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IN THE SUPREME COURT OF FLORIDA

ELAINE HESS, etc.,

Petitioner,

v.

Case No.: SC12-2153
L.T. No.: 4D09-2666

PHILIP MORRIS USA, INC.,

Respondent.

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

PETITIONER'S INITIAL BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

Petitioner raises three questions regarding the statute of repose for fraud claims,[1] each of which she contends should be answered in the negative: (I) Are the defendants entitled to raise the statute of repose defense in individual lawsuits brought by members of the class this Court approved and then decertified in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006)? (II) When a plaintiff proves that he relied on a course of fraudulent concealment that continued into the twelve-year repose period, must the plaintiff further prove that he relied on some statement the defendant made within the repose period? (III) If so, can the statute of repose constitutionally extinguish a fraud cause of action before it accrues in a latent injury case?

Course of Proceedings

As personal representative of the estate of her late husband Stuart Hess, Petitioner Elaine Hess sued Respondent Philip Morris USA, Inc. ("PM USA"), for wrongful death based on claims of strict liability, negligence, fraudulent concealment, and conspiracy to commit fraudulent concealment. (R1:1-12.) She sought the res judicata effect this Court afforded certain class findings in *Engle*. (R1:5.) In its answer, PM USA asserted, among other things, the statute of repose as an affirmative defense. (R9:1640.)

[1] *See* § 95.031(2), Fla. Stat. (1994) ("[A]n action for fraud … must be begun within 12 years after the date of the commission of the alleged fraud.").

Along with similarly situated plaintiffs with *Engle* progeny cases pending before the same trial judge, Hon. Jeffrey E. Streitfeld, Mrs. Hess moved for partial summary judgment on all affirmative defenses that did not depend on the individual conduct of the class members and argued that all such defenses were necessarily defeated by the res judicata effect of the *Engle* findings approved by this Court. (SR8:1254-75.)

Mrs. Hess relied on the judgment and omnibus order (the "*Engle* Judgment") that Judge Robert P. Kaye entered after the class proceedings and that this Court reviewed and affirmed in relevant part in *Engle*. (SR8:1261.) *Engle v. R.J. Reynolds Tobacco Co.*, No. 94-08273, 2000 WL 33534572 (Fla. 11th Cir. Nov. 6, 2000). In response to separate and discrete questions on the Phase I verdict form, the *Engle* jury had found that all the *Engle* defendants engaged in both individual concealment and a conspiracy to conceal the dangers of smoking beginning before and continuing after May 5, 1982, which is twelve years before the *Engle* complaint was filed. (Appendix 83-88[2].) The *Engle* trial court rejected the repose defense based on two lines of cases, one from the Second District holding that the

[2] The appendix contains material filed in the district court that was not transmitted to this Court. Mrs. Hess is separately filing an unopposed motion to supplement the record with this appendix. The materials are largely filings from the *Engle* proceedings, so even if they did not belong in a true supplemental record, Mrs. Hess alternatively requests the Court take judicial notice of them. *See* § 90.202(6), Fla. Stat. (2013) (authorizing judicial notice of court records).

repose period does not begin to run until the last fraudulent act by the defendant and another from this Court providing a constitutional exception to the statute of repose for latent injury claims. 2000 WL 33534572, at *5 (citing *Laschke v. Brown & Williamson Tobacco Corp.*, 766 So. 2d 1076, 1078-79 (Fla. 2d DCA 2000), and *Pulmosan Safety Equip. Corp. v. Barnes*, 752 So. 2d 556, 559 (Fla. 2000)).

In a pretrial order applying to all *Engle* progeny cases pending before him, Judge Streitfeld granted Mrs. Hess's motion in part and entered summary judgment against PM USA and the other defendants on, among other things, their statute of repose defense, conditioned on the respective plaintiffs proving at trial that they were members of the *Engle* class. (SR20:3363-67.)

Mrs. Hess's case proceeded to a bifurcated trial, and in the first phase the jury returned a verdict finding that she was a member of the *Engle* class. (R39:7784-85; R49:9619.) In the second phase, the court instructed the jury that it was bound by the *Engle* findings, including the findings that PM USA had, both individually and as part of a conspiracy, concealed what it knew about the dangers of smoking. (R108:2333-34.) The court gave the causation instruction PM USA proposed on the fraud claims:

> 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.

(R109:2479; R110:2652.)

PM USA further requested the jury be asked to decide whether Mr. Hess had relied on statements omitting information both before and after the May 5, 1982, the statute of repose trigger date. (R109:2507, 2522-23.) Mrs. Hess indicated she did not object to a record being made on this point so that the issue could be resolved post-verdict as it was in *Engle*. (R109:2523.) The court largely allowed PM USA to craft the following question used on the verdict form:

> Did Stuart Hess rely to his detriment on any statement by Philip Morris USA that omitted material information which caused or contributed to his injury and death?
>
> 4a) Before May 5, 1982? Yes __ No __
>
> 4b) After May 5, 1982? Yes __ No __
>
> 4c) Both before and after May 5, 1982? Yes __ No __

(R109:2523-31; R52:10,317.) The jury was instructed to consider whether to award punitive damages only if it answered at least one of the questions in the affirmative. (R52:10,317.)

The jury ultimately checked "yes" to the first part, checked "no" to the second part, and did not answer the third part. (R52:10,317.) It also apportioned responsibility for Mr. Hess's death assigning 42% to PM USA and 58% to Mr. Hess. (R52:10,316.) It awarded a total of $3 million in compensatory damages ($2 million for Mrs. Hess and $1 million for the couple's son David) plus $5 million in punitive damages. (R52:10,316-17.)

The court heard the arguments of both parties regarding the statute of repose during a post-trial hearing and accepted written submissions on the issue. (R110 04/02/09 Tr. at 10-59; R91:18,168-87, 18,194-18,211.) The parties and trial court had initially forgotten about the earlier summary judgment based on the res judicata effect of the *Engle* findings (R91:18,196-97, SR40:6441-42), and most of the court's questions during the hearing revolved around whether the repose issue was controlled by the date of Mr. Hess's reliance or the date PM USA ceased its course of fraudulent conduct. (R110 04/02/09 Tr. at 11, 15, 32, 58-59.) The court made clear that its reading of the case law led it to conclude that it was the date of PM USA's conduct that controlled and that it was concerned that PM USA had not proposed any question for the jury to resolve the date PM USA stopped its fraudulent conduct. (R110 04/02/09 Tr. at 24, 32.) The court noted that it had recently read the *Engle* verdict, which requested the class jury to determine whether the defendant's misconduct occurred before and after May 1982. (R110 04/02/09 Tr. at 34.)

Mrs. Hess's counsel relied at the hearing on evidence she had presented to the jury showing that PM USA's participation in the conspiracy began in 1953 and continued at least through 1994. (R110 04/02/09 Tr. at 29, 34-35.) In her subsequent memorandum, she reminded the court of the earlier summary judgment ruling and argued that pursuant to *Engle* "the post 1982 concealment is *res*

judicata." (R91:18,197-98.) After giving PM USA the chance to address Mrs. Hess's memorandum, the court orally denied PM USA's motion for judgment on the statute of repose. (SR40:6440-45.)

The court also rejected Mrs. Hess's argument that, because she prevailed on her intentional tort claims, her compensatory damages should not be reduced for comparative fault. (SR40:6446-52.) Accordingly, it reduced the compensatory award to $1.26 million, added the $5 million punitive damage award, and entered judgment for Mrs. Hess for $6.26 million. (R92:18,307.)

On appeal, PM USA argued that it was entitled to a judgment as a matter of law on the concealment claims and the award of punitive damages based on the statute of repose and the jury's finding that Mrs. Hess did not prove her husband relied on any of its statements made after May 5, 1982. (4D09-2666, Initial Br. at 18-21.) It also argued that it was entitled to a new trial on the strict liability and negligence claims because it contended that this Court's decision in *Engle* giving preclusive effect to the approved findings violated both Florida law and its federal right to due process. (4D09-2666, Initial Br. at 21-45.) It alternatively argued that the $5 million punitive damage award was excessive. (4D09-2666, Initial Br. at 46-47.) Mrs. Hess cross-appealed the trial court's reduction of her damages by

comparative fault (4D09-2666, Answer Br. at 26-29), but she abandoned the cross-appeal at the 21:00 mark of the video recording of oral argument.[3]

The Fourth District rejected PM USA's arguments about the *Engle* findings and held that, among other things, the *Engle* findings

> 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.

Philip Morris USA, Inc. v. Hess, 95 So. 3d 254, 259 (Fla. 4th DCA 2012). Turning to the repose issue, the court determined that the question was whether the statute of repose required a defense judgment in light of the jury's finding that Mrs. Hess had only proved that Mr. Hess relied on statements PM USA made before May 5, 1982. *Id.* at 260. It began by noting that the statute of repose

> 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.

Id. (quoting *WRH Mortg., Inc. v. Butler*, 684 So. 2d 325, 327 (Fla. 5th DCA 1996)). It then focused on the reliance element of fraud claims and concluded:

> 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

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[3] The district court's opinion suggests that the issue was rendered moot by its reversal of the judgment on the fraud claim. *Philip Morris USA, Inc. v. Hess*, 95 So. 3d 254, 256 & n.2 (Fla. 4th DCA 2012). Because Mrs. Hess affirmatively abandoned the cross-appeal, there will be no need to remand for consideration of the issue should she prevail in this Court.

> the concealment-based punitive damages award are foreclosed by the statute of repose.

Id. at 260-61. It cited an unpublished federal trial court decision for the proposition that a plaintiff pursuing a fraud claim must prove reliance within the repose period. *Id.* at 261 (citing *Joy v. Brown & Williamson Tobacco Corp.*, No. 96-2645 CIV-T24(B), 1998 WL 35229355, at *5 (M.D. Fla. May 8, 1998)).

It rejected Mrs. Hess's arguments that the time of reliance is irrelevant, by explaining:

> 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. 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. 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.

Hess, 95 So. 3d at 261 (citations omitted). It identified the intent of the statute of repose as "to extinguish valid causes of action, sometimes before they even accrue." *Id.* (quoting *Nehme v. Smithkline Beecham Clinical Labs., Inc.*, 863 So. 2d 201, 208 (Fla. 2003)). Finally, it rejected Mrs. Hess's reliance on the Second District's decision in *Laschke*, on the ground that *Laschke* involved a claim of conspiracy to conceal, while Mrs. Hess had, according to the court, never submitted her conspiracy claim to the jury. *Hess*, 95 So. 3d at 256 n.3, 261.

In a motion for rehearing, Mrs. Hess (1) argued that she had, in fact, submitted her conspiracy claim to the jury, (2) provided this Court's case law that it is the defendant's conduct and not the plaintiff's that is at issue with the statute of repose, and (3) explained why the district court's conclusion that Mrs. Hess's fraud claim had been extinguished before it accrued violated this Court's constitutional precedents regarding the right of access to courts. (App. 1-20.) PM USA contended in response that Mrs. Hess had waived the constitutional argument because she had not addressed it in her answer brief. (App. 148-168.) The district court summarily denied Mrs. Hess's motion. (App. 199.)

This Court granted review after the parties agreed in their jurisdiction briefs that, at a minimum, the district court's opinion expressly and directly conflicted with the decision in *Frazier v. Philip Morris USA Inc.*, 89 So. 3d 937 (Fla. 3d DCA 2012).[4]

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[4] Mrs. Hess also demonstrated conflict with *R.J. Reynolds Tobacco Co. v. Webb*, 93 So. 3d 331 (Fla. 1st DCA 2012), a decision PM USA ignored in its jurisdiction brief.

The Court has since granted review of *Frazier* in *Philip Morris USA, Inc. v. Russo,* Case No. SC12-1401. The following subsequent decisions from the Fourth District that conflict with *Frazier* and *Webb* are currently pending in this Court on jurisdiction briefs: *Philip Morris USA, Inc. v. Kayton*, 104 So. 3d 1145 (Fla. 4th DCA 2013) (No. SC13-171); *Philip Morris USA Inc. v. Cohen*, 102 So. 3d 11 (Fla. 4th DCA 2012) (No. SC13-135); *Philip Morris USA Inc. v. Putney*, 117 So. 3d 798 (Fla. 4th DCA 2013) (No. SC13-1838).

In addition, the Fourth District reiterated its conflict with *Frazier* in *R.J. Reynolds Tobacco Co. v. Buonomo*, No. 4D10-3543, 2013 WL 5334590 (Fla. 4th

Statement of Facts

Mr. Hess began smoking in the late 1950s between the ages of 12 and 13 and, despite numerous attempts to beat his addiction and quit, smoked for 40 years until his 1997 death from lung cancer. (R98:625, 681, 688, 689, 690; R100:943, 959-60, 972-81; R102:1279-80; R103:1368, 1374-80.) His brand of choice throughout was Benson and Hedges, manufactured by PM USA. (R100:943, 972; R103:1368.)

The jury heard substantial evidence about not only of all of PM USA's internal studies and documents demonstrating that it knew from early on that its cigarettes were addictive and deadly, but also about PM USA's participation in the industry's conspiracy to conceal these dangers from 1953 until beyond Mr. Hess's death in 1997. (R98:610-682; R100:1022-R101:1175.) For example, they heard that PM USA's executives signed on to the industry's "Frank Statement" in 1953, a full page ad run in 448 newspapers read by about 43 million people and covered extensively on television and other media. (R98:638-55; Pl. Ex. 77.) The ad claimed there was no proof that smoking causes lung cancer and conveyed the industry's promise to conduct further research and let the world know of any dangers that could be proven. (R98:638-55.)

DCA Sept. 25, 2013), which is still pending in the district court. Finally, the Second District followed *Frazier* and *Webb* in *Philip Morris USA, Inc. v. Hallgren*, No. 2D12-2549, 2013 WL 5663188, at *2 (Fla. 2d DCA Oct. 18, 2013), which is still pending in the district court as well.

As another example, the jury heard how PM USA marketed its filtered cigarettes as safe and effective for removing anything harmful from cigarette smoke, even though they knew this was a false marketing gimmick that would lead smokers to believe they were safe. (R101:1135-37.) They also heard that as late as 1994, tobacco company executives continued to deny, even under oath in congressional testimony in the famous Waxman hearings, that nicotine is addictive and that smoking causes cancer. (R109:2436-38.) PM USA did not admit the truth until around the year 2000. (R98:666.)

Mrs. Hess testified that she and her husband had seen many of the reports of tobacco company executives denying the dangers of smoking and that Mr. Hess believed them. (R109:2402-03.) He had explained to her that he smoked filtered cigarettes because "[t]hey took out all the bad stuff." (R109:2402.)

> He over and over and over again believed what they were saying. That more scientific evidence had to be done, more studies had to be done, it hadn't been proven yet and he just believed them, the doubt that was created was a doubt in his mind.

(R109:2403.) He trusted the tobacco company executives and had no way of knowing about all the internal documents the jury saw that demonstrated that PM USA well knew that its cigarettes were deadly and addictive and that filters did not make them safe. (R109:2403-07.)

SUMMARY OF ARGUMENT

The district court's decision should be quashed and the trial court's judgment affirmed for at least three independent reasons. First, the res judicata effect this Court granted the concealment and conspiracy findings in *Engle* necessarily disposed of the defendants' repose defense because the Court did not limit the findings to post-1982 concealment. This issue was actually determined against the defendants by the *Engle* trial court in a ruling that the defendants did not appeal and without which only part of the concealment and conspiracy findings could have been upheld.

Second, the jury's finding that Mr. Hess did not rely on any post-1982 statements does not establish the repose defense for two reasons. As an initial matter, reliance is a matter of the plaintiff's conduct and thus the timing of reliance is irrelevant. This Court has made clear that, unlike statutes of limitations, statutes of repose depend on the timing of the conduct of the defendant, not the plaintiff. The statute of repose is intended to give a defendant peace by insulating it from liability twelve years after it stops its fraudulent conduct. The repose period should not be narrowed or enlarged based on when a particular plaintiff was misled. It is the defendant, not the plaintiff, with the power to start the repose clock.

Additionally, if the district court were correct that the repose period is triggered by the last element of the cause of action for fraud, reliance would still

not be the test. A necessary element of every claim for fraud is injury suffered by the plaintiff. Thus, under the district court's reasoning, a defendant could be held liable for a fifty-year-old fraudulent statement so long as the plaintiff either relied or suffered his injury within twelve years of filing suit. Because *Engle* plaintiffs' injuries must necessarily manifest within the limitations period, which is shorter than the repose period, none of their claims could be timely under the statute of limitations but barred by the statute of repose if the test for the repose period is when the last element occurred.

The only relevance of reliance and injury to the statute of repose is that the plaintiff must prove reliance on and injury by the same fraud that continued into the repose period. Thus, a plaintiff alleging several distinct frauds can only recover as to the frauds that occurred within the repose period. It is not the timing of the reliance and injury, but the identity of the fraud that counts. Defendants' repeated attempts to cast *Engle* claims as a disparate set of distinct claims notwithstanding, the only claims that enjoy the res judicata effect of the *Engle* filings are claims based on a common course of misconduct common to the class. While the class did assert fraud claims based on various misrepresentations, this Court declined to afford the jury's findings on those claims any preclusive effect. Instead, the Court rejected those findings but approved the concealment findings specifically because the latter do not depend on any discrete statements. Instead, they depend on an

ongoing course of concealment begun in 1953 and continued well into the 1990s. It is because this uniform course of misconduct continued beyond 1982 that the statute of repose does not apply; the inquiry does not turn on the timing of the plaintiff's reliance and injury.

Moreover, even if the timing of reliance were relevant, the burden would be on the defendant to prove the smoker had stopped relying on the defendant's concealment and nondisclosure by the repose trigger date. Again, these are concealment claims, not misrepresentation claims. Thus, if reliance has any role in the repose defense, PM USA was required to prove that Mr. Hess was no longer fooled by its fraudulent concealment by May 5, 1982. The jury's verdict in this case, in contrast, simply found that Mrs. Hess failed to prove that Mr. Hess independently relied on affirmative statements after that date. This has no bearing because Mr. Hess was relying on PM USA's failure to do what it promised all the way back in the 1950s – disclose the dangers it knew its cigarettes posed. He did not have to rely on any new statements; indeed, he was relying on the **failure** to make statements. The jury's answer to the reliance question therefore did not establish the repose defense.

Finally, under this Court's latent disease case law, applying the statute of repose to bar latent disease claims before they accrue would violate the plaintiff's constitutional right of access to the courts. The only exception this Court has

recognized is for the medical malpractice statute of repose, which was enacted based on detailed legislative findings of an insurance crisis. There are no similar legislative findings for the fraud statute of repose and no reason to treat it any differently than the statute of repose for products liability claims.

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON THE REPOSE DEFENSE BASED ON THE RES JUDICATA EFFECT OF THE *ENGLE* FINDINGS.

Standard of Review. An order granting a motion for summary judgment is reviewed de novo. *E.g., Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).

The trial court correctly afforded res judicata effect to Judge Kaye's ruling in the *Engle* Judgment that the defendants' statute of repose defense fails under the lines of cases holding that (1) it is the last act in furtherance of the course of fraudulent conduct that triggers the statute of repose and, in any event, (2) *Engle* cases fall under the latent disease exception to the statute of repose that this Court has long recognized. *Engle v. R.J. Reynolds Tobacco Co.*, No. 94-08273, 2000 WL 33534572, at *5 (Fla. 11th Cir. Nov. 6, 2000) (citing *Laschke v. Brown & Williamson Tobacco Corp.*, 766 So. 2d 1076, 1078-79 (Fla. 2d DCA 2000), and *Pulmosan Safety Equip. Corp. v. Barnes*, 752 So. 2d 556, 559 (Fla. 2000)).

At the end of the Phase I trial on issues common to the class, the *Engle* jury returned a verdict that expressly held that the class had proven that PM USA fraudulently concealed information about the health effects and addictive nature of cigarettes "[b]oth before and after May 5, 1982." (Appendix 83-88.) PM USA and other defendants moved to set aside the verdict and to enter a defense judgment on the concealment and conspiracy claims based on the statute of repose as to "fraud claims predicated on acts that took place prior to May 5, 1982." (App. 89-93.) The trial court promptly denied that motion outright. (App. 94.)

At the conclusion of the *Engle* Phase II trial on three class representatives' claims, the jury found that PM USA's "concealment or omission [was] a legal cause of injury" for each of the three individual plaintiffs "[b]oth before and after May 5, 1982." (App. 95-101.) PM USA renewed its motion for a directed verdict as to the "claims of fraudulent concealment prior to May 5, 1982" based on the statute of repose. (App. 102-12.) It was at this point that the trial court entered the *Engle* Judgment identifying the two bases for rejecting this defense. (App. 113-15.)

The defendants appealed but did not raise the statute of repose. *Liggett Grp., Inc. v. Engle*, 853 So. 2d 434, 453 n.23 (Fla. 3d DCA 2003), *rev'd on other grounds*, 945 So. 2d 1246 (Fla. 2006). The case eventually made it to this Court, which approved the original certification of the class and held, among other things, that the concealment and conspiracy findings would be entitled to res judicata

effect in individual lawsuits filed by members of the *Engle* class. *Engle*, 945 So. 2d at 1269, 1277. The Court did not limit the res judicata effect only to the findings as to concealment and conspiracy to conceal after May 5, 1982.

Because Judge Kaye's ruling on the statute of repose was necessary to uphold the *Engle* jury's concealment and conspiracy to conceal findings, that ruling is subsumed in the res judicata effect this Court afforded to the concealment and conspiracy findings. *See, e.g.*, *Philip Morris USA, Inc. v. Hallgren*, No. 2D12-2549, 2013 WL 5663188, at *6 (Fla. 2d DCA Oct. 18, 2013) (noting that rulings of substantive law underlying the findings have res judicata effect) (citing *McCormack v. Abbott Labs.*, 617 F. Supp. 1521, 1524 (D. Mass. 1984)).

Indeed, the gravamen of the defendants' serial attacks on *Engle* has been their incorrect assertion that it was never "actually adjudicated" whether the *Engle* jury's defect finding applies to all cigarettes smoked by the class. Underlying those arguments was the recognition that any issue that was actually adjudicated against them in the class litigation is entitled to res judicata effect. (4D09-2666, Initial Br. at 32-33, 41-43 (citing *Seaboard Coast Line R.R. Co. v. Indus. Contracting Co.*, 260 So. 2d 860 (Fla. 4th DCA 1972), and *Fayerweather v. Ritch*, 195 U.S. 276 (1904)).) Having raised and lost the repose defense at the class stage, the defendants are precluded from relitigating it in every individual lawsuit.

While this should end the issue, the rest of this brief demonstrates why Judge Kaye's ruling was correct. Thus, even if the ruling did not have preclusive effect, both underlying reasons demonstrate why the jury's verdict in Mrs. Hess's case did not establish PM USA's statute of repose defense.

II. THE JURY'S FINDING THAT MR. HESS DID NOT RELY ON ANY STATEMENTS WITHIN THE REPOSE PERIOD DID NOT ESTABLISH PM USA'S STATUTE OF REPOSE DEFENSE.

Standard of Review. The determination of the legal effect of special findings in a verdict is a legal issue reviewed de novo. *E.g., Brown v. State*, 959 So. 2d 218, 220 (Fla. 2007).

The district court concluded that PM USA was entitled to a defense judgment on Mrs. Hess's concealment claim because the jury found that she failed to prove that her husband relied on any statements by PM USA after that date. *Philip Morris USA, Inc. v. Hess*, 95 So. 3d 254, 260-61 (Fla. 4th DCA 2012). This was error because (A) the plaintiff's reliance is not relevant to the statute of repose and (B) if it were relevant, the burden would have been on PM USA to prove that Mr. Hess had stopped believing it by May 5, 1982, an issue it waived by failing to even submit it to the jury.

A. The Timing of the Plaintiff's Reliance Is Irrelevant to the Statute of Repose.

The statute of repose for fraud claims provides that "an action for fraud … must be begun within 12 years after the date of the commission of the alleged

fraud." § 95.031(2), Fla. Stat. (1994).[5] As the district court recognized, in this and all other *Engle* progeny cases, the trigger date for the statute of repose is May 5, 1982, which is twelve years prior to the filing of the original *Engle* complaint. *Hess*, 95 So. 3d at 260. Thus, the repose defense can only apply in *Engle* cases if "the commission of the alleged fraud" ended by that date.

The use of the term "commission of the alleged fraud," as opposed to accrual of a cause of action for fraud, is key because a fraud can be committed in one sense even if nobody relies on or is hurt by it. Indeed, this Court has explained, in the specific context of statutes of repose:

> "Fraud" is generally defined as (1) a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment; and (2) a misrepresentation made recklessly without belief in its truth to induce another person to act.

Nehme v. Smithkline Beecham Clinical Labs., Inc., 863 So. 2d 201, 205 (Fla. 2003) (quoting *Black's Law Dictionary* 670 (7th ed. 1999)). The only reference to reliance is that the defendant engage in the conduct to "induce" reliance; there is no suggestion that a fraud is not committed for purposes of the statute of repose unless it injured a particular plaintiff.

While it is true that an **actionable** fraud cannot be committed without the additional elements of both reliance and injury to the plaintiff, those elements

[5] This provision was subsequently renumbered to section 95.031(2)(a). Ch. 99-225, § 11, Laws of Fla.

address the plaintiff's conduct and not the conduct of the defendant. *See, e.g.*, *Sutton v. Gulf Life Ins. Co.*, 189 So. 828, 829 (Fla. 1939) (holding that a defendant in a foreclosure action cannot assert a fraud defense based on a misrepresentation that did not injure him because "[d]eceit and fraud, if not acted upon, or not accompanied by injury, are moral, not legal, wrongs" and "[i]t is of the very essence of an action for fraud or deceit that the same shall be accompanied by damage" (internal quotation marks and citations omitted)). To the extent the phrase "commission of the alleged fraud" might otherwise be read to include concepts involving the plaintiff's conduct, the following phrase in section 95.031(2) – "regardless of the date the fraud was or should have been discovered" – dispels that doubt.

Moreover, in an "action for products liability," the statute provides that the repose period "is tolled for any period during which the manufacturer … had actual knowledge that the product was defective in the manner alleged by the claimant and took affirmative steps to conceal the defect." § 95.031(2)(d), Fla. Stat. (2013). The *Engle* findings, of course, establish that PM USA and its co-conspirators affirmatively concealed the dangers of their cigarettes beyond May 5, 1982. (App. 83-88.) In short, the plain language the Legislature employed in section 95.031 demonstrates this is not a viable defense in *Engle* cases. That conclusion is buttressed by prior decisions of this Court and the other district courts of appeal.

Although the decision below acknowledged that "the conduct elements of a fraudulent concealment cause of action" were established by *Engle*, *Hess*, 95 So. 3d at 259, it held that the statute of repose was governed not by when PM USA committed the fraudulent conduct found in *Engle*, but instead when Mr. Hess relied on that conduct. This holding represents the same misunderstanding of the statute of repose that this Court has previously tried to dispel:

> 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**.

Kush v. Lloyd, 616 So. 2d 415, 418 (Fla. 1993) (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.

While *Kush* did not discuss the application of the statute of repose to a fraud claim, subsequent district court of appeal decisions have. Most directly on point is *Frazier v. Philip Morris USA Inc.*, 89 So. 3d 937 (Fla. 3d DCA 2012), another

Engle-progeny case. After reversing a defense judgment based on the statute of limitations, the Third District considered and rejected the exact argument that PM USA raises here:

> The appellees also argue … that Florida's twelve year statute of repose relating to fraud claims 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.

Id. at 947-48 (citations omitted). Similarly, the First District has summarily rejected the statute of repose as a viable defense in *Engle* claims. *R.J. Reynolds Tobacco Co. v. Webb*, 93 So. 3d 331, 333 (Fla. 1st DCA 2012) (citing *Laschke*, 766 So. 2d at 1079).

And now the Second District has reiterated its holding from *Laschke* and expressly relied on the holdings in *Frazier* and *Webb* to reject the repose defense in *Engle* cases. *Hallgren*, 2013 WL 5663188, at *2. Despite the Second District's reliance on *Frazier* and *Webb* and reaffirmation of the holding in *Laschke* that it is the last act in furtherance of the fraud that counts, PM USA has taken the position that *Hallgren* instead adopted the Fourth District's view that reliance is relevant to

the repose defense. While a single sentence in *Hallgren* is ambiguous and could be read to support that interpretation, the better interpretation is that the court was noting that the plaintiff had proven reliance on the course of conduct that continued past 1982, not that her reliance occurred after 1982. Specifically, the court states, "The 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.* PM USA assumes "on which the plaintiff relied" modifies the word "act," which would be one reasonable way to read the sentence in isolation. Mrs. Hess assumes it modifies the word "concealment" immediately preceding it, which is a reference to the "ongoing pattern of concealment" used at the beginning. Otherwise, the court would have cited *Hess* and noted conflict with *Frazier* and *Webb*.

Similarly, PM USA argues that one panel of the Third District somehow retreated from another panel's decision in *Frazier* when it decided *Lorillard Tobacco Co. v. Alexander*, No. 3D12-1593, 2013 WL 4734565 (Fla. 3d DCA Sept. 4, 2013). In that case, the district court rejected Lorillard's contention that the trial court erred in admitting out-of-court statements by the deceased smoker explaining how he relied on the concealment by Lorillard and its co-conspirators from 1958 through 1985. *Id.* at *5. That the court plainly held statements regarding reliance before 1982 were admissible demonstrates its continued rejection of the

defendants' argument that only reliance after 1982 may be considered. PM USA ignores that aspect of the opinion and focuses on the following statement: "Since the statute of repose begins in 1982, Coleman's belief and reliance through 1985 was relevant to show that his cause of action was not barred by the statute of repose." *Id.* In context, this merely shows that the evidence was admissible under the *Engle* defendants' view of the statute of repose. Especially since the author of *Alexander* and another member of that panel were both on the *Frazier* panel, this language does not portend any change in the law on repose in that district.[6]

Regardless, *Frazier* was vindicated when this Court recently removed any remaining doubt that the *Engle* findings "resolved all elements of the claims that had anything to do with the *Engle* defendants' cigarettes or their conduct." *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 432 (Fla. 2013), *cert. denied*, No. 13-191, 2013 WL 4079332 (U.S. Oct. 7, 2013). This holding combined with the Court's holding in *Kush* that it is the defendant's conduct that controls the statute of repose demonstrate that the statute of repose is no longer a viable defense in *Engle* cases.

[6] Undersigned counsel argued *Alexander*, and a review of the oral argument archived recording demonstrates that this issue was framed in a way to avoid having the *Alexander* case get caught up as a tag case to *Frazier* and this case. In other words, the opinion dealt with the issue so the decision will stand regardless of how the conflict over the statute of repose is resolved. *See* http://www.3dca.flcourts.org/Archived_Video.shtml (search for 3D12-1593).

The decision below did not address *Kush*, *Frazier*, or *Webb* even though they were brought to the court's attention on rehearing. (App. 7-8.) But it did address and purport to distinguish *Laschke* as only applying to "cases of **conspiracy**, not fraud by concealment, which is at issue here." *Hess*, 95 So. 3d at 261. This was wrong for at least three reasons.

First, the conclusion that no conspiracy claim is at issue reflects a misunderstanding of the record. Mrs. Hess submitted her conspiracy claim to the jury because the same causation question resolved both the concealment and conspiracy claims. The trial court had been of the view that an *Engle* conspiracy claim can only be brought against the defendants who manufactured the cigarettes smoked by the particular class member, which essentially merged the concealment and conspiracy claims together. (R110 04/02/09 Tr. at 31-32.) While the trial court's narrow view of *Engle* conspiracy claims has since been rejected, *Rey v. Philip Morris, Inc.*, 75 So. 3d 378, 380-83 (Fla. 3d DCA 2011), this error should not impact this appeal. The court instructed the jury it was bound by the *Engle* conspiracy finding, Mrs. Hess argued the conspiracy claim during closing, and the trial court made clear in the end that it was entering judgment for Mrs. Hess on the conspiracy claim. (R110:2570-86, 2639, 2651-52; R110 04/02/09 Tr. at 8-59; SR40:6445.) Proof of reliance on concealment by one member of the conspiracy is necessarily proof of reliance on concealment by the entire conspiracy because each

conspirator is liable for the acts of the others in furtherance of the conspiracy. *E.g.*, *Charles v. Fla. Foreclosure Placement Ctr., LLC*, 988 So. 2d 1157, 1160 (Fla. 3d DCA 2008); *Wilcox v. Stout*, 637 So. 2d 335, 337 (Fla. 2d DCA 1994). Thus, the conspiracy claim was presented to the jury, and Mrs. Hess prevailed.

Second, even if Mrs. Hess had abandoned her conspiracy claim, that should have no impact on the repose defense because the Fourth District has since applied its same reasoning on the statute of repose to *Engle* conspiracy claims, removing any argument that its reasoning only applies to individual concealment claims. *Philip Morris USA, Inc. v. Kayton*, 104 So. 3d 1145, 1150-52 (Fla. 4th DCA 2012).

Third and finally, the district court's opinion in Mrs. Hess's case missed the point of *Laschke*. The Second District reached its holding in *Laschke* not because the fraud in that case was perpetrated through a conspiracy among different tobacco companies, but because the underlying fraud was "ongoing and continuous":

> 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

766 So. 2d at 1078-79 (emphases added).

Both *Frazier* and *Webb* expressly follow *Laschke* to reject the statute of repose defense to both concealment and conspiracy claims. Regardless of whether Mrs. Hess actually submitted the conspiracy claim to the jury, the fact remains that, as in all *Engle* trials, the evidence and arguments she made in support of her concealment claim involved an ongoing and continuous course of fraud by PM USA from 1953 through Mr. Hess's death in 1997.

The district court's conclusion that reliance triggers the repose period because it is the last element of Mrs. Hess's fraud claim to occur demonstrates the flaw in its reasoning. Reliance is never the last element to accrue in an *Engle* concealment claim; the last element is injury to the plaintiff in the form of manifestation of one of the diseases enumerated in *Engle*. *See, e.g.*, *Hynd v. Ireland*, 582 So. 2d 772, 773 (Fla. 4th DCA 1991) ("Damages are an essential element of a cause of action for fraudulent misrepresentation and fraudulent omission."); *Sutton*, 189 So. at 829 (emphasizing need to prove both reliance and damages to state an actionable claim for fraud). That is clearly the case with Mr. Hess, whose lung cancer did not develop until the 1990s.

Indeed, if the panel's reasoning is correct and the last element of a fraud claim triggers the repose date, there can be no repose defense in any *Engle* case that is not already barred by the statute of limitations. An *Engle* claim is time-barred where the plaintiff knew or should have known she had the smoking-related

disease before May 5, 1990, and that cigarettes were the cause. *Philip Morris USA, Inc. v. Barbanell*, 100 So. 3d 152, 158-60 (Fla. 4th DCA 2012); *Webb*, 93 So. 3d at 334-35; *Frazier*, 89 So. 3d at 946-47. Thus, all timely *Engle* claims involve injuries manifesting after that date, so the last element of all valid *Engle* fraud claims necessarily occurs well within the twelve-year repose period. In short, whether the analysis is limited to the elements of the fraud claim turning on the defendant's conduct or can also include elements involving the plaintiff's conduct, the defense is not available in *Engle* cases.

Now all of this is not to say that reliance and injury are completely irrelevant to the statute of repose, only that the **timing** of these elements should be irrelevant. To be clear, Mrs. Hess readily concedes that she must prove that the fraud on which her husband relied and which caused his injury was the same fraud that continued beyond 1982. Thus, for example, the Second District's decision in *Hallgren* makes sense when it ties reliance to the ongoing fraud that began before but continued after 1982. After all, if a defendant commits a series of discrete frauds, the plaintiff can only recover for relying on and being injured by frauds committed within the repose period. It is to this limited extent that the district court's reasoning makes some initial logical sense. But the flaw in the reasoning is that Mrs. Hess did not make separate claims based on different frauds. Like all

Engle plaintiffs, she asserted a single claim alleging an ongoing fraud by concealment and nondisclosure.

Just as the *Engle* defendants attempted to warp *Engle* in their due process challenges by claiming that the class's strict liability and negligence claims were a series of alternate claims aimed at different kinds of cigarettes, they attempt to cast the concealment claims as a series of alternate fraud claims based on different misrepresentations. But those were the fraudulent misrepresentation claims that the class asserted, which this Court refused to approve in *Engle*. Specifically, this Court declined to give res judicata effect to the *Engle* jury's findings on the class misrepresentation claims because they depended on which statements each individual class member heard. *Douglas*, 110 So. 3d at 424-25 (noting that the court approved res judicata effect for the concealment findings but not the misrepresentation findings because the latter "were 'inadequate to allow a subsequent jury to consider individual questions of reliance' ") (quoting *Engle*, 945 So. 2d at 1255); *id.* at 428-29 (explaining this dichotomy in terms of the approved findings being sufficiently specific to be common to the entire class while the disapproved findings on misrepresentation were "nonspecific" as they failed to identify specific conduct common to the class).

Conversely, the only reason the Court gave res judicata effect to the concealment and conspiracy to conceal findings is that they do **not** depend on

discrete statements. The point of those findings is that the defendants undertook a duty to disclose what they knew about the dangers of smoking. For *Engle* concealment and conspiracy claims, therefore, the plaintiff's burden on causation is to prove reliance on silence. In other words, the plaintiff must prove that had the defendants disclosed what they knew, the smoker would have avoided injury.

Thus, despite the defendants' repeated attempts to cast the concealment claims as necessarily requiring reliance on discrete "statements" or "acts," *Engle* concealment (and conspiracy to conceal) claims are based on reliance on the **absence** of statements and acts by the defendants. This concealment was not a series or even a pattern of separate frauds over time; it was a single ongoing course of misconduct by refusing to do that which the law required. *Engle* plaintiffs need prove only reliance on the scheme to conceal, and not reliance on any discrete statements or acts.[7] When viewed with this understanding of the concealment claims this Court approved for res judicata effect in *Engle*, it becomes clear that while *Engle* plaintiffs must prove reliance on the ongoing concealment,[8] the date

[7] As noted in the next section, plaintiffs can meet this burden by proving reliance on statements that either gave rise to a subsequent duty to disclose or were directly fraudulent by omitting material information. The point is that the reliance that is required is reliance on concealment and nondisclosure, not misrepresentation.

[8] Proof of reliance is necessary to establish that the fraud proximately caused injury. *See, e.g.*, *Estate of Law v. Law*, 852 So. 2d 33, 39 (Miss. Ct. App. 2002) ("The reliance issue is in essence a focus on proximate cause."), *rev'd on other*

of their reliance is irrelevant because the concealment and nondisclosure continued beyond May 5, 1982, as the *Engle* jury found.

Finally, at the risk of gilding the lily, Mrs. Hess points out that the decision below has the perverse and paradoxical effect of obliterating the true purpose of the statute of repose, which is to give defendants peace of mind twelve years after they cease their misconduct so they will not have to defend against stale claims. *Nehme*, 863 So. 2d at 208. Under 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 twelve years of filing suit. That cannot be the law and demonstrates why this Court was correct in *Kush* in holding that the statute of repose is solely concerned with when the defendant's conduct took place and that the conduct of the plaintiff is irrelevant.

When a fraudster in Florida wishes to avail itself of the protection the Legislature afforded against stale claims, all it has to do is stop committing the fraud. PM USA and its co-conspirators made the business decision in 1953 to falsely deny the risks of smoking and to promise to disclose any dangers they later learned. While they could have protected themselves from stale claims at any time

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grounds, 869 So. 2d 1027 (Miss. 2004); *Morris v. Inv. Life Ins. Co. of Am.*, 248 N.E.2d 216, 221 (Ohio Ct. App. 1969) ("False representations or concealment alone are not actionable. There must exist a causal chain from the fraud of one party to the act of the other. The necessary causal link is called reliance … .");.

by coming clean and stopping their fraudulent scheme, they instead assiduously followed this uniform course of conduct at least through their executives' congressional testimony in 1994 when they were still denying what they knew to be true. The statute of repose is designed to encourage an end to this kind of behavior by cutting off liability twelve years after a defendant makes the decision to cease its fraudulent misconduct. The Fourth District's perverse holding that these tobacco companies who chose to continue their course of fraudulent concealment should nonetheless benefit from the statute of repose as to plaintiffs who quit believing their lies should be vacated.

B. To the Extent Reliance Is Relevant, Mrs. Hess Did Not Have to Prove That Mr. Hess Relied on Any Statement Made After May 5, 1982.

Alternatively, if reliance is relevant, Mrs. Hess is still entitled to prevail because PM USA did not obtain a jury finding that it had carried its burden of proving that Mr. Hess quit believing them by May 5, 1982. The jury's finding that Mrs. Hess failed to prove that he relied on some statement made by PM USA after that date cannot establish the repose defense for at least two independent reasons.

First, since the statute of repose is an affirmative defense, PM USA bore the burden of proof. *See Johnston v. Hudlett*, 32 So. 3d 700, 704 (Fla. 4th DCA 2010) (holding that the statute of repose is an affirmative defense); *AVCO Corp. v. Neff*, 30 So. 3d 597, 604 (Fla. 1st DCA 2010) (same); *see also Custer Med. Ctr. v.*

United Auto. Ins. Co., 62 So. 3d 1086, 1096-97 (Fla. 2010) (holding that the burden of proving every element of an affirmative defense rests on the defendant). By proving that Mr. Hess relied on a statement by PM USA, regardless of the timing of that statement, Mrs. Hess met her burden of proving the reliance element of her fraud and conspiracy claims. *See, e.g.*, *Johnson v. Davis*, 480 So. 2d 625, 627 (Fla. 1985) (holding that reliance is an element of fraud claims). The jury in this case was instructed that the burden of proving reliance was on Mrs. Hess, and it was never advised that the burden of proving the timing of the reliance was on PM USA. Thus, its conclusion that Mrs. Hess failed to prove reliance after May 5, 1982, does not establish that PM USA met its burden.

Second, burden of proof aside, whether Mr. Hess relied on any statements after 1982 is not dispositive because the claims in this case are for fraudulent concealment, not misrepresentation, as explained above. In *Engle*, this Court declined to give res judicata effect to findings based on fraudulent statements and instead only approved the findings based on concealment, which is by definition the **failure** to speak when under a duty to speak or disclose. There are many possible ways a particular plaintiff might attempt to meet this burden,[9] and Mrs.

[9] For example, a plaintiff might seek to prove that, regardless of any particular statements from the defendant, the smoker relied on the pervasive public relations campaign waged by the defendants to cast doubt on public health warnings and conceal the true dangers. Indeed, the Fourth District itself has recognized that *Engle* plaintiffs may prove reliance "without the necessity of

Hess chose to meet it by proving that Mr. Hess initially relied on statements he heard from PM USA. There was ample evidence supporting the jury's finding that she proved reliance on statements made before 1982, most notably the 1953 Frank Statement where the defendants promised to tell the world the minute they discovered that their cigarettes caused cancer and that they would remove anything dangerous in their products. Once reliance on the concealment was proven, it mattered not whether Mr. Hess relied on any subsequent statements; indeed, the whole point of the concealment claim is that the defendants made no statements disclosing that they knew their cigarettes were addictive and caused cancer.

The so-called "wrongful adoption" case of *Ambrose v. Catholic Social Services*, 736 So. 2d 146 (Fla. 5th DCA 1999), provides a good example of how the statute of repose should work in concealment cases. *Id.* at 148 n.2. In that case, Catholic Social Services ("CSS") advised the plaintiff in August 1985 that a newborn child had no known family history of hereditary diseases even though the birth father had told CSS that manic depression ran in the family. *Id.* at 147-48. Believing that there was no such family history, the plaintiff adopted the child, and the adoption became final in October 1986. *Id.* at 148. In July 1998, which was

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proving [the smoker] relied on any specific statement." *Philip Morris USA Inc. v. Putney*, 117 So. 3d 798, 802 (Fla. 4th DCA 2013).

Or she might seek to simply prove that had the defendants disclosed that they knew cigarettes were deadly and addictive, the smoker never would have started smoking or would have quit in time to avoid injury.

more than twelve years after CSS's representation that there was no family history, but less than twelve years after she relied on the concealment by finalizing the adoption, the plaintiff sued CSS for fraudulently concealing the family history because the child had been diagnosed with bipolar disorder and she never would have adopted the child had she known of the family history. *Id.* The district court held that the statute of repose did not bar this claim because CSS's duty to disclose did not end when it claimed there was no family history on August 1985, and that it had a continuing duty to disclose the medical history until the adoption was finalized in October 1986. *Id.* at 149.

The same is true in *Engle* cases. The defendants' obligation to disclose the dangers of smoking did not begin and end with each statement they made; it was a continuing duty that they violated at least through their 1994 testimony in Congress where they continued to deny that smoking is addictive or causes cancer. Thus, the burden was on PM USA to prove that by May 5, 1982, Mr. Hess had stopped believing that the tobacco companies would disclose the dangers if they knew their products were addictive and deadly. Not only was there no evidence that by 1982 Mr. Hess discovered that he had been duped, but PM USA failed to even submit the issue to the jury. Thus, even if reliance were relevant to the statute of repose, PM USA failed to prove that Mr. Hess's reliance stopped by May 5, 1982. The judgment therefore must be affirmed.

III. APPLYING THE STATUTE OF REPOSE WOULD VIOLATE MRS. HESS'S CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS BY ELIMINATING HER FRAUD CLAIMS BEFORE THEY ACCRUED.

Standard of Review. The constitutionality of a statute is a question of law reviewed de novo. *E.g.*, *Public Defender, Eleventh Judicial Cir. of Fla. v. State*, 115 So. 3d 261, 279 (Fla. 2013).

Even if the district court were correct that the jury's finding established a defense under the statute of repose, it erred in concluding that the statute of repose may extinguish a cause of action before it accrues, at least in the context of *Engle* claims and other (non-medical malpractice) claims based on latent diseases.[10] *Hess*, 95 So. 3d at 260-61 (quoting *Carr v. Broward Cnty.*, 505 So. 2d 568, 570 (Fla. 4th DCA 1987), *approved*, 541 So. 2d 92 (Fla. 1989), and *Nehme*, 863 So. 2d

[10] This point was not briefed by either party until Mrs. Hess's motion for rehearing, but the point was squarely raised in the district court's decision. Moreover, whether an appellee articulates an argument for affirmance in its answer brief should be "inconsequential" because "[a] trial court's decision will be upheld on appeal if any legal theory supports it." *Aberdeen Golf & Country Club v. Bliss Constr., Inc.*, 932 So. 2d 235, 239 n.6 (Fla. 4th DCA 2005); *accord Graney v. Caduceus Props., LLC*, 91 So. 3d 220, 224 n.3 (Fla. 1st DCA 2012) (considering tipsy coachman argument not raised in answer brief).

Moreover, this Court clearly has authority to consider alternative grounds for affirming a trial court's decision that were not raised by the appellee. *Cont'l Cas. Co. v. Ryan Inc. E.*, 974 So. 2d 368, 377-78 (Fla. 2008) (citing *Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999)); *see also State v. Hankerson*, 65 So. 3d 502, 505 (Fla. 2011) ("A trial court's ruling should be upheld if there is any legal basis in the record which supports the judgment. It follows that to aid the appellate court in its task, the appellee should be permitted to explicate any legal basis supporting the trial court's judgment.").

at 208). While *Carr* and *Nehme* do stand for the proposition that the statute of repose for medical malpractice claims may bar an action before it accrues, this Court has made clear that this rule of law is limited to the statute of repose for medical malpractice claims and does not apply to other statutes of repose. *Pulmosan Safety Equip. Corp. v. Barnes*, 752 So. 2d 556, 558-59 (Fla. 2000). Indeed, this was the second basis for Judge Kaye's rejection of the statute of repose in *Engle*.

In *Diamond v. E.R. Squibb & Sons, Inc.*, 397 So. 2d 671 (Fla. 1981), this Court reaffirmed, as a matter of constitutional law, the latent injury exception to the statute of repose for fraud and products liability claims. Under that doctrine, the Legislature may not abolish a cause of 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. *Id.* at 672 (citing *Overland Constr. Co. v. Sirmons*, 369 So. 2d 572 (Fla. 1979)). While an exception to this constitutional rule has been carved out for medical malpractice actions, the Court held in *Pulmosan* that this exception is limited to medical malpractice cases. 752 So. 2d at 558-59.

As explained in a Third District decision on which this Court relied in *Pulmosan*, 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. *Owens-Corning Fiberglass Corp. v. Corcoran*, 679 So. 2d 291, 294 (Fla. 3d DCA 1996), *cited with approval by Pulmosan*, 752 So. 2d at 558-59; *see also Carr*, 505 So. 2d at 575 (quoting the legislative findings that "legislative relief" was necessary due to a crisis in insurance premiums that threatened to force doctors to "curtail their practices, retire, or practice defensive medicine at increased cost to the citizens of Florida"). Because the Legislature has not made similar findings regarding fraud and products liability cases, the statute of repose cannot constitutionally bar a plaintiff's *Engle* concealment claim because the plaintiff's latent disease necessarily did not manifest until into the repose period, lest her claim would be barred by the statute of limitations. Accordingly, the district court erred in relying on *Carr* and *Nehme*, which are medical malpractice cases.

At least one other court has applied *Diamond* to the statute of repose for fraud claims, albeit in dicta. *Kempfer v. St. Johns River Water Mgmt. Dist.*, 475 So. 2d 920, 924 n.14 (Fla. 5th DCA 1985). Mrs. Hess recognizes that the Third District rejected a similar argument by concluding that (1) the availability of a strict liability claim under section 95.031(2)(d) is an adequate alternative for this kind of fraud claim and (2) there is a "public necessity" to cut off fraud claims. *Kish v. A.W. Chesterton Co.*, 930 So. 2d 704, 706-07 (Fla. 3d DCA 2006). But the

Third District reached the first conclusion only after determining that section 95.031(2)(d) saved the fraud claims against the manufacturers at issue, so the repose defense only applied to the non-manufacturer defendant in that case, an insurance company that concealed its own studies regarding the dangers of asbestos exposure. *Id.* at 705, 706 & n.4. Because Mrs. Hess's claims in this case are against the manufacturer, the Court would reach the constitutional issue in this case only if it rejects *Kish*'s interpretation of section 95.031(2)(d).

And if the Court rejects the first basis of the holding in *Kish*, it should reject the second one as well. As *Pulmosan*, *Carr*, and *Corcoran* all make clear, the exception for medical malpractice claims depends on specific legislative findings unique to that area of the law. This Court should not legislate from the bench to determine that there is some overwhelming public necessity to protect those who engage in fraud.

Moreover, claims for strict liability and negligence are common law claims that have been around for a long time. The Legislature did not provide them as some new alternative remedy when it enacted the fraud statute of repose. And unlike claims for strict liability or negligence, which are limited to damages that can be apportioned to the fault of a particular defendant, fraud claims are intentional torts for which each defendant is jointly and severally liable for all of the plaintiff's damages. *R.J. Reynolds Tobacco Co. v. Sury*, 118 So. 3d 849, 851-53

(Fla. 1st DCA 2013). Thus, an action for negligence or strict liability is simply not an adequate alternative to an action for fraud.

Using the statute of repose to extinguish *Engle* claims is particularly harsh. These are primarily people who began smoking in the 1950s and 1960s when the conspiracy was particularly successful in drowning out and casting doubt on public claims that smoking was addictive and caused cancer. Thus, a great many class members were deceived by the concealment well before 1982. Many of them learned the truth before 1982 and either stopped smoking altogether or tried to stop but were hindered by their addiction. When they discovered and therefore stopped "relying" on the tobacco companies' fraud, they could not have sued because, although the die was cast from the prior years of smoking, they had not yet developed the diseases that afflicted them later in life. But if reliance is the test and a future claim is pretermitted, the tobacco companies will get away with decades of continuing fraudulent conduct with no compensation for the thousands of their customers who subsequently contracted lung cancer and other fatal diseases. The constitution does not tolerate such a result.

CONCLUSION

For all of these reasons, this Court should quash the decision below and remand with directions to affirm the judgment in its entirety.

Respectfully submitted,

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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.

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