IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,797

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 BRIEF ON JURISDICTION

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TABLE OF CITATIONS

Other Authorities:

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I. INTRODUCTION

The Petitioner/Defendant, THE UNIVERSITY OF MIAMI, shall hereinafter be referred to as "UNIVERSITY". Respondents/Plaintiffs, ADAM BOGORFF, a minor, by and through his father and next friend, ROBERT BOGORFF AND ROBERT BOGORFF, individually, will be referred to as "BOGORFF". References to the lower's Court's opinion and other matter contained in the appendix shall be referred to by the letter "A" with appropriate page numbers. All emphasis added unless otherwise indicated.

II. STATEMENT OF CASE AND 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 Leukemia which had been diagnosed in 1970. The incidents of alleged malpractice by Dr. Koch commenced as early as June of 1971 and the last incident occurred in January of 1972. These involved the intrathecal administration of four doses of Methotrexate. The first symptoms of injury appeared in January and February of 1972 and by July of 1972, Bogorff was unable to walk or talk. (A. 2)

The Bogorffs maintain they suspected negligence in 1979. Though references to a connection between Dr. Koch's use of Methotrexate and Bogorff's injury appear in the medical records in 1972, 1973, 1975 and 1977, the Bogorffs maintain they knew nothing of these letters and reports until 1982. (A. 2, 3, 4, 15, 18).

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The Trial Court entered summary final judgment for the University of Miami because no genuine issue of material fact remained as to whether the Bogorff claim was time barred. This was based upon arguments that even under §95.11(4), Florida Statutes (1971) a four year statute, with no repose provisions, Bogorff was charged with knowledge commencing the running of the statute in 1972, 1973, 1975, and at the latest in 1977 which would have barred this action filed in 1982. It was also argued that more correctly, a two year statute of limitations, §95.11(6), Florida Statutes (1973), applied to Bogorff's action and was a time bar. Finally, it was argued that the repose provisions of §95.11(4)(b), Florida Statutes (1975) were dispositive in that even absent discovery and even assuming concealment and/or misrepresentation, seven years had passed since the incidents of malpractice and that the action was time barred under the statute of repose. (A. 27) The Trial Court entered Summary Final Judgment for the University.

On appeal, the Third District held that the Trial Court was incorrect in finding that Bogorff's action was time barred and reversed and remanded the cause for further proceedings. The UNIVERSITY's timely Motion for Rehearing, Rehearing En Banc and Suggestion for Certification was denied and a timely notice seeking to invoke this Court's discretionary jurisdiction was filed.

SUMMARY OF ARGUMENT

The issue in this case though perplexing is not one of first impression. It is conceded that the incidents of alleged malpractice occurred not later than January of 1972. Bogorff

states that the relationship between the alleged malpractice and the injury was not discovered until February of 1982. They assert these facts were concealed from them by Dr. Koch and that they did not discover the facts and circumstances giving rise to this claim until 1982.

The repose provisions of §95.11(4)(b) (1975) are dispositive. The last incident of alleged malpractice occurred in 1972. Absent concealment, the action would be time barred at the latest in 1976. Even assuming concealment and misrepresentation, the action would be time barred at the latest in 1979, over three years before suit was filed in this case.

By finding that genuine issues of merit material fact remain with respect to whether Bogorff's claim was time barred, the Third District misapplied the distinct an entirely separate doctrine relating to statutes of limitation and statutes of repose and reached a result inconsistent and in conflict with a decision of the Fourth District Court of Appeal in Carr v. Broward County, 505 So.2d 568 (Fla.4th DCA 1987) and the Florida Supreme Court in the case of Ellen M. Carr v. Broward County, 541 So.2d 92 (Fla. 1989) on the same question of law.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL DIRECTLY CONFLICTS WITH THE FOURTH DISTRICT'S DECISION IN CARR V. BROWARD COUNTY, 505 SO.2D 568 (FLA. 4TH DCA 1987) AND THE FLORIDA SUPREME COURT IN THE CASE OF ELLEN M. CARR V. BROWARD COUNTY, 541 SO.2D 92 (FLA. 1989) AND REACHES A DIFFERENT RESULT IN A SITUATION INVOLVING SUBSTANTIALLY SIMILAR FACTS ON THE SAME QUESTION OF LAW.

Carr likewise involved the application of a statute of repose to a cause of action for medical malpractice. The plaintiff, Ellen Carr, on December 20, 1975, delivered a child who was later diagnosed as suffering from severe brain damage. Not until September 26, 1985, did Ellen and her husband file a Complaint against the hospital and the treating physician. They alleged that they were not able to discover the facts and circumstances giving rise to the claim which would have placed them on notice that negligence had occurred. They likewise alleged that these facts had been fraudulently concealed from them. Motions to Dismiss were granted with prejudice based upon the application of §95.11(4)(b), Florida Statutes (1975). The statute has a two year provision which is a statute of limitations, not pertinent here. The four year and seven year provisions operate as statutes of repose. Both are to be measured from "the incident giving rise to the injury . . .".

The injury occasioning the instant litigation, brain damage, is alleged to have resulted from treatment occurring not later than January of 1972. Thus, the latest date on which the "incident" could have occurred is January of 1972, so that an action commenced in 1982 is well beyond the seven year statutory

period for repose. The District Court of Appeal of Florida, Fourth District, so held in Carr v. Broward County, 505 So.2d 568 (Fla. 4th DCA 1987) which was affirmed in this Court in the case of Ellen M. Carr v. Broward County, 541 So.2d 92 (Fla. 1989).

Why, then, is it necessary for the UNIVERSITY to petition this Court for discretionary review if Bogorff's cause of action has been laid to rest by the statute? The answer is that the District Court of Appeal of the State of Florida, Third District, for reasons which do not appear in its opinion, has refused to even address the statute of repose, stating without explanation that "the Court's immediate concern extends only to the statute of limitations and the asserted existence of fraudulent concealment tolling the statute." (A. 8). Indeed, erroneously relying upon Dade County v. Ferro, 384 So.2d 1283 (Fla. 1980); Foley v. Morris, 339 So.2d 215 (Fla.. 1976) and Hellinger v. Fike, 503 So.2d 905 (Fla. 5th DCA 1986), review denied, 508 So.2d 14 (Fla. 1987), the majority opinion stated that the applicable statute was §95.11(4), Florida Statutes (1971) (amended 1974, 1975). The opinion went on to state that there was a four year limitations period with no statute of repose.

The threshold question is whether the repose provisions which were amended into the statute in 1975 and remain there today, apply to actions based on incidents of alleged malpractice which occurred in 1971 and 1972 resulting in injury not later than 1972. The Fourth District's opinion in Carr and the Supreme Court's opinion in Carr leave no doubt that as in Bauld v. J.A. Jones

Construction Co., 357 So.2d 401 (Fla. 1978), the Supreme Court has decided that this statute of repose enacted after the University's alleged incidents of malpractice and after Bogorff's injury constitutionally barred this action since the statute as applied to this particular plaintiff's cause of action provided for a reasonable time within which an action could be brought.

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 action where 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 commences to run from the date 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 . . ..
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> In Purk v. Federal Press Co., 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. (emphasis supplied)

Carr, 505 So.2d 568 (Fla. 4th DCA 1987) at 570. Also in Pullman v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985) where 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.

In the Fourth District's opinion in Carr the Court stated:

> 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 . . .

The cases are precisely those cases which were cited by the University in its Briefs and which are referred to by the

Supreme Court in its Carr opinion. Now there is a Florida Supreme Court decision containing this explicit holding.[1]

Phelan v. Hanft, 471, So.2d 648 (Fla. 3rd DCA 1985), relied upon by the majority was not "disapproved on other grounds" in the Supreme Court's Carr decision as stated by the majority. (Op.pg. 8) To the contrary, the Fourth District's opinion in Carr and the Third District's opinion in Phelan were acknowledged to be in conflict on the same question of law presented here, and the Supreme Court disapproved Phelan on that same question of law.

As the Fourth District's opinion in Carr acknowledged, the Third District in Phelan determined that the pertinent cases led to the conclusion that a statute of repose that bars a cause of action before it accrues is bad. The Fourth District came down on the other side of that line. This Court resolved that conflict in its opinion. The Third District, nevertheless, continues in its refusal to do so and is in conflict both with the Fourth District in Carr and this Court in Carr.

REASONS SUPPORTING EXERCISE OF DISCRETION

This Court should exercise its discretion and grant review herein on the grounds that the question involves a critical issue relating to legal responsibilities in the health care industry. By accepting jurisdiction, this Court can put to rest the matters presumed to have been resolved by its earlier opinion in Carr where jurisdiction was held to be present, the Fourth

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

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District's opinion was approved and Phelan was disapproved. By not accepting jurisdiction, this Court will allow a clearly confusing and conflicting decision to remain and will once again leave undetermined an issue that will surely affect the health care industry adversely. This Court has recognized that statutes of repose are a valid legislative means to restrict or limit causes of action in order to achieve certain public interests. It has specifically held that §95.11(4)(b) is constitutional and that the legislature may properly take into account the difficulties of defending against a stale fraud claim in determining a reasonable period for the statute of repose, and has further found that seven years is an objectively reasonable period within which the legislature may require such claims to be discovered. A denial of jurisdiction would leave in place the Third District's opinion essentially overruling this Court's decision regarding the statute of repose.

CONCLUSION

WHEREFORE, the Petitioner respectfully requests that this Court accept jurisdiction in the aforementioned action.

Respectfully submitted,

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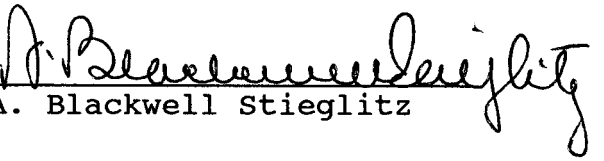
By: 
A. Blackwell Stieglitz

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 29th day of September, 1989, to: Jon E. Krupnick, Esq., Krupnick & Campbell, P. A., Attorney for Plaintiff, Suite 100, 700 S.E. 3rd Avenue, Ft. Lauderdale, Florida 33316; Shelley H. Leinicke, Esq., Wicker, Smith, Blomqvist, Tutan, O'Hara, McCoy, Graham & Lane, Attorneys for Dr. Kjell Koch, One East Broward Blvd., P.O. Box 14460, Ft. Lauderdale, Florida 33132; John Kelley, Esq., Blackwell, Walker, Fascell & Hoehl, Attorneys for Dr. Kjell Koch, 2400 Amerifirst Building, One Southeast 3rd Avenue, Miami, Florida 33131; Robert D. McIntosh, Esq., Fleming, O'Bryan & Fleming, Attorneys for Lederle Laboratories, 1415 East Sunrise Boulevard, P.O. Drawer 7028, Ft. Lauderdale, Florida 33338; John Beranek, Esq., Klein & Beranek, P.A., Attorneys for Appellants, 501 S. Flagler Drive, Suite 503, West Palm Beach, Florida 33401.

By: A. Blackwell Stieglitz
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APPENDIX TO PETITIONERS' BRIEF ON JURISDICTION

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