

>> NEXT CASE FOR THE DAY IS HESS
VERSUS PHILIP MORRIS.

>> GOOD MORNING AND MAY IT
PLEASE THE COURT,

MR. CANTERO AND I HAVE SWITCHED
ROLES.

HE WILL NOW ASSUME THE ROLE OF
THE RESPONDENT AND I'M THE
PETITIONER IN THIS CASE.

BECAUSE WE COME FROM THE FOURTH
DCA WHERE WE HAVE DIFFERENT
PROCEDURAL BACKGROUND.

HERE WE HAD A VERDICT FOR THE
PLAINTIFF BUT THE VERDICT
SPECIFICALLY BROKE DOWN WHEN THE
STATEMENTS WERE ON WHICH THE
JURY FOUND THE PLAINTIFF RELIED.
AND SAID THOSE STATEMENTS WERE
PRE-1982.

THE FOURTH DCA SAID THE
ANSWER TO THAT QUESTION
ESTABLISHED THE QUESTION OF THE
STATUTE OF REPOSE DEFENSE.

>> CAN YOU ANSWER, MR. CANTERO
SAID AS TO THE LAST ENGLE ISSUE
IN PHASE TWO, THERE WAS A JURY
INSTRUCTION GIVEN AS TO THE
THREE PLAINTIFFS AS TO THE MAY
1982 BEFORE AND AFTER.

>> YES.

>> COULD YOU EXPLAIN HOW THAT
FACTORS INTO WHAT WOULD --

>> ABSOLUTELY.

I CAN EXPLAIN AND A LITTLE BIT
OF A INTRODUCTION TO GET TO
EXACTLY THAT ANSWER I THINK
WOULD HELP BECAUSE
PHILIP MORRIS'S ARGUMENT IN THIS
CASE, MR. CANTERO'S WHOLE
ARGUMENT IN THIS CASE, RESTS ON
A FUNDAMENTAL MISUNDERSTANDING
OF ENGLE AND OF THIS COURT'S
HOLDING IN ENGLE AND THE TRIAL
COURT'S DEALING WITH THIS IN
ENGLE.

MR. CANTERO STARTED HIS ARGUMENT
AND ENDED HIS REBUTTAL BY
TALKING ABOUT, WE DON'T KNOW
WHAT FRAUD INJURED WHICH CLASS
REPRESENTATIVES AND WHICH

CONCEALMENT INJURED WHICH CLASS REPRESENTATIVES.

THAT'S A FUNDAMENTAL MISUNDERSTANDING OF ENGLE. IN ENGLE THERE WERE TWO KIND OF FRAUD CLAIMS.

THERE WAS A MISREPRESENTATION CLAIM, AND CONSPIRACY TO MISREPRESENT, AND THE CONCEALMENT AND CONSPIRACY TO CONCEAL.

THIS COURT REJECTED RES JUDICATA EFFECT FOR THE MISREPRESENTATION CLAIMS.

SAID THAT IS NOT COMMON TO ALL CLASS MEMBERS BECAUSE EACH CLASS MEMBER HEARD DIFFERENT STATEMENTS.

THERE WERE DIFFERENT FRAUDS. WHEN IT IS AN AFFIRMATIVE STATEMENT GIVING FALSE INFORMATION, JUSTICE QUINCE, AS YOU USED THAT TERM, THAT IS ACTUALLY A MISREPRESENTATION CLAIM.

THAT IS SAYING THEY SAID SOMETHING FALSE AND WE RELIED ON THAT.

THAT IS NOT CONCEALMENT. THIS COURT CORRECTLY HELD IN ENGLE THAT THE MISREPRESENTATION DOESN'T HAVE RES JUDICATA EFFECT BECAUSE IT IS NOT SPECIFIC TO THE WHOLE CLASS.

SOME PEOPLE HEAR DIFFERENT THINGS.

THAT'S WHY WE DON'T GET THE MISREPRESENTATION CLAIM.

IF WE WANT TO PROVE MISREPRESENTATION WE PROVE IT UP FROM THE GET-GO.

THIS IS FALSE STATEMENT THEY MADE AND THIS IS WHY IT WAS FALSE AND IT WAS MATERIAL AND THEY RELIED ON IT.

CONCEALMENT IS THE COUNTER TO THAT AND THIS COURT SPECIFICALLY FOUND THAT THE CONCEALMENT CLAIM IN THE ENGLE CASES IS COMMON TO EVERYBODY.

IT'S THE SAME FRAUD TO
EVERYBODY.
AND THAT IS THAT BEGINNING WITH
THE CONSPIRACY, THE CONSPIRACY
BEGAN IN 1953.
BUT IT DOES NOT MATTER.
INDIVIDUAL CONCEALMENT STARTED
BEFORE THAT TYPE.
EITHER WAY WE HAD A SINGLE
COURSE OF CONDUCT OF CONCEALING
FROM THE VERY BEGINNING, THEY
KNEW FROM THEIR OWN RESEARCH
THAT CIGARETTES CAUSED CANCER.
THEY KNEW FROM THEIR OWN
RESEARCH THAT NICOTINE IN
CIGARETTES WAS ADDICTIVE.
THEY MADE IT SO.
THEY ENGINEERED IT TO MAKE IT
MORE ADDICTIVE.
YET THEY CONCEALED ALL OF THAT
FROM EVERYBODY.
IT IS THAT CONCEALMENT.
THAT IS A UNIFORM COURT.
IT IS NOT LIKE SELLING PINTOS.
IT WAS A UNIFORM FRAUD THAT WAS
COMMITTED AGAINST EVERYBODY
EVERY CLASS MEMBER IS THE SAME.
SO THE RELIANCE THAT THE CLASS
MEMBERS HAVE TO PROVE IS NOT
THAT THEY RELIED ON SOME
STATEMENT.
NOW THEY CAN PROVE THAT.
IF THEY SHOW THEY RELIED ON A
FALSE STATEMENT THEY HAVE PROVEN
UP A MISREPRESENTATION CLAIM
WITHOUT THE ENGLE FINDINGS.
BUT FOR THE ENGLE CONCEALMENT
CLAIM ALL THEY HAVE TO PROVE IS
THAT IF THE DEFENDANT HAD TOLD
ME WHAT HE KNEW, IF THE
DEFENDANT, IF THE DEFENDANTS HAD
DISCLOSED WHAT THEY KNEW ABOUT
SMOKING, I WOULD HAVE AVOIDED
INJURY.
AND SO IT'S THE FAILURE TO DO
SOMETHING --
>> WHY SHOULDN'T THEY JUST BE
ABLE TO PROVE THEIR PART OF THE
CLASS?
>> IF THEY'RE A MEMBER OF THE

CLASS THEY GET THE BENEFIT OF THE FINDING THERE WAS CONCEALMENT AS TO THE WHOLE CLASS.

>> RIGHT.

>> SO THEY'RE IN THAT, AS SOON AS THEY PROVE CLASS MEMBERSHIP THEY HAVE PROVEN FRAUDULENT CONCEALMENT.

>> THEY STILL HAVE TO, YOU AGREE FOR THEIR CAUSE OF ACTION THEY HAVE TO PROVE THEY RELIED ON FALSE STATEMENTS?

>> THEY DO NOT.

NO THEY HAVE TO PROVE THEY RELIED ON ABSENCE OF STATEMENTS. THAT THERE WAS NO STATEMENT EVER MADE.

THEY NEVER TOLD ME WHAT THEY KNEW.

AND HAD THEY TOLD ME I RELIED ON THEIR SILENCE.

REALLY RELIANCE ON SILENCE.

>> SO, OKAY.

THERE ARE TWO PARTS TO THIS, MISREPRESENTATION AND THE CONCEALMENT BY NOT REPRESENTING.

>> RIGHT.

>> MAKING ANY STATEMENT.

AND SO WHAT WE HAVE IN HESS HERE IS REALLY, YOU'RE TALKING ABOUT THEIR FAILURE TO SAY, TO GIVE THE INFORMATION THAT THEY HAD AS OPPOSED TO MAKING ANY AFFIRMATIVE STATEMENT?

>> THAT'S CORRECT.

NOW THE DUTY TO DISCLOSE WAS PROVEN IN ENGLE, BASED ON SOME STATEMENTS AND THOSE STATEMENTS COME IN INDIVIDUAL CASES.

SOMETIMES YOU SHOW THAT THEY HEARD A SPECIFIC STATEMENT THAT OMITTED INFORMATION.

AND THAT WOULD SUFFICE.

BUT JUST TO DELVE REAL QUICKLY INTO THE EVIDENCE, THAT THIS COURT CONSIDERED FINDING CONCEALMENT WAS COMMON TO EVERYBODY BUT MISREPRESENTATION WAS NOT, IF YOU DELVE JUST A

LITTLE BIT INTO THE EVIDENCE,
THE CONSPIRACY IN THIS CASE
BEGAN WITH A MEETING OF THESE
EXECUTIVES IN THE PLAZA HOTEL IN
1953.

THAT'S WHERE THEY AGREED TO
CONCEAL WHAT THEY KNEW AND TO
CREATE THIS CONTROVERSY OF
DOUBT.

AND THE VERY FIRST PRODUCT OF
THAT CONSPIRACY WAS AN
ADVERTISEMENT THAT THEY PUT OUT.
IT'S CALLED THE FRANK STATEMENT.
IT IS IN THE RECORD.

IT IS IN THE RECORD IN ALL OF
THESE CASES.

THAT WAS PUBLISHED IN OVER 200
NEWSPAPERS ACROSS THE WORLD TO
EVERYBODY.

IN THAT, THEY SAID, WE THE
TOBACCO COMPANIES AND SHAM
INDUSTRIES THAT THEY FORMED,
ACCEPT A PARAMOUNT
RESPONSIBILITY OF PROTECTING THE
HEALTH OF CONSUMERS AND WE WILL
RESEARCH AND FIND IF THERE ARE
ANY DANGERS IN SMOKING AND IF
THERE ARE, WE'LL TAKE OUT THE
DANGEROUS CHEMICALS AND WE'LL
TELL EVERYBODY.

THAT'S THE CONSPIRACY.

THE CONCEALMENT INDIVIDUALLY
BEGAN BEFORE THEN BUT IN 1953
THEY ALL AGREED TO DO THAT.
THEY UNDERTOOK A DUTY TO
DISCLOSE WHAT THEY KNEW AND THEY
MADE LOTS OF FALSE STATEMENTS
TOO.

THEY AFFIRMATIVELY SAID IT
DOESN'T CAUSE CANCER.

NOBODY HAS PROVEN THAT IT IS NOT
ADDICTIVE.

IT IS CONCEALMENT OF WHAT THEY
KNEW.

THAT IS AN ONGOING THING.

THE WAY THEY END, THE ANSWER TO
YOUR QUESTION ABOUT THE PINTOS,
CHIEF JUSTICE POLSTON, IS, THESE
DEFENDANTS HAD THE KEYS TO THE
STATUTE OF REPOSE.

ALL THEY HAD TO DO WAS COME FORWARD WITH THE INFORMATION THAT THEY KNEW. THE MINUTE THEY STOPPED THE LIE, THE LIE BY CONCEALMENT THAT WE'LL TELL YOU AS SOON AS WE KNOW SOMETHING, THEN THEY WEL KNEW THE DANGERS AND WERE CONCEALING IT, AS SOON AS THEY SAID YES, WE ADMIT IT, WE KNOWN IT ALL ALONG, WE KNOW IT NOW, THE STATUTE WOULD BEGIN, THE STATUTE OF REPOSE PERIOD. THEN THEY WOULD HAVE 12 YEARS.

>> SO WHEN DO YOU -- ARE YOU IN AGREEMENT THAT THE STATUTE OF REPOSE IN THIS CASE WAS 1982 TO 1984?

>> IT WAS 1982.

>> 1982?

>> MAY 5th, 1982.

IT WAS ESTABLISHED IN ENGLE. IN OUR CASE WE WON THIS ON SUMMARY JUDGMENT BEFORE TRIAL. THIS ISN'T A INDIVIDUAL CASE. RELIANCE ON ANY CLASS MEMBERS SHOULD BE IRRELEVANT. TWO SEPARATE REASONS THAT JUDGE KAYE RELIED UPON IN ENGLE. NOW I'M GETTING REAL ANSWER TO YOUR QUESTION. I HAD TO THIS KIND OF SET IT UP. IN THE FIRST CLASS ACTION TRIAL, THE PHASE ONE TRIAL WITH EVERYBODY, THE VERDICT FORM FOR BOTH THE FRAUD, AFFIRMATIVE AND CONCEALMENT HAD BEFORE OR AFTER MAY 5, 1982. THE REASON FOR THAT IT IS THE REPOSE DATE. AFTERWARDS THEY ARGUED ANY FRAUD FROM BEFORE 1982 IS NOT ACTIONABLE BECAUSE THAT'S BARRED BY THE STATUTE OF REPOSE AND YOU HAVE TO LIMIT IT TO POST-1982. THEY SOUGHT A DIRECTED VERDICT ON THAT BASIS. IT WAS DENIED. IT WAS SUMMARILY DENIED BY JUDGE KAYE.

HE DIDN'T TELL US AT THAT POINT HIS REASONING.

SO WE THEN WENT TO PHASE 2-A AFTER WHERE WE HAD THE THREE CLASS REPRESENTATIVES TRY THEIR CASE.

THEN WE HAD BEFORE 1982 AND AFTER 1982.

>> IT WAS, THEY WERE LOOKING TO, WE DON'T KNOW WHAT WE'RE GOING TO DO LATER BUT WAS THE DATE USED BOTH FOR THE MISREPRESENTATION AS WELL AS THE FRAUDULENT CONCEALMENT IN THAT CASE?

>> IT WAS.

>> SO THAT, BUT YOU'RE SAYING THAT THAT, WAS ERRONEOUS, I'M THINKING THAT YOU'RE ARGUMENT WOULD BE THAT'S ERRONEOUS AS TO FRAUDULENT CONCEALMENT.

>> YES, AS TO BOTH. IT WAS NOT NECESSARY.

AND HE RULED THUS AFTER THE CASE.

BECAUSE THE MOTION WAS SO, SO THE JURY, BOTH PHASES CHECKED YES BEFORE AND AFTER.

SAID IT WAS CONTINUING BEFORE AND AFTER.

>> BUT YOUR ARGUMENT, IS IT YOUR POSITION THAT WHAT WE DID IN ENGLE WAS SEPARATING OUT MISREPRESENTATION FROM FRAUDULENT CONCEALMENT RENDERS THE FINDINGS ON FRAUDULENT CONCEALMENT AT LEAST FOR PURPOSES OF THE STATUTE OF REPOSE WAS RES JUDICATA?

>> YES.

I DON'T MEAN TO SAY YOU WERE, LET ME LOOK AT THE HISTORY OF IT BECAUSE IT IS IMPORTANT.

BETWEEN PHASE ONE, AND PHASE 2-A THEY LIMITED TO DIRECT VERDICT TO POST-1982 FRAUD THAT WAS DENIED SUMMARILY.

THE PHASE 2-A TRIAL THE JURY SAYS BEFORE AND AFTER.

ULTIMATELY THE FINAL JUDGMENT

THE COURT WOULD REVIEW.
IN THE FINAL JUDGMENT THE
TRIAL COURT DENIED RENEWED
MOTION FOR DIRECTED VERDICT.
THEY MADE THE SAME ARGUMENT.
WAS TO BE LIMITED TO PRE,
POST-1982 FRAUD.
JUDGE KAYE SAID NO.
THE HE SAID THE REASON I'VE BEEN
DENYING THIS ALL ALONG.
PULMOSAN IS THIS COURT'S CASE
LATENT DISEASE CASES.
THESE CAUSES OF ACTION DON'T
BELONG, EVEN IF YOU FIND OUT ABOUT
THE FRAUD AND YOU QUIT, YOU
DON'T HAVE A CAUSE OF ACTION
UNTIL YOU GET LUNG CANCER.
YOU DON'T GET LUNG CANCER
UNTIL YEARS AFTER EVEN IF YOU
ALREADY QUIT.
THIS COURT HELD YOU CAN'T APPLY
A STATUTE OF REPOSE TO BAR A
LATENT INJURY CASE BECAUSE IT
WOULD KNOCK OUT THE CAUSE OF
ACTION BEFORE IT EVER ACCRUED.
IT MADE A DISTINCTION BETWEEN
LATENT INJURIES AND NON-LATENT
INJURIES CASE.
THAT WAS THE PULMOSAN CASE.
IT WAS BRIEFED IN BOTH CASES
BEFORE THIS COURT.
I DON'T THINK YOU NEED TO REACH
IT BECAUSE WE'RE SO CLEAR ON
ENGL, THAT WAS ONE OF JUDGE
KAYE'S BASIS AND IT WAS ENTIRELY
CORRECT.
HE SAID THE STATUTE OF REPOSE
UNCONSTITUTIONAL IN THIS CASE.
BASED ON THE VERDICT BEFORE AND
AFTER HE SAID LASCHKE.
THE LASCHKE WAS THE SECOND DCA
CASE THAT SAID WHEN YOU HAVE A
CONTINUING FRAUD.
IT WAS A CONSPIRACY BUT IT
WASN'T THE FACT IT WAS A
CONSPIRACY.
IT WAS THE FACT IT WAS A SINGLE
CONTINUING FRAUD.
THAT IT IS THE LAST ACT IN
FURTHERANCE OF THAT FRAUD THAT

TRIGGERS THE STATUTE.
AS SOON AS YOU END THE FRAUD,
THE STATUTE OF REPOSE ENDS.
SO JUDGE KAYE RELIED ON BOTH OF
THOSE OF THE DEFENDANTS
ABANDONED THE STATUTE OF REPOSE.
THEY DID NOT RAISE IT BEFORE
THIS COURT.
IT CAME BEFORE THIS COURT AND
HAD THEY WANTED TO THEY SHOULD
HAVE MADE THE ARGUMENT, NO, THE
CONCEALMENT FINDING DOES NOT
HAVE RES JUDICATA EFFECT BEFORE
1982.
IT IS ONLY POST-1982 CONCEALMENT
THAT SHOULD APPLY.
THEY DIDN'T MAKE THAT ARGUMENT
OF THE HAD THEY MADE THAT
ARGUMENT I THINK THIS COURT
WOULD HAVE REACHED SAME RULING.
WOULD HAVE REJECTED THAT ALL FOR
YOU WILL REASONS WE'RE SAYING
BUT IT DIDN'T.
BUT IT DIDN'T.
NONE OF THAT GOT RESOLVED AND OR
GOT ADDRESSED THIS COURT HELD
WITHOUT QUALIFICATION THAT
ENTIRE FINDINGS APPLY,
CONCEALMENT AND CONSPIRACY, NO
LIMITATION TO JUST POST 1982.
THAT BECAME LAW OF THE CASE.
THAT WAS RES JUDICATA.
THAT IS WHY JUDGE STREITFELD
KNOCKED THIS DEFENSE AND SEVERAL
OTHERS DEFEND WENT TO DEFENSE
CONDUCT OUT OF THE CASE.
YOU DON'T NEED TO ADDRESS THE
MERITS WHETHER RELIANCE
MATTERS OR WHETHER IT IS
CONSTITUTIONAL OR ANYTHING
BECAUSE JUDGE KAYE DID ALL OF
THAT THEY LOST ON IT AND THEY
DIDN'T APPEAL IT AND THAT BECAME
LAW OF THE CASE OF THE THAT IS
WHY WE START WITH THE SUMMARY
JUDGMENT ARGUMENT.
REALLY WHAT THEY'RE DOING HERE,
I DON'T KNOW MR. CANTERO HAS
THIS INTENT BUT WHAT THE
DEFENDANTS ARE DOING IS THEY'RE

TRYING, THEY'RE PLANTING SEEDS FOR ANOTHER COLLATERAL ATTACK ON ENGLE BECAUSE WHEN THEY KEEP TALKING ABOUT, WE DON'T KNOW WHICH CONCEALMENT, WE DON'T KNOW WHICH ACT OF CONCEALMENT, ALL THEY'RE DOING THEY'RE MAKING SAME ARGUMENT THIS COURT REJECTED IN ENGLE AND DOUGLAS AND THEY'RE APPLYING IT TO THE FRAUD.

THEY'RE SAYING WE CAN'T TELL FROM THIS VERDICT FORM WHO INFORMATION WAS CONCEALED FROM. THIS COURT REJECTED THAT ARGUMENT.

THIS COURT HELD THAT WOULD BE TRUE AS TO THE MISREPRESENTATION BECAUSE WE DON'T KNOW WHO WAS MISREPRESENTED TO, AFFIRMATIVE STATEMENTS THAT WOULD VARY BY CLASS MEMBERS SO THAT WAS NOT APPROPRIATE TO DETERMINE ON A CLASS BASIS BUT THE CONCEALMENT YOU HAD TO HAVE, YOUR OPINION DOESN'T EXPRESSLY GO THROUGH ALL OF THIS, BUT IT HAD TO HAVE MEANT THAT WHEN YOU SAID MISREPRESENTATION SO NOT COMMON TO EVERYBODY.

IT IS TOO GENERIC, BUT CONCEALMENT IS, THAT IS WHAT YOU HAD TO MEAN.

WHAT THEY'RE TRYING TO DO AND EVEN A LOT OF QUESTIONS TODAY WERE RELIANCE ON STATEMENTS AND RELIANCE ON FALSE INFORMATION, THAT'S A TRAP.

THAT'S A TRAP FOR THEM TO GO, THEY'RE IN FEDERAL COURT RIGHT NOW SAYING THAT DOUGLAS DIDN'T APPLY TO THE FRAUD CLAIMS AND THAT WE HAVE THIS, THE SAME ARGUMENT WE'RE HEARING RIGHT NOW, THEY'RE MAKING IN THE 11th CIRCUIT TO SAY THAW VIOLATED THEIR DUE PROCESS RIGHTS BECAUSE YOU CAN'T TELL WHICH CONCEALMENT. AND THAT'S JUST NOT TRUE BECAUSE

THIS COURT MADE THE DETERMINATION AND IT WAS A CORRECT DETERMINATION THAT THE CONCEALMENT APPLIED TO EVERYBODY.

>> LET ME ASK YOU.

THE BOTTOM LINE, I WANT TO BE CLEAR IN MY MIND OF WHAT IT IS YOU'RE SAYING.

>> SURE.

>> SO THE BOTTOM LINE HERE IS THAT BECAUSE THIS WAS AN ONGOING CONSPIRACY OF CONCEALMENT, THAT, THE STATUTE OF REPOSE IS NOT APPLICABLE?

>> YES.

WELL, BECAUSE IT IS AN ONGOING, LASTED BEYOND THE REPOSE DATE. YOU HAVE TO HAVE THAT.

COMBINE THIS COURT'S HOLDING IN KUSH, THAT IT IS DEFENSE CONDUCT WITH ITS HOLDING IN ENGLE AFFIRMED BY DOUGLAS, THAT DOUGLAS ESTABLISHED EVERYTHING YOU NEED TO KNOW ABOUT THE DEFENSE CONDUCT.

BECAUSE OF THAT FINDING FROM ENGLE, THAT'S WHY THE STATUTE OF REPOSE DOES NOT APPLY IN ENGLE CASES TO CLASS MEMBERS.

IF YOU'RE NOT A CLASS MEMBER YOU HAVE TO PROVE IT WAS CONTINUING AND IT CONTINUED AFTER 1982 EVEN THOUGH THE WHOLE WORLD NOW KNOWS THAT IS THE CASE HE JUSTICE QUINCE YOU ASKED EARLIER I WANT TO MAKE SURE YOU GET A CORRECT ANSWER, YOU ASKED WHETHER THE FRAUD CLAIMS ARE ONLY BASIS FOR PUNITIVE DAMAGES IN THESE CASES? THE ANSWER YOU GOT WAS YES.

THAT IS THEIR POSITION.

THAT POSITION HAS BEEN REJECTED AND ACTUALLY BEFORE THIS COURT IN A STATE CALLED SOF.

THIS COURT ACCEPTED JURISDICTION THE QUESTION WHETHER YOU BET PUNITIVE DAMAGES ON STRICT LIABILITY CLAIMS.

THAT IS COMING.

WE'LL BE BACK TO TALK ABOUT THAT
WE JUST FILED --

>> THANK YOU VERY MUCH.

>> IS THERE A DATE AT WHICH ON
CONCEALMENT THAT STATUTE OF
REPOSE HAS BEEN TRIGGERED?

>> WE STILL HAVE NOT
TRIGGERED THAT DATE YET?

>> IT DOESN'T MATTER IN ENGLE
CASES, IF YOU'RE AN ENGLE
CLASS MEMBER, YOU SATISFIED
STATUTE OF REPOSE IT.

PROBABLY WAS TRIGGERED IN
2000 WHEN THEY CAME CLEAN TO
CONGRESS AND SAID WE'VE BEEN
CONCEALING THIS ALL ALONG, WE
FINALLY ADMIT, SMOKING IS
ADDICTIVE, YES, IT CAUSES
CANCER.

>> ALL THE ENGLE MEMBERS HAD
TO BRING THE CASE WITHIN
WHAT?

A YEAR AFTER THE CASE WAS
DECIDED.

>> YES, THE STATUTE OF
LIMITATIONS AND STATUTE OF
REPOSE IS IRRELEVANT TO ALL
OF THAT.

YOU FOUND THE CLASS WAS
APPROPRIATE, YOU AFFIRM CLASS
CERTIFICATION, IF THEY
REMEMBER THE CLASS, THE CLASS
COMPLAINT WAS THEIR
COMPLAINT.

ALL THESE PEOPLE, MS. HESS
STARTED HER CASE IN 1994 IN
THE ENGLE LAWSUIT.

THAT WAS HER INDIVIDUAL
COMPLAINT AS MUCH AS
EVERYBODY'S.

THAT WAS A CLASS-ACTION
COMPLAINT AND THE JURY FOUND
SHE WAS A MEMBER OF THAT
CLASS.

>> AS TO NON-ENGLE CLASS
MEMBERS IT WOULD BE 2000 IS
THE TRIGGER DATE.

WE'RE WORKING 2000-2012.
THAT IS YOUR POSITION?

>> THAT'S PROBABLY CORRECT ON

THE FACT, I WOULD HAVE TO GO
BACK AND LOOK, YOU COULD
MAYBE -- A CREATIVE PLAINTIFF
COULD SAY THEY DIDN'T
COMPLETELY COME CLEAN.

>> I'M SURE.

>> IT DOESN'T MATTER IN THESE
CASES.

>> IT WOULD BE PRETTY HARD,
THAT WOULD BE REALLY
SPECULATIVE FOR SOMEBODY WHO
NOW CONTINUES TO SMOKE TO SAY
THAT THEY DIDN'T KNOW ABOUT
THE HARM.

>> THAT'S WHY YOU'RE NOT
SEEING THOSE CASES.

YOU KNOW, YOU'RE SEEING
CASES, ENGLE CLASS MEMBERS
STARTED IN 40S, 50 AND 60S,
THE NATURE OF THE CASES THESE
DISEASES TAKE YEARS TO
DEVELOP SO YOU HAVE TO GO
BACK.

THESE ARE PEOPLE WHO ALMOST
STARTED SMOKING BEFORE
WARNING LABELS.

AS LATE AS 1994, THE YEAR THE
COMPLAINT WAS FILED IN THIS
CASE, THEY WERE SAYING WE
DON'T KNOW, WE DON'T KNOW IF
IT CAUSES CANCER, WHEN THEY
DID KNOW.

IT DEFINITELY CONTINUED
BEYOND THAT POINT.

I DON'T WANT TO USE UP ALL OF
MY REBUTTAL TIME, WE HAVE
ALTERNATIVE ARGUMENTS, I
DON'T THINK YOU NEED TO GET
THERE, I'M LARGELY GOING TO
RELY ON OUR BRIEFS FOR THAT.
BUT EVEN IF RELIANCE WERE
RELEVANT HERE, IT'S NOT THE
QUESTION SUBMITTED ON THE
JURY THAT THE JURY ANSWERED.
THIS JURY FOUND WE DIDN'T
PROVE THE STATEMENTS WERE
MADE WHICH WE RELIED IN 1982.
WE DIDN'T HAVE STATUTE OF
REPOSE.

THAT WAS THEIR BURDEN, OUR

BURDEN WAS TO PROVE RELIANCE AT SOME POINT AND LIKE THE STATUTE OF LIMITATIONS YOU HAVE TO PROVE YOUR CASE FIRST AND THEY HAVE THE BURDEN TO COME ON, IF WE MEET, THAT THE BURDEN SHIFTS TO THEM TO SAY NO, NO, WHATEVER RELIANCE THERE WAS ENDED IN 1982. IF RELIANCE WERE RELEVANT, THE PROPER JURY QUESTION WOULD BE DID THE DEFENDANT PROVE RELIANCE ENDED BEFORE 1982?

WE DON'T HAVE ANY OF THAT. ALTERNATIVELY, WE GO BACK TO WHERE WE BEGAN.

JUDGE KAYE FOUND THE STATUTE OF REPOSE IS UNCONSTITUTIONAL UNDER THIS COURT'S HOLDING IN PULMOSAN.

THIS COURT HELD ONE EXCEPTION TO THE LATENT DISEASE EXCEPTION TO THE STATUTE OF REPOSE FOR THE MED MAL STATUTE OF REPOSE.

THE LEGISLATURE MADE DETAILED FINDINGS OF A MEDICAL MALPRACTICE CRISIS THAT WILL SOUND FAMILIAR TO YOU BASED ON RECENT RECALL DECISION, THAT WAS AN EARLIER ACT AND THE COURT SAID THE FINDINGS WERE SUFFICIENT AND IN THE MED MAL CONTEXT, THE STATUTE OF REPOSE CAN KNOCK OUT A CASE.

BEFORE THAT, THEY SAID THEY LIMITED THAT, YOU MAY CLEAR YOU LIMITED IT TO MED MAL, AND THE PULMOSAN CAUSE.

IN PULMOSAN, THE COURT SAID NO, THE LATENT INJURY DISEASE EXCEPTION IS ALIVE AND WELL, TO A PRODUCT'S LIABILITY NOT A FRAUD CASE THERE, THERE'S NO REASON TO MAKE A DISTINCTION.

THERE HAVE BEEN NO LEGISLATIVE FINDINGS OF A

FRAUD CRISIS THAT WE NEED TO PROTECT FRAUDSTERS. THE PURPOSE OF THE STATUTE OF REPOSE IS TO GIVE A DEFENDANT PEACE OF MIND 12 YEARS FROM WHEN THEY STOP THE CONDUCT. THEY HAVE THE KEYS, IF THEY WANT TO START THE CLOCK, ALL THEY HAVE TO DO IS COME CLEAN.

IF THEY CONTINUE TO CONCEAL, THAT CONTINUE THAT SAME ACT, THAT SAME CONDUCT, THE STATUTE NEVER RUNS AND THE LEGISLATURE HAS NOT SAID THAT FRAUDSTERS GET A SPECIAL BREAK.

THANK YOU.

I HAVE TWO SECONDS.

>> MAY IT PLEASE THE COURT? RAOUL CANTERO FOR PHILIP MORRIS.

I'D LIKE TO START OFF WITH THIS WHOLE ISSUE OF CONCEALMENT AND THE DISTINCTION BETWEEN CONCEALMENT AND A STATEMENT. FIRST OF ALL, IT DOESN'T MATTER TO YOUR DECISION TODAY BECAUSE WHETHER IT'S AN AFFIRMATIVE STATEMENT OR CONCEALMENT, THE PLAINTIFF STILL HAS TO RELY ON IT.

>> BUT IS IT -- I HAVE TO GO BACK TO ENGLE, AND I'M SURE YOU ARE VERY FAMILIAR WITH THE CASE.

BUT WE DID MAKE A DISTINCTION BETWEEN FRAUDULENT CONCEALMENT CLAIMS AND MISREPRESENTATION CLAIMS AS TO WHAT THE PLAINTIFFS HAD APPROVED AFTER ENGLE.

SO COULD YOU ADDRESS THAT ASPECT OF WHAT ENGLE SAID AND WHETHER -- AND I KNOW YOU DON'T FEEL YOU ARE, BUT IT FEELS LIKE MAYBE YOU ARE COMPLAINING THE TWO?

>> I DON'T THINK SO, YOUR

HONOR.

>> TELL MEET DIFFERENCE
BETWEEN A MISREPRESENTATION
CLAIM AND A FRAUDULENT
CONCEALMENT CLAIM.

>> A MISREPRESENTATION
CLAIM†--

>>†IN THE CONTEXT OF ENGLE?

>> THEY ARE SIMILAR, BECAUSE
IN ENGLE IN AFFIRMATIVE
MISREPRESENTATION CLAIM IS A
STATEMENT THAT IS FALSE.

>> DID WE DISTINGUISH -- WHAT
I'M ASKING, DIDN'T ENGLE
DISTINGUISH BETWEEN THE TWO
TYPES OF CLAIMS?

>>†IT DID.

IT DIDN'T SAY YOU HAVE TO
PROVE RELIANCE ON FRAUDULENT
CONCEALMENT.

IT DIDN'T SAY THAT.

>> NO, OF COURSE, THAT'S THE
CAUSE OF ACTION.

>> THEY DIDN'T SAY IN
FRAUDULENT CONCEALMENT
RELIANCE IS DETERMINED AND
YOU DON'T HAVE TO SHOW THAT
IN INDIVIDUAL CASES.

IT DIDN'T SAY THAT.

AND LET ME JUST CONTINUE, IN
ENGLE, THE DIFFERENCE BETWEEN
A FRAUDULENT STATEMENT AND
CONCEALMENT IS IN A
FRAUDULENT CONCEALMENT CASE,
THE ENGLE JURY WAS INSTRUCTED
ON PAGE 37527 OF THE ENGLE
RECORD, THEY WERE IN THE
RECORD IN THIS CASE, THEY
WERE INSTRUCTED AS TO
FRAUDULENT CONCEALMENT, THE
DEFENDANTS ARE LIABLE, IF ONE
OR MORE OF THE DEFENDANTS
OMITTED OR CONCEALED MATERIAL
FACTS, THAT WOULD BE
NECESSARY TO MAKE STATEMENTS
BY SUCH DEFENDANTS, NOT
MISLEADING, AND ONLY IF ONE
OR MORE OF THE DEFENDANTS
KNEW THE STATEMENT WAS FALSE
OR MADE THE STATEMENT NOT

KNOWING WHETHER IT WAS TRUE.
IN OTHER WORDS, A HALF TRUTH.
IT WAS NOT INSTRUCTED IF THEY
WERE JUST SILENT, YOU CAN
FIND LIABILITY.

IT HAD TO BE A STATEMENT THAT
OMITTED MATERIAL INFORMATION.
AND IN FACT, IN THIS CASE,
THE PLAINTIFF CONCEDED AT THE
TRIAL, THAT THE JURY
INSTRUCTIONS HAD TO HAVE THE
WORD STATEMENT IN IT, THAT'S
ON PAGE 2480 OF THIS TRIAL
WHERE THEY WENT THROUGH THE
COLLOQUY AND THE PLAINTIFF'S
COUNSEL AGREED THAT IT HAD TO
BE A STATEMENT.

AND THEREFORE, THE JURY WAS
INSTRUCTED ON PAGE 2652 OF
THE TRIAL, AS FOLLOWS†--
YOU MUST DETERMINE WHETHER
STUART HESS RELIED TO HIS
DETRIMENT ON ANY STATEMENTS
BY PHILIP MORRIS, STATEMENTS
MADE BY PHILIP MORRIS THAT
OMITTED MATERIAL INFORMATION.

>> SO WHAT'S THE DIFFERENCE
THEN BETWEEN CONSPIRACY,
FRAUDULENT CONCEALMENT AND
MISREPRESENTATION CLAIMS IN
THE CONTEXT OF THESE CASES?
YOU ARE SORT OF SAYING
NOTHING.

>> NO, IT'S SAYING A HALF
TRUTH.

SAYING THAT CIGARETTES ARE
GREAT AND NOT SAYING THEY CAN
CAUSE CANCER.

>> WHAT ABOUT†--

>>†HAVE THE INFORMATION,
POSITIVE AND PURE INFORMATION
THAT WHAT THEY'RE SAYING
ISN'T TRUE.

ISN'T THAT WHAT THE
CONCEALMENT IS ABOUT?

>> YES, YES, I AGREE.

AT THE SAME TIME THEY'RE
SAYING THESE THINGS, A
STATEMENT WHERE THEY OMITTED
TO MAKE THAT COMPLETE

DISTINCTION.

>> MAKE THE STATEMENT THE CIGARETTES ARE SAFE AND HAVE A STUDY THAT SAYS IT'S NOT. THEY ALL AGREE THAT IT'S NOT, AND CONCEALED IT.

>> YES.

>> THAT'S THE STATEMENT THAT'S NOT REALLY SAID. ISN'T THAT THE GRASSROOTS†-- >>†SAYING CIGARETTES ARE SAFE BUT KNEW THERE WERE THE STUDIES THAT SHOW IT WAS UNSAFE THAT THAT IS A FRAUDULENT CONCEALMENT. BUT AS RELEVANT TO THIS CASE, WHICH IS ON THE STATUTE OF REPOSE, THE PLAINTIFF STILL HAS TO RELY ON THAT, SO IF A PLAINTIFF SAYS, BY 1980, I KNEW THAT THEY WERE DANGEROUS, I DIDN'T BELIEVE WHAT THEY WERE SAYING, THEN THEY ARE NO LONGER RELYING, CONCEALMENT OR STATEMENT, THEY NO LONGER RELY ON THAT.

>> THE QUESTION IS IN MY MIND -- THIS IS RATHER COMPLEX. IF STATUTE OF REPOSE, WHEN DOES IT KICK IN? ONCE THEY RELEASE THIS CONCEALED INFORMATION THAT THEY CONCEALED?

>> THAT'S WHAT THE PLAINTIFFS ARGUE, NOT WHAT WE ARGUE.

>> WHY DOESN'T IT?

ISN'T IT CONTINUANCE, THAT THEY DON'T LET THE PUBLIC KNOW?

>>†THE WORRY OF THE STATUTE OF REPOSE IS A COMMISSION OF THE ALLEGED FRAUD SO THE ALLEGED FRAUD HAS TO BE AGAINST THIS PARTICULAR PLAINTIFF.

SO IF THIS PLAINTIFF WAS NO LONGER -- IF THEY DIDN'T REVEAL THAT INFORMATION BUT THE PLAINTIFF IS NO LONGER RELYING ON THEM, THEN THAT'S

WHEN THE STATUTE OF REPOSE
KICKS IN.

FOR EXAMPLE, IN THIS CASE,
THERE WAS EVIDENCE THAT THE
PLAINTIFF KNEW THAT
CIGARETTES WERE DANGEROUS AT
SOME POINT.

SO AT THAT POINT IS WHEN THE
STATUTE OF REPOSE WOULD KICK
IN.

>> I UNDERSTAND.

BUT THE FACT IT'S CONCEALED
IN THE STUDY, ISN'T THAT WHAT
THEY'RE CONCEALING?

WHEN THEY ADMIT THAT, YES,
THIS IS IT.

WHY DOESN'T THE STATUTE OF
REPOSE START THEN?

>> IT HAS TO BE A SPECIFIC
EXAMPLE OF OMISSION.

MR. †FRANK STATEMENT WAS
AFFIRMATIVE STATEMENT THAT
OMITTED INFORMATION, THAT WAS
WAY BACK IN 1953.

>> BUT WHAT ABOUT WHAT WE
ACCEPTED IN ENGLE, SEEMS TO
ME, IS THE JURY FINDINGS
UNDER 4-A, AND 4-A, ON THE
JURY VERDICT FORM SAYS DID
ONE OR MORE OF THE DEFENDANTS
CONCEAL OR OMIT INFORMATION
NOT OTHERWISE KNOWING THAT
THE MATERIAL WAS FALSE AND
MISLEADING, OR FAILED TO
DISCLOSE A MATERIAL FACT
CONCERNING OR PROVING THE
HEALTH EFFECTS AND/OR
ADDICTIVE NATURE OF SMOKING
CIGARETTES?

AND THEY ANSWER, YES.

AND ALL THIS OCCURRED BEFORE
AND AFTER MAY 5TH, 1982.

AND THAT QUESTION

SPECIFICALLY SAYS OR FAILED
TO DISCLOSE A MATERIAL FACT.

>> YES, BUT THAT'S IN
CONJUNCTION WITH THE JURY
INSTRUCTION GIVEN TO THEM
WHICH SAYS THEY ARE LIABLE
ONLY IF ONE OF THE DEFENDANTS

OMITTED OR CONCEALED FACTS
THAT WOULD BE NECESSARY TO
MAKE STATEMENTS BY DEFENDANTS
NOT MISLEADING.

>> I'M NOT SURE THAT YOU
ANSWERED MY QUESTION ABOUT
THE SIGNIFICANCE OF ENGLE
STATING THAT THE -- AS TO
FRAUDULENT CONCEALMENT.
THERE WAS RES JUDICATA EFFECT
BUT AS TO MISREPRESENTATION,
THERE HAD TO BE RELIANCE AS
TO THE INDIVIDUAL PLAINTIFF.
NOW, AGAIN, UNDERSTANDING THE
DIFFERENCE BETWEEN THE CAUSE
OF ACTION AND THE STATUTE OF
REPOSE, AND REALIZING WE
DIDN'T DISCUSS STATUTE OF
REPOSE.

>> WHAT THE COURT WAS SAYING
IS THE JURY IN ENGLE PHASE
ONE FOUND THAT THERE WAS
CONCEALMENT.

>> AFTER MAY.

>> BEFORE AND AFTER MAY OF
1982.

HOWEVER, THEN THERE WAS PHASE
2-A WHERE PARTICULAR
PLAINTIFFS STILL HAD TO SHOW
THAT THEY RELIED ON A
MISREPRESENTATION OR
MISSTATEMENT AFTER 1982,
WHICH GOING TO
MR. MILLS' ARGUMENT, BECAUSE
THE JURY IN 2-A SAYS THERE
WAS AS TO THESE THREE
PLAINTIFFS MISREPRESENTATION,
BASED ON CONCEALMENT AFTER
1982, THERE WAS NO REASON TO
APPEAL THAT BECAUSE IT WAS A
MOOT POINT.

>> WELL, I THINK THAT THE
ISSUE, I GUESS THE QUESTION
OF WHETHER IS GOING TO BE A
BINDING EFFECT TO SOMETHING
THAT WASN'T APPEALED IN A
RECORD THAT IS MAYBE --

>> WHAT IS BINDING --

>> WHAT WAS THE DISTINCTION
MADE IN ENGLE BETWEEN THE TWO

TYPES OF CAUSES OF ACTION.

>> WE'RE BOUND BY THE FACT WE CONCEAL FACTS, A PARTICULAR PLAINTIFF HAS TO SHOW THEY RELIED THEY WERE HARMED BY THE FACTS.

>> I DON'T THINK ANYONE IS DISAGREEING, THE ISSUE IS WHETHER THE RELIANCE, IF IT'S NOT AFTER 1982, GETS YOU OUT UNDER THE STATUTE OF REPOSE?

>> THAT'S WHY THE PHASE 2-A VERDICT FORM WAS THE WAY IT WAS.

AND THIS COURT DIDN'T SAY, WE DON'T NEED PHASE 2-A.

>> THE ISSUE WASN'T RAISED IN THAT REGARD.

RIGHT?

WE DIDN'T SIDE A STATUTE OF REPOSE ISSUE.

>> NO, NO, RIGHT.

BUT YOU DIDN'T DISAPPROVE OF THE FACT THERE WAS PHASE 2-A.

>> IT WOULD HAVE HAD TO HAVE BEEN BROUGHT.

THIS WAS A RECORD THAT WAS VOLUMINOUS AND HAD TO BE RAISED ON ISSUE OF APPEAL FOR US TO HAVE ADDRESSED IT.

THE FACT WE DIDN'T DISAPPROVE SOMETHING HAS VERY LITTLE†--

>>†SOMEONE IN MY POSITION WOULD HAVE ADDRESSED IT ONE WAY OR ANOTHER.

ENGLE IS NOT PRECLUSIVE TO OUR ARGUMENT HERE.

WE CANNOT ARGUE IN THESE CASES THAT WE DIDN'T CONCEAL INFORMATION AFTER 1982, BUT WE STILL CAN ARGUE WE DIDN'T CONCEAL INFORMATION FROM THIS PARTICULAR PLAINTIFF AFTER 1982 BECAUSE THIS PARTICULAR PLAINTIFF DIDN'T RELY ON THAT INFORMATION.

THAT'S WHY WE HAVE PHASE 2-A.

>> COULD WE, FOR A MOMENT, IF WE ACCEPT YOUR ARGUMENT, START WITH THAT PROPOSITION,

AND WITH REGARD SPECIFICALLY TO THE LATENT CONDITIONS, LATENT MEDICAL CONDITIONS, CREEPING ILLNESSES, AND WE HAVE A PLAINTIFF THAT, VERY CLEARLY, RELIES ON, CAN IDENTIFY EVEN, THE EXACT AD THEY RELY ON, AND IT'S PRIOR TO THE REPOSE DATE, BUT NOTHING HAS SURFACED. THAT PERSON IS DOGGING, STILL FINE.

AND IT'S NOT UNTIL THIS YEAR THAT THE CANCER EXPOSES ITSELF.

IT'S LINKED SPECIFICALLY, DIRECTLY, WITHOUT ANY DISPUTE, TO SMOKING, AND YOU'VE GOT ALL THE EVIDENCE THAT LINKS IT AND THE RELIANCE AND ALL OF THAT, BUT BEFORE THE STATUTE OF REPOSE. WHY WOULD NOT THE DIAMOND AND THE PULMOSAN LINE OF CASES SAY IT CANNOT BE APPLIED IN THAT FASHION?

>> YOUR HONOR, AS YOU KNOW DIAMOND AND PULMOSAN WERE PRODUCTS LIABILITY CASES.

>> I DO.

>> REGARDING YOUR DECISION IN THIS CASE, PLAINTIFFS STILL HAVE PRODUCTS LIABILITY ACTIONS.

>> BUT AGAIN, BUT AGAIN, THERE ARE DIFFERENT CAUSES OF ACTION THAT I'M NOT AWARE THAT DIAMOND OR PULMOSAN TALKS ABOUT THAT IT'S LIMITED TO A PARTICULAR CAUSE OF ACTION.

ANY CAUSE OF ACTION THAT YOU WOULD TERMINATE WOULD TERMINATE SOMETHING BEFORE IT EVEN ACCRUES.

>> YES.

AND THIS COURT APPROVED THAT IN THE CARR CASE, CARR V. BROWARD COUNTY, AND I WOULD LIKE TO POINT OUT WHAT THE

COURT SAID AS TO THE STATUTE OF REPOSE.

FIRST IT FOUND THAT THE 4TH DISTRICT PROPERLY APPLIED THE PRINCIPLES OF KLUGER, WAS THERE ALTERNATIVE REMEDY, OR IF NOT, WAS THERE OVERRIDING PUBLIC NECESSITY.

IN THE NEXT PARAGRAPH, THE COURT SAYS IRRESPECTIVE OF THAT FACT, WE FIND THE LEGISLATURE MAY PROPERLY TAKE INTO ACCOUNT THE DIFFICULTIES OF DEFENDING AGAINST A STALE FRAUD CLAIM AND REASONABLE PERIOD FOR THE STATUTE OF REPOSE AND FURTHER FIND SEVEN YEARS IS AN OBJECTIVELY REASONABLE PERIOD WITHIN WHICH THE LEGISLATURE MAY REQUIRE FRAUD CLAIMS BE DISCOVERED.

SO THIS COURT HAS ADDRESSED AND CONSIDERED THE PARTICULAR PROBLEMS ASSOCIATED WITH FRAUD CLAIMS AND AS THE 3RD DCA SAID IN KISCH, THESE ARE MOST SUSCEPTIBLE TO FADED MEMORIES, LOST DOCUMENTS AND YOU SEE THAT IN THESE CASES WITH A LOT OF THE WITNESSES ARE, I DON'T REMEMBER, I KNOW BACK IN 1960, SOMEBODY WAS SMOKING, WHETHER SHE RELIED, I REALLY DON'T REMEMBER.

>> TO YOUR CONDUCT, THE DIFFICULTY IS YOU'RE STILL THE CONDUCT OF WHAT THE TOBACCO COMPANIES DID, WAS SET BACK IN ENGLE.

STARTED IN 1952 AND ENDED, WHATEVER, 2000, 1994.

IT'S SO THE DIFFICULTY OF SAYING, WELL, I DON'T THINK WE ACTUALLY -- THE FRANKS REPORT, THEY'RE MISREPRESENTING WHAT IS IN THE FRANKS REPORT.

NOT TO SAY I'M GOING HAVE A DIFFICULT -- THE PERSON, THE

ENTITY THAT HAS DIFFICULTY IS THE PLAINTIFF WHO DIDN'T GET DIAGNOSED UNTIL -- UNTIL THE 90S OR THE 80S WITH ADDICTION BUT STARTED SMOKING BACK IN THE 50S.

THAT'S WHO'S HAVING THE DIFFICULTY.

NOT THE TOBACCO COMPANIES.

>> I THINK THE DIFFICULTY IS ON BOTH SIDES.

>> NOT TO THE WRONGFUL CONDUCT.

THAT'S WHAT -- YOUR -- NOT YOU, OBVIOUSLY.

>> I UNDERSTAND.

>> AS TO THE CONDUCT THAT IS THE SUBJECT FIRST OF ALL OF THE -- BOTH THE NEGLIGENCE, THE PRODUCTS LIABILITY AND THE FRAUD CLAIM.

IT'S SORT OF THE SAME IN ALL THESE CASES.

WHERE IS THE DIFFICULTY IN DEFENDING IT?

NO MATTER WHAT IS DONE.

SOMEHOW YOU'RE GETTING VERDICT FOR THE TOBACCO COMPANIES IN THESE CASES.

NOT ALL BUT SOME OF THEM.

THERE MUST BE SOMETHING YOU ARE DEFENDING ON THAT IS PRETTY SUCCESSFUL.

>> YOU HAVE TO REMEMBER WHATEVER THE COURT DECIDES IN THIS CASE HAS BROADER APPLICATIONS, THERE ARE CASES OF FRAUD WHERE THERE ARE LOST MEMORIES.

>> I'M TRYING TO UNDERSTAND, THE LOST MEMORIES OF THE TOBACCO COMPANY AS TO THEIR WRONGFUL CONDUCT?

OR THE LOST MEMORIES OF THE PLAINTIFFS SAYING, I CAN'T REMEMBER IF THAT AD THAT I SAW, THE MARLBORO MAN WAS BEFORE 1982 OR AFTER 1982.

ALL I KNOW IS THAT FROM THE TIME I WAS IN HIGH SCHOOL OR

THE TIME I WAS IN THE ARMY,
CIGARETTES WERE, TO ME,
SOMETHING THAT MADE ME MORE
OF A MAN OR A -- YOU KNOW,
THAT'S WHAT I WAS†--

>>†GLAMOROUS.

>> MORE GLAMOROUS.

RIGHT.

THAT'S WHO'S HAVING THE
DIFFICULTY OF TRYING TO
REMEMBER.

IT WAS JUST A GENERAL IDEA
THAT EVERYTHING THE TOBACCO
COMPANY.

THIS IS THEIR ARGUMENT.

>> MY POINT IS THAT THIS CASE
IS GOING APPLY ACROSS THE
BOARD TO FRAUD CASES NOT JUST
TO THESE PARTICULAR CASES.
THERE ARE CASES WHICH FRAUD
IS GOING TO AFFECT THE
DEFENDANT OR LOST MEMORIES
ARE GOING TO AFFECT THE
DEFENDANT.

>> GIVE ME AN EXAMPLE OF
WHERE.

>> NOT IN TOBACCO CASES,
WHATEVER THIS COURT DECIDES
ON STATUTE OF REPOSE APPLIES
TO ALL KINDS OF FLAWED CASES.

>> UNLESS WE DECIDE THE ENGLE
FINDING OF FRAUDULENT
CONSPIRACY BOTH BEFORE AND
AFTER 1982, WHICH WAS
LITIGATED BACK IN THE 90S,
NOT IN 2014, IS THAT'S WHAT
MAKES THIS CASE DIFFERENT
FROM OTHER CASES THAT MAY
ARISE IN THE FUTURE.

>> I THINK THERE IS STILL A
PURPOSE TO THE STATUTE OF
REPOSE.

IF SOMEBODY RELIES ON A
STATEMENT THAT WAS MADE IN
1953, AND STOPS RELYING ON
THAT STATEMENT.

LET'S SAY IN 1970, WHEN SHE
SAW THE WARNINGS ON THE
CIGARETTE PACKS THAT
SPECIFICALLY SAID THAT

CIGARETTES ARE HARMFUL TO
YOUR HEALTH, UNDER THE
STATUTE OF REPOSE, WHY SHOULD
A PLAINTIFF BE ALLOWED TO
FILE A CASE 20 YEARS LATER?

>> ISN'T IT THE ABSENCE OF
THE MEMORY?

THAT'S THE PROBLEM WHICH IS
-- WHAT ABOUT THE IDEA THIS
IS TURNING THE BURDEN OF
PROOF ON THIS AFFIRMATIVE
DEFENSE ON ITS HEAD?

IS THAT -- COULD YOU.

>> NUMBER ONE THE BURDEN OF
PROOF ISSUE WAS NOT RAISED
BELOW.

I THINK THAT WAS WAIVED.
THAT'S NOT AN ISSUE YOU NEED
TO REACH TODAY.

SPEAKING OF WHAT OTHER
QUESTIONS YOU WANT TO ASK.
THAT'S NOT A QUESTION THAT
WAS RAISED.

>> DON'T YOU AGREE STATUTE OF
REPOSE IS AFFIRMATIVE
DEFENSE.

>> IT IS, BUT THAT DOESN'T
MEAN IT CAN'T SWITCH THE
BURDEN ONCE THAT AFFIRMATIVE
DEFENSE IS ASSERTED.

THERE ARE TYPES OF
AFFIRMATIVE DEFENSES THAT
QUALIFY AS IMMUNITY THAT ONCE
YOU ASSERT IT AS AFFIRMATIVE
DEFENSE, THE BURDEN SWITCHES
BACK, THAT IS KNOWLEDGE
PARTICULARLY WITHIN THE
PLAINTIFF'S KNOWLEDGE AND NOT
WITHIN THE DEFENDANT'S.

WE STILL BELIEVE THE BURDEN
OF PROOF WOULD BE ON THE
PLAINTIFF.

>> LIMITATION TYPES OF
AFFIRMATIVE DEFENSES, I DON'T
RECALL, NOR CAN I THINK OF,
ONE THAT IS THE BURDEN ON A
CLAIMANT.

BUT THAT'S SOMETHING THAT IS
PERSONAL TO A DEFENDANT AND
CAN BE WAIVED BY A DEFENDANT,

EVEN.

>> IT CERTAINLY CAN BE
WAIVED.

>> YOU TELL ME OF ONE AND THE
NATURE OF A LIMITATION, TIME
LIMITATION WHERE THAT BURDEN
SHIFTS TO A CLAIMANT?

I JUST CAN'T THINK OF ONE.

>> NOT ON THE STATUTE OF
LIMITATIONS.

>> THAT'S WHAT A REPOSE IS.
A LIMITATION ON TIME.

>> THE ONLY ONE I CAN THINK
OF IS THE QUALIFIED IMMUNITY
THAT IS AFFIRMATIVE DEFENSE
AND SWITCHES BACK.

>> YOU KNOW, YOU MADE A
STATEMENT A LITTLE WHILE AGO
ABOUT RELYING ON THINGS, YOU
KNOW, BEFORE 1982, BUT IT
SEEMS TO ME THAT WHAT WE HAVE
HERE IN THESE CASES IS AT
LEAST, I THINK IT'S THE HESS
CASE, WHERE THE JURY FOUND
THE SMOKER TO BE 50% OR 50
SOMETHING PERCENT AT FAULT ON
THIS TOO TAKES INTO
CONSIDERATION WHAT YOU WERE
TALKING ABOUT.

DON'T YOU THINK THAT'S WHAT
HAPPENED IN THE VERDICTS WHEN
THEY FIND THE TOBACCO COMPANY
WAS 40% AND THE SMOKER WAS
60%?

>> NO, I THINK THEY'RE JUST
TAKING INTO ACCOUNT HOW THE
PLAINTIFF CONTINUED TO SMOKE
KNOWING OF THE DANGERS AND
THINGS LIKE THAT.

BUT IF THIS WERE†--

>>†KNOWING OF THE DANGERS,
MEANING THEY STOPPED RELYING.

>> YES, THERE ARE SOME CASES
WHERE THE STATUTE OF REPOSE
WOULD NOT APPLY.

THERE ARE SOME CASES WHERE
THEY CAN SHOW THAT THERE WAS
A FRAUD AGAINST THIS
PLAINTIFF AND MAYBE MANY
CASES.

I DON'T KNOW.

BUT IF YOU SHOW FRAUD THEY CONTINUE TO RELY, THAT'S NOT AN ISSUE.

AND, YES, THAT IS COMPARATIVE NEGLIGENCE QUESTION AT THAT TIME.

IF THEY STOP RELYING BEFORE THE REPOSE PERIOD, BEFORE 1982, THEN THEY SHOULDN'T EVEN BE ABLE TO GET TO THAT STAGE.

I WANT TO ADDRESS ONE LAST POINT.

I'M SORRY.

>> NO, GO ON.

>> THERE IS A POINT

MR. †MILLS†--

>> †YOU'RE OUT OF TIME, GO AHEAD AND SUM UP, IF YOU MAY.

>> IN SUM, I THINK THE HESS DECISION OF 4TH DCA WAS CORRECT AND THIS COURT SHOULD AFFIRM IT AND ALLOW JURIES TO CONSIDER AND A QUESTION TO BE ASKED ON THE JURY WHETHER THERE WAS RELIANCE ON A STATEMENT MADE AFTER MAY 5TH OF 1982.

>> IF WE AFFIRM HESS, WHAT ARE THE CASES THAT WE HAVE TO DISAPPROVE?

LIKE EVERY OTHER CASE DECIDED.

>> YOUR HONOR, THAT'S A HARD QUESTION TO ANSWER BECAUSE IF YOU'RE ASKING ABOUT THE OTHER PENDING CASES IN THIS COURT?

>> NO, NO, THE CASES THAT HAVE ALREADY BEEN DECIDED.

>> IT WOULD BE HESS, NOGDEL, TO THAT EXTENT.

SOME HAVE OTHER LANGUAGE.

>> WOULD LASCHKE HAVE TO BE DISAPPROVED.

>> I DON'T THINK YOU WOULD HAVE TO DISAPPROVE OF LASCHKE, INTERPRET LASCHKE THE WAY WE ASKED IT.

AS RELATES TO THE PLAINTIFF

IN TERMS OF THE A CONSPIRACY,
AND THEN THERE IS CADEN.

>> I'M SORRY, THE LOST ACT OF
THE PLAINTIFF?

>> NO, THE LAST ACT OF THE
DEFENDANT ON WHICH THE
PLAINTIFF RELIED.

>> THANK YOU.

>> ONE MINUTE FOR REBUTTAL,
MR. †MILLS.

>> THANK YOU, CONTRARY TO
WHAT MR. †CANTERO SAID AT THE
BEGINNING, OUR POSITION IS
NOT THAT WE DO NOT HAVE TO
PROVE RELIANCE OR RELIANCE
WAS ESTABLISHED.

WE DO.

IT'S RELIANCE ON CONCEALMENT,
NOT STATEMENTS.

RELIANCE IS A TOUGH WORD WHEN
TALKING ABOUT CONCEALMENT BUT
THE CONCEPT IS THERE.

IF HE WERE CORRECT THAT THE
CONCEALMENT IN THIS CASE WERE
HALF TRUTHS, ASK YOURSELVES
HOW YOU COULD HAVE REACHED
THE OPINION YOU DID IN ENGLE?
BECAUSE IF THEY WERE HALF
TRUTHS THEN THEY'RE
MISREPRESENTATIONS AND YOU
SAID MISREPRESENTATION DOES
NOT HAVE RES JUDICATA EFFECT.
WHAT YOU SAID HAD TO HAVE
MEANING.

THE ARGUMENT THAT CARR
ANSWERS THE -- JUSTICE LEWIS
ANSWERS YOUR QUESTION IS DEAD
WRONG, CARR WAS DECIDED IN
1989.

IN 2000 THIS COURT DECIDED
PULMOSAN AND THE CERTIFIED
QUESTION THIS COURT ANSWERED
IS WHETHER THE DIAMOND
DECISION IS VIABLE BASED ON
THE STATUTE OF REPOSE, AND
YOU SAID YES, IT IS.

SO YOU LIMITED IT TO CARR.
AND JUSTICE PARIENTE, THE
VAST MAJORITY OF CASES THEY
ARE PREVAILING ON WITH

RELIANCE, IT'S NOT THEY'RE
WINNING A LOT.
THEY ARE WINNING THE VAST
MAJORITY OF THEM.
>> THANK YOU FOR YOUR
ARGUMENTS.
COURT IS IN RECESS FOR 10
MINUTES.
>> ALL RISE.