OVER THE COUNTER

No.

IN THE SUPREME COURT OF THE STATE OF TENNESSEE

ANNE PAYNE,

Plaintiff–Appellee

v.

CSX TRANSPORTATION, INC.,

Defendant–Appellant.

On appeal from the Circuit Court of Knox County, No. 2-231-07
Court of Appeals, Eastern Division: No. E2012-02392-COA-R3-CV

ADDENDA OF LEGAL AUTHORITY AND OTHER SOURCES[1]

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[1] See Tenn.R.App. P. 11(b), 27(e) and Supreme Court Rule 4(H).

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[1] See Tenn.R.App. P. 11(b), 27(e) and Supreme Court Rule 4(H).

Addendum 1

Judgment of Court of Appeals

Opinion of Court of Appeals

Correction of Opinion of Court of Appeals

Order on Petition for Rehearing

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 16, 2013 Session

ANNE PAYNE v. CSX TRANSPORTATION, INC.

Circuit Court for Knox County
No. 2-231-07

No. E2012-02392-COA-R3-CV

JUDGMENT

This appeal came on to be heard upon the record from the Circuit Court for Knox County and briefs filed on behalf of the respective parties. Upon consideration thereof, this Court is of the opinion that the judgment of the trial court should be reversed and this cause remanded with instructions.

It is, therefore, ORDERED and ADJUDGED by this Court that the judgment of the trial court ordering a new trial is reversed. The judgment of the trial court granting CSX summary judgment is reversed as moot. This case is remanded to the trial court with instructions to the first trial judge to review the evidence at trial and enter judgment in accordance with our directions. Costs on appeal are assessed to the appellee, CSX Transportation, Inc.

PER CURIAM

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 16, 2013 Session

ANNE PAYNE v. CSX TRANSPORTATION, INC.

Appeal from the Circuit Court for Knox County
No. 2-231-07 Harold Wimberly, Judge

No. E2012-02392-COA-R3-CV

Winston Payne brought this action against his former employer, CSX Transportation, Inc., under the Federal Employers' Liability Act ("FELA"), alleging that CSX negligently exposed him to asbestos, diesel fumes, and radioactive materials in the workplace causing his injuries.[1] The jury returned a verdict finding (1) that CSX negligently caused Payne's injuries; (2) that CSX violated the Locomotive Inspection Act or safety regulations regarding exposure to asbestos, diesel fumes, and radioactive materials; and (3) that Payne's contributory negligence caused 62% of the harm he suffered. The jury found that "adequate compensation" for Payne's injuries was $8.6 million. After the jury returned its verdict, the trial court, *sua sponte*, instructed the jury, for the first time, that, under FELA, its finding that CSX violated a statute or regulation enacted for the safety of its employees meant that plaintiff would recover 100% of the damages found by the jury. The court sent the jury back for further deliberations. It shortly returned with an amended verdict of "$3.2 million @ 100%." Six months after the court entered judgment on the $3.2 million verdict, it granted CSX's motion for a new trial, citing "instructional and evidentiary errors." The case was then assigned to another trial judge, who thereafter granted CSX's motion for summary judgment as to the entirety of the plaintiff's complaint. The second judge ruled that the causation testimony of all of plaintiff's expert witnesses was inadmissible. We hold that the trial court erred in instructing the jury, *sua sponte*, on a purely legal issue, *i.e.*, that the jury's finding of negligence per se under FELA precluded apportionment of any fault to the plaintiff based upon contributory negligence, an instruction given after the jury had returned a verdict that was complete, consistent, and based on the instructions earlier provided to it by the trial court. We further hold that, contrary to the trial court's statements, the court did not make any prejudicial evidentiary rulings in conducting the trial, and that its jury instructions, read as a whole, were clear, correct, and complete. Consequently, the trial court erred in granting a new trial. We remand to the trial court. We direct the first trial judge to

[1]The primary illness was lung cancer from which the original plaintiff died. We refer in this opinion to his health issues as "injuries" or "injury."

review the evidence as thirteenth juror and determine whether the jury verdict in the amount of $8.6 million is against the clear weight of the evidence. If it is not, the trial judge is directed to enter judgment on that verdict. If, on the other hand, the trial judge finds that the larger verdict is against the clear weight of the evidence, the court is directed to enter a final judgment on the jury's verdict of $3.2 million. The trial court's grant of summary judgment is rendered moot by our judgment. However, in the event the Supreme Court determines that our judgment is in error, we hold that the grant of summary judgment was not appropriate.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed; Case Remanded with Instructions

CHARLES D. SUSANO, JR., P.J., delivered the opinion of the Court, in which THOMAS R. FRIERSON, II, J., and D. KELLY THOMAS, SP.J, joined.

Richard N. Shapiro, Virginia Beach, Virginia; Sidney W. Gilreath and Cary L. Bauer, Knoxville, Tennessee, for the appellant, Anne Payne.

Randall A. Jordan, Karen Jenkins Young, and Christopher R. Jordan, St. Simons Island, Georgia; Evan M. Tager and Carl J. Summers, Washington, D.C.; John W. Baker, Jr. and Emily L. Herman-Thompson, Knoxville, Tennessee, for the appellee, CSX Transportation, Inc.

OPINION

I.

Payne worked for CSX as a trainman and a switchman from 1962 until his retirement in 2002. In 2005, he was diagnosed with lung cancer. He underwent extensive medical treatment, including 43 rounds of chemotherapy and 44 radiation treatments. He filed this FELA action in 2007, alleging that CSX was negligent in exposing him to asbestos, diesel fumes, and radioactive material in the course of his employment, resulting in his injuries, particularly his lung cancer. He also alleged that CSX was guilty of negligence per se when it violated several statutes or regulations enacted for the safety of its employees. CSX denied liability and alleged that Payne's contributory negligence, specifically his cigarette smoking, caused his injuries. Payne started smoking in 1962, smoked a pack a day on average for approximately 26 years, and quit in 1988. After Payne died on February 24, 2010, his widow, Anne Payne, was substituted as plaintiff.

A ten-day jury trial took place over the course of two weeks in November 2010. After the close of proof, the trial court instructed the jury and provided it with a verdict form

including special interrogatories. To aid the reader, the jury verdict form is hereinafter set forth in its entirety, with the jury's handwritten answers in italics:

1. Was the defendant negligent as defined in these instruction[s]? *Yes*

2. If you answered yes to question one, did that negligence cause in whole or in part the harm suffered by plaintiff? *Yes*

3. If negligent, was the defendant negligent with regard to:

Asbestos exposure? *Yes*
Diesel exposure? *Yes*
Radiation exposure? *Yes*

If your answer to any of these is yes, did negligence of the defendant cause in whole or in part the harm suffered by plaintiff as a result of:

Asbestos exposure *Yes*
Diesel exposure *Yes*
Radiation exposure *Yes*

4. A. Did the defendant violate the Locomotive Inspection Act or any regulation concerning locomotives read to you regarding asbestos and was any such violation a legal cause of plaintiff's harm? *Yes*

B. Did the defendant violate the Locomotive Inspection Act or any regulation concerning locomotives read to you regarding diesel fumes and was any such violation a legal cause of plaintiff's harm? *Yes*

C. Did the defendant violate any regulation read to you regarding the operation of railroad cars and transportation of radioactive materials read to you and was any such violation a legal cause of harm suffered by plaintiff? *Yes*

5. If you answered yes to question two, was plaintiff negligent with regard to harm he suffered and did his negligence cause in whole or in part the harm he suffered? *Yes*

6. If your answer to question five is yes, to what extent, expressed in percentage, did plaintiff's negligence cause in whole or in part the harm he suffered? *62%*

7. What amount of money do you find, without deduction for any negligence which you may find on plaintiff's part, will fairly represent adequate compensation? $ *8.6 million*

When the jury returned to the courtroom following its deliberations, the following colloquy took place between the trial court and the jury foreman:

THE COURT: If you will refer to the verdict, you can tell me briefly. Question No. 1, was the defendant negligent as defined in these instructions?

JURY FOREMAN: Yes.

THE COURT: Question No. 2, did that negligence cause, in whole or in part, the harm suffered by the plaintiff?

JURY FOREMAN: Yes.

THE COURT: Question No. 3, was the defendant negligent with regard to asbestos exposure?

JURY FOREMAN: Yes.

THE COURT: With regard to diesel exposure?

JURY FOREMAN: Yes.

THE COURT: With regard to radiation exposure?

JURY FOREMAN: Yes.

THE COURT: Did the negligence of the defendant cause, in whole or in part, the harm suffered by plaintiff as a result of asbestos exposure?

JURY FOREMAN: Yes.

THE COURT: Diesel exposure?

JURY FOREMAN: Yes.

THE COURT: Radiation exposure?

JURY FOREMAN: Yes.

THE COURT: Did the defendant violate the Locomotive Inspection Act or any regulation concerning locomotives regarding asbestos, and was any such violation a legal cause of the plaintiff's harm?

JURY FOREMAN: Yes.

THE COURT: Did the defendant violate the Locomotive Inspection Act or any regulation concerning locomotives regarding diesel fumes, and was any such violation a legal cause of the plaintiff's harm?

JURY FOREMAN: Yes.

THE COURT: Did the defendant violat[e] any regulation regarding the operations of railroad cars and transportation of radioactive materials, and was any such violation a legal cause of harm suffered by the plaintiff?

JURY FOREMAN: Yes.

THE COURT: Question 5, was the plaintiff negligent with regard to the harm he suffered?

JURY FOREMAN: Yes.

THE COURT: Your answer was yes. To what extent, expressed in percentages, did the plaintiff's negligence cause, in whole or in part, the harm that he suffered?

JURY FOREMAN: 62 percent.

THE COURT: *And finally, what amount of money do you find, without deduction for any [of] the negligence, that would fairly represent adequate compensation in this case?*

JURY FOREMAN: 8.6 million.

(Emphasis added.)

Immediately after the jury foreman confirmed the jury's written responses establishing the plaintiff's total damages at $8.6 million, the following took place:

THE COURT: Okay. Now, let me further inform you that by answering yes to questions listed on this form in Part 4 about the Inspection Act or any regulations, by answering yes to all of those questions, the concept of contributory negligence may not apply in this case. In that situation, the plaintiff would receive the entire amount of money that you have listed on the answers to the seventh question. If that is what you intend in this particular case, please indicate by raising your right hand?

(Jury foreman raised hand).

THE COURT: Okay. That is something that we hadn't talked about before, but . . . we need to know if that is your intention. Again, by answering yes to the questions listed under Part 4 of the verdict form, the effect of yes answers there is that the recovery would be 100 percent of the amount listed on the response to Question 7.

* * *

THE COURT (to the jury): What is your feeling now?

JURY FOREMAN: Could we have a moment to discuss that?

THE COURT: All right.
(Jury dismissed from courtroom at 4:05 p.m.)
(Jury returned to courtroom at 4:13 p.m.)

> THE COURT: Based on a previous discussion, [jury foreman] Mr. Alexander, it is the intention of the jury that the plaintiff recover a total amount of what?
>
> JURY FOREMAN: $3.2 million.
>
> THE COURT: If everyone agrees with that, raise your right hand. The jury has raised their right hand indicating that's their feeling in this particular case.

The amended verdict form returned by the jury after the jury's eight-minute further deliberation had a handwritten line through the "8.6 million" amount and a handwritten notation of "3.2 million @ 100%."

On March 7, 2011, the trial court entered judgment against CSX in the amount of $3.2 million in compensatory damages. CSX moved under Tenn. R. Civ. P. 50.02 for judgment notwithstanding the verdict, or, in the alternative, for a new trial. The trial court conducted a hearing on CSX's motion on August 19, 2011. At the end of the hearing, the court stated as follows:

> The Court has come to this conclusion, that the motion for new trial is warranted. I hate to admit this because a lot of the problems come back to me, but in particular the jury instructions I feel were incomplete, therefore insufficient and inadequate and incorrect. This was illustrated graphically by their response and what we had to do to try to understand what they meant.
>
> During the trial itself I agree that there were too many things that had been ruled improperly for the jury to consider that were considered and presented to the jury, and probably the worst of those was when we started talking about this thyroid cancer which he apparently didn't have. The Court took it upon itself to make a comment about that and made a comment which could well have been misinterpreted. I just made – did not express what I tried to express by saying that is not part of this lawsuit. It could be understood that he actually had that and it was not being considered now.
>
> I deeply regret what I just said because, you know, I like to get cases over with, but at the same time I feel that this one was

> probably not handled appropriately and needs to be handled again, whether by me or somebody else. So that's the extent of what I want to say today.

The trial court entered an order on September 6, 2011, granting CSX a new trial and stating, "[t]he Court makes this decision based upon specific prejudicial errors including, but not limited to, instructional and evidentiary errors that resulted in an injustice to Defendant and, *independent of considerations regarding sufficiency of the evidence*, warrant a new trial." (Emphasis added.) The case was subsequently transferred to a second Knox County circuit court judge, the Honorable Dale C. Workman. Judge Workman granted CSX's motion to exclude the causation testimony of all of the plaintiff's expert witnesses – the same testimony that had earlier been found to be admissible by the first trial judge, Judge Wimberly, and had been thereafter presented to the jury. Judge Workman then granted CSX's motion for summary judgment on the ground that there was no expert testimony establishing causation, and dismissed the case. Plaintiff timely filed a notice of appeal.

II.

Plaintiff raises the issues of whether the trial court erred in: (1) further instructing the jury and permitting it to further deliberate after it had returned a proper verdict; (2) granting CSX a new trial; and (3) granting CSX summary judgment and dismissing the complaint. CSX does not raise any separate issues. The sufficiency of the evidence to support the jury's verdict(s) is not before us.

III.

We first address the trial court's jury instructions. The trial court instructed the jury in accordance with FELA, the federal statute that provides a cause of action for employees of railroads engaged in interstate commerce who are injured on the job. *See* 45 U.S.C.A. § 51; *see also* ***Spencer v. Norfolk S. Rwy. Co.***, No. E2012-01204-COA-R3-CV, 2013 WL 3946118 at *1, n.1 (Tenn. Ct. App. E.S., filed July 29, 2013). In ***Spencer***, this Court recently reiterated the following background and principles governing a FELA claim:

> "The impetus for the [Federal Employers' Liability Act ("FELA"), 45 U.S.C.A. §§ 51–60] was that throughout the 1870's, 80's, and 90's, thousands of railroad workers were being killed and tens of thousands were being maimed annually in what came to be increasingly seen as a national tragedy, if not a national scandal." *CSX Transp., Inc. v. Miller*, 159 Md. App. 123, 858 A.2d 1025, 1029 (Md. Ct. Spec. App. 2004). "In

response to mounting concern about the number and severity of railroad employees' injuries, Congress in 1908 enacted FELA to provide a compensation scheme for railroad workplace injuries, pre-empting state tort remedies." *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 165, 127 S.Ct. 799, 166 L.Ed.2d 638 (2007) (citing *Second Employers' Liability Cases*, 223 U.S. 1, 53-55, 32 S.Ct. 169, 56 L.Ed. 327 (1912)). FELA was passed to extend statutory protection to railroad workers because of the high rate of injury to workers in that industry. ***Blackburn v. CSX Transp., Inc.***, No. M2006-01352-COA-R10-CV, 2008 Tenn. App. LEXIS 336, 2008 WL 2278497, at *8 (Tenn. Ct. App. May 30, 2008); ***Reed v. CSX Transp., Inc.***, No. M2004-02172-COA-R3-CV, 2006 Tenn. App. LEXIS 620, 2006 WL 2771029, at *2 (Tenn. Ct. App. Sept. 26, 2006). "In adopting FELA, Congress created a remedy that 'shifted part of the human overhead of doing business from employees to their employers.' " ***Pomeroy v. Ill. Cent. R.R. Co.***, No. W2004-01238-COA-R3-CV, 2005 Tenn. App. LEXIS 294, 2005 WL 1217590, at *9 (Tenn. Ct. App. May 19, 2005) (quoting ***Consol. Rail Corp. v. Gottshall***, 512 U.S. 532, 542, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994)). Congress recognized that the railroad industry was better able to shoulder the cost of industrial injuries and deaths than were injured workers or their families. ***Miller***, 159 Md. App. at 131, 858 A.2d 1025 (citing ***Kernan v. Am. Dredging Co.***, 355 U.S. 426, 431-32, 78 S.Ct. 394, 2 L.Ed. 2d 382 (1958)). "[FELA] was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations." ***Pomeroy***, 2005 Tenn. App. LEXIS 294, 2005 WL 1217590, at * 17 (quoting ***Wilkerson v. McCarthy***, 336 U.S. 53, 68, 69 S.Ct. 413, 93 L.Ed. 497 (1949) (Douglas, J., concurring)). The Federal Employers' Liability Act provides, in relevant part:

> Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in

> its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C.A. § 51. The statute is broad and remedial, and it is to be liberally construed in order to accomplish the aforementioned purposes. ***Blackburn***, 2008 Tenn. App. LEXIS 336, 2008 WL 2278497, at *8; ***Reed***, 2006 Tenn. App. LEXIS 620, 2006 WL 2771029, at *2.

"Unlike a typical workers' compensation scheme, which provides relief without regard to fault, Section 1 of FELA provides a statutory cause of action sounding in negligence. . . ." ***Sorrell***, 549 U.S. at 165. Under FELA, the railroad-employer's liability is premised upon its negligence. ***Reed***, 2006 Tenn. App. LEXIS 620, 2006 WL 2771029, at *2. In order to recover, an employee must show:

> (1) that an injury occurred while the employee was working within the scope of his employment;
>
> (2) that the employment was in the furtherance of the railroad's interstate transportation business;
>
> (3) that the employer railroad was negligent; and
>
> (4) that the employer's negligence played some part in causing the injury.

Id. (*citing* ***Jennings v. Ill. Cent. R.R. Co.***, 993 S.W.2d 66, 69-70 (Tenn. Ct. App. 1998)). . . . FELA does not define negligence. ***Id.*** When considering whether an employer was negligent under FELA, "courts are to analyze the elements necessary to establish a common law negligence claim." ***Id.*** (*citing* ***Adams v. CSX Transp., Inc.***, 899 F.2d 536, 539 (6th Cir. 1990); ***Davis v. Burlington Northern, Inc.***, 541 F.2d 182 (8th Cir. 1976), cert. denied, 429 U.S. 1002, 97 S.Ct. 533, 50 L.Ed. 2d 613 (1976)). The issue of negligence is to be determined "by the common law principles as established and applied in federal courts." ***Reed***, 2006 Tenn. App. LEXIS 620, 2006 WL 2771029, at *2

> (citations omitted). Thus, the plaintiff must prove the traditional elements of negligence: duty, breach, foreseeability, and causation. *Id.* (citing ***Robert v. Consol. Rail Corp.***, 832 F.2d 3, 6 (1st Cir. 1987)). However, FELA deviated from the common law by abolishing the railroad's common law defenses of assumption of the risk, § 54, and it rejected contributory negligence in favor of comparative negligence, § 53. ***Sorrell***, 549 U.S. at 166, 168. In FELA cases, an employee's negligence does not bar relief, but the employee's recovery is diminished in proportion to his fault. ***Id.*** at 166.
>
> "Under FELA, the employer railroad has a duty to provide a reasonably safe workplace." ***Reed***, 2006 Tenn. App. LEXIS 620, 2006 WL 2771029, at *3 (citing ***Bailey v. Cent. Vt. Ry.***, 319 U.S. 350, 352, 63 S.Ct. 1062, 1062, 87 L.Ed. 1444 (1943); ***Ulfik v. Metro-North Commuter R.R.***, 77 F.3d 54, 58 (2d Cir.1996); ***Adams***, 899 F.2d at 539). This does not mean that the railroad has the duty to eliminate all workplace dangers, but it does have the "duty of exercising reasonable care to that end." ***Van Gorder v. Grand Trunk W. R.R., Inc.***, 509 F.3d 265, 269 (6th Cir. 2007) cert. denied, 555 U.S. 994, 129 S.Ct. 489, 172 L.Ed. 2d 356 (2008) (citing ***Baltimore & Ohio S. W.R. Co. v. Carroll***, 280 U.S. 491, 496, 50 S.Ct. 182, 74 L.Ed. 566 (1930)). "A railroad breaches its duty to its employees when it fails to use ordinary care under the circumstances or fails to do what a reasonably prudent person would have done under the circumstances to make the working environment safe." ***Id.*** (citing ***Tiller v. Atl. C.L.R. Co.***, 318 U.S. 54, 67, 63 S.Ct. 444, 87 L.Ed. 610 (1943); ***Aparicio v. Norfolk & W. Ry.***, 84 F.3d 803, 811 (6th Cir. 1990)). In other words, "a railroad breaches its duty when it knew, or by the exercise of due care should have known that prevalent standards of conduct were inadequate to protect the plaintiff and similarly situated employees." ***Id.*** at 269-70 (internal quotations omitted).

Spencer, 2013 WL 3946118 at *1-2 (footnotes omitted) (quoting ***Jordan v. Burlington N. Santa Fe R.R. Co.***, No. W2007-00436-COA-R3-CV, 2009 WL 112561 at *5-6 (Tenn. Ct. App. W.S., filed Jan. 15, 2009)).

As already stated, CSX asserted the defense of contributory negligence. FELA provides as follows regarding contributory negligence:

> In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

45 U.S.C.A. § 53 (italics in original). Plaintiff did not argue that decedent Payne was not contributorily negligent to some extent by virtue of his years of smoking. Rather, the plaintiff asserted that the FELA's proviso quoted above, allowing for a full recovery notwithstanding contributory negligence if the defendant violated "any statute enacted for the safety of employees," applied because CSX violated the Locomotive Inspection Act[2] and

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[2] The Locomotive Inspection Act is codified at 49 U.S.C.A. § 20701 and provides in pertinent part:

> A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances–
>
> (1) are in proper condition and safe to operate without unnecessary danger of personal injury;
>
> (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and
>
> (3) can withstand every test prescribed by the Secretary under this chapter.

various safety regulations[3] enacted or promulgated for employees' safety. The United States Supreme Court recognized nearly a century ago that, under FELA,

> contributory negligence on the part of the employee does not operate even to diminish the recovery where the injury has been occasioned in part by the failure of the carrier to comply with the exactions of an act of Congress enacted to promote the safety of employees. In that contingency the statute abolishes the defense of contributory negligence, not only as a bar to recovery, but for all purposes.

Grand Trunk W. Ry. Co. v. Lindsay, 233 U.S. 42, 49-50 (1914). The federal courts have referred to a violation of a statute or regulation enacted for the safety of employees as "negligence per se." *See, e.g.*, ***Ries v. Nat'l R.R. Passenger Corp.***, 960 F.2d 1156, 1158-59 (3rd Cir. 1992); ***Walden v. Ill. Cent. Gulf R.R.***, 975 F.2d 361, 364 (7th Cir. 1992).

In this case, the trial court instructed the jury with respect to the issue of contributory negligence prior to its initial deliberations; but the court did not inform the jury of the legal effect of a finding that CSX was guilty of negligence per se. Neither side requested a jury instruction on negligence per se, and neither side objected at any time to the lack of such an instruction. On appeal, neither side has provided any legal authority suggesting that a jury instruction is required on the FELA's provision regarding negligence per se, *i.e.*, that, as a matter of law, "no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." 45 U.S.C.A. § 53. Plaintiff, noting that the jury's second damage award of "$3.2 @ 100%" is reduced by roughly 62% of its initial damage award of $8.6 million, argues that the trial court, by its instruction after the jury returned its verdict, essentially invited the jury to nullify FELA's 45 U.S.C.A. § 53 provision ("Section 53"). Plaintiff cites ***Shepard v. Grand Trunk W. R.R.***, No. 92711, 2010 WL 1712316 (Ohio Ct. App., filed Apr. 29, 2010),

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[3] FELA provides that certain safety regulations are deemed to be statutory authority for FELA purposes:

> A regulation, standard, or requirement in force, or prescribed by the Secretary of Transportation under chapter 201 of Title 49, or by a State agency that is participating in investigative and surveillance activities under section 20105 of Title 49 is deemed to be a statute under sections 53 and 54 of this title.

45 U.S.C.A. § 54a.

a FELA case involving a fact pattern similar in many respects to the case at bar,[4] in which the Ohio Court of Appeals stated the following:

> Here, the jury was specifically instructed that Shepard alleged that two statutory violations were at issue: (1) the FELA, which requires negligence and provides for comparative negligence and (2) the [Locomotive Inspection Act], which imposes absolute liability. Under FELA, the jury found Grand Trunk negligent and also found Shepard comparatively negligent. But because the jury further found that the railroad had violated the LIA, under well-settled law, it was not entitled to apportionment of damages under a comparative negligence defense.
>
> * * *
>
> Grand Trunk's contention that the *post-verdict discussions with the jury demonstrated that they believed the award was going to be reduced* is not persuasive – a party may not challenge the validity of the verdict using post-verdict discussions with jurors. The jury was properly instructed and is presumed to have followed those instructions.

Id., 2010 WL 1712316 at *13-14 (emphasis added; internal citations omitted). The implication of the italicized language is clear – the jury in ***Shepard*** was not instructed on the legal effect of its finding of negligence per se, and the court there found no error in the trial court's failure to advise the jury of this legal effect.

We do not find any reason for the jury to be instructed regarding the legal consequences of a finding that an employer railroad violated a safety statute or regulation. As the Tennessee Supreme Court has stated, "[i]t is for the jury to determine the facts and the trial judge to apply the appropriate principles of law to those facts." ***Smith Cty. Educ. Ass'n v. Anderson***, 676 S.W.2d 328, 338 (Tenn. 1984) (holding that "it was improper and unnecessary to submit questions which required the jury to determine whether or not the Board negotiated in good faith" because "[w]hether the Board committed acts that amount to a failure to negotiate in good faith was a question for the trial judge and not the jury."). Section 53 of the FELA eliminating contributory negligence when a defendant is guilty of

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[4] The plaintiff in ***Shepard*** alleged injuries resulting from negligent exposure to diesel fumes and asbestos. The plaintiff in that case "admitted to a long history of heavy cigarette smoking." 2010 WL 1712316 at *2.

negligence per se provides a principle of law to be applied by the trial court after the jury has determined the facts. "We entrust the responsibility of resolving questions of disputed fact, including the assessment of damages, to the jury." ***Meals ex rel. Meals v. Ford Motor Co.***, No. W2010-01493-SC-R11-CV, 2013 WL 4673609 at *3 (Tenn., filed Aug. 30, 2013) (citing Tenn. Const. art. I, § 6; ***Spence v. Allstate Ins. Co.***, 883 S.W.2d 586, 594 (Tenn. 1994)). Regarding the jury's resolution of factual questions and its verdict, we have observed that

> [t]he jury's verdict is the foundation of the judgment in civil cases where the parties have invoked their constitutional or statutory right to a jury trial. It represents the jury's final statement with regard to the issues presented to them. The verdict, whether general or special, is binding on the trial court and the parties unless it is set aside through some recognized legal procedure. Accordingly, neither the trial court nor the parties are free to disregard a jury's verdict once it has been properly returned.

Ladd ex rel. Ladd v. Honda Motor Co., 939 S.W.2d 83, 94 (Tenn. Ct. App. 1996); *see also* ***Jordan***, 2009 WL 112561 at *17 (stating that "[t]he United States Supreme Court has repeatedly emphasized the preeminence of jury decisions in FELA matters.") (internal quotation marks omitted).

In this case, the jury was instructed on all of the pertinent questions upon which it was properly called to decide – whether the defendant was negligent; whether the defendant's negligence caused plaintiff's injury; whether the plaintiff was negligent and caused his own injury; the percentage of fault attributed to plaintiff by his own negligence; whether the defendant violated the Locomotive Inspection Act or regulations enacted for the safety of employees; whether any such violation caused plaintiff's injury; and the amount of damages. The jury answered these questions in a verdict form that has been reproduced in its entirety earlier in this opinion. The jury resolved all of the issues in a clear, complete, and consistent manner. There is nothing contradictory in the verdict. Under these circumstances, in keeping with the litigants' "constitutionally protected right to have the disputed factual issues in their case decided by a jury," ***Duran v. Hyundai Motor Am., Inc.***, 271 S.W.3d 178, 209 (Tenn. Ct. App. 2008), we have recognized "the well-known principle that it is the trial court's duty to enter a judgment that is consistent with the jury verdict."[5] ***Leverette v. Tenn. Farmers Mut. Ins. Co.***, No. M2011-00264-COA-R3-CV, 2013 WL 817230 at *29 (Tenn. Ct. App. M.S., filed Mar. 4, 2013).

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[5]This duty is, of course, concomitant with the trial court's duty to decide whether to approve the verdict as thirteenth juror in ruling on a motion for new trial, as further discussed later in this opinion.

In *Leverette* we noted some "narrow exceptions" to this general principle, including one that "is found at Tenn. R. Civ. P. 49.02, which gives the trial court some leeway *when there are inconsistencies between a general verdict and a special verdict.*" *Id.* (Emphasis added.) Rule 49.02 provides as follows:

> The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation and instruction as may be necessary to enable the jury to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. *When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers.* When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict, or may return the jury for further consideration of its answers and verdict, or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but shall return the jury for further consideration of its answers and verdict or shall order a new trial.

(Emphasis added); *see also* ***Concrete Spaces, Inc. v. Sender***, 2 S.W.3d 901, 911 (Tenn. 1999) (observing that, although "[w]here a judgment is based upon inconsistent findings by a jury it is the duty of the appellate court to reverse and remand the case for a new trial, . . . [w]ell-settled law requires courts to construe the terms of a verdict in a manner that upholds the jury's findings, if it is able to do so.").

In the present case, the trial court, presented with a consistent and complete jury verdict, nevertheless and *sua sponte,* instructed the jury that the legal effect of its finding of negligence per se was that "the concept of contributory negligence may not apply in this case." The trial court then asked the jury "what is your feeling now?" We agree with plaintiff's argument that the trial court's new and unnecessary further instruction and

invitation to reconsider its verdict was a prejudicial abuse of discretion.[6] It is true, as a general principle, that "a jury may amend or change their verdict at any time before they have been discharged, or, if they bring in an informal or insufficient verdict, the court may send them back to the jury room, with directions to amend it, and put it in proper form." ***George v. Belk***, 49 S.W. 748, 749 (Tenn. 1899); *see also* ***State v. Williams***, 490 S.W.2d 519, 520 (Tenn. 1973); ***Riley v. State***, 227 S.W.2d 32, 34-35 (Tenn. 1950); ***Oliver v. Smith***, 467 S.W.2d 799, 804 (Tenn. Ct. App. 1971). But in these cases citing and applying this general rule, the jury's initial verdict was defective in some manner. There is no defect in the jury's first verdict in this case. Tenn. R. Civ. P. 49.02 mandates that "[w]hen the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers." Under these circumstances, where the jury was properly and completely instructed and returned a consistent and complete verdict in accordance with the court's instructions, we hold it was error for the trial court to *sua sponte* further instruct the jury upon an unnecessary matter and invite the jury to reconsider the amount of damages it initially awarded.

IV.

The trial court, in its memorandum opinion granting a new trial, stated that "in particular the jury instructions I feel were incomplete, therefore insufficient and inadequate and incorrect." Our review of the record and transcript leads us to the conclusion that the "incompleteness" the trial court mentions is a reference only to the initial absence of an instruction regarding the legal effect of a finding of negligence per se. This conclusion is supported by the trial court's further comment that the "incompleteness" of the jury instructions "was illustrated graphically by their response and what we had to do to try to understand what they meant." Our conclusion is further bolstered by the fact, as we are about to demonstrate, that the instructions given to the jury before they retired initially to consider their verdict were correct and complete. The trial court did not specify any other error in its jury instructions in either its order granting a new trial or its incorporated memorandum opinion. We do not believe the trial court ruled that there were any other reversible errors in its instructions. Despite this belief, we have reviewed all of CSX's objections to the jury

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[6]This is not to say, however, that a trial court's initial instruction to a jury that informs the jury of the effect of its negligence per se finding under FELA would be erroneous, and our opinion should not be construed as so holding. We merely hold that such an instruction is not required, and that the trial court's further instruction in this case after the jury deliberated and returned a verdict was unwarranted and resulted in error.

instructions. both those raised by CSX orally after the jury was instructed as well as those in the later motion for a new trial.[7]

In reviewing the trial court's disposition of a motion for new trial in a FELA case. we apply the federal standard. ***Melton v. BNSF Rwy. Co.***, 322 S.W.3d 174, 181 (Tenn. Ct. App. 2010). In ***Melton***, we observed that

> [u]nder the federal standard, the trial court has the power and duty to order a new trial whenever, in its judgment, this action is required to prevent an injustice. Common grounds for granting a new trial include the verdict is against the clear weight of the evidence, a prejudicial error of law, or misconduct affecting the jury. We review the trial court's decisions on motions for new trial on an abuse of discretion standard.

Id. (internal citations and quotation marks omitted). In this case, the trial court gave no indication that it was granting a new trial based on either misconduct affecting the jury or insufficiency of the evidence. The trial court's ruling was grounded in its perceived errors of law.

The following principles apply to our review of the trial court's jury instructions:

> "Jury instructions must be correct and fair as a whole, although they do not have to be perfect in every detail." ***Pomeroy*** [***v. Illinois Central R.R. Co.***, No. W2004-01238-COA-R3-CV], 2005 Tenn. App. LEXIS 294, 2005 WL 1217590, at *3 [(Tenn. Ct. App. May 19, 2005)] (citing ***Wielgus v. Dover Indus.***, 39 S.W.3d 124, 131 (Tenn. Ct. App.2001)). Jury instructions must be plain and understandable, and inform the jury of each applicable legal principle. ***Id.*** On appeal, we review jury instructions in their entirety and in context of the entire charge. ***Id.*** We will not invalidate a jury charge if, when read as a whole, it fairly defines the legal issues in the case and does not mislead the jury. ***Hensley v. CSX Transp., Inc.***, No. E2007-00323-COA-R3-CV. 278 S.W.3d 282, 2008 Tenn. App. LEXIS

[7]None of CSX's numerous objections to the jury instructions included an argument that the trial court should have instructed the jury on the legal effect of its finding that CSX was negligent per se. As already noted, neither party requested such an instruction, and neither party objected to the absence of such an instruction in the given instructions.

> 147. 2008 WL 683755, at *2 (Tenn. Ct. App. Mar. 14, 2008) *perm. app. denied*. 2008 Tenn. LEXIS 867 (Tenn. Nov. 17, 2008). "The trial court should give requested special jury instructions when they are a correct statement of the law, embody the party's legal theory, and are supported by the proof." ***Pomeroy***. 2005 Tenn. App. LEXIS 294, 2005 WL 1217590, at *3 (citing ***Otis v. Cambridge Mut. Fire Ins. Co.***, 850 S.W.2d 439, 445 (Tenn.1992)). "However, the trial court may decline to give a special instruction when the substance of the instruction is covered in the general charge." ***Id.*** We will not reverse the denial of a special request for an additional jury instruction where the trial court fully and fairly charged the jury on the applicable law. ***Id.***

Spencer. 2013 WL 3946118 at *3 (quoting ***Jordan***, 2009 WL 112561 at *11).

In its motion for new trial, CSX argued that the trial court's instruction on causation was erroneous, asserting that the court "erroneously failed to charge the jury on proximate causation." The trial court instructed the jury on causation as follows:

> The mere fact that a person suffered harm, injury, illness or death standing alone without more does not permit an inference that the harm, injury, or death was caused by anyone's negligence.
>
> You have heard reference to the Federal Employers' Liability Act or FELA. That law provides in part that every common carrier by railroad engaging in commerce between any of several states shall be liable for damages to any person suffering injury while he is employed by such carrier in such commerce for such injury resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, and such injury would include illness or death.
>
> * * *
>
> So, again, the burden of proof in any case such as this is upon the plaintiff to establish by a preponderance of the evidence, first, that the defendant was negligent in one or more of the particulars alleged by plaintiff and, second, that the defendant's

> negligence caused or contributed in whole or in part to the harm, illness or death of the plaintiff.
>
> The purpose of this action, illness, harm or death is said to be caused or contributed to by an act or failure to act when it appears from a preponderance of the evidence the act or failure to act played any part, in whole or in part, in bringing about or actually causing illness or death.
>
> So if you should find from the evidence in the case that any negligence of the defendant contributed in any way toward illness or death suffered by the plaintiff you may find that plaintiff's illness or death was caused by the defendant's act or failure to act.
>
> Stated another way, an act or failure to act is a cause of illness or death if the illness or death would not have occurred except for the act or failure to act even though the act or failure to act combined with other causes. So this does not mean that the law recognizes only one cause of illness or death consisting of only one factor, or one thing or the conduct of only one person. On the contrary, many factors or things where the conduct of two or more persons may operate at the same time either independently or together to cause illness, harm or death, and in such a case each may be a cause for the purposes of determining liability in a case such as this.

As can be seen, CSX correctly argued that the trial court's instruction does not include the proximate cause standard. The United States Supreme Court addressed the appropriate FELA standard of causation in ***CSX Transp. v. McBride***, 131 S. Ct. 2630 (2011), stating as follows:

> We conclude that the Act [FELA] does not incorporate "proximate cause" standards developed in nonstatutory common-law tort actions. The charge proper in FELA cases, we hold, simply tracks the language Congress employed, informing juries that a defendant railroad caused or contributed to a plaintiff employee's injury if the railroad's negligence played any part in bringing about the injury.

* * *

> FELA's language on causation . . . "is as broad as could be framed." *Urie v. Thompson*, 337 U.S. 163, 181, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949). Given the breadth of the phrase "resulting in whole or in part from the [railroad's] negligence," and Congress' "humanitarian" and "remedial goal[s]," we have recognized that, in comparison to tort litigation at common law, "a relaxed standard of causation applies under FELA." *Gottshall*, 512 U.S., at 542-543, 114 S.Ct. 2396. In our 1957 decision in *Rogers* [*v. Mo. Pac. R.R.*, 352 U.S. 443], we described that relaxed standard as follows:
>
> > "Under [FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." 352 U.S., at 506, 77 S.Ct. 443.

McBride, 131 S. Ct. at 2634, 2636. The *McBride* Court clarified that "*Rogers* announced a general standard for causation in FELA cases, not one addressed exclusively to injuries involving multiple potentially cognizable causes," *id.* at 2639, and conclusively determined that a proximate cause instruction is not required in FELA cases. In the present case, the trial court's causation instruction closely tracks, and in one instance directly quotes, FELA's causation language. We find no error in the trial court's causation instruction.

CSX also argued in its motion for new trial that the trial court erred in giving an instruction on contributory negligence that provided a different causation standard from the one applicable to the defendant. The United States Supreme Court has ruled that in a FELA case the same standard of causation applies in assessing both the negligence of a defendant railroad and the contributory negligence of a plaintiff employee. *Norfolk S. Rwy. Co. v. Sorrell*, 549 U.S. 158, 160 (2007). In this case the trial court instructed the jury on contributory negligence as follows:

> [I]n addition to denying any negligence on the part of the defendant caused harm to the plaintiff, a defendant may also allege as a further defense that some negligence on the part of the plaintiff himself was a cause of any harm that plaintiff suffered or was the sole and only cause of any harm that the

plaintiff suffered. We refer to that defense as contributory negligence.

Contributory negligence then is fault on the part of a plaintiff which corroborates in some degree with the negligence of another and so helps to bring about harm to the plaintiff or is itself the sole cause of harm to the plaintiff.

By the defense of contributory negligence, the defendant is in effect alleging that even though the defendant may have been guilty of some negligent act or failure to act which was one of the causes of harm suffered by the plaintiff, the plaintiff himself by his own failure to use ordinary and reasonable care for his own safety also contributed to one of the causes of harm suffered by the plaintiff.

With respect to the defense of contributory negligence, the burden is on the defendant claiming the defense to establish by a preponderance of the evidence the claim that the plaintiff was at fault, the negligence on the part of the plaintiff contributed to one of the causes of harm suffered by the plaintiff.

As to contributory negligence, the FELA, the law in question provides in part, "In all actions brought against any railroad to recover damages for personal injury to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the negligence attributable to the employee.["] So if you should find from a preponderance of the evidence that the defendant was guilty of negligence but the plaintiff was also guilty of negligence and such negligence on the part of the plaintiff caused any harm to the plaintiff, then the total award of damages to the plaintiff must be reduced by an amount equal to the percentage of fault or contributory negligence chargeable to the plaintiff.

If you should find that the defendant was not guilty of negligence or the defendant was negligent but such negligence was not a cause in whole or in part of harm suffered by the plaintiff, then your verdict would be for the defendant.

This contributory negligence instruction given by the trial court does not suggest a different causation standard than the one applicable to the defendant's negligence. It does not define "causation" differently from the court's earlier instruction. It directly quotes the FELA's provision regarding contributory negligence. We find no error in the trial court's contributory negligence instruction.

CSX also asserted error in the trial court's foreseeability instruction, arguing that it was insufficient as a matter of law. We recently addressed a similar challenge in *Spencer*. There we stated as follows:

> "[R]easonable foreseeability of harm is an essential ingredient of Federal Employers' Liability Act negligence." ***Gallick v. Baltimore & Ohio R.R. Co.***, 372 U.S. 108, 83 S.Ct. 659, 665, 9 L.Ed.2d 618 (1963). In ***Gallick***, the United States Supreme Court noted that the jury in that case correctly had been charged with regard to reasonable foreseeability of harm, and stated:
>
> > The jury had been instructed that negligence is the failure to observe that degree of care which people of ordinary prudence and sagacity would use under the same or similar circumstances; and that defendant's duty was measured by what a reasonably prudent person would anticipate as resulting from a particular condition – "defendant's duties are measured by what is reasonably foreseeable under like circumstances" – by what "in the light of the facts then known, should or could reasonably have been anticipated."
>
> ***Gallick v. Baltimore & Ohio R.R. Co.***, 372 U.S. 108, 83 S.Ct. 659, 665-66, 9 L.Ed.2d 618 (1963) (footnotes omitted).
>
> With regard to foreseeability and notice in FELA cases, the Sixth Circuit has explained:
>
> > The law is clear that notice under the FELA may be shown from facts permitting a jury to infer that

> the defect could have been discovered by the exercise of reasonable care or inspection:
>
> Under familiar law, defendant could not be convicted of negligence, absent proof that such defect was known, or should or could have been known, by defendant, with opportunity to correct it. This rule is applicable to FELA actions where negligence is essential to recovery. The establishment of such an element, however, may come from proof of facts permitting a jury inference that the defect was discovered, or should have been discovered, by the exercise of reasonable care or inspection.

Szekeres v. CSX Transportation, Inc., 617 F.3d 424, 430–31 (6th Cir. 2010) (quoting ***Miller v. Cincinnati, New Orleans & Tex. Pac. Ry. Co.***, 317 F.2d 693, 695 (6th Cir. 1963)).

Similarly, our own Supreme Court has stated:

> To prove a breach of duty under the FELA, an employee must show that the railroad " 'knew, or by the exercise of due care should have known' that prevalent standards of conduct were inadequate to protect [the employee] and similarly situated employees."

Mills v. CSX Transportation, Inc., 300 S.W.3d 627, 633 (Tenn. 2009) (quoting *Van Gorder v. Grand Trunk W. R.R.*, 509 F.3d 265, 269-70 (6th Cir. 2007)).

Spencer, 2013 WL 3946118 at *3-4 (footnote omitted; some internal citations omitted). The trial court in this case instructed the jury on foreseeability as follows:

> [D]eciding whether ordinary care was exercised in the given case, the conduct in question must be viewed in the light of all surrounding circumstances as shown by the evidence in the case at the time.

> Because the amount of care exercised by reasonably prudent and careful persons varies in proportion to the dangers known to be involved in what is being done, it follows that the amount of caution required in the exercise of ordinary care will vary with the nature of what is being done and all the surrounding circumstances shown by the proof in the case.
>
> To put it another way, if any danger that should be reasonably foreseen increases so the amount of care required by law increases.

We find this instruction to be substantially similar to the one approved by the Supreme Court in ***Gallick***. We find no error in the court's foreseeability instruction.

CSX also argued that the trial court erred in failing to charge the jury with its special request that CSX was only required to provide a reasonably safe workplace, not a perfect work environment. CSX submitted the following jury instruction:

> Although the Railroad is duty-bound to provide a reasonably safe place to work, this does not mean that the Railroad must provide a perfect work environment. The Railroad Defendant is not bound to anticipate every possible incident or accident which might occur, because a railroad is necessarily attended by some danger and it is impossible to eliminate all danger. The law does not make the Defendant an insurer of the safety of its employees, nor of the safety of the places in which they work. The railroad is not held to an absolute responsibility for the reasonably safe condition of the places where the Plaintiff might work, but only to the duty of exercising reasonable care to that end, the degree of care being commensurate with the danger reasonably to be anticipated.

To the extent that this instruction incorporates a correct statement of the law, the essence of the instruction was provided to the jury in our earlier-referenced instructions on duty of care, its definitions of negligence, causation, and foreseeability, and the following additional instruction of the trial court:

> [t]he employer is required to use ordinary and reasonable care under the circumstances to maintain and keep places of work in a reasonably safe condition for the employee.

> This does not mean the employer is a guarantor or insurer of the safety of the place of work. The extent of the employer's duty is to exercise ordinary care under the circumstances then existing[.]

CSX contends that the trial court erroneously charged the jury on both a pre-1976 and post-1976 version of 49 C.F.R. § 174.700, a federal regulation governing the shipping of radioactive material. Part of plaintiff's theory presented at trial was that CSX negligently caused Payne's exposure to radioactive materials shipped in and out of a metal scrap yard in Knoxville called David Witherspoon Industries, Inc. ("DWI"). DWI was licensed to receive and recycle scrap metal contaminated with low levels of radioactivity. CSX presented testimony of a former DWI employee that DWI received contaminated metal from 1964 until 1972. The trial court instructed the jury on the pre-1976 and post-1976 versions of 49 C.F.R. § 174.700 as follows:

> A 1961 regulation provided that no person should remain in a car containing radioactive material unnecessarily, and the shipper must furnish the carrier with such information and equipment as is necessary for the protection of the carrier's employees.
>
> [A] section from 1976 provides a person may not remain unnecessarily in a railcar containing radioactive materials.

CSX argues that the court erred by instructing the post-1976 regulation because DWI "stopped receiving contaminated scrap altogether in 1972." Plaintiff responds by arguing that it was not conclusively established that no radioactive shipments went either in *or out* of DWI after 1972. We agree with plaintiff. Plaintiff presented the videotaped deposition of a corporate representative of CSX, William Bullock, who, when asked whether CSX or its corporate predecessors "did any monitoring of train cars that may have been calling in or out of" DWI prior to 1985, responded, "we didn't, but at the same time we didn't think there was a concern" that "we needed to be looking into radiation exposure of our workers." In short, there was evidence from which the jury could have reasonably concluded that plaintiff was exposed to radioactivity from railcar shipments out of DWI after 1976, and consequently the trial court did not err in its instruction regarding the post-1976 federal regulation regarding the shipping of radioactive materials.

CSX raised several other objections to the jury instructions in its motion for new trial, including the court's refusal to specifically instruct the jury according to CSX's special requests (1) regarding actual or constructive notice of an alleged defective condition and

notice as to "known dangers" in the workplace; (2) to charge the jury that the "mere presence of potentially harmful substances" in the workplace is insufficient by itself to establish negligence; (3) to charge the jury that "there should be no bias against a corporate defendant"; (4) regarding the proper scope of damages, specifically that no punitive damages or loss of consortium damages for Payne's widow should be awarded; and (5) to charge the jury that it must not speculate or guess as to whether CSX's negligence caused plaintiff's damages. We have reviewed all of these objections and arguments, comparing CSX's 40 written special requests for jury instructions with the trial court's instructions. We find that, to the extent the requested instructions are relevant and correctly state the law, they were adequately covered and presented to the jury in the court's instructions. In instructing a jury, "the trial court may decline to give a special instruction when the substance of the instruction is covered in the general charge." ***Pomeroy***, 2005 WL 1217590, at *3; *see also* ***Otis***, 850 S.W.2d at 439. "The fact that a special request for jury instruction asserts a correct rule of law does not make it proper jury charge material." ***Godbee v. Dimick***, 213 S.W.3d 865, 881 (Tenn. Ct. App. 2006).

The jury instructions presented by the trial court in this case, viewed as a whole, are correct, fair and complete. The court's jury charge fairly defined the legal issues in the case. The instructions were not misleading to the jury. The jury returned a verdict in accordance with the court's clear instructions; the only indication of potential confusion came after the court's further unnecessary and erroneous instruction after the verdict. We therefore hold that none of the trial court's jury instructions provide grounds for a new trial.

V.

In its order granting a new trial, the trial court based its ruling on "specific prejudicial errors including, but not limited to, instructional and evidentiary errors." The court did not specify what evidentiary rulings it considered to be erroneous. The trial court stated the following in its oral memorandum opinion:

> During the trial itself I agree that there were too many things that had been ruled improperly for the jury to consider that were considered and presented to the jury, and probably the worst of those was when we started talking about this thyroid cancer which he apparently didn't have.

The trial court did not make any other specific references regarding other evidentiary decisions at trial. The evidence regarding thyroid cancer was briefly presented during plaintiff's cross-examination of one of CSX's medical experts who apparently misdiagnosed Payne with thyroid cancer at some point during his treatment.

The trial in this case was lengthy.[8] The jury heard the case over a two-week period. The testimony of 26 witnesses was presented. The trial transcript is over 2,500 pages long, and the exhibits are sequentially marked up to number 574. Against this backdrop, the following is the entirety of the objected-to evidence of thyroid cancer, which came into proof by way of the cross-examination of Dr. John Craighead, a medical expert called by CSX.

> Q: Of course, you saw a thyroid cancer in Mr. Payne, didn't you?
>
> A: Yes.
>
> Q: And that's caused by radiation, isn't it?
>
> A: That's one of the contributing causes, yes. It's not the only cause. Most individuals we don't know what the cause was.

CSX objected and moved for a mistrial or a curative instruction from the trial court. The trial court provided the following curative instruction to the jury:

> Before we get to the next witness, in the cross examination of the last witness, mention was made of the term thyroid cancer. As you previously heard, there's no claim in this case that the plaintiff suffered from thyroid cancer or that that caused him anything that is the subject matter of this case.

CSX argues that a new trial was warranted because the curative instruction was insufficient in that the "court never unambiguously told the jury that Payne did not have thyroid cancer." We hold, however, that there is very little substantive difference between the statement that "the plaintiff did not suffer from thyroid cancer" and "there's no claim in this case that the plaintiff suffered from thyroid cancer." The clear import of the trial court's curative instruction was that thyroid cancer was not a part of the case and that the jury should disregard the brief evidence of Dr. Craighead's misdiagnosis of thyroid cancer. "The jury is presumed to have followed the trial court's instructions." ***Johnson v. Tenn. Farmers Mut. Ins. Co.***, 205 S.W.3d 365, 375 (Tenn. 2006); *see also* ***Johnson v. Lawrence***, 720 S.W.2d 50, 60 (Tenn. Ct. App. 1986) ("We must assume th[at] the jury followed the trial court's [curative] instruction unless there is proof to the contrary. If error was committed . . . in

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[8]Indeed, in its final remark to the jury, the trial court thanked the jury for serving "on the longest case that the court has had in more than 20 years" and stated, "I actually don't know of a longer case in this court, so that's something."

asking the question, it was cured by the trial court's instruction."). We hold that the trial court's curative instruction effectively cured any error in the presentation of the testimony regarding thyroid cancer. Given the court's timely and accurate curative instruction, any prejudice to CSX resulting from the improper evidence was remedied.

CSX also argues that a new trial was warranted due to the plaintiff's presentation of a powerpoint slide regarding cesium contamination of an area in Oak Ridge where Payne worked. During the 1960s, an area of railroad track near the Y-12 facility in Oak Ridge became contaminated with low levels of cesium, a radioactive element. Payne worked in that area occasionally for about a year of his career. In the 1980s, the U.S. Department of Energy undertook a remedial cleanup of the contaminated area, removing a section of track and the ballast rock from the roadbed. In this case, CSX moved in limine before trial to exclude any evidence of cesium contamination. The trial court declined to grant the motion, taking it under consideration to see how the proof developed at trial, with the intention of ruling on objections as they came up. During trial, plaintiff's counsel agreed not to present cesium evidence in his case-in-chief. During cross-examination of one of CSX's witnesses, plaintiff's counsel put up a powerpoint slide saying "Oak Ridge Y-12 spur cleanup; tracks closed down; cesium radiation contamination; tracks, ballast rock cleaned; remediated by DOE." CSX objected, and the trial court said, "sustain the objection. The jury will disregard that slide." Plaintiff did not present any other evidence of cesium exposure. CSX later presented expert testimony that there was no risk to the public or railroad employees from cesium radiation at Oak Ridge.

After the trial court sustained the objection and instructed the jury to disregard the slide, CSX moved for a mistrial. The trial court denied the motion. After the trial, CSX renewed its motion, "based upon [its] contention that it was entitled to a mistrial on the issues relating to thyroid cancer and cesium contamination at Oak Ridge." The trial court again denied the motion for mistrial.

CSX argues that the cesium evidence was so prejudicial that a new trial was warranted. We disagree. The trial court sustained CSX's objection and excluded the evidence. The court then instructed the jury to disregard the slide, and there is no reason to presume the jury did not follow the court's instruction. There was no error in the trial court's resolution of this issue.

CSX points to several other evidentiary decisions made by the trial court that it says were erroneous, and argues that the trial court *may* have agreed that it erred in ruling on some of them, and that the trial court *may* have relied upon these supposed errors in granting a new trial. These arguments include assertions that the trial court erred in allowing several lay witnesses, including Payne himself, to testify about the presence of asbestos in his

workplaces and his exposure to asbestos, and that the court erred in allowing testimony that the DWI site where Payne worked was contaminated with radioactivity from plutonium and that it was eventually designated as a Superfund site. We have reviewed these issues, and find that they address matters of admissibility upon which the trial court has broad discretion. We have discerned no error in the trial court's rulings on these evidentiary matters, and certainly nothing that would warrant a new trial under the circumstances. We hold that the trial court erred in granting CSX a new trial.

VI.

A motion for a new trial made after a jury verdict triggers the trial court's duty to independently assess the evidence and either approve or disapprove the verdict. Because the trial court is reviewing and weighing the evidence as did the jury, this is generally known as the "thirteenth juror" rule. *See* ***Huskey v. Crisp***, 865 S.W.2d 451, 454 (Tenn. 1993) (observing that the thirteenth juror rule "applies only in the context of a motion for a new trial, for it is only there that the trial court has the duty to decide if the jury verdict is contrary to the weight of the evidence."). In ***Blackburn v. CSX Transp.,*** No. M2006-01352-COA-R10-CV, 2008 WL 2278497 (Tenn. Ct. App. M.S., filed May 30, 2008), this Court determined that there are significant differences between the Tennessee standard for reviewing the evidence as thirteenth juror and the federal standard, and held that the federal standard applies in FELA cases, stating as follows:

> The standard federal courts employ in deciding whether to grant a new trial is whether the verdict is against the "clear weight" of the evidence. When ruling on motions for new trials based upon sufficiency of the evidence, the Sixth Circuit Court of Appeals has stated the standard thusly:
>
> > A court may set aside a verdict and grant a new trial when it is of the opinion that the verdict is against the clear weight of the evidence; however, new trials are not to be granted on the grounds that the verdict was against the weight of the evidence unless that verdict was unreasonable. Thus, if a reasonable juror could reach the challenged verdict, a new trial is improper.
>
> The trial court may not set aside the verdict to grant a new trial if the judge would have reached a different verdict. 6A MOORE'S FEDERAL PRACTICE § 59.08[5] (1996).

> The trial judge, exercising a mature judicial discretion, should view the verdict in the overall setting of the trial; consider the character of the evidence and the complexity or simplicity of the legal principles which the jury was bound to apply to the facts; and abstain from interfering with the verdict unless it is *quite clear* that the jury has reached a seriously erroneous result. The judge's duty is essentially to see that there is no miscarriage of justice.
>
> *Id.* In Tennessee, the law is clear that if a motion for a new trial is filed, then the trial court is under a duty to independently weigh the evidence and determine whether the evidence "preponderates" in favor of or against the verdict.
>
> * * *
>
> [A]t a very basic level, the standards are quite different since the Tennessee standard uses "preponderance" of the evidence, while the federal standard requires that the verdict be outweighed by the "clear" weight of the evidence. Under state law if a judge is "dissatisfied" with a jury verdict then the trial court is at liberty to order a new trial. Under the federal standard, the verdict must be unreasonable. Under state law a court must make an independent decision, while under federal law if a reasonable juror could have reached the verdict, the trial court is to defer. We believe that the differences between the standards are both apparent and significant.

Id., 2008 WL 2278497 at *5-7 (internal citation, footnote and section headings omitted); *accord* ***Jordan***, 2009 WL 112561 at *17 n.12. The ***Blackburn*** Court concluded "that federal law provides the standard to determine whether to grant a new trial in a FELA case tried in state court." *Id.* at *11.

In this case, the trial court did not have an opportunity to approve or disapprove the jury verdict awarding damages in the amount of $8.6 million. We find it appropriate to remand the case for the first trial judge to conduct a review of the evidence under the above-described federal standard and determine whether the $8.6 million verdict is against the clear weight of the evidence. *See* ***Blackburn***, 2009 WL 2278497 at *17 (noting that "[a]n appellate court cannot fulfill this role" of determining "whether the verdict was against the

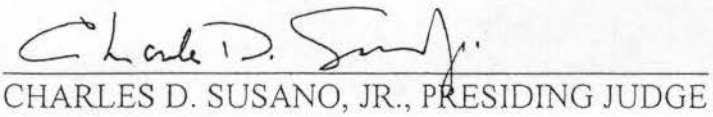
clear weight of the evidence"). If the trial court concludes that the jury's $8.6 million verdict is not against the clear weight of the evidence, then the court is directed to enter judgment in that amount. If the trial court concludes to the contrary. then the court is directed to enter judgment in plaintiff's favor in the amount of $3.2 million, because the verdict assessing damages in that amount has already been duly approved by the trial court when it entered its judgment. We note in this regard that the trial court, in its order granting a new trial, stated that it "applie[d] the appropriate Federal standard for considering motions for new trial in FELA cases" and that it was basing its ruling granting a new trial on "instructional and evidentiary errors" – matters involving questions of law – "independent of considerations regarding sufficiency of the evidence." All of this tells us that the trial court was satisfied that the $3.2 million verdict was not against the clear weight of the evidence.

VII.

Our holding and remand to the trial court with directions to enter judgment in plaintiff's favor in the amount of either $8.6 million or $3.2 million renders moot the question of whether the second trial judge erred in excluding the testimony of the plaintiff's expert witnesses and granting CSX summary judgment. Nevertheless, we have reviewed the issue and hold that the trial court erred in excluding the causation testimony of plaintiff's expert witnesses, all of whom were found to be qualified by the first trial judge in the face of the same challenge and all of whom testified at trial.

VIII.

The judgment of the trial court ordering a new trial is reversed. The judgment of the trial court granting CSX summary judgment is reversed as moot. This case is remanded to the trial court with instructions to the first trial judge to review the evidence at trial and enter judgment in accordance with our directions. Costs on appeal are assessed to the appellee, CSX Transportation, Inc.



CHARLES D. SUSANO, JR., PRESIDING JUDGE

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

ANNE PAYNE v. CSX TRANSPORTATION, INC.

Knox County Circuit Court
223107

No. E2012-02392-COA-R3-CV

Date Printed: 01/17/2014 **Notice / Filed Date: 01/17/2014**

NOTICE - Notice (Outgoing) - Corrected Page(s) to Opinion/Judgment

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The Appellate Court Clerk's Office entered a corrected page to the opinion previously released.

The Correction is as follows:

On page 8 of the opinion, the paragraph starting "The trial court entered an order on September 6, 2011, . . ." is modified.
On page 32, section VII is modified.

Michael W. Catalano
Clerk of the Appellate Courts

> probably not handled appropriately and needs to be handled again, whether by me or somebody else. So that's the extent of what I want to say today.

The trial court entered an order on September 6, 2011, granting CSX a new trial and stating that "[t]he Court makes this decision based upon specific prejudicial errors including, but not limited to, instructional and evidentiary errors that resulted in an injustice to Defendant and, *independent of considerations regarding sufficiency of the evidence*, warrant a new trial." (Emphasis added.) The case was subsequently transferred to another Knox County circuit court judge, the Honorable Dale C. Workman. Judge Workman granted CSX's motion to exclude the causation testimony of Dr. Arthur Frank and Dr. Ross Kerns, both of whom had testified as causation experts before the jury. When the plaintiff acknowledged that Drs. Frank and Kerns were her only witnesses on the issue of causation, Judge Workman granted CSX's motion for summary judgment on the ground that there was no expert testimony establishing causation, and dismissed the case. Plaintiff timely filed a notice of appeal.

II.

Plaintiff raises the issues of whether the trial court erred in: (1) further instructing the jury and permitting it to further deliberate after it had returned a proper verdict; (2) granting CSX a new trial; and (3) granting CSX summary judgment and dismissing the complaint. CSX does not raise any separate issues. The sufficiency of the evidence to support the jury's verdict(s) is not before us.

III.

We first address the trial court's jury instructions. The trial court instructed the jury in accordance with FELA, the federal statute that provides a cause of action for employees of railroads engaged in interstate commerce who are injured on the job. *See* 45 U.S.C.A. § 51; *see also* ***Spencer v. Norfolk S. Rwy. Co.***, No. E2012-01204-COA-R3-CV, 2013 WL 3946118 at *1, n.1 (Tenn. Ct. App. E.S., filed July 29, 2013). In ***Spencer***, this Court recently reiterated the following background and principles governing a FELA claim:

> "The impetus for the [Federal Employers' Liability Act ("FELA"), 45 U.S.C.A. §§ 51–60] was that throughout the 1870's, 80's, and 90's, thousands of railroad workers were being killed and tens of thousands were being maimed annually in what came to be increasingly seen as a national tragedy, if not a national scandal." ***CSX Transp., Inc. v. Miller***, 159 Md. App. 123, 858 A.2d 1025, 1029 (Md. Ct. Spec. App. 2004). "In

clear weight of the evidence"). If the trial court concludes that the jury's $8.6 million verdict is not against the clear weight of the evidence, then the court is directed to enter judgment in that amount. If the trial court concludes to the contrary, then the court is directed to enter judgment in plaintiff's favor in the amount of $3.2 million, because the verdict assessing damages in that amount has already been duly approved by the trial court when it entered its judgment. We note in this regard that the trial court, in its order granting a new trial, stated that it "applie[d] the appropriate Federal standard for considering motions for new trial in FELA cases" and that it was basing its ruling granting a new trial on "instructional and evidentiary errors" – matters involving questions of law – "independent of considerations regarding sufficiency of the evidence." All of this tells us that the trial court was satisfied that the $3.2 million verdict was not against the clear weight of the evidence.

VII.

Our holding and remand to the trial court with directions to enter judgment in plaintiff's favor in the amount of either $8.6 million or $3.2 million renders moot the question of whether the second trial judge erred in excluding the causation testimony of Drs. Frank and Kerns and granting CSX summary judgment. Nevertheless, we have reviewed the issue and hold that the trial court erred in excluding the causation testimony of these two witnesses, both of whom had testified, over the objection of CSX, to causation at trial.

VIII.

The judgment of the trial court ordering a new trial is reversed. The judgment of the trial court granting CSX summary judgment is reversed as moot. This case is remanded to the trial court with instructions to the first trial judge to review the evidence at trial and enter judgment in accordance with our directions. Costs on appeal are assessed to the appellee, CSX Transportation, Inc.

Charles D. Susano

CHARLES D. SUSANO, JR., PRESIDING JUDGE

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

ANNE PAYNE v. CSX TRANSPORTATION, INC.

Knox County Circuit Court
223107

No. E2012-02392-COA-R3-CV

Date Printed: 01/23/2014 **Notice / Filed Date: 01/23/2014**

NOTICE - Order - Petition to Rehear Denied

The Appellate Court Clerk's Office has entered the above action.

If you wish to file an application for permission to appeal to the Tennessee Supreme Court pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure, you must file an original and six copies with the Appellate Court Clerk. The application must be filed "within 60 days after the denial of the petition or entry of the judgment on rehearing." NO EXTENSIONS WILL BE GRANTED.

Michael W. Catalano
Clerk of the Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

ANNE PAYNE v. CSX TRANSPORTATION, INC.

Circuit Court for Knox County
No. 2-231-07

No. E2012-02392-COA-R3-CV

ORDER

The appellee CSX Transportation, Inc., has filed a petition for rehearing pursuant to the provisions of Tenn. R. App. P. 39, arguing that our Opinion "overlooks or misapprehends that several post-trial issues related to the first trial remain unresolved." CSX characterizes these issues as "never-before-resolved." CSX asks us to "grant rehearing for the limited purpose of modifying [our] instructions to the trial court relating to the scope of the remand" to allow the trial court to address these issues.

Our Opinion did not overlook or misapprehend these issues. They are not "unresolved" because, in our view, the trial court considered and implicitly resolved these issues against CSX when it considered CSX's post-trial motion. We adhere to the holding in our Opinion released and filed on December 27, 2013, that "the trial court was satisfied that the $3.2 million verdict was not against the clear weight of the evidence" – a holding CSX has not challenged in its petition for rehearing.

In the Opinion filed in December 2013, we directed the trial court "to conduct a review of the evidence under the . . . federal standard and determine whether the $8.6 million verdict is against the clear weight of the evidence." This remains our directive. *See* ***Blackburn v. CSX Transportation, Inc.***, No. M2006-01352-COA-R10-CV, 2008 WL 2278497 (Tenn. Ct. App. M.S., filed May 30, 2008).

CSX's petition for rehearing is DENIED with costs taxed to CSX.

IT IS SO ORDERED.

CHARLES D. SUSANO, JR., PRESIDING JUDGE

THOMAS R. FRIERSON, II, JUDGE

D. KELLY THOMAS, SPECIAL JUDGE

bad faith when the insurance company did not give them the result they wanted.

TFM's general counsel acknowledged the six cases and also testified that TFM had paid over 220,000 claims in the previous year.

Whether or not the prior adverse decisions were appropriate as evidence, which, of course, the parties dispute, we cannot conclude that they actually establish a pattern of bad faith or unfair acts or practices that are relevant to the situation in this case. The trial court was able to review the opinions and put them in perspective, which would not have been possible for a lay jury. The opinion of the non-attorney expert on what the cases showed does not offer any help to the decision maker.

We have reviewed the opinions of the cases at issue. The existence of coverage was not an issue in any them. They did not involve interpretation of the language of the policy. Most of the cases were based on a bad faith refusal to settle, resulting in a judgment in excess of the policy limits. *Johnson v. Tennessee Farmers Mut. Ins. Co.* 205 S.W.3d 365 (Tenn.2006); *Tennessee Farmers Mut. Ins. Co. v. Wood,* 277 F.2d 21, 24 (6th Cir.1960); *Maclean v. Tennessee Farmers Mut. Ins. Co.,* 01A–01–9407–CH–00320, 1994 WL 697857 (Tenn.Ct.App. Dec. 14, 1994). The cases are simply not probative of any pattern or consistent practice that occurred in this case.

Additionally, we find significant, although the expert did not, that only six instances of court holdings of bad faith occurred over twenty or thirty years (the oldest was from 1960). The occurrence of judgments of bad faith seems infrequent and very low considering the number of claims processed by TFM. We cannot conclude that any evidence supports a finding that TFM has a practice or pattern of conduct that would justify the trebling of damages in this case.

***27** In the case before us, the Plaintiffs spend a number of pages in their brief citing cases from this and other jurisdictions interpreting "possession" and "lawful possession," with inconsistent definitions and outcomes. The Plaintiffs used that authority to argue strenuously that the words of the exception were ambiguous. Of course, Plaintiffs then argued that any ambiguity must be construed against the insurer. Nonetheless, it is difficult to understand how the insurance company's interpretation of an admittedly ambiguous term could amount to a knowing and willful violation of the TCPA's prohibition of deceptive and unfair acts.

We reverse the trial court's holding that treble damages, or enhanced penalties, were appropriate and vacate the award of treble damages.

VIII. STANDING AND PROPER PARTIES

TFM argues that the trial court erred by dismissing its pre-trial motion for judgment on the pleadings under Tenn. R. Civ. P. 12.02. The motion was in large part a challenge to the rights of all the plaintiffs to sue. The insurance company contends on appeal, for example, that the trial court should have dismissed all the Leverettes' claims from the lawsuit because they were not insured by TFM and the insurance company owed absolutely no duty to them under the insurance contract.

In response to TFM's motion on the pleadings, Plaintiffs moved to amend their complaint to remove any claims by the Leverettes based on the insurance company's bad faith. They asserted, however, that the Leverettes were entitled to remain as plaintiffs, not because of their agreement with the Sanders, but because they were third party beneficiaries or subrogated judgment creditors of the Sanders' insurance policy. Under the amended complaint, the only relief the Leverettes sought from the trial court was a judgment for the insurance policy limits of $62,000.

The case of *Linehan v. Allstate Ins. Co.,* 1994 WL 164113(Tenn.Ct.App. May 4, 1994) involves a claim similar to the one the Leverettes are asserting in the present case. In *Linehan,* a landlord obtained an $80,000 judgment against a tenant for damages caused by a fire on property owned by the landlord and occupied by the tenant. The tenant had obtained a renter's insurance policy, but his insurance company declined to defend him. The landlord then sued the tenant's insurance company, asserting that the judgment against the tenant made him a third party beneficiary on the insurance contract as well as the tenant's judgment creditor.

The landlord's claim was ultimately dismissed, but not because he lacked standing to sue. Rather, the court held that the landlord's rights as a judgment creditor were derivative and thus could rise no higher than the rights the tenant possessed. *Linehan v. Allstate Ins. Co.,* 1994 WL 164113 at *2. Since the tenant lost his rights against the insurance

Addendum 2

Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*

Tennessee Code Annotated § 20-9-508

Tennessee Rule of Evidence 702

Tennessee Rule of Evidence 703

United States Code Annotated
Title 45. Railroads (Refs & Annos)
Chapter 2. Liability for Injuries to Employees (Refs & Annos)

45 U.S.C.A. § 51

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Currentness

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

CREDIT(S)

(Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.)

Notes of Decisions (3749)

45 U.S.C.A. § 51, 45 USCA § 51
Current through P.L. 113-74 approved 1-16-14

End of Document

United States Code Annotated
Title 45. Railroads (Refs & Annos)
Chapter 2. Liability for Injuries to Employees (Refs & Annos)

45 U.S.C.A. § 52

§ 52. Carriers in Territories or other possessions of United States

Currentness

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

CREDIT(S)

(Apr. 22, 1908, c. 149, § 2, 35 Stat. 65.)

Notes of Decisions (6)

45 U.S.C.A. § 52, 45 USCA § 52
Current through P.L. 113-74 approved 1-16-14

End of Document

United States Code Annotated
Title 45. Railroads (Refs & Annos)
Chapter 2. Liability for Injuries to Employees (Refs & Annos)

45 U.S.C.A. § 53

§ 53. Contributory negligence; diminution of damages

Currentness

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

CREDIT(S)

(Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.)

Notes of Decisions (475)

45 U.S.C.A. § 53, 45 USCA § 53
Current through P.L. 113-74 approved 1-16-14

End of Document

United States Code Annotated
Title 45. Railroads (Refs & Annos)
Chapter 2. Liability for Injuries to Employees (Refs & Annos)

45 U.S.C.A. § 54

§ 54. Assumption of risks of employment

Currentness

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

CREDIT(S)

(Apr. 22, 1908, c. 149, § 4, 35 Stat. 66; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.)

Notes of Decisions (371)

45 U.S.C.A. § 54, 45 USCA § 54
Current through P.L. 113-74 approved 1-16-14

End of Document

United States Code Annotated
Title 45. Railroads (Refs & Annos)
Chapter 2. Liability for Injuries to Employees (Refs & Annos)

45 U.S.C.A. § 54a

§ 54a. Certain Federal and State regulations deemed statutory authority

Currentness

A regulation, standard, or requirement in force, or prescribed by the Secretary of Transportation under chapter 201 of Title 49, or by a State agency that is participating in investigative and surveillance activities under section 20105 of Title 49 is deemed to be a statute under sections 53 and 54 of this title.

CREDIT(S)

(Apr. 22, 1908, c. 149, § 4A, as added July 5, 1994, Pub.L. 103-272, § 4(i), 108 Stat. 1365.)

45 U.S.C.A. § 54a, 45 USCA § 54a
Current through P.L. 113-74 approved 1-16-14

End of Document

United States Code Annotated
Title 45. Railroads (Refs & Annos)
Chapter 2. Liability for Injuries to Employees (Refs & Annos)

45 U.S.C.A. § 55

§ 55. Contract, rule, regulation, or device exempting from liability; set-off

Currentness

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

CREDIT(S)

(Apr. 22, 1908, c. 149, § 5, 35 Stat. 66.)

Notes of Decisions (313)

45 U.S.C.A. § 55, 45 USCA § 55
Current through P.L. 113-74 approved 1-16-14

End of Document

United States Code Annotated
Title 45. Railroads (Refs & Annos)
Chapter 2. Liability for Injuries to Employees (Refs & Annos)

45 U.S.C.A. § 56

§ 56. Actions; limitation; concurrent jurisdiction of courts

Currentness

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

CREDIT(S)

(Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, § 2, 53 Stat. 1404; June 25, 1948, c. 646, § 18, 62 Stat. 989.)

Notes of Decisions (594)

45 U.S.C.A. § 56, 45 USCA § 56
Current through P.L. 113-74 approved 1-16-14

End of Document

United States Code Annotated
Title 45. Railroads (Refs & Annos)
Chapter 2. Liability for Injuries to Employees (Refs & Annos)

45 U.S.C.A. § 57

§ 57. Who included in term "common carrier"

Currentness

The term "common carrier" as used in this chapter shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

CREDIT(S)

(Apr. 22, 1908, c. 149, § 7, 35 Stat. 66.)

Notes of Decisions (3)

45 U.S.C.A. § 57, 45 USCA § 57
Current through P.L. 113-74 approved 1-16-14

End of Document

United States Code Annotated
Title 45. Railroads (Refs & Annos)
Chapter 2. Liability for Injuries to Employees (Refs & Annos)

45 U.S.C.A. § 58

§ 58. Duty or liability of common carriers and rights of employees under other acts not impaired

Currentness

Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress.

CREDIT(S)

(Apr. 22, 1908, c. 149, § 8, 35 Stat. 66.)

45 U.S.C.A. § 58, 45 USCA § 58
Current through P.L. 113-74 approved 1-16-14

End of Document

United States Code Annotated
Title 45. Railroads (Refs & Annos)
Chapter 2. Liability for Injuries to Employees (Refs & Annos)

45 U.S.C.A. § 59

§ 59. Survival of right of action of person injured

Currentness

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

CREDIT(S)

(Apr. 22, 1908, c. 149, § 9, as added Apr. 5, 1910, c. 143, § 2, 36 Stat. 291.)

Notes of Decisions (66)

45 U.S.C.A. § 59, 45 USCA § 59
Current through P.L. 113-74 approved 1-16-14

End of Document

United States Code Annotated
Title 45. Railroads (Refs & Annos)
Chapter 2. Liability for Injuries to Employees (Refs & Annos)

45 U.S.C.A. § 60

§ 60. Penalty for suppression of voluntary information incident to accidents; separability

Currentness

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided,* That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

If any provision of this chapter is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and the applicability of such provision to other persons and circumstances shall not be affected thereby.

CREDIT(S)

(Apr. 22, 1908, c. 149, § 10, as added Aug. 11, 1939, c. 685, § 3, 53 Stat. 1404.)

Notes of Decisions (41)

45 U.S.C.A. § 60, 45 USCA § 60
Current through P.L. 113-74 approved 1-16-14

End of Document

Note 1

and the term was not extended by formal order of court. Code, §§ 10312, 10347. Crane Enamel Co. v. Jamison, 1948, 217 S.W.2d 945, 188 Tenn. 211. Workers' Compensation ⇐ 1773

2. Construction

Code sections undertaking to control the effect of the ending of the term on litigation pending in the circuit court are in pari materia and should be considered together. Code, §§ 10312, 10347. Crane Enamel Co. v. Jamison, 1948, 217 S.W.2d 945, 188 Tenn. 211. Statutes ⇐ 231

§ 20–9–507. Repealed by 1981 Pub.Acts, c. 449, § 1(3)

§ 20–9–508. Polling jury

The trial judges in all courts of record in which suits are tried by juries, in both criminal and civil cases, shall be required to poll the jury on application of either the state or the defendant in criminal cases and either the plaintiff or the defendant in civil cases, without exception.

1955 Pub.Acts, c. 239, § 1.

Formerly § 20–1324.

Library References

Treatises and Practice Aids

Verdict, polling the jury, see Raybin, 11 Tenn. Prac. Debtor—Creditor Law and Practice § 31.36 (1985).

Notes of Decisions

1. In general

Statutes governing polling of juries on request require no particular method in conduct of poll. T.C.A. §§ 20–1324, 20–1325. Lovell v. McCullough, 1969, 439 S.W.2d 105, 26 McCanless 567, 222 Tenn. 567. Trial ⇐ 325(1)

Polling of jury by posing question as to whether verdict against defendant driver of automobile was juror's verdict was reversible error where foreman had announced general verdict against all three joint tort-feasors. T.C.A. §§ 20–1324, 20–1325. Lovell v. McCullough, 1969, 439 S.W.2d 105, 26 McCanless 567, 222 Tenn. 567. Appeal And Error ⇐ 1070(1)

Plaintiff waived right to have jury polled in principal suit where plaintiff's request for poll had not been made at time jury reported verdict in principal suit but only after jury had again retired and brought in verdict in husband's dependent suit. T.C.A. § 20–1324. Ball v. Mallinkrodt Chemical Works, 1964, 381 S.W.2d 563, 53 Tenn.App. 218, 19 A.L.R.3d 813. Trial ⇐ 325(1)

Right to have jury polled is not constitutional right but is conferred by statute. T.C.A. § 20–1324. Ball v. Mallinkrodt Chemical Works, 1964, 381 S.W.2d 563, 53 Tenn.App. 218, 19 A.L.R.3d 813. Trial ⇐ 325(1)

Failure to poll jury was not error in absence of defense or prosecution requesting that jury be polled. T.C.A. §§ 20–1324, 20–1325. Nance v. State, 1962, 358 S.W.2d 327, 14 McCanless 328, 210 Tenn. 328. Criminal Law ⇐ 874

Trial judge is only required to poll jury upon application of one of parties. T.C.A. §§ 20–1324, 20–1325. Nance v. State, 1962, 358 S.W.2d 327, 14 McCanless 328, 210 Tenn. 328. Criminal Law ⇐ 874

In will contest, record established that trial judge, in his discretion, ascertained with accuracy the verdict of each member of the jury, and did not erroneously refuse to poll the jury at the request of counsel for contestants. Smith v. Weitzel, 1960, 338 S.W.2d 628, 47 Tenn.App. 375. Trial ⇐ 325(1)

Where in automobile negligence action, jury not only reported general verdict for plaintiff but each juror, upon poll, did likewise, and where there could be but one recovery, trial court did not err in failing, on defendant's request to poll the jury, to poll jury on cross-action as well as on general verdict. T.C.A. § 20–1318; Pub.Acts 1955, c. 239. Dixon Stave & Heading Co. v. Archer, 1956, 291 S.W.2d 603, 40 Tenn.App. 327. Trial ⇐ 325(1)

Polling of jury met requirements of statute though, after three jurors had been polled, trial

favor of or prejudiced against a party or another witness.

[Adopted effective January 1, 1990.]

Advisory Commission Comment

Bias is an important ground for impeachment. See Creeping Bear v. State, 113 Tenn. 322, 87 S.W. 653 (1905).

Rule 617. Impeachment by Impaired Capacity

A party may offer evidence that a witness suffered from impaired capacity at the time of an occurrence or testimony.

[Adopted effective January 1, 1990.]

Advisory Commission Comment

Only impaired capacity at "occurrence or testimony" will impeach.

Rule 618. Impeachment of Expert by Learned Treatises

To the extent called to the attention of an expert witness upon cross-examination or relied upon by the witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice, may be used to impeach the expert witness's credibility but may not be received as substantive evidence.

[Adopted effective January 1, 1990.]

Advisory Commission Comment

The rule restates the current Tennessee view. Sale v. Eichberg, 105 Tenn. 333, 59 S.W. 1020 (1900); McCay v. Mitchell, 62 Tenn.App. 424, 463 S.W.2d 710 (1970).

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses

(a) Generally. If a witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are

(1) rationally based on the perception of the witness and

(2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

(b) Value. A witness may testify to the value of the witness's own property or services.

[Adopted effective January 1, 1990; amended effective July 1, 1996.]

Advisory Commission Comment to 1996 Amendment

This rule was amended because the former rule precluded any lay opinion if the lay witness could substitute facts for opinion.

Rule 702. Testimony by Experts

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.

[Adopted effective January 1, 1990.]

2001 Advisory Commission Comment

The Frye test no longer exists in Tennessee. In McDaniel v. CSX Transportation, Inc., 955 S.W.2d 257 (1997), the Tennessee Supreme Court listed five nonexclusive factors taken from the federal case of Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993):

"(1) whether scientific evidence has been tested and the methodology with which it has been tested;

"(2) whether the evidence has been subjected to peer review or publication;

"(3) whether a potential rate of error is known;

"(4) whether, as formerly required by Frye, the evidence is generally accepted in the scientific community; and

"(5) whether the expert's research in the field has been conducted independent of litigation."

[Comment adopted effective July 1, 2001.]

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

[Adopted effective January 1, 1990; July 1, 2009.]

Advisory Commission Comment

Experts in any field may base opinions on facts not in evidence under this rule. Requisite foundations are that (1) the facts must be "reasonably relied upon by experts in the particular field" and (2) the facts must be trustworthy.

With such foundations, inadmissible hearsay could support an admissible expert opinion.

New Jersey Zinc Co. v. Cole, 532 S.W.2d 246 (Tenn.1975), allows a treating doctor to base an opinion on reports of other professionals.

If the bases of expert testimony are not independently admissible, the trial judge should either prohibit the jury from hearing the foundation testimony or should deliver a cautionary instruction. Unfairly prejudicial facts or data should be dealt with under Rule 403. With respect to cross-examination, see Rule 705.

[Comment amended effective May 17, 2005.]

2009 Advisory Commission Comment

The third sentence is new. Normally a jury should not be allowed to hear the reliable but inadmissible bases underlying an expert's opinion.

Rule 704. Opinion on Ultimate Issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

[Adopted effective January 1, 1990.]

Advisory Commission Comment

The Supreme Court has already approved this language. City of Columbia v. C.F.W. Construction Co., 557 S.W.2d 734 (Tenn.1977). But Blackburn v. Murphy, 737 S.W.2d 529 (Tenn.1987), places limitations on lay witnesses testifying to some ultimate issues, such as whether an accident was unavoidable.

1996 Advisory Commission Comment

One ultimate issue is outside the scope of expert testimony. T.C.A. § 39-11-501 provides that "no expert witness may testify as to whether the defendant was or was not insane."

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

[Adopted effective January 1, 1990.]

Advisory Commission Comment

This rule gives a lawyer the option of not using a hypothetical question in examining an expert; the lawyer can ask the expert simply to state an opinion. Tennessee presently requires the hypothetical unless the expert bases testimony on personal observation. See, e.g., Valentine v. Conchemco, Inc., 588 S.W.2d 871 (Tenn.App.1979).

Rule 706. Court-Appointed Experts

(a) Appointment. The court may not appoint expert witnesses of its own selection on issues to be tried by a jury except as provided otherwise by law. As to bench-tried issues, the court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed and may request the parties to submit nominations. The court ordinarily should appoint expert witnesses agreed upon by the parties, but in appropriate cases, for reasons stated on the record, the court may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness's duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness's findings, the witness's deposition may be taken by any party, and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and condemnation proceedings. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs and thereafter charged in like manner as other costs.

(c) Disclosure of Appointment. Where a court-appointed expert is permitted otherwise by law to testify on an issue to be tried by a jury, no one may disclose to the jury the fact that the court appointed the expert witness.

(d) Parties' Experts of Own Selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

[Adopted effective January 1, 1990.]

Advisory Commission Comment

The Commission was wary of the undue impact a court-appointed expert might have on a jury, and the rule prohibits such experts in jury trials unless expressly permitted by statute. Even where the trial court wants its own expert in a bench trial, the judge normally should defer to the parties' suggestions. Either party may discover and cross-examine the court's expert.

Addendum 3

Unpublished Judicial Opinions, Secondary Legal Sources, and Other Materials

Tennessee State Court Cases

Dickey v. Nichols, No. 01-A-01-9007-CH00260, 1991 WL 169618 (Tenn.Ct.App. Sept. 4, 1991) – further appellate disposition unknown

Kerney v. Endres, No. E2008-01476-COA-R3-CV, 2009 WL 1871933 (Tenn. Ct. App. June 30, 2009) – no appeal taken, mandate issued Sept. 2, 2009.

Leverette v. Tennessee Farmers Mut. Ins. Co., M2011-00264-COA-R3-CV, 2013 WL 817230 (Tenn.Ct.App. March 4, 2013) – no appeal taken, mandate issued May 8, 2013

McConkey v. Laney, No. 02A01-9608-CV-00250, 1996 WL 735234 (Tenn.Ct.App. Dec. 24, 1996) – further appellate disposition unknown

Pellicano v. Metro. Gov.'t of Nashville & Davidson Cnty, No. M2003-00292-COA-R3-CV, 2004 WL 343951 (Tenn.Ct.App. Feb. 23, 2004), app. perm. appeal denied by Supreme Court, October 4, 2004

Pittenger v. Ruby Tuesday, Inc., M2006-00266-COA-R3CV, 2007 WL 935713 (Tenn. Ct. App. Mar. 28, 2007) – no appeal taken.

Russell v. Anderson County, No. E2008-00925-COA-R3-CV, 2009 WL 2877415 (Tenn.Ct.App. Sept. 8, 2009) – no appeal taken, mandate issued Nov. 13, 2009.

Wright v. Dixon, No. E2010-01647-COA-R3-CV, 2011 WL 1648088 (Tenn.Ct.App. May 2, 2011) – no appeal taken, mandate issued July 6, 2011

Federal Court Cases

Nelson v. Tennessee Gas Pipeline Co., No. 95-1112, 1998 WL 1297690 (E.D. Tenn. Aug. 31, 1998), aff'd 243 F.3d 244 (6th Cir. 2001), cert. den. 534 U.S. 822 (2001)

In re Southeastern Milk Antitrust Litigation, No. 2:07-CV 188, 2012 WL 947106 (E.D. Tenn. March 20, 2012)

Other Court Cases

McGuire v. Mayfield, No. 1-90-83, 1991 WL 261831 (Ohio Ct. App. Dec. 9, 1991)

Secondary Legal Sources

66 C.J.S. New Trial § 331

Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747 (1982)

Other

American Cancer Society, *Tobacco-Related Cancers Fact Sheet*, available at http://www.cancer.org/cancer/cancercauses/tobaccocancer/tobacco-related-cancer-fact-sheet.

1991 WL 169618
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee,
Middle Section, at Nashville.

Ira Curtis DICKEY, Nita Jean Dickey Bailey,
Roy Franklin Dickey, Jr., and Carolyn
Lois Dickey Rowell, Plaintiffs/Appellees,
v.
Leroy B. NICHOLS, individually, and
as Executor of the Estate of Pearl
Dickey Nichols, Defendant/Appellant.

No. 01-A-01-9007-CH00260. | Sept. 4, 1991.

Wayne Chancery No. 7203, Appeal from the Chancery Court for Wayne County, at Waynesboro, William B. Cain, Judge.

Attorneys and Law Firms

J. Daniel Freemon, Freemon & Hillhouse, Lawrenceburg, for plaintiffs/appellees.

George G. Gray, Waynesboro, for defendant/appellant.

Opinion

OPINION

KOCH, Judge.

*1 This appeal involves an intrafamily dispute concerning a sixty-acre tract of Wayne County property that arose after the death of the family's matriarch. The deceased's children, believing that they had a vested remainder interest in the property, brought suit in the Chancery Court for Wayne County against the deceased's second husband, alleging that he had committed waste by cutting timber on the property. The deceased's husband counterclaimed for reformation of the deed to give him the right to dispose of the property. After protracted proceedings before two trial judges, the trial court granted a summary judgment dismissing the husband's counterclaim.[1] The deceased's husband has appealed, asserting that the trial court should not have granted the summary judgment. We disagree and, therefore, affirm the trial court.

I.

Leroy B. Nichols and Pearl Dickey Nichols were married in February, 1948. Mrs. Nichols had been married before and had four children from her first marriage. Mr. and Mrs. Nichols lived near Detroit, Michigan where Mr. Nichols worked for a steel company.

In June, 1972, Mr. and Mrs. Nichols purchased a sixty-acre tract of property in Wayne County from Mrs. Nichols' sister and brother-in-law. The original, inartfully written deed reflected that Mr. and Mrs. Nichols owned a fee simple interest in the property. The language of the deed concerned Mrs. Nichols because she had intended that she and Mr. Nichols would have only a life estate in the property and that her four children would have the fee simple remainder.

Mr. and Mrs. Nichols moved to Wayne County sometime in 1979 after Mr. Nichols retired from the steel company. They used the proceeds from the sale of their house in Michigan, as well some funds Mr. Nichols had inherited from his family, to build a house on the Wayne County property.

Mrs. Nichols continued to have misgivings about whether the June, 1972 deed correctly reflected their intentions with regard to the property. In early 1981, she and Mr. Nichols discussed the matter with the attorney who was assisting them with the preparation of their wills. The attorney informed them that the 1972 deed was ambiguous and recommended that it be rewritten. Mr. and Mrs. Nichols did not act immediately on this recommendation or on the preparation of their wills.

The subject of the property took on more immediacy in late 1981 when Mrs. Nichols discovered she had cancer. She underwent surgery on December 29, 1981, and two days later while still hospitalized, she and Mr. Nichols executed a "deed of correction," stating:

Whereas, said deed [the June, 1972 deed] is irregular because it does not express the unambiguous intention of the parties inasmuch as it was the intention of the parties at the time of the execution and delivery of such deed that the said Leroy B. Nichols and wife, Pearl O. Nichols, would become seized and possessed of a life estate only in such property and that on their death, or the death of the survivor of them, the remainder estate would go to the children and heirs at law of Pearl O.

Nichols, to-wit, Ira Curtis Dickey, Nita Jean Dickey Bailey, Roy Franklin Dickey, Jr. and Carolyn Lois Dickey Rowell, as equal tenants in common, their heirs and assigns, in fee simple forever.

***2** The deed of correction was also signed by Mrs. Nichols' sister and brother-in-law and was recorded in the register of deeds' office.

On January 16, 1982, Mr. and Mrs. Nichols went to their attorney's office to execute their wills. The wills, which were identical in substance, specifically dealt with the Wayne County property in the following manner:

The real estate which my husband and I have a life estate in will of course go to my children upon the death of the survivor of us, all as shown by deed of correction recorded a few weeks ago in the Register's Office of Wayne County, Tennessee.

Mrs. Nichols died in July, 1982. Disputes between Mr. Nichols and Mrs. Nichols' children concerning the status of the property delayed the probate of her will. As a result, Mr. Nichols did not file the will for probate or seek to be appointed executor until July, 1983.

Mr. Nichols continued to live on the property. Some time after he filed the will for probate, he cut some timber on the property and kept the proceeds for himself. This prompted Mrs. Nichols' children to file a lawsuit against Mr. Nichols alleging, among other things, that he had only a life estate in the property and that he was committing waste by cutting and selling the timber. Mr. Nichols counterclaimed for reformation of the deeds to give him an "unlimited power of disposition."

The case was tried to a jury in August, 1985. In specific answer to one of the questions propounded to them, the jury determined that Mr. Nichols had proved by a preponderance of the evidence

that a mutual mistake was made which under the law requires the Court to reform the deed so it would have given Mr. & Mrs. Nichols the power of disposition during their lifetime or the lifetime of the survivor of them.

Accordingly, on September 26, 1985, the trial court entered a judgment reforming the deed to provide Mr. Nichols with an unlimited power of disposition.

Mrs. Nichols' children filed timely motions for a new trial and for a judgment notwithstanding the verdict. On July 18, 1986, the trial court entered an order denying the motion for new trial but granting a judgment notwithstanding the verdict. The trial court specifically found (1) that Mrs. Nichols intended all along that her children should have "an irrevocable and unlimited remainder interest" in the property; (2) that Mr. Nichols had "a different understanding and different intents concerning the remainder interest being created," (3) that Mrs. Nichols died "without her intent ever changing," and (4) that there was a mutual mistake only in the sense that Mr. Nichols and Mrs. Nichols had different understandings concerning the remainder interest.

Based on these findings, the trial court "modified" the original judgment

to reform the Deeds which were the subject matter of this lawsuit ... to vest in the Plaintiffs ... a one-half (½) undivided interest in said property, subject to the life estate in favor of Leroy B. Nichols, and without any power of Mr. Nichols to dispose of said one-half (½) remainder interest; and to vest in the Plaintiffs a one-half (%½) remainder interest in said real estate, subject to the life estate of Leroy B. Nichols, with an unlimited power of disposition in that one-half (½) interest in favor of Leroy B. Nichols.

***3** All parties perfected an appeal, but the appeals were dismissed because the July 18, 1986 order was not final.[2] *Dickey v. Nichols,* App. No. 86-348-11 (Tenn.Ct.App. Dec. 2, 1986).

The case lay dormant in the trial court for over two years after it was remanded. During this time, the judge who had presided over the case since its inception resigned and was succeeded by a new judge. Finally, in early 1989, Mrs. Nichols' children renewed their motion for a new trial and filed a motion for summary judgment. In its March 16, 1989 memorandum granting a new trial, the trial court stated:

There is no alternative at this time but to grant a new trial to all parties on all issues. The counterclaimant has never waived his demand for a trial by jury. The Court cannot conceive how such a trial by jury can be bifurcated to allow some issues of fact to be tried by this Court by review of the previous testimony without doing violence to the very essence of trial by jury.

A new trial will, therefore, be granted on all issues with leave to all parties to amend pleadings, file new summary judgment motions, and otherwise proceed in accordance with the Tennessee Rules of Civil Procedure.

The parties permitted the case to languish for almost another year. On February 2, 1990, the trial court entered a detailed memorandum granting Mrs. Nichols' children's motion for summary judgment and dismissing Mr. Nichols' counterclaim seeking reformation of the deeds. In substance, the trial court decided that Mr. Nichols could not make out a case for reformation as a matter of law because he could not prove that he and Mrs. Nichols made a mutual mistake when they executed the deeds or that he was induced to sign the deeds by fraud. The trial court certified it decision as final judgment in accordance with Tenn.R.Civ.P. 54.02, and Mr. Nichols has again appealed to this court.

II.

Mr. Nichols asserts in his first two issues that the trial court erred, first by entering the July 18, 1986 order "modifying" the judgment and second by later granting a new trial after this court dismissed the first appeal. We will consider these issues together because they call the status of the September 26, 1985 judgment into question. We have concluded that the September, 1985 judgment was not final and, therefore, that it could be revised either by the original trial judge or his replacement.

The complaint filed by Mrs. Nichols' children contained two claims within the trial court's jurisdiction: first, that Mr. Nichols had committed waste by cutting down trees on the property and second that Mr. Nichols had maliciously defaced Mrs. Nichols' gravestone. Mr. Nichols' counterclaim sought reformation of the deeds. Thus, there were three issues to be resolved when this case went to trial in August, 1985.

The September, 1985 judgment disposed of Mr. Nichols' counterclaim but did not mention either of Mrs. Nichols' children's claims. Thus, on its face, the judgment adjudicated fewer than all the claims between all the parties. Since it did not contain a Tenn.R.Civ.P. 54.02 certification, it was not final and remained subject to revision at any time prior to the entry of a final judgment adjudicating all the claims of all the parties. Tenn.R.Civ.P. 54.02; Tenn.R.App.P. 3(a); *Stidham v. Fickle Heirs,* 643 S.W.2d 324, 325 (Tenn.1982).

***4** Another panel of this court reached the same conclusion on the first appeal of this case. *Dickey v. Nichols,* App. No. 86-348-11, slip op. at 2 (Tenn.Ct.App. Dec. 2, 1986). Since this opinion was not appealed from, it is now the law of the case. *Jones v. Jones,* 784 S.W.2d 349, 351 n. 1 (Tenn.Ct.App.1989).

With the case in the posture of being without a final order, the trial court could, as it did, grant the motion for new trial in March, 1989. *See Grissim v. Grissim,* 637 S.W.2d 873, 875 (Tenn.Ct.App.1982); *Benson v. Fowler,* 43 Tenn.App. 147, 157-58, 306 S.W.2d 49, 54-55 (1957). In light of the validity of the March, 1989 order granting the new trial, we need not pass directly upon the propriety of the trial court's July, 1986 "modification" of the judgment. [3]

When a new trial is granted, the case proceeds de novo as if there had never been a previous trial. *Day v. Amax, Inc.,* 701 F.2d 1258, 1263 (8th Cir.1983); *Pasquel v. Owen,* 97 F.Supp. 157, 158 (W.D.Mo.1951). While rather unusual, nothing in the rules prevents granting a summary judgment after granting a new trial. *Registration Control Sys., Inc. v. Compusystems, Inc.,* 922 F.2d 805, 810 (Fed.Cir.1990); *Farrow Precision, Inc. v. IBM,* 745 F.2d 1283, 1284 (9th Cir.1984); *United States v. An Article of Drug Consisting of 4,680 Pails,* 725 F.2d 976, 989 (5th Cir.1984). Doing so is substantially the same as granting a motion for judgment notwithstanding the verdict. *Fryman v. Federal Crop Ins. Corp.,* 936 F.2d 244, 250 n. 5 (6th Cir.1991). Accordingly, the trial court did not err by entertaining the motion for summary judgment.

III.

Mr. Nichols finally takes issue with two aspects of the summary judgment. First, he asserts that the trial court should not have considered his own prior testimony at the August, 1985 trial. Second, he asserts that his testimony concerning his wife's intentions should have been sufficient to thwart the summary judgment. We disagree.

A.

Mr. Nichols' reasons for opposing the use of his own trial testimony are rather curious. He argues that considering his testimony "perverts the purpose of Rule 56" and further that it has a "chilling effect upon the candor, honesty, and

responsiveness which should characterize trial testimony." We place little stock in these concerns because the standards for litigants' candor, honesty, and responsiveness does not vary depending on the stage of the litigation. Litigants are expected to be just as candid and honest at the summary judgment stage as they are at trial.

Tenn.R.Civ.P. 56.05 does not specifically mention the transcripts of testimony in other judicial proceedings. However, this type of evidentiary material bears all the indicia of reliability of affidavits and depositions. The testimony is under oath and is subject to cross-examination. Accordingly, many federal courts have held that the evidence contained in transcripts of other judicial proceedings can be used to support or to oppose a summary judgment motion. *Boston Athletic Ass'n v. Sullivan,* 867 F.2d 22, 24 (1st Cir.1989); *Langston v. Johnson,* 478 F.2d 915, 918 n. 17 (D.C.Cir.1973); 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 56.11[1.-8] (2d ed. 1991).

***5** We find these decisions persuasive in light of the similarities between our summary judgment rule and its federal counterpart. *Continental Casualty Co. v. Smith,* 720 S.W.2d 48, 49 (Tenn.1986); *Bowman v. Henard,* 547 S.W.2d 527, 530 (Tenn.1977). Thus, the trial court did not err by considering the transcript of Mr. Nichols' testimony during the first trial in disposing of the motion for summary judgment.

B.

We now turn to the propriety of the summary judgment in this case. Mr. Nichols asserts that it was inappropriate because of the existence of material factual disputes. We disagree. Mr. Nichols has not demonstrated that he can make out a successful claim for reformation as a matter of law.

Summary judgment proceedings are not intended to be substitutes for trials when genuine factual disputes exist. *Jones v. Home Indem. Ins. Co.,* 651 S.W.2d 213, 214 (Tenn.1983). They should not be used to weigh the evidence, to resolve disputed factual issues, or to choose among the conclusions and inferences that could be drawn from the facts. *Bellamy v. Federal Express Corp.,* 749 S.W.2d 31, 33 (Tenn.1988); *Solomon v. Hall,* 767 S.W.2d 158, 162 (Tenn.Ct.App.1988).

However, otherwise material factual disputes are rendered immaterial for summary judgment purposes when there is a failure of proof with regard to an essential element of a claim. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552 (1986); *Laws v. Johnson,* 799 S.W.2d 249, 251 (Tenn.Ct.App.1990); *Moman v. Walden,* 719 S.W.2d 531, 533 (Tenn.Ct.App.1986). Thus, it is now established in Tennessee that a claim is subject to summary dismissal if the claimant cannot demonstrate its ability to prove an essential element of the claim on which it will have the burden of proof at trial. *Dooley v. Everett,* 805 S.W.2d 380, 386 (Tenn.Ct.App.1990); *Goodman v. Phythyon,* 803 S.W.2d 697, 703 (Tenn.Ct.App.1990); *Stanley v. Joslin,* 757 S.W.2d 328, 330 (Tenn.Ct.App.1987).

The equitable remedy of rescission is only available to correct errors in written instruments caused by a mutual mistake or by fraud attributable to one of the parties to the instrument. *Tennessee Valley Iron & R. Co. v. Patterson,* 158 Tenn. 429, 432-33, 14 S.W.2d 726, 729 (1929); *Pittsburg Lumber Co. v. Shell,* 136 Tenn. 466, 472, 189 S.W. 879, 880 (1916); *Pierce v. Flynn,* 656 S.W.2d 42, 46 (Tenn.Ct.App.1983). A mutual mistake is not simply a misunderstanding between the parties. In order to amount to a mutual mistake, the mistake

must be common to all the parties to the written contract or instrument or in other words it is a mistake of all the parties laboring under the same misconception.

Collier v. Walls, 51 Tenn.App. 467, 497, 369 S.W.2d 747, 760-61 (1962).

Because the law favors the validity of written instruments, a person seeking to reform an instrument must do more than prove its case by a preponderance of the evidence. In order to justify reformation, the evidence of mistake or fraud must be clear and convincing. *Hazlett v. Bryant,* 192 Tenn. 251, 260, 241 S.W.2d 121, 125 (1951); *Sawyers v. Sawyers,* 106 Tenn. 597, 603, 61 S.W. 1022, 1023 (1901); *Bailey v. Bailey,* 27 Tenn. (8 Hum.) 230, 233 (1847); *Perry v. Pearson,* 20 Tenn. (1 Hum.) 431, 439 (1839).

***6** Mr. Nichols does not claim that Mrs. Nichols practiced fraud on him. Thus, in order for his counterclaim to succeed, he must prove that both he and Mrs. Nichols executed the June, 1972 deed and the December, 1981 correction deed with the mistaken belief that they were reserving for themselves a life estate with an unlimited power of disposition of the underlying fee. Mr. Nichols has not made out his case.

The deed of correction and Mrs. Nichols' will are plain and easily understood. They show unmistakably that Mrs. Nichols never labored under a mistaken understanding concerning the nature of her children's interest in the property. Neither Mr. Nichols' self-serving testimony nor his claim that he acted out of ignorance and stress amounts to clear and convincing evidence of a mutual mistake. *See Jones v. Jones,* 150 Tenn. 554, 595-96, 266 S.W. 110, 121 (1924).

Based on our review of the evidence, and after according Mr. Nichols every indulgence to which the opponent of a summary judgment motion is entitled, we find that he has not presented clear and convincing evidence that Mrs. Nichols was laboring under a mistaken understanding concerning the nature of the conveyance. Accordingly, the trial court properly granted the summary judgment dismissing Mr. Nichols' counterclaim.

IV.

We affirm the summary judgment and remand the case to the trial court to dispose of the remaining claims not adjudicated in its March 30, 1990 order. We also tax the costs of this appeal to Leroy B. Nichols and his surety for which execution, if necessary, may issue.

LEWIS and CANTRELL, JJ., concur.

Footnotes

1 The trial court certified its judgment as a final order pursuant to Tenn.R.Civ.P. 54.02, thereby permitting the deceased's husband an appeal as of right.

2 Neither the judgment nor the order disposed of Mrs. Nichols' children's claims concerning the incomplete accounting or the malicious damage to Mrs. Nichols' gravestone. The orders were accordingly not final for the purposes of Tenn.R.App.P. 3(a) because they did not resolve all the claims of all the parties.

3 It should be noted, however, that Tenn.R.Civ.P. 59.04 does not empower a trial court to "modify" a judgment in response to a Tenn.R.Civ.P. 50.02 motion for a judgment notwithstanding the verdict. *See* 6A J. Moore, J. Lucas & G. Grotheer, *Moore's Federal Practice* ¶ 59.12 [1] (2d ed. 1991). Had it not been for the trial court's mistaken interpretation of Tenn.R.Civ.P. 59.04 Mrs. Nichols' children would have obtained the same relief in 1986 that they ultimately obtained in 1989 when the trial court ordered a new trial. The July, 1986 order shows clearly that the trial court would not have permitted the verdict to stand but would have granted a new trial.

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2009 WL 1871933
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

Eric KERNEY, Et Al.
v.
Gary ENDRES, Et Al.

No. E2008-01476-COA-R3-CV. | Feb. 12, 2009 Session. | June 30, 2009.

Appeal from the Chancery Court for Sullivan County, No. K0033175(L); E.G. Moody, Chancellor.

Attorneys and Law Firms

Margo J. Maxwell and Gwendolyn M. Kerney, Knoxville, Tennessee for the appellants, Eric Kerney and Cassandra Kerney.

Gary Endres and Susan Endres, Kingsport, Tennessee, appellees, pro se.

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and JOHN W. McCLARTY, JJ., joined.

Opinion

OPINION

CHARLES D. SUSANO, JR., J.

***1** Eric Kerney and wife, Cassandra Kerney, brought this suit to enjoin the operation of a beauty salon by defendant Susan Endres in the home owned by her and her husband, Gary Endres. The Kerneys and the Endreses are adjoining homeowners in the Plantation Manor Subdivision in Kingsport. The properties are subject to a restrictive covenant limiting their use to residential and forbidding commercial use. Following a bench trial, the court found the salon was merely incidental to the residential use and, as a consequence, did not violate the restriction. The court did, however, enjoin any expansion of the business. Plaintiffs appeal. We vacate the judgment of the trial court and remand for further proceedings consistent with this opinion.

I.

This is a timely appeal from the trial court's opinion and order filed June 5, 2008. We will quote at length from that opinion as an accurate summary of most of the evidence presented.

1. The parties stipulated the following facts in their Joint Pretrial Statement:

a. The Plaintiffs, Eric and Cassandra Kerney ... are residents of the Plantation Manor Subdivision ... in Sullivan County, Tennessee, having the address of 168 Coralwood Drive, Kingsport, Tennessee 37663.

b. The Defendants, Gary Endres and Susan Endres ... are residents of the Plantation Manor having the address of 160 Coralwood Drive, Kingsport, Tennessee 37663....

c. Both the Kerneys and the Endreses live in the cul-de-sac end of Coralwood Drive.

d. The developer of Plantation Manor, Robert Brooks Piercy, has previously submitted an affidavit that he intended that Plantation Manor be a strictly residential neighborhood.

e.... [T]he Endreses' chain of title contains a prior Deed that provides, in relevant part, that the Endreses' Property:

(1) "shall be used exclusively ... for residential purposes";

(2) "not ... for any commercial undertaking"; and

(3) that these "covenants run with the land."

f. The Endreses have opened a beauty salon called "California Cuts," on their property.

g. The Endreses' salon business does not have any employees other than themselves, does not have any set hours, takes customers" by appointment only", works on only "one customer at a time", and is usually open "a few days a week, during the day."

h. The Endreses' salon business has no advertisement signage on the exterior of their home or on the Endreses' property, nor have the Endreses created "any other alterations to the appearance of the property that would indicate that the property is being used as anything other than for [']residential use[']".

i. The Kerneys have requested the Endreses to cease operating the beauty salon on their property as violative of the Covenants, but the Endreses have refused to do so.

j. One of the main reasons the Kerneys purchased a home on the cul-de-sac was to raise their child and future children on a dead-end street where they could play safely.

* * *

*2 4. The Endreses' income from the beauty salon for July 1, 2006 to June 30, 2007 was $13,472.00.

5. The Endreses' appointments for the beauty shop averaged 63 per month for the period from January 1, 2007 to December 31, 2007.

6. The Endres family occupies all but one room of their residence.

7. The beauty shop occupies one 12# x 14# room.

8. Susan Endres testified that she buys all of her supplies from a distributor in Johnson City and that she picks them up.

9. Susan Endres testified that UPS does not make deliveries to her house for the beauty shop and that any UPS deliveries were personal.

10. Susan Endres testified that the beauty shop has no employees.

11. Susan Endres testified that the beauty shop did not have a sign.

12. Susan Endres testified that the beauty shop never had more than two customers at a time, usually only one, and that they parked in her driveway most of the time.

13. Susan Endres testified that:

a. An auto detailing business was conducted on tax parcel 46 for two or three years;

b. A daycare was operated on tax parcel 47 for two years;

c. A jewelry and vending related business has been operating on tax parcel 48 for several years;

d. The Endreses have operated a one chair beauty salon on tax parcel 49 for four years;

e. A swimming instruction business has been operating on tax parcel 51 during the summer months for six years and whose services the Kerneys have used; and

f. A landscaping and lawncare business has been operating on tax parcel 52 for several years and whose services the Kerneys have also used.

14. Pam Sandage, who has lived directly behind the Endreses for twenty-one years, corroborated Susan Endres' testimony about the businesses being operated out of nearby residences and also testified that an accounting business has been operating out of another residence for some time.

15. Eric Kerney testified that his wife is currently doing some business related internet work on tax parcel 50;

16. Eric Kerney testified that he knew about the lawnmowing business, the vending related business and the accounting business.

Based on the above findings, the trial court reached the following "Conclusions of Law":

The Endreses are bound by the restrictive covenants contained in the prior deed in their chain of title which limits the use of their property to residential purposes and excludes commercial purposes. However, from the stipulated facts and uncontradicted testimony the Court finds that the Endreses ['] use of their property for commercial purposes is merely incidental to their use of it for residential purposes. They only use a 12# x 14# room of a six room house for a one chair beauty shop; the shop has no employees; the residential appearance hasn't been altered; the beauty shop does not have a sign; there are never more than two customers at a time and usually only one; the customers primarily park in the driveway; the income from the beauty salon was only $13,472 for July 1, 2006 to June 30, 2007; the appointments averaged sixty-three per month during 2007 and the beauty shop does not receive deliveries.

*3 The Court finds the same facts are persuasive that the Endreses are not causing a nuisance per se.

The testimony also supports their position that the character of the neighborhood has changed.... However, in view of the Court's ruling on the "restrictive covenants" issue which resolves this matter, it is not necessary to rule on this issue.

* * *

> ... Although the Court finds that the Endreses have not violated the restrictions in regard to residential use, it finds that a significant change in their business would violate them.
>
> IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that Gary Endres and Susan Endres be and they are hereby enjoined from expanding their beauty shop business which includes, but is not limited to, increasing the shop size, adding employees, extending the hours of operation, advertising the business, increasing signage, changing the residential appearance and increasing the customer base.

II.

The issues presented for review, as stated by plaintiffs, are:

> Did the Trial Court err in ruling that Defendants' use of their residential property for a beauty salon business was "incidental" use that did not violate the restrictive covenants that the property shall be used for residential purposes only and not "any commercial undertaking"?
>
> Did the Trial Court err in finding that the testimony supported Defendants' position that the character of the neighborhood has changed, where the Trial Court declined to rule on that issue?

II.

A.

A trial court's findings of fact are reviewed *de novo* upon the record and accorded a presumption of correctness unless the evidence preponderates against those findings. Tenn. R.App. P. 13(d). A trial court's conclusions of law, however, are reviewed *de novo* with no presumption of correctness. *Ganzevoort v. Russell,* 949 S.W.2d 293, 296 (Tenn.1997). The construction to be given a restrictive covenant is a question of law. *See General Bancshares v. Volunteer Bank & Trust,* 44 S.W.3d 536, 540 (Tenn.Ct.App.2000).

B.

Plaintiffs argue that the trial court erred in holding defendants' beauty shop did not violate the restrictive covenant. They also contend that the concept of incidental use employed by the trial court is simply inapplicable in the context of a specific prohibition of the incidental use.

A good summary of the law applicable to restrictive covenants is found in *Maples Homeowners Ass'n, Inc., v. T & R Nashville Ltd. Partnership,* 993 S.W.2d 36, 38-39 (Tenn.Ct.App.1998).

> Covenants, conditions, and restrictions such as [subdivision restrictions] are property interests that run with the land. They arise, however, from a series of overlapping contractual transactions. Accordingly, they should be viewed as contracts, and they should be construed using the rules of construction generally applicable to the construction of other contracts.
>
> The courts enforce restrictions according to the clearly expressed intentions of the parties manifested in the restrictions themselves. We give the terms used in restrictions their fair and reasonable meaning, and we decline to extend them beyond their clearly expressed scope. We also construe the terms of a restriction in light of the context in which they appear.
>
> *4 When the restriction's terms are capable of more than one construction, we should adopt the construction that advances the unrestricted use of the property.... [W]e should resolve all doubts concerning a covenant's applicability against applying the covenant.

Id. (Citations omitted.)

We have been made aware of one case in this state involving an in-home beauty salon challenged as a violation of a residential restriction. *Waller v. Thomas,* 545 S.W.2d 745 (Tenn.Ct.App.1976). *Waller* was not mentioned in the trial court's ruling. Defendants argue that *Waller* is controlling. Plaintiffs argue that the language of the restriction is the controlling factor and that the language in the present case is different from the language in *Waller.* We agree with plaintiffs.

The restrictions at issue in *Waller* were, in pertinent part, as follows:

> 1. All lots in the Subdivision shall be known and described as residential lots. No structure shall be erected, altered, placed or permitted to remain on any of said lots other than buildings for residential purposes....
>
> * * *
>
> 3. No mercantile business or industrial trade or activity shall be carried on upon any lot....

Id. at 746. The *Waller* court noted that had the restrictive covenant stopped with the first paragraph, the beauty salon would have clearly been in violation of the restriction. The language in paragraph 3, however, modified, or elaborated on, the broader language of paragraph 1. "This elaboration ... can only be interpreted as a limitation of the broader restrictive language contained in the first restriction." *Id.* at 748. Upon determining from secondary sources that the language in paragraph 3 required the *buying and selling of goods and wares for* profit, the court construed the restriction as falling short of a complete prohibition of business use.

In reaching its holding, *Waller* carefully distinguished *Carr v. Trivett,* 143 S.W.2d 900 (Tenn.Ct.App.1940). *Waller's* comments about *Carr* are helpful for our consideration of the present facts.

> The court is aware of only one case in Tennessee specifically addressing the issue of the incidental use of a dwelling for business purposes under a restrictive covenant that it be used for residential purposes, *Carr v. Trivett, supra.* The court in *Carr* enjoined the incidental use of a dwelling for a tourist home in a restricted location, but the case is distinguishable from the case at bar for two reasons: first, the restrictions on the use of the property contained in the deed were clear and unambiguous, using language as follows: "... said property shall not be used except for residential purposes and that no building or structure shall be erected thereon to be used for the purpose of any trade, manufacture or other business", and, second, the extent of the use of the premises for business purposes went beyond incidental use. Approximately one-half of the dwelling was being used in connection with the business.
>
> *5 *Carr v. Trivett, supra,* is important however, because the case illustrates that the courts of Tennessee are in agreement with the general proposition that whether an incidental use of residential property for business purposes is in violation of a covenant restricting use to residential purposes depends upon the wording of the restriction and the extent and nature of the use.

Waller, 545 S.W.2d at 748.

We have examined *Carr* and have no quarrel with *Waller's* characterization of *Carr.* We believe, however, notwithstanding that *Waller* involved a beauty salon, the present case is more like *Carr* than *Waller. Waller* involved a broad positive commitment to residential use followed by a narrowing negative prohibition against only mercantile uses which the court interpreted to mean the selling of goods and wares for profit. *Carr* involved a broad commitment to residential purposes followed by an equally broad negative prohibition against "the purpose of any trade, manufacture or other business." 143 S.W.2d at 902. The present case involves a broad commitment to "residential purposes" followed by an equally broad negative prohibition against "any commercial undertaking." According to Ballentine's Law Dictionary (3d. Ed.1969), the word "commercial" means "[p]ertaining to the purchase and sale or exchange of goods and commodities and connoting as well forms of, and occupations in, business enterprises not involved in trading in merchandise; in a broad sense, embracing every phase of commercial and business activity and intercourse." *Id.* at 222. Thus, while the term mercantile used in *Waller* requires the sale of goods [1], the term commercial used in the present case includes any "business activity." Accordingly, we hold that the "wording of the restriction" is clear and unambiguous and prohibits operation of a beauty salon in the subdivision.

We think it is doubtful that *Waller's* examination of the nature and extent of the incidental use is applicable to the present case. We understand that in a case where one use is explicitly permitted but the actual use is not exactly within the permitted use, some analysis should be made to determine whether the actual use should be allowed as incidental to the permitted use. We are not convinced, however, that an actual use which is explicitly prohibited will be allowed to continue as incidental to a permitted use. For example, in *Laughlin v. Wagner,* 244 S.W. 475, 478 (Tenn.1922), a residential restriction resulted in the holding that lots could be used for purposes incidental to residential use, such as flower beds and walkways, but not as driveways to a prohibited business use.

Furthermore, we do not agree that defendants' beauty salon was merely an incidental use. The undisputed facts show that the defendants filed federal tax returns for 2005 and 2006 which included a Schedule C reporting profit from a business.

Though much was made of testimony that defendants did not advertise their shop, they listed $2,250 advertising expense for 2005 and $2,667 in 2006 on their schedule C[2]. Further, the trial exhibits include state sales tax reports in 2005 and 2006, and Sullivan County tax reports for 2005, 2006 and 2007 for business license holder "California Cuts." Trial exhibit 1 is a report by the State Board of Barber Examiners on California Cuts. To borrow again from the language in *Carr,* "We think such an undertaking is substantially different from the incidental use of a dwelling for purposes, not strictly residential in character, from which the owner derives some income or profit but which may not, by any fair construction, be termed a business or trade." *Id.* at 903. Defendants were clearly running a business out of their home.

C.

***6** We will now address the trial court's comment that the testimony indicated "the character of the neighborhood has changed." We do so in light of the court's determination that "it is not necessary to rule on this issue." Defendants assert that "[i]f this Court were to reverse the Trial Court on the issue of incidental use, then this Court would have to remand the case to the Trial Court for its determination on the waiver issue." Plaintiffs argue that this Court should either refuse to consider the issue or treat the trial court's comment as an erroneous factual finding. On this point, we must agree with the defendants.

Abandonment of the restrictive covenant was clearly pleaded in paragraph 5 of the answer, and evidence was presented that several other businesses operated in the neighborhood. The trial court's comments indicate that abandonment or waiver was a viable issue in the case, but the court stopped short of a complete analysis upon determining another issue that it saw as dispositive. A complete analysis would have included, at least, further consideration of whether or not the alleged violations rose to the level of "community acquiescence." *Scandlyn v. McDill Columbus Corp.,* 895 S.W.2d 342, 349 (Tenn.Ct.App.1994). Sporadic violations do not prove community waiver or abandonment. *Id.* The violations must be so pervasive "as to frustrate the object of the scheme with the result that enforcement of the restriction involved would seriously impair the value of the burdened lot without substantially benefiting the adjoining lots." *Id.* Whether there has been a waiver or abandonment of the restriction is a fact question. *Taylor v. Burleson,* 2002 WL 1870269 (Tenn. Ct.App., E.S., filed August 15, 2002). We decline plaintiffs' invitation to decide this fact question before the trial court has that opportunity. *See Zaharias v. Vassis,* 789 S.W.2d 906, 911 (Tenn.Ct.App.1989) (factual issues should be determined first at trial level). Accordingly, we will remand the case to the trial court for determination of issues that were pretermitted.

IV.

The judgment of the trial court is vacated. Costs on appeal are taxed to the appellees, Gary Endres and Susan Endres. This case is remanded to the trial court, pursuant to applicable law, for further proceedings consistent with this opinion.

Footnotes

1 Susan Endres stocks and sells beauty products to her customers.

2 The trial court found that there were no exterior signs on the residence. Susan Endres testified that she does no advertising.

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2013 WL 817230
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

Wendy LEVERETTE, Et Al.
v.
TENNESSEE FARMERS MUTUAL INSURANCE COMPANY.

No. M2011-00264-COA-R3-CV. |
Oct. 14, 2011 Session. | March 4, 2013.

Appeal from the Circuit Court for Maury County, No. 0913135; Jim T. Hamilton, Judge.

Attorneys and Law Firms

Michael Ross Campbell, Lauren Michelle Rutherford, Chattanooga, Tennessee; Patrick Arnold Flynn, Seth Michael Lasater, Columbia, Tennessee, for the appellant, Tennessee Farmers Mutual Insurance Company.

Richard Thomas Matthews, Columbia, Tennessee, for the appellee, Wendy Leverette, et al.

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the Court, in which ANDY D. BENNETT, J. joined. RICHARD H. DINKINS, J., concurring in part, dissenting in part.

Opinion

OPINION

PATRICIA J. COTTRELL, P.J., M.S.

*1 A woman who was severely injured in a collision with an automobile driven by an unlicensed minor filed suit against the minor. The minor's parents' insurance company denied coverage and refused to defend the suit on the basis of an exclusion in the insurance policy for damages caused by a party driving without permission of the owner or a person "in lawful possession" of the vehicle. No defense was offered, and the injured party obtained a $1 million default judgment against the minor driver. The injured party and the minor's parents then jointly filed suit against the insurance company, alleging that the insurance company was liable for breach of contract, bad faith, violation of the Tennessee Consumer Protection Act, and violation of the Unfair Claims Practices Act based upon its denial of coverage. The trial court ruled that, as a matter of law, the minor was entitled to insurance coverage under her parents' policy at the time of the accident. The remainder of the case was tried, and the plaintiffs were awarded compensatory and punitive damages on the bad faith claim. The jury also found the insurance company had violated the Tennessee Consumer Protection Act, and the trial court trebled the compensatory damages and awarded attorney fees under the Act. The insurance company has raised a number of issues in this appeal, *inter alia,* the grant of partial summary judgment to the plaintiffs on the question of coverage; the finding of liability for bad faith, the liability and enhanced penalty under the TCPA, and the requirement that plaintiffs should make an election between the punitive damages and the enhanced damages. We affirm the breach of contract holding, including the conclusion that the policy terms provided coverage. We reverse and vacate the holding of liability for bad faith, including the award of punitive damages thereunder, since the statutory cause of action was not plead. We also reverse the award of treble damages under the TCPA, but affirm the finding of a violation of the Act. We affirm as modified the award of attorneys' fees.

I. BACKGROUND

Tennessee Farmers Mutual Insurance Company ("TFM") denied coverage under an automobile policy for damages sustained in an accident caused by the thirteen year old daughter of its insureds, Chad and Donna Sanders ("the Sanders"). The accident was caused by the unlicensed daughter, who was driving an uninsured automobile owned by a friend's mother.

In the resulting lawsuit, the trial court granted partial summary judgment to Plaintiffs prior to trial, declaring that the insurance contract provided coverage. At the close of the evidence, the trial court granted Plaintiffs a directed verdict for breach of contract and awarded the Plaintiffs damages for that breach. Then, the jury awarded compensatory damages on the bad faith claim and found the insurance company's acts of bad faith were committed intentionally and knowingly. After a hearing, the jury awarded punitive damages against the insurance company on the same claim. The trial court then determined that the Plaintiffs were entitled to treble damages and attorney fees under the TCPA. This appeal followed.

*2 We begin with a description of the accident, the actions of the insureds and injured parties, and the actions of the insurance company.

A. The Accident

The accident at the core of this dispute occurred in Bedford County on December 21, 2008, when Claire Sanders, an unlicensed thirteen year old driving a car owned by Tracy Neeley, tried to navigate a sharp curve on a narrow road and crossed into the opposing lane of traffic, colliding head-on with a car driven by Wendy Leverette. Tracy Neeley's daughter Beth Neeley was in the passenger seat of her mother's car.

Claire Sanders and another girl had been visiting the Neely house. When it was time for the other girl to leave, Tracy Neely asked her daughter Beth to drive the other girl home in Tracy's car. The three girls left. Claire wanted to drive, she got into the driver's seat, and they proceeded on until the accident.

Both drivers were seriously injured. Claire Sanders suffered bruises and a broken ankle, resulting in two surgeries and medical expenses of over $14,000. Wendy Leverette's injuries were even more severe, ultimately leading to amputation of her foot.

Tracy Neeley had no automobile liability insurance at the time of the accident. However, Claire Sanders fell within the definition of "a covered person" under the terms of an automobile liability insurance policy owned by her parents and underwritten by TFM. The policy provided liability coverage of $50,000 per person for personal injury and up to $50,000 for property damage, as well as medical payments coverage in the amount of $5,000 per person.

B. The Insurance Company Denies Coverage

Donna Sanders called TFM's Shelbyville office to report the accident two days after it occurred and was instructed to call the company's 800 number. The claims adjuster took statements from Claire Sanders and Tracy Neeley over the phone and prepared a claims form stating that Claire "did not have permission to drive vehicle."

However, the adjuster did not make any attempt to speak to Beth Neeley to better understand the circumstances that led to Claire Sanders' appearance behind the wheel of Tracy Neeley's car. Nor did he contact the State Trooper who had written up the accident report and who had issued citations to Claire Sanders and Tracy Neeley. He did not make any attempt to ascertain the extent of Wendy Leverette's injuries.

On February 4, 2009, TFM sent the Sanders a letter stating that its investigation showed that Tracy Neeley did not give Claire Sanders permission to drive the car and that she did not authorize Beth Neeley to give such permission. The letter then declared that Claire Sanders was not entitled to insurance coverage because of an exclusion in its policy that eliminated coverage for an auto not owned by the policyholders to the use, operation, or occupancy "without the permission of the owner or person or entity in lawful possession of the auto."

On February 13, 2009, counsel for Ms. Leverette and her husband Jason ("the Leverettes") sent a letter to the Sanders and to TFM's senior claims adjuster, Frank Smith, together with a then-unfiled complaint for damages against Claire Sanders. After stating that the Leverettes were reluctant to file a lawsuit against a minor child, the letter explained that the exclusion the insurance company was relying on was inapplicable because Claire Sanders was operating the vehicle "with the knowledge and permission of the owner's daughter, who was present in the car at the time of the collision." The letter also stated that if TFM did not respond, the complaint would be filed on March 2, 2009, and it demanded that the company pay the policy limits of its liability coverage. The proof showed that all the parties understood that the demand amounted to an offer to settle for the policy limits. Mr. Smith did not reply to the letter, nor did he forward the letter to TFM's lawyers, and TFM made no attempt to settle the claim. [1]

C. Default Judgment in Bedford County Suit Against Minor Driver

*3 The Leverettes' complaint against Claire Sanders was filed on March 5, 2009 in the Bedford County Circuit Court. No answer was filed. The Leverettes filed a motion for default judgment and for a hearing on damages. Their counsel sent a copy of the default judgment motion to TFM, along with a letter stating that "I want to give Tennessee Farm Bureau one more opportunity to enter an appearance and defend your insured in this case."

Meanwhile, the Sanders had consulted with an attorney. He sent a letter to the Leverettes explaining that because Claire Sanders had no assets and no means to afford legal representation, and because her parents did not have adequate funds to afford legal counsel for their daughter, the attorney

would not be defending the lawsuit. The attorney sent a copy of the letter and another copy of the complaint to TFM. Again, the insurance company did not respond.

The trial court conducted a hearing on the default judgment motion. The Sanders were subpoenaed, and they made a general appearance before the court, but did not offer a defense. [2] The court heard evidence about Wendy Leverette's damages, including her testimony and that of her husband, and it examined deposition testimony from Ms. Leverette's doctor and documentary evidence in support of the Leverettes' claim. The court then entered a judgment against Claire Sanders in the total amount of $1 million.

D. The Leverettes and the Sanders Join Forces

On the same day that judgment was entered against Claire Sanders, her parents teamed up with the Leverettes by entering into a written agreement designed to vindicate the rights of both parties against the insurance company. The agreement provided that the two couples would cooperate with each other in any future proceedings against TFM for breach of contract or bad faith. The Leverettes agreed to pay all costs of litigation, to hold the Sanders harmless for any such costs, and not to sue the Sanders or to attempt to execute on the Bedford County judgment against Claire Sanders.

For their part, the Sanders conveyed to the Leverettes all their legal and equitable rights under their TFM insurance policy arising from the accident of December 21, 2008, and any claims arising from or connected to TFM's failure to defend or settle the claims of the Leverettes against the Sanders. The parties also agreed that any judgment they obtained in excess of the $1 million judgment against Claire Sanders and the litigation costs the Leverettes incurred would be divided equally between the Leverettes and the Sanders.

In response to issues subsequently raised by the insurance company as to the legal enforceability and efficacy of Plaintiffs agreement of August 13, 2009, the parties entered into an amended agreement on August 24, 2010, which superseded their earlier agreement. Among other things, the amended agreement specifically declared that the Sanders were granting to the Leverettes "a subrogation interest in and to all of their recoveries," as well as to all legal and equitable rights arising from the insurance contract or from the conduct of Tennessee Farmers Mutual Insurance Company. It also provided that "... this agreement shall not operate as a release of the liability of Sanders to Leverettes to the extent that such liability is covered by the insurance policy ...," but that upon the collection of any judgment obtained against TFM, the agreement would operate as "as a full and unconditional satisfaction of any judgment obtained against Sanders by Leverettes."

II. PRE–TRIAL PROCEEDINGS IN THE MAURY COUNTY COURT

A. The Complaint for Damages

***4** On November 6, 2009, the Leverettes and the Sanders, individually and as parents and guardians of Claire Sanders, filed a complaint in the Maury County Circuit Court against Tennessee Farmers Mutual Insurance Company. They claimed that TFM was guilty of breach of contract, bad faith, fraud, and violation of the Tennessee Consumer Protection Act, Tenn.Code Ann. § 47–18–101 *et seq.* ("TCPA"), and of the Unfair Claims Practices Act, Tenn.Code Ann. § 56–8–105. The Sanders claimed that their damages included the $1 million judgment against their daughter as well as emotional distress resulting from "TFM's acts and/or omissions." They asked for compensatory damages of $1.5 million, punitive damages of $10,000,000, and treble damages under the TCPA. TFM answered, denying all allegations of wrongdoing.

B. Summary Judgment on Coverage

On January 25, 2010, Plaintiffs filed a motion for partial summary judgment, seeking a declaration that the terms of the contract of insurance at issue provided liability and medical payments coverage for Claire Sanders. A statement of undisputed material facts and supporting documents were appended to the motion. Among these were the insurance policy issued to the Sanders, which included as persons covered under the policy "you or any family member for the maintenance or use of any auto or trailer." Also attached were the affidavits of Wendy Leverette, Donna Sanders, and Claire Sanders, and the depositions of Claire Sanders and Tracy Neeley. Claire Sanders' affidavit established that she was thirteen years old and living with her parents at the time of the accident. She stated that she was visiting with her friend Beth Neeley, and that,

> When it came time for our friend Paige to go back to her home, Beth's mother, Tracy Neeley, told Beth to take Paige home. While in the driveway I got in the driver's seat and Beth let me drive

> the car. I started driving from the time we left and continued driving until we had the wreck. Beth and Paige were in the car with me the entire time. Beth sat on the passenger side and Paige was in the back seat. No one told me that I could not drive the car.

Tracy Neeley's deposition confirmed that she sometimes allowed her sixteen year old daughter Beth to drive her car for routine errands, even though Beth did not have a drivers license. She testified that on the date of the accident, Beth, Claire, and Paige were together in Tracy Neeley's home. Tracy was cooking in the evening when Paige said she needed to go home. Tracy Neeley asked Beth to drive Paige home. She stated that she did not give Claire permission to drive her car and did not even know that Beth had allowed her to get behind the wheel. Plaintiffs nonetheless contended that Beth Neeley was in lawful possession of the car as the result of her mother's request, and that because Beth Neeley gave Claire Sanders permission to operate the car, the exclusion in the contract of insurance against those driving without the permission of a person in lawful possession of the vehicle could not be used to deny coverage to Claire Sanders.

*5 On April 14, 2010, TFM filed a memorandum in opposition to the motion for partial summary judgment, together with excerpts from the depositions of Tracy and Beth Neeley, the transcript of Tracy Neeley's recorded telephone conversation with Frank Smith, and answers to Plaintiffs' statement of undisputed material facts. The insurance company admitted that Beth Neeley was a passenger in her mother's car at the time of the accident, but it adhered to the position that it was not required to provide coverage for Claire Sanders because of the undisputed fact that Tracy Neeley did not give her explicit permission to drive her car.

The trial court conducted a hearing on the summary judgment motion on April 16, 2010, and it granted summary judgment to Plaintiffs in an order filed on May 6, 2010. The court stated that it had read the insurance policy, the cases cited by the parties, and the depositions and affidavits found in the record, and that it found as undisputed facts that Beth Neeley was in lawful possession of the automobile on the evening of the accident and that Beth Neeley gave Claire Sanders permission to drive the automobile. The court also noted the familiar rule that an exclusion in a policy of insurance is to be construed against the insurance company, and it concluded that as a matter of law Claire Sanders was entitled to both liability and medical payments coverage at the time of the accident under the policy at issue. All other issues raised by the pleadings were reserved for trial. [3]

C. Other Pre–Trial Motions

The parties filed several other motions prior to trial which are relevant to this appeal. TFM filed a motion for judgment on the pleadings and/or to dismiss under Tenn. R. Civ. P. 12, on the theory that a cause of action for bad faith refusal to settle is not assignable in Tennessee, and that the Leverettes and the Sanders were not proper plaintiffs. That motion was denied. TFM also filed a motion in limine to exclude any testimony from the Leverettes about the accident, as well as a motion to amend the scheduling order to allow the testimony of its proposed expert witness to be heard. Those motions were likewise denied. Plaintiffs filed a motion to exclude from the jury any person who was employed by or insured by TFM. Their motion was granted. TFM has challenged the rulings on a variety of these motions, and they will be considered later in this opinion.

III. THE TRIAL

The trial was conducted over three consecutive days, beginning on September 1, 2010. Because the question of coverage was decided prior to trial through the order granting partial summary judgment to Plaintiffs, their claim of bad faith against TFM was the focus of testimony, and the majority of witnesses called were current or retired insurance professionals. Plaintiffs called a few witnesses to testify as to the exact circumstances of the accident, however, which included testimony related to the question of permission. The testimony of some witnesses came in through the reading of their depositions into the record.

*6 The State trooper who prepared the accident report testified that he spoke to Claire Sanders, Beth Neeley, Paige Brown, and Tracy Neeley at the scene of the accident. He also spoke to Wendy Leverette in the hospital. He stated that no adjuster from TFM or any other insurance company ever contacted him concerning the accident. He said that he issued a citation against Claire Sanders for driving without a license and against Tracy Neeley for allowing an unlicensed driver to drive.

Paige Brown, the other girl in the car, testified that Claire Sanders had nagged Beth Neeley to be allowed to drive on

several occasions, including the day of the accident. On that day, all three girls were standing on Tracy Neeley's porch as they were about to leave. Paige testified that when Claire asked Beth if she could drive, Beth said okay. Beth got in the passenger side of the vehicle, while Claire got in on the driver's side and Paige got in the back seat. An excerpt from the deposition of Beth Neeley that was read into the record at a later point in the proceedings confirmed this account: "She kept egging on and egging on about wanting to drive, and her grandmother had said a time before that she was a pretty good driver. And she just kept on wanting to drive, and finally I was just like, 'Whatever, go ahead.' So she got in the driver's seat and was taking Paige home."

Donna Sanders testified that she been insured by TFM for ten or eleven years, and that she had never previously filed a claim. She also testified that she was very strict with Claire, and that if she had known that her daughter was planning to drive, she would have forbidden it. She would not have allowed her to even ride in a car that Beth was driving, because she knew that Beth was not an adult.

Ms. Sanders described the emotional turmoil she and her family suffered as a result of her daughter's reckless conduct and about the injuries Claire caused to herself and to Ms. Leverette. She also testified about the shock she and her husband felt when they realized that TFM was planning to refuse coverage for Claire's medical expenses and for her liability to Ms. Leverette. That shock turned to fear when she saw the complaint that Ms. Leverette's attorney planned to file in the Bedford County Court, for she knew that she and her husband did not have the means to pay the judgment demanded. On cross-examination, TFM elicited testimony that Ms. Sanders had been advised that she and her husband would not be liable for any judgment rendered, because Claire was the only named defendant. Ms. Sanders testified that she continued to worry nonetheless.

Wendy Leverette testified about the moments before and after the collision and about the severity of her injury. She was asked about her medical expenses, and she answered (in accordance with the default judgment of the Bedford County Circuit Court that was entered into the record) that they amounted to $70,000. She also testified that USAA, her uninsured motorist carrier, advised her to pursue her claim against TFM, and that she accordingly tried calling Frank Smith several times but that he never returned her calls. A photograph of her injured foot was entered into the record over the objections of TFM's attorney.

*7 Plaintiffs' first expert witness was John Moyer, a retired insurance executive with forty years of experience in the industry. He testified that the purpose of automobile insurance was two-fold: first, to protect insured parties from financial ruin and to promote their peace of mind; and second, to protect the driving public from unsafe or irresponsible drivers. Mr. Moyer noted that a claims adjuster usually has greater knowledge than does any policyholder about the claims process, and that insurance companies therefore have a duty when handling insurance claims to be fair and to act in good faith for the benefit of the policyholder who has paid a premium for the service.

Mr. Moyer was questioned about application of the policy to the facts at hand. He stated that it was irrelevant whether a party insured under the policy was a minor or had a driver's license, because those conditions were not addressed in the policy. He also noted that while many terms were specifically defined in the policy, "lawful possession" was not one of them. In his opinion, lawful possession meant that the car was not stolen, but that in any case the phrase was an ambiguous one, and he cited the well-known rule of law that ambiguous terms in an insurance policy are to be construed against the insurance company.

Mr. Moyer concluded that if TFM had properly investigated the accident, it would have concluded that Claire Sanders had permission to drive. He also stated that by denying coverage to Claire Sanders, TFM showed reckless disregard for the Sanders as well as for the Leverettes "because they manufactured a permission issue that didn't even really exist." He was also asked about the Unfair Claims Practices Act, Tenn.Code Ann. § 56–8–105. He testified that the Act was a codification of insurance industry standards that all companies are supposed to abide by, and that TFM's conduct violated five of the first six specific provisions of that act. We will discuss those provisions more fully later in this opinion.

Plaintiffs also called Ronald Freemon, an attorney who had previously worked for seventeen years as a claims representative for State Farm Insurance Company. Like Mr. Moyer, he testified that the policy in question contained no exclusion for an unlicensed or minor driver, and therefore that coverage could not be denied to Claire Sanders on either of those grounds. He stated, rather, that the issue of coverage turned on the meaning of the term "lawful possession." Asked for his definition of the term, he said "if you're in lawful possession of the vehicle, it means you didn't steal the

vehicle." He also testified that in his opinion, TFM showed bad faith because it did not make a full and fair investigation before denying coverage to Claire Sanders.

After the Plaintiffs rested their case, the defense read into evidence the depositions of three TFM employees, two of whom were directly involved in the decision to deny coverage to Claire Sanders. Senior claims adjuster Frank Smith testified that he was a twenty year veteran of the insurance industry, and that he handled between 600 and 700 claims a year. He described the process he followed to reach the decision in the present case. He received the report of Donna Sanders' account of the accident, which stated that Claire Sanders did not have her mother's permission to drive. He then reviewed the policy language, and after learning from his phone conversation with Tracy Neeley that she did not give Claire Sanders permission to drive her car, he concluded that there was no coverage.

***8** When Ms. Sanders notified TFM of the accident, she told the adjuster taking the call that Claire Sanders did not have her permission to drive the vehicle and that she did not have Tracy Neeley's permission. The claims form subsequently prepared by the adjuster simply stated that she "did not have permission to drive vehicle." The claims adjuster subsequently took statements from Claire Sanders and Tracy Neeley over the phone and recorded them. The recorded statement of Tracy Neeley included an acknowledgment that she asked her daughter Beth to drive the car, and also the following:

Q. How did it come about that, that Julia Claire Sanders was driving the vehicle?

A. Uh, she kept asking my daughter to let her drive. So my daughter did.

Q. Well did Julia Sanders have permission to be driving your vehicle?

A. Not from me, no.

Q. So who gave her permission to drive your vehicle?

A. Uh, well Beth.

Q. Mm. Did Beth tell her she could drive or not or did ...

A. She let her drive.

Mr. Smith then consulted with his supervisor, regional claims manager Jack Morgan Shofner and explained what he learned and what he had concluded. Mr. Shofner agreed with his decision. Mr. Smith also testified that he had a brief telephone conversation about the Sanders' claim with TFM's attorney Todd Bobo, and that the attorney agreed with Mr. Smith's decision on coverage. On cross-examination, Plaintiffs' attorney read an excerpt from Todd Bobo's deposition into the record, in which attorney Bobo testified that he did not remember any such conversation. Mr. Smith was asked if he thought that talking to Beth Neeley could have had a bearing on his decision. He replied, "I considered it but I didn't pursue it. I didn't think it was important." He also testified that he still thought his decision to deny coverage was the correct one.

Both Mr. Smith and Mr. Shofner, whose testimony was read to the jury next, were questioned about the training TFM provided to its claims representatives, and about the procedures they were instructed to follow. They both acknowledged that TFM does not have a claims manual for its representatives and that there were no written rules or guidelines. Mr. Smith had testified that he had to take a few courses when he was first hired at TFM, but that he did not remember exactly what they were. Mr. Shofner explained that new claims representatives take a training course in Jackson, Mississippi, and then shadow a senior claims representative for three months. Representatives also attend annual conferences and seminars about new developments in the field of claims. Like Mr. Smith, Mr. Shofner insisted that TFM had reached the right decision by denying coverage to Claire Sanders.

The Defendant's final witness was Scott Walls, TFM's vice president of underwriting. He testified on direct examination that he believed the decision to deny coverage was the right one on the basis of the information that was available to Frank Smith. On cross-examination, Plaintiffs' attorney read the excerpt from Beth Neeley's deposition about Claire Sanders "egging her on" about wanting to drive and Beth allowing it, and then asked,

***9** Q. That sounds like Beth gave Claire permission to drive, doesn't it?

A. Well—

A. Yes or no?

A. Yes, in the end reluctant permission.

Q. Okay. Well, reluctant permission is good enough, isn't it? Isn't it?

A. I guess so.

Q. Okay. Now as Mr. Flynn had you point out, there's no exclusion in the policy for being underage, not having a drivers license, being foolish, stupid or even doing something against the law, is there?

A. No, sir.

Q. Can we agree, Mr. Walls, that if—under the exclusion language in the policy Beth Neeley was a person in lawful possession when she let Claire drive the car, that Claire was covered?

A. Basically based on the language, yes.

IV. VERDICT AND JUDGMENT

At the close of the evidence, the trial court granted Plaintiffs a directed verdict for breach of contract and awarded the Plaintiffs a total of $67,000 in damages based on the limits in the policy: $50,000 in compensatory damages for Wendy Leverette's injuries, $12,000 for her property damage, and $5,000 for Claire Sanders' medical expenses.

The jury returned from their deliberations shortly thereafter, and announced that they had reached a verdict. The verdict was documented by answers on the jury verdict form. In response to the first question, "[d]id Tennessee Farmers Mutual Insurance Company act in bad faith toward its insured," the jury answered that it had. The jury also answered in the affirmative to the question whether TFM had "committed an unfair or deceptive act under the Tennessee Consumer Protection Law that caused damage to Chad and Donna Sanders, parents and guardians of Julia Claire Sanders, and Chad and Donna Sanders in their individual capacity."

The jury awarded Chad and Donna Sanders $1.2 million as compensatory damages for bad faith and $1.2 million as compensatory damages for violation of the TCPA[4] In response to another question on the jury form, the jury responded that the TFM's acts of bad faith were committed intentionally and knowingly, which opened the door to punitive damages.

During the brief hearing on punitive damages that followed, an exhibit reflecting TFM's financial condition was entered into the record and Ed Lancaster, TFM's general counsel took the stand. He testified that TFM was a mutual insurance company, owned by its policyholders, and that it had paid about 220,000 separate claims during the previous year. He acknowledged that the company held over $1.6 billion dollars in reserves, and he explained that the reserves were necessary to make sure that future claims could be paid. He testified that the company only operated in the State of Tennessee, and he acknowledged the existence of six appellate decisions in the Tennessee's courts involving claims of bad faith against the company.

He also testified that in the sixty years of TFM's existence, a punitive damages award had never been imposed against it and that such an award in this case would constitute a change in the law that would require the insurance company to rewrite its policies, to increase its reserves, and to recalculate its premiums. The jury then retired for deliberations, and returned a punitive damages verdict of $500,000 against TFM, which was affirmed by the trial court.

***10** The trial court awarded the amount of the Bedford County judgment to Chad and Donna Sanders in their capacities as parents and guardians of Claire Sanders and set that amount off by the damages from the breach of contract claim. The remaining $200,000 of the compensatory damages verdict was awarded to the Sanders in their individual capacities for emotional anguish. [5]

The court filed two other judgments. In the first, the trial court recited its findings of fact and conclusions of law in regard to punitive damages, affirmed the jury verdict and awarded the Sanders an additional $500,000, in both their representative and individual capacities. In the second, the court recited findings of fact and conclusions of law in regard to Plaintiffs' claims under the Tennessee Consumer Protection Act as well as their claims for attorney fees and prejudgment interest.

Since the jury found that TFM had committed an unfair or deceptive practice, the court discussed the four factors set out in Tenn.Code Ann. § 47–18–109 for determining whether the treble damages provision should apply. It found that all four factors applied and, accordingly, trebled the award for the economic losses the Sanders had suffered individually (medical expenses and attorney fees) for a total of $18,300. The court also trebled the amount of compensatory damages awarded to Chad and Donna Sanders as parents and guardians of Julia Claire Sanders, resulting in a judgment of $3,005,535 against TFM. The court also awarded the Sanders over $1.2 million in attorney fees and prejudgment interest at the rate

of 10% per year. TFM filed a motion to alter or amend the court's judgment or for a new trial, which was denied. This appeal followed.

TFM has raised eighteen issues on appeal. We have in some instances restated those issues and have organized them differently.

V. COVERAGE AND BREACH OF CONTRACT

The correctness of the trial court's ruling on Plaintiffs' motion for partial summary judgment must be addressed first. If, as TFM contends, the trial court erred in ruling that Claire Sanders was entitled to insurance coverage under the policy underwritten by the insurance company, then the verdict, the judgment, and the award of damages would be of no effect. Thus, the other issues raised by TFM would be moot.

The trial court granted the Plaintiffs partial summary judgment on the issue of coverage. The standards for deciding a motion for summary judgment are well-known. The trial court may grant such a motion only if the filings supporting the motion show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Blair v. West Town Mall,* 130 S.W.3d 761, 763 (Tenn.2004). A trial court's decision on a motion for summary judgment enjoys no presumption of correctness on appeal. *Martin v. Norfolk Southern Railway Co.,* 271 S.W.3d 76, 84 (Tenn.2008); *Blair v. West Town Mall,* 130 S.W.3d at 764. We review the summary judgment decision as a question of law. *Id.* Accordingly, this court must review the record *de novo* and make a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been met. *Eadie v. Complete Co., Inc.,* 142 S.W.3d 288, 291 (Tenn.2004); *Blair v. West Town Mall* 130 S.W.3d at 763.

***11** The moving party has the burden of demonstrating that it is entitled to judgment as a matter of law and that there are no material facts in dispute. *Martin,* 271 S.W.3d at 83; *McCarley v. West Quality Food Service,* 960 S.W.2d 585, 588 (Tenn.1998) To be entitled to summary judgment, a defendant moving party must either (1) affirmatively negate an essential element of the non-moving party's claim or (2) show that the non-moving party cannot prove an essential element of the claim at trial. *Hannan v.. Alltel Publishing Co.,* 270 S.W.3d 1, 9 (Tenn.2008). If the party seeking summary judgment makes a properly supported motion, the burden shifts to the nonmoving party to set forth specific facts establishing the existence of a genuine issue of material fact. *Martin,* 271 S.W.3d at 84; *Hannan,* 270 S.W.3d at 5; *Staples v. CBL & Associates,* 15 S.W.3d 83, 86 (Tenn.2000) (citing *Byrd v. Hall,* 847 S.W.2d 208, 215 (Tenn.1993))

The issue of coverage involves interpretation of the insurance policy, a contract, and, thus presents a question of law, which we review *de novo. Pitt v. Tyree Organization Ltd.,* 90 S.W.3d 244, 252 (Tenn.Ct.App.2002) (citing *Rainey v. Stansell,* 836 S.W.2d 117 (Tenn.Ct.App.1992)); *Union Planters Corp. v. Harwell,* 578 S.W.2d 87, 92 (Tenn.Ct.App.1978).

A term in a contract that is susceptible to more than one reasonable meaning is "ambiguous." *Tata v. Nichols,* 848 S.W.2d 649, 650 (Tenn.1993). It is a basic rule of contracts that ambiguous terms in a contract are construed against the drafting party. *Travelers Insurance Co. v. Aetna Casualty & Surety Co.,* 491 S.W.2d 363, 365 (Tenn.1973); *Calvert Fire Insurance Co. v. American National Bank and Trust Co.,* 438 S.W.2d 545, 547 (Tenn.1969); *Jackson v. Miller,* 776 S.W.2d 115, 117 (Tenn.Ct.App.1989).

As a corollary to that rule, "[i]t is well settled that exceptions, exclusions and limitations in insurance policies must be construed against the insurance company and in favor of the insured. *Allstate Insurance Co. v. Watts,* 811 S.W.2d 883, 886 (Tenn.1991) (citing *Travelers Insurance Co. v. Aetna Casualty & Surety Co.,* 491 S.W.2d at 367; which states that such provisions must be "strongly construed" against the insurance company); *Tennessee Farmers Mutual Insurance Co. v. Moore,* 958 S.W.2d 759, 763 (Tenn.Ct.App.1997). *See also Harrell v. Minnesota Mutual Life Insurance Co.,* 937 S.W.2d 809, 814 (Tenn.1996).

When a party challenges the grant of summary judgment on the basis that there exist genuine disputes of material fact, we must determine first whether factual disputes exist and, if so, whether the facts are material to the claim or defense upon which the summary judgment is predicated. *Summers v. Cherokee Family & Children Serv.,* 112 S.W.3d 486, 508 (Tenn.Ct.App.2002). In other words, we must determine whether there exist factual disputes that must be resolved by trial before a determination on the legal issues can be made. *Id.; Byrd v. Hall,* 847 S.W.2d 208, 211–14 (Tenn.1993); *Rutherford v. Polar Tank Trailer, Inc.,* 978 S.W.2d 102, 104 (Tenn.Ct.App.1998). "If there is a dispute as to any material fact or any doubt as to the conclusions to be drawn from that fact, the motion must be denied." *Byrd,* 847 S.W.2d at 211.

*12 Herein, it is undisputed that the insurance policy issued to the Sanders included as persons covered under the policy "you or any family member for the maintenance or use of any auto or trailer." Thus, it is undisputed that Claire would be a covered person under this provision of the policy. However, TFM relies on an exclusion from that coverage, and the pertinent language excludes coverage:

> for the use, operation or occupancy of any auto that you do not own without the permission of the owner or person or entity in lawful possession of the auto.

Therefore, the question is whether Claire was operating the car with the permission of its owner (Tracy Neely) or from someone else who was in lawful possession of the auto. The Plaintiffs did not assert that Tracy Neely gave Claire permission to operate the car, so the dispute is (1) whether Beth Neely was in lawful possession of the car, and (2) whether Beth gave Claire permission to drive it.

A. Lawful Possession by Beth

TFM argues that there was a question of material fact as to whether Beth Neeley was ever in lawful possession of the car. This argument has two prongs. First, the insurance company contends that Beth was not actually "in possession" of her mother's car. They also argue that, even if Beth had actual possession, that possession was not "lawful," pointing out that it was unlawful for Beth Neeley to drive her mother's car because she was unlicensed and also because she was uninsured, and that it was unlawful for Tracy Neeley to allow her daughter to drive.

TFM asserts that Beth never got behind the wheel or took control of the car on that day and, consequently, was never in possession. In support of that argument, it cites Black's Law Dictionary and Webster's Dictionary which include in their definitions of possession "the exercise of dominion over property," and "the act of having or taking property into control."

Plaintiffs note, however, that Black's Law Dictionary discusses two kinds of possession: actual possession and constructive possession, stating that "[a] person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it." BLACK'S LAW DICTIONARY, 1163 (6th Ed.1990).

The Tennessee Supreme Court referred to that very definition in the case of *State v. Edmondson,* 231 S.W.3d 925 (Tenn.2007), stating that actual possession occurs when a person "knowingly has direct physical control over a thing, at a given time." *Edmondson,* 231 S.W.3d at 928. Constructive possession occurs when a person "knowingly has both the power and the intention at a given time to exercise dominion or control over a thing...." *Id.*

In *Edmondson,* the Court held that a victim of a carjacking was in possession of an automobile when the defendant forcibly demanded the car keys from her, even though the victim was three car lengths from the vehicle at the time of the encounter. The court also stated that "[w]e agree with the Defendant that a person is in actual possession of his or her car when in, on, or immediately adjacent to it." *Edmondson,* 231 S.W.3d at 928. The argument by TFM raises a question of law and does not involve a factual dispute. We conclude that Beth was in possession of the car. Her mother gave her permission to operate and take control of it.

*13 TFM, argues, however, that even if Beth Neeley was in possession of the car, the question of whether that possession was "lawful" remains unanswered. The insurance company points out that it was unlawful for Beth Neeley to drive her mother's car because she was unlicensed and also because she was uninsured, and that it was unlawful for Tracy Neeley to allow her daughter to drive.

Although we have been unable to find a Tennessee case that is on point, Plaintiffs have directed our attention to a number of cases from other jurisdictions in which the courts have interpreted the meaning of legal possession within the context of an exclusion in an automobile insurance policy. For example, *Oakes v. American Family Mutual Insurance Co.,* 535 N.W.2d 120 (Wisc.1995), like the present case, also featured an accident caused by an unlicensed minor driver, and an argument by the insurance company that the minor driver was not covered under a relative's policy because he was not in lawful possession of the vehicle.

In its review of a summary judgment in that case, the Wisconsin court was required to determine the meaning of "lawful possession," because that term was not defined in the insurance policy. The court consulted Webster's Dictionary, and concluded that the term "is susceptible to one reasonable

construction in the context of this policy: a person who has lawful possession of a vehicle is a person who has a right to use the vehicle. To obtain that right, the individual must be either: (1) a person with legal title to the vehicle; (2) a person who has permission to use the vehicle from the titled owner; or (3) a person who has permission to use the vehicle from another person who has permission to use it from the titled owner." *Oakes v. American Family Mutual Insurance Co.*, 535 N.W.2d at 123.

Of course under that definition, there would be no question as to whether Beth Neeley was in lawful possession of the vehicle, for she had permission from the titled owner to drive it.[6] Plaintiffs also cite the case of *Stanley v. Nationwide Insurance Co.*, 321 S .E. 920 (N.C.App.1984). The driver in that case borrowed a car from his brother by falsely representing to him that his revoked license had been restored. Shortly thereafter, he collided with another car. The appeals court found that the driver was in legal possession of the car because he had the owner's permission, notwithstanding his misrepresentation and his invalid license.

For its part, TFM cites the case of *Campbell v. Old Republic Insurance Co.*, 978 So.2d 416 (La.App.2007). In that case, a fifteen year old unlicensed driver took his grandfather's company truck without permission and collided with an eighteen-wheeler. The trial court found that on the basis of the driver's age and his lack of a license, his "possession and operation of the vehicle was not lawful," and that his operation of the car without the owner's permission simply added to the unlawfulness. *Campbell v. Old Republic Insurance Co.*, 978 So.2d at 418.

***14** TFM suggests that the different meanings ascribed to lawful possession in the above cases raise questions of material fact which would preclude summary judgment on the question of coverage. However, the interpretation of a written contract is a matter of law and not of fact. *Pitt v. Tyree Organization Ltd.*, 90 S.W.3d 244, 252 (Tenn.Ct.App.2002) (citing *Rainey v. Stansell,* 836 S .W.2d 117 (Tenn.Ct.App.1992)); *Union Planters Corp. v. Harwell,* 578 S. W.2d 87, 92 (Tenn.Ct.App.1978). It appears to us that TFM's arguments only prove that the terms "possession" and "lawful possession" can be reasonably interpreted in more than one way. "It has long been the rule in this state that in construing an insurance policy, uncertainties or ambiguities must be construed strongly against the insurer and in favor of the insured." *Travelers Insurance Co. V. Aetna Cas. & Sur. Co.*, 491 S.W.2d 363, 367 (Tenn.1973) (emphasis added).

Since it is undisputed that Tracy Neeley asked Beth Neeley to drive her car, Beth can reasonably be deemed to have been in "lawful possession" of the vehicle.

B. Permission

In the present case, TFM does not dispute that Tracy Neeley gave her daughter Beth permission to drive her car, or that Beth Neeley in turn allowed Claire Sanders to get behind the wheel. Nor does the insurance company dispute that Beth sat in the passenger seat beside Claire from the time they left Tracy Neeley's driveway until the accident occurred. The insurance company argues, nonetheless, that certain filings they submitted with their memorandum in opposition to summary judgment raise a genuine issue of material fact as to whether Beth Neeley actually gave Claire Sanders permission to drive.

In support of its theory, TFM relies on the loss report prepared by the insurance adjuster, which recited that Donna Sanders' daughter "did not have permission to drive vehicle," and a single response by Claire Sanders to a deposition question about permission.

We note that the loss report was not authenticated by an affidavit attesting to the truth of the matters contained therein, or that the information it recited was made on personal knowledge. *See* 56.06 Tenn. R. Civ. P. Further, even a casual examination of the report reveals that it cannot be competent evidence because it amounts to double or triple hearsay. It is a written statement prepared by the insurance adjuster, summarizing an account of an accident conveyed to him by the 800 operator who had spoken to Tracy Neeley, but not to anyone who was actually in the car prior to the time of the accident. Such a document does not satisfy the requirements of Tenn. R. Civ. P. 56.06 for the purpose of establishing the existence of genuine issues of material fact for trial. *See Newman v. Jarrell,* 354 S.W.3d 309, 317 (Tenn.Ct.App.2010); *Perlberg v. Brencor Asset Management, Inc.*, 63 S.W.3d 390, 397 (Tenn.Ct.App.2001); *Byrd v. Hall,* 847 S.W.2d at 215–216.

***15** TFM also insists that an answer Claire Sanders gave to a question she was asked about the accident at her deposition raises a material question of fact as to whether Beth Sanders gave her permission to drive. We note that Claire first testified that as she and Beth were walking outside, she told Beth, "I want to drive and Beth said 'Okay,' " and that Claire then got in the driver's side. The keys were already in the

ignition. Claire was asked about the immediate aftermath of the accident, and she testified that she made a phone call, which brought her father, her mother and her brother to the scene of accident. She was then asked,

> Q. Did you tell your mother or father, either one, that you had permission to drive the car?
>
> A. No.
>
> Q. Did you think you had permission to drive the car?
>
> A. No.
>
> Q. And is that because you knew you weren't supposed to be driving the car?
>
> A. Yes, sir.

TFM invokes the well-known rule that on a motion for summary judgment, the trial court must view the pleadings and the evidence before it in the light most favorable to the opponent of the motion. *See Keene v. Cracker Barrel Old Country Store,* 853 S.W.2d 501, 503 (Tenn.Ct.App.1992); *Taylor v. Nashville Banner Publishing Co.,* 573 S.W.2d 476 (Tenn.Ct.App.1978). It insists that Claire's answer to the question "[d]id you think you had permission to drive the car?" created a question about her credibility, and raised a genuine issue of material fact about whether she received permission to drive, which should have precluded summary judgment.

But TFM has taken her answer out of context. Earlier in her deposition, Claire Sanders acknowledged that she knew that her parents would not have agreed to let her drive and that Tracy Neeley did not know she took the wheel. She also testified, both before and after the single response relied upon by TFM, that she told Beth she wanted to drive and that Beth said "Okay." In the context of the questions she was asked, it is clear to us that the answer TFM relies on does not contradict Claire's other testimony, but simply demonstrates that Claire understood the wrongfulness of driving without the permission of her parents and of the car's owner.

There is no dispute of material fact that would preclude summary judgment. We hold that Claire Sanders was driving the car with the permission of a person in lawful possession. Therefore, we conclude that the trial court was correct to find that there was no question of material fact as to insurance coverage and that Plaintiffs were entitled to summary judgment on that issue as a matter of law.

C. Breach of Contract

Following close of all evidence, the trial court found that TFM breached its insurance contract by denying coverage and awarded compensatory damages in the amount of $50,000 and $12,000 to the Sanders, parent and guardians of Claire, and the Leverettes. It also awarded $5,000 for medical payments to the Sanders, in their individual capacity, for expenses incurred in the treatment of Claire's injuries.

***16** Because we have concluded that the policy provided coverage, we agree that TFM breached the contract by denying coverage. We affirm the holding of the trial court on the breach of contract claim.

VI. BAD FAITH CLAIMS

In addition to their claim for breach of contract, the Plaintiffs specifically alleged that the acts or omissions of TMF "constitute the tort of bad faith." They also alleged that TFM "committed unfair claims practices in violation of T.C.A. Sections 56–8–101 through 56–8–111," and they specifically listed alleged violations of Tenn.Code Ann. § 56–8–105.

A. The Insurance Trade Practices Act

The Plaintiffs' assertion of "unfair claims practices" is, by the language of their Complaint, based upon the Insurance Trade Practices Act, Tenn.Code Ann. §§ 56–8–101 *et seq.* The purpose of the Act is

> regulat[ing] trade practices in the business of insurance ... by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

Tenn.Code Ann. § 56–8–101.

The Act contains a list of acts that constitute unfair competition or deceptive acts in the insurance business, including "unfair claim settlement practices." Tenn.Code Ann. § 56–8–104(8). The Act focuses on the comprehensive regulation of insurance industry practices and gives the

Commissioner of Commerce and Insurance broad authority to enforce its provisions. *Myint v. Allstate Ins. Co.,* 970 S.W.2d 920, 924 (Tenn.1998). However, no private right of action may be maintained under the Act. *Id.*

The Supreme Court's holding that the Insurance Trade Practices Act, Tenn.Code Ann. §§ 56–8–101 *et seq.,* does not create a private right of action has been applied in a number of federal court decisions. *See, e.g., Kansas Bankers Sur. Co. v. Bahr Consultants, Inc.,* 69 F.Supp.2d 1004, 1017–18 (E.D.Tenn.1999); *Lindsey v. Allstate Ins. Co.,* 34 F.Supp.2d 636, 649 (W.D.Tenn.1999); *Pemberton v. AMOCO Life Ins. Co., Inc.,* 2002 WL 32059028, at *7 (E.D.Tenn. February 15, 2002).

Accordingly, if the Plaintiffs intended to bring a separate claim based upon the alleged violations of the Insurance Trade Practices Act, Tenn.Code Ann. §§ 56–8–101 *et seq.,* that claim must be dismissed. However, it appears that although Plaintiffs alleged that TFM had violated provisions of that Act, specifically § 56–8–105, they did not seek any relief on the basis of those violations. In any event, the trial court's orders do not indicate that any liability was assigned to TMF for violations of the Act *per se,* [7] and no damages were attributed to that cause of action.

B. Statutory Bad Faith

There is, however, a different statutory basis for a bad faith claim by an insured against his insurer.

> While the Insurance Trade Practices Act focuses on the comprehensive regulation of insurance industry practices, the bad faith statute, Tenn.Code Ann. § 56–7–105, focuses on specific instances of bad faith. Enacted in 1901, the bad faith statute provides a private right of action to an individual injured by an insurance company's refusal to pay a claim, if the refusal "was not in good faith."

***17** *Myint,* 970 S.W.2d 920 at 925.

The statute known as the "bad faith penalty" statute applies to insurers and provides:

> The insurance companies of this state ... in all cases when a loss occurs and they refuse to pay the loss within sixty (60) days after a demand has been made by the holder of the policy ... on which the loss occurred, shall be liable to pay the holder of the policy ..., in addition to the loss and interest on the bond, a sum not exceeding twenty-five percent (25%) on the liability for the loss; provided, that it is made to appear to the court or jury trying the case that **the refusal to pay the loss was not in good faith,** and that the failure to pay inflicted additional expense, loss, or injury including attorney fees upon the holder of the policy ...; and provided, further, that the additional liability, within the limit prescribed, shall, in the discretion of the court or jury trying the case, be measured by the additional expense, loss, and injury including attorney fees thus entailed.

Tenn.Code Ann. § 56–7–105(a) (emphasis added).

As this language makes clear, the statute provides for a 25% penalty where refusal to pay the claim is not made in good faith. *Gaston v. Tennessee Farmers Mut. Ins. Co.,* 120 S.W.3d 815, 822 (Tenn.2003) (reversing the trial court's grant of directed verdict dismissing the statutory bad faith claim, because a reasonable jury could find the insurer's conduct constituted bad faith under the statute).

However, in the case before us, a careful review of the Complaint reveals that Plaintiffs did not allege liability under Tenn.Code Ann. § 56–7–105. Moreover, in this appeal they do not assert they made a claim under the statute. Nothing in the trial court's instructions or orders indicates a cause of action based upon the bad faith statute. Instead, by submitting the question of punitive damages to the jury and approving the award of punitive damages for bad faith, rather than the 25% statutory penalty, it is clear that any "bad faith" liability was based on Plaintiff's claim for "the tort of bad faith," as stated in the Complaint.

C. Tort of Bad Faith

In the case before us, the jury and the trial court awarded the Plaintiffs both compensatory and punitive damages based upon TMF's liability for the "tort of bad faith." However, this court has held that Tennessee does not recognize the tort of

bad faith in suits between an insured and her insurer where the actions complained of are covered by the bad faith penalty statute.

In *Chandler v. Prudential Insurance Co.*, 715 S.W.2d 615 (Tenn.Ct.App.1986), the plaintiff originally brought an action based upon the bad faith statute, but later took a voluntary nonsuit on that claim and, instead, proceeded on a claim that the insurance company's actions "constituted the tort of bad faith." *Id.* at 619. This court described the plaintiff as seeking

> to have this Court decide—**for the first time**—that the tort of bad faith exists in Tennessee insofar as an action between an insured and its insurer is concerned.... Plaintiff concedes that such is presently not the law in Tennessee.

***18** *Id.* (emphasis added).

This court declined to recognize such a tort, holding that the bad faith statute, Tenn.Code Ann. § 56–7–105, provides the exclusive remedy for an insurer's failure to pay a claim in bad faith. *Id.* In addition to the facts that the tort had not been recognized in this state and that the statute had existed for many years, the *Chandler* court found the statute's use of the words "**in all cases**" when an insurance company refuses to pay a loss not in good faith indicative of the legislature's intent that the statute be the exclusive remedy where an insured's claim is based upon the insurer's refusal to pay a claim. *Id.* at 621 (emphasis in original).[8] Federal courts in this state and a subsequent opinion from this court have repeated the *Chandler* holding. *See, e.g., Cracker Barrel Old Country Store, Inc. v. Cincinnati Ins. Co.*, 590 F.Supp.2d 970, 972 (M.D.Tenn.2008) ("Tennessee does not recognize a general common law tort for bad faith by an insurer against an insured; the exclusive remedy is statutory."); *Rice v. Van Wagoner Co., Inc.*, 738 F.Supp. 252, 253 (M.D.Tenn.1990); *Watry v. Allstate Prop. and Cas. Ins. Co.*, 2011 WL 6916802, at *4 (Tenn.Ct.App. Dec. 28, 2011).

Neither this court nor the Tennessee Supreme Court has overruled or even questioned the continuing validity of *Chandler*. Neither court has explicitly recognized a tort based upon an insurer's bad faith in situations covered by the bad faith penalty statute. A number of cases have dealt with the application, interpretation, and requirements for stating a claim under the statute. *Gaston v. Tenn. Farmers Mut. Ins. Co.*, 120 S.W.3d 815, 822 (Tenn.2004); *Ginn v. Am. Heritage Life Ins. Co.*, 173 S.W.3d 433, 442–43 (Tenn.Ct.App.2004); *Stooksbury v. Am. Nat. Prop. and Cas. Co.*, 126 S.W.3d 505, 518–19 (Tenn.Ct.App.2003); *Minton v. Tenn. Farmers Mut. Ins. Co.*, 832 S.W.2d 35, 37–38 (Tenn.Ct.App.1992); *Palmer v. Nationwide Mut. Fire Ins. Co.*, 723 S.W.2d 124, 125–26 (Tenn.Ct.App.1986); *see also Pactech, Inc. v. Auto–Owners Ins. Co.*, 292 S.W.3d 1, 9 (Tenn.Ct.App.2009).

The Plaintiffs herein assert that the holding of *Chandler* regarding the exclusivity of the statutory remedy is no longer good law and that "the Tennessee Supreme Court has expressly recognized the tort of bad faith," citing *Johnson v. Tennessee Farmers Mut. Ins. Co.*, 205 S.W.3d 365, 370 (Tenn.2006).[9] We have carefully reviewed the opinion in *Johnson* and find no express recognition of the tort of bad faith in situations that fall within the parameters of the statute.

To the contrary, *Johnson* and the cases cited therein address the duty of an insurance company to settle within policy limits. In that situation, the insurer has not refused to pay a claim, so the bad faith statute is not applicable. Instead, the insurer has already acknowledged coverage and liability and has undertaken to provide a defense for the insured in suits or actions by third parties.

***19** It has long been the law in this state that an insurance company has a special duty to its insureds after it undertakes defense of a claim against those insureds. *Johnson* and its predecessors recognize that duty. "It is well established that an insurer having exclusive control over the investigation and settlement of a claim may be held liable to its insured for an amount in excess of its policy limits if as a result of bad faith it fails to effect a settlement within the policy limits." *Johnson*, 205 S.W.3d at 370 (citing *State Auto. Ins. Co. of Columbus, Ohio v. Rowland*, 427 S.W.2d 30, 33 (Tenn.1968)).

The *Johnson* Court explained:

> Bad faith refusal to settle is defined, in part, as an insurer's disregard or demonstrable indifference toward the interests of its insured. This indifference may be proved circumstantially. Bad faith on the part of the insurer can be proved by facts that tend to show a willingness on the part of the insurer to gamble with the insured's money in an attempt to save its own money or any intentional

> disregard of the financial interests of the plaintiff in the hope of escaping full liability imposed upon it by its policy. If the claim exceeds the policy limits, then the insurer's conduct is subject to close scrutiny because there is a potential conflict of interest between the insurer and the insured.

Johnson, 205 S.W.3d at 370 (internal citations omitted). All the cases cited by the *Johnson* Court that describe the special duty owed by insurers involve allegations of a failure to settle within the policy limits, obviously after the duty to defend has been acknowledged. *See, e.g., State Auto. Ins. Co. of Columbus, Ohio v. Rowland,* 427 S.W.2d 30, 33 (1968); *Perry v. U.S. Fid. & Guar. Co.,* 359 S.W.2d 1, 6–7 (1962); *S. Fire & Cas. Co. v. Norris,* 250 S.W.2d 785, 790–91 (1952); *Goings v. Aetna Cas. & Sur. Co.,* 491 S.W.2d 847, 849 (Tenn.Ct.App.1972); *see also Brown v. St. Paul Fire and Marine Ins. Co.,* 604 S.W.2d 863, 865 (Tenn.Ct.App.1980); *Clark v. Hartford Accident and Indem. Co.,* 457 S.W.2d 35, 38 (Tenn.Ct.App.1970).

In that situation, there is no refusal to pay a claim, so the statute does not apply. Consequently, there is no conflict or inconsistency [10] between, on one hand, *Johnson* and the prior cases dealing with the duty specifically applicable to situations where the insurer has undertaken to defend its insured, and, on the other, *Chandler* and other cases involving application of the statute where the insurer has refused to defend a claim.

VII. TENNESSEE CONSUMER PROTECTION ACT CLAIMS

In the verdict form submitted to it, the jury herein was asked, "Do you find that the Defendant committed an unfair or deceptive act or practice under the Tennessee Consumer Protection Law that caused damage to Chad and Donna Sanders parents and guardians for Julia Claire Sanders, or Chad and Donna Sanders in their individual capacity?" The jury answered the question in the affirmative and awarded $1.2 million in compensatory damages to the Sanders. [11]

***20** The acts and practices of insurance companies are subject to the application of the Tennessee Consumer Protection Act. *Myint v. Allstate Insurance Co.,* 970 S.W.2d 920, 925 (Tenn.1998). The TPCA is complementary to the bad faith penalty statute, *Id.,* and the same conduct may be found to violate both. *Gaston v. Tennessee Farmers Mutual Insurance Co. (Gaston I),* 120 S.W.3d at 822 (restating that causes of action arising under TCPA may be cumulative to other statutory remedies, and considering both the statutory bad faith claim and the TCPA claim).

The provisions of the TCPA are to be "liberally construed" to "protect consumers and legitimate business enterprises from those who engage in unfair or deceptive acts or practices in the conduct of any trade or commerce...." T.C.A. § 47–18–102(2); *Ginn v. American Heritage Life Ins. Co.,* 173 S.W.3d 433, 444 (Tenn.Ct.App.2004). The TCPA creates a private right of action:

> Any person who suffers an ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated, as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be unlawful by this part, may bring an action individually to recover actual damages.

Tenn.Code Ann. § 47–18–109(a)(1); *Discover Bank v. Morgan,* 363 S.W.3d 479 (Tenn.2012); *Morrison v. Allen,* 338 S.W.3d 417, 437 (Tenn.2011).

Tennessee Code Annotated § 47–18–104(a) declares unlawful any "[u]nfair or deceptive acts or practices affecting the conduct of any trade or commerce." Subsection (b) of that statute provides a lengthy, non-exclusive list of acts and practices that are "unfair or deceptive." Many of those are specific to particular types of businesses or industries, none of which are applicable in this case. The specific acts or practices enumerated in Tenn.Code Ann. § 47–18–104(b) include a "catch-all" provision, *i.e.,* "[e]ngaging in any other act or practice which is deceptive to the consumer or to any other person." Tenn.Code Ann § 47–18–104(b)(27) . [12]

Additionally, the list in subsection (b) is qualified by the statement that the list of specific unfair acts or practices does not limit the scope of subsection (a). This clear language means simply that there can be unfair or deceptive acts or practices other than those specifically set forth in Tenn.Code Ann. § 47–18–104(b). *Gaston v. Tennessee Farmers Mut. Ins. Co. (Gaston II),* 2007 WL 1775967, at *11 (Tenn. Ct.App. June 21, 2007) (citing *Roberson v. West Nashville Diesel,*

Inc., No. M2004–01825–COA–R3–CV, 2006 WL 287389, at *6 (Tenn.Ct.App. February 3, 2006)).

> "[T]he standards to be used in determining whether a representation is 'unfair' or 'deceptive' under the TCPA are legal matters to be decided by the courts. However, whether a specific representation in a particular case is 'unfair' or 'deceptive' is a question of fact." *Tucker v. Sierra Builders,* 180 S.W.3d 109, 116 (Tenn.Ct.App.2005) (citations omitted). "A deceptive act or practice is one that causes or tends to cause a consumer to believe what is false or that misleads or tends to mislead a consumer as to a matter of fact." *Id.* An act or practice is unfair where " 'the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.' " *Id.* at 116–17 (quoting 15 U.S.C.A. § 45(n)).

***21** *Morrison v. Allen,* 338 S.W.3d at 437 (citations omitted).

A. Could TFM's Alleged Conduct Be a Violation the TCPA?

We must first determine whether the conduct alleged to have been a violation of the TCPA fits within the Act such that it was proper to allow the question of violation to go to the jury instead of granting a directed verdict to TFM. *See, e.g. Gaston I,* 120 S.W.3d at 822 (reversing the trial court's grant of directed verdict to insurance company because a jury could reasonably conclude that the insurer's conduct was unfair or deceptive under the TCPA).

The conduct of TFM does not fit into any one of the specific enumerated acts or practices declared to be unlawful under the TCPA, in Tenn.Code Ann. § 47–18–104(b). The "catch-all" provision, *i .e.,* "[e]ngaging in any other act or practice which is deceptive to the consumer or to any other person," Tenn.Code Ann § 47–18–104(b)(27), does not apply, either, because it is clearly limited to "deceptive" conduct. We find no basis in the allegations or proof that TFM enagaged in any deceptive conduct.

That leaves the question of whether TFM's conduct in how it handled the Sanders' claim could constitute unfair acts or practices other than those specifically listed in Tenn.Code Ann. § 47–18–104(b).

An insurance company may be found to have breached its insurance contract, but that holding does not necessarily establish an unfair act or a violation of the TCPA. For example, in *Myint* the insurance company refused to pay on a claim due to the suspicious nature of the cause of two fires which ultimately resulted in substantial damage to the plaintiffs' property. It was stipulated by the parties that both fires were set intentionally, but the plaintiffs steadfastly denied that they set the fires. In determining whether the denial of the plaintiffs' insurance claim constituted a violation of the TCPA, the Court stated:

> While the sale of a policy of insurance easily falls under this definition of "trade" and "commerce," we conclude that Allstate's conduct in handling the Myints' insurance policy was neither unfair nor deceptive. The record reveals no evidence of an attempt by Allstate to violate the terms of the policy, deceive the Myints about the terms of the policy, or otherwise act unfairly. It is apparent that the denial of the Myints' claim was Allstate's reaction to circumstances which Allstate believed to be suspicious. Consequently, Allstate's conduct does not fall within the purview of the Tennessee Consumer Protection Act, and the Myints are not entitled to the benefits of treble damages and attorney's fees recoverable under the Act.

Myint v. Allstate Ins. Co., 970 S.W.2d at 923. *Similarly, in Ginn v. American Heritage Life Insurance Co.,* this court examined the conduct that the plaintiff alleged supported the jury's finding of a violation of the TCPA, 173 S.W.3d at 445, holding as to at least one allegation, "We fail to see how this even remotely states a cause of action under the TCPA." *Id.* The court stated:

> ***22** Plaintiff's husband had a valid life insurance contract, and Defendants have never questioned that with the sole exception being whether Plaintiff made material misrepresentations about her husband's health. Today we reach the same ultimate conclusion reached

> by this Court in *Stooksbury* and by our Supreme Court in *Myint*. We conclude there was no unfair or deceptive conduct by Defendants when the insurance contract was entered into; there was no unfair or deceptive conduct by Defendants when handling Plaintiff's claim; there was no evidence of an attempt by Defendants to violate the terms of the policy; and Defendants had substantial legal grounds to support their defense to Plaintiff's claim for benefits.

Id. [13]

There have also been situations in which the courts determined that an insurance company's actions were unfair or deceptive in violation of the TCPA. In *Gaston I* the Supreme Court held that a juror could reasonably conclude that the insurer had acted in an "unfair" manner in dealing with the plaintiff, explaining:

> Neither Brown nor anyone else at Tennessee Farmers notified or informed Gaston, who was not represented by counsel, that her effort to settle with CNL would prohibit her from collecting under her own policy. In our view, a jury could reasonably conclude that Tennessee Farmers' conduct was unfair or deceptive under the TCPA.

Gaston I, 120 S.W.3d at 822. On remand, based upon those same facts, the trial court found that the insurer treated its insured "unfairly in failing to advise her that the actions that she was taking could impair her rights under her insurance policy." This court affirmed that holding. *Gaston II,* 2007 WL 1775967, at *11.

In the case before us, the Plaintiffs do not assert that the denial of coverage itself was a violation of the TCPA. We agree that our affirmance of the trial court's determination that the policy provided coverage to Claire Sanders at the time of the accident does not mean that denial was somehow unfair. However, the Plaintiffs herein relied upon sections of the Unfair Claims Practices Act, discussed earlier in this opinion, to establish TFM's unfair acts. Specifically, Tenn.Code Ann. § 56–8–105 sets out a list of fifteen types of "acts by an insurer or person" that constitute unfair claims practices. The Plaintiffs and their expert alleged that TFM committed certain of those enumerated acts.

Since Tenn.Code Ann. § 47–18–104(b) declared that the extensive list it contained was not exclusive and did not limit "the scope of subsection (a)," of the TCPA, the Plaintiffs were entitled to allege other "[u]nfair or deceptive acts or practices affecting the conduct of any trade or commerce." Tenn.Code Ann. § 47–18–104(a). The legislature has identified specific acts or practices by insurance companies that are unfair claims practices. We conclude that violation of those statutory provisions can also constitute violation of the TCPA. Accordingly, the jury was appropriately assigned the task of determining whether the conduct of TFM was an unfair act or practice prohibited by the TCPA.

B. Jury Verdict

***23** The standard of review an appeals court must follow in reviewing a jury verdict is set out in the Rules of Appellate Procedure. "Findings of fact by a jury in civil actions shall be set aside only if there is no material evidence to support the verdict." Tenn. R.App. P. 13(d); *Whaley v. Perkins,* 197 S.W.3d 665, 671 (Tenn.2006). When addressing whether there is material evidence to support a verdict, this court is required to: "(1) take the strongest legitimate view of all the evidence in favor of the verdict; (2) assume the truth of all evidence that supports the verdict; (3) allow all reasonable inferences to sustain the verdict; and (4) discard all countervailing evidence." *Barnes v. Goodyear Tire & Rubber Co.,* 48 S.W.3d 698, 704 (Tenn.2000) (citing *Crabtree Masonry Co. v. C & R Constr., Inc.,* 575 S.W.2d 4, 5 (Tenn.1978)). "Appellate courts shall neither reweigh the evidence nor decide where the preponderance of the evidence lies." *Barnes,* 48 S.W.3d at 704. If there is any material evidence to support the verdict, we must affirm it; otherwise, the parties would be deprived of their constitutional right to trial by jury. *Crabtree Masonry Co.,* 575 S.W.2d at 5.

Therefore, our task is to determine whether there is any material evidence in the record to support the jury's finding that TFM committed an unfair or deceptive act or practice under the TCPA that caused damage to the Sanders.

Plaintiffs' expert witness John Moyer testified that the conduct of the insurer in the case before us presented prime examples of five unfair practices found in the statutes regulating the insurance industry at Tenn.Code Ann. § 56–8–105. He identified those practices as:

(1) Knowingly misrepresenting relevant facts or policy provisions relating to coverages at issue;

(2) Failing to acknowledge with reasonable promptness pertinent communications with respect to claims arising under its policies;

(3) Failing to adopt and implement reasonable standards for the prompt investigation and settlement of claims arising under its policies;

(4) Except when the prompt and good faith payment of claims is governed by more specific standards, not attempting in good faith to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear;

...

(6) Refusing to pay claims without conducting a reasonable investigation except when denied because of an electronic submission error by the claimant;

Mr. Moyer explained the reasons why, in his opinion, TFM was guilty of all the unfair acts listed above. While the insurer may dispute Mr. Moyer's conclusion that its acts were in violation of numbers (1) and (4), it admitted that it's conduct violated numbers (2) and (3). It does not deny that it failed to acknowledge or respond to pertinent communications about the claim before it from the Sanders, their representatives and other interested parties and it admitted that it had not implemented uniform written standards for the prompt investigation and settlement of the millions of claims that it administered.

***24** TFM argues that its investigation was reasonable under the circumstances, but we conclude there was evidence from which the jury could have found otherwise. The adjuster's original decision was based upon an incomplete investigation that disclosed, at most, that neither the Sanders, Claire's parents, nor Tracy Neely, the car's owner, had given Claire permission to drive. The adjuster ignored, or did not investigate, whether another person, *i.e.,* someone in possession of the car, had given her permission. The insurer stuck to its original position and did not explain its interpretation of the policy to the insureds or to the Leverettes' attorney.

C. Enhanced Penalties

The trial court enhanced Plaintiffs' damages award under the provisions of Tenn.Code Ann. § 47–18–109 of the TCPA. That statute allows the court to award a plaintiff three times the actual damages sustained, if it finds that the defendant has committed an unfair or deceptive act or practice prohibited by the TCPA., and if such violation was willful or knowing. The definitions section of the TCPA defines "knowingly" or "knowing" as "actual awareness of the falsity or deception, but actual awareness may be inferred where objective manifestations indicate that a reasonable person would have known or would have had reason to know of the falsity or deception." Tenn.Code Ann. § 47–18–103(10). [14]

The court's authority to enhance an award beyond actual damages is found in Tenn.Code Ann. § 47–18–109, which provides:

(3) If the court finds that the use or employment of the unfair or deceptive act or practice was a willful or knowing violation of this part, the court may award three (3) times the actual damages sustained and may provide such other relief as it considers necessary and proper, except that the court may not award exemplary or punitive damages for the same unfair or deceptive practice.

(4) In determining whether treble damages should be awarded, the trial court may consider, among other things:

(A) The competence of the consumer or other person;

(B) The nature of the deception or coercion practiced upon the consumer or other person;

(C) The damage to the consumer or other person; and

(D) The good faith of the person found to have violated the provisions of this part.

The trial court herein discussed the four factors listed above, and found that they all were present. It accordingly held that the Sanders were entitled to a treble damages award for their "proven actual economic damages." [15] The court's specific findings include:

(1) Here there is evidence that the Defendant deceived Plaintiffs with regard to the investigation of the claim and interpretation of the exclusionary language relied upon by the insurance company. At trial Plaintiffs produced expert testimony tending to prove that the representations made

in the Defendant's denial letter that was sent to Plaintiffs contained untrue and deceptive statements.

***25** (2) Clearly the Plaintiffs have suffered extensive economic harm. Claire Sanders has suffered judgments against her in Bedford County totaling in excess of $1,000,000.00. Mr. And Mrs. Sanders, individually, suffered medical expenses and out of pocket costs for retention of an attorney.

(3) The jury specifically found the defendant guilty of bad faith and the court agrees.

After carefully reviewing the record, we must conclude that the evidence preponderates against the trial court's findings of fact and/or that the evidence does not support the holdings. With regard to deception, the evidence preponderates against the finding that deceit was involved. We have already held that the insurer's conduct herein did not implicate the "deceptive act or practice" element of the TCPA. The fact that the insurance company interpreted its policy differently from the insureds does not make their interpretation deceitful.

With regard to harm, it is inevitable that in a coverage denial situation, the insureds will suffer economic harm, whether the coverage was denied on a reasonable basis or not. We find nothing in the record to indicate that the Plaintiffs' situation was graver than others or warranted trebling of the damages actually suffered by them.

We have vacated the jury's and the trial court's holding that TFM committed the tort of bad faith. While that holding does not eliminate consideration of specific conduct that was found to be in bad faith, there is little identification of what that specific conduct was. In any event, the trial court also included another factor that is relevant:

> (4) Other facts and considerations the court may consider are all of the separate factors considered by the court in weighing the jury's assessment of punitive damages. That is the *Hodges v. S.C. Toof Co.*, 833 S.W.2d 901 (Tenn.1992) factors may be considered by the court. The court has previously considered those factors and its findings are set forth in a previous order entered in this cause.

As to the factors set out by the trial court in its order on punitive damages, the most relevant findings are:

> It is clear to the court that the Defendant has been in continuous violation of insurance industry standards by its failure to adopt and implement reasonable standards for the prompt investigation and settlement of claims arising under its policies during its entire corporate existence.
>
> While there is no evidence of prior punitive damage awards against this Defendant, it is also clear from the evidence that the Defendant has been guilty of bad faith on multiple prior occasions from conduct similar to that in this case which is bad faith refusal to settle within policy limits. There was no evidence that any change in policy or procedure was made by the Defendant in response to any of the prior bad faith findings.

While TFM admitted it had not adopted the type of standards referenced by Plaintiffs' experts, it is not clear at all that the lack of standards for prompt investigation and settlement of claims had anything to do with TFM's decision on coverage or its interpretation of its policy language. Even though we held that there was some material evidence in the record to support the jury's verdict that TFM committed a violation of the TCPA, we cannot see that the evidence supports a knowing and willful violation or supports the trebling of damages.

***26** The basis of the finding that TFM has been guilty of bad faith "on multiple prior occasions from conduct similar to that in this case" requires some explanation. As a result of the reading into the record of a request for admission and TFM's response, copies of six (6) appellate opinions in which TFM was a party were introduced into evidence. [16]

John Moyer, Plaintiffs' expert, was asked if he had detected a pattern of bad behavior on the part of TFM with respect to the handling of its policyholders' claims. He testified that while reviewing the facts of this case, he had also examined the six cases mentioned above, and he stated that although those cases were filed over a period of thirty or forty years, they did demonstrate such a pattern.

Under cross-examination, Mr. Moyers once again acknowledged that the six cases were filed over a period of thirty or forty years, but he maintained that they still constituted a significant number of adverse appellate opinions on the question of bad faith. He was then asked if he would be surprised to learn that TFM had handled more that two and a half million auto claims since the 1980's, and he said that he would not be. He also admitted that in his experience in the insurance industry, it was not unusual for attorneys to claim

bad faith when the insurance company did not give them the result they wanted.

TFM's general counsel acknowledged the six cases and also testified that TFM had paid over 220,000 claims in the previous year.

Whether or not the prior adverse decisions were appropriate as evidence, which, of course, the parties dispute, we cannot conclude that they actually establish a pattern of bad faith or unfair acts or practices that are relevant to the situation in this case. The trial court was able to review the opinions and put them in perspective, which would not have been possible for a lay jury. The opinion of the non-attorney expert on what the cases showed does not offer any help to the decision maker.

We have reviewed the opinions of the cases at issue. The existence of coverage was not an issue in any them. They did not involve interpretation of the language of the policy. Most of the cases were based on a bad faith refusal to settle, resulting in a judgment in excess of the policy limits. *Johnson v. Tennessee Farmers Mut. Ins. Co.* 205 S.W.3d 365 (Tenn.2006); *Tennessee Farmers Mut. Ins. Co. v. Wood,* 277 F.2d 21, 24 (6th Cir.1960); *Maclean v. Tennessee Farmers Mut. Ins. Co.,* 01A–01–9407–CH–00320, 1994 WL 697857 (Tenn.Ct.App. Dec. 14, 1994). The cases are simply not probative of any pattern or consistent practice that occurred in this case.

Additionally, we find significant, although the expert did not, that only six instances of court holdings of bad faith occurred over twenty or thirty years (the oldest was from 1960). The occurrence of judgments of bad faith seems infrequent and very low considering the number of claims processed by TFM. We cannot conclude that any evidence supports a finding that TFM has a practice or pattern of conduct that would justify the trebling of damages in this case.

***27** In the case before us, the Plaintiffs spend a number of pages in their brief citing cases from this and other jurisdictions interpreting "possession" and "lawful possession," with inconsistent definitions and outcomes. The Plaintiffs used that authority to argue strenuously that the words of the exception were ambiguous. Of course, Plaintiffs then argued that any ambiguity must be construed against the insurer. Nonetheless, it is difficult to understand how the insurance company's interpretation of an admittedly ambiguous term could amount to a knowing and willful violation of the TCPA's prohibition of deceptive and unfair acts.

We reverse the trial court's holding that treble damages, or enhanced penalties, were appropriate and vacate the award of treble damages.

VIII. STANDING AND PROPER PARTIES

TFM argues that the trial court erred by dismissing its pre-trial motion for judgment on the pleadings under Tenn. R. Civ. P. 12.02. The motion was in large part a challenge to the rights of all the plaintiffs to sue. The insurance company contends on appeal, for example, that the trial court should have dismissed all the Leverettes' claims from the lawsuit because they were not insured by TFM and the insurance company owed absolutely no duty to them under the insurance contract.

In response to TFM's motion on the pleadings, Plaintiffs moved to amend their complaint to remove any claims by the Leverettes based on the insurance company's bad faith. They asserted, however, that the Leverettes were entitled to remain as plaintiffs, not because of their agreement with the Sanders, but because they were third party beneficiaries or subrogated judgment creditors of the Sanders' insurance policy. Under the amended complaint, the only relief the Leverettes sought from the trial court was a judgment for the insurance policy limits of $62,000.

The case of *Linehan v. Allstate Ins. Co.,* 1994 WL 164113(Tenn.Ct.App. May 4, 1994) involves a claim similar to the one the Leverettes are asserting in the present case. In *Linehan,* a landlord obtained an $80,000 judgment against a tenant for damages caused by a fire on property owned by the landlord and occupied by the tenant. The tenant had obtained a renter's insurance policy, but his insurance company declined to defend him. The landlord then sued the tenant's insurance company, asserting that the judgment against the tenant made him a third party beneficiary on the insurance contract as well as the tenant's judgment creditor.

The landlord's claim was ultimately dismissed, but not because he lacked standing to sue. Rather, the court held that the landlord's rights as a judgment creditor were derivative and thus could rise no higher than the rights the tenant possessed. *Linehan v. Allstate Ins. Co.,* 1994 WL 164113 at *2. Since the tenant lost his rights against the insurance