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Case No. SC12-2153

Fourth District Case No. 4D09-2666

IN THE SUPREME COURT
STATE OF FLORIDA

ELAINE HESS, as personal representative
of the Estate of STUART HESS, deceased,

Plaintiff/Petitioner,

v.

PHILIP MORRIS USA INC.,

Defendant/Respondent.

ON DISCRETIONARY REVIEW FROM A DECISION
OF THE FOURTH DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT PHILIP MORRIS USA INC.

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page(s)

Cases

Statutes

STATEMENT OF THE CASE AND FACTS

Florida's fraud statute of repose states that "an action for fraud . . . must be begun within 12 years after the date of the commission of the alleged fraud." § 95.031(2)(a), Fla. Stat. The jury in this *Engle* progeny action found that the decedent, Stuart Hess, did not "rely to his detriment on any statement by" Philip Morris USA Inc. ("PM USA") "omitting material information" at any point after May 5, 1982—twelve years before the *Engle* class-action complaint was filed. *Philip Morris USA Inc. v. Hess*, 95 So. 3d 254, 258 (Fla. 4th DCA 2012). "Because 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 Fourth District held that plaintiff's "fraudulent concealment claim and the concealment-based punitive damages award are foreclosed by the statute of repose." *Id.* at 260-61.

The Fourth District's application of the statute of repose is consistent with the text and purpose of the statute, and is supported by settled fraud and repose principles. The Court should approve the Fourth District's decision, and quash the Third District's conflicting decision in *Frazier v. Philip Morris USA Inc.*, 89 So. 3d 937 (Fla. 3d DCA 2012), pending before this Court in No. SC12-1401.

A. The Trial Court Proceedings

Plaintiff Elaine Hess filed this lawsuit against PM USA to recover for the death of her husband, Stuart Hess, a longtime smoker who died of lung cancer in 1997. R. 1:1-12 [App. Tab A].[1] She alleged claims for strict liability, negligence, and fraudulent concealment. *Id.* at 7-10. Plaintiff also alleged a claim for conspiracy to fraudulently conceal that was never submitted to the jury. *Id.* at 9; R. 52:10316-18 [App. Tab B].

Plaintiff filed suit pursuant to this Court's decision in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) (per curiam) ("*Engle III*"), which prospectively decertified a class action against PM USA and other tobacco companies. Before it was decertified by this Court, the *Engle* class encompassed "'[a]ll 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.'" *Philip Morris USA Inc. v. Douglas*, 110 So. 3d 419, 422 (Fla.), *cert. denied*, 2013 WL 4079332 (U.S. Oct. 7, 2013) (alteration omitted).

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[1] The trial transcript is cited as "T. [page number]." Non-trial transcript portions of the record and supplemental record on appeal are cited as "R. [volume number]:[page number]" or "S.R. [volume number]:[page number]." For the Court's convenience, copies of all cited record materials are provided in an appendix to this brief, which is cited as "App. Tab [tab letter] at [page number]."

When this Court decertified the *Engle* class, it stated that former class members could "initiate individual damages actions" within one year of its mandate and that the "common core findings" made by the jury in Phase I of the class-action proceedings "will have res judicata effect in those trials." *Engle III*, 945 So. 2d at 1269. Those findings included that each defendant made unspecified statements that "concealed or omitted" information regarding the "health effects or addictive nature of smoking cigarettes," and entered into an "agree[ment] to conceal or omit information" regarding the health effects or addictiveness of smoking. *Id.* at 1257 n.4. The Court emphasized, however, that the Phase I findings "did not determine whether the defendants were liable to anyone," *id.* at 1263 (internal quotation marks and emphasis omitted), and that juries in the individual actions would therefore have to "consider individual questions of reliance and legal cause." *Id.* at 1255.

Plaintiff's complaint alleged that Mr. Hess was a member of the *Engle* class and that she was therefore entitled to the "res judicata effect" of the Phase I findings. R.1:1-12 [App. Tab A at 5]. In its answer, PM USA asserted that plaintiff's fraudulent concealment and conspiracy claims were barred by Florida's twelve-year statute of repose for "action[s] founded upon fraud." § 95.031(2)(a), Fla. Stat. In May 2008, plaintiff moved for partial summary judgment as to the statute of repose based on the preclusive effect of the *Engle* Phase I findings. *See*

S.R. 8-9:1254-1512 [App. Tab C]. Over PM USA's opposition, the trial court granted plaintiff partial summary judgment on the statute of repose. S.R. 20:3363-96 [App. Tab D at 1-5].

The case then proceeded to trial in two phases. *See* R. 39:7784-85 [App. Tab E]; T. 2334-35 [App. Tab O]. In Phase I, the jury was asked to decide whether Mr. Hess was a member of the *Engle* class. S.R. 34:5468-5588 [App. Tab F at 26-27]; T. 495 [App. Tab O]. During Phase I, the jury heard testimony from several family members, friends, and expert medical witnesses regarding Mr. Hess's smoking history and medical background, including that he smoked two to three packs of cigarettes a day (T. 862 [App. Tab O]); that, beginning in the 1970s, he made several unsuccessful attempts to quit smoking (*id.* at 963-82); and that, as early as his college days, he "was aware of smoking being dangerous" (*id.* at 1911). At the conclusion of Phase I, the jury found that Mr. Hess was an *Engle* class member. R. 49:9619 [App. Tab G].

In Phase II, the jury was asked to decide whether Mr. Hess had relied to his detriment on any material omissions by PM USA, to assign a degree of comparative fault to Mr. Hess, and to calculate compensatory damages and punitive damages (if any). *See* R. 52:10316-18 [App. Tab B]; *see also* T. 2334-35, 2651-52 [App. Tab O]. Plaintiff chose to introduce virtually no evidence in Phase II, which consisted of brief testimony from plaintiff and her son. Although

plaintiff presented limited evidence that Mr. Hess relied on statements by the tobacco industry about the health risks of smoking, the evidence indicated that any such reliance occurred before he began trying to quit smoking in the 1970s. T. 2402-03, 2406 [App. Tab O].

At PM USA's request, the trial court agreed to include a verdict form question that asked the jury to determine whether any reliance by Mr. Hess had occurred within the twelve-year actionable period established by the statute of repose. *See* R. 52:10316-18 [App. Tab B at 2]. That verdict form question asked whether Mr. Hess "rel[ied] to his detriment on any statement by Philip Morris USA that omitted material information which caused or contributed to his injury and death" before, after, or both before and after May 5, 1982—twelve years before the *Engle* class-action complaint was filed and thus the earliest date for which plaintiff could assert a viable fraud claim under the statute of repose. *See id.*

On February 18, 2009, the jury reached a verdict that found that Mr. Hess had relied to his detriment on statements by PM USA that omitted material information only *before* May 5, 1982. *See* R. 52:10316-18 [App. Tab B]. The jury further found that Mr. Hess's comparative fault was 58%, and awarded Mr. Hess's survivors—plaintiff and her son—compensatory damages of $3 million and punitive damages of $5 million. *See id.*

PM USA moved for judgment as a matter of law on the fraudulent concealment claim, which was the only ground for the punitive damages award. *See* R. 1:1-12 [App. Tab A at 8]; R. 84:16847-81 [App. Tab H]; R. 30:5942-6035 [App. Tab I at ¶ 154]. PM USA argued that, in light of the jury's finding that PM USA did not defraud Mr. Hess within the twelve-year period preceding the filing of the *Engle* complaint, that claim—and the associated punitive damages award—were barred by the statute of repose. R. 84:16847-81 [App. Tab H at 4]. The trial court denied the motion without explanation. S.R. 40:6421-6530 [App. Tab J at 25].

B. Appellate Proceedings

The Fourth District Court of Appeal affirmed in part and reversed in part. The court affirmed the trial court's ruling permitting plaintiff to rely on the *Engle* findings to establish the conduct elements of her tort claims. *Hess*, 95 So. 3d at 258-59. But the Fourth District reversed the denial of PM USA's motion for judgment as a matter of law on the fraudulent concealment claim and punitive damages award. *See id.* at 259-61.

The Fourth District held that the statute of repose, § 95.031(2)(a), Fla. Stat., barred plaintiff's fraudulent concealment claim because the jury found that PM USA did not defraud Mr. Hess within the twelve-year period preceding the filing of the *Engle* complaint. *Hess*, 95 So. 3d at 260-61. The court explained that, "[o]n

its face, section 95.031(2) clearly bars a fraud claim to the extent that it is based on fraudulent conduct committed more than twelve years before the institution" of the suit. *Id.* at 260 (internal quotation marks and alteration omitted). A fraudulent concealment claim, the court continued, "requires proof of detrimental reliance on a material misrepresentation." *Id.* (internal quotation marks omitted). Because the jury found that "Mr. Hess relied to his detriment on an omission by PM USA only *before* May 5, 1982," the Fourth District concluded that "PM USA did not defraud Mr. Hess within the twelve-year period established by the statute" and that plaintiff's fraudulent concealment claim was therefore barred. *Id.* at 260-61.

In reaching that conclusion, the Fourth District "reject[ed] Mrs. Hess's contention that the date of reliance is irrelevant" for statute-of-repose purposes. *Hess*, 95 So. 3d at 261. The court held that "the 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." *Id.* (quoting § 95.031(2)(a), Fla. Stat.). "If it did not," the court explained, "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," which would be "contrary to the intent of a statute of repose." *Id.*

Because plaintiff's fraudulent concealment claim was "foreclosed by the statute of repose"—and the "conspiracy to commit fraud claim was never

submitted to the jury"—the Fourth District reversed the award of punitive damages, which plaintiff had sought solely on her intentional tort claims. *Hess*, 95 So. 3d at 256 n.3, 261. The court subsequently denied plaintiff's motion for rehearing. *Id.* at 254.

SUMMARY OF ARGUMENT

The Fourth District correctly held that plaintiff's fraudulent concealment claim—and the punitive damages award premised on that claim—are barred by the statute of repose.

I. Under Florida's fraud statute of repose, a fraud claim must be filed within twelve years of "the date of the commission of the alleged fraud." § 95.031(2)(a), Fla. Stat. To recover on her fraudulent concealment claim, plaintiff was therefore required to prove that PM USA defrauded Mr. Hess after May 5, 1982—twelve years before the filing of the *Engle* class-action complaint. The jury explicitly found, however, that, after that date, Mr. Hess did not "rely to his detriment on any statement by Philip Morris USA that omitted material information." R. 42:10316-18 [App. Tab B at 2]. Because reliance is an essential element of every fraud claim, *Johnson v. Davis*, 480 So. 2d 625, 627 (Fla. 1985), PM USA did not defraud Mr. Hess within the twelve-year period established by the statute of repose. Plaintiff's fraudulent concealment claim and the concealment-based punitive damages award are therefore barred.

The application of the statute of repose to plaintiff's fraudulent concealment claim was not resolved in *Engle*. The jury in Phase I of *Engle* found that the defendants had concealed information about the health risks or addictiveness of smoking both before and after May 5, 1982. In the trial of the claims of three individual class members in Phase II-A, the jury was specifically asked to make findings about the three plaintiffs' pre- and post-1982 reliance; it found that all three had relied after May 5, 1982. The *Engle* jury's affirmative responses to the post-1982 verdict-form questions mooted the repose issue for purposes of *Engle* itself. But neither those findings nor the *Engle* trial court's denial of the defendants' repose-based directed verdict motions resolved the repose issue for purposes of the individual progeny trials. In fact, the *Engle* proceedings make clear that, like the named plaintiffs in Phase II-A, plaintiff here was required to prove that Mr. Hess relied on statements that omitted material information after May 5, 1982.

Moreover, plaintiff is incorrect that "the timing of the plaintiff's reliance is irrelevant to the statute of repose." Initial Br. 18 (capitalization altered). Because reliance is a critical element of fraud, *Johnson*, 480 So. 2d at 627, the "commission of the alleged fraud" within the meaning of the statute of repose must encompass alleged reliance by the plaintiff. If it did not, a plaintiff who had stopped relying on a defendant's alleged fraud decades before suit was filed could bring a timely

fraud claim simply because the defendant had continued to deceive *other people* within the twelve-year actionable period. That result would effectively nullify the statute of repose and eviscerate the legislature's objective of extinguishing "stale fraud claim[s]" that are "difficult[ ] [to] defend[ ]." *Carr v. Broward County*, 541 So. 2d 92, 95 (Fla. 1989).

Plaintiff's contention that the burden was on PM USA to prove the *absence* of reliance by Mr. Hess during the twelve-year actionable period is equally unavailing. As with every other element of her fraudulent concealment claim, plaintiff bears the burden of proving that Mr. Hess relied on a fraudulent statement by PM USA; all the statute of repose does is establish a time frame within which that element must be proven. Shifting the burden of proof as plaintiff suggests would be wholly unworkable because it would require a defendant in a fraud action to prove a negative—that the plaintiff (or the plaintiff's decedent) did *not* rely to her detriment during the relevant twelve-year period. The plaintiff herself is much better positioned to bear the burden of proof on this plaintiff-focused inquiry.

II. Applying the statute of repose to bar plaintiff's fraudulent concealment claim does not violate her constitutional right of access to the courts. As this Court has explained, while statutes of repose may "extinguish valid causes of action, sometimes before they even accrue," they address an important "countervailing concern—that is, the difficulty in defending against a lawsuit many

years after the conduct at issue occurred." *Nehme v. Smithkline Beecham Clinical Labs., Inc.*, 863 So. 2d 201, 208, 209 (Fla. 2003). The legislature therefore may bar a cause of action before it accrues if it "provid[es] a reasonable alternative to protect the rights of the people of the State to redress for injuries," *or* if it "can show an overpowering public necessity . . . and no alternative method of meeting such public necessity can be shown." *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973). The fraud statute of repose satisfies both of these standards because it leaves plaintiffs with products-liability causes of action against a manufacturer and responds to the "public necessity" for "cutting off a stale fraud claim," which is "exactly th[e] type of claim that is most susceptible to concerns of stale memories." *Kish v. A.W. Chesterton Co.*, 930 So. 2d 704, 706-07 (Fla. 3d DCA 2006).

ARGUMENT

I. THE FOURTH DISTRICT CORRECTLY CONCLUDED THAT THE STATUTE OF REPOSE BARS PLAINTIFF'S FRAUDULENT CONCEALMENT CLAIM AND THE CONCEALMENT-BASED PUNITIVE DAMAGES AWARD.

The Fourth District correctly concluded that PM USA is entitled to judgment as a matter of law on plaintiff's fraudulent concealment claim and on the punitive damages award, which is based solely on that claim. *Philip Morris USA Inc. v. Hess*, 95 So. 3d 254, 260-61 (Fla. 4th DCA 2012); *see also* R. 1:1-12 [App. Tab A at 8]; R. 84:16847-81 [App. Tab H]; R. 30:5942-6035 [App. Tab I at ¶ 154]. The

jury expressly found that Mr. Hess did not rely on "any statement by Philip Morris USA that omitted material information" during the twelve-year period that preceded the filing of the *Engle* complaint. R. 52:10316-18 [App. Tab B at 2]. Plaintiff's fraudulent concealment claim is therefore barred by the statute of repose. *See Hess*, 95 So. 3d at 260-61.[2]

A. The Fraud Statute Of Repose Required Plaintiff To Prove Each Element Of Her Concealment Claim Within The Twelve-Year Actionable Period.

Florida law provides that an action "founded upon fraud" must be filed within twelve years "after the date of the commission of the alleged fraud." § 95.031(2)(a), Fla. Stat. This twelve-year window applies "regardless of the date the fraud was or should have been discovered." *Id.*; *see also Kush v. Lloyd*, 616 So. 2d 415, 418 (Fla. 1992) (per curiam) (a statute of repose can "extinguish[ ]" a claim "before it is discovered"). As this Court has recognized, litigants face significant "difficulty in defending against a lawsuit many years after the conduct at issue occurred" because "memories fade, documents are destroyed or lost, and witnesses disappear." *Nehme v. Smithkline Beecham Clinical Labs., Inc.*, 863 So. 2d 201, 209 (Fla. 2003). Statutes of repose are a legislative response to this "difficulty." *Id.* They promote "finality in legal relationships," *Whigham v. Shands Teaching Hosp. & Clinics, Inc.*, 613 So. 2d 110, 111 (Fla. 1st DCA 1993)

[2] The interpretation of a statute of repose is a matter of law that is reviewed *de novo*. *Cassoutt v. Cessna Aircraft Co.*, 742 So. 2d 493, 495 (Fla. 1st DCA 1999).

(internal quotation marks omitted), and shield defendants from stale claims. *Kish v. A.W. Chesterton Co.*, 930 So. 2d 704, 706-07 (Fla. 3d DCA 2006).

To be actionable under the statute of repose, the "commission of the alleged fraud" in this case must have occurred after May 5, 1982—twelve years before the filing of the *Engle* class-action complaint. § 95.031(2)(a), Fla. Stat.; *Engle v. R.J. Reynolds Tobacco*, 2000 WL 33534572, at *5 (Fla. Cir. Ct. Nov. 6, 2000). The "commission" of fraudulent concealment requires, among other things, "proof of detrimental reliance on a material misrepresentation." *Soler v. Secondary Holdings, Inc.*, 771 So. 2d 62, 69 (Fla. 3d DCA 2000) (citing *Johnson v. Davis*, 480 So. 2d 625, 627 (Fla. 1985)); *see also Humana, Inc. v. Castillo*, 728 So. 2d 261, 265 (Fla. 2d DCA 1999) ("Florida law imposes a reliance requirement in an omissions case"). The statute of repose therefore required plaintiff to prove that Mr. Hess relied on a statement concealing material information that was made within the twelve-year period before the *Engle* complaint was filed. *See Joy v. Brown & Williamson Tobacco Corp.*, 1998 WL 35229355, at *5 (M.D. Fla. May 8, 1998) (magistrate judge's opinion) (plaintiffs pursuing a fraud claim must "adduce[ ] . . . proof of reliance upon a misrepresentation that was committed within the 12-year period prior to the filing of the complaint").

The Fourth District correctly held that plaintiff's concealment claim fails as a matter of law because the jury explicitly found that, after May 5, 1982, Mr. Hess

did *not* "rely to his detriment on any statement by Philip Morris USA that omitted material information which caused or contributed to his injury and death." R. 52:10316-18 [App. Tab B at 2]; *see also Hess*, 95 So. 3d at 260. Because plaintiff failed to prove the critical element of reliance after May 5, 1982, the "commission of the alleged fraud" in this case did not take place within the twelve-year actionable period. § 95.031(2)(a), Fla. Stat. Plaintiff's concealment claim and the punitive damages award based on that claim are therefore barred by the statute of repose. *See Puchner v. Bache Halsey Stuart, Inc.*, 553 So. 2d 216, 218 (Fla. 3d DCA 1989) (statute of repose barred claim for any fraudulent conduct that occurred more than twelve years prior to the filing of the complaint); *see also Philip Morris USA Inc. v. Naugle*, 103 So. 3d 944, 947 (Fla. 4th DCA 2012) (reaffirming holding in *Hess*); *Philip Morris USA Inc. v. Kayton*, 104 So. 3d 1145, 1151 (Fla. 4th DCA 2012) (same); *Philip Morris USA Inc. v. Cohen*, 102 So. 3d 11, 15 (Fla. 4th DCA 2012) (same); *Philip Morris USA Inc. v. Putney*, 117 So. 3d 798, 804 (Fla. 4th DCA 2013) (same); *R.J. Reynolds Tobacco Co. v. Buonomo*, __ So. 3d __, 2013 WL 5334590, at *2 (Fla. 4th DCA Sept. 25, 2013) (same).

B. None Of Plaintiff's Attacks On The Fourth District's Reasoning Can Withstand Scrutiny.

Plaintiff contends that the Fourth District's repose analysis was flawed because (1) the statute-of-repose issue was resolved in plaintiff's favor in *Engle*, Initial Br. 15-18; (2) the timing of reliance is irrelevant to the statute of repose, *id.*

at 18-32; and (3) to the extent reliance is relevant, the burden rested on PM USA to prove that Mr. Hess did not rely on any fraudulent statement made after May 5, 1982, *id.* at 32-35. These arguments uniformly lack merit.

1. The Application Of The Statute Of Repose To Plaintiff's Concealment Claim Was Not Resolved In *Engle*.

Plaintiff contends that PM USA is precluded from raising the statute of repose in this case because that issue was decided against PM USA in *Engle* itself. *See* Initial Br. 15-18. *Engle*, however, cannot bear the weight that plaintiff seeks to place on it.

In Phase I of *Engle*, the jury decided "issues common to the entire class" relating to the defendants' conduct without considering the facts of any individual class member's claim, *Philip Morris USA Inc. v. Douglas*, 110 So. 3d 419, 422 (Fla.), *cert. denied*, 2013 WL 4079332 (U.S. Oct. 7, 2013); in Phase II-A, the jury considered the claims of three named plaintiffs. *Id.* According to plaintiff, the *Engle* "defendants are precluded from relitigating" the statute of repose "in every individual suit" filed by progeny plaintiffs because, at the conclusion of both Phase I and Phase II-A, the trial court denied the defendants' motions for a directed verdict based on the statute of repose. Initial Br. 16-17. But those rulings by the *Engle* trial court simply reflected that, in Phase I, the jury found the defendants "concealed or omitted" information both before and after May 5, 1982, R. 30:5942-6035 [App. Tab K at 5-6], and that, in Phase II-A, the jury found the three

named plaintiffs had relied on allegedly fraudulent statements both before and after that date. R. 49-51:9828-10243 [App. Tab L at 6-9]. Those jury findings meant that, for purposes of Phase I and Phase II-A, the class and the three named plaintiffs had satisfied the statute of repose. Those jury findings also explain why the "defendants appealed [in *Engle*] but did not raise the statute of repose," Initial Br. 16—the jury's affirmative responses to the post-1982 verdict-form questions mooted for appellate purposes the question whether the statute of repose requires each element of a concealment claim to occur within the twelve-year period before suit was filed.

The *Engle* jury's findings do not mean, however, that the preclusive effect of *Engle* eliminates the statute-of-repose issue in individual progeny cases. If anything, *Engle* compels the opposite conclusion. As the Fourth District has recognized, the fact that "the jury in the *Engle* case (through a specific verdict form) was asked whether each of the three named plaintiffs had proven their claims for conspiracy to commit fraudulent concealment"—as well as their claims for fraudulent concealment—"within the twelve-year period preceding the filing of the *Engle* complaint . . . demonstrate[s] [that] the issue of reliance upon deceptive statements made by [an *Engle* defendant] within the statute of repose window is an individualized jury issue." *Kayton*, 104 So. 2d at 1151. There is no basis for permitting *Engle* progeny plaintiffs to recover without confronting the same

individualized statute-of-repose issue as the three named plaintiffs in Phase II-A of *Engle*.

Moreover, in light of the *Engle* jury's finding of post-1982 concealment and reliance, the *Engle* trial court's denial of the defendants' repose-based directed verdict motions was not, as plaintiff suggests, "necessary to uphold the *Engle* jury's concealment and conspiracy to conceal findings." Initial Br. 17; *see also id.* (citing *Philip Morris USA Inc. v. Hallgren*, __ So. 3d __, 2013 WL 5663188, at *6 (Fla. 2d DCA Oct. 18, 2013), for the proposition that "rulings of substantive law underlying the findings have res judicata effect"). Those findings were adequately supported by the jury's responses to the post-1982 verdict-form questions. In addition, plaintiff was not a party to Phase II-A, which only "decide[d] individual causation and damages for the class representatives." *Douglas*, 110 So. 3d at 422. The element of mutuality—an essential prerequisite to preclusion under Florida law, *see Dep't of Health & Rehabilitative Servs. v. B.J.M.*, 656 So. 2d 906, 910 (Fla. 1995)—is therefore not satisfied with respect to the Phase II-A verdict or to the trial court's ruling denying the defendants' directed verdict motion at the conclusion of Phase II-A.[3]

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[3] Nor could the application of the statute of repose to individual progeny plaintiffs' claims have been resolved in Phase I of *Engle*. To recover for fraudulent concealment, progeny plaintiffs must prove that they (or their decedents) relied to their detriment on fraudulent statements made by a defendant after May 5, 1982. *See supra* p. 13. This Court made clear in *Engle*, however, that

2. Reliance Is Relevant For Statute-Of-Repose Purposes.

Plaintiff also makes a series of arguments that the timing of reliance by the plaintiff (or the plaintiff's decedent) is irrelevant to the statute of repose, which, according to plaintiff, "depend[s] on the timing of the conduct of the defendant, not the plaintiff." Initial Br. 12. Each of those arguments is flawed.

"Commission of the alleged fraud." Plaintiff contends that the plain language of the statute of repose—which looks to "the date of the commission of the alleged fraud"—establishes that the timing of a plaintiff's reliance is irrelevant to the repose analysis. § 95.031(2)(a), Fla. Stat.; *see also* Initial Br. 19-20. She argues that "a fraud can be committed in one sense even if nobody relies on or is hurt by it" and that, for repose purposes, it therefore does not matter when a plaintiff relied on the fraud. Initial Br. 19-20.

Plaintiff's understanding of fraud is mistaken because, as discussed above, fraudulent "concealment requires proof of detrimental reliance." *Soler*, 771 So. 2d at 69. Without the essential element of reliance, there can be no claim for fraud. *See Johnson*, 480 So. 2d at 627. Thus, the "commission of the alleged fraud" must encompass alleged reliance by the plaintiff. This is confirmed by the very case that

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"reliance" is an "individualized issue[ ]" that was not decided by the Phase I jury. *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1263, 1268 (Fla. 2006) (per curiam); *see also id.* at 1263 (the Phase I jury "did not consider whether any class members relied on Tobacco's misrepresentations"). That individualized question therefore remains to be litigated in each *Engle* progeny case.

plaintiff cites in contending that fraud can be "commi[tted]" without reliance, *Sutton v. Gulf Life Insurance Co.*, 189 So. 828 (Fla. 1939), which explains that, "[t]o constitute fraud, a misrepresentation must be of a specific material fact that is untrue and known to be so, and stated for the purpose of inducing another to act, upon which statement the other *relies*." *Id.* at 829 (emphasis added; internal quotation marks omitted).[4]

This Court's decision in *Nehme* is not to the contrary. Initial Br. 19. In the passage quoted by plaintiff—which lists a "general[ ] defin[ition]" of fraud without including reliance—the Court is defining the term "fraud" as used in the medical-malpractice statute of repose, which is extended where "fraud . . . prevented the discovery of the injury." § 95.11(4)(b), Fla. Stat.; *see also Nehme*, 863 So. 2d at 205. Nothing in *Nehme*'s interpretation of the medical-malpractice provision purports to define the elements of a fraud cause of action or to eliminate the settled

[4] Plaintiff is incorrect that, "[u]nder the district court's reasoning, if a defendant made a single fraudulent statement fifty years ago, a plaintiff could still sue for fraud so long as he relied on the statement within the twelve years of filing suit." Initial Br. 31. To the contrary, as the Fourth District has made clear in subsequent decisions, the "commission" of *every* element of the "alleged fraud" must occur within the actionable period. § 95.031(2)(a), Fla. Stat.; *see also Naugle*, 103 So. 3d at 947 ("Because fraudulent concealment requires proof of reliance, Naugle's claim is barred unless the record demonstrates that she justifiably relied on statements or omissions made after [May 5, 1982]."). But even if plaintiff were correct, that would not justify excusing a plaintiff who was *not* deceived within the actionable period from the operation of the statute of repose.

requirement that a plaintiff asserting a fraud claim prove reliance on the alleged fraud. *See Johnson*, 480 So. 2d at 627.

For similar reasons, plaintiff derives no support from this Court's statement in *Kush* that "a statute of repose . . . runs from the date of a discrete act on the part of the defendant." 616 So. 2d at 418. In *Kush*, the Court was again construing the statute of repose for medical-malpractice actions, which, like assault and negligence, rarely include a reliance requirement. *See* § 95.11(4)(b), Fla. Stat. (defining an "action for medical malpractice" as "a claim in tort or in contract for damages . . . arising out of any medical, dental, or surgical diagnosis, treatment, or care").

Date of Discovery. Plaintiff seeks to "dispel[ ] [any] doubt" about her reading of the statute of repose by pointing to the language providing that the twelve-year actionable period begins to run "regardless of the date the fraud was or should have been discovered." § 95.031(2)(a), Fla. Stat.; *see also* Initial Br. 20. According to plaintiff, this language confirms that fraud can be "committed for purposes of the statute of repose" without reliance. Initial Br. 19.

The fact that the statute of repose can run even if the plaintiff has not discovered the fraud does not mean, however, that reliance is irrelevant to the repose inquiry. Discovery of the fraud generally triggers the running of the statute of *limitations*. *See, e.g.*, *Baker v. Hickman*, 969 So. 2d 441, 443 (Fla. 5th DCA

2007); § 95.031(2)(a), Fla. Stat. It is not equivalent to reliance on the fraud—which serves as the causal link between the defendant's misrepresentation and the plaintiff's injury. *See Townsend v. Morton*, 36 So. 3d 865, 868 (Fla. 5th DCA 2010) ("The fourth element of fraud is a justifiable reliance on the false statement causing injury."). In fact, discovery and reliance are mutually exclusive concepts; if the fraud has been discovered, the plaintiff can no longer reasonably rely on an allegedly fraudulent statement.

Plaintiff is therefore mistaken when she maintains that reliance "has no relevance to the triggering of the statute of repose" because "reliance by the plaintiff goes solely to 'when the cause of action accrued'" for purposes of the statute of limitations. Initial Br. 21 (quoting *Kush*, 616 So. 2d at 418). The statute of limitations on a fraud action "run[s] from the time the facts giving rise to the cause of action were discovered or should have been discovered," § 95.031(2)(a), Fla. Stat.—which means the date that the plaintiff discovered, or should have discovered, *all* elements of his claim, including a fraudulent statement by the defendant and reasonable reliance by the plaintiff resulting in a compensable injury. Reliance, standing alone, is insufficient to commence the statute-of-limitations period.

Plaintiff also contends that reliance cannot "trigger[ ]" the statute of repose because "[r]eliance is never the last element to accrue in an *Engle* concealment

claim." Initial Br. 27. Rather, plaintiff maintains, "the last element is injury to the plaintiff in the form of manifestation of one of the diseases enumerated in *Engle*," and thus, if the statute of repose looks beyond the defendant's conduct, it is manifestation of injury that triggers the repose period. *Id.* That too is mistaken.

In a fraud claim, injury occurs at the time of reliance because reliance is the point at which the plaintiff acts to his detriment based on the defendant's fraud. *See Tourismart of Am., Inc. v. Gonzalez*, 498 So. 2d 469, 471 (Fla. 3d DCA 1986) ("The essential elements of the common law action for fraud [include that] . . . the plaintiff's reliance on the representation caused him injury."). To be sure, an injury might not manifest itself—and the fraud claim therefore might not accrue—until years later. *See Carter v. Brown & Williamson Tobacco Corp.*, 778 So. 2d 932, 934 (Fla. 2000). There is no exception to the fraud statute of repose, however, for delayed manifestation. *Cf.* § 95.031(c), Fla. Stat. (establishing a delayed-manifestation exception to the products-liability statute of repose).

Plaintiff is therefore incorrect that, under the Fourth District's analysis, "there can be no repose defense in any *Engle* case that is not already barred by the statute of limitations." Initial Br. 27. The date on which an injury manifests—which is pivotal to the accrual of a claim for statute-of-limitations purposes, *see Carter*, 778 So. 2d at 934—is irrelevant to a statute of repose, which may "extinguish valid causes of action . . . before they even accrue." *Nehme*, 863 So.

2d at 208. Under plaintiff's contrary understanding of the Fourth District's decision, the statute of repose would begin to run only when an injury is discovered and would thus "be[ ] converted into a lengthened statute of limitation"—an outcome that "cannot be squared" with this Court's repose jurisprudence. *Kush*, 616 So. 2d at 421; *see also id.* (rejecting a reading of the medical-malpractice statute of repose that would have resulted in there being "no occasion where the repose period would expire before the statute of limitation period").

Finally, Plaintiff argues that considering the date of reliance for repose purposes conflicts with a provision of Section 95.031 providing that the repose period is tolled "for any period during which the manufacturer . . . had actual knowledge that the product was defective . . . and took affirmative steps to conceal the defect." § 95.031(2)(d), Fla. Stat. By its terms, however, that tolling provision applies *only* to the repose period established in Section 95.031(2)(b) for "[a]n action for *products liability*," and is inapplicable to the repose period established in Section 95.031(2)(a) for "[a]n action founded upon fraud." *See id.* ("The repose period prescribed within paragraph (b) is tolled . . . .").

Indeed, the inclusion of the tolling provision in the products-liability statute of repose and its omission from the fraud statute of repose makes clear that the legislature did not intend the availability of repose to depend on whether the

defendant continued its fraudulent activities against other persons. The same legislature that chose to toll the products-liability statute of repose on account of the defendant's knowing concealment of a product's defect plainly knew how to add a tolling provision to the fraud statute of repose for continuing fraudulent concealment but elected not to do so. That election should be respected by this Court. *See* Initial Br. 32-37, *Philip Morris USA Inc. v. Russo*, SC12-1401 (discussing this point at greater length).

Reliance on continuing fraud. While plaintiff argues that "reliance by the plaintiff . . . has no relevance to the triggering of the statute of repose," she is at pains to emphasize that, in her view, reliance is not "completely irrelevant to the statute of repose." Initial Br. 21, 28. According to plaintiff, it is "only . . . the timing" of Mr. Hess's reliance that is irrelevant, and she still "must prove that the fraud on which her husband relied . . . was the same fraud that continued beyond 1982." *Id.* at 28. Plaintiff's "continuing fraud" argument is legally insupportable and would give rise to a host of practical problems.

An allegation of a "continuing fraud" does not change the basic elements of fraud or the basic requirements of the statute of repose. Regardless of whether a defendant defrauded *other* people, a plaintiff cannot recover in a fraud action against the defendant unless the plaintiff herself—not someone else—relied on, and was injured by, that fraud. *See Bankers Mut. Capital Corp. v. U.S. Fid. &*

Guar. Co., 784 So. 2d 485, 490 (Fla. 4th DCA 2001) (the "essential elements of fraud" include that "*the plaintiff* relied to his detriment") (emphasis added). There is no cause of action under Florida law for fraud against third parties.

Similarly, the fact that a defendant allegedly continued to defraud other people after the plaintiff stopped relying on that fraud has no relevance to the statute of repose. *See Shepard v. Philip Morris Inc.*, 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"). If it did, a plaintiff who stopped being deceived by a defendant's fraud decades earlier could avoid the statute of repose simply because other people continued to rely on that fraud in the intervening years. That extraordinary result would eviscerate the statute of repose by requiring defendants to litigate decades-old claims hampered by faded memories, lost documents, and missing witnesses. *Nehme*, 863 So. 2d at 208-09. This case—in which witnesses were asked to speculate about the reasons that Mr. Hess began smoking in the 1950s and continued smoking for the next four decades—amply illustrates the practical difficulties of trying such cases. *See, e.g.*, T. 984-85 [App. Tab O] (Q: "I'm asking you do you recall your father having any doubt about his smoking being bad for him at any time in your life?" A: "I have no idea, really, I was 5, 6, 7, I don't know if he thought it was good or bad.").

Moreover, the plaintiff's "continuing fraud" standard would inject additional complexity into fraud trials by requiring the jury to determine whether the fraud on which the plaintiff relied more than twelve years before suit was filed was "the *same* fraud that continued into the repose period." Initial Br. 13 (emphasis added); *see also id.* ("a plaintiff alleging several distinct frauds can only recover as to the frauds that occurred within the repose period"). Juries would therefore be saddled with determining the scope and nature of the fraud on which the plaintiff relied and determining whether it was the same fraud—or some other fraud—that continued into the twelve-year period before suit was filed. Indeed, plaintiff did not even pose that question to the jury here, and thus waived application of her own "continuing fraud" theory.

Laschke. Plaintiff argues that the Fourth District wrongly departed from the Second District's decision in *Laschke v. Brown & Williamson Tobacco Corp.*, 766 So. 2d 1076 (Fla. 2d DCA 2000), which she reads as establishing that "it is the last act in furtherance of the fraud that counts" for statute-of-repose purposes. *See* Initial Br. 26; *see also id.* at 21-22, 27. Plaintiff misreads *Laschke*.

Laschke did not hold, as plaintiff suggests (*see, e.g.*, Initial Br. 22-23), that the plaintiff's reliance is irrelevant to the application of the statute of repose. In *Laschke*, a plaintiff who had stopped smoking cigarettes manufactured by defendants Lorillard and Brown & Williamson more than twelve years before

filing suit alleged that those defendants had conspired with other defendants that manufactured cigarettes she continued to smoke within the actionable period. 766 So. 2d at 1077-79. The trial court granted summary judgment in favor of Lorillard and Brown & Williamson on the basis of repose because the plaintiff had not smoked their cigarettes within the twelve-year period before suit was filed. The Second District reversed. Because a defendant is "responsible for all of the acts of his coconspirators," *Charles v. Fla. Foreclosure Placement Ctr., LLC*, 988 So. 2d 1157, 1160 (Fla. 3d DCA 2008) (internal quotation marks omitted), the Second District focused on whether the plaintiff had sufficiently alleged fraudulent acts by *any* co-conspirator within the relevant twelve-year period, and held that summary judgment was improper because there were factual disputes on that point. *Laschke*, 766 So. 2d at 1079. The Court in *Laschke* did not address the role of reliance in applying the statute of repose, much less hold that reliance should be ignored in determining whether a plaintiff's fraud claim is actionable under the statute.

The Second District recently confirmed this reading of *Laschke* in *Philip Morris USA Inc. v. Hallgren*, __ So. 3d __, 2013 WL 5663188. In *Hallgren*, the Second District held 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." *Id.* at *2 (citing *Laschke*,

766 So. 2d at 1079) (emphasis added). Although the court ultimately rejected the defendants' argument that they were entitled to judgment on the plaintiff's concealment and conspiracy claims based on the statute of repose, it did not do so (as plaintiff suggests) because "the last act in furtherance of the fraud" occurred within the actionable period. Initial Br. 22. Rather, it rejected the defendants' repose argument because, in its view, the plaintiff had presented 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" to permit a jury finding in the plaintiff's favor. *Hallgren*, 2013 WL 5663188, at *2 (emphases added).[5]

This is not to say that all courts have read *Laschke* correctly. Indeed, it was the failure to understand *Laschke* that resulted in the Third District's erroneous interpretation of the statute of repose in *Frazier v. Philip Morris USA Inc.*, 89 So. 3d 937 (Fla. 3d DCA 2012), now pending before this Court in No. SC12-1401. Rather than fully consider the text and purpose of the statute of repose, the Third District in *Frazier* merely cited *Laschke* for the proposition that "the last act done in furtherance of the alleged conspiracy fixes the pertinent date for purposes of

[5] In addition to arguing that they were entitled to judgment, the defendants in *Hallgren* also argued in the alternative that they were entitled to a new trial on the concealment and conspiracy claims because the trial court had failed to instruct the jury on the statute of repose. The Second District did not address that argument in its opinion.

commencement of the statute of repose." *Id.* at 947. Based on that reading of *Laschke*, the Third District "reject[ed] the [defendants'] contention that Ms. Frazier was obligated to show further or continued reliance upon the alleged last act in furtherance of the conspiracy." *Id.* at 947-48.

As explained above, *Laschke* does not support the Third District's conclusion that reliance is irrelevant to the repose analysis. Moreover, although plaintiff insists that *Frazier* was somehow "vindicated" by this Court's decision in *Douglas*, Initial Br. 24, *Douglas* said nothing whatsoever about the statute of repose. Indeed, the *Douglas* jury had rejected the concealment and conspiracy claims, and the Court therefore had no occasion to consider the fraud statute of repose. 110 So. 3d at 425.[6]

In *Lorillard Tobacco Co. v. Alexander*, __ So. 3d __, 2013 WL 4734565 (Fla. 3d DCA Sept. 4, 2013), the Third District appeared to retreat from its erroneous decision in *Frazier*. *Alexander* held that testimony that the decedent believed until 1985, based on representations by the tobacco industry, that filtered cigarettes were safer "was relevant to establish [the decedent's] reliance outside of

[6] Plaintiff is incorrect that the First District "summarily rejected the statute of repose as a viable defense [to] *Engle* claims" in *R.J. Reynolds Tobacco Co. v. Webb*, 93 So. 3d 331 (Fla. 1st DCA 2012). Initial Br. 22. *Webb* rejected only the argument that "the combined effect of the statute of repose and federal preemption" barred the plaintiff's claim for fraudulent concealment as a matter of law. 93 So. 3d at 333. The First District did not address the question in this case, much less hold that the statute of repose is inapplicable even when a progeny plaintiff fails to prove reliance within the twelve-year actionable period.

the limits of the statute of repose." *Id.* at *5. "Since the statute of repose begins in 1982," the court explained, 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.* While plaintiff emphasizes that *Alexander* permitted the introduction of testimony about the decedent's reliance dating back to the 1950s, Initial Br. 23-24, that does not diminish the force of the Third District's holding that "reliance *through 1985* was relevant" for statute-of-repose purposes.

In this case, the Fourth District—which did not have the benefit of the Second District's subsequent decision in *Hallgren*—concluded that plaintiff's reliance on *Laschke* was "misplaced because *Laschke* explained that the date of the last act done is the critical date in cases of *conspiracy*, not fraud by concealment, which is at issue here." *Hess*, 95 So. 3d at 261. The Fourth District has made clear in subsequent cases, however, that proof of reliance within the twelve-year repose period is also required for claims of conspiracy to commit fraudulent concealment. *See Kayton*, 104 So. 3d at 1151 (holding that the trial court "erred in striking Philip Morris's statute of repose defense to the conspiracy claim" because "the issue of reliance upon deceptive statements made by a conspirator within the statute of repose window is an individualized jury issue"); *Putney*, 117 So. 3d at 803-04 (same). That conclusion follows inexorably from the Fourth District's reasoning in this case. While a conspirator is vicariously liable for the torts of its co-

conspirators, the plaintiff still must establish that one or more of the co-conspirators committed the underlying tort. *See Liappas v. Augoustis*, 47 So. 2d 582, 582 (Fla. 1950). Here, the underlying tort of fraudulent concealment requires proof of reliance within the twelve-year actionable period.

In any event, the Fourth District was plainly correct when it concluded that plaintiff's "conspiracy to commit fraud claim was never submitted to the jury." *Hess*, 95 So. 3d at 256 n.3. Plaintiff waived her conspiracy claim when she submitted her proposed verdict form (R. 50:9762-81 [App. Tab N]) and failed to object to the trial court's verdict form (R. 52:10316-18 [App. Tab B])—neither of which presented the jury with a conspiracy claim. Moreover, the fraudulent concealment question asked only whether Mr. Hess "rel[ied] to his detriment on any statement by Philip Morris USA that omitted material information." R. 52:10316-18 [App. Tab B at 2]. The jury therefore was never asked to find one of the essential elements of a conspiracy claim—that Mr. Hess relied on an act taken "in pursuance of the conspiracy." *Eagletech Commc'ns, Inc. v. Bryn Mawr Inv. Grp., Inc.*, 79 So. 3d 855, 863 (Fla. 4th DCA 2012).

3. Plaintiff Had The Burden Of Proving Each Element Of Her Concealment Claim Within The Twelve-Year Period Established By The Statute Of Repose.

Plaintiff alternatively contends that, even "if reliance is relevant" to the statute of repose, "[t]he jury's finding that Mrs. Hess failed to prove that [Mr.

Hess] relied on some statement made by PM USA after [May 5, 1982] cannot establish the repose defense." Initial Br. 32. According to plaintiff, the statute of repose "is an affirmative defense," and thus "PM USA bore the burden of" establishing it. *Id.* at 32-33. Plaintiff's attempt to shift the burden of proof to PM USA is flawed in multiple respects.

As an initial matter, plaintiff has waived this argument because (1) she did not propose a jury instruction or verdict-form question that would have required PM USA to prove the absence of reliance after May 5, 1982, *see, e.g.*, *Gregory v. State*, 937 So. 2d 180, 183 (Fla. 4th DCA 2006); (2) she did not object to the jury instructions and verdict form used by the trial court on the ground that they placed the burden of proof as to the timing of Mr. Hess's alleged reliance on plaintiff, *see, e.g.*, *City of Orlando v. Birmingham*, 539 So. 2d 1133, 1134-35 (Fla. 1989) (jury instructions); *Hill v. Dep't of Corr.*, 513 So. 2d 129, 134 (Fla. 1987) (verdict form); and (3) she did not raise this argument in the Fourth District, *see, e.g.*, *Cochran v. State*, 476 So. 2d 207, 208 (Fla. 1985).

In any event, the fraud statute of repose does not impose the burden of proof on the defendant to prove that it did not defraud the plaintiff within the twelve-year actionable period. If it did, the statute of repose would reverse the standard burden of proof in civil fraud cases—which requires *the plaintiff* to prove each element of her claim (including reliance), *Foreline Sec. Corp. v. Scott*, 871 So. 2d 906, 910

(Fla. 5th DCA 2004)—and effectively create a rebuttal presumption of liability. That is a nonsensical reading of a statute that was enacted to "[p]rotect potential defendants from the protracted fear of litigation." *Kish*, 930 So. 2d at 707 n.6 (internal quotation marks omitted; brackets in original).

Properly understood, the statute of repose leaves the burden of proof in civil fraud cases where it has always been—with the plaintiff—and simply establishes a time frame within which the plaintiff must prove each element of the fraud claim. The statute of repose is thus different from traditional affirmative defenses—such as the statute of limitations. A statute of limitations is distinct from the elements of the plaintiff's claim and runs from the date that the plaintiff discovered, or should have discovered, the claim. *See* § 95.031(2)(a), Fla. Stat. The burden of establishing that a claim is untimely under the statute of limitations rests with the defendant because "[s]tatutes of limitations bar the enforcement of an otherwise valid cause of action." *Baskerville-Donovan Eng'rs, Inc. v. Pensacola Exec. House Condo. Ass'n*, 581 So. 2d 1301, 1303 (Fla. 1991). The burden of complying with the statute of repose, in contrast, rests on the plaintiff because the statute of repose defines a component of each element of the plaintiff's claim by establishing the time period within which the elements must occur. Thus, while the statute of limitations bars recovery on an otherwise-valid claim, a claim barred by the statute

of repose fails on its merits because the plaintiff has not established each of the elements of the claim.

This allocation of the burden of proof also makes practical sense. It would be extraordinarily difficult for a defendant to prove the *absence* of reliance during the twelve-year actionable period because doing so would place the defendant in the position of effectively having to prove a negative. The plaintiff is far better positioned, by contrast, to carry the burden of establishing reliance within the actionable period. *See Carter v. Dep't of Prof'l Regulation*, 633 So. 2d 3, 7 (Fla. 1994) (holding that a licensee against whom administrative disciplinary proceedings are brought bears the burden of proving that he was prejudiced by undue agency delay because requiring the agency to "prov[e] that its actions did not prejudice the licensee . . . would require the [agency] to prove the negative" and "it is the licensee who is best equipped to identify the harm caused by the delay").

While plaintiff cites two cases describing the statute of repose as an "affirmative defense," *see* Initial Br. 32-33, neither case addressed the issue of the burden of proof on repose. In *Johnston v. Hudlett*, 32 So. 3d 700 (Fla. 4th DCA 2010), the Fourth District simply concluded that "the statute of limitations and the statute of repose are affirmative defenses" that the defendant had waived by failing to plead. *Id.* at 704 (internal quotation marks omitted). And, in *AVCO Corp. v.*

Neff, 30 So. 3d 597 (Fla. 1st DCA 2010), the First District held that Florida's products-liability statute of repose, and the statute of repose under federal law established by the General Aviation Revitalization Act of 1994, 49 U.S.C. § 40101 note, "operate as affirmative defenses" and that the trial court's denial of summary judgment based on those provisions could therefore be challenged only through a post-judgment appeal, not through an extraordinary writ. *Id.* at 604.

Plaintiff also contends that she is not required to prove reliance within the actionable period "because the claims in this case are for fraudulent concealment, not misrepresentation," and concealment includes "the failure to speak when under a duty to speak or disclose." Initial Br. 33; *see also id.* at 33-35. Thus, according to plaintiff, "[o]nce reliance on the concealment was proven" for the period before May 5, 1982, "it mattered not whether Mr. Hess relied on any subsequent statements." *Id.* at 34.

This argument does nothing more than repackage plaintiff's assorted other efforts to demonstrate that the timing of reliance is irrelevant for repose purposes. It fails for the same reason as those other arguments—the plain language of the statute of repose makes clear that the "commission of the alleged fraud," including the essential element of reliance on a "false *statement*" concealing material information, *Johnson*, 480 So. 2d at 627 (emphasis added), must be established within the twelve-year actionable period. § 95.031(2)(a), Fla. Stat.

The Fifth District's decision in *Ambrose v. Catholic Social Services*, 736 So. 2d 146 (Fla. 5th DCA 1999), is not to the contrary. In *Ambrose*, the plaintiff alleged that Catholic Social Services had misrepresented that a child being considered for adoption had no known history of mental illness, and the Fifth District held that the statute of repose began to run on the date the adoption was finalized. *See id.* at 149. As plaintiff herself concedes, the plaintiff in that case "*relied* on the concealment by finalizing the adoption" in October 1986—less than twelve years before she filed suit in July 1998. Initial Br. 35 (emphasis added); *see also Ambrose*, 736 So. 2d at 148. Here, in contrast, the jury explicitly found the *absence* of reliance by Mr. Hess within the twelve-year period before suit was filed.

II. APPLYING THE STATUTE OF REPOSE DOES NOT VIOLATE PLAINTIFF'S CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS.

Plaintiff argues that, if the statute of repose bars her fraudulent concealment claim, then the statute is unconstitutional because it extinguished her claim before it accrued. Initial Br. 36-40. Plaintiff concedes that she raised this constitutional argument for the first time in her rehearing motion in the Fourth District. *Id.* at 36 n.10. It is therefore waived. *See Polyglycoat Corp. v. Hirsch Distribs., Inc.*, 442 So. 2d 958, 960 (Fla. 4th DCA 1983) (per curiam).

In any event, plaintiff's argument also fails on the merits.[7] As this Court has explained, while statutes of repose may "extinguish valid causes of action, sometimes before they even accrue," they address an important "countervailing concern—that is, the difficulty in defending against a lawsuit many years after the conduct at issue occurred." *Nehme*, 863 So. 2d at 208, 209. The legislature can therefore foreclose causes of action through a statute of repose as long as it "provid[es] a reasonable alternative to protect the rights of the people of the State to redress for injuries," or "can show an overpowering public necessity . . . and no alternative method of meeting such public necessity can be shown." *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973).

Applying these principles, this Court held in *Pullum v. Cincinnati, Inc.*, 476 So. 2d 657 (Fla. 1985), that a predecessor to the current products-liability statute of repose did not violate the right of access to the courts under Article I, Section 21 of the Florida Constitution because the "legislature, in enacting this statute of repose, reasonably decided that perpetual liability places an undue burden on manufacturers." *Id.* at 659. Similarly, in *Carr v. Broward County*, 541 So. 2d 92 (Fla. 1989), the Court rejected a constitutional challenge to the medical-malpractice statute of repose, § 95.11(4)(b), Fla. Stat. The Court addressed, in

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[7] The determination of a statute's constitutionality is a question of law that, if it had been raised and decided below, would be reviewed *de novo*. *Fla. Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005).

particular, a provision of the medical-malpractice statute of repose that provides that where "'it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury within the 4-year [repose] period, the period of limitations is extended forward 2 years . . . but in no event to exceed 7 years'" from the date of the medical procedure. *Carr*, 541 So. 2d at 94 (quoting § 95.11(4)(b), Fla. Stat.). The Court held that the "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," and found that "seven years is an objectively reasonable period within which the legislature may require fraud claims be discovered." *Id.* at 95.

The reasoning of *Pullum* and *Carr* applies with equal force to the fraud statute of repose. Indeed, several courts have already rejected constitutional challenges to that statute. *See Kish*, 930 So. 2d at 705; *Koulianos v. Metro. Life Ins. Co.*, 962 So. 2d 357, 357 (Fla. 4th DCA 2007) (per curiam) (summary affirmance, citing *Kish*). The only contrary authority cited by plaintiff is unreasoned footnote dictum from a nearly thirty-year-old case decided before this Court's opinions in *Pullum* and *Carr*. *See* Initial Br. 38 (relying on *Kempfer v. St. Johns River Water Mgmt. Dist.*, 475 So. 2d 920, 924 n.14 (Fla. 5th DCA 1985) (per curiam)).

The Third District's thorough analysis in *Kish* is instructive. In *Kish*, the Third District rejected the 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 by *Diamond v. E.R. Squibb & Sons, Inc.*, 397 So. 2d 671 (Fla. 1981), resulted in an unconstitutional denial of access to courts." 930 So. 2d at 705. The Third District determined that the legislature has provided a "reasonable alternative remedy" to a "stale fraud claim" based on a latent injury caused by an allegedly defective product—namely, a products-liability action against the manufacturer. *Id.* at 706. In response to this Court's decision in *Diamond*, the legislature has provided a latent-injury exception to the statute of repose for products-liability claims, permitting those claims to be pursued if the injury "'did not manifest itself until after expiration of the repose period.'" *Id.* at 706 & n.4 (quoting § 95.031(2)(c), Fla. Stat.). Because that alternative remedy is available, the Florida Constitution does not require that a plaintiff suffering a latent injury from an allegedly defective product also be permitted to pursue a belated fraud claim against the manufacturer. *Id.* at 706.

The Third District further held that "public necessity . . . justifies cutting off a stale fraud claim" because fraud claims are "exactly th[e] type of claim that is most susceptible to concerns of stale memories." *Kish*, 930 So. 2d at 706-07. Indeed, fraud claims require proof of specific intent and justifiable reliance—issues

that are particularly difficult to resolve based on anything other than speculation "when the evidence has been lost, memories have faded, and witnesses have disappeared." *Id.* at 707 (internal quotation marks omitted). Thus, as this Court held in *Carr*, "'the 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.'" *Id.* at 707-08 (quoting *Carr*, 541 So. 2d at 95). Indeed, "since 1974 when the fraud statute of repose was first enacted, the Legislature has had numerous opportunities to import a *Diamond* exception into it, but has not done so." *Id.* at 708.

Plaintiff argues that *Kish* found a reasonable alternative remedy only because "section 95.031(2)(d) saved the fraud claims against the manufacturers at issue." Initial Br. 39. But, as already discussed, Section 95.031(2)(d) is an exception to the statute of repose for *products-liability*—not fraud—claims. *See supra* p. 23-24. Like the plaintiff in *Kish*, plaintiff here was able to pursue timely products-liability claims against PM USA, which culminated in an award of $3 million in compensatory damages.

Moreover, while plaintiff characterizes *Kish* as improper "legislat[ion] from the bench," Initial Br. 39, that gets things precisely backward. Rather than strike down a duly enacted statute, as plaintiff urges this Court to do, the Third District properly deferred to the legislature's decision to establish a twelve-year repose

period for fraud claims and to leave that provision intact despite numerous opportunities to amend it.

Plaintiff also argues that in *Pulmosan Safety Equipment Corp. v. Barnes*, 752 So. 2d 556 (Fla. 2000), this Court held that a statute of repose may bar a cause of action before it accrues *only* in the medical-malpractice context. Initial Br. 37; *see also id.* at 37-38. But *Pulmosan* held nothing of the sort. *Pulmosan* addressed the statute of repose for products-liability claims that existed at the time of the *Diamond* decision in 1981, and held that the latent-injury exception established in *Diamond* remains applicable with respect to claims governed by that "now-defunct statute of repose." 752 So. 2d at 559. The Court did not even address the statute of repose for fraud claims, much less endorse plaintiff's argument that the fraud statute of repose cannot bar a claim before it accrues.

Finally, plaintiff maintains that "the reason that the medical malpractice statute of repose may constitutionally bar an action that has not yet accrued is that the Legislature made specific and detailed findings of an overriding public necessity to limit medical malpractice actions because of a crisis involving malpractice insurance." Initial Br. 37-38 (citing *Owens-Corning Fiberglass Corp. v. Corcoran*, 679 So. 2d 291, 294 (Fla. 3d DCA 1996), and *Carr v. Broward Cnty.*, 505 So. 2d 568, 575 (Fla. 4th DCA 1987)); *see also id.* at 39. But neither of the cases cited by plaintiff identifies a requirement for "specific and detailed findings."

And this Court imposed no such requirement when it upheld the medical-malpractice statute of repose in *Carr*. Instead of pointing to specific legislative findings on the issue of fraud—there were none—the Court independently determined the legislative objectives underlying that provision and concluded that "the 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." *Carr*, 541 So. 2d at 95. Those same policies animate the fraud statute of repose, which is a constitutionally permissible means of "address[ing] . . . the difficulty in defending against a lawsuit many years after the conduct at issue occurred." *Nehme*, 863 So. 2d at 209.

CONCLUSION

For the foregoing reasons, this Court should approve the Fourth District's decision and quash the Third District's conflicting decision in *Frazier v. Philip Morris USA Inc.*, 89 So. 3d 937 (Fla. 3d DCA 2012).

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2013, I caused the foregoing Brief of Respondent and accompanying Appendix to be filed with this Court via the Court's e-filing portal and to be served by e-mail on the below listed individuals:

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

DATED: November 25, 2013

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