OA 9-6-90

IN THE SUPREME COURT OF FLORIDA.

JNIVERSITY OF MIAMI, Petitioner, vs. ADAM BOGORFF, etc., et al, Respondents.	)	CASE NO. 74,797
KJELL KOCH, M.D., Petitioner, vs. ADAM BOGORFF, etc., et al, Respondents.	)	CASE NO. 74,835
LEDERLE LABORATORIES, Petitioner, vs. ADAM BOGORFF, etc., et al, Respondents.	)	CASE NO. 74,863

REPLY BRIEF OF PETITIONER, LEDERLE LABORATORIES

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TABLE OF CONTENTS

Table of Authorities

PREFACE

The parties will be referred to as they appear before this Court, or as follows:

ADAM BOGORFF, a minor, and his father, ROBERT BOGORFF	Plaintiffs, Respondents, ADAM, Mr. BOGORFF
LEDERLE LABORATORIES	Defendant, Petitioner, LEDERLE
KJELL KOCH, M.D.	Defendant, Petitioner, DR. KOCH
UNIVERSITY OF MIAMI	Defendant, Petitioner, UNIVERSITY

The symbol (R) will be used to refer to the record before this Court. The symbol (A-1) will be used to refer to the Appendix attached to LEDERLE's Initial Brief. The symbol SR will be used to refer to the Supplement to the Record based upon the Court granting LEDERLE's May 17, 1990 Motion to Supplement Record to add Mr. BOGORFF's answers to interrogatories dated October 3, 1983. All emphasis contained in this brief is that of the Petitioner, LEDERLE LABORATORIES, unless otherwise identified.

ARGUMENT

THE THIRD DISTRICT ERRED IN REVERSING THE TRIAL COURT'S SUMMARY JUDGMENT IN FAVOR OF LEDERLE LABORATORIES ON STATUTE OF LIMITATIONS GROUNDS WHEN (1) THE BOGORFFS HAD ACTUAL AND CONSTRUCTIVE KNOWLEDGE OF THEIR POSSIBLE CLAIM AGAINST LEDERLE MORE THAN FOUR YEARS BEFORE THE SUIT WAS FILED, AND (2) LEDERLE WAS NEITHER GUILTY OF NOR RESPONSIBLE FOR ANY CONDUCT WHICH FRAUDULENTLY CONCEALED THE BOGORFFS' CLAIM AGAINST IT.

A. INTRODUCTION.

The argument against LEDERLE in BOGORFFS' brief is virtually nonexistent, LEDERLE being mentioned only on Page 1 and Pages 23-24. The former dealt only with the possible liability of LEDERLE' and the latter dealt only generally with the statute of limitations question with respect to LEDERLE.

LEDERLE's position in reply can be simply stated: The BOGORFFS had both actual and constructive knowledge of their possible claim against LEDERLE far more than four years before this action was commenced. Since either type of knowledge is sufficient, LEDERLE's statute of limitations defense is available and effective. No alleged conduct by Dr. KOCH (or by any other non-LEDERLE agent or employee) can bar or estop LEDERLE from the successful assertion of its defense.

.....

'While information contained in a Physicians' Desk Reference Publication could, conceivably, be the basis for liability in a proper case, there has been no allegation, no proffered proof, and more importantly, no argument that any such literature issued by LEDERLE one to two years before the treatment in question in any way impacts upon the statute of limitations question before this Court.

B. ACTUAL KNOWLEDGE BY BOGORFFS' OF POSSIBLE INVOLVEMENT OF METHOTREXATE.

1. Applicable Law.

It is obvious that the Plaintiffs in this case are not doctors, but no law in Florida states, nor should state, that a plaintiff's actual knowledge must equal that of the professional certainty of a physician. If that were the threshold requirement, no cause of action would ever arise. See Byington v. A. H. Robins Co., 580 F.Supp. 1513, 1517 (S.D. Fla. 1984) (applying Florida law). Nevertheless, information must be available so that a plaintiff suspects, or after reasonable diligence and inquiry, should have suspected that the product in question caused damage. Id.

Just as a plaintiff's actual knowledge is not tested by the professional certainty of a doctor, similarly, it is not tested by the standard of legal certainty. As the Third District noted in Steiner v. Ciba-Geigy Corp., 364 So.2d 47, 52 (Fla. 3d DCA 1978), legal certainty concerning the cause of a product's involvement can only come after resort to legal processes and a full trial on the merits.

What is required is that which this Court stated simply in the case of Nardone v. Reynolds, 333 So.2d 25, 34 (Fla. 1976). Because of the severity of their son's condition, the BOGORFFS "through the exercise of reasonable diligence [must be] on notice of the possible invasion of their legal rights." The

record before this Court amply demonstrates that the BOGORFFS were aware of that possible invasion of their rights more than four years before the suit was filed.

2. Factual Record of Actual Notice of Possible Claim.

The BOGORFFS acknowledge that they began to notice changes in their son's condition in January of **1972**, after the Methotrexate intrathecal administration. (SR 5 at qu. **11).** By July of **1972,** their son had regressed through slurred speech, a grand mal seizure, to paralysis and non-responsiveness. (See, e.g. Id. at qu. **12).**

Even before seeing Dr. KOCH in July of **1972** with the medical article that Mr. BOGORFF had found, Mr. BOGORFF had already questioned Dr. KOCH concerning the boy's drug therapy as a possible cause of his deterioration. (Id. at qu. **14).** More specifically, prior to the July **1972** discussion with Dr. KOCH concerning the article, Mr. BOGORFF believed that Methotrexate could be the cause. **"I** considered it a possibility." (SR 6 at **qu. 18).** The article reinforced that possibility and when he talked to Dr. KOCH, Mr. BOGORFF was particularly interested in that article (among other that he had found) because, in his words, "this was a possibility at least in what was going on."). (R **771).**

As a result, by July of **1972,** the BOGORFFS had actual **"notice** of the possible invasion of their legal rights," and as to LEDERLE (if not the other Defendants) the statute of limitations had begun to run. Nardone, at 34.

C. CONSTRUCTIVE NOTICE OF POSSIBLE INVOLVEMENT OF METHO

Leaving aside for now the question of misrepresentations by any treating physician, the record is clear that by no later than July of 1977,[2] the **BOGORFFS** also had constructive notice of the possible involvement of Methotrexate. At that time, Dr. Zee, a consultant physician, wrote to one of ADAM's primary treating physicians concerning the possible involvement of Methotrexate as a cause. (A-1, R **210-238**, Exhibit **C)**. The following facts concerning that letter are clear:

1. The Plaintiffs have acknowledged that this letter is the "definitive diagnosis" of their boy's condition.

2. Although Dr. Zee wrote a contemporaneous letter directly to the **BOGORFFS** without spelling out his medical impressions on causation, his letter to them did refer to the details set forth in the letter sent to the treating physician.

3. Dr. Zee's letter to Dr. Winnick (copy to Dr. Cullen) was always present and available in ADAM's medical records.

4. When finally reviewed by the **BOGORFFS**, both Mr. and Mrs. **BOGORFF** were capable **of** understanding the letter and, in fact, acted upon it. There was nothing in that letter that they could not understand or comprehend.

.....

[2] Other letters were present in ADAM's medical records before July of **1977** and have been previously identified to this Court. Because of the Plaintiffs' acknowledgment of the importance and impact of the July **1977** letter, focus is made upon that letter.

Once again, Nardone speaks to the precise issue at Page 34 of this Court's opinion. As a matter of law, this Court stated that the:

> knowledge of the medical, doctor, hospital, etc. records concerning the incompetent minor patient which are of a character as to be obtainabe by, or available to, the patient but the contents of which are not known should be imputed to the parents, etc.

Thus, in addition to the Plaintiffs' actual knowledge of the possible involvement of Methotrexate as early as the spring of **1972**, the Plaintiffs were further on constructive notice, as a matter of law, no later than July of **1977**, more than five years before the suit against LEDERLE was filed.

This Court summed up the applicable law in Nardone by stating "the means of knowledge are the same as knowledge itself." Id. The claim against LEDERLE is time-barred because the BOGORFFS are charged with the knowledge of the possible claim against LEDERLE set forth in their son's records.

D. LEDERLE IS NOT RESPONSIBLE FOR ANY ALLEGED MISREPRESENTATIONS BY] DOC

On Pages **18** to 23 of its initial brief, LEDERLE spelled out in detail why under Florida law, under the law of other states, and pursuant to public policy a defendant manufacturer is not estopped or barred from asserting a statute of limitations defense because a doctor or third party has allegedly made a misrepresentation to the plaintiff concerning the case.

Although the BOGORFFS seem to acknowledge the accuracy of this proposition by stating that LEDERLE in fact "may not be responsible for the conduct of the various medical professionals," they also suggest that LEDERLE may not assume that such misrepresentations never occurred.

Respectfully, as to the statute of limitations defense of LEDERLE, only its conduct and not that of co-defendants (or absent doctors) is to be tested. Once more, as this Court succinctly stated in Nardone:

> The philosophy behind the exception to the statute of limitations of fraudulent concealment and the 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.

Nardone, at 36.

This principle was recently reapplied by this Court in its recent decision in Barron v. Shapiro, So.2d (Fla. June 15, 1990, 15 F.L.W. S340), where it stated:

> The fact that a doctor other than [the defendant] suggested to Mrs. Shapiro that the tubes in Mr. Shapiro's body may have acted as a host for the infection could not serve to toll the statute.

Whatever Dr. KOCH (or Dr. Zee or anyone else) may have said or not said concerning their impressions as to the cause of ADAM BOGORFF's condition, that conduct is not ascribable to the drug manufacturer and does not bar LEDERLE from asserting its statute of limitations defense where, as here, it is fully available and conclusively applicable.

CONCLUSION

For the reasons set forth in the foregoing brief and in LEDERLE's Initial Brief, the record before this Court is absolutely clear and free of any genuine issue of material fact (1) that the BOGORFFS had actual notice of their potential claim against LEDERLE no later than July of **1972, (2)** that the BOGORFFS as a matter of law had constructive knowledge of their claim against LEDERLE no later than July of **1977, (3)** that no conduct ascribable to LEDERLE can bar LEDERLE's ability to raise that statute of limitations, and **(4)** that as a result, the summary judgment in favor of LEDERLE should be reinstated.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by mail, this 17th day of July, 1990 to ALL COUNSEL OF RECORD on attached list.

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Bogorff v. Koch, et al
Third District Court of Appeal
Case Nos, 86-2550 and 86-2911 (Consolidated)
Supreme Court of Florida
Case Nos. 74,797, 74,835 and 74,863

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