

finding that the discovery rule which was enunciated in Teeters v. Currey, 518 S.W2d 512, (Tenn.1974), would preclude their suit from being barred by the applicable statute of limitations.

Our standard of review in summary judgment cases is set out in Byrd v. Hall, 847 S.W2d 208 (Tenn.1993), which mandates that the evidence be viewed in the light most favorable to the Thomases and that they be entitled to all reasonable inferences to be drawn therefrom

Eleanor Thomas, 58 years of age at the time of the incident giving rise to this suit, has been a licensed registered nurse since 1965. Previous to the surgery giving rise to her claim she had been a patient of Dr. Pitts from May 8, 1992, through September 14, 1992. She had various pre-existing conditions and had experienced a heart attack in 1988. She also was afflicted with a gall bladder problem which she determined to have removed.

In furtherance of this determination, she sought clearance from Dr. Pitts as to whether she was physically able to withstand the surgery.

In late August 1992, which was prior to the surgery, she began experiencing shortness of breath similar to that which she had experienced prior to her earlier heart attack. Because of this she called Dr. Pitts' office on August 29, 31, and

September 4, reporting her shortness of breath to the nurse. On September 14, the day before her surgery, she saw Dr. Pitts and personally told him about her shortness of breath.

Notwithstanding the foregoing, Dr. Pitts, who was not present during the operation, cleared her for surgery by Dr. Douglas Vanderbilt, whom he had recommended. Dr. Stephen Wseman administered the anesthesia. During or immediately following the operation, which also included a procedure to correct a carpal tunnel problem, M. Thomas sustained a second heart attack. As a result thereof her heart was severely and permanently damaged and her condition can only be remedied by a heart transplant.

A few days after the operation M. Thomas had a conversation with Dr. Curtis McCoy, a cardiologist who had been called in for consultation. Dr. McCoy related to M. Thomas that the damage to Ms. Thomas' heart resulted from the heart attack she suffered not being promptly diagnosed and treated.

The Thomases first contacted an attorney in July 1993, who referred them to their present counsel, Jeffrey D. Boehm, who they contacted in August of the same year. After Mr. Boehm's investigation, suit was filed on September 14, 1993, against Dr. Vanderbilt, Dr. Wseman and Dr. Wseman's anesthesiologist group.

Shortly thereafter, on October 5, Mr. Boehm contacted Dr. McCoy, and during their conference Dr. McCoy pointed out the

absence of a written report clearing Mrs. Thomas for surgery and questioned whether she was a suitable candidate. Whereupon, the Thomases' attorney contacted Dr. Pitts who advised that he had not been asked to clear Mrs. Thomas for surgery, nor had he given any clearance. His discovery deposition was taken on December 3 in which he testified that Mrs. Thomas had not come to him for any surgical clearance, that he had not cleared her, nor referred her to Dr. Vanderbilt, notwithstanding the fact that his medical file contained a letter from Dr. Vanderbilt confirming his referral.

Suit was filed against Dr. Pitts on March 25, 1994, which was within six months of counsel having any hint of Dr. Pitts' involvement.

The discovery rule in this State was first enunciated by our Supreme Court in Teeters v. Currey, 518 S.W2d 512, 517 (Tenn. 1974), as follows:

We adopt as the rule of this jurisdiction the principle that in those classes of cases where medical malpractice is asserted to have occurred through the negligent performance of surgical procedures, the cause of action accrues and the statute of limitations commences to run when the patient discovers, or in the exercise of reasonable care and diligence for his own health and welfare, should have discovered the resulting injury. All cases contra are overruled.

From the foregoing it can be seen that the sole question to be determined is whether under the undisputed proof

the Thomases knew or should have known of their cause of action against Dr. Pitts on or prior to March 25, 1993.

The case of Gosnell v. Ashland Chemical, Inc., 674 S. W 2d 737, 739 (Tenn. App. 1984), also discusses the discovery rule after it had been held to apply to cases other than medical malpractice.

In their arguments on appeal both parties agree that the proper statute of limitations in this case is T. C. A. 28-3-104, which provides for a one-year statute of limitations. This statute has been construed to begin running "when the injury occurs or is discovered, or when in the exercise of reasonable care and diligence, it should have been discovered. McCroskey v. Bryant Air Conditioning Company, 524 S. W 2d 487 (Tenn. 1975). Accord: Hoffman v. Hospital Affiliates, Inc., 652 S. W 2d 341 (Tenn. 1983). Therefore, the issue in this case concerns whether the Appellant exercised reasonable care and diligence in discovering that the Appellees' acts may have caused her husband's illness and ultimate death, and whether this issue was properly disposed of by the Court sustaining a summary judgment motion.

We find the decision of Sullivant v. Americana Homes, Inc., 605 S. W 2d 246 (Tenn. App. 1980), to be controlling on this issue. This Court stated (at page 249):

As to the second count, the complaint clearly states that Willola Sullivant was not aware of the fact that defendants had caused her harm until she was advised (and we must presume such advice was medical) that her exacerbated asthmatic condition was caused by the dampness of her living conditions. The defendants argue that the complaint states that she began to have an increase in asthmatic attacks about September 1, 1977, when plaintiff first occupied the premises, and that the one year statute of limitations set forth in T. C. A. § 28-304 (Supp. 1979) runs from that date. Hence, defendants contend that the recovery for personal injuries based on a complaint filed in November of 1978, was barred. This is nothing more than an assertion that plaintiff should have known on September 1, 1977, that her injuries were a result of the defendants' actions. Perhaps she should have. Perhaps not. In either event, it is not for counsel

or Court to decide that fact on motion to dismiss. In McCroskey v. Bryant Air Conditioning Co., (1975 Tenn.) 524 S.W2d 487, 493 it was held (and reiterated in the opinion on petition to rehear) that "a suit for personal injuries may be brought more than one year after the injury occurs, provided it is brought within one year after it is discovered or in the exercise of reasonable care and diligence should have been discovered." Whether or not Willola Sullivant exercised reasonable care and diligence to discover that he had a compensable injury is a fact for a jury to determine. (Emphasis added in original.)

Likewise in this case the Appellant stated that she was unaware of the link between her husband's illness, leukemia, and the Appellees' businesses, until over one year after her husband's death. Similarly, the Appellees maintain that the Appellant was not diligent in discovering the possible connection. However, as pointed out by the Sullivant Court, reasonable care and diligence in discovering a compensable injury is a question of fact for the jury unless, of course, viewing the facts in the light most favorable to the Appellant, there exists no genuine issue of any material fact. Taylor v. Nashville Banner Publishing Co., 573 S.W2d 476 (Tenn. App. 1978). Here the Appellees merely alleged that the Appellant was not reasonably diligent but did not present evidence which would justify a summary judgment. Teeters v. Currey, 518 S.W2d 512 (Tenn. 1974).

Both parties have cited the case of Foster v. Harris, 633 S.W2d 304 (Tenn. 1982). In that case the plaintiff had visited her dentist on October 11, 1975, and during the procedure performed upon her, the dentist lacerated his fingers and the plaintiff's lip, resulting in their blood becoming intermingled.

Shortly thereafter, the plaintiff became ill and later was diagnosed as suffering from serum hepatitis, a disease that can be contracted only through blood contact.

The plaintiff, notwithstanding her diligent search, was unable to determine how she had contracted the illness until she returned to her dentist on July 21 of the same year, at which time the dentist informed her that in October of the preceding year he was infected with the disease.

Suit was thereupon filed, on February 11, 1977. In holding that the statute of limitations did not begin to run until the plaintiff learned of the dentist's infection on July 21, our Supreme Court stated the following (at page 305):

The so-called "discovery doctrine" was fashioned to alleviate the intolerable result of barring a cause of action by holding that it "accrued" before the discovery of the injury or the wrong. In addition to the two quotes above, the entire thrust of Teeters is to that effect.

In McCroskey v. Bryant Air Conditioning Co., 524 S.W2d 487 (Tenn.1975), we overruled Jackson v. General Motors, supra, on the rationale that a cause of action does not accrue until the "injury occurs or is discovered."

In this case, neither the injury nor the tortfeasor who perpetrated the injury were discovered until July 21, 1976. All that plaintiff discovered in January was the name of the disease. That discovery did not reveal that he contracted it through a negligent act or who the tortfeasor might be. In McCroskey, in addition to relying on the rationale of Teeters, we added the Hornbook principle that a cause of action in tort does not exist until a judicial remedy is available to the plaintiff; that before a judicial remedy exists, two elements must coalesce, (1) a breach of some legally recognized duty owed by the defendant to the plaintiff; (2) that causes the plaintiff some legally cognizable damage. McCroskey v. Bryant Air Conditioning Co., 524 S.W2d 487, 489-90. 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 his injury; and (2) the identity of the defendant who breached the duty.

We hold that under the two statutes of limitations to be construed in this case, T. C. A. § 28-3-104 and T. C. A. § 29-26-116, plaintiff's cause of action accrued on July 21, 1976, and that this suit was timely filed, and remand for a trial on the merits.

Upon applying the facts of this case to the foregoing authority, we conclude reasonable minds could differ as to whether the Thomases should have known of their cause of action against Dr. Pitts and, as was held in Gosnell, resolution of this question of fact is "for a jury to determine."

In reaching our conclusion, we again point out that Dr. Pitts was not a member of the operating team, nor even present in the operating room. Moreover, the information received by Mr. Thomas from Dr. McCoy would suggest that the injury occurred because Ms. Thomas's massive heart attack was not promptly diagnosed to enable a specialist such as himself to be immediately summoned to minimize, if not prevent, any permanent damage to her heart.

For the foregoing reasons the judgment of the Trial Court is vacated and the cause remanded for proceedings not inconsistent with this opinion. Costs of appeal are adjudged against Dr. Pitts.

Houston M Goddard, P. J.

CONCUR:

Herschel P. Franks, J.

Charles D. Susano, Jr., J.