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Case No. SC12-1401

IN THE SUPREME COURT OF FLORIDA

PHILIP MORRIS USA INC., *ET AL.*,

Petitioners,

v.

TINA RUSSO, AS EXECUTOR DE SON TORT FOR THE ESTATE OF PHYLLIS FRAZIER,

Respondent.

On Discretionary Review of a Decision of
the Third District Court of Appeal

INITIAL BRIEF OF PETITIONERS

Benjamine Reid
FL Bar No. 183522
Alina Alonso Rodriguez
FL Bar No. 178985
CARLTON FIELDS, P.A.
Miami Tower
100 S.E. Second Street, Suite 4200
Miami, Fla. 33131

Gregory G. Katsas
FL Bar No. 89091
JONES DAY
51 Louisiana Avenue
Washington, D.C. 20001

Counsel for Defendant/Petitioner
R.J. Reynolds Tobacco Co.

Raoul G. Cantero
FL Bar No. 552356
WHITE & CASE LLP
Southeast Financial Center, Suite 4900
200 South Biscayne Boulevard
Miami, Fla. 33131

Lauren R. Goldman
(*pro hac vice* application pending)
Scott A. Chesin
(*pro hac vice* application pending)
MAYER BROWN LLP
1675 Broadway
New York, N.Y. 10019

Counsel for Defendant/Petitioner
Philip Morris USA Inc.

OCTOBER 28, 2013

William Geraghty
FL Bar No. 0089508
Frank Cruz-Alvarez
FL Bar No. 0499803
SHOOK, HARDY & BACON L.L.P.
Miami Center, Suite 2400
201 South Biscayne Boulevard
Miami, Fla. 33131

Counsel for Defendant/Petitioner
Philip Morris USA Inc.

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PRELIMINARY STATEMENT

Florida's statute of repose requires that an action "founded upon fraud" be filed within twelve years "after the date of the commission of the alleged fraud." § 95.031(2)(a), Fla. Stat. This case is one of several now pending before this Court that present the same issue: whether the statute of repose requires the plaintiff to prove that he or she relied on a fraudulent act or omission committed within the twelve-year period before filing suit. In this case, the Third District held that the plaintiff could recover damages *without* proving reliance on an act of fraud committed within the statutory period, so long as there was evidence in the record that the defendant or a co-conspirator had continued to commit fraudulent acts that may have injured *someone else* within that period. In contrast, the Fourth District, in a case also under review in this Court, held that the statute of repose bars a plaintiff's fraud claim absent proof that the plaintiff *himself* relied to his detriment on a misrepresentation or omission made within the twelve years before commencement of the action.

The Third District was wrong, and the Fourth District was right. As the Fourth District has explained, if proof of the plaintiff's reliance within the actionable period were not required by the statute, then a plaintiff defrauded decades before filing suit "would still be able to seek recovery from a defendant based on the defendant's defrauding of third parties" many years later. *Philip*

Morris USA Inc. v. Hess, 95 So. 3d 254, 261 (Fla. 4th DCA 2012). Such a reading is contrary to both the language and the intent of the statute of repose.

This Court should quash the decision below and direct the trial court to submit the repose defense to the retrial jury, and it should approve the Fourth District's contrary decision in *Hess*, the other case now under review.

STATEMENT OF THE CASE AND FACTS[1]

This case is one of the many "*Engle* progeny" lawsuits that were filed pursuant to this Court's decision in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) (per curiam) ("*Engle III*"). As the Court is aware, *Engle* was a class action prosecuted on behalf of "Florida citizens and residents, and their survivors, who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 40 (Fla. 3d DCA 1996) ("*Engle II*") (internal quotation marks omitted). In *Engle III*, this Court decertified the class but held that individual class members could pursue their own claims against

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[1] The trial transcript is cited herein as "T. [page number]"; non-transcript portions of the record are cited as "R. [volume number]:[page number]." Parallel citations in the form "App. Tab [letter]" indicate where copies of cited materials may be found in the appendix to this brief. The appendix also contains copies of several trial and appellate documents from two *Engle* progeny cases (*Hess* and *Buonomo*), referenced on pages 19-20 and 42-44, *infra*. As records of Florida courts, those documents are subject to judicial notice (*see* § 90.202(6), Fla. Stat.), and petitioners hereby request such notice. The entire *Hess* trial transcript is part of the record on appeal for that case, which is currently on review in this Court.

the defendants (provided that such actions were filed within one year of the Court's mandate), and that certain findings made by the original *Engle* jury would have "res judicata effect" in the individual trials. 945 So. 2d at 1277. The Court also held that the *Engle* jury "did not determine whether the defendants were liable to anyone," *id.* at 1263, and thus that subsequent juries would have to "consider individual questions of reliance and legal cause." *Id.* at 1255.

The plaintiff in this case, Phyllis Frazier, sued Petitioners Philip Morris USA Inc. ("PM USA") and R.J. Reynolds Tobacco Company ("Reynolds") in 2007, contending that she was a member of the *Engle* class. In her complaint, Ms. Frazier alleged that her chronic obstructive pulmonary disease (COPD) was caused by smoking cigarettes manufactured by the defendants. *Frazier v. Philip Morris USA Inc.*, 89 So. 3d 937, 939-41 (Fla. 3d DCA 2012). She asserted four causes of action that had been asserted in the original *Engle* litigation and as to which this Court had affirmed the *Engle* jury's factual findings: (1) negligence, (2) strict liability, (3) fraudulent concealment, and (4) conspiracy to commit fraudulent concealment. The case was tried over the course of 18 days in September and October of 2010.

A. The Jury's Verdict And Ms. Frazier's Direct Appeal

Each of the causes of action that was alleged at trial is governed by a four-year statute of limitations. *See* § 95.11(3), Fla. Stat. At trial, the defendants

contended that Ms. Frazier's claims were barred by the statute of limitations because she either knew or should have known that she had a smoking-related injury more than four years before the *Engle* class action was filed on May 5, 1994. The jury found for the defendants on this issue, determining that Ms. Frazier was a member of the *Engle* class (thus entitling her to use the date of the *Engle* class action complaint as the pertinent filing date for statute-of-limitations purposes), but that she knew or should have known of her injuries more than four years before the *Engle* complaint was filed. Implementing the verdict, the trial court entered judgment for the defendants. Ms. Frazier appealed to the Third DCA, arguing that the trial court had erred in submitting the limitations defense to the jury and in instructing the jury on the defense. The Third DCA agreed with Ms. Frazier that the defendants' evidence was insufficient to sustain their burden of proof on the limitations defense, and it therefore reversed and remanded for a new trial.

Although Petitioners disagree with the Third DCA's holding on this issue, they have elected not to present the issue in this Court.

B. Events At Trial And On Appeal Relating To The Statute Of Repose

The present appeal concerns an issue that the defendants raised in their cross-appeal to the Third DCA. The facts and procedural history relevant to that cross-appeal are as follows.

1. Plaintiff's Concealment and Conspiracy Claims

Ms. Frazier asserted two causes of action based on fraud: (1) fraudulent concealment and (2) conspiracy to commit fraudulent concealment. As the Court is aware, the *Engle* jury found that Reynolds and PM USA had each "concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both." 945 So. 2d at 1277. The *Engle* jury also found that Reynolds and PM USA had each "agreed to conceal or omit" such information, with the "intention that smokers and the public would rely on this information to their detriment." *Id.* In its 2006 *Engle* opinion, this Court ruled that those findings would have "res judicata effect" in individual lawsuits filed by former members of the *Engle* class. *Id.* at 1269.

At the same time, the Court emphasized that juries in the progeny cases would have to "consider individual questions of reliance and legal cause." *Id.* at 1255. Each *Engle* progeny plaintiff who asserts a claim for fraudulent concealment or conspiracy to commit fraudulent concealment is therefore required to allege and prove reliance—specifically, that he or she detrimentally relied on an act of concealment by the defendants in the case (to prove the concealment claim) or on an act done in furtherance of a conspiracy to conceal (to prove the conspiracy claim).

Another legal requirement for fraud claims is relevant here. Florida's statute of repose requires that an action "founded upon fraud" be filed within twelve years "after the date of the commission of the alleged fraud." § 95.031(2)(a), Fla. Stat. Members of the *Engle* class are deemed to have filed their complaints on May 5, 1994, the date the *Engle* class complaint was filed. *See Hess*, 95 So. 3d at 260 (citing *Engle v. R.J. Reynolds Tobacco ("Engle I")*, No. 94-08273, 2000 WL 33534572, at *5 (Fla. Cir. Ct. Nov. 6, 2000)). Therefore, to recover for fraudulent concealment or conspiracy to commit fraudulent concealment, an *Engle* progeny plaintiff must prove that "the" fraud "alleged" in the complaint was "commi[tted]" after May 5, 1982—twelve years before the filing of the *Engle* complaint. § 95.031, Fla. Stat.

2. Evidence Relating To Ms. Frazier's Reliance

At trial, Ms. Frazier adduced evidence that she claimed was sufficient to allow the jury to conclude that the defendants and their alleged co-conspirators had concealed the hazards and addictiveness of cigarettes from the public, and that Ms. Frazier had relied to her detriment on that concealment. Ms. Frazier began smoking cigarettes in 1959 or 1960, when she was 14 or 15 years old. T. 3214 [App. Tab H]. She testified that when she began smoking, she did not understand what nicotine was, what "tar" was, or what effects those substances would have on her body if she smoked cigarettes. *Id.* at 3215-16. She remembered seeing

advertisements for various brands of cigarettes manufactured by the defendants, and she remembered the slogans and advertising jingles associated with those brands. *See*, *e.g.*, *id.* at 3175-76. She testified that she understood several such slogans and advertisements to mean that particular cigarettes were "better for [her]" (*e.g.*, *id.* at 3210 (discussing Parliaments); *id.* at 3211-12 (discussing Benson & Hedges Ultra Lights)) or "healthier" (*e.g.*, *id.* at 3209 (discussing Carltons)) than other cigarettes. And she stated that even after warnings were put on cigarette packages in 1966, she did not believe that cigarettes were hazardous because "[t]he tobacco company didn't tell me it was going to be hazardous. And I relied on that." *Id.* at 3379-80.

Ms. Frazier also testified, however, that by the time she was a young adult, she had begun to understand the hazards of smoking. She testified on direct examination that she first attempted to quit in 1963, when she was 18 years old, because cigarettes were expensive. T. 3236-37 [App. Tab H]. That was the first time, she testified, that she "realized it was addictive because it was very difficult to quit." *Id.* at 3237. And on cross-examination, she acknowledged several times that by the 1970s, she was fully aware of the health hazards of smoking. She testified, for example, that by 1970, when packages of cigarettes began to be labeled with the words "Warning: The Surgeon General has determined that cigarette smoking is dangerous to your health," she believed it was "common

knowledge," "at least [among] those who smoked," that cigarette smoking was indeed dangerous to health. *Id.* at 3382. She testified further (via a deposition transcript that was read to the jury) that "certainly by 1975 or 1976," she "understood that cigarette smoking could cause lung cancer, COPD and emphysema." *Id.* at 4793. *See also id.* at 3389 ("[A]s of at least 1975 or '76, [Ms. Frazier] understood the possibility that smoking could cause lung cancer."); *id.* at 4788-89 ("in 1975 or 1976," when Ms. Frazier learned that her daughter was smoking cigarettes, she knew "that it was at least possible that you could get lung cancer from smoking cigarettes"); *id.* at 4789-90 (by 1975 or 1976, Ms. Frazier "knew it was addictive" and that smokers "expos[ed]" themselves "to a significant health risk").

Thus, there was sufficient evidence from which jurors could have concluded (1) that Ms. Frazier relied on statements made by the defendants that allegedly concealed the hazards of smoking when she decided to begin and continue smoking in the 1960s; *but* (2) that by the 1970s (and certainly before May 5, 1982), Ms. Frazier was no longer relying on any of the tobacco companies' alleged misstatements or omissions, because by that point she knew that smoking was hazardous and was not under any misimpressions about the risks.

To be sure, the evidence on both of these points was disputed. Defendants adduced evidence suggesting that the risks of smoking were common knowledge

well before Ms. Frazier ever smoked a cigarette, and that she *never* relied on the defendants' actions when making decisions about smoking. *See, e.g.*, T. 2564-80 [App. Tab H]. And Plaintiff adduced evidence suggesting that Ms. Frazier continued to rely on allegedly misleading statements in tobacco advertisements as late as the 1990s. *Id.* at 3211-12. But based on the evidence, the jury certainly *could* have concluded that Ms. Frazier relied to her detriment when she was a teenager but ceased relying when she was an adult.

3. The Trial Court's Refusal To Instruct The Jury On The Statute Of Repose

Because there was evidence from which the jury could have concluded that Ms. Frazier, if she was defrauded at all, last relied on any fraudulent concealment in the 1960s or 70s, the defendants asked the trial court to instruct the jury that it could not find for Ms. Frazier on her fraud claims unless it concluded that she had been defrauded by conduct that occurred after May 5, 1982. *See* R. 36:6852-6946 [App. Tab A] ("In making your determinations regarding Plaintiff's fraudulent concealment and agreement to conceal claims, you may not consider evidence of alleged concealment, statements, or other conduct before . . . May 5, 1982.").[2]

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[2] Defendants' proposed instruction actually listed two different repose dates in the alternative. Defendants argued that the repose period should have been calculated based on the date Ms. Frazier filed her own complaint: December 14, 2007. If that date were used, the applicable repose date would be December 14, 1995. In the alternative, they requested that the trial court instruct the jury that the applicable date was May 5, 1982. Petitioners do not contend here that the proper

In response, plaintiff argued that the instruction should not be given because (1) "the critical date for statute of repose purposes should be the date of the last act done in furtherance of the conspiracy" (R. 38:7266-7270 [App. Tab B at 2] (relying on *Laschke v. Brown & Williamson Tobacco Corp.*, 766 So. 2d 1076, 1079 (Fla. 2d DCA 2000))), and (2) the jury found in Phase I of *Engle* that the defendants committed acts of concealment "[b]oth before and after May 5, 1982" (*id.* at 3).

The trial court ruled in plaintiff's favor, stating only that it "agree[d]" with plaintiff's counsel regarding the issue. T. 5087 [App. Tab H]. The court did not instruct the jury regarding the statute of repose, and—despite defendants' request (R. 36:6852-6946 [App. Tab D at 4, 5])—it did not include any question on the verdict form that would have asked the jury to determine whether any concealment that injured Ms. Frazier occurred after the repose date. Instead, the court simply asked the jury to find (for purposes of the concealment claim) whether Ms. Frazier had "relied to her detriment on a statement . . . that concealed or omitted material information" regarding the health effects of cigarettes; and similarly (for purposes of the conspiracy claim) whether she had "relied to her detriment on a statement

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repose date is twelve years before the filing of the individual progeny plaintiff's complaint; we assign as error the trial court's denial of the request to charge the jury consistent with the alternative request for an instruction regarding a repose period beginning in 1982.

made in furtherance of [the] Defendant[s'] agreement" to conceal material information. R. 37:7111-7114 [App. Tab C at 2]. There was no temporal limitation on either of these questions; the jury could have answered either question in the affirmative upon a finding that Ms. Frazier had relied on acts of concealment only before May 5, 1982.

4. The Third DCA's Holding In The Cross-Appeal

As discussed above, the jury found for defendants on the limitations issue, and the trial court entered judgment in defendants' favor. Ms. Frazier appealed. Defendants cross-appealed, arguing that *if* the Third DCA were to award the plaintiff a new trial, it should correct two errors committed during the original trial. The first assigned error concerned the trial court's application of the *Engle* Phase I findings to Ms. Frazier's case.[3] The second assigned error was the trial court's refusal to instruct the jury on repose.

On the latter point, defendants argued that because the jury could have concluded that Ms. Frazier did not rely on any alleged acts of fraud during the

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[3] For purposes of preservation of the claim, petitioners continue to assert that the trial court violated their federal due process rights in applying the *Engle* findings in the manner that it did, and that the Third DCA erred by affirming that application, but we recognize that this argument was rejected by this Court in *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013), *cert. denied*, 82 U.S.L.W. 3088, 2013 WL 4079332 (U.S. Oct. 7, 2013), and we do not ask the Court to address the issue in this case.

twelve years preceding the *Engle* complaint, the trial court should have submitted the repose issue to the jury.

The Third District disagreed, holding as follows:

> The appellees contend that Ms. Frazier was obligated to prove that she relied upon a deceptive statement or omission after May 5, 1982 (twelve years before the *Engle* lawsuit began in the trial court). The trial court refused a jury instruction requested by the appellees on this point. We conclude that the last act done in furtherance of the alleged conspiracy fixes the pertinent date for purposes of commencement of the statute of repose, and we conclude that Ms. Frazier introduced evidence of deceptive statements or omissions occurring after May 5, 1982. *Laschke v. Brown & Williamson Tobacco Corp.*, 766 So. 2d 1076, 1078 (Fla. 2d DCA 2000). We reject the appellees' 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 947-48.

This holding conflicts directly with six Fourth DCA decisions. *See Hess*, 95 So. 3d at 260-61; *Philip Morris USA, Inc. v. Naugle*, 103 So. 3d 944, 947 (Fla. 4th DCA 2012); *Philip Morris USA, Inc. v. Kayton*, 104 So. 3d 1145, 1151 (Fla. 4th DCA 2012); *Philip Morris USA, Inc. v. Cohen ("R. Cohen.")*, 102 So. 3d 11, 15 (Fla. 4th DCA 2012); *Philip Morris USA, Inc. v. Putney*, 117 So. 3d 798, 804 (Fla. 4th DCA 2013); *R.J. Reynolds Tobacco Co. v. Buonomo*, __ So. 3d __, No. 4D10-3543, 2013 WL 5334590, at *2 (Fla. 4th DCA Sept. 25, 2013). In *Naugle*, for example, the Fourth DCA held that "any concealment claim" raised in an *Engle*

progeny case must "be based on conduct that occurred after May 5, 1982." *Naugle*, 103 So. 3d at 947; *see also Hess*, 95 So. 3d at 260-61 (same); *R. Cohen*, 102 So. 3d at 15 (same). The Fourth DCA also held that "[b]ecause fraudulent concealment requires proof of reliance," claims of concealment and conspiracy to conceal are barred "unless the record demonstrates that [the plaintiff] justifiably relied on statements or omissions made after that date." *Naugle*, 103 So. 3d at 947; *see also R. Cohen*, 102 So. 3d at 15 (same); *Hess*, 95 So. 3d at 261 (rejecting plaintiff's "contention that the date of reliance is irrelevant").

The decision below is also in tension with a subsequent statement by the Third DCA itself in *Lorillard v. Alexander*, __ So. 3d __, No. 3D12-1593, 2013 WL 4734565 (Fla. 3d DCA Sept. 4, 2013), that "[s]ince the statute of repose begins in 1982, [the decedent's] belief and reliance through 1985 was relevant to show that his cause of action was not barred by the statute of repose." *Id.* at *5.[4]

To resolve the conflict between the District Courts of Appeal, this Court accepted jurisdiction over this case as well as *Hess*. Since the Third DCA's decision, Ms. Frazier has passed away and a personal representative, Tina Russo, has been substituted as the plaintiff.

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[4] In *R.J. Reynolds Tobacco Co. v. Webb*, 93 So. 3d 331 (Fla. 1st DCA 2012), the First DCA rejected without analysis the defendant's argument that the statute of repose and federal preemption operated in combination to bar the plaintiff's concealment and conspiracy claims. *Id.* at 333.

SUMMARY OF ARGUMENT

1. The Third DCA's holding is contrary to the plain language of the fraud statute of repose, which requires a plaintiff to bring suit no more than twelve years "after the date of the commission of the alleged fraud." The natural meaning of the term "the alleged fraud" is the fraud alleged in the complaint—in other words, "the" fraud "alleged" to have harmed the plaintiff herself. A fraudulent act cannot harm a plaintiff unless the plaintiff relies on that act to her detriment. If the plaintiff does not rely on a fraudulent act, no fraud has been committed against that plaintiff. Therefore, as the Fourth DCA, two federal district court judges applying the Florida statute, and even a recent panel of the Third DCA have all held, the statute of repose requires a plaintiff to bring a fraud claim within twelve years of the commission of a fraudulent act or omission *on which he or she relied.*

2. The decision below is also contrary to the statute's purpose. This Court explained 25 years ago that the Florida Legislature enacted the statute of repose because it recognized the profound difficulties involved in defending against "stale" fraud claims. The Third DCA itself, before it encountered this issue in the *Engle* litigation, wrote that the statute was constitutional because defendants "ought not to be called on to defend a claim when the evidence has been lost, memories have faded, and witnesses have disappeared."

The decision below would allow a plaintiff with a decades-old claim to bring suit based on an allegation that other people may have been harmed by the defendant's more recent conduct. It thereby permits suits that suffer from all the ills the statute of repose was intended to cure. Defendants in such cases would need to adduce evidence about the intentions and beliefs of people who may be long dead, or too far removed from the relevant events to remember what happened. The Third DCA's rule, if approved, would substantially dilute the protections of the repose period not just in tobacco litigation but in a wide variety of other cases involving allegations of "continuing frauds."

3. The Third DCA based its holding on a misinterpretation of a decision from the Second DCA, *Laschke v. Brown & Williamson*. *Laschke* did not hold, as the Third DCA believed, that the statute of repose is inapplicable where the plaintiff alleges that the defendant engaged in an ongoing conspiracy to defraud other people after the fraud involving the plaintiff himself had ended. Indeed, in an opinion filed just last week, the Second DCA made clear that under *Laschke*, "[t]he statute of repose begins to run on a claim for fraudulent concealment based on an ongoing pattern of concealment when the last act of concealment *on which the plaintiff relied* occurs."

In any event, if *Laschke* did stand for the proposition for which the Third DCA cited it, *Laschke* would be wrong. The Third DCA's rule effectively creates

a tolling provision for the statute of repose, which would allow plaintiffs to sue more than twelve years after allegedly being defrauded if they could show that the defendant concealed the fraud from *others* through a continuing conspiracy. The Florida Legislature considered whether to add a tolling provision to the fraud statute of repose, and it declined to do so. Similar provisions exist elsewhere in Florida law, including in the statute of repose applicable to product liability claims. By including a tolling provision in the product liability statute but not in the fraud statute, the Legislature consciously decided to balance plaintiffs' right of access to courts against defendants' right to be protected against stale claims.

That balance, if respected by the courts, would protect the rights of all parties in the *Engle* progeny litigation. The fraud statute of repose bars a progeny plaintiff's concealment and conspiracy-to-conceal claims if she cannot prove reliance after May 5, 1982. But the product-liability tolling provision still allows that same plaintiff to pursue claims for strict liability and negligence, and to recover damages, based on allegations of events that happened many years before suit was filed.

4. There are no other reasons to hold that the repose defense is unavailable in *Engle* progeny cases. Plaintiffs in other cases have argued (a) that the statute of repose is unconstitutional; (b) that the repose defense is foreclosed in the progeny suits as a result of various aspects of the original *Engle* litigation; and (c) that

under this Court's decision in *Kush v. Lloyd*, the repose defense depends on the timing of the defendant's conduct and not that of the plaintiff's reliance or injury. All of these contentions are meritless. The plaintiff in this case has largely waived these arguments, but we address them here because the repose defense is a recurring issue.

STANDARD OF REVIEW

Generally, this Court "review[s] the denial of a requested instruction for an abuse of discretion." *Hoskins v. State*, 965 So. 2d 1, 14 (Fla. 2007). But "[b]ecause this issue presents a question of statutory interpretation, the standard of review is de novo." *Hampton v. State*, 103 So. 3d 98, 110 (Fla. 2012); *see also Johnson v. State*, 78 So. 3d 1305, 1310 (Fla. 2012) ("Judicial interpretations of statutes are pure questions of law subject to de novo review."); *McConnell v. Union Carbide Corp.*, 937 So. 2d 148, 152-53 (Fla. 4th DCA 2006) ("Many appellate courts have held that a decision to give or withhold a jury instruction is to be reviewed under the abuse of discretion standard of review. But whether the jury should be instructed at all on an issue actually presents a question of law because the court has a duty to instruct on the law applicable to the issues litigated." (internal quotation marks and citation omitted)). The constitutional question discussed in Part III.A is also reviewed de novo. *See Fla. Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005).

ARGUMENT

I. THE THIRD DISTRICT'S HOLDING IS CONTRARY TO THE LANGUAGE AND PURPOSE OF THE STATUTE OF REPOSE.

Because defendants presented ample evidence that Ms. Frazier was not defrauded during the twelve years preceding the filing of the *Engle* action, the trial court should have submitted the repose defense to the jury.

A. The Statute's Plain Language Requires Proof Of Reliance On An Act Committed No More Than 12 Years Before The Complaint Was Filed.

The Third DCA's holding—that Ms. Frazier could recover for concealment or conspiracy without proving that she had relied on a fraudulent act committed after May 5, 1982—contravenes the express language of the statute of repose. The statute requires that an action "founded upon fraud" be filed within twelve years "after the date of the commission of the alleged fraud." § 95.031(2)(a), Fla. Stat. "The alleged fraud" in this case was the fraud that injured Ms. Frazier, not a fraud that may have injured others. And a fraud committed years after Ms. Frazier learned facts that may once have been concealed from her is not a fraud that caused her any harm.

As this Court has long recognized, a plaintiff cannot recover on a claim of fraud—whether it is styled as a claim for affirmative misrepresentation, fraudulent concealment, or fraud-based conspiracy—without proving *both* a fraudulent act *and* detrimental reliance. *See, e.g., Johnson v. Davis*, 480 So. 2d 625, 627 (Fla.

1985).[5] This is why a plaintiff has no standing to sue based on an allegation the defendant defrauded others. (Of course, other individuals defrauded by acts that did not affect the plaintiff may bring their own suits.) Thus, when the statute bars actions filed more than twelve years after "the date of the commission of the alleged fraud," it cannot mean that a plaintiff such as Ms. Frazier who sues in 1994 is permitted to recover for fraud even if the last time she heard and was deceived by a fraudulent statement was in 1970, simply because others may have been defrauded by similar conduct in the more recent past.

The pending *Hess* case (another *Engle* progeny suit) is particularly instructive. There, the evidence was quite similar to that presented here. The plaintiff's evidence suggested that the tobacco companies had concealed material information from the public and that Mr. Hess had been misled to his detriment by that concealment, at least when he was a young man first starting to smoke. *See* 95 So. 3d at 256-57; *Hess* Trial Tr. 2343-2344, 2402-03, 2406 [App. Tab E]. The defense evidence indicated that whatever misconceptions Mr. Hess may have had when he was young, he had become fully aware of the dangers of smoking as an

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[5] There is no controversy on this point. In addition to this Court, every District Court of Appeal has recited the familiar elements of fraud (including reliance) on multiple occasions. *See, e.g., Shakespeare Foundation, Inc. v. Jackson*, 61 So. 3d 1194, 1199 n. 1 (Fla. 1st DCA 2011); *Webb v. Kirkland*, 899 So. 2d 344, 346 (Fla. 2d DCA 2005); *Soler v. Secondary Holdings, Inc.*, 771 So. 2d 62, 69 (Fla. 3d DCA 2000); *Naugle*, 103 So. 3d at 947; *Townsend v. Morton*, 36 So. 3d 865, 868 (Fla. 5th DCA 2010).

adult and could not have relied on any fraudulent concealment of those hazards by the tobacco companies after May 1982. *See, e.g.*, *Hess* Trial Tr. 963-82, 1911 [App. Tab E].

Unlike the trial judge here, the trial judge in *Hess* included questions on the verdict form that asked the jury to find whether Mr. Hess had relied on any fraudulent acts or omissions by the defendants (1) *before* the repose date, (2) *after* the repose date, or (3) *both before and after* the repose date. The jury found that Mr. Hess had relied on acts of concealment before but not after May 5, 1982. Nevertheless, the trial court, adopting the same view of the repose statute as the Third DCA in this case, entered judgment for the plaintiff.

The Fourth DCA reversed, granting judgment to the defendant on the fraud claim and the associated claim for punitive damages. "On its face," the court wrote, the statute of repose "clearly bars a fraud claim to the extent that it is based on fraudulent conduct committed more than twelve years before the institution of this action." 95 So. 3d at 260. The court noted that "a claim of fraudulent misrepresentation and/or concealment requires proof of detrimental reliance on a material misrepresentation." *Id.* (citing *Soler*, 771 So. 2d at 69; *Johnson*, 480 So. 2d at 627). And "[b]ecause reliance is an element of every fraud claim, and PM USA did not defraud Mr. Hess within the twelve-year period established by the statute of repose," the court held "that the fraudulent concealment claim and the

concealment-based punitive damages award are foreclosed by the statute of repose." *Id.* at 260-61. The Fourth DCA expressly rejected "Mrs. Hess's contention"—identical to the plaintiff's contention in this case—"that the date of reliance is irrelevant." *Id.* at 261. It explained:

> While Mrs. Hess is correct that PM USA's conduct with respect to fraudulent concealment was preclusively established by *Engle*, this alone does not resolve the issue. . . . [T]he triggering event set forth in the applicable statute of repose, "the date of the commission of the alleged fraud", necessarily includes reliance by the plaintiff. If it did not, a plaintiff would still be able to seek recovery from a defendant based on the defendant's defrauding of third parties after the twelve-year repose period applicable to the plaintiff. Such a reading is contrary to the intent of the statute of repose.

Id. (citation omitted).

The *Hess* case was followed in the Fourth DCA by *Kayton*, *Cohen*, *Naugle*, *Putney*, and *Buonomo*. Several of those decisions have added nuance to the court's holding in *Hess*. In *Kayton*, as we discuss below (at 32), the court made clear that the interpretation of the statute in *Hess* applied equally in cases alleging conspiracy to conceal. (The *Hess* plaintiff had not submitted a conspiracy claim to the jury, but the *Kayton* plaintiff had.) In *Cohen*, the court held that it was error to refuse to give a jury instruction—identical to the one the defendants proposed in this case—

addressing the repose defense.[6] And in *Naugle*, the court held expressly that not only the plaintiff's reliance but the acts of concealment themselves must post-date May 5, 1982. *Naugle*, 103 So. 3d at 947 (holding that "any concealment claim in [an *Engle* progeny] case had to be based on conduct that occurred after May 5, 1982").

The Fourth DCA is not the only court to have confronted this issue and ruled that reliance on an act committed within the statutory period is a necessary element of fraud. Two cases from the federal district court in the Middle District of Florida interpreting Florida's fraud statute of repose reached the same conclusion in 1998. *See Shepard v. Philip Morris, Inc.*, No. 96-1720-CIV-T-26B, 1998 WL 34064515, at *4 (M.D. Fla. Apr. 28, 1998) (rejecting the argument that the "continuing nature of the fraud overcomes the application of the statute of repose"); *Joy v. Brown & Williamson Tobacco Corp.*, No. 96-2645-CIV-T24(B), 1998 WL 35229355, at *4-5 (M.D. Fla. May 8, 1998) (granting summary judgment on a fraud claim, in part

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[6] In *Cohen*, the defense requested the following instruction:

> In determining whether Nathan Cohen reasonably relied to his detriment on a statement by a defendant that omitted material information, you may not consider evidence of alleged statements, concealment or other conduct that occurred before May 5, 1982.

102 So. 3d at 15. The Fourth DCA held that because the plaintiff was required to prove "that [the smoker] relied upon statements or omissions by appellants made after [May 5, 1982], [t]he jury should have been instructed accordingly." *Id.*

because "the plaintiff has not adduced any proof of reliance upon a misrepresentation that was committed within the 12-year period prior to the filing of the complaint").

And indeed, a different panel of the Third DCA itself, in a recently-issued *Engle* progeny opinion, parted company with the interpretation adopted in this case. *See Alexander*, 2013 WL 4734565, at *5 (holding that testimony that the decedent believed until 1985, on the basis of the defendant's advertising, that its filtered cigarettes were safer "was relevant to establish [the decedent's] reliance outside of the limits of the statute of repose[; s]ince the statute of repose begins in 1982, [his] belief and reliance through 1985 was relevant to show that his cause of action was not barred by the statute of repose").

B. The Decision Below Nullifies The Statute Of Repose In A Substantial Category Of Cases, Contrary To The Legislature's Intent.

The Third DCA's ruling would vitiate the express purpose of the statute of repose in any case involving an alleged pattern or practice of claimed fraudulent conduct. Statutes of repose, as this Court explained nearly 25 years ago, protect defendants against "the difficulties of defending against a stale fraud claim." *Carr v. Broward Cnty.*, 541 So. 2d 92, 95 (Fla. 1989). They are designed to "extinguish[]" claims after a certain period even if that means that the claims lose their viability "before [the fraud] is discovered" by the plaintiff. *Kush v. Lloyd*,

616 So. 2d 415, 418 (Fla. 1992). This is because fraud claims are the "most susceptible to concerns of stale memories, and most deserving of the observation that a defendant 'ought not to be called on to defend a claim when the evidence has been lost, memories have faded, and witnesses have disappeared.'" *Kish v. A.W. Chesterton Co.*, 930 So. 2d 704, 707 (Fla. 3d DCA 2006) (quoting *Shepard*, 1998 WL 34064515, at *4); *see also Nehme v. Smithkline Beecham Clinical Labs., Inc.*, 863 So. 2d 201, 209 (Fla. 2003) ("As time passes, memories fade, documents are destroyed or lost, and witnesses disappear."); *Kush*, 616 So. 2d at 421 (a "statute of repose represents a legislative determination that there must be an outer limit beyond which . . . suits may not be instituted"). The legislature has had "numerous" opportunities to alter the fraud statute, and it has repeatedly declined to do so. *Kish*, 930 So. 2d at 708 n.7; *Pullum v. Cincinnati, Inc.*, 476 So. 2d 657, 659 (Fla. 1985).

The purpose of the statute of repose—to protect defendants from "stale" claims that are often based on dimly-recalled allegations of long-ago frauds—would be substantially undermined if plaintiffs were permitted to evade the statute by alleging that the defendant continued to defraud other people after the plaintiff was no longer defrauded. Cases tried on such a theory of liability would suffer from all the ills the statute of repose was designed to cure: plaintiffs could allege that they heard and believed misrepresentations made decades before trial, and

defendants would be hard-pressed to find and present evidence refuting such allegations.

First, there is the question of the state of mind with which the defendant spoke or acted. Did the speaker know or believe that the statements being made were false, and were they made with a purpose to deceive? Often, especially in the case of corporate or other organizational actors, the employees who made the allegedly fraudulent statements will be deceased or otherwise unavailable to testify, or will no longer recall the events or the state of mind that accompanied or prompted their actions. Even if a similar fraud is alleged to have been continued into the twelve-year period, that does not solve the problem of stale evidence regarding the defendant's knowledge and belief from earlier periods. Knowledge changes over time; a defendant may be unaware that its product is dangerous when the state of science is ill-developed, but may later learn new facts that warrant a change in opinion. So the mere fact that a plaintiff can prove that a defendant behaved with scienter in the recent past does not mean that there is reliable proof that more remote actions were fraudulent.

Second, there is the question of the plaintiff's reliance: what he or she knew and believed. Even in the ordinary case, proof of reliance is usually based on a combination of circumstantial evidence and testimony from the plaintiff and his or her family members. Defending a fraud claim thus necessarily involves probing

the memories of the plaintiff and those around her—friends, family, doctors, neighbors, and so on—about what they observed of the plaintiff's behavior: did she watch television? Read newspapers? Was she exposed to information that would have disproved a fraudulent assertion? Did she hear the assertion at all? Did she ever make any statements suggesting that she knew about the facts she now claims to have been withheld from her? Questions like this are difficult enough to answer in the ordinary case. When the evidence concerns events and beliefs from decades past, it becomes increasingly difficult to rebut the plaintiff's assertions. This is why the statute of repose requires a plaintiff to bring fraud suits within a reasonable time after being defrauded: so that the defendant has a fair opportunity to gather and explore the evidence before it disappears.

If, as the Third DCA held, "the pertinent date for purposes of the commencement of the statute of repose" is the date of the defendant's last alleged act of fraud, regardless of whether that act affected the plaintiff, then the statute of repose does very little, or nothing at all, to protect the defendant from the difficulties of defending a case based on stale memories. The "disappearing" evidence—recollections about the defendant's state of mind and the plaintiff's knowledge and beliefs at the time of the alleged fraud—is just as unreliable as it would be in the absence of a repose statute. While the evidence surrounding the defendant's conduct toward others during the twelve-year actionable period may

be fresher, evidence about its earlier conduct or knowledge may be much more remote. In any event, the evidence surrounding the *plaintiff's* circumstances will be stale. As the Fourth DCA observed in *Hess*, "the triggering event set forth in the . . . statute of repose . . . necessarily includes reliance by the plaintiff," because "[i]f it did not, a plaintiff would still be able to seek recovery after the twelve-year repose period applicable to the plaintiff. Such a reading is contrary to the intent of the statute of repose." *Hess*, 95 So. 3d at 261.[7]

II. AN ALLEGED ONGOING CONSPIRACY OR CONTINUING FRAUD DOES NOT CHANGE THE STATUTE OF REPOSE.

The only authority the Third DCA cited was the Second DCA's decision in *Laschke v. Brown & Williamson Tobacco Corp.*, 766 So. 2d 1076 (Fla. 2d DCA 2000). In *Laschke* (a non-*Engle* tobacco case), the Second DCA stated that "[i]n claims alleging conspiracy, the critical date for statute of repose purposes should be the date of the last act done in furtherance of the conspiracy." *Id.* at 1079. The Third DCA evidently interpreted this statement to mean that a fraud plaintiff need not prove reliance within the twelve-year actionable period, so long as the case

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[7] The effects of such a rule would not be limited to tobacco litigation. The Third DCA's interpretation of the statute of repose would effectively nullify it in any case where the plaintiff alleged an ongoing "pattern" of fraud—cases alleging fraud in the calculation of credit card fees, for example, or the failure to disclose the adverse effects of a prescription drug. Under the Third DCA's analysis, any defendant alleged to have defrauded multiple people over a long period of time would be subject to suit by anyone who claimed to have been harmed, even if the plaintiffs sued decades after they were allegedly deceived.

involves ongoing fraudulent conduct, either by the defendant itself or by co-conspirators, extending into that period.

Had the Second DCA held such a thing in *Laschke* or any other case, it would have been wrong, and certainly not binding on this Court. But *Laschke* did not hold what the Third District believed it did. Indeed, in a recent opinion filed after the Third DCA's opinion in this case, the Second DCA cited *Laschke* for the exact principle we advance here: that "[t]he statute of repose begins to run on a claim for fraudulent concealment based on an ongoing pattern of concealment when the last act of concealment *on which the plaintiff relied* occurs." *Philip Morris USA, Inc. v. Hallgren*, __ So. 3d __, No. 2D12-2549, 2013 WL 5663188, at *2 (Fla. 2d DCA Oct. 18, 2013) (emphasis added). That is a correct statement of the law. Nothing in *Laschke*, and nothing about conspiracy cases or cases involving ongoing frauds, changes the basic requirements of the statute of repose.

A. The Lower Court Misunderstood *Laschke*.

In *Laschke*, the plaintiff sued four tobacco manufacturers, claiming (among other things) that they had conspired to defraud her about the dangers of smoking cigarettes. She had smoked cigarettes made by two of those defendants (Lorillard and Brown & Williamson) from 1956 through 1972. She smoked "other brands" of cigarettes (made by R.J. Reynolds and Liggett Group) "until 1995," *Laschke*, 766 So. 2d at 1077, and she filed suit in 1996. Invoking the statute of repose, the

trial court dismissed Lorillard and Brown & Williamson because the plaintiff had not smoked their cigarettes during the twelve-year actionable period. However, the case was permitted to proceed against Reynolds and Liggett.

The Second DCA reversed. Because the plaintiff had alleged that the dismissed companies had conspired with the remaining companies to defraud her during the twelve-year actionable period (766 So. 2d at 1078-79), the court held that disputed factual issues—including "whether Mrs. Laschke relied on specific advertisements, [and] whether her reliance on those advertisements caused her to continue smoking"—made it error to dismiss any of the alleged co-conspirators. *Id.* at 1078.

The Second DCA's statement that the statute of repose is triggered by the "last act done in furtherance of the conspiracy" did not mean that proof of reliance during the actionable period was unnecessary. It meant simply that Lorillard and Brown & Williamson, who were alleged to have been co-conspirators of the two defendants that remained in the case, were not entitled to judgment just because the plaintiff had stopped using their products more than twelve years before bringing suit. Rather, they would remain liable for the acts of their co-conspirators occurring within the twelve-year actionable period—so long as the plaintiff could prove that she heard and relied upon *those acts* when deciding whether to continue smoking.

In *Hallgren*, the Second DCA confirmed this reading of *Laschke*. *Hallgren* was an *Engle* progeny case similar to this one, in which the plaintiff asserted claims for (among other things) fraudulent concealment and conspiracy to conceal, alleging that his wife relied on the defendants' allegedly misleading statements and omissions when deciding to begin and continue smoking. A jury found for the plaintiff, and the defendants appealed. They argued that they were entitled to judgment on the concealment and conspiracy claims because the plaintiff had introduced insufficient evidence to allow the jury to find that Mrs. Hallgren had relied on acts of fraud committed within the twelve-year actionable period. The Second DCA disagreed, but the court made clear that under *Laschke*, a plaintiff can recover for fraud only if he supplies evidence that he relied to his detriment on an act committed within the actionable period. As the court explained,

> [t]he statute of repose begins to run on a claim for fraudulent concealment based on an ongoing pattern of concealment when the last act of concealment *on which the plaintiff relied* occurs. As to the conspiracy claim, "the critical date for statute of repose purposes should be the date of the last act done in furtherance of the conspiracy."

Hallgren, 2013 WL 5663188, at *2 (citing and quoting *Laschke*, 766 So. 2d at 1079) (emphasis added). Because the *Hallgren* plaintiff had provided sufficient evidence "not only" of the defendants' "misleading advertising campaigns . . . that continued until the late 1990s, but *also of Mrs. Hallgren's direct reliance on that*

misleading advertising," the court held that the plaintiff had satisfied his burden of proof "for both the fraudulent-concealment and conspiracy claims." *Id.* (emphasis added). [8] In other words, it was not sufficient for the plaintiff to supply proof of the defendants' (or their co-conspirators') recent acts *alone*; the court found that the statute of repose was satisfied as to both claims (which were "inextricably intertwined"), because such proof was coupled with adequate proof of *reliance* on those acts.[9]

In the end, there is nothing about an allegation of an ongoing conspiracy that changes the basic requirements of the statute of repose. Regardless of how long the fraud is alleged to have continued, or whether the acts alleged to have harmed the plaintiff were committed by the defendant or a co-conspirator, the plaintiff still

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[8] The Second DCA also stated that "the element of reliance for fraudulent concealment "may be inferred from evidence of the pervasive and misleading advertising campaigns perpetuated by the Tobacco Companies." *Hallgren*, 2013 WL 5663188, at *2 (citing *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1069-70 (Fla. 1st DCA 2010)). Defendants disagree with the suggestion that a plaintiff can prove reliance through such inferences. *See, e.g., Humana, Inc. v. Castillo*, 728 So. 2d 261, 265 (Fla. 2d DCA 1999) (holding that reliance "cannot be satisfied by assumptions"). But whether reliance can be proven by inference or must be proven by direct evidence, there is no question that to satisfy the statute of repose, a plaintiff must prove reliance on an act committed no more than twelve years before filing suit.

[9] In addition to arguing that they were entitled to judgment, the *Hallgren* defendants argued in the alternative that they were entitled to a new trial because the trial court had failed to instruct the jury on the statute of repose. The Second DCA's opinion did not address that argument.

must prove that he *himself*—not another person—was injured by an act of fraud that was committed no more than twelve years before the complaint was filed. As the Fourth DCA explained in *Kayton*, "a plaintiff claiming conspiracy to commit fraudulent concealment in an *Engle* progeny case [must] prove that he or she detrimentally relied upon deceptive statements made by a member of the conspiracy." *Kayton*, 104 So. 3d at 1150-51. "Because fraud cannot be committed absent detrimental reliance by the plaintiff, whether a fraudulent act was committed within twelve years of the filing of an action can only be determined based on the timing of a particular plaintiff's alleged reliance." *Id.* at 1151 (citation omitted). The Second DCA does not appear to disagree with the Fourth on this point—and if it did, it would be wrong.

B. A "Continuing Fraud" Exception To The Fraud Statute Of Repose Would Violate Clear Legislative Intent.

The Third DCA misunderstood *Laschke*'s holding, as we have just discussed. But even if the Second DCA *had* held in *Laschke* that a continuing fraud or conspiracy extends the statute of repose indefinitely, the underlying holding would be incorrect: it would vitiate the purpose for which the Legislature enacted the fraud statute of repose.

The Third DCA's decision below effectively establishes a tolling provision that would allow a plaintiff to assert a claim far more than twelve years after having been defrauded, on the theory that the defendant had defrauded others after

it stopped defrauding the plaintiff. Tolling provisions exist elsewhere in Florida law. Indeed, the statute of repose itself contains one, but it does not apply to the fraud portion of the statute that is at issue in this case. In 1999, the Legislature added a tolling provision only to a different portion of the statute, which applies to product liability causes of action like strict liability and negligence. *See* § 95.031(3)(d), Fla. Stat ("The repose period prescribed within paragraph (b) [applicable only to product liability actions] is tolled for any period during which the manufacturer . . . took affirmative steps to conceal the defect."); Ch. 99-225, Laws of Fla. (1999). The courts cannot add a tolling provision to the fraud statute in the guise of "interpreting" its language, when the Legislature chose to exclude such a provision from that portion of the statute.

When the statute of repose was originally enacted in 1974, it contained a single provision establishing a repose period for both product liability actions and fraud actions. § 95.031(2), Fla. Stat. (1977).[10] In 1981, this Court held the original

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[10] The original wording of the statute was as follows:

> Actions for products liability and fraud under subsection 95.11(3) 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 subsection 95.11(3) but in any event within 12 years after the date of delivery of the completed product to its original purchaser or the date of the

statute unconstitutional as applied to product liability actions for injuries that first manifested after the twelve-year actionable period ended, because it "operated [] to bar the cause of action before it ever accrued, so that no judicial forum was available to the aggrieved plaintiff." *Diamond v. E.R. Squibb & Sons, Inc.*, 397 So. 2d 671, 672 (Fla. 1981).

In response to this decision, the Legislature amended the repose statute twice. First, in 1986, it eliminated the product-liability repose period altogether, leaving the statute of repose applicable only to fraud actions. Ch. 86-272, Laws of Fla. (1986); *Firestone Tire & Rubber Co. v. Acosta*, 612 So. 2d 1361, 1362 (Fla. 1992) (noting that "the [product liability] statute of repose was repealed by the Florida legislature on July 1, 1986"). Then, in 1999, the Legislature amended the statute again, restoring the repose period for product liability actions. When it did so, however, it codified the product-liability repose period as a separate provision from the fraud repose period, so that the statute would include two distinct provisions: one for "action[s] for fraud," and a second for "action[s] for product liability." §§ 95.031(2)(a), (b), Fla. Stat.; Ch. 99-225, Laws of Fla. (1999). With respect to the provision for product liability actions—but *not* for the fraud provision—the Legislature codified *Diamond*'s holding by adding (1) an exception

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> commission of the alleged fraud, regardless of the date the defect in the product or the fraud was or should have been discovered.

for an injury that does "not manifest itself until after the repose period"; and (2) a tolling provision for the period during which the product manufacturer "took affirmative steps to conceal the defect." §§ 95.031(3)(c), (d), Fla. Stat.

Thus, the Florida Legislature, with this Court's guidance, considered whether to add a provision to the fraud statute of repose that would allow a plaintiff to bring suit more than twelve years after having been defrauded, upon a showing that the defendant had continued to conceal its conduct into that twelve-year period. The Legislature demonstrated both an understanding of the issue and the ability to codify such a tolling provision based on a theory of continuing fraud. It specifically declined to do so, however, choosing instead to create a continuing-fraud tolling exception only for the product-liability section of the statute and to leave intact the fraud statute of repose, with no exception for continuing acts of concealment. The Third DCA's holding in this case effectively adds a tolling provision that the Legislature specifically declined to enact. That was error. *See Olmstead v. F.T.C.*, 44 So. 3d 76, 82 (Fla. 2010) ("Where the legislature has inserted a provision in only one of two statutes that deal with closely related subject matter, it is reasonable to infer that the failure to include that provision in the other statute was deliberate rather than inadvertent.") (citing *Cason v. Fla. Dep't of Mgmt. Services*, 944 So. 2d 306, 315 (Fla. 2006); *Horowitz v. Plantation*

Gen. Hosp. Ltd. P'ship, 959 So. 2d 176, 185 (Fla. 2007); *Rollins v. Pizzarelli*, 761 So. 2d 294, 298 (Fla. 2000)).

The error in the Third DCA's holding becomes evident when one considers the operation of the product liability repose provision in the ordinary case, where there is no latent injury and no concealment of the defect. The product liability statute is triggered by "delivery of the product"; the fraud statute is triggered by "commission of the alleged fraud." Consider a plaintiff who purchased a defective band saw in 1990 and was injured by the saw in 2010. Such a plaintiff could not bring a personal injury suit against the manufacturer; the actionable period would have ended in 2002. *See, e.g., Pullum v. Cincinnati, Inc.*, 458 So. 2d 1136, 1137-38 (Fla. 1st DCA 1984) (applying the product-liability statute to bar plaintiff's claim for a suit filed in 1980 for injuries sustained while operating a pressbrake machine delivered in 1966). But if the Third DCA's logic were applied to the product liability statute, such a plaintiff *would* be able to sue notwithstanding the statute of repose so long as he could prove that the manufacturer had sold a saw with the same design to *someone else* within twelve years of the filing of his suit. That is not the way the product liability statute works. There is no reason to conclude that the fraud statute, with its parallel structure, is any different.

The tolling provision in the product liability statute of repose serves to protect *Engle* progeny plaintiffs who cannot prove that they relied to their

detriment on a fraudulent act committed after 1982; such plaintiffs are not left without a remedy. Even if they cannot recover on a fraud theory, the statute expressly permits them to pursue their claims for strict liability and negligence, because of the delayed manifestation of smoking-related diseases.

III. THERE ARE NO ADDITIONAL REASONS TO CONCLUDE THAT THE REPOSE DEFENSE IS INVALID.

In the courts below, Ms. Frazier primarily asserted one justification for her position that a repose instruction was unnecessary: that the existence of a continuing conspiracy within the actionable period made it unnecessary to show reliance. That argument is wrong for the reasons expressed above. Because the repose defense is a recurring issue, however, we address three arguments that other plaintiffs have advanced against applying that defense in *Engle* progeny cases.

A. The Statute Of Repose Is Constitutional.

Progeny plaintiffs in other cases have argued that interpreting the statute of repose as barring their fraud claims would violate the Florida Constitution. Ms. Frazier did not make this argument below, and should not be permitted to do so now. *See Terry v. State*, 668 So. 2d 954, 961 (Fla. 1996); *Cobb v. State*, 691 So. 2d 574, 575 (Fla. 1st DCA 1997). But if the Court considers the issue, it should hold that the statute of repose is constitutional.

The Florida Constitution provides that "[t]he courts shall be open to every person for redress of any injury." Art. 1, § 21, Fla. Const. In *Diamond*, this Court

held that the product liability repose statute violated this provision because it barred claims that had not yet accrued, thus depriving plaintiffs of their right of access to courts. After the Legislature amended the statute to include tolling provisions for the product-liability section of the statute (but not the fraud section), this Court reaffirmed *Diamond*'s holding that "in a product liability action where the now defunct statute of repose is still applicable," the old statute must be read to include a "latent injury exception . . . so that the statute of repose will not extinguish the plaintiff's cause of action if his or her injuries are latent and undiscoverable within the repose period." *Pulmosan Safety Equip. Corp. v. Barnes*, 752 So. 2d 556, 559 (Fla. 2000).

As discussed above, neither the Florida Legislature nor this Court has ever imported a latent-injury exception into the *fraud* statute of repose. And both of the District Courts of Appeal that have considered a right-of-access challenge to that provision have rejected it. *See Kish v. A.W. Chesterton Co.*, 930 So. 2d 704, 705 (Fla. 3d DCA 2006); *Koulianos v. Metro. Life Ins. Co.*, 962 So. 2d 357, 357 (Fla. 4th DCA 2007) (summary affirmance citing *Kish*). These decisions are correct, and *Kish* is particularly instructive.

In *Kish*, the Third DCA rejected the plaintiff's argument that the "failure to apply a delayed manifestation exception to the fraud statute of repose, similar to that made applicable to the products liability statute of repose . . . , resulted in an

unconstitutional denial of access to courts." 930 So. 2d at 705. The court first quoted from *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), which holds that the Legislature may bar a cause of action before it accrues if it either: (1) "'provid[es] a reasonable alternative to protect the rights of the people of the State to redress for injuries'"; or (2) "'can show an overpowering public necessity . . . and no alternative method of meeting such public necessity.'" *Kish*, 930 So. 2d at 706 (quoting *Kluger*, 281 So. 2d at 4). The court then correctly held that both of these requirements are satisfied in the case of the fraud statute of repose.

First, *Kish* determined that by adding a latent-injury exception to the product-liability statute of repose, the Legislature had provided a "reasonable alternative remedy" for a plaintiff like Ms. Frazier who alleges a "stale fraud claim" based on a latent physical injury from use of the defendant's product: such a plaintiff can bring a product liability action against the manufacturer. *Id.* That development made *Kish* (and makes this case) very different from *Diamond*, where the older version of the statute left the plaintiffs with "no judicial forum" to pursue damages for their product-related injuries. 397 So. 2d at 672. Because the plaintiffs in *Kish* "ha[d] valid ongoing claims against the manufacturers of the products which they maintain[ed] caused their injuries," it was not constitutionally necessary to permit them to bring a belated fraud claim as well. 930 So. 2d at 706.

Second, *Kish* found that "public necessity [ ] justifie[d] cutting off a stale fraud claim" because such a claim "is exactly th[e] type . . . that is most susceptible to concerns of stale memories, and most deserving of the observation that a defendant ought not to be called on to defend a claim when the evidence has been lost, memories have faded, and witnesses have disappeared." *Id.* at 707 (internal quotation marks omitted). The Third DCA found "[t]hese policy considerations [ ] equally applicable" to those this Court had cited "when rejecting a latent manifestation argument involving a claim of fraudulently concealed medical negligence." *Id.* at 707-08 (citing *Carr*, 541 So. 2d at 95); see *Carr*, 541 So. 2d at 95 ("[T]he legislature may properly take into account the difficulties of defending against a stale fraud claim in determining a reasonable period for the statute of repose.").

Kish correctly determined that the fraud statute of repose satisfies both of *Kluger*'s prongs, either one of which is sufficient to uphold a law against a right-of-access challenge. If the Court reaches this issue, it should follow that decision and hold that application of the statute of repose to bar Ms. Frazier's fraud claims would not result in an unconstitutional denial of access to the courts.

B. The Repose Defense Is Not Barred By *Engle*.

Progeny plaintiffs have argued that defendants' repose argument is barred by the *Engle* litigation. That is incorrect.

By way of background, the *Engle* litigation was intended to proceed in three phases. In Phase I, the jury decided a number of issues about the *Engle* defendants' allegedly tortious conduct, the diseases caused by cigarettes, and the class's entitlement to punitive damages. In Phase II, the jury decided the issues of individual causation and damages for the class representatives (Phase II-A) and the amount of punitive damages to be awarded to the entire class (Phase II-B). Phase III was intended to resolve issues of individual causation and damages for each class member, but the *Engle* defendants appealed before the individual trials contemplated by Phase III could begin. *See generally Douglas*, 110 So. 3d at 422-24.

Progeny plaintiffs who have asserted that the original *Engle* litigation bars defendants in the progeny suits from asserting a repose defense generally advance two different arguments, one that relates to Phase I and one that relates to Phase II-A. Ms. Frazier has previously asserted only the argument relating to Phase I. Both arguments are meritless.

1. Ms. Frazier has argued that defendants' repose defense is barred by issue preclusion because the Phase I jury found that the *Engle* defendants had fraudulently concealed material information, and had conspired to conceal information, both before and after May 5, 1982. *See* R. 38:7266-7270 [App. Tab B at 3]. This argument is a *non sequitur*, however, because the Phase I jury

indisputably made no finding regarding any individual plaintiff's reliance on an act of concealment. *Engle*, 945 So. 2d at 1263 ("In Phase I, the jury decided issues related to Tobacco's conduct but did not consider whether any class members relied on Tobacco's misrepresentations or were injured by Tobacco's conduct."); *see also Hess*, 95 So. 3d at 259 ("*Engle* did not relieve plaintiffs of the burden of proof with respect to the element of reliance in a fraud based claim."). Indeed, as the Fourth DCA explained in *Kayton*, the Phase II-A verdict form asked whether the defendants had fraudulently concealed information from each of the three named plaintiffs within the twelve-year period before the filing of the *Engle* complaint—a question that would have been entirely unnecessary if the repose issue had been resolved in Phase I. *See Kayton*, 104 So. 3d at 1151. This was one of the reasons why the *Kayton* court concluded that "the issue of reliance upon deceptive statements made by a conspirator within the statute of repose window is an individualized jury issue." *Id.*

2. Some progeny plaintiffs have suggested that the defendants' statute of repose defense was resolved in Phase II-A because the jury in that proceeding found that each of the three named plaintiffs had proven reliance both before and after May 5, 1982, and the trial judge did not grant the defendants a directed verdict based on the statute of repose. *See, e.g.*, Appellee's Mot. for Rehearing,

Rehearing En Banc, or Certification, *Philip Morris USA Inc. v. Hess*, No. 4D09-2666 (Fla. 4th DCA 2012) [App. Tab F at 4-5]. This argument is wrong.

For one thing, only the three named plaintiffs were parties to Phase II-A. The Phase II jury did not determine whether *Ms. Frazier* relied on an act of concealment after the repose date, and nothing that happened in Phase II prevents the defendants from raising a repose defense in her case. In any event, the Phase II jury found that each of the three named plaintiffs *had* proven reliance after May 5, 1982, rendering moot the question whether those plaintiffs were *required* to prove this fact in order to recover on their fraud claims. As we discuss above, the structure of Phase II-A confirms that each progeny plaintiff is required to prove reliance within the twelve-year period preceding the filing of the *Engle* complaint. After all, the three named plaintiffs whose cases were adjudicated in that phase were required to adduce proof of post-1982 reliance, and each of them did. There is no reason the progeny plaintiffs should be treated any differently.

C. *Kush v. Lloyd* Does Not Support The Decision Below.

Some progeny plaintiffs have argued that under this Court's decision in *Kush v. Lloyd*, 616 So. 2d 415 (Fla. 1992), a repose period begins to run from the date of a defendant's, rather than a plaintiff's, last act. Thus, these plaintiffs argue, it is appropriate to begin calculating the repose period in fraud cases on the date of the defendant's last act of fraud, rather than the date of the plaintiff's reliance. *See,*

e.g., Answer Brief of Appellee/Initial Brief on Cross-Appeal of Cross-Appellant, *R.J. Reynolds Tobacco Co. v. Buonomo*, No. 4D10-3543, at 46-48 (Fla. 4th DCA 2011) [App. Tab G at 46-48].

This argument misreads *Kush*. In *Kush*, a couple who suspected they were carriers of a hereditary disease sought genetic counseling from their doctor before attempting to conceive a child. The doctor incorrectly informed them that they were not carriers, when in fact they were. Five years after consulting with the doctor, the couple conceived a child, who was born with significant birth defects. The couple sued the doctor, who moved to dismiss the claim under the four-year statute of repose for medical malpractice claims (§ 95.11(4)(b), Fla. Stat.). 616 So. 2d at 415-17. The trial court denied the motion, reasoning that the repose period began to run from the birth of the child, rather than the date of the medical advice. This Court disagreed and dismissed the claim, holding that unlike a statute of limitations, which "begins to run upon the accrual of a cause of action," 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." *Id.* at 418.

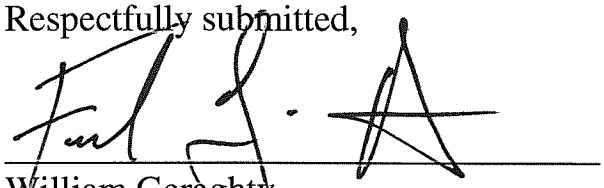
Nothing in *Kush* is inconsistent with the assertion of a repose defense in an *Engle* progeny case. To satisfy the statute of repose, a plaintiff in a progeny case must show that the defendant committed a fraud within the twelve years prior to the *Engle* action—*and* that such fraud injured the plaintiff. Certainly, the *Kush*

plaintiffs would not have been able to evade the four-year statute of repose by showing that their doctor had given negligent medical advice to someone *else* in the four years before they filed their suit. The same is true here.

CONCLUSION

This Court should quash the Third DCA's holding that Ms. Frazier satisfied the statute of repose by adducing evidence of fraudulent acts committed after May 5, 1982. It should order that the plaintiff may not prevail on her fraud claims in any retrial of this case without proving reliance upon a fraud committed within the twelve years before the *Engle* complaint was filed.

Respectfully submitted,



William Geraghty
FL Bar No. 0089508
Frank Cruz-Alvarez
FL Bar No. 0499803
SHOOK, HARDY & BACON L.L.P.
Miami Center, Suite 2400
201 South Biscayne Boulevard
Miami, Fla. 33131
Phone: (305) 358-5171
Facsimile: (305) 358-7470
E-mail: SHBPMAttyMiami@shb.com

Lauren R. Goldman
(*pro hac vice* application pending)
Scott A. Chesin
(*pro hac vice* application pending)
MAYER BROWN LLP
1675 Broadway

Gregory G. Katsas
FL Bar No. 89091
JONES DAY
51 Louisiana Avenue
Washington, D.C. 20001
Phone: (202) 879-3939
Facsimile: (202) 626-1700
E-mail: ggkatsas@jonesday.com

Benjamine Reid
FL Bar No. 183522
Alina Alonso Rodriguez
FL Bar No. 178985
CARLTON FIELDS, P.A.
Miami Tower
100 S.E. Second Street, Suite 4200
Miami, Fla. 33131
Phone: (305) 530-0050

Facsimile: (305) 530-0055
E-mail: breid@carltonfields.com
arodriguez@carltonfields.com

Counsel for Defendant/Petitioner
R.J. Reynolds Tobacco Co.

New York, N.Y. 10019
Phone: (212) 506-2500
Facsimile: (212) 262-1910
E-mail: lrgoldman@mayerbrown.com
schesin@mayerbrown.com

Raoul G. Cantero
FL Bar No. 552356
WHITE & CASE LLP
Southeast Financial Center, Suite 4900
200 South Biscayne Boulevard
Miami, Fla. 33131
Phone: (305) 995-5290
Facsimile: (305) 358-5744
E-mail: rcantero@whitecase.com

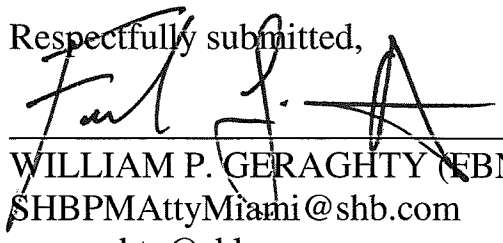
Counsel for Defendant/Petitioner
Philip Morris USA Inc.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic mail and through the Florida Court's E-Filing Portal on all counsel listed below this 28th day of October 2013:

Philip M. Gerson
Edward S. Schwartz
Gerson & Schwartz, P.A.
1980 Coral Way
Miami, Fla. 33145
Telephone: (305) 371-6000
Facsimile: (305) 371-5749
pgerson@gslawusa.com
eschwartz@gslawusa.com
zdiaz@gslawusa.com

Respectfully submitted,

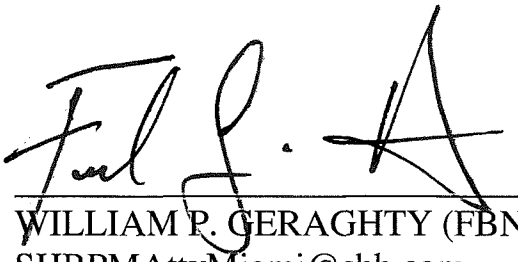


WILLIAM P. GERAGHTY (FBN: 0089508)
SHBPMAttyMiami@shb.com
wgeraghty@shb.com
FRANK CRUZ-ALVAREZ (FBN: 0499803)
SHBPMAttyMiami@shb.com
falvarez@shb.com
SHOOK, HARDY & BACON L.L.P.
Miami Center, Suite 3200
201 South Biscayne Boulevard,
Miami, FL 33131
Telephone: (305) 358-5171
Facsimile: (305) 358-7470

CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), counsel for petitioners hereby certifies that the foregoing brief complies with the applicable font requirements because it is written in 14-point Times New Roman font.

DATED: October 28, 2013



WILLIAM P. GERAGHTY (FBN: 0089508)
SHBPMAttyMiami@shb.com
wgeraghty@shb.com
FRANK CRUZ-ALVAREZ (FBN: 0499803)
SHBPMAttyMiami@shb.com
falvarez@shb.com
SHOOK, HARDY & BACON L.L.P.
Miami Center, Suite 3200
201 South Biscayne Boulevard,
Miami, FL 33131
Telephone: (305) 358-5171
Facsimile: (305) 358-7470