IN THE SUPREME COURT OF FLORIDA.

UNIVERSITY OF MIAMI, Petitioner, vs. ADAM BOGORFF, etc., et al, Respondents.	)	CASE NO. 74,797
KJELL KOCH, M.D., Petitioner, vs. ADAM BOGORFF, etc., et al, Respondents.	)	CASE NO. 74,835
LEDERLE LABORATORIES, Petitioner, vs. ADAM BOGORFF, etc., et al, Respondents.	)	CASE NO. 74,863

INITIAL BRIEF AND APPENDIX OF PETITIONER, LEDERLE LABORATORIES

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PREFACE

This is a discretionary review proceeding brought by LEDERLE LABORATORIES, KJELL KOCH, M.D., and UNIVERSITY OF MIAMI from a two to one decision of the Third District Court of Appeal which reversed a summary judgment entered in favor of all Defendants on the basis of their statute of limitations defense. Each Defendant requested that this Court exercise its discretionary review jurisdiction and this Court did so, consolidating all three petitions into this consolidated action.

The parties will be referred to as they appear before this Court, or as follows:

ADAM BOGORFF, a minor, and his father, ROBERT BOGORFF	Plaintiffs, Respondents, ADAM, Mr. BOGORFF
LEDERLE LABORATORIES	Defendant, Petitioner, LEDERLE
KJELL KOCH, M.D.	Defendant, Petitioner, DR. KOCH
UNIVERSITY OF MIAMI	Defendant, Petitioner, UNIVERSITY

The symbol (R) will be utilized to refer to the record before this Court. The symbol (A-1) will be used to refer to the Appendix attached to this brief. All emphasis contained in this brief is that of the Petitioner, LEDERLE LABORATORIES, unless otherwise identified.

STATEMENT OF THE FACTS AND OF THE CASE

LEDERLE adopts and incorporates the Statements of the Case and of the Facts contained in the initial brief on the merits filed by THE UNIVERSITY OF MIAMI in these consolidated cases as properly delineating the history of this cause. Because LEDERLE's connection to this case is different than that of either THE UNIVERSITY OF MIAMI or DR. KOCH and because that connection is substantially limited and clearly defined, the following supplement to THE UNIVERSITY OF MIAMI's Statements is submitted.

In the Second Amended Complaint in this cause, LEDERLE was charged with being the manufacturer of a drug called Methotrexate which was used in ADAM's chemo- and radiation therapy in **1971** and January of **1972.**[1]

From January of **1972** (the last intrathecal Methotrexate administration) until July of **1972,** ADAM's condition deteriorated markedly, as spelled out on Pages **2** and **3** of the UNIVERSITY's Statement of the Facts. By July of **1972,** at a time when ADAM had become partially paralyzed and unresponsive, Mr. BOGORFF, a

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[1]The Plaintiffs also noted in their brief in the Third District that the **1971** (pretreatment) Physicians' Desk Reference gave "affirmative indication" for the intrathecal use of Methotrexate at a time when there had allegedly been no FDA approval for that use. No allegation has been made concerning any pre-injection reliance upon this **1971** PDR, and there has been no hint or suggestion, let alone allegation, that this PDR statement in any way defrauded the Plaintiffs with respect to the fact of ADAM's injury or the causation of his injury after treatment.

university librarian, discovered an article in the Archives of Disease in Childhood, **1972**, Volume **47** at **344**, entitled "Encephalopathy in Acute Leukaemia Associated With Methotrexate Therapy." As Mr. BOGORFF testified, the article was obviously of interest to him because it seemed to him to be "a possibility at Least in what was going on." (R **770**).[2]

The Plaintiffs then argue that DR. KOCH took the article and threw it in the trash can, telling Mr. BOGORFF that the article was not related to ADAM's condition. Id.

There is no suggestion in the record, nor allegation, that DR. KOCH in any way was acting as an employee or agent of LEDERLE in the summer of **1972**, nor is there any other allegation or evidence that any other employee or agent of LEDERLE gave any opinions as to causes, possible causes, nor ruled out causes of ADAM's condition. In fact, the record contains no evidence or allegations of any contact between LEDERLE and the BOGORFFS and no evidence that any relationship of any sort existed, whether fiduciary or otherwise, between the Plaintiffs and LEDERLE.

Over the next five years, a number of letters and reports were written to and among various doctors concerning ADAM's condition and the possible involvement of Methotrexate in his decline in early **1972**. These letters and reports are delineated at Pages **3** and **4 of** the UNIVERSITY's brief and at Page 2 of DR. KOCH's brief in this cause. These reports culminated in a July

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[2] Mr. BOGORFF made similar acknowledgments -- that he was aware of the possible involvement of Methotrexate before July of **1972** -- in his sworn answers to interrogatories. Those answers at present are not before this Court, but are the subject of a contemporaneous motion to supplement the record in this cause.

L , 1977 report from Dr. Paul Zee, a physician at St. Jude's Hospital in Memphis to Dr. Winick (ADAM's pediatrician) with a copy to Dr. Cullen (ADAM's neurologist). Under the heading Impression, this letter states:

> 1) Encephalopathy with irreversible anatomical changes possibly secondary to radiation and intrathecal Methotrexate. (A-1, R 210-238, Exhibit C).

Although the Plaintiffs claim not to have seen this letter or any other reports in 1977, they did look at Dr. Winick's file in 1982, found this letter among others, and recognized based on that letter the possible involvement Methotrexate could have had in their son's significant and irreversible decline in early 1972. (See Plaintiffs' Affidavits, Exhibits to R 210-238). The Plaintiffs also assert that this letter is the "definitive diagnosis" of their son's condition. (R 291).

In the intervening five and one-half years between the last treatment with Methotrexate and Dr. Zee's letter of July 18, 1977, no employee or agent of LEDERLE (or of anyone else for that latter) in any way limited the Plaintiffs' access to any medical or hospital record of ADAM. The access to the records that they readily had and used in 1982 was equally as available to them at all times prior thereto.

In the Plaintiffs' Second Amended Complaint filed February , 1986, no allegations are made that LEDERLE participated in any way in any fraud or concealment that may have taken place. (R 74-89). The only allegations concerning concealment are found in

Paragraphs 13 and 14, where it is claimed that DR. **KOCH's** disposing of the above-described article as irrelevant was fraud, aoncealment, or intentional misrepresentation. (R 476).

In response to LEDERLE's motion for summary judgment based on the defense of statute of limitations, the Plaintiffs argued that DR. **KOCH's** actions in the summer of 1972 not only bar him and the UNIVERSITY from asserting the defense of the statute of limitations, but also bar LEDERLE from prevailing on that argument.

After substantial argument and reargument in the trial aourt, the trial court entered summary judgment for the Defendant LEDERLE (and the medical malpractice Defendants as well). That decision was timely appealed to the Third District which, in a two to one decision, found that there were issues as to alleged concealment by DR. **KOCH** or the UNIVERSITY of information the BOGORFFS needed to determine whether the various Defendants' conduct was possibly negligent. Each Defendant requested this Court to exercise its discretionary review jurisdiction and this Court has accepted jurisdiction.

POINT ON APPEAL

WHETHER THE THIRD DISTRICT ERRED IN REVERSING THE TRIAL COURT'S SUMMARY JUDGMENT IN FAVOR OF LEDERLE LABORATORIES ON STATUTE OF LIMITATIONS GROUNDS WHEN (1) THE BOGORFFS HAD ACTUAL AND CONSTRUCTIVE KNOWLEDGE OF THEIR POSSIBLE CLAIM AGAINST LEDERLE MORE THAN FOUR YEARS BEFORE THE SUIT WAS FILED, AND (2) LEDERLE WAS NEITHER GUILTY OF NOR RESPONSIBLE FOR ANY CONDUCT WHICH FRAUDULENTLY CONCEALED THE BOGORFFS' CLAIM AGAINST IT.

SUMMARY OF ARGUMENT

LEDERLE LABORATORIES is in a somewhat different position than the other two Petitioners in this cause. It has been sued in a products liability suit claiming that it manufactured and distributed a drug called Methotrexate which was used intrathecally by the Defendants, DR. KOCH and the UNIVERSITY, in treating ADAM BOGORFF's leukemia in **1971** and January of **1972**. The Plaintiffs claim that the boy's precipitous decline into a significantly neurologically deficient state following the last Methotrexate treatment was caused, in whole or in part, by the medical malpractice of DR. KOCH and the UNIVERSITY and the negligence or strict liability of LEDERLE in distributing a defective drug.

The lawsuit against LEDERLE was not commenced until December of **1982** and it has maintained consistently thereafter that this action, filed almost eleven years after the last treatment, was barred by the statute of limitations. The basis of the defense is twofold.

First of all, the BOGORFFS had actual knowledge of their son's neurologic dysfunction during the first six months of **1972**. They saw a significant number of physicians in an attempt to identify the cause or causes of their son's decline and knew, prior to July of **1972**, that one of the possible causes was his drug therapy in general and the administration of Methotrexate specifically.

In addition to the actual knowledge that the BOGORFFS had of their son's deteriorated condition and the possible involvement of Methotrexate in that decline, their son's records from **1972** through **1977** contained a number of reports implicating Methotrexate as the possible cause of their son's condition. These reports, including a "definitive diagnosis" in July of **1977,** were at all times available to the BOGORFFS and, when finally reviewed in **1982,** were understandable by them as implicating the Methotrexate therapy. Accordingly, more than four years prior to the bringing of the lawsuit in question, the BOGORFFS had actual and constructive knowledge of their possible cause of action against the manufacturer of Methotrexate.

The only means of avoiding this statute of limitations defense, fraudulent concealment, cannot be used to bar LEDERLE's use of the defense. Although DR. KOCH has been accused of defrauding the Plaintiffs by rejecting a medical article in July of **1972** which suggested a link between Methotrexate and conditions such as their son's, **DR. KOCH's** conduct in fact misrepresented no fact, simply constituted a disagreement between his opinion as to possible cause and the authors of the article, and in no way precluded or limited the BOGORFFS from reviewing the subsequently created records which implicated Methotrexate.

More importantly, whatever the conduct of DR. **KOCH** might have been, that conduct, even if fraudulent, cannot be charged against a third party drug manufacturer who had no fiduciary relationship with the Plaintiffs and no responsibility for the conduct of health care providers such as DR. **KOCH.** According to

controlling Florida law, the principle that allows a statute of limitations to be tolled if fraudulent concealment has occurred only bars or estops the defrauding defendant from asserting the defense. Third parties who have not participated in the allegedly fraudulent conduct are not barred from asserting the defense.

Accordingly, the decision of the Third District with respect to LEDERLE LABORATORIES should be quashed and the summary judgment entered by the trial court should be reinstated.

ARGUMENT

THE THIRD DISTRICT ERRED IN REVERSING THE TRIAL COURT'S SUMMARY JUDGMENT IN FAVOR OF LEDERLE LABORATORIES ON STATUTE OF LIMITATIONS GROUNDS WHEN (1) THE BOGORFFS HAD ACTUAL AND CONSTRUCTIVE KNOWLEDGE OF THEIR POSSIBLE CLAIM AGAINST LEDERLE MORE THAN FOUR YEARS BEFORE THE SUIT WAS FILED, AND (2) LEDERLE WAS NEITHER GUILTY OF NOR RESPONSIBLE FOR ANY CONDUCT WHICH FRAUDULENTLY CONCEALED THE BOGORFFS' CLAIM AGAINST IT.

A. INTRODUCTION.

The issues with respect to LEDERLE are fewer, or it is believed at least somewhat simpler than those which are before the Court on the petitions of the medical malpractice defendants, DR. KOCH and the UNIVERSITY.

First of all, with respect to LEDERLE, the applicable statute of limitations is clear -- it is the four year statute of limitations for products liability.

Secondly, notwithstanding the Third District's somewhat curious statute of repose analysis as to LEDERLE, LEDERLE's motion for summary judgment did not raise that defense and no brief filed by LEDERLE, nor argument made at oral argument, raised any twelve year products liability statute of repose defense. The court's discussion was not relevant to any argument made by LEDERLE and, therefore, can only have been raised by the court in an apparent attempt to bolster its conclusion that (1) the tolling of the statute of limitations by virtue of DR. KOCH's actions was imputed to LEDERLE, but (2) would still not have violated the twelve year statute of repose. Bogorff V. Koch, 547 So.2d 1223, 1228 (Fla. 3d DCA 1989). As will be set forth below, the issue was simply a straw man raised by the Court.

Thus, distilled to its essence, the simple issues as to LEDERLE are **(1)** did the Defendants know, or should they have known more than four years before their suit was filed in December of **1982,** that they possibly had a cause of action against LEDERLE for products liability and **(2)** does the action of DR. KOCH in throwing the article away in July of **1972** in some way bar or estop LEDERLE from raising its otherwise valid statute of Limitations defense.

The answers to these questions are simple: **(1)** the Plaintiffs should have known of their cause of action against LEDERLE, are charged as a matter of law with knowledge of it, and beyond peradventure, had actual knowledge of their possible cause of action more than four years before December of **1982** when the action was filed; and **(2)** DR. **KOCH's** actions, whatever they were in July of **1972,** are no bar to and do not estop LEDERLE from asserting successfully its statute of limitations defense in this case.

B. The BOGORFFS were on notice of the possible claim against LEDERLE more than four years before the suit was filed in December of 1982.

Putting aside for the time being the question of whether there was any concealment or not, the BOGORFFS clearly had sufficient actual and imputed knowledge of their potential cause of action against LEDERLE more than four years before it was brought in December of **1982.** Different courts define the

degree o knowledge (actual or imputed) necessary to begin the statute of limitationsdifferently, but the Third District has defined it in this way:

> The statute of limitations will begin to run only when the "moment of trauma" and the "moment of realization" have both occurred. By "trauma," we simply mean the ill effect, damage, or injury; and by "realization," we mean the "known or should have known" element associated with the trauma.

Steiner v. Ciba-Geigy Corp., 364 So.2d 47, 53 (Fla. 3d DCA 1978).

The knowledge required, of course, is not to a level of legal certainty as to whether a particular potential defendant was at fault. As the Steiner court went on to note, the legal fact of causation is never definitively defined until it "is established by legal processes." Id. at 52.

This Court in Nardone v. Reynolds, faced with a similar question of a minor's condition, defined the requisite knowledge as being the point in time when "the parents, through the exercise of reasonable diligence, were on notice of the possible invasion of their legal rights." Nardone v. Reynolds, 333 So.2d 25, 34 (Fla. 1976).

The record here is absolutely clear that between January and July of 1972, irrespective of any imputed knowledge or constructive knowledge that the Plaintiffs are charged with, they were actively searching for explanations for the disastrous change in their boy's condition since the last treatment in January of 1972. There is no hiding this fact. Mr. and Mrs. BOGORFF were well aware of it. The moment of trauma had occurred and, just as clearly and sadly, had been appreciated by them.

By July of **1972,** the moment of realization had also occurred, as a matter of actual knowledge. As Mr. BOGORFF clearly stated in his deposition, he himself had found an article which identified Methotrexate as a possible cause of conditions such as his son had. He was particularly interested in this article because, in his own mind, "this was a possibility at least in what was going on." (R **771).**[3]

From this record, as a matter of actual knowledge, there can be no genuine issue of material fact that the BOGORFFS knew of their son's obviously changed physical condition and, in their search for an explanation before even going to see DR. KOCH, had already identified Methotrexate as a possible cause for their son's condition. The moment of trauma and the moment of realization had occurred and the statute of limitations, as to LEDERLE, had begun to run.

In addition to this actual knowledge, however, there is the further and overwhelming imputed knowledge which was discoverable in the medical records of their son for a period more than four years before the suit was filed.

Between January of **1972** and December of **1978** (four years before the lawsuit was filed), a number of different medical reports and letters were created and placed into the medical records of ADAM BOGORFF, which reports identified causes and possible causes of the boy's condition. Although a number of them, highlighted in Co-Petitioner's Statement of the Facts, specifically highlight the possible role Methotrexate played in

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[3] See footnote 2 supra.

ADAM's condition, it is sufficient for our purposes to focus upon the letter written on July **18, 1977** from Dr. Paul Zee, one of ADAM's consultants at St. Jude's Hospital in Memphis, Tennessee to Dr. Paul Winick, ADAM's pediatrician in South Florida (with a copy to Dr. Robert Cullen, one of ADAM's neurologists in South Florida). (For ease of access, a copy of said letter has been appended to this brief as **A-1).**

Under the Impression section of Dr. Zee's letter, he concluded as follows:

> **1)** Encephalopathy with irreversible anatomical changes possibly secondary to radiation and intrathecal Methotrexate. (R **731,** Exhibit D).

The significance of this letter has not been lost on the Plaintiffs. It has variously been referred to as being the "definitive diagnosis of ADAM's condition" (R **291)** or the letter in which Dr. Zee "incriminated intrathecal Methotrexate and radiation as the cause of ADAM's encephalopathy (brain damage), which was responsible for ADAM'S convulsions and failure to thrive." (R **212).**

Moreover, in the Plaintiffs' original memorandum in opposition to the motions for summary judgment, both Mr. and Mrs. BOGORFF submitted affidavits which identified Dr. Zee's letter of July **18, 1977** as being their source of the information which "incriminated Methotrexate and radiation as the cause of ADAM's brain damage." (See Affidavit of THELMA BOGORFF, page **2,** exhibit to Plaintiffs' Memorandum of Law, R **210-238.** See also Affidavit of ROBERT BOGORFF, exhibit to Plaintiffs' Memorandum of Law, R **210-238).**

While there may be some circumstances in which the import of technical medical jargon hidden in voluminous hospital records will not be imputed as a matter of law to a plaintiff (see Tetstone v. Adams, 373 So.2d 362 (Fla. 1st DCA 1979), that is not the situation here. First of all, Dr. Zee's 1977 letter clearly highlights his number one impression in language easily understood by anyone. More importantly, the proof of the pudding is that when the BOGORFFS chose to look at their son's records in 1982, each of them recognized the 1977 letter for what it was, an identification of Methotrexate as a possible cause, confirming the exact same knowledge that Mr. BOGORFF himself had in July of 1972. (See R 210-238, Affidavits of Mr. and Mrs. BOGORFF).

The controlling Florida law with respect to such medical records is clear. As this Court stated in Nardone:

> 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.

133 So.2d at 34. This law has continued to be the law in the State of Florida since 1976. See, e.g., Jackson v. Georgopolous, 532 So.2d 215 (Fla. 2d DCA 1989); Humber v. Ross, 509 So.2d 356 (Fla. 4th DCA 1987); Frankowitz v. Propst, 489 So.2d 51 (Fla. 4th DCA 1986).

Accordingly, the BOGORFFS had both actual knowledge of the possible invasion of their legal rights by virtue of the drug [ethotrexateno later than July of 1972, and further had imputed to them as a matter of law confirmatory knowledge of that relationship not later than July of 1977, five years and five

months prior to the lawsuit being filed in this cause against LEDERLE. As a result, unless some other factor intervenes and estops and bars LEDERLE from asserting its statute of limitations defense, the summary judgment entered by the trial court below should be affirmed.

C. No action of DR. KOCH bars or estops LEDERLE from successfully raising its statute of limitations defense.

There being no genuine issue of material fact as to the Plaintiffs' knowledge (actual and imputed) of the possible invasion of their rights by and claim against the manufacturers of Methotrexate, the real issue as to LEDERLE devolves into the question of whether any actions by DR. KOCH in July of 1972 were sufficient, as a matter of fact and law, to bar and estop LEDERLE from being able to assert its otherwise valid statute of limitations defense. For two basic reasons, the answer is no -- LEDERLE is responsible for no conduct of any sort sufficient to bar it from being able to assert an otherwise available statute of limitations defense.

1. No actions by DR. KOCH constitute conduct sufficient to toll the statute as to him.

As is clear from the record, LEDERLE had no relationship, let alone a confidential or fiduciary relationship with the BOGORFFS at any time between the administration of the drug Methotrexate and the ultimate filing of the suit over ten years later. Thus, if there had been fraudulent concealment such as would bar LEDERLE's statute of limitations defense, it could only have been and has only been charged to have been the conduct

of the actions of DR. KOCH and the UNIVERSITY in throwing the medical article away in July of **1972.** Accordingly, LEDERLE incorporates by reference the argument made by the UNIVERSITY concerning "the alleged concealment" and its legal significance found on Pages **20** through 26 of its Initial Brief on the Merits. Regardless of who may have been legally responsible for DR. KOCH's actions in July of **1972,** suffice it to say:

1. He did not conceal, nor has he been charged with concealing in any way, the fact of injury;

2. There was no misrepresentation of fact -- but at most a difference of medical opinion rising to no more than "conjecture and speculation as to possibilities." Nardone, at **39.**

3. Whatever the legal significance of DR. KOCH's actions in July of **1972,** there has been no suggestion that his conduct in any way limited the BOGORFFS' access to later-created records or otherwise excused them from their Nardone-recognized obligation which charges the Plaintiffs with the knowledge of those subsequently created records.

4. In regard to this last sub-point, had Dr. Gieseke or Dr. Cullen[4] created a record or report the day after DR. KOCH's conversation with Mr. BOGORFF in July of **1972** and if that report had identified a penicillin product manufactured by Eli Lilly as being a possible cause of ADAM's condition, it can hardly be suggested that DR. KOCH's disposal of an article

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[4] Drs. Gieseke and Cullen also examined ADAM at or about the time of DR. KOCH's alleged fraudulent concealment.

concerning Methotrexate would in any way excuse the Plaintiffs from their failure to discover the records that pointed a finger at penicillin as a possible cause of their son's unfortunate condition.

Since the various post-July 1972 reports and correspondence, by their terms and by the admission of both Mr. and Mrs. BOGORFF, were sufficient to apprise them (even in the absence of any other information) of the possible link between Methotrexate and their son's condition, nothing DR. KOCH said or did in July of 1972 concerning a medical article can prevent that knowledge from being imputed to the BOGORFFS.

2. Even if DR. KOCH's actions constitute fraudulent concealment and bar him and the UNIVERSITY from asserting a statute of limitations defense, that conduct is not imputed to LEDERLE and cannot estop LEDERLE from asserting its own statute of limitations defense.

Finally, and unique to LEDERLE, is the issue not expressly stated by the Third District, but at least implicitly recognized. That is whether LEDERLE should in some way be charged with the alleged concealment by DR. KOCH. It is respectfully suggested to this Court that the Plaintiffs' position is not the law in the State of Florida and should not be the law in the State of Florida.

As is the case with so many of the issues before this Court, the issue of LEDERLE's possible responsibility for DR. KOCH's actions such as would estop it from being able to assert the statute of limitations is directly dealt with in the Nardone decision.

As this Court is aware, Nardone was before the Court on certified questions from the Fifth Circuit. The third and fourth sets of those questions were 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 or likely cause 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?

333 So.2d at 28. The Court answered all parts of the third and fourth questions in the negative as to each party in the suit.[5]

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[5] It is important to note that all of the defendants in the Nardone case were physicians who had separate direct and personal relationships with the plaintiffs. These confidential and fiduciary relationships were critically important in this Court's analysis of the law concerning fraudulent concealment. See, e.g., Nardone, 333 So.2d at 37, 38, and 39.

As is apparent from these certified questions, the precise circumstances of the BOGORFFS' case against LEDERLE -- a products liability case against a manufacturer of a drug -- were not specifically before this Court in Nardone. The issue of third parties' "responsibility" for an active defrauder's misrepresentations is dealt with directly and in that context, this Court has spelled out quite clearly the philosophy behind the policy of barring or estopping a concealing defendant from being able to assert successfully a statute of limitations defense.

In discussing the role of fraudulent concealment in the law of statutes of limitations defenses, this Court recognized that barring a defendant from raising an otherwise available defense is an exception to the general rule and purpose of statutes of limitations, which is to protect defendants from the long delays in defending old and stale claims. Thus, the Court recognized that the law in Florida with respect to such defendants is as follows:

> The philosophy behind the exception to the statute of limitations of fraudulent concealment and the tolling of the statute if such concealment exists, is courts will not protect defendants who are directly responsible for the delays of filing because of their own willful acts.

33 So.2d at 36.

This rule of law -- that a defendant will not be allowed to benefit from his own wrong and will be estopped from asserting a statute of limitations defense when he directly caused the delay in the filing of the suit -- is by no means a

proposition unique to Florida law. Rather, courts throughout the country which have considered this question have held that the only parties so estopped are defendants who themselves committed the fraudulent act. Thus, in the case of Greenfield v. Kanwit, 87 F.R.D. 129 (S.D. N.Y. 1980), the court was faced with a situation in which one of three co-conspirators had fraudulently concealed the names of the remaining co-conspirators (without their participation). The isssue was whether the claims against those other conspirators would be barred by the statute of limitations. In ruling that the proposed amended complaint to add them would be barred by the statute, the court stated:

> The purpose of the doctrine of fraudulent concealment is to prevent a party from profiting from his own wrong. . . (citations omitted), so that one who conceals facts to prevent the timely commencement of a lawsuit is estopped from pleading that defense. In each of the cases cited by Greenfield in which the doctrine has been applied, the running of the statute was tolled only as to the defendants who had committed the concealment. Here, however, Greenfield alleges no wrongdoing by Beltrani or Savetsky, and accordingly they are entitled to assert the defense.

87 F.R.D. at 132 (Emphasis the Court's).

Similarly, in Stoneman v. Collier, 94 Mich. App. 187, 288 N.W.2d 405, 407 (1979), the Court of Appeals of Michigan had to deal with a case in which an individual died from carbon monoxide poisoning in a car. Although the plaintiffs acknowledged that they were aware of a claim against the company that installed the muffler and exhaust system, they argued that the owner of the car fraudulently concealed information that

would have disclosed a products liability claim against General Motors. In rejecting that argument, the Michigan court, in a decision directly parallel to this, held as follows:

> The purpose of the statute of limitations is to prevent the bringing of stale claims which are difficult to prove and defend against. The Fraudulent Concealment Act extends the statute of limitations against those who fraudulently conceal causes of action. The Fraudulent Concealment Act punishes concealment. It would be inequitable in the present case to punish General Motors for acts of concealment engaged in by a third party.
>
> The lower court properly ruled that the Fraudulent Concealment Act does not operate against persons who do not participate in the concealment.

In Smith, Miller and Patch v. Lorentzon, 254 Ga. 111, 327 S.E.2d 221, 222 (1985), the Supreme Court of Georgia faced a case in which the plaintiff brought both a medical malpractice case against an ophthalmologist and a products liability action against the manufacturer of a drug. Georgia had a statute which said that a defendant (or those claiming under such a defendant) who is guilty of a fraud and deters or delays a plaintiff from bringing an action shall have the statute of

concluded, however, that any alleged fraud of the ophthalmologist would not be imputable to the manufacturer unless that entity were "claiming under" the defendant who was himself guilty of the fraud. See also Cato v. South Atlantic & Gulf Coast District of the International Longshoremen's Association, 364 F.Supp. 489, 493 (S.D. Tex.), aff'd 485 F.2d 583 (5th Cir. 1973); Burns v. Hartford Hospital, 192 Conn. 451, 472 A.2d 1257, 1261 (1984); Smith v. Sinai Hospital of Detroit, 152 Mich. App. 716, 394

N.W.2d 82, 87-88 (1986); 51 Am.Jur.2d § 150, Limitation of Actions; 4 Am. Law. Prod. Liab. 3d, Statutes of Limitations and Repose, § 47:35 Fraudulent Concealment of Information; Equitable Estoppel, at 48 (1987) ("Acts of fraudulent concealment by a third party do not operate to toll the statute of limitations against a party who did not participate in any concealment or fraud.").

In addition to the sound reasons behind the rule set forth in Nardone, as mirrored in the many cases an authorities set forth above, the imputation of any fraud or concealment committed by a health care professional to the manufacturer of a prescription drug would turn the concept of the Learned intermediary on its head. See Felix v. Hoffmann-LaRoche, Inc., 540 So.2d 102 (Fla. 1989). If an innocent manufacturer is to be estopped from asserting an otherwise valid statute of Limitations defense because a patient's doctor (with an existing confidential and fiduciary relationship) fraudulently conceals Eacts necessary to allow a plaintiff to identify a possible cause of action against that manufacturer, then the carefully and properly crafted system for dispensing prescription drugs in the United States will be significantly and adversely affected.

CONCLUSION

Statutes of limitations cases often identify somewhat incomfortable policy questions for courts to resolve. On the facts before this Court, however, and with particular focus on the products liability claim against LEDERLE, it is respectfully urged to this Court that the trial court properly recognized that the Plaintiffs had both actual and constructive notice of their possible claim against LEDERLE more than four years prior to their actually bringing the suit in December of **1982**. Further, since LEDERLE was wholly separate from and not involved in any of DR. KOCH's actions in July of **1972** relating to the medical article, there is no way that his actions can estop LEDERLE from asserting its valid defense, even if the DOCTOR's conduct could in some fashion be construed as a bar to his own successful assertion of a statute of limitations defense. For these reasons, it is respectfully urged that the decision of the Third District be quashed and the summary judgment in favor of LEDERLE entered by the trial court be reinstated.

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By: Paul R. Regemsdorf

APPENDIX TO INITIAL BRIEF OF PETITIONER, LEDERLE LABORATORIES

A-1 - Letter of July 18, 1977.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by mail, this 4th day of May, 1990 to ALL COUNSEL OF RECORD on attached list.

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Bogorff v. Koch, et al
Third District Court of Appeal
Case Nos. **86-2550** and **86-2911** (Consolidated)

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