Furst v. Defrances

Supreme Court of Florida

September 2, 2021, Decided

No. SC19-701

Reporter
2021 Fla. LEXIS 1437 *; 46 Fla. L. Weekly S 246; 2021 WL 3923409

BILL FURST, etc., et al., Petitioners, vs. SUSAN K. DEFRANCES, et al., Respondents.

Notice: NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Prior History: [*1] Application for Review of the Decision of the District Court of Appeal Class of Constitutional Officers. Second District - Case No. 2D17-3973. (Sarasota County).

Defrances v. Furst, 267 So. 3d 525, 2019 Fla. App. LEXIS 4562, 2019 WL 1371409 (Fla. Dist. Ct. App. 2d Dist., Mar. 27, 2019)

Core Terms

taxation, escaped, taxes, parcel, lawfully, valuation, collected, assess, back-assessment, clerical error, back taxes, ad valorem tax, conversion, assessed value, levied, summary judgment, assessment of property, entire parcel, taxpayer, hotel, tax roll, homestead, factors, records, personal property, correct an error, previous year, under-taxed, omission, invalid

Case Summary

Overview
HOLDINGS: [1]-Because property had "escaped taxation" under § 193.092(1), Fla. Stat. when it was not taxed, not when it was under-taxed because of a mistaken under-valuation, a property appraiser that assessed taxes on all of taxpayer's real property for 2014 based on an incorrectly low valuation, after which the taxpayer timely paid her assessed tax, was not entitled to back-assess the property for 2014 after discovering its error; furthermore, the statute did not draw a distinction between clerical errors, as was claimed here, and errors in judgment.

Outcome
Decision of court of appeal approved.

LexisNexis® Headnotes

Tax Law > State & Local Taxes > Administration & Procedure > Assessments

HN1 **Administration & Procedure, Assessments**

By the terms of the statutory text, only property that has escaped taxation is subject to back-assessment under *§ 193.092(1), Fla. Stat.* If that element is not satisfied, then the conditions in the beginning clauses of the statute—including whether the property tax could have been lawfully assessed but was not lawfully assessed—do not come into play.

Governments > Legislation > Interpretation

HN2 **Legislation, Interpretation**

Under basic principles of statutory interpretation, the court's task is to discern the text's meaning as it would have been understood by a reasonable reader, fully competent in the language, at the time of its enactment. Recognizing that the contextual meaning of a word or phrase will not always be free from doubt, the court aims to arrive at the best reading of the text.

Tax Law > State & Local Taxes > Administration & Procedure > Assessments

Tax Law > ... > Personal Property

Taxes > Intangible Personal Property > Imposition of Tax

Tax Law > ... > Real Property Taxes > Assessment & Valuation > Valuation of Real Property

Tax Law > ... > Personal Property
Taxes > Intangible Personal Property > Limitations on Tax

HN3 **Administration & Procedure, Assessments**

In Simpson, the Florida Supreme Court explained that former § 199.29, Fla. Stat. (1941), only authorizes the tax assessor to back-assess intangible personal property which for any reason has escaped taxation—not to raise the valuation of intangible personal property which has been erroneously valued. The court said that if the legislature had intended to grant the power to, and to direct, the tax assessor to back-assess because of an inaccurate original valuation, the court had no doubt it would, as it should, have done so clearly and unequivocally in § 199.29. And the court summed up its view of the matter by observing that property is either taxed or is not taxed. In the latter event only has it escaped taxation.

Tax Law > ... > Personal Property
Taxes > Intangible Personal Property > Imposition of Tax

HN4 **Intangible Personal Property, Imposition of Tax**

There is a commonsense distinction between not being taxed at all and being undertaxed. And a typical speaker would use the phrase "escaped taxation" to describe the former and not the latter. Only property that is not taxed has "escaped taxation" under § 193.092(1), Fla. Stat.

Governments > Legislation > Interpretation

Tax Law > State & Local Taxes > Real Property Taxes > Collection of Tax

HN5 **Legislation, Interpretation**

The text of *§ 193.092(1), Fla. Stat.* does not speak of "taxable value" escaping taxation. Nor does the text mention—much less draw a distinction between—clerical errors and errors in judgment. In fact, if the court were to read the statutory phrase "escaped taxation" as encompassing the under-taxation of property, the text would give the court no basis to categorically prohibit the use of back-assessments to correct errors in judgment. Through its use of the phrase "escaped taxation" in *§ 193.092(1)*, the legislature drew the line between property that has been taxed and property that has not been taxed, and that is the line that the court must enforce.

Governments > Legislation > Interpretation

Tax Law > State & Local Taxes > Administration & Procedure > Judicial Review

HN6 **Legislation, Interpretation**

The general rule is that statutes providing for taxation are to be construed strictly as against the state and in favor of the taxpayer.

Tax Law > ... > Real Property Taxes > Assessment & Valuation > Methods & Timing

HN7 **Assessment & Valuation, Methods & Timing**

Section 193.092(1), Fla. Stat., mandates back assessment of such property as may have escaped taxation.

Tax Law > ... > Personal Property
Taxes > Intangible Personal Property > Imposition of Tax

HN8 **Intangible Personal Property, Imposition of Tax**

Property has "escaped taxation" under *§ 193.092(1), Fla. Stat.* when it is not taxed, not when it is under-taxed because of a mistaken under-valuation.

Counsel: J. Geoffrey Pflugner, Anthony J. Manganiello, Jason A. Lessinger, and Mark C. Dungan of Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A., Sarasota, Florida, for Petitioner, Bill Furst, as Property Appraiser of Sarasota County, Florida.

Ashley Moody, Attorney General, and Robert P. Elson, Senior Assistant Attorney General, Tallahassee, Florida, for Petitioner, Jim Zingale, as Executive Director of the State of Florida Department of Revenue.

Sherri L. Johnson of Johnson Legal of Florida, P.L., Sarasota, Florida, for Respondent, Susan K. DeFrances.

Loren E. Levy and Stuart W. Smith of The Levy Law Firm, Tallahassee, Florida, for Amicus Curiae The Property Appraisers' Association of Florida, Inc.

Judges: MUÑIZ, J. CANADY, C.J., and LABARGA and COURIEL, JJ., concur. POLSTON, J., dissents with an opinion, in which LAWSON, J., concurs. LAWSON, J., dissents with an opinion, in which POLSTON, J., concurs. GROSSHANS, J., did not participate.

Opinion by: MUÑIZ

Opinion

MUÑIZ, J.

This case pits a property appraiser against a taxpayer. The property appraiser undervalued **[*2]** and undertaxed the taxpayer's property, the taxpayer paid her tax bill, and then the property appraiser assessed back taxes after discovering his (purportedly) clerical error. The Second District Court of Appeal invalidated the back-assessment, holding that under these circumstances the property had not "escaped taxation," as required by the governing statute. *DeFrances v. Furst, 267 So. 3d 525, 526 (Fla. 2d DCA 2019)*. We agree with the district court and approve its decision.

I.

In 2014, Susan DeFrances received an implausibly low property tax bill for her waterfront property in Sarasota County. The reason is that the taxes were assessed based on a property value nearly $2 million lower than the value for the year before, even though there had been no change to the property. DeFrances timely paid the bill.

The next year the Sarasota County Property Appraiser discovered that errors affecting DeFrances's assessment had occurred during his office's conversion from one computer-assisted mass appraisal system to another. Before the conversion, DeFrances's property had been treated as a single parcel made up of five lots, each with its own value; after the conversion, the new system treated the parcel as made up of a single lot. *Id. at 527 n.1*. The new system **[*3]** also mistakenly applied DeFrances's homestead exemption to the entire parcel, even though the property includes an additional single-family home that DeFrances uses as a rental property. *Id.*

After discovering these valuation errors, the Property Appraiser reassessed DeFrances's property for the 2014 tax year and sent her a bill for back taxes. From the Property Appraiser's perspective, his authority to assess the back taxes depended on the valuation errors being "clerical errors," as opposed to errors in judgment. For purposes of discussion, we will accept the Property Appraiser's "clerical errors" characterization. But as we explain later, we do not think the distinction is relevant to the disposition of this case, and we do not intend to create precedent for what counts as a "clerical error" in any case where the label matters.

What does matter here is that the Property Appraiser in his briefing concedes that DeFrances's "entire parcel was (technically) assessed." Moreover, the Property Appraiser gave an interrogatory response acknowledging that "[t]here is no specific, defined area of land that escaped taxation since the land was valued as a whole." *Id. at 528*. The Property Appraiser had been **[*4]** asked the question: "Identify the specific portions of the Property that escaped taxation in 2014 (or which would have escaped taxation if the Property had been assessed at $302,400.00 in 2014)."

DeFrances initiated this lawsuit to obtain a judgment declaring the invalidity of the back-assessment of taxes for 2014. She lost in the trial court. But on appeal, the Second District ruled in DeFrances's favor. The district court concluded that the back taxes were invalid because DeFrances's property had not "escaped taxation," a prerequisite for a Property Appraiser's authority to assess back taxes under *section 193.092(1), Florida Statutes* (2013), the statute under which the Property Appraiser proceeded here.

We have exercised our discretion to review the district court's decision, which expressly affects property appraisers, a class of constitutional officers. *See art. V, § 3(b)(3), Fla. Const.*

II.

A.

"Escaped taxation"—the statutorily undefined phrase

that is central to resolving this case—has a long history in Florida law. Before 1899, a property appraiser could assess back taxes if "any land in his county was omitted in the assessment roll of either or all of the three previous years." Ch. 4322, § 24, Laws of Fla. (1895). Then, in 1899, the phrase "escaped **[*5]** taxation" first appeared. Our Legislature amended the omitted property law (which applied only to taxes on real property) to require the property appraiser to back-assess taxes on "any land in his county [that] has, for any reason, escaped taxation for all or any of the three previous years." Ch. 4663, § 24, Laws of Fla. (1899). In the statute book, the pre-and post-1899 laws appeared under a section heading titled "Assessment of land previously omitted." § 722, Rev. Gen. Stat. Fla. (1920).

The Legislature amended this law again in 1923, retaining the phrase "escaped taxation" but, among other things, broadening the statute to cover property other than land. *See* Ch. 9180, § 1, Laws of Fla. (1923). As to the issues in this case, there have been no material changes to the relevant portion of our state's back-assessment law since 1923. That law—the only law on which the Property Appraiser relies for authority to assess back taxes—is now found in section 193.092(1), Florida Statutes.

Section 193.092(1), Florida Statutes (2015), appears under the title "Assessment of property for back taxes." In pertinent part the statute reads:

> When it shall appear that any ad valorem tax might have been lawfully assessed or collected upon any property in the state, but that such tax **[*6]** was not lawfully assessed or levied, and has not been collected for any year within a period of 3 years next preceding the year in which it is ascertained that such tax has not been assessed, or levied, or collected, then the officers authorized shall make the assessment of taxes upon such property in addition to the assessment of such property for the current year, and shall assess the same separately for such property as may have *escaped taxation* at and upon the basis of valuation applied to such property for the year or years in which it *escaped taxation*, noting distinctly the year when such property *escaped taxation* and such assessment shall have the same force and effect as it would have had if it had been made in the year in which the property shall have *escaped taxation* . . . .

§ 193.092(1), Fla. Stat. (emphasis added).

The Second District concluded, and we agree, that the resolution of this case turns on the meaning of the phrase "escaped taxation" as applied to the facts here. HN1[↑] By the terms of the statutory text, only property that has "escaped taxation" is subject to back-assessment. If that element is not satisfied, then the conditions in the beginning clauses of the statute—including **[*7]** whether the property tax could have been lawfully assessed but was not lawfully assessed—do not come into play.

HN2[↑] Under basic principles of statutory interpretation, our task is to discern the text's meaning as it would have been understood by a reasonable reader, fully competent in the language, at the time of its enactment. *See* Page v. Deustche Bank Trust Co. Americas, 308 So. 3d 953, 958 (Fla. 2020). We have not uncovered any evidence suggesting that the phrase "escaped taxation" had a different meaning in 1923 than it would to an informed reader today (or to an informed reader in the years in between). Nor do we have reason to believe that in 1923 the phrase was a legal term of art with a meaning different from its ordinary meaning. Recognizing that the contextual meaning of a word or phrase will not always be free from doubt, we aim to arrive at the best reading of the text.

Although there are several past decisions of this Court involving section 193.092(1) and its predecessors, none of those cases explicitly sought to discern the ordinary meaning of the phrase "escaped taxation" as used in the statutory text. Therefore we seek guidance in a decision interpreting the same phrase in a closely related statute. Now repealed, section 199.29, Florida Statutes (1941), governed the back-taxation of intangible **[*8]** personal property. The statute required back-assessment when "any intangible personal property has for any reason escaped taxation for any or all of the three previous years." We addressed the meaning of this provision in Florida National Bank of Jacksonville v. Simpson, 59 So. 2d 751 (Fla. 1952).

Simpson involved a dispute over the taxation of a portion of Alfred I. DuPont's estate. *Id.* The taxpayer in *Simpson* had paid taxes based on property valuations submitted by the taxpayer and accepted by the property appraiser. *Id.* The property appraiser later determined that the valuation did not represent the property's full cash value, and he sought to impose a back-assessment. *Id.* We framed the issue for determination as whether the untaxed value "represents a portion or part of the intangible which will be considered as having 'escaped taxation' and be subject to back assessments

within three years." *Id. at 756*. Our Court answered no to that question.

We rejected what we deemed "a strained construction" of the text and instead adopted what we called "the customary, common usage meaning" of the phrase "escaped taxation." *Id.* ***HN3***[] We explained that "Section 199.29 only authorizes the tax assessor to back-assess intangible personal property which for any reason has 'escaped taxation'—not to raise **[*9]** the valuation of intangible personal property which has been erroneously valued." *Id. at 756-57*. We said that if the Legislature had "intended to grant the power to, and to direct, the tax assessor to *back-assess* because of an inaccurate original valuation, we have no doubt it would, as it should, have done so clearly and unequivocally in Section 199.29." *Id. at 757*. And we summed up our view of the matter by observing that property "is either taxed or is not taxed. In the latter event only has it 'escaped taxation.'" *Id. at 758*.[1]

The *Simpson* Court's analysis is compelling, and we think that it applies equally to the meaning of the phrase "escaped taxation" in *section 193.092(1)*. ***HN4***[] There is a commonsense distinction between not being taxed at all and being undertaxed. And a typical speaker would use the phrase "escaped taxation" to describe the former and not the latter. Only property that is not taxed has "escaped taxation."[2]

We see confirmation of this ordinary meaning in judicial decisions that naturally use "escaped taxation" to mean "not taxed," even when the decisions do not explicitly define the phrase. For example, in *Schleman v. Connecticut General Life Insurance Co., 151 Fla. 96, 9 So. 2d 197, 200 (Fla. 1942)*, we wrote: "[T]he appellants question the right of the appellee to recover without showing that he owns no other property **[*10]** which has escaped taxation; none that is assessed at less than its full value; and none on which legally assessed taxes have not been paid." In *State v. Beardsley, 77 Fla. 803, 820, 82 So. 794 (Fla. 1919)*, we wrote: "It may be said to hold this is to allow the property to escape taxation; it being shown by the record that it was not taxed in New York or elsewhere." *Id. at 820*. In *Superior Oil Co. v. Mississippi ex rel. Knox, 280 U.S. 390, 395, 50 S. Ct. 169, 74 L. Ed. 504 (1930)*, Justice Holmes wrote: "The only purpose of the vendor here was to escape taxation. It was not taxed in Louisiana and hoped not to be in Mississippi." Similar examples abound, and courts' usage of the phrase seems almost universally one-sided—judges do not appear to use the phrase "escaped taxation" to refer to property that has been under-taxed. [3]

The highest courts of other jurisdictions have also concluded that the concept of escaping taxation does not include being under-taxed due to a mistaken valuation of property. For example, in *Pheasant Lane Realty Trust v. City of Nashua, 143 N.H. 140, 720 A.2d 73, 76 (N.H. 1998)*, the New Hampshire Supreme Court held that "underassessed property" is not "within the scope of property which escapes taxation." Similarly, in a case decided much closer in time to the enactment of *section 193.092(1)*, the Mississippi Supreme Court observed that the "usual, ordinary, [and] popular signification" of property that has "escaped taxation" **[*11]** encompasses only cases "where there never has been any actual assessment at all of such property." *Adams v. Luce, 87 Miss. 220, 39 So. 418, 419 (Miss. 1905)*.

Turning back to the facts of this case, we conclude that DeFrances's property did not "escape taxation" for purposes of *section 193.092(1)*. Although the property was assessed based on an incorrectly low valuation, the Property Appraiser does not dispute the Second District's conclusion that "[t]he entire parcel and all the improvements were assessed and placed on the tax roll." *DeFrances, 267 So. 3d at 530*. And DeFrances timely paid her taxes. Accordingly, we agree with the Second District that in these circumstances *section*

---

[1] In an opinion that we find persuasive, the Attorney General also cited *Simpson* to support the opinion's conclusion that *section 193.092* does not authorize back-assessments to correct for the "undervaluation of property." The opinion answered no to the question: "May an assessor of taxes in Florida back-assess properties for years for which there were insufficient valuations of the properties assessed?" *See* Op. Att'y Gen. Fla. 64-139 (1964).

[2] By adopting this interpretation, we do not disturb the holding of *City of Coral Gables v. Fluvia Corp., 135 Fla. 544, 185 So. 621 (Fla. 1939)*, where this Court allowed a back-assessment after the initial tax assessment had been invalidated by judicial decision.

[3] One possible exception can be found in this Court's decision in *Root v. Wood, 155 Fla. 613, 21 So. 2d 133 (Fla. 1945)*. But this Court criticized and receded from *Root* seven years later in *Simpson*, observing that in the earlier case "we offered no reason for giving to the words 'escaped taxation' a connotation different from the customary, common usage meaning of said words." *Simpson, 59 So. 2d at 756*.

193.092(1) does not give the Property Appraiser authority to back-assess DeFrances's property for 2014.

B.

The Property Appraiser criticizes the Second District's interpretation of section 193.092(1)—and by extension our interpretation here—as artificially constraining the text. He asks us to draw a distinction between underassessments caused by "clerical errors" and those caused by errors in judgment. He concedes that errors in judgment are not correctable through back assessments under section 193.092(1). But he urges us to hold that the statute requires property appraisers to impose back assessments when clerical errors result in "taxable value" being lost.

The **[*12]** problem with the Property Appraiser's arguments is that they are disconnected from anything the text says or fairly implies. HN5[] The text does not speak of "taxable value" escaping taxation. Nor does the text mention—much less draw a distinction between—clerical errors and errors in judgment.[4] In fact, if we were to read the statutory phrase "escaped taxation" as encompassing the under-taxation of property, the text would give us no basis to categorically prohibit the use of back-assessments to correct errors in judgment. Through its use of the phrase "escaped taxation," the Legislature drew the line between property that has been taxed and property that has not been taxed, and that is the line that we must enforce.

The Property Appraiser leans heavily on this Court's decision in Korash v. Mills, 263 So. 2d 579 (Fla. 1972), but we think that case supports our interpretation of the statute. In *Korash*, a property appraiser made the mistake of assessing a parcel of land without also assessing a hotel newly built on the land. *Id.* When the property appraiser later issued a back-assessment taxing the hotel building, the taxpayer objected. *Id.* This Court upheld the back-assessment.

Critical to our analysis in *Korash* was our decision **[*13]** to treat the taxation of the land and of the hotel as separate assessments. We recognized that it would have been impermissible for the property appraiser simply to "increase . . . the valuation of the total property", *id. at 580*, and then to assess back taxes. In our view, as to the hotel, there had been no initial assessment—"there had been no billing at all on the improvement." *Id. at 581*. We described the facts as involving "a complete omission reached for the first time under s. 193.092." *Id. at 581 n.3*. Consistent with the interpretation we adopt today, our Court understood the statutory phrase "escaped taxation" to mean "not taxed."

It is true that one sentence of our *Korash* opinion says that "we have here an instance where the principal value of the property has indeed 'escaped' taxation which is fairly within the contemplation of" section 193.092. *Id. at 581-82*. But that was simply a recognition of the fact that the (untaxed) hotel had a substantially higher value than that of the underlying land. Before we wrote that sentence, though, we already had established that the hotel had "escaped taxation" because the property appraiser's error resulted in it not being taxed at all. By contrast, all of DeFrances's property (including any improvements) **[*14]** was taxed, albeit based on an incorrectly low valuation. The Property Appraiser's reliance on *Korash* is misplaced.

Finally, the Property Appraiser invokes three cases from the district courts of appeal: Robbins v. First National Bank of South Miami, 651 So. 2d 184 (Fla. 3d DCA 1995); McNeil Barcelona Associates, Ltd. v. Daniel, 486 So. 2d 628 (Fla. 2d DCA 1986); and Straughn v. Thompson, 354 So. 2d 948 (Fla. 1st DCA 1978). These cursory decisions (the two longest are three paragraphs) allowed back-assessments of taxes after a property appraiser corrected clerical errors. But only one of the decisions cites section 193.092(1), and none even mentions—much less interprets—the phrase "escaped taxation." We do not find these decisions persuasive or helpful for resolving the question presented here.[5]

---

[4] The Property Appraiser's argument that we should decide this case based on a distinction between clerical errors and errors in judgment appears to borrow from case law interpreting a different statute, section 197.122, Florida Statutes (2015). *See* Smith v. Krosschell, 937 So. 2d 658, 661 (Fla. 2006) (explaining that this statute addresses "the correction of mathematical, administrative, or clerical error[s]" in the assessment roll but not errors in judgment). Section 197.122 relates to corrections to the assessment roll, not to the imposition of back taxes. And section 197.122 does not include the phrase "escaped taxation." The Property Appraiser does not rely on section 197.122 for the authority to impose the back-assessment at issue in this case.

[5] Each party discusses and relies on ***rule 12D-8.006***, which the Department of Revenue adopted to guide property appraisers' implementation of section 193.092. *See* ***Fla. R. Admin. Code R. 12D-8.006***. The rule appears to embody the department's attempt to restate the holdings of Okeelanta Sugar Refinery, Inc. v. Maxwell, 183 So. 2d 567 (Fla. 4th DCA

C.

Justice Lawson's dissent offers an interpretation of the statutory text that is more plausible than any interpretation developed by the Property Appraiser himself. With a focus on the beginning clauses of section 193.092(1), that dissent essentially maintains that the text itself *defines* "escaped taxation" to mean a situation "[w]hen it shall appear that any ad valorem tax might have been lawfully assessed or collected upon any property in the state, but that such tax was not lawfully assessed or levied." Justice Lawson reasons that, since our constitution and statutory law require property to be assessed at its just value, and **[*15]** since that concededly did not happen in DeFrances's case, taxes were not "lawfully assessed" and DeFrances's property therefore "escaped taxation."[6]

We believe that the better reading of the statute treats these clauses as setting out the conditions under which property that "escaped taxation" must be back-assessed. It is possible for property to escape taxation—that is, not be taxed—for reasons that are lawful. For example, the property might have been exempt from taxation in previous years. Or, in the case of personal property, it might not have existed or been subject to the taxing authority's jurisdiction. The clauses that the dissent focuses on clarify that, for a back-assessment to be required, the property that "escaped taxation" must also have been liable to taxation in the first place.[7]

If section 193.092(1) limits back-assessments to property that has "escaped taxation," then we think it unlikely that the Legislature would have sought to redefine that critical phrase through such indirect means and by giving it such an unnatural meaning. Justice Lawson's dissent gives the text a meaning that would have been a major innovation in our State's omitted property law and that would have displaced the **[*16]** well-entrenched ordinary meaning of "escaped taxation." Even if one assumes that this dissent has identified a plausible (though not better) interpretation of the statute, the Property Appraiser still loses. ***HN6***[↑] The "general rule" is that "statutes providing for taxation are to be construed strictly as against the state and in favor of the taxpayer." *Simpson, 59 So. 2d at 758*.

Legislatures know how to authorize do-overs when a property appraiser under-taxes property because of an incorrect valuation. To give just one example, Montana law allows back-assessments of taxes whenever it is discovered that "any taxable property of any person has in any year escaped assessment, been erroneously assessed, or been omitted from taxation." *Mont. Code Ann. § 15-8-601(1)(a)* (2021). Our own Legislature has the discretion to enact such a law, but we do not believe it has done so in *section 193.092(1)*.

D.

Justice Polston's dissent takes issue with the premise that the entirety of DeFrances's property was assessed. That dissent instead claims that "4 lots" (out of the five lots into which the county's *preconversion* mass appraisal system had divided DeFrances's single tax parcel) were not assessed.

This argument contradicts the Property Appraiser's own position in this case. As we **[*17]** have explained, the Property Appraiser concedes that here "the entire parcel was (technically) assessed." The Property Appraiser says that this case involves an error "essentially identical" to that in *Robbins*. And he then goes on to

---

1971) and *Korash*. We do not find the rule helpful to the Property Appraiser's case, and in any event our state constitution precludes us from deferring to the department's interpretation of *section 193.092*. *Art. V, § 21, Fla. Const.*

[6] As support for its interpretation, this dissent also points to the title to chapter 9180, noting this language in that title: "An Act to Authorize the Assessment and Collection of Taxes upon any Property in the State of Florida . . . as to which an Invalid Assessment . . . shall appear to have been made." Putting aside the question whether the Property Appraiser's initial 2014 assessment of DeFrances's property was in any sense "invalid," we think that this portion of the Act's title is simply a reference to the following sentence in the statutory text: "Provided, if real or personal property be assessed for taxes, and because of litigation delay ensues and the assessment be held invalid the taxing authorities, [sic] may re-assess such property within the time herein provided after the termination of such litigation." Ch. 1923-9180, § 1, Laws of Fla. (1923). This portion of the text speaks to a situation where property escapes taxation (is not taxed) because of a judicial decision invalidating an assessment; that is not what happened here.

[7] Given our conclusion that DeFrances's property did not "escape taxation," we need not resolve the question whether the Property Appraiser's initial 2014 assessment was "lawful" for purposes of *section 193.092(1)*. At a minimum, this case appears to have been litigated on the assumption that the initial 2014 assessment complied with the procedural requirements governing assessments and that DeFrances was obligated to pay her initial 2014 tax bill.

describe *Robbins* as a case where "[t]he entire parcel, as well as the improvements, were assessed and included on the tax roll, but the property was undervalued as a result of the [clerical] error." Finally, as we also have explained, the Property Appraiser acknowledged in discovery that DeFrances's "land was valued as a whole" and that therefore "[t]here is no specific, defined area of land that escaped taxation."

We will end where we began, by focusing on the text of the statute. ***HN7***[↑] *Section 193.092(1)* mandates back assessment of "such property as may have escaped taxation." Upon the initial assessment of DeFrances's property in 2014, the county's mass appraisal system treated that property as one parcel made up of one lot.[8] As the Property Appraiser has conceded, taxes were assessed on *all* of DeFrances's property. *Section 193.092(1)* simply does not apply.

III.

HN8[↑] Property has "escaped taxation" when it is not taxed, not when it is under-taxed because of a mistaken under-valuation. We approve the **[*18]** decision of the Second District Court of Appeal.

It is so ordered.

CANADY, C.J., and LABARGA and COURIEL, JJ., concur.

POLSTON, J., dissents with an opinion, in which LAWSON, J., concurs.

LAWSON, J., dissents with an opinion, in which POLSTON, J., concurs.

GROSSHANS, J., did not participate.

Dissent by: POLSTON; LAWSON

Dissent

POLSTON, J., dissenting.

Because of a computer error in the property appraiser's office, 4 lots that are part of 1 overall parcel were omitted from assessment, and the property homestead exemption was misapplied. The Florida Legislature, pursuant to *section 193.092(1), Florida Statutes* (2013), requires the property appraiser in these circumstances to correct this mistake with back assessments for the years missed so that the property does not escape taxation. The majority treats this circumstance, a partial omission, the same as a change in judgment of the valuation or an underassessment. I disagree. This error involves the omission of assessment amounts relating to 4 lots, not a difference in how those 4 lots should be valued according to *section 193.011, Florida Statutes* (2013). Their inclusion in an overall parcel does not change how the statute applies. Accordingly, I agree with Petitioner Bill Furst (Furst) (the Property Appraiser of Sarasota County), **[*19]** the Property Appraiser Association, and the Florida Department of Revenue, that the partial omission should be assessed by backdating as required by the plain meaning of *section 193.092(1)* and our binding precedent in *Korash v. Mills, 263 So. 2d 579 (Fla. 1972)*.

My disagreement with the majority is best demonstrated through a hypothetical: If the property appraiser, through a clerical error, valued a 1,000-acre parcel of land as 10 acres, the majority would agree with Respondent Susan DeFrances (DeFrances) that this error could not be back-assessed through *section 193.092(1)* because there was some assessment of the property as a whole, albeit at the clearly wrong 10 acres. I would apply the statute and our precedent to conclude that 990 acres were omitted by error and thereby escaped taxation.

I respectfully dissent.

I. BACKGROUND

Since 1993, DeFrances has held a life estate in a large parcel of waterfront property in Sarasota County. The property consists of 1 overall parcel made up of 5 separate lots. Two of the lots contain single-family residences: DeFrances lives in one and the other is a rental home. From 1993-2013, the property's value was based on the sum of all 5 lots minus an ad valorem homestead tax exemption on 78% of the property. In 2013, the property **[*20]** had an assessed value of $2,269,560. Throughout DeFrances' ownership of the land, the value of the property was correctly assessed, and DeFrances paid the associated taxes.

At some point between 2013-2014, the Property Appraiser of Sarasota County converted the county's

[8] *DeFrances, 267 So. 3d at 527 n.1* ("The new system, however, used a different methodology (per front foot versus per lot) to arrive at the value of the parcel, which it treated as a single parcel made up of a single lot.").

mass appraisal computer program from "AssessPro" to "Custom CAMA." During the program conversion, what has been characterized as a clerical or administrative error occurred: the transfer only accepted 1 value for DeFrances' property rather than all of the inputted factors from AssessPro. In addition, DeFrances' homestead property exemption was erroneously applied to 100% of the property. As a result of these errors, the Property Appraiser "inadvertently and incorrectly" assessed the property at $302,400 for the 2014 tax year. The error went unnoticed, and a tax bill based on that amount was sent to DeFrances. She promptly paid the tax bill of $4,439.41.

The details of the error are explained in the affidavit of Jason Clevenger, a Deputy Sarasota County Property Appraiser, in support of Furst's motion for summary judgment. In the affidavit, Clevenger attested to the details of the clerical error, which are uncontroverted: **[*21]**

> 6. During 2013-2014, the Property Appraiser instituted a conversion of the Computer Aided Mass Appraisal program ("CAMA System") from AccessPro to Custom CAMA. In performing the conversion, many uploads of property parcel details were required. They were not accomplished in one omnibus "data transfer".
>
> 7. As part of the conversion, each classification of property was being assigned a consistent form of baseline data analysis or determination. As an example, all "tidally" influenced real property was being converted to a "front foot" basis from any other method of analysis, such as "acreage" or "lot". This process was intended to provide a more uniform method of analysis and result in producing a more uniform tax roll.
>
> 8. In the process of the conversion, the subject parcel, ID# 0108N15-0019, was not properly converted to the new CAMA System. Prior to the conversation [sic] for the 2013 tax roll, the subject parcel had been reflected on the Property Appraiser's records as five (5) lots contained under one parcel ID number. Lots 44 and 45 Buccaneer Bay Plat Book 24 page 36 were considered one lot as an improvement located on the site "straddled" the lot line between Lots 44 and 45. Lot **[*22]** 46 was classified as an improved lot and it contained a separate residential structure. Lot 42 and part of Lot 41, considered as one site, Lots 43 and 47, were shown as separate lots for assessment purposes. The total "Just" Value was $2,269,560, which was less than the 2012 Just Value of $3,675,400.00, which reduction reflected changes in the market.
>
> 9. *When the upload for the conversion of the subject parcel occurred, the system only accepted one value for the subject property, omitting the prior factors used in AssessPro rather than the data that produced five (5) assessable lots from the 2013 (and prior years) property records. This failure to convert resulted in the subject property being carried on the records as one (1) lot with an assigned value based upon one (1) lot of $65,000.00, not the five (5) lots as it had been previously assessed. In addition, the homestead exemption was applied to the entire property and not to 78% of the property as had been applied in 2013 and before*.
>
> 10. This error was not immediately detected and the 2014 TRIM Notice and 2014 tax bill each were issued upon the erroneous information. . . .
>
> 11. In July 2015, the error was detected when reconciling **[*23]** the 2015 tax roll to the 2014 tax roll.

(Emphasis added.)

When the Property Appraiser became aware of the error, he corrected the error in the CAMA system to reflect 1 parcel of 5 lots, and he corrected the homestead exemption. As a result of the update in the CAMA system, the Property Appraiser issued a Notice of Proposed Increase in Assessed Value and Taxes to DeFrances, which informed her that the 2014 assessment of her property was being retroactively increased to $2,473,518. She also received a bill from the Tax Collector for $26,254.30 in back taxes for 2014.

On December 4, 2015, DeFrances filed a 3-count declaratory judgment action against Petitioner Bill Furst, Property Appraiser of Sarasota County; Barbara Ford-Coates, Tax Collector of Sarasota County; and Marshall Stranburg, Executive Director of the Florida Department of Revenue, challenging (1) the 2014 back taxes, (2) the 2015 assessed value, and (3) the 2014 assessed value.

The circuit court granted Furst's motion for summary judgment as to all 3 counts. The circuit court concluded in its Final Summary Judgment that the Property Appraiser was obligated to correct the error under *section 193.092(1)* and to assess the property correctly by adjusting **[*24]** the appropriate factors that would have otherwise allowed the property to escape taxation:

FINAL SUMMARY JUDGMENT

THIS CAUSE having come before the Court upon the Defendant, Bill Furst's Motion for Summary Judgment as to All Counts (in which Defendant, Department of Revenue joined), and Plaintiffs Cross-Motion for Summary Judgment, and the Court, having reviewed the pleadings and documents entered in evidence, having heard argument of counsel, and being otherwise fully informed in the premises, rules as follows:

I. Uncontroverted facts of record:

A. The Plaintiff, Susan K. DeFrances is the owner of a life estate on certain real property located at 7326 Captain Kidd Avenue in Sarasota, Florida and identified as Parcel No. 0109-15-0019 (the "Property"). The Property consists of one overall parcel made up of 5 separate lots. Two of the lots are improved with single family residences.

B. Prior to 2014, the Property was assessed as one parcel consisting of 5 separate lots, with the assessment based on the value of 5 lots, together with the improvements on two of the lots. The Plaintiff was granted an ad valorem real property homestead tax exemption on 78% of the Property.

C. During the years **[*25]** 2013-2014 the Property Appraiser instituted a conversion in their mass appraisal computer program from "AssessPro" to "Custom CAMA".

D. During the conversion from "AssessPro" to "Custom CAMA" a clerical/administrative error occurred in that the transfer only accepted one value for the Property, rather than all the inputted factors from "AssessPro". In addition, the homestead exemption was applied to the entire property (instead of only 78% of the property). (The subject clerical/administrative error described herein shall be referred to as "the Error").

E. As a result of the Error, the Property Appraiser inadvertently, and incorrectly, assessed the Property of "one parcel of five lots" as "one parcel of one lot", with an incorrect total assessed value of $302,400.00. A tax bill for an amount based upon the one parcel as one lot was generated and provided to the Plaintiff utilizing the miscalculated assessment. Plaintiff promptly paid the tax bill.

F. The Error is a clerical/administrative error. The Error resulted in a portion of the Property escaping taxation.

G. When the Property Appraiser became aware of the Error, the Property Appraiser corrected the Error, and updated the Custom CAMA **[*26]** system to show the one parcel of five lots that make up the assessed parcel to establish an accurate assessment of the Property. As a result of the correction of the error and update of the Custom CAMA system, the Property Appraiser issued a notice of proposed increase in assessed value to the Plaintiff.

H. Following the increase in the assessed value of the Property, the Plaintiff commenced the instant case, which includes three Counts summarized as follows:

> Count I: seeking cancellation of the 2014 back assessment, premised on the argument that, because the Property was assessed in 2014, the Property did not "escape taxation" as that phrase is used in *§193.092(1)*.
>
> Count II: seeking to limit the 2015 assessed value of the Property, pursuant to the "Save our Homes Cap" (codified in *Article VII, Section 4 of the Florida Constitution* and *Section 193.155, Florida Statutes*), to no more than 1.5% more than the erroneous 2014 assessment which resulted from the Error.
>
> Count III: seeking to apply the "Save our Homes Cap" (codified in *Article VII, Section 4 of the Florida Constitution* and *Section 193.155, Florida Statutes*), to the entire property.

II. Conclusions of law.

A. The Property Appraiser was authorized to correct the Error pursuant to *Fla. Stat. §193.092(1)*.

B. The Property Appraiser was authorized, and obligated, to correct the Error and assess the Property correctly by adjusting the **[*27]** factors applicable to the parcel for the 2014 assessment and the resulting assessment that would have otherwise allowed a portion of the

Property to escape taxation.

C. The "Save Our Homes" cap (codified in *Article VII, Section 4 of the Florida Constitution* and *Section 193.155, Florida Statutes*) limits the increase in the annual assessed value of homestead residences to 3% or the change in the Consumer Price Index, whichever is less and only applies to the assessment of the homestead.

III. Holding.

A. The Property Appraiser properly assessed the Property at a capped value of $1,983,725 for 2014. The Property Appraiser correctly assessed the Property at a capped value of $2,054,128 for 2015.

B. The Court finds that the Property Appraiser properly apportioned that portion of the Property used for commercial purposes from the homestead portion of the Property.

C. The uncontroverted evidence submitted by the Property Appraiser established that the Property Appraiser correctly followed Florida law when calculating the increase for both the 2014 and 2015 assessments of the Property. The Property Appraiser correctly limited the increase on the homestead portion (78%) of the total assessed value by the Save Our Homes Cap, and limited the increase on the commercial portion (22%) **[*28]** to 10% (as required under *§193.1554, Florida Statutes*).

Therefore, it is **ORDERED AND ADJUDGED**:

Bill Furst's Motion for Summary Judgment is ***GRANTED*** as to all Counts, and the Plaintiffs Cross-Motion for Summary Judgment is ***DENIED***. Final Summary Judgment is therefore entered in favor of Defendants Bill Furst and the Department of Revenue, as to all Counts. It is therefore ADJUDGED that Plaintiff take nothing by this action and that Defendants shall go hence without day.

I agree with the trial court's ruling.

II. ANALYSIS

Section 193.092(1), the relevant Florida Statute at issue, states:

(1) When it shall appear that any ad valorem tax might have been lawfully assessed or collected upon any property in the state, but that such tax was not lawfully assessed or levied, and has not been collected for any year within a period of 3 years next preceding the year in which it is ascertained that such tax has not been assessed, or levied, or collected, then the officers authorized shall make the assessment of taxes upon such property in addition to the assessment of such property for the current year, and shall assess the same separately for such property as may have escaped taxation at and upon the basis of valuation applied to such property for **[*29]** the year or years in which it escaped taxation, noting distinctly the year when such property escaped taxation and such assessment shall have the same force and effect as it would have had if it had been made in the year in which the property shall have escaped taxation, and taxes shall be levied and collected thereon in like manner and together with taxes for the current year in which the assessment is made. But no property shall be assessed for more than 3 years' arrears of taxation, and all property so escaping taxation shall be subject to such taxation to be assessed in whomsoever's hands or possession the same may be found, except that property acquired by a bona fide purchaser who was without knowledge of the escaped taxation shall not be subject to assessment for taxes for any time prior to the time of such purchase, but it is the duty of the property appraiser making such assessment to serve upon the previous owner a notice of intent to record in the public records of the county a notice of tax lien against any property owned by that person in the county. Any property owned by such previous owner which is situated in this state is subject to the lien of such assessment in the **[*30]** same manner as a recorded judgment. Before any such lien may be recorded, the owner so notified must be given 30 days to pay the taxes, penalties, and interest. Once recorded, such lien may be recorded in any county in this state and shall constitute a lien on any property of such person in such county in the same manner as a recorded judgment, and may be enforced by the tax collector using all remedies pertaining to same; provided, that the county property appraiser shall not assess any lot or parcel of land certified or sold to the state for any previous years unless such lot or parcel of lands so certified or sold shall be included in the list furnished by the Chief Financial Officer to the county property appraiser as provided by law; provided, if real or personal property be

> assessed for taxes, and because of litigation delay ensues and the assessment be held invalid the taxing authorities, may reassess such property within the time herein provided after the termination of such litigation; provided further, that personal property acquired in good faith by purchase shall not be subject to assessment for taxes for any time prior to the time of such purchase, but the individual or **[*31]** corporation liable for any such assessment shall continue personally liable for same. As used in this subsection, the term "bona fide purchaser" means a purchaser for value, in good faith, before certification of such assessment of back taxes to the tax collector for collection.

Applying the plain terms of the statute to these facts, any property that is unlawfully assessed and escapes taxation qualifies under the statute. As the trial court ruled, ad valorem tax might have been lawfully assessed upon the 4 lots but it was not. I agree with Justice Lawson's separate dissenting opinion explaining this provision of section 193.092(1). However, the majority erroneously dismisses application of this provision by interpreting the phrase "escaping taxation" as applying only to property that is wholly omitted, not partially omitted. Majority op. at 9. But there is no language in the statute that makes it applicable only to entire omissions from assessment, and such interpretation is contrary to this Court's precedent.

In Korash v. Mills, 263 So. 2d 579, 580 (Fla. 1972), due to a clerical error, the property appraiser omitted a newly constructed hotel. The property record card for the land was accidentally separated from the property record card for the improvements, **[*32]** causing only the value of the land to be entered on the tax roll. *Id.* As a result, there was not a composite assessed value of both land and improvements. *Id.* Upon later discovery of the error, the property appraiser attempted to back assess the value of the improvements, and the taxpayer contested the back assessment. *Id.* This Court upheld the back assessment, concluding that "we have here an instance where the principal value of the property has indeed 'escaped' taxation which is fairly within the contemplation of" section 193.092 and that "[n]either is it a *total* escape of taxation but it is a partial one." Id. at 581. This Court further explained, "If there is no new judgment being exercised, and property not theretofore included is just late in being enrolled and billed . . . it *is* a proper assessment and is payable . . . as 'escaped' property." *Id.* The Court distinguished a permissible basis for a back assessment by the property appraiser (the erroneous omission of a hotel from taxation) from an impermissible basis (a "change in judgment" such as a change in valuation after the certification of the tax roll for the year). Id. at 581-82. This Court also explained that its "holding is consistent with the basic purpose **[*33]** of taxation: That all taxpayers share in proportion to their assessments, the support of their government and the protection and services afforded to their property and to themselves, and that none bears an added or unfair burden by reason of other taxpayers not paying their just share." Id. at 582.

The majority attempts to distinguish *Korash* as somehow supportive of its interpretation in this case, *see* majority op. at 14, and incorrectly states that all of DeFrances' property was assessed, *see* majority op. at 3, 15. I disagree. This Court in *Korash* explained the case as involving not "a *total* escape of taxation but . . . a partial one." 263 So. 2d at 581. Similar to the hotel in *Korash* that escaped taxation because it was not included, 4 of DeFrances' lots escaped taxation as they were similarly not included. The majority states that this argument contradicts the Property Appraiser's own position in this case, citing one line of the Property Appraiser's Initial Brief stating, "the entire parcel was (technically) assessed." Majority op. at 19. However, I do not believe this is an accurate depiction of the Property Appraiser's argument in this case. The entire quote from the Initial Brief is as follows: "In the **[*34]** present case, while the entire parcel was (technically) assessed, it was assessed based on clerical errors that resulted in the parcel's component parts (multiple lots) being ignored or forgotten." Initial Br. at 22-23. The Property Appraiser's Initial Brief further provides:

> Under "AssessPro" the Property was inputted as a single parcel with five lots, such that the value of all five lots was attributed to the single parcel. During the conversion from "AssessPro" to "Custom CAMA" a clerical error occurred as to the value of the land in that the value of the entire parcel was calculated based on only one of five lots, rather than all of the lots. Moreover, certain factors were not included in the land value calculation (by way of example, the waterfront factor), which resulted in the property being carried on the records as one lot with the assigned value of only one lot, rather than all five as had been historically assessed.

Initial Br. at 8. The Property Appraiser's Initial Brief also argued, "In this case the particular error resulted in a parcel of five specifically identifiable lots being assessed based only on the value of one lot. The value of four lots was effectively skipped **[*35]** or forgotten." Initial Br. at 17. Returning to my earlier hypothetical, when a clerical

error on a 1,000-acre property results in valuing it at 10 acres, the 990 acres are omitted from assessment and escape taxation. As the trial court ruled here, the 4 lots omitted through a clerical error from the total parcel of 5 lots resulted in escaped taxation according to a plain reading of the statute.

This Court's decision in *Korash* is also the basis by which the Florida Department of Revenue has defined "escape taxation" in *Florida Administrative Code Rule 12D-8.006* titled, "Assessment of Property for Back Taxes." Citing *Korash* and the applicable statute, the rule states:

> (1) "Escape taxation" means to get free of tax, to avoid taxation, to be missed from being taxed, or to be forgotten for tax purposes. Improvements, changes, or additions which were not taxed because of a clerical or some other error and are a part of and encompassed by a real property parcel which has been duly assessed and certified, should be included in this definition if back taxes are due under Section 193.073, 193.092 or *193.155(8)*, F.S. Property under-assessed due to an error in judgment should be excluded from this definition. Korash v. Mills, 263 So. 2d 579 (Fla. 1972).

Fla. Admin. Code R. 12D-8.006(1).

Contrary to the majority's opinion and the Second District's **[*36]** decision below, the 4 lots missing from the parcel at issue fit squarely within this definition. *Rule 12D-8.021 of the Florida Administrative Code* explains in detail the distinction between errors subject to correction versus those that are changes in the judgment of the property appraiser.[9] The omission of these 4 lots is subject to correction and back assessment as a clerical error.

---

[9] ***Rule 12D-8.021(2)*** provides in pertinent part that:

> (a) The following errors shall be subject to correction:
>
> 1. The failure to allow an exemption for which an application has been filed and timely granted pursuant to the Florida Statutes.
>
> 2. Exemptions granted in error.
>
> 3. Typographical errors or printing errors in the legal description, name and address of the owner of record.
>
> 4. Error in extending the amount of taxes due.
>
> 5. Taxes omitted from the tax roll in error.
>
> 6. Mathematical errors.
>
> 7. Errors in classification of property.
>
> 8. Clerical errors.
>
> 9. Changes in value due to clerical or administrative type errors.
>
> . . . .
>
> (b) The correction of errors shall not be limited to the preceding examples, but shall apply to any errors of omission or commission that may be subsequently found.
>
> . . . .
>
> (d) The following is a list of circumstances which involve changes in the judgment of the property appraiser and which, therefore, **[*37]** shall not be subject to correction or revision, except for corrections made within the one-year period described in subparagraph (2)(a)24. of this rule section. The term "judgment" as used in this rule section, shall mean the opinion of value, arrived at by the property appraiser based on the presumed consideration of the factors in Section 193.011, F.S., or the conclusion arrived at with regard to exemptions and determination that property either factually qualifies or factually does not qualify for the exemption. It includes exercise of sound discretion, for which another agency or court may not legally substitute its judgment, within the bounds of that discretion, and not void, and other than a ministerial act. The following is not an all inclusive list.
>
> 1. Change in mobile home classification not in compliance with attorney general opinion 74-150.
>
> 2. Extra depreciation requested.
>
> 3. Incorrect determination of zoning, land use or environmental regulations or restrictions.
>
> 4. Incorrect determination of type of construction or materials.
>
> 5. Any error of judgment in land or improvement valuation.
>
> 6. Any other change or error in judgment, including ordinary negligence which would require the exercise of **[*38]** appraisal judgment to determine the effect of the change on the value of the property or improvement.
>
> 7. Granting or removing an exemption, or the amount of an exemption.
>
> 8. Reconsideration of determining that improvements are substantially complete.
>
> 9. Reconsideration of assessing an encumbrance or restriction, such as an easement.

Fla. Admin. Code R. 12D-8.021(2).

III. CONCLUSION

Because a computer error caused 4 lots to escape taxation, I would hold that the back assessment was required by the plain meaning of section 193.092(1) and our binding precedent in *Korash*, quash the Second District's decision, and remand with instructions to affirm the trial court's final summary judgment.

LAWSON, J., concurs.

LAWSON, J., dissenting.

This case presents a straightforward statutory construction question: When, under section 193.092(1), Florida Statutes (2020), must "the officers authorized" to assess and collect "ad valorem tax" on "property in the state" assess and collect tax for a prior year "in addition to the assessment of such property for the current year"? The plain language of the statute provides the straightforward answer.

In unambiguous language, section 193.092(1) states that the assessing authority must assess "back" taxes[10] "[w]hen it shall appear that *any* ad valorem tax might have been lawfully **[*39]** assessed or collected upon any property in the state, but that such tax was not lawfully assessed or levied, and has not been collected," and provides a three-year limit on back assessments. *Id.* (emphasis added).

"Lawfully" means "being in harmony with the law" or as "constituted, authorized, or established by law." *Merriam-Webster's Collegiate Dictionary* 705 (11th ed. 2014). Florida's Constitution commands that "[b]y general law regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation," art. VII, § 4, Fla. Const., with some exceptions not applicable in this case. "Just valuation" is synonymous with "fair market value." Mazourek v. Wal-Mart Stores, Inc., 831 So. 2d 85, 88 (Fla. 2002) (citing Valencia Ctr., Inc. v. Bystrom, 543 So. 2d 214, 216 (Fla. 1989)). Consistent with article VII, section 4(d)(1) of the Florida Constitution, general law requires all sixty-seven property appraisers to annually assess all property in their respective counties, *see* §§ 192.011, .042, Fla. Stat. (2014), and details the factors that a property appraiser "shall take into consideration" in "arriving at just valuation" as required by the Florida Constitution, § 193.011, Fla. Stat. (2014). The law requires that this "just" valuation serves as the basis for the property taxes collected on all non-exempt properties. *See* art. VII, § 4, Fla. Const.

Therefore, property taxes would be levied as established by or in harmony with Florida law **[*40]** only if they were based upon a just value assessment using the factors set forth in section 193.011.

What the law explained above means for this case is that section 193.092(1) required a back assessment in 2015 when the Sarasota County Property Appraiser discovered the 2014 erroneous valuation of a multi-million-dollar five-lot waterfront parcel at a fraction of its just value in violation of section 193.011. This is because it then "appear[ed]" that "ad valorem tax [that] might have been lawfully assessed" pursuant to section 193.011 had not been "lawfully assessed." § 193.092(1), Fla. Stat. Because the property was not valued in accordance with Florida law in 2014, ad valorem tax that might have been lawfully assessed and collected was neither assessed nor collected. It also appears that the appraiser inadvertently extended the homestead tax exemption to nonexempt property, providing a second reason why ad valorem tax that might have been lawfully assessed and collected on this property was not assessed or collected in 2014. *See* §§ 196.001, .015-.061, Fla. Stat. (2020) (explaining that exemptions are not extended to nonexempt property and detailing the processes appraisers must follow to assure that the homestead exemption is not extended to nonhomestead property).

In reaching its contrary conclusion, **[*41]** the majority essentially rewrites section 193.092(1) as follows:

> When it shall appear that any
>
> ad valorem tax real property might have been lawfully assessed and taxed
>
> or collected upon any property in the state, but that such property
> tax was not lawfully assessed . . . then the officers authorized shall make the assessment of taxes upon such property in addition to the assessment of such property for the current year, and shall assess the same separately for such property . . . .

In other words, the majority reads the statute as

---

[10] Section 193.092(1) appears under the title "Assessment of property for back taxes." And "back taxes" describes taxes assessed and collected after the time set for the assessment by statute. In Florida, ad valorem taxes are assessed annually. § 192.042, Fla. Stat. (2020).

requiring back assessment only when the assessing authority discovers that it has missed an entire parcel altogether, such that no tax is assessed or collected on the property. The majority justifies this rewrite based upon its narrow focus on, and analysis of, the phrase "escaped taxation," which appears after the operative language of the statute discussed above. *§ 193.092(1), Fla. Stat.*

However, reading the statute as a whole, it is clear that "escaped taxation" is nothing more than a shorthand reference to the conditions requiring a back assessment—which are plainly described at the beginning of the statute. In pertinent part, the statute reads:

> When it shall appear that any ad valorem tax might **[*42]** have been lawfully assessed or collected upon any property in the state, but that such tax was not lawfully assessed or levied, and has not been collected for any year within a period of 3 years next preceding the year in which it is ascertained that such tax has not been assessed, or levied, or collected, then the officers authorized shall make the assessment of taxes upon such property in addition to the assessment of such property for the current year, and shall assess the same separately for such property as may have escaped taxation at and upon the basis of valuation applied to such property for the year or years in which it escaped taxation, noting distinctly the year when such property escaped taxation and such assessment shall have the same force and effect as it would have had if it had been made in the year in which the property shall have escaped taxation . . . .

Id.

The statute's history underscores why the phrase "escaped taxation" must be read to refer back to tax that could have been but was not "lawfully assessed or collected." The majority is correct that Florida's 1895 tax statute only required back assessment whenever an "assessor . . . discover[s] that any land in **[*43]** his county was omitted in the assessment roll of either or all of the three previous years." Ch. 4322, § 24, Laws of Fla. (1895). Therefore, under the 1895 statute, only land that was missed entirely—that had escaped valuation altogether—was subject to back assessment. The 1899 enactment that added the phrase "escaped taxation" replaced the language limiting back assessments to land that had escaped *valuation* altogether and instead required back assessment upon discovery of land that had "*for any reason, escaped taxation* for all or any of the three previous years." Ch. 4663, § 1, Laws of Fla. (1899) (emphasis added). Were we deciding this case in 1899, the debate would properly center on whether back assessment was required for land that had escaped some tax because the valuation had not been conducted in accordance with the law (as arguably suggested by the "for any reason" language) or whether back assessment was still required only for land that wholly escaped valuation (as clearly directed by the 1895 language that had been replaced).

However, any potential ambiguity was cleared up in 1923 when the Legislature enacted chapter 9180, Laws of Florida, titled:

> AN ACT to Authorize the Assessment **[*44]** and Collection of Taxes upon any Property in the State of Florida upon which Ad Valorem Taxes could have been Lawfully Assessed for any Year or Years within three Years Previous to the Year in which such Assessment shall be made when the Taxes which might have been Lawfully Assessed against such Property for any cause have not been Paid, *or to which an Invalid Assessment* or Sale shall appear to have been made.

Ch. 9180, Laws of Fla. (1923) (emphasis added).

Although the "or to which an Invalid Assessment . . . shall appear to have been made" language is not repeated in the text, it does demonstrate that the Legislature understood that its operative language would require back assessment whenever land "escaped taxation" due to an invalid assessment, even if some tax had been paid.[11] Additionally, the 1923 enactment unambiguously placed a duty on the appraiser to assess back taxes "[w]hen it shall appear that any ad valorem tax might have been lawfully assessed or collected upon any property in the State of Florida, but that such tax was not lawfully assessed or levied." Ch. 9180, § 1. This language is materially identical to the operative language in the current version

---

[11] Attempting to shift the focus off of the invalidity of the assessment at issue, the majority posits that this portion of the 1923 act's title refers to statutory text that extends the deadline to back assess following a judicial determination of invalidity. *See* majority op. at 17 n.6. Putting aside that the statute's plain language compels us to focus on the invalidity of the assessment, the majority cannot be correct, or else the Legislature would have used the words "were held to have been made" rather than "shall appear to have been made."

of section 193.092(1). It was with the **[*45]** 1923 act that Florida's Legislature replaced the "for any reason, escaped taxation" language with the operative language analyzed above and retained the phrase "escaped taxation" in a subsequent clause as a shorthand reference to the unambiguously stated conditions under which an assessing authority "shall" back assess. *See* ch. 9180, § 1, Laws of Fla. (1923).

As we explained in *Ham v. Portfolio Recovery Assocs., LLC, 308 So. 3d 942, 946-47 (Fla. 2020)*, when interpreting statutes,

> we follow the "supremacy-of-text principle"—namely, the principle that "[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012). We also adhere to Justice Joseph Story's view that "every word employed in [a legal text] is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it." *Advisory Op. to Governor re Implementation of Amendment 4, the Voting Restoration Amendment, 288 So. 3d 1070, 1078 (Fla. 2020)* (quoting Joseph Story, *Commentaries on the Constitution of the United States*157-58 (1833), *quoted in* Scalia & Garner, *Reading Law* at 69).

Adherence to these principles of textual analysis compels the conclusion that section 193.092(1) requires back assessment under the circumstances of this case. **[*46]** No party disputes that Florida law required the property appraiser to assess this property at fair market value. No party disputes that the appraiser failed in this duty such that the property was not assessed at just value as lawfully required. As a result, the property escaped taxation that was required to be assessed and collected by Florida law. While the majority is correct that we should "discern the text's meaning as it would have been understood by a reasonable reader, fully competent in the language, at the time of its enactment," majority op. at 6, there is nothing to suggest that the operative words "lawfully assessed" have changed in meaning over the last century; that the phrase "escaped taxation" was in any way intended to override the operative language of the statute; or that "escaped taxation" would have been understood in context as having the very constraining meaning ascribed to it by the majority.

I would quash the decision of the Second District Court of Appeal and remand for further proceedings in which the statute is applied as plainly written.

POLSTON, J., concurs.

End of Document

Philip Morris USA Inc. v. Principe

Court of Appeal of Florida, Third District

September 22, 2021, Opinion Filed

No. 3D20-875

Reporter
2021 Fla. App. LEXIS 13205 *

Philip Morris USA Inc., Appellant, vs. Edward F. Principe, Appellee.

Notice: NOT FINAL UNTIL DISPOSITION OF TIMELY FILED MOTION FOR REHEARING.

Prior History: **[*1]** An Appeal from the Circuit Court for Miami-Dade County, Valerie R. Manno Schurr, Judge. Lower Tribunal No. 17-25772.

Core Terms

cigarettes, smoking, repose, statute of repose, disclaimers, filtered, wrongful conduct, smokers, fraud claim, cause of action, induce, quit, misrepresentations, cancer, concealment, messaging, manufacture, fraudulent, deposition testimony, allege fraud, knowingly, safe, fraudulent misrepresentation, occurring, accrued, directed verdict, final judgment, tobacco case, ultra-light, addictive

Case Summary

Overview
HOLDINGS: [1]-A final judgment entered against the tobacco company after a jury had determined that it fraudulently misrepresented to, and concealed from, the smoker the dangers associated with smoking filtered cigarettes was improper because the smoker's claims were barred by Florida's statute of repose for fraud, § 95.031(2)(a), Fla. Stat. (2017). The tobacco company's pre-repose period disclaimers adequately disclaimed the dangers inherent in cigarette smoking so that its continued manufacture and distribution of filtered cigarettes did not constitute a misrepresentation occurring during the repose period.

Outcome
Judgment reversed and remanded.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Statute of Repose

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN1 **Standards of Review, De Novo Review**

When the relevant facts are not in dispute, whether a claim is barred by the statute of repose, *Fla. Stat. § 95.031(2)(a)*, presents a question of law that is reviewed de novo.

Governments > Legislation > Statute of Repose

Torts > Procedural Matters > Statute of Repose > Tolling of Statutory Period

Governments > Legislation > Statute of Limitations > Time Limitations

HN2 **Legislation, Statute of Repose**

A statute of limitations provides a specific time period after the accrual of a cause of action in which a plaintiff must bring his lawsuit. This time period generally begins upon the occurrence of the last element of the cause of action. For example, a plaintiff must bring an action for negligence within four years of the occurrence of the last element for the tort of negligence: generally, the plaintiff's suffering injury as a result of the tortfeasor's

breach of duty. *Fla. Stat. § 95.11(3)(a)* (2017). Recognizing that sometimes the last element of the cause of action may occur — and the cause of action may therefore accrue — several years after the defendant's act or omission, legislatures have enacted statutes of repose to ensure that a defendant's potential liability ends at some definite point, irrespective of when the cause of action may have accrued. Statutes of repose run from the date of a discrete act on the part of the defendant without regard to when the cause of action accrued.

Torts > Procedural Matters > Statute of Repose > Personal Injury

Torts > Procedural Matters > Statute of Repose > Products Liability

HN3 **Statute of Repose, Personal Injury**

To ensure that a manufacturer's potential liability is not of indefinite duration, the Florida Legislature enacted a statute of repose for products liability claims that generally requires such claims be brought no later than twelve years after the alleged defective product is first purchased, irrespective of when the plaintiff's injury occurs. *§ 95.031(2)(a), Fla. Stat.* (2017).

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Defenses

Torts > Procedural Matters > Statute of Repose

HN4 **Statute of Limitations, Time Limitations**

Florida's statute of limitations for fraud is four years. *§ 95.11(3)(j), Fla. Stat.* (2017). Because a plaintiff can be the victim of fraud for some time without even knowing it, Florida provides that the limitations period for bringing a fraud claim does not begin until the wrongdoer's acts were, or should have been, discovered. Florida's legislature has combined fraud's limitations statute with a statute of repose requiring that any fraud action must begin within twelve years of the commission of the alleged fraud, irrespective of the date the wrongdoer's acts were, or should have been, discovered. *§ 95.031(2)(a), Fla. Stat.* (2017).

Governments > Legislation > Statute of Repose

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Defenses

Torts > Procedural Matters > Statute of Repose

HN5 **Legislation, Statute of Repose**

Per the fraud repose statute, *§ 95.031(2)(a), Fla. Stat.* (2017), if the commission of the alleged fraud does not take place within the statute of repose period, then the fraud claim is extinguished. In order to prove a fraudulent misrepresentation claim, a plaintiff must generally establish that: (i) the defendant made a false statement of material fact; (ii) the defendant knew or should have known the representation was false; (iii) the false representation was made with the intent that it would induce the plaintiff to act; and (iv) the plaintiff suffered resulting damages in reliance upon the representation.

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

Torts > ... > Fraud & Misrepresentation > Nondisclosure > Elements

HN6 **Actual Fraud, Elements**

The elements of a fraudulent concealment claim are similar to that of fraudulent misrepresentation, and are as follows: (i) the defendant concealed or failed to disclose a material fact; (ii) the defendant knew or should have known the material fact should be disclosed; (iii) the defendant knew its concealment of or failure to disclose the material fact would induce the plaintiff to act; (iv) the defendant had a duty to disclose; and (v) the plaintiff detrimentally relied on the concealed information.

Governments > Legislation > Statute of Repose

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Defenses

Torts > Procedural Matters > Statute of Repose > Tolling of Statutory Period

Governments > Legislation > Statute of Limitations > Time Limitations

HN7 **Legislation, Statute of Repose**

Although a plaintiff in a tobacco case must establish each of these elements for a fraud claim, Florida's Supreme Court has clarified that the date of the commission of the alleged fraud in the fraud repose statute, § 95.031(2)(a), Fla. Stat. (2017). refers not to the date that the fraud cause of action accrued, but rather, to the date of the defendant's wrongful conduct. In other words, for statute of repose purposes it is not necessary that the smoker relied during the 12-year repose period. Where there is evidence of the defendant's wrongful conduct within the repose period, the statute of repose will not bar a plaintiff's fraud claim. And, for statute of repose purposes, the wrongful conduct consists of a discrete act on the part of the defendant.

Governments > Legislation > Statute of Repose

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Defenses

Torts > Procedural Matters > Statute of Repose > Tolling of Statutory Period

Torts > Procedural Matters > Statute of Repose > Products Liability

HN8 **Legislation, Statute of Repose**

To defeat a defendant's statute of repose, § 95.031(2)(a), Fla. Stat. (2017), affirmative defense in a tobacco case premised upon the defendant's fraud, the plaintiff need only show that the defendant's wrongful conduct-i.e., the first three elements of the fraudulent misrepresentation cause of action and the first four elements of the fraudulent concealment cause of action — occurred prior to the expiration of the twelve-year repose period. In a tobacco case where the plaintiff is alleging fraud, the plaintiff will defeat a statute of repose defense if the plaintiff establishes that, during the 12-year period prior to the filing of the complaint, the defendant knowingly made a materially false statement with the intent that the statement be relied upon by smokers.

Governments > Legislation > Statute of Repose

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Procedural Matters > Statute of Repose > Products Liability

Torts > Procedural Matters > Statute of Repose

HN9 **Legislation, Statute of Repose**

The repose statute requires the action be brought within 12 years of the commission of the alleged fraud. § 95.031(2), Fla. Stat. (2017). Therefore, to be actionable under Hess v. Philip Morris USA, Inc. — dispensing with the element of reliance during the repose period — the defendant's materially false statement must not only be made within the repose period, but also must be similar in nature and related to the fraudulent statement upon which the plaintiff, outside the repose period, initially detrimentally relied.

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN10 **Actual Fraud, Elements**

To constitute wrongful conduct under Hess v. Philip Morris USA, Inc., the defendant's conduct must meet the first three elements of fraud: the defendant's statement must be materially false, knowingly made, and intended to induce another to act.

Governments > Legislation > Statute of Repose

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Defenses

Torts > Procedural Matters > Statute of Repose

HN11 **Legislation, Statute of Repose**

For statute of repose purposes, to determine the date of the commission of the alleged fraud courts look to the discrete act of the defendant, without regard to the plaintiff's reliance on that act. Because the plain text of the repose statute expressly requires a defendant's

commission of the alleged fraud to occur within the repose period, § 95.031(2)(a), Fla. Stat. (2017), courts cannot read into Hess v. Philip Morris USA, Inc. an implied excusal of another element of fraud, that is, proof that the defendant intended reliance upon a knowingly false statement. A false statement in the abstract, even if knowingly made, does not constitute fraud; indeed, what makes a false statement fraudulent is the declarant's intent that others rely upon it.

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN12 **Actual Fraud, Elements**

A party cannot recover in fraud for alleged misrepresentations that have been expressly disclaimed.

Counsel: Arnold & Porter Kaye Scholer LLP, and Geoffrey J. Michael (Washington, D.C.); Mayer Brown LLP, and Michael Rayfield (New York, NY); Shook, Hardy & Bacon, L.L.P., and Scott A. Chesin (New York, NY), for appellant.

Ratzan Weissman & Boldt, and Kimberly L. Boldt and Ryan C. Tyler (Boca Raton); The Alvarez Law Firm, and Alex Alvarez, Michael Alvarez, Nick Reyes and Phillip Holden, for appellee.

Judges: Before EMAS, LOGUE and SCALES, JJ.

Opinion by: SCALES

Opinion

SCALES, J.

In this non-*Engle* case,[1] Philip Morris USA, Inc. ("PM") appeals from a final judgment entered against it after a jury determined PM had fraudulently misrepresented to, and concealed from, Edward Principe the dangers associated with smoking filtered cigarettes. We reverse the final judgment because Principe's claims are barred by Florida's statute of repose for fraud.

I. Background[2]

A. *Principe's smoking history*

In 1970, when he was sixteen years-old, Principe started smoking Parliaments, a filtered cigarette manufactured by PM. In 1975, after joining the Marines, Principe switched to another PM brand of filtered cigarette, **[*2]** Marlboro. In about 1980, Principe switched to Marlboro Lights, and finally, in the 1990s, to Marlboro Ultra Lights.

Each time Principe switched brands, he did so because he thought — based on PM's advertising and messaging — that he was progressing to a safer cigarette. Ultimately, in 1998, Principe quit smoking. Shortly after Principe quit smoking, PM changed its public position about the risks and addictive nature of cigarettes. Contrary to its previous messaging, PM publicly admitted both that smoking causes cancer and that nicotine is addictive. Beginning in 1999, PM has stated publicly on its website that: "Philip Morris USA agrees with the overwhelming medical and scientific consensus that cigarette smoking is addictive and it can be very difficult to quit smoking, but this should not deter smokers who want to quit from trying to do so."

B. *PM's about-face disclaimers*

Beginning in the early 2000's, PM's website elaborated on this message:

> We agree with the overwhelming medical and scientific consensus that cigarette smoking causes lung cancer, heart disease, emphysema and other serious diseases in smokers. Smokers are far more likely to develop serious diseases, like lung cancer, **[*3]** than non-smokers. There is no "safe" cigarette.

PM's website, which contained links to, and quotations from, various publications from the U.S. Surgeon General and the National Cancer Institute, also made clear that the only way to reduce the risks of smoking-related diseases meaningfully was to quit smoking:

> To reduce the health effects of smoking, the best thing to do is to quit; public health authorities do not

[1] *Engle* was a class action case against the tobacco industry by Florida smokers who suffered smoking-related diseases between 1990 and 1996. After a partial trial, the Florida Supreme Court vacated the judgment and de-certified the class, but held that certain findings made by the Engle jury would be *res judicata* for class members who sought to pursue individual claims. *Engle v. Liggett Grp., Inc., 945 So. 2d 1246 (Fla. 2006)*.

[2] The relevant facts are not in dispute.

> endorse either smoking fewer cigarettes or switching to lower tar and nicotine brands as a satisfactory way of reducing risk. In fact, one of the required cigarette warnings for packages and advertisements in the U.S. is "SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health."

This message was amplified in a brochure produced by PM, in 2002, and distributed as inserts in major newspapers nationwide. In a section titled "Quitting Smoking," the inserts stated plainly: "The only proven way to reduce the health risks of smoking is to quit." The inserts also included this disclaimer: "Low-tar cigarettes evidence does not indicate a benefit to public health."

C. *Principe's lawsuit and the resulting proceedings*

PM's about-face disclaimers, though, **[*4]** had come too late for Principe. In 2016, eighteen years after he stopped smoking, Principe was diagnosed with laryngeal cancer. The following year, he underwent surgery that removed his larynx, leaving him with permanent breathing, eating and speaking problems.

On November 6, 2017, Principe filed this suit against PM[3] in the Miami-Dade County Circuit Court. Principe asserted negligence and strict liability claims, as well as the two fraud claims relevant here: fraudulent concealment and fraudulent misrepresentation. With regard to his fraud claims, Principe's operative complaint asserted, with significant detail and specificity, that PM engaged in a decades-long, deliberate campaign of deception regarding the health dangers of smoking. Principe's complaint asserts that PM "made numerous public statements and advertisements, including but not limited to, that smoking had not been proven to be injurious to health, that filtered cigarettes were safe, safer or less hazardous than non-filtered cigarettes and other similar statements and or advertisements."

In his claim for fraudulent concealment, Principe alleged that information regarding the health hazards of cigarettes was concealed by **[*5]** PM "for the purpose of inducing [Principe] to smoke, what [he] believed to be a safe, safer or less hazardous cigarette." In his claim for fraudulent misrepresentation, Principe alleged that PM "sustained a broad-based public campaign for many years disseminating misleading information and creating controversy over the adverse effects of smoking cigarettes, and the addictive nature of smoking cigarettes, intending that current and potential smoker [sic] would rely on the misinformation."

Among its affirmative defenses, PM alleged that Principe's claims are barred by Florida's statute of repose for fraud. At trial, the court deferred ruling on PM's motion for directed verdict based on PM's statute of repose defense, and the jury found in Principe's favor on his two fraud claims.[4] The jury awarded Principe $360,000 for past medical expenses and $10.2 million in non-economic damages for future pain and suffering. The trial court then entered the orders appealed by PM in this case: the final judgment consistent with the jury verdict, the order denying PM's post-trial motion for judgment notwithstanding the verdict, and the order denying PM's motion for directed verdict upon which the trial **[*6]** court had deferred ruling.

II. Analysis[5]

As it did below, PM argues that, as a matter of law, Principe's fraud claims are time-barred by Florida's statute of repose for fraud.

A. *Statutes of limitations and repose — generally*

HN2[] A statute of limitations provides a specific time period after the accrual of a cause of action in which a plaintiff must bring his lawsuit. This time period generally begins upon the occurrence of the last element of the cause of action.[6] For example, a plaintiff must bring an action for negligence within four years of the occurrence of the last element for the tort of negligence: generally, the plaintiff's suffering injury as a result of the tortfeasor's breach of duty. § 95.11(3)(a), Fla. Stat. (2017).

Recognizing, though, that sometimes the last element of the cause of action may occur — and the cause of

---

[3] Principe's lawsuit also named other tobacco manufacturers and the retailer where Principe alleged that he purchased his cigarettes. Our record reflects that Principe and certain of these other defendants resolved Principe's claims prior to trial, and only the case against PM is relevant to our adjudication.

[4] The jury found in PM's favor on Principe's other claims.

[5] HN1[] When, as in this case, the relevant facts are not in dispute, whether a claim is barred by the statute of repose presents a question of law that we review *de novo. Hess v. Philip Morris USA, Inc.*, 175. So. 3d 687, 692 (Fla. 2015).

[6] In pertinent part, section 95.031(1) of the Florida Statutes provides: "A cause of action accrues when the last element constituting the cause of action occurs."

action may therefore accrue — several years after the defendant's act or omission, legislatures have enacted statutes of repose to ensure that a defendant's potential liability ends at some definite point, irrespective of when the cause of action may have accrued. Statutes of repose "run from the date of a discrete act on the part of the defendant without regard to when the cause **[*7]** of action accrued." *Kush v. Lloyd, 616 So. 2d 415, 418 (Fla. 1992)*. For example, in the products liability context, it is possible that a plaintiff's injury (i.e., generally, the last element of the cause of action for product liability) may not occur until decades after the plaintiff buys the product. ***HN3***[⬆] Thus, to ensure that a manufacturer's potential liability is not of indefinite duration, the Florida Legislature enacted a statute of repose for products liability claims that generally requires such claims be brought no later than twelve years after the alleged defective product is first purchased, irrespective of when the plaintiff's injury occurs. *§ 95.031(2)(a), Fla. Stat.* (2017).

B. *Florida's statutes of limitations and repose for fraud, and the Hess decision*

HN4[⬆] Florida's statute of limitations for fraud is four years. *§ 95.11(3)(j), Fla. Stat.* (2017). Because a plaintiff can be the victim of fraud for some time without even knowing it, Florida provides that the limitations period for bringing a fraud claim does not begin until the wrongdoer's acts were, or should have been, discovered. *See Kush, 616 So. 2d at 418*. Significantly, for our analysis, Florida's legislature has combined fraud's limitations statute with a statute of repose requiring that any fraud action must begin within twelve years of the **[*8]** commission of the alleged fraud, irrespective of the date the wrongdoer's acts were, or should have been, discovered:

> An action founded upon fraud . . . must be begun within . . . [four years] . . . with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere . . . , but in any event an action for fraud . . . *must be begun within 12 years after the date of the commission of the alleged fraud*, regardless of the date the fraud was or should have been discovered.

§ 95.031(2)(a), Fla. Stat. (2017) (emphasis added).

HN5[⬆] Hence, per the fraud repose statute, "[if] the 'commission of the alleged fraud' does not take place within the statute of repose period, then the fraud claim is extinguished." *Hess, 175 So. 3d at 696*. In order to prove a fraudulent misrepresentation claim, a plaintiff must generally establish that: (i) the defendant made a false statement of material fact; (ii) the defendant knew or should have known the representation was false; (iii) the false representation was made with the intent that it would induce the plaintiff to act; and (iv) the plaintiff suffered resulting **[*9]** damages in reliance upon the representation.[7] *Butler v. Yusem, 44 So. 3d 102, 105 (Fla. 2010)*.

HN7[⬆] Although a plaintiff in a tobacco case must establish each of these elements for a fraud claim, Florida's Supreme Court has clarified that "the date of the commission of the alleged fraud" in the fraud repose statute refers not to the date that the fraud cause of action accrued, but rather, to the date of the defendant's "wrongful conduct." *Hess, 175 So. 3d at 698*. In other words, "for statute of repose purposes it is not necessary that the smoker relied during the twelve-year repose period. Where there is evidence of the *defendant's wrongful conduct* within the repose period, the statute of repose will not bar a plaintiff's [fraud] claim." *Id. at 698* (emphasis added). And, for statute of repose purposes, the "wrongful conduct" consists of "a discrete act on the part of the defendant." *Hess, 175 So. 3d at 698* (citing *Kush, 616 So. 2d at 418*).

HN8[⬆] Therefore, to defeat a defendant's statute of repose affirmative defense in a tobacco case premised upon the defendant's fraud, the plaintiff need only show that the defendant's "wrongful conduct" - i.e., the first three elements of the fraudulent misrepresentation cause of action and the first four elements of the fraudulent concealment cause of action — occurred prior to the **[*10]** expiration of the twelve-year repose period (see section II(D), *infra*). Put another way, in a tobacco case where the plaintiff is alleging fraud, the plaintiff will defeat a statute of repose defense if the plaintiff establishes that, during the twelve-year period prior to the filing of the complaint, the defendant

---

[7] ***HN6***[⬆] The elements of a fraudulent concealment claim are similar to that of fraudulent misrepresentation, and are as follows: (i) the defendant concealed or failed to disclose a material fact; (ii) the defendant knew or should have known the material fact should be disclosed; (iii) the defendant knew its concealment of or failure to disclose the material fact would induce the plaintiff to act; (iv) the defendant had a duty to disclose; and (v) the plaintiff detrimentally relied on the concealed information. *R.J. Reynolds Tobacco Co. v. Martin, 53 So. 3d 1060, 1068 (Fla. 1st DCA 2010)*.

knowingly made a materially false statement[8] with the intent that the statement be relied upon by smokers.

C. *Whether PM engaged in "wrongful conduct" during the repose period*

Against this backdrop, we analyze this case and PM's statute of repose defense. It is important to note that we take no issue with the jury's factual findings and accept that Principe established the elements of both fraudulent concealment and fraudulent representation. What makes this case analytically challenging is the difficulty of applying the statute of repose given both the chronology of events and the time periods that elapsed between the occurrence of the elements of Principe's fraud causes of action.

PM's knowing misrepresentations and concealment were ongoing for decades and were not disclaimed until approximately 2000, when PM began publicly to renounce its prior false messaging **[*11]** regarding cigarette safety. Principe's reliance on PM's misrepresentations and concealment occurred in the 1970s and 1980s, long before PM's disclaimers. Principe stopped smoking in 1998, several years before PM's disclaimers, almost eighteen years before he was diagnosed with laryngeal cancer (and his cause of action accrued), and nineteen years before he filed his lawsuit.

Our inquiry, however, is not whether or when Principe's cause of action against PM accrued. Because the statute of repose runs from the date of "a discrete act on the part of the defendant" *Hess, 175 So. 3d at 698* (citing *Kush, 616 So. 2d at 418*), the parties appear to agree that this case hinges — and we limit our focus — upon whether PM engaged in "wrongful conduct" during the twelve-year repose period beginning on November 6, 2005, and ending on November 6, 2017, the date Principe filed his lawsuit. If, in our *de novo* review of the record, we conclude that PM engaged in "wrongful conduct" during the repose period, we must affirm. *Hess, 175 So. 3d at 698*. Otherwise, the statute of repose bars Principe's claims. *§ 95.031(2)(a), Fla. Stat.* (2017).

Principe identifies two acts occurring during the repose period that he asserts constitute "wrongful conduct" so as to defeat PM's statute of repose defense: (i) **[*12]** the 2011 deposition testimony of PM's corporate representative, Dr. Peter Lipowicz, in an unrelated Florida tobacco case in which Dr. Lipowicz testified that PM believes that filtered cigarettes reduce the risk of cancer; and (ii) PM's continued manufacture and sale of cigarettes with filters during the repose period. We address each of the identified acts in turn.

D. *Dr. Lipowicz's deposition testimony in an unrelated case*

At trial, Principe presented the jury with deposition testimony, given in 2011, by Dr. Lipowicz, a PM vice president whom PM had designated as its corporate representative in an unrelated Florida tobacco case. Principe points to the following specific testimony as "wrongful conduct" (occurring within Principe's repose period):

> Q: Does Philip Morris admit that filtered cigarettes are just as hazardous as unfiltered cigarettes?
> A: No. We think that filtered cigarettes and the addition of filters on cigarettes, their research has shown that they have been shown to reduce the risk of cancer in smokers who smoke them. So we disagree with that.
> . . . .
>
> Q: Does Philip Morris admit that there is not sufficient evidence that there is any less danger with low-tar cigarettes than **[*13]** other cigarettes?
> A: No. Philip Morris — you know, we believe that lower-tar cigarettes, the evidence shows that there is some reduction in cancer risk by using lower-tar cigarettes.

Principe asserts that Dr. Lipowicz's testimony — as PM's corporate representative — constitutes "wrongful conduct" because it is contrary not only to established science, but also to PM's own disclaimers made in 2000, stating that "there is no safe cigarette." ***HN10***[⬆] As mentioned above, to constitute "wrongful conduct" under *Hess*, the defendant's conduct must meet the first three elements of fraud: the defendant's statement must be materially false, knowingly made, *and* intended to induce another to act. (see Section II (B), *supra*).

---

[8] Obviously, not just any materially false statement made by the defendant during the repose period satisfies *Hess's* requirement. ***HN9***[⬆] The repose statute requires the action be brought within twelve years of "the commission of *the* alleged fraud." *Hess, 175 So. 3d at 698* (quoting *§ 95.031(2), Fla. Stat.*) (emphasis added). Therefore, to be actionable under *Hess* - dispensing with the element of reliance during the repose period — the defendant's materially false statement must not only be made within the repose period, but also must be similar in nature and related to the fraudulent statement upon which the plaintiff, outside the repose period, initially detrimentally relied.

We do not quarrel with Principe's assertion that Dr. Lipowicz's deposition testimony was knowingly false, thus establishing the first two elements of fraud. We agree, though, with PM's argument that Dr. Lipowicz's compelled testimony in a deposition in an unrelated case, was not intended to induce anyone to act. The testimony was not intended to induce nonsmokers to start smoking; it was not intended to induce smokers to smoke more cigarettes; nor was it intended to induce smokers of **[*14]** non-filtered cigarettes to smoke filtered cigarettes. Indeed, this deposition testimony in an unrelated case was not intended by PM to induce anyone to do anything. While the deposition was a public statement, as part of a public proceeding (and presumably it was offered into evidence in the case in which it was solicited as well as in this case), there is no evidence in this record — or any suggestion by Principe — that PM intended that the testimony induce anyone to act.

Principe argues that, under *Hess*, he need establish only that Dr. Lipowicz's testimony was false and made knowingly, without regard to whether the testimony was intended to induce reliance. We do not read the holding in *Hess* so broadly. ***HN11***[↑] As mentioned earlier, *Hess* instructs that, for statute of repose purposes, to determine "the date of the commission of the alleged fraud" we look to the discrete act of the defendant, without regard to the plaintiff's reliance on that act. *Hess, 175 So. 3d at 698*. Because the plain text of the repose statute expressly requires a defendant's "commission *of the alleged fraud*" to occur within the repose period, *see* *§ 95.031(2)(a), Fla. Stat.* (2017) (emphasis added), we cannot, consistent with the statute's plain language, read into **[*15]** *Hess* an implied excusal of another element of fraud, that is, proof that the defendant intended reliance upon a knowingly false statement.

A false statement in the abstract, even if knowingly made, does not constitute fraud; indeed, what makes a false statement fraudulent is the declarant's intent that others rely upon it. *Butler, 44 So. 3d at 105*. Hence, to give full effect to both the repose statute's text and *Hess*'s holding, we cannot conclude, as Principe invites us to do, that a defendant's knowingly false statement, made without an intent to induce, constitutes sufficient "wrongful conduct," thereby negating the statute of repose defense.

Thus, we conclude, as a matter of law, that Dr. Lipowicz's deposition testimony did not constitute the requisite "wrongful conduct" occurring within the repose period so as to defeat PM's statute of repose defense.

E. *PM's continued manufacture and distribution of filtered cigarettes — the Gentile decision*

Principe also asserts that the statute of repose is inapplicable because PM's manufacturing and distribution of filtered cigarettes during the repose period constituted a misrepresentation. Essentially, Principe argues that, for decades, PM's messaging touted the health **[*16]** benefits of filtered cigarettes, and, because PM now concedes in its public messaging that filtered cigarettes are not safe, PM's continued manufacturing and distribution of filtered cigarettes is inherently wrongful conduct that defeats a statute of repose defense. Heavily relying on our sister court's opinion in *Philip Morris USA Inc. v. Gentile, 281 So.3d 493 (Fla. 4th DCA 2019)*, PM responds by arguing that its above-referenced public disclaimers, published in 2000 and 2002, adequately and expressly disclaimed any prior fraudulent messaging, thus extinguishing Principe's fraud claims.

In *Gentile*, the plaintiff filed a wrongful death action on behalf of the deceased smoker who died from lung cancer in 2014. In his lawsuit, the *Gentile* plaintiff alleged, among other claims against PM, fraudulent misrepresentation and concealment. At trial, PM argued (as it did below in this case) that it was entitled to a directed verdict because the plaintiff had failed to prove that PM had made false or misleading statements during the repose period that began on May 12, 2003, twelve years prior to the suit's filing. *Id. at 494, n.2*. The trial court denied PM's directed verdict motion and, after the jury returned a verdict for the plaintiff, PM appealed. *Id. at 494*.

On appeal, PM argued that **[*17]** essentially the same public disclaimers, referenced in section I(B), *supra*, negated the *Gentile* plaintiff's virtually identical fraud claims. *Id. at 496*. The *Gentile* court, on *de novo* review, reversed and remanded with instructions for the trial court to enter a directed verdict for PM on the plaintiff's fraud claims. The *Gentile* court determined that PM's continued marketing of light and ultra-light cigarettes during the repose period did not constitute a misrepresentation because PM had "adequately disclaimed any prior misrepresentations." *Id. at 497*.

HN12[↑] It is well settled that a party cannot recover in fraud for alleged misrepresentations that have been expressly disclaimed. *See* *Mac-Gray Servs., Inc. v. DeGeorge, 913 So. 2d 630, 634 (Fla. 3d DCA 2005)*. As described in section I(B), *supra*, in 2000 and 2002, PM

issued its official position regarding smoking and health issues, clearly and unequivocally stating, among other things, that: "There is no safe cigarette. Cigarettes are addictive and cause serious disease in smokers. For those concerned about the health risks of smoking, the best thing to do is to quit."

Gentile held that these disclaimers adequately disclaimed any prior misrepresentations so that PM's continued marketing of light and ultra-light cigarettes during the **[*18]** repose period did not constitute a fraudulent misrepresentation. *Gentile, 281 So. 3d at 496*. Principe seeks to distinguish *Gentile* on the basis that the *Gentile* plaintiff alleged that the deceased smoker relied upon PM's misrepresentations regarding light and ultra-light cigarettes, as opposed to filtered cigarettes. Principe argues that, because a portion of the disclaimers referenced in the *Gentile* opinion specifically reference "light" and "ultra-light" cigarettes — and the disclaimers do not specifically reference "filtered" cigarettes - *Gentile* is inapplicable.

We do not read *Gentile*'s holding as limiting the scope of PM's disclaimers only to light and ultra-light cigarettes. We agree with PM that there is no reasonable way to read into these disclosures the distinctions that Principe would have us make; that, by not specifically mentioning "filtered" cigarettes in the disclaimers, the disclaimers do not disclaim any prior misrepresentations regarding filtered cigarettes. PM's disclaimers did not suggest, either overtly or subtly, that a smoker's health concerns could be alleviated by smoking filtered cigarettes. To the contrary, the advice and messaging in the disclaimers are absolute and unequivocal: **[*19]** those with any health concerns should quit smoking because there are no safe cigarettes.[9]

We therefore conclude, as did the *Gentile* court, that PM's pre-repose period disclaimers adequately disclaimed the dangers inherent in cigarette smoking so that PM's continued manufacture and distribution of filtered cigarettes did not constitute a misrepresentation occurring during the repose period. *Id. at 496-97*.[10]

III. Conclusion

The two acts identified by Principe that occurred during the repose period — Dr. Lipowicz's deposition testimony and PM's continued manufacture and sale of filtered cigarettes — do not constitute "wrongful conduct" as required by *Hess*. Therefore, because the record reveals no other wrongful conduct by PM occurring within the repose period, Principe's fraud claims are barred by Florida's statute of repose for fraud. We reverse the final judgment and the trial court's orders denying PM's motions for directed verdict and judgment notwithstanding the verdict, and remand for entry of a final judgment for PM.

Reversed and remanded, with instructions.

End of Document

[9] In its order denying PM's directed verdict motion, the trial court concluded that PM had failed to preserve a "disclaimer defense." PM, though, did not allege, and on appeal does not argue a separate affirmative defense of disclaimer. As *Gentile* instructs, this Court may look to PM's disclaimers to determine whether PM engaged in wrongful conduct during the repose period.

[10] This is not a case where PM's manufacture and sale of filtered cigarettes during the repose period are coupled with messaging that suggests a filter makes its cigarettes safer or healthier. Principe, rather, asks us to conclude that a cigarette containing a filter is, itself, a fraudulent misrepresentation. While cigarette filters do not make cigarettes safer or healthier, we are unable to conclude, based on our *de novo* review of this record, that either PM's manufacturing of filtered cigarettes, or its labelling a cigarette that has a filter as "filtered," is inherently fraudulent. Indeed, at oral argument, PM's counsel stated that its customers prefer a cigarette with a filter because a filter blocks small pieces of tobacco from reaching the smoker's mouth.