original OA 9-6-90

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

UNIVERSITY OF MIAMI,

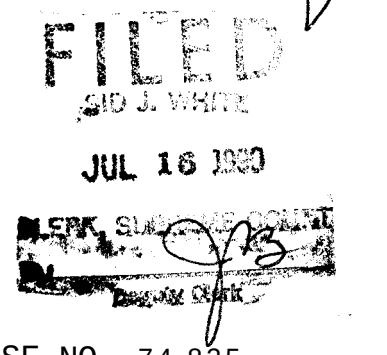
Petitioner/Defendant,

vs.

CASE NO. 74,797

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

Respondents/Plaintiffs./



KJELL KOCH, M.D.,

Petitioner,

vs.

CASE NO. 74,835

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

Respondent./

LEDERLE LABORATORIES,

Petitioner,

vs.

CASE NO. 74,863

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

Respondents./

Petitioner Kjell Koch, M.D.'s Reply Brief

SHELLEY H. LEINICKE
WICKER, SMITH, BLOMQVIST, TUTAN, O'HARA, McCOY, GRAHAM & LANE
Attorneys for Kjell Koch, M.D.
P. O. Drawer 14460
Fort Lauderdale, Florida 33302
(305) 467-6405

TABLE OF CONTENTS

TABLE OF CITATIONS

ARGUMENT

The Bogorffs continue to proffer the same arguments for avoiding the time bar to this case. Each of these arguments is insufficient to preclude application of the statute of limitations.

The 1971 statute of limitations, which Bogorff claims controls, is a simply worded four year limitation:

> Actions other than those for the recovery of real property can only be commenced as follows:
>
> Within 4 years-any action for relief not specifically provided for in this chapter. F. S. 95.11 (1971)

This court has repeatedly reaffirmed the principle that this statute of limitation begins to run once the plaintiff knew or should have known of either the fact of injury of the negligent act. Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976); Barron v. Shapiro, 15 FLW S340 (Fla. 61490). There is no question that Bogorff knew of the child's deteriorating condition by July, 1972. Further, Bogorff has repeatedly conceded that the alleged medical negligence occurred in late 1971 and in January, 1972, and therefore, under both prongs of the 1971 statute, the period for bringing this action expired in 1976.

There are absolutely no references in the 1971 statute itself for delaying the statute of limitations based upon fraud or concealment. The statute simply states that the claim must be filed within four years. The discussion in the Nardone decision that the statute of limitations should be abated during any period of fraudulent concealment is inapplicable under the facts of this case. Whatever statements or actions were taken by Dr. Koch are wholly irrelevant because of the underdisputed fact that Bogorff was seen during the same time period by at least three non-defendant physicians of his own choosing (Dr. Cullen, Dr. Winick and Dr. Zee), and that each of these physicians generated records and reports reciting a possible link between Dr. Koch's treatment and Bogorff's physical condition.

Bogorff makes a valiant attempt to sweep these non-defendant doctors into the so called "conspiracy of silence" or "cover up'' so as to set up a fraudulent concealment exception to the current statute of limitations. This simply will not work. Bogorff cannot avoid the fact that these physicians were never defendants and that they are independent medical practitioners who Bogorff voluntarily chose to consult and to rely upon. Further, there has never been any suggestion that these records promulgated by these non-defendant physicians of Bogorff's own choosing were ever unavailable. The continual access to these independently maintained medical records and reports moots the argument that the University of Miami misplaced its records or,

alternatively, that Dr. Koch voiced a different, "fraudulent" reason for the child's condition. The unflaging availability of these records which were maintained by Doctors Cullen, Winick and Zee, prevent Bogorff from successfully relying upon the Almaqore, Moore or Schaffer decisions.

Bogorff readily admits the contents of the records and reports of these three independently selected non-defendant physicians were written in easily understandable layman's language. Bogorff cannot claim any delay based upon fraudulent concealment by the defendants when Bogorff is indisputably charged with knowledge of the contents of the records of their own separately retained physicians.

Dr. Koch disagrees with Bogorff's assertion that his actions constituted fraudulent concealment. Dr. Koch's statements regarding the causes of the child's condition is simply a difference of opinion between medical experts and is not fraud. Nardone, supra. This not inconsistent in any way with Dr. Koch's position that the same record and reports promulgated by Doctors Cullen, Winick and Zee are sufficient to commence statute of limitations because, to the extent, these reports differ from Dr. Koch's opinions and conclusions, these reports put Bogorff on notice on the possible invasion of rights which is sufficient to commence statute of limitations.

As this court recently said in the Barron, supra decision, the plaintiff's "contention that the statute of limitations did not commence to run until she had reason to know that the injury

was negligently inflicted flies directly in the face of both Nardone and Moore. The District Court of Appeal misinterpreted Moore when it said that knowledge of physical injury alone, without knowledge that is resulted from a negligent act, does not trigger the statute of limitations." The instant record unequivocally establishes that Bogorff knew of that child's deteriorated physical condition by June, 1972. This alone is sufficient to trigger the statute of limitations.

Bogorff argues at length that Dr. Zee's two reports in 1977 should continue to delay the onset of the statute of limitations. This argument is without merit for multiple reasons:

1) It totally ignores the fact that Bogorff was on notice from at least 1973 of the contents of the reports and records of Dr. Cullen and Dr. Winick;

2) The report which Dr. Zee sent to Bogorff states that "details" are in a separate report sent simultaneously to the treating physicians. This put Bogorff on actual notice that further information was available from Dr. Zee and that they should follow up and check the records:

3) Bogorff is on imputed notice of the contents of all of Dr. Zee's records and reports:

4) Dr. Zee was never a party, and Bogorff cannot impute any "cover up" by Dr. Zee (who they independently consulted), to Dr. Koch:

5) Bogorff has acknowledged that the contents of Dr. Zee's report were readily understandable and, once read, were sufficient to put them on notice of the possible invasion of their legal rights.

At no time has this court ever receded from the statement in Nardone that "the means of knowledge are the same as knowledge itself." Nardone at 34. None of the arguments or citations advanced by Bogorff can avoid the undisputable and insurmountable fact that records and reports of multiple, independently consulted and non-defendant health care providers repeatedly put them on notice (actual and/or constructive) of the possible link between the methotrexate treatment and their son's open and obviously deteriorated physical condition.

As this court stated in Nardone, "with the knowledge of the severity of their son's resultant condition, the parents through he exercise of reasonable diligence were on notice that the possible invasion of their legal rights." Id at 34. It was this very deteriorated physical condition which was at least one of the reasons Bogorff sought the advice and treatment of Doctors Cullen, Winick and Zee. Bogorff cannot simultaneously seek this care and claim ignorance of the contents of these physicians' medical records and reports. "The 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 but the contents are which not known should be imputed to the parents, etc.". Nardone at 34.

Nothing in Bogorff's brief counters Dr. Koch's assertion that subsequently enacted versions of the statute of limitations and/or the statute of repose in medical malpractice claims can constitutionally be applied to this case and that no matter what statute is used the result is the same: this action is time bared. The factual recitations and case law cited in petitioners' initial briefs on the merits remain unchallenged and serve as additional or alternative grounds for determining that this claim is time bared.

CONCLUSION

For th reasons set forth herein, it is respectfully requested that this court reverse the District Court's decision and remand this cause with instructions to affirm the trial court's order granting summary final judgment. This claim is time bared by the statute of limitations and/or statute of repose provisions of each and every enactment of Section 95.11 which has been in effect throughout the existence of this claim.

Respectfully Submitted,

WICKER, SMITH, BLOMQVIST, TUTAN, O'HARA, McCOY, GRAHAM & LANE, P.A.
Attorneys for Kjell Koch, M.D.
P. O. Box 14460
Fort Lauderdale, FL 33302
(305) 467-6495

BY 
SHELLEY H. LEINICKE
Florida Bar No: 230170

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 12th day of July, 1990 to: **ALL ATTORNEYS OF RECORD** on the attached Mailing List.

WICKER, SMITH, BLOMQVIST, TUTAN, O'HARA, McCOY, GRAHAM & LANE
Attorneys for Kjell Koch, M.D.
P. O. Drawer 14460
Fort Lauderdale, Florida 33302
(305) 467-6405

SHELDEY H. LEINICKE
Florida **Bar No. 230170**

Koch vs. Bogorff

MAILING LIST

John Beranek, Esq.
Aurell, Radey, Hinkle & Thomas
Attorney for Plaintiff/Appellant/Respondent
Suite 1000, Monroe Park Tower
101 North Monroe Street
Tallahassee, FL 32301

Jon E. Krupnick, Esq.
Krupnick, Campbell, Malone & Roselli, P.A.
Co-counsel for Plaintiff/Appellant Respondent
Suite 100
700 S.E. 3rd Ave.
Ft. Lauderdale, Florida 33316
763-8181

Robert McIntosh, Esq.
Attorney for Defendant/Appellee/Petitioner Lederle Lab
P.O. Drawer 7028
Ft. Lauderdale, Florida 33338

Blackwell & Walker, P.A.
Paul R. Larkin, Jr.
Attorney for Defendant/Appellee/Petitioner Koch, M.D.
2400 AmeriFirst Building
1 S.E. 3rd Ave.
Miami, Florida 33131

A. Blackwell Stieglitz, Esq.
Attorney for Defendant/Appellee/Petitioner University of Miami
25 W. Flagler St., #501
Miami, Florida 33130