

IN THE SUPREME COURT OF FLORIDA

ELAINE HESS, etc.,

Petitioner,

v.

PHILIP MORRIS USA, INC.,

Respondent.

Case No.: SC12-2153

L.T. No.: 4D09-2666

2012 NOV 15 AM 9:05

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, STATE OF FLORIDA

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND OF THE FACTS

Petitioner Elaine Hess seeks review to resolve conflicts regarding when the statute of repose begins to run on claims of fraudulent concealment. Respondent Philip Morris USA Inc. (“PM USA”) has separately invoked this Court’s conflict jurisdiction on other issues in Case No. SC12-2151. While Mrs. Hess disagrees that PM USA’s issues support conflict jurisdiction, PM USA not only concedes conflict jurisdiction on Mrs. Hess’s repose issue, but it has affirmatively asked this Court to (1) accept review of Mrs. Hess’s petition to resolve the repose conflict with another district court decision that PM USA is challenging and (2) designate Mrs. Hess’s case as the lead case. (*Philip Morris USA Inc. v. Hess*, No. SC12-2151, Jurisdiction Br. 2 n.2 (Nov. 12, 2012); *Philip Morris USA Inc. v. Russo*, No. SC12-1401, Jurisdiction Br. 1 n.1 (Nov. 9, 2012).) Similarly, R.J. Reynolds Tobacco Company (“RJR”) joined in PM USA’s jurisdiction brief in *Russo* and has independently invoked this Court’s conflict jurisdiction to review the repose conflict with this decision. *R.J. Reynolds Tobacco Co. v. Webb*, No. SC12-1461, Jurisdiction Br. 5-6 (July 26, 2012).

Mrs. Hess brought this wrongful death action on behalf of her late husband, Stuart Hess, who was a member of the class approved by this Court in *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246 (Fla. 2006), as the jury in this case found and PM USA does not dispute. (App. 1.) She ultimately prevailed on claims for strict

liability, negligence, and fraudulent concealment, and the jury awarded punitive damages based solely on the concealment claim. (App. 4.) The jury made a specific finding that Mr. Hess relied on PM USA's fraudulent concealment only before May 5, 1982. (App. 4.) PM USA argued that this finding required a judgment as a matter of law in its favor on the fraudulent concealment claim under the statute of repose, but the trial court rejected that argument and entered a judgment that included the punitive damage award. (App. 4-5.)

On appeal, the Fourth District affirmed the compensatory damage award on the negligence and strict liability claims, but reversed the award of punitive damages because it concluded that the jury's finding that Mr. Hess only relied before May 5, 1982, required a judgment for Phillip Morris on the fraudulent concealment claim. (App. 5-9.) Although the court expressly acknowledged that the findings approved in *Engle* "established the conduct elements of a fraudulent concealment cause of action" (App. 7), it concluded that the determination of when the repose period begins to run does not depend solely on the defendant's conduct, but also on when the plaintiff relied on the fraudulent concealment:

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, we hold that the fraudulent concealment claim and the concealment-based punitive damages award are foreclosed by the statute of repose.

(App. 8.)

In rejecting Mrs. Hess's argument that "the date of reliance is irrelevant," the court emphasized that when PM USA committed its fraudulent conduct "does not resolve the issue" because "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." (App. 8 (quoting § 95.031(2)(a), Fla. Stat. (1993)).) It concluded that Mrs. Hess's argument was "contrary to the intent of a statute of repose," which "is to extinguish valid causes of action, sometimes before they even accrue." (App. 8 (quoting *Nehme v. Smithkline Beecham Clinical Labs., Inc.*, 863 So. 2d 201, 208 (Fla. 2003)).) This was the third time in the opinion that the court expressed that the statute of repose can bar a cause of action before it accrues. (App. 7 (quoting *WRH Mortg., Inc. v. Butler*, 684 So. 2d 325, 327 (Fla. 5th DCA 1996), and *Carr v. Broward Cnty.*, 505 So. 2d 568, 570 (Fla. 4th DCA 1987)).) Finally, it rejected Mrs. Hess's argument that the trigger for the statute of repose in concealment claims is the date of the last act in furtherance of the concealment. (App. 8-9.) After the district court denied both parties' motions for rehearing and rehearing en banc, Mrs. Hess timely invoked this Court's conflict jurisdiction.

SUMMARY OF ARGUMENT

This Court has conflict jurisdiction because the decision below conflicts with (A) decisions holding that the statute of repose is based solely on the conduct

of the defendant, not the plaintiff and that reliance is irrelevant and (B) decisions of this Court holding that a statute of repose may not bar an action for a latent injury before it accrues, at least outside the malpractice area. The Court should grant review because these conflicts are extremely important and impact thousands of cases. The parties further agree that the Court should designate this as the lead case among the pending cases presenting the issue.

ARGUMENT

I. THIS COURT HAS CONFLICT JURISDICTION.

This Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of either this Court or another district court of appeal. Art. V, § 3(b)(3), Fla. Const. This case presented conflict on at least two critical issues involving the statute of repose.

A. The Decision Conflicts with Decisions Holding that the Statute of Repose Is Based on the Conduct of the Defendant, Not the Plaintiff.

The Fourth District's decision conflicts with numerous decisions of this Court and other district courts that clearly hold that the triggering event for a statute of repose is tied solely to the defendants' conduct and that the plaintiff's conduct is not relevant. The most direct conflicts are with decisions of three other district courts holding that in claims that cigarette manufacturers engaged in a continuing course of conduct to fraudulently conceal the dangers of smoking, the repose period is triggered by the last act taken in furtherance of the fraudulent

scheme. The Second District was the first to reach this holding when it reversed a defense summary judgment in a non-*Engle* case:

[The cigarette manufacturer defendants] argue that the fraud statute of repose bars the Laschkes' claim for conspiracy to commit fraud to the extent that it arose prior to 1984, twelve years before the Laschkes' commencement of this action in 1996. However, a statute of repose runs not from the time a cause of action accrues, but from the date of a discrete act on the part of a defendant. In this case, the Laschkes have alleged an ongoing and continuous conspiracy to commit fraud on the part of Appellees and others. The Laschkes' theory of liability is not that the alleged successive and repetitive acts in furtherance of the conspiracy resulted in successive and separate causes of action that they were unaware of until a later time. Rather, their theory is that the successive, continuous, repetitive and ongoing conspiracy resulted in a single actionable occurrence, i.e., a slowly evolving latent disease.

In 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.

Laschke v. Brown & Williamson Tobacco Corp., 766 So. 2d 1076, 1078-79 (Fla. 2d DCA 2000) (citations omitted).

The Fourth District in this case sought to distinguish *Laschke* by noting that it addressed a conspiracy claim while, according to the Fourth District, Mrs. Hess did not submit her conspiracy claim.¹ But as PM USA and RJR have argued in their jurisdiction briefs in *Russo* and *Webb*, that is a distinction without a difference because, regardless of whether a claim is for individual fraudulent

¹ Mrs. Hess respectfully disagrees with the district court's interpretation of the record on this point, but that issue is not relevant to this Court's jurisdiction as it goes beyond the four corners of the opinion. *Reaves v. State*, 485 So. 2d 829, 830 n.3 (Fla. 1986).

concealment or conspiracy to fraudulently conceal, reliance on the concealment is still an element that must be satisfied for the cause of action to accrue. Moreover, the Second District in *Lashcke* made clear that the critical issue is that a “successive, continuous, repetitive, and ongoing” fraud is involved, not that the fraud is the subject of a conspiracy. 766 So. 2d at 1079.

Indeed, in the past several months, two other district courts of appeal have applied *Lashcke*’s holding to both conspiracy and individual concealment claims brought by *Engle* class members. The Third District rejected the exact position embraced by the Fourth District in this case:

The appellees [PM USA and RJR] also argue that Florida’s twelve year statute of repose relating to fraud claims, section 95.031(2)(a), Florida Statutes (1994), barred Ms. Frazier’s cause of action for fraudulent concealment or conspiracy to conceal. 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. 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 v. Philip Morris USA Inc., 89 So. 3d 937, 947-48 (Fla. 3d DCA 2012) (citation omitted).² Shortly thereafter, the First District needed even less reasoning

² This is the decision that is subject to the petition for review in *Russo*.

to conclude that *Laschke* constituted “recent, definitive precedent” warranting a summary rejection of RJR’s argument that the statute of repose barred both concealment and conspiracy claims. *R.J. Reynolds Tobacco Co. v. Webb*, 93 So. 3d 331, 333 (Fla. 1st DCA 2012). Although *Frazier* and *Webb* were published before the Fourth District’s decision in this case, the Fourth District made no attempt to address, much less distinguish them.

The Fourth District’s decision also conflicts with this Court’s holding in *Engle* that the jury’s findings that the defendants engaged in both concealment and a conspiracy to conceal will have res judicata effect in class members’ individual trials. The *Engle* jury having found that these continuing torts started before May 5, 1982, and continued afterwards, the *Engle* trial court had rejected the statute of repose defense based in part on *Lashcke*. *Engle v. R.J. Reynolds Tobacco Co.*, No. 94-08273 CA-22, 2000 WL 33534572, at *5 (Fla. Cir. Ct. Nov. 6, 2000).

Moreover, the conflicts are not limited to cigarette cases. In *Kush v. Lloyd*, 616 So. 2d 415 (Fla. 1993), this Court held that the repose period begins to run from the date of the defendants’ conduct and not from the date that conduct causes harm to the plaintiff. It explained:

There is considerable misunderstanding of the relationship between statutes of limitation and statutes of repose. A statute of limitation begins to run upon the accrual of a cause of action except where there are provisions which defer the running of the statute in cases of fraud or where the cause of action cannot be reasonably discovered. On the other hand, a statute of repose, which is usually

longer in length, **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 (emphasis added). Because reliance by the plaintiff goes solely to “when the cause of action accrued” and cannot be considered “a discrete act on the part of the defendant,” it has no relevance to the triggering of the statute of repose. Stated differently, a statute of limitations protects a defendant from liability after a certain time has passed from when it could be sued, while a statute of repose protects a defendant from liability after a certain time has passed from when it stopped its misconduct.

And two other non-cigarette decisions hold that the statute of repose does not bar a claim for fraud where the plaintiff relied on the misrepresentation or omission outside the repose period, but the fraudulent conduct continued into the period. *McLeod v. Barber*, 764 So. 2d 790 (Fla. 5th DCA 2000); *Ambrose v. Catholic Soc. Servs.*, 736 So. 2d 146 (Fla. 5th DCA 1999).

B. The Decision Conflicts with Decisions Holding that a Statute of Repose Cannot Constitutionally Bar a Non-Malpractice Claim Before It Accrues Where the Injuries Are Latent and Undiscoverable Within the Repose Period.

Putting the issue of reliance and the defendants’ conduct aside, the Fourth District’s opinion also 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. While the Fourth District went out of its way to say three different

times that a plaintiff's claims can be barred by the statute of repose before they accrue (App. 7-8), this Court has made clear that this is only true with regard to the medical malpractice statute of repose based on a legislative determination that there was a crisis involving malpractice insurance that supported denying the right of access to courts in this instance. *Pulmosan Safety Equip. Corp. v. Barnes*, 752 So. 2d 556, 558-59 (Fla. 2000) (citing *Owens-Corning Fiberglass Corp. v. Corcoran*, 679 So. 2d 291, 294 (Fla. 3d DCA 1996)).

Outside the malpractice context, this Court's long standing latent injury case law continues to prohibit a statute of repose from barring an action before it accrues where the action is based on exposure to a toxic substance within the repose period but a latent disease does not develop from that exposure until after the period has expired. *Pulmosan*, 752 So. 2d at 558-59; *Diamond v. E.R. Squibb & Sons, Inc.*, 397 So. 2d 671 (Fla. 1981). Because this is true of all *Engle* claims that are not time barred under the statute of limitations, applying the statute of repose to bar an *Engle* class members' claims violates the plaintiff's right of access to courts. Indeed, this was the other reason (in addition to *Laschke*) that the *Engle* trial court rejected the statute repose defense. 2000 WL 33534572, at *5 (citing *Pulmosan*).

II. THE COURT SHOULD EXERCISE ITS DISCRETION TO RESOLVE THESE CONFLICTS AND DESIGNATE THIS AS THE LEAD CASE.

Given the thousands of *Engle* progeny cases still working their way through the courts, the prompt resolution of this conflict is extremely important. The issue arises in every *Engle* case with a concealment claim and is often dispositive. Indeed, in many cases the smoker managed to overcome the defendants' scheme to conceal the dangers of smoking and accordingly quit smoking before May 5, 1982. But he could not sue unless and until he developed cancer until many years later. The very nature of smoking-related diseases is that the injury will not occur until years after the plaintiff relied on the defendants' fraudulent conduct.

Moreover, the conflict is well-developed and not limited to *Engle* cases. It can arise in any fraud case, and this Court should grant review to remove the remaining "considerable misunderstanding of the relationship between statutes of limitation and statutes of repose" that it tried to clear up in *Kush*. While the prejudice in *Engle* cases is generally to plaintiffs, it can equally impact defendants in other cases. Under the Fourth District's reasoning, even when a defendant ceases its fraudulent conduct, the repose period does not begin to run until the plaintiff relies, which may be years later.

CONCLUSION

For all of these reasons, this Court has jurisdiction and should grant review.

Respectfully submitted,



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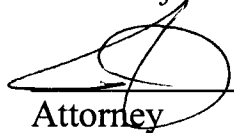
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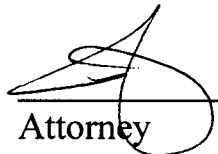
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I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.



Attorney

APPENDIX INDEX

District Court Opinion..... 1

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2012

PHILIP MORRIS USA, INC.,
Appellant,

v.

ELAINE HESS, as Personal Representative of the Estate of Stuart Hess,
deceased,
Appellee.

No. 4D09-2666

[May 2, 2012]

DAMOORGIAN, J.

Philip Morris USA, Inc. ("PM USA") appeals the trial court's final judgment entered in favor of Elaine Hess, as surviving spouse and personal representative of the estate of her deceased husband, Stuart Hess. PM USA raises three issues on appeal. First, it contends that the trial court erred in denying its motion for judgment as a matter of law on the fraudulent concealment claim because it was barred by the statute of repose. Next, it argues that the trial court misapplied the *Engle*¹ findings. Lastly, it submits that the trial court erred in denying its motion to remit the punitive damages award because it was excessive under federal and Florida law. Mrs. Hess cross appeals the trial court's final judgment to the extent it reduced the compensatory damages award based on the comparative fault of the decedent Mr. Hess. She argues that the substance of her action was the intentional tort of fraudulent concealment, precluding application of the comparative fault statute. See § 768.81(3)-(4), Fla. Stat. (1993). We affirm with respect to the application of the *Engle* findings. We reverse the denial of PM USA's motion for judgment as a matter of law on the fraudulent concealment claim, upon which the punitive damages award was based. Because we reverse for entry of judgment in PM USA's favor on the fraudulent concealment claim, PM USA's argument on appeal regarding the denial of its motion for remittitur is rendered moot as is Mrs. Hess's issue on cross

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

appeal regarding the trial court's reduction of the compensatory damages award.²

The instant case commenced as one of the *Engle* progeny cases. See *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). By way of background, Mrs. Hess filed a complaint against PM USA for strict liability, negligence, conspiracy to commit fraud, and fraudulent concealment, seeking to recover damages for the death of her husband, a longtime smoker.³ The complaint admitted that Mr. Hess bore some measure of fault for his smoking-related injuries and death.

The case proceeded to trial in two phases and in the manner we approved in *R.J. Reynolds Tobacco Co. v. Brown*, 70 So. 3d 707 (Fla. 4th DCA 2011). *Id.* at 714. In the first phase, the jury was required to determine whether Mr. Hess was a member of the *Engle* class, i.e. whether he was addicted to PM USA's cigarettes, and, if so, was his addiction a legal cause of his death. Mrs. Hess presented substantial evidence of Mr. Hess's smoking history and medical background, as well as expert testimony regarding his addiction in this phase. Testimony also indicated that Mr. Hess's cigarette of choice was PM USA's Benson & Hedges brand.⁴ Furthermore, she presented evidence regarding the tobacco companies' strategy to conceal the addictive nature of nicotine from smokers. Pursuant to the parties' stipulations, the jury was instructed that (i) cigarettes containing nicotine are addictive; (ii) smoking cigarettes causes lung cancer; (iii) Mr. Hess's lung cancer was caused by PM USA's cigarettes containing nicotine; and (iv) Mr. Hess died of lung cancer. At the conclusion of this phase, the jury found that Mr. Hess was addicted to cigarettes containing nicotine, and his addiction was the legal cause of his death.

In the second phase of trial, limited testimony was presented to the jury from Mrs. Hess and her son, David Hess, regarding Mr. Hess's exposure to cigarette advertising, his knowledge of the health risks posed by smoking, and the emotional loss they suffered as a result of Mr.

² We also note that, based upon our review of the record, any error in the reduction of the compensatory damages award was invited by Mrs. Hess. See *Franqui v. State*, 59 So. 3d 82, 100 (Fla. 2011) (“[A] party may not invite error and then be heard to complain of that error on appeal.”) (citation omitted).

³ The conspiracy to commit fraud claim was never submitted to the jury.

⁴ The Final Judgment and Amended Omnibus Order entered in the *Engle* class action reflects that Benson & Hedges, the brand Mr. Hess primarily smoked, was named in the Phase I jury findings. *Engle v. R.J. Reynolds Tobacco*, No. 94-08273, 2000 WL 33534572, at * 1 (Fla. Cir. Ct. Nov. 6, 2000).

Hess's death in 1997 at the age of 55. At the conclusion of evidence in this phase, the trial court instructed the jury that the strict liability, negligence, and fraudulent concealment *Engle* findings were binding on it.⁵ It also explained to the jury that the complaint had admitted Mr. Hess bore some measure of responsibility and instructed that his behavior was "a concurring legal cause in combination with acts or omissions of Philip Morris USA of his smoking related injuries and death." The trial court also instructed:

The conduct of Stuart Hess and Philip Morris USA may be considered a legal cause if it directly and in natural and in continuance (sic) sequence produces or contributes substantially to producing the loss so that it can reasonably be said that but for that conduct, the loss would not have occurred. Accordingly, you must assign some percentage of responsibility on your verdict form to Mr. Hess.

In regard to the fraudulent concealment claim, the trial court instructed the jury:

You must determine whether Stuart Hess relied to his detriment on any statements made by Philip Morris USA that omitted material information. If the greater weight of the evidence does not support the Plaintiff's claim on this issue, then your verdict should be for the Defendant on this claim.

Relating to that claim, Stuart Hess' reliance to his detriment on any statements by Philip Morris USA that omitted material information is a legal cause of loss if it directly and in natural and continuance (sic) sequence produces or contributes substantially to producing such loss so that it can reasonably be said that but for Stuart Hess' reliance, the loss would not have occurred.

In order to be regarded as a legal cause of loss, Stuart Hess' reliance on omitted statements to his detriment need

⁵ These findings were as follows: (3) (strict liability) that Tobacco placed cigarettes on the market that were defective and unreasonably dangerous; (4)(a) (fraud by concealment) that Tobacco concealed or omitted material information not otherwise known or available knowing 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; and (8) (negligence) that Tobacco was negligent. See *Engle*, 945 So. 2d at 1276-77.

not be the only cause. Stuart Hess' reliance on omitted statements to his detriment may be a legal cause of loss . . . even though it operates in combination with the act of another, some natural cause or some other cause.

The verdict form in this second phase directed the jury as follows:

By answering the following questions, you will determine the damages that ELAINE HESS and DAVID HESS sustained as a result of the incident in question. In determining the amount of damages, do not make any reduction because of the fault of the parties. The Court, in entering judgment, will make an appropriate reduction of the damages awarded.

It then asked the jury to (i) state the percentage of responsibility it charged to PM USA and Stuart Hess; (ii) state the amount of damages sustained by Mrs. Hess due to pain and suffering and the loss of her husband's companionship and protection; (iii) state the amount of damages sustained by David Hess due to pain and suffering and the loss of parental companionship, instruction and guidance; (iv) determine whether Mr. Hess had relied to his detriment on any statement by PM USA omitting material information, which caused or contributed to his injury and death; (v) choose the time period during which he relied on such; (vi) determine whether punitive damages were warranted against PM USA by clear and convincing evidence; and (vii) if punitive damages were warranted, to assign a total amount. It did not ask the jury to return findings on any other element of Mrs. Hess's claims.

The jury returned a verdict of \$3 million in compensatory damages, presumably on all three claims. It determined Mr. Hess was 58% responsible and PM USA was 42% responsible. It also found Mr. Hess had relied on PM USA's statements only *before* May 5, 1982, and found punitive damages were warranted on the fraud by concealment claim in the amount of \$5 million. Before entering its final judgment, the trial court *sua sponte* reduced the compensatory damage award to \$1.26 million based on the comparative fault assigned to Mr. Hess.

PM USA moved for judgment as a matter of law on the fraudulent concealment claim, upon which the punitive damages award was based. It argued that in light of the jury's finding that PM USA did not defraud Mr. Hess within the twelve years prior to the filing of the *Engle* complaint, the fraudulent concealment claim and the punitive damages award were barred by the statute of repose. Without explanation, the

trial court denied the motion. It also denied PM USA's motion to remit the punitive damages award. This appeal and cross-appeal follows.

We first address PM USA's issue with the trial court's application of the *Engle* findings. We reject PM USA's various arguments regarding the application of the findings. This Court recently addressed the scope of application of the *Engle* findings in the *Engle* progeny cases. See *Brown*, 70 So. 3d at 717-18. In *Brown*, we stated that "the *Engle* findings preclusively establish the conduct elements" of claims brought in a post-*Engle* action. *Id.* at 715. Therefore, despite PM USA's urging, plaintiffs are not required to relitigate these elements. See *id.* at 717, 718. However, we further recognized that establishing membership in the *Engle* class does not satisfy a plaintiff's burden of proving legal causation on individual claims. *Id.* at 715. With respect to the strict liability and negligence claims, we concluded in *Brown* that the trial court properly instructed the jury on legal causation and submitted the relevant questions to the jury. *Id.* As such, we affirmed the final judgment because there was no error in the trial court's application of the *Engle* findings. *Id.* at 718.

To find that Mr. Hess was a member of the *Engle* class, the jury was required to find that his addiction to cigarettes containing nicotine was a legal cause of his death. However, unlike *Brown*, the jury was not instructed on legal causation as it pertained to the claims of strict liability and negligence. Moreover, the second phase verdict form did not require the jury to make a legal causation finding on the strict liability or negligence claims. This aspect of legal cause is directed at the loss, injury, or damage claimed by the plaintiff.

Despite these failings, we affirm the final judgment on the strict liability and negligence claims due to certain stipulations made by PM USA. In the first phase of trial, pursuant to the parties' stipulations, the trial court instructed the jury that "Stuart Hess' lung cancer was caused by smoking Philip Morris USA cigarettes that contained nicotine" and "Stuart Hess died of lung cancer." In addition, the jury was later instructed that PM USA's cigarettes were "defective and unreasonably dangerous" and PM USA was "negligent in failing to exercise the degree of care that a reasonable manufacturer would exercise under like circumstance." The particular stipulations found here coupled with the accepted *Engle* findings concerning PM USA's conduct obviated the need to provide strict liability and negligence causation instructions in the second phase and submit those questions to the jury, as would otherwise

be required pursuant to *Brown*.⁶ See *Brown*, 70 So. 3d at 717, 718. Under these specific circumstances, the causation instructions necessary for consideration of the causes of action and subsequent jury findings on that element were not required. Cf. *Philip Morris USA v. Douglas*, --- So. 3d. ---, 2012 WL 1059048, *7 (Fla. 2d DCA 2012) (affirming the final judgment on a strict liability claim based on the Phase I finding that cigarettes were “defective and unreasonably dangerous” and the jury’s determination that Mrs. Douglas’ diseases were legally caused by her smoking cigarettes manufactured by Tobacco).

Turning to the fraudulent concealment claim, the First District in *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. 1st DCA 2010), explained that in order to prevail on such a claim:

[P]laintiffs ha[ve] to prove [1] the tobacco companies concealed or failed to disclose a material fact; [2] the companies knew or should have known the material fact should be disclosed; [3] the companies knew their concealment of or failure to disclose the material fact would induce the plaintiffs to act; [4] the tobacco companies had a duty to disclose the material fact; and [5] the plaintiffs detrimentally relied on the misinformation.

Id. at 1068 (citations omitted). In response to Question 4(a), the *Engle* jury determined that Tobacco “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.” See *Engle*, 945 So. 2d at 1277. We hold this *Engle* finding established the conduct elements of a fraudulent concealment cause of action, i.e. that PM USA knowingly concealed material information with the purpose of inducing reliance. *Engle* did not relieve plaintiffs of the burden of proof with respect to the element of reliance in a fraud based claim. See *Engle*, 945 So. 2d at 1263. Therefore, in accordance with *Engle* and our recent opinion in *Brown*, trial courts must instruct the jury on the remaining elements of a fraudulent concealment claim—reliance and damages—and allow the jury to make those determinations based upon the evidence presented. The trial court in this instance did instruct the jury regarding reliance with respect to the fraudulent concealment claim, and the jury was required to make a finding as to reliance and damages. Accordingly,

⁶ We note that while there were also stipulations in *Brown*, those stipulations did not satisfy the causation elements in the strict liability and negligence causes of action as they did here. See *Brown*, 70 So. 3d at 712.

we find no error in the application of the *Engle* findings with respect to the fraudulent concealment claim.

However, we must address whether in light of the jury's finding that Mr. Hess relied on PM USA's statements only *before* May 5, 1982, the fraudulent concealment claim was barred by the statute of repose. This Court reviews a trial court's application of a statute of repose *de novo* because it involves an issue of law. *Inmon v. Air Tractor, Inc.*, 74 So. 3d 534, 537 (Fla. 4th DCA 2011) (citation omitted).

PM USA contends that the statute of repose bars the fraudulent concealment claim because each element of the claim, including reliance, must have occurred after May 5, 1982, twelve years before the filing of the *Engle* complaint. Mrs. Hess responds that the statute of repose sets forth the relevant time period for the statute's application, focusing on the defendant's conduct in committing the alleged fraud. Therefore, Mrs. Hess contends that reliance is irrelevant.

Florida's statute of repose under section 95.031(2), Florida Statutes (1993) provides, "[A]ctions for . . . fraud . . . under s. 95.11(3) must be begun within 12 years after the date of the commission of the alleged fraud, regardless of the date the fraud was or should have been discovered." § 95.031(2), Fla. Stat. (1993). "[A] statute of repose is a substantive statute which not only bars enforcement of an accrued cause of action but may also prevent the accrual of a cause of action where the final element necessary for its creation occurs beyond the time period established by the statute." *WRH Mortg., Inc. v. Butler*, 684 So. 2d 325, 327 (Fla. 5th DCA 1996). The Fifth District in *Butler* further stated that "[t]he period of time established by a statute of repose commences on the date of an event specified in the statute. At the end of that time period, the cause of action ceases to exist." *Id.* (citations omitted); *see also Carr v. Broward County*, 505 So. 2d 568, 570 (Fla. 4th DCA 1987) (also discussing how a statute of repose will "prevent the accrual of a cause of action where the final element necessary for its creation occurs beyond the time period established by the statute"), *approved*, 541 So. 2d 92 (Fla. 1989).

"On 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 this action." *Shepard v. Philip Morris, Inc.*, 1998 WL 34064515, at *4 (M.D. Fla. Apr. 28, 1998). As noted earlier, "a claim of fraudulent misrepresentation and/or concealment requires 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)). The *Engle* class action was commenced on May 5, 1994. *Engle v. RJ Reynolds Tobacco*, No. 94-08273, 2000 WL 33534572, at * 5 (Fla. Cir. Ct. Nov. 6, 2000). Thus, any fraud committed before May 5, 1982 is barred by the statute of repose. See *Puchner v. Bache Halsey Stuart, Inc.*, 553 So. 2d 216, 218 (Fla. 3d DCA 1989) (“Because Pulchner filed suit in August of 1982, any fraud committed before August of 1971 is barred by the statute of repose.”).

On the verdict form in this progeny suit, the jury was asked whether Mr. Hess relied to his detriment on any statement made by PM USA that omitted a material fact before May 5, 1982, after May 5, 1982, or both before and after May 5, 1982. The jury returned a verdict that Mr. Hess relied to his detriment on an omission by PM USA only *before* May 5, 1982. 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, we hold that the fraudulent concealment claim and the concealment-based punitive damages award are foreclosed by the statute of repose. Cf. *Joy v. Brown & Williamson Tobacco Corp.*, 1998 WL 35229355, at *5 (M.D. Fla. May 8, 1998) (noting, in a summary judgment context, that plaintiffs pursuing a fraud claim must “adduce[] . . . proof of reliance upon a misrepresentation that was committed within the 12-year [statute of repose] period prior to the filing of the complaint.”).

In so holding, we reject Mrs. Hess’s contention that the date of reliance is irrelevant. 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. See *Engle*, 945 So. 2d at 1277. As discussed above, 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. See § 95.031(2)(a), Fla. Stat. (1993). 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 a statute of repose. See *Nehme v. Smithkline Beecham Clinical Labs., Inc.*, 863 So. 2d 201, 208 (Fla. 2003) (“The very purpose of a statute of repose is to extinguish valid causes of action, sometimes before they even accrue.”) (citation omitted). Moreover, Mrs. Hess’s reliance on *Laschke v. Brown & Williamson Tobacco Corp.*, 766 So. 2d 1076 (Fla. 2d DCA 2000) is 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. *Id.* at 1079 (“In 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.”).

Based upon the foregoing, we reverse the judgment and punitive damages award on the fraudulent concealment claim and remand for entry of judgment for PM USA on that claim. In all other respects we affirm the final judgment.

Affirmed in part and Reversed in part.

POLEN and GROSS, JJ., concur.

* * *

Appeal and cross-appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Jeffrey E. Streitfeld, Judge; L.T. Case No. 2007-CV-11513 (19).

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Not final until disposition of timely filed motion for rehearing.