# TORT-BASED STATUTES OF LIMITATIONS AND REPOSE IN TENNESSEE

There have been several significant developments here in Tennessee over the last few years on issues pertaining to statutes of limitation and repose in the general tort arena. This paper is designed to highlight some of the major decisions handed down by the appellate courts and hopefully provide a refresher and assist the Tennessee attorney in their practice.

Lets start off with the statute that governs the SOL in the majority of commonly-seen tort actions. I have bolded some pertinent language.

28-3-104. Personal tort actions; actions against certain professionals.

---

**(a)**
**(1) Except as provided in subdivision (a)(2)**, the following actions shall be commenced within one (1) year after the cause of action accrued:
**(A)** Actions for libel, injuries to the person, false imprisonment, malicious prosecution, or breach of marriage promise;
**(B)** Civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes; and
**(C)** Actions for statutory penalties.
**(2) A cause of action listed in subdivision (a)(1) shall be commenced within two (2) years after the cause of action accrued, if:**
**(A) Criminal charges are brought against any person alleged to have caused or contributed to the injury;**
**(B) The conduct, transaction, or occurrence that gives rise to the cause of action for civil damages is the subject of a criminal prosecution commenced within one (1) year by:**
**(i) A law enforcement officer;**
**(ii) A district attorney general; or**
**(iii) A grand jury; and**
**(C) The cause of action is brought by the person injured by the criminal conduct against the party prosecuted for such conduct.**
**(3)** This subsection (a) shall be strictly construed.
**(b)** For the purpose of this section, in products liability cases:
**(1)** The cause of action for injury to the person shall accrue on the date of the personal injury, not the date of the negligence or the sale of a product;
**(2)** No person shall be deprived of the right to maintain a cause of action until one (1) year from the date of the injury; and
**(3)** Under no circumstances shall the cause of action be barred before the person sustains an injury.
**(c)**
**(1)** Actions and suits against licensed public accountants, certified public accountants, or attorneys for malpractice shall be commenced within one (1) year after the cause of action accrued, whether the action or suit is grounded or based in contract or tort.
**(2)** In no event shall any action or suit against a licensed public accountant, certified public accountant or attorney be brought more than five (5) years after the date on which the act or omission occurred, except where there is fraudulent concealment on the part of the defendant, in

which case the action or suit shall be commenced within one (1) year after discovery that the cause of action exists.
**(d)** Any action to recover damages against a real estate appraiser arising out of the appraiser's real estate appraisal activity shall be brought within one (1) year from a person's discovery of the act or omission giving rise to the action, but in no event shall an action to recover damages against a real estate appraiser be brought more than five (5) years after the date the appraisal was conducted.

## I. T.C.A. 28-3-104(a)(2) extends 1 year SOL to 2 years if Defendant has been charged with a criminal offense and a criminal prosecution has been commenced against Defendant.

In Younger v. Okbahhanes, No. E2020-00429-COA-R10-CV, 2021 Tenn. App. LEXIS 33 (Ct. App. Jan. 28, 2021) the Eastern Section Court of Appeals held that a Plaintiff was entitled to a 2 year SOL in a personal injury/car accident case where the Defendant was issued traffic citations pursuant to T.C.A. 55-10-207 for failing to exercise due care in violation of T.C.A. 55-8-136, violation of the financial responsibility law (T.C.A.55-12-139) and failure to carry registration documents (T.C.A. 55-4-108.) The Defendant thereafter paid a fine after being summoned to appear before the local General Sessions Court. It was undisputed that the case was initially filed more than one year after the alleged injury and thus the legal issue of whether exception to the one-year SOL actually applied was front and center.

The trial court found that the 2 year exception found at T.C.A. 28-3-104(a)(2) applied and denied Defendant's request for TRAP Rule 9 appellate relief with the Defendant then seeking appeal pursuant to TRAP 10 which was subsequently granted.

The issue of law was whether or not a traffic citation for failure to exercise due care constituted a "criminal charge" and whether a subsequent criminal prosecution occurred. Thr Court of Appeals confirmed that failure to exercise due care is a Class C misdemeanor punishable by (according to T.C.A. 40-35-111(e)(3)) up to 30 days incarceration and a fine of up to $50. T.C.A. 55-10-207 pertains to traffic citations in lieu of arrest and allows the issuance of a citation to serve in effect as a complaint and will have the same effect as an affidavit prepared by the officer which the cited party must answer. Notably the Court of Appeals also pointed out that prior case law specifically referenced that TCA 55-10-207 exempted the Court from issuing a formal warrant as otherwise required by TCA 55-10-305.

> The language of the statute is clear and unambiguous, and, therefore, we must enforce the statute as written. We must give effect to each word that the General Assembly included when enacting a statute. In this case, the General Assembly specifically included that a criminal prosecution may be commenced by a law enforcement officer. Following the preparation, acceptance, and delivery of the original citation to the court, the individual charged with the traffic violation was required to answer the citation, and there was nothing further the police officer was required to file in order to commence the prosecution for such criminal offense. If our

> General Assembly intended to exclude traffic citations from the application of Tennessee Code Annotated § 28-3-104(a)(2) for policy reasons, it easily could have done so. It did not do so. It is not the role of this Court to rewrite the statute.
> **We hold that the traffic citation issued to Defendant for failure to exercise due care, which had been prepared, accepted, and the original citation filed with the court, is a criminal charge and a criminal prosecution by a law enforcement officer, such that Tennessee Code Annotated § 28-3-104(a)(2) is applicable [*15] to extend the statute of limitations in this action to two years.** We, therefore, affirm the Trial Court's judgment denying Defendant's summary judgment motion. Our holding that the issuance of a traffic citation for failure to exercise due care satisfies the statutory requirement of a criminal charge and commencement of a criminal prosecution by a law enforcement officer is limited to our interpretation of Tennessee Code Annotated § 28-3-104(a)(2) and has no effect on any criminal statute or procedure.
>
> Younger v. Okbahhanes, No. E2020-00429-COA-R10-CV, 2021 Tenn. App. LEXIS 33, at *14-15 (Ct. App. Jan. 28, 2021) (Emphasis added.)

This is an important decision as it solidifies reliance on T.C.A. 28-3-104(a)(2). This case could also play a major role on an issue pertaining to a civil claim for assault and/or battery where an allegedly injured Plaintiff files criminal charges as this would then extend the filing date for civil charges which may aid the prosecution in the sense that there would not be a readily available defense of "in it for the money" given the otherwise one year SOL that would normally necessitate earlier filing of a civil lawsuit against the individual defendant.

## II. SOL in Health Care Liability Actions Not Stayed With The Filing Of A Complaint That Fails To Meet The Pre-Suit Notice Requirements Pursuant To T.C.A. 29-26-121.

There are, by my conservative "guestimation", more than 50 (and I would venture closer to 80) appellate opinions rendered over the last decade where the Plaintiff's case has been dismissed—effectively with prejudice—as a result of the Plaintiff's counsel's failure to properly follow T.C.A. 29-26-121 as it pertains to delivering to each health care provider a proper Notice of Intent to Sue letter and its evil twin the "NOI HIPAA release."

Section 121 has been a veritable graveyard for unsuspecting Plaintiffs and yes, even veteran plaintiff medical malpractice lawyers. Notably, when the case is dismissed for failure to comply with TCA 29-26-121, it is dismissed without prejudice, however, the effect is almost always *with prejudice* because by the time the ruling at the trial court is made, the one year statute of limitations has expired. Practical time limits and the requirement of medical

review with a letter of merit before filing may occur often places the pre-suit investigation past the original 12 months from date of injury and into the 120-day additional time extension. Remember, the 120 day extension is *only effective* IF the NOI letter and attendant NOI HIPAA form both comply. While case law originally did not require "strict compliance," the general trend over the last 5 years has indeed been strict compliance as a failure to date the HIPPA release, a failure to state the "purpose" or a failure to provide proper disclose and acquire language or the failure to allow one provider to disclose to a party subsequently sued have all been grounds for dismissal of the lawsuit.

Notably, the appellate court never really states exactly how to comply with T.C.A. 29-26-121 correctly, but instead, how it was done wrong yet once again. The Notice of Intent to Sue letter ("NOI") HIPAA release form needs to be signed by the Plaintiff or representative for the Plaintiff, it must be dated, and it must allow each potential defendant-provider access to all other records from any other provider who was named who was an actual provider (as opposed to a corporate entity that played no direct role in the provision of health care services.) Make sure that the HIPAA release meets the 6 core requirements as discussed more recently in Shaw v. Gross, Docket No. W2019-01448-COA-R3-CV (Western Section Tenn. Crt. App., April 13, 2021.) If only one provider is named then a defective NOI HIPAA release is not fatal.[1]

Having served dozens of these NOI letters and NOI HIPAA releases over the years, I highly recommend distilling the necessary information onto one page—its less to have to manage, less to go wrong, and the release must state a purpose[2], set a time limit for the disclosure to expire, and clearly state that each named provider can both receive and produce medical records from all other named providers.

I will not attempt to provide an exacting recitation of the case law from the past decade but would caution the lawyer who is "dabbling" in this area to talk to a lawyer who has successfully filed a Health Care Liability Act lawsuit prior to tackling this procedural nightmare alone.

## III. Interplay Between The Statute of Repose and Comparative Fault Asserted More Than Three Years After Injury Occurred In HCLA-Med Mal Cases

One issue that I have seen develop several times is the interplay between the medical malpractice three-year statute of repose (from the date of injury) and a subsequent comparative fault allegation that is first asserted more than three years after the alleged negligence. When a defendant who was sued in the original lawsuit (very important qualifier-it must be any

[1] Moore-Pitts v. Bradley, 605 S.W.3rd 24 (Tenn. Cr. App, 2019) *perm app. denied* (Tenn. April 16, 2020) one-provider exception is limited to situations where only one provider is named in the NOI letter, not when one provider is ultimately the only defendant actually sued. See also Bray v. Khuri, 523 S.W.3rd 619 (Tenn. 2017).

[2] Woods v. Arthur, No.W2019-01936-COA-R3-CV (March 23, 2021, Western Section Tenn. Ct. App.). The Woods court found that the failure to state the purpose for providing the release cannot be inferred and that this error rendered the HIPAA release invalid.

defendant who is sued within the initial applicable SOL) asserts a comparative fault defense and seeks to amend their answer naming a new party as a tortfeasor, then pursuant to T.C.A. 20-1-119 the plaintiff has an automatic 90-day window to file an amended complaint naming that tortfeasor as a new party to the lawsuit. Remember, that TCA 20-1-119 was amended a while back so that you don't have to first file a Motion to Amend—instead, you can file the Amended Complaint without taking leave of Court.

Here is a published 2002 decision McCullough v. Johnson City Emergency Physicians, P.C., 106 S.W.3d 36 (Tenn. Ct. App. 2002) where the Eastern Section Court of Appeals upheld the trial court's decision not to allow a Plaintiff to amend the complaint to add the comparative fault tortfeasor named by the original defendant (pursuant to TCA 20-119—in 2002 the language of 20-119 mandated that the Plaintiff file a motion to obtain leave of Court unlike the current language). The reason was that the three-year statue of repose (TCA 29-26-116) had already expired thus any amendment would be futile.

As an aside, when you have a situation where a new defendant is going to be added to the lawsuit pursuant to TCA 20-1-119, *venue for that new defendant is an interesting issue as well*—what if the original tortfeasor blames subsequent healthcare providers in a different county than where the original tort occurred? (You can see this happen in a car accident case where subsequent medical treatment is provided in a separate county which was allegedly was sub-standard as well as in med mal cases where Plaintiff is transferred to a separate facility in different county.)

Under Tennessee's venue statute—T.C.A. 20-4-101, there is a provision which states that if the Plaintiff and Defendant share the same county of residence, then the action may be brought either there or where the alleged negligence occurred. So, if the original action is brought in County A and original defendant claims subsequent negligence occurred in County B and county B is where Plaintiff happens to reside, then the Amended Complaint *must* be brought in County B and original Defendant A just lost their venue of County A. Additionally, if the original defendant asserts comparative fault as to tortfeasors who reside in County B and the alleged subsequent negligence occurred in County B, IF Plaintiff is not a resident of County B, then County A is proper venue as to these new defendants EVEN IF none of their behavior occurred in County A. See the bolded language below from the Barrett v Chesney case.

Take a look at this unpublished opinion from 2015 which discusses the interplay of Tennessee's venue statute and comparative fault allegations –Tennessee does not take the majority rule on venue matters. Barrett v. Chesney, No. W2014-01921-COA-R9-CV, 2015 Tenn. App. LEXIS 790 (Ct. App. Sep. 28, 2015). Here are some of its holdings:

- When considering venue, Tenn. Code Ann. § 20-4-101(b) is couched in singular terms, and thus its application to cases involving multiple defendants is not readily apparent.

- Tenn. Code Ann. § 20-4-101(b) provides that if a plaintiff and defendant both reside in the same county in Tennessee, then an action shall be brought either in the county where the cause of action arose or in the county of their residence.

- When considering proper venue, the language of Tenn. Code Ann. § 20-4-101(b) is mandatory and has been consistently recognized as such. **If venue is proper as to one of several defendants who is a material party, venue is proper as to all properly joined defendants, even if venue would not be proper as to the other defendants if sued individually.** An exception, however, applies as to a defendant having common county residence with the plaintiff.

- Tenn. R. Civ. P. 15.01 currently provides, in part, that, for amendments adding defendants pursuant to Tenn. Code Ann. § 20-1-119, written consent of an adverse party or leave of the court is not required. Because Tenn. Code Ann. § 20-1-119 allows potential comparative tortfeasors pled in an answer to be added to a complaint, there is no reason to trouble a trial court with permission to amend.

I apologize for that foray into venue, but its interesting and you may see it in your law practice and may come up when comparative fault and thus TCA 20-1-119 comes into play. Now back to our regularly scheduled program.

## IV. If New Comparative Tortfeasor Added As Party Pursuant To TCA 20-119, Then This "New Defendant" Asserts Comparative Fault Against Yet Another Un-Named Party, Does TCA 20-1119 Kick In To Play Again? No.

Lets first reacquaint ourselves with T.C.A. 20-1-119:

20-1-119. Comparative fault — Joinder of third party defendants.

**(a)** In civil actions where comparative fault is or becomes an issue, if a defendant named in an original complaint initiating a suit filed within the applicable statute of limitations, or named in an amended complaint filed within the applicable statute of limitations, alleges in an answer or amended answer to the original or amended complaint that a person not a party to the suit caused or contributed to the injury or damage for which the plaintiff seeks recovery, and if the plaintiff's cause or causes of action against that person would be barred by any applicable statute of limitations but for the operation of this section, the plaintiff may, within ninety (90) days of the filing of the first answer or first amended answer alleging that person's fault, either:
**(1)** Amend the complaint to add the person as a defendant pursuant to Tenn. R. Civ. P. 15 and cause process to be issued for that person; or
**(2)** Institute a separate action against that person by filing a summons and complaint. If the plaintiff elects to proceed under this section by filing a separate action, the complaint so filed shall not be considered an original complaint initiating the suit or an amended complaint for purposes of this subsection (a).
**(b)** A cause of action brought within ninety (90) days pursuant to subsection (a) shall not be barred by any statute of limitations. This section shall not extend any applicable statute of repose, nor shall this section permit the plaintiff to maintain an action against a person when such an action is barred by an applicable statute of repose.
**(c)** This section shall neither shorten nor lengthen the applicable statute of limitations for any cause of action, other than as provided in subsection (a).

**(d)** Subsections (a) and (b) shall not apply to any civil action commenced pursuant to § 28-1-105, except an action originally commenced in general sessions court and subsequently recommenced in circuit or chancery court.
**(e)** This section shall not limit the right of any defendant to allege in an answer or amended answer that a person not a party to the suit caused or contributed to the injury for which the plaintiff seeks recovery.
**(f)** As used in this section, "person" means any individual or legal entity.
**(g)** Notwithstanding any law to the contrary, this section applies to suits involving governmental entities.

The Tennessee Supreme Court answered this very question in Mills v. Fulmarque, Inc., 360 S.W.3d 362 (Tenn. 2012). Specifically, TCA 20-1-119 provides for a 90-day extension only when the party asserting the comparative fault defense is an *original defendant* named within the applicable statute of limitations or a new defendant named still within the applicable statute of limitations. Here is T.C.A. 20-1-119 (a):

> **(a)** In civil actions where comparative fault is or becomes an issue, if a defendant named in an original complaint initiating a suit filed within the applicable statute of limitations, or named in an amended complaint filed within the applicable statute of limitations, alleges in an answer or amended answer to the original or amended complaint that a person not a party to the suit caused or contributed to the injury or damage for which the plaintiff seeks recovery, and if the plaintiff's cause or causes of action against that person would be barred by any applicable statute of limitations but for the operation of this section, the plaintiff may, within ninety (90) days of the filing of the first answer or first amended answer alleging that person's fault, either:
> **(1)** Amend the complaint to add the person as a defendant pursuant to Tenn. R. Civ. P. 15 and cause process to be issued for that person; or
> **(2)** Institute a separate action against that person by filing a summons and complaint. If the plaintiff elects to proceed under this section by filing a separate action, the complaint so filed shall not be considered an original complaint initiating the suit or an amended complaint for purposes of this subsection (a).

Notably, for TCA 20-1-119 to kick into play, the Mills court referenced that there must be a formal assertion in the answer or amended answer as this is required by TCA 20-1-119. Sending over a letter or testimony in a deposition is not sufficient to engage TCA 20-1-119's provisions.

Various attempts at "analogous methods" for engaging TCA 20-1-119 have also been denied—here is the Middle Section Court of Appeals commenting on this exact issue:

> The City argues that judicial interpretations of Tenn. Code Ann. § 20-1-119 do not allow for "equivalent" or "analogous" methods of compliance. The City cites cases holding that an attorney's letter is not an answer for purposes of Tenn. Code Ann. § 20-1-119, ***Grindstaff v. Bowman*, No.E2007-00135-COA-R3-CV, 2008 Tenn. App. LEXIS 323, 2008 WL 2219274, at *4 (Tenn. Ct. App. May 29, 2008)**; a discovery response is not an answer for purposes of Tenn. Code Ann. § 20-1-119, *Shaffer v. Memphis Airport Authority*, No.W2012-00237-COA-R9-CV, 2013 Tenn. App. LEXIS 32, 2013 WL 209309, at *7-8 (Tenn. Ct. App. Jan. 18, 2013), *Crawford v. U.S. Foodservice, Inc.*, No. 3:10-0030, 2010 U.S. Dist. LEXIS 74716, 2010 WL 2901740, at *4 (M.D. Tenn. July 23, 2010); and that a motion **[*12]** to dismiss is not an answer for purposes of Tenn. Code Ann. § 20-1-119, *Johnson v. Trane U.S. Inc.*, No.W2011-01236-COA-R3-CV, 2013 Tenn. App. LEXIS 537, 2013 WL 4436396, at *7 (Tenn. Ct. App. Aug. 19, 2013).

Moreno v. City of Clarksville, No. M2013-01465-COA-R3-CV, 2014 Tenn. App. LEXIS 94, at *11-12 (Ct. App. Feb. 25, 2014) *overturned on other grounds* Moreno v. City of Clarksville, 479 S.W.3d 795 (Tenn. 2015)

In the Mills case, the original defendant asserted comparative fault defense against new defendant #1 who then answered and asserted comparative fault defense against new defendant #2. Supreme Court ruled that new defendant #1 was not a defendant who was sued within the one year applicable statute of limitations thus Plaintiff could not bring in new Defendant #2 pursuant to T.C.A. 20-1-119.

Stated plainly, the holding in Mills is that there are not successive ninety day windows *unless* each new defendant is sued within the applicable underlying statute of limitations.

**TCA 20-1-119 Nuggets**

- TCA 20-1-119 has also been interpreted so that unnamed defendants include corporate defendants who would only been held vicariously liable for the actions of their individual agents/employees. Browder v. Morris, 975 S.W.2d 308, 1998 Tenn. LEXIS 463 (Tenn. Special Workers' Comp. App. Panel 1998) .

- A plaintiff's knowledge of the existence of other persons who might be liable for the plaintiff's injuries is irrelevant. Townes v. Sunbeam Oster Co., 50 S.W.3d 446, 2001 Tenn. App. LEXIS 68 (Tenn. Ct. App. 2001). See also Becker v. Ford Motor Co., 431 S.W.3d 588 (Tenn. 2014) where the Tennessee Supreme Court confirmed the Townes court's interpretation via certified question from the United States District Court Eastern District of Tennessee, No. 1:13-cv-276-SKL. Susan K. Lee, Magistrate Judge.

- Nationwide Mut. Fire Ins. Co. v. Memphis Light, Gas & Water, 578 S.W.3d 26 (Tenn. Ct. App. 2018) is an important case as it provides a historical discussion of

the implementation of TCA 20-1-119 while holding that the focus must be on whether the underlying statute of limitations as to the original named defendant has been properly met when determining whether a comparative tortfeasor may be added—with the proviso that if the repose has run as to the new defendant then the plaintiff is out of luck.

Both the plain language of Tenn. Code Ann. § 20-1-119 and the supporting case law indicate that the statute of limitations relevant to determine the timeliness of an original complaint for purposes of triggering the 90-day grace period is the statute of limitations applicable to the original defendant/claim. Thus when an original complaint was brought within the applicable three year statute of limitations for property damage (Plaintiff was insurance company via subrogation for losses stemming from a house fire)and the defendant (manufacturer of a gas flex line) then asserted a comparative fault defense against a governmental entity (MLG&W) for failure to properly trim trees hanging allegedly too close to a power line, the amended complaint against MLG&W was timely brought although it was first filed well after the one year applicable SOL as to a governmental entity.

This is an important holding as it involved the interpretation of two statutes—the one year SOL as to governmental entities enshrined at T.C.A. 29-20-305(b) (with case law that states that claims for damages brought under the GTLA must strictly comply with the GTLA) vs the specific provision in TCA 20-1-119(g) holding that this 90 day window exception specifically applies to GTLA entities.

- Brown v. Wal-Mart Disc. Cities, 12 S.W.3d 785, 789 (Tenn. 2000) is an important case and here is its holding as set forth succinctly by the Tennessee Supreme Court:

> [A] defendant may not attribute fault to a nonparty who is not identified sufficiently to allow the plaintiff to plead and serve process on such person pursuant to Tenn. Code Ann. § 20-1-119, even if the defendant establishes the nonparty's existence by clear and convincing evidence.

Brown, was a slip and fall case. The issue that most attendants to this CLE would think of that could be impacted by the Brown holding is—**how does the Brown opinion play in the context of a defendant asserting fault against a phantom tortfeasor in the automobile liability context?**

Here is this exact issue and its holding in Breeding v. Edwards, 62 S.W.3d 170, 171 (Tenn. Ct. App. 2001) –the first paragraph of the opinion is presented below:

> We are asked to decide whether the Supreme Court's decision in the case of ***Brown v. Wal-Mart Discount Cities*, 12 S.W.3d 785 (Tenn. 2000)**, is applicable to a case in which a plaintiff seeks to

> recover under the uninsured motorist provisions of its policy based upon the alleged negligence of an unknown motorist, the existence of whom is first asserted by a named defendant. In the instant case, a vehicle driven by the plaintiff Shirley Irene Breeding was struck by a vehicle driven by the defendant Robert Lewis Edwards and owned by the defendant Johnston Coca Cola Bottling Group, Inc. ("Johnston"). She filed a complaint against these defendants within the period of the statute of limitations and secured the service of process upon her uninsured motorist ("UM") carrier, the appellee Farmers Insurance Exchange ("Farmers"). Outside the period of the statute of limitations, the defendants amended their answer to allege that an unknown motorist caused or contributed to the accident. Within 90 days, Breeding amended her [**2] complaint to add John Doe, *i.e.*, the unknown driver, as a party defendant. Farmers moved to dismiss the claim against it. It relied on ***Brown***, a slip and fall case. The trial court agreed with Farmers and dismissed Breeding's claim. Breeding appeals, asserting, *inter alia*, that ***Brown*** does not apply to the instant case. We reverse.

However, what about a scenario where the Plaintiff does NOT HAVE UM coverage as it is optional coverage in Tennessee. In 2002, the Eastern Section Court of Appeals tackled this exact issue and again limited the Brown holding to factual scenarios where the option to bring in the unknown tortfeasor was impossible:

> We agree with the defendant that the right to assign fault to another under the rubric of ***McIntyre*** prevails in a situation where the existence of the unknown motorist is established in one of the ways authorized by Tenn. Code Ann. § 56-7-1201(e). The fact that a plaintiff does not have an automobile liability insurance policy, or has elected to decline uninsured motorist coverage, or, for whatever reason, has failed to timely pursue a claim against his or her carrier, is immaterial. The law gives an injured individual that right and the failure to pursue it cannot deprive a defendant of the right to assign fault to an unknown motorist.
>
> Marler v. Scoggins, 105 S.W.3d 596, 601 (Tenn. Ct. App. 2002)

Thus, the Brown decision from 2000 has limited precedential value in the context of automotive liability cases involving phantom tortfeasors.

- Matthews v. Story, No. E2002-00517-COA-R3-CV, 2003 Tenn. App. LEXIS 58, at *8 (Ct. App. Jan. 28, 2003) Alleging wrong party sued is not asserting a comparative fault defense thereby implicating TCA 20-1-119. Plaintiff mistakenly sued Morelock

as named Defendant who was owner of vehicle but it was undisputed that Morelock was not present in vehicle when passenger named Story (who was daughter of Morelock) allegedly obstructed Plaintiff driver's field of view and caused accident with injuries to Plaintiff. It was undisputed that Plaintiff was aware of Story's presence in vehicle thereby preventing any argument of "discovery rule" coming into play. Here is what the Court of Appeals held:

> In the instant case, Morelock [named defendant and owner of vehicle being driven by Plaintiff] never raised the defense of comparative fault, nor did she allege that Story [her daughter and a passenger in vehicle] was, or even might be, at fault. On the contrary, the stipulations of fact contained in the record recite that Morelock's attorney informed counsel for the plaintiff that "Morelock was not in the vehicle at the time of the accident, but her daughter, Natasha Story, was using the car owned by the defendant Morelock, and was a passenger in the car being driven by the plaintiff; *therefore, the wrong person had been sued*." (Emphasis added). As the plaintiff has stipulated, the lawyer for Morelock was simply informing his counterpart that the plaintiff had sued the wrong person; Morelock's counsel was not raising the comparative fault of Story. These two concepts are separate and distinct, as illustrated by our decision in ***Hodge v. Jones Holding Co.***, No. M1998-00955-COA-R3-CV, 2001 WL 873458, 2001 Tenn. App. LEXIS 567 (Tenn. Ct. App. M.S., filed Aug. 3, 2001). In ***Hodge***, the plaintiff argued that the defendant construction company should not have been allowed to assert that the plaintiff sued the wrong company since the defendant failed to affirmatively plead the defense of comparative fault, as required by Tenn. R. Civ. P. 8.03. ***Id.*** at *1, 2001 Tenn. App. LEXIS 567, at *2. This court agreed with the defendant's position on the issue before it:
> [The defendant] was not asserting the comparative fault affirmative defense in this case. Rather than seeking to lay off all or a part of the fault for [the plaintiff's] injuries on another tortfeasor, it was simply asserting that it was not the construction company responsible for the road construction where [the plaintiff] was injured.
>
> ***Id.*** at *5, 2001 Tenn. App. LEXIS 567, at *15. Similarly, in the instant case, Morelock was not raising the defense of comparative fault when her counsel informed the plaintiff's counsel that the plaintiff had sued the wrong person. Because Morelock did not raise comparative fault as an affirmative defense, the 90-day extension provided for in Tenn. Code Ann. § 20-1-119 never came into play and the plaintiff cannot rely upon it. The plaintiff's attempt to add Story as a defendant is barred by the one-year statute of limitations. Therefore, we find no error in the trial court's dismissal of the plaintiff's action against Story.

## V. SOL Affected When Plaintiff Names Corporation As Defendant Pursuant To Vicarious Liability In Med Mal Action But Not The Individual Tortfeasor? Answer:: No.

The Tennessee Court of Appeals recently rendered two separate companion opinions that clarified that when a Plaintiff asserts vicarious liability against a corporation in the medical malpractice context and relies upon the 120-day extension window pursuant to TCA 29-26-121 and does not name or subsequently sue the underlying individual agent/employee, the failure to name the employee does not thus render the vicarious liability theory dead on arrival. The theory espoused by the defendant was that since the individual employees would be immune from suit with passing of the 1 year SOL, the 120-day extension granted to the corporation did not change the fact that the employees on whom vicarious liability was based were now immune from suit, thereby destroying any liability towards the employer corporation. The Ultsch court stated: [W]e conclude that, in health care liability cases in which a plaintiff chooses to sue only the principal, the provisions of the HCLA on pre-suit notice prevail over the common law exception in *Abshure* with respect to the tolling of the statute of limitations. Ultsch v. HTI Mem'l Hosp. Corp., No. M2020-00341-COA-R9-CV, 2021 Tenn. App. LEXIS 136, at *17-18 (Ct. App. Apr. 1, 2021) Here is the companion case that stands for this same holding: Gardner v. St. Thomas Midtown Hospital, No, M2019-02237-COA-R3-CV (April 1, 2021 Middle Section Tenn. Ct. App.)

## VI. Discovery Rule –Application With SOL

Here is the traditional interpretation of the discovery rule in Tennessee as it applies to personal injury claims:

> In Tennessee, the discovery rule "provides that a cause of action accrues and the statute of limitations begins to run when the plaintiff knows or in the exercise of reasonable care and diligence should know that an injury has been sustained as a result of wrongful or tortious conduct by the defendant." *Fahrner v. SW Mfg., Inc*., 48 S.W.3d 141, 143 (Tenn. 2001) (citing *Kohl & Co. v. Dearborn & Ewing*, 977 S.W.2d 528, 532 (Tenn. 1998). When applying the discovery rule, determining "[w]hether the plaintiff exercised reasonable care and diligence in discovering the injury or wrong is usually a fact question for the jury to determine." *Wyatt v. ACandS, Inc*., 910 S.W.2d 851, 854 (Tenn. 1995); *McIntosh v. Blanton*, 164 S.W.3d 584, 586 (Tenn. Ct. App. 2004). Nevertheless, if undisputed facts show "that [*19] no reasonable trier of fact could conclude that a plaintiff did not know, or in the exercise of reasonable care and diligence should not have known, that he or she was injured as a result of the defendant's wrongful conduct, Tennessee case law has established that judgment on the pleadings or dismissal of the complaint is

appropriate." *See Schmank v. Sonic Auto., Inc.*, No. E2007-01857-COA-R3-CV, 2008 Tenn. App. LEXIS 291, 2008 WL 2078076, at *3 (Tenn. Ct. App. E.S., May 16, 2008) (citations omitted).

Dutton v. Farmers Grp., Inc., No. E2009-00746-COA-R3-CV, 2010 Tenn. App. LEXIS 395, at *18-19 (Ct. App. June 22, 2010)

In Dutton the Court of Appeals found that the plaintiffs reasonably did not discover the true cause of their physical ailments, which differed amongst each other, until a physician advised Plaintiffs that toxic mold was causing their ailments. Plaintiffs home had flooded and they were assured by the Defendant that the mess had ben properly remediated and was safe to inhabit. Defendants did not reveal to Plaintiff that a lineoleum floor which allegedly had been replaced in fact harbored toxic mold. Thereafter Plaintiffs suffered a variety of illnesses none of which were necessarily obviously caused by hidden toxic mold.

The Tennessee Supreme Court adopted the **discovery rule** more than 30 years ago in *Teeters v. Currey*, 518 S.W.2d 512, 517 (Tenn. 1974). In *Teeters*, the plaintiff **discovered** that she was pregnant two and a half years after undergoing a tubal ligation for the purpose of sterilization. *Id.* at 512. Eleven months after learning of her pregnancy, she sued the doctor who had performed the surgery. *Id.* at 513. The trial court granted the defendant's motion for summary judgment based on the statute of limitations. *Id.* at 514. The Supreme Court reversed, stating, "We find it difficult to embrace a rule of law requiring that a plaintiff file suit prior to knowledge of his injury or, phrasing it another way, requiring that he sue to vindicate a non-existent wrong, at a time when injury is unknown or unknowable." *Id.* at 515. The following year, the General Assembly **codified** the **discovery rule** in the **Medical Malpractice** Review Board and Claims Act. *Puckett v. Life Care of America*, No. E2004-00803-COA-R3-CV, 2004 Tenn. App. LEXIS 622, 2004 WL 2138337, at *4 (Tenn. Ct. App. E.S., filed Sept. 24, 2004); see **Tenn. Code Ann. § 29-26-116(a)(2**).

Under the **discovery rule**, the statute of limitations in a **medical malpractice** case begins to run "when the patient **discovers**, or reasonably should have **discovered** (1) the **occasion**, the manner, and the means by which the **breach of duty** that caused his or her injuries occurred, and (2) the **identity** of the person who caused the injury." *Id.* However, the plaintiff is not entitled to wait until he or she knows all of the injurious consequences caused by the alleged negligence before filing suit. *Shadrick v. Coker*, 963 S.W.2d 726, 733 (Tenn. 1998).

Murphy v. Lakeside Med. Ctr., Inc., No. E2006-01721-COA-R3-CV, 2007 Tenn. App. LEXIS 154, at *9 (Ct. App. Mar. 26, 2007.)

Here are some general principles that govern application of the discovery rule:

- *Shadrick v. Coker*, 963 S.W.2d 726, 733-34 (Tenn. 1998) (explaining that "'It is knowledge of facts sufficient to put a plaintiff on notice that an injury has been sustained which is crucial.'") (citation omitted). In *Shadrick*, our Supreme Court reached a similar result. In that case, the plaintiff underwent back surgery that involved placing pedicle screws in his back. 963 S.W.2d at 728. Soon after the surgery, the plaintiff began to

experience complications for which the treating physician offered varying explanations. *Id*. at 729. Although the plaintiff was aware that he sustained an injury, he did not discover the origin of the injury until well after the statute of limitations expired. *Id*. at 734. For that reason, the Court held that the statute of limitations was tolled by the discovery rule

- *Grindstaff v. Bowman*, No. E2007-001350-COA-R3-CV, 2008 Tenn. App. LEXIS 323, 2008 WL 2219274, at *5 (Tenn. Ct. App. E.S., May 29, 2008) (noting that the statute of limitations was not tolled by the discovery rule because plaintiffs failed to use due diligence in investigating their case). In *Grindstaff*, this court explained:

  > [T]he plaintiffs cannot simply wait for information regarding a potential defendant to come to them. They have a duty to investigate and discover pertinent facts through the exercise of reasonable care and due diligence. If their lack of knowledge was due to a lack of due diligence, they will not be allowed to plead ignorance and effectively extend the statute of limitations, by way of the discovery [*21] rule, simply because they later discovered "new" information that "they reasonable should have discovered" much earlier.
  > 2008 Tenn. App. LEXIS 323, [WL] at *6 (internal citation omitted).
  >
  > Dutton v. Farmers Grp., Inc., No. E2009-00746-COA-R3-CV, 2010 Tenn. App. LEXIS 395, at *20-21 (Ct. App. June 22, 2010)

- It is well settled that a plaintiff cannot initiate a lawsuit until he or she knows the cause or origin of the claim. *See, e.g., Brandt v. McCord*, 281 S.W.3d 394, 400 (Tenn. Ct. App. 2008) (noting that "Such knowledge includes not only an awareness of the injury, but also the tortious origin or wrongful nature of that injury.")

  Dutton v. Farmers Grp., Inc., No. E2009-00746-COA-R3-CV, 2010 Tenn. App. LEXIS 395, at *25 (Ct. App. June 22, 2010)

- The discovery rule's cornerstone is, at minimum, the knowledge of the patient of the injury. *See* ***Redwing***, 363 S.W.3d at 458 (focusing on the patient's knowledge of the negligence); *But see* ***Holliman v. McGrew***, 343 S.W.3d 68, 75 (Tenn. Ct. App. 2009) (focusing, in a wrongful death action predicated on health care liability, the knowledge of the patient's heirs of the patient's injury).

- As such, at the very least, Defendant must point to undisputed facts showing Decedent knew or should have known that a misdiagnosis had been made the prior day, which is often met where a new diagnosis is communicated to the patient to put him or her on notice that he was previously misdiagnosed. Indeed, in cases cited involving misdiagnoses as the predicate for a health care liability action, Tennessee courts have repeatedly held that the cause of action accrued when the misdiagnosis or a new diagnosis was made known to the patient. *See, e.g.*, ***Hoffman v. Hospital Affiliates, Inc.***, 652 S.W.2d 341 (Tenn. 1983) (noting that it was uncontroverted that the patient

discovered her injury when a second doctor informed her that her first diagnosis was incorrect); ***Young v. Kennedy***, 429 S.W.3d 536, 561 (Tenn. Ct. App. 2013) (holding that the patient's "knowledge of the infection" put the patient on notice of a physician's prior negligence); ***Murphy v. Lakeside Med. Ctr., Inc.*, No. E2006-01721-COA-R3-CV, 2007 Tenn. App. LEXIS 154, 2007 WL 906760, at *4 (Tenn. Ct. App. Mar. 26, 2007)** (holding that the plaintiff was placed on notice of his injury when the patient received conflicting diagnoses regarding his hearing loss); ***Jones v. Neblett***, No. CA 1306, 1989 Tenn. App. LEXIS 688, 1989 WL 126280, at *1 (Tenn. Ct. App. Oct. 23, 1989) (holding that the plaintiff was put on notice of the injury on the date that another doctor informed the plaintiff-patient that a prior diagnosis was incorrect). While "there is no requirement of diagnosis of the actual injury by another medical professional," the record must contain evidence that the patient was put on notice that he or she was injured [*14] by the defendant's negligence. ***Rogers v. Blount Mem'l Hosp., Inc.***, No. E2015-00136-COA-R3-CV, 2016 Tenn. App. LEXIS 151, 2016 WL 787308, at *5 (Tenn. Ct. App. Feb. 29, 2016) (citing ***Sherrill***, 325 S.W.3d at 595) (reversing summary judgment on the issue of the statute of limitations because the evidence did not establish that the patient had notice he had been injured by a physician until another physician informed him of the prior misdiagnosis).

Shaw v. Gross, No. W2017-00441-COA-R3-CV, 2018 Tenn. App. LEXIS 72, at *12-14 (Ct. App. Feb. 9, 2018)

## VII. Tolling Statute

28-1-106. Accrual of right if person under eighteen years of age, adjudicated incompetent, or lacking capacity.

**(a)** If the person entitled to commence an action is, at the time the cause of action accrued, either under eighteen (18) years of age, or adjudicated incompetent, such person, or such person's representatives and privies, as the case may be, may commence the action, after legal rights are restored, within the time of limitation for the particular cause of action, unless it exceeds three (3) years, and in that case within three (3) years from restoration of legal rights.
**(b)** Persons over the age of eighteen (18) years of age are presumed competent.
**(c)**
**(1)** If the person entitled to commence an action, at the time the cause of action accrued, lacks capacity, such person or such person's representatives and privies, as the case may be, may commence the action, after removal of such incapacity, within the time of limitation for the particular cause of action, unless it exceeds three (3) years, and in that case within three (3) years from removal of such incapacity, except as provided for in subdivision (c)(2).
**(2)** Any individual with court-ordered fiduciary responsibility towards a person who lacks capacity, or any individual who possesses the legal right to bring suit on behalf of a person who

lacks capacity, shall commence the action on behalf of that person within the applicable statute of limitations and **may not rely on any tolling of the statute of limitations, unless that individual can establish by clear and convincing evidence that the individual did not and could not reasonably have known of the accrued cause of action.**
**(3)** Any person asserting lack of capacity and the lack of a fiduciary or other representative who knew or reasonably should have known of the accrued cause of action shall have the burden of proving the existence of such facts.
**(4)** Nothing in this subsection (c) shall affect or toll any statute of repose within this code.
**(d)** For purposes of this section, the term "person who lacks capacity" means and shall be interpreted consistently with the term "person of unsound mind" as found in this section prior to its amendment by Chapter 47 of the Public Acts of 2011.

This statute was thankfully changed to the present language in 2016. From 2011 to 2016, "unsound mind" had been replaced with "adjudicated incompetent" which is a much more involved and frankly higher standard with case law interpreting the phrase "adjudicated incompetent" to mean that a Court had made a factual finding of incompetence which normally only occurs in a conservatorship setting with medical proof from a physician.

In 2016 the current language was enacted which provides for a slightly better circumstance for Plaintiffs as the "unsound mind" standard returned with the important exception that a plaintiff of "unsound mind" who has provided a power of attorney to someone or if there is an established conservatorship/guardian ad litem, then there is no tolling of the statute of limitations. This new development must be considered as it can play an important role in certain lawsuits involving a fact pattern where at first blush the Plaintiff's SOL would appear to toll as the Plaintiff has dementia at the time of the injury.