IN THE FLORIDA SUPREME COURT
TALLAHASSEE, FLORIDA

CASE NOS.: **74,797, 74,835, 74,863**
(consolidated)

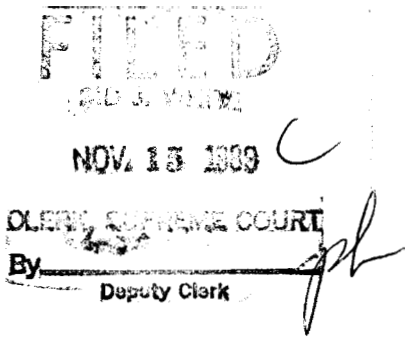
KJELL KOCH, M.D., UNIVERSITY OF MIAMI, LEDERLE LABORATORIES,

Petitioners,

vs.

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

Respondents.
_____/



RESPONDENTS' JURISDICTIONAL BRIEF

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PREFACE

This is a jurisdictional brief in a consolidated matter involving three cases. One brief was filed by petitioners, University of Miami and Dr. Koch, and a second brief was filed by Lederle Laboratories. The sole issue is whether conflict exists.

STATEMENT OF THE CASE AND FACTS

All of the facts are taken from the opinion of the Third District Court of Appeal as included in the appendix to the opposing briefs. (A **1-25**). Adam Bogorff was a three and a half year old child diagnosed as having leukemia. In June of **1970**, the Bogorffs began treatment with Dr. Koch of the University of Miami and Jackson Memorial Hospital. This treatment continued through **1978**. (A **1,7** and footnote **8**). Adam's leukemia was in remission when Dr. Koch began his treatment which included intrathecal injections of methotrexate along with cranial and spinal radiation. This treatment was to have catastrophic affects on Adam Bogorff. The child sustained encephalopathy with irreversible anatomical changes. By **1979**, Adam was a total quadriplegic, functioning at an infantile level, with brain damage, an absence of speech, and no chance for improvement. The treatment by Dr. Koch was negligent and Lederle Laboratories had indicated in the Physician's Desk Reference that intrathecal use of methotrexate was appropriate, despite the fact that the Federal Drug Administration had not approved such treatment. The negligence in question occurred in January of **1972**.

The parents, while attempting to cope with Adam's leukemia, now faced an ever worsening parade of medical horribles. The child slipped in to a coma and was unable to walk or talk. Dr. Koch said this was due to his leukemia or a viral infection. An outside neurosurgeon was called in and also said the condition was due to the spread of leukemia to the brain. Mr. Bogorff was a librarian and randomly gathered articles dealing with leukemia and provided them to Dr. Koch. Although he had not read it, in the summer of **1972,** Mr. Bogorff took an article to Dr. Koch which specifically dealt with the dangers of intrathecal use of methotrexate in a combination with radiation therapy. Dr. Koch read this article in the presence of Mr. Bogorff, threw it in a trash can, and strongly stated that his treatment had nothing to do with Adam's worsening medical condition.

Because of the absence of any improvement, **the** parents continued taking their child to other doctors. Some of these doctors wrote Dr. Koch advising of the possible connection between methotrexate and Adam's condition.

Despite Dr. Koch's continued care for the child through **1978** and his continual fiduciary duty to disclose relevant medical information, Dr. Koch never told the parents what had caused their son's ever worsening condition.

When the parents sought the medical records from Jackson Memorial Hospital, they were told that there were no records. It is these records which the defendants now say the parents had constructive notice of.

In July of 1977, Adam was taken to a nutritional specialist for a complete nutritional and metabolic study. The head of the department, Dr. Zee, wrote two letters on July 18, 1977. The letter to Mrs. Bogorff complimented her on her excellent care of Adam and made no mention of the irreversible state of Adam's medical condition. This letter of July 18, 1977 did not mention methotrexate. On the same day, Dr. Zee wrote a further letter to Dr. Winick where he noted the irreversible encephalopathy due to intrathecal methotrexate. This second letter was not seen by the Bogorffs and never mentioned to them by any of the physicians.

Finally, in 1982, under crushing financial obligations due to care for their son, the Bogorffs applied for financial aid through the Social Security Administration. In that process, all of the boy's medical records were obtained and the parents first became aware of the second Zee letter of July 1977. Suit was filed shortly thereafter in 1982.

The negligence in question occurred in January of 1972 and the statute of limitations applicable at that time was §95.11(4), Florida Statutes (1971) which provides:

(4) within four years. - any action for relief not specifically provided for in this chapter.

There was no statute of repose in this statute of limitations. This statute of limitations, governing the negligence in this case, existed from 1943 up through July of 1972 when it was amended by Chapter 71-254.

The trial court ruled by summary judgment that all claims were time barred. The Third District Court of Appeal reversed, finding that the case was governed by Section 95.11(4) which was a four year statute of limitations without a statute of repose. The Third District found factual issues as to (1) fraudulent concealment and (2) when the parents should have become aware of the accrual of the cause of action.

SUMMARY OF ARGUMENT

There was substantial evidence of fraudulent concealment on the part of Dr. Koch and numerous other medical professionals. There were obvious issues as to when the Bogorffs should have become aware of their cause of action particularly in the face of the fraudulent concealment and gross abuse of the fiduciary relationship between the physician and patient. Dr. Koch treated this child for seven years while his condition gradually worsened. He knew of his own negligence from the beginning and continued active care for the child without disclosing it. In fact, he

actively concealed it and also did not furnish the parents with the medical reports he received from other doctors.

This case is governed by §95.11(4) as it existed and applied in January 1972.

The case is not governed by **§95.11(4)(b)** as enacted effective May 20, 1975 in the Medical Malpractice Reform Act of 1985. Carr v. Broward County, 541 So.2d 92 (Fla. 1989) concerns medical negligence which occurred after May 20, 1975 and thus after the effective date of the Medical Malpractice Reform Act which initially created the statue of repose. The overpowering public necessity which required the 1985 Reform Act is not applicable to the medical negligence in question here which is governed by an entirely different statute.

No conflict exists with Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976). In fact, Nardone was relied upon by the Third District in the Boqorff decision.

ARGUMENT

ISSUE

WHETHER THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IS IN CONFLICT WITH Carr v. Broward County, 541 So.2d 92 (Fla. 1989) OR Nardone V. Reynolds, 333 So.2d 25 (Fla. 1976).

There is no conflict with the Carr opinions as issued by this court or by the Fourth District Court of Appeal. Further, Phelan v. Hanft, 471 So.2d 648 (Fla. 3d DCA 1985), is not applicable. The important dates as to the negligence, discovery of the cause of action, and the filing of suit can be summarized in regard to the three cases as follows:

	Bosorff	Carr	Phelan
NEGLIGENCE	January 1972	December 1975	August 1976
DISCOVERY	February 1982	?	August 1981
SUIT	December 1982	September 1985	August 1983

It is obvious from the above that the negligence in Carr and Phelan occurred after May 20, 1985; the effective date of the Medical Malpractice Reform Act of 1975. Further, the negligence in Bosorff occurred substantially prior to the Malpractice Reform Act of 1975. What the opposing briefs refuse to recognize is that the statute of limitations in this case as specifically found by the Third District Court of Appeal was §95.11(4) which provided a four year statute of limitation with no statute of repose. The cause of action accrued on the date of discovery or when the

plaintiff should have discovered the cause of action under the circumstances. Factually, the date of discovery was in **1982** when the Dr. Zee report (which had intentionally not been disclosed by the medical professionals) was finally seen.

This may well be the last medical malpractice case in existence governed by the statute as it existed prior to the first amendment thereto which **was** effective July **1, 1972.** The malpractice statute of limitations existed unchanged from **1943** up to July **1, 1972** when the first amendment occurred pursuant to Chapter **71-254.** Subsequent amendments occurred in Chapter **74-382** and the Malpractice Reform Act in Chapter **75-9.**

It is obvious that the statute of repose, which became effective May **20, 1975,** applied to the negligence in Carr and in Phelan which occurred after that date. The statute simply has no application to the Boqorff case.

The Carr opinion was based on the legislative finding of an "overpowering public necessity" and a medical malpractice insurance crisis of the "past few **months."** This was a current crisis. The medical negligence in both Carr and Phelan occurred after the effective date of the statute and within the crisis. The Boqorff negligence occurred before the statute and not within the crisis period.

The amendments to the medical malpractice statute of limitations have been held not to have retroactive effect. As cited by the Third District, see 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).

There is no conflict with the Carr decision because a totally different statute applies due to the date of the medical negligence. Thus, review as requested by Dr. Koch and the University of Miami should be denied.

Lederle Laboratories manufactured and disseminated the drug with an inappropriate PDR direction for intrathecal use. Lederle asserts conflict with Nardone v. Reynolds, supra, arguing that the Bogorffs were on notice of all of the medical reports and that Dr. Zee's July 17, 1989 letter was sufficient notice to support the summary judgment. Although the District Court opinion deals with the two letters written by Dr. Zee on the same date, the Lederle brief refuses to take notice of this fact. Whether a parent should realize that a physician would write one letter to the parent of a complimentary and vague nature simultaneously while writing another letter to a doctor pointing out irreversible brain damage due to the treating doctor's care, at least presents an issue of fact. Further, the Bogorffs tried to obtain medical reports and were told by the hospital that there were no records. Certainly,

this disappearance is a factual mystery. There are obviously no statute of repose considerations regarding Lederle Laboratories which asserts conflict only with Nardone. Whether applicable or not, the products liability statute of repose is 12 years.

In actuality, the Lederle brief is more a brief on the merits than it is a conflict brief. Six cases from outside the state of Florida are argued. Obviously, these arguments have no place in a jurisdictional brief. See Dodi Publishing Company v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980).

CONCLUSION

Conflict does not exist and review should be denied.

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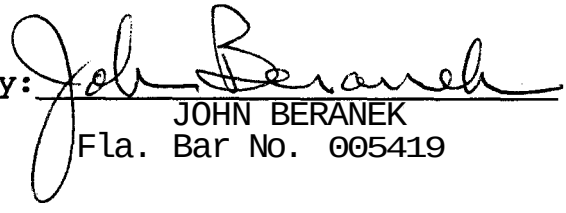
By: 
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