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IN THE SUPREME COURT OF FLORIDA.

CASE NO. 74,863

FLORIDA BAR NO. 152395

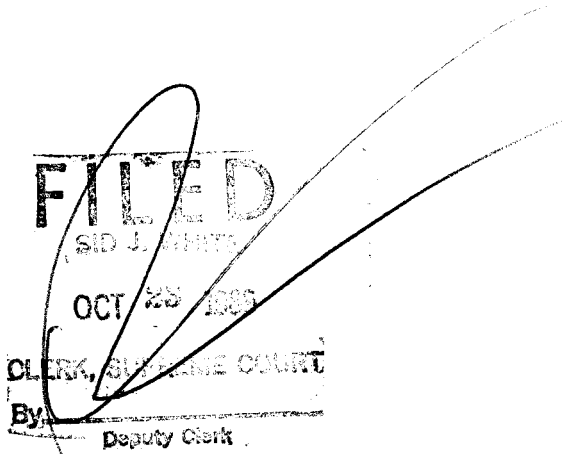
LEDERLE LABORATORIES,

Petitibner,

vs.

ADAM BOGORFF, etc., KJELL KOCH, M.D., and THE UNIVERSITY OF MIAMI

Respondents.




**PETITIONER, LEDERLE LABORATORIES' BRIEF ON JURISDICTION AND APPENDIX**

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## TABLE OF AUTHORITIES

## PREFACE

The parties before this Court will be referred to as follows:

| | |
|---|---|
| ADAM BOGORFF, ROBERT BOGORFF | Plaintiffs, Respondents, BOGORFFS |
| LEDERLE LABORATORIES | Defendant, Petitioner, LEDERLE |
| UNIVERSITY OF MIAMI | Defendant, Respondent,[1] UNIVERSITY |
| KJELL KOCH, M.D. | Defendant, Respondent,[2] DR. KOCH |

The symbol "LA" will be used to designate the Appendix filed in support of LEDERLE's petition. All emphasis will be that of LEDERLE unless otherwise indicated.

## STATEMENT OF THE CASE AND OF THE FACTS

This action arises out of the claimed malpractice by Dr. KOCH while he was on the UNIVERSITY faculty. (LA-2). BOGORFF had leukemia, and in 1971 and January of 1972, Dr. KOCH administered several doses of Methotrexate (a drug manufactured by LEDERLE) into the boy's spine and used x-rays in conjunction with that treatment. Id. Shortly after the last injection, BOGORFF began to lose neurological function, and eventually lapsed into a coma (from which he has partially recovered). Id.

In the summer of 1972, Mr. BOGORFF, who was a university librarian, came to see Dr. KOCH with a medical journal article suggesting a possible link between Methotrexate and the minor BOGORFF's condition. Dr. KOCH read the article, threw it in a

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[1] The UNIVERSITY OF MIAMI has instituted its own discretionary review proceeding on different grounds.

[2] Dr. KOCH has joined in the discretionary review proceeding instituted by the UNIVERSITY OF MIAMI.

trash can, and told Mr. BOGORFF that the Methotrexate treatment had no relationship to the boy's problems. **(LA-3).**

No complaint for products liability against LEDERLE, or for medical malpractice against Dr. KOCH or the UNIVERSITY was filed until December of **1982.** However, 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 radiation. The BOGORFFS claim not to have seen these letters until **1982,** but, after examining them, they understood them and filed a malpractice action against Dr. KOCH and the UNIVERSITY and a products liability action against LEDERLE. **(LA-3, 14-15).**

All Defendants raised a statute of limitations defense and the trial court in **1986** reentered summary judgments for all Defendants. **(LA-5).** On April **18, 1989,** the Third District, in a **2-1** decision, reversed the summary judgments. The Court concluded that the alleged action of Dr. KOCH in throwing away the medical journal article and in telling Mr. BOGORFF that the Methotrexate treatment was unrelated to the boy's condition could have been found by the jury to be fraudulent concealment. Thus, Dr. KOCH (and the UNIVERSITY responsible for his actions) could be barred from asserting the statute of limitations defense subject to a jury's resolution of the concealment and notice issues. **(LA-8).**

As to LEDERLE, the Court stated that the twelve year statute of repose period had not run (an issue never raised by LEDERLE in the Third District) and concluded that the "moment of trauma" and

:he "moment of realization" may not have occurred by December of .978 (four years prior to the time the suit was filed). (LA-9-LO).

After motions for rehearing and for clarification were lenied, this discretionary review proceeding was commenced.

## SUMMARY OF ARGUMENT

More than four years before the Plaintiffs in this cause filed their products liability action against LEDERLE, the minor's medical records contained clear and unmistakable reports (later seen and, by their own admission, understood by them) that their son's condition was possibly secondary to the Methotrexate treatment. Notwithstanding the presence of this information in the minor's records, the Third District reversed a summary judgment in favor of LEDERLE on the statute of limitations defense.

This decision is in conflict with Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976), (L-26), in that Nardone, and cases thereafter, impute as a matter of law the information contained in a minor's records to the parents and only stop the statute of limitations from running as against those defendants who fraudulently conceal or misrepresent the nature or cause of the patient's condition. LEDERLE neither participated in, nor ratified, nor was even aware of the alleged misrepresentation by Dr. KOCH and, therefore, is not estopped from asserting the defense of the statute of limitations in this cause.

## ARGUMENT

### POINT ON DISCRETIONARY REVIEW

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN NARDONE V. REYNOLDS, 333 So.2d 25 (Fla. 1976) IN THAT THE ALLEGED MISREPRESENTATION BY THE PLAINTIFF'S DOCTOR AS TO A MINOR'S CONDITION (WHICH BARS THE DOCTOR FROM ASSERTING SUCCESSFULLY A STATUTE OF LIMITATIONS DEFENSE) HAS BEEN CHARGED AGAINST A DRUG MANUFACTURER INNOCENT OF AND IN NO WAY CONNECTED WITH THE ALLEGED MISREPRESENTATION SO AS TO PRECLUDE IT FROM OBTAINING A SUMMARY JUDGMENT ON A STATUTE OF LIMITATIONS GROUND.

The demonstration of conflict between the decision below and the decision of this Court in Nardone V. Reynolds, 333 So.2d 25 (Fla. 1976) requires the realization of several basic points:

1. LEDERLE is not a health care provider and had no confidential relationship with the BOGORFFS.

2. LEDERLE is neither responsible for, nor in anywise linked with any charges of fraud, misrepresentation, or concealment leveled at Dr. KOCH and the UNIVERSITY. To necessarily suggest that there is responsibility on the part of the drug manufacturer for such a doctor's (alleged) conduct turns the "learned intermediary" doctrine on its head.[3]

3. There has been no suggestion that LEDERLE in any capacity hindered or kept the BOGORFFS from having full and complete access to their son's medical records at all times from 1971 through December of 1982, when this suit was filed.

The law in Florida on the two major points which compel a

[3] The only suggestion in the District Court of any even liability-producing conduct on the part of LEDERLE was an alleged misstatement in a Physicians' Desk Reference description of the drug published well prior to the injections in question. There is no allegation nor proof that that had any part to play in any post-injection fraud or concealment.

summary judgment for LEDERLE is found in Nardone v. Reynolds, 333 So.2d 25 (Fla. **1976).** Although Nardone case addressed a number of issues highly pertinent to the Third District's decision below, the two primary points are this Court's conclusion 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, the contents of which are not known should be imputed to the parents, etc.

333 So.2d at 34, and

> The philosophy behind the exception to the statute of limitations of fraudulent concealment and 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. The purpose of the statutes of limitations are to protect defendants against unusually long delays in filing of lawsuits and to prevent unexpected enforcement of stale claims concerning which interested persons have been thrown off guard for want of reasonable prosecution.

333 So.2d at **36.** See also Buck v. Mouradian, 100 So.2d **70** (Fla. 3d DCA **1958).**

The record before this Court, as spelled out in the decision of the Third District, is that by no later than July, **1977,** the medical records of BOGORFF clearly contained the opinion of at least one physician that Methotrexate was implicated in the minor BOGORFF's condition. Since the knowledge of the contents of these medical records is imputed as a matter of law to the BOGORFFS and since the records, if reviewed in **1977** demonstrated the possible link of Methotrexate to the boy's condition, and since these letters were in the minor BOGORFF's records more than four years prior to the filing of the products liability case against LEDERLE, the BOGORFFS' moment of trauma and moment of

realization coincided such as to put them on legal notice that they should explore the possibility of a suit against LEDERLE within four years from that date. They did not.

The only plausible reason for the Third District's avoiding this decision is that that court imputed to LEDERLE the same estoppel effect that Dr. KOCH's alleged misrepresentation had on his statute of limitations defense. This conclusion is inescapable because, of the page and one-half devoted in the opinion below to LEDERLE, almost all of it is addressed to a statute of repose issue which was never argued or raised by LEDERLE in the court below. The inclusion of it in the Third District's decision can only mean that the court was insuring that twelve years had not passed from the delivery of the drug to Dr. KOCH. Otherwise the fraudulent concealment it was ascribing to LEDERLE would be barred by the statute of repose.

What the Third District has done is to turn the learned intermediary doctrine on its head and hold a drug manufacturer responsible for a doctor's alleged misrepresentation to a patient concerning a pharmaceutical product administered by the doctor. See Felix v. Hoffmann-LaRoche, Inc., 540 So.2d 102 (Fla. 1989). This reverse imputation of vicarious responsibility is absolutely unprecedented in Florida law.

As this Court carefully set out in Nardone, the reason fraudulent concealment or misrepresentation by a doctor precludes the utilization of a statute of limitations defense by that doctor is that "courts will not protect defendants who are directly responsible for the delays of filing because of their

own willful acts." 333 So.2d at 36. Whatever the law may be with respect to the alleged conduct of Dr. KOCH and his employer, LEDERLE was innocent of any fraudulent concealment and has in fact not even been alleged to have been involved in any way with it. Other than supplying the medication which the Plaintiffs claim was used in this case, LEDERLE was neither alleged nor proven to have had any involvement after the administration of the Methotrexate, with any alleged misrepresentation or concealment, nor did LEDERLE in any way restrict or inhibit the access of the BOGORFFS to their medical records at any time from 1972 through December of 1978 (four years prior to the complaint being filed).

In short, the decision of the Third District is in direct, express, and jurisdictional conflict with this Court's decision in Nardone because the BOGORFFS' medical records were at all times fully available to them, because those records implicated Methotrexate as a cause or a possible cause,[4] because the BOGORFFS are charged as a matter of law with the contents of those records, and because LEDERLE was in no way connected with or responsible for any alleged conduct which might estop some other defendant from asserting a statute of limitations defense. This Court should exercise its discretionary jurisdiction and proceed to merit briefing on this petition.

**POLICY REASONS FAVORING DISCRETIONARY REVIEW**

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[4] A plaintiff, of course, does not need to know of a valid claim to a legal certainty, because that doesn't occur until after a trial. See Steiner v. Ciba-Geigy Corp., 364 So.2d 47 (Fla. 3d DCA 1978).

As this Court clearly stated in Nardone, the philosophical basis for estopping a defendant in a fiduciary relationship from asserting the defense of statute of limitations in the face of fraudulent concealment by that defendant is that no wrongdoer should be allowed to benefit from his own wrong; that is, no defendant should be allowed to directly cause a plaintiff to delay the filing of an action against it and then be able to assert successfully the statute of limitations as an affirmative defense.

Those policy reasons, however, are absent where, as here, the defendant is a drug manufacturer, legally and physically separated from the plaintiff in all respects. Were the rule and reason of the Third District decision to be allowed to continue, the learned intermediary doctrine would not only be stood on its head, it would create a reverse conduit for drug manufacturer liability where no vicarious relationship with the doctor exists.

By taking discretionary review in this case, the Court will have an opportunity to restore the Nardone rule and again bring Florida in line with those cases which consistently hold that only the defrauding or misrepresenting party is estopped from raising the defense of statute of limitations. See, e.g., Burns v. Hartford Hospital, 192 Conn. 451, 472 A.2d 1257 (1984) ("the act of an independent intervening third party, who may have misled the plaintiff about the injury's seriousness or even compounded the harm by failing to render effective treatment, cannot extend the hospital's liability beyond the statutory limitation."); Stoneman v. Collier, 94 Mich. App. 187, 288 N.W.2d

105 (1979) ("fraudulent concealment act does not operate against persons who do not participate in the concealment"); Smith v. Sinai Hospital of Detroit, 152 Mich. App. 716, 394 N.W.2d 82 (1986) ("a defendant cannot be penalized for the fraudulent acts of third parties in concealing the defendant's identity where the defendant played no part"); Greenfield v. Kanwit, 87 F.R.D. 129 (S.D. N.Y. 1980) ("The purpose of the doctrine of fraudulent concealment is to prevent a party from profiting from his own wrong" (emphasis the Court's)); Smith, Miller & Patch v. Lorentzson, 254 Ga. 111, 327 S.E.2d 221 (1985) (under Georgia statute, alleged fraud of ophthalmologist as to a drug is not imputable to the manufacturer so as to toll the statute of limitation); Cato v. South Atlantic & Gulf Coast District of the International Longshoremens' Association, 364 F.Supp. 489 (S.D. Tex.), aff'd 485 F.2d 583 (5th Cir. 1973). See also 51 Am.Jur. 2d § 150, Limitations of Actions.

**CONCLUSION**

For all of the foregoing reasons, it is respectfully urged that this Court exercise its discretionary jurisdiction, order full merit briefing on this cause and, upon review, quash the decision of the Third District and reinstate the summary judgment in favor of the Defendant, LEDERLE LABORATORIES.

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