OA 9-6-90

IN THE FLORIDA SUPREME COURT

CASE NO. 74,835

KJELL KOCH, M.D., THE UNIVERSITY OF MIAMI, and LEDERLE LABORATORIES,

Petitioners,

vs.

ADAM BOGORFF, minor, by his father and next Friend, ROBERT BOGORFF, and ROBERT BOGORFF, individually,

Respondents.

PETITIONER, KJELL KOCH, M.D.'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS~

This action arises from incidents of alleged medical malpractice occurring during care provided by appellant, Dr. Kjell Koch, a member of the faculty of the University of Miami. In late 1969 or early 1970, Bogorff was diagnosed in Connecticut as having undifferentiated leukemia and received treatment there. (R 450) In the summer of 1970, Bogorff began seeing Dr. Koch at the University of Miami for treatment. (R 450,807) This treatment included the intrathecal (in the spine) administration of a medication known as Methotrexate in June 1971 and January 1972. (R 450) In July and August 1971, Bogorff also received central nervous system radiation under Dr. Koch's direction. (R 450)

Shortly after the administration of the Methotrexate in January, 1972, Bogorff began developing symptoms including lethargy, headaches, vomiting and jerking movements. (R 563-574) By July, 1972, Bogorff was unable to walk or talk. In the summer of 1972, Bogorff's father, a university librarian, presented Dr. Koch with a medical journal article suggesting a possible link between radiation coupled with oral administration of Methotrexate and the minor Bogorff's condition. (R 155,451,946)

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[1] In the interest of judicial economy, Dr. Koch also adopts the facts and arguments raised by the University of Miami.

The symbol "R" refers to the Index to the Record on Appeal.

Dr. Koch said this article was inapplicable to Bogorff's condition and allegedly threw the article in the trash can. (R 451,946,1031) From 1973 to 1977, a number of letters and reports were exchanged among Bogorff's doctors which identified the boy's condition as being possibly secondary to the use of Methotrexate in conjunction with the radiation. These letters included:

(1) a letter from Dr. Winick (Bogorff's pediatrician) to Dr. Koch in May 1973 saying it was difficult to ascertain whether the minor Bogorff's condition was related to the use of Methotrexate. (R 166)

(2) A 1973 letter from Dr. Charyulu to Dr. Winick indicating a remote connection with the Methotrexate. (R 563-574A - Exhibit H)

(3) A May 8, 1975 neurological consultation by Dr. Robert F. Cullen, Jr., a copy of which was sent to Dr. Winnick stating a relation between the use of Methotrexate and the minor Bogorff's condition. (R 563-574A - Exhibit I)

(4) letter from Dr. Winick to the University of Connecticut Tumor Registry stating that Bogorff's brain damage was secondary to the administration of Methotrexate. (R 563-574A - Exhibit J)

(5) a letter from Dr. Winick dated June 17, 1977 stating Bogorff's encephalopathy was related to a folic acid deficiency, (R 563-574A - Exhibit K)

(6) A letter from Dr. Paul Zee to Dr. Winick relating encephalopathy to the use of radiation and intrathecal Methotrexate. (R 563-574A - Exhibit L)

(7) A February 21, 1979 letter from Dr. Winick to the State of Florida Health and Rehabilitative Services Office stating diagnosis of demyelination encephalopathy secondary to the drug therapy administered on Bogorff. (R 563-574A - Exhibit M)

(8) A note from the State of Florida Department of Health and Rehabilitative Services on March 3, 1979 confirming telephone conversation of Dr. Winick which stated Bogorff had encephalopathy due to the drug therapy administered. (R 563-574A - Exhibit N)

Although these medical records were at all times available to Bogorff and his parents, they never chose to review or exam these files prior to 1982.

In 1979, the Bogorffs retained counsel to investigate the medical treatment administered to the minor Bogorff. No complaint for medical malpractice was filed at that time. (R 788,888,909, 563-574A - Exhibits B,C) No complaint for medical malpractice against Dr. Koch, University of Miami or Lederle Labs was filed until December of 1982. (R 2-19) All defendants raised the statute of limitations defense in the trial court and summary judgment was entered on behalf of each defendant. (R 1086,1093) The trial court entered Summary judgment on the basis that Florida Statutes §95.11(4)(b) (1975) contained a seven year statute of repose. This statute provided that, even assuming the existence of fraudulent concealment or misrepresentation on the part of the Defendants, more than seven years had passed from the date the alleged incidence of medical malpractice and, thus, the action was time barred. Furthermore, assuming arquendo, the applicability of Florida Statute §95.11(4) (1971) (a four year statute of limitations with no statute of repose provision) Bogorff was charged with knowledge commencing with the running of the statute in 1972, 1973, 1975, or at the latest in 1977, which would have barred this action filed in 1982. Based upon these grounds, the trial court correctly entered summary judgment in favor of Dr. Koch. (R 1086,1093).

On appeal, the Third District Court of Appeal, in a split decision, reversed the summary judgments. Bogorff by and through Bogorff v. Koch, 547 So. 2d 1223 (Fla. 3rd DCA 1989). The court concluded the alleged action of Dr. Koch in throwing away the medical journal article and in telling Bogorff that the Methotrexate treatment was unrelated to the boy's condition could have been found by the jury to constitute fraudulent concealment. Thus, the court reasoned, Dr. Koch could be barred from asserting a statute of limitations or repose defense subject to the jury's resolution of the concealment and notice issues. Dr. Koch's timely motion for rehearing, rehearing en banc, clarification and certification were denied. A timely notice seeking to invoke this court's jurisdiction was filed. This court has accepted jurisdiction.

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal erred in reversing the summary judgment which was entered on the basis of a statute of limitations/repose defense. Bogorff was placed on constructive notice of the contents of his medical records a minimum of five to nine years before suit was filed. These records contained sufficient information establishing the existence of Bogorff's claim for medical negligence. Specifically, a 1977 letter explicitly discussed the association between the drugs administered to Bogorff during the medical treatment and Bogorff's present physical condition. In addition, Bogorff was placed on actual notice of his deteriorating condition in 1972. Bogorff's failure to file a complaint within four years of the notice of his injury bars his cause of action.

The 1975 limitation of action statute contained a general four year statute of repose and a seven year statute of repose in cases involving fraudulent concealment or misrepresentation. This amended statute can be constitutionally applied, because it allowed Bogorff a sufficiently reasonable time in which to file his complaint. Assuming the existence of fraudulent concealment or misrepresentation as Bogorff alleged, Bogorff had until 1979 to file his complaint. Bogorff did not file a complaint until 1982. Bogorff's failure to file his complaint in accordance with the applicable statute of repose requires the reversal of the Third District opinion and reinstatement of the Summary Judgment in favor of Dr. Koch.

ISSUES ON APPEAL

I. WHETHER THE THIRD DISTRICT COURT OF APPEAL ERRED IN REVERSING THE TRIAL COURT'S SUMMARY JUDGMENT IN FAVOR OF DR. KOCH WHERE THE APPLICABLE STATUTE OF LIMITATIONS HAD EXPIRED, BOGORFF HAD CONSTRUCTIVE NOTICE OF THE MEDICAL RECORD IN HIS FILES, AND BOGORFF FAILED TO PROVE FRAUDULENT CONCEALMENT OF THE MEDICAL RECORDS.

11. WHETHER THE THIRD DISTRICT COURT OF APPEAL ERRED IN REVERSING THE TRIAL COURT'S SUMMARY JUDGMENT IN FAVOR OF DR. KOCH WHERE THE APPLICABLE STATUTE OF LIMITATIONS CONTAINED A MAXIMUM SEVEN-YEAR STATUTE OF REPOSE AND BOGORFF DID NOT FILE A COMPLAINT UNTIL TEN YEARS AFTER THE ALLEGED INCIDENT OF MEDICAL MALPRACTICE.

ARGUMENT

I. THE THIRD DISTRICT COURT OF APPEAL ERRED IN REVERSING THE TRIAL COURT SUMMARY JUDGMENT IN FAVOR OF DR. KOCH WHERE THE APPLICABLE STATUTE OF LIMITATIONS HAD EXPIRED, BOGORFF HAD CONSTRUCTIVE NOTICE OF THE MEDICAL RECORD IN HIS FILES, AND BOGORFF HAD FAILED TO PROVE FRAUDULENT CONCEALMENT MEDICAL RECORDS.

"Under Florida's discovery standard, a cause of action does not accrue, for limitation purposes, until the injured party discovers or has a duty to discover the act constituting an invasion of his legal rights." Celotex Corp. v. Meehan, 523 *So.* 2d 141,145 (Fla. 1988) (quoting Creviston v. General Motors Corp., 225 *So.* 2d 331,334 (Fla. 1969). The general rule states that actions for medical negligence accrue at the time the plaintiff has notice of the physical injury which is the consequence of a negligent act or when the plaintiff knew or should have known of the negligent act giving rise to the cause of action. Nardone v. Reynolds, 333 So. 2d 25 (Fla. 1976). A plaintiff is placed on constructive notice of hospital or other records which showed the nature and cause of the injuries suffered and actual notice of the physical condition and drastic change therein during the course of medical treatment. Id at 27,28-31.

> Knowledge of the medical, doctor, hospital, etc. records concerning the ... 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 plaintiff... The means of knowledge are the same as knowledge itself." Id. at 37.

Where the defendants did not engage in a conduct which has the effect of hindering the plaintiffs from consulting other physicians, reviewing the hospital record, or from becoming aware of the facts regarding their medical negligence claim, plaintiffs must file their claim within the applicable statute of limitations time period. Id.

In the recent case of Jackson v. Georgopolous, 552 So. 2d 215 (Fla. 2nd DCA 1989), the trial court entered a directed verdict in favor of the defendants on the basis of a statute of limitations defense. In Jackson, incidents of medical malpractice allegedly occurred, at the latest, in February 1985. The plaintiff did not file a complaint until August 1987, six months after the two-year statute of limitations expired. The appellate court affirmed, noting that the plaintiff's hospital records were available and had not been denied to the plaintiff's family. The court stated, "The statute of limitations is tolled only for those who remained ignorant through no fault of their own... the party seeking protection [from the effect of the statute] must have exercised reasonable care and diligence in seeking to learn the facts..." Id at 2430.

In the instant case, the trial court correctly found that, as a matter of law, Bogorff knew or should have known of the existence of the injury more than four years prior to the filing of their complaint in 1982.[2] Bogorff received the last

[2] For purposes of the argument in Issue I, Dr. Koch assumes the applicability of Florida Statutes §95.11(4) (1971) which sets (footnote continued)

injection of Methotrexate in January, 1972. The medical records throughout the 1970's are replete with references of a potential relationship between Methotrexate and Bogorff's condition. (See R. 563-574A) The record discloses that as late as July, 1977, the medical records of Bogorff clearly contained an opinion of at least one physician that Methotrexate was implicated in the minor Bogorff's condition. Furthermore, in an affidavit sworn to by Bogorff's parents, the Bogorffs acknowledged that the contents of the medical records were sufficient to place them on notice of a claim. (R 563-574A Exhibits A,B) These records were always available to Borgoff's for their review. Just as in the Nardone case, Bogorff was placed on constructive notice of the contents of these medical records and was on actual notice of his deteriorating condition. Bogorff's failure to exercise due diligence in reviewing the contents of these medical records and subsequent failure to file a timely complaint mandates the time bar to this claim.

Contrary to settled law, the Third District Court of Appeal's decision relieved Bogorff of constructive notice of the contents of the medical records on the basis that Dr. Koch was guilty of fraudulent misconduct and concealment of the cause of

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(footnote continued from previous page)
forth a four year statute of limitation and no repose provision. As discussed more fully in Issue 11, Dr. Koch alternatively asserts Florida Statutes §95.11(4)(b) (1975), which provides a two year statute of limitations and either a four year (in the absence of fraud) or seven year (where fraud is alleged) statute of repose, is applicable.

the boy's condition. Dr. Koch's alleged action did not constitute fraudulent concealment, which requires a party to establish:

> 1) the physician, his employee, agent, or servant engaged in conduct to prevent inquiry or elude investigation as to the cause of action or
>
> 2) the physician failed to reveal to the plaintiff facts (not possibilities or conjecture) relating to the nature or cause of the plaintiff's condition.

Almensor v. Dade County, 359 So. 2d 892, 894 (Fla. 3rd DCA 1978).

The record is clear that Dr. Koch never prevented Bogorff from investigation or review of the numerous medical records establishing the possible link between the treatment and the physical condition. There is no evidence in this record that the Bogorffs were discouraged or otherwise hindered in obtaining medical records from any of the treating physicians. The Bogorffs were specifically directed to various other consulting physicians in order to obtain second opinions. The knowledge of the contents of all these medical records was imputed to Bogorff.

The record also suggests that Bogorff was last treated by Dr. Koch in 1974. Once Dr. Koch's treatment ceased, any alleged fraudulent concealment by Dr. Koch was also terminated:

> After the relationship of physician and patient is terminated, the patient has full opportunity for discovery and no longer is there a reliance by the patient or a corresponding duty of the physician to

> advise or inform. The statute of limitations is no longer told by any fraudulent concealment and begins to run.

Nardone at 38, quoting Guy v, Schuldt, 236 Ind. 101,138 N.E. 2d 891 (1956). Based upon the foregoing, the statute of limitations began to run on Bogorff's claim by 1974 and became time barred in 1978.

The second element for proof of fraudulent concealment is also missing in this case. Dr. Koch's rejection of the medical journal article linking radiation coupled with oral administration of Methotrexate as a cause of encephalopathy in patients (where this patient received intrathecal administration of the Methotrexate) and his alternative medical opinion that the damage was a consequence of either a virus or cancer cells invading the brain does not amount to a fraudulent withholding of facts. The medical opinions contained in the record demonstrate that Methotrexate was merely one possibility of many which may have caused Bogorff's condition. A divergence of expert views cannot form the basis of fraudulent concealment. Almenqor, supra.

II. THE THIRD DISTRICT COURT OF APPEAL ERRED IN REVERSING THE TRIAL COURT'S GRANTING OF SUMMARY JUDGMENT IN FAVOR OF DR. KOCH WHERE THE APPLICABLE STATUTE OF LIMITATIONS CONTAINED A MAXIMUM SEVEN-YEAR STATUTE OF REPOSE AND BOGORFF DID NOT FILE A COMPLAINT UNTIL TEN YEARS AFTER THE ALLEGED INCIDENT OF MEDICAL MALPRACTICE.

In 1975, the Florida Legislature amended §95.11(4) to add repose provisions to the two year limitation of action period.[3] The statute provides, in pertinent part,

> ... an action for medical malpractice shall be commenced within two years from the time of the incident given 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: 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... In those actions covered by this paragraph in which it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury within the four year period, the period of limitation 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 of the incident giving rise to the injury occurred.

Florida Statutes §95.11(4)(b) (1975). This latest amendment to the medical malpractice statute of limitations is constitutionally applicable to the instant case because, after its enactment, ample time remained for Bogorff to file suit.

[3] The statute had been previously amended in 1972 to establish a two year statute of limitations. Dr. Koch suggests that this enactment is also constitutionally applicable and acts as another basis to bar this action.

In the case of Bauld v. J.A. Jones Construction Co., 357 So. 2d 401 (Fla. 1978), the plaintiff suffered a compensable injury in 1972. Subsequently, the legislature amended the limitation of action statute effective January 1, 1975. The plaintiff failed to file a complaint before January 1976. The trial court, applied the 1975 limitations period and granted the defendant's motions for summary judgment on the ground that the statute of repose barred the actions. This court affirmed, holding that a statute of repose enacted subsequent to the accrual of the cause of action did not impermissibly deny access to the courts if the statute as applied to a particular plaintiff's cause of action provided for a reasonable time within which an action could be brought.

In the case of Overlin Construction Co. v. Sirmons, 369 So. 2d 572 (Fla. 1979), this Court reaffirmed the principle of the Bauld decision and held that application of an amended statute of limitation to bar a recognized right before the cause of action ripened (allowing no time within which to file an action): would constitute in an unconstitutional denial of access to the courts. However, if the amended statute provided the Plaintiff with a reasonable time within which to file his complaint, the statute, as applied, would be constitutional. Here, Bogorff had up to four years left (assuming the maximum seven year statute of repose applies to this 1972 injury, based on allegations of fraud) in which to file a claim after the 1975 amendment to §95.11(4), and therefore the amendment may constitutionally be applied and the claim became time barred in 1979. Even in the absence of fraud

(which would then mandate use of a four year repose period) one year would have remained (until 1976) in which to file suit, which the cases have held is a reasonable time.

In the case of Carr v. Broward County, 505 So. 2nd 568 (Fla. 4th DCA 1987) aff'd 541 So. 2d 92 (Fla. 1989), this court upheld the constitutionality of the statute of repose finding that the seven year limitation is an objectively reasonable period within which the legislature could require fraud claims to be discovered. This court stated, "Section 95.11 (4) (b) was properly grounded on an announced public necessity and no less stringent manner would obviate the problems the legislature sought to address, ... the statute does not violate the access to the court's provision." Id at 95.

The case of Dade County v. Ferro, 384 So. 2d 1283 (Fla. 1980), is readily distinguishable from the instant case. In Ferro, the plaintiff suffered a non discoverable compensable injury in 1971. The discovery of the alleged malpractice was not possible until more than four years had passed. If §95.11(4) (1975) applied, the plaintiff's claim would have been time barred before it ever accrued because suit was not brought within four years from the date of the incident giving rise to the cause of action. The trial court properly found the statute to be unconstitutional as applied in that case. This court affirmed, stating that under those facts, the application of the statute would produce an absurd result because the plaintiff's cause of action would be extinguished at the very time the act first became effective. Id at 1287.

In the instant case, Bogorff's cause of action for medical negligence accrued, at the latest, in 1972. Absent fraud, the amended statute of repose provided Bogorff with over one year within which to file his medical malpractice complaint by 1976. Assuming the existence of fraudulent misconduct or concealment, Bogorff had well over four years within which to file his claim by 1979. Bogorff did not file a complaint until 1982. The time periods established by this amended statute provided Bogorff with the reasonable time within which to file his claim. Therefore, under this Court's rulings in Carr, Bauld, and Overlin, the amended statute of limitations containing the statute of repose is applicable to Bogorff's claim. Bogorff's failure to file his complaint within the prescribed time limits embodied in the statute requires the dismissal of his claim as being time barred.

CONCLUSION

For the reasons set forth herein, it is respectfully suggested the Third District Court of Appeal erred in reversing the summary judgment granted by the trial court. It is respectfully requested that this Honorable Court reverse and remand this cause with directions to enter a summary judgment in favor of Dr. Kjell Koch.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed May 7 **, 1990 to: ALL ATTORNEYS OF RECORD on the attached Mailing List.**

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