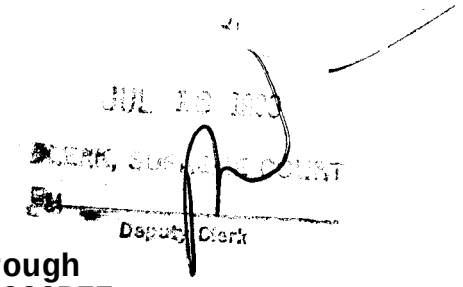
DA 9-6-90 #7

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 74,797
CASE NO.: 74,835
CASE NO.: 74,863



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, UNIVERSITY OF MIAMI'S, REPLY BRIEF ON THE MERITS

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I. REPLY TO STATEMENT OF THE CASE AND FACTS

Respondents chastise the Petitioners for an alleged failure to discuss the facts in the case in the light most favorable to them and assert that petitioners have left out numerous facts. However, in response to petitioners' briefs, respondents merely rely upon the majority opinion in the District Court of Appeal and do not make any independent reference to the record on appeal in this case. Although the decision of the Third District is necessary to this appeal, this Court is entitled to review the entire record and is not obligated to rely upon those facts found by the majority of the Third District. Indeed, there were additional facts noted by the dissent in the Third District decision, which were applied to the law to reach a different conclusion. The question of whether the Third District has misapplied prior precedent, including this Court's Nardone and Carr decisions is the integral issue in this appeal, and respondents' reliance on the facts found by the Third District's majority, although understandable in light of the favorable ruling obtained by the Respondents in the District Court, is not binding on this Court.

In any event, a review of the record in this case reveals that the BOGORFFS essentially overstate their position herein, even when viewing the evidence in their favor. Specifically, although Dr. Koch may have been the child's primary treating physician for purposes of his leukemia treatment in Miami, the parents were never precluded from taking their child to other health care practitioners, independently chose other physicians to treat the child both prior and subsequent to Dr. Koch's care, and always had access to the records

of these physicians, the contents of which they now claim was concealed from them.

Dr. Winick was retained as the child's pediatrician immediately after relocating to South Florida and prior to ever approaching Dr. Koch or the UNIVERSITY OF MIAMI.

After Dr. Koch suggested that the child's deteriorating condition was the result of a spread of his leukemia to the brain, he also stated that he could not know the exact cause of the child's condition without a brain biopsy. The BOGORFFS were concerned about this and concerned with Dr. Koch's care in general and independently consulted two neurosurgeons, Dr. Geisecke and Dr. Cullen, who confirmed Dr. Koch's diagnosis. Finally, the BOGORFFS also took their son to St. Jude's Hospital under the care of Dr. Zee, who was also not affiliated with the University in any way.

Furthermore, the BOGORFFS assert that Petitioners have taken contrary positions by asserting that the connection between the child's condition and Methotrexate was only a possible cause but then arguing that if the parents had reviewed the medical records they definitely would have determined that the child's condition was related to Methotrexate. BOGORFF's Brief at **5.** However, this is misconstruction of the UNIVERSITY's Brief and merely reveals the BOGORFFS' attempt to cloud the issues before this Court.

The BOGORFFS have admitted under oath, in affidavits filed with the Court, that Dr. Zee's July **18, 1977** letter **"incriminated** Methotrexate and radiation as the cause of Adam's brain damage" (R. **563-574A** Exhibit B and C) and put them on notice as to a potential cause of action for malpractice. Dr. Zee is not a defendant in this

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action, is not affiliated with the UNIVERSITY, and was specifically sought out and seen by the BOGORFFS independently. Furthermore, Dr. Zee's letter, which the BOGORFFS relied upon to identify the potential malpractice herein, was also sent to Dr. Winick, who is also unconnected to the UNIVERSITY and was also independently selected by the BOGORFFS as their child's pediatrician. The BOGORFFS were informed that this letter had been sent to the child's physicians and had access to this letter and the complete medical records at any time they wished.

The BOGORFFS implicitly recognize that these physicians are unconnectedto the defendants, but desperately assert that both Dr. Zee and Dr. Winickalsomisrepresentedthe child's condition and failed to disclose the true cause of that condition. This conspiracy theory merely reveals the flaws in the BOGORFFS' argument and does nothing to address the issues in this case. Clearly, neither Dr. Zee nor Dr. Winick misrepresented or concealedthe contents of their files, norshouldtheiractionsbeattributedtothedefendants in any event. There is nothing in this record to reveal that the BOGORFFS were ever precluded from reviewing Dr. Winick's files, Dr. Zee's files, Dr. Cullen's files, Dr. Geisecke's files, or any other medical records and their assertion that there was active concealment or misrepresentation which prevented them from discovering the records, which they now claim put them on notice, is unavailing.

Furthermore, Dr. Zee's letter, which in Mrs. BOGORFF's mind, incriminated Methotrexate, only stated that the child's condition was "possibly secondary to radiation and Endothecral Methotrexate" and not that it was definitely related. (R. 563-574A Exhibit L).

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This is no different than a 1977 letter from Dr. Winick to the University of Connecticut Tumor Registry indicating that the condition was related either to the child's leukemia or more likely to radiation or perhaps related to a folic acid deficiency (R. 563-574A, Exhibit K); a 1975 letter from Dr. Cullen noting that the encephalopathy was either related to leukemia, radiation, or perhaps folic acid deficiency accompanying the use of Methotrexate (R. 563-574A Exhibit I); a letter from Dr. Winick in May 1973 to Dr. Koch stating "whether this whole business is secondary to Methotrexate is difficult to ascertain" (R. 166) or another letter in Dr. Winick's file from Dr. Cheryulu noting a possible "distant or remote connection with Methotrexate toxicity." P8. (R. 563-574A, Exhibit H).

According to all of these physicians, the exact cause of the child's condition was unknown and Dr. Koch merely told the parents that he did not believe that the cause was Methotrexate. Although the BOGORFFS assert that Mr. BOGORFF did not read the article(s) he provided to Dr. Koch, his inquiry reveals that he must have at least read and understood the title. In fact, Mr. BOGORFF has admitted in answers to interrogatories that prior to presenting Dr. Koch with this article, he considered it a possibility that his son's symptoms could be due to the Methotrexate therapy. (Supplemental Record Exhibit A, Answer 18). In addition, this same article was presented to the law firm of Cohen & Cohen in 1979 when the BOGORFFS had the matter reviewed for a potential malpractice action.

The BOGORFFS' assertion that the Third District relied upon the fact that when the BOGORFFS requested medical records from Jackson Memorial Hospital they were informed that none were available, ignores

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the fact that Jackson Memorial Hospital, not the University, maintains their own records and equally ignores the fact that it was not until **1982**, a full **10** years after the child was originally treated, that the **BOGORFFS** requested the medical records from Jackson Memorial Hospital. Each of the aforementioned physicians records, which the **BOGORFFS** claim were concealed, are not part of the Jackson chart and were freely available at all times. Indeed, they were obtained, filed, and made a part of the record before this Court. Accordingly, the assertion that the Jackson Hospital Memorial Hospital records are now unavailable and, therefore, the **BOGORFFS** cannot be placed on constructive notice of their contents has no relevance to the issue in this case. In fact, it merely supports the argument that statutes of limitations and/or statutes of repose are intended to protect defendants from stale claims which, through the inaction of the plaintiff, are not brought for such a long period of time that witnesses become unavailable or necessary records are discarded or lost.

What is clear from the record is that the **BOGORFFS** were aware of the dramatic change in their child's condition immediately after the drug therapy was completed and of the permanent nature of these changes shortly thereafter; that the child was being treated on a prophylactic basis to prevent the spread of leukemia to the brain which at the time that the therapy was initiated was in remission; that the **BOGORFFS** had available to them medical journal articles and medical records that gave or would have given them the exact same information that they now suggest supports their claim; and that there was nothing between **1972** and **1982** which prevented the **BOGORFFS** from

discovering that which they now assert was concealed from them and, therefore, nothing to prevent them from timely filing the instant lawsuit. Whether this Court applies a four-year statute of limitations, a two-year statute of limitations, a four-year statute of repose or a seven-year statute of repose, it must conclude that this action is barred as a matter of law.

II. REPLY TO ARGUMENT

The BOGORFFS assert that the applicable statute of limitation, is the general four-year statute that was in effect prior to **1972**. They argue that the later amendments to this statute, which provided for a two-year statute of limitations and ultimately a four-year statute of repose do not apply. Both the statute of limitations and the statute of repose will be addressed in sections that follow, but regardless of what statute this Court applies, this action, which arose out of an incident occurring at the latest in January **1972** but was not filed until **1982**, is time barred pursuant to all applicable authority.

A. The Statute of Limitations and Nardone

Regardless of whether the **1972** statute of limitations or the laterversionsthereof apply, this Court has recentlyreiteratedthat its Nardone decision controlsthedetermination of when a particular statute of limitations begins to run. In Barron v. Shapiro, 15 FLW S340 (Fla. June 14, **1990**), this Court reaffirmed the principle that a statute of limitations for medical malpractice "begins to run when the plaintiff knew or should have know that either injury or negligence had occurred" and reversed the finding of the Fourth District Court of Appeal and the other Districts Courts that had incorrectly held

that both knowledge of a physical injury and knowledge that it resulted from a negligent act are necessary to trigger the statute of limitations. In the instant action, the BOGORFFS had knowledge of the injury in 1972 and knowledge of any possible cause of the injury (and thereby knowledge of the alleged negligence) either actually, or constructively, at the latest in 1977, more than four years prior to the filing of the instant action. Accordingly, under any interpretation of the applicable statutes this action is time-barred and the Third District's reversal of the trial court's ruling in favor of the defendants is in error.

Recognizing that discovery of the injury starts the statute running, which occurred at the latest in the summer of 1972, the BOGORFFS argue that this Court's Barron decision is inapplicable because there was a distinct and separate injury to the plaintiff in Barron, whereas the injury in the instant action was no different that the child's underlying condition.

However, when ADAM BOGORFF first came under the care of Dr. Koch and the UNIVERSITY OF MIAMI, his leukemia was in remission and drug and radiation therapy was given as a prophylactic measure in order to prevent spread of leukemia into his brain and spinal column. Immediately after this therapy there was a drastic change in the child's condition and shortly thereafter the parents became aware of the extent and permanent nature of the child's resulting brain damage. Pursuant to Nardone, at this point the parents were on notice of a possible invasion of their legal rights and there was not, nor could there have been, any concealment of this obvious injury. Indeed, Nardone is remarkably similar to the instant action.

In Nardone the child was brought into the hospital experiencing coordination difficulties, blurred visions, double vision, headaches, and other neurologic deficits. He underwent various diagnostic procedures and four brain operations. Following the first surgery, the child suffered numerous physical and neurological symptoms. Althoughhe improved slightly during the courseofthe hospitalization, he later experienced constant headaches, was difficult to arouse, was unable to speak, was drowsy and incoherent, had spiking temperatures and vomited. Ultimately, he experiencedtotalblindness, lapsed into a coma and otherwise remained in a vegetative condition.

In Nardone, this Court found that the injury to the child was clear and that the parents were on notice of this injury upon discharge from the hospital. In the instant action, the child was admitted to the hospital in good condition and in remission from his leukemia, underwent various prophylactic drug and radiation therapies, immediately began experiencing neurologic symptoms and deficits and ultimately lapsed into a coma. Although his condition improved at times, by July 1972 his condition had deteriorated further, he became paralyzed and unresponsive and was diagnosed as having permanent neurologic deficits. This change in condition was even more drastic than that involved in the Nardone case and, applying the rationale of Nardone, it is clear that the parents were on notice of the child's injuries at the time of or shortly after the therapy was complete.

The BOGORFFS also rely on Moore v. Morris, 475 So.2d 666 (Fla. 1985). In Moore, although the child manifested numerous symptoms after a difficultdelivery, there was no manifestation of permanent injury until the child was three years old, which was shortly before

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suit was filed. The Third District found that the two-year statute of limitations applied and affirmed a summary judgment in favor of the defendant. This Courtdiscussedthe general rule in Nardone and found that the events surrounding the birth were not notice of malpractice as a matter of law and, more importantly, found that the injury could not have been discovered within the statutory period. Therefore, a factual question existed as to whether the parents were aware of either the negligence or the injury more than two years prior to filing suit. In reversingthe Third District's affirmance of the trial court's grant of summary judgment, this Courtessentiallyupheld Judge Schwartz' dissent in which he noted that there was a genuine issue of fact because:

> Neither the Moores nor any of the medical professionals knew or could have know that the baby had sustained any significant injury. and specifically permanent brain damaae, until it was scientifically ascertained shortly before suit was filed. I very strongly dissent from the conclusion, inherent in the summary judgment below and its affirmance here, that one is obliged as a matter of law to bring an action before there is a clear indication that damages have ever been sustained.

Moore v. Morris, 429 So.2d 1209, 1210 (Fla. 3d DCA 1983) (Schwartz, C.J. dissenting) (emphasis added).

In the instant action, as in Nardone, the extent and permanent nature of ADAM BOGORFF's injury was known to the parents approximately ten years prior to filing suit. Accordingly, under Nardone, Moore, and Barron, the action herein is clearly time-barred.

The BOGORFFS however, assert, that there was concealment on the part of Dr. Koch and other physicians of the cause of the injury that tolled the running of the statute of limitations. Although pursuant

to this Court's Nardone decision, active and successful concealment or misrepresentation regarding the cause of an injury will toll the statute of limitations, there was neither fraud, misrepresentation nor concealment herein. Although this Court in Nardone held that the fiduciary and confidential relationship of physician-patient imposed a duty to disclose on the physician, it noted that:

> this is a duty to disclose known facts and not conjecture and speculation as to possibilities. Thenecessarypredicate of this duty is knowledge of the fact of the wrong done to the patient.. . [W]here the symptoms or the condition are such that the doctor in the exercise of reasonable diligence cannot reach a judgment as to the exact cause of the injury or condition and merely can conjecture over the possible or likely causes he is under no commanding duty to disclose a conjecture of which he is not sure.

Nardone, 333 So.2d at 39. In the instant action, the BOGORFFS located an article that suggested other possible causes, but neither Dr. Koch, nor any of the other physicians that the BOGORFFS claim had an obligation to inform them of the alleged negligence were ever able to determine the exact cause of the child's condition. By their own admission, however, the letters in which these physicians suggested a possible or remote connection to the Methotrexate or radiation put the BOGORFFS on notice as to the invasion of their child's legal rights and, therefore, the statute of limitations began to run as soon as thoseletterswere available to them -- at the time theywerewritten.

In addition, even assuming that there was some concealment by Dr. Koch or the UNIVERSITY, this was not successful concealment and the statute would not be tolled once the BOGORFFS knew or through the exercise of reasonable diligence should have known of the facts

constituting such fraudulent concealment. As this Court stated in Nardone:

> Fraudulent concealment by defendant so as to prevent plaintiffs from discovering their cause of action, where the physicianhas fraudulently concealedthe facts showing negligence, will toll the statute of limitations until the facts of such fraudulent concealment can be discovered throuah reasonable diligence.

Id. at 37. (Emphasis added).

As this Court noted, any party seeking protection of the doctrine of fraudulent concealment must have exercised reasonable care and diligence in seeking to learn the facts which would disclose fraud and mere ignorance of the facts will not postpone the statute of limitations where such ignorance is due to want of diligence. Id. at 35. This Court also noted that the means of knowledge is considered the same as knowledge itself. Id. at 34. Accordingly, even assuming that there was some act of concealment on the part of the defendants herein and an ongoing tolling of the statute of limitations, such tolling stopped when:

> The [parents] learned or through the exercise of reasonable diligence should have learned of [the facts revealing the negligence].

Id. at 39.

In the instant action, the BOGORFFS either learned or should have learnedofthecauseoftheir child's injurymore than four years prior to filing suit in this action and, therefore, there was no successful concealment to prevent the statute of limitations from barring the action herein. Clearly they could have discovered the contents of the medical records of Dr. Cullen, Dr. Winick or Dr. Zee,

but never choose to inquire. They also could have known of the contents of Dr. Koch's records, but never sought the same.'

The BOGORFFS attempt to convince this Court that the constructive notice of the medical records is not imputed to the BOGORFFS if there is fraudulent concealment. Nevertheless, Nardone imposed a duty on the plaintiffs to exercise reasonable care in determining the facts necessary to their cause of action. In this case, if as the BOGORFFS allege, the negligence herein is the use of Methotrexate and radiation then they were aware of these therapies at the time that the actual treatment occurred, were aware of the injury shortly thereafter, and are on constructive notice as to the contents of records that were readily available to them, the access to which was never prevented.

Finally, if, as the BOGORFFS assert, their cause of action was not discovered and, therefore, did not accrue until sometime after

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[1] The BOGORFFS' suggestion that they are not on notice of the UNIVERSITY's records because Jackson Memorial Hospital had lost or misplaced the chart, is wholly irrelevant to this issue, since it is the records that have already been filed in this court, not the Jackson records, that made the BOGORFFS aware of the alleged malpractice herein. Furthermore, as noted in Nardone, the entire purpose of the statute of limitations is to protect the defendant from such claims:

> 'As a statute of repose, [statute of limitations] afford parties **neededprotectionagainstthenecessityofdefending** claims which, because of their antiquity, would place the defendant at a grave disadvantage. In such case how resolutely unfair it would be to award one who has willfully or carelessly slept on his legal rights an opportunity to enforce an unfresh claim against a party that is left to shield themselves from liability with nothing more than tattered or faded memories misplaced or discarded records, or missing or deceased witnesses.... '

Nardone, 333 So.2d at 36 (emphasis in original; citations omitted).

July 1972, then the two-year statute of limitations applies and this action is barred as well.[2]

B. The Statute of Repose and Carr

The instant action is also barred by the statute of repose contained in §95.11(4)(b), Florida Statutes (1975), whether the four-year or the seven-year period is applied. The application of the statute of repose in the instant action does not amount to a retroactive application because at the time the legislature enacted this statute in response to an existing medical malpractice crisis, which crisis by its very nature included the problem of unending tail liability suggested in this case, the BOGORFFS had at least eight months or assuming concealment up to four years within which to file suit. This Court, in upholding the statute of repose against constitutional challenges and overruling earlier decisions that found that a statute of repose that barred a cause of action before it ever accrued was unconstitutional, determined that the statute of repose can barr an action regardless of whether the final element necessary for the cause of action to accrue for limitations purpose ever occurs. See Carr v. Broward County, 541 So.2d 92 (Fla. 1989) (overruling Phelan v. Hanft, 471 So.2d 645 (Fla. 3d DCA 1985)). All that is required by the statute and all that is seemingly required by this Court's decisions is that the injury be discoverable before the end of the repose period so that the plaintiff could then be on notice of the possible invasion of their legal rights. In the instant action, the

[2] See Homemakers, Inc. v. Gonzalez, 400 So.2d 965 (Fla. 1981); Johnson v. Szymanki, 368 So.2d 370 (Fla. 2d DCA 1979); Brooks v. Cerrato, 355 So.2d 119 (Fla. 4th DCA 1978).

incident occurred at the latest in January 1972 and the injury was known at that time or shortly thereafter. Accordingly, the action is barred by the applicable statute of repose, whether applying a four-year, or a seven-year period.

Although applying a different statute and different enactment, this Court has upheld the constitutionality and applicability of a statute of repose in product liability actions even when the applicable date for the beginning of the running of the statute of repose -- the sale of the product -- occurred prior to the effective date of that statute. When the legislature determined that twelve years would be a maximum time from the sale of a particular product for the cause of action to accrue and for suit to be filed, this Court implicitly recognizedthatsuch a statute would constitutionally apply to sales of products that had occurred prior to the statute's effective date as long as a sufficient period of time was given after the enactment of the statute for plaintiff to file suit or not file suit as the case may be.[3] This conclusion was based upon the legislative determination of overriding public necessity for barring stale claims. Such a determination of overriding public necessity was also found with respect to the medical malpractice statute of repose, which this

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[3] See Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985); Purk v. Federal Press Co., 387 So.2d 354 (Fla. 1980).

To the extent that the legislature recognized retroactivity of the statute by enacting a savings clause, this Court has noted that the savings clause only applies to a shortening of the statute of limitations and circumstances in which the action is barred at the time that the statute becomes effective. Homemakers, Inc. v. Gonzalez, 400 So.2d 965 (Fla. 1981). The savings provision does not apply, nor is it necessary, in a circumstance in which at the time of the effectivedateofthe statutethere still remains a sufficient period of time within which to file suit.

Court has also declared constitutional. Accordingly, the instant action medical malpractice is barred, not only by the four-year statute of limitations of limitations, but also by the application of either the four-year or seven-year statute of repose.

III. CONCLUSION

WHEREFORE, the Petitioner, UNIVERSITY OF MIAMI, respectfully requests that this Court reverse the decision of the Third District Court of Appeal and remand the case to the Third District with instructions to affirm the trial court's ruling granting summary judgment in favor of this defendant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 17 day of July, 1990 to: JOHN BERANEK, ESQ. Aurell, Radey, Hinkle & Thomas, Suite 1000, Monroe Park Tower, 101 North Monroe Street, Tallahassee, Florida 32301; PAUL L. REGENSDORF, ESQ., Fleming, O'Byran & Fleming, P.O. Drawer 7028, Fort Lauderdale, Florida 33338; JON E. KRUPNICK, ESQ., Krupnick, Campbell, Malone, Roselli, P.A., Suite 100, 700 Southeast Third Avenue, Fort Lauderdale, Florida 33316; SHELLEY H. LEINICKE, ESQ., Wicker, Smith, Blomoqvist, Tutan, O'Hara, McCoy, Graham & Lane, Barnett Bank Plaza, 5th Floor, One East Broward Boulevard, Fort Lauderdale, Florida 33302; and JOHN B. KELLY, ESQ., Blackwell, Walker, Gray, Powers, Flick & Hoehl, 400 AmeriFirst Building, One Southeast Third Avenue, Miami, Florida 33131.

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