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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 REPLY BRIEF

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Before addressing PM USA's arguments, a few points must be made about its statement of the case, which risks creating the same mischief sowed below by confusing the nature of reliance Mrs. Hess had prove to prevail on her claims for concealment and conspiracy to conceal. PM USA incorrectly states that in *Engle* this Court approved for *res judicata* effect a finding "that each defendant made **unspecified statements** that 'concealed or omitted' information regarding the health effects or addictive nature of smoking cigarettes." (Ans. Br. at 3 (emphasis added).) Not only did this Court not approve any findings that depended on "unspecified statements," but PM USA ignores Mrs. Hess's thorough explanation as to how this Court necessarily **rejected** res judicata effect of the class's fraud claims that did depend on statements made by the defendants. (Init. Br. at 29-30.) The fraud findings this Court approved for res judicata effect were not that the defendants made fraudulent statements, but that they concealed what they knew. While they surely carried out this scheme to conceal in part by misleading statements that omitted information, the gravamen of the concealment and conspiracy claims is that they **failed** to disclose what they knew.

In discussing the evidence Mrs. Hess presented at trial, PM USA continues to try to confuse the real issue in *Engle* cases, which is whether the smoker would have avoided injury had the defendants disclosed what they knew. Instead, it casts

the issue solely as reliance on statements and then compounds its misleading description by claiming that "the evidence indicated that any such reliance occurred before he began trying to quit smoking in the 1970s." (Ans. Br. at 5.) While there was certainly evidence to support the jury's finding that the only statements on which Mr. Hess relied were made before 1982, there was ample evidence that Mr. Hess continued to rely on these statements and more importantly continued to be deceived by the defendant's failure to make statements disclosing what it knew after 1982. In short, before 1982, PM USA and its coconspirators claimed that smoking was not dangerous, promised to thoroughly research the issue, and assured millions of Americans like Mr. Hess that they would come forward in the future and disclose any dangers they discovered; but instead of disclosing what they knew, they worked hard to keep it secret all the way through the late 1990s. This evidence, which is ignored by PM USA, is recounted in the initial brief and there is no indication that the jury rejected it or concluded that Mr. Hess discovered all that the defendants knew by May 5, 1982. (Init. Br. at 10-11.)

PM USA also seeks to morph the verdict form question it convinced the court to ask the jury from the actual question answered by the jury – whether Mr. Hess "rel[ied] on any statement … Before May 5, 1982? After May 5, 1982? [or] Both before and after May 5, 1982?" – to the very different question of "whether **any reliance** by Mr. Hess had occurred within the

twelve-year actionable period established by the statute of repose." (Ans. Br. at 5 (emphasis added).) But the jury was never asked, for example, whether Mr. Hess's reliance on statements made before May 5, 1982, continued after that date or whether he otherwise relied on the defendants' concealment beyond that date.

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

PM USA's main argument on this point is that the statute of repose was handled on an individual basis in *Engle* and the issue was moot as to the two class representatives whose judgments were affirmed in *Engle*. This ignores two crucial facts. First, while Judge Kaye did allow the jury to return a verdict in Phase II-A as to whether the defendants' individual concealment and conspiracy to conceal was a legal cause of the class representatives' injuries as to time periods both outside and within the repose period, his rejection of the repose defense was not based on this finding. He rejected the defense even as to pre-1982 time periods at the conclusion of Phase I, which applied to the entire class (App. to Init. Br. 94), and his reasoning in again rejecting it in the final judgment was based on the same grounds Mrs. Hess raises here. Contrary to PM USA's suggestion, Mrs. Hess is not arguing that any finding from Phase II-A is entitled to res judicata effect.

Second and more importantly, this Court did not approve the res judicata effect of only the post-1982 concealment findings at the end of Phase I; it approved

the concealment and conspiracy to conceal findings without limitation. Thus, a rejection of the statute of repose even as to the parts of the defendants' ongoing scheme of concealment that pre-dated 1982 was necessary to uphold the findings this Court gave res judicata effect in *Engle*. PM USA is essentially making a collateral attack on *Engle* by arguing that only the finding of post-1982 concealment can apply in individual lawsuits. The trial court below properly rejected this argument when it granted summary judgment. In short, the trial court's rejection of the statute of repose defense at the conclusion of the class phase and its explanation for that ruling in the final judgment are entitled to the res judicata effect of *Engle*. But even if the Court addresses the merits, it should affirm because Judge Kaye's reasoning was correct and applies equally to all *Engle* progeny cases.

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.

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

PM USA entirely misses the point of Mrs. Hess's plain language argument that "commission of the alleged fraud," the language used in section 95.031(2)(a), has a different meaning from accrual of cause of action for fraud, which is how the Fourth District interpreted the language. Mrs. Hess does not dispute that a cause of action for fraud does not accrue until the plaintiff both relies on the fraud and

suffers an injury. But this Court has made clear that a statute of repose "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. 1992) (emphasis added). The statute of repose speaks to the timing of the defendant's fraudulent conduct, not when that conduct became actionable by the occurrence of the last element of a cause of action for fraud. In other words, the fraud is committed by the defendant at the time of the defendant's conduct, even though it may not become actionable until a later date when the plaintiff suffers an injury caused by his reliance on the fraud.

Moreover, PM USA bases its entire argument on the fact that an actionable fraud cannot occur without reliance, while largely ignoring the equally true fact that an actionable fraud cannot occur without injury suffered by the plaintiff. As argued on pages 27 to 29 of the initial brief, if the repose period commences when the last element of the fraud claim occurs, then it runs in an *Engle* case not from the date of reliance – that is, when the smoker would have changed his or her smoking behavior had the defendants' knowledge of the dangers been disclosed – but from the date of injury – that is, when the smoker manifested a disease caused by smoking.

PM USA's only response to this argument is its conclusory claim that reliance and injury are one and the same. (Ans. Br. at 22.) There is no support in

the law for this. Reliance and injury are discrete elements, each of which must be proven before a fraud becomes actionable. While it is certainly true that the reliance must cause the injury, as stated in the case cited by PM USA, that cannot mean that reliance and injury are one and the same. *Tourismart of Am. Inc. v. Gonzalez*, 498 So. 2d 469, 471 (Fla. 3d DCA 1986). Thus, when a young smoker is manipulated into thinking the dangers of smoking have never been proven and relies on the mistaken belief by starting to smoke, no actionable fraud has been committed. It is only when that reliance leads to a subsequent injury that there has been actionable fraud.

In a footnote, PM USA argues for the first time that "the Fourth District has made clear in subsequent decisions [that] the 'commission' of **every** element of the 'alleged fraud' must occur within the actionable period." (Ans. Br. at 19 n.4.) As an initial matter and as PM USA well knows from *Engle* litigation, an argument in a footnote is insufficient to preserve a claim of trial court error. Thus, the Court should disregard this point. *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 41 n.1 (Fla. 3d DCA 1996) ("It is elementary that arguments which are not made as a point on appeal, as here, but are found only in [a] footnote in the appellant's brief, are not properly presented to the appellate court for review."). Preservation aside, the argument is meritless. Neither the Fourth District nor any other court of which Mrs. Hess is aware has held such a thing.

Moreover, this argument demonstrates the fallacy in PM USA's argument. While the statute of fraud runs from the "commission" of the fraud, reliance and injury are not acts that are "committed." The only action that the defendant commits is the fraudulent statement or concealment. On top of that, a repose period that does not run from a discrete act but instead a collection of different events (fraudulent conduct plus reliance plus injury) is impossible to apply. If a fraud is committed on date X, the plaintiff relies on date Y, and the plaintiff suffers a resulting injury on date Z, when exactly does the repose period begin? The only logical answer is that the repose period runs from one date only – the date of the last act that was part of the fraudulent scheme.

Finally, this argument is directly belied by the decision in *Ambrose v. Catholic Social Services, Inc.*, 736 So. 2d 146 (Fla. 5th DCA 1999), which PM USA embraces without any suggestion that it was wrongly decided. (Ans. Br. at 36.) In *Ambrose*, the defendant made a false statement outside the limitations period that the child up for adoption had no family history of mental illness, but the court found the statute of repose to be no bar because the concealment of that history lasted into the repose period. 736 So. 2d at 148. PM USA makes a point of the fact that the reliance took place during the repose period. To the extent the *Ambrose* court thought reliance was relevant, it held that reliance within the repose period on a statement made outside the period defeats the defense. *Id.* at 149.

PM USA's argument that "[t]here is no cause of action under Florida law for fraud against third parties" (Ans. Br. at 25) is both correct and utterly irrelevant. Mrs. Hess has never made a claim for fraud against third parties; her claim is fraud against Mr. Hess. The point that PM USA refuses to acknowledge is that the fraud committed by PM USA and its coconspirators was a uniform and continuing scheme of concealment that lasted for decades. PM USA seeks to convert the *Engle* class claims for concealment and conspiracy to conceal into a series of disparate claims involving millions of discrete frauds as if PM USA was engaging in separate acts of concealment as to each of the millions of Americans it attempted to defraud. The Second District correctly rejected this theory in terms directly applicable to *Engle* litigation:

> The [plaintiffs'] 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.

Laschke v. Brown & Williamson Tobacco Corp., 766 So. 2d 1076, 1079 (Fla. 2d DCA 2000). The only case PM USA cites for support of its argument that the continuing nature of a fraudulent scheme does not delay the beginning of the repose period is *Shepard v. Philip Morris Inc.*, No. 96-1720-CIV-T-26B, 1998 WL 34064515 (M.D. Fla. Apr. 28, 1998). Apart from the fact that an unpublished federal trial court decision carries no precedential value, the *Shepard* court

expressly based its decision on "the absence of any indication that Florida law permits tolling of the repose period under these circumstances." *Id.* at *4. But *Laschke* was decided two years later and correctly holds that the period does not begin to run in continuing fraud cases until the fraudster ceases its fraudulent scheme. All PM USA's worries about a poor defendant who might have to answer for the current injuries suffered as a result of reliance on decades old fraud should ring hollow. The Legislature decided that whatever difficulty might befall a defendant due to faded memories, lost documents, and missing witnesses can be avoided by the defendant doing one simple thing – ceasing its fraudulent conduct.

PM USA makes the exact argument about the holding in *Philip Morris USA Inc. v. Hallgren*, 124 So. 3d 350 (Fla. 2d DCA 2013), that Mrs. Hess predicted on page 23 of her initial brief. There, she explained why PM USA was misreading the subject sentence in *Hallgren*. PM USA makes no attempt to rebut this argument and instead stubbornly insists that *Hallgren* followed the Fourth District's decision and rejected *R.J. Reynolds Tobacco Co. v. Webb*, 93 So. 3d 331, 333 (Fla. 1st DCA 2012), and *Frazier v. Philip Morris USA Inc.*, 89 So. 3d 937, 947-48 (Fla. 3d DCA 2012), even though the opinion itself does exactly the opposite. It relied on *Frazier* and *Webb* and did not cite any of the Fourth District decisions that have adopted PM USA's view of the statute of repose. *Hallgren*, 124 So. 3d at 353.

PM USA correctly notes that this Court's decision in *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 432 (Fla. 2013), did not directly address the statute of repose. But PM USA fails to respond to Mrs. Hess's argument that this Court's holding in *Douglas* that the *Engle* findings "resolved all elements of the claims that had anything to do with the *Engle* defendants' … conduct" demonstrates that the statute of repose is no longer a viable defense in *Engle* cases in light of this Court's holding in *Kush* that the repose period is governed exclusively by the timing of the defendant's conduct. (Init. Br. at 24 (quoting *Douglas*, 110 So. 3d at 432.)

PM USA fails to respond at all to Mrs. Hess's arguments as to why the Fourth District was mistaken in concluding that she did not submit her conspiracy claim to the jury and why it should not matter even if she did. (Init. Br. at 25-26.)

Finally, PM USA fails to respond at all to Mrs. Hess's arguments that *Engle* claims for concealment and conspiracy to conceal require proof of reliance on the defendants' failure to disclose what they knew and not reliance on fraudulent statements as PM USA continues to stubbornly insist. As thoroughly explained in the initial brief, this Court expressly rejected res judicata effect for fraud claims that depended on fraudulent statements, and only approved the findings that were common to the entire class no matter what statements class members may have heard. (Init. Br. at 29-30.) PM USA makes much of the language on the *Engle*

Phase II-A verdict form, but ignores the fact that it plainly did not require reliance on any statement. It only required proof that the defendants' concealment was a legal cause of the smoker's disease.

Once one understands this basic fact about *Engle* concealment and conspiracy claims, PM USA's argument that these claims are based on a series of separate incidents of fraud falls apart. An *Engle* plaintiff must prove that the smoker was injured as a result of reliance on a single scheme of fraudulent concealment that began no later than 1954 and ended well after the 1982 beginning of the repose period.

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.

The Court should not reach this point because the timing of the plaintiff's reliance is irrelevant to the statute of repose as explained above. But if it does, it should reject PM USA's responses to Mrs. Hess arguments that PM USA bore the burden of proving that Mr. Hess's reliance stopped by May 5, 1982.

PM USA starts with waiver arguments that ignore the fact that Mrs. Hess prevailed in the trial court on the ground that the statute of repose defense is not viable in these cases. The judgment below must be affirmed for any reason supported by the record, regardless of whether Mrs. Hess, as the prevailing party,

"preserved it" either in the trial court or the appellate court. Mrs. Hess provided the authority for these propositions on page 36, footnote 10 of her initial brief.

On the merits, PM USA insists that Mrs. Hess's position is that PM USA bore the burden of disproving the reliance element of her claims, but this completely ignores her clear acknowledgement on pages 32-33 of her initial brief that she bore the burden of proof on the element of reliance. Her argument is that once she did that, the burden then shifted to PM USA to prove that the reliance ended by May 5, 1982. That is how affirmative defenses work. PM USA acknowledges that the statute of repose is an affirmative defense, but nonetheless argues that Mrs. Hess had the burden of disproving its affirmative defense. It cites no case law for the proposition that a plaintiff must disprove an affirmative defense, and Florida law is directly to the contrary. On pages 32-33 of her brief, Mrs. Hess pointed out that in *Custer Medical Center v. United Automobile Insurance Co.*, 62 So. 3d 1086, 1096-97 (Fla. 2010), this Court held that the defendant bear the burden of proving every element of its affirmative defenses. PM USA simply ignores *Custer*.

Again, PM USA misrepresents the nature of *Engle* concealment claims by insisting that Mrs. Hess had to prove the "essential element of reliance on a 'false **statement**' concealing material information." (Ans. Br. at 35 (citation omitted).) But as Mrs. Hess has amply demonstrated, this Court disapproved the *Engle*

findings based on claims of false statements (i.e., misrepresentations) and only approved claims for concealment. While concealment certainly can be exacerbated by affirmative statements that omit material information, the gravamen of the claim approved in *Engle* was the defendants' failure to disclose what they knew. It is the **absence** of truthful statements that is at the heart of *Engle* concealment and conspiracy claims.

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.

PM USA's reliance on a 1983 Fourth District decision for the proposition that an appellee waives a ground for affirming the trial court when he or she does not raise it in the district court of appeal is frivolous. Mrs. Hess cited, and PM USA ignores, recent decisions from this Court rejecting that notion. (Init. Br. at 36 n.10 (citing *Cont'l Cas. Co. v. Ryan Inc. E.*, 974 So. 2d 368, 377-78 (Fla. 2008), and *State v. Hankerson*, 65 So. 3d 502, 505 (Fla. 2011)). Given the tremendous importance of this issue to the thousands of *Engle* cases still pending in the lower courts, this Court should not hesitate to exercise its discretion to reach this issue, which has been fully brief on the merits.

On the merits, PM USA concedes that applying the statute of repose in *Engle* cases, which necessarily involve latent diseases, implicates the plaintiff's constitutional right of access to courts, but argues that the fraud statute of repose

satisfies the test set forth in *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), for when the Legislature may abridge that right. The first way the Legislature can abridge this right is by "providing a reasonable alternative to protect the rights of the people of the State to redress for injuries." *Id.* at 4. While PM USA argues that the common law remedy for products liability is a reasonable alternative, it fails to respond to Mrs. Hess's arguments that (1) this was not an alternative provided by the Legislature when it enacted the statute of repose, and (2) in any event, it is not a reasonable alternative because a products liability claim only allows for a much reduced remedy – a compensatory damage award reduced by the comparative fault of the plaintiff and third parties. (Init. Br. at 39-40.)

The other way the Legislature can abridge the right of access to court is if it "can show an overpowering public necessity … and no alternative method of meeting such public necessity can be shown." *Kluger*, 281 So. 2d at 4. The Legislature made no attempt to show such a necessity and the reasons PM USA claims an overpowering public necessity exists to deprive plaintiffs of their right to bring fraud claims are the exact same reasons underlying the statute of repose for products liability claims. As is clear from this Court's decision in *Pulmosan Safety Equipment Corp. v. Barnes*, 752 So. 2d 556 (Fla. 2000), the Legislature violated the rights of plaintiffs suffering latent injuries when it passed that statute of repose. The fraud and products liability statutes of repose are in the same statute.

The justifications this Court found demonstrated the requisite overpowering public necessity in *Carr v. Broward County*, 541 So. 2d 92 (Fla. 1989), were not stale memories and other difficulties in proving claims based on distant conduct. Instead, the Court referred to the necessities on which the district court in *Carr* had relied: legislative findings related to skyrocketing medical malpractice insurance policies and the resulting crisis of doctors curtailing their practices, retiring, or practicing defensive medicine. *Id.* at 94-95 (quoting *Carr v. Broward Cnty.*, 505 So. 2d 568, 575 (Fla. 4th DCA 1987)). The Legislature has made no findings or given any suggestion that there is some crisis in Florida about skyrocketing costs for insurance against fraud or that those who engage in fraud need protection.

In short, the statute of repose for fraud falls on the same side of the spectrum as the statute of repose for products liability claims found in the same statute and invalidated in latent disease cases in *Pulmosan*. It is nothing like the statute of repose the Legislature enacted to protect doctors, which was upheld in *Carr*. If the statute of repose were applied as the Fourth District held and PM USA argues, then the tobacco industry will have escaped liability for its heinous fraud simply because its deadly products cause latent diseases that rarely, if ever, manifest in time for the fraud cause of action to accrue before it is barred.

The decision below should therefore be quashed, and this Court should make clear that the statute of repose is not a viable defense in *Engle* litigation.

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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