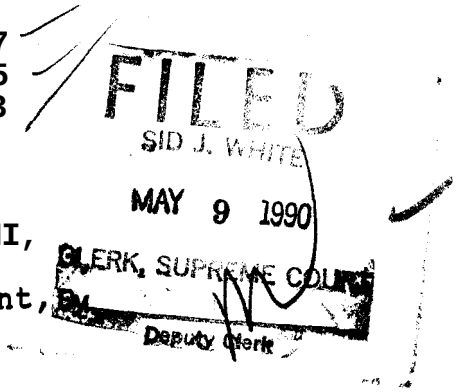
OA 9-6-90

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 74,797
CASE NO.: 74,835
CASE NO.: 74,863



UNIVERSITY OF MIAMI,

Petitioner/Defendant,

-vs-

ADAM BOGORFF, a minor, by and through his father and next friend, ROBERT BOGORFF, and ROBERT BOGORFF, individually,

Respondents/Plaintiffs.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT (CASE NO. 86-2550 AND 86-2911)

PETITIONER'S INITIAL BRIEF ON THE MERITS

A. Blackwell Stieglits, Esq.
Steven E. Stark, Esq.
FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A.
Attorneys for Petitioner
Eleventh Floor, CourtHouse Center
175 Northwest First Avenue
Miami, Florida 33128-1817
Telephone: (305) 358-6550

TABLE OF CONTENTS

LAW OFFICES OF FOWLER, WHITE, BURNETT, HURLEY. BANICK & STRICKROOT, P.A.
ELEVENTH FLOOR COURTHOUSE CENTER, 175 NORTHWEST FIRST AVENUE, MIAMI, FLORIDA 33128-1817 • TEL. (305) 358-6550

TABLE OF CI' ONS

LAW OFFICES OF FOWLER, WHITE, EURNETT. HURLEY. BANICK & STRICKROOT, P.A.
ELEVENTH FLOOR COURTHOUSE CENTER, 175 NORTHWEST FIRST AVENUE, MIAMI, FLORIDA 33128-1817 • TEL. (305) 358-6550

TABLE OF CITATIONS
(cont'd)

OTHER AUTHORITIES:

LAW OFFICES OF FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A.
ELEVENTH FLOOR COURTHOUSE CENTER, 175 NORTHWEST FIRST AVENUE, MIAMI, FLORIDA 33128-1817 • TEL. (305) 358-6550

I. INTRODUCTION

The Petitioner/Defendant, University of Miami, shall hereinafter be referred to as the "University". Petitioner/Defendant, Kjell Koch, M.D., shall be referred to as "Dr. Koch". Petitioner/Defendant, Lederle Laboratories, shall be referred to as **"Lederle".** Respondents/Plaintiffs, Adam Bogorff, a minor, by and through his father and next friend, Robert Bogorff, and Robert Bogorff, individually, shall be referred to individually, or as the **"Bogorffs"** collectively. References to the Record on Appeal shall be referred to by the letter "R" with appropriate page numbers. All emphasis is added unless otherwise indicated.

II. BTATEMENT OF THE CASE

In the trial Court Summary Final Judgment was entered for the University of Miami and Dr. Kjell Koch on claims of medical malpractice and for the defendant Lederle Laboratories on product liability claims, concluding that no genuine issue of material fact remained as to whether the Bogorffs' claim was time barred. (R.963; 1086) The alleged negligence occurred in 1971 and 1972, but suit was not filed until December 1982. (R.2-19) On appeal, the District Court of Appeal, Third District, held that the trial Court was incorrect in finding that the Bogorff's action was time barred and reversed and remanded the cause for further proceedings. (R.1093-1116) The University's timely Motion for Rehearing, Rehearing En Banc and suggestion for Certification was denied (R.1117-18) and a timely notice seeking to invoke this Court's discretionary jurisdiction was filed.

LAW OFFICES OF FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A.
ELEVENTH FLOOR COURTHOUSE CENTER, 175 NORTHWEST FIRST AVENUE, MIAMI, FLORIDA 33128-1817 • TEL. (305) 358-6550

Following Briefs from the parties in this Court on the question of jurisdiction, the Court entered its Order accepting jurisdiction on Tuesday, April 10, 1990.

III. STATEMENT OF FACTS

This action arises from incidents of alleged malpractice occurring during care provided by Dr. Kjell Koch, a member of the faculty of the University of Miami. Dr. Koch was treating Adam Bogorff for acute undifferentiated Leukemiawhichhadbeen diagnosed in 1970. (R 449-464).

Adam Bogorff's illness was diagnosed in Connecticut in 1970 and following treatment there was in remission. (R 450). In June, 1970, the Bogorffs moved to South Florida and Adam came under the medical care of Paul Winick, M.D., a pediatrician in Hollywood, Florida. (R 807). At that time, the family was also referred to Dr. Koch, a member of the faculty of the University of Miami. (R 450, 804).

In July and August of 1971, Adam Bogorff received central nervous system (CNS) radiation under the direction of Dr. Koch (R 450). In June, 1971 and January, 1972, Dr. Koch administered four doses of intrathecal Methotrexate to Adam Bogorff. (R 450). The Bogorffs allege that the administration of this therapy was inappropriate, fell below the applicable standards for treatment of Adam's illness, and resulted in his injury. (449-464).

Subsequent to the intrathecal administration of Methotrexate, Adam Bogorff developed symptoms of lethargy and inattention, loss

LAW OFFICES OF FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A.
ELEVENTH FLOOR COURTHOUSE CENTER, 175 NORTHWEST FIRST AVENUE, MIAMI, FLORIDA 33128-1817 • TEL. (305) 358-6550

of hair and appetite, headaches, nausea and vomiting. In January of 1972 he developed more serious symptoms that included symptoms of fever, headache, lethargy, exhaustion, vomiting, frustration, slurred speech and jerking movements. (R 563-574A, Exhibits B and C). In April 1972, he suffered convulsions and lapsed into a coma. Although later radiation and chemotherapy treatments succeeded in rousing the child from his comatose condition he never regained his former state of health and never recovered his speech or motor skills. By July 1972, Adam Bogorffs condition deteriorated further and he became paralyzed and unresponsive.

In May, 1973, Dr. Winick, Adam Bogorff's pediatrician, wrote a letter to Dr. Koch, which was discovered in his medical records, stating in pertinent part:

> Adam has remained exactly the same over the past three months . . . Whether this whole business is secondary to Methotrexate is difficult to ascertain. (R 166).

Dr. Charyulu, the radiologist in charge of Adam Bogorff's radiation therapy wrote in 1973 to Dr. Winick stating in pertinent part regarding Adam Bogorff's condition that:

> It seems to indicate that there may be some distant or remote connection with Methotrexate toxicity. (R 563-574A Exhibit H).

The neurology consultation of Dr. Robert F. Cullen, Jr., M.D., dated May 8, 1975, a copy of which was sent to Dr. Winick Adam Bogorff's pediatrician, states in pertinent part regarding Adam's condition:

> He seems to have some type of peculiar encephalopathy, either related to his leukemia, radiation, or perhaps related to a folic acid

LAW OFFICES OF FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A.
ELEVENTH FLOOR COURTHOUSE CENTER, 175 NORTHWEST FIRST AVENUE, MIAMI, FLORIDA 33128-1817 • TEL. (305) 358-6550

deficiency accompanying the use of Methotrexate. (R 563-574A Exhibit I).

In January 1977, Dr. Winick, Adam Bogorff's pediatrician, advised the University of Connecticut tumor registry that Adam's brain damage was secondary to the administration of intrathecal Methotrexate and radiation treatment. (R 563-574A Exhibit J). On June 17, 1977 Dr. Winick wrote a letter regarding Adam's condition, discovered in his medical records, stating in pertinent part:

> At this point his condition remains status quo. He seems to have some type of encephalopathy, which is related to either his leukemia or more likely to radiation or perhaps related to a folic acid deficiency. (R 563-574A Exhibit K).

On July 18, 1977, Dr. Paul Zee at St. Jude's Hospital wrote a letter to Dr. Winick, the pediatrician, with a copy to Dr. Cullen, the neurologist, regarding Adam Bogorff's condition following an examination and consultation which stated in pertinent part:

> Impression: 1) Encephalopathy with irreversible anatomical changes possibly secondary to radiation and intrathecal Methotrexate. (R 563-574A Exhibit).

On February 21, 1979, Dr. Winick, wrote to the State of Florida Health and Rehabilitative Services Office of Disability Determinations, stating in pertinent part:

> Adam Bogorff has a diagnosis of diffuse demyelinating encephalopathy, secondary to a drug therapy which he had for acute lymphoblastic leukemia. Adam developed his illness during 1972 ... (R 563-574A Exhibit M).

On March 3, 1979, the State of Florida Department of Health and Rehabilitative Services wrote a letter to Dr. Winick which confirmed a telephone conversation with him and stated in pertinent part:

LAW OFFICES OF FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A.
ELEVENTH FLOOR COURTHOUSE CENTER, 175 NORTHWEST FIRST AVENUE, MIAMI, FLORIDA 33128-1817 • TEL. (305) 358-6550

> Patient has leukemia, in remission and due to drug therapy had resulting encephalopathy . . . . (R 563-574A Exhibit N). (emphasis supplied).

In their response to a Request for Production filed in the Bogorff's legal malpractice claim against the firm of Cohen and Cohen, the Bogorffs state that they had two medical articles in October of 1979 which they insist they sent to their attorneys and received back from them when the representation was turned down. (R 563-574A Exhibit O). One of the articles is entitled "Encephalopathy in Acute Leukemia Associated With Methotrexate Therapy," and states in pertinent part:

> The condition appears to be due to methotrexate. (R 563-574A Exhibit P).

Robert Bogorff stated under oath in an affidavit signed on September 11, 1984 that:

> I was not aware that any problem existed in the care and treatment of Adam's leukemia until I discovered in 1982 with my wife a letter from St. Jude's Hospital dated July 18, 1977 whereby the drug Methotrexate was the possible cause of Adam's brain damage. (R 563-574A Exhibit B) (Dr. Zee's letter).

Thelma Bogorff, Adam's mother, stated under oath in an affidavit signed September 11, 1984:

> That in February 1982 I obtained some of the records of Dr. Paul Winick, Adam's pediatrician, and discovered that a letter to Dr. Winick from St. Jude's center incriminated methotrexate and radiation as the cause of Adam's brain damage . . . (R 563-574A Exhibit C) (Dr. Zee's letter).

The Bogorffs have alleged that through fraud and concealment or intentional misrepresentation, Dr. Koch prevented them from discovering the true cause of Adam's injury and that they did not discover the cause until 1982. (R 451). In support thereof, the

Bogorffs concede in their Brief that Mr. Bogorff found the previously referred to article entitled "Encephalopathy in Acute Leukemia Associated With Methotrexate Therapy" in a medical journal. (R 563-574A Exhibit P), and that he brought it to Dr. Koch in the summer of 1972. Mr. Bogorff testified that Dr. Koch threw it in the trash can and stated that the article bore no relation to Adam's condition. (R 771-772). Thelma Bogorff concedes, however, that she cannot recall whether she discussed the possibility of Methotrexate having some relationship to Adam's condition which he developed in 1972 with Dr. Winick. (R 835) (Thelma Bogorff's deposition, page 39).

Mrs. Bogorff never examined Dr. Winick's file prior to 1982, never examined Dr. Cullen's file prior to 1982 and never examined the contents of Dr. Koch's file prior to 1982. (R 909). Indeed, the Bogorffs did not prior to 1982 request the University of Miami to give them copies of Adam's medical chart. (R 788, 888).

IV. SUMMARY OF THE ARGUMENT

Assuming, as the Bogorffs' allegedand the Third District agreed, the 1971 four-year statute of limitations applies to this cause of action, the suit herein is deemed to accrue, at the latest, in July 1972 when the injury was discovered. Accordingly, the complaint, which was filed in December 1982, is barred by the application of this four-year statute of limitations. This is regardless of the Bogorffs' assertion that they were unaware of any relationship between Adam Bogorff's Methotrexate and radiation therapy and his brain damage until February 1982 or their assertion that the facts were concealed

from them by Dr. Koch, since there was, nor could there be, any concealment of this patent injury.

In addition, the Bogorffs are deemed to have constructive knowledge of the contents of Adam Bogorff's medical records. After reviewing these records, it is clear that the Bogorffs have imputed notice of not only the injury but also the alleged cause of the injury in **1973, 1975,** and culminating with the July **19, 1977** letter written to Dr. Winick, which the Bogorffs admit notified them of the their cause of action when they read it in **1982.** If such letter is sufficient notice of the cause of action in **1982,** it is sufficient notice in **1977** and the complaint filed in December **1982** is barred by the statute of limitations.

With respect to any alleged fraudulent concealment, neither the University of Miami nor any other defendants concealed either the facts of the child's injury or its cause. Indeed, neither the University nor Dr. Koch were obligated to inform the parents of any possible or even likely causes of their child's condition, only those causes they knew, or through efficient diagnosis should have known, were the actual cause of the condition. Where the connection between the Methotrexate and the child's condition was unclear at best, there was no obligation to further provide any information to the family.

In addition, even assuming that any concealment or misrepresentation did occur, it was not successful concealment because the Bogorffs had available to them, at all times, medical records which clearly revealed that which they claim was concealed. Pursuant to this Court's Nardone decision, such information is imputed to the plaintiff, and

their failure to act diligently in reviewing said records or pursuing a cause of action is fatal to their claim.

If one assumes correctly, that the statute of limitations began to run when the Bogorffs acquired knowledge of his son's injury, then the two-year statute of limitations applicable subsequent to July 1, **1972** or the later amendments thereto in **1974** and **1975** apply to this cause of action and bar it, at the latest, over one year before suit was filed in this case. The Bogorffs were charged with knowledge of their son's injury and/or a cause of action arising therefrom in **1972, 1973, 1975, 1977,** and at the latest in **1979** when they consulted an attorney regarding a potential malpractice claim.

Finally, the statute of repose is dispositive. The Bogorffs have repeatedly stated that intrathecal Methotrexate and radiation therapy ended in **1971** and **1972.** Assuming that there was no concealment, the action would be time barred at the latest in **1976.** On the other hand, even assuming concealment and misrepresentation, the action would still be time barred at the latest in **1979,** over three years before suit was filed in this case. The Bogorffs had sufficient time within which to file suit after the **1975** statute of reposewas enacted and this Court has determinedthat reasonable time to sue is all that is required for a statute of repose to apply. Accordingly, the instant complaint, which was filed a full 10 years after the allegedly negligent treatment, is barred by the statute of repose.

The trial court correctly entered Summary Final Judgment for the University of Miami and the Third District Court of Appeal's

decision that reversed this ruling must be quashedwith instructions to enter an Order affirming the summary judgment entered in the trial court.

V. ISSUES ON APPEAL

WHETHER THE TRIAL COURT WAS CORRECT IN ENTERING FINAL SUMMARY JUDGMENT IN FAVOR OF THE UNIVERSITY OF MIAMI AND WHETHER THE THIRD DISTRICT COURT'S REVERSAL OF THE TRIAL COURT'S RULING WAS ERROR.

VI. ARGUMENT

THE TRIAL COURT WAS CORRECT IN ENTERING FINAL SUMMARY JUDGMENT IN FAVOR OF THE UNIVERSITY OF MIAMI AND THE THIRD DISTRICT COURT'S REVERSAL OF THE TRIAL COURT'S RULING WAS ERROR

A. Introduction

This action is before this Court on discretionary review of a decision of the Third District Court of Appeal that reversed a Final Summary Judgment entered in favor of the defendants based on the applicable statute of limitation and/or repose. Although the trial court did not make specific factual and legal findings in support of its order(R.974), it is clear that the Court of Appeal found that §95.11(4), Florida Statutes (1971), which provided a four-year statute of limitations, was applicable and that pursuant to this Court's Nardone decision there were material questions of fact which precluded summary judgment on the statute of limitations issue. Judge Jorgenson's dissent also applied the 1971 four-year statute of limitations but after analyzing this Court's Nardone decision and its progeny came to the opposite conclusion with respect to the statute

of limitations. The issue before this Court is whether a claim that arose out of alleged incidents of malpractice in late 1971 and early 1972, but for which suit was not brought until December 1982, is barred by the provisions of Chapter 95, Florida Statutes. It is the University's position herein that regardless of whether this Court applies the four-year limitations period that was in effect until July 1972; the two-year limitations period that followed; or the four/seven-year statute of repose that became effective in May 1975, the action is time bared as a matter of law. The appellate court applied the 1971 version of the statute of limitations and relied upon Nardone and, therefore, the four year limitation will be addressed first. The applicability of the two-year statute of limitations and the statute of repose, which were rejected by the Court of Appeal, will be addressed in later sections of the brief.

B. §95.11(4), Florida Statutes and Nardone

1. Pre-Nardone Decisions

From 1943 through July 1, 1972, there was no specific statute of limitations for medical malpractice actions. Rather, the applicable statute of limitations was the four-year statute of limitations applicable to actions not otherwise covered under Chapter 95, Florida Statutes. Nevertheless, in applying this statute to medical malpractice actions, the Florida Courts formulated particular rules with respect to medical malpractice actions.

City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954) was an action arising out of an overdose of x-ray therapy on the plaintiff's left heel in April 1944. The injury first manifested in May, 1949 and

suit was filed on May 11, 1950. The trial court denied the defendant's motion for directed verdict based on the statute of limitations.

In analyzing the statute of limitation issue, this Court noted:

> At the time of the application of the x-ray treatment there was nothing to put the plaintiff on notice of any probable or even possible injury. The general rule, of course, is that where an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once.

Id. at 308. This Court noted that there was a distinction between notice of a negligent act and notice of its consequences. It further noted that the statute attaches when there has been notice of invasion of the legal right of the plaintiff or he has been on notice of his right to a cause of action. However, this Court affirmed the trial court's ruling, stating:

> In the instant case, at the time of the x-ray treatment there was nothing to indicate any injury or put the plaintiff on notice of such, or that there had been an invasion of her legal rights... so that the statute must be held to attach when the plaintiff was first put on notice or had reason to believe that a right of action had accrued.

Id. at 309.

This case was followed by the Third District's decision in Buck v. Mouradan, 100 So.2d 70 (Fla. 3d DCA 1958) cert. denied, 104 So.2d 592 (Fla. 1958). Suit was instituted in December 26, 1956. Discovery showed that as a result of the 1951 x-ray treatments the plaintiff experienced some skin burns, blushing and erythema in and about her abdomen. The plaintiff admitted that she experienced the skin condition and that she discussed it with the appellee, who advised

her that it was the result of the x-ray treatments but that he did not know why her skin had burned. In **1955,** she allegedly learned through diagnosis of other doctors the extent of her injuries occasioned by the x-ray burns in **1951.** The trial court entered summary judgment in favor of the defendant based upon the applicable four-year statute of limitations.

The court noted that the general rule is that:

> When there has been notice of the invasion of a legal right or a person has been put on notice of his right to a cause of action, the statute of limitations begins to run.

Id. The court noted, however, that in a malpractice action, the application of this rule becomes difficult where the injured person is:

> Prevented from knowing of his injury due to the concealment of the fact of his injury by the treating physician. In such cases, there is a well-recognized exception which tolls the running of the statute when it could be shown that fraud has been perpetrated upon the injured party sufficient to place him in ignorance of his right to a cause of action, or to prevent him from discovering such injury.

Id.[1]

In applying these rules, however, the Third District found that the plaintiff was aware of her injuries in **1951** shortly after the treatment. Although she complained that the defendant fraudulently concealed his negligence and the true extent of the resulting injury, the court stated:

---

[1] Although not specifically stated, the court seemed to hold that the discovery of injury was the same as notice of the invasion of a legal right embodied in the general rule.

> Nowhere have we been able to find that she was without knowledge of her injury at the time, or shortly thereafter of the administration of the x-ray treatments. On the contrary, her admission established her knowledge.

Accordingly, the Third District affirmed the trial court's ruling dismissing the action based upon the statute of limitations.

2. The Nardone Decisions

In 1972, Nicholas Nardone, individually and on behalf of his minor son brought a medical malpractice action in the United States District Court for the Southern District of Florida. The District Court held that the action, which was filed more than five years after the minor child's discharge from Jackson Memorial Hospital was barred under the four-year Florida Statute of Limitations, §95.11(4). This judgment was appealed to the Fifth Circuit Court of Appeal. Nardone v. Reynolds, 508 F.2d 660, 661 (5th Cir. 1975).

After discussing the facts the case, the Fifth Circuit noted:

> In Florida the 'discovery rule' governs the time when the statute of limitations begins to run in medical malpractice cases. At the risk of over-simplification, the rule, as developed through judicial decision provides that the statute of limitations shall commence when either one of two conditions precedent occur: (i) the plaintiff has notice of the negligent act giving rise to a cause of action, or (ii) the plaintiff has notice of the physical injury which is the consequence of the negligent act. At the bottom the problem are the two cases of Brooks and Buck or more accurately, the reading to be given to what the Florida courts have said in those two opinions.

Id. at 661-62.

The plaintiff in Nardone contended that the reference to "injury" and invasion of a legal right meant an awareness by the victim or

derivative beneficiary not only of the existing physical condition but also an awareness of facts that would lead a reasonable person to believe that the injury was due to the acts or non-acts of the defendants.[2]

On the other hand, the defendants insisted that the word injury denoted the plaintiff's physical condition (effect) as distinguished from the alleged act of negligence or legal injury (cause). They asserted that critical fact is the victim's or the derivative beneficiaries' awareness of the physical condition without regard to whether they know that this is a result of a natural phenomena or the acts or non-acts of the defendants.

Given this dichotomy of argument, and the court's inability to discern the applicable Florida law, the court certified four question to this Court related to the application of Section 95.11, Florida Statutes. In the sections that follow, each of these questions will be discussed and this Court's determination on those issues will be applied to the facts in the instant matter in order to show that the trial court was correct that the instant action is barred as a matter of law and the Third District's finding that a fact question existed is a misapplication of this Court's Nardone decision.

i. Commencement of the Period of Limitation

In Nardone the Fifth Circuit certified the following question to this Court:

---

[2] The plaintiffs insisted and the court agreed that, although they knew the unfortunate result, they had no actual knowledge prior to 1969 of what brought it about.

> 'I. In a medical malpractice case does the period of limitation (F.S.A. 95.11(4)) commence:
>
> (a) As to the parents and legal guardians of the incompetent minor in their own right
>
> (b) As to the parents and legal guardians of the incompetent minor as next friends in behalf of the minor
>
> (c) As to the incompetent minor in his own right when the parents and legal guardians of the incompetent minor have (i) knowledge of the physical condition and the drastic change therein during the course of medical treatment, but (ii) do not then have (or are not charged with having) knowledge that such physical-mental condition was caused in whole or in part by acts or non-acts of the alleged malpractitioners?'

Nardone v. Reynolds, 333 So.2d 25, 27 (Fla. 1976).

In January 1965 Nicholas Nardone was admitted to Jackson Memorial Hospital and between January and March underwent four brain operations and numerous diagnostic tests in an attempt to diagnose and treat various neurologic difficulties he was experiencing. At various times during this he experienced serious neurological and physical problems resulting from intracranial pressure. On March 7th, the child could not be aroused and an emergency operation was performed in an attempt to relieve the pressure. Further surgery was performed on March 15, 1965. However, the patient did not improve. Upon discharge from the hospital in July 1965, the child's condition was comatose and totally blind: he had suffered irreversible brain damage. Id. at 28-9. As this Court stated:

> The parents were told and knew that this was the infant's condition prior to his discharge --

LAW OFFICES OF FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A.
ELEVENTH FLOOR COURTHOUSE CENTER, 175 NORTHWEST FIRST AVENUE, MIAMI, FLORIDA 33128-1817 . TEL. (305) 358-6550

> totally blind, no longer able to walk and beyond help or hope of recovery -- although they were not specifically told of the pantopaque ventriculogram or the possible causes of their son's ultimate condition.
>
> * * * *
>
> With one exception, to be explained below, no request for records, charts, or information pertaining to the child's hospitalization was ever directed to any of the defendants. Records were available from the hospital at all times upon request.

Id. at 29. This Court further noted that between September, 1965 and October 19, 1965, the child was admitted to Columbia Presbyterian Hospital in New York. After examining certain records requested from Jackson Memorial Hospital, the child's neurosurgeon at Columbia stated in his final report that:

> This condition developed in the early part of March as a result of bilateral subdural hematomas that arose as a complication of the ventriculoatrial shunt done on 2/12/65 at the Jackson Memorial Hospital. . . .
>
> . . . It is certain that the brain damage responsible for the decerebrate state is irreversible and that he has bilateral total blindness. The family has been advised against subjecting him to any further diagnostic or therapeutic procedures and to transfer him to a nursing home for further care.

Id. at 29-30. These records were available to appellants from either the hospital itself or from another family physician to whom a copy was sent in October, 1965, but the appellants never made any request for these records.

Before this Court, the parents argued that:

> The Statute of Limitations did not commence to run until they became aware of the negligence of the physicians in the hospital.

Id. at 32. Nevertheless, after reviewing its earlier decision in City of Miami v. Brooks, this Court found:

> Sub judice, the plaintiffs were on actual notice of the decerebrate state of their son, that he had suffered irreversible brain damage, and in accordance with Brooks, supra, the Statute of Limitations began to run when the injury was known.

Id. Accordingly, this Court in response to the first certified question stated:

> The severe nature of Nicholas' injury was readily apparent in **1965** before his discharge and was reaffirmed by Dr. Vicale in October, **1965**, he stated in his report that the family had been advised against subjecting him to any further diagnostic or therapeutic procedures and to transfer him to a nursing home for further care. We agree with the United States District Court that since in **1965** the nature of the child's condition was obvious and known to the plaintiffs, it was then that the cause of action accrued and the Statute of Limitations commenced to run as to the parents and legal guardians of the incompetent minor in their own right, as to the parents and legal guardians of the minor as next friends in behalf of the minor, and as to the incompetent minor in his own behalf. Readily evidenced by the record, there could be no concealment and was none of the infant's obvious condition. . . .
>
> With the knowledge of the severity of their son's resultant condition, the parents through the exercise of reasonable diligence were on notice of the possible invasion of their legal rights. Notice of the consequences of the physicians' acts, assuming arguendo that they were negligent, occurred in **1965**.

Id. at 33-4 (citations omitted).

Viewing the instant action in light of this Court's Nardone decision, it is clear that the facts herein are remarkably similar to those of Nardone. In the instant action the Bogorffs assert that

the incident from which this claim arose was Dr. Koch's negligent treatment in January, 1972, and that the limitation period was measured from the date of discovery or opportunity to discover with reasonable diligence, the injury. They also assert that the applicable statute of limitations was Section 95.11(4), Florida Statutes (1971). The University of Miami submits that the Bogorffs' own statements under oath (R 563-574A Exhibits B & C), their Complaint (R 449-464), and the plaintiff's memorandum filed in opposition to the first motion for summary judgment (R 563-574A Exhibit D) all reveal that the Bogorffs had knowledge to place them on notice of Adam Bogorff's brain damage (his injury) in mid to late 1972. The Bogorffs are also charged with knowledge of a connection between their son's injury and his medical care which was contained in his medical records beginning as early as 1973.

It is clear that, as in Nardone, although Adam Bogorff's condition may have wavered during the period of treatment, the parents were fully aware in 1972 of the extent and permanent nature of their child's injuries:

> The plaintiffs were on actual notice of the decerebrate state of their son, that he had suffered irreversible brain damage, and . . . the Statute of Limitations began to run when the injury was known.

Nardone, 333 S.2d at 32. Once they had knowledge of the severity of their son's resultant condition, the parents, through reasonable diligence, were on notice of the possible invasion of their legal rights. See Nardone, 333 So.2d at 34. Under the circumstances, the trial court's ruling thereon is correct.

ii. The Knowledge of the Contents of the Child's Medical Records are Imputed to the Parents in their Own Right, as Legal Guardians of the Child, and to the Minor in His Own Right.

The second question certified by the Fifth Circuit in the Nardone was as follows:

> 'II. Is knowledge of the contents of the medical doctor, hospital, etc. records concerning the incompetent minor patient which are of a character as to be obtainable by, or available to, the patient (or guardian) but the contents of which are actually not known, imputed to:
>
> (a) The parents and legal guardians of the incompetent minor in their own right?
>
> (b) The parents and legal guardians of the incompetent minor as next friends in behalf of the minor?
>
> (c) The incompetent minor in his own right?

Nardone, 333 S.2d at 27.

This Court answered this question in the affirmative, stating:

> We find that knowledge of the medical, doctor, hospital, etc., records concerning the incompetent minor patient which are of a character as to be obtainable by or available to the patient but the contents of which are not known should be imputed to the parents, etc.

Id. at 34. As this Court noted, "the means of knowledge are the same as knowledge itself", id. and:

> 'mere ignorance of the facts which constitute the cause of action will not postpone the operation of the statute of limitations, where such ignorance is due to want of diligence; a party cannot thus take advantage of his own fault.'

Id. at 35. Quoting 21 Fla.Jur., Limitation of Actions, Section 37. Accordingly, the Bogorffs are deemed to have constructive knowledge of the available records of Dr. Koch, Jackson Memorial Hospital, Dr.

Charyulu, Dr. Cullen, Dr. Winick and Dr. Giesecke and the contents thereof are imputed to them regardless of whether they actually reviewed the records. The Bogorffs had actual knowledge of the injury to their child at the latest in July, **1972,** and the statute began to run from that point, notwithstanding their assertion that they did not become aware of the cause of the injury -- i.e., the Methotrexate and radiation treatment -- prior to **1982.** In any event, a review of the medical records that were available to the Bogoroffs reveals that they were on constructive notice in **1972, 1973, 1975,** 1977 and **1979** of the alleged connection between their child's injury and the treatment in **1971** and **1972.** Therefore, they were on notice as to the alleged malpractice as well.

iii. The Alleged Concealment

The third and fourth questions that the Fifth Circuit certified to this Court in Nardone deal with the doctrine of fraudulent concealment andtolling of the Statute of Limitations. The questions are as follows:

> 'III. Under the Florida doctrine of tolling limitations by fraudulent concealment, where there is knowledge by the parents of the incompetent minor of the physical-mental condition but not the cause as set forth in I above, does non-disclosure by one or more of the alleged malpractitioners of possible causes of the such condition unaccompanied by misrepresentation toll the statute:
>
> (a) as to all of the alleged malpractitioners?
>
> (b) as to individual alleged malpractitioners who did not participate in the asserted 'concealment'?

> IV. Where there is knowledge by the parents as set out in I and III above but no request by them for such information did the alleged malpractitioners, each considered individually, have:
>
> > (a) a duty to make disclosure to the parents of the records and the essential, material significant facts relating to possible orlikelycauses of the minor patient's condition and change therein?
> >
> > (b) If the answer to (a) is 'yes' what is the consequence if any on the statute of limitations?'

Nardone, 333 S.2d at 27-8.

This Court noted that the majority of cases it had revieweddealt with the duty to disclose to the patient the fact of injury done to him. This Court also noted, however, that once plaintiff has sufficient facts to discover the injury, the prevention rationale of the fraudulent concealment doctrine is no longer applicable. In Nardone, since there was not and could not have been any concealment of a patently obvious injury, the concealment doctrine was inapplicable.

In the instant action, it is also apparent that there was and could not have been any fraudulent concealment of the injury to Adam Bogorff. The majority opinion in the Third District, however, asserted that the child's injuries were not immediately noticeable after the treatment and that he did not lapse into a coma until a number of months thereafter. Nevertheless, just as in Nardone, although the child's conditionwavered, the parents were fully aware of the nature and extent of the injury by July 19, 1972 and, therefore, there was not, nor could there be any concealment of this known injury.

The Bogorffs have also suggested in their pleadings, in their depositions, and in their affidavits filed in opposition to the motions for summary judgment, that Dr. Koch and/or the University of Miami fraudulently concealed the cause of their child's injury by failing to inform them of the possible connection between the drug and radiation therapy and their child's encephalopathy. In order to evaluate this claim, it is necessary to further analyze this Court's Nardone decision with regard to fraudulent concealment.[3]

As this Court stated in Nardone:

> Generally, two elements are required before the equitable principle of fraudulent concealment will be utilized to toll the statute of limitations, to wit: plaintiff must show both successful concealment of the cause of action and fraudulent means to achieve that concealment.

Id. at 37. This Court further defined fraudulent concealment as:

> [T]he intentional nondisclosure of material facts by one owing a duty to disclose. . . . Ordinarily, the defrauding party must have knowledge of the facts concealed.

Id. at 38. Quoting Allen v. Layton, 235 A.2d 261 (Del. Super. 1967). After analyzing various decisions from other jurisdictions as well as earlier Florida decisions, this Court held that:

> Although generally the fraud must be of such a nature as to constitute act of concealment to prevent inquiry or allude investigation or to mislead a person who could claim a cause of action, we do recognize the fiduciary, confidential relationship of physician-patient imposing on a physician a duty to disclose; but, this is a duty to disclose known facts and not conjecture

---

[3] A review of the Third District opinion reveals that this portion of the court's Nardone decision is the issue upon which the dissent and majority took divergent views.

> and speculation as to possibilities. The necessary predicate of this duty is knowledse of the fact of the wrong done to the patient. . . . Where an adverse condition is known to the doctor or readily available to him through efficient diagnosis, he has a duty to disclose and his failure to do so amounts to a fraudulent withholding of facts, sufficient to toll the running of the statute. But, where the symptoms or the condition are such that the doctor in the exercise of reasonable diligence cannot reach a judgment as to the exact cause of the injury or condition and merely can conjecture over the possible or likely causes, he is under no commanding duty to disclose the conjecture of which he is not sure. Therefore, his silence as to a possible condition or cause which he is unable to verify in the exercise of reasonable diligence does not standing alone constitute sufficient fraudulent withholding to toll the statute of limitations.

Nardone, 333 S.2d at 39. At the time that Mr. Bogorff approached Dr. Koch with the medical article, which by its very title suggested to Mr. Bogorff that there was a potential connection between the Methotrexate and the child's injury, it was Dr. Koch's opinion that the condition was not related to the Methotrexate. Rather, hebelieved that the problems were an extension of the child's leukemia or the result of a viral infection. However, he could not provide a definitive diagnosis withoutperforming abrainbiopsy. At this point, the parents began to doubt the care rendered by Dr. Koch,[4] and independently approached Dr. Cullen and Dr. Giesecke. Both doctors also opined that the child was suffering from an extension of his

[4] This admission also leads to the conclusion that the Bogorffs were aware of the cause or potential cause or at a minimum an invasion of their child's legal rights sufficient to start the statute of limitations.

leukemia into the brain. In addition, they also counseled against a brain biopsy, which the Bogorffs' concurred with.

Clearly, a difference of opinion among physicians or uncertainty as to a potential cause does not amount to fraudulent concealment or misrepresentation sufficient to toll a statute of limitations. As stated in Kauchick v. Williams, 435 S.W.2d 342 (Mo. 1968), which was relied upon by this Court in Nardone:

> The claim of fraudulent concealment against Dr. Williams is based on his failure to advise Mrs. Kauchick as to what made the Cesarean operation necessary and the statement, as testified to by Mrs. Kauchick that he did not know what caused her difficulty.
>
> Again the difficulty with Mrs. Kauchick's position is that there was no evidence to support the finding that Dr. Williams did know what actually caused her difficulty. He testified that he relied upon the X-ray report that her pelvic measurement would permit vaginal delivery. Mrs. Kauchick's expert medical testimony might support a finding that Dr. Williams' reliance upon the X-rays and his failure to make a clinical measurement were not in accord with the generally accepted medical practice in the community at that time. However, that would not establish that Dr. Williams was aware that he had been negligent and that, in telling Mrs. Kauchick that he did not know what caused her difficulty, he was endeavoring to conceal his negligence from her in order to avoid an action for malpractice.

Kauchick, quoted in Nardone, 333 S.2d at 36. Similarly, neither Dr. Kochnor any of the other doctors were required to inform the Bogorffs of a potential cause when there was no concrete evidence linking that cause to the child's condition and there were other reasonable and more probable causes for his condition.

Undoubtedly, the Bogorffs will argue in this Court, as they have previously, that unlike Nardone this case does not involve a situation in which a doctor fails to disclose or is silent with respect to a condition, but rather involves an active misrepresentation which misled the family. Nevertheless, a review of the record herein reveals that there was no active misrepresentation whatsoever and that upon being asked, Dr. Koch provided all the information that was available to him in his medical expert opinion at that time. In addition, the family was not prevented from consulting with other physicians,[5] nor were they ever precluded from seeking access to any of the medical records in the possession of Dr. Cullen, the University, Dr. Koch, Dr. Winick, Dr. Giesecke, or any other physician with whom their child came in contact with. Pursuant to Nardone, the parents clearly had constructive knowledge of these medical records and through reasonable diligence they can and should have discovered the information that they now assert was withheld from them. Even assuming, that there was fraudulent concealment or some sort of misrepresentation by Dr. Koch or other physicians at the University, such concealment was not successful concealment of the cause of action because the facts of such alleged fraudulent concealment could have been discovered at any time through reasonable diligence.

The fraudulent concealment doctrine understandably recognizes that any action that conceals an injury or misleads a patient regarding

---

[5] Although the Bogorffs state in their affidavits that Dr. Koch was not agreeable to having their child seen by other doctors, these conclusory assertions, even if assumed true, still does not show that Dr. Koch prevented them from seeing these doctors, since they did obtain other consultations.

their right to bring an action, will toll the statute as a result of that conduct. Nevertheless, it is expected that a lay person will always argue that they were unfamiliar with medical terminology or relied upon their physician and thereby did not seek to pursue their rights. In order to assure that this exception does not destroy the general rule, this court has imposed an equally compelling duty upon the plaintiff to discover any facts which may put them on notice as to a potential cause of action. Just as the physician has an obligation to disclose known causes, as opposed to possible or likely causes, plaintiffs themselves are on notice as to the contents of their medical records. To do otherwise would be to allow them to benefit from their own failure to act with due diligence. If the plaintiff is aware of the injury, the statute ordinarily begins to run at that time. If any concealment occurs, then the court will still require that the contents of medical records, which reveal any such concealment or otherwise point the plaintiff into the appropriate direction, be imputed to the plaintiff as long as such records are themselves not concealed or access thereto denied. In the instant case, this policy requires a finding that the Bogorffs' claim is barred.

C. The Subsequent Amendments to the Statute of Limitations Shortening the Period of Limitations from Four Years to Two Years Applies

Between the time that Adam Bogorff was first seen by Dr. Koch and the University, and the time that this suit herein was actually filed, the relevant Statute of Limitations went through numerous changes.

The first of these changes was effected by Chapter 71-254 Laws of Florida, which was enacted on June 23, 1971 but did not become effective until July 1, 1972. This Statute provided atwo-year Statute of Limitation and stated that in:

> [a]n action to recover damages for injuries to the person arising from any medical . . . or surgical operation, the cause of action in such case not to be deemed to have accrued until the plaintiff discovers, or through the use of reasonable care should have discovered, the injury.

Chapter 71-254, codified as Section 95.11(6). In describing this amendment, this Court has stated:

> Apart from shortening the limitation period, this amendment essentially codified existing caselaw respectingthe date upon which medical malpractice claims accrued [i.e. date of discovery of the injury]. City of Miami v. Brooks, 70 S.2d 306 (Fla. 1954); Vilford V. Jenkins, 226 So.2d 245 (Fla.2d DCA 1969). See Nardone V. Reynolds, supra.

Dade County v. Ferro, 384 S.2d 1283, 1284 (Fla. 1980).

Thereafter, in 1974, the legislature once again amended the Statute of Limitations, effective January 1, 1975, and redesignated it as Section 95.11(4), Florida Statutes. The two-year limitation period for malpractice actions was brought forward but the accrual language was modified to state that:

> The period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence.

Chapter 74-382, Laws of Florida, codified as Section 95.11(4), Florida Statutes (1975).

Finally, pursuant to Chapter 75-9, Laws of Florida, effective May 20, 1975, the legislature once again amended the Statute of Limitations adding a new subsection (b), which specifically dealt with actions for medical malpractice and stated, in relevant part:

> An action for medical malpractice shall be commenced within two years from the time the incident giving rise to the action occurred or within two years from the time the incident is discovered, or should have been discovered with the exercise of due diligence. . . .

Section 95.11(4) (b), Fla.Stats. (1975).[6]

Each of these statutory changes, which shortened the period of limitations and then modified the accrual date, preceded the filing of the lawsuit in this action and preceded the Bogorffs' alleged date ofdiscoveryofthecauseofactionherein. Nevertheless, thegeneral rule is that the applicable statute of limitations is the one in effect when a cause of action accrues.

Johnson v. Szymanski, 368 So.2d 370 (Fla. 2d DCA 1979) exemplifies this rule with respect to the 1971 statute of limitations and the applicability of the July 1972 amendments thereto. In Johnson, althoughthe malpractice occurred before July 1, 1972, the court noted that it was undisputed that the plaintiff could not have reasonably discovered the defendant's malpractice before October, 1973, after the effective date of the statutory change. The court found that the two-year limitation period in effect at that later date was

---

[6] The statute also enacted the four-year repose provisions which were held constitutional in this Court's decision in Carr v. Broward County, 541 S.2d 92 (Fla. 1989). The applicability of these provisions will be addressed in the sections that follow.

controlling, not the earlier four-year statute.[7] In the instant action, notwithstanding any allegation that Dr. Koch or the University engaged in some sort of concealment, the Bogorffs clearly knew of the nature and extent of their child's injury and the permanency thereof in 1972.

A similar conclusion was reached in the case of Brooks v. Cerrato, 355 S.2d 119 (Fla.4th DCA 1978). In Brooks, the court determined that an action filed in June, 1975 was subject to the 1973 Statute of Limitations, which provided that the statute ran two years from the date of discovery of the injury, rather than 1974 Amendments, which provided that the statute of limitations began to run from discovery of the cause of action. See also, Nelson v. Winter Park Memorial Hospital Association, Inc., 350 So.2d 91 (Fla. 4th DCA 1977).

Finally, in Lipshaw v. Pinosky, 442 So.2d 992 (Fla. 3d DCA 1983) (affirmed in part and reversed in part, sub. nom. 464 So.2d 551 (Fla. 1985)), the plaintiffs alleged that malpractice had occurred in the treatment of their son between 1974 and 1977. Suit was not filed, however, until 1981. The Third District held that:

> We have no trouble in affirming the dismissal of [the medical malpractice survival claim] as being time barred by the applicable two-year statute of limitations.... Plainly this action accrued, when, as the plaintiffs alleged in their Third Amended Complaint, their proffered Fourth Amended Complaint, and their Affidavits filed in Support of the Motion for Rehearing -- the medical misdiagnosis sued upon was actually discovered by the plaintiffs on February 25, 1977.... The assertionsthat the plaintiffs, as claimed, did not realize until much later that

---

[7] This reasoning has been specifically upheld by this court in the Ferro case.

> theseknownacts of misdiagnosis andmistreatment were acts of negligence is plainly of no avail to the plaintiffs, as they were long ago on actual notice as to the acts of negligence now sued upon. It therefore followsthat the medical malpractice instituted ... nearly four years after the accrual of said action -- was time barred by the applicable two year statute of limitations ...

Id. at 993-94.

In the instant action both the majority opinion and the dissent determined that the 1971 statute applied based upon this Court's opinion in Folev v. Morris, 339 S.2d 215 (Fla. 1976). In Foley, this court, on conflict review, had to determine two questions: (1) when the petitioner's cause of action accrued: and (2) whether the petitioner's cause of action was governed by the 1971 four-year statute of limitations or thetwo-year statute of limitations effective July 1, 1972. In Foley, surgery was performed upon the petitioner on April 14, 1971. After the surgery, a rubber drain was accidentally left in the patient's body. This drain was removed on September 11, 1971 by another physician, at which time the cause of action accrued. This Court determined that the 1971 Amendments to the Statute of Limitations, which were effective July 1, 1972, were not intended to be retroactive and, therefore, did not apply to the action. In reaching its decision, this Court upheld the decisions of the Second District in Maltempo v. Cuthbert, 288 So.2d 517 (Fla.2d DCA 1974) and the Fourth District in DeLuca v. Mathews, 297 So.2d 854 (Fla.4th DCA 1974).

If Foley is applied to the instant action, then the Bogorff's cause of action must be deemed to have accrued prior to July 1, 1972

and be barred within four years of the date of discovery of the injury. Given the outcome of the majority opinion in the Third District, however, the court's reliance on Foley is confusing at best.

If the injury was discovered sometime after July, 1972, the cause of action is deemed to accrue at that time and the two-year shortened statute of limitations would apply to bar the action by 1974. This is regardless of any alleged concealment on the part of the defendants since there was not and could have been any concealment of this obvious injury or, as previously discussed, its alleged cause.

In addition, if the action did not accrue until the Bogorffs 1982 discovery of the 1977 letter in Dr. Winick's files, then the '74 or '75 Amendments apply as a result of constructive notice of the contents of that letter and the cause of action would be barred on July 18, 1980. This would equally apply to all similar records that the Bogorffs could have discovered prior to 1977.

Furthermore, the Bogorffs' contact with an attorney in 1979 in order to investigate a potential malpractice action should be deemed to be accrual of the cause of action as a matter of law so that the two-year statute would apply, which would also bar the action if it was not filed prior to October, 1981.

A final problem with the application of Foley, Maltempo, and DeLuca is that in each of those cases, both the act of malpractice and the date on which the malpractice could have been reasonably discovered occurred before the effective date of the statute. In the instant action, if the cause of action did not accrue in the spring of 1972, then the issue would be which statute applies when the alleged

act of malpractice precedes the effective date of a particular amendment shortening the statute of limitations, but the discovery date is sometime thereafter. This issue was specifically addressed in Johnson v. Szymanski, 368 S.2d **370** (Fla.2d **DCA 1979)** and the inapplicability of Foley and Maltempo to that situation was specifically noted.

In any event, whetheratwoyears or four year limitation applies or whether the limitations period runs from the date of the injury, discovery of the cause of action, or discovery of the incident, the Bogorffs had ample information available to them to discover their cause of action well in advance of the time that suit was filed herein.

D. The Statute of Repose

The repose provisions of Section **95.11(4)** (b), Florida Statutes **(1975)** are dispositive. The statute recites that:

> **"An** action for medical malpractice shall be commenced within two years from the time the incident giving rise to the action occurred or within two years from the time the incident is discovered, or shouldhavebeendiscoveredwith the exercise of due diligence; however, in no event shall the action be commenced later than four years from the date of the incident or occurrence out of which the cause of action accrued. An 'action for medical malpractice' is defined as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of any medical, dental or surgical diagnosis, treatment, or care by any provider of health care. The limitation of actions within this subsection shall be limited to the health care provider and persons in privity with the provider of health care. In those actions coveredby this paragraph in which it can be shown that fraud, concealment, or intentionalmisrepresentationof fact prevented the discovery of the injury within the four year period, the period of limitations is extended forward two years from the time that the injury

> is discovered or should have been discovered, but in no event to exceed seven years from the date the incident giving rise to the injury occurred." (Emphasis supplied).

The statute provides for a two year period of limitation but states that this period will not begin to run until two years from the time the plaintiff knew or should have known of the malpractice. Absent fraud, concealment or misrepresentation, the action is time barred, regardless of discovery, four years from the date of the incident of malpractice. Even where there has been concealment or misrepresentation the action must nevertheless be brought without regard to discovery, ". . . seven years from the date the incident giving rise to the injury occurred." Section 95.11(4)(b), Florida Statutes (1975).

The Bogorffs concede that the incident giving rise to Adam Bogorff's injury occurred not later than 1972. If one assumes there was no concealment, the action would be time barred at the latest in 1976. On the other hand, even assuming concealment and/or misrepresentation, the action would be time barred at the latest in 1979, "seven years from the incident giving rise to the injury" and three years before suit was filed in this case. This Court has so held in Bauld v. J.A. Jones Construction Company, 357 So.2d 401 (Fla. 1978), Purk v. Federal Press Company, 387 So.2d 354 (Fla. 1980), and in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985) and most recently in Ellen M. Carr v. Broward County, 541 So.2d 92 (Fla. 1989) affirming Carr v. Broward County, 505 So.2d 568 (Fla. 4th DCA 1987).[8]

---

[8] The Supreme Court's Carr opinion also holds the repose provisions of Section 95.11(4)(b) meet the Kluger test. Kluger v. White, 281 So.2d (Fla. 1973).

In Purk, this Court, relying on the distinction pointed out in Overland Construction Co., Inc. v. Sirmons, 369 So.2d 579 (Fla. 1979), stated:

> The present case is like Bauld v. J.A. Jones Construction Company, 357 So.2d 401 (Fla. 1978) in that the injury occurred prior to the enactment of Section 95.11(3)(c). The time for bringing suit was shortened, but the cause of actionwas not abolished . . . consequently, the absolute twelve year prohibitory provision did not operate to abolish . . . [the] . . . cause of action, but merely abbreviated the period within which suit could be commenced . . . although shortened the time for bringing suit was found to be ample and reasonable; it was not forestalled altogether.

A statute of repose is distinguishable from a statute of limitation in two particulars.

> First, a statute of limitations bars enforcement of an accrued cause of action whereas a statute of repose not only bars an accrued cause of action but will also prevent the accrual of a cause of actionwhere the final element necessary for its creation occurs beyond the time period established by the statute . . .

(here the Bogorff's alleged knowledge or notice).

> A second distinction may be made with reference to the event from which time is measured. A statute of limitation runs from the date the cause of action arises; that is, the date on which the final element (ordinarily, damages, but it may also be knowledge or notice) essential to the existence of a cause of action occurs. The period of time established by a statute of repose commencestorun fromthedate of an event specified in the statute, such as . . . the performance of a surgical operation. At the end of the time period the cause of action ceases to exist . . . .
>
> In Purk v. Federal Press Company, 387 So.2d 354 (Fla. 1980) . . . Plaintiff was allegedly injured because of defective and negligent manufacture of the machine which caused her injury. The

> applicable statute barring actions for product liability after twelve years from the date of delivery of the finished product to the original purchaser became effective on January 1, 1975. Delivery of the product took place in June of 1961 plaintiff's alleged injury occurred on April 24, 1973. However, the statute contained a savings clause providing that an action that would have been barred by the statute on its effective date could be commenced at any time up until January 1, 1976. Since the saving clause provided a reasonable time within which to bring suit, the statute did not deny access to the Courts in any impermissible manner. Appellant lost, nevertheless, having filed a complaint beyond the savings period.

Carr, 505 So.2d at 570. Also in Pullumv. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985) the Court held that a mere reduction in the time permitted for commencement of an action was not a denial of access to the Courts.

The Fourth District's opinion in Carr further recited:

> Recapitulating, under the present state of the law a statute of repose does not violate the constitutional guarantee of access to the Courts even if it abolishes a cause of action or right otherwise protected . . . provided the legislature either provides a reasonable alternative or overwhelmingly establishes the public necessity for the particular time restraints imposed by the statute. . . . Where such necessity is demonstrated the statute effectively bars the specified right after expiration of the repose. This, of course, is the bottom line; the rule the legislature seeks to establish when it adopts a statute of repose . . . No Florida Supreme Court case has been called to our attention in which this rule has been the explicit holding. It is, nevertheless, necessarily implied from the language, results and rationale in the . . . cases . . .

Id.

While recognizing that this rule, which first arose in the context of product liability and construction defects cases was equally

applicable to medical malpractice cases, the Third District Court of Appeal in Phelan v. Hanft, 471 So.2d 648 (Fla. 3d DCA 1985), nevertheless reached the conclusion that a Statute of Repose which barred an action which had not accrued was unconstitutional. This Court rejected that result in Carr citing Pullum, and affirmed the Fourth District's opinion which relied upon Bauld, Purk and Pullum.

Notwithstanding the foregoing, the Plaintiffs have argued and the Appellate Court agreed, that the four year/seven year Statute of Repose is not applicable to the instant action. This argument was based primarily upon this Court's decision in Dade County v. Ferro, 384 So.2d 1283 (Fla. 1980) and the Fifth District's decision in Hellinser v. Fike, 503 So.2d 905 (Fla. 5th DCA 1986) which found Ferro to be controlling.

Admittedly, if Ferro and Hellinger, are applied strictly, then the 1975 Statute of Repose is inapplicable and the Third District's decision with respect thereto would be correct. However, this Court's perception of both the constitutionality and applicability of statutes of repose has undergone an apparent shift in recent year such that the underlying basis for the Ferro decision is no longer applicable.

Ferro, like Brooks before it, involved an action against Jackson Memorial Hospital for allegedly negligent radiation therapy administered to the plaintiff between December 1970 and May 1971. The treatment resulted in permanent loss of the use of both of the respondent's arms. The respondent discovered the alleged malpractice in September 1975 and filed a medical mediation claim in April of 1977, within two years of discovery but more than four years after

the allegedly negligent medical treatment occurred. The hospital moved for judgment on the pleadings or summary judgment based upon the Statuteof Limitation/Repose contained in the **1975** act. The trial court held that the **1975** Statute applied, but denied the hospital's motion on the grounds that the Statute unconstitutionally violated the respondent's right of access to courts and that the legislative findings contained in the Preamble of the **1975** Medical Malpractice Reform Act were insufficient to justify the abolition of the respondent's common law rights. This Court reviewed the action directly, based upon the fact that the trial court declared the act unconstitutional and determined the two issues were presented **(1)** whether the **1975** Statute was applicable to the facts of the case; and, if so, (2) whether it unconstitutionally denied access to courts.

With respect to the applicability of the statute, the respondents maintained that because Chapter **75-9** was enacted subsequent to the incident or occurrence out of which the plaintiff's injuries arose, application of the four year repose provision to them would result in an invalid retroactive application, pursuant to Foley v. Morris. Petitioners argued that the Chapter was not a retroactive measure vis-a-vis the respondents because their injury was not discovered until September **1975** and, therefore, no cause of action arose until after the effective date of the enactment. This argument was supported by the Second District opinion in Johnson v. Sczvmanski, **360** So.2d **370** (Fla. 2d DCA **1979).**

Although this Court agreed that the Johnson decision is correct and found that the date of discovery is relevant in ascertaining the

attachment date of a Statute of Limitations that measures from that date, it held that such a date is irrelevant in ascertaining the attachment date of a Statute of Repose that runs from the date of the incident or occurrence. Accordingly, the Court made the somewhat confusing holding that, although the two year limitation provisions of the 1975 Act could apply to a cause of action that accrued after its effective date, the four year repose provision, which was also contained in the statute, would not apply to the same cause action. As this Court stated:

> Where a Statute of Limitations is measured by occurrence rather than accrual of the cause of action it must be assumed that some claim arose upon the occurrence of the event causing injury.

Id. at 286.

It is respectfully suggested, that the assumptions underlying the Ferro decision are no longer applicable or should be revisited by this Court in light of later developments regarding the interpretation of statutes of repose.

Specifically, the suggestion by this Court that Justice Drew in the Folev decision would not have utilized the term **"occurring"** if he had meant **"accrued",** should be reconsidered in light of the fact that numerous courts, including this one, have often confused the various terms utilized with respect to Statutes of Limitation and Repose such that the law is to a large extent, currently irreconcilable as tothemeaning and applicability of various statutory terms. Furthermore, Folev did not deal with a Statute of Repose

but only with a Statute of Limitations and its application to a Statute of Repose issue should be narrowly circumscribed.

In addition, and perhaps more importantly, this Court's discussion in Ferro that the petitioner's argument that the Statute of Repose should apply at the time the cause of action accrues would be an absurd result because the cause of action would be extinguished at the time that the act first became effective, needs to be revisited. Although this Court assertedly did not address the constitutional issue in Ferro, this discussion is essentially an analysis of the constitutional question which had previously been addressed by this and other courts and which were further addressed in decisions that followed Ferro. In Ferro, the last date of treatment was May 1971. Applying a four year Statute of Repose the action would, therefore, have been barred at the time the Statute of Repose became effective. In that respect, this Court's observation was correct and its adoption of the principle that statutes which cut off rights before they accrue are "bad" was appropriately applied based on the law in effect at the time.

In the instant action, however, the last date of treatment that allegedly caused injury to the minor child was January 1972. Therefore, at the time the four year Statute of Repose became effective there was a full eight months within which to file suit assuming that there was no alleged concealment. If it is deemed that the alleged concealment was sufficient to toll the Statute, then the Bogorffs had until January 1979 to bring suit. Furthermore, Dr. Zee's July 1978 letter are imputed to the Bogorffs, so they had at least one and a half years from that point within which to file suit, but didn't.

Accordingly, to the extent that the Ferro decision rejected petitioner's argument because application of the repose statute would bar the cause of action as soon as the Statute was passed, a different analysis is necessary in the instant action in order to determine whether the Statute applies.

Subsequent to this Court's decision in Ferro, the Third District rendered an opinion in the case of Cates v. Graham. In Cates, the Third District upheld the constitutionality of the medical malpractice statute of repose, relying upon this Court's decision in Bauld v. J.A. Jones Construction Co., 357 So.2d 401 (Fla. 1978). In Cates, the trial court granted a summary judgment in favor of the defendant. The negligent care and treatment occurred from June 21, 1975 through July 4, 1975. Nevertheless, the injury was not discovered until February 6, 1979 and a claim was not filed until January 9, 1980. The Third District held that the five-month period between the date of discovery and the date that the cause of action was barred was a reasonable period of time within which to bring suit and affirmed the ruling of the trial court.

This Court affirmed the decision in Cates v. Graham, 451 So.2d 475 (Fla. 1984), finding that a five to six month period remaining after discovery of the injury did not constitute a bar to court access in accordance with its decision in Bauld and Purk.

Similarly, the Fourth District, in Carr, also applied this Court's decisions regarding the product liability statute of repose in reaching its conclusion. After analyzing the various cases, the Fourth District determined that the legislature had established an overriding public

interest meeting the Kluser test as applied in Overland, and that the trial court validly applied the statute to the Carr's cause of action. In so doing, it noted the conflicting decision of the Third District in Phelan, stating:

> Judge Daniel S. Pearson for the court, in his customarily logical and eloquent style, determinedthatthe caseswehavepreviouslyanalyzed lead to the conclusion that a statute of repose that bars a cause of action before it accrues is bad. We have come down on the other side of that indistinct line.

Carr, 505 So.2d at 575. This Court ultimately affirmedthe decision in Carr, even though the Carrs had alleged that they were unable to discover the facts and circumstances surrounding the prenatal and obstetrical care and the care rendered during birth to their child despite their due diligence.

Accordingly, this Court has apparently further reviewed statutes of repose in medical malpractice actions in light of its decisions on the product liability statute of repose and come to a conclusion that a statute of repose, which bars a cause of action even before it accrues is constitutionally valid. Under the circumstances, the underlying basis for the Ferro decision has been arguably overruled by implication. In the instant action, the Bogorffs had, at a minimum, eight months and at most three years and eight months within which to file their cause of action after the effective date of the statute of repose. In addition, they had information readily available to them, which by their own admission, commenced the running of the statute of limitations at the latest eighteen months prior to the time that the statute of repose barred this action. Therefore, there

is no retroactive application of the statute to the Bogorffs, no unconstitutional denial of access to the courts, and consistent with this Court's decisions interpreting statutes of repose in both product liability and medical malpractice actions, the Bogorffs' action is barred.

CONCLUSION

WHEREFORE, the Petitioner, UNIVERSITY OF MIAMI, respectfully requests that this Court reverse the Third District's decision and remand with instructions to affirm the trial court's order granting a final summary judgment in this action. The trial court was correct whether this Courtappliesthe four-year statute of limitations, the two-year statute of limitations, or the four-year/seven-year statute of repose.

Respectfully submitted,

FOWLER, WHITE, BURNETT, HURLEY,
BANICK & STRICKROOT, P.A.
Attorneys for University of Miami
CourtHouse Center - 11th Floor
175 Northwest First Avenue
Miami, Florida 33128-1817
(305) 358-6550

By: _____
Steven E. Stark
Florida Bar No. 516864

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 7th day of May, 1990 to: JOHN BERANEK, ESQ. Aurell, Radey, Hinkle & Thomas, Suite 1000, Monroe Park Tower, 101 North Monroe Street, Tallahassee, Florida 32301; PAULL. REGENSDORF, ESQ., Fleming, O'Byran & Fleming, P.O. Drawer 7028, Fort Lauderdale, Florida 33338; JON E. KRUPNICK, ESQ., Krupnick, Campbell, Malone, Roselli, P.a., Suite 100, 700 Southeast Third Avenue, Fort Lauderdale, Florida 33316; SHELLEY H. LEINICKE, ESQ., Wicker, Smith, Blomoqvist, Tutan, O'Hara, McCoy, Graham & Lane, Barnett Bank Plaza, 5th Floor, One East Broward Boulevard, Fort Lauderdale, Florida 33302; and JOHN B. KELLY, ESQ., Blackwell, Walker, Gray, Powers, Flick & Hoehl, 400 Amerifirst Building, One Southeast Third Avenue, Miami, Florida 33131.

Steven E. Stark

SES.26022.01X.8E