IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

v.

CASE NO. 74,835

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

Respondents.

RESPONDENTS' BRIEF ON THE MERITS

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PREFACE

This is a Respondents' Brief on the merits directed to the three separate briefs filed by Dr. Kjell Koch, the University of Miami and Lederle Laboratories. The appendix filed by the University of Miami will be referred to as [A.___]. The record on appeal before the Third District Court of Appeal will be referred to as [R.____]. The parties will be referred to by name. Each of the Petitioner's briefs incorporate the briefs filed by the other petitioners.

STATEMENT OF THE CASE AND FACTS

The opposing briefs leave out many of the facts that the District Court of Appeal found to be important. Since this is a reversal of a summary judgment, the detailed, but one-sided, factual analysis is rather surprising. The correct approach would be to construe the facts most strongly in favor of the Bogorffs/Plaintiffs.

The following facts are taken from the opinion of the Third District Court of Appeal contained at [A.1-25]. Adam Bogorff was a 3 1/2 year-old child who had been previously diagnosed and treated for leukemia. This is, quite obviously, a life threatening disease. In June of 1970, the Bogorffs began treatment with Dr. Koch of the University of Miami and Jackson Memorial Hospital. [A.7]. This treatment continued for eight years. [A.7]. At no time did Dr. Koch or the University of Miami ever disclose that the true cause of Adam Bogorff's serious medical condition was not his leukemia but was in fact Dr. Koch's treatment of the boy.

When Dr. Koch began his treatment, this physician chose to use intrathecal injections of methotrexate along with cranial and spinal radiation. This was a highly dangerous form of treatment and was not approved by the Federal Drug Administration. Lederle Laboratories had falsely published in the Physician's Desk Reference that intrathecal use of methotrexate had been approved by FDA. [A.17, footnote 6 and A.24, footnote 11).

The use of intrathecal methotrexate was to have catastrophic effects on Adam Bogorff. It was alleged that Dr. Koch's treatment was negligent as was the conduct of Lederle Laboratories in failing to give an adequate or accurate warning concerning the treatment. The child sustained encephalopathy and eventual irreversible anatomical changes. Finally, in 1979, Adam was a total quadriplegic functioning at an infantile level, with brain damage, an absence of speech and no chance for improvement.

The negligence in question by Dr. Koch occurred in January of 1972. [A.2]. In the early stages, The parents, while attempting to cope with Adam's leukemia, faced an ever-worsening parade of medical horribles. Subsequent to the last methotrexate, the child slipped into a coma and was unable to walk or talk. At this point, Dr. Koch told them that this was due to his leukemia or a viral infection. [A.2]. An outside neurosurgeon was consulted and also advised that Adam's condition was caused by the spread of leukemia to the brain. The parents did not know better and relied upon Dr. Koch who remained the treating physician. The child later recovered somewhat but then his condition continued to decline to the state he reached in 1979.

Although he had not read it, in the summer of 1972, Mr. Bogorff took a technical article from a British medical journal to Dr. Koch which specifically dealt with possible dangers of intrathecal use of methotrexate in combination with radiation therapy. Mr. Bogorff was a librarian and randomly gathered

articles dealing with cancer and leukemia and provided them to Dr. Koch. In the presence of Mr. Bogorff, Dr. Koch read this article and threw it in a trash can. Dr. Koch strongly stated that his treatment had nothing to do with Adam's worsening medical condition. The parents relied upon this statement and the previous statements that their son's ever-worsening medical condition was the result of his leukemia. During all the years of his treatment, Dr. Koch never told the parents the truth. Dr. Koch received numerous letters from other consulting physicians during this time indicating that his treatment was indeed the cause of the boy's condition. These letters were never disclosed to the parents.

Because of the absence of improvement, the parents continued taking their child to other doctors. Some of these doctors wrote Dr. Koch confirming that the boy's condition was a result of the prior rnethotrexate treatment. When the parents sought the medical records from Jackson Memorial Hospital, they were told that there were no records. [A.4]. The University of Miami, with whom Dr. Koch was associated, supervises the medical staff at Jackson Memorial Hospital and because Dr. Koch treated Adam at Jackson Memorial Hospital facilities, the child's medical files would be maintained at the hospital. [A.6]. The parents were simply unable to obtain these records from the hospital.

In July of 1977, Adam was taken to a nutritional specialist, Dr. Zee, at an out-of-state hospital for **a** complete nutritional and metabolic study. Dr. Zee was the head of the

department and on July 18, 1977, he wrote two separate letters describing Adam's condition. The letter to Mrs. Bogorff gave no indication that Zee had found any cause for Adam's condition other than that previously stated by Dr. Koch. In fact, 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 even mention methotrexate. It merely stated that the "details" had been sent to other doctors. On the same day, Dr. Zee also wrote a letter to another treating physician, Dr. Winick, where he noted the irreversible encephalopathy due specifically to intrathecal methotrexate. The letter to the parents was a misrepresentation by omission and the second letter was not seen by the Bogorffs and never mentioned to them by any of the physicians. The Bogorffs found this letter in 1982 in the process of making an application for Social Security benefits. This occurred under crushing financial obligations due to care for their son. In that process, all of the boy's medical records were obtained and the parents first became aware of the true cause of their son's condition. Suit was filed shortly thereafter in 1982.

The opposing briefs simply leave out the important and adverse facts. The Petitioners do not recognize that Dr. Koch treated Adam Bogorff for all the years through 1978. Thus, his misrepresentations of the cause of Adam Bogorff's condition continued for approximately eight years. Of course, the eventual

issue to be tried is the negligence of Dr. Koch and his choice of treatment. At present, the alleged negligence must be accepted as a fact.

The opposing briefs state as a fact that the connection between methotrexate and Adam's condition was "unclear at best" and that it was simply "a disagreement" among medical opinions. The briefs thus assert that Dr. Koch had no duty to tell the parents anything. Amazingly, the briefs next assert that the same "unclear connection" was *so* clear that the parents were on notice of the medical fact that intrathecal methotrexate caused their son's condition.

The briefs leave out the fact that, in July of 1972 when Adam was initially unable to walk or talk, Dr. Koch affirmatively stated that his condition was due to leukemia or a viral infection and that another consulting physician told the Bogorffs the same thing. This condition improved under continuing treatment but later declined to its irreversible state.

The briefs stress Dr. Zee's letter of July 18, 1977, directed to another doctor and claim that this letter put the Bogorffs on notice. The briefs do not recognize the existence of the second letter of the same date to the parents which was substantially misleading. The Third District Court of Appeal found this second letter to be important. Dr. Zee wrote one letter to the parents saying one thing and another letter to the doctors saying something else.

The briefs state as a matter of fact that the only concealment was Dr. Koch's throwing the article in the trash can in August of 1972. This was not the only concealment. Koch was guilty of concealment before and after the article incident by maintaining that the boy's condition was caused by the spread of his leukemia. Dr. Koch blamed the ever-worsening condition on the natural progression of the disease. In short, he told the parents there was nothing wrong with their son, other than his leukemia, which the doctor continued to treat. The doctor denied that the child had been injured by the treatment and the parents did not know otherwise.

All of the many letters were sent and received solely within the medical profession by the various doctors but never given or mentioned to the parents. Dr. Zee was certainly guilty of concealment. It was not as though these physicians simply told the parents nothing about the cause of their son's condition. At all times, the parents were told directly that the condition was due to leukemia or other causes but not due to Koch's own medical treatment.

The briefs state as a fact that all medical records were always available to the Bogorffs. The District Court found it noteworthy that when the Bogorffs asked Jackson Memorial Hospital for the medical records, they were told that none existed.

The negligence in question occurred in January of 1972 with the last injection of methotrexate. The statute of limitations applicable at that time was §95.11(4), Florida

Statutes (1971), which provided a four-year statute of limitations and no statute of repose. This statute begins to run only when the plaintiff should reasonably have become aware of either a distinct injury or negligent act.

This statute of limitations provision governed negligence and had existed from 1943 up through July of 1972. In 1972, it was amended in Chapter 71-254. The Third District Court of Appeal found that the case was governed by this four-year statute of limitations without a statute of repose. The Third District found factual issues as to fraudulent concealment and factual issues as to when the parents should have become aware of accrual of the cause of action.

SUMMARY OF ARGUMENT

The Third District Court of Appeal correctly ruled that issues of fact required reversal of the summary judgment based upon the statute of limitations in this medical malpractice case. Factual issues existed as to fraudulent concealment by the physician who actually treated the child and factual issues existed as to when the parents should have become aware of a distinct injury triggering the accrual of the cause of action. Unfortunately, the child already had leukemia and then became the victim of apparent irreversible encephalopathy. Dr. Koch continually maintained that the encephalopathy condition was the result of the leukemia rather than the result of his treatment in the form of radiation and intrathecal methotrexate. This misrepresentation went on for many years. The parents were not on constructive notice of everything of a technical nature in the medical records. Additionally, the doctors' fraudulent concealment as to the contents of those records makes the rule regarding notice inapplicable. Further, the records were unavailable from the hospital and the medical reports actually received by the parents were extremely misleading and false.

The District Court applied the correct four-year statute of limitations. This case predates any of the amendments to the statute of limitations which specifically recognized medical malpractice and treat it differently than other forms of negligence. There is no statute of repose applicable to this

case because no repose provision was present in the applicable statute.

The opinion by the Third District Court of Appeal is correct and review should be denied. The matter should proceed to trial on the factual issues concerning the statute of limitations and malpractice.

ISSUE ON APPEAL

WHETHER THE THIRD DISTRICT COURT OF APPEAL ERRED IN (1) APPLYING THE FOUR-YEAR STATUTE OF LIMITATIONS CONTAINED IN §95.11(4), FLORIDA STATUTES (1971), TO THE NEGLIGENCE WHICH OCCURRED BEFORE JULY OF 1972 AND (2) IN FINDING THAT ISSUES OF FACT EXISTED CONCERNING **(a)** FRAUDULENT CONCEALMENT BY THE DOCTORS AND (b) WHEN THE PARENTS SHOULD HAVE BECOME AWARE OF THE ACCRUAL OF A CAUSE OF ACTION.

ARGUMENT

WHETHER THE THIRD DISTRICT COURT OF APPEAL ERRED IN (1) APPLYING THE FOUR-YEAR STATUTE OF LIMITATIONS CONTAINED IN §95.11(4), FLORIDA STATUTES (1971), TO THE NEGLIGENCE WHICH OCCURRED BEFORE JULY OF 1972 AND (2) IN FINDING THAT ISSUES OF FACT EXISTED CONCERNING (a) FRAUDULENT CONCEALMENT BY THE DOCTORS AND (b) WHEN THE PARENTS SHOULD HAVE BECOME AWARE OF THE ACCRUAL OF A CAUSE OF ACTION.

The Pre-1972 Limitations Period

The Third District Court of Appeal correctly held that the statute of limitations applicable to this case was §95.11(4), Florida Statutes (1971). This was the statute of limitations which predated the independent recognition of medical malpractice as a very specialized cause of action. The statute simply provided a four-year limitations period. There is no statute of repose included within this statute of limitations.

The medical malpractice statute of limitations has been the subject of numerous amendments. A simplified chart of its progression is as follows:

> §95.11(4) - four year statute of limitations and no statute of repose. Effective from 1943 through July 1, 1972.
>
> §95.11(6) - two year statute of limitations and no statute of repose. Effective July 1, 1972, Chapter 71-254. Foley v. Morris holds no retroactive application.
>
> §95.11(4)(b) - two year statute of limitations and no statute of repose. Effective January 1, 1975, Chapter 74-382.
>
> §95.11(4)(b) - two year statute of limitations and four year/seven year statute of repose. Effective May 20, 1975, Chapter 75-9 Medical Malpractice Reform Act of 1975. Dade County v. Ferro holds no retroactive application.

The medical negligence here occurred late in 1971 and in January of 1972. At this point, the statute of limitations was §95.11(4), Florida Statutes (1971), which provided a four-year statute of limitations and no statute of repose. The four-year statute did not begin to run until the plaintiffs should have reasonably learned of the accrual of their cause of action. In a complex medical situation where the child had both leukemia and encephalopathy, the question of when the parents reasonably should have become aware that their already seriously ill child had been further traumatized and sustained a further distinct injury or illness is problematic to say the least.

The statute of limitations applicable here was the simple four-year statute in existence at the time of the negligence. Plaintiff became aware of their cause of action in 1982 and filed suit that year. This statute, §95.11(4), applies because Foley v. Morris, 339 So.2d 215 (Fla. 1976), and Dade County v. Ferro, 384 So.2d 1283 (Fla. 1980), specifically So hold.

Both of these cases involved medical malpractice occurring in 1971 and both cases directly hold that §95.11(4) is the applicable statute. Foley also holds that the 1972 amendments to the statute of limitations are not applicable and Ferro holds that the 1975 amendments to the statute are not applicable. Under these two decisions by this Court, the applicable statute of limitations is §95.11(4), as it existed in 1971 providing for a four-year statute and no absolute statute of

repose. The two later statutory amendments may not be retroactively applied.

The opposing briefs adopt a rather convoluted argument that Foley and Ferro have both been overruled by implication or that this Court should adopt a new attitude and overrule those cases in the present dispute. This dispute is indeed a very old medical malpractice case. It is old because of the conduct of the medical professionals involved who are guilty of aggravated conduct in concealing the true cause of this child's severe medical condition.

Petitioners argue that this Court's attitude has now changed regarding medical malpractice and the statute of repose. Petitioners contend the statute of repose in the Medical Malpractice Reform Act of 1975 bars this claim. Carr v. Broward County, 541 So.2d 92 (Fla. 1989), is cited and relied upon. Neither Carr nor Phelan v. Hanft, 471 So.2d 648 (Fla. 3d DCA 1985), are applicable to this case and neither case requires application of the 1975 amendment to the statute.

The negligence in the Bogorff case occurred in January of 1972 and the negligence in the Carr case occurred in December of 1975. The negligence in Phelan occurred in August of 1976. The effective date of the Medical Malpractice Reform Act of 1975 was May 20, 1975. The Bogorff negligence occurred substantially prior to the effective date of this statute whereas the negligence in Carr and Phelan occurred subsequent to the effective date of this legislation. The 1975 Reform Act was the first time

that a statute of repose was created regarding medical negligence.

This Court's 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 1975 statute and within the crisis period. The Bogorff 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. See the Ferro decision, the Foley decision and Hellinger v. Fike, 503 So.2d 905 (Fla. 5th DCA 1986), rev. denied, 508 So.2d 14 (Fla. 1987). The Third District Court of Appeal correctly applied the four-year statute of limitations which contains no statute of repose.

This Court's recent decision in Barron v. Shapiro, 15 FLW S340 (Fla. June 14, 1990), pending on rehearing, does not require a different result. Barron holds that "the limitation period commences when the plaintiff should have known either of the injury or the negligent act." In Barron, the plaintiff entered the hospital for colon surgery and following surgery developed an infection. He eventually recovered from this but later his eyesight began to deteriorate and approximately four months later became blind. Suit was filed against the operating physician whose treatment of the patient had terminated approxi-

mately a month and a half after surgery. This Court held that the statute of limitations began to run at the point that the patient knew, without question, that he had sustained an injury. This date was held to be the date of blindness. Obviously, blindness is a completely distinct injury.

Adam Bogorff had, according to Dr. Koch, a life threatening and progressive disease in the form of infantile leukemia. The parents were told by Dr. Koch that the child's ever-worsening physical condition was merely the result of the progression of his leukemia. Under these facts, the parents were not aware of either a distinct injury or the negligent act which produced it. In short, they were told that their child had not been further injured or traumatized. They were told that he merely had the same condition he had always had when in fact his ever-worsening physical state was attributable to the treatment rather than the disease for which he was being treated.

In Barron, it was obvious that blindness was not a result of stomach surgery. On the other hand, loss of hair is a common result in cancer radiation therapy cases. Dr. Koch said that Adam Bogorff's loss of hair and all of his other much worse symptoms were the result of the progression of his leukemia condition. Thus, the parents did not and should not have recognized these conditions as an "injury" so as to begin the running of the period of limitation.

This case is governed by Section 95.11(4), Florida Statutes, as it existed prior to 1972. This Court's Barron

opinion construes the statute as subsequently amended.

This case is quite similar to Moore v. Morris, 475 So.2d 666 (Fla. 1985), which was reaffirmed in Barron. There a child was brain damaged at birth but the doctors gave assurances of the baby's good health. The mother was told specifically that the child had suffered no injury when it became necessary to cut open the child's chest to insert a breathing tube. This is exactly the situation presented here where the Bogorffs were told that their son suffered no damage as a result of the intrathecal methotrexate treatment.

The cause of action here 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 Zee report was finally seen by the plaintiffs. This report was intentionally not disclosed by the medical professionals (both the writer and the recipient) involved in the case.

This may well be the last medical malpractice case in existence which will be governed by the original unamended statute. The negligence here occurred in January of 1972 and is governed by the early statute.

Issues of Fact Re Fraudulent Concealment and Discovery of the Cause of Action

Relying upon Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976), defendants argue that the plaintiffs are on notice of every single thing in the medical records and that these medical records absolutely proved that intrathecal methotrexate was the

cause of Adam Bogorff's serious medical condition. They argue that, if the parents had just obtained, read and understood all of the medical records, they would have known that it was -- not leukemia, not the spread of cancer to the brain and not a viral infection which caused their son's condition. These were the causes stated by Dr. Koch for a period of eight years. Defendants contend that notwithstanding these statements, the parents were on notice of everything in the medical records. Amazingly, the defendants then argue that as a matter of law Dr. Koch did nothing wrong and that it was merely a divergence of medical viewpoints or a situation of alternative medical opinions. On the one hand, defendants argue that Dr. Koch should be excused from failing to read and understand the medical reports he received but that the parents were on notice of those same medical reports and required to understand them as a matter of law.

The Nardone v. Reynolds decision is clearly distinguishable from the facts presented here. In Nardone, the plaintiff was admitted to the hospital in January of 1956. A diagnostic procedure was performed in February and negligence in that procedure rendered the plaintiff comatose, blind and irreversibly brain damaged. The Nardones did not bring suit until May of 1971. Summary judgment was entered in favor of the defendants based on the statute of limitations. This court held on pages 35, 36 and 39 as follows:

> It is undisputed that defendants did not engage in conduct of any nature which had the

> effect of hindering plaintiff from consulting other physicians, or the hospital records or from becoming aware of the facts so as to prevent them from bringing an action. There was no affirmative misrepresentation to the appellants as to the cause of the infant's condition.
>
> * * *
>
> Sub judice, no fraudulent means to conceal were utilized by appellees, and so the question becomes whether non-disclosure by the alleged practitioners of possible causes of the infant's decerebrate condition constitutes concealment sufficient to toll the statute, and whether there was a duty to disclose the possible or likely causes where there was no request for such information.
>
> * * *
>
> Where an adverse condition is known to the doctor or readily available to him through efficient diagnosis, he has a duty to disclose and his failure to do so amounts to a fraudulent withholding of the facts sufficient to toll the running of the statute. (Emphasis supplied)

See also Schafer v. Lehrer, 476 So.2d 781, 783 (Fla. 4th DCA 1985), where the court held:

> Even if Dr. Lehrer did not affirmatively prevent his patient from obtaining her records, given the fiduciary nature of the doctor-patient relationship, the doctor's duty extends beyond nonconcealment. See Nardone v. Reynolds . . . .

As to the argument that the plaintiffs were on notice of everything in the medical records, it is surprising that none of the defendants deal with the rationale of the Third District's decision on this issue. The District Court did not avoid the issue -- it was specifically addressed. Five reasons were given

for the Court's conclusion that notice of the medical records was not a proper basis for the summary judgment.

(1) The doctor misrepresented both the cause and the condition.

Here, the Bogorffs were not on constructive notice of everything in the medical records because the doctors fraudulently misrepresented the cause of the medical condition and further misrepresented the actual state of the boy's condition. Dr. Koch continually said that the condition was due to leukemia or some other cause such as an infection. He continued to treat Adam for leukemia and for his other conditions supposedly caused by the leukemia. Where there is such a fraudulent misrepresentation, the rule concerning notice of medical records is not applicable. At page 1226, the Third District stated as follows:

> A plaintiff who lacks actual knowledge is deemed to have constructive notice of a negligent act disclosed by the contents of obtainable hospital and medical records . . . However, when defendants fraudulently conceal or misrepresent their negligence, the statute of limitations does not begin to run until plaintiff is able to discover the negligence.

In Almengor v. Dade County, 359 So.2d 892 (Fla. 3d DCA 1978), plaintiff alleged that the defendant hospital negligently delivered her baby and a hospital employee thereafter negligently cared for the baby resulting in brain damage. The Third District reversed a summary judgment based on the statute of limitations because there was an issue of fact as to whether plaintiff was on notice that her baby was injured during birth. There was

evidence that plaintiff knew her baby was born mentally retarded but that was held not to put plaintiff on notice as a matter of law that the baby was injured during birth as opposed to having a congenital defect without any birth trauma. In addition, a nurse at the hospital allegedly told the plaintiff that the baby would be only slightly retarded and not to worry about it. The Third District held that, if an employee of the hospital had engaged in active concealment of the true condition of the plaintiff's baby, such active and successful concealment would toll the running of the statute of limitations. Further, the court held that, if the doctors failed to inform the plaintiff, such non-disclosure, resulting in a successful concealment, would also toll the running of the statute of limitations.

In short, the rule of the notice as to all medical records is not applicable when the doctor sits with those records in his file and misrepresents their content to the patient or his parents. This is precisely the situation present here and the opposing briefs do not even recognize that the District Court herein has so ruled.

(2) Lack of sophistication and a grave medical crisis.

The District Court recognized that Mr. and Mrs. Bogorff was faced with a grave medical crisis concerning their son's leukemia. This was a life threatening condition for which he was treated with extraordinary therapeutic measures including methotrexate and radiation. When Dr. Koch chose to inject methotrexate into the child's spine, the child was eventually

rendered a hopeless and irreversible brain damaged being. When the parents first asked Dr. Koch about it, he said that it was the spread of cancer to the brain. Dr. Koch treated this child for many years and never told the parents the real cause of the condition. There has yet to be a trial where the plaintiffs will be entitled to offer proof of this medical malpractice. The District Court noted the grave medical crisis and the lack of medical sophistication on the part of these parents. They are not to be judged with the degree of medical expertise which the opposing briefs assume. Again, the opposing briefs disregard the above principle of law as specifically applied by the District Court's opinion.

(3) The hospital records disappeared.

The opposing briefs all argue that all of the medical records were readily available to Mr. and Mrs. Bogorff. The opposing briefs again do not bother to recognize the importance of the fact that, when the Bogorffs sought to obtain the hospital records from Jackson Memorial Hospital, they were told that there were none. The District Court commented on this stating:

> The record discloses that the University of Miami may have been culpable in its own right for the Bogorffs' inability to discern the truth about Adam's condition: When the Bogorffs requested Adam's medical records from Jackson Memorial Hospital, they were told there were none.

At the very least, the absence of such records totally negates the argument that the Bogorffs were on notice of the records.

(4) Continuous misrepresentation.

Dr. Koch's treatment continued for an extended period and at no point did he ever disclose the true cause of Adam's condition or indeed that Adam even had a condition other than as caused by the leukemia. Although Dr. Koch received numerous letters and reports condemning intrathecal methotrexate treatment, he continued to maintain his posture that he was merely treating the boy for an ever-worsening leukemia condition.

(5) Misleading medical reports.

Perhaps the most startling omission from all three opposing briefs relates to the fact that Dr. Zee wrote two letters rather than merely one on July 18, 1977. Again, the District Court of Appeal found this fact to be important and the opposing briefs simply choose to disregard it. Dr. Zee sent a very complimentary letter to Mrs. Bogorff commending her on her excellent care for Adam. The "letter to Mrs. Bogorff gave no indication that he had found any cause for Adam's condition other than that postulated by Dr. Koch." At the same time, on the same day, Dr. Zee wrote a letter to Dr. Winick stating that the boy had "encephalopathy with irreversible anatomical changes possibly secondary to radiation and intrathecal methotrexate." The report went on to say that the boy's entire severe medical condition was due to the methotrexate.

Dr. Zee's letter to Mrs. Bogorff did indicate that the "details" had been sent to the physician. Amazingly, the omitted detail was the fact that Dr. Koch's intrathecal use of

methotrexate in combination with radiation had caused the boy's condition. Dr. Zee simply left out this "detail" and no doctor ever chose to disclose this "detail" to the parents. A factual issue is presented as to whether or not the Bogorffs should have suspected that Zee's letter to them was misleading and should have gone and asked to review the "details" in the report to another doctor. A jury should be allowed to judge this medical conduct. The opposing briefs pretend there was only one letter written on July 18.

As to Lederle Laboratories, the issue remains the same. Lederle's products liability is governed by a four-year statute of limitations and this limitation period begins to run when the Bogorffs should have become aware of the accrual of their cause of action. The District Court again addressed this issue and stated that the statute of limitations in a products liability action begins to run only when the "moment of trauma" and the "moment of realization" have occurred. Citing Steiner v. Ciba-Geigy Corp., 364 So.2d 47 (Fla. 3d DCA 1978), cert. denied, 373 So.2d 461 (Fla. 1979). The District Court held that genuine issues of fact existed as to when the Bogorffs' moment of realization occurred. The Court concluded as follows:

> The injury Adam sustained, which the Bogorffs now link to the intrathecal injection of methotrexate, was not easily distinguishable from the leukemia he suffered.

The issue as to Lederle Laboratories is when the Bogorffs became or should have become aware of the accrual of their cause of action. Lederle is not entitled to assume that

the misrepresentations by the doctors in this case never occurred. In fact, although Lederle may not be responsible for the conduct of the various medical professionals, the fact remains that the statute of limitations issue is dependent upon when, in fact, the parents of this severely ill child became aware that the medical treatment and the drug misrepresented by Lederle Laboratories resulted in a new and distinct injury to the child.

Summary judgments should be cautiously granted in negligence and malpractice cases. Again, Moore v. Morris, supra, is applicable. The parents of the infant were aware that an emergency situation existed at birth but such knowledge without more was insufficient to impute notice of injury or negligence to parents. Only in the total absence of any genuine issue of material fact may a summary judgment be upheld in this sort of situation.

This is a reversal of a summary judgment and there has never been a trial. The parents have been litigating since 1982. Eight years have elapsed and they are still at the starting gate. The case should be returned to the trial court to proceed with a factual determination of the numerous issues regarding the statute of limitations which must be tried along with the proof of malpractice.

CONCLUSION

The opinion of the Third District Court of Appeal is correct. Review should be denied and the matter remanded to the circuit court for trial.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail to SHELLY H. LEINICKE, ESQUIRE, Wicker, Smith, Blomqvist, Tutan, O'Hara, McCoy, Graham & Lane, Post Office Drawer 14460, Ft. Lauderdale, FL 33302; JON E. KRUPNICK, ESQUIRE, Krupnick, Campbell, Malone & Roselli, P.A., 700 S. E. Third Avenue, Suite 100, Ft. Lauderdale, FL 33316, ROBERT McINTOSH, ESQUIRE, Fleming, O'Bryan & Fleming, Post Office Drawer 7028, Ft. Lauderdale, FL 33338; PAUL L. REGENSDORF, ESQUIRE, Fleming, O'Bryan & Fleming, Post Office Drawer 7028, Ft. Lauderdale, FL 33338; and A. BLACKWELL STIEGLITZ, ESQUIRE, Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A., 25 W. Flagler Street, Suite 501, Miami, FL 33130, this 22ND day of June, 1990.

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HTD/41601brief