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 ON JURISDICTION OF RESPONDENT PHILIP MORRIS USA INC.

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SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal held in this *Engle* progeny case that the statute of repose, section 95.031(2)(a), Florida Statutes, barred plaintiff Elaine Hess's claim for fraudulent concealment because the jury found that Philip Morris USA Inc. ("PM USA") did not defraud plaintiff's husband, Stuart Hess, within the twelve-year period preceding the filing of the *Engle* complaint. *Philip Morris USA, Inc. v. Hess*, 95 So. 3d 254, 260-61 (Fla. 4th DCA 2012). That ruling correctly applied both the plain language of the statute of repose and settled precedent.

Although the Fourth District's decision on the repose issue is correct, PM USA does not dispute that this aspect of the Fourth District's opinion conflicts with the Third District's decision in *Frazier v. Philip Morris USA Inc.*, 89 So. 3d 937 (Fla. 3d DCA 2012). The Court should grant review to resolve the conflict on this important and recurring issue. PM USA and R.J. Reynolds Tobacco Company have invoked this Court's discretionary jurisdiction to review the Third District's decision in *Frazier*, and that request remains pending before this Court. *See Philip Morris USA, Inc. v. Russo*, No. SC12-1401.[1] PM USA respectfully submits that the Court should take up *Hess* as the lead case on the repose issue because the

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[1] While the *Frazier* case was pending before the Third District, Tina Russo was substituted as the executor of the plaintiff's estate.

Fourth District's opinion contains a more extensive and thorough analysis of that issue than the Third District's opinion in *Frazier*.[2]

ARGUMENT

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. In this case, the Fourth District Court of Appeal held 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. *Hess*, 95 So. 3d at 260 (internal quotation marks and alteration omitted). A fraudulent concealment claim, the Fourth District continued, "requires proof of detrimental reliance on a material misrepresentation." *Id.* (internal quotation marks omitted). The jury in this case, however, expressly found that "Mr. Hess relied to his detriment on an omission by PM USA only *before* May 5, 1982," and thus did not rely on any alleged concealment by PM USA during the twelve-year period before the *Engle* class action was filed. *Id.* Based on that finding, the Fourth District concluded that "PM USA did not defraud Mr. Hess

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[2] PM USA has separately invoked this Court's discretionary jurisdiction in this case with respect to the Fourth District's rulings on the preclusive effect of the *Engle* Phase I findings and the standard for proving legal causation in *Engle* progeny cases. *See* No. SC12-2151. For the reasons explained in PM USA's jurisdictional brief, this Court should grant review on those issues—which are also currently pending before the Court in *Philip Morris USA, Inc. v. Douglas*, No. SC12-617—in addition to the repose question.

within the twelve-year period established by the statute" and that plaintiff's fraudulent concealment claim was therefore barred. *Id.* at 261.

"In so holding," the Fourth District rejected plaintiff's argument that "the date of reliance is irrelevant" to the application of the statute of repose. *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 Fourth District 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.* That ruling is consistent with the language of the statute of repose and well-established precedent.

PM USA does not dispute, however, that the Fourth District's decision on the repose issue conflicts with the Third District's decision in *Frazier*. In that *Engle* progeny case, the Third District held that, to overcome the statute of repose, the plaintiff was *not* "obligated to prove that she relied upon a deceptive statement or omission after May 5, 1982." *Frazier*, 89 So. 3d at 947. Instead, the Third District ruled that the plaintiff could satisfy the statute of repose by introducing evidence "of deceptive statements or omissions occurring after May 5, 1982"—whether or not the plaintiff herself relied on those statements to her detriment. *Id.*

Thus, the Third District's decision in *Frazier* "expressly and directly conflicts" (Art. V, § 3(b)(3), Fla. Const.) with the Fourth District's holding in this case that a plaintiff must prove the element of reliance within the actionable twelve-year period under the statute of repose.

This Court should grant review to resolve the conflict on this significant and frequently recurring issue. The statute of repose is implicated in virtually every *Engle* progeny case that involves a claim of fraudulent concealment—in addition to countless non-*Engle* progeny cases raising claims of fraud. In these cases, plaintiffs in the Fourth District currently must prove that they relied on a fraudulent statement within the actionable twelve-year period established by the statute of repose; by contrast, plaintiffs in the Third District currently need *not* prove reliance within the twelve-year period, and instead need only prove that the defendant made a misrepresentation or omission within that period. This Court should intervene to eliminate the confusion and unfairness that will result from this inconsistent application of Florida law.

Plaintiff's jurisdictional brief also argues that the Fourth District's decision in this case gives rise to additional conflicts and is incorrect on the merits. Although PM USA disagrees with those arguments, they are irrelevant at this stage of the proceeding because this Court's review is warranted in any event based on the conflict between the decision below and the Third District's decision in

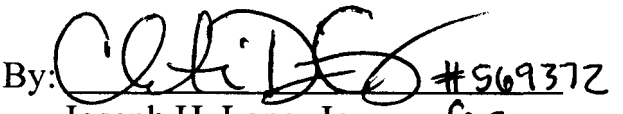
Frazier. Thus, rather than address plaintiff's additional arguments now, PM USA will address them in its merits briefing should the Court grant review.[3]

[3] Plaintiff argues, for example, that the Fourth District's decision "conflicts with this Court's precedents holding that a statute of repose cannot constitutionally bar an action before it accrues when it is based on a latent injury." Pl. Br. 8. That constitutional argument is waived, however, because plaintiff raised it for the first time in her motion for rehearing in the Fourth District. *See* Fla. R. App. P. 9.330(a) ("A motion for rehearing . . . shall not present issues not previously raised in the proceeding."); *see also Polyglycoat Corp. v. Hirsch Distribs., Inc.*, 442 So. 2d 958, 960 (Fla. 4th DCA 1983) (per curiam). Indeed, the Fourth District's opinion did not even address this constitutional issue—much less establish a "point of law contrary to a decision of this Court," as required to justify review. *Fla. Star v. B.J.F.*, 530 So. 2d 286, 289 (Fla. 1988). In any event, plaintiff's argument has been rejected on its own terms by every court that has confronted it. *See, e.g.*, *Kish v. A.W. Chesterton Co.*, 930 So. 2d 704, 706-09 (Fla. 3d DCA 2006); *Koulianos v. Metro. Life Ins. Co.*, 962 So. 2d 357 (Fla. 4th DCA 2007) (per curiam).

CONCLUSION

PM USA requests that the Court grant review in this case.

Respectfully submitted,

By:  #969372 for

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DECEMBER 4, 2012

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail and electronic mail upon the following counsel for Petitioner this 4th day of December, 2012:

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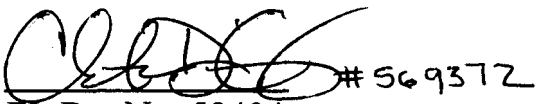
By:  # 569372
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CERTIFICATE OF COMPLIANCE

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: December 4, 2012

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