

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

MELISSA BINNS,

*

Plaintiff,

*

Case No. _____

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v.

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TRADER JOE’S EAST, INC.,

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*

Defendant.

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**On Rule 11 Application from the Tennessee Court of Appeals at
Nashville, No. M2022-01033-COA-R9-CV**

**Disposing of the Rule 9 Application from the Circuit Court for
Davidson County, Tennessee No. 19C938**

APPLICATION FOR PERMISSION TO APPEAL
DENIAL OF RULE 9 APPLICATION

COMES NOW the Defendant, Trader Joe’s East, Inc. (“Defendant”), pursuant to *Tenn. R. App. P.* 9(c) and 11(a), to submit its Application for Permission to Appeal Denial of Rule 9 Application.

INTRODUCTION

This application raises a question of law which is currently unsettled in Tennessee—whether a plaintiff can assert direct negligence claims against an employer if the employer admits that it will be vicariously liable for the conduct of its employees under the doctrine of *respondeat superior*. It also raises an issue of first impression: Whether direct negligence claims can even be asserted against a premises owner concurrently with a premises liability theory of recovery. If Plaintiff’s direct negligence claims are litigated through trial and the trial court’s

order denying Defendant's Motion for Partial Judgment on the Pleadings is reversed on appeal, the parties will have wasted a significant amount of time and resources litigating those claims. Despite these circumstances, the Court of Appeals denied Defendant's *Tenn. R. App. P. 9* application. The Court of Appeals erred in doing so, and an appeal under *Tenn. R. App. P. 11* is appropriate.

This Court should permit an appeal under *Tenn. R. App. P. 11* because there is a need to secure uniformity of decision. The sole appellate decision in Tennessee addressing the preemption rule was vacated by this Court and the orders of Tennessee state and federal trial courts addressing that issue are inconsistent. Further, the issue of whether direct negligence claims can even be asserted concurrently with a premises liability theory of recovery is an issue of first impression in Tennessee.

This Court should also permit an appeal under *Tenn. R. App. P. 11* because there is a need to secure settlement of important questions of law and public interest. Both rules of law raised in Defendant's Motion for Partial Judgment on the Pleadings will promote efficiency and streamline litigation. Further, the questions raised in that motion will impact certain industries in Tennessee—in particular, the retail and hospitality industries.

Additionally, this Court should permit an appeal under *Tenn. R. App. P. 11* because there is a need for this Court to exercise its supervisory authority. The Court of Appeals abused its discretion when it concluded that there is no need for an appeal to prevent needless, expensive, and protracted litigation and create uniform bodies of law.

The parties will waste a significant amount of time and resources if they litigate Plaintiff's direct negligence claims and the trial court's order denying Defendant's Motion for Partial Judgment on the Pleadings is reversed after trial. Further, the body of law in Tennessee governing the preemption rule is currently inconsistent and unsettled. This Court should exercise its supervisory authority and permit a *Tenn. R. App. P.* 11 appeal.

DATE OF ENTRY OF JUDGMENT

The Court of Appeals entered its order denying Defendant's *Tenn. R. App. P. 9* Application for Permission to Appeal on August 24, 2022. No petition for rehearing was filed.

STATEMENT OF THE QUESTIONS
PRESENTED FOR REVIEW

The following are the questions presented for review:

1. Whether the Court of Appeals erred in denying Defendant's Application for Permission to Appeal.
2. Whether the trial court erred in denying Defendant's Motion for Partial Judgment on the Pleadings.
3. Whether the "preemption rule" bars a plaintiff from asserting direct negligence claims against an employer after the employer admits that it will be vicariously liable for the negligent conduct of its employees under the doctrine of *respondeat superior*.
4. Whether a plaintiff can assert direct negligence claims against a premises owner concurrently with a premises liability theory of recovery.

STANDARD OF REVIEW

A court's decision to deny a *Tenn. R. App. P.* 9 application is reviewed for abuse of discretion. *Bailey v. Champion Window Co. Tri-Cities, LLC*, 236 S.W.3d 168, 172 (Tenn. Ct. App. 2007). A court abuses its discretion if it “applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining.” *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999)).

Appellate review of a trial court's ruling on a motion for partial judgment on the pleadings is “*de novo* with no presumption of correctness” *Franks v. Sykes*, 600 S.W.3d 908, 911 (Tenn. 2020). In determining the legal sufficiency of Plaintiff's claims challenged by Defendant, this Court must construe all facts alleged by Plaintiff as true and give her the benefit of all reasonable inferences that can be drawn from those facts. *Mortgage Elec. Registration Sys. v. Ditto*, 488 S.W.3d 265, 275 (Tenn. 2015) (quoting *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 352 n.1 (Tenn. 2008)).

Additionally, appellate review of a lower court's legal conclusions is *de novo* without any presumption of correctness. *Cullum v. McCool*, 432 S.W.3d 829, 832 (Tenn. 2013).

**STATEMENT OF THE FACTS RELEVANT
TO THE QUESTIONS PRESENTED**

I. The December 17, 2018 slip and fall incident.

This case arises from a slip and fall incident which occurred on December 17, 2018 at Defendant's Trader Joe's branded store located at 3909 Hillsboro Pike, Nashville, Tennessee 37215 ("Trader Joe's Nashville"). (Appendix ("App.") at 1-2, ¶¶ 4-12). While walking in the fresh section of Trader Joe's Nashville on the morning of December 17, 2018, Plaintiff Melissa Binns allegedly slipped and fell on liquid on the floor. (App. at 2, ¶¶ 6-12). Plaintiff initially claimed that the liquid originated from a nearby stocking cart in Trader Joe's Nashville. (App. at 2, ¶ 11). Plaintiff now alleges that the liquid originated from a box of tofu which was dropped on the floor, despite the fact that the sole testimony in the record regarding that liquid demonstrates that it was covered at all times. (App. at 110-111, ¶¶ 15-30).

II. Proceedings in the trial court.

Plaintiff filed her original Complaint in this case on April 18, 2019. (App. at 1). In it, Plaintiff asserted both premises liability claims and direct negligence claims for allegedly negligent training. (App. at 2-4, ¶¶ 14-32). Shortly after the parties completed an initial round of written discovery and conducted Plaintiff's deposition, Defendant filed its Motion for Summary Judgment, in which it argued that Plaintiff cannot succeed on either her premises liability or direct negligence claims. (App. at 14-52).

Since Defendant filed its Motion for Summary Judgment, Plaintiff has conducted a significant amount of discovery related to her direct negligence claims. In addition to serving three sets of interrogatories,

three sets of requests for production of documents, and a set of requests for admissions, Plaintiff has conducted the depositions of three of Defendant's employees and seeks to depose Defendant's corporate representative. (App. at 68-104). All of that discovery has primarily focused on topics related to Plaintiff's direct negligence claims.

Shortly after completing the depositions of Defendant's employees, Plaintiff filed her Motion to Amend Complaint. (App. at 53-67). An Order Granting Plaintiff's Motion to Amend Complaint was entered on October 15, 2021. (App. at 105-107). Plaintiff filed her First Amended Complaint on February 2, 2022. (App. at 108-118). In the First Amended Complaint, Plaintiff asserts both premises liability claims and claims for negligent training and supervision. (App. at 114-115, ¶¶ 59-62). Specifically, Plaintiff alleges that Defendant failed to properly train and supervise its employees in regard to "safely load[ing] its stocking carts in a neat and organized way," "stock[ing] store products from its stocking carts carefully," and "never leav[ing] a spill on the floor of the store unattended" (App. at 109, ¶¶ 7-12). Plaintiff also alleges that Defendant is vicariously liable for any negligent conduct of its employees under the doctrine of *respondeat superior*. (App. at 115, ¶ 62).

Defendant filed its Answer to Plaintiff's First Amended Complaint on February 17, 2022. (App. at 120-128). In it, Defendant raised the preemption rule as an affirmative defense. (App. at 127). Additionally, Defendant admitted that it will be vicariously liable for the conduct of its employees under the doctrine of *respondeat superior*, to the extent Plaintiff can prove that their conduct was negligent by a preponderance

of the admissible evidence presented at trial. (App. at 121, 125-126).

Shortly after filing its Answer to Plaintiff's First Amended Complaint, Defendant filed its Motion for Partial Judgment on the Pleadings. (App. at 129-139). In that motion, Defendant argued that Plaintiff's direct negligence claims for allegedly negligent training and supervision should be dismissed for two reasons. First, Defendant argued that Plaintiff cannot assert her direct negligence claims concurrently with her premises liability theory of recovery. (App. at 133-135). Second, Defendant argued that Plaintiff's direct negligence claims are barred under the preemption rule because Defendant admits that it will be vicariously liable for the conduct of its employees in connection with the December 17, 2018 slip and fall incident under the doctrine of *respondeat superior*. (App. at 135-138). After the parties completed their briefing, the trial court conducted a hearing on Defendant's Motion for Partial Judgment on the Pleadings on April 8, 2022. (App. at 130).

On April 14, 2022, the trial court entered its Order denying Defendant's Motion for Partial Judgment on the Pleadings.¹ (App. at 158-159). In that order, the trial court reasoned that denial of the motion was appropriate because "the 'Preemption Rule' has not been adopted in Tennessee and this Court will follow the precedent set by the Tennessee Supreme Court." (App. at 159).

¹ The trial court's Order incorrectly refers to Defendant's Motion for Partial Judgment on the Pleadings as a "Motion for Partial Summary Judgment." (App. at 158-159). Defendant's motion sought partial judgment on the pleadings under *Tenn. R. Civ. P.* 12.03, not partial summary judgment under *Tenn. R. Civ. P.* 56.02.

Defendant timely filed its Motion for Permission to File an Interlocutory Appeal on April 13, 2021. (App. at 160-172). In that motion, Defendant first argued that permitting an interlocutory appeal of the April 14, 2021 Order is appropriate under *Tenn. R. App. P. 9(a)(2)* because it will prevent needless, expensive, and protracted litigation. (App. at 166-167). Defendant also argued in that motion that permitting an interlocutory appeal is appropriate under *Tenn. R. App. P. 9(a)(3)* because there is a need to create uniform bodies of law governing both the preemption rule and the legal sufficiency of direct negligence claims asserted in premises liability cases. (App. at 167-171). After the parties completed their briefing, the trial court heard oral argument on the motion on June 24, 2022. (App. at 190).

On July 19, 2022, the trial court entered its Order Granting Defendant's Motion for Permission to File an Interlocutory Appeal. (App. at 190-253). In that order, the trial court made the following findings:

Upon due consideration of the criteria set forth in *Tenn. R. App. P. 9(a)*, the Court finds that *Tenn. R. App. P. 9(a)(2)* and (3) weigh in favor of permitting an interlocutory appeal of the Court's April 14, 2022 Order denying Defendant's Motion for Partial Judgment on the Pleadings.

In regard to *Tenn. R. App. P. 9(a)(2)*, the Court finds that permitting an interlocutory appeal is appropriate because it will prevent needless, expensive, and protracted litigation. In particular, the Court finds that the April 14, 2022 Order denying Defendant's Motion for Partial Judgment on the Pleadings could constitute a basis for reversal after entry of a final judgment and an interlocutory appeal will result in a net reduction of the duration and expense of this litigation if the April 14, 2022 Order is reversed on appeal. A significant

amount of discovery conducted in this case has pertained to Plaintiff's direct negligence claims, including a corporate representative deposition Plaintiff seeks to conduct. If the April 14, 2022 Order is reversed on appeal after the parties complete discovery and trial, the parties will have wasted time and resources litigating Plaintiff's direct negligence claims.

In regard to *Tenn. R. App. P.* 9(a)(3), the Court finds that permitting an interlocutory appeal is appropriate because there is a need to develop a uniform body of law. The Court finds that there is great inconsistency among the orders entered by Tennessee federal and state trial courts on the issue of whether a plaintiff can assert direct negligence claims against an employer if the employer admits that it will be vicariously liable for the negligent conduct attributed to its employees under the doctrine of *respondeat superior*. The Tennessee Court of Appeals issued an opinion declining to adopt what is often referred to as the "preemption rule" in 2016 in *Jones v. v. Windham*, No. W2015-00973-COA-R10-CV, 2016 Tenn. App. LEXIS 182, at *15-16 (Tenn. Ct. App. Mar. 11, 2016); however, the Tennessee Supreme Court vacated that opinion the very same year and held that the Tennessee Court of Appeals improvidently granted review of the trial court's order in that case pursuant to *Tenn. R. App. P.* 10. See *Jones v. Windham*, No. W2015-00973-SC-R11-CV, 2016 Tenn. LEXIS 538, at *1 (Tenn. Aug. 19, 2016). In addition to the April 14, 2022 Order entered in this case, the parties identified four other orders entered by Tennessee state trial courts addressing the preemption rule, which are attached to this order as Exhibit 1 and incorporated by reference herein. Two of those orders apply the preemption rule and dismiss direct negligence claims asserted against employers based on their admission of potential *respondeat superior* liability. Two of those orders decline to apply the preemption rule. Moreover, all three federal district courts in Tennessee have issued opinions, which are attached to this order as Exhibit 2 and incorporated by reference herein, applying the preemption rule. Finally, the issue of whether

direct negligence claims can be asserted against a premises owner concurrently with a premises liability theory of recovery is an issue of first impression under Tennessee law.

(App. at 191-192).

III. Proceedings in the Court of Appeals.

Defendant timely filed its Application for Permission to Appeal in the Tennessee Court of Appeals on July 28, 2022, in which it raised substantially the same arguments as in its Motion for Permission to File an Interlocutory Appeal. Plaintiff filed no answer opposing the application. Despite that lack of opposition, the Court of Appeals entered an order denying Defendant's Application for Permission to Appeal on August 24, 2022. (App. at 254). In the order, the Court of Appeals ruled that, based on its review of the application and the record, it could not "conclude that an interlocutory appeal is necessary to prevent irreparable injury, to develop a uniform body of law, or to prevent needless, expensive and protracted litigation." (App. at 254).

Defendant now seeks this Court's intervention and requests that it permit an appeal of the issues raised in its Motion for Partial Judgment on the Pleadings.

**STATEMENT OF THE REASONS SUPPORTING
REVIEW BY THE SUPREME COURT**

I. The Court of Appeals erred in denying permission to appeal pursuant to *Tenn. R. App. P. 9*.

Appeal of an intermediate appellate court’s decision to not permit a *Tenn. R. App. P. 9* interlocutory appeal of a trial court’s order is permissible under *Tenn. R. App. P. 9(c)*. Under that rule, an appellant may appeal an intermediate appellate court’s decision to deny an application for an interlocutory appeal by filing an application with the Tennessee Supreme Court “as provided for in Rule 11, with the exception that the application shall be filed within 30 days of the filing date of the intermediate appellate court’s order” *Tenn. R. App. P. 9(c)*. Pursuant to *Tenn. R. App. P. 11*, this Court should consider the following factors when deciding whether to permit such an appeal: “(1) the need to secure uniformity of decision, (2) the need to secure settlement of important questions of law, (3) the need to secure settlement of questions of public interest, and (4) the need for the exercise of the Supreme Court’s supervisory authority.” *Tenn. R. App. P. 11(a)(1)-(4)*.

In this case, all four factors identified in *Tenn. R. App. P. 11(a)* weigh in favor of permitting an appeal to this Court.

A. This Court should permit an appeal because there is a need to secure uniformity of decision.

Among other circumstances, permitting an appeal under *Tenn. R. App. P. 11* is appropriate if there is a “need to secure uniformity of decision.” *Tenn. R. App. P. 11(a)(1)*. In this case, permitting an appeal is appropriate because the law in Tennessee governing the legal

sufficiency of direct negligence claims asserted against employers who admit *respondeat superior* liability for the conduct of their employees is unsettled. Moreover, the issue of whether direct negligence claims can even be asserted against a premises owner concurrently with a premises liability theory of recovery is an issue of first impression under Tennessee law.

1. There is a need to secure uniformity of decision governing the preemption rule.

The law in Tennessee governing the viability of direct negligence claims asserted against employers who admit *respondeat superior* liability for the conduct of their employees is inconsistent and unsettled. This Court should permit an appeal to bring uniformity to that body of law.

Under Tennessee’s system of modified comparative fault, the fault of all parties—whether plaintiff or defendant—generally must be compared by the trier of fact at trial. *See McIntyre v. Balentine*, 833 S.W.2d 52, 57-58 (Tenn. 1992). However, this Court holds that an exception to that rule exists “where vicarious liability is based on an agency relationship between a principal and the principal's negligent agent, such as the family purpose doctrine or *respondeat superior*.” *See Ali v. Fisher*, 145 S.W.3d 557, 564 (Tenn. 2004) (citing *Browder v. Morris*, 975 S.W.2d 308, 311-12 (Tenn. 1998)). In short, this Court acknowledges that the fault of an employer and employee cannot be compared by the trier of fact if the employer admits that it will be vicariously liable for the negligent conduct of its employee under the doctrine of *respondeat superior*. *See id.* The “preemption rule,” which provides that direct negligence claims asserted against an employer are

legally unviable after the employer admits potential *respondeat superior* liability, is consistent with Tennessee's law governing comparative fault.

Despite that Tennessee Supreme Court precedent regarding comparative fault, in 2016, the Tennessee Court of Appeals issued its decision in *Jones v. Windham*, No. W2015-00973-COA-R10-CV, 2016 Tenn. App. LEXIS 182, at *15-16 (Tenn. Ct. App. Mar. 11, 2016), *vacated*, *Jones v. Windham*, No. W2015-00973-SC-R11-CV, 2016 Tenn. LEXIS 538, at *1 (Tenn. Aug. 19, 2016). In that case, the Tennessee Court of Appeals declined to adopt the preemption rule and held that plaintiffs can assert direct negligence claims against employers even if the employers admit vicarious liability for the negligent conduct of their employees. *See id.* In doing so, the Tennessee Court of Appeals not only ignored a substantial number of jurisdictions that have adopted the preemption rule and recognized its consistency with modified comparative fault, but also Tennessee Supreme Court precedent recognizing that *respondeat superior* constitutes an exception to the rule that the fault of all defendants must be compared by the jury at trial. *See id.*

Windham, however, is no longer binding authority in Tennessee. Shortly after *Windham* was issued, this Court vacated that opinion and held that review of the trial court's order dismissing direct negligence claims was improvidently granted pursuant to *Tenn. R. App. P.* 10 "because the trial court did not so far depart from the accepted and usual course of judicial proceedings as to require immediate review and because immediate review was not necessary for a complete

determination of the action on appeal.” See *Windham*, 2016 Tenn. LEXIS 538, at *1 (citing *Gilbert v. Wessels*, 458 S.W.3d 895, 898-99 (Tenn. 2014)).² As a vacated opinion, the Tennessee Court of Appeals’ opinion in *Windham* has been stripped of its precedential value. See *Resurrection Sch. v. Hertel*, No. 21-1699, 2022 U.S. App. LEXIS 829, at *5 (6th Cir. Jan. 11, 2022) (“A vacated decision cannot operate as the law of the case. Nor can it operate as binding precedent.”) (internal citations omitted). Because this Court vacated *Windham*, the issue of whether the preemption rule bars direct negligence claims asserted against employers who admit *respondeat superior* liability is an unsettled question of Tennessee law.

As a consequence of the unsettled state of the law in Tennessee regarding the preemption rule, a great amount of inconsistency exists among the orders issued by Tennessee state and federal trial courts addressing that issue. Some state trial courts have adopted the preemption rule and dismissed direct negligence claims asserted against employers who have admitted *respondeat superior* liability. (App. at 194-202). Other state trial courts, including the trial court in this case, have declined to adopt the preemption rule. (App. at 203-209). Additionally, all three federal district courts in Tennessee have issued decisions adopting the preemption rule. See *Cottrell v. Harbor Seafood, LLC, Daquien Dodd, USA Truck, Inc., and Christopher Brantley Elgin*, No. 1:21-cv-184 (E.D. Tenn. July 14, 2022); *Freeman v. Paddack Heavy Transportation, Inc.*, No. 3:20-cv-00505, 2020 U.S. Dist.

² In this case, Defendant sought interlocutory review of the trial court’s order pursuant to *Tenn. R. App. P. 9*, not *Tenn. R. App. P. 10*.

LEXIS 237024, at *7-8 (M.D. Tenn. Dec. 16, 2020); *Jackson v. Valeriy Trendafilov*, No. 19-cv-02886-SHM-cgc, 2022 U.S. Dist. LEXIS 95532, at *5-8 (W.D. Tenn. May 7, 2022); *Madrid v. Annett Holdings, Inc.*, No. 1:21-cv-1173-STA-jay, 2022 U.S. Dist. LEXIS 62285, at *5-10 (W.D. Tenn. Apr. 4, 2022); *Ryans v. Koch Foods, LLC*, No. 1:13-cv-234-SKL, 2015 U.S. Dist. LEXIS 193054, at *25-26 (E.D. Tenn. July 8, 2015); *Swift v. Old Dominion Freight Lines, Inc.*, 2:20-cv-2758-MSN-tmp (W.D. Tenn. Jan. 31, 2022); *Teil v. Rowe*, 3:21-cv-00917, 2022 U.S. Dist. LEXIS 10504, at *2-5 (M.D. Jan. 20, 2022).

The body of law in Tennessee governing the preemption rule is very inconsistent and unsettled. There is no controlling, Tennessee appellate precedent on the issue since *Windham* was vacated by this Court. Further, state trial court orders addressing the issue are inconsistent. Moreover, Tennessee federal trial courts have issued numerous decisions contradicting the ruling in *Windham*. The body of Tennessee law governing the preemption rule will only become more inconsistent as litigants continue to challenge the validity of direct negligence claims in cases where *respondeat superior* liability is admitted. To bring consistency to that body of law, this Court should permit an appeal in this case and resolve the issue of whether Tennessee courts should apply the preemption rule once and for all.

2. The issue of whether a plaintiff can even assert direct negligence claims against a premises owner concurrently with a premises liability theory of recovery is an issue of first impression.

The issue of whether a plaintiff can even assert direct negligence claims against a premises owner concurrently with a premises liability

theory of recovery is an undecided issue of Tennessee law. Although no Tennessee appellate courts have decided the issue, courts in other jurisdictions hold that “a plaintiff cannot pursue both a negligent activity and premises defect theory of recovery based on the same injury.” *See Allen v. Wal-Mart Stores Tex., LLC*, No. H-14-3628, 2015 U.S. Dist. LEXIS 56425, at *10 (S.D. Tex. Apr. 29, 2015) (dismissing employment-based negligence claims where a plaintiff simultaneously asserted premises liability claims) (citing *Austin v. Kroger Texas L.P.*, 746 F.3d 191, 297 (5th Cir. 2014)); *see also Cupp v. United States*, No. CV-512-005, 2014 U.S. Dist. LEXIS 164216, at *14 n.2 (S.D. Ga. Nov. 24, 2014) (rejecting a premises liability theory for a claim caused by negligent activity). Courts in other jurisdictions disallow plaintiffs from asserting direct negligence claims in premises liability cases because those claims involve logically inconsistent theories of liability. *See State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006) (“A negligent activity claim requires that the claimant's injury result from a contemporaneous activity itself rather than from a condition created on the premises by the activity; whereas a premises defect claim is based on the property itself being unsafe. We have rejected attempts to blur the distinction between these two claims.”) (citing *Kvetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992)) (internal citations omitted).

Barring a plaintiff from asserting direct negligence claims against a premises owner concurrently with a premises liability theory of recovery is logically consistent with Tennessee law governing premises liability. They are inconsistent causes of action which provide double redress for a single wrong, which is prohibited under Tennessee law.

See Miller v. United Automax, 166 S.W.3d 692, 696-97 (Tenn. 2005). Tennessee law imposes a non-delegable duty on premises owners to keep their premises safe for patrons, and premises owners are liable for unsafe conditions that exist on their premises regardless of the acts of or the training they provide to their employees. *See Pryor v. Southbrook Mall Assocs. L.P.*, No. 02A01-9709-CV-00217, 1998 Tenn. App. LEXIS 778, at *10-11 (Tenn. Ct. App. Nov. 18, 1998) (“[S]tore operators have a nondelegable duty to the public to keep their place of business in a reasonably safe condition and free from danger of personal injury”) (citing 41 Am. Jur. 2d *Independent Contractors* § 47 (1995)). A premises owner’s policies and training it provides to employees cannot alter the standard of care it must adhere to and the duty it owes to the public. *See Gross v. Nashville Gas Co.*, 608 S.W.2d 860, 868 (Tenn. Ct. App. 1980) (citing Donald F. Pain, *Tennessee Law of Evidence* § 44 (1974)); *Epstein, Henning & Co. v. Nashville, C & S.L.R. Co.*, 4 Tenn. App. 412, 420-23 (Tenn. 1926) (“[W]hether a certain course of conduct is negligent, or the exercise of reasonable care, must be determined by the standard fixed by law, without regard to any private rules of the party.”). Moreover, a plaintiff cannot prove direct negligence claims against a premises owner without proving liability for his or her underlying premises liability claims, and those direct negligence claims are therefore superfluous.

This Court should permit an appeal to resolve the issue of whether a plaintiff can assert direct negligence claims against a premises owner concurrently with a premises liability theory of recovery. Barring plaintiffs from asserting direct negligence claims in

premises liability cases is consistent with Tennessee law governing premises liability. Moreover, that issue is one of first impression under Tennessee law. As Tennessee courts consistently grant appeals to decide issues of first impression,³ permitting an appeal is particularly appropriate to address that issue.

B. This Court should permit an appeal because it will secure settlement of important questions of law and of public interest.

Appellate review is also appropriate under *Tenn. R. App. P.* 11 if there is a “need to secure settlement of important questions of law . . . [and/or] questions of public interest” *See Tenn. R. App. P.* 11(a)(2)-(3). This case raises several questions of law that are important and of public interest, such that review under *Tenn. R. App. P.* 11 is appropriate.

This appeal raises important questions of law in which the public has an interest. The preemption rule, by which direct negligence claims asserted against employers are legally insufficient after they admit *respondeat superior* liability, is a rule of law that the highest courts in numerous other jurisdictions have already addressed. *See, e.g., Elrod v. G & R Const. Co.*, 628 S.W.2d 17, 19 (Ark. 1982); *Armenta v. Churchill*, 267 P.2d 303, 309 (Cal. 1954); *Prosser v. Richman*, 50 A.2d 85, 87 (Conn. 1946); *Wise v. Fiberglass Sys., Inc.*, 718 P.2d 1178, 1181-82 (Idaho 1986); *Houlihan v. McCall*, 78 A.2d 661, 665 (Md. 1951); *Nehi Bottling Co. v. Jefferson*, 84 So.2d 684, 686 (Miss. 1956); *McHaffie v.*

³ *See, e.g., Jones v. Prof'l Motorcycle Escort Serv., L.L.C.*, 193 S.W.3d 564, 566 (Tenn. 2006) (permitting an appeal of an issue of first impression); *McCall v. Nat'l Health Corp.*, 100 S.W.3d 209, 211 (Tenn. 2003) (permitting an appeal of an issue of first impression).

Bunch, 891 S.W.2d 822, 826 (Mo. 1995); *Jordan v. Cates*, 935 P.2d 289, 293 (Okla. 1997); *Heath v. Kirkman*, 82 S.E.2d 104, 107 (N.C. 1954); *Shielee v. Hill*, 287 P.2d 479, 480-81 (Wash. 1955); *Bogdanski v. Budzik*, 408 P.3d 1156, 1161 (Wyo. 2018). It is a question of law those courts deemed of sufficient importance to address and this case affords the Court the opportunity to address whether that rule applies in Tennessee. Further, both rules of law raised in Defendant’s Motion for Partial Judgment on the Pleadings promote efficiency given that they limit the circumstances in which litigants may pursue direct negligence claims against employers and premises owners. Moreover, the issue of whether a plaintiff can even assert direct negligence claims concurrently with a premises liability theory of recovery will greatly impact the retail industry, which forms a substantial portion of the economy. In short, this appeal raises several important questions of law which need to be addressed and appellate review under *Tenn. R. App. P. 11* is appropriate.

C. This Court should permit an appeal because there is a need for it to exercise its supervisory authority.

Permitting an appeal under *Tenn. R. App. P. 11(a)* is also appropriate if there is a “need for the exercise of the Supreme Court’s supervisory authority.” *See Tenn. R. App. P. 11(a)(4)*. In this case, the Court of Appeals abused its discretion by holding that an interlocutory appeal is unnecessary to develop a uniform body of law and to prevent needless, expensive, and protracted litigation. Appeal is appropriate because there is a need for this Court to exercise its supervisory authority.

1. Permitting an appeal is appropriate because it will prevent needless, expensive, and protracted litigation.

The record in the trial court clearly reflects that the cost and duration of litigation in this case have been amplified—and will continue to be amplified—by Plaintiff’s decision to pursue direct negligence claims against Defendant. As a simple premises liability case, Plaintiff need only prove that Defendant created, had actual notice of, or had constructive notice of an unreasonably dangerous condition on its premises and either failed to remove it or to provide adequate warning of its existence. *See Blair v. West Town Mall*, 130 S.W.3d 761, 764 (Tenn. 2004). Defendant’s duty to remove or provide warning of dangerous conditions is non-delegable and exists regardless of whether or not it properly trained and supervised its employees. *See Pryor v. Southbrook Mall Assocs. L.P.*, No. 02A01-9709-CV-00217, 1998 Tenn. App. LEXIS 778, at *10-11 (Tenn. Ct. App. Nov. 18, 1998). Rather than focusing on those simple matters, Plaintiff has prolonged the duration of and increased the expense of this litigation by pursuing discovery related to her claims for negligent training and supervision.

The duration of and expense associated with this litigation will only increase as Plaintiff continues to pursue discovery related to her negligent training and supervision claims. Moreover, the future trial associated with this case will be unnecessarily prolonged because of Plaintiff pursuing two, separate theories of recovery—despite the fact that they both relate to the very same slip and fall incident. If the trial court’s denial of Defendant’s Motion for Partial Judgment on the Pleadings is reversed on appeal after trial, the parties will have wasted

a substantial amount of time and resources litigating Plaintiff's direct negligence claims. Under these circumstances, the Court of Appeals erred in concluding that an interlocutory appeal will not prevent needless, expensive, and protracted litigation.

2. Permitting an appeal is appropriate because there is a need to develop uniform bodies of law.

As already discussed above, the body of law in Tennessee governing the legal sufficiency of direct negligence claims asserted against an employer after it admits *respondeat superior* liability for the conduct of employees is currently inconsistent and unsettled. The only Tennessee appellate decision addressing the preemption rule was vacated and there is therefore no binding, Tennessee appellate authority governing that issue. *See Windham*, 2016 Tenn. App. LEXIS 182, at *15-16, *vacated*, *Windham*, 2016 Tenn. LEXIS 538, at *1. Since this Court vacated *Windham*, there have been numerous, inconsistent orders addressing the preemption rule issued by Tennessee state and federal trial courts. Further, the issue of whether a plaintiff can even assert direct negligence claims against a premises owner concurrently with a premises liability theory of recovery is an issue of first impression in Tennessee. Under these circumstances, the Court of Appeals erred in concluding that an appeal is not necessary to create uniform bodies of law and this Court should exercise its supervisory authority by granting this application.

CONCLUSION

The Court of Appeals erred in denying Defendant's *Tenn. R. App. P.* 9 application because there is a need to prevent needless, expensive, and protracted litigation and to create uniform bodies of law. An appeal

under *Tenn. R. App. P. 11* is appropriate because there is a need to create uniformity of decision, to settle important questions of law, and for this Court to exercise its supervisory authority. Accordingly, Defendant respectfully requests that this Court grant its application pursuant to *Tenn. R. App. P. 11*.

Respectfully submitted,

CARR ALLISON

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CERTIFICATE OF COMPLIANCE

Pursuant to *Tenn. R. App. P. 30(e)*, undersigned counsel hereby certifies that this application complies with the 15,000 word limitation set forth in that rule. Words this application contains, exclusive of words in sections excluded by *Tenn. R. App. P. 30(e)*: 5,369.

BY: /s/ Michael J. Petherick
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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2022, a true and correct copy of the foregoing document was served via the Court's electronic filing system and by placing a true and correct copy of the same in the United States Mail, postage prepaid, in a properly-addressed envelope, or by hand delivering the same to each attorney of record as follows:

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