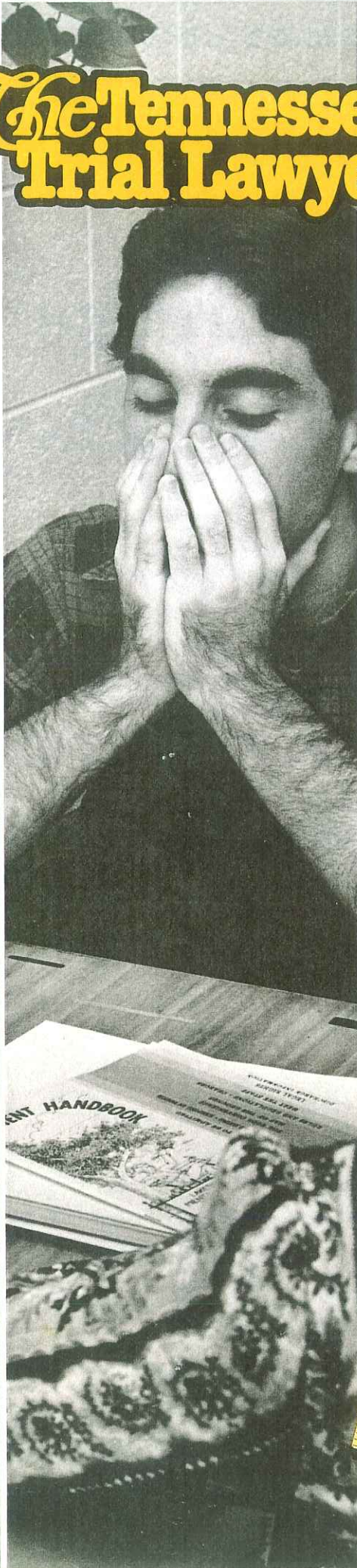
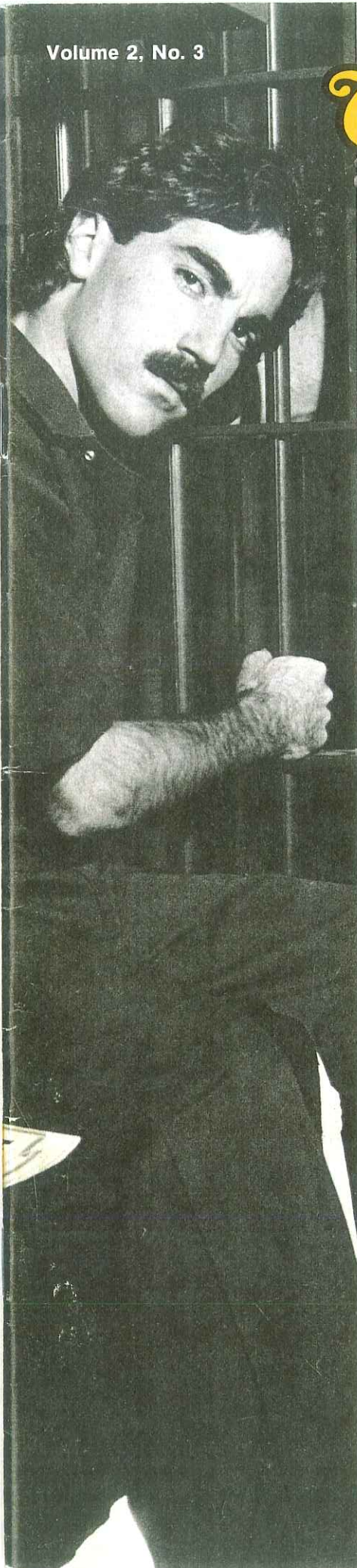


The Tennessee Trial Lawyer



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Is Your Action Really Time-Barred?

By

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When a new tort case comes into your office, among the first questions you ask yourself is, "Does the statute of limitations bar the case?" Some recent decisions may be useful in saving what otherwise might initially appear to be a time-barred case.

Often a medical care provider is negligent in the care and treatment of a patient but the negligence does not manifest itself in a cognizable injury for more than three years. In that event—in spite of the absence of discovery of the injury within three years—the injured party's case is barred if brought more than three years after the date of the negligent act. T.C.A. 29-26-116. (The statute does provide an exception to the three-year "cap" where there is fraudulent concealment or where a foreign object has been left in the patient's body.)

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Obviously, powerful lobbying efforts with the Tennessee Legislature resulted in the passage of this oppressive three-year ceiling in medical negligence cases. A well-intending Tennessee Supreme Court believed in 1978 that there was some sort of "medical malpractice insurance crisis," and upon this basis held that the medical malpractice statute of limitations did not violate equal protection and declared that such limitation was not unconstitutional. *Harrison v. Schrader*, 569 S. W. 2d 822 (Tenn. 1978).

The three-year ceiling in T.C.A. 29-26-116 is contrary to the general law in torts in Tennessee. It is now held in this state that a cause of action in non-medical malpractice cases does not accrue and the statute of limitations does not start to run until an injury occurs or is discovered. See *McCroskey v. Bryant Air Conditioning Co.*, 524 S. W. 2d 487 (Tenn. 1975).

While the Tennessee Supreme Court in 1978 upheld the constitutionality of the onerous statute of limitations of T.C.A. 29-26-116, the court in the 1980's is rendering decisions that not only benefit plaintiffs in medical malpractice cases, but may very well lay the groundwork for saving injured parties' actions in other tort cases.

The biggest break for medical malpractice vic-

tims came in the Tennessee Supreme Court decision in *Foster v. Harris*, 633 S. W. 2d 304 (Tenn. 1982). Therein, on October 11, 1975, the plaintiff was treated by the defendant dentist. During the treatment the dentist lacerated his own finger, and his blood and the blood of the plaintiff intermingled. Approximately three months later, the plaintiff learned that he was suffering from serum hepatitis, a disease contracted and passed from one person to another only through blood contact. It was not until July 21, 1976, that the plaintiff discovered that the defendant dentist was infected with serum hepatitis during the office treatment of October 11, 1975, and further learned that was when the plaintiff contracted the disease. The complaint was filed on February 11, 1977—one year and six months after negligent act and one year and one month after the discovery of the presence of the disease. The important fact was that the lawsuit was filed within one year of the date of the discovery of the breach of duty by the defendant and the identity of the person who breached the duty.

In holding that the cause of action was filed on a timely basis, the Tennessee Supreme Court stated, "It is axiomatic that no judicial remedy was available to this plaintiff until he discovered, or reasonably should have discovered, (1) the occasion, the manner and means by which a breach of duty occurred that produced this injuries; and (2) the identity of the defendant who breached the duty." *Foster v. Harris*, 633 S. W. 2d at 305.

Thus, in *Foster v. Harris*, the Tennessee Supreme Court said in effect that the "injury" was discovered upon learning that the source of the disease of the patient was a negligent act, and the statute of limitations does not run until the existence or identity of a tortfeasor is known. See *Hoffman v. Hospital Affiliates, Inc.*, (8 TAM 24-1, Tenn. Sup. Ct., June 6, 1983, for publication). In the future, some innovative plaintiff's attorney surely will use the *Foster v. Harris* decision to save a non-medical malpractice case that otherwise might be barred.

An interesting issue was presented to the Court of Appeals in the case of *Adkins v. Martin*, (Tenn. Ct. App., decided March 28, 1983) 8 TAM 17-4. The principal question upon appeal was whether the three-year ceiling statute of limitations in T.C.A. 29-26-116(a)(3) constitutes a bar to an action for damages based upon alleged medical malpractice brought by a person who was rendered non compos mentis by the alleged act of malpractice. The plaintiff relied upon T.C.A.

28-1-106, which reads as follows:

"Persons under disability on accrual of right.—If the person entitled to commence an action is, at the time the cause of action accrued, either within the age of eighteen (18) years, or of unsound mind, such person, or his representatives and privies, as the case may be, may commence the action, after the removal of such disability, within the time of limitation for the particular cause of action . . ."

The defendants argued that the three-year ceiling contained in the medical malpractice act (T.C.A. 29-26-116) supercedes and suspends the operation of the disability statute (T.C.A. 28-1-106). The Court of Appeals rejected the defendants' arguments and accepted that of the plaintiff. The court reasoned, first of all, that all fifty states and the District of Columbia recognize the basic unfairness of rigidly enforcing a statute of limitations against mentally incompetent persons. 8 TAM 17-4 at p. 6. Secondly, the court acknowledged the long-standing policy of this state to protect potential causes of action of minors during their period of minority and of persons of unsound mind during their period of mental incompetency. 8 TAM 17-4 at p. 6. The court relied upon the case of *Parlato v. Howe*, 470 F. Supp. 996 (E.D. Tenn. 1979), an opinion by United States District Judge Robert L. Taylor.

In *Parlato*, *supra*, the parents and natural guardians of a minor filed suit on February 28, 1979, for alleged negligence by the defendant medical care providers stating that serious injuries had occurred to the minor at birth in 1971. The action was filed more than three years after the negligence. It was held in *Parlato* that the three-year limit set forth in the medical malpractice act did not interfere with the Tennessee legal disability statute as it applied to minors.

"The important fact was that the lawsuit was filed within one year of the date of the discovery of the breach of duty by the defendant and the identity of the person who breached the duty."

The Court of Appeals also relied upon the Tennessee Products Liability Act of 1978 which provides an exclusion of minors from the effects of the ten-year "ceiling" in products liability cases. 8 TAM 17-4 at p. 8. The Court of Appeals finally concluded that it is "wholly illogical and totally unjust to consider treating the rights of one who is a non compos mentis different from the rights of a minor." 8 TAM 17-4 at p. 9.

Contrary to the arguments of defense counsel, the Court of Appeals did not feel that it was in

any way "fueling the fires of the 'medical malpractice insurance crises' that precipitated the enactment of the Medical Malpractice Review Board Act in the first instance." The court in fact took a well-deserved shot at the Tennessee Legislature when it stated, "If our holding in this case is deemed to present a problem in the medical malpractice field, then it is the prerogative of the legislature to remedy it." 8 TAM 17-4 at p. 9.

The case of *Johnson v. Metropolitan Government of Nashville and Davidson County, Tennessee* (Tenn. Ct. App., April 11, 1983) 8 TAM 20-2, is yet another logical decision that saved an otherwise potentially time-barred case. In this case the deceased David Wayne Johnson fell off a truck and struck his head upon the pavement on March 21, 1981. He was taken to the emergency room of Metropolitan General Hospital, a municipally-owned hospital. At the hospital he allegedly remained uncared for and unattended for approximately two and one-half hours. Relatives of the deceased then removed him from the hospital premises and took him to a private hospital where he was given aid for his fractured skull.

The plaintiff administrator alleged that the defendant's negligent delay in treatment caused the ultimate death of David Wayne Johnson on March 27, 1981. The brother of the deceased was appointed administrator of the estate on February 23, 1982. Suit was filed on March 19, 1982. The suit was filed within one year of the date of the injury and obviously within one year of the date of the negligence. However, the 120 day statutory notice to the municipality required by T.C.A. 29-20-301 through 29-20-303 was not given. In an effort to avoid the "sinking-ship-before-we-set-sail" syndrome, the plaintiff bailed himself out by arguing two points: first, the act of filing suit alone is sufficient "notice" of the claim, and secondly, the 120 days' period was "tolled" until a personal representative of the deceased was appointed.

The court quickly decided for the plaintiff the issue of whether filing suit instead of sending a certified letter to a public official constituted the requisite notice under T.C.A. 29-20-302. Returning to the most important aspect of the case, to wit, whether the case was time-barred, the Court of Appeals took the plaintiff's complaint in its most favorable light. According to the complaint, it was alleged that when the plaintiff entered the municipally-owned hospital, he was unable to sign himself in or out and was "barely conscious." Upon leaving the hospital, he was "almost totally unconscious," had to be physically carried out and, therefore, his "condition worsened" until he died. The court noted that under these facts it could hardly be said that the deceased, while living, ever had knowledge of any of the requirements set forth in the Tennessee Supreme Court case of *Foster v. Harris*, *supra*, for the accrual of a cause of action for wrongful

death. The court noted that ordinarily a cause of death is established by autopsy. Then the court said, "We hardly see how information obtained by the autopsy or any post mortem event would be imputable to a deceased. Death renders one beyond all human knowledge. One can hardly conceive of a more poignant circumstance than death, an injury consummate, which renders a suit totally beyond the control of the injured party make(ing) it impossible for him to bring suit." 8 TAM 20-2 p. 8.

Then the court discussed the evolutionary process of how the term "when the cause of action accrues" has been construed. Relying upon the *Foster v. Harris*, supra, decision and other prior precedent, the Court of Appeals stated the most important language in the decision as follows:

"At the hospital he allegedly remained uncared for and unattended for approximately two and one-half hours."

"[I]t would seem to us that logic would impel one to the conclusion that until someone elects to act as legal representative of the deceased or is appointed as such by a Court, that in a medical malpractice case for wrongful death, knowledge regarding the injury, identity of the tortfeasor or the manner and means by which the injury was accomplished should not be imputed to the deceased, for if it is the action of the deceased, there is only a corpse upon which an imputation is to fall absent the existence of a representative . . . [I]t has been held that even when living, the cause of action does not begin to accrue until a plaintiff is reasonably apprised of his injury [citations omitted] . . . [I]f lack of knowledge and opportunity to discover prevent the accrual of a right of action for the living, it seems to us that such deficiency would also prevent the accrual of the right of action for the deceased at least until someone takes legal action on behalf of the deceased or is appointed his representative. At that time the rules of discovery of a cause of action would commence to operate. Therefore, we hold the cause of action in this case under the alleged facts could not have arisen prior to February 23, 1982, at which time the plaintiff administrator was appointed." 8 TAM 20-2 pp. 8-10.

Since the plaintiff filed suit (and thus gave "notice") within 120 days of the date of the appointment of the administrator, the suit was filed on a timely basis according to the Court

of Appeals.

The three important medical malpractice decisions discussed herein certainly inure to the benefit of victims of medical malpractice. These cases may prove useful in other tort cases as well.



ABOUT THE AUTHOR . . .

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