

**IN THE SUPREME COURT OF FLORIDA**

**GRADY CARTER AND  
MILDRED CARTER,  
Petitioners,**

vs.

**CASE NO.: 94, 797  
FIRST DCA CASE NO.: 96-4831**

**BROWN & WILLIAMSON TOBACCO  
CORPORATION,  
as successor by merger to  
THE AMERICAN TOBACCO  
COMPANY,  
Respondent.**

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**ON PETITION FOR DISCRETIONARY REVIEW OF  
A DECISION OF THE FIRST DISTRICT COURT OF APPEAL**

**PETITIONERS' INITIAL BRIEF**

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### III. CERTIFICATION OF FORMAT

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I certify that this brief complies precisely with the requirements of Fla R. App. P. 9.210 (as modified by this Court's July 13, 1998 Order); 11 Cir. Fed. R. App. Proc 28-2(d), 32-4.

The following abbreviations are used:

R -- Record on appeal

A -- Appendix

PX -- Plaintiffs' exhibits

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Gregory H. Maxwell

#### IV. STATEMENT OF THE CASE AND OF THE FACTS

Petitioners Grady Carter and Mildred Carter, his wife, seek review of the Florida First District Court of Appeal's decision reversing a jury verdict in their favor against Brown & Williamson Tobacco Corporation ("B&W"), as successor by merger to The American Tobacco Company ("ATC"). *Brown & Williamson Tobacco Corporation v. Carter*, 723 So.2d 833 (Fla. 1 DCA 1998), A 1. The Carters timely filed a motion for rehearing, clarification, and for rehearing en banc in the district court. Their motion for rehearing was denied by decision filed by the district court on December 31, 1998. Timely Notice to Invoke Discretionary Jurisdiction of this Court was filed by the Carters on 1/29/99, and this Court accepted jurisdiction by order dated May 25, 1999.

Grady Carter began smoking unfiltered Lucky Strike cigarettes as a 16 year old in 1947. He continued to smoke Lucky Strikes up until 1972 at which time he switched to a different brand. R53:2144-45; 2148. At the time he began smoking as a teenager, Mr. Carter had no knowledge or awareness that cigarette smoking could harm him in any way. However, as he grew older, he became gradually aware of the dangers of cigarette smoking and began making repeated, unsuccessful attempts to quit smoking. R53:2148-50; 2153-73. Mr. Carter tried a number of different methods to quit smoking which included: trying to quit by laying the cigarettes down and walking away from them; the use of over-the-counter medications; the use of graduated filters; treatment at a "nicotine withdrawal clinic" which involved injections into his ear lobes, temples, and nose; hypnosis; a mechanical watch-like device; and a nicotine substitute in the form of chewing gum. R53:2153-73. Mr. Carter was eventually successful in quitting smoking with the assistance of his physician, who prescribed medication to assist him in permanently quitting. R53:2192-93.

In late January, 1991, Mr. Carter spit up blood. R53:2178. He immediately made an appointment with his doctor for 2/4/91. Concerned that something was wrong

he looked in a medical book and found two things that would result in spitting up blood: lung cancer and tuberculosis. R53:2178-79. Although not noted in the district court's decision, Mr. Carter testified that he was concerned about the possibility of tuberculosis because he had been exposed to an individual at work who had that disease. R53:2181-82, A 2. On 2/4/91, Dr. Decker took chest x-rays and told Mr. Carter he observed an abnormality on his lung which could indicate several things, including cancer or tuberculosis. R53:2181. Dr. Decker referred him to a pulmonary specialist, Dr. Yergin. Mr. Carter saw Dr. Yergin the next day, 2/5/91. R53:2181-83. When Dr. Yergin saw Mr. Carter on 2/5/91, he reviewed the x-ray taken by Dr. Decker and observed a large left upper lobe mass lesion which he indicated on his report of that visit was highly suggestive of a neoplasm, i.e. lung tumor. A 3. However, he did not know what the nodule was on that day, and while suggestive of a neoplasm, it could have been tuberculosis or a slowly resolving pneumonia. R39:553; 558. Although not noted by the district court, no evidence was presented at trial that either tuberculosis or pneumonia are caused by cigarette smoking. Because cancer cannot be reliably differentiated from other ailments by chest x-ray alone, Dr. Yergin testified that it would not have been correct to tell Mr. Carter on February 5 that he had lung cancer, and *he, in fact, did not tell Mr. Carter on that date that he had lung cancer*. R39: 554; 558, A 4. Several additional tests were necessary to make an accurate diagnosis including a bronchoscopy, in which a tissue sample is obtained and tested. R39:554-56.

Dr. Yergin's chart of February 5 reflects his impressions: "left upper lobe nodule, COPD, chronic bronchitis, cigarette abuse of approximately 65 pack years, history of nephrolithiasis, previous history of ulcer disease, status post pneumothorax 1958". R39:557; A 5. Although not noted by the district court in its decision, no testimony was elicited at trial that Dr. Yergin discussed any of these impressions or the cause of same with Mr. Carter before 2/10/91, (the operative date for the statute of limitations) with the exception of the left upper lobe nodule, which was discussed to

the extent indicated above. At trial, neither Dr. Yergin nor Mr. Carter were asked *when* it was that Mr. Carter was informed about the impressions of bronchitis or COPD.

On 2/12/91, Dr. Yergin performed the additional tests on Mr. Carter, including the bronchoscopy. The bronchoscopy pathology report showed Mr. Carter had lung cancer. Dr. Yergin told Mr. Carter he had lung cancer on 2/14/91. R39:565-66. Mr. Carter testified that prior to 2/14/91, he did not know for sure what the problem was. R53:2187.

On 2/10/95, less than four years after Mr. Carter had been told he had lung cancer, the Carters filed their complaint against ATC alleging counts for strict liability and negligence. The Carters later moved to amend the style of their case to reflect the merger of ATC into B&W, which merger the Carters learned of after their complaint was filed. R2:335-36; R3:454. The case proceeded to trial and the jury returned a verdict in favor of the Carters on both the negligence and the strict liability counts. The jury also determined that the Carters' cause of action was not barred by the applicable four year statute of limitations. A 7. On appeal, the district court reversed, holding that (1) the Carters' action was barred as a matter of law by the four year statute of limitations; (2) the trial court erred in permitting the Carters to violate the preemptive scope of the 1969 Federal Cigarette Labelling Act; and (3) the trial court erred in allowing the Carters to proceed at trial on an "unpleaded claim". The district court also addressed two other issues raised by B&W concerning the admission into evidence of a certain memorandum and the use of allegedly speculative testimony from Mr. Carter and the Carters' expert witness, Dr. Feingold. The district court ruled, however, that any error with respect to those issues was insignificant and that it would not reverse as to either. Accordingly, those issues are not addressed in this brief.

## V. SUMMARY OF ARGUMENT

**Statute of Limitations.** Mr. Carter was in the midst of a diagnostic procedure on 2/10/91, four years from which his case against B&W was filed. He had been told on 2/5/91 he could have tuberculosis, pneumonia, or lung cancer, two of which were not attributable to cigarettes. Prompt diagnostic tests came in on 2/12/91, and Mr. Carter was told of the cancer on 2/14/91, within the statutory limitations period for the claim. The district court erred in holding that limitations commenced in mid-diagnosis, misapplying this court's *Tanner v. Hartog* and *Celotex Corp. v. Copeland* decisions. The district court found he had knowledge of a "reasonable possibility of injury" prior to 2/14/91. The correct test was "knowledge of injury" and knowledge of a "reasonable possibility that the injury was caused by negligence or defect." *By using this incorrect "possibility" test, the district court erroneously circumvented the jury.* "Knowledge" includes, of course, knowledge obtainable through reasonable diligence; however, there was no suggestion of lack of diligence in obtaining information. Mr. Carter had no "knowledge of injury," in this case, prior to his *diligently-pursued diagnosis* on 2/14/91. The court misapplied *Copeland* by holding that only a "misdiagnosis" creates a jury issue on knowledge of injury; however, *Ash v. Stella*, and other Florida cases make it clear that a *tentative or provisional diagnosis* may be considered by the jury as insufficient knowledge of injury. Likewise, the jury could well have concluded that Mr. Carter lacked knowledge of a *reasonable possibility that his injury was caused by the defect* in the product, especially in view of B&W's denials that its products were hazardous in any way; this was an alternate ground that the jury could have used. Finally, it appears that Mr. Carter had separate, divisible injuries with separate limitations periods; this was a further alternate ground to sustain the jury's verdict.

**Preemption.** The district court erred in holding that certain evidence ran afoul of federal preemption. *First*, plaintiffs acknowledged the fair reach of preemption, and did not make a claim for post-1970 failure to warn. The jury was properly instructed on

this. A sample package insert showing plaintiff's contended adequate warning, was specifically in testimony *related only to pre-1970 warning claims*. Other evidence consisting mostly of remarks by counsel, according to the court, violated preemption because it *implied* that the post-1970 warnings were inadequate. An issue preclusion doctrine, preemption bars *claims* not *evidence*. The evidence complained of was relevant to other claims and issues, including responding to B&W's defenses and establishing lack of consumer expectation in a product defect case. Furthermore, the district court used a discredited *implied preemption* analysis, one specifically overruled by the U.S. Supreme Court in *Cipollone v. Liggett Group, Inc, infra*.

**Unpleaded Claim.** The district court erred in several areas. *First*, B&W's "unpleaded claim" argument was really an evidentiary challenge in disguise. As such, in evaluating whether the challenged evidence was properly admitted a standard of abuse of discretion is required, which abuse the district court failed to find. Under this Court's ruling in *Sims v. Brown, infra*, reversal of the Carters' judgment on this ground cannot be sustained. *Second*, the record reflects that there were, in fact, good and valid grounds for the admission of the evidence. *Third*, the complained-of comments by the Carters' counsel, and from the plaintiffs' expert Dr. Feingold, viewed in proper context, did not constitute an "unpleaded claim". The complained-of evidence, going to knowledge and conduct of B&W, was relevant to show industry-wide state-of-the-art. Evidence showing that B&W had failed to turn over addiction research to the Surgeon General was also relevant to impeach B&W's argument that the 1964 Surgeon General's report was authoritative on the subject of addiction at that time, and therefore the trial court did not abuse its discretion in admitting same. Finally, contrary to the district court's holding, the record reflects that B&W was not unfairly surprised at trial by the use of its own documents against it.

VI. THE JURY VERDICT ON THE STATUTE OF LIMITATIONS IS SUPPORTABLE BECAUSE A DILIGENTLY PURSUED DIAGNOSIS IN A LATENT DISEASE CASE MAY BE CONSIDERED THE FIRST KNOWLEDGE OF INJURY

**A. The discovery rule is the basis for the statute of limitations.**

Sections 95.11(3)(e) and 95.031(2), FLA. STAT. (1995) define the products liability statute of limitations. They require that a products liability action must be begun within four years 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. Under the "discovery rule," the time limit for obligatory filing is defined *relative* to the date of diligent discovery, *by the plaintiff*, of the cause of action. Florida's discovery rule aligns with the national majority. *Celotex Corp v. Meehan*, 523 So.2d 141, 150 (Fla. 1988). It was applied by the Third District in *Copeland v. Armstrong Cork Co.*, 447 So.2d 922, 924 footnote 5 (Fla. 3 DCA 1984) to a latent disease case involving exposure to a deleterious product, a decision approved by this Court in *Celotex Corporation v. Copeland*, 471 So.2d 533, 539 (Fla. 1985).

This Court's most recent explanation of the statute of limitations, *Tanner v. Hartog*, 618 So.2d 177 (Fla. 1993), clarified the principles of the discovery rule in the context of the medical malpractice limitations statute (which also speaks in terms of discovery of the cause of action):

We hold that the knowledge of the injury as referred to in the rule as triggering the statute of limitations means not only **knowledge of the injury** but also **knowledge that there is a reasonable possibility that the injury was caused by medical malpractice**. *Id.* at page 181.

Translating the rule of *Tanner* from the malpractice setting to the products liability setting requires, it would seem, that the phrase "medical malpractice" be replaced by "defect in the product", or "negligence of the manufacturer". Note that "knowledge of the injury" is *not* the same as "knowledge of the *possibility* of injury." The "possibility" referenced in *Tanner* is the knowledge of the reasonable possibility that the injury was *caused by medical malpractice*, which in the products liability

setting is the *reasonable possibility of defect in the product or negligence of the manufacturer*. "Knowledge of the injury" in both settings must affirmatively exist -- the Plaintiff, with due diligence, must know that he has been "injured". A mere *possibility of injury* cannot logically begin the statute, because every cough or sneeze brings with it a *possibility* of injury. **Especially in a latent disease case, as argued below, mere "possibility" of injury could always exist and should not be used as a basis for eliminating the role of the jury in determination of the statute of limitations.**

***B. In a latent disease products liability case, discovery of the "injury" can require medical confirmation.***

What is the "injury" that Plaintiff must discover to accrue his cause of action? Obviously, an injury is not just any "effect" or "symptom" but must be sufficient upon which to *base a claim against the defendant* whose conduct Plaintiff contends resulted in his injury. As argued below, in a products case, Plaintiff must be able to *attribute* his injury to the product, otherwise he cannot base a claim against the manufacturer thereof.

In some cases the connection between the injury and the product is known to the lay person without medical confirmation, as when a drug causes immediate and dramatic harmful effects as soon as it is ingested. Medical confirmation is not needed in that case to tie that injury to the product. In latent disease cases, however, the time that passes between *exposure* and *manifestation* of injury is so attenuated that the lay person does not automatically have knowledge of the connection between the two: cause and effect is not knowable by the untrained Plaintiff. In such cases, a reasonable jury can find that *medical confirmation is necessary* for the plaintiff to have "knowledge of the injury".

This was the holding of the latent disease products liability cases of *Brown v. Armstrong World Industries, Inc.*, 441 So.2d 1098 (Fla. 3 DCA 1983) and *Szabo v. Ashland Oil Company*, 448 So.2d 549 (Fla. 3 DCA 1984), decisions that conflict with

the District Court in this case. In *Brown and Szabo*, the Third District recognized that the Plaintiff could not be said, as a matter of law, to have knowledge that he had been injured for purposes of accrual of his cause of action, until his physician was able to establish *to a reasonable medical certainty* a cause and effect relationship between Plaintiff's exposure to the product and his injury.

The need for confirmation in a latent disease case was also recognized by the First District in *Barnes v. Clark Sand Company, Inc.*, 721 So.2d 329 (Fla. 1st. DCA 1998), another conflicting decision. Although *Barnes* involved the products liability statute of repose, which has since been repealed, the court's reasoning was instructive; the court agreed with the analysis of the Third District in *Owens-Corning Fiberglass Corp. v. Corcoran*, 679 So.2d 291 (Fla. 3 DCA 1996), that manifestation of symptoms must be *sufficient to support a medical diagnosis*. This reasoning also agrees with the holding of this Court in *Copeland*: "manifestation of injury" necessarily presupposes the Plaintiff's *knowledge of the relationship between the symptoms of the disease and exposure to the allegedly defective product*. *Id.* at page 332-333. **The unworkable alternative is to put the plaintiff in jeopardy such that every passing cough, sneeze, or ailment, real or imagined, could possibly relate to something ingested 20 years ago and thus begin the statute of limitations for more serious diseases yet undiagnosed.**

***C. The Copeland cases hold that determination of when the cause of action has accrued under the discovery rule is generally a jury question and that the jury can conclude that discovery occurs upon medical diagnosis.***

Determination of "discovery" questions necessarily involves questions of knowledge, opportunity to observe, diligence, and interpretation of conversations. These are "inherently debatable questions" that are traditionally decided by juries unless reasonable people could not disagree. *The instant case cannot be reconciled with Copeland v. Armstrong Cork Co., supra*, where the Third District stated:

Admittedly, there is no magic moment when this point in time arrives as we often deal here with **inherently debatable questions** about which

reasonable people may differ. For that reason, **these matters are generally treated as fact questions for a jury to resolve**, and therefore inappropriate for resolution on a summary judgment or directed verdict. 477 So.2d at 926.

In *Copeland* the Third District discussed at length the evidence presented both supporting and contradicting whether the product-related disease had sufficiently manifested itself to the Plaintiff more than four years before he filed his action. The court held that on the conflicting evidence a reasonable jury could have concluded either way, and determined that *a reasonable jury could select the date that the Plaintiff was informed of the diagnosis of the product-related disease as the date that his action accrued and limitations began to run*. *Id.* at 927-28.

In affirming the Third District's decision, this Court emphasized that the determination was a "question of fact:"

[T]he record reflects that Copeland was not diagnosed as having asbestosis until 1978. We agree with the District Court that, under these circumstances, **when the disease manifested itself was a question of fact not subject to resolution by summary judgment**. . . *Celotex Corporation v. Copeland, supra* at page 539.

*Accord, Barnes v. Clark Sand Company, Inc., supra* at page 332-333. This Court's holding in *Copeland* is consistent with the decisions discussed above in Section B that discovery of the injury can require medical confirmation; indeed this court cited *Brown v. Armstrong World Industries* with approval. *Id.* page 539. The holding of the *Copeland* cases is in accord with long-settled Florida jurisprudence that factual issues are for the jury and that it is not the function of an appellate court to reevaluate the evidence and substitute its judgment for that of the jury. *Helman v. Seaboard Coastline R. Co.*, 349 So.2d 1187 (Fla. 1977). **In the instant case there was considerable evidence that indicated a non-product condition; the jury, not the appellate court, should be permitted to weigh that evidence.**

**D. The First District erred in limiting the holding of the Copeland cases to circumstances where the claimant has been misdiagnosed as not suffering from a product-related injury.**

In the present case, the First District erroneously accepted the argument of B&W that *Copeland's* holding that the accrual issue is for the jury was limited to cases involving a *misdiagnosis* of a non-product related disease, because the Third District in *Copeland* stated “decisive here is the Plaintiff’s consultation with two doctors immediately after serious symptoms appeared when the Plaintiff’s condition was diagnosed as emphysema and pneumonia unrelated to the job.” 447 So.2d at 927. This statement, however, was immediately followed by the Third District’s observation that, in fact, a doctor did advise the plaintiff to "change jobs" to avoid asbestos exposure (thus creating at least the possibility of connecting the disease to the product):

[T]his disclosure, we think, could lead a reasonable person to conclude, as the Plaintiff did, that this condition was not related to the asbestos dust at all. Indeed, the inference is irresistible as it was based on expert medical advice, rather than lay opinion. **Still, it is true that one of those doctors did advise the plaintiff to change jobs so as to avoid the subject asbestos dust, which, it is urged, shows evidence that the Plaintiff’s serious symptoms were related to the asbestos dust. Perhaps, but again this is a question of fact for a jury to resolve, as conflicting reasonable inferences can surely be drawn from such a statement.** *Id.* at page 928.

The First District below read the *Copeland* decisions too narrowly. Those decisions more broadly hold that *where there is evidence that the Plaintiff has reason to believe he does not have a product-related disease*, a jury reasonably can find that accrual awaits medical diagnosis. The evidence that can support such a conclusion by the jury is not limited to evidence of a misdiagnosis of Plaintiff’s condition, as shown above in section B and below in section E.

**E. A jury can conclude that a tentative or preliminary diagnosis, made before appropriate diagnostic tests, is not sufficient to begin the running of the statute of limitations.**

This court's decision in *Ash v. Stella*, 457 So. 2d 1377, 1379 (Fla. 1984) is analogous to the instant case. This Court held that a tentative diagnosis does not "start the clock" on the statute of limitations:

[T]he diagnosis on which the trial court based its decision was inarguably a preliminary diagnosis. Tests to confirm that diagnosis were not performed until March 29. The final results of those tests were not available until March 30. **We do not believe that, as a matter of law, a tentative diagnosis, however proper it may turn out to be in hindsight, starts the clock** on an action for medical malpractice arising out of negligent failure to properly diagnose. *Id.* at page 1379.

Likewise, in *Colon v. Celotex Corp.*, 465 So. 2d 1332 (Fla. 3 DCA 1975), *quashed on other grounds sub nom. Celotex Corp. v. Meehan*, 523 So. 2d 141 (Fla. 1988), an asbestos products liability case, this Court's rationale in *Ash v. Stella* was applied by the Third District in holding that the statute of limitations did not begin to run as a matter of law based solely on a tentative diagnosis given to the Plaintiff that he suffered from asbestosis. Plaintiff's doctor testified that it is a customary practice not to make a final diagnosis of a product-related disease until after review of the test results and x-rays. **This was exactly the situation in the instant case, where Mr. Carter, exercising due diligence was literally in the midst of a diagnostic procedure when the court, using the erroneous "possibility of injury" test, countermined the jury and held that the statute ran.**

**F. Based on the evidence presented, the jury's verdict is supportable under the discovery rule.**

In the instant case, the properly instructed jury<sup>1</sup> reached the conclusion that Mr.

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<sup>1</sup>The issues for your determination as to Brown & Williamson Tobacco Corporation's statute of limitations defense are whether the plaintiffs filed their action within four years 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. In determining this issue, you should consider, one, whether plaintiff Grady Carter had

Carter had not in the exercise of reasonable diligence discovered his cause of action by 2/10/91 (4 years prior to the filing date). The jury had ample evidence to support its verdict including (a) the testimony of the treating physicians; (b) all relevant medical records; (c) the testimony of Mr. Carter. Each item of evidence is discussed below:

***1. Coughing up blood on 1/29/91***

On 1/29/91, Mr. Carter coughed up blood. He consulted a family medical dictionary, which gave lung cancer and tuberculosis as options for coughing up blood. R53:2178-79. There were other options as well, including pneumonia, as his physician later told him. He knew that he had been exposed to tuberculosis (which is not a cigarette related disease). R53:2181-82, A 2.

Although this was experienced by Mr. Carter himself (and thus discovered when it happened), this could not give rise to the cause of action. Coughing up blood is not a disease and does not necessarily cause, in itself, impairment, disability, or shortened life expectancy. It could resolve on its own. An legally cognizable injury requires knowledge of an underlying disease attributable to the product, as we argued above. One could sue for lung cancer but not for coughing up blood. Coughing up blood did not in and of itself indicate a connection to the product -- it was a symptom connected to multiple diseases, including tuberculosis and pneumonia, diseases not related to the product.

***2. Stopping smoking on 1/29/91***

After coughing up blood, Mr. Carter stopped smoking. R53:2192-93. A reasonable jury could have concluded that anyone would have stopped smoking upon coughing up of blood, whether the symptom resulted from lung cancer, or tuberculosis, or pneumonia, as smoking could exacerbate the symptom, particularly since the symptom was one that results from any of these diseases. That Mr. Carter stopped

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both knowledge of the actual injury and knowledge that there was a reasonable possibility that the injury was caused by defendant; and, two, whether Grady Carter brought the instant action within four years of that time. R66:4128, A 8.

smoking did not compel the jury to conclude that Mr. Carter then knew he had a smoking related disease.

***3. Visit to Dr. Decker on 2/4/91***

Using due diligence Mr. Carter scheduled an immediate medical evaluation for 2/4/91. R53:2178-79. His first treating physician, Dr. Decker, suspected that he had either tuberculosis or lung cancer, but was not a lung specialist, so appropriately he sent Mr. Carter to Dr. Bruce Yergin, a pulmonologist. R53:2181.

#### ***4. Visit to Dr. Yergin on 2/5/91***

Dr. Yergin was consulted immediately on 2/5/91. R53:2181-83. He stated to Mr. Carter that the chest x-ray (obtained from Dr. Decker) was abnormal and that the abnormality could be *either (a) tuberculosis; (b) slowly resolving pneumonia; or (c) lung cancer*. R39:654. A bronchoscopy and other tests were immediately scheduled to answer the question.

#### ***5. Dr. Yergin's intake sheet from 2/5/91 containing the receptionist's words "lung in tumor"***

An intake sheet from 2/5/91 written by the receptionist says "lung in tumor." Dr. Yergin testified that those words were the receptionist's, who received the referral from someone in Dr. Decker's office and that they *were not his diagnosis or that of Dr. Decker* on that day. R39:551-552; 649-650, A 6. Based on Dr. Yergin's testimony that these were not his words or diagnosis, nor those of Dr. Decker, and his testimony that as of 2/5/91 he could not have diagnosed a cancerous lung tumor, the jury reasonably could have concluded that even if Mr. Carter had knowledge of this record on 2/5/91, it would not be sufficient for him to know he had lung cancer rather than tuberculosis or pneumonia.

#### ***6. Dr. Yergin's medical records from 2/5/91 containing an impression of "COPD"***

Dr. Yergin's medical records from 2/5/91 state a list of *impressions* including incidental impressions of "COPD" and "cigarette abuse." A 5. However, there was no discussion with Mr. Carter of the "COPD" impression on that date. While Dr. Yergin testified that he had diagnosed Mr. Carter with COPD, which was mild, and was caused from cigarette smoking, R39:582-583, he was not asked when he diagnosed COPD caused by smoking nor when he communicated it to Mr. Carter. Mr. Carter also was not asked about the date of his knowledge of Dr. Yergin's diagnosis of chronic bronchitis and COPD. R53:2288-2300; R54:2368-2370. *There was no attribution*

*on the medical records or discussed with Mr. Carter of COPD to cigarettes.*<sup>2</sup>

There are several reasons why a jury could have found that the impression of "COPD" on Dr. Yergin's chart was not sufficient to start the statute:

- (a) **COPD was not discovered by Mr. Carter in the exercise of reasonable diligence at the time, nor was it attributed to the product at the time.** Mr. Carter exercised due diligence in discussing his condition with Dr. Yergin on 2/5/91 and no evidence exists that COPD was then discussed, as the focus of the medical effort was on the more serious potential diseases of tuberculosis, pneumonia or lung cancer. We separately discuss "imputation" of medical records below at section H, because the First District depended on imputation to reverse the jury's verdict.
- (b) COPD was itself an **incidental finding and/or a symptom**, neither of which necessarily start the running of the statute of limitations. No medical testimony related COPD to any impairment or shortened life expectancy. "COPD" is a catch-all term that means, variously, asthma, chronic bronchitis and emphysema. COPD is not cancer nor is it a pre-cancerous condition. There was little testimony about this finding at trial. Dr. Yergin did feel, at trial, that it was associated with cigarette smoking, but whether it was really a "disease" or only a physical finding was not explored. It was not discussed whether this finding was permanent or temporary. There was no evidence that it caused clinical impairment or disability. (Mr. Carter had not previously reported clinically significant shortness of breath.) R39:582-84; 698-701.

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<sup>2</sup>It was B&W, in its briefs, that improperly added the words "due to" or "caused by" cigarette smoking to the COPD impression on the chart, words which do not appear on the chart. See B&W's Initial Brief pages 4 and 22 and Reply Brief pages 1-3 filed in the First District Court of Appeal, and its Brief on Jurisdiction filed in this Court, pages 2-3; 8 and 10.

(c) **COPD was not attributed to cigarettes or anything else at that time.** We discuss this above.

***7. Discussion with Dr. Yergin on 2/5/91 and being told of possible tuberculosis, pneumonia, or lung cancer.***

Dr. Yergin told Mr. Carter that his symptoms could be caused by tuberculosis, by slowly resolving pneumonia, or by lung cancer, and he deliberately stated the potential causes to him in that order, in an effort to minimize in Mr. Carter's mind the likelihood of lung cancer until the proper tests could be performed. He testified: "*I definitely, unequivocally did not tell him it was most likely lung cancer.* I said you have a problem and the problem could be TB. In fact, I know that I stated--I purposely *in a situation like this clinically will state lung cancer last.* I will say that it could be TB, it could be a slowly resolving pneumonia and, of course, it could be lung cancer.?" R39:552-556; 653-657. R39:654. At best, Dr. Yergin's conversation with Mr. Carter amounts to a provisional, tentative, or alternative diagnosis.

Thus, in Mr. Carter's case, as in the *Copeland* cases, medical advice was given that the symptoms were consistent with a non-product related disease -- tuberculosis or a slowly resolving pneumonia -- which could lead a reasonable jury to conclude that at that point in time, Mr. Carter did not have sufficient knowledge of a product-related disease to accrue his action. The facts of Mr. Carter's case are more compelling than the facts of *Ash v. Stella, supra*, and *Colon v. Celotex Corp., supra*, (see section E above), where tentative diagnoses were found insufficient as a matter of law to accrue the causes of action. The tentative diagnoses Mr. Carter was given were in the alternative, and two of the three were of non-product related diseases. A reasonable jury could thus conclude that Mr. Carter did not have sufficient knowledge of product related injury to accrue his action. As recognized by the Third District in *Brown v. Armstrong World Industries, supra* and *Szabo v. Ashland Oil Company, supra* and even the First District in *Barnes v. Clark Sand Co., supra* (see section D above), in latent disease cases such as this one, plaintiff cannot be said, as a matter of law, to have

knowledge of his product-related injury until his physician can establish to a reasonable medical certainty a cause and effect relationship between exposure to the product and his injury.

***8. The operative date for the statute of limitations: 2/10/91***

The *operative date* for the statute of limitations was **2/10/91**, as the complaint was filed four years later. This date was in mid-diagnosis, between an initial impression with three possibilities, and a diagnosis of cancer.

**9. Bronchoscopy results obtained on 2/12/91 and Mr. Carter informed on 2/14/91**

On **2/12/91** the bronchoscopy studies were reported. On **2/14/91** Mr. Carter was informed that they showed lung cancer. R39:565-66. Mr. Carter testified that prior to 2/14/91 *he did not know for sure what the problem was.* R53:2187.

It was reasonable for the jury reject the idea that knowledge of the cause of action came in *mid-diagnosis*, and to conclude that it was not until Mr. Carter's physician was able to determine and advise him whether or not he had a product-related disease that he had *knowledge of the injury* to start limitations.

It was therefore *inherently debatable* and thus a *jury question* when Mr. Carter had knowledge of an injury related to cigarettes. **In cases of uncertainty, the incorrect "possibility" standard does not circumvent the jury's role in weighing whether sufficient evidence exists to begin the running of the statute.**

**G. Imputation of medical records is not absolute but is a standard of due diligence that may or may not apply to a given case and did not apply in this case.**

"Imputation" of knowledge of the contents of medical records is not an absolute rule, but a standard of due diligence. The principle is that a plaintiff can learn what is in his accessible records. But sometimes the circumstances make imputation irrelevant or impossible. *Assume as a hypothetical:* a patient undergoes surgery during which cancer was discovered and recorded. The patient was unconscious for several days post-surgery but was promptly informed upon awakening. Does the "imputation" rule mean that the cause of action began to run *during the period of unconsciousness*, as a matter of law, regardless of the due diligence of the patient? We suggest not; the "discovery rule" would seem to require an opportunity to "discover." (Perhaps the requirement for *accessible* medical records is rooted in this concept.) What if the physician testifies the entry is a mistake (written in the wrong chart for example)? Insisting on "imputation" in these circumstances would invalidate the discovery rule,

and improperly remove the jury from its integral fact finding role on the discovery question.

For these reasons, imputation of knowledge of medical records is only appropriate in those cases where the facts support a finding that the claimant did not use due diligence in determining the cause of his injury. *Nardone v. Reynolds*, 333 So.2d 25, 34-35 (Fla. 1976); *Berisford v. Jack Eckerd Corp.*, 667 So.2d 809, 812 (Fla. 4 DCA 1995.) As this Court noted with approval in *Nardone v. Reynolds*, the "reason of the rule" is "want of due diligence:"

...the rule is generally established that mere ignorance of the facts which constitute the cause of action will not postpone the operation of the statute of limitations, but the statute will run from the time the cause of action first accrues, notwithstanding such ignorance. **The reason of the rule seems to be that in such cases ignorance is the result of want of diligence and the party cannot thus take advantage of his own fault.** *Id.* at 34.

In *University of Miami v. Bogorff*, 583 So.2d 1000, 1004 (Fla. 1991), imputation to the Plaintiff of knowledge contained in accessible medical records was found to be appropriate. Although this Court did not explain its rationale for applying imputation, the Plaintiff's lack of due diligence in determining the cause of dramatic symptoms that developed shortly after ingestion of the drug (this was not a latent disease case) was the focus of this Court's analysis.

The imputation rule *does not silently overrule the discovery rule*, but is in contrast, a special case of it where the evidence shows Plaintiff may have failed to exercise due diligence to discover his cause of action. Here, since Mr. Carter exercised all due diligence to discover the cause of his symptoms, imputation was not warranted. Moreover, as shown above, the February 5 records would not have given him knowledge of injury in any event. What is contained in an unclear or ambiguous record cannot be imputed, *Walls v. Armour Pharmaceutical Co.*, 832 F.Supp 1467, 1481 (M.D. Fla. 1993), reversed on other grounds sub nom, *Christopher v. Cutter Laboratories*, 53 F.3rd 1184 (11th Cir. 1995).

The First District did not reach B&W's argument that the jury should have been instructed on imputation and that lack of such instruction is reversible error. For the reasons stated above, an imputation instruction was not warranted in this case. Moreover, the trial judge determined that B&W's requested instruction on imputation was *subsumed in the instruction that was given regarding the requirement that Mr. Carter exercise due diligence*. R64:3764; R66:4128. Refusal to give an instruction adequately covered by another is not reversible error. *Robinson v. Gerard*, 611 So.2d 605 (Fla. 1 DCA 1993). The trial judge permitted counsel for B&W to introduce the February 5 record and argue imputation to the jury, R64:3764, such that the jury was not misled and B&W was not prejudiced. *Bullock v. Mount Sinai Hospital of Greater Miami, Inc.*, 501 So.2d 738 (Fla. 3 DCA 1987)<sup>3</sup>. The trial court's exercise of discretion with respect to instructions should not be reversed on appeal unless prejudicial error exists, which occurs where lack of instruction results in a miscarriage of justice or in confusing or misleading the jury. *Goldschmidt v. Holman*, 571 So.2d 422, 425 (Fla. 1990).

**Imputation cannot be blindly applied; furthermore the records in the instant case were, even if imputed, not conclusive, as the jury could have concluded.**

**H. The jury could have found that Mr. Carter did not have knowledge of the "reasonable possibility" that his injury was caused by a defect in the product and/or the negligence of the Defendant.**

At what point in time Mr. Carter had "knowledge of the injury" was only one of the discovery issues that the jury had to decide in this case. The second prong was: at what point in time Mr. Carter had knowledge of the *reasonable possibility that the injury was caused by a defect in the product and/or the negligence of the*

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<sup>3</sup>Had the imputation instruction been given, this would have been an improper comment on the evidence by the trial judge, as the jury then could have been misled that the Court had concluded that the record in question should impute knowledge to Mr. Carter, as of the date it was written, that he suffered from a product-related disease. See *Hill v. Sadler*, 186 So.2d 52 (Fla. 2d DCA 1966).

Defendant?

B&W attempts to supply an attribution of symptoms and possible cancer to the product by arguing that Mr. Carter knew "cigarettes caused cancer." That cigarettes cause cancer was denied by B&W for 50 years up to and including the time of trial.<sup>4</sup> Even if accepted, the general proposition is not a sufficient basis (so the jury could have found) for Mr. Carter to attribute *his disease to pre-1972 Lucky Strike cigarettes*.

Cigarettes differ in their delivery of carcinogens, gas phase ciliatoxins, nicotine, and other deleterious substances.<sup>5</sup> B&W never published the *nicotine or tar* content of Lucky Strike Cigarettes prior to the early 1970's. Other deleterious substances such as gaseous ciliatoxins, aldehydes, and specific carcinogens like nitrosamines, have never been published for individual brands. Whether Mr. Carter's smoking of Lucky Strike cigarettes or other brands was a substantial contributing cause of his lung cancer was a scientific question that the jury could have believed was not knowable within a reasonable possibility by Mr. Carter in 1991.<sup>6</sup>

Likewise, it was argued extensively by B&W in cross-examination of Dr. Feingold that the injurious effects of smoking *decline over time* such that smoking

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<sup>4</sup>B&W, beginning in 1954, with the FRANK STATEMENT TO CIGARETTE SMOKERS, A 9, and continuing through the trial, steadfastly denied that its products caused cancer or any human disease, and stated that the causes of cancer were "unknown" and "unproven." Mr. Carter testified he generally recalled industry denials. R53:2150-52. The jury could have found that Mr. Carter could not be held to a higher standard of knowledge of causation than that possessed by B&W.

<sup>5</sup> See, generally, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE (USDHEW, 1964); REDUCING THE HEALTH CONSEQUENCES OF SMOKING: A REPORT OF THE SURGEON GENERAL (USDHHS 1989). PX 21. FTC Report of Tar and Nicotine Content of the Smoker of 118 varieties of cigarettes, July 19, 1969. A 10.

<sup>6</sup>Compare *Celotex Corp. v. Copeland*, 471 So.2d 533, 538 (Fla 1985): "Asbestos products ... have widely divergent toxicities, with some asbestos products presenting a much greater risk of harm than others." The same issues are presented for cigarettes.

pre-1972 *could not be a cause of cancer* in 1991. The jury could well have concluded that Mr. Carter could not have known the reasonable possibility that his disease was attributed to pre-1972 cigarettes.

Finally, Mr. Carter was diagnosed with adenocarcinoma, a particular form of lung cancer which B&W contended had no relation to cigarettes.<sup>7</sup> The jury could have concluded that Mr. Carter could not have known to a reasonable possibility about the relationship between *this specific type of lung cancer* and his smoking Lucky Strike cigarettes, in 1991.

**I. The "separate disease rule" provides that "COPD" does not determine the statute of limitations for lung cancer.**

The *separate disease rule* (also known as the "two-disease rule") representing the national majority rule with respect to separate and distinct injuries<sup>8</sup>, provides that knowledge of one distinct disease does not necessarily begin the running of the statute of limitations for all other separate diseases. This rule is naturally derived from the discovery principle,<sup>9</sup> and most "discovery" states also are "separate disease" states. Although this Court has not addressed the issue, the Third District's decision in *Eagle-Picher Industries, Inc. v. Cox*, 481 So. 2d 517 (Fla. 3 DCA 1985) has stood without appellate challenge for almost 15 years.

The rationale behind *Eagle-Picher* was that requiring a plaintiff to file and claim all possible diseases (particularly cancer) at the first sign of *any* disease (particularly asbestosis) was unfair and unwise. Such a policy invites litigation;

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<sup>7</sup>Although B&W denied any connection between cigarettes and *any disease*, at trial it specifically singled out adenocarcinoma as a tumor type not related to cigarettes. R58:2845-48.

<sup>8</sup>See *Fusaro v. Porter-Hayden Co.*, 548 NYS.2d 856, 860 (NY Sup. 1989), affirmed 565 NYS.2d 357 (N.Y.A.D. 1991); *Celotex Corp. v. Meehan*, 523 So.2d 141, 150 (Fla. 1988)

<sup>9</sup>It would seem most consistent with the discovery rule to begin the statute of limitations to run on a disease when discovery of that disease is possible.

moreover, recovery will necessarily be too little (if the subsequent disease is in fact encountered) or too much (if it is not.)

The solution was to recede from a strict interpretation against "splitting a cause of action" and to separately commence limitations for distinct diseases, like cancer and asbestosis, from the time that each is discovered. In the instant case, discovery of the nonmalignant COPD would not, therefore, begin the running of the statute of limitations as to cancer. Since a special verdict or jury instruction for separating the two diseases was not requested by B&W, R15:2445-2489<sup>10</sup>, the verdict must be sustained if *either* injury was timely.<sup>11</sup>

Because we assert that the statute did not run on COPD *or* lung cancer because *neither* was discovered before 2/10/91, the separate disease rule is not necessary to decide this case. However, perceiving as we do the clear reinforcement of the discovery principle by this Court in *Tanner v. Hartog, supra*, we believe the *Eagle Picher* rule provides an alternative basis for upholding the jury's verdict on limitations. **Under the two disease rule, the verdict is sustainable if the statute did *not* run on *either* COPD or lung cancer.**

VII. NO FEDERALLY PREEMPTED CLAIMS WERE TRIED, AND UNDER THE CORRECT STANDARD OF EXPRESS, NOT IMPLIED, PREEMPTION, EVIDENCE THAT TANGENTIALLY BEARS UPON PREEMPTED ISSUES BUT IS ADMISSIBLE FOR OTHER REASONS IS ADMISSIBLE.

**A. The Cigarette Labeling Acts and federal preemption.**

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<sup>10</sup>Any error in this regard was invited by appellant. *Gupton v. Village Key*, 656 So. 2d 475, 478 (Fla. 1995); *Batlemento v. Dove Foundation*, 593 So. 2d 234, 241 (Fla. 5th DCA 1991).

<sup>11</sup>Note that appellant's motion for summary judgment below on the limitations issue addressed *only* the claim for lung cancer. R29:3-18.

The limited Federal preemption in cigarette case arises from the Cigarette Labeling Acts of 1969 and 1984. A 11. Tobacco products were devoid of any cautionary labels or warnings whatsoever before 1966 (although, as the Carters argued, published evidence at that time had established that cigarettes posed serious risks for lung cancer, other cancers, cardiovascular diseases, and addiction.)

In 1966 the Federal Cigarette Labeling and Advertising Act<sup>12</sup> required the following text on all packages of cigarettes:

CAUTION: CIGARETTE SMOKING MAY BE HAZARDOUS TO YOUR HEALTH

The 1966 act did not contain a preemption provision, so common-law attacks on the adequacy of the above 1966-1970 warning (and on the pre-66 warning vacuum) are permissible.<sup>13</sup>

In 1969 Federal law changed<sup>14</sup> the required text slightly, substituting "Warning" for "Caution" and "Is Dangerous" for "May Be Hazardous":

WARNING: THE SURGEON GENERAL HAS DETERMINED THAT CIGARETTE SMOKING IS DANGEROUS TO YOUR HEALTH

In 1984 the warning was changed to the current four rotating warnings<sup>15</sup>.

The 1969 and 1984 statute preempted state law claims on the adequacy of *these labels*. Claims of product defect (and of express warranty, misrepresentation, fraud, or conspiracy -- not pled in this case) are never preempted.

The law of preemption in cigarette cases was set by the U.S. Supreme Court in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed. 2d 407

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<sup>12</sup>Pub.L. 89-92; 79 STAT. 282, 15 U.S.C. §1331-1340.

<sup>13</sup>For example, "may be hazardous" grossly understates the hazard known or knowable by the defendant at the time; it omits any reference to cancer, addiction, heart disease, quantum of hazard, consequences of use, etc. Although the language was mandated, the mandate was a minimum only; an adequate warning was not prohibited.

<sup>14</sup>Pub.L. 91-222, 84 STAT.87, as amended 15 U.S.C. §1331-1340

<sup>15</sup>Pub.L. 98-474, 98 STAT 2200, as amended 15 U.S.C. §1331-1340

(1992).<sup>16</sup> A 12. *Cipollone* was the first and the last U.S. Supreme Court case focusing on cigarette labeling preemption.<sup>17</sup> *Cipollone* stated that preemption bars only "claims" that assert that post-1969 advertising or promotions should have included better warnings:

Thus, insofar as **claims under either failure-to-warn theory require a showing that respondent's post-1969 advertising or promotions should have included additional, or more clearly stated, warnings, those claims are preempted.** The Act does not, however, preempt petitioner's claims that rely solely on respondent's testing or research practices or other actions unrelated to advertising or promotion. *Id.* 112 S. Ct. 2621-2622 (all bold face emphasis is supplied unless otherwise stated).

Preemption is not favored in Florida law, and defendants bear the burden of proof of this affirmative defense. In *Hernandez v. Coopervision, Inc.*, 661 So.2d 330, 335 (2d DCA 1995), the court noted the "long-standing presumption against federal preemption" and underlined that the party seeking preemption must bear the burden of proof. In *Philip Morris Inc. v. Harshbarger*, 122 F.3d 58, 75-76 (1st Cir. 1997), the court began its preemption analysis: "Moreover we begin by noting that the health and safety of each state's citizens 'are primarily, and historically, matters of local concern.'" *Medtronic, Inc. v. Lohr*, 116 S.Ct. 2240, 2245, 135 L.Ed.2d 700 (1996) ("[W]e used a '**presumption against the pre-emption** of state police power regulations' to support a **narrow interpretation** of such an express command in *Cipollone*.")

**B. The jury was properly instructed on the scope of preemption.**

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<sup>16</sup>For a full analysis of the cigarette labeling statutes and preemption, see also *Philip Morris Inc. v. Harshbarger*, 122 F.3d 58 (1st Cir. 1997). A 13.

<sup>17</sup>The U.S. Supreme Court mentioned cigarette preemption again in *Medtronic, Inc. v. Lohr*, 116 S.Ct. 2240, 2245, 135 L.Ed.2d 700 (1996), holding that preemption was express and narrowly construed.

At the conclusion of the evidence the jury was correctly instructed on preemption, that they were "not to base a claim" on post-70 failure to warn:

The federal law does not limit the liability of defendant against the claim of a failure to warn before July 1, 1969. However, **you're not to base any findings of liability on a determination that after July 1, 1969, the defendant should have included additional or more clearly stated warnings in the advertising or promotion of its cigarettes or that the defendant, through its advertising or promotional practices, neutralized, minimized, or undermined the effect of the federally mandated warnings during that time.** R66:4132-4133; 4143-4144. A 14.

There is no evidence that the jury failed to follow the instruction, or that damages were awarded for any activity protected by federal preemption. Juries are presumed to follow the instructions given them. *Burnette v. State*, 157 So.2d 65 (Fla. 1963); *Owens v. State*, 560 So.2d 207 (Fla. 1990).

**C. There was compelling evidence of pre-1970<sup>18</sup> failure to warn.**

There was compelling evidence of defendant's pre-1970 failure to warn. Plaintiffs' expert pulmonologist Dr. Allan Feingold testified that medical and scientific research had established that cigarettes caused disease as early as 1941, and that virtual certainty in the scientific community had been achieved by the early 1950's.<sup>19</sup> R43:955-969. Thus, the jury could have found that defendant had a duty to warn customers of these hazards at that point in time and that it had violated that duty.

**Given that there was a correct instruction to the effect that only pre-**

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<sup>18</sup>Because the operative date is mid-year (7/1/69) we use "pre-1970" and "post-1970" for convenience in notation.

<sup>19</sup>See, e.g. Ochsner A, DeBakey M. *Carcinoma of the lung*. Arch Surg 42:209-258 ("It is our definite conviction that the increase in the incidence of pulmonary carcinoma is due largely to the increase in smoking, particularly cigarette smoking, which is universally associated with inhalation."); Doll R. *Bronchial carcinoma: incidence and aetiology*. BRIT M J 2:521-590 (1953) ("The results amount, I believe, to proof that smoking is a cause of bronchial carcinoma.")

**1970 claims should be considered, and given that there was ample evidence from which the jury could have found liability for pre-1970 failure to warn, defendant's complaints about preemption are invalid.**

***D. Plaintiffs failure to warn claims were expressly and directly limited to pre-1970.***

***1. Plaintiffs had no motivation to present post-1970 failure to warn claims.***

Plaintiffs and the trial court scrupulously followed *Cipollone*. For one thing, plaintiffs lacked motivation to make post-70 warning claims, because Mr. Carter stopped using defendant's Lucky Strike cigarettes in 1972. By 1969, Carter testified, he had heard about the reported hazards of cigarettes, but was incurably addicted R53:2148-2153. He described how he tried numerous times to stop, resorting unsuccessfully to hypnotherapy. R53:2153-2173. Eventually he switched brands to a "lighter" cigarette, the safety of which is not at issue in this case. There was simply no motivation to argue preempted, post-1970 failure to warn claims.

## ***2. No post-1970 failure to warn claim was made in testimony or argument***

The Carters' opening statement focuses exclusively on *pre-1970* failure to warn, saying, "'66 to '70 ... I suggest it wasn't [adequate]":

These were the warnings I promised to tell you. **Before '66 none. '66 to '70, that's the warning--we're mainly back here in this area in this case. The damage was done to Mr. Carter's lungs from '47 before '66. That damage was done. We'll prove that. And there was nothing on that. '66 to '70, this mild, *may be hazardous*.**<sup>20</sup> In the face of what we've seen, was that adequate? I suggest it wasn't. R38:398-399.

Dr. Feingold's testimony on warnings criticized only the pre-1970 label, stating "that's not what I would have told the patient in 1966". R48:1501-03:

Q: Dr. Feingold, if you were counseling a patient to achieve smoking cessation through breaking the habit and addiction of cigarette smoking, would you feel that telling them that, Caution: cigarette smoking may be hazardous to your health, is an adequate statement?

A: That would be very inadequate. **That's not what I would have told the patient in 1966, for example.**

Q: What is wrong with that statement? I mean, doesn't it say there's something wrong with cigarettes?

A: No. As a matter of fact, it says that there might be something wrong with cigarettes. Whereas in **1966**, it was known that for sure there was a terrible thing wrong with cigarettes. And also it doesn't say what that something is. I mean, we are talking about lung cancer and heart attacks and emphysema and other very bad diseases. And it doesn't give any idea of the enormity of the risk or the fact that **by that point, 1966**, the risk had been variously reported to be between twice and ten times higher for lung cancer alone. So the risk that was being discussed was in the range of a thousand percent higher, for example. That's not suggested by the word **Caution: it may be hazardous**.

When petitioners' counsel asked a direct question of Dr. Feingold on the adequacy of the post-1970 warning, the trial judge sustained the objection, stating: "I think the warning is an issue in this case, at least to the extent that it may relate to

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<sup>20</sup>Recall that this was the text of the 1966-70 package label: Caution, cigarette smoking *may be hazardous* to your health.

causation.<sup>21</sup> Obviously, Mr. Carter was exposed to the warning. **I am not going to permit you, though, Mr. Wilner, to attack the warning....**" R52:2062-2063.

Thus the trial court correctly permitted limited inquiry into the content of the post-70 warning as it related to Mr. Carter's behavior, but did not permit plaintiff to directly "attack" the warning.<sup>22</sup>

### ***3. The complained-of package insert was a sample pre-1970 warning***

Dr. Feingold presented testimony and evidence on what a proper pre-1970 warning would and should have been. A sample "package insert" was introduced, containing explicit warnings of cancer and addiction that, in his expert opinion, were known or knowable and should have been placed in packages beginning 1954 or thereabouts. A 15. The entire context of the testimony on inadequate warnings was within the parameters of our claim, i.e. pre-1970. R45:1160-1166; R48:1508-1509; R49:1535-1547.

Defendants have raised on appeal two non-sequiturs concerning the package insert: (1) that the sample warning contains "whole subjects that are absent today from the federal law"; and (2) that the sample warning contains knowledge not available to the defendant until after 1970. Neither has a thing to do with preemption of the post-1970 claim and neither, even if true, would exclude the package insert as evidence.

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<sup>21</sup>This was absolutely correct, as we have argued. B&W argued that Mr. Carter "caused" his own injuries because he smoked in the face of post-1970 warnings R38:442-445.

<sup>22</sup>We believe that plaintiffs *should* be able to *attack* post-1970 warnings directly so long as defendants use them to argue comparative negligence or causation, and inasmuch as their inadequacies impact on consumer expectation of hazard, so long as there is a limiting instruction that there is no post-1970 *claim*. For example, although the Carters did not attack the adequacy of the post-1969 federally mandated warnings, it is submitted that such an attack would be proper for purposes of rebutting appellant's proximate cause defense to show what effect those warnings had on Mr. Carter's motivation to quit smoking, and whether they were sufficiently compelling to one addicted to nicotine.

As to the first concern, the pre-1970 warning *should* have been comprehensive. Because there is no preemption of a pre-1970 warning claim, an adequate pre-1970 warning is not limited in content to the post-1970 statutory warning. For political reasons perhaps, the post-70 statutory package label was less complete than the common law then required, but this was not in itself actionable because of preemption; however, expert testimony could well claim that pre-70, *when the common law required a warning*, a more comprehensive one was required.

The second concern, which apparently was accepted by the district court, was that the package insert contained scientific information that was supposedly *not known* until after 1970. In response to this, we state:

**First**, we *deny* that the package insert or sample warning contained scientific knowledge that was not *knowable* (the test is whether the information is *knowable*, in the exercise of reasonable diligence, not just whether it in fact was known) by the defendant before 1970. There is nothing in the record supporting defendant's claim, nor the district court's opinion. Dr. Feingold testified that the knowledge was available pre-1970. *See*, R49:1538; 1540.

**Second**, there is *no evidence that the jury was told* that the package insert supposedly contained post-1970 information. Furthermore, any testimony that the sample warning contained post-1970 information was certainly not from the *plaintiffs*. If the defendants somehow gave the jury this incorrect impression, then any error would be invited by them.<sup>23</sup>

**Third**, even if the package insert contained post-1970 science, this has *nothing to do with the preempted claim*.<sup>24</sup> The jury could easily conclude that the sample warning, in whole or in part, was not feasible as a pre-1970 warning, and give it little

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<sup>23</sup>We are unaware of any testimony presented to the jury that the package insert had post-1970 science.

<sup>24</sup>Preemption concerns claims, not evidence, as we have stated above. The jury was instructed that the post-1970 claims were preempted.

weight. The weight to be accorded evidence is within the province of the jury. *K-mart Corp. v. Collins*, 707 So.2d 753 (Fla. 2nd 1998). **The court was within its discretion to admit the package insert.**

***E. Evidence tangentially related to arguably preempted issues is not automatically barred, if it is relevant to other, non-preempted claims or to defenses raised by defendants.***

B&W argues in essence that *any conceivable reference* to post-1970 warnings or inadequacy thereof is automatically reversible as a "violation of preemption." This is all wrong on all grounds, as discussed below:

Although it has never been completely clear, B&W appeared to complain about two evidentiary points:

- A statement that the word "cancer" did not appear on the label until 1984
- A statement that carcinogens known to the defendants were never included on the cigarette labels

The trial court had discretion to admit evidence on these issues.

***1. Preemption precludes claims, not evidence***

The cigarette labeling acts offer a limited statutory immunity for certain *claims*; they do not in themselves bar *evidence*. The preemption is for "claims" that "require a showing that respondent's post-1969 advertising or promotions should have included additional, or more clearly stated, warnings." *Cipollone*, 112 S.Ct. 2608, 2621. Facts and evidence that bear on other, nonpreempted claims are not automatically barred just because they may directly or indirectly mention or even appear to outshine the post-1970 warnings. If the defendant chooses to argue lack of proximate causation because of the existence of the post-1970 label, for example, the door is open to evidence by the plaintiff to the contrary. *See Lucas v. State*, 658 So.2d 18, 21 (Fla. 1990); *Thornes v. State*, 485 So. 2d 1357, 1359 (Fla. 1 DCA 1986).

As to whether such evidence was properly admitted over objections to relevance, or objections that the relevance was exceeded by the prejudice, the trial

court exercised discretion, which should not be overturned absent a showing of abuse of discretion. *Sims v. Brown*, 574 So.2d 131 (Fla.1991).

Contrary to the district court's apparent belief, there is no federal preemption requiring all evidence to agree that the post-1970 labels were "adequate," or requiring judicial notice on the question of adequacy. Post-1970 claims based on inadequate warning are preempted, but *the fact of adequacy or inadequacy* of the warning may come up in many other contexts<sup>25</sup>, and indeed there never has been even a Congressional statement that the label is "adequate."<sup>26</sup>

To illustrate we suggest the following hypothetical: in a trial over a defective punch press, suppose the employer is statutorily immune from suit because of workers' compensation. This immunity does not, however, equate to a statutory determination that the employer is "not negligent." Indeed, negligence of the employer may be a central defense for the manufacturer, and evidence of it will almost certainly be admitted, despite the immunity from suit. Likewise, although there is a statutory immunity for post-1970 warning claims, *evidence* that bears on other claims, defenses, or replies, which may *implicate* the post-70 warning, is perfectly acceptable. **The court is not required to blind the jury's eyes to the truth. Statutory immunity on certain claims does not bar evidence on others, even if the evidence might by its nature factually suggest a different view of the immune claim.**

***2. Limited evidence involving the post-1970 warning would be***

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<sup>25</sup>Such as public awareness or consumer expectation, as argued below.

<sup>26</sup>In fact, one could persuasively argue that the 1970-84 label was conclusively found to be *inadequate* during the hearings for the 1984 label; the need for the improved 1984 labels was precisely because of the inadequacy of the 1970 label.

*admissible to refute the defendant's argument that the plaintiff was guilty of not "following" the post-1970 warnings.*

Although the comparative negligence defense was dropped and although plaintiffs objected to evidence about Carter's conduct, the objections were overruled<sup>27</sup> and Carter's conduct was tried as the centerpiece of the defense case. Among other things, appellants claimed that if Mr. Carter was not dissuaded from smoking by constant exposure to post-1970 warnings, then no warning would have dissuaded him. R38:442-445. In response, it was proper to point out that the 1970-84 warning lacked any references to cancer, and that there was never any disclosure of carcinogens in the product made available to Mr. Carter. The trial court had discretion in accepting or rejecting this evidence as relevant but overly prejudicial. Absent an abuse of discretion the trial court's ruling should not be disturbed. *Sims v. Brown*, 574 So.2d 131 (Fla. 1991). **Post-70 preemption does not address, much less conclusively determine, whether a plaintiff was negligent in smoking post-70, or whether a plaintiff was thereby the sole cause of his injury.**

***3. Limited evidence on the post-1970 label was relevant to the state of consumer expectation which is an issue under strict liability***

*Auburn Machine Works Co. v. Jones*, 366 So.2d 1167, 1170 (Fla. 1979) listed seven factors that should be applied in the determination of "unreasonable danger," an element of "defect" in a strict liability case:

(1) the usefulness and desirability of the product, (2) the availability of other and safer products to meet the same need, (3) the likelihood of injury and its probable seriousness, (4) the obviousness of the danger, (5) **common knowledge and normal public expectation of the danger (particularly for established products)**, (6) **the avoidability of**

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<sup>27</sup>Appellant was permitted by the trial court to make this argument, despite dropping its comparative negligence defense, over the Carters' objection that it was improper under *Kendrick v. Ed's Beach Service, Inc.*, 577 So. 2d 936 (Fla. 1991), which held that a defendant cannot refute the element of proximate cause with evidence that the plaintiff had knowledge of the risk, but assumed it anyway, because such evidence can only go to the plaintiff's comparative negligence. *Id.* at page 938; R36:42-49.

**injury by care in use of the product (including the effect of instructions or warnings),** and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.

The *Auburn* factors include "common knowledge and normal public expectation" and "*the effect of instructions and warnings.*" Since strict liability claims are never preempted, one might well consider the effect of both post- and pre-1970 package labels on the consumer. This would of necessity involve describing the label and pointing out such things as the lack of a cancer reference, the lack of carcinogen identification, etc. This inquiry into *the effect of the package label* on public expectation does not equate to *making a failure to warn claim*. Once again, these evidentiary determinations are within the trial court's discretion. **Statutory immunity on post-70 failure to warn does not speak to, much less establish beyond challenge, the subject of consumer expectation.**

***F. The scope of preemption urged by the defendants, known as "implied preemption" is not the correct holding of Cipollone.***

The District Court used an incorrect test of preemption known as "implied preemption."<sup>28</sup> Under this theory, any evidence that *so much as implies* that the post-1970 warning label is inadequate is to be rejected.<sup>29</sup> As we will demonstrate below, this is an incorrect reading of *Cipollone*, which expressly rejected the implied

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<sup>28</sup> The District Court held: "During the trial of this case, Dr. Feingold, the plaintiff's expert, exhibited to the jury and testified concerning his proposal for an adequate warning about the dangers of cigarette smoking, in the form of a detailed illustrated proposed package insert. In our view, this extensive proposed package insert undoubtedly would run afoul of the federal preemption of state causes of action for inadequate warnings. The presentation of the insert, and testimony about it, **strongly implied to the jury that appellant's post 1969 labeling was inadequate.**" 723 So.2d 833, 837.

<sup>29</sup>The trial court correctly ruled that the claim against post-70 warnings was barred, but not necessarily evidence which implied that the label was inadequate.

preemption theory that was the holding of the Third Circuit (*Cipollone's* lower court<sup>30</sup>). *Cipollone*, 112 S.Ct. 2608, 2168.

***1. Cipollone and express preemption.***

The U.S. Supreme Court in *Cipollone* expressly rejected implied preemption in cigarette cases. The decision first discusses the three types of preemption: express, implied, and area preemption:

Congress' intent may be **explicitly stated** in the statute's language ["express preemption"] or **implicitly contained** in its structure and purpose ["implied preemption"]. 112 S.Ct. 2608, 2617.

The preemption urged by the defendants and accepted by the District Court is *implied preemption*, which is in fact the law for other types of legislation<sup>31</sup> but not for the Cigarette Act.

***2. Implied preemption was rejected.***

*Cipollone* holds that the Cigarette Acts contain only *express* or explicit preemption:

In our opinion, the pre-emptive scope of the 1965 act and the 1969 act is **governed entirely by the express language** in § 5 of each act. *Id.*

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<sup>30</sup>*Cipollone v. Liggett Group, Inc.*, 893 F.2d 541 (3rd Cir. 1990).

<sup>31</sup>For example, the FIFRA cases, see footnote 21 *supra*.

### ***3. The Third Circuit's opinion advanced discredited implied preemption***

The Third Circuit opinion in *Cipollone* is instructive, because it illustrates an incorrect application of implied preemption that was expressly overruled by the Supreme Court:

In our preemption decision, **we applied the doctrine of implied preemption** and held that in light of section 1331's declaration of Congressional purpose the Act preempts ... state law damage actions relating to smoking and health that **challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes....** 789 F.2d at 187.

Note that the Third Circuit's implied preemption ruling, that *preemption applies whenever there is an implied challenge to the adequacy of the label*, is exactly the concept urged by defendants and accepted by the district court in this case. However, this was reversed by the U.S. Supreme Court.

Note that the Third Circuit's implied preemption decision also barred claims for fraudulent misrepresentation, express warranty, and conspiracy to defraud "to the extent they sought to challenge the defendant's advertising, promotional, and public relations activities after January 1, 1966" 893 F.2d 541, 582. According to Third Circuit implied preemption analysis any claim that *directly or indirectly* "challenge[s] the defendant's advertising, promotional, and public relations activities after January 1, 1966" is preempted" 789 F.2d at 187. The Supreme Court overruled this and reinstated conspiracy, misrepresentation and express warranty, even though such claims might well imply that the labels were inadequate.

This is the reasoning that is urged by the defendants, the reasoning that was from time to time adopted erroneously by lower courts including *Sonnenreich v. Philip Morris, Inc.*, 929 F.Supp 416 (S.D. Fla. 1996), the reasoning that was accepted erroneously by the First District below, and the reasoning declared to be wrong by the Supreme Court in *Cipollone*.

#### ***4. The consequences of rejecting implied preemption.***

Returning to the Supreme Court *Cipollone* opinion, we can see how the Supreme Court classified the Third Circuit's analysis as implied preemption, and then rejected it:

The [Third Circuit] court's ultimate ruling that petitioner's claims were **impliedly pre-empted** effective January 1, 1966, reflects the fact that the 1969 act did not alter the statement of purpose in Section 2, which was critical to the court's **implied pre-emption analysis**.

**In our opinion, the pre-emptive scope of the 1965 act and the 1969 act is governed entirely by the express language in Sect 5 of each act.** 112 S.Ct. 2608,2617.

#### ***5. The implied preemption cases are not applicable.***

*Sonnenreich v. Philip Morris, Inc.*, 929 F. Supp. 416 (S.D.Fla. 1996), a lower court decision on the adequacy of pleadings (no evidence was taken) erroneously adopted the implied preemption analysis. Also inapplicable to cigarette litigation is *ISK Biotech, Inc. v. Douberly*, 640 So. 2d 85 (Fla. 1 DCA 1994) which construes the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). FIFRA is much more comprehensive and different in concept from the Cigarette Labeling Acts. In FIFRA, labeling information pre-approved by the EPA is extensive and covers every type of communication about the products it covers. This is unlike cigarettes, which are not under EPA nor FDA jurisdiction and which are covered by the Labeling Act only with respect to advertising and promotional communication. Cases construing FIFRA have applied *implied preemption*. **The implied preemption standard, which would preempt all issues that impliedly suggest or indicate that the warnings were inadequate post-70, is inapplicable to cigarette cases.**

**G. The summary judgment and jury instruction including the terms "advertising and promotion" were correct, but no evidence at trial depended upon the construction of "advertising and promotion".**

The jury instruction, including the terms "advertising or promotion" was taken directly from *Cipollone*, which stated:

The [1969 Cigarette Labeling] act does not, however, preempt petitioner's claims that rely solely on respondent's testing or research practices **or other actions unrelated to advertising or promotion.** ... The concealment allegations, insofar as they rely on a **state law duty to disclose material facts through channels of communication other than advertising and promotions,** do not involve an obligation with respect to those activities within §5(b)'s [the preemption section] meaning. *Id.* 112 S. Ct. at 2621-2622.

The Supreme Court further explained in *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 116 S.Ct. 2240 (1996), that the preemptive reach of the cigarette labeling acts was limited:

The pre-emptive statute in *Cipollone* n8 was targeted at a limited set of state requirements--those "based on smoking and health"--and then **only at a limited subset of the possible applications of those requirements--those involving the "advertising or promotion of any cigarettes** the packages of which are labeled in conformity with the provisions of" the federal statute. 518 U.S. 470, 488, 116 S.Ct. 2240, 2252.

***1. No evidence required the construction of these terms.***

B&W has not identified any evidence in this case that in fact required construction of the terms "advertising and promotion." None of the pre-1970 evidence was concerned with this issue, because *no* pre-1970 claims are preempted (regardless of whether they concerned advertising or promotion or not). The fact that post-1970 preemption is (or is not, as B&W claims) limited to advertising and promotion is not relevant to pre-1970 claims. No error could be prejudicial on this issue.

***2. The terms "advertising and promotion" cannot logically be meaningless or***

*all-encompassing.*

B&W claims that the terms "advertising and promotion" have been construed by a lower federal court as being all-inclusive. *Griesenbeck v. American Tobacco Co.*, 897 F. Supp. 815 (D.N.J. 1995), cited by B&W below, is the apparent source of this error. Cited also by *Sonnenreich v. Philip Morris, Inc.*, 929 F.Supp 416 (S.D. Fla. 1996), *Griesenbeck* holds that any communications between a cigarette company and the public must of necessity be advertising and promotion. The effect of *Griesenbeck* would be to render the terms "channels of communication other than advertising and promotion" in *Cipollone* (see 112 S.Ct. at 2622) a nullity. No citations are given in *Griesenbeck* for this proposition, which is false in both concept and fact. ***Griesenbeck* is no longer good law in view of *Philip Morris Inc. v. Harshbarger*, 122 F.3d 58, 75-76 (1st Cir. 1997).**

There are in fact numerous examples of communications to the public from cigarette companies that *cannot* be advertising or promotion because they lack the federally mandated caution label. These communications are typically statements published in newspapers that argue medical or scientific points contending that smoking is not hazardous for example<sup>32</sup>, or supporting or opposing legislation which impacts on the cigarette industry. Avoiding all references to product or brands, they also fail to contain the federal caution label. None were the subject of this appeal, so their status, and the entire "advertising and promotion" question, is not necessary to decide this case.

*Philip Morris Inc. v. Harshbarger*, 122 F.3d 58, 75-76 (1st Cir. 1997), the most recent federal circuit court to discuss preemption, was an attempt by the cigarette industry to block proposed Massachusetts regulations requiring disclosure of ingredients on cigarette packages. A 13. The reporting requirement was held to be an example of "channels of communication other than advertising or promotion" (which

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<sup>32</sup>See, A 16.

*Griesenback* denies the existence of) and thus was not a preempted subject matter.

While we need not decide the issue now, **we are skeptical of the manufacturers' sweeping proposition that the FCLAA [the cigarette labeling act] prescribes the exclusive means by which they may be compelled to communicate health information directly to the public.** On this point, we find informative the Cipollone plurality's preservation of some claims that were based, in part, on the duty to communicate smoking-and-health information to the public. See 505 U.S. at 524-25, 112 S.Ct. at 2621-22 (failure-to-warn claims); *id.* at 528, 112 S.Ct. at 2623 (fraudulent misrepresentation claims). **The survival of such claims undermines the premise that the FCLAA delineates the exclusive scope of consumer-communication duties, and furthermore suggests the very existence of a subset of such requirements that are wholly unrelated to advertising and promotion.** We also find informative the legislative history's repeated reference to the "narrow" and "limited" nature of the preemption provision and declaration that the provision "is limited entirely to State or local requirements or prohibitions in the advertising of cigarettes." S. Rep. 91- 566, 1970 U.S.C.C.A.N. at 2663.

Therefore, although we cannot think of evidence in this trial that depended upon the viability of the concept of "channels of communication other than advertising and promotion," such communications are not preempted. **The advertising and promotion question is a non-issue, but the cases cited by the district court are not good law and are illogical.**

VIII. THE DISTRICT COURT'S HOLDING THAT THE CARTERS PROCEEDED ON AN "UNPLEADED CLAIM" WAS IN REALITY A RULING ON THE ADMISSIBILITY OF CERTAIN EVIDENCE, WHICH CANNOT FORM THE BASIS OF REVERSAL ABSENT AN EXPLICIT FINDING OF ABUSE OF DISCRETION; FURTHERMORE, THE EVIDENCE WAS ADMISSIBLE ON NUMEROUS OTHER GROUNDS.

***A. There was no explicit finding of a clear abuse of discretion.***

Although phrased as an “unpleaded claim,” B&W’s contention below really amounts to nothing more than a complaint, in disguise, that certain **evidence** should not have been admitted. There was, of course, no unpleaded claim, because the jury was properly instructed that plaintiff’s claims were against ATC, and that evidence against ATC, not B&W, should define plaintiff’s claim.<sup>33</sup> Where a trial court has weighed the probative value of proffered evidence against its prejudicial impact, an appellate court may not overturn that decision absent an explicit finding of a *clear abuse of discretion*. *Sims v. Brown*, 574 So.2d 131, 133 (Fla. 1991), quoting *Trees v. K-Mart Corp.*, 467 So.2d 401, 403 (Fla. 4th. DCA), *review denied*, 479 So.2d 119 (Fla. 1985). This is so because the weighing of relevance versus prejudice or confusion is best performed by the trial judge, who is present and best able to compare the two. *Sims*, at 133.

In *Sims* this Court reversed a district court decision that had disagreed with the lower court on evidentiary grounds, holding “. . . the district court **must find an abuse of discretion** in the trial judge’s rejecting this evidence before reversing. It failed to do so.” *Id.* 134. In this case, as in *Sims*, the district court likewise made no explicit finding on abuse of discretion; thus, the district court’s disagreement with the trial court’s admission of the subject evidence cannot be a basis for reversal of the Carters’ judgment. **Evidentiary challenges in disguise are still subject to the abuse of discretion rule.**

***B. There was, in fact, no clear abuse of discretion because the subject evidence was admissible for other valid reasons.***

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<sup>33</sup>The jury was properly instructed, at B&W’s request, that the Carters’ claims were based solely on the conduct of ATC, prior to the time it merged with B&W in 1995. R66:4128, A 19.

***1. The evidence was relevant to the issue of the "state of the art" on nicotine addiction.***

The complained-of evidence consisted of documentary and testimonial evidence showing research conducted by B&W, the British American Tobacco Company ("BAT"), and the Battelle Institute in the 1950's through 1970's. This research principally demonstrated that contrary to published medical literature and to the public statements of the tobacco industry as a whole, nicotine caused physical dependence and was addictive.

In *A Tentative Hypothesis of Nicotine Addiction* (Battelle Institute, 1963), A 17, for example, the Battelle Institute explained the "addiction" of nicotine:

If nicotine intake, however, is prohibited to chronic smokers, the corticotropin-releasing ability of the hypothalamus is greatly reduced, so that these individuals are left with an unbalanced endocrine system. A body left in this unbalanced status craves for renewed drug intake in order to restore the physiological equilibrium. **This unconscious desire explains the addiction of the individual to nicotine.**

The Battelle research was sophisticated for its time; it showed that cigarette smoking was not merely a habit, but was more in the nature of a drug addiction. Such research had extremely important public health implications. This and supporting research was transmitted to B&W, whose Executive Vice President and General Counsel Addison Yeaman concluded that "nicotine is addictive:"

Moreover, **nicotine is addictive.**

We are, then, in the business of selling nicotine, an addictive drug... A 18.

Manufacturers are held to the knowledge and skill of experts and are obligated to keep abreast of any scientific discoveries, and are presumed to know the results of all such discoveries. *Dartez v. Fibreboard Corp.*, 765 F. 2d 456, 461 (5th Cir. 1985); *Advance Chemical Co. v. Harter*, 478 So.2d 444, 447 (Fla. 1<sup>st</sup> DCA 1985), *review denied*, 488 So.2d 829 (Fla. 1986). The knowledge and research of one manufacturer can be relevant to defining the standard of knowledge required of the industry as a whole. *Dartez, supra*, at 463.

It was an element of plaintiff's proof of negligence that B&W's predecessor corporation, ATC, failed to adequately test its products. In this regard, it was undisputed that ATC failed to test its products for addictive qualities. R41:805; 871; 873-74; 880. The Battelle research was relevant, therefore, to show what ATC's scientists *would have and could have found* had they tested their product for addiction as Battelle did. **B&W's documents were valid evidence defining the standard of care and knowledge for the industry.**

## ***2. The evidence was admissible to rebut and impeach B&W's defenses***

At trial, ATC was no longer a legal entity, having been merged into B&W in 1995. The defendant corporation at counsel table was B&W, not ATC. The statements made to the jury were from B&W counsel. B&W counsel asserted privileges for B&W that were not available to the former ATC, including the attorney-client privilege to a document from B&W's former Vice President Addison Yeaman (referred to in subsection B(1) above.) The credibility of B&W's trial positions, or lack of it, belonged to B&W alone. B&W's concealment of important addiction research was directly relevant to B&W's credibility at trial. B&W expressed various positions at trial through counsel's arguments and through its interrogatory answers. B&W's credibility was at issue, and a valid attack on credibility is to show a pattern or practice of concealment or inconsistent positions. B&W in fact consciously concealed the Battelle research, as shown by the telex in evidence, stating it was "undesirable" to turn the addiction research over to the Surgeon General advisory committee:

**PRIOR TO RECEIPT YOUR TELEX JULY 3 HOYT OF TIRC  
AGREED TO WITHHOLD DISCLOSURE BATTELLE REPORT TO  
TIRC MEMBERS OR SAB UNTIL FURTHER NOTICE FROM ME.  
FINCH AGREES SUBMISSION BATTELLE OR GRIFFITH  
DEVELOPMENTS TO SURGEON GENERAL  
UNDESIRABLE AND WE AGREE CONTINUANCE OF  
BATTELLE WORK USEFUL BUT DISTURBED AT ITS**

## IMPLICATIONS RE CARDIOVASCULAR DISORDERS. A 20.

It was B&W, not ATC, who stood before the jury and urged that cigarette smoking had not been scientifically proven to be either addictive or a cause of lung cancer. R38:420; 430-33; 435. The Carters properly impeached B&W's defense posture by showing B&W's long-term knowledge to the contrary. *Johns-Manville Sales Corp. v. Janssens*, 463 So.2d 242, 256 (Fla. 1 DCA 1984) (holding that similar evidence to rebut a defense and to impeach a witness was properly admitted).

B&W relied heavily upon the 1964 Surgeon General's Report (as did its expert, Dr. Thompson), to support its defense position that smoking was not addictive. R38:420; 430-33; 435; R47:1389. R61:3274; 3291-93. The trial court properly permitted the Carters to introduce evidence, some mentioned above, that demonstrated that B&W's knowledge of the addictiveness of nicotine was, in fact, *superior* to that expressed by the Surgeon General in his 1964 Report. **Concealment of addiction research was admissible to challenge the validity of the 1964 Surgeon General's Report.**

### ***C. Viewed In The Proper Context, The Carters' Counsel's Comment And Dr. Feingold's Testimony Did Not Constitute An "Unpleaded Claim"***

In agreeing with B&W that the Carters were allowed to pursue an "unpleaded claim," the district court took out of context a comment made by the Carters' counsel in response to a motion to strike made in open court by B&W's counsel, R47:1385-90; A 21, and the testimony of the Carters' expert witness, Dr. Feingold, which appears at R46:1345-50; A 22.

Viewed in its proper context, it is evident that counsel's comment was made during a line of questioning of Dr. Feingold, the purpose of which was, according to our arguments above, entirely proper: to undermine the credibility of B&W's position that there was no scientific awareness prior to the Surgeon General's 1964 Report that cigarettes were addictive and caused cancer; to rebut B&W's contention that the 1964

Report confirmed the lack of scientific evidence linking cigarettes with addiction and cancer; and to show that the pre-1970 warning on Lucky Strike cigarettes was inadequate in light of the industry's knowledge, which knowledge was properly imputed to ATC.

Accordingly, taken in their proper context, including the jury instruction defining the claims as requested by B&W, plaintiffs' counsel's comments made in opening statement and during the examination of Dr. Feingold, which were not evidence,<sup>34</sup> cannot amount to "an unpleaded claim." Additionally, the probative value of Dr. Feingold's challenged testimony was properly determined by the court to outweigh any unfair prejudice to B&W. Thus, it cannot be stated that the trial court clearly abused its discretion in admitting same.

***D. The Record Reflects That B&W Was Not Unfairly "Surprised" By Its Own Documents***

The district court erroneously concluded that B&W was somehow surprised by documents from its own files. The record reflects otherwise. Attached at A 23 is a chronology of the record evidence that shows that B&W was well and painfully aware of the subject documents well in advance of trial and had more than sufficient notice that they would be used at trial. The district court also stated that the subject documents "were not discovered until after this claim was filed, and after the merger of ATC with Brown & Williamson" *Brown & Williamson Tobacco Corp. v. Carter*, 723 So.2d 833, 837 (Fla. 1 DCA 1997); A 1. This statement is factually incorrect. In fact, B&W had engaged in extensive litigation in 1994 concerning the very same documents, *see, e.g., Maddox v. Williams*, 855 F.Supp. 406 (D.D.C. 1994), and the documents had been posted on the internet and subject to extensive public commentary since their disclosure in 1994, *see, e.g., Glantz, S.A.: THE CIGARETTE PAPERS* (University of California Press, 1996), pp. 6-11; A 24; Editorial, *The Brown and*

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<sup>34</sup> B&W did not move for a mistrial after the comments were made; nor did it ask the court to strike the comments and instruct the jury to disregard same.

*Williamson Documents, Where Do We Go From Here?* JAMA, July 19, 1995 - Vol. 274, No. 3, A 25. This fact was made known to the trial court. R31:366-80. Thus, B&W was well aware of the subject documents long before this case was filed.

Finally, the trial court overruled B&W's objections to the documents only after conducting extensive hearings on B&W's objections, both before and during trial. R31:264-381; R32:387-400; R33:514-66; R34:568-77; R35:7-12; R64:3717-37. Accordingly, it cannot be said that the trial court clearly abused its discretion in admitting the documents and, in fact, no such finding was made by the district court. Therefore, reversal on this ground cannot be sustained. **B&W cannot legitimately complain it was surprised by its own documents.**

#### IX. CONCLUSION

Based on the argument above, the district court's decision should be reversed and the judgment of the trial court reinstated.

Respectfully submitted,

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