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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-1401
L.T. CASE NO. 3D11-580

PHILIP MORRIS USA INC.
and R.J. REYNOLDS
TOBACCO COMPANY,

Petitioners,

v.

TINA RUSSO as executor
de son tort for the
Estate of PHYLLIS FRAZIER,

Respondent.

_____/

ON PETITION FOR DISCRETIONARY REVIEW OF THE
DECISION OF THE DISTRICT COURT OF
APPEAL OF FLORIDA, THIRD DISTRICT

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE

The Respondent adds the following information to the Petitioners' Statement of the Case. As was noted by Petitioners, PHYLLIS FRAZIER[1], an *Engle* progeny plaintiff[2], brought suit against PHILIP MORRIS USA INC. and R.J. REYNOLDS TOBACCO COMPANY for damages because of her chronic obstructive pulmonary disease (COPD) caused by smoking, which eventually resulted in bilateral lung transplants. (T. 2753-3134).[3] The case was tried in September and October of 2010. The jury answered "YES" in Ms. FRAZIER's favor on the first two questions on the verdict form; finding that she was addicted to cigarettes containing nicotine and that her addiction to cigarettes containing nicotine was a legal cause of her chronic obstructive pulmonary disease/emphysema. Nevertheless, the jury returned a defense verdict based on an affirmative defense, the statute of limitations (not statute of repose). (Pet. Amended App. Tab C)[4]. Ms. FRAZIER appealed. The Third District Court of Appeal reversed and remanded

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[1] Prior to issuance of the opinion below, Ms. FRAZIER died; her daughter, Ms. Tina Russo, as executor de son tort for Ms. FRAZIER's estate, has been substituted as the Respondent.

[2] *See Engle v. Liggett Group, Inc.*, 945 So.2d 1246 (Fla. 2006).

[3] Record citations to "T." refer to pages of the trial transcript incorporated into the record on appeal.

[4] Record citations to "Pet. Amended App." are to the Amended Appendix filed with the Court by Petitioners in this case on November 6, 2013.

ordering a new trial with instructions to enter a directed verdict for Ms. FRAZIER on the statute of limitations defense. *Frazier v. Philip Morris USA, Inc.*, 89 So.3d 937 (Fla. 3d DCA 2012). Petitioners did not challenge this opinion as to the statute of limitations issue in their petition for review or initial merits brief[5]; nor did Petitioners challenge either of the two findings in favor of Ms. FRAZIER made by the jury.

Even though they were the prevailing parties at trial, and final judgment was entered in their favor, the Petitioners filed a cross-appeal in the Third District. Among other grounds, they asserted the jury should have been given their requested instructions and verdict form on the affirmative defense of the twelve year fraud section of the statute of repose, F.S. §95.031(2)(a). *Frazier*, 89 So.3d at 939, 947-48.[6] They argued the statute of repose required Ms. FRAZIER to prove, not only that the conspiracy to conceal information among tobacco manufacturers and others as referenced in *Engle* continued past May 5, 1982 (twelve years before

[5] In their Initial Brief Petitioners stated that they disagree with the Third District decision regarding the statute of limitations, but have "elected not to present the issue" before this Court. (Pet. Initial Brief at 4).

[6] On cross-appeal the Petitioners also asserted that the trial court should not have granted preclusive effect to the Phase I *Engle* findings. This issue was conclusively decided by this Court in *Philip Morris, USA, Inc. v. Douglas*, 110 So.3d 419 (Fla. 2013), to which Petitioners in their brief have apparently made only a pro forma challenge for record preservation purposes.

the original *Engle* complaint was filed)[7], but also that Ms. FRAZIER was required to prove she relied on a deceptive statement or omission within the twelve year repose period. *Frazier*, 89 So.3d at 947.[8]

In the trial court, the Petitioners requested a verdict form which asked the jury whether each defendant, after alternative critical dates of May 5, 1982 or December 14, 1995, made a statement that concealed or omitted material information concerning the health effects and/or addictive nature of smoking, and, if so, whether Ms. FRAZIER relied on the statement to her detriment. (Pet. Amended App. Tab D at 4). The Petitioners also requested the jury be instructed that:

> In making your determination regarding Plaintiff's fraudulent concealment and agreement to conceal claims, you may not consider evidence of alleged concealment, statements or other conduct before [December 14, 1995/May 5, 1982].[9]

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[7] This Court in *Engle* held the *Engle* Phase I findings that the tobacco company defendants concealed, or omitted and agreed to conceal or omit material information, is binding as res judicata, without any expressed time qualification or restriction. *Engle*, 945 So.2d at 1277.

[8] As the Respondent explains below, reliance is not and should never be an issue when determining the start date of the repose period under Section 95.031(2)(a). The Respondent also notes that the statute of repose is an affirmative defense; if reliance is to be relevant to the analysis at all, it is the Petitioner's burden to prove a date when reliance ended, if it ever did, not the Respondent's burden to prove reliance continued.

[9] The instruction as requested below included alternative proposed critical dates of December 14, 1995 and May 5, 1982. The Petitioners in their brief have conceded that the applicable critical date, if the statute of repose is to be deemed applicable

(Pet. App. Tab A at 3).

The trial court rejected both the proposed instruction and proposed verdict form.

The Third District affirmed on all cross-appeal issues, expressly holding that "the last act done in furtherance of the alleged conspiracy fixes the pertinent date for purposes of the statute of repose" and "Ms. Frazier introduced evidence of deceptive statements or omissions occurring after May 5, 1982." *Frazier*, 89 So.3d at 947, *citing Laschke v. Brown & Williamson Tobacco Corp.*, 766 So.2d 1076, 1078 (Fla. 2d DCA 2000). Indeed, Ms. FRAZIER introduced substantial evidence of a well documented decades long conspiracy by tobacco companies, beginning no later than 1953 and continuing at least until 1994 and possibly thereafter, to conceal from smokers and the public in general, the truth concerning the health effects and addictive nature of smoking cigarettes. (T. 4139-4468).

The Third District said it would "reject" the Petitioners' "contention that Ms. Frazier was obligated to show further or continued reliance upon the alleged last act in furtherance of the conspiracy." *Frazier*, 89 So.3d at 948. The Third District concluded the trial court correctly refused to give the Petitioners' requested instructions on the statute of repose. The Petitioners now seek review, asserting

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at all, is May 5, 1982 rather than December 14, 1995. (Pet. Initial Brief at 6, 9-10 and n.2).

that the Third District's holding on the repose issue was error. However, they have not challenged the Third District's ruling that the case should be retried without the statute of limitations defense, nor have they challenged either finding made by the jury concerning addiction making Ms. Frazier a class member or that her addiction to cigarettes containing nicotine was a legal cause of her disease.

SUMMARY OF ARGUMENT

I.

IN CASES OF CONSPIRACY TO COMMIT FRAUD OR FRAUDLENT CONCEALMENT, THE REPOSE PERIOD STARTS ON THE DATE OF THE LAST DISCRETE ACT IN FURTHERANCE OF THE CONSPIRACY, REGARDLESS OF THE DATE ANY INDIVIDUAL PLAINTIFF'S CAUSE OF ACTION DID OR COULD HAVE ACCRUED.

The Petitioners have confused the time at which the fraud repose period begins to run with the time at which Ms. FRAZIER's causes of action for fraudulent concealment and conspiracy to commit fraud accrued. Under controlling case law from this Court, a repose period is distinct from a limitations period. Unlike a limitations period, a repose period runs from the date of some

discrete act defined in the applicable repose statute, which may have nothing to do with the acts leading to accrual of the plaintiff's cause of action. The repose period thus runs independently of the date at which the plaintiff's cause of action accrues. A repose statute may even operate to bar a cause of action before it could accrue, as this Court has recognized.

The Florida fraud repose statute indicates that the time period runs from the date of "commission" of the fraud, which the statute indicates is wholly separate from the date the fraud is or should be "discovered." Case law from this Court indicates that a fraud is committed when a speaker or writer makes material misrepresentations (or, in a concealment case such as this one, conceals material information), with the intent to induce detrimental reliance. Whether or when reliance occurs may matter for purposes of determining if or when a cause of action for the fraud accrues, but has nothing to do with determining when the fraud itself was committed and hence when the repose period as defined in the statute begins to run.

In cases of conspiracy to commit fraud, whether by affirmative misrepresentation or concealment, the repose period runs from the date of the last act in furtherance of the conspiracy. Reliance may be relevant in determining whether or when a particular plaintiff's cause of action based on the conspiracy

accrues, but has nothing to do with determining when the repose period begins to run.

The Petitioners' concern about staleness of evidence is misplaced, particularly in *Engle* progeny cases. The statute of limitations operates as an independent check on stale claims (although it is inapplicable under the facts of this case as the Third District determined below). Furthermore, *Engle* progeny cases rely on historical evidence equally available to all parties.

In this case, there was substantial evidence of a conspiracy to conceal extending well into any conceivable repose period, as the Third District noted. The trial court therefore properly declined to submit the Petitioners' proposed repose instruction and verdict question to the jury.

II.

THE TRIAL COURT DID NOT ERR BY DECIDING NOT TO GIVE THE LIMITING EVIDENTIARY INSTRUCTION REQUESTED BY THE PETITIONERS, SINCE THE REQUESTED INSTRUCTION DID NOT ADDRESS THE ACTUAL ISSUES RAISED BY THE REPOSE DEFENSE UNDER EITHER PETITIONERS' OR RESPONDENT'S POSITION AND

UNREASONABLY RESTRICTED THE EVIDENCE THE JURY COULD CONSIDER.

The Petitioners below requested the trial court to instruct the jury that

> In making your determination regarding Plaintiff's fraudulent concealment and agreement to conceal claims, you may not consider evidence of alleged concealment, statements or other conduct before [December 14, 1995/May 5, 1982].

Even if some instruction regarding repose were to be given, the instruction the Petitioners requested was not proper. The requested instruction does not address the issue a jury would actually have to decide to determine when a repose period began to run in this conspiracy case, that being the date of the last act in furtherance of the conspiracy.

The proposed evidentiary restriction in the instruction is unnecessary and misleading, even if this Court were to adopt the Petitioners' view that reliance is relevant to determining when the repose period runs. Even if reliance were relevant, the jury would merely have to determine whether Ms. FRAZIER relied on concealment after May 5, 1982. In order to determine whether a person has reasonably relied on concealment by another, a jury must consider the entire background of the relationship between the parties and all the prior information about the relevant subjects the reader or listener has received. Arbitrarily limiting the statements and acts of concealment the jury considers to those made after the

repose critical date, or any other date, will unduly and unnecessarily restrict the jury's assessment of reasonable reliance. For this reason as well, the Petitioners' requested instruction was improper and the trial court correctly declined to give it.

III.

APPLICATION OF A STATUTE OF REPOSE TO BAR MS. FRAZIER'S CAUSE OF ACTION FOR HER LATENT INJURY BEFORE IT COULD ACCRUE WOULD VIOLATE HER CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS.

As noted above, a statute of repose may operate to bar a cause of action before it accrues or even can accrue. Application of a statute of repose to bar causes of action for latent injuries before the injury could reasonably be discovered is fundamentally unfair and has been held by this Court to be in violation of the Florida constitutional right of access to courts.

This court has upheld application of the medical malpractice statute of repose to bar actions for latent injuries before they could be discovered. The Court has applied this exception because of the legislative findings of a medical malpractice crisis, creating an overpowering public necessity authorizing otherwise unwarranted restrictions on medical malpractice plaintiffs' access to courts. There is no such overpowering public necessity, or indeed any public necessity, to

provide special protections for those who conspire to commit fraud by concealment.

The Third District Court of Appeal has suggested that an overpowering public necessity exists to bar fraud claims before they accrue, because of concern over stale claims. For the reasons argued above, this concern is misplaced; the fraud statute of limitations provides ample protection against stale claims, and in *Engle* progeny cases in particular the historical evidence is equally available to all parties.

Finally, in light of continuing uncertainty regarding the permissible basis for punitive damage awards and application of comparative negligence in *Engle* progeny cases, barring fraudulent concealment claims and conspiracy claims by a particular *Engle* progeny plaintiff may substantially prejudice that plaintiff's case.

ARGUMENT

I.

IN CASES OF CONSPIRACY TO COMMIT FRAUD OR FRAUDLENT CONCEALMENT, THE REPOSE PERIOD STARTS ON THE DATE OF THE LAST DISCRETE ACT IN FURTHERANCE OF THE CONSPIRACY,

REGARDLESS OF THE DATE ANY INDIVIDUAL PLAINTIFF'S CAUSE OF ACTION DID OR COULD HAVE ACCRUED.

The Petitioners have confused the date at which the fraud repose period begins to run pursuant to Section 95.031(2)(a) Florida Statutes with the date on which Ms. FRAZIER's causes of action for fraudulent concealment and conspiracy to commit fraud accrued. The accrual date is relevant to an affirmative defense based on a statute of limitations, but is not relevant to an affirmative defense based upon a statute of repose. As this Court has stated, "a statute of repose...runs from the date of a discrete act on the part of the defendant without regard to when the cause of action accrued." *Kush v. Lloyd*, 616 So.2d 415, 418 (Fla. 1992). In the *Kush* opinion this court gave several examples of discrete triggering acts set forth in various Florida repose statutes, none of which was tied to the accrual of any cause of action:

> Repose statutes may begin to run from the time of the defendant's act or neglect, as in the medical malpractice context, or upon the occurrence of a specific and identifiable event shortly thereafter - as from the substantial completion of the structure, in actions against architects and contractors, or from the manufacture or sale of the product, in products liability cases.

Kush, 616 So.2d at 418.

The event triggering the repose period may occur before, at the same time as, or even after the occurrence of the events needed for accrual of a cause of

action. For this reason, a statute of repose may bar a cause of action before it has or even could accrue. *See Kush*, 616 So.2d at 421 ("In the final analysis, the dissenting opinion seems to rest upon its reluctance to eliminate a cause of action before it has accrued. Yet, this is exactly what a statute of repose does."); *Nehme v. Smithkline Beacham Clinical Laboratories, Inc.*, 863 So.2d 201, 208 (Fla. 2003) ("the very purpose of a statute of repose is to extinguish valid causes of action, sometimes before they even accrue").

The repose statute applicable to this case is Section 95.031(2)(a), Florida Statutes, specifically dealing with fraud. This statute provides:

> An action founded upon fraud under *s.95.11(3)*, including constructive fraud, must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in *s. 95.22(3)*, but in any event an action for fraud under *s.95.11(3)* must be begun within 12 years after the date of the commission of the alleged fraud, regardless of the date the fraud was or should have been discovered.

Thus section 95.031(2) (a) provides a twelve year repose period beginning on the date of a discrete and identifiable act; the "date of commission of the alleged fraud." The statutory language distinguishes this triggering date from the wholly separate "date the fraud was or should have been discovered," which may occur on the date of commission of the fraud, decades later, or never. The fraud repose period runs from the date a speaker or writer committed fraud through false

statements or concealment, not from the date any particular listener or reader discovered or should have discovered that fraud or the date any particular listener's or reader's cause of action for fraud may have accrued.

The *Nehme* opinion provides guidance as to the meaning of the term "commission" of affirmative fraud or fraud through concealment, as distinguished from accrual of a cause of action for fraud. In *Nehme*, the Court interpreted the phrase "fraud, concealment or intentional misrepresentation of fact" included in the medical malpractice statute of repose, Section 95.11(4)(b)(1996). The Court noted that

> "Fraud" is generally defined as (1) a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment; and (2) a misrepresentation made recklessly without belief in its truth to induce another person to act.

Nehme, 863 So.2d at 205.

Thus, under the *Nehme* definition, a speaker or writer commits a fraud when knowingly misrepresenting or concealing a material fact with the intent to induce detrimental reliance. This definition focuses on the speaker's or writer's conduct and intent, not the listener's or reader's response to the conduct. A listener or reader may rely on the misrepresentation or concealment immediately after it is made, at some later time, or never. The occurrence and timing of reliance may be relevant when assessing whether and when a listener's or reader's cause of action

for the fraud has accrued,[10] but not for determining when the speaker or writer committed the fraud itself. Applying the stated policy perspective that the statute of repose focuses on the defendant's conduct rather than the plaintiff's, the fraud repose period must run from the date the speaker or writer committed the fraud by misrepresenting or concealing information with the intent to induce reliance, not from the date any particular person's cause of action for the fraud did or may have accrued. Therefore, the occurrence and timing of a plaintiff's reliance is irrelevant to determining when the repose period for fraud either begins to run or has expired.

The Second District Court of Appeal applied these principles in an action for conspiracy by tobacco companies to commit fraud. As in this case, the fraud included a conspiracy to commit fraud by concealment. *Laschke v. Brown & Williamson Tobacco Corp.*, 766 So.2d 1076 (Fla. 2d DCA 2000).

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[10] However, since *Engle* plaintiffs such as Ms. FRAZIER are suing for fraud by concealment rather than fraudulent inducement through an affirmative misstatement or misstatements, Florida courts have held it appropriate to infer reliance from the pervasive nature of the tobacco companies' advertising and publicity campaigns. *See, e.g., R.J. Reynolds Tobacco Co. v. Martin*, 53 So.3d 1060, 1069 (Fla. 1st DCA 2010) (" the record contains abundant evidence from which the jury could infer Mr. Martin's reliance on pervasive misleading advertising campaigns for the Lucky Strike brand in particular and for cigarettes in general, and on the false controversy created by the tobacco industry during the years he smoked aimed at creating doubt among smokers that cigarettes were hazardous to health.").

Laschke and her husband sued several tobacco companies, including Brown & Williamson, The complaint included a count for conspiracy to commit fraud by both misrepresentation and concealment of material facts. Among other arguments, Brown & Williamson urged that the fraud repose statute barred the Laschkes' claims for conspiracy to commit fraud to the extent those claims arose more than twelve years before the Laschkes filed suit in 1996. The Second District rejected this argument, following *Kush* and noting that a repose period runs "not from the time a cause of action accrues, but from the date of a discrete act on the part of a defendant." *Laschke*, 766 So.2d at 1078, *citing Kush*, 616 So.2d at 416. Therefore, in a case like Laschke's and the present case, where the plaintiff has alleged a conspiracy to commit fraudulent inducement or fraud by concealment, "the critical date for statute of repose purposes should be the date of the last act done in furtherance of the conspiracy." *Laschke*, 766 So.2d at 1079.

In their complaint the Laschkes alleged the "conspiracy of the defendants has been ongoing since at least December 1953 and has been continuous through the present." *Laschke*, 766 So.2d at 1079. If the tobacco companies' conspiracy was indeed both "ongoing" and "continuous," it did not stop twelve years before the Laschkes filed suit (or indeed at any date up to the time the Laschkes filed), so there was no last act in furtherance of the conspiracy to trigger the repose period.

The *Laschke* court concluded that under the pleadings, the date of the last act in furtherance of the conspiracy, and hence the date, if any, when the repose period began to run, remained a question of fact. Id.

The Second District in *Laschke* correctly applied this Court's holding in *Kush*. Where conspirators join to commit an ongoing fraud by concealment, the conspirators' collective acts of concealment continue until the last act in furtherance of their conspiracy. The date of this last act is therefore the date of the last discrete and identifiable act from which the repose period begins to run. The last act may occur before, at the same time as or even after any particular plaintiff's cause of action accrues, but maturation of a cause of action does not matter. Under *Kush*, accrual of a cause of action is not relevant to the repose period, and under the repose statute, discovery of or failure to discover the fraud does not determine the boundaries of the repose period.

Furthermore, under *Nehme* the continuation or termination of reliance upon an ongoing fraud also does not affect the repose period. Conspirators who conceal information commit a new act of fraudulent concealment each time they conceal information with the intent to induce others to rely on the misinformation created by their concealment. They commit this fraudulent act regardless of when or whether any particular person relies on the concealment; reliance may be relevant

to determining accrual of a cause of action, but not to determining when a repose period begins to run. Under *Nehme* the appropriate date for triggering the repose period in cases of conspiracy to commit fraud by concealment is the date of the last act of concealment in furtherance of the conspiracy, regardless of whether or when any particular plaintiff relied on any specific act along the timeline of the continuing conspiracy. Only termination of the fraudulent conspiracy can trigger the beginning of a repose period.

Notwithstanding the Petitioners' argument in their brief, nothing written in *Laschke* is inconsistent with *Nehme.* The *Laschke* court tied the beginning of the repose period to the "last act done in furtherance of the conspiracy," not the last act upon which the Laschkes or anyone else relied; indeed, the Second District did not mention reliance at all in its repose analysis. Furthermore, while the Laschkes alleged that the conspiracy to conceal was ongoing through the date they filed their complaint, filing their complaint against the defendant conspirators demonstrated that their reliance had ended at some unspecified time before their filing. If the timing of reliance were important to the statute of repose analysis, the *Laschke* court surely would have pointed out that Laschkes' reliance had ended; but the court did not do so, thus demonstrating a view of the repose period trigger based on the defendant's conduct rather than the plaintiff's reliance.

The Third District correctly applied the concepts outlined above. Following *Laschke*, the court below correctly held that the repose period in a fraudulent concealment conspiracy case runs from the date of the last act in furtherance of the conspiracy to conceal. *Frazier*, 89 So.3d at 847. The evidence below demonstrated that the Petitioners' conspiracy continued until at least 1994, well before expiration of any conceivable repose period. The Third District did not consider the timing of Ms. FRAZIER's reliance in its repose analysis, because her reliance was irrelevant to that analysis.

The Petitioners suggest that the Second District qualified or sub silentio receded from *Laschke* in *Philip Morris USA, Inc. v. Hallgren*, ___So.3d ____, 2013 Fla. App. *LEXIS* 16640, 38 Fla. L. Weekly D2189 (Fla. 2d DCA Case No. 2D12-2549, October 18, 2013). The *Hallgren* court did say the repose period in a case of fraudulent concealment ran from the last act of concealment upon which Hallgren relied, but this statement was dicta since the *Hallgren* court found the record to contain

> abundant, adequate evidence of not only the Tobacco Companies' misleading advertising campaigns and the false controversy perpetrated by the tobacco industry that continued until the late 1990's, but also of Mrs. Hallgren's direct reliance on that misleading advertising.

In light of this finding, there was sufficient evidence to "affirmatively demonstrate that Mrs. Hallgren's claims were not barred by the statute of repose" even assuming

the jury needed to find reliance. More importantly, when discussing the repose period for conspiracy to conceal, the *Hallgren* court merely quoted the statement of the *Laschke* court that the repose period runs from the date of the last act in furtherance of the conspiracy, without mentioning a need for proof of reliance. To the extent that *Hallgren* can be read to add an implied reliance requirement into the fraud repose statute, such a construction would be inconsistent with the language of Section 95.031(2)(a), and would be in conflict with the controlling holdings of this Court in *Kush* and *Nehme*.

The Petitioners also cite a series of cases from the Fourth District Court of Appeal, in which that court held proof of reliance within the repose period to be relevant in determining when the fraud repose period begins to run, both in individual fraud and conspiracy cases. *Philip Morris USA, Inc. v. Hess*, 95 So.3d 254 (Fla. 4th DCA 2012); *Philip Morris USA, Inc. v. Cohen*, 102 So.3d 11, 15 (Fla. 4th DCA 2012); *Philip Morris USA, Inc. v. Kayton*, 104 So.3d 1145, 1151 (Fla. 4th DCA 2012)(applying *Hess* to conspiracy claims); *Philip Morris USA, Inc. v. Putney*, 117 So.3d 798, 804 (Fla. 4th DCA 2012) ; *R.J. Reynolds Tobacco Co. v. Buonomo*, ___So.3d ___, 2013 Fla. App. *LEXIS* 15117 (Fla. 4th DCA Case No. 4D10-3543, September 25, 2013).

Hess and the Fourth District cases following it provide the basis for conflict jurisdiction in this case. In these cases the Fourth District incorrectly treated the repose period as if it were a statute of limitations period tied to accrual of a plaintiff's cause of action for fraud and thus to reliance. As discussed above, this Court's opinions have rejected this flawed analysis; the fraud repose period has nothing to do with the accrual of a cause of action for fraud, nothing to do with the time, if ever, when the fraud is discovered, and nothing to do with the presence or timing of reliance.

To justify their request that this Court recede from long standing statutory and decisional law, the Petitioners suggest that the repose analysis approved by this Court and the Third District below must be changed to prevent future prosecution of stale claims. The Petitioners' concern is misplaced.

First, independently of the repose statute, a statute of limitations applies to all fraud claims. Section 95.11(3) (j), Florida Statutes establishes a four year limitations period for "A legal or equitable action founded on fraud". The first clause of Section 95.031(2) (a) clarifies that the Section 95.11(3) limitations period runs "from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence ...." The Legislature has thus enacted two independent time limitations for bringing a fraud

action. In addition to a repose period independent of discovery, there is a statute of limitations period of four years, beginning when the fraud cause of action was or should have been discovered. This limitations period is generally available, although the Third District below determined it not to have expired in Ms. FRAZIER's case. Depending on the facts of a particular case, the statute of repose may or may not operate to bar a particular plaintiff's fraud claim before the statute of limitations runs. In any event the statutory limitations period is generally available as an independent bar to allegedly stale claims. Regardless of the repose period, fraud plaintiffs in Florida may not base their claims upon any fraud discovered (or which should have been discovered) more than four years before filing of the fraud action. Thus, statutory protection exists; alleged fraudulent conspirators are adequately protected from defending "stale" claims.

Ms. FRAZIER further notes that in cases such as this one, *Laschke*, and almost all *Engle* progeny cases in which there is allegation and evidence of an ongoing conspiracy to conceal which lasted decades, there is nothing stale about the claims. Like many *Engle* plaintiffs Ms. FRAZIER introduced evidence proving an ongoing conspiracy among the Petitioners and other tobacco companies, which began in 1953 and extended at least through 1994. The conspiracy was undertaken to conceal the truth about the health hazards and addictive nature of smoking and

thereby to mislead the public in general and smokers in particular. Since the ongoing conspiracy ended, if at all, at the soonest just before the *Engle* complaint was filed in May of 1994, proof of the last stages of the conspiracy would require no resort to remote evidence. The historical evidence pertaining to the beginning and earlier stages of the conspiracy is the same regardless of when the repose and limitations periods began to run and is based on documents at least as accessible to the tobacco companies as to the *Engle* plaintiffs. The record in this like most *Engle* progeny cases indicates that such evidence is abundant and was addressed by all parties, belying any claim that the defense was hampered by alleged staleness of evidence. Indeed, any difficulties caused by the need to consider historical documents as evidence fall at least equally on the plaintiffs. *See Overland Construction Co., Inc. v. Sirmons*, 369 So.2d 572, 574 (Fla. 1979)("Undoubtedly, the passage of time does aggravate the difficulty of producing reliable evidence, and it is likely that advances in technology tend to push industry standards inexorably higher. The impact of these problems, however, is felt by all litigants.").

This Court should apply the interpretation of the statute of repose approved in *Kush* and *Nehme* as applied by the Third District below. Reliance is irrelevant to

determining the fraud repose period, so no instruction or verdict question on repose incorporating a repose element was necessary. The Court should affirm.

II.

THE TRIAL COURT DID NOT ERR BY DECIDING NOT TO GIVE THE LIMITING EVIDENTIARY INSTRUCTION REQUESTED BY THE PETITIONERS, SINCE THE REQUESTED INSTRUCTION DID NOT ADDRESS THE ACTUAL ISSUES RAISED BY THE REPOSE DEFENSE UNDER EITHER PETITIONERS' OR RESPONDENT'S POSITION AND UNREASONABLY RESTRICTED THE EVIDENCE THE JURY WOULD CONSIDER.

The Petitioners argued to the Third District and to this Court that the trial court should have instructed the jury as follows:

> In making your determination regarding Plaintiff's fraudulent concealment and agreement to conceal claims, you may not consider evidence of alleged concealment, statements or other conduct before [December 14, 1995/May 5, 1982].[11]

A similar instruction was requested in *Cohen.* This proposed instruction on the statute of repose is improper for at least two reasons.

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[11] The Petitioners requested alternative critical dates below, but have now conceded that the applicable critical date, if any, would be May 5, 1982.

First, a party asserting instructional error must show that: (1) the requested instruction accurately states the law applicable to the facts of the case; (2) the testimony and other evidence presented supports the giving of the instruction; and (3) the instruction was necessary to resolve the issues in the case properly. *Saunders v. Dickens*, 103 So.3d 871, 879 (Fla. 4th DCA 2012), *citing Force v. Ford Motor Co.*, 879 So.2d 103, 106 (Fla. 4th DCA 2004). In this case, even if some instruction on the statute of repose were necessary, the instruction should incorporate the applicable law and inform the jury of the issues they would actually need to resolve regarding the repose period.

If the jury must decide anything regarding the statute of repose, it should only be the date of the last act committed in furtherance of the conspiracy to conceal, since that is the date from which the repose period begins to run as explained in *Laschke* and by the Third District below. The requested instruction did not advise the jury of a need for this factual finding and is therefore both an inaccurate statement of the law and misleading.

Secondly, even if the trial court had adopted the Petitioners' erroneous view that the timing of reliance is relevant to the repose determination, the Petitioners' proposed instruction would still be inaccurate and misleading, because it contains an improper evidentiary restriction. Even under the Petitioners' view, a jury

applying a reliance element to a repose determination would merely need to decide when Ms. FRAZIER relied (or stopped relying) on the Petitioners' ongoing pattern of concealment.[12] The Petitioners apparently assume, without case law support or logic, that a determination of when Ms. FRAZIER relied on the Petitioners' concealment would also require some time restriction on the evidence the jury may consider. Such an evidentiary restriction is both legally inaccurate and improper.

To determine whether and perhaps when Ms. FRAZIER reasonably relied (or relied at all) on the Petitioners' conduct, statements, or concealment, the jury would necessarily have to evaluate Ms. FRAZIER's entire preexisting fund of knowledge regarding the Petitioners and their tobacco products. To evaluate the impact of any statements which tobacco companies made or any information about cigarette smoking Ms. FRAZIER received after 1982, among other matters the jury would have to decide whether Ms. FRAZIER reasonably perceived the new information as a continuation of or a change in the tobacco companies' previous positions and whether her preexisting information and state of mind would lead her to credit the new information or not. Thus, in order to determine whether Ms. FRAZIER reasonably relied on any information about cigarette smoking which she

[12] The statute of repose is an affirmative defense as to which the Petitioners have the burden of proof. Therefore, even if a jury determination on reliance were necessary, the jury's determination for repose purposes would be when, if ever, Ms. FRAZIER's reliance ended, not how long her reliance continued.

received after 1982, the jury would have to evaluate the life history of Ms. FRAZIER's exposure to the Petitioners' misinformation and the complete catalogue of information she received about smoking from all sources, including the Petitioners, before as well as after 1982. Arbitrarily cutting off the evidence of Ms. FRAZIER's knowledge after the asserted May 5, 1982 repose date, or at any other date for that matter, would force the jury to make a decision about reliance based upon an incomplete and hence probably inaccurate analysis of Ms. FRAZIER's state of mind and knowledge. Indeed, the Petitioners themselves in their Initial Brief have addressed information about smoking Ms. FRAZIER received during the 1960's and 1970's, not just the post-1982 information.

In light of the inadequacies of the Petitioners' requested proposed instruction, the trial court properly rejected it and the Third District correctly affirmed this decision on cross-appeal. This Court should affirm the opinion below.

III.

APPLICATION OF A STATUTE OF REPOSE TO BAR MS. FRAZIER'S CAUSE OF ACTION FOR HER LATENT INJURY BEFORE IT COULD ACCRUE WOULD VIOLATE HER CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS.

As properly interpreted and applied by the Third District, and as explained above, the fraud statute of repose did not and does not bar Ms. FRAZIER's claims, since the last act in furtherance of the Petitioners' conspiracy occurred well within any conceivable repose period, and Ms. FRAZIER's reliance, or lack thereof, is irrelevant for repose purposes. Notwithstanding this analysis, if any court were to apply the fraud repose statute in a manner barring Ms. FRAZIER's cause of action before it accrued, such a ruling would violate her right of access to courts under Article I, section 21 of the Florida constitution.[13]

The Legislature may not abolish a cause of action before it accrues under circumstances in which a person is exposed to a toxic substance within a repose period but does not develop the latent disease resulting from that exposure until after the repose period has facially expired. Application of a statute of repose to

[13] Since Ms. FRAZIER was a cross-appellee as to the statute of repose issue below, and Ms. RUSSO is a Respondent in this Court, the Court may consider any applicable grounds urged by the Respondent in support of affirmance, whether they were raised in the trial court or Third District or not. *See Continental Casualty Co. v. Ryan Inc. Eastern*, 974 So.2d 368, 377-78 (Fla. 2008)("We have authority to consider alternative grounds for affirming the decision below that were not raised by the parties" at the district court level); *Dade County School Board v. Radio Station WQBA*, 731 So.2d 638, 645 (Fla. 1999)("an appellee, in arguing for the affirmance of a judgment, is not limited to legal arguments expressly asserted as grounds for the judgment in the court below"); *State v. Hankerson*, 65 So.3d 502, 505 (Fla. 2011)("A trial court's ruling should be upheld if there is any legal basis in the record which supports the judgment. It follows that to aid the appellate court in its task, the appellee should be permitted to explicate any legal basis supporting the trial court's judgment.").

bar an action for such a latent disease before it accrues or even could accrue is fundamentally unfair and violates the Florida constitutional right of access to the courts. *Pulmosan Safety Equipment Corp. v. Barnes*, 752 So.2d 556, 557-59 (Fla. 2000); *Diamond v. E.R. Squibb & Sons, Inc.*, 397 So.2d 671, 672 (Fla. 1981); *Overland Construction Co. v. Sirmons*, 369 So.2d 572, 574-75 (Fla. 1979).

The Petitioners may claim that the *Pulmosan/Diamond* "latent injury" doctrine applies only to the product liability statute of repose, not to the fraud repose statute. However, the basis for this exception is the fundamental unfairness of barring a cause of action for a latent injury before it does or could accrue or before the plaintiff could even discover that he or she has been injured. This common sense consideration applies regardless of the theory under which the latently injured plaintiff brings suit against the manufacturer of the injurious substance, whether the action proceeds in negligence, strict liability, fraud or all three.

This Court has approved the medical malpractice statute of repose in cases where that statute bars causes of action before they accrue. *See Nehme,* 863 So.2d at 208 (medical malpractice repose statute can bar causes of action before they accrue). This result, however, is based on the "overpowering necessity" exception to the constitutional right of access to the courts; the right may be restricted in

cases where the Legislature has found an overpowering public necessity to restrict access to the courts for special reasons of public policy. Such an overpowering necessity has been found to exist specifically in the medical malpractice cases, due to concerns about a crisis in medical malpractice insurance, thereby justifying otherwise unwarranted restrictions on medical malpractice plaintiffs' access to the courts. *See Carr v. Broward County*, 541 So.2d 92, 95 (Fla. 1989) (approving district court finding of an overpowering public necessity to restrict medical malpractice plaintiff's access to courts through a statute of repose).

The Third District has indicated that there is a similar "public necessity" undergirding the fraud statute of repose, based on a concern about the use of stale evidence. *Kish v. A.W. Chesterton Co.*, 930 So.2d 704, 706-07 (Fla. 3d DCA 2006). As noted above, any concern about the use of historical evidence in *Engle* cases is misplaced due to the operation of an independent statute of limitations to bar old claims, and the equal access to and use by all parties in *Engle* litigation of the historical evidence. *See Overland Construction Co.*, 369 So.2d at 574 (effect of passage of time on evidence an equal problem for all litigants). Furthermore, it is difficult to fathom what actual "public necessity" could conceivably exist for providing special protections to those who commit frauds. The Legislature has not found any.

Moreover, the *Kish* court applied the fraud statute of repose only to protect an insurer, not a manufacturer. Kish was allowed to proceed with latent disease asbestosis claims against asbestos manufacturers.

The *Kish* court also suggested that application of the fraud statute of repose to bar fraud claims against manufacturers would not prejudice plaintiffs, since they could still proceed against the manufacturers of the injurious asbestos products under theories of negligence or strict liability, unaffected by the defenses applying to fraud. As applied to *Engle* progeny actions, this suggestion from *Kish* may not be accurate. It remains a matter in controversy in the district courts of appeal whether *Engle* progeny plaintiffs may seek punitive damages under their strict liability and negligence theories or only under their intentional tort theories of fraud by concealment and conspiracy. *See Soffer v. R.J. Reynolds Tobacco Co.*, 106 So.3d 456, 460-61 (Fla. 1st DCA 2012)(*Engle* progeny plaintiffs may recover punitive damages only on their concealment and conspiracy claims, not on their negligence or strict liability claims); *R.J. Reynolds Tobacco Co. v. Ciccone*, __ So.3d ___, 2013 Fla. App. LEXIS 12726, 38 Fla. L. Weekly D1729(Fla. 4th DCA Case No. 4D11-3807, August 14, 2013)(following *Soffer*) *Cf. Hallgren* (disagreeing with *Soffer* and holding that *Engle* progeny plaintiffs may seek punitive damages on strict liability and negligence claims as well as on

concealment and conspiracy claims). Also, the application of comparative negligence as a defense to intentional fraud is restricted. *See Besett v. Basnett*, 389 So.2d 995, 997-98 (Fla. 1980) (plaintiff in a case of intentional fraudulent misrepresentation may recover even though the falsity of the misrepresentation would have become apparent upon investigation, unless the plaintiff has actual knowledge that the representation is false or its falsity is obvious to the plaintiff without investigation); *M/I Schottenstein Homes v. Azam*, 813 So.2d 91 (Fla. 2002)(explaining *Besett*). Thus, limiting *Engle* plaintiffs to recovering only compensatory and not punitive damages, and unnecessarily applying a comparative fault reduction, if those proved to be the effects of applying the fraud statute of repose to *Engle* plaintiffs, would substantially prejudice them and result in outcomes contrary to long established legal principles. Accordingly, this Court should find the fraud statute of repose unconstitutional as applied in the context of the *Engle* progeny actions, and should affirm on that ground as well,

CONCLUSION

The Third District correctly applied the Florida law regarding the statute of repose as stated in *Kush*, *Nehme* and *Laschke*. In conspiracy to conceal cases such as this one the act triggering the repose period is the last act in furtherance of the conspiracy, regardless of the timing of reliance. The instruction proposed by the Petitioners below was also improper, and properly rejected, because it imposed on the jury an unnecessary and misleading evidentiary restriction. For that reason as well, the Court should affirm.

Finally, the Court should also affirm because the fraud statute of repose is unconstitutional as applied to the circumstances of *Engle* progeny plaintiffs such as Ms. FRAZIER.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by e-mail and/or e-service, pursuant to Rule 2.516, Florida Rules of Judicial Administration, this 22nd day of November, 2013 upon counsel on the attached service list.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure, having been prepared in 14 point Times New Roman font.

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