional negligence claims that include damages for emotional injuries and claims that are based solely on NIED. This case is distinguishable from Amos, in that Ms. Sparkman's NIED claim is the only claim that is personal to one of the plaintiffs.

- We hold that Ms. Sparkman failed to meet the heightened proof requirements of Camper for a stand-alone NIED claim by not presenting expert medical or scientific proof of her emotional injuries. We therefore affirm, albeit under slightly different reasoning, the Court of Appeals' reversal of the compensatory and punitive damage awards based on Ms. Sparkman's NIED claim.

- We hold that Ms. Sparkman's NIED claim is a "stand-alone" claim in spite of the fact that she simultaneously brought a wrongful death claim. Therefore, Ms. Sparkman's NIED claim should

have been supported by expert medical or scientific proof of a severe emotional injury. Accordingly, we affirm the Court of Appeals' reversal of the compensatory and punitive damage awards based on Ms. Sparkman's NIED claim.

XII. PRODUCTS LIABILITY CASES

A. REBECCA L. MAINO v. THE SOUTHERN COMPANY, INC. d/b/a THE SOUTHERN COMPANY, et al., No. W2007-00225-COA-R9-CV (November 19, 2007)

The Court's Summary:

The trial court awarded summary judgment to Defendants based on the ten-year statute of repose applicable to products liability actions codified at Tennessee Code Annotated § 29-28-103. We granted Plaintiff's application for interlocutory appeal with respect to whether the savings statute saves a products liability action that was filed within the products liability statutes of limitations and repose, voluntarily dismissed, and refiled within one year where the products liability statute of repose expired during the one-year savings period. We hold Plaintiff may rely on the savings statute to refile her action. Summary judgment in favor of Defendants is reversed, and this matter is remanded for further proceedings.

Key Language from the Court's Opinion:

- We begin our analysis by noting that the statute of repose is but one part of a comprehensive products liability statutory scheme that was enacted by the legislature in1978. *Sharp*, 937 S.W.2d at 850. In *Sharp*, the supreme court observed that the statute was enacted to "address the actuarial concerns of the insurance industry and allow for accurate assessment of the liability exposure for insurance purposes." *Id*. The *Sharp* court noted, "[t]he stated purpose of the products liability statute of repose was to provide a 'specific period of time for which product liability insurance premiums can be reasonable and accurately calculated.'" *Id*. (quoting Tenn. Public Acts 1978, ch. 703, § 1).

- The savings statute, on the other hand, is remedial in nature. *Sharp v. Richardson*, 937 S.W.2d 846, 849 (Tenn. 1996)(citations omitted). Its purpose is "to afford a *diligent* plaintiff the opportunity to renew a suit that was dismissed without concluding the plaintiff's right of action." *Id*. (emphasis in the original).

- Permitting a plaintiff to refile an action that originally was filed within the statute of limitations and ten-year statute of repose, non-suited, and refiled within the one-year period permitted by the savings statute does not frustrate the legislative intent of achieving a degree of predictability for the purposes of setting product liability insurance premiums. Unlike mental incompetency, the extension of time under the savings statute is neither unpredictable nor without limitation. Additionally, no surprise or hardship is worked on a defendant or its insurance carrier where actual notice of an asserted claim is had within the statutory period. On the other hand, the purpose and spirit of the longstanding savings statute is realized.

- We accordingly hold that a plaintiff who commences a products liability action within the products liability statute of limitations and ten-year statute of repose, voluntarily non-suits, and refiles within one year of the non-suit, may rely on the savings statute notwithstanding the expiration of the ten-year statute of repose.

B. REBECCA LYNN SPARKS v. MICHAEL C. MENA, et al., No. E2006-02473-COA-R3-CV (February 6, 2008)

The Court's Summary:

The plaintiff brought this action alleging that a surgical device manufactured by the defendant was in a defective and unreasonably dangerous condition, which resulted in the accidental laceration of her aorta during abdominal surgery. Upon our determination that the trial court erred in excluding evidence of other similar incidents involving actual or potential surgical injuries with the same model of device, and that the trial court erred in excluding the testimony of plaintiff's expert witness, we vacate the judgment of the trial court and remand the case for a new trial.

Key Language from the Court's Opinion:

- Because the trial court utilized an incorrect legal standard in determining the admissibility of the evidence of similar incidents, we find merit in Ms. Sparks' argument that the trial court erred in excluding all but two of the reports.

- Of the 21 analysis reports offered by Ms. Sparks, 18 meet the substantial similarity requirement. All of the reports document complaints about the same make and model of trocar, the 512SD. By way of example, the documents contain reports of such instances as: "the 512SD safety shield would not cover the knife after passing through the abdominal wall;" "the shield did not come back over the blade when the trocar was inserted, and a vein was punctured;" "another 512SD blade shield failed to advance after entering the abdomen;" "the 512SD instrument safety shield did not close back over the blade after having reached the abdominal cavity;" and "the surgeon and the nurse checked the instrument and could not activate the safety shield (it would not return into the safety lock position)." These analysis reports contain descriptions of incidents substantially similar to what Ms. Sparks alleges occurred in her case, causing her injury.

- We are of the opinion that the fact that Ethicon reported finding no defect in its own returned product upon inspection pertains to the weight to be afforded the evidence, and not its admissibility. In other words, Ethicon is free to argue to the trier of fact that no weight should be given to the allegations of the analysis reports regarding other similar incidents because Ethicon reported finding nothing wrong with the product, but that fact does not render the evidence inadmissible. The trial court's application of the legal standard provided by Tenn. R. Evid. 404(b) to the evidence of other similar incidents was reversible error in this case. On remand, those 18 reports documenting claims of instances where the safety shield of the trocar would not retract, or the knife blade remained exposed inside the patient's abdominal cavity, are admissible for two purposes: "(1) to show the existence of a particular dangerous condition or (2) to show the defendant's knowledge of the dangerous condition." *Flax*, 2006 WL 3813655, at *17; *Winfree v. Coca-Cola Bottling Works*, 83 S.W.2d 903, 905 (Tenn. Ct. App. 1935).

- Ms. Sparks also takes issue with the trial court's decision to exclude the expert testimony of Dr. Ted Eyrick, a professional mechanical engineer who proferred his opinion that, among other things, the trocar was likely defectively manufactured and in an unreasonably dangerous condition when it left Ethicon's custody and control, and that "more likely than not, the knife collar on the Sparks trocar became bent in a downward position, which allowed the Sparks trocar to arm properly, but prevented the safety shield from springing back to cover the knife blade after the trocar was inserted into Plaintiff's insufflated abdomen." The trial court held that Dr. Eyrick was unqualified to testify as an expert witness. We have determined that Dr. Eyrick possesses the

education, training and experience that qualifies him to render an opinion on the mechanical design and operation of the device at issue, and consequently that the trial court erred in disqualifying him as an expert under Tenn. R. Evid. 702 and 703.

C. JEREMY FLAX and RACHEL SPARKMAN, as the Natural Parents of Joshua Flax, deceased; Rachel Sparkman, Individually v. DAIMLYERCHRYSLER CORPORATION; and LOUIS A. STOCKELL, JR., No. M2005-01768-SC-R11-CV (July 24, 2008)

The Court's Summary:

See page 134.

Key Language from the Court's Opinion:

- DCC contends that the trial court erred in recognizing the post-sale failure to warn claim. We agree. Although different states apply the doctrine differently, the vast majority of courts recognizing post-sale failure to warn claims agree that a claim arises when the manufacturer or seller becomes aware that a product is defective or unreasonably dangerous after the point of sale and fails to take reasonable steps to warn consumers who purchased the product.

- Unlike plaintiffs in post-sale duty to warn cases, the plaintiffs in this case do not allege that DCC discovered problems with the seatbacks after the time of sale. On the contrary, the theory of the plaintiffs' case was that DCC had knowledge that the seats were defective and unreasonably dangerous as early as the 1980s. Furthermore, DCC does not deny that it had knowledge of the performance of its seats at the time of sale but argues that the seats functioned in a non-defective and reasonably safe manner. There is therefore no dispute regarding DCC's knowledge at the time of sale of the Caravan.

- Although the plaintiffs allege that DCC continued to receive notice that its product was dangerous after the sale, they do not allege that DCC received any new information during this period. Accordingly, this case does not present the facts necessary to allow us to consider the merits of recognizing post-sale failure to warn claims. Rather, the plaintiffs' allegation that DCC [w]as negligent in failing to warn the plaintiffs after the sale is an attempt to impose liability a second time for what is essentially the same wrongful conduct. If a defendant negligently fails to warn at the time of sale, that defendant does not breach any new duty to the plaintiff by failing to provide a warning the day after the sale. Instead, the defendant merely remains in breach of its initial duty. For these reasons, we conclude that the trial court erred by adopting and applying the post-sale failure to warn claim in this case. We express no opinion, however, as to the merits of recognizing that cause of action in an appropriate case.

- Although the jury heard evidence of twenty-five post-sale similar incidents, the trial court instructed the jury that it could consider that evidence only for the purpose of determining whether DCC had notice of the condition of the seats. We presume that the jury followed the trial court's instruction and did not consider the other similar incidents for purposes of determining whether the seats were unreasonably dangerous. State v. Williams, 977 S.W.2d 101, 106 (Tenn. 1998). We therefore conclude that the trial court's instruction significantly reduced the danger of prejudice to DCC. In addition, the trial judge's remittitur of the punitive damages award also limited the danger that the evidentiary error affected the judgment in this case. In light of the wealth of evidence supporting the jury's verdict, we conclude that the twenty-five other similar

incidents that were improperly admitted were not so significant as to affect the jury's verdict. Accordingly, we conclude that the trial court's decision to admit the post-sale other similar incidents did not prejudice the judicial process or more probably than not affect the judgment.

- Finally, we hold that the trial court erred by recognizing the plaintiffs' second failure to warn claim but conclude that the error did not more probably than not affect the judgment or prejudice the judicial process.

D. NICKIE DURAN v. HYUNDAI MOTOR AMERICA, INC. et al., No. M2006-00282-COA-R3-CV (February 13, 2008)

The Court's Summary:

This appeal involves a single vehicle accident in which the driver was seriously injured. The driver filed suit against the manufacturer of the automobile in the Circuit Court for Dickson County, alleging that the automobile's exhaust system was dangerously defective and seeking both compensatory and punitive damages. The jury returned a verdict awarding the driver $3,000,000 in compensatory damages and concluding that the driver was entitled to punitive damages. However, the trial court granted a directed verdict on the punitive damage claim and reduced the jury's award of compensatory damages to $2,000,000 to conform to the driver's amended prayer for relief. On this appeal, the manufacturer takes issue with (1) the admissibility of the evidence regarding punitive damages during the driver's case-in-chief, (2) the scope of the cross-examination of one of its expert witnesses, (3) the trial court's delay in directing a verdict on the driver's punitive damage claim, (4) the jury's allocation of fault, (5) the amount of the compensatory damages award, and (6) the award of discretionary costs. The driver takes issue with the dismissal of her punitive damages claim. We have determined that no error was committed during the trial. In addition, we find that the trial court properly directed a verdict on the driver's punitive damages claim and reduced the award for compensatory damages to $2,000,000. We also find that the verdict, as approved by the trial court, is supported by material evidence. Finally, we have determined that the award for discretionary costs must be reduced.

Key Language from the Court's Opinion:

- The Hyundai defendants take issue with the trial court's decision to permit counsel for Ms. Cook to include arguments regarding punitive damages in his opening statement and to present evidence during Ms. Cook's case-in-chief regarding her entitlement to punitive damages. They insist that the trial court erred by denying their motion in limine seeking to exclude this argument and evidence. We find two fundamental flaws with this argument. First, the trial court did not deny the Hyundai defendants' motion in limine; it simply acceded to their request to defer the ruling on the motion until the punitive damage phase of the trial. Second, a motion in limine is not the proper vehicle for seeking a dispositive pretrial ruling on a claim for punitive damages.

- The Hyundai defendants also take issue with the jury's allocation of fault. In light of Ms. Cook's testimony that she continued to operate her automobile after smelling odors, they assert that the record lacks material evidence to support the jury's decision that they were completely at fault while Ms. Cook was completely without fault. We have determined that the record contains material evidence to support the jury's allocation of one hundred percent of the fault to the Hyundai defendants.

- When appellate courts review the evidentiary foundation of a jury's verdict regarding liability, they should keep in mind that the Constitution of Tennessee assigns this task to the jury. Smith v.

Sloan, 189 Tenn. 368, 374, 225 S.W.2d 539, 541 (1949); Jackson v. B. Lowenstein & Bros., Inc., 175 Tenn. 535, 538, 136 S.W.2d 495, 496 (1940). Appellate courts are not a jury of three with the prerogative to re-weigh the evidence, Whaley v. Rheem Mfg. Co., 900 S.W.2d 296, 300 (Tenn. Ct. App. 1995); Lowe v. Preferred Truck Leasing, Inc., 528 S.W.2d 38, 41 (Tenn. Ct. App. 1975), or to determine where the "truth" lies. D.M. Rose & Co. v. Snyder, 185 Tenn. 499, 508, 206 S.W.2d 897, 901 (1947); Davis v. Wilson, 522 S.W.2d 872, 875 (Tenn. Ct. App. 1974). Nor are they empowered to substitute their judgment for the jury's, Grissom v. Modine Mfg. Co., 581 S.W.2d 651, 652 (Tenn. Ct. App. 1978), even if they conclude that the evidence might well have supported a different conclusion, or that the jury did not weigh the evidence well or that they would have reached a different conclusion had they been members of the jury.

- We disagree with the Hyundai defendants' underlying premise that Ms. Cook was negligent. The evidence established that carbon monoxide is an odorless gas. It certainly could have been pouring into Ms. Cook's car through her vents for some period of time before Ms. Cook became aware of the strange odor resulting from the fire in the engine compartment. Expert testimony established that carbon monoxide, which ultimately rendered Ms. Cook unconscious, can rise to extremely high levels in an enclosed space such as an automobile within an extremely short period of time. Furthermore, expert testimony established that a person's level of consciousness would be declining as his or her carboxyhemoglobin level increased.

- A jury certainly could have concluded that a person is not negligent for failing to realize when they smell an odor that is similar to being behind an eighteen-wheeler or a Greyhound bus that carbon monoxide may be streaming into his or her vehicle in quantities so substantial as to create a danger. The time period between Ms. Cook first smelling a strange odor and being rendered unconscious was extremely short. Ms. Cook did not know what was causing the odor and believed that it was attributable to the pavement. This evidence provides material evidence to support the jury's conclusion that Ms. Cook was not negligent for failing to roll down her windows or stop her automobile in response to a strange, unknown odor. Any other conclusion would require a disturbing and highly improper substitution of this court's judgment for that of the jury. We find no error in the jury's allocation of fault.

E. DONNA S. RIEGEL, Individually and as Administrator of the Estate of CHARLES R. RIEGEL, PETITIONER v. MEDTRONIC, INC., 552 U.S. ___ (Feb. 20, 2008)

The Court's Summary:

Charles Riegel underwent coronary angioplasty in 1996, shortly after suffering a myocardial infarction. His right coronary artery was diffusely diseased and heavily calcified. Riegel's doctor inserted the Evergreen Balloon Catheter into his patient's coronary artery in an attempt to dilate the artery, although the device's labeling stated that use was contraindicated for patients with diffuse or calcified stenoses. The label also warned that the catheter should not be inflated beyond its rated burst pressure of eight atmospheres. Riegel's doctor inflated the catheter five times, to a pressure of 10 atmospheres; on its fifth inflation, the catheter ruptured. Complaint 3. Riegel developed a heart block, was placed on life support, and underwent emergency coronary bypass surgery. Riegel and his wife Donna brought this lawsuit in April 1999, in the United States District Court for the Northern District of New York. Their complaint alleged that Medtronic's catheter was designed, labeled, and manufactured in a manner that violated New York common law, and that these defects caused Riegel to suffer severe and permanent injuries. The complaint raised a number of common-law claims. The District Court held that the MDA pre-empted Riegel's claims of strict liability; breach of implied warranty; and negligence in the design, testing, inspection, distribution, labeling, marketing, and sale of the catheter. It also held that the MDA pre-empted a negligent manufacturing claim insofar as it was not premised on the theory that Medtronic

violated federal law. Finally, the court concluded that the MDA pre-empted Donna Riegel's claim for loss of consortium to the extent it was derivative of the pre-empted claims. The United States Court of Appeals for the Second Circuit affirmed these dismissals.

We consider whether the pre-emption clause enacted in the Medical Device Amendments of 1976, 21 U. S. C. §360k, bars common-law claims challenging the safety and effectiveness of a medical device given premarket approval by the Food and Drug Administration (FDA).

Key Language from the Court's Opinion:

- Once a device has received premarket approval, the MDA forbids the manufacturer to make, without FDA permission, changes in design specifications, manufacturing processes, labeling, or any other attribute, that would affect safety or effectiveness. §360e(d)(6)(A)(i). If the applicant wishes to make such a change, it must submit, and the FDA must approve, an application for supplemental premarket approval, to be evaluated under largely the same criteria as an initial application. §360e(d)(6); 21 CFR §814.39(c).

- After premarket approval, the devices are subject to reporting requirements. §360i. These include the obligation to inform the FDA of new clinical investigations or scientific studies concerning the device which the applicant knows of or reasonably should know of, 21 CFR §814.84(b)(2), and to report incidents in which the device may have caused or contributed to death or serious injury, or malfunctioned in a manner that would likely cause or contribute to death or serious injury if it recurred, §803.50(a). The FDA has the power to withdraw premarket approval based on newly reported data or existing information and must withdraw approval if it determines that a device is unsafe or ineffective under the conditions in its labeling. §360e(e)(1); *see also* §360h(e) (recall authority).

- Unlike general labeling duties, premarket approval is specific to individual devices. And it is in no sense an exemption from federal safety review—it is federal safety review. Thus, the attributes that Lohr found lacking in §510(k) review are present here. While §510(k) is " 'focused on equivalence, not safety,' " *id.,* at 493 (opinion of the Court), premarket approval is focused on safety, not equivalence. While devices that enter the market through §510(k) have "never been formally reviewed under the MDA for safety or efficacy," *ibid*., the FDA may grant premarket approval only after it determines that a device offers a reasonable assurance of safety and effectiveness, §360e(d).

- Congress is entitled to know what meaning this Court will assign to terms regularly used in its enactments. Absent other indication, reference to a State's "requirements" includes its common-law duties. As the plurality opinion said in *Cipollone*, common-law liability is "premised on the existence of a legal duty," and a tort judgment therefore establishes that the defendant has violated a state-law obligation. *Id*., at 522. And while the common-law remedy is limited to damages, a liability award " 'can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'" *Id*., at 521.

- In the present case, there is nothing to contradict this normal meaning. To the contrary, in the context of this legislation excluding common-law duties from the scope of pre-emption would make little sense. State tort law that requires a manufacturer's catheters to be safer, but hence less effective, than the model the FDA has approved disrupts the federal scheme no less than state regulatory law to the same effect. Indeed, one would think that tort law, applied by juries under a negligence or strict-liability standard, is less deserving of preservation. A state statute, or a

regulation adopted by a state agency, could at least be expected to apply cost-benefit analysis similar to that applied by the experts at the FDA: How many more lives will be saved by a device which, along with its greater effectiveness, brings a greater risk of harm? A jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court.

- In the case before us, the FDA has supported the position taken by our opinion with regard to the meaning of the statute. We have found it unnecessary to rely upon that agency view because we think the statute itself speaks clearly to the point at issue.

- The Riegels contend that the duties underlying negligence, strict-liability, and implied-warranty claims are not pre-empted even if they impose " 'requirements,' " because general common-law duties are not requirements maintained " 'with respect to devices.' "

- The language of the statute does not bear the Riegels' reading. The MDA provides that no State "may establish or continue in effect *with respect to a device . . . any requirement*" relating to safety or effectiveness that is different from, or in addition to, federal requirements. §360k(a) (emphasis added). The Riegels' suit depends upon New York's "continu[ing] in effect" general tort duties "with respect to" Medtronic's catheter. Nothing in the statutory text suggests that the pre-empted state requirement must apply *only* to the relevant device, or only to medical devices and not to all products and all actions in general.

- The Riegels' argument to the contrary rests on the text of an FDA regulation which states that the MDA's preemption clause does not extend to certain duties, including "[s]tate or local requirements of general applicability where the purpose of the requirement relates either to other products in addition to devices (e.g., requirements such as general electrical codes, and the Uniform Commercial Code (warranty of fitness)), or to unfair trade practices in which the requirements are not limited to devices." 21 CFR §808.1(d)(1). Even assuming that this regulation could play a role in defining the MDA's preemptive scope, it does not provide unambiguous support for the Riegels' position.

- The agency's reading of its own rule is entitled to substantial deference, *see Auer v. Rob- bins*, 519 U. S. 452, 461 (1997), and the FDA's view put forward in this case is that the regulation does not refer to general tort duties of care, such as those underlying the claims in this case that a device was designed, labeled, or manufactured in an unsafe or ineffective manner.

- State requirements are pre-empted under the MDA only to the extent that they are "different from, or in addition to" the requirements imposed by federal law. §360k(a)(1). Thus, §360k does not prevent a State from providing a damages remedy for claims premised on a violation of FDA regulations; the state duties in such a case "parallel," rather than add to, federal requirements. *Lohr*, 518 U. S., at 495; *see also id*., at 513 (O'Connor, J., concurring in part and dissenting in part). The District Court in this case recognized that parallel claims would not be preempted, *see* App. to Pet. for Cert. 70a–71a, but it interpreted the claims here to assert that Medtronic's device violated state tort law notwithstanding compliance with the relevant federal requirements, *see id*., at 68a. Although the Riegels now argue that their lawsuit raises parallel claims, they made no such contention in their briefs before the Second Circuit, nor did they raise this argument in their petition for certiorari. We decline to address that argument in the first instance here.

F. In Re: BRIDGESTONE/FIRESTONE AND FORD MOTOR COMPANY LITIGATION, No. W2006-02550-COA-R9-CV (September 15, 2008)

The Court's Summary:

The second appeal in this case involves the effect of a previous *forum non conveniens* dismissal. The plaintiffs, residents and citizens of Mexico, were injured in automobile accidents that took place in Mexico. They filed multiple lawsuits against several American corporate defendants, alleging that the accidents were the result of defects in the vehicles' tires. The corporate defendants moved for dismissal on the ground of *forum non conveniens*. The trial court denied the motions, and the defendants were granted permission to file an interlocutory appeal. The Court of Appeals reversed the trial court and dismissed the consolidated case on the ground of *forum non conveniens*, based on the availability of Mexico as a more convenient forum for litigation of the plaintiffs' claims. Subsequently, the plaintiffs filed numerous lawsuits in several Mexican trial courts. These cases were all dismissed, and the dismissals were affirmed on appeal. The plaintiffs then filed new lawsuits in Davidson County Circuit Court against the same defendants, which were again consolidated for pretrial purposes. The defendants filed motions to dismiss on grounds of issue preclusion, arguing that the issues of *forum non conveniens* and the availability of Mexico as an available alternate forum had been determined in their favor in the first appeal. The trial court denied the motion to dismiss, finding that Mexico was not, in fact, an available forum, as evidenced by the numerous dismissals by the Mexican tribunals. The defendants were granted permission for this interlocutory appeal. On appeal, we address the effect of our previous decision and vacate the order denying the defendants' motion to dismiss, and remand the cause to the trial court for further proceedings on the availability of Mexico as an alternate forum for the plaintiffs' claims.

Key Language from the Court's Opinion:

- Obviously, a dismissal on the basis of *forum non conveniens* does not operate as a dismissal on the merits; it is a "deliberate refusal[] to decide the substantive issues presented." 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4436 (Westlaw 2008). The dismissal leaves the plaintiff free to file his lawsuit on the same claim in the alternate forum. Therefore, the doctrine of claim preclusion is not applicable.

- We consider, then, the principle of issue preclusion. The parties have not cited a Tennessee decision in which a dismissal on the basis of forum non conveniens has preclusive effect on a subsequent case, and we have found none. Courts in other jurisdictions, however, have addressed this issue. In general, "[a] prior forum non conveniens dismissal precludes relitigation between the parties of those issues of law and fact actually litigated and necessary to the dismissal decision." *Alcantara v. Boeing Co.*, 705 P.2d 1222, 1225 (Wash. Ct. App. 1985) (citations and footnote omitted).

- In the prior appeal in this case, the trial court denied the Defendants' motion to dismiss on the grounds of *forum non conveniens*, finding that the Mexican courts were not an "adequate" alternative forum, and that the Defendants had not shown other factors warranting dismissal. *In re Bridgestone/Firestone*, 138 S.W.3d 202, 205 (Tenn. Ct. App. 2003). On appeal, this Court held that the "adequacy" of the alternate forum was not to be considered; the alternate forum need only be "available." *Id*. at 206. The appellate court noted that, because the Defendants had agreed to waive any jurisdictional defenses, "the courts of Mexico are available to adjudicate the instant cases." *Id*. at 207. The appellate court found that the relevant public policy factors, especially the difficulty of applying Mexican law, weighed in favor of relegating the Plaintiffs to

re-filing in Mexico. *Id*. at 208-09. Therefore, the trial court's denial of the motion to dismiss was reversed and the case was dismissed. *Id*. at 210.

- In the appeal before us, Bridgestone/Firestone likewise alleges that there is a "suspicious haze" over the Plaintiffs' actions in Mexico. *See Bridgestone/Firestone*, 420 F.3d at 706. Like the Seventh Circuit, however, we simply cannot determine from this vantage point whether the Plaintiffs' actions were undertaken in good faith.

- We find that issue preclusion can apply to the findings underlying a dismissal on the basis of *forum non conveniens*, and in particular can apply to a finding that an alternate forum is available. In this case, the finding of an available alternate forum was not made by the trial court; rather, it was made by the appellate court based on the record, after rejection of the trial court's reason for denying the Defendants' motion to dismiss. Nevertheless, the finding was necessary to the appellate court's dismissal of the lawsuit on the basis of *forum non conveniens,* and can have preclusive effect in a subsequent action, "in the absence of any change in the material facts underlying [the prior] determination." *Ex parte Ford Motor Credit*, 772 So. 2d at 444; *see also Zurick*, 426 S.W.2d at 771-72 (available alternate forum necessary to a *forum non conveniens* dismissal).

- Like the Seventh Circuit, however, we must conclude that "[i]t would be unfair . . . to pretend that nothing had occurred at all, particularly because the . . . assumption about the availability of a Mexican forum might, in the end, prove to be erroneous." *Bridgestone/Firestone*, 420 F.3d at 706.

- Consequently, we decline to hold, as a matter of law, that the Plaintiffs are precluded from reconsideration of the issue of the availability of Mexico as an alternate forum for their claims. The trial court's order denying the Defendants' motion to dismiss must be vacated. The cause must be remanded to the trial court to "thoroughly explore the circumstances surrounding" the Plaintiffs' proceedings in Mexico.

- On remand, the trial court should consider whether the Plaintiffs acted in good faith in the Mexican proceedings, whether the Mexican proceedings were manipulated to achieve dismissal by the Mexican courts, and whether the Mexican court decisions are entitled to recognition here. *In re Bridgestone/Firestone*, 420 F.3d at 706-07. In addition, the trial court may consider whether the dismissal of the Plaintiffs' claims was foreseeable. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 28(5)(b) and comment i. If the trial court finds that the decisions of the Mexican courts should not be recognized, it may, in its discretion, hold that the Plaintiffs are precluded from re-litigating the issue of the availability of Mexico as an alternate forum, and dismiss the Plaintiffs' lawsuit on that basis.

XIII. PROCUREMENT OF BREACH OF CONTRACT

A. ROB RENNELL v. THROUGH THE GREEN, INC., et al., No. M2006-01429-COA-R3-CV (March 14, 2008)

The Court's Summary:

This is an appeal from a bench trial for intentional procurement of breach of contract. Through the Green, Inc., a closely held for-profit corporation, was formed in 1994 by John Doerr, who served as both

president and majority shareholder. Through the Green, Inc. operated as a golf course and driving range located in Franklin, Tennessee. Thomas Doerr, John Doerr's brother, served as the corporation's vice president. Rob Rennell, a professional golf instructor, entered into an oral employment contract with John Doerr in 1994 to work for Through the Green, Inc. A dispute over the terms of Rob Rennell's employment contract arose. Rob Rennell contended that he possessed a 20% ownership interest in the corporation because he had contributed five years of "sweat equity" through his work in accordance with the oral employment contract. Rob Rennell also alleged that he deferred salary in 2003 and 2004 in return for a 2 for 1 stock exchange. The corporation ceased operations in 2004, and John Doerr maintained that Rob Rennell had no company ownership interest. Rob Rennell brought suit, alleging several theories of liability, including procurement of breach of contract against John and Thomas Doerr. First, the trial court found that Through the Green, Inc. breached its employment contract with Rob Rennell. Next, the court found John Doerr individually liable for procurement of breach of contract and awarded Rob Rennell treble damages in the amount of $1,524,000. Finally, the court found Thomas Doerr vicariously liable for John Doerr's conduct in the amount of $508,000, jointly and severally with John Doerr. John and Thomas Doerr appeal. John Doerr alleges that 1) the chancery court erred in finding him liable for procurement of breach of contract because he, acting as president and owner of Through the Green, Inc., is not a third party necessary for such a procurement claim; 2) the chancery court erred in its calculation of damages; and 3) he is entitled to an offset for any amount Rob Rennell may collect in the future from Through the Green, Inc. on the underlying breach of contract claim. Thomas Doerr argues that the judgment holding him vicariously liable for the actions of John Doerr should be reversed because Rob Rennell neither asserted nor pled such a cause of action. In the alternative, Thomas Doerr argues that the evidence is not sufficient to support a judgment holding him vicariously liable. We reverse in part, vacate in part and remand for further proceedings.

Key Language from the Court's Opinion:

- Next, we address John Doerr's contention that this case lacks the three-party relationship. The case at bar poses a slightly different situation than the cases previously discussed, as Mr. Rennell was not terminated; rather, the corporation ceased operations and the president, John Doerr, refused to acknowledge Mr. Rennell's equity interest in violation of the oral employment contract. Nevertheless, the same aforementioned principles apply… Thus, the court simply found that the elements of the claim were met without further elaboration. We are unable to ascertain whether the chancery court, in reaching its decision, even determined whether a three-party relationship existed. Therefore, we will look to the record to determine whether John Doerr stood as a third party to the contract between Mr. Rennell and TTGI.

- John Doerr contends that there is no proof that he stood as a third party to the contract, and that "[i]f a corporate officer who acts on behalf of the corporation could be held liable for procuring the corporation's breach of contract, then every breach of contract case against a corporation would include a potential claim against the responsible corporate officer for procuring the breach." We agree that the facts in this case do not support a finding of a three-party relationship.

- While there is no doubt in this case that John Doerr, acting as president of TTGI, breached Rob Rennell's employment contract, John Doerr is so closely tied to the operations of the breaching corporation that it cannot be said he stood as a third party to this contract. He was the president and majority shareholder of this closely held corporation with the authority to enter into contracts. He essentially controlled TTGI. It is "the basic principle under Tennessee law that a party to a contract cannot be held liable for tortious interference with that contract." *Cambio Health Solutions, LLC v. Reardon*, 213 S.W.3d 785, 789 (Tenn. 2006) (citations omitted). It follows that a corporate director, officer, or employee, if acting within the scope of their authority for the

interests of the corporation, should not be held liable because their action is treated as that of the corporation. *Id*. at 790.

- In the present case, Mr. Rennell presented no evidence as to John Doerr's intent or motive, other than the fact that if Mr. Rennell's equity interest was denied, then more money would be available to TTGI, and consequently to John Doerr for reinvestment in Highland Rim. There is no evidence that John Doerr closed TTGI or caused TTGI to fail so his other limited partnership, Highland Rim, would profit. As to the fact that John Doerr attempted to minimize TTGI's income tax, this if anything goes to show that John Doerr was acting in TTGI's best interest. The fact that he would personally benefit is incidental to TTGI's benefit.

- We do not believe that this alone is enough to prove that John Doerr's actions were not substantially motivated by an intent to further TTGI's interest or that he acted outside the scope of his authority. Even if John Doerr was angry that Mr. Rennell did not want to invest in Highland Rim, which could possibly indicate a spiteful motive, that is not enough to hold John Doerr liable for the procurement of breach of contract if he was substantially motivated to further TTGI's interest. There is insufficient proof in the record that John Doerr was not acting in furtherance of the corporation's interest.

- We hold that under the facts of this case, Mr. Rennell did not meet his burden of proof for procurement of breach of contract, and accordingly, we reverse. Therefore, we likewise reverse the holding of vicarious liability of Tom Doerr for the acts of his brother, John Doerr.

- We find no expert testimony in the record to support John Doerr's argument that Mr. Rennell's expert's valuation, which the court adopted, inflated the calculation of TTGI's value. Rather, it appears John Doerr is raising a new argument on appeal… And as to any testimony excluded by the trial court, Mr. Rennell points out that Appellant's counsel failed to make an offer of proof, and thus we should not consider this issue. We agree with Mr. Rennell. The record clearly indicates that no offer of proof was made, despite the fact that the judge specifically asked, "You want to make a record to support that?", to which counsel for the Doerrs instead chose to "move on."… We affirm the trial court's calculation of compensatory damages.

- Finally, John Doerr contends that the court exceeded its authority by awarding discretionary costs for all of the fees charged by Mr. Rennell's expert witness. Specifically, John Doerr points to the charges relating to preparation for trial, travel time, and travel expense totaling $9,627.16. Mr. Rennell concedes in his brief that the court erred in awarding these costs. We agree. Rule 54.04(2) of the Tennessee Rules of Civil Procedure provides that discretionary costs are allowable for "reasonable and necessary expert witness fees for depositions (or stipulated reports) and for trials[;]" however, travel expenses are specifically excluded. We also agree that trial preparation expenses are unrecoverable. *See Trundle v. Park*, 210 S.W.3d 575, 583 (Tenn. Ct. App. 2006). Thus, we vacate part of the discretionary costs award in the amount of $9,627.16.

- For the aforementioned reasons, we reverse the chancery court's judgment as it concerns procurement of breach of contract and vicarious liability for intentional interference with business relationship. We affirm the award of compensatory damages and vacate part of the award of discretionary costs amounting to $9,627.16. We remand for such further proceedings as are necessary and consistent with this opinion.

B. MORRIS PROPERTIES, INC. REALTORS v. NORRIS JOHNSON, et al., No. M2007-00797-COA-R3-CV (April 29, 2008)

The Court's Summary:

Morris Properties, Inc. ("Plaintiff"), a Tennessee real estate company, filed suit against four individuals and two corporations ("Defendants"), attempting to allege tortious interference by all defendants, and breach of contract, breach of fiduciary duty and negligence by some defendants. The trial court dismissed the complaint, in accordance with Tenn. R. Civ. P. 12.02(6), for failure to state a claim. Plaintiff subsequently filed simultaneous motions to 1) alter or amend the judgment and 2) amend the complaint. Both motions were denied. Plaintiff appeals. We affirm.

Key Language from the Court's Opinion:

- The complaint in the instant case utterly fails to meet this standard. Firstly, as to the tortious interference claims, no facts are asserted that would even arguably establish intent or malice, the third and fourth elements of the tort under *Buddy Lee Attractions, Inc. v. William Morris Agency, Inc*., 13 S.W.3d 343, 359 (Tenn. Ct. App. 1999). Secondly, with regard to the claims against defendant Norris Johnson for breach of contract and breach of fiduciary duty, Defendants concede that the first element of each cause of action – the existence of a contract, and of a fiduciary duty, respectively – is successfully alleged, by way of the claim that Mr. Johnson agreed to be Plaintiff's C.E.O. Yet the terms of the contract are not disclosed, nor is the nature of the fiduciary duty discussed, and thus the assertions of misconduct by Mr. Johnson – which are factually sparse in any event – do not effectively allege a breach of either the contract or the duty. Consequently, the parallel claims against the two corporations also must fail, as they depend upon Mr. Johnson's supposed breaches being imputed to the companies. Finally, as to the claim of negligence, Plaintiff seemingly does not even attempt to allege facts that would support this claim. The complaint states literally nothing in support of this claim beyond a simple recitation of the word "negligence." The self-evident inadequacy of such a meager pleading requires no further comment. Dismissal was appropriate.

- Denial of the post-dismissal motions was also appropriate. Plaintiff had adequate time to file a motion to amend its complaint before the trial court's order of dismissal, but failed to do so. Plaintiff cannot now be heard to complain about the court's refusal to grant a belated amendment. In any event, Plaintiff offered no valid legal grounds to set aside the judgment in its Tenn. R. Civ. P. 59.04 motion to alter or amend the judgment, and the failure of that motion necessarily doomed Plaintiff's contemporaneous motion to amend its complaint… The trial court committed no error in denying Plaintiff's post-dismissal motions.

- Plaintiff does not elaborate on what "facts were plead" that supposedly "meet the elements" of these causes of action. We agree with Defendants that "this Court is entitled to expect significantly more from an appellant's brief than the abbreviated, summary, conclusory analysis presented here." However, we decline to declare the appeal frivolous because, with regard to the issue of whether the trial court should have allowed Plaintiff to amend its complaint, Plaintiff does cite a case, *Richland Country Club, Inc. v. CRC Equities, Inc*., 832 S.W.2d 554, 558-59 (Tenn. Ct. App. 1991), that plausibly supports its position. We believe *Richland's* treatment of the post-dismissal amendment issue is no longer the prevailing law in Tennessee, and that *Lee*, 2005 WL 123492, at *11, is now controlling. However, Plaintiff's attempted reliance on *Richland* is sufficiently reasonable to spare it from Tenn. Code Ann. § 27-1-122 penalties.

XIV. GOVERNMENTAL TORT LIABILITY ACT CASES

A. DANNY JONES, et al. v. SHELBY COUNTY DIVISION OF CORRECTIONS, No. W2007-00198-COA-R3-CV (February 12, 2008)

The Court's Summary:

The Appellant, Shelby County Division of Corrections ("SCDC"), appeals the judgment of the trial court in favor of Appellee inmates. Appellee inmates filed suit against the SCDC, under the Tennessee Governmental Tort Liability Act ("GTLA"), for injuries sustained when a metal ventilation system fell from the ceiling while officers were performing a search of the cell block. The SCDC asserts three points of error: (1) that the SCDC is not a governmental entity, as defined by T.C.A.§ 29-20-102(3)(A) of the GTLA so as to be subject to suit thereunder; (2) that expert testimony was required as to the cause of the system's collapse; and (3) that the trial court erred in not considering the fault of unknown inmates in manipulating the ventilation system. Finding no error, we affirm.

Key Language from the Court's Opinion:

- On appeal, Appellant asserts that the SCDC is not a municipality, government, or county. Consequently, the SCDC asserts that it is not a cognizable legal entity subject to suit under the GTLA… Turning to the language used in § 29-20-102(3)(A), *supra*, we first note that, although the statute specifically lists municipalities, metropolitan governments, counties, etc. as governmental entities, the statute clearly does not limit the definition only to those entities specifically enumerated - - i.e. "including, *but not limited to* . . ." (emphasis added). Moreover, the statute unambiguously includes "any instrumentality of government created by any one (1) or more of the named local governmental entities" in its definition of governmental entity. There can be no doubt that the SCDC is, in fact, an instrumentality of Shelby County government.

- On appeal, the SCDC argues that the Plaintiffs were required to put on expert proof as to the cause of the ventilation system collapse. We disagree. It is well settled that causation in a negligence case is a question of fact, which we review with a presumption of correctness. Tenn. R. App. P. 13(d). Here, the question of what caused the ventilation system to fall is a judgment that does not require specialized skills, or information that an ordinary person would not possess. Rather, common sense dictates the finding in this case.

- At any rate, there is no evidence to suggest that the there was any immediate threat that the ductwork would fall from the ceiling. Rather, the undisputed evidence is that the ductwork was attached to the ceiling until Officer Guyton shook it. It was not until the Officer manipulated the ductwork that it started to fall. Moreover, Officer Guyton testified that, when an object is not reachable with an outstretched arm or with a probe, the usual procedure would be for the officer to call maintenance for assistance. Office Guyton testified that he did not make such a call to maintenance in this case… From the record before us, we cannot conclude that the trial court erred in its finding that Officer Guyton's act of shaking the vent was the cause of it falling.

- The SCDC also asserts that the trial court did not give proper consideration to their theory that the actions of unknown inmates, in putting items inside the ductwork, was the cause in fact of the system's collapse. We have reviewed the record in this case; and, while there are some vague references to indicate that inmates occasionally manipulate the ductwork in order to hide contraband, there is simply not enough evidence to preponderate in favor of a finding that unknown inmates caused the ductwork to fall.

- Consequently, even if the trial court had inferred, from the types of items taken from the ductwork, that unknown inmates had, in fact, manipulated that system, we are nonetheless left with the fact that the system did not fall until Officer Guyton shook it. The evidence supports that finding, but does not preponderate in favor of the SCDC's assertion that unknown inmates caused this accident.

B. EMMANUAL SMALL, by Next Friend, and Mother, JUANITA SMALL RUSSELL v. SHELBY COUNTY SCHOOLS, a/k/a BOARD OF EDUCATION OF SHELBY COUNTY SCHOOLS, No. W2007-00045-COA-R3-CV (February 12, 2008)

The Court's Summary:

This is a negligence claim brought by a student against a school board pursuant to the Tennessee Governmental Tort Liability Act. The plaintiff, a student at Millington Middle School, began experiencing breathing problems after physical education class. The physical education teacher was unaware of the student's asthma, or the fact that the student was mentally retarded. The mother came to school and picked up her son, who was later taken to Le Bonheur Children's Medical Center in Memphis, where he remained for six months. The mother then brought a negligence claim on behalf of her son against the school board. During discovery, the student's attorney failed to disclose the student's treating doctor as an expert witness. The school board sought to exclude testimony from the doctor concerning causation of the student's injuries and the reasonableness and/or necessity of the medical charges. The court allowed the testimony concerning causation and necessity, but excluded testimony related to reasonableness. In its answer, the school board failed to raise the affirmative defense of comparative fault. On the first day of trial, the court granted the school board leave to amend its complaint to include the comparative fault of other individuals, including the student's mother. After a bench trial, the circuit court entered a judgment in favor of the student in the amount of $3 million dollars, but reduced that award to $130,000 pursuant to the Governmental Tort Liability Act. The student's attorney then moved for an award of discretionary costs, which the court denied. The school board appeals, alleging that it is immune from suit because its employees were performing a discretionary function. Next, the school board argues that the court erred by allowing the doctor to testify concerning causation and necessity because the student's attorney failed to disclose the doctor as an expert witness. Finally, the school board argues that the only witness that corroborated the student's claim was not credible. The student raises the issue of whether the court erred in allowing the school board to amend its answer to include comparative fault, and whether the court erred in refusing to award discretionary costs. For the following reasons, we affirm.

Key Language from the Court's Opinion:

- We begin by addressing the issue of whether the Board should be immune from suit because its employees were performing a discretionary function. We find that the Board is not entitled to immunity, because the failure to follow policy concerning the dissemination of Small's medical information was operational as opposed to discretionary.

- Acts that are operational in nature, however, are not afforded this same immunity as those acts considered discretionary. "Under the planning-operational test, decisions that rise to the level of planning or policy-making are considered discretionary acts which do not give rise to tort liability, while decisions that are merely operational are not considered discretionary acts and, therefore, do not give rise to immunity." *Bowers v. City of Chattanooga*, 826 S.W.2d 427, 430 (Tenn. 1992).

- "On the other hand, operational decisions may be generally classified as ad hoc decisions made by an individual or group not charged with the development of planning or policy decisions that stem from a determination based on preexisting laws, regulations, policies, or standards." *Id*. (citation omitted). An act or omission is operational if it involves 1) conduct in the absence of policy guiding the act or omission, or 2) conduct that deviates from the established policy or plan. *Brown v. Hamilton County*, 126 S.W.3d 43, 48 (Tenn. Ct. App. 2003) (citations omitted).

- The Board had a procedure for disseminating the medical concerns of students to each student's respective teachers. The policy was not followed in this case, as Ms. Castleberry testified. Coach Coleman also testified that had he known of Small's medical problems, he would have tailored a physical program to meet his needs. This failed to happen with Small, and because the aforementioned constitutes an operational act, immunity is removed.

- Next, we turn to the issue of whether the trial court erred in apportioning 20 percent of fault to Small's mother. We review a trial court's apportionment of fault between the parties de novo with a presumption of correctness. *Cross v. City of Memphis*, 20 S.W.3d 642, 645 (Tenn. 2000). From our own review of the record, it cannot be said that the trial court erred by allocating 20 percent of fault to the mother. The mother testified that she informed Small's previous schools that he was not to run because of his health problems, but she failed to inform Millington Middle School of this information. As she testified, she knew Small was enrolled in PE, yet made no inquiries as to what activities he was involved in, nor did she protest his enrollment in such a class. The Board, though, should be assigned a higher degree of fault in that the mother reported Small had asthma, yet Coach Coleman knew nothing about it. As discussed previously, policy was not followed, which in turn left Coach Coleman in the dark about Small's health issues. In sum, we agree with the trial court's apportionment of fault in this case.

C. CLIFTON K. CRUTCHER, et al. v. MAURY COUNTY BOARD OF EDUCATION, No. M2007-00244-COA-R3-CV (July 9, 2008)

The Court's Summary:

Plaintiff appeals the trial court's determination that under the Tenn. Code Ann. § 29-20-404(a) of the Tennessee Governmental Tort Liability Act, the limitation of liability in Tenn. Code Ann. § 29- 20-403 applies even if there is insurance policy coverage with a greater limitation of liability since the policy did not contain an express waiver of the limitation of liability. The defendant County also appeals several determinations by the trial court regarding the admissibility of expert proof, allocation of fault, allowing proof of negligent entrustment and damages for loss of consortium. We affirm.

Key Language from the Court's Opinion:

- There is no dispute between the parties that the GTLA removed the immunity of governmental entities for injuries resulting from the negligent operation of motor vehicles by employees acting within the scope of their employment. Tenn. Code Ann. § 29-20-202. Consequently, the Board is not immune and may be liable for Mr. Crutcher's injuries resulting from Ms. Stiggers' negligent operation of the bus. The question presented to us on appeal is whether and to what extent the Crutchers' damages are capped by the GTLA. To make that determination we must examine Tenn. Code Ann. §§ 29-20-311 and 29-20-404(a).

- Consequently, we agree with the trial court that in order to recover for any amount in excess of the limits in Tenn. Code Ann. § 29-20-403, the waiver of limits of liability must be "expressly contained" in the insurance policy as required by Tenn. Code Ann. § 29-20-404(a).

- Clearly, the mere existence of the policy alone is insufficient. Normally, immunity is waived and limitations of liability are established by the legislature in statutes. Since the legislature authorized governmental entities in Tenn. Code Ann. § 29-20-404(a) to waive immunity for claims *and* waive the statutory limit of liability, the legislature may have wanted to be clear that any such action by a governmental entity must be express. In any event, the legislature clearly created this requirement and we must abide by it… Consequently, the trial court's order on partial summary judgment limiting plaintiffs' recovery is affirmed.

- Second, the Board argues that plaintiffs should not have been able to introduce evidence pertaining to the Board's negligent entrustment of the bus to Ms. Stigger. While the trial court heard testimony of complaints about Ms. Stiggers' driving, which might support the conclusion that Ms. Stigger was a poor driver, the trial court's order is clear that it relied on evidence about this particular accident in finding and allocating fault. Consequently, since the trial court's order was clear on this issue and no liability was placed on the Board as a result, we find the under Tenn. R. App. P. 36(b), quoted above, that the admission of such evidence, even if erroneous, does not constitute reversible error.

- Third, the Board argues the trial court erred in its allocation of fault. This case presented a classic "he said, she said" wherein the trial court clearly found one credible witness and the other not credible. As mentioned previously, there was ample evidence to support Mr. Crutcher's version of the accident. We do not find the trial court erred in its allocation of fault.

D. ROBERT JOSEPH MULLINS v. BOBBY REDMON, et al., No. W2007-00616-COA-R3-CV (December 19, 2007)

The Court's Summary:

Plaintiff/Appellant, a student of McNairy County School District, filed a complaint for negligence against the Defendant/Appellee School District for injuries arising from an accident that occurred while the student was engaged in a work-based learning program. Finding that the actions of the School District did not cause the accident, the trial court granted summary judgment in favor of the School District. The student appeals. We affirm and remand.

Key Language from the Court's Opinion:

- Mr. Mullins contends that the School District "failed to adequately supervise [Mr. Mullins] during his participation in the [WBLP,] and [failed to] enforce the implementation and use of safety equipment and measures...and [failed] to warn [Mr. Mullins] of the unsafe conditions that existed at R & R...."

- Mr. Mullins filed a timely notice of appeal, and raises one issue for review as stated in his brief: Whether or not the McNairy County School District could reasonably foresee the risk of serious injury arising from Joey Mullins' work duties at R & R Truck Sales as part of the School District's Work- Based Learning Program.

- It is undisputed that the act that immediately caused Mr. Mullins' injuries was the failure of the brakes on the equipment being driven by Mr. Pickens. From the testimony in record, it appears that the brake failure was a sudden event. Mr. Pickens testifies that the truck manifested no indication that the brakes were going to fail prior to the actual failure. Mr. Mullins testifies that he believed that Mr. Pickens, according to the usual custom, would park the tractor-truck outside the work bay, and that the brake failure "was a surprise to both [himself and Mr. Pickens]. Mr. Pickens further states that, even if someone had been sitting in the cab of the truck with him, they could not have stopped the accident. Although it appears from the record that even those closest in proximity to the accident could not and, in fact, did not foresee its occurrence, Mr. Mullins seeks to contribute fault for the accident upon the School District for the actions, or inactions, of its agent, Kathy Findlayson.

- Mr. Mullins cites to his WBLP diary entry indicating that, on one day, he "dropped 2 trans" as evidence that the School District was on notice that he was working in an unsafe environment. Even if we assume, *arguendo*, that this entry put Ms. Findlayson on notice that Mr. Mullins was exceeding the scope of his employment at R & R, we cannot carry the assumption so far as to conclude that knowledge of a deviation from the original job description, *ipso facto*, proves that the accident that actually occurred was foreseeable on the part of the School District. The record is undisputed that, at the time of the accident, Mr. Mullins was merely standing in the service bay. There is no indication that he was working on a transmission, or that he was otherwise engaged in any inherently dangerous activity at that time.

- Proof of causation equating to a "possibility," a "might have," "may have," or "could have," is not sufficient, as a matter of law, to establish the required nexus between the plaintiff's injury and the defendant's tortious conduct by a preponderance of the evidence. *Kilpatrick v. Bryant*, 868 S.W.2d 594, 602 (Tenn. 1993). Consequently, as significant and tragic as the injuries to Mr. Mullins are, the evidence in record leads only to the conclusion that this accident was not foreseeable on the part of the School District. For the foregoing reasons, we affirm the Order of the trial court granting summary judgment in favor of the McNairy County School District. We remand the case for such further proceedings as may be necessary consistent with this Opinion.

E. MICHAEL S. STENBERG v. HICKMAN COUNTY, TENNESSEE, No. M2007-00433-COA-R3-CV (December 17, 2007)

The Court's Summary:

This is a negligence case based on actions of county law enforcement officers. After a night of drinking heavily, the plaintiff pointed a gun at his wife and threatened to kill her or himself. The wife called 9-1-1, and two county law enforcement officers were dispatched to the plaintiff's trailer home. Upon the officers' arrival, the plaintiff retreated to his bedroom and refused to surrender his gun. Eventually, the plaintiff agreed to allow the officers to enter his bedroom, and placed the gun near the bed within his reach. In an effort to get the plaintiff under control and away from the gun, the officers made a plan to have one officer spray the plaintiff with pepper spray, with the other officer ready to shoot the plaintiff if he tried to grab his gun. As planned, the first officer sprayed the plaintiff with pepper spray. The plaintiff then lunged in the direction of his gun, and the second officer fired his gun, striking the first officer in the hand and the plaintiff under his arm. The plaintiff filed this lawsuit against the defendant county, alleging that the officers acted unreasonably under the circumstances and arguing that they could have apprehended him without using lethal force. After a bench trial, the trial court held in favor of the county. The plaintiff now appeals. We affirm, finding that the preponderance of the evidence supports the trial court's finding that the officers acted reasonably under the circumstances.

Key Language from the Court's Opinion:

- On appeal, Mr. Stenberg argues that the evidence preponderates against the trial court's finding that Deputy Lynn and Constable Cayce acted reasonably. Mr. Stenberg argues that a preponderance of the evidence shows that Deputy Lynn acted unreasonably, in that he had more reasonable means of apprehending him other than giving an order for Constable Cayce to shoot him. Mr. Stenberg contends that Deputy Lynn and Constable Cayce had two options other than shooting him. First, they could have apprehended Mr. Stenberg when Deputy Lynn reached over to hand him the telephone to speak to Dispatcher Rushton. Mr. Stenberg argues that both Deputy Lynn and Constable Cayce were within an arm's length of him, and that they "should have been able to handle an inebriated man with little problem." Second, the officers could have apprehended Mr. Stenberg when he was sprayed with pepper spray. Deputy Lynn and Constable Cayce both testified that Mr. Stenberg paused for a couple of seconds after he was sprayed, and they could have apprehended him at that time. Mr. Stenberg claims that the evidence shows that the officers did not actually believe that he was a threat, noting that the officers' guns were holstered while they were all in the bedroom. Therefore, he argues that the evidence preponderates against the trial court's conclusion that Deputy Lynn and Constable Cayce acted reasonably under the circumstances.

- In the face of Mr. Stenberg's complete failure to cooperate, it was reasonable for the officers to surmise that force would be required to apprehend Mr. Stenberg, and that the force used would have to be sufficient to prevent Mr. Stenberg from reacquiring his gun.

- Deputy Lynn and Constable Cayce both testified that, at the time Mr. Stenberg was shot, they were certain that he was lunging for his gun. Both were in fear for their safety. There is no clear and convincing evidence to refute the trial court's decision to credit the officers' testimony. Under all of these circumstances, giving due deference to the trial court's credibility determinations, we find that the preponderance of the evidence supports the trial court's determination that Deputy Lynn and Constable Cayce acted reasonably under the circumstances. Therefore, we find in favor of the County and affirm the trial court's decision to dismiss Mr. Stenberg's case. The decision of the trial court is affirmed.

F. CHRIS JONES v. BEDFORD COUNTY, TENNESSEE, No. M2006-02710-COA-R3-CV (October 31, 2007)

The Court's Summary:

A former inmate of the Bedford County Jail alleges in this negligence action under the Governmental Tort Liability Act that he was sexually assaulted by a corrections officer employed by the sheriff's department and that the county is liable due to the negligent acts and omissions of supervisory personnel of the sheriff's department for "failing to properly supervise" Correctional Officer Raymur when the County "knew, or should have known of his sexually oriented behavior." The trial court summarily dismissed the claim upon a finding there was no evidence the sheriff's department knew or should have known that it was reasonably foreseeable the corrections officer would sexually assault the plaintiff. We have concluded the record contains facts sufficient to create a dispute of fact as to the issue of foreseeability. Therefore, we vacate the summary dismissal of the plaintiff's claim for negligent supervision and remand for further proceedings.

Key Language from the Court's Opinion:

- In order for the County to be liable for failing to properly supervise its employee, it must be established that the County should have reasonably foreseen or anticipated that the plaintiff would be at risk of the injuries complained about. *Limbaugh*, 59 S.W.3d at 84; ***Mason v. Metro. Gov't of Nashville***, 189 S.W.3d 217, 222 (Tenn. Ct. App. 2005), perm to appeal denied, (Tenn. 2006). The foreseeability requirement does not, however, require that the County foresee the exact manner in which the injury takes place, provided it is determined that the County could foresee, or through the exercise of reasonable diligence should have foreseen, the general manner in which the injury or loss occurred. ***McClenahan v. Cooley***, 806 S.W.2d 767, 775 (Tenn. 1991) (citing ***Roberts v. Robertson County Bd. of Educ***., 692 S.W.2d 863, 871 (Tenn. Ct. App. 1985); ***Wyatt v. Winnebago Indus., Inc.***, 566 S.W.2d 276, 281 (Tenn. Ct. App. 1977)).

- The statement by Sgt. Shouse provides evidence that a supervisor in the sheriff's department was on notice of Raymur's inappropriate behavior. Sgt. Shouse's statement, which was also given only one day after the plaintiff's formal complaint and five days after the last alleged assault, states that "inmates said [Raymur] pulled down the pants of Israel Noriega. I asked Raymur about this and he said he did not. *This was the last I heard of that till this investigation*." (emphasis added). The significant fact, as it pertains to notice, is that Sgt. Shouse admitted he knew of this complaint *prior to* "this investigation." The investigation commenced on March 5; thus, although there is no specific date given for when this incident occurred or when Sgt. Shouse knew of the incident, it is reasonable to infer from the statement that Sgt. Shouse knew of the alleged incident prior to March 1, the date of the last assault on the plaintiff.

- The trial court also concluded that no one in authority over Raymur knew of any of the alleged incidents. We, however, are unable to conclude that this fact is undisputed. The plaintiff asserted that Sgt. Shouse was Raymur's immediate supervisor. The County did not contest this assertion or provide any evidence to the contrary, and at least it is reasonable to infer that Sgt. Shouse, one of Raymur's superiors, obtained knowledge of Raymur's alleged behavior prior to the last assault. Accordingly, if Sgt. Shouse was acting in the course and scope of his employment with the sheriff's department when he was informed of the alleged actions by Raymur, his knowledge may be imputed to the County. *See Hurst Boillin Co. v. S. S. Jones*, 279 S.W. 392, 393 (Tenn. 1925).

- Considering all of the evidence in the record in the light most favorable to the plaintiff, and allowing all reasonable inferences in favor of the plaintiff, we find that there is sufficient evidence to create a dispute of material fact as to whether the sheriff's department had information that would have made it reasonably foreseeable that Raymur may assault the plaintiff. Accordingly, summary judgment was not appropriate.

G. CHARLES ROBERT BAGGETT v. BEDFORD COUNTY, TENNESSEE, No. M2007-00441-COA-R3-CV (January 15, 2008)

The Court's Summary:

This is a comparative negligence case. The plaintiff prisoner was incarcerated at the defendant county's jail. The inmates were given an opportunity to earn a reduction in their sentences by performing construction work to expand the jail's workhouse facility. The plaintiff volunteered for this program and was assigned the task of hanging cement board on the walls of the workhouse; the jail provided the plaintiff with a scaffold and a step ladder. The plaintiff was told to hang one of the boards at a height that could not be reached by standing on the scaffold alone. To perform the task, the plaintiff put the ladder

on top of the scaffold and climbed the ladder. In doing so, he lost his balance, the scaffold collapsed, and he fell to the floor, sustaining serious injuries. The plaintiff prisoner sued the county under the Governmental Tort Liability Act, seeking damages for his injuries. The county moved for summary judgment, asserting the simple tool doctrine and comparative negligence. The trial court granted the motion on both grounds. The plaintiff appeals. We reverse, finding, *inter alia*, that the simple tool doctrine is a form of assumption of the risk and, as such, has been abolished in favor of comparative negligence.

Key Language from the Court's Opinion:

- Simple tools have been described as tools "of a simple nature, easily understood and comprehended, and the defects in them can be readily observed by a person of ordinary intelligence." 27 AM. JUR. 2D Employment Relationship § 260 (2004). The simple tool doctrine was adopted in Tennessee in 1913 in the case of *Sivley v. Nixon Mining Drill Co*., 164 S.W. 772 (Tenn. 1913). In Sivley, the tool at issue was a ladder, which was held to be a "simple tool." The Tennessee Supreme Court held that the employer could not be held liable for an injury caused by a defect in the ladder because "a defect in such a simple tool must be obvious to its user, by whom *any risk of danger therefrom must be held to be assumed*." *Sivley*, 164 S.W. at 772 (emphasis added).

- The simple tool doctrine is clearly grounded in the principle of implied assumption of risk, unequivocally abolished in *Perez*. Because the simple tool doctrine is a variation of assumption of risk, we hold that it too must be considered abolished in favor of comparative negligence. Therefore, we must conclude that the trial court erred to the extent that it relied on the simple tool doctrine in granting Bedford County's motion for summary judgment.

- Bedford County maintains that, because participation in the workhouse program was voluntary, Baggett's status as an inmate need not be considered. It asserts that Baggett must be deemed at least fifty percent at fault in causing his injuries because he was aware of the defective condition of the scaffold and nevertheless proceeded.

- Certainly we must consider the facts that participation in Bedford County's workhouse program was voluntary, that Baggett had some past experience with Baker scaffolds, that he was aware that the Baker scaffold was without stabilizer bars, and that a ladder placed on top of the scaffold would be unstable. We must, however, consider all of the surrounding circumstances, including the facts that Baggett was an inmate; that the benefit of participating in the workhouse program was a reduction in his sentence; that Bedford County supplied the Baker scaffold and the ladder; that the scaffold provided was without stabilizer bars and its platform was not properly secured; that the scaffold provided was not tall enough to hang the upper wall panels; and that, accordingly, the only way Baggett could have performed the assigned task was to place the ladder on top of the scaffold and then climb the ladder.

- Viewing the evidence in the light most favorable to Baggett, we think that reasonable minds could differ over whether the fault attributable to Baggett was equal to the fault potentially attributable to Bedford County. Therefore, we must conclude that the trial court's grant of Bedford County's motion for summary judgment was in error. Accordingly, we reverse.

H. DAVID LUKE HARVEY v. DICKSON COUNTY, TENNESSEE, et al., No. M2007-01793-COA-R3-CV (May 21, 2008)

The Court's Summary:

An inmate at the Dickson County Jail who was attacked by another inmate filed this action against co-defendants, Dickson County and the Sheriff of Dickson County to recover damages for his personal injuries. The trial court summarily dismissed the complaint against both defendants without stating the legal grounds for its conclusion. The plaintiff contends the defendants breached their duty to prevent foreseeable harm because the defendants left a mop in the jail, which was not secured or locked away, and the defendants knew or should have known that a mop could be used by an inmate as a weapon. Penal institutions have a duty to use reasonable and ordinary care to prevent foreseeable attacks on inmates by other inmates. For a penal institution to be liable for injuries resulting from inmate-on-inmate assaults, the general rule is that the institution must have had prior notice of an attack. The defendants supported their motion for summary judgment with affidavits stating that they had no notice and no reason to believe that the plaintiff was likely to be assaulted. This shifted the burden to the plaintiff to establish that a dispute of fact exists concerning whether the defendants knew of or had reason to anticipate such an attack. The evidence presented by the plaintiff fails to create a dispute of this material fact. Accordingly, we affirm.

Key Language from the Court's Opinion:

- Our courts have repeatedly noted that penal institutions are not insurers of an inmate's safety. *See Gillespie v. Metropolitan Government*, No. 01A01-9109-CV-00317, 1992 WL 9441, at *1 (Tenn. Ct. App. Jan. 24, 1992). The general rule is that the penal institutions merely have a duty to use reasonable and ordinary care to prevent foreseeable attacks on inmates by other inmates. *Id*.

- Turning to the matter at hand, Harvey had been incarcerated for twenty-three days prior to the assault. At no time during these three weeks was Harvey involved in any incidents or altercations with his attacker… Harvey further testified that at no time prior to the assault did he believe the attacker posed a threat to his safety, and Harvey had never advised anyone that the attacker posed a threat. Moreover, Harvey never requested to be moved from the area of the jail where the attacker was housed or Harvey was assaulted. Furthermore, there is no proof in the record establishing that the attacker had any violent tendencies or a history of altercations during his imprisonment. The record indicates that the attacker was imprisoned as the result of a drug offense, not a violent act. Moreover, Sheriff Tom Wall testified that he "never had any advance warning that Mr. Robertson, the attacker, would attack Harvey, and to the best of his knowledge, no jail employee had such warning either."

- Harvey claims the defendants knew or should have known that cleaning items like the mop could be used as weapons if left in the jail pod for an extended period of time; therefore, the defendants had constructive notice of the dangers that could be caused by leaving such instrumentalities in a jail cell with unsupervised inmates. This, according to Harvey, amounts to a breach of the duty to prevent foreseeable harm to the inmates.

- We, however, find this argument unpersuasive because the relevant cases, *Gillespie*, *Hanks* and *Kinningham*, focus not on the instrumentalities used in the inmate-on-inmate assaults, but rather, on the previous conduct of the inmates at issue.

- Instead, the issue in these cases is whether the penal institution had notice that an inmate posed a threat to assault another inmate, and if so, did the institution use reasonable care to prevent such an assault. *See Hanks,* 1999 WL 454459, at *3. We have determined that a reasonable person could draw but one conclusion from the facts of this case – that the defendants did not have prior notice of the assault that took place, nor did they have reason to anticipate an assault. We therefore affirm the grant of summary judgment.

I. JOSH W. NEWELL v. JEFF MAITLAND, et al., No. W2007-01704-COA-R3-CV (May 21, 2008)

The Court's Summary:

This appeal involves a negligence action filed after the plaintiff was charged with child rape. The plaintiff sued the sheriff's deputy and Department of Children's Services employee who interviewed the alleged victim; the sheriff; the county mayor; the county itself; a Department of Children's Services supervisor; and the District Attorney General. The plaintiff contended that if a "child protective team" had interviewed the victim, he would not have been arrested and charged with child rape. The trial court dismissed the claims against the state employees for lack of jurisdiction, and it dismissed the claims against the county employees pursuant to the Tennessee Governmental Tort Liability Act, Tenn. Code Ann. § 29-20-101, et seq. The sheriff's deputy was also named as a defendant in his individual capacity, and the trial court granted his motion for summary judgment. The plaintiff appeals. We affirm.

Key Language from the Court's Opinion:

- Therefore, even assuming that Plaintiff could establish a violation of the statutes regarding child protective teams, and a private right of action for such violation, exclusive jurisdiction for his negligence claims against the State Defendants is vested in the Tennessee Claims Commission… Plaintiff's argument that this statute allowed him to file his claims in circuit court is without merit.

- As previously noted, "[s]tate officers and employees are absolutely immune from liability for acts or omissions within the scope of the officer's or employee's office or employment, except for willful, malicious, or criminal acts or omissions or for acts or omissions done for personal gain." Tenn. Code Ann. § 9-8-307(h) (1999 & Supp. 2007). To the extent that Plaintiff's complaint could be construed to allege willful conduct on the part of Ms. Dudley, we nevertheless conclude that the complaint fails to state a claim for relief. Plaintiff does not allege that Ms. Dudley was not authorized to participate in the investigation or that he was injured in any way by her participation. Taking the allegations in the complaint as true, Plaintiff does not state a cause of action, and "[t]here is no duty on the part of the court to create a claim that the pleader does not spell out in his complaint." Trau-Med of Am., Inc. v. Allstate Ins. Co., 71 S.W.3d 691, 704 (Tenn. 2002). Thus, Plaintiff's claim against Ms. Dudley was properly dismissed.

- Plaintiff's alleged injury clearly arose out of the institution or prosecution of a judicial proceeding, so the County Defendants are immune from suit in their official capacities even if the proceeding was instituted maliciously or without probable cause. The claims against the County Defendants were properly dismissed.

- Here, Plaintiff did not even raise the issue in the trial court that Deputy Maitland failed to file a statement of undisputed facts. Therefore, we find no abuse of discretion in the trial court's decision to grant summary judgment without the benefit of a statement of undisputed facts.

Plaintiff does not point to any disputed facts or cite any authority to suggest that Deputy Maitland was not entitled to judgment as a matter of law; thus, we affirm the trial court's grant of summary judgment.

J. KALA DEAN and LEXIE M. DEAN v. WEAKLEY COUNTY BOARD OF EDUCATION, No. W2007-00159-COA-R3-CV (April 9, 2008)

The Court's Summary:

This is a negligence case. The plaintiff, a female high school student, was being verbally harassed by a male student. The plaintiff complained repeatedly to a school administrator, who assured her that he would take care of the situation. The male student's taunts did not stop and he threatened to beat up the plaintiff. The school administrator was told about the threat and took no action. Subsequently, in the school hallway, a confrontation between the male student and the female plaintiff resulted in the male student punching the plaintiff in the face and causing serious injuries. A lawsuit was filed on behalf of the female student against the high school board of education. The trial court denied the school board's motion for summary judgment, and the case was tried. The trial court found for the plaintiff, awarding damages and medical expenses. The school board argued that the award should be reduced under comparative fault principles, but the trial court declined to do so because it found that the male student was the instigator. The school board appeals, arguing, *inter alia*, that the trial court erred by denying its motion for summary judgment, by not holding that the school board was immune under the public duty doctrine, by allocating no fault to the plaintiff, by not appropriately weighing judicial admissions of fault by the plaintiff, and by applying the clear and convincing evidence standard to determine whether the school board had established comparative fault. We affirm, finding that the denial of the summary judgment motion is not appealable after a trial on the merits, that the public duty doctrine is not applicable, that the trial court found that the male student was the instigator under the preponderance of the evidence standard, and that the preponderance of the evidence supports the trial court's decision, even considering the plaintiff's judicial admissions.

Key Language from the Court's Opinion:

- The Board first argues that the trial court erred in denying its motion for summary judgment. In the order denying the Board's motion, the trial court stated, "there exists certain and genuine issues concerning material facts such that summary judgment is not appropriate." When the denial of summary judgment is grounded in the existence of genuine issues of material fact, it is not reviewable on appeal after a trial on the merits. *Hobson v. First State Bank*, 777 S.W.2d 24, 32 (Tenn. Ct. App. 1989); *Mullins Precision Rubber Products Corp.*, 671 S.W.2d 496, 498 (Tenn. Ct. App. 1984); *Tate v. Monroe County*, 578 S.W.2d 642, 644 (Tenn. Ct. App. 1978). Therefore, the trial court's denial of the Board's motion for summary judgment is not reviewable by this Court.

- Second, the Board argues that it should have been held immune from liability under the common law public duty doctrine. The public duty doctrine, recognized in *Ezell v. Cockrell*, 902 S.W.2d 394 (Tenn. 1995), "shields a public employee from suits for injuries that are caused by the public employee's breach of a duty owed to the public at large." *Ezell*, 902 S.W.2d at 397.

- This assertion conflicts with the numerous Tennessee cases holding that school systems and their teachers and administrators have a duty to exercise reasonable care in the supervision and protection of their students. *See, e.g., Hawkins County v. Davis*, 391 S.W.2d 658, 660 (Tenn. 1965) (holding a school system to a duty of reasonable and ordinary care when a high school student was injured on the steps of a school bus); *Snider v. Snider*, 855 S.W.2d 588, 590 (Tenn.

Ct. App. 1993) ("[S]chools, teachers, and administrators have a duty to exercise ordinary care for the safety of their students."); *Roberts v. Robertson County Bd. of Educ*., 692 S.W.2d 863, 870 (Tenn. Ct. App 1985) (finding that a high school vocational teacher had a duty to exercise reasonable care to protect his students from the risk of injury in shop class). This can include a duty to protect students from the foreseeable intentional acts of third parties.

- In this case, we must conclude that the public duty doctrine is not applicable because Coach Taylor and the Board did not simply have a "duty to the public at large"; rather, they had a duty to the students placed in their charge to exercise reasonable care to supervise and protect them. Thus, we affirm the trial court's refusal to apply the public duty doctrine.

- In this case, the Board had known since the institution of these proceedings that it was facing a claim for medical expenses arising out of Kala's injuries. Adding Mr. Dean as a plaintiff in order to assert this claim could not have surprised the Board or compromised its ability to defend the lawsuit. We affirm the trial court's decision to permit relation back of the amendment adding Mr. Dean as a plaintiff.

- The Board argues further that the trial court erred by allowing Andrew Laney to testify about his recollection of the October 2 altercation… Here, the Board objected to Laney's testimony on the basis that the Plaintiffs failed to supplement the interrogatory response to include him. Once the trial court ascertained that Laney was identified as a person with knowledge in the context of a deposition, it overruled the Board's objection to Laney's testimony, apparently implicitly finding that the failure to supplement the interrogatory response had "substantial justification" or was "harmless." Under these circumstances, we cannot say that the trial court misconstrued or misapplied Rule 37.03(1), and therefore find that the trial court did not abuse its discretion in permitting Laney's testimony.

- On appeal, the Board contends as well that the trial court gave no weight to admissions by the Plaintiffs that Kala instigated the physical confrontation with Dial. Had the trial court done so, the Board argues, then it would have assessed some comparative fault against Kala.

- After reviewing the pleadings and listening to the testimony, the trial court found that "Mr. Dial was the instigator of all this" and that the evidence did not show that Kala "started the fight." This was based in large part on the trial judge's assessment of the witnesses' credibility. The trial court's determinations of witness credibility and evaluations of disputed evidence are given great weight on appeal. *W.F. Holt Co. v. A & E Elec. Co., Inc.*, 665 S.W.2d 722, 733 (Tenn. Ct. App. 1983) (citation omitted). We will not overturn the trial court's determination of a witness's credibility "absent clear and convincing evidence to the contrary." *Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999) (citations omitted).

- In this case, the admissions on which the Board relies do not amount to an admission that Kala "instigated" a fight with Dial. The complaint says only that, when Dial "got up into" Kala's face, she pushed him away, and that she knocked the strap of Dial's book bag off his shoulder in the crowded hallway. Based on the overall testimony and record, we cannot say that the trial court did not give appropriate weight to the admissions in the complaint in determining comparative fault.

- Here, the trial court appropriately focused on the information that was available to Coach Taylor, the information that the Board should have been made available to Coach Taylor, and the actions that Coach Taylor should have taken in response to the information. The Board could have made

Dial's school disciplinary record available to officials at Westview High, but failed to do so. When Kala's complaints about Dial arose, Coach Taylor could have looked into Dial's background before Dial came to Westview High, but Coach Taylor failed to do so. Coach Taylor could have been aware of Dial's record during his first year in the ninth grade at Westview High, but apparently was not. Coach Taylor could have spoken to other students to determine whether Kala was contributing to the ongoing dispute with Dial, or whether Dial had simply decided, for whatever reason, to make her life miserable, but Coach Taylor failed to do so. Had these actions been taken, the trial court concluded, Coach Taylor would have realized that Dial "had a problem with women. He bullied them." Dial's assault, it found, was foreseeable.

- Assuming that the admissions in the complaint are in fact what happened, it is foreseeable that, in the face of relentless harassment and continued inaction by school officials, a fourteen-year- old girl might not respond with perfect restraint. The Board "should not be permitted to rely upon the foreseeable harm it had a duty to prevent so as to reduce its liability." *Turner*, 957 S.W.2d at 823. The preponderance of the evidence in the record supports the trial court's finding that the overall course of events, in particular Dial's assault, was foreseeable, and that the Board had a duty to take preventive actions, but failed to do so.

K. PERRY H. YOUNG v. HAMILTON COUNTY, TENNESSEE, No. E2006-02718-COA-R3-CV (January 28, 2008)

The Court's Summary:

The plaintiff sued Hamilton County seeking damages for false arrest. Following the dismissal, the plaintiff filed a motion pursuant to Tenn. R. Civ. P. 60.02(2) seeking to vacate the order of dismissal. The motion charged that Hamilton County was guilty of fraud in connection with the filing of its motion. The trial court denied the plaintiff's motion. The plaintiff appeals, contending that the trial court erred when it failed to vacate its order dismissing the plaintiff's complaint. We affirm pursuant to the provisions of Court of Appeals Rule 10.

Key Language from the Court's Opinion:

- The trial court correctly dismissed the plaintiff's complaint for false arrest. Hamilton County is specifically immune from such suits under the applicable statute. *See* Tenn. Code Ann. § 29-20-205(2) (2000); *see also Potter v. City of Chattanooga*, 556 S.W.2d 543, 546 (Tenn. 1977), overruled on other grounds by *Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d 73, 84 (Tenn. 2001).

XV. ENVIRONMENTAL TORTS/ NUISANCE CASES

A. DAVID GOFF, ET UX, et al. v. ELMO GREER & SONS CONSTRUCTION CO., INC., No. M2006-02660-COA-R3-CV (May 16, 2008)

The Court's Summary:

This appeal involves a jury's award of punitive damages. The construction company entered into a contract with the State of Tennessee to widen a portion of a highway. The homeowners entered into a contract with the construction company allowing the construction company to place excess materials generated from the highway project on the homeowners' property. In exchange, the homeowners would receive compensation based on the cubic fill area, and the company would fill and grade that portion of the homeowners' property. The project required that the construction company conduct extensive

blasting near the homeowners' house and vehicles. One of the homeowners became concerned when he witnessed the construction company placing various garbage items and tires on his property near the fill area. After three years, the construction company finished the project. The homeowners brought suit, alleging that the company failed to pay the amount due under the contract and caused damage to their house due to the blasting. The complaint also alleged that the company buried certain items, including tires, on the property which constituted an environmental tort. The homeowners' amended complaint stated a cause of action in nuisance and also sought an award of punitive damages in the amount of $1 million dollars. The jury returned a verdict in favor of the homeowners for the nuisance claim in the amount of $3,305.00 and found that punitive damages should be imposed on the construction company. The jury found in favor of the construction company for the environmental tort claim. After the second phase of the trial, the jury returned an award of $2 million in punitive damages. The trial court remitted the award to $1 million, the amount of the homeowners' *ad damnum*. The construction company appeals, and we reverse and remand in part and affirm in part.

Key Language from the Court's Opinion:

- Construction Company raises several arguments concerning the punitive damages award. First, we will address its argument that the trial court incorrectly relied on the environmental tort in approving the jury's award of punitive damages, because the jury rejected that cause of action and declined to award compensatory damages on that basis.

- Relevant to this case is intentional and reckless conduct: the jury found that the Goffs had proven by clear and convincing evidence that Construction Company "was guilty of such egregious, intentional or reckless acts," and thus, punitive damages were warranted.

- Turning back to the present case, Construction Company argues that the trial court incorrectly relied on the environmental tort in approving the jury's award of punitive damages, because the jury rejected that cause of action and declined to award compensatory damages on that basis. We agree. Construction Company goes on to argue that "[w]here there is a finding that plaintiff has suffered no actual damage (in this case under the environmental hazard claim), no punitive damages may be awarded." We disagree with this contention, however, because the jury found that the Goffs were legally injured and awarded actual damages based on the claim of nuisance.

- Whatever the jury's reasoning for the "modest" award, punitive damages cannot be used to make up for a low compensatory award. The trial court's findings of fact and conclusions of law are insufficient in that they rely heavily on the environmental tort claim, a theory which the jury rejected. We therefore reverse the award of punitive damages and remand the case to the trial court. On remand, the trial court should apply the *Hodges* factors and make appropriate findings of fact and conclusions of law in approving or decreasing the award of punitive damages, if the court deems appropriate, based on the nuisance theory.

- Next, Construction Company argues that the trial court erred in instructing the jury on the issue of punitive damages… The jury instruction read, in part: "The purpose of punitive damages is not to further compensate the plaintiff but to punish a wrongdoer and deter others from committing similar wrongs in the future." The instruction complies with *Hodges* and we find no error here.

- In this case, the trial judge determined that a punitive damages charge based on intentional and reckless conduct was needed based on the evidence presented, and that there was no evidence from which the jury could find that punitive damages should be imposed based on Construction

Company's fraudulent conduct. We cannot say that the lower court abused its discretion in making this decision.

B. STATE OF TENNESSEE v. LAHIERE-HILL, L.L.C., No. E2007-02424-COA-R3-CV (July 31, 2008)

The Court's Summary:

The State of Tennessee ("the state") sued Lahiere-Hill, L.L.C. ("the company"), seeking a declaratory judgment defining the scope of the company's rights with respect to the minerals on several tracts of land in Hamilton County. The state, which owns the surface rights to the land in question, also stated causes of action for trespass, ejectment and public nuisance. The severance of the mineral rights from the surface rights occurred in 1951, when the parties' common grantor reserved the mineral rights for itself while conveying the surface rights to a grantee who wished to use the land for its timber. The state eventually acquired the surface rights previously owned by timber companies, and has designated most of the land as part of the Cumberland Trail State Park. The parties' dispute focuses on how to interpret the 1951 deed, specifically whether the grantor's reservation of "other minerals" includes the right to mine sandstone. The state contends that sandstone is not a mineral, and that, in any event, the company's "surface mining" is too destructive to the surface and should not be allowed absent an explicit provision in the deed permitting such mining. The company argues that sandstone is a mineral, and that the mining techniques at issue are not so destructive as to deprive the state of its surface rights. The trial court granted the company's motion for summary judgment, holding that the term "minerals" unambiguously includes sandstone; determining that there are no disputed issues of material fact in this case; and concluding that the material facts before the court support summary judgment for the company. We disagree with the trial court's determination that there are no genuine issues of material fact. We hold that, absent an explicit provision so stating, the 1951 deed cannot be read as waiving the surface owner's right to use the property for its reasonable or intended purpose. We further hold that the company has not demonstrated the absence of a disputed issue of material fact on the question of whether its mining techniques are impermissibly destructive. Accordingly, we vacate the trial court's grant of summary judgment and remand for further proceedings.

Key Language from the Court's Opinion:

- In moving for summary judgment, the company sought to prove that it has the right, by way of the 1951 deed, to engage in the proposed mineral extraction. If the company could prove this, it would negate an essential element of the state's claims for declaratory judgment, trespass and ejectment. However, in accordance with the above-cited strip-mining precedents, the company must do more than demonstrate that sandstone is a "mineral" and that the proposed extraction method is "usual, necessary and convenient." The company must *also* prove that the proposed extraction method does not unduly interfere with the state's surface rights. Otherwise, the company has not negated any essential element of the state's claims, because it has not proven that the state lacks grounds, under the deed, to halt the company's activity.

- Moreover, the destructiveness inquiry is also analytically distinct from the question of whether the company is employing the "usual, necessary and convenient means for searching for, mining, working, getting, preparing, carrying away, and disposing of said mines and minerals." That latter question is a secondary inquiry, which begins only after the company's right to extract "said mines and minerals" has been established. By contrast, the inquiry into whether the extraction method inherently violates the state's surface rights is part and parcel of the initial determination of whether a "right to extract" exists at all. If the extraction of the substance in question – in this case sandstone – is necessarily so destructive of the mined surface area as to essentially

"destroy[] the conveyance" of the surface rights to that area, *Tennessee Coal*, 265 S.W. at 676, then the company does not have the right to perform the proposed extraction at all, regardless of whether the substance is a "mineral," and regardless of whether the extraction method is the "usual, necessary and convenient means" of removing said mineral.

- More specifically, in the instant case, given that the court found that "[t]he basic intention of the parties was to sever the surface and mineral rights to the real property in order to develop the timber and mineral resources separately," we will not interpret the deed as allowing the company to destroy the very timber resources that the grantor conveyed to the grantee. If the proposed sandstone extraction would, by its nature, result in significant damage or destruction to trees in the mined area, then it is clearly outside the scope of what the original parties intended, and we must conclude that the deed does not allow it.

- That leaves the state's nuisance claim, which requires a far shorter discussion, in light of our findings above. Unlike the claims for declaratory judgment, trespass and ejectment, the success of the state's claim for public nuisance does not necessarily depend on the proposition that the company lacks the right to mine for sandstone on the subject property – but certainly, dismissal of the nuisance claim cannot be supported given that the company's ownership right is now once again at issue. This is particularly true given that the trial court's dismissal of the nuisance claim relied in part on the notion that "the removal of sandstone comports with the mineral reservation," and on the related conclusion that "the Defendants have been reasonable, and legal, with regard to their activities."

- Furthermore, in any event, the company's aforementioned failure to demonstrate the absence of a factual dispute over the destructiveness of its extraction methods also necessarily dooms its motion for summary judgment on the nuisance claim, since the same facts are equally material to that claim. Accordingly, the grant of summary judgment on this issue was also improper.

C. J. HANNAH FRANK v. THE GOVERNMENT OF THE CITY OF MORRISTOWN, No. E2007-02012-COA-R3-CV (July 31, 2008)

The Court's Summary:

The city of Morristown appeals a judgment in favor of a commercial leaseholder who brought an inverse condemnation and nuisance action against the city for damages allegedly sustained as a result of dirt, debris, odor, noise, and interference with ingress and egress caused by the city's road and bridge construction project. After careful review, we reverse the judgment of the trial court as to the inverse condemnation claim upon our finding that the damages complained of by the leaseholder were the necessary effects of careful construction and not different from the effects suffered by the leaseholder's neighbors and because damages resulting from inconvenience during construction are not recoverable. We also reverse the trial court's judgment in favor of the leaseholder upon the claim of nuisance because the leaseholder failed to establish that the construction project was conducted in an unreasonable manner.

Key Language from the Court's Opinion:

- The City also argues that the trial court erred in awarding Ms. Frank compensation upon the ground that the noise, dirt, debris, and obstruction caused by the construction project constituted a nuisance. We agree.

- As stated by the Tennessee Supreme Court in *Pate v. City of Martin*, 614 S.W.2d 46, 47 (Tenn. 1981), "[a] nuisance has been defined as anything which annoys or disturbs the free use of one's property, or which renders its ordinary use or physical occupation uncomfortable." Under the circumstances presented in the present matter, it is clear that the noise, dirt, debris, and obstruction complained of annoyed or disturbed Ms. Frank's free use of her leasehold and rendered its ordinary use uncomfortable. However, as this court has further noted, "[t]he key element of any nuisance is the reasonableness of the defendant's conduct under the circumstances." *Sadler v. State*, 56 S.W.3d 508, 511 (Tenn. Ct. App. 2001); *Charles v. Latham*, No. E2003-00852-COA-R3-CV, 2004 WL 1898261 (Tenn. Ct. App. E.S., filed Aug. 25, 2004).

- Our careful review of the record reveals no finding by the trial court that the City acted unreasonably at any time during the construction project. No evidence was presented that the offending noise, dirt, and debris were the result of any unreasonable action by the City and with regard to closure of the street in front of Ms. Frank's shop, the trial court specifically observed that had the City kept one lane of the street open, Ms. Frank " couldn't complain about the lack of access, you know, but they couldn't and get the project done apparently. . . or they couldn't get it done right or they couldn't get it done the best way . . . ." In the absence of any finding that the City acted unreasonably in conducting the construction project, we hold that Ms. Frank failed to establish that the matters complained of constituted a compensable nuisance.

D. WILMA WILSON, et al. v. HARRY OURS, et al., No. M2006-02703-COA-R3-CV (September 3, 2008)

The Court's Summary:

See page 132.

Key Language from the Court's Opinion:

- A nuisance is "a condition," as distinguished from an act or failure to act, as is the case in a negligence claim. *Cuffman v. City of Nashville*, 175 S.W.2d 331, 332 (Tenn. Ct. App. 1943) (quoting *Burnett v. Rudd*, 54 S.W.2d 718, 720 (Tenn. 1932) (holding the plaintiff failed to distinguish between "a condition produced by the affirmative action of the city and the negligent acts of its employees resulting in injury to a citizen")). In general, negligence is not involved in nuisance actions. *Id*.

- The City is a municipality, thus, the plaintiffs have the burden of proving, *inter alia*, that an inherently dangerous condition existed. The record before us is devoid of any proof the City created an inherently dangerous condition. Accordingly, the plaintiffs have failed to carry their burden of proof to establish a claim of nuisance, and, therefore, their claim of nuisance must be dismissed. *See Dean*, 551 S.W.2d at 704 (wherein this court dismissed the complaint on the ground that there was no evidence in the record to establish an inherently dangerous condition). Accordingly, we affirm the decision of the trial court to dismiss the plaintiffs' claims of nuisance.

XVI. SUICIDE CASES

A. AUDREY L. LINKOUS, on her own behalf, and on behalf of and as surviving spouse of CHARLES G. LINKOUS, deceased, and by next friend on behalf of her minor children, JUSTIN L. LINKOUS, and HEATHER M. LINKOUS, v. HAWKINS COUNTY DEPUTY DANIEL LANE, HAWKINS COUNTY DEPUTY BRIAN BOGGS, HAWKINS COUNTY JAILER KIMBERLY GIBSON a/k/a KIMBERLY COOK, HAWKINS COUNTY JAILER NATHAN SIMPSON, HAWKINS COUNTY JAIL SUPERVISOR SCOTT ALLEY, HAWKINS COUNTY SHERIFF WARREN D. RIMER, and HAWKINS COUNTY, TENNESSEE, No. E2007-01054-COA-R3-CV (May 14, 2008)

The Court's Summary:

This wrongful death action was brought by the widow of deceased, who committed suicide in the county jail. The Trial Court granted summary judgment to defendant County on the grounds that the undisputed evidence established that the defendant's suicide was not foreseeable. On appeal, we affirm.

Key Language from the Court's Opinion:

- In this case Plaintiff alleged the employees at the Hawkins County jail had a duty to keep decedent safe while he was in their custody. Further, that the employees should have recognized that the decedent was at an increased risk of suicide, based on his intoxicated state, and that the duty to deceased had been breached by these personnel.

- In support of this argument, Plaintiffs contend that it is a well established fact that an intoxicated person is at increased risk of suicide. However, the correctional professionals involved here disagreed with this assumption and Plaintiffs offered no expert testimony to support this supposition. The affidavits submitted by the defendant established that the deceased was specifically questioned regarding whether he was having suicidal thoughts or whether he had a history of suicide attempts. The affidavits further show that the deceased was frequently observed by the jailers and that he was "quiet and respectful" during his interactions with Deputy Simpson and resting quietly when both Deputy Simpson and Deputy Gibson observed him shortly before he was found dead with the telephone cord around his neck. The affidavits establish that the deceased's unfortunate suicide was not foreseeable by his jailers.

- Plaintiffs failed to present any evidence, expert or non-expert, to refute defendant's statement of facts on this issue, and the Trial Court did not err in finding that the suicide was not foreseeable by the Hawkins County employees, based on the evidence in the record.

B. DON DRAKE et al. v. JANA M. WILLIAMS, M.D., et al., No. M2007-00979-COA-R3-CV (April 25, 2008)

The Court's Summary:

The parents of a young man who committed suicide after being discharged from a psychiatric hospital sued the hospital and the treating psychiatrist for wrongful death. The trial court granted the defendants' motions for summary judgment on the basis that the decedent's act of suicide was an intervening, superseding cause. We reverse and remand for further proceedings.

Key Language from the Court's Opinion:

- Our Supreme Court has held: "[I]n those malpractice actions wherein expert testimony is required to establish negligence and proximate cause, affidavits by medical doctors which clearly and completely refute plaintiff's contention afford a proper basis for dismissal of the action on summary judgment, in the absence of proper responsive proof by affidavit or otherwise." *Bowman v. Henard*, 547 S.W.2d 527, 531 (Tenn. 1977). The first question, then, is whether the defendants' affidavits "clearly and completely refute" the plaintiffs' claim of medical malpractice and, therefore, are sufficient to shift the burden to the plaintiffs to substantiate the essential elements of their claim. To effectively refute a claim of malpractice, the defendants "must present facts rebutting the allegations of [the] complaint as to at least one of the three statutory elements for medical malpractice actions." *Fitts v. Arms*, 133 S.W.3d 187, 190 (Tenn. Ct. App. 2003).

- The depositions of Dr. Williams and the Drakes contain factual disputes concerning what Dr. Williams told the Drakes about their son's condition and what steps they needed to take to promote his recovery. Specifically, the parties disagree as to whether Dr. Williams told them that Eric was at risk for suicide, that the Drakes needed to watch Eric constantly for more than a few days, and that they needed to lock up or remove all guns. The defendants' affidavits do not specifically describe the applicable standard of practice for a psychiatrist treating and discharging a patient like Eric Drake or outline how Dr. Williams's actions accorded with that standard. Instead, the affidavits describe Eric's course of treatment at Parthenon Pavilion and then opine that Dr. Williams's treatment conformed with the standard of practice. Since the affidavits of Dr. Williams and the other three psychiatrists specifically mention the fact that Eric was discharged to the care of his parents, however, it appears that the circumstances of the discharge formed part of the basis for their opinions that Dr. Williams acted appropriately. Therefore, these factual disputes cast doubt upon the trustworthiness of the opinions of the defendants' experts.

- Even if we assume that the defendants' affidavits "clearly and completely refute" at least one of the elements of the plaintiffs' claim of malpractice, thereby shifting the burden to the plaintiffs to establish the essential elements of their claim, we have determined that the physician affidavit submitted by the plaintiffs is sufficient to establish genuine issues of material fact. Pursuant to Tenn. Code Ann. § 29-26-115(a), the plaintiffs have the burden of establishing the recognized standard of acceptable medical practice, the defendant's breach of that standard, and causation.

- In a medical malpractice case not involving the "common knowledge" exception, a plaintiff must introduce expert testimony to establish the requisite factual elements. *Kenyon*, 122 S.W.3d at 758. We find, however, that Dr. Reisman's affidavit is not conclusory. According to Dr. Reisman, "[t]he recognized standard of acceptable professional practice required Dr. Williams to keep Lee Eric Drake hospitalized until he successfully reached the benchmarks of treatment. Dr. Williams deviated from the standard of care by releasing Lee Eric Drake prematurely." He further opines that Dr. Williams's failure to comply with the applicable standard of practice resulted in injuries that would not have occurred otherwise. Thus, Dr. Reisman addressed all three of the required elements; he identified deficiencies in Dr. Williams's conduct sufficient to show that there are genuine issues of material fact.

- In the present case, as discussed above, Dr. Reisman's affidavit does not merely state conclusions; he identified a specific deficiency in Dr. Williams's actions that violated the applicable standard of practice.… An expert's opinion is subject to change if and when additional facts come to light. Thus, in any medical malpractice case, expert opinions may change as additional facts are revealed during discovery or at trial. Dr. Reisman's affidavit is sufficient to

establish that genuine issues of material fact exist, making summary judgment improper. The trial court did not err in determining that Dr. Reisman's affidavit was sufficient to establish the existence of genuine issues of material fact.

- The Drakes make two main arguments in opposition to the trial court's finding that Eric's suicide was a superseding, intervening cause of his death. First, the Drakes argue that the trial court erred in applying the doctrine of superseding, intervening cause without finding antecedent negligence by the defendants. Second, they argue that the trial court erred in finding that Eric's suicide was unforeseeable as a matter of law.

- As to the first argument, there is no requirement that a court make a finding of negligence prior to considering whether there is a superseding, intervening cause.

- An act "which is a normal response created by negligence, is not a superseding, intervening cause so as to relieve the original wrongdoer of liability, provided the intervening act could have reasonably been foreseen and the conduct [of the original wrongdoer] was a substantial factor in bringing about the harm." *McClenahan v. Cooley*, 806 S.W.2d 767, 775 (Tenn. 1991). Thus, an intervening act will not cut off the liability of the original wrongdoer unless it is shown that the intervening act could not reasonably have been anticipated. *Id*. at 775. The superseding, intervening cause doctrine applies "only when the intervening act (1) was sufficient by itself to cause the injury, (2) was not reasonably foreseeable to the negligent actor, and (3) was not a normal response to the negligent actor's conduct." *Rains*, 124 S.W.3d at 593. The issue for determination here is whether Eric's suicide was foreseeable to Dr. Williams.

- Especially relevant to the present case is the court's discussion in *Rains* of three exceptions to the application of the independent intervening cause doctrine in suicide cases: "(1) circumstances in which the defendant's negligence causes delirium or insanity that results in self-destructive acts . . . (2) custodial settings in which the custodian knew or had reason to know that the inmate or patient might engage in self-destructive acts . . . and (3) special relationships, such as a physician-patient relationship, when the caregiver knows or has reason to know that the patient might engage in self-destructive acts." *Id*. at 593-94 (citations omitted).

- Viewing the evidence in the light most favorable to the non-moving party, we have concluded that summary judgment was not properly granted in this case as reasonable minds could conclude that Eric's suicide was foreseeable. Dr. Reisman's affidavit includes the following statement: "Dr. Williams foresaw or should have foreseen that Lee Eric Drake would commit suicide. The recognized standard of acceptable professional practice requires psychiatrists like Dr. Williams to consider suicide as a likely outcome when their patients are prematurely released from mental health care facilities like Parthenon Pavilion."

- The deposition testimony of the Drakes and Dr. Williams also provides some support for the conclusion that Eric's suicide was foreseeable. For example, Dr. Williams testified that Eric was at higher risk for suicide because of his diagnosis and that he needed to be discharged under the close supervision of his parents until outpatient psychiatric care had been established. Eric's parents testified that they were not given proper warning or instructions concerning the supervision necessary to protect Eric.

- In our opinion, there is a jury question as to whether Eric's suicide was a foreseeable result of Dr. Williams's alleged negligence. It was, therefore, improper for the trial court to find Eric's suicide

to be a superseding, intervening cause of his death as a matter of law and to grant summary judgment.

XVII. PREMISES LIABILITY CASES

A. ROY S. LAWRENCE, et al. v. HCA HEALTH SERVICES OF TENNESSEE, INC. d/b/a SUMMIT MEDICAL CENTER, et al., No. M2007-01128-COA-R3-CV (August 12, 2008)

The Court's Summary:

Plaintiffs, husband and wife, filed this premises liability action for personal injuries sustained by the elderly husband who was injured when automatic doors at the entrance to a medical office building struck him causing him to fall. In the premises liability action that followed, Plaintiffs alleged that the major tenant of the office building and the property management company failed to exercise the required due care in the maintenance, inspection, and repair of the doors and/or to properly warn Plaintiffs of the dangers existing at the office building. The trial court summarily dismissed the claims against both defendants. We have determined the major tenant owed no duty to Plaintiffs and thus was entitled to summary judgment. We have also determined that the property management company did not create the alleged dangerous or defective condition, and it did not have actual or constructive knowledge that a dangerous or defective condition existed. Accordingly, we affirm.

Key Language from the Court's Opinion:

- HCA contends, *inter alia*, that it did not owe a duty to Mr. Lawrence because it did not own or operate the medical office building, it was merely a tenant in a building with multiple tenants, and that Mr. Lawrence was injured in the common area, not within the premises for which HCA had a duty to maintain… It is undisputed that HCA was not the owner of the medical office building. Instead, the medical office building in which Dr. Hawthorne's office was located was owned and operated by Medical Office Buildings of Tennessee ("MedCap"), which was never made a party to this action. HCA was one of several tenants in the medical office building, albeit the major tenant.

- HCA had no contractual duty to maintain or repair the automatic doors at the entrance to the office building. To the contrary, as the lease with MedCap expressly provides, MedCap had the affirmative duty to maintain the common areas, including the automatic doors at issue. Moreover, MedCap contracted with Holladay to provide the requisite property management service for the multiple-tenant office building, and Holladay contracted with Mid South Automatic Door to maintain and service the automatic doors.

- Although the owner is responsible for maintaining the common areas, tenants may have a duty to see that the leased premises, particularly the approach to the premises leased by the tenant, is in a reasonably safe condition. *Berry v. Houchens Market of Tennessee, Inc*., 253 S.W.3d 141, 146 (Tenn. Ct. App. 2007).

- Here, the injury to Mr. Lawrence did not occur on or within the premises leased by HCA. Accordingly, the only basis upon which HCA may owe a duty to Mr. Lawrence would be if the ingress/egress extension of a tenant's premises liability applies. We, however, find no basis upon which to apply the ingress/egress principle in this case because Mr. Lawrence was not in the

building to visit HCA's leased premises. Instead, Mr. Lawrence was in the building to see his podiatrist, Dr. Hawthorn. Accordingly, if the ingress/egress principle applied, it would be Dr. Hawthorn, not HCA, who owed a duty to Mr. Lawrence to provide safe ingress and egress. *See Id*.; *see also Thompson*, 2006 WL 468724, at *5; *Frazee v. Med Center Inns of America, Inc*., No. 01A01-9301-CV-00034, 1993 WL 312674, at *4-5 (Tenn. Ct. App. Aug. 18, 1993).

- We have determined as a matter of law that HCA did not owe Mr. Lawrence a duty to maintain the automatic doors. Accordingly, HCA was entitled to summary judgment.

- Plaintiffs contend that HCA's failure to conduct daily safety checks caused the dangerous condition of the automatic doors. We find no merit to this contention because HCA had no duty or responsibility to check or service the automatic doors… Considering the evidence in the light most favorable to Plaintiffs, we find no evidence upon which to conclude that the condition was caused or created by HCA or its agent.

- As is the case with the owner, an operator of a premises can be held liable for negligence in allowing a dangerous or defective condition to exist on the premises if it is established that condition was created by the operator or the operator had actual or constructive notice that the condition existed prior to the accident. *Neff v. Southeastern Salvage Co*., 694 S.W.2d 311, 313 (Tenn. Ct. App. 1985) (quoting *Jones v. Zayre, Inc*., 600 S.W.2d 730, 732 (Tenn. Ct. App. 1980)). Therefore, in order to hold Holladay liable for the alleged malfunction of the automatic doors, Plaintiffs must show that Holladay either created the dangerous condition or had actual or constructive notice of the dangerous condition of the automatic doors. *See Neff*, 694 S.W.2d at 313.

- There is no evidence in the record to suggest that Holladay created a dangerous condition. Therefore, the issue before this court is whether the evidence presented in favor of and in opposition to Holladay's motion for summary judgment was sufficient to create a genuine issue of a material fact on the question of whether Holladay had actual notice or constructive notice that a dangerous or defective condition existed with regard to the automatic doors.

- During the three days between the full AAADM inspection and Mr. Lawrence's fall, no one reported a problem with the doors. In fact, prior to Mr. Lawrence's injury on March 18, 2002, there had never been a report, complaint, or work order indicating that the automatic doors at issue had struck anyone or that the sensors were malfunctioning in a manner as to cause the doors to close while a person was walking through the doors. Accordingly, there is no evidence upon which to find that a dangerous or defective condition existed prior to Mr. Lawrence's fall.

B. TIMOTHY SANDERS v. CB RICHARD ELLIS, Inc., No. W2007-02805-COA-R3-CV (September 22, 2008)

The Court's Summary:

This is a premises liability case. Appellant sued Appellee for injuries sustained in a fall on an icy parking lot that was maintained by Appellee. The material facts of the case are undisputed and, on principles of comparative fault, the trial court determined that Appellant was at least 50% liable for the injuries he sustained in that Appellant (1) ignored the open and obvious danger when he undertook to walk inside the bank, (2) decided not to use the drive-through window in order to avoid traversing the ice, and (3) undertook a risk that a reasonable person would have avoided. Finding no error, we affirm.

Key Language from the Court's Opinion:

- Traditionally, liability has not been imposed on a premises owner by courts of this state for injuries that resulted from defective or dangerous conditions that were "open and obvious." *See McCormick v. Waters*, 594 S.W.2d 385 (Tenn. 1980); *Kendall Oil Co. v. Payne*, 293 S.W.2d 40 (Tenn. Ct. App. 1955). In cases after the decision of the Tennessee Supreme Court in *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992), liability in premises liability actions has been determined according to the principles of comparative fault:

  > [w]hen 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 and the general negligence law of this state.

  Cooperwood v. Kroger Food Stores, Inc., No. 02A01-9308-CV-00182, 1994 WL 725217 (Tenn. Ct. App. Dec. 30, 1994).

- Applying the above authority to the undisputed facts in this case, and specifically from Mr. Sanders' own testimony, there is no dispute that he knew and appreciated the dangerous condition of the icy parking lot prior to his decision to walk across it. Mr. Sanders was cognizant of the fact that there had been a winter storm in the area that day, and that the roadways were "bad." Mr. Sanders specifically testified that he noticed the parking lot was "real icy" when he arrived at the bank, and that it appeared that the lot had not been salted. In short, there is no dispute that the danger faced by Mr. Sanders was open and obvious.

- Moreover, there is no dispute that the drive-through window was available as an alternative to walking into the bank. Mr. Sanders testified that, he was aware that the drive-through was open, but he chose not to use it. By his own admission, had Mr. Sanders used the drive-through window, this incident could have been avoided.

- Finally, it is undisputed that, despite his awareness of the open and obvious dangerous condition and despite his knowledge that the drive-through was an available alternative to his crossing the icy lot, Mr. Sanders undertook to walk into the bank. From the undisputed facts, Mr. Sanders' actions were not reasonable in light of the surrounding circumstances and the potential risk.

- We concede that, if there was a dispute of material fact concerning Mr. Sanders' actions, then same should be decided by the fact finder. However, the facts of this case are undisputed; consequently, there is no need for fact finding. The issue before us is a legal question. As such, we review that decision de novo upon the record with no presumption of correctness. Tenn. R. App. P. 13(d). Applying these legal principles to the undisputed facts in the record, we cannot conclude that the trial court erred in granting CB Richard Ellis' motion for summary judgment.

XVIII. CONVERSION CASES

A. ANNETTE HANNA v. SCOTT SHEFLIN, et al., No. M2007-01158-COA-R3-CV (July 22, 2008)

The Court's Summary:

The plaintiff brought this action for conversion against her parents, alleging that they converted $30,000 she entrusted to her father in 1991. The plaintiff, then 18 years of age, entrusted to her father the settlement proceeds she received as compensation for serious personal injuries she sustained in a vehicular accident. After recovering in her parents' home for two years, the plaintiff married and moved out of her parents' home. She did not ask her father to return the funds entrusted to him when she got married and moved out of his home in 1993, and did not ask that he return the funds until 2005. This action was filed in 2006. Following a bench trial, the trial court dismissed the action as time barred. The plaintiff appeals, contending the statute of limitations was tolled because her father fraudulently concealed his wrongful conduct. We have determined that the daughter failed to exercise reasonable care and diligence in discovering her father's alleged conversion of the funds. Accordingly, we affirm.

Key Language from the Court's Opinion:

- Conversion is "the appropriation of [property] to the party's own use and benefit, by the exercise of dominion over it, in defiance of plaintiff's right." *Barger v. Webb*, 391 S.W.2d 664, 665 (Tenn. 1965). To be liable for conversion, the defendant "need only have an intent to exercise dominion and control over the property that is in fact inconsistent with the plaintiff's rights, and do so." *Mammoth Cave Prod. Credit Ass'n v. Oldham*, 569 S.W.2d 833, 836 (Tenn. Ct. App. 1977).

- Actions for conversion of personal property shall be commenced within three years of the accruing of the cause of action. Tenn. Code Ann. § 28-3-105(2). A cause of action accrues "when the plaintiff knew or reasonably should have known that a cause of action existed." *Johnson v. Craycraft*, 914 S.W.2d 506, 511 (Tenn. Ct. App. 1995) (quoting *Stone v. Hinds*, 541 S.W.2d 598, 599 (Tenn. Ct. App. 1976)).

- The trial court correctly determined that Mr. Sheflin owed a fiduciary duty to his daughter while she was living with her parents as she recuperated following her 1991 accident. This confidential relationship, however, ended when Ms. Hanna got married in 1993 and moved out of her parents' home to live with her husband. Moreover, it is undisputed that Ms. Hanna knew her father was still in possession of a substantial amount of her settlement proceeds when she moved out of her parents' home in 1993; yet, she made no inquiries concerning the funds.

- Ms. Hanna had fully recuperated by 1993 when she married and moved out of her parents' home… Therefore, with the exception of accounting for the settlement proceeds and returning the remaining funds to Ms. Hanna, all of Mr. Sheflin's fiduciary duties that arose from the confidential relationship had been completed by 1993. Accordingly, the statute of limitations began to run in 1993, when her father failed to make an accounting and deliver the remaining funds to her.

- Mere ignorance and failure of a plaintiff to discover the existence of a cause of action is not sufficient to toll the running of the statute of limitations. *Vance v. Shulder*, 547 S.W.2d 927, 930 (Tenn. 1977) (citing *Hall v. DeSaussure*, 297 S.W.2d 81 (Tenn. 1956)). Fraudulent concealment of the cause of action by the defendant is an exception to this rule, which tolls the running of the

statute of limitations. To come within this exception, Ms. Hanna had the burden to prove that her father took affirmative action to conceal her cause of action from her. *See Vance*, 547 S.W.2d at 930; *see also Willis*, 683 S.W.2d at 688.

- Ms. Hanna failed to establish that she falls within the exception. She did not prove that her father took affirmative action to conceal her cause of action from her. Moreover, as the trial court correctly found, she failed to establish that through the exercise of reasonable diligence she could not have discovered the existence of circumstances that would have or should have alerted her to the fact that she had a cause of action.

- We therefore conclude that the statute of limitations for a claim of conversion ran in 1996, ten years prior to the commencement of this action. Accordingly, we affirm the decision of the trial court that the claim is time barred.

XIX. DAMAGES CASES

A. C. RICK POINTS v. WAYMOND LEE THOMPSON, et al., No. M2006-02425-COA-R3-CV (January 9, 2008)

The Court's Summary:

In this case arising from an automobile accident, the issues presented are whether there is material evidence supporting the jury verdict in favor of the plaintiff and whether the trial court erred in denying the plaintiff's motion in limine to exclude, as inadmissibly speculative, portions of his own medical expert's testimony on cross-examination. Because we find that there is material evidence supporting the jury verdict and that the trial court did not abuse its discretion in denying the plaintiff's motion in limine, we affirm the judgment of the trial court.

Key Language from the Court's Opinion:

- Points argues that there was no material evidence supporting the jury verdict because it was manifestly insufficient in light of the proof presented regarding his medical expenses, loss of earning capacity, and permanent vocational impairment. Our review of the record in keeping with the above- stated standard of review yields the conclusion that, although the jury award was significantly lower than Points's total damages, there was material evidence from which the jury could have concluded that a significant portion of his injuries were not caused by the accident.

- The trial court approved the verdict, finding it to be neither manifestly insufficient nor unreasonable in light of the evidence presented. Our task on appeal is therefore limited to determining whether there is material evidence supporting the jury verdict, and we find that there is such evidence. The jury could have reasonably found from the evidence outlined above that Points had mostly or fully recovered from the injuries resulting from the accident and that his injuries occurring after he asked to be released from Dr. Bartsokas's care were caused by his attempts to lift and move the bodies and other activities resulting in overexertion. "[T]he amount of compensation in a personal injury case is primarily for the jury, and next to the jury, the most competent person to pass on the matter is the trial judge who presided at the trial and heard the evidence." Foster v. Amcon Int'l, Inc., 621 S.W.2d 142, 143-44 (Tenn. 1981). Consequently, because there is material evidence supporting the verdict, we must affirm the jury verdict of $64,000.

- In the present case, Points's reliance on Hunter is misplaced because of the significant differences between the two cases. In Hunter, the testimony excluded was that of an expert witness called by the defendant in an attempt to provide an alternative theory of an entirely different, independent cause of injury, which the trial court found to be based on mere speculative possibility and which was arguably improbable. Id. In contrast, the present case presents a challenge not of an opposing witness who is proffering an alternative theory, but of the party's own witness in response to questions on cross-examination. Furthermore, the testimony sought to be excluded as speculative is not an alternative theory of causation as in Hunter, but rather mostly a reiteration of a conclusion that Dr. Howard had already testified to on direct examination – that she was unable to say that the disc protrusions in Points's spine were caused by the accident.

- We find no abuse of discretion in the trial court's decision to deny Points's motion in limine and to allow the jury to see the entire testimony of his medical expert, Dr. Howard… For the aforementioned reasons, the judgment of the trial court is affirmed.

B. PATRICIA AMBROSE v. BLYTHE BATSUK, No. M2006-01131-COA-R3-CV (April 30, 2008)

The Court's Summary:

This case arose from a low-speed collision in which the plaintiff's car was rear-ended by the defendant's car. The plaintiff claimed that the accident caused her to suffer neck and shoulder injuries, resulting in considerable pain and suffering. The defendant conceded fault for the accident, but denied that the accident had caused the plaintiff any actual injury. The plaintiff attempted to prove causation by offering the deposition testimony of the primary care doctor who had treated her. The trial court excluded the doctor's testimony because he was unable to state that the accident more probably than not caused the plaintiff's physical injuries. The jury returned a verdict for the defendant and the trial court entered judgment thereon. We affirm.

Key Language from the Court's Opinion:

- The plaintiff's final issue involves the medical bills that she included with her amended complaint. By filing those medical bills, in the total amount of $2,562, she hoped to take advantage of the presumption set out in Tenn. Code Ann. § 24-5-113, that such bills, when they are itemized and attached as an exhibit to complaints in personal injury actions, and when they total less than $4,000, create a prima facie presumption that the expenses incurred were necessary and reasonable.

- Ms. Ambrose appears to misapprehend the presumption created by the statute. Essentially, if a plaintiff makes a claim for medical expenses in compliance with the procedural requirements of the statute, there is no need for more specific proof regarding the necessity or reasonableness of those expenses. However, the presumption does not alleviate the need to prove that the condition requiring the medical treatment was caused by the defendant's conduct. There is nothing in the language of Tenn. Code Ann. § 24-5-113 addressing the requirement that plaintiff prove causation. Ms. Ambrose was required to prove that her claimed damages, including the medical bills she submitted, were caused by the accident with Ms. Batsuk.

- While the plaintiff may have had some appointments solely for diagnosis or treatment of neck and shoulder pain, she acknowledged that she had previously suffered from pains in those areas.

Thus, there was no proof, aside from her own testimony, that the cause of her pain was the automobile accident. When we take the strongest legitimate view of all the evidence that tends to uphold the verdict, we find that the jury was entitled to conclude that the medical bills submitted by the plaintiff were incurred for treatment of her pre-existing conditions, and not for treatment of any injury caused by the defendant.

- Jury verdicts of zero damages where the plaintiff's fault for an accident has been conclusively established have been upheld in a number of Tennessee cases. See, e.g., Newsom v. Markus, 588 S.W.2d 883 (Tenn. Ct. App. 1979); Dixon v. Cobb, 2007 WL 2089748; Vaughn v. Cunningham, No. E2004- 03001-COA-R3-CV, 2006 WL 16321 (Tenn. Ct. App. Jan. 4, 2006) (no Tenn. R. App. P. 11 application filed)… The judgment of the trial court is affirmed.

C. WILMA WILSON, et al. v. HARRY OURS, et al., No. M2006-02703-COA-R3-CV (September 3, 2008)

The Court's Summary:

See page 132.

Key Language from the Court's Opinion:

- We have determined it was error to award damages to any of the plaintiffs. There are three reasons for our decision. One, none of the plaintiffs sustained any physical injuries; thus, their claims of emotional injuries constitute stand-alone claims for emotional injuries, meaning they occurred in the absence of accompanying physical injury or physical consequences. Two, the plaintiffs' stand-alone claims for negligent infliction of emotional distress were properly dismissed. Three, the City's conduct did not constitute extreme or outrageous conduct, and thus, the plaintiffs failed to state a claim upon which relief could be granted for stand alone emotional injuries.

- It is undisputed that none of the plaintiffs incurred any expenses or property damage as a consequence of the City's negligence. The plaintiffs were not charged for the disinterment and re-interment of James B. Wilson, and Bruff Wilson was not and will not be disinterred. Moreover, none of the plaintiffs received medical or psychological treatment as a consequence of the City's negligence. The only evidence of "injuries" or "damages" sustained by the plaintiffs pertained to the emotional consequences of learning that a beloved relative would be disinterred and re-interred and the resulting delays in erecting grave markers.

- But for a few exceptions, plaintiffs may not recover damages where the only "injury" resulting from the defendant's negligence is mental distress "without accompanying physical injury or physical consequences, or without other independent basis for tort liability." *Laxton v. Orkin Exterminating Co., Inc*. 639 S.W.2d 431, 433-34 (Tenn. 1982) (citing *Medlin v. Allied Investment Co*., 217 Tenn. 469, 398 S.W.2d 270 (1966); *Bowers v. Colonial Stages Interstate Transit Co*., 163 Tenn. 502, 43 S.W.2d 497 (1965); 64 A.L.R.2d 100, at 115). The denial of damages for emotional disturbance alone applies to all forms of emotional disturbance including temporary fright, nervous shock, nausea, grief, rage, and humiliation. *See* Restatement (Second) of Torts § 436(a) (1979). The fact that these "injuries" are accompanied by transitory, nonrecurring physical phenomena, harmless in themselves, such as dizziness, vomiting, and the like, does not make the actor liable where such phenomena alone are inconsequential and do not amount to any substantial bodily harm. *Id*., § 436A comment (c) (1965)

- Tennessee does not permit a plaintiff to recover damages for emotional injuries without accompanying physical injury where the defendant's conduct merely constitutes general or simple negligence.

XX. PUNITIVE DAMAGES CASES

A. EXXON SHIPPING COMPANY, et al., PETITIONERS v. GRANT BAKER et al., 554 U.S. ____ (June 25, 2008)

The Court's Summary:

On March 24, 1989, the supertanker Exxon Valdez grounded on Bligh Reef off the Alaskan coast, fracturing its hull and spilling millions of gallons of crude oil into Prince William Sound. The owner, petitioner Exxon Shipping Co. (now SeaRiver Maritime, Inc.), and its owner, petitioner Exxon Mobil Corp. (collectively, Exxon), have settled state and federal claims for environmental damage, with payments exceeding $1 billion, and this action by respondent Baker and others, including commercial fishermen and native Alaskans, was brought for economic losses to individuals dependent on Prince William Sound for their livelihoods.

For the purposes of the case, Exxon stipulated to its negligence in the Valdez disaster and its ensuing liability for compensatory damages. The court designed the trial accordingly: Phase I considered Exxon and Hazelwood's recklessness and thus their potential for punitive liability; Phase II set compensatory damages for commercial fishermen and Native Alaksans; and Phase III determined the amount of punitive damages for which Hazelwood and Exxon were each liable.

In Phase I, the jury heard extensive testimony about Hazelwood's alcoholism and his conduct on the night of the spill, as well as conflicting testimony about Exxon officials' knowledge of Hazelwood's backslide. Exxon did not dispute that Hazelwood was a managerial employee under this definition, *see* App. G, *id*., at 264a, n. 8, and the jury found both Hazelwood and Exxon reckless and thus potentially liable for punitive damages, App. L, *id*., at 303a.

In Phase II the jury awarded $287 million in compensatory damages to the commercial fishermen. After the Court deducted released claims, settlements, and other payments, the balance outstanding was $19,590,257. Meanwhile, most of the Native Alaskan class had settled their compensatory claims for $20 million, and those who opted out of that settlement ultimately settled for a total of around $2.6 million.

In Phase III, the jury heard about Exxon's management's acts and omissions arguably relevant to the spill. The court charged the jury to consider the reprehensibility of the defendants' conduct, their financial condition, the magnitude of the harm, and any mitigating facts. *Id*., at 15a. The jury awarded $5,000 in punitive damages against Hazelwood and $5 billion against Exxon.

On appeal, the Court of Appeals for the Ninth Circuit upheld the Phase I jury instruction on corporate liability for acts of managerial agents under Circuit precedent. With respect to the size of the punitive damages award, however, the Circuit remanded twice for adjustments in light of this Court's due process cases before ultimately itself remitting the award to $2.5 billion. We granted certiorari to consider whether maritime law allows corporate liability for punitive damages on the basis of the acts of managerial agents, whether the Clean Water Act (CWA), 86 Stat. 816, 33 U. S. C. §1251 et seq. (2000 ed. and Supp. V), forecloses the award of punitive damages in maritime spill cases, and whether the punitive damages awarded against Exxon in this case were excessive as a matter of maritime common law. 552 U. S. ___ (2007). We now vacate and remand.

There are three questions of maritime law before us: whether a shipowner may be liable for punitive damages without acquiescence in the actions causing harm, whether punitive damages have been barred implicitly by federal statutory law making no provision for them, and whether the award of $2.5 billion in this case is greater than maritime law should allow in the circumstances. We are equally divided on the owner's derivative liability, and hold that the federal statutory law does not bar a punitive award on top of damages for economic loss, but that the award here should be limited to an amount equal to compensatory damages.

Key Language from the Court's Opinion:

- On the first question, Exxon says that it was error to instruct the jury that a corporation "is responsible for the reckless acts of . . . employees . . . in a managerial capacity while acting in the scope of their employment.

- The Court is equally divided on this question, and "[i]f the judges are divided, the reversal cannot be had, for no order can be made." *Durant v. Essex Co*., 7 Wall. 107, 112 (1869). We therefore leave the Ninth Circuit's opinion undisturbed in this respect, though it should go without saying that the disposition here is not precedential on the derivative liability question. *See, e.g., Neil v. Biggers*, 409 U. S. 188, 192 (1972); *Ohio ex rel. Eaton v. Price*, 364 U. S. 263, 264 (1960) (opinion of Brennan, J.).

- Exxon next says that, whatever the availability of maritime punitive damages at common law, the CWA preempts them… Exxon renewed the CWA preemption argument before the Ninth Circuit. The Court of Appeals recognized that Exxon had raised the CWA argument for the first time 13 months after the Phase III verdict, but decided that the claim "should not be treated as waived," because Exxon had "consistently argued statutory preemption" throughout the litigation, and the question was of "massive . . . significance" given the "ambiguous circumstances" of the case. 270 F. 3d, at 1229. On the merits, the Circuit held that the CWA did not preempt maritime common law on punitive damages. *Id*., at 1230.

- Although we agree with the Ninth Circuit's conclusion, its reasons for reaching it do not hold up. First, the reason the court thought that the CWA issue was not in fact waived was that Exxon had alleged other statutory grounds for preemption from the outset of the trial. But that is not enough. It is true that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U. S. 519, 534 (1992). But this principle stops well short of legitimizing Exxon's untimely motion. If "statutory pre- emption" were a sufficient claim to give Exxon license to rely on newly cited statutes anytime it wished, a litigant could add new constitutional claims as he went along, simply because he had "consistently argued" that a challenged regulation was unconstitutional.

- As to the merits, we agree with the Ninth Circuit that Exxon's late-raised CWA claim should fail… If Exxon were correct here, there would be preemption of provisions for compensatory damages for thwarting economic activity or, for that matter, compensatory damages for physical, personal injury from oil spills or other water pollution. But we find it too hard to conclude that a statute expressly geared to protecting "water," "shorelines," and "natural resources" was intended to eliminate *sub silentio* oil companies' common law duties to refrain from injuring the bodies and livelihoods of private individuals.

- All in all, we see no clear indication of congressional intent to occupy the entire field of pollution remedies, *see, e.g., United States v. Texas*, 507 U. S. 529, 534 (1993) ("In order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law" (internal quotation marks omitted)); nor for that matter do we perceive that punitive damages for private harms will have any frustrating effect on the CWA remedial scheme, which would point to preemption.

- Finally, Exxon raises an issue of first impression about punitive damages in maritime law, which falls within a federal court's jurisdiction to decide in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result… In addition to its resistance to derivative liability for punitive damages and its preemption claim already disposed of, Exxon challenges the size of the remaining $2.5 billion punitive damages award. Other than its preemption argument, it does not offer a legal ground for concluding that maritime law should never award punitive damages, or that none should be awarded in this case, but it does argue that this award exceeds the bounds justified by the punitive damages goal of deterring reckless (or worse) behavior and the consequently heightened threat of harm.

- The more promising alternative is to leave the effects of inflation to the jury or judge who assesses the value of actual loss, by pegging punitive to compensatory damages using a ratio or maximum multiple. *See, e.g*., 2 ALI Enterprise Responsibility for Personal Injury: Reporters' Study 258 (1991) (hereinafter ALI Reporters' Study) ("[T]he compensatory award in a successful case should be the starting point in calculating the punitive award"); ABA, Report of Special Comm. on Punitive Damages, Section of Litigation, Punitive Damages: A Constructive Examination 64–66 (1986) (recommending a presumptive punitive-to-compensatory damages ratio). As the earlier canvass of state experience showed, this is the model many States have adopted, *see supra*, at 22, and n. 12, and Congress has passed analogous legislation from time to time, as for example in providing treble damages in anti-trust, racketeering, patent, and trademark actions, *see* 15 U. S. C. §§15, 1117 (2000 ed. and Supp. V); 18 U. S. C. §1964(c); 35 U. S. C. §284.20 And of course the potential relevance of the ratio between compensatory and punitive damages is indisputable, being a central feature in our due process analysis. *See, e.g., State Farm*, 538 U. S., at 425; *Gore*, 517 U. S., at 580.

- Still, some will murmur that this smacks too much of policy and too little of principle. *Cf. Moviecolor Ltd. v. Eastman Kodak Co*., 288 F. 2d 80, 83 (CA2 1961). But the answer rests on the fact that we are acting here in the position of a common law court of last review, faced with a perceived defect in a common law remedy. Traditionally, courts have accepted primary responsibility for reviewing punitive damages and thus for their evolution, and if, in the absence of legislation, judicially derived standards leave the door open to outlier punitive-damages awards, it is hard to see how the judiciary can wash its hands of a problem it created, simply by calling quantified standards legislative.

- There is better evidence of an accepted limit of reasonable civil penalty, however, in several studies mentioned before, showing the median ratio of punitive to compensatory verdicts, reflecting what juries and judges have considered reasonable across many hundreds of punitive awards. *See supra*, at 25–26, and n. 14. We think it is fair to assume that the greater share of the verdicts studied in these comprehensive collections reflect reasonable judgments about the economic penalties appropriate in their particular cases… The data put the median ratio for the entire gamut of circumstances at less than 1:1, *see supra*, at 25–26, and n. 14, meaning that the compensatory award exceeds the punitive award in most cases.

- On these assumptions, a median ratio of punitive to compensatory damages of about 0.65:1 probably marks the line near which cases like this one largely should be grouped. Accordingly, given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ratio, which is above the median award, is a fair upper limit in such maritime cases.

- Applying this standard to the present case, we take for granted the District Court's calculation of the total relevant compensatory damages at $507.5 million. *See In re Exxon Valdez*, 236 F. Supp. 2d 1043, 1063 (D. Alaska 2002). A punitive-to-compensatory ratio of 1:1 thus yields maximum punitive damages in that amount. We therefore vacate the judgment and remand the case for the Court of Appeals to remit the punitive damages award accordingly.

B. JEREMY FLAX and RACHEL SPARKMAN, as the Natural Parents of Joshua Flax, deceased; Rachel Sparkman, Individually v. DAIMLYERCHRYSLER CORPORATION; and LOUIS A. STOCKELL, JR., No. M2005-01768-SC-R11-CV (July 24, 2008)

The Court's Summary:

See page 134.

Key Language from the Court's Opinion:

- DCC continues to assert three arguments against the validity of the punitive damages awarded for the wrongful death of Joshua Flax. First, DCC argues that punitive damages are not warranted in this case because the evidence was insufficient to support a finding of recklessness. Second, DCC argues that the award of punitive damages is excessive in violation of the due process standards announced by the United States Supreme Court in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), and State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003). Finally, DCC argues that the trial court violated the due process requirements of Phillip Morris USA v. Williams, ___ U.S. ___, 127 S. Ct. 1057 (2007), by allowing the jury to consider harm to non-parties when determining the amount of punitive damages to impose against DCC.

- A verdict imposing punitive damages must be supported by clear and convincing evidence that the defendant acted intentionally, fraudulently, maliciously, or recklessly. Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992). The jury in this case found that there was clear and convincing evidence that DCC's conduct was reckless. When this Court is called upon to review the reasonableness of a jury's verdict, as we are in this case, we "are limited to determining whether there is material evidence to support the verdict." Id. at 898.

- We conclude that this evidence adequately supports the jury's conclusion that there is no serious or substantial doubt that DCC consciously disregarded a known, substantial, and unjustifiable risk to the plaintiffs. The evidence that DCC executives failed to heed the warnings of the MSLT and ordered the destruction of the committee's findings is particularly compelling. Not only did DCC fail to warn customers or redesign its product, DCC hid the evidence and continued to market the Caravan as a vehicle that put safety first. Because the jury's verdict is supported by clear and convincing material evidence, we must affirm the jury's finding of recklessness. Elec. Power Bd. of Chattanooga, 691 S.W.2d at 526.

- We are unconvinced by DCC's arguments that compliance with federal regulations and custom within an industry should bar the recovery of punitive damages. It is true that compliance with FMVSS 207 entitled DCC to a rebuttable presumption that its product was not unreasonably dangerous. Tenn. Code Ann. § 29-28-104. It is equally true, for the reasons stated above, that the evidence in this case thoroughly rebutted that presumption. Tennessee Code Annotated section 29-28-104 was designed "'to give refuge to the manufacturer who is operating in good faith and [in] compliance of what the law requires him to do.'" Tuggle v. Raymond Corp., 868 S.W.2d 621, 625 (Tenn. Ct. App. 1992) (alteration in original). The statute was not designed to provide immunity from punitive damages to a manufacturer who is aware that compliance with a regulation is insufficient to protect users of the product. While evidence of compliance with government regulations is certainly evidence that a manufacturer was not reckless, it is not dispositive.

- Evidence that a manufacturer consciously disregarded substantial and unjustifiable risks to the public can, in some rare cases, overcome evidence that the manufacturer's practice was common in the industry. This is such a case. Because the jury could have reasonably concluded from the evidence presented that DCC was aware that compliance with the FMVSS 207 and the industry standard for seat design was insufficient, we hold that punitive damages were not barred in this case.

- In addition, we conclude that the punitive damages awarded by the trial court were adequately supported by the evidence and were not excessive. Therefore, we reverse the Court of Appeals' decision to overturn the punitive damage award related to the plaintiffs' wrongful death claim.

C. NICKIE DURAN v. HYUNDAI MOTOR AMERICA, INC. et al., No. M2006-00282-COA-R3-CV (February 13, 2008)

The Court's Summary:

See page 139.

Key Language from the Court's Opinion:

- Ms. Duran, representing her mother's estate, takes issue with the trial court's decision to grant the Hyundai defendants' Tenn. R. Civ. P. 50.02 motion for a judgment in accordance with their motion for directed verdict. She insists that the record contains evidence that demonstrates clearly and convincingly that the Hyundai defendants acted recklessly by delaying their internal investigation of the causes of the reported engine fires and by delaying the issuance of the recall to address the problems with the Hyundai Excel's reed valve subassembly. We disagree.

- To prevail on a claim for punitive damages, the plaintiff must show that the defendant's negligence that proximately caused his or her injury reached a substantially higher level than ordinary negligence. Punitive damages are reserved for only the "most egregious of wrongs." Cambio Health Solutions, LLC v. Reardon, 213 S.W.3d 785, 792 (Tenn. 2006); Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992). Thus, the Tennessee Supreme Court has reserved punitive damages for conduct that was so reprehensible that it must be both punished and deterred. See Culbreath v. First Tenn. Bank Nat'l Ass'n, 44 S.W.3d 518, 528-29 (Tenn. 2001); Coffee v. Fayette Tubular Prods., 929 S.W.2d 326, 328 (Tenn. 1996). In order to be entitled to recover punitive damages, the plaintiff must prove by clear and convincing evidence

that the defendant acted either intentionally, fraudulently, maliciously, or recklessly. Hodges v. S.C. Toof & Co., 833S.W.2d at 901.

- In light of all the facts, we have determined that Ms. Cook failed to produce clear and convincing evidence that the Hyundai defendants acted recklessly with regard to the problems associated with the component parts in the reed valve subassembly. No evidence was introduced, either from regulators, representatives of the automobile industry, or consumer safety experts, regarding what an automobile manufacturer's response should be in this or a similar circumstance. What the record does show is that within six months after its employees determined that the corrosion problems would worsen with the passage of time, the Hyundai defendants agreed with NHTSA to issue voluntary recall notices informing the owners of the affected automobiles of the existence of the problem and of their willingness to repair the problem at no cost. Based on this evidence, we have concluded that no reasonable person would find that Ms. Cook established that it was highly probable that the Hyundai defendants were aware of, but consciously disregarded, the potential dangers that could be caused by the corrosion of the component parts in the Hyundai Excel's reed valve subassembly.

D. GORDON C. COLLINS v. BARRY L. ARNOLD, et al., No. M2004-02513-COA-R3-CV (November 20, 2007)

The Court's Summary:

See page 126.

Key Language from the Court's Opinion:

- We have already determined that the finding of negligence must be reversed because of an omission in the jury instructions. That conclusion necessarily requires reversal of the punitive damage award.

- As explained earlier in this opinion, the jury did not find that Denim & Diamonds had any liability related to furnishing alcohol. Just as Denim & Diamonds cannot be liable for compensatory damages based on conduct related to serving alcohol, it cannot be liable for punitive damages based on that conduct. By statute, because the jury did not find that Denim & Diamonds was liable under the statutory exception to the Dram Shop Act, the jury could not have awarded and the trial judge could not have approved punitive damages against Denim & Diamonds based upon it selling alcohol to Mr. Arnold. Tenn. Code Ann. § 57-10-102. Consequently, any alleged recklessness relating to the furnishing of alcohol is not relevant to the analysis of the punitive damage award and cannot be considered as a justification of that award.

- The proof showed that Denim & Diamonds did not ignore the threat posed by Mr. Arnold driving in his impaired condition. To the contrary, the employees took significant steps to address this risk. They put a lot of time, effort and attention into deterring Mr. Arnold from driving his vehicle. The fact that once the club's employees undertook to act they did so negligently is not tantamount to recklessness.

- The conduct of Denim & Diamond's employees in attempting to prevent Mr. Arnold from driving off was simply neither misconduct nor reprehensible. While their efforts were unsuccessful, they were not reckless. Accordingly, we conclude that the award of punitive damages must be reversed.

XXI. EQUAL ACCESS TO JUSTICE ACT CASES

A. RICHLIN SECURITY SERVICE CO. v. CHERTOFF, SECRETARY OF HOMELAND SECURITY, 553 U.S. ___ (June 2, 2008)

The Court's Summary:

The question presented in this case is whether the Equal Access to Justice Act (EAJA), 5 U. S. C. §504(a)(l) (2006 ed.) and 28 U. S. C. §2412(d)(1)(A) (2000 ed.), allows a prevailing party in a case brought by or against the Government to recover fees for paralegal services at the market rate for such services or only at their cost to the party's attorney. The United States Court of Appeals for the Federal Circuit limited recovery to the attorney's cost. 472 F. 3d 1370 (2006). We reverse.

Key Language from the Court's Opinion:

- Under EAJA, "[a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust." 5 U. S. C. §504(a)(1).

- The Board held that EAJA limited recovery of paralegal fees to "the cost to the firm rather than . . . the billed rate." *Ibid*. Richlin had not submitted any evidence regarding the cost of the paralegal services to its law firm, see *ibid*., but the Board found that "$35 per hour is a reasonable cost to the firm[,] having taken judicial notice of paralegal salaries in the Washington D. C. area as reflected on the internet." *Id*., at 42a– 43a. A divided panel of the Federal Circuit affirmed. 472 F. 3d 1370… We granted certiorari. 551 U. S. ___ (2007).

- In this case, Richlin "incurred" "fees" for paralegal services in connection with its contract action before the Board. Since §504(b)(1)(A) awards fees at "prevailing market rates," a straightforward reading of the statute leads to the conclusion that Richlin was entitled to recover fees for the paralegal services it purchased at the market rate for such services.

- The Government resists this reading by distinguishing "fees" from "other expenses." The Government concedes that "fees" are reimbursable at "prevailing market rates," but it insists that "other expenses" (including expenses for "any study, analysis, engineering report, test, or project") are reimbursable only at their "reasonable cost." And in the Government's view, outlays for paralegal services are better characterized as "other expenses" than as "fees."

- We find the Government's fractured interpretation of the statute unpersuasive. Contrary to the Government's contention, §504(b)(1)(A) does not clearly distinguish between the rates at which "fees" and "other expenses" are reimbursed. Although the statute does refer to the "reasonable cost" of "any study, analysis, engineering report, test, or project," Congress may reasonably have believed that market rates would not exist for work product of that kind. At one point, Congress even appears to use the terms "expenses" and "fees" interchangeably: The first clause of §504(b)(1)(A) refers to the "reasonable expenses of expert witnesses," while the parenthetical characterizes expert compensation as "fees." There is no indication that Congress, in using the

term "expenses" in one place and "fees" in the other, was referring to two different components of expert remuneration.

- Surely paralegals are more analogous to attorneys, experts, and agents than to studies, analyses, reports, tests, and projects. Even the Government's brief, which incants the term "paralegal expenses," *e.g.*, Brief for Respondent 4, 5, 6, 7, 8, 9, 10, 11, 12, slips up once and refers to them as "fees," see *id*., at 35.

- We think *Jenkins* substantially answers the question before us. EAJA, like §1988, entitles certain parties to recover "reasonable attorney . . . fees." 5 U. S. C. §504(b)(1)(A). EAJA, like §1988, makes no mention of the paralegals, "secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client." *Jenkins*, *supra*, at 285. And we think EAJA, like §1988, must be interpreted as using the term "attorney . . . fees" to reach fees for paralegal services as well as compensation for the attorney's personal labor. The Government does not contend that the meaning of the term "attorney's fees" changed so much between §1988's enactment in 1976 and EAJA's enactment in 1980 that the term's meaning in one statute must be different from its meaning in the other. Under the reasoning of *Jenkins*, we take it as "self-evident" that when Congress instructed agencies to award "attorney . . . fees" to certain parties prevailing against the Government, that term was intended to embrace paralegal fees as well. Since §504 generally provides for recovery of attorney's fees at "prevailing market rates," it follows that fees for paralegal services must be recoverable at prevailing market rates as well.

- The Senate Report accompanying the 1984 bill remarked that "[e]xamples of the type of expenses that should ordinarily be compensable [under EAJA] include paralegal time (billed at cost)." S. Rep., at 15. The Government concludes from this stray remark that Congress intended to limit recovery of paralegal fees to attorney cost. But as we observed earlier, the word "cost" could just as easily (and more sensibly) refer to the client's cost rather than the attorney's cost. Under the former interpretation, the Senate Report simply indicates that a prevailing party who satisfies EAJA's other requirements should generally be able to "bil[l]" the Government for any reasonable amount the party paid for paralegal services.

- "Nothing in [EAJA] requires that the work of paralegals invariably be billed separately. If it is the practice in the relevant market not to do so, or to bill the work of paralegals only at cost, that is all that [EAJA] requires." *Jenkins*, *supra*, at 288 (construing 42 U. S. C. §1988). We thus recognize the possibility, as we did in Jenkins, that the attorney's cost for paralegal services will supply the relevant metric for calculating the client's recovery. Whether that metric is appropriate depends on market practice.

- Confronted with the flaws in its interpretation of the statute, the Government seeks shelter in a canon of construction. According to the Government, any right to recover paralegal fees under EAJA must be read narrowly in light of the statutory canon requiring strict construction of waivers of sovereign immunity. We disagree.

- The sovereign immunity canon is just that—a canon of construction. It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction.

- In this case, traditional tools of statutory construction and considerations of stare decisis compel the conclusion that paralegal fees are recoverable as attorney's fees at their "prevailing market

rates." 5 U. S. C. §504(b)(1)(A). There is no need for us to resort to the sovereign immunity canon because there is no ambiguity left for us to construe.

- For these reasons, we hold that a prevailing party that satisfies EAJA's other requirements may recover its paralegal fees from the Government at prevailing market rates. The Board's contrary decision was error, and the Federal Circuit erred in affirming that decision. The judgment of the Federal Circuit is reversed, and this case is remanded for further proceedings consistent with this opinion.