The Bare Bones of Bankruptcy

With Great Power Comes Great Responsibility

Short- & Long-Term Effects of TBI and CTE

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TTLA 2021-2022 President Profile

Tony Seaton

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The right referral gives peace of mind to your client. And you.

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1. We provide a TIMELY, free consultation to your referred client, family member, or friend.

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Tennessee ethics rules permit the payment of referral fees in contingent fee cases.
Our citizens, when they are serving on juries, are under attack in this country. The members of TTLA, as well as its legislative team, fight every day to preserve individual and constitutional rights. I believe the attack on the jury system with caps and other tort reform legislation is part of the same movement to limit people’s right to vote. Certain powerful interests in our societies do not trust our citizens when they serve on juries. Many of those same powerful interests do not trust voters because they cannot be trusted to vote for the right people, therefore we have voter suppression. Thank you to this organization and the staff for fighting the good fight to preserve individual and constitutional rights.

We have a wonderful organization, and I renew my offer to answer the phone calls of any TTLA member who has questions about tort law or appeals. All of you please do the same for your colleagues. Let’s help each other tilt the arc of history toward justice. Good luck to everyone, and stay safe during COVID 19, and thanks again to Theresa Grisham for her amazing work on this magazine.

Sincerely,

Donald Capparella, Editor
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What a tough year this has been. I had just finished a jury trial near the end of February 2020 when the trial courts began closing in response to the COVID 19 pandemic. No one knew how long these closures would last. Many of us speculated that it would be two to three months and at most, six months. None of us knew then that civil trials would not be held again for over a year and a half. What we did know was that our overhead costs did not go away. Many offices had to lay off staff. We all had to tighten our belts and adapt to the unknown. Our clients had to do without.

Now we are in the throes of huge backlogs with many trial courts reluctant to get things moving. It is incumbent upon us as indispensable members of our judicial system to work together to get the “wheels of justice” moving again.

The Tennessee Supreme Court issued its decision in McClay v. Airport Management Services the second day of my February 2020 trial. Many of us on both sides of the aisle (plaintiff and defense) were confident that caps on damages could not withstand constitutional scrutiny because of the language in the Tennessee Constitution which states that the “right to trial by jury shall remain inviolate.” Many of us were likewise devastatingly disappointed by the Court’s decision.

The Tennessee Legislature, unimpeded by the Tennessee Supreme Court, has continued to obstruct the ability of trial lawyers to serve our clients and to serve justice. Law offices throughout the state can no longer afford to answer simple questions about the workers compensation system in Tennessee. Injured workers are left to try and navigate an unfair bureaucratic system of denials and minimal compensation that answer to the demands of health insurance carriers. In the alternative, they can try to claim social security disability, which shifts the cost of their injuries to taxpayers as a whole. Amendments to workers compensation laws in the past decade have reduced benefits for serious life changing on the job injuries by 70-90%. The Tennessee Supreme Court has upheld this legislative scheme, never venturing to critique it.

After the law which created the workers compensation bureaucracy passed I was contacted by a prominent legislator. He asked me how lawyers representing injured workers were going to react to the changes. I told the senator that the lawyers statewide would have to quit taking cases and phone calls that were in any way related to injuries at work. His response to me was: “That wasn’t our intent.” As you may recall, trial lawyers were not asked to be a part of developing the new plan.

Although medical errors are the third leading cause of death in our country, Tennessee’s new medical malpractice act is a complicated system of steps intended to discourage lawyers from filing medical malpractice actions. This, coupled with caps on damages which limit recoveries, results in fewer lawyers with the means to seek redress for aggrieved people. While defense attorneys make hundreds of dollars per hour each month, a plaintiff’s attorney must be prepared to risk hundreds of thousands of dollars with hopes to net a capped amount, often years following the filing. The final result is that in the future only a select few cases will be filed, allowing wrongdoers in the medical community to escape accountability for their serious errors, especially in smaller cases.

Likewise, business-oriented groups do their best to have conservative judges appointed in an effort to curtail jury awards. Many of these judges abuse the thirteenth juror role and substitute their judgment for the collective judgment of twelve citizens who work diligently to promote justice as it was intended by the framers of our state constitution.

What can we do? TTLA was founded in the mid-sixties by a group of lawyers who believed it was their responsibility to help hold wrongdoers accountable. This responsibility has not changed. If anything, it is even more important today for us to keep this effort alive. We do this by increasing our ranks (signing up new members), developing relationships with our legislators, and making sure our voices are heard. If each and every member were to recruit just one other member, we would double our numbers. If half of our members would reach out and establish communications with their current legislative representatives, our influence would double. Legislators often respond better to their constituents than to lobbyists, but they cannot respond if they have not heard from you. Get involved in the appointments and elections of qualified judges. Be trustworthy and a vocal constituent to your local legislators. Do the good work.

TONY SEATON
PRESIDENT, TTLA 2021-2022

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CALENDAR OF EVENTS

2021

SEPTEMBER 30  6th Annual Paralegal Seminar .......................................................... Drury Plaza Hotel, Franklin
OCTOBER 18  TN Judicial Conference Golf Tournament...................... Indian Hills Golf Course, Murfreesboro
OCTOBER 19  Winning Your Case with a Better Memory ......................................... Online via Zoom
OCTOBER 21  Executive Comm., Board of Governors Meeting & LIFT..................... Online via Zoom and TTLA Headquarters
OCTOBER 28  Jake from State Farm: Beating Bad Faith Tactics .................. Drury Plaza Hotel, Franklin
NOVEMBER 2  Compassion Fatigue: Keeping Legal Minds Intact .................. Online via Zoom
DECEMBER 2-3  Annual Review & Ethics .............................................................. Carnegie Hotel, Johnson City

2022

FEBRUARY 28  Circle of Advocates Dinner ......................................................... Maggianos, Nashville
MARCH 1  Civil Justice Lobby Day
APRIL 7  Family Law Seminar ........................................................................ Drury Plaza Hotel, Franklin
APRIL 21  Executive Comm., Board of Governors Meeting & LIFT............. Online via Zoom and TTLA Headquarters
JUNE 15-17  2022 Annual Convention ................................................................. Hilton Hotel, Cool Springs
DECEMBER 1-2  Annual Review & Ethics .............................................................. Carnegie Hotel, Johnson City

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The Tennessee Trial Lawyers Association recently elected Tony Seaton as president for the 2021-22 term. Seaton, a Johnson City attorney, replaces John Griffith of Franklin who served as president from 2020-21. Griffith now assumes the role of immediate past president and Mark Chalos of Nashville advances to the office of president-elect.

“Tony will be a true asset to the Association and the citizens of Tennessee,” stated TTLA immediate Past President John Griffith. “As an experienced personal injury lawyer, he fights on behalf of deserving people and will do a tremendous job leading the state’s top trial attorneys as president.”

Tony Seaton is a sixth generation, upper East Tennessean who has practiced in Upper East Tennessee for over 40 years. He started his own practice 36 years ago concentrating his skills in serious injury law. In the past five years Tony and the lawyers in his firm have spent hundreds of hours per year developing state of the art trial skills through the Keenan Trial Colleges. Currently, Tony also serves as the Administrator over more than 100 instructors in the Keenan Trial Institute.

From 2012 until 2018, Tony served on the Access to Justice Commission appointed by the Tennessee Supreme Court. During that time Tony traveled across the state recruiting lawyers to start free legal advice clinics in most all of the judicial districts in the state.

Tony and his wife, Lee enjoy traveling with their 2 labradors to see their five children and two grandchildren.
The Tennessee Trial Lawyers Association (TTLA) plays an important role in the legislative process by working to ensure that Tennessee citizens are never deprived of their constitutional guarantee of access to justice. The Tennessee legislature prides itself on promoting a business-friendly environment. Many times, the interest of business conflicts with the rights of Tennessee citizens and occasionally the TN Constitution. TTLA works hard to ensure our legislators understand the impact legislation will have on the citizens of Tennessee. Due to the hard work and collaboration of the leaders of TTLA, the legislative committee, TTLA members and the lobbying team, we once again stood as a voice of reason and reliable counsel to legislators during the 2021 legislative session.

On January 12, 2021, the first year of the 112th Tennessee General Assembly began while the COVID-19 pandemic was still raging. Once again there were differences in how the House & Senate would operate. The House allowed only registered lobbyists to attend committee meetings, while the Senate decided to close off meetings and only allowed its members, staff, and the media to attend in person. As the vaccine rolled out, both the House & Senate loosened restrictions to allow more access. The 112th General Assembly adjourned on Wednesday May 5, 2021, for the year after many long debates and several conference committees where they hashed out the differences between the House and Senate.

TTLA bill filed:

- **Medical bills** – SB 321 by Gardenhire (HB 1124) by Farmer – As introduced increases the amount of medical bills that are presumed necessary and reasonable when attached to a complaint from $4,000 to $25,000.
  - The $4,000 presumption has not been increased in twenty years.
  - The bill also included a large caption*

  dealing with auto coverage to use as a defense against a collateral source bill.
  (*A caption is part of a bill that opens T.C.A. sections you want to amend in the future. All bills that were filed during the first year of session remain in the system during the two-year general assembly.)

**BILLS THAT DID NOT PASS:**

- **Premium Theft as it applies to GTLA (Collateral Source)** - SB 0861 by *Lundberg (HB 1310) by *Alexander – As introduced, sets certain limits on economic damages recoverable under the governmental tort liability act.
  - The bill was filed in response to the 2020 Tri-Cities Joint Legislative Policy, a list of legislative priorities produced by leaders in Johnson City, Kingsport and Bristol where they prioritized dealing with the “collateral source rule” as it applied to government.
  - After TTLA leadership, who had built relationships with the bill sponsors, had conversations educating them about the unfairness of the bill they did not run it this year.
  - Please help TTLA educate members of the General Assembly about the importance of the collateral source rule so that Tennesseans can continue to use full, undiscounted medical bills to prove their medical expenses instead of the discounted amounts paid by insurance companies.

- **Statutes of Limitations** - SB 1362 by *Bell (HB 1367) by *Lynn - As introduced, clarifies that a cause of action brought by a person injured by criminal conduct that is a traffic offense that is classified as a Class B or C misdemeanor or a violation of a municipal ordinance must be commenced within one year of the cause of

continued to page 9
action, not within two years as authorized for causes of action based on other criminal conduct.

- The bill was filed in response to the 2020 TN Ct. of Appeals Younger case which held that a traffic citation is a criminal charge and is applicable to extend the statute of limitations to two years.
- The bill was taken off notice in committee.

**Public Contracts - SB 0514** by *Briggs (HB 0392) by *Reedy - As introduced, enacts the “Public Contracts for Legal Services Act” to establish the process by which a political subdivision of this state may enter into a contingent fee contract for legal services.

- The US Chamber filed this bill to prohibit hiring outside counsel on a contingency fee basis to recover taxpayer money from wrongdoers. This was filed in response to the litigation against opioid manufacturers regarding the national opioid crisis.
- Tennessee’s big 4 cities, the Tennessee Municipal League, local district attorneys general and other municipalities opposed this bill.
- The bill failed in committee.

**Health Care - SB 0530** by *Briggs (HB 0635) by *Smith - As introduced, establishes a uniform definition for medical necessity and medically necessary as (A) Reasonably calculated to prevent, diagnose, correct, cure, alleviate, or prevent worsening of conditions in the patient that endanger life, cause suffering or pain, result in an illness or infirmity, threaten to cause or aggravate a handicap, or cause physical deformity or malfunction; AND (B) No other equally effective, more conservative, or substantially less costly course of treatment is available and suitable for the patient’s best interest.

- TTLA was able to work out an amendment with the sponsor to carve out the application in personal injury cases.
- Ultimately the bill failed in committee.

**BILLS THAT PASSED:**

- **Workers Compensation - PC 152** - As enacted, authorizes the court of workers’ compensation claims to award additional attorneys’ fees and costs incurred when an employer wrongfully denies a claim or wrongfully fails to timely initiate benefits to which the employee or dependent is entitled for injuries that occur between July 1, 2021, and June 30, 2023.
- The statute went into sunset on June 30, 2020 and was not able to be extended during the COVID-19 pandemic.

- **Effective Date of this bill is July 1, 2021.**

- **Asbestos - PC 265** - As enacted, specifies information that must be provided by a plaintiff in a sworn information form and included with any complaint filed in an asbestos action.

- The asbestos industry was back again with their latest attempt to delay and deny justice to asbestos victims.

- TTLA was able to amend the bill to take out the most harmful aspects.

- **Effective Date July 1, 2021.**

- **GTLA - PC 534** - As amended, broadens the definition of “governmental entity” under the Tennessee Governmental Tort Liability Act to include a nonprofit property owners association that has received a 501(c)(4) exemption and maintains more than 100 miles of roads. Entities must also; own and operate a water or sewer distribution service, appropriate funds to support a nonprofit volunteer police or fire department, manage trash pick-up services and fund and operate at least one park, dog park, recreation facility...
and walking trail and is a census-designated place according to the 2010 federal census.
- Fairfield Glade & Tellico Village are the HOAs that will benefit. They are in Lt. Governor McNally’s & Speaker Sextons district.
- TTLA was able to work with the civil justice committee members and the bill sponsors to tighten up the language so that it would only apply to these two HOAs.

• **Effective Date May 25, 2021**

• **Local Government Subrogation - PC 360** - As amended revises the provisions governing a county’s, a municipal corporation’s, and a special school district’s right of subrogation under the local authority’s group life, hospitalization, disability, or medical insurance plan.
- In 2019 there was a compromise to mirror the TennCare lien statute for local governments right of subrogation instead of eliminating the made whole doctrine completely.
- This is a rewrite of that compromise.

• **Effective Date July 1, 2021.**

• **Courts - Constitutional Challenges - PC 566** - As amended when a complaint is filed challenging the constitutionality of state statutes, includes a claim for declaratory judgment or injunctive relief AND are brought against the state, a department, agency, or commissioner acting in official capacity, the Supreme Court shall select two trial judges to sit with the presiding judge as a three judge panel to hear and decide the civil action. The panel judges shall be from each grand division.
- Several bills were filed this year in response to a ruling by a Davidson County Chancellor on voting by mail during the pandemic last year. There was a push to change the venue from Davidson County where current constitutional challenges are held.
- Originally the bill created a statewide chancery court comprised of 3 chancellors, elected statewide, to hear any lawsuits challenging the constitutionality of state statutes.
- This was a hotly debated bill that had many versions through the final days of session.

The bill that passed was a last-minute compromise between the House & Senate.

• **Effective Date July 1, 2021.**

• **Appeals by the State - PC 564** - As amended, in an action brought against this state, a department or agency of this state, or an official of this state in their official capacity that challenges the constitutionality of a state statute, the state may appeal as of right from an interlocutory order of a circuit or chancery court of this state that: (1) Grants, continues, or modifies an injunction; or (2) Denies a motion to dissolve or modify an injunction.
- Originally the bill would have banned local governments from using taxpayer money to sue the state.

• **Effective Date July 1, 2021.**

**GOING FORWARD**

TTLA will continue to fight to protect the civil justice system. Our organization, which often stands alone, strives to protect the rights of Tennessee citizens against the many well-funded special interest groups. There will never be a time when we do not have a battle before us.

We want to thank all members of TTLA for their support, dedication, and hard work throughout the year. Thank you to the members of the trial lawyer political action committee LIFT (Lawyers Involved for Tennessee) and to the Circle of Advocates who help fund our lobbying team and legislative program.

TTLA would not be able to have a meaningful presence in the General Assembly without trial lawyers being involved.

We urge all members of TTLA to get to know your local legislators and develop relationships with them. Visit their offices and invite them to visit yours. Your relationships help more than you know.

John Griffith, TTLA President
Mark Chalos, TTLA Legislative Chair & VP Middle
Lauren Brinkley, TTLA Legislative Counsel
TTLA Lobbying Team
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I. Does your client’s claim fall under ERISA?

Is your client’s insurance claim covered by the Employment Retirement Income Security Act of 1974 (“ERISA”)? ERISA is a federal law designed to provide federal oversight to employee pension plans and to provide uniform national standards rather than having different state laws control the same type of claims. Claims related to insurance provided through an employer, with a few exceptions, fall under ERISA. If your client’s claim falls under ERISA, then state law no longer controls the claim.

Your client’s claim is not governed by ERISA if she did not obtain her insurance through her employer. The rules seem pretty clear-cut, yet insurance companies often assert that non-ERISA claims are governed by ERISA. So it is important to know why your client’s claim is or is not governed by ERISA.

If your client obtained her insurance on her own, but perhaps her employer either assisted in her getting the insurance or was involved with handling the premiums, it can be challenging to determine whether ERISA applies. The Department of Labor listed four factors in its “Safe Harbor” regulation to evaluate in deciding whether your client’s plan is excluded from ERISA. In this article, I lay out some issues and arguments you are likely to see, but this is not an exhaustive list of potential arguments and issues. If you have any questions while analyzing your client’s case, please feel free to contact us and we can help you determine ERISA’s applicability.

II. The Department of Labor set out four factors to evaluate whether a plan is excluded from ERISA

The Department of Labor’s (“DOL”) “Safe Harbor” regulation, codified at 29 C.F.R. §2510.3-1(j), excludes any plan from ERISA that meets these four factors:

1. the employer makes no contribution to the policy;

2. employee participation in the policy is completely voluntary;

3. the employer’s sole functions are, without endorsing the policy, to permit the insurer to publicize the policy to employees, collect premiums through payroll deductions and remit them to the insurer; and

4. the employer receives no consideration in connection with the policy other than reasonable compensation for administrative services actually rendered in connection with payroll deduction.

Thompson v. Am. Home Assurance Co., 95 F.3d 429, 434 (6th Cir. 1996) (citing 29 C.F.R. § 2510.3 1(j)). Each factor is explained in detail below.

i. Were there any employer contributions to the policy?

In the Sixth Circuit, a “contribution” is generally understood to mean “an actual contribution in the form of a partial or full payment of premiums.” Turner v. Liberty Nat. Life Ins. Co., 2012 U.S. Dist. LEXIS 28456 at 12 (E.D. Tenn. Mar. 5, 2012). You must determine who paid the premiums for the plan. If your client paid all the premiums for the plan on her own and out of her account, then this factor is met.

Insurance companies often argue that if an employer and the employee get a discount on their premiums because each other purchased a policy, then that is a contribution and the plan would be governed by ERISA. But that is not always the case.

Gooden v. Unum Life Ins. Co. of Am is particularly instructive on this issue. 181 F. Supp. 3d 465 (E.D. Tenn. Mar 30, 2016). Dr. Gooden was a physician at Gessler clinic who bought a disability insurance policy through an insurance agent who sold insurance to specific highly compensated physicians at the clinic. Id. Unum offered a premium discount through a billing program called FlexBill, through which participants are eligible to get the discount if at least three individuals in the same
practice bought certain insurance policies and the payments were billed through the employer. \textit{Id.} The participants were individually able to receive discounts on their premiums because of multiple doctors signing up, but the employer did not negotiate for or otherwise endorse the benefits program; the discount was unilaterally offered by Unum. \textit{Id.}

When considering a motion to remand back to state court because there would be no federal jurisdiction if ERISA did not apply, the court in \textit{Gooden} addressed whether either the discount given to the group at Gessler or the remittal of payroll deductions constituted a “contribution.” The court found that it did not, holding: “a non-negotiated group discount that occurs only because premiums are paid through payroll deductions is not a contribution under the first criterion of safe harbor.” \textit{Id.} at 472.

Under \textit{Gooden}, if your client’s employer did not negotiate for a group discount then it is not a “contribution” under the first criterion of safe harbor, and this factor continues to be met.

\textbf{ii. Was your client’s participation or purchase of the policy voluntary?}

Next, you must determine whether your client voluntarily bought the policy. This factor is simple, in that if your client bought the policy on their own and was not made to do so by their employer, then the purchase was voluntary and this factor is met.

\textbf{iii. Did the employer endorse the policy in any way?}

To determine whether endorsement exists it involves looking at “the employer’s involvement in the creation or administration of the policy from the employee’s point of view.” \textit{Thompson}, 95 F.3d at 436-437. See also \textit{Helfman v. GE Group Life Ass. Co.}, 573 F.3d 383, 391 (6th Cir., 2009). If your client bought an individual disability policy from an insurance agent and their employer did not offer incentives or publicize the policies available, then this factor is also met.

If there was some employer involvement, it does not necessarily mean that this factor is not met. The Sixth Circuit adopted a “neutrality” threshold in \textit{Thompson}:

\cite{[A]s long as the employer merely advises employees of the availability of group insurance, accepts payroll deductions, passes them on to the insurer, and performs other ministerial tasks that assist the insurer in publicizing the program, it will not be deemed to have endorsed the program under 29 C.F.R. § 2510.3-1(j). It is only when an employer proposes to do more, and takes substantial steps in that direction, that it offends the ideal of employer neutrality and brings ERISA into the picture.}

\textit{Id.} at 436 (quoting \textit{Johnson v. Watts Regulator Co.}, 63 F.3d 1129, 1133 (1st Cir. 1995). Further, in \textit{Gooden} the court pointed out that the Sixth Circuit has created non-exclusive factors for a court to consider when analyzing whether an employee has ‘endorsed” the plan:

(1) Has the employer played an active role in either determining which employees will be eligible for coverage or in negotiating the terms of the policy or the benefits thereunder?

(2) Is the employer named as the plan administrator?

(3) Has the employer provided a plan description that specifically refers to ERISA or that the plan is governed by ERISA?

(4) Has the employer provided any materials to its employees suggesting that it has endorsed the plan?

(5) Does the employer participate in processing claims?


After evaluating your client’s claim using the above factors, it will become clearer whether the employer endorsed the policy.

\textbf{iv. Did the employer receive consideration or compensation in connection with your client’s purchase of an individual policy?}

If the employer did not receive any consideration or compensation in connection to your client’s purchase of a policy, then this factor is met. If your client’s employer received a discount on its premiums, then courts have given guidance to determine whether the discount amounts to receiving consideration or compensation.

Courts have held that discounts received by the employer as the result of a salary allotment agreement can put the policies at issue outside the safe harbor requirements. For example, in \textit{Alexander v. Provident Life & Accident Ins. Co.}, the court found that a negotiated discount resulting from an agreement for the employer to pay 35% of the premium could be enough to place the policy outside the safe harbor. 663 F. Supp. 2d 627 (E.D. Tenn. 2009). If your client’s employer did not negotiate the discount that it received and it did not receive the discount as a result of a salary allotment agreement like that in \textit{Alexander}, then the employer did not receive compensation or consideration and this factor is met.
Conclusion:

If your client’s claim meets all of the Safe Harbor criteria, then Safe Harbor applies and your client’s policy is exempt from ERISA. If you are unsure or have a scenario that was not addressed in this article, please feel free to contact our office and we can help you determine whether ERISA applies to your client’s claim.

ABOUT THE AUTHOR

Audrey C. Dolmovich enjoys representing people denied insurance benefits because she has a passion for helping people and appreciates getting to know her clients on a one-on-one basis. She knows that each of her clients has their own set of challenges, and it is important to her to get to know them well so that she can do the best job possible to get her clients the benefits they deserve. Audrey’s clients come to her after their lives have been turned upside down by their medical conditions and their insurance company, and she takes pride in being able to ease their burden as much as possible.

Audrey has worked for Eric Buchanan & Associates since shortly after graduating from Faulkner’s Thomas Goode Jones School of Law. During law school, she received the Best Paper award in Law & Bioethics and volunteered as a mediator in her school’s mediation clinic in small claims court in Montgomery, Alabama. She was also a member of the trial advocacy team and participated in several trial competitions including the American Association of Justice Trial Advocacy Competition. While on the trial advocacy team, Audrey was on the Board of Advocates, the Executive Director of Service, and the Mockingbird National Trial Competition Witness Coordinator. Audrey’s experience on the trial advocacy team taught Audrey how to properly advocate for her clients. She strongly believes that one of the important aspects of advocating for a client is knowing their story.

Prior to law school, Audrey attended the University of Tennessee at Chattanooga. She graduated in 2014 with a major in political science and a minor in legal studies.

When she is not representing disabled clients against big insurance companies, she spends her free time with her family, friends, and her two dogs, Johnson and Maddux.
We acknowledge the following members who support the Tennessee Trial Lawyers Association through the sustaining membership category. Each of these members contributes financially in addition to their regular dues. Without their support, it would be impossible for our Association to carry on its programs.

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At the beginning of COVID in early 2020, during a staff meeting, the suggestion was born to put a blessing box behind the law office at the Fox and Farley Law Firm in Clinton, Tennessee to help provide food for families in need.

It was such a success that the firm decided to put more blessing boxes at schools, churches and various community locations. The law firm employees reached out to folks at the schools and churches to help them fill the boxes with items that people needed during the pandemic. Fox and Farley employees built the boxes and delivered them to the schools and churches and they became self-sustaining. Other people started requesting the blessing boxes and the project grew beyond the original plan.

Blessing boxes were designed to house non-perishable food items to those in need. They are located in elementary schools, pre-schools, and churches. The boxes are located to be easily visible and have a sign saying – Leave what you can, Take what you need.

At this time, fourteen blessing boxes have been installed and there are more to come. The law firm of Fox Farley Willis and Burnette helps fill these boxes through programs and encouragement of communities support them.

The law firm is currently taking nominations for additional places to install the boxes. Great locations for blessing boxes include churches, Boys and Girls Clubs, etc. Nominate your East Tennessee location by emailing our marketing director Tina@foxandfarleylaw.com or leave a comment with your nomination.

“Don’t just count your blessings. Be the blessing other people count on.” The good folks at the law firm believe “When our community needs us most, we are doing what we believe is our best – We Help Good People Through Difficult Times.”

---

Helping Good People in Difficult Times Blessing Box Project
Fox, Farley, Willis & Burnette Law Firm / 310 North Main Street / Clinton, TN 37716 / tina@foxandfarleylaw.com
I'm very pleased to report that the Biden administration has come quickly out of the gates with a diverse set of judicial nominations. Over 25 judicial nominations have been made, and seven nominees have been confirmed by the Senate — the most confirmations at this stage of a first presidential term in over 50 years.

The Biden administration is clearly prioritizing filling the 100 plus vacancies as quickly as possible and aiming for a demographically and professionally diverse set of nominees. The vast majority of the nominees’ backgrounds include working as public defenders, civil rights attorneys, consumer advocates, and labor lawyers.

The nominees include trial attorneys Margaret Strickland (nominated to the U.S. District Court for the District of New Mexico) and Tana Lin (to the U.S. District Court for the Western District of Washington), former trial attorneys Judge Jane M. Beckering and Chief Judge Shalina D. Kumar (nominated to the U.S. District Court for the Western and Eastern District of Michigan) and labor attorney Jennifer Sung (nominated to the Ninth Circuit Court of Appeals). With diverse experience and civil justice backgrounds, these nominees understand the importance of all people having equal access to justice under the law.

AAJ continues to work with our members, a broad coalition of advocacy organizations, the Senate, and the Biden administration to ensure that individuals who have represented Americans in every walk of life are nominated to the federal bench.

**Good News on Trucking**

As many of you know, the federal trucking insurance minimum was set in 1980 at $750,000 per crash and has not been increased in over 40 years, not even to keep pace with inflation. Now, I have some good news to report in our continued fight on this issue that is important to so many of you and your clients.

A provision to raise the insurance minimum to $2 million was included in the base text of the U.S. House surface transportation bill. AAJ fought to keep that provision in the bill, and I am very pleased to report that the House has now passed the bill.

Raising the federal trucking insurance minimum will provide true justice for your clients and an economic incentive for trucking companies to operate safely. AAJ will not rest till we remedy this ill-conceived policymaking and win justice for your clients. Watch this space for updates soon.
Ending Forced Arbitration

Ending the rigged system of forced arbitration remains a top priority for AAJ. We continue to advance this issue, expose the lack of diversity among arbitrators, and advocate for passage of the Forced Arbitration Injustice Repeal (FAIR) Act which has been reintroduced in both the House and Senate. Please contact your members of Congress today at https://p2a.co/61QaKae to urge that they support the bill.

Also, I am pleased to report that on July 14, a bipartisan group of legislators — Senators Lindsey Graham (R-SC), Kirsten Gillibrand (D-NY), and Dick Durbin (D-IL) and Representatives Morgan Griffith (R-VA), Cheri Bustos (D-IL), and Pramila Jayapal (D-WA) — introduced the Ending Forced Arbitration of Sexual Assault & Sexual Harassment Act to prohibit the use of forced arbitration in sexual assault and sexual harassment claims. I will keep you informed as this important legislation progresses.

Federal Rules Update

We will continue to keep you updated on federal rule changes, as the same rules often are adopted at the state level.

Important Informal Comment Period – Open Now

A Discovery Subcommittee of the Advisory Committee on Civil Rules has requested public comments on privilege log practice as part of an informal comment period that runs from now until August 1, 2021; however, comments can be submitted after this date. The subcommittee is considering whether to update Rule 26(b)(5)(A) regarding privilege logs. AAJ knows that there are many concerns related to privilege logs and wants members to make their concerns known. We encourage you to write and submit a comment on your firm's letterhead outlining any issues or problems with privilege logs that you want the committee to be aware of. For more information, including how to submit a comment, please email Sue Steinman at susan.steinman@justice.org or Amy Brogioli at amy.brogioli@justice.org.

Fighting for You and Your Clients

Thank you for your continued support. Despite these difficult times, AAJ continues to fight all attempts to deny access to justice. We will keep you informed about important developments and welcome your input. You can reach me at advocacy@justice.org.
Part one of “The Bare Bones of Bankruptcy” series discussed the minimum that must be done if your personal injury client files bankruptcy. Part two will explain the process a personal injury lawyer must take to not run afoul with the Federal Bankruptcy Court when the defendant files for bankruptcy relief.

Below is a quick refresher on the various types of bankruptcy. While there are many forms, Chapter 7 and 13 bankruptcies are the most common types that personal injury lawyers will experience.

**Chapter 7** - Asset Liquidation

**Chapter 13** - Repayment Plan (Individuals and Married Couples)

**Chapter 11** - Large Reorganization (Businesses)

**Chapter 12** - Family Farmers

**Chapter 15** - Foreign Cases

**Chapter 9** - Municipalities

### Chapter 7 Bankruptcy

Chapter 7 bankruptcy allows individuals to liquidate their assets to pay their existing debts. A court appointed Trustee reviews the estate of the debtor to determine if there are assets worth liquidating. The majority of Chapter 7 cases are “no asset” cases. The debtor still receives a discharge from his debts because most debtor’s assets will fit under their state’s allotted exemptions shielding their assets from liquidation.

### Chapter 13 Bankruptcy

Chapter 13 Bankruptcies are repayment plans primarily for individuals and married couples. The debts are usually paid back over a three-to-five-year period with the Debtor’s disposable income. *Proceeds from a personal injury settlement or verdict must be disclosed and almost always have to be paid into the case.* A Trustee is appointed to receive payments and pay creditors.

### The Automatic Stay

Bankruptcy Code Section 362 discusses the automatic stay. It has been said that the automatic stay is one of the most powerful laws in the United States Code. Immediately upon the filing of a bankruptcy, the automatic stay is invoked. The Stay does exactly as it sounds; it “stays” certain creditors and governmental entities from taking actions deemed collection efforts against a creditor. This means creditors cannot sue, garnish wages, assert a deficiency, repossess property, etc. If a creditor violates the automatic stay, they may be ordered to pay punitive damages, sanctions, and/or attorney’s fees. In some situations, the automatic stay is not imposed after filing Bankruptcy, but for personal injury claims/cases, the stay will be applicable to your client and is in place immediately at the filing of the bankruptcy.

So, what does this mean for your client? You MUST file a motion and obtain relief from the stay. If you properly file a Motion for Relief and the bankruptcy Judge grants your Motion, the automatic stay can be removed or temporarily modified so that your client may continue pursuing their personal injury claim. Check your local bankruptcy court’s website and local rules. Generally, they have template forms for a Motion and Order for Relief from Stay. My office has all the forms needed to accomplish this as well.

Typically, the Defendant’s personal obligation on your personal injury claim will be discharged at the end of their bankruptcy case. However, you are still allowed to pursue the personal injury claim, upon relief from the stay, to pursue the debtor’s insurance.

**In Re Morris** explains this perfectly. In *Morris*, a creditor had a personal injury claim against the debtor who had filed for chapter 7 bankruptcy. The Court decided that a Bankruptcy Discharge did not erase an insurance company’s liability. “Despite the fact that 11 U.S.C. § 524(a)(2) prohibits a creditor from attempting to hold a debtor personally liable for a pre-petition debt, it does not preclude a determination of the debtor’s liability on the basis of which indemnification would be owed by an-
other party.” *In re Morris*, 430 B.R. 824 (Bankr.W.D.Tenn.2010). So, just because the debtor filed for bankruptcy does not mean your client no longer has a case.

**Proof of Claims**

A proof of claim (Official Form B10) is the form used to note the amount owed (if determined) by the debtor as of the date of the filing of the bankruptcy. The creditor/personal injury plaintiff must file the form with the bankruptcy court where the case was filed. Just because there is not an agreed upon amount owed in the personal injury case does not mean you cannot file a proof of claim. You are still permitted to file claims for contingent and/or unliquidated debts.

As discussed earlier, a Chapter 13 is a repayment plan. You should always file a Proof of Claim in a Chapter 13 case even if you do not have a judgment. Chapter 13 bankruptcies can last up to five years. If you obtain a judgment in excess of the insurance limits within those five years, there may be some additional funds that were paid into the bankruptcy case that could be disbursed to your client. However, if you do not file the Proof of Claim on time, your client will be barred from collecting those funds.

In a Chapter 7 Bankruptcy, a trustee will review the Debtor’s estate and determine if there are assets available to be liquidated. If there are assets available for liquidation, your client will receive notice of this. If your client receives such notice, you should always file a Proof of Claim even if the amount owed has not yet been determined. The trustee will hold those funds until the resolution of your case in the event of an excess judgment.

Bankruptcy Rule 3002 “Filing Proof of Claim or Interest” outlines the rules surrounding the deadlines and requirements for a Proof of Claim. Rule 3002(c) requires you to file the proof of claim not later than 70 days after the order for relief under Chapter 13 and not later than 90 days after the order for relief is entered in Chapter 7 cases. There are some exceptions for certain types of creditors but they are not applicable to personal injury cases.

**Reopening the Bankruptcy Case**

As you are well aware, the claim in a personal injury suit arises when the injury takes place; the day the statute of limitations begins to run. That is when the claim or “debt” is originated for bankruptcy purposes. Why is this important? Often times, a debtor/personal injury defendant may file a Chapter 7 Bankruptcy and it closes before the statute of limitations runs in the personal injury case.

Even if the Chapter 7 is closed, the automatic stay still prohibits you from proceeding with any type of collection efforts such as filing suit. So, what must you do? As soon as you find out the debtor/personal injury defendant has filed for bankruptcy and it has already closed, you must file a Motion to Reopen the case for the purposes of filing a Motion for Relief from the Stay. If you do not, you run the risk of a Motion for Sanctions against you for violating the automatic stay. You can find most of these template forms on your local bankruptcy court’s website.

**Review the Petition**

The Bankruptcy Petition is a collection of documents required to be filled out by the Debtor in order to get relief from the Automatic Stay. As part of the petition, there are schedules that disclose the debtor’s assets and financial information. Additionally, the Statement of Financial Affairs further breaks down the debtor’s financial status. Often times, Chapter 13 cases are dismissed because the debtor stops paying into the case so you may find good nuggets of information that you may use in building your personal injury case.

Additionally, you may find information that can be used for impeachment purposes. For example, you may see other existing or prior law suits the defendant has been a part of that could be relevant to your case. In the Schedules, you will see a great snapshot of the Debtor’s financial position, so you can decide if it is worth pursuing an excess judgment or not.

In summary, this is meant to be the “Bare Bones” of what you must do in the event the personal injury defendant files bankruptcy. As with any area of law there are some exceptions to the imposition of the Automatic Stay and the necessity of filing a Proof of Claim. However, by following the process given above, you should be able to avoid the risk of running afoul of the Federal Bankruptcy Court and will continue breathing life into your client’s personal injury case. Stay tuned for part 3 of The Bare Bones of Bankruptcy which will discuss miscellaneous matters regarding personal injury cases and bankruptcy and strategies to make your client’s debt non-dischargeable.

**Checklist if the Personal Injury Defendant Files Bankruptcy**

- File Motion to Re-open if Bankruptcy case closes prior to suit initiation.
- File Motion for Relief from Automatic Stay
- File Proof of Claim (Remember Deadlines!!!)
- Review the Schedules
- Review the Statement of Financial Affairs

*continued to page 23*
Checklist if your Client Files Bankruptcy (See Part 1 for detailed analysis)

- Statement of Financial Affairs lists personal injury case (Question 9 on SOFA)
- Statement of Financial Affairs lists property loss (Question 15 on SOFA)
- Pending personal injury claim is listed on Schedule B
- Pending personal injury claim is exempted on Schedule C
- File Motion to Employ you as personal injury attorney
- File Motion to Substitute Trustee as Party in personal injury case (State Court Filing)
- File Motion to Approve Settlement Proceeds

ABOUT THE AUTHOR

Joshua Cantrell serves as an Associate Attorney at Griffith Law in Franklin, TN. He joined the firm in December 2017 as a Case Manager while completing law school and began practicing law in October 2019.

He is a summa cum laude graduate of Bryan College with a B.S. in Business Management. He received his law degree from Nashville School of Law in May 2019 graduating number seven in his class.

From 2007 to 2013, Joshua served in both the Army and Army National Guard as a paralegal. From 2011 until joining Griffith Law, Joshua served as paralegal and office manager for a consumer bankruptcy firm where he dealt with clients directly in their bankruptcy cases.

Joshua currently serves as Chairman for the Membership Committee for the Tennessee Trial Lawyers Association. He is also an active member of the Williamson County Bar Association and the American Association for Justice.

Outside of the law, Joshua loves to travel and experience new foods and restaurants. In his spare time, he enjoys taking on small wood working projects and watching sports. He tries to live life by one of his favorite quotes from Siqi Chen. “Life is short. Do stuff that matters.”
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TTLA is also your partner in facing the challenges of an evolving legal market, providing the research and education to help guide you through the coming challenges.

Check out these MEMBERSHIP BENEFITS:

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TTLA plaintiff members are offered specialized listserves and document banks. With the listserves, members can instantly get assistance from other members on how to handle specific cases, answer complicated law issues and find experts.

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TTLA is consistently representing the needs of your clients in the legislature and educating Tennesseans on the importance of the justice system. With the help of the Circle of Advocates, TTLA hires several top contract lobbyists who represent TTLA on Capitol Hill. TTLA sponsors proactive legislation to promote the civil justice system as well as opposes adverse bills.

AMICUS
TTLA Amicus Curiae Committee works to keep abreast of important judicial decisions. They review cases and file briefs involving civil issues that have a far-reaching impact beyond the isolated facts of the case. TTLA also provides a moot court experience for appellate cases.

CONNECTING
TTLA hosts local networking events across the state several times a year. These events give members a chance to socialize with attorneys and judges from their area.

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TTLA members have access to a variety of sponsor partners who can provide services specific to civil justice issues. These include expert witnesses, financial assistance, marketing and investigations.

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Serving the needs of today’s lawyer
# MEMBER APPLICATION

**MEMBER INFORMATION**

*Please complete all applicable sections for your level of membership and return the application to:*

**Tennessee Trial Lawyers Association**

629 Woodland St. Nashville TN, 37206

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My practice is approximately ____% Plaintiff ____% Defense (If Defense: ____% Criminal ____% Civil).

Please indicate your gender (optional): [ ] Male [ ] Female

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It is often important to identify members who are constituents in different legislative districts in order to more effectively communicate with lawmakers regarding civil justice issues. Your response here will be greatly appreciated.

State House Dist. # State Senate Dist. #

(This information can be found on your voter registration card)

Political party affiliation (please check one): [ ] Democratic [ ] Republican [ ] Independent
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Credit Card enrollment in Tennessee Trial Lawyers Assoc. is maintained automatically until notice is received of the member’s intention not to renew.

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- Sustaining Members in good standing are eligible for complimentary attendance at all CLE events sponsored by the association, with the exception of Annual Convention.
- Season Pass Members in good standing are eligible for complimentary attendance at all CLE events sponsored by the association.

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(Your signature below authorizes TTLA to keep you informed of association programs and benefits via phone, fax, email and USPS unless TTLA is notified otherwise.)

ATTORNEY: I am a licensed attorney and subscribe to the purpose of the Tennessee Trial Lawyers Association. I hereby apply for membership.

Signature: ___________________________________________
I was referred to TTLA by _____________________________

PARALEGAL: I hereby certify that I am a paralegal who is qualified through education, training and/or experience to perform substantive legal work under the direction of an attorney. The majority of my present work (over 50%) is on behalf of the plaintiff and is in accordance with the purpose of Tennessee Trial Lawyers Association.

(Signature - Paralegal Applicant) ____________________________
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Our firm’s mantra is that truck wrecks cannot be treated like car wrecks. The skill required to operate a commercial motor vehicle is a prime example of how a truck wreck is different from a car wreck. A practitioner need only look to the Federal Motor Carrier Safety Regulations for support that operating a tractor-trailer requires more skill.

Under the Federal Motor Carrier Safety Regulations, a commercial motor vehicle is defined as: “Commercial motor vehicle means any self-propelled or towed motor vehicle used on a highway in interstate commerce to transport passengers or property when the vehicle — (1) Has a gross vehicle weight rating or gross combination weight rating, or gross vehicle weight or gross combination weight, of 4,536 kg (10,001 pounds) or more, whichever is greater ...” FMCSR 390.5. Commercial motor vehicles are further categorized by the type of license required to operate each. These designations are:

- Class A license, a combination vehicle with a gross motor vehicle weight of over 26,001 pounds;
- Class B license, a single motor vehicle with greater than 26,001 pounds or a vehicle towing a vehicle not in excess of 10,000 pounds gross motor vehicle weight; and
- Class C designation, a single vehicle less than 26,001 pounds or is towing a vehicle less than 10,000 pounds.

Tennessee Commercial Driver’s License Manual Section 1, page 1-1.

A person cannot operate a commercial motor vehicle without passing the necessary testing and receiving an appropriate license. See id.

Tennessee defines the standard of care as “negligence is the failure to use ordinary or reasonable care. ... failure to do something that a reasonably careful person would do, under all of the circumstances in this case ...” T.P.I. 3.05 (20th ed. 2020). A practitioner should look to the phrase “… a reasonably prudent person would do” under the circumstances of their case.

Under the FMCSR, a commercial motor vehicle operator must possess knowledge in 20 areas of operation of a motor vehicle. See FMCSR 383.111. A commercial motor vehicle operator must have the following skills:

(a) **Pre-trip vehicle inspection skills.** Applicants for a CDL must possess the following basic pre-trip vehicle inspection skills for the vehicle class that the driver operates or expects to operate:

(1) **All test vehicles.** Applicants must be able to identify each safety-related part on the vehicle and explain what needs to be inspected to ensure a safe operating condition of each part, including:

   (i) Engine compartment;
   (ii) Cab/engine start;
   (iii) Steering;
   (iv) Suspension;
   (v) Brakes;
   (vi) Wheels;
   (vii) Side of vehicle;
   (viii) Rear of vehicle; and
   (ix) Special features of tractor-trailer, school bus, or coach/transit bus, if this type of vehicle is being used for the test.

(2) **Air brake equipped test vehicles.** Applicants must demonstrate the following skills with respect to inspection and operation of air brakes:

   (i) Locate and verbally identify air brake operating controls and monitoring devices;
   (ii) Determine the motor vehicle’s brake system condition for proper adjustments and that air system connections between motor vehicles have been properly made and secured;
   (iii) Inspect the low-pressure warning device(s) to ensure that they will activate in emergency situations;
   (iv) With the engine running, make sure that the system maintains an adequate supply of compressed air;
   (v) Determine that required minimum air pressure build up time is within acceptable limits and that required alarms and emergency devices automatically deactivate at the proper pressure level; and
   (vi) Operationally check the brake system for proper performance.
(b) Basic vehicle control skills. All applicants for a CDL must possess and demonstrate the following basic motor vehicle control skills for the vehicle class that the driver operates or expects to operate:

1. Ability to start, warm up, and shut down the engine;
2. Ability to put the motor vehicle in motion and accelerate smoothly, forward and backward;
3. Ability to bring the motor vehicle to a smooth stop;
4. Ability to back the motor vehicle in a straight line, and check path and clearance while backing;
5. Ability to position the motor vehicle to negotiate safely and then make left and right turns;
6. Ability to shift as required and select appropriate gear for speed and highway conditions; and
7. Ability to back along a curved path.

(c) Safe on-road driving skills. All applicants for a CDL must possess and demonstrate the following safe on-road driving skills for their vehicle class:

1. Ability to use proper visual search methods;
2. Ability to signal appropriately when changing direction in traffic;
3. Ability to adjust speed to the configuration and condition of the roadway, weather and visibility conditions, traffic conditions, and motor vehicle, cargo and driver conditions;
4. Ability to choose a safe gap for changing lanes, passing other vehicles, as well as for crossing or entering traffic;
5. Ability to position the motor vehicle correctly before and during a turn to prevent other vehicles from passing on the wrong side, as well as to prevent problems caused by off-tracking;
6. Ability to maintain a safe following distance depending on the condition of the road, visibility, and vehicle weight;
7. Ability to adjust operation of the motor vehicle to prevailing weather conditions including speed selection, braking, direction changes, and following distance to maintain control; and
8. Ability to observe the road and the behavior of other motor vehicles, particularly before changing speed and direction.

These skills are similar to what is required in a regular motor vehicle; however, tractor-trailers can be as heavy as 80,000 pounds. The skill necessary to safely operate them is different. For example, a regular motor vehicle driving 55 mph can stop in 240 feet. A tractor-trailer requires over 450 feet. See Tennessee Driver’s License Manual p.109. In addition, the Tennessee Driver’s license manual recommends that a driver use the basic speed rule of 2-4 seconds to keep a safe distance to stop. See Tennessee Driver’s License Manual p.48. A tractor-trailer driving over 40 mph, must have at least 5 seconds. See Tennessee Commercial Driver’s License Manual, Section 2.7, p.2-16. A commercial motor vehicle operator must also add an additional second for every 10 feet over 40 feet to the following distance. See id.

From 2016 to 2020, 5,454 individuals died on Tennessee Roads. Of the 5,454 killed, 729 (over 13%) were killed in crashes involving commercial motor vehicles and busses. See https://www.tn.gov/content/dam/tn/safety/documents/crash_stats/Historical_Fatalities_2016_2020.pdf. This percentage is eye-popping given there are 2,185,229 cars registered in Tennessee and only about 2,000,000 tractor-trailers operating in the United States. https://www.statista.com/statistics/196010/total-number-of-registered-automobiles-in-the-us-by-state/ and https://www.truckinfo.net/trucking/stats.htm.

Tennessee recognizes the doctrine that the greater the risk/harm, the greater care is needed to avoid the risk. See Louisville & N.R. Co. v. Fort, 80 SW 429, 434 (Tenn. 1904). Based on the statistics provided, the harm that can come from an 80,000-pound tractor-trailer hitting a normal vehicle, a practitioner may argue successfully that a tractor-trailer driver must use a higher standard of care while driving.

This heightened standard of care for a tractor-trailer driver has been recognized by various courts outside of Tennessee. Louisiana law recognizes that commercial truck drivers must exercise a higher standard of care than regular car drivers. See Davis v. Witt, 851 So.2d 1119, 1128-29 (La. 2003). Other courts have rejected this approach and stated, “all drivers, regardless of class, are held to the same standard of care under the circumstances.” See State, Dept. of Transp. v. Robbins, 246 P.3d 864 (Wyo. 2011). A court in Oklahoma has held the proper standard of care is to compare a commercial truck driver to other commercial truck drivers. Ferrell v. BGF Global, LLC, 2018 WL 878621, *4 (W.D. Okla. 2018).

While I would prefer the heightened standard of care model, in Tennessee the comparison of commercial truck drivers to other commercial truck drivers will probably be the proper argument to a court. Practitioners must be mindful to properly ask the jury to compare a commercial truck driver with how a prudent commercial truck driver would drive. The practitioner must use an expert witness to make this point.

An expert is needed to explain industry standards and the proper standard of care for commercial truck drivers because the everyday person does not drive a tractor-trailer. Under Tennessee Rule of Evidence 702:

continued to page 31
If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

“An expert must identify and explain the standard of care applicable to a specific case notwithstanding the existence of even uniform guidance.” See Benedict v. Hankook Tire Company, 286 F.Supp.3d 785, 795 (E.D. Va. 2018). Even with a uniform standard such as the Commercial Driver’s License Manual, an expert is needed to explain the rules of the Manual as well as industry implementation of such. “The common usage of a business or occupation is a test of care or negligence and is a proper matter for consideration in determining whether or not sufficient care has been exercised.” Lohr v. Zehner, 2014 WL 2832192, *2 (M.D. Alabama 2014) (quoting Klein v. Mr. Transmission, Inc., 318 So.2d 676, 680 (Ala. 1975)).

In conclusion, in any case where there is an industry standard that is outside the normal everyday knowledge of a juror, the practitioner may make a case for a heightened standard of care if the danger/harm is great. If not this argument, the practitioner may argue that a heightened standard of care is not being asked for but rather the argument of circumstance is being requested. The practitioner is asking for apples to be compared with apples, the comparison of people within the specialized area. Either argument will require an expert or the practitioner cannot make the request. Good luck.

ABOUT THE AUTHOR

Danny Ellis works with referral lawyers all across the country focusing on tractor-trailer, bus, and commercial vehicle litigation. Danny is board certified by the National Board of Trial Advocacy in Truck Accident Law. Danny, using his 20 years of trial experience, has already obtained great recoveries for clients in states such as Tennessee, Georgia, Arkansas, Washington, Iowa, Oklahoma, Arizona, and South Dakota. Danny is currently licensed in Tennessee, Georgia, Washington, and Arkansas. Danny currently serves as the dean of the deposition college in the prestigious, Keenan Trial Institute. Danny has also authored the Tennessee chapter in the book, Negligence and Purpose, Elements and Evidence, The Role of Foreseeability in the Law of Each State. ISBN 978-0-9980073-3-5 (2018).

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When a person is struck in the head, the force of the blow to the skull and the brain tucked inside may result in what is known as a traumatic brain injury (TBI). TBIs can occur from any number of activities and incidents, including vehicular crashes, assaults, and full contact sports.

Athletes participating in many sports, particularly contact sports such as football, hockey, and soccer, are consistently exposed to hard hits to their heads. There has been an extended history of athletes, both professional and amateur, that have experienced such material injuries. Even children and adolescents that play full-contact sports are at risk - accounting for over 21% of all traumatic brain injuries suffered in the U.S. each year.

The following sports or activities that contribute to the highest number of estimated head injuries treated in the U.S.: cycling, football, baseball or softball, basketball, soccer, skateboarding, hockey, and rugby. Among children ages 14 and younger, head injuries are most commonly caused by playground equipment, football, basketball, cycling, baseball or softball, soccer, swimming, and trampolines. Well-fitted helmets or protective headgear is recommended for preventing the risk of head injuries and TBIs.

While there have been continued efforts to reduce the number and severity of TBIs in sports through advanced helmet technology and rule changes, these injuries are still occurring at a frightening level. According to the CDC, it is estimated that 1.7 to 3.8 million traumatic brain injuries are suffered each year in the United States. Around 10% of these TBIs are due to contact sports and other recreational activities.

At the time of impact, these injuries are damaging to the brain and skull and may additionally cause long-term damage to the brain. In particular, Chronic Traumatic Encephalopathy (CTE)
has been often diagnosed, which is caused by repeated head traumas. CTE is characterized by long-lasting, intense alterations of the function and structure of the brain. The occurrence of CTE and its effects and severity are highly variable depending on the person. While there is much to be learned about CTE, it is believed that this variability may be due to genetics, lifestyle, and other factors.

Several of our childhood sports heroes have suffered after their professional careers ended due to the repeated brain traumas that they experienced in their playing days. Football players have been most notably identified as being hugely affected after they move past the gridiron. These athletes may endure hundreds of thousands of head traumas over the course of their careers. The head traumas themselves do not necessarily need to be dramatically jarring, and even seemingly non-violent blows to the head have an effect when occurring with frequency. A football player can be subjected to numerous head traumas during one individual game.

One article, published by The New York Times in 2017 titled “110 NFL Brains” cited a study conducted by a neuropathologist that examined the brains of 111 deceased NFL players. Amazingly, 110 of them were found to have CTE. While the sample of brains examined in the study were subject to some selection bias, there is no doubt that retired athletes are experiencing the symptoms of CTE in large numbers. At present, CTE can only be formally diagnosed as part of an autopsy but it can be suspected based on symptoms that one is incurring.

What does a brain look like after a TBI?

The image above is reflective of a brain following a significant impact - the initial stage of first-time brain trauma. This brain shows extra-axial (outside the brain) and intra-axial (inside the brain) hemorrhages. It also includes scattered contusions. There is increased intra-cranial pressure and brain swelling evidenced by the compressed ventricle.

Some of the physical symptoms that one may experience following a TBI include loss of consciousness, vomiting, loss of coordination, headaches, seizures, infections, altered cognitive abilities, profound confusion, and weakness in extremities.

Imagine suffering this kind of trauma multiple times during the course of a sports game. Now imagine how many games a professional athlete plays in a year, including practices. A reminder that the illustration above shows damage after just one damaging impact.

What happens to the brain after a TBI?

When someone suffers a direct blow to the head, there is severe damage to the internal tissue and blood vessels. The mechanism of this kind of damage and bruising is called coup-contrecoup, which occurs on the location where the head was hit (coup), and then on the opposite side of that injury (contrecoup). The trauma is suffered when both areas are impacted, as the brain is jolted against the inside of the skull. This can lead to internal bleeding, swelling, and bruising - all components of a TBI.
The next image in the series shown above, is reflective of a brain injury that has evolved over time. There are hemorrhagic contusions throughout the brain, and there is increased intra-cranial pressure and brain swelling indicated by the compressed ventricle and loss of sulci. Frequently, the brain injury evolves days after the initial trauma.

**What does a brain look like with CTE?**

This last image, illustrating CTE, shows decreased brain volume and atrophy demonstrated by the enlarged ventricles and the continued loss of sulci. The gray and white matter junction is less distinct and shows thinning of the cortex. The elements of CTE are exhibited by all of those that are afflicted with the disease, but the presentation and degree of CTE varies by subject.

**Symptoms of CTE**

These symptoms vary from person to person, however there are some common issues that someone with CTE may suffer:

- Short-term memory loss;
- Mood swings, including anxiety, depression, and severe frustration;
- Difficulty focusing; and
- Disorientation and confusion (long-term: dementia).
- Future progression of CTE can result in long-term cognitive and behavioral deficits including severe memory loss, muscle tremors, and slurred speech.

**Can the brain heal after trauma?**

Many studies have been conducted about the likelihood of recovery after someone has suffered from a TBI. Unfortunately, once brain cells are damaged or even destroyed it is highly unlikely that they will be regenerated.

With that said, some recovery can be made. Through therapy and rehabilitation, the brain can learn how to make new connections, and even reroute information effectively to avoid any areas that are damaged. Each person and injury is different, so it is difficult to estimate the length of time it would take to make any level of recovery. Most people that suffer severe TBI end up having to work through rehabilitation for the rest of their lives.

**How can someone recover from a TBI?**

Since some amount of recovery is possible, there are a number of strategies that can be put into place to rebuild regular abilities and quality of life. Although many things factor into success of treatment (such as severity of injury, overall patient health, financial or familial support), positive community involvement and positive reinforcement goes a long way in increasing the likelihood of a successful recovery. Although a patient may not live the same life they did before the incident, with the right support and rehabilitation they can reclaim physical, psychological, and social independence.

An all-encompassing TBI rehabilitation program will often include re-learning a number of skills (depending on brain damage suffered), including:

- Psychological and emotional management (through therapy);
- Basic cognitive skills (such as speech and writing);
- Mobility (walking, general movement);
- Pain management (through medications or physical therapy and strengthening);
- Self-care (grooming, bathing, dressing, skin care, nutrition, eating);
- Ongoing care (finances, family support, discharge plans).

These components all work together in rebuilding a better quality of life for the patient, and are achieved through regular, ongoing care by medical professionals.
Demonstrating TBI and CTE Damages in Legal Proceedings?

In brain injury cases, it is vital to team up with experts that really understand the medical effects and consequences. Collaboration with radiologists, neurologists, and neuropsychologists helps to ensure that the message you are communicating is valid and clear and will hold up in court if need be.

Visual medical images that are well-designed with color details and labeling, really help to show the severity of TBI and CTE. Even something as simple as colorizing a brain scan will add a powerful element in clearly communicating the details of these damages. Other methods of showing these injuries can include creating brain “slices” (which allow the viewer to show multiple levels of damage), or a 3D brain map (animated to show the progression of issues).

Illustrating these injuries in a visual form helps to break down complex and difficult-to-read brain scans into a simpler form, making the details more memorable and easier to understand.

Legal proceedings related to TBI and CTE

A number of famous lawsuits have occurred due to the connection between football players and CTE injuries. Since so many NFL pros and NCAA players have suffered severe brain damage and mental health issues, there are numerous studies that have been conducted to gain a better understanding of the long-term effects.

These lawsuits have brought about a lot of positive changes, such as technological advancements in protective head gear and helmets along with new guidelines, and requirements set in place for recovery time before returning to play. With certain states and schools there are procedures that must be followed (such as allotted time to rest and heal, a doctor’s note) in order for an athlete to participate in these sports or activities again.

However, since many athletes are driven to excel in their sport many injuries are not reported or well documented. And although great strides have been made with these changes in requirements, numerous brain injuries are still suffered by athletes as a result of playing full-contact sports.

These lawsuits tie to the causation and liabilities related to TBI and CTE injuries that have befallen athletes. Attorneys will find that utilizing medical illustrations, colorized films of MRI’s or CT scans, or other visuals help to clearly show the danger and seriousness of traumatic brain injuries to varied audiences.

ABOUT THE AUTHOR

Jordan Halperin is the CEO of High Impact, in Centennial, CO. High Impact is a team of expert medical illustrators, skilled forensic animators, and talented designers that create interactive presentations and powerful visuals to help attorneys accurately communicate their stories and ultimately win cases. As both a leader of investor-led businesses and as a middle-market Private Equity executive, Jordan has helped develop innovative client-focused solutions that have resulted in repeated massive growth. Jordan is also an eager marathoner who enjoys the nearly year-round training required to try to break his PR. Jordan can be reached at jhalperin@highimpact.com or at (720) 874-5409.

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When I heard my friend Bill Walk had written a book, suffice it to say I was impressed he could find the time. After reading the book, I think he may have found a way out of this rat race we call the practice of law. In Holes in the Souls of his Gucci Loafers, we are introduced to Ben Jennings, a likeable, brash young medical malpractice attorney as he encounters the intersection of several life and practice changing events, any one of which would be enough to send most of us over the edge, let alone all of them at once. As the story unfolds, Ben somehow manages to grapple with each disaster and keep his sanity.

To begin, he has agreed to take on a medical negligence case for a client who has placed her entire faith in humanity on Ben. It is a bad baby case, and anyone who has handled one of those can attest, you get invested real fast in the clients. Ben begins the daunting task of preparing for trial, laying out his strategy, and hoping against hope to pull out a win. To compound his angst, he learns that his law partner has been engaged in an all-out fraud and leaves the mess for Ben to deal with and vanishes. Dozens of clients (that Ben was unaware of) are affected, and they are out for blood. If that were not enough for four lawyers to bear, Ben’s daughter is in the midst of full-on mental breakdown and Ben’s ex-wife has to summon him to deal with her at all hours of the day or night. Ben is her lifeline, and he is torn between duty and family. And finally, he is broke. Just because he is broke does not mean that the expert witness he needs will cut him a break. Ben has to make some rather unusual arrangements to secure the financing necessary to get the case to trial, to have a shot at the win. Bill masterfully introduces the reader to a cast of characters that are rich in texture and complexity, and we then get to see how they all fit into the ever-changing events as the story takes shape and comes to life. Anyone familiar with the Memphis bar may be able to recognize some of the characters by the way that they interact and carry themselves both in court and out. Anyone who has seen Bill in action will recognize how Ben masterfully tries the case, as the courtroom scenes in the book are true to Bill’s swaggering courtroom approach in real life. An unexpected side note about the book is that if you are not starving by the end, you should be. Bill uses the rich cultural backdrop of Memphis’ many and varied restaurants and cafes as their own characters in the book. If nothing else, you will have a ready-made list of places to eat the next time you are in Memphis. I highly recommend that you pick up a copy. It is a great read.

You can order this book on Amazon.com.
ABOUT THE AUTHOR

Jeffrey P. Boyd is a shareholder in the Boren & Boyd firm in Jackson, TN. He handles primarily motor vehicle crashes and workers compensation cases. Mr. Boyd is married to the former Amy Cummings of Jackson and has four children, most of which turned out good...the jury is still out on the last one. He spends every spare minute he can find on the Tennessee River or in a tree stand.

Bill Walk, a prominent and respected Memphis trial lawyer for over 30 years, specializes in personal injury law. He tirelessly advocates for his clients, who have suffered serious, and sometimes catastrophic, injuries. He is proud to be a voice for his clients and shepherd them through the daunting legal process.

In addition to his devotion to the law, Walk has always had a deep respect and appreciation for architecture. From an early age he began designing houses and stadiums, while using Legos, blocks, and even playing cards to create the pictures in his head. Walk furthered his love of architecture at the University of Memphis, where he received a Bachelor of Science degree in Engineering Technology, with a concentration in Architecture. Facing graduation and a down market with a degree from a yet to be AIA accredited architecture program, Walk decided to attend law school at the University of Memphis Cecil C. Humphrey’s School of Law, from which he earned his Juris Doctor degree.

Growing up in Memphis, Walk experienced as a boy the beginnings of desegregation in the South, being bussed into other neighborhoods far from his own home to attend junior high and high schools. His firsthand experiences played a significant and fundamental role in the person he is today. It is by no accident that Walk’s law office sits on the third floor of an old dry goods store on historic South Main Street in Memphis, overlooking the National Civil Rights Museum and the Lorraine Motel, the hallowed grounds where Dr. Martin Luther King, Jr. was assassinated in 1968.

Full of wanderlust since he was a child, Walk loves to travel with his family in his downtime, always feeding his passion for architecture and nature along the way. Walk lives in Memphis with his family.
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<td>Copper</td>
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(Referred by: ______________________________________)

Federal Law Requires the Following Information:

Name

Occupation/Employer/Law Firm

Address

City ____________________ State ______ ZIP _____________

Phone ____________________ Fax ____________________

E-mail ____________________

Check here, if your contribution will be made from a partnership account.

Contributions made from partnership accounts are assumed to be paid from your portion of the assets. If this is not the case, state what portion will be charged to you, as well as what partners will be responsible for the remainder of the contribution:

$ __________

Other monthly contribution allocation:

If you wish to contribute according to a formula that differs from the monthly allocation schedule set forth above, please indicate the amounts to be paid to each:

$ __________ LIFT

$ __________ TTLA

$ __________ AAI-PAC

AAI-PAC acts as the collecting agent for LIFT and TTLA. Therefore, if this is a joint contribution, state-only contribution or AAI-PAC-only contribution, charges may appear on your account as “AAI-PAC.” LIFT and/or TTLA will receive the full amount of the contribution so designated.

Payment Method:

Personal check is enclosed (payable to “LIFT”)

Bank Draft (please complete requested info)

Bank Account Number __________________________

Bank Name & Address

Charge to: _____________________________

Credit Card Number ___________________________ Exp. Date ________

Name (as it appears on account) __________________________

Signature______________________________

I request that monthly payments be deducted from my personal account according to the allocation schedule set forth herein to LIFT (state PAC), TTLA and AAI-PAC (federal PAC). It is agreed that (a) each payment, upon being charged to my account by the respective bank or credit card company, shall be my receipt for payment of the designated contribution; (b) I reserve the right to revoke this authorization by giving written notice to the institutions and authority to charge such drafts to my account shall cease upon delivery of written notice of revocation; and, (c) If any such draft is dishonored, whether with or without cause, whether intentionally or unintentionally, no liability whatsoever shall attach.

FEC Disclaimer – Federal law requires political committees to report the names, mailing addresses, occupation and employers for each individual whose contributions aggregate in excess of $200 calendar-year. Federal law prohibits federal political action committees from accepting corporate contributions. Contributions to political committees are strictly voluntary, no member will be subject to reprisal for declining to contribute. The contribution amount is merely a suggestion and each member is free to contribute more or less than that amount, although particular designations shall apply to those who contribute certain amounts.

IRS Disclaimer – None of these contributions is deductible as charitable contributions under federal law. Contributions to political committees are not tax deductible. The portion of your contributions paid to the TTLA, which is used for lobbying and political purposes is not tax deductible. Contact TTLA (615) 329-3000 or refer to your TTLA dues invoice for the percentage of association membership dues that is tax deductible.

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$750M Settlement in MO – GMO Rice Contamination
$392M Settlement in TX – Whistleblower
$1.55M Settlement in KY – Trucking Accident
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$4.5M Settlement in KY – Automotive Product Liability

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