

**IN THE SUPREME COURT OF FLORIDA**

ELAINE HESS, etc.,

Petitioner,

v.

Case No. SC12-2153

L.T. No. 4D09-2666

PHILIP MORRIS USA, INC.,

Respondent.

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ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

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BRIEF OF *ENGLE* PLAINTIFF AMICI

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STEVEN L. BRANNOCK

Florida Bar: 319651

CELENE H. HUMPHRIES

Florida Bar: 884881

TYLER K. PITCHFORD

Florida Bar: 54679

BRANNOCK & HUMPHRIES

100 South Ashley Drive, Suite 1130

Tampa, Florida 33602

Tel: (813) 223-4300

Fax: (813) 262-0604

[tobacco@bhappeals.com](mailto:tobacco@bhappeals.com)

Attorneys for *Engle* Plaintiff Amici

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## INTEREST OF AMICI

This brief is filed on behalf of several law firms that collectively represent thousands of *Engle*<sup>1</sup> class members in their individual actions against the cigarette companies<sup>2</sup> (“the *Engle* plaintiffs’ firms”).<sup>3</sup> The *Engle* plaintiffs’ firms are interested in this case because their clients have brought similar claims against the cigarette companies, which include actions for fraudulent concealment and for conspiracy to fraudulently conceal.

The *Engle* plaintiffs’ firms believe that their filing of a brief will help the Court accurately discuss an issue that is interrelated with the repose issue, specifically the reliance element in a fraudulent concealment action. The language used in the *Hess* decision under review arguably suggests that an *Engle*-progeny plaintiff’s burden of proof on a fraudulent concealment action requires proof of

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<sup>1</sup> *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006).

<sup>2</sup> By “cigarette companies” we mean the defendants in the *Engle* class action.

<sup>3</sup> The specific law firms are Abrahamson & Uiterwyk; Alley, Clark, & Greiwe; Andrews Law Group; Avera & Smith, LLP; Beltz & Ruth, P.A.; Carlos Santisteban, P.A.; The Carlyle Appellate Law Firm; Dennis A. Lopez, P.A.; Doffermyre Shields Canfield & Knowles LLC; Domnick & Shevin PL; Engstrom, Lipscomb & Lack; The Ferraro Law Firm; Fitzgerald & Associates, P.A.; Gary, Williams, Parenti, Watson & Gary, P. L.; J.B. Harris, P.A.; Law Office of Howard M. Acosta; Law Office of Robert S. Glazier; Law Offices of Eric S. Block, P.A.; Law Offices of John S. Kalil, P.A.; Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor, P.A.; Morgan & Morgan, P.A.; O’Shea & Reyes, LLC; Parker Waichman LLP; Richard J. Diaz, P.A.; Robert J. Hanreck, P.A.; Searcy, Denney, Scarola, Barnhart & Shipley, P.A.; Schlesinger Law Offices, P.A.; Vaka Law Group, P.L.; The Whittemore Law Group, P.A.; Wiggins, Childs, Quinn & Pantazis LLC; William J. Wichmann, P.A.; and Wolf Haldenstein Adler Freeman & Herz LLP.

reliance on particular statements by the cigarette companies. This brief briefly summarizes the applicable law to assist this Court's accurate discussion of the evidence required to establish reliance in a fraudulent concealment action.

## **SUMMARY OF THE ARGUMENT**

The *Amici* submit this brief to inform this Court of an important corollary issue implicated by the *Hess* opinion. In trial and appellate courts throughout the state, the cigarette companies have asserted that the repose defense is controlled by the date of a person's reliance (and not the date the cigarette companies ceased their course of fraudulent conduct). Only the Fourth District Court of Appeal has adopted this argument. The *Hess* case is one of those cases.

In this brief, we do not duplicate the detailed, substantive analysis of the repose issue provided by Petitioner, Elaine Hess ("Petitioner"). Instead, our brief addresses the *Hess* court's suggestion that an *Engle*-progeny plaintiff's burden of proof requires reliance on particular statements by the cigarette companies. As we explain below, that is a requirement of a fraudulent misrepresentation action, not an action for fraudulent concealment. This brief briefly summarizes the applicable law to assist this Court's accurate discussion of the repose issue and the interrelated issue of the reliance element in a fraudulent concealment action.

## ARGUMENT

The *Amici* fully join in the detailed, substantive analysis presented by the Petitioner. We file this amicus brief to assist this Court's accurate discussion of the repose issue, including the Fourth District's assumption that proof of reliance in a fraudulent concealment case requires evidence of a particular statement that was relied upon.

One of the many claims brought against the cigarette companies in the original *Engle* class action was that the cigarette companies engaged in a massive conspiracy to deceive the public about the dangers of smoking. The evidence in *Engle* established that the cigarette companies engaged in marketing campaigns to start new smokers on the path to addiction by promoting smoking as stylish, glamorous, and mature. They simultaneously engaged in a long-term conspiracy to deceive the public about the dangers of smoking, first denying that smoking caused any ill health effects at all, despite much internal industry data to the contrary. Then, as the dangers became more obvious, the cigarette companies downplayed that danger by creating an atmosphere of doubt concerning just how serious the dangers of smoking were. On the physiological side, they cynically hooked smokers through the addictive quality of nicotine, which they manipulated to achieve the greatest possible effect, all while hiding the addictive nature of nicotine from the public. Thus, once they had convinced folks to begin smoking, there was

a good chance that they had a customer for life—folks who continued to smoke the cigarette companies’ products, even though they desperately may have wanted to quit.

This Court’s decision in *Engle* has already established that the cigarette companies engaged in a fraudulent conspiracy to conceal and downplay the dangers of smoking. The remaining question in the *Engle* progeny litigation is whether that conspiracy was a legal cause of a smoker’s illness and, often times, death.

In every *Engle* progeny action to be litigated thus far, the cigarette companies have asserted that the individual plaintiff cannot prove reliance on the companies’ fraudulent concealment or on their conspiracy together to fraudulently conceal. It is this argument that is inadvertently implicated by imprecise language used by the *Hess* court in its analysis of the statute of repose. For example, that *Hess* decision discusses whether “Mr. Hess relied on PM USA’s statements” before or after May 5, 1982. *Philip Morris USA, Inc. v. Hess*, 95 So. 3d 254, 260 (Fla. 4th DCA 2012).

In all of these cases, the cigarette companies argue, based on a false premise, that to prove “reliance,” an individual *Engle* progeny plaintiff must identify particular false or fraudulent advertisings, promotions, or statements by the cigarette companies and show why the plaintiff would have acted differently but



for these fraudulent statements. The false premise is that the progeny plaintiffs have not brought a claim for fraudulent misrepresentation. They have brought a claim for fraudulent *concealment*. Thus, the claim is not based on particular misstatements, but instead is based on what the cigarette companies withheld from the plaintiffs and the rest of the public—the cigarette companies' 50-year conspiracy to deceive the public about the true dangers of smoking, a campaign that started in the early 1950s and continued in full force during the years that everyone of these people became hooked.

As the cigarette companies well know, reliance in the very narrow sense argued by them is literally impossible to prove. How can anyone prove reliance on a particular statement that was *not* made? How can one prove reliance on information that was withheld? How can one be required to speculate many years after the fact what one would have done had the campaign of concealment not been in existence? The cigarette companies' goal here is quite transparent. They seek to create a Catch-22 where any evidence that a plaintiff might give in this regard would be dismissed as pure speculation. But, the need to speculate and assume is the very product of the cigarette companies' campaign of fraud and concealment. Once the true facts emerged, it was too late for any of these class members. Now, years after the fact, they demand a direct connection between statements they never made and the fact that these people began and continued smoking.

That sort of evidence is not necessary. Reliance for fraudulent concealment can be inferred from circumstantial evidence, including the pervasive and misleading advertising campaigns perpetuated by the cigarette companies. A key fact is whether the individual smoker acted precisely as the conspiracy intended they would. For example, did a smoker begin cigarette smoking without a full understanding of the dangers associated with smoking, and without knowing the addictive properties of tobacco? Did that person continue to smoke and succumb to that addiction, against a cultural context created by the cigarette companies that muffled and downplayed the horrific dangers of cigarette smoking? What information about the dangers of filtered cigarettes or “low tar” cigarettes did the cigarette companies withhold from the plaintiff? Did the smoker follow the cigarette companies’ messages by switching to filtered and “low tar” cigarettes? Did the smoker become addicted? The cigarette companies cannot engage in a conspiracy to conceal, obtain precisely the result they intended, and then complain that a plaintiffs’ evidence is not specific enough.

This Court essentially came to the same conclusion in *Engle*, specifically distinguishing between fraudulent misrepresentation claims (which require the identification of particular misstatements and reliance on those misstatements), and a fraudulent conspiracy of concealment. *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1269 (Fla. 2006). Although this Court declined to make *res judicata* any

findings on fraudulent misrepresentation, because the facts in each case would be too individualized, this Court specifically affirmed the findings of fraudulent concealment and fraudulent conspiracy to conceal. *Id.* This is a clear recognition that one can infer reliance from the success of the conspiracy itself, without evidence of reliance on a particular statement.

For this reason, other *Engle* progeny appellate decisions have held that reliance for fraudulent concealment can be inferred from circumstantial evidence, including the pervasive and misleading advertising campaigns perpetuated by the cigarette companies. *See Philip Morris USA, Inc. v. Hallgren*, 2013 WL 5663188, at \*2 (Fla. 2d DCA Oct. 18, 2013); *R.J. Reynolds Tobacco Co. v. Webb*, 93 So. 3d 331, 333 (Fla. 1st DCA 2012); *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1069-70 (Fla. 1st DCA 2010). Likewise, the Fourth District has itself recognized in other decisions that reliance does not require direct evidence that the smoker saw or heard a particular advertisement or statement. *See Philip Morris USA, Inc. v. Putney*, 117 So. 3d 798, (Fla. 4th DCA 2013) (plaintiff need not identify a particular advertisement or statement to prevail on her concealment or conspiracy claim); *Philip Morris USA, Inc. v. Kayton*, 104 So. 3d 1145, 1149 (Fla. 4th DCA 2012) (same); *Philip Morris USA, Inc. v. Naugle*, 103 So. 3d 944, 947 (Fla. 4th DCA 2012) (“*it is not necessary that a direct statement be made to the*

*representee* in order to give rise to the right to rely upon the statement”) (emphasis supplied).

Unfortunately, through its suggestion that an *Engle*-progeny plaintiff’s burden of proof requires reliance on particular statements, the *Hess* decision obscures the obvious point that, in a concealment case, a party may establish liability in the absence of any statements whatsoever.

## **CONCLUSION**

For the reasons stated, it is respectfully submitted that the Court should clarify that an action for fraudulent concealment does not require evidence of reliance on a particular statement by the cigarette companies, but may instead be inferred from circumstantial evidence, including the pervasive and misleading advertising campaigns perpetuated by the cigarette companies.



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STEVEN L. BRANNOCK

Florida Bar No. 319651

CELENE H. HUMPHRIES

Florida Bar No. 884881

TYLER K. PITCHFORD

Florida Bar No. 54679

Brannock & Humphries

100 South Ashley Drive, Suite 1130

Tampa, Florida 33602

Tel: (813) 223-4300

Fax: (813) 262-0604


[tobacco@bhappeals.com](mailto:tobacco@bhappeals.com)

Attorneys for *Engle* Plaintiff Amici

## **CERTIFICATE OF SERVICE**


I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email to John S. Mills ([jmills@mills-appeals.com](mailto:jmills@mills-appeals.com)) and Courtney Brewer ([cbrewer@mills-appeals.com](mailto:cbrewer@mills-appeals.com); [service@mills-appeals.com](mailto:service@mills-appeals.com)), The Mills Firm, P.A., 203 North Gadsen Street, Suite 1A, Tallahassee, Florida 32301; Alex Alvarez ([Alex@integrityforjustice.com](mailto:Alex@integrityforjustice.com)), The Alvarez Law Firm, 355 Palermo

Avenue, Coral Gables, Florida 33134; Bruce S. Rogow ([brogow@rogowlaw.com](mailto:brogow@rogowlaw.com)) and Tara A. Champion ([tcampion@rogowlaw.com](mailto:tcampion@rogowlaw.com)), 500 East Broward Blvd., Suite 1930, Fort Lauderdale, Florida 33394; Adam Trop ([adamtrop@aol.com](mailto:adamtrop@aol.com)), Trop & Ameen, P.A., 3860 West Commercial Blvd.. Tamarac, Florida 33309; Gary M. Paige ([garyp216@aol.com](mailto:garyp216@aol.com)), Gordon & Doner, 10650 W. SR 84, Suite 210, Davie, Florida 33324; Marvin Weinstein ([Michele@gwtatlaw.com](mailto:Michele@gwtatlaw.com)), Grover & Weinstein, P.A., 777 Arthur Godfrey Road, Second Floor, Miami Beach, Florida 33140; Joseph H. Lang, Jr. ([jlang@carltonfields.com](mailto:jlang@carltonfields.com); [jgrayson@carltonfields.com](mailto:jgrayson@carltonfields.com); [tpaecf@cfdom.net](mailto:tpaecf@cfdom.net)), Carlton Fields, P.A., P.O. Box 3239, Tampa, Florida 3360; and Andrew S. Brenner ([abrenner@bsfllp.com](mailto:abrenner@bsfllp.com)) and Patricia A. Melville ([pmelville@bsfllp.com](mailto:pmelville@bsfllp.com)), and Luis E. Suarez ([lsuarez@bsfllp.com](mailto:lsuarez@bsfllp.com)), Boies Schiller & Flexner, 100 SE 2nd Street, Suite 2800, Miami, Florida 33131 this 12 day of November 2013.

  
\_\_\_\_\_  
CELENE H. HUMPHRIES  
Florida Bar No. 884881

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rules of Appellate Procedure 9.210(a)(2).

  
\_\_\_\_\_  
CELENE H. HUMPHRIES  
Florida Bar No. 884881