IN THE SUPREME COURT OF FLORIDA

GRADY CARTER and
MILDRED CARTER,

Petitioners,

CASE NO. 94,797

vs.

BROWN & WILLIAMSON TOBACCO
CO., as successor by merger to
The American Tobacco Co.,

Respondent.

AMENDED RESPONDENT'S ANSWER BRIEF ON THE MERITS

On Writ of Discretionary Review
To The District Court of Appeal, First District

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STATEMENT OF THE CASE AND FACTS

Grady Carter smoked "Lucky Strike" cigarettes made by The American Tobacco Company from 1947 until 1972, and other brands of cigarettes until 1991. On January 29, 1991, Carter coughed up bright red blood; he immediately knew something was "very bad wrong with me." (R 53: 2178, 2297.) He checked a medical reference, and read that coughing up blood indicated lung cancer, or tuberculosis. (R 53: 2178-79.) After 44 years, Carter quit smoking right away. (R 53: 2148, 2296.)

Mr. Carter had read about the relationship between smoking and health for decades. In the 1960s, he saw news articles linking smoking with lung cancer and emphysema; he also saw announcements by the American Cancer Society that smoking causes lung cancer. (R 53: 2238-40, 2248, 2259.) Carter's son, a chiropractor, told Carter about the adverse effects of smoking; his wife also reminded him that smoking causes cancer and other diseases on a "pretty regular" basis. (R 53: 2263, 2270-71.)

When Mr. Carter coughed up blood, he knew his prognosis was not good. (R 53: 2296.) He promptly called the doctor, and, on February 4, 1991, went to see Dr. Gary Decker. Decker sent Carter for an immediate x-ray. When Carter returned to Decker's office that same day, he was given even more alarming news -- the x-ray revealed a mass in his lung. (R 53: 2179-81.)

Decker told Carter that the mass could be cancer or tuberculosis. (R 53: 2181.) Nevertheless, Carter knew there was a strong possibility that he had cancer as soon as he coughed up blood. Referring to the reason he had stopped smoking on January 29, Carter testified that he knew he might have cancer: *"I feared*

the worst, yes, sir. I feared the worst." (R 53: 2297.)

Carter's worst fears were confirmed by the February 4 x-ray; Carter testified that when the x-ray showed a mass, *"in my mind I already knew I had lung cancer."* (R 54: 2369.) Carter's belief was consistent with the February 4 report of his radiologist, who concluded outright: "Left upper lobe carcinoma." (DX 19; A 37.) Decker directed Carter to see a lung specialist, Dr. Bruce Yergin, "immediately." (R 53: 2181.)

Mr. Carter saw Yergin the very next day, February 5, 1991. (R 39: 547-48.) Yergin noted that Carter had coughed up bright red blood "a couple of times," and was "very anxious and very worried and very concerned." (R 39: 550-51; A 39.) Yergin also noted that Carter had stopped smoking. (R 39: 551; A 39.) According to Yergin's intake sheet, Carter had been referred to him due to a "lung tumor." (DX 19;A 39.) Yergin testified that this notation reflected Decker's high degree of concern that the mass in Carter's lung was cancer. (R 39: 552, 650.)

Yergin reviewed Carter's x-ray, and agreed that the lung mass was "highly suggestive of a neoplasm." (R 39: 553; DX 19; A 38.) There was a lingering possibility that tuberculosis or pneumonia was the source of the mass; nevertheless, Yergin testified that cancer was "the most likely cause." (R 39: 567-68, 652.) Indeed, Yergin testified that lung cancer was "the first, second and third things" that came to mind based upon Carter's presentation. (R 39: 653.) Therefore, Yergin told Carter on February 5 that the mass was "more likely" a tumor, although he did not "stress" the point. (R 39: 656-57.) Yergin testified that on February 5, "I think [Mr. Carter] did feel that

he probably had lung cancer, yes, and it was reasonable for him to make that conclusion." (R 39: 659.)

In addition to the highly suspicious mass, Yergin's notes reflect that on February 5, 1991, he also rendered the following unequivocal diagnoses: "COPD;" "chronic bronchitis;" and "cigarette abuse." (R 39: 557, 582-83; DX 19; A 42.) Yergin testified that "COPD" refers to "chronic obstructive pulmonary disease," an "umbrella" term referring to both bronchitis and emphysema. (R 39: 582.)

On February 12, 1991, Yergin obtained tissue samples from Mr. Carter's lung. (R 39: 559.) The samples confirmed what Carter and his doctors had already concluded was highly likely -- Carter had lung cancer. Yergin presented the results to Carter on February 14, 1991. (R 39: 565.)

Petitioners waited until February 10, 1995 to file this lawsuit. On appeal from a judgment entered in favor of Petitioners after a jury trial, the District Court correctly ruled that Petitioners' claims were time-barred as a matter of law. In addition, the District Court found that the trial court committed four other errors, two of which were reversible.

SUMMARY OF ARGUMENT

Petitioners' claims were barred by limitations, because Grady Carter was on notice that he might have an injury caused by smoking before February 10, 1991. Relying on *University of Miami v. Bogorff*, 583 So.2d 1000 (Fla. 1991), the District Court correctly held that medical confirmation of lung cancer was not required for Carter's claims to accrue. Rather, limitations began to run as soon as Carter was on notice that he might have

an actionable injury. Carter had four years from that time to investigate the precise nature and cause of his condition, and to file his lawsuit. Carter received the requisite notice by February 5, 1991, but waited more than four years to sue.

This Court's decision in *Bogorff* properly recognizes that legal certainty is not necessary to trigger the statute of limitations. The Court should adhere to its ruling in *Bogorff*, and should reject Petitioners' effort to change the law by imposing a standard requiring definitive knowledge to start the limitations period. The standard Petitioners advocate is unsupported by Florida law, is inconsistent with the Legislature's intent, and would lead to indefinite postponement of the limitations period. The Court should affirm the District Court's ruling that Petitioners' claims were time-barred.

Alternatively, the judgment and the jury verdict should be set aside, and a new trial should be ordered, because of the reversible errors found by the District Court. There is no express and direct conflict between the District Court's ruling that the trial court committed reversible errors, and any other ruling of a Florida appellate court. No such conflict was alleged by Petitioners; their petition to invoke this Court's jurisdiction was based solely on limitations. Thus, there is no need for the Court to address these additional issues on the merits. See, *e.g.*, *Sanchez v. Wimpey*, 409 So.2d 20 (Fla. 1982)(in its discretion, the Court declined to consider merits of additional issues raised by petitioners).

[1] Rather, if the Court does not affirm the District Court's ruling that Petitioners' claims were time-barred, it should

direct that a new trial be held for the reasons expressed by the District Court. Out of an abundance of caution, we have argued these issues below.

I

THE DISTRICT COURT CORRECTLY APPLIED THE LAW AS DEFINED BY THIS COURT, AND THE CHANGES WHICH PETITIONERS ADVOCATE WILL NOT MAKE THE LAW CLEARER OR MORE DEFINITE.

The Legislature did not intend to allow a person unlimited time to achieve certainty as to the nature and cause of an injury, and then four additional years for the sole purpose of deciding whether or not to file a lawsuit. Logic suggests a more sensible intent: the Legislature allowed a generous four years in which to conduct a factual investigation to determine the precise nature and cause of an injury, once the injured person has reasonable notice of the possibility that he or she has suffered an injury caused by another. That is the interpretation applied by this Court, and followed by the District Court.

A. The District Court Properly Applied This Court's Well Established Rule That Certainty Is Not Necessary For Limitations To Begin Running.

The District Court held that "the evidence shows beyond dispute that Grady Carter knew or should have known, before February 10, 1991, that his lungs were injured, and he was on notice that the injury was probably caused by smoking." 723 So.2d at 836. Based on *Bogorff*, the District Court ruled that "Neither absolute knowledge nor medical confirmation is required for a cause of action to accrue." *Id*. The fact that Mr. Carter was not told the results of tissue analysis until February 14 did not present a jury question as to when limitations began to run.

This Court clearly held in *Bogorff* that knowledge to a reasonable possibility, not legal certainty, will begin the limitations clock. The Court expressly rejected legal certainty as the start of the limitations period:

> The knowledge required to commence the limitation period, however, *does not rise to that of legal certainty*. . . . Plaintiffs need only have notice, through the exercise of reasonable diligence, of *the possible invasion of their legal rights*. . . .

583 So.2d at 1004 (citations omitted)(emphasis added). The plaintiffs' claim in *Bogorff* accrued as a matter of law when they knew "of a dramatic change" in their son's condition, and of the *"possible"* involvement of a drug made by the defendant in causing the injuries. *Id*. (emphasis added).

The District Court properly relied on *Bogorff* to conclude that Carter's products liability claims were time-barred. Like the plaintiffs in *Bogorff*, Carter argues that his condition, prior to February 10, 1991, could not be distinguished from a disease unrelated to the defendant's product. But *Bogorff* teaches that it was not necessary for Carter to be "legally certain" of his condition for limitations to begin running. The limitations period began to run as soon as Carter was reasonably on notice of the possibility that he had been injured by smoking. As a matter of law, Carter's knowledge by February 5, 1991 of a possible invasion of his legal rights was enough to trigger the statute.

[2] Cases involving affirmative *mis-diagnosis*, such as *Celotex Corp. v. Copeland*, 471 So.2d 533 (Fla. 1985), and *Ash v. Stella*, 457 So.2d 1377 (Fla. 1984), are consistent with the Court's later

holding in *Bogorff*. Those cases involved circumstances far different from this case.

In *Copeland*, two doctors told the plaintiff his shortness of breath was due to pneumonia and emphysema; neither linked the plaintiff's breathing problems to dusty job conditions. The plaintiff was not diagnosed with asbestosis until years later. *Ash* also involved a diagnosis that was needed to correct a prior mis-diagnosis. The plaintiff's cause of action for medical malpractice, based on the defendant's failure to diagnose a tumor, did not accrue until tests showed that the initial diagnosis was erroneous.[1]

When a claimant has been affirmatively misled by an erroneous diagnosis and has no reason to suspect the error, as in *Copeland* and *Ash*, the plaintiff has no reason to inquire further and has not received notice of a possible cause of action. Carter, in contrast, was never given an erroneous diagnosis nor misled about the relationship between his condition and smoking. In *Copeland*, the Third DCA noted that the "*decisive*" factor in that case was that the plaintiff had been told by two doctors that his shortness of breath was due to pneumonia and emphysema, not asbestos. *Copeland v. Armstrong Cork Co.*, 447 So.2d 922, 928 (Fla. 3rd DCA 1984). This *mis-diagnosis*, the court said, "*could lead a reasonable person to conclude, as the plaintiff did, that his condition was not related to the asbestos dust at all.*" *Id*.

[1] *Barnes v. Clark Sand Co.*, 721 So.2d 329 (Fla. 1st DCA 1998), also involved a mis-diagnosis. The plaintiff's left lung was removed in 1984, and he was told that the surgery was due to cancer. Later, he was told that he had a fungal infection. He claimed he first became aware that his lung problems might be due to silica in 1992.

Here, the District Court properly distinguished *Copeland*. 723 So.2d at 835-36. Carter was never told, and never concluded, that his condition was not related to smoking "at all." A formal diagnosis was simply not needed to alert Carter to his potential claims.[2]

B. The District Court Properly Determined That There Was No Issue of Fact For The Jury To Decide.

Petitioners urge the Court to create a rule that statute of limitations in all "latent disease" cases should automatically be sent to the jury. They argue that the time between exposure and manifestation of a latent injury "is so attenuated that the lay person does not automatically have knowledge of the connection between the two"; Petitioners suggest a jury could reasonably determine that "medical confirmation is necessary for the plaintiff to have 'knowledge of the injury'" in such a case. (Petitioners' Initial Brief, at 8.)

Petitioners' argument is flawed, because there is nothing uniformly unique about cases involving latent diseases which would justify treating them as an entire category separate from general rules of law regarding jury issues. In any given case, there either are, or are not, genuine issues of material fact regarding the plaintiff's knowledge of the cause of his injury, regardless of the nature of the disease. The latency of the disease might, in a given case, contribute to the conclusion that

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[2] Petitioners argue that the District Court read *Copeland* "too narrowly," since a jury question is presented where "the Plaintiff has reason to believe he does not have a product-related disease." (Petitioners' Initial Brief, at 11-12.) That argument has no relation to the facts of this case. Carter had no reason to believe that he did *not* have a product-related disease; he believed he probably *did* have a smoking-related illness.

a plaintiff did not have notice of the possibility of an actionable injury. But there is no reason to establish, as a matter of law, that this is always the case.

As a fall back, Petitioners argue that the facts in this case created an issue for jury resolution, because a diagnosis of tuberculosis or pneumonia could not be excluded. (Petitioners' Initial Brief, at 13-19.)

Petitioners' argument misses the point. The statute of limitations begins running upon knowledge of a reasonable possibility of an actionable injury, even if other possibilities cannot be definitively excluded. The plaintiff is given four years to determine whether or not the injury is actionable. In this case, the evidence was overwhelming and undisputed that Mr. Carter had more than adequate notice of the possibility that he had lung cancer as a result of smoking. Indeed, the evidence came in the form of Carter's own testimony.

Carter had no difficulty at all linking his lung condition to smoking prior to February 5, 1991. Carter quit smoking on January 29 before he even saw a doctor, precisely because of his fear that he had lung cancer (a fear that only intensified on February 4 with the discovery of the lung mass). Carter did not need a doctor to suggest that his condition might be related to smoking. He reached that conclusion on his own, based on what he had heard and read for years. Once Carter was aware that his condition might be related to smoking, his claim accrued as a matter of law.

Petitioners cite *Brown v. Armstrong World Industries, Inc.*, 441 So.2d 1098 (Fla. 3rd DCA 1983), and *Szabo v. Ashland Oil Co.*,

448 So.2d 549 (Fla. 3rd DCA 1984), both of which are factually different from this case. An issue of fact was present in *Szabo* because medical science had not established a connection between the product in question and the plaintiff's illness until 1977. Of course the plaintiff's claims did not accrue until 1977 -- no plaintiff using due diligence could possibly have gathered all the facts necessary to maintain an action before then.

In *Brown*, the plaintiff was not informed until 1979 that he had an asbestos-related disease. When asked "in your mind, did you relate the shortness of breath that you were having to your career in [the] asbestos industry," the plaintiff responded "No, because I didn't want to." 441 So.2d at 1100. That is a far cry from Grady Carter, whose very first reaction when he began to experience symptoms was to suspect smoking as the cause.

The Third DCA's short, *per curiam* opinion in *Brown* did not pronounce a broad new standard that requires proof "to a reasonable medical certainty" for the statute of limitations to begin running in any case involving a latent disease. The Third DCA did not cite any authority for such a sweeping proposition. Nor has any other court ever applied such a standard to Florida's four year limitations period, in the absence of a prior mis-diagnosis.

[3]

Even if *Szabo and Brown* suggest that a cause of action cannot accrue until medical confirmation of the plaintiff's injury, that suggestion was later rejected by this Court in *Bogorff*. Indeed, Florida cases since *Szabo* and *Brown* have consistently rejected any argument that legal or medical certainty is needed for

limitations to begin running. See, *e.g.*, *Senger Bros. v. E.I. DuPont de Nemours & Co*., 184 F.R.D. 674, 685 (M.D. Fla. 1999)("The knowledge required to commence the running of the statutes of limitation does not need to be a legal certainty."); *Samson v. R.J. Reynolds Tobacco Co*., 1997 U.S. Dist. LEXIS 8062 (M.D. Fla. 1997)("The fact that Plaintiff may not have been 'medically diagnosed' with emphysema is irrelevant. Such knowledge is not required by Florida law."); *Bowers v. Northern Telecom, Inc*., 1995 U.S. Dist. LEXIS 20141 (N.D. Fla. 1995)(a "formal medical diagnosis" is not necessarily needed for limitations to begin running); see also *Steiner v. Ciba-Geigy Corp*., 364 So.2d 47 (Fla. 3rd DCA 1978), cert. denied, 373 So.2d 461 (Fla. 1979).

C. The Court Should Not Change Florida Law By Requiring Definitive Knowledge For A Claim To Accrue As A Matter Of Law.

Respondent does not argue that "every passing cough, sneeze, or ailment" -- whether real or "imagined" -- triggers the statute of limitations. (Petitioners' Initial Brief, at 9.) When Carter spit up blood on January 29, 1991, that was not a "passing cough." Carter's doctors did not treat it that way, and Carter realized that something was *"very bad wrong with me."* (R 53: 2297.) Nor was the sinister mass discovered in Carter's lung on February 4 something that was "imagined"; Carter and his doctors believed that most likely, it was cancer.

The undisputed evidence showed that by February 5, 1991, Carter knew there was a strong probability that he had lung cancer due to smoking. Thus, a change in current law to anything short of certain diagnosis would not alter the outcome of this

case, and it is understandable that Petitioners urge the Court to adopt a rule requiring a certain diagnosis to commence the limitations period. But such a rule would be contrary to the purpose of the statute, and would not bring clarity or certainty to the law.

Statutes of limitations are designed to balance the interest of defendants in not being forced to construct a defense from "faded memories, misplaced or discarded records, and missing or deceased witnesses," *Allie v. Ionata*, 503 So.2d 1237 (Fla. 1987), and after "the facts have become obscure from the lapse of time," *Whaley v. Wotring*, 225 So.2d 177 (Fla. lst DCA 1969), against the interest of the plaintiff in having sufficient time to investigate a possible claim. Statutes of limitation are not designed to give a plaintiff time to conduct an investigation, and then an *additional* extended period in which to sit on rights which are manifest. The statute allows the plaintiff time to investigate rights *and* file a lawsuit after reasonable notice of a potential claim.

[4]

The reasoning of the U.S. Court of Appeals for the First Circuit (applying Massachusetts law) reflects this principle. *Cornell v. E.I. DuPont de Nemours & Co*., 841 F.2d 23 (1st Cir. 1988). The court held that a claim accrued when the plaintiff associated his respiratory problems with exposure to paint fumes, not upon receipt of a formal diagnosis of chronic obstructive lung disease:

> The plaintiffs need not know that their injuries are legally compensable . . ., but rather they must be put on notice such that they have a 'duty to discover from the legal, scientific, and medical communities whether the theory of causation is

supportable and whether it supports a legal claim.' *Id.*, at 24 (citations omitted). Once on notice of a likely relation between their injury and the defendant's conduct, "the plaintiffs have three years to ascertain whether their claims are legally supportable." *Id.* Other courts have applied similar reasoning and have also held that a definitive diagnosis is not needed to begin the limitations period.[3]

If certain knowledge of the nature and cause of the plaintiff's illness were required for the statute to begin running, the intended purpose of requiring diligent inquiry would be lost, and the start of the limitations period would be postponed indefinitely. In *Byington v. A.H. Robins Co.*, 580 F. Supp. 1513, 1517 n. 4 (S.D. Fla. 1984), for example, the court held that the plaintiff's claims accrued even though the plaintiff's doctor "did not know for a fact that [her] pelvic inflammatory disease was related to her use of the Dalkon shield . . . ." All that is required to trigger the statute "is that information be made available to Plaintiff so that she suspects, or after a reasonably diligent investigation should suspect that the IUD contributed to her pain"; otherwise, "the claimant's action would almost never accrue", and the underlying purpose of the statute of limitations would be frustrated. *Id.*, at 1517. See also *Bowen v. Eli Lilly & Co.*, 557 N.E.2d 739, 742 (Mass. 1990).

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[3] *Harrison v. Digital Equipment Corp.*, 465 S.E.2d 494, 495 (Ga. Ct. App. 1995); *Thomason v. Gold Kist, Inc.*, 407 S.E.2d 472, 474 (Ga. Ct. App. 1991); *Doucette v. Handy & Harmon*, 625 N.E.2d 571 (Mass. Ct. App. 1994); *Mascarenas v. Union Carbide Corp.*, 492 N.W.2d 512 (Mich. Ct. App. 1992); *Martinez v. Showa Denko, K.K.*, 964 P.2d 176 (N. Mex. Ct. App. 1998); *Whitney v. Agway Inc.*, 656 N.Y.S.2d 455 (N.Y. App. Div. 1997).

The standard that Petitioners advocate is unworkable, because a plaintiff in any lawsuit involving any product could stall the limitations period by arguing that his or her knowledge was incomplete or not definitive enough. For example, Petitioners assert that the jury in this case was entitled to render a verdict in their favor on limitations because Carter did not know: 1) that the "specific type of lung cancer" he had ("adenocarcinoma") was caused by smoking; 2) that cigarette brands "differ in their delivery of carcinogens, gas phase ciliatoxins, nicotine, and other deleterious substances"; and 3) that his illness "was attributed to pre-1972 cigarettes." (See Petitioner's Initial Brief, at 22-23.) If such detailed knowledge were necessary to start the limitations period, the statute would be delayed indefinitely.

In *Tanner v. Hartog*, 618 So.2d 177, 181 (Fla. 1993), this Court held that limitations in a medical malpractice action begins to run when the plaintiff was aware of a "reasonable possibility" that he had sustained an injury due to malpractice. It rejected a suggestion that the statute should not begin to run until the plaintiff had notice of a "probability" of medical malpractice, because such a requirement "would result in an inordinate extension of the statute." 618 So.2d at 181, n. 4. The standard Petitioners advocate -- a certain diagnosis -- is even more problematic, and should likewise be rejected. A standard based on reasonable notice prevents inordinate delay, but still allows ample opportunity for a plaintiff to investigate and file suit. It is also in keeping with the Legislature's intent to require due diligence by a claimant.

D. Plaintiffs' Effort To Split Their Cause Of Action Does Not Salvage Their Claims.

The District Court correctly ruled that "the accrual date for all [of Carter's] smoking related lung injuries occurred more than four years before the complaint was filed." 723 So.2d at 836 n. 2. Far from providing a basis to uphold verdict, Carter's claims for COPD and chronic bronchitis were untimely and provide a further reason to set the verdict aside. See, *e.g.*, *City of Miami v. Brooks*, 70 So.2d 306, 308 (Fla. 1954)("where an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once."). Yergin's February 5, 1991 diagnosis of COPD and chronic bronchitis was sufficient, in and of itself, to start the limitations period.

Petitioners argue that Yergin "was not asked when he diagnosed COPD caused by smoking nor when he communicated it to Mr. Carter." (Petitioners' Initial Brief, at 15-16.) The date of the diagnosis, however, was conclusively fixed by Yergin's records -- February 5, 1991. Carter conceded that his doctors told him he had COPD: "I remember one of them saying I had COPD and I didn't know what it was. I went home and looked it up." (R 53: 2308.) Of course it was Yergin, the lung specialist, who told Carter he had COPD.

But even if it was not Yergin who told Carter that he had COPD, Yergin's diagnosis is imputed as a matter of law. *Bogorff*, 583 So.2d at 1004. Information in Yergin's records was knowable to Carter, and Carter's professed ignorance would not prevent the statute from beginning to run. *Nardone v. Reynolds*, 333 So.2d

25, 34-35 (Fla. 1976). If Carter failed to ask for a diagnosis, "he cannot take advantage of his own fault" in not doing so. *Id.*, at 35.

Carter was aware for years that smoking is related to cancer and other respiratory disease, and his immediate decision to quit smoking on January 29, 1991 shows without doubt his awareness of the relationship between his respiratory condition and smoking.

Petitioners rely upon *Eagle-Picher Industries, Inc. v. Cox*, 481 So.2d 517 (Fla. 3rd DCA 1985), to split their cause of action in two: one for COPD, and one for cancer. There is no reason to apply *Eagle-Picher* here. *Eagle-Picher* allowed splitting causes of action only because the plaintiff in that case did not have cancer when he was required by limitations to sue for asbestosis. To resolve this dilemma, the court relaxed the rule against splitting causes of action, and recognized separate causes of action for limitations purposes.

Carter's case is far different from *Eagle-Picher*, and there is no reason to allow split causes of action here. Carter could have filed his action within four years after he was first diagnosed with a smoking-related illness for *all* of his claimed injures. Unlike the plaintiff in *Eagle-Picher*, nothing ever impeded Carter from filing a timely complaint for all of his smoking-related injuries. Therefore, the usual rule set forth in *City of Miami* applies.

Finally, Respondent was not required to request a special verdict or jury instruction separating the two diseases. There was simply no reason to recognize split claims; indeed, Petitioners themselves joined their claims for all smoking-

related diseases in one cause of action, in a single count in their Complaint. (R 1: 1-11, ¶ 15; A 10-11; see also R 49: 1551; R 53: 2198.)

The District Court properly concluded that "the evidence shows beyond dispute that Grady Carter knew or should have know, before February 10, 1991, that his lungs were injured, and he was on notice that the injury was probably caused by smoking." 723 So.2d at 836.

II

THE DISTRICT COURT RULED CORRECTLY THAT THE TRIAL COURT REVERSIBLY ERRED BY FAILING TO ENFORCE THE PREEMPTIVE EFFECT OF FEDERAL LAW.

The District Court ruled correctly that the trial court committed reversible error by failing to enforce the preemptive effect of the Federal Cigarette Labeling & Advertising Act, 15 U.S.C. § 1331 *et seq*. ("the Labeling Act"). In particular, the trial court: 1) improperly allowed the jury to decide the scope of preemption (an issue of law, not fact); and 2) violated "federal preemption of state causes of action for inadequate warnings" by receiving Petitioners' package insert into evidence. 723 So.2d at 836-37.

A. Petitioners Were Improperly Allowed To Introduce Evidence That A Package Insert Should Have Been Used To Provide Detailed Warnings To Smokers.

Petitioners' counsel argued to the jury that a "package insert" should be used to warn consumers of the dangers of smoking: "We're going to present you with [an insert] we think should have been folded up in every cigarette package." (R 38: 408-409.) Over objection, they were allowed to introduce into evidence a package insert that one of their experts, Dr.

Feingold, prepared. (PX 7; A 42; R 45: 1157-60.) Feingold testified that his insert should be included with all cigarette packages sold to consumers:

> This is a document that I did to attempt to answer the question *what would be an adequate package insert*. *What would I like a product like cigarettes to be sold with*. *When a cigarette addict buys his or her package of cigarettes and opens the package, what should the addict expect to be confronted with*.

(R 45: 1153.) There was no limitation, either in counsel's questions or in Feingold's answers, suggesting that the insert was *only* a pre-1969 insert.

Feingold later testified (again over objection) that there has *never* been a package insert that "discusses the dangers of cigarettes in detail" -- arguing, of course, that there should be. (R 48: 1509.) Feingold reiterated his argument that *the insert is what patients should "be confronted with when they open a package of cigarettes."* (R 49: 1536.) Again, there was no limitation as to time.

The insert describes the dangers of smoking in great detail. It also contains a graphic "skull and cross-bones," because, Feingold said, that is a "universal image . . . for very serious danger and death." He explained the contents of the insert to the jury at great length, addressing: 1) the diseases associated with smoking; 2) instructions to smoke fewer cigarettes; 3) information about "addiction"; 4) the effect of quitting on the risk of disease; 5) the harmful effect of smoking on DNA; 6) the dangers of smoking filtered and low tar cigarettes; 7) the identity of carcinogens in cigarette smoke; 8) the need for smokers to seek medical examination; 9) directions on how to stop

smoking; and 10) instructions on how much of a cigarette to smoke. (R 45: 1190; R 47: 1452; R 49: 1537-1546.) *According to Feingold, "each of these items in the message is important for the person to consider before they continue to smoke . . . ."* (R 49: 1537.)

The District Court ruled correctly that Petitioners' use of the insert "strongly implied that additional warnings should have been given, without limitation as to time period." 723 So.2d at 837.

B. Federal Law Preempts States From Imposing Additional Warning Requirements On Cigarette Manufacturers.

The Labeling Act requires cigarette manufacturers to place warning labels on all packages of cigarette sold in the United States. 15 U.S.C. § 1333. The exact language of the warnings is specified by the Act. *Id*. In addition, the Labeling Act expressly preempts States from imposing their own warning requirements:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334(b). The purpose of the Labeling Act is to "establish a comprehensive Federal program to deal with cigarette labeling and advertising," under which: 1) "the public may be adequately informed about any adverse health effects of cigarette smoking"; and 2) commerce and the national economy may be protected and not impeded "by diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." 15 U.S.C. § 1331.

In *Cipollone v. Liggett Group, Inc*., 505 U.S. 504 (1992), a plurality of the Supreme Court held that the Labeling Act preempts claims that "require a showing that [a cigarette manufacturer's] post-1969 advertising or promotions should have included additional, or more clearly stated, warnings." *Cipollone*, 505 U.S. at 524. Preemption applies to claims after July 1, 1969, because that is when the current version of § 1334(b) took effect.

1. States May Not Require Cigarette Manufacturers To Provide Additional Warnings To Consumers.

Courts have uniformly held that the Labeling Act prevents states from imposing any requirement that a cigarette manufacturer provide warnings to consumers, such as a package insert, other than the warnings Congress itself has mandated. "Many Federal and State courts agree that the Act preempts all claims by consumers that the tobacco companies failed to disclose information to the public beyond what was required by Federal law." *Small v. Lorillard Tobacco Co*., 679 N.Y.S.2d 593, 603 (N.Y. App. Div. 1998)(citations omitted); see also *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 489 n. 9 (1996)(the warning label required by the Labeling Act is "the precise warning to smokers that Congress deemed both necessary *and sufficient*")(emphasis added).

For example, in *Sonnenreich v. Philip Morris, Inc*., 929 F.Supp. 416 (S.D. Fla. 1996), plaintiff alleged that a cigarette manufacturer should have provided additional warnings to consumers through public service messages, seminars, and mailings. The court held that the manufacturer could not be

required to provide any warnings in addition to those required by Congress. It interpreted the terms "advertising" and "promotion" broadly:

> Any attempt by Defendants to notify its customers of the dangers of smoking would employ the same techniques as a traditional advertising or promotional campaign, save with the goal of discouraging smoking. Lobbying, seminars, and public service announcements are all undertaken with the effect of promoting and fostering a product or an ideology.

Id., at 419. Plaintiff's claims sought to impose requirements with respect to cigarette advertising and promotion, and were preempted. Under *Sonnenreich*, Feingold's package insert could not form the basis for a post-1969 failure to warn claim.[5]

The court in *Lacey v. Lorillard Tobacco Co.*, 956 F.Supp. 956, 963 (N.D. Ala. 1997), also rejected claims similar to those made by Petitioners through Feingold. Plaintiff alleged that cigarette manufacturers should be compelled to provide additional information about cigarette additives to consumers. The court held that "a plaintiff's claim based upon an alleged duty of defendants to provide to consumers more information regarding smoking and health than is required by the Labeling Act is preempted." *Id.*, at 963. Again, the terms "advertising" and "promotion" were interpreted broadly: "a company's attempt to notify its mass market of anything . . . is considered 'advertising or promotion' under the general usage of those terms . . . ." *Id.*, at 964.

The court in *Lacey* quoted *Griesenbeck v. American Tobacco Co.*, 897 F.Supp. 815, 823 (D.N.J. 1995), another case in which the court rejected additional warning requirements like the ones Feingold advocated. In that case, as in *Lacey*, the court held that "A company's attempt to notify its mass market of anything, whether a

danger warning or a marketing effort, is considered 'advertising or promotion' under the general usage of those terms . . . ."[4]

Other courts, including the Alabama Supreme Court and the Texas Supreme Court, have also held that the Labeling Act preempts states from requiring cigarette manufacturers to provide warnings to customers in addition to those mandated by the Act itself. *Cantley v. Lorillard Tobacco Co.*, 681 So.2d 1057, 1061 (Ala. 1996); *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 439 (Tex. 1997); *Stewart v. Philip Morris, Inc.*, 1998 U.S. Dist. LEXIS 21540 (E.D. Ark. 1998).

Because a cigarette manufacturer cannot be required by state law to provide warnings to consumers in addition to the federal warning, Petitioners violated federal preemption by claiming to the jury that a package insert was required to warn smokers.

2. Cigarette Packaging Falls Within The Scope Of Preemption Under The Labeling Act.

Petitioners cite no authority for their assertion that cigarette manufacturers may be required to provide additional warnings to consumers.

The only case they rely on, *Philip Morris, Inc. v. Harshbarger*, 122 F.3rd 58 (1st Cir. 1997), does not deal with warnings to *consumers* at all; it involved a statute that required disclosure of information about cigarette additives to the state's public health department. The First Circuit went to

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[4] *Griesenbeck* does not render the Supreme Court's reference in *Cipollone* to "channels of communication other than advertising and promotion" a "nullity." (Petitioners' Initial Brief at 42.) The Supreme Court made clear that its reference was to communications to persons or entities *other than* consumers. *Cipollone*, 505 U.S. at 528 (preemption would not apply if state law required disclosure "to *an administrative agency*")(emphasis added).

great length to distinguish that requirement from a requirement to provide additional warnings directly to consumers.

[5] *Harshbarger* held that the agency-reporting requirement was not preempted because the statute did "not direct the manufacturers to employ any mass-marketing or other techniques even remotely resembling advertising and promotion." *Id.*, at 77. The First Circuit noted, in contrast, that decisions involving common law claims asserting that cigarette manufacturers are required to provide further warnings directly to consumers "yield a *broad* interpretation" of the preemption provision. *Id.*, at 73 (emphasis added). Far from being inconsistent with the District Court's ruling in this case, *Harshbarger* acknowledges that there is abundant authority that supports the District Court's holding.[6]

Undoubtedly, preemption extends to the package insert advocated by Feingold. The purpose of the Labeling Act is to prevent "diverse, non-uniform, and confusing cigarette labeling and advertising regulations", and the terms "advertising" and "promotion" must be construed in a manner that implements that purpose. See, *e.g.*, *Crandon v. United States*, 494 U.S. 152, 158 (1990)(in interpreting a statute, courts must look to "the design

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[5] *Harshbarger*, 122 F.3rd at 73 (there is a "difference" "between direct communication with the public and disclosure to a state agency"); at 75 (the statute did not "impose a duty upon manufacturers to provide additional smoking and health information directly to the public"); at 76 ("significantly, the [Massachusetts statute] does not require the manufacturers to communicate directly with consumers").

[6] Petitioners' argument that the District Court applied "implied preemption" is wrong. Every court that has addressed the question has held that express preemption under § 1334(b) extends to all usual methods of communication between manufacturers and consumers, because the terms "advertising" and "promotion" are so broad. That is exactly what the District Court held. 723 So.2d at 837.

of the statute as a whole and to its object and policy."). The need for uniformity with respect to cigarette packaging is compelling; if labeling and packaging requirements were not uniform among states and municipalities, cigarette packages could not move freely through interstate commerce. Because of the need for uniformity, the states were expressly preempted from imposing their own packaging and labeling requirements on cigarette manufacturers.[7]

Package inserts are part of the normal methods by which manufacturers communicate with consumers, and must be considered part of "advertising" and "promotion" under § 1334(b). Otherwise, the purpose of the Labeling Act -- to insure nationally uniform requirements regarding cigarette labeling -- would be defeated. Congress obviously did not intend to allow states and municipalities to impose crazy-quilt requirements regarding cigarette packaging. It did not intend for there to be a uniform national warning requirement *on* cigarette packages, but to allow diverse, non-uniform requirements for warnings *in* the package.

C. The District Court Properly Rejected Petitioners' Efforts To Justify Admission Of The Insert On Other Grounds.

Petitioners argue that they had "no motivation" to present post-1969 failure to warn claims to the jury, but Petitioners'

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[7] *Small v. Lorillard Tobacco Co.*, 679 N.Y.S.2d at 603 (preemption of state regulation of cigarette packaging is based on "the need for uniform standards in packaging and promoting nationally-advertised products"); see also *Vango Media, Inc. v. City of New York*, 34 F.3rd 68, 74 (2nd Cir. 1994)(Congress did not intend to allow state and federal requirements "to exist side by side"); *Taylor v. American Tobacco Co.*, 983 F. Supp. 686, 690 (E.D. Mich. 1997)(failure to warn claims are preempted, as they would "potentially impose conflicting requirements").

"motive" is not relevant. Whether or not that is what they intended, that is what they did. Of course Petitioners claimed to the jury that package inserts are required to warn smokers -- that was what Feingold said, and that is what Petitioners' counsel argued.

Likewise, Petitioners' assertion that "no post-1970 failure to warn claim was made in testimony or argument" cannot be squared with the record. Petitioners' counsel attacked the adequacy of *all* of the federal warnings through the present. While his assistant displayed a list of more than 30 carcinogens on a screen before the jury, counsel argued: "Known carcinogens are in cigarettes that have *never* been put on the label." "Why hasn't it *ever* been put on the label?" "There is no excuse." " . . . it's *never* been publicized." (R 38: 396.) In their Initial Brief (at 30), Petitioners quote from their counsel's attack on the adequacy of the 1966 warning labels, but ignore the very next passage, in which he argued that the *post-1969 warnings were also inadequate*. Counsel argued to the jury that the *post-1969* warnings were inadequate, stating "[T]hat just says it's dangerous, but it doesn't say how much. It doesn't say what or how, whatever." (R 38: 399.)

The proposed remedy for these deficiencies, of course, was Feingold's insert. Three times, Feingold asserted that cigarettes should be sold with a package insert to warn consumers. As the District Court properly found, the package insert "was not limited to a particular time period." 723 So.2d at 837.

Nor is it possible to justify the admission of the insert on the ground that it was just "a sample pre-1970 warning." That is not how Feingold described it; according to Feingold, the insert was required to warn smokers -- anytime, anywhere. Moreover, the insert itself belies Petitioners' claim that it was just a "pre-1970" warning. *Some* of the information in the insert may have been available to the medical community before that time, but the insert also draws on information that became available *after* that time. For example, Feingold's insert refers to the danger of "somatic mutations" due to smoking; this warning is not based on scientific knowledge available before 1970, but on studies published in *1992* and *1993*. (PX 7; A 45; compare R 5: 657, citing *Slebos, Westra* and *Kondo*.)[8]

The insert was not, and could not have been, a pre-1969 warning. It was never described that way by Feingold, and was not introduced as such. Moreover, because the insert was far more graphic and far more detailed than the warnings Congress has required, and because it embodied information that was not known by the medical community until after 1969, the insert was inflammatory and prejudicial. After 1969, no cigarette manufacturer could be required to provide the detailed and graphic warnings advocated by Feingold; before 1969, the insert exceeded what was known to science.[9]

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[8] Similarly, Feingold's insert warns of "Carcinogens" and "Poisons" listed in the 1989 Surgeon General's Report, which in turn uses data from a 1989 paper by Hoffman and Hecht and criteria for carcinogenicity adopted in 1986. (PX 7; A 45; compare PX 21, Reducing the Health Consequences of Smoking: 25 Years of Progress. A Report of the Surgeon General (1989), Table 7 at 86-87.)

[9] We do not argue, as Petitioners suggest, that the jury was specifically told that Feingold's insert contained post-1969

There is no reason to assume that the jury would accord little weight to the insert on the ground that it was not a feasible pre-1969 warning. Since Feingold did not describe the insert as a pre-1969 warning, the jury would have no reason at all to disregard it on that ground.

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medical information. Rather, because the insert contains post-1969 information, it could never serve as a model for a pre-1969 warning.

D. The Trial Court Improperly Let The Jury Decide The Scope of Preemption.

Not only did the trial court improperly admit evidence that a package insert was required to provide detailed warnings to smokers after 1969, it incorrectly let the jury decide whether or not such an insert was subject to preemption.

Prior to trial, Respondent sought partial summary judgment dismissing any claim that additional warnings to consumers were required after 1969. (R 2: 352-56.) Petitioners opposed this motion. Foreshadowing their use of Feingold's package insert at trial, they argued that a jury is entitled to determine the scope of preemption under the Labeling Act, and to require cigarette manufacturers to provide further warnings to consumers through *"methods of communication that are the subject of expert testimony."* (R 4: 478, 484-85.)

Of course, Petitioners' opposition to Respondent's motion refutes their contention on this appeal that they did not intend to assert claims for post-1969 failure to warn through Feingold's testimony. More importantly, the trial court denied Respondent's motion, because, it said, there was a genuine issue of material fact "regarding the general usage of the terms 'advertising or promotions,'" in the Labeling Act. (R 3: 450-51; A 19.) In so ruling, the court accepted Petitioners' argument that the jury was entitled to decide the extent to which the states may require cigarette manufacturers to provide further warnings to consumers.

This decision was erroneous. It was the court's responsibility, not the jury's prerogative, to determine the law.

Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994); *Hernandez v. Coopervision, Inc.*, 661 So.2d 33 (Fla. 2nd DCA 1995); *Florida Auto. Dealers Industry Benefit Trust v. Small*, 592 So.2d 1179 (Fla. 1st DCA 1992). By receiving Feingold's testimony and package insert, and then permitting the jury to decide a question of law, the trial court freed the jury of the constraints imposed by preemption.

The jury instructions were a wholly inadequate substitute for a proper legal ruling that after 1969, a cigarette manufacturer could not be required to use a package insert to provide further warnings to consumers because of the Labeling Act. The court should have decided this issue as a matter of law, rather than leaving it to the jury to decide whether a package insert could be required, or whether it was preempted.

Petitioners contend that for purposes of applying preemption, there is a distinction between "claims" and "evidence." When the trial judge lets the jury decide the law, there is no such demarcation. Any distinction between "claims" and "evidence" was destroyed because the trial court admitted the package insert, and then let the jury decide what claims are preempted. Feingold's thrice-repeated testimony that a package insert was required to warn consumers of the dangers of smoking was used to support a claim for failure to warn after 1969, not to show why Carter continued to smoke, or to address consumer expectations. Federal law does not permit a claim on those grounds, but the trial judge erroneously let the jury decide whether or not it does.

III

THE DISTRICT COURT CORRECTLY RULED THAT PETITIONERS WERE IMPROPERLY ALLOWED TO SUBMIT PROOF OF A CAUSE OF ACTION THEY NEVER ALLEGED.

The District Court correctly held that the trial court also reversibly erred by allowing Petitioners to assert liability based on a tort allegedly committed by a company they never sued, for a tort they never alleged.

Petitioners sued American Tobacco in their Complaint, and alleged that American Tobacco caused Carter's injuries. (R 1: 5-7, 9-10; A 7-17.) On February 28, 1995, shortly after Petitioners sued American Tobacco, American Tobacco was merged into Brown & Williamson Tobacco Corp. as a result of a corporate acquisition. Due to the merger, Brown & Williamson appeared to defend the case as American Tobacco's successor in interest. (R 1: 12.) The trial court later amended the style of the action to reflect that Brown & Williamson was the defendant "as successor by merger to The American Tobacco Company." (R 3: 454; A 21.) But the Complaint itself was never amended, and petitioners never alleged any conduct or a tort of any nature by Brown & Williamson that allegedly caused injury to Mr. Carter. Nor did Mr. Carter ever smoke cigarettes made by Brown & Williamson.

At trial, however, Petitioners sought to prove that Brown & Williamson caused Carter's injuries, even though their Complaint was based solely on American Tobacco's conduct.

A. Petitioners Sought To Prove A Cause Of Action Against Brown & Williamson That They Never Alleged.

Petitioners sought to prove an entire tort allegedly committed by Brown & Williamson that resulted in injury to Grady Carter. It was an inflammatory claim, based on documents that

were stolen and made public by a legal assistant for Brown & Williamson, many of which were privileged attorney-client communications. (R 47: 1396.) Petitioners asserted that Brown & Williamson violated a duty to disclose to the U.S. Surgeon General in 1963 research conducted in Switzerland for an affiliate of Brown & Williamson, and that the failure to produce this research was unethical, misled Congress, impeded public health, and injured Carter. The trial court overruled Respondents' repeated objections to this claim throughout proceedings before and during trial. (See, *e.g.*, A 22-30; A 31-36; R 30: 170, 206-207; R 31: 271; R 33: 564-66; R 35: 7-8; R 47: 1388-89.)

In pretrial conferences, the trial court ruled that the claim had become provable due to the merger that occurred shortly after the case was filed. When Respondent argued that Brown & Williamson's own conduct was irrelevant because it was being sued merely as American Tobacco's successor, the court replied:

> THE COURT: . . . That's an interesting question as to what extent the liabilities of a subsidiary corporation or a corporation merged into another *becomes a liability and conduct for purposes of previous behavior by one or the other*. It's an interesting question. *I'm going to deny the motion on that ground*.

(R 33: 566 (emphasis added).) The trial court improperly treated the *conduct* of Brown & Williamson as if it were the conduct of American Tobacco, and vice versa, even though American and Brown & Williamson were separate entities throughout the entire time that Grady Carter smoked, and even though Petitioners never alleged that any conduct by Brown & Williamson caused injury to Grady Carter.

Since the trial court mistakenly believed that the conduct of Brown & Williamson and the conduct of American Tobacco could be freely attributed to each other, it allowed Petitioners to introduce all of the elements of their incendiary claim against Brown & Williamson: duty, breach, and causation. The trial court did not recognize a distinction between claims involving Brown & Williamson's conduct and American's conduct until the jury was charged. By then, it was too late, because the court obliterated the distinction between the companies, and Petitioners put in proof of an incendiary cause of action based on Brown & Williamson's own alleged conduct.

Again, Dr. Feingold served as the advocate for Petitioners' claim. Posing as an "ethical advisor" to Brown & Williamson, Feingold argued that the company had an ethical duty to disclose the Swiss research to the Surgeon General: *"To withhold the research would have represented an unethical act."* (R 46: 1346.) Feingold was then allowed, over objection, to describe the alleged effect of Brown & Williamson's conduct on public health:

> Q. Did it [Brown & Williamson's conduct] interfere with further public health efforts to get to the bottom of nicotine addiction?
>
> [Objection based on speculation overruled.]
>
> A. Did it interfere? I think that it in fact created a profound roadblock. It profoundly interfered. There was a big problem because the Surgeon General did not clearly determine that nicotine was addictive at that time.

(R 46: 1346-48.) According to Feingold, the disclosure of the Swiss research in July, 1995 by the *Journal of the American Medical Association* was a "dramatic revelation" that "astounded" physicians. (R 47: 1387-91.)

Harkening back to Petitioners' preempted failure to warn claim, Feingold claimed that it was Brown & Williamson's alleged "unethical" conduct that led Congress to adopt inadequate cigarette warning labels:

> . . . there were very bad results in terms of what the labeling of cigarettes eventually became. If the Surgeon General had decided that cigarette smoking was clearly an addictive process, then *the labels that were eventually agreed to would have had to be very different. And the warning that the American consumer should have been given would have been very different*.

(R 46: 1348-49 (emphasis added).) Thus, Petitioners asserted that Brown & Williamson breached a duty and caused injury to smokers, including Carter. This cause of action was never alleged.

B. The District Court Properly Ruled That Petitioners' Claims Exceeded Permissible Grounds.

Petitioners argue that at trial they merely sought to prove that Brown & Williamson had scientific knowledge regarding addiction that was relevant to state of the art, or to impeach its defense to the allegation that smoking is addictive. Their argument is refuted by their counsel's own words, spoken in open court in front of the jury:

> *Your Honor, we would show that this research which was not turned over to the U.S. Surgeon General affected the course of public health, affected the cautionary labels on [cigarette] packages, and affected Mr. Grady Carter.*

(R 47: 1388-89.) Petitioners seek to disavow those comments, but the District Court was correct to take counsel at his word. 723 So.2d at 838.

Those comments merely echoed assertions made in opening statement, in which Petitioners' counsel claimed that Brown & Williamson conducted "secret" research on addiction, which was

"never turned over to the Surgeon General." That, Petitioners argued, is "why we think *Brown & Williamson didn't do its job*". (R 38: 382, 401, 404.) Petitioners claimed not just that Brown & Williamson had scientific knowledge that smoking was addictive, but that its failure to disclose the Swiss research was a basis for liability.

The District Court properly ruled that the focus of Petitioners' proof at trial "was less on what Brown & Williamson, and therefore other manufacturers, knew, and more on Brown & Williamson's alleged failure to disclose all that it knew, an allegation not attributable to [American Tobacco] by virtue of its position in the industry." 723 So.2d at 838. Petitioners did not merely show that in 1963 Brown & Williamson had scientific knowledge relating to addiction that should also have been known to American Tobacco. Their claims and arguments went far beyond that -- Petitioners argued that Brown & Williamson violated a duty to disclose the information it had, misled Congress, and injured consumers in general and Carter in particular. The District Court correctly rejected Petitioners' arguments, "because of the manner in which [Petitioners' evidence] was presented to the jury." 737 So.2d at 837.

C. Petitioners' Inflammatory And Unpleaded Cause Of Action Was Not A Matter Within The Trial Court's Discretion.

Petitioners did not argue below (either in their brief or their motion for rehearing) that the District Court was required to render an explicit finding that the trial court abused its discretion by allowing Petitioners to pursue an entire cause of action that they never alleged. They may not advance

the argument for the first time in this Court.

In any event, when it allowed Petitioners to pursue an entire cause of action that they never alleged, the trial court was not acting on matters within its discretion. The trial court incorrectly allowed the actions of one company (Brown & Williamson) to be attributed to another (American Tobacco), even though they were separate companies. That was an error of law, not an exercise of discretion.

Moreover, the trial court ignored a fundamental tenet of due process: "The purpose of pleadings is to present, define and narrow the issues, and to form the foundation of, and to limit, the proof to be submitted at trial." *White v. Fletcher*, 90 So.2d 129, 131 (Fla. 1956). Respondent cited numerous authorities to the trial court holding that Florida courts are to try only those claims that are properly pleaded:

> [P]laintiffs would be getting away with what is perhaps the most basic requirement of civil practice, i.e., that a "pleader must set forth the facts in such a manner as to reasonably inform his adversary of what is proposed to be proved in order to provide the latter with a fair opportunity to meet it and prepare his evidence." *Walker v. Walker*, 254 So.2d 832, 834 (Fla. 1st DCA 1971). See also *Citizens Nat'l Bank of Orlando v. Youngblood*, 296 So.2d 92, 93 (Fla. 4th DCA 1974) (reversible error where court allowed case to go to the jury on a theory not alleged in the complaint) . . . .

(R 7: 1022, 1028; A 28.) These are not discretionary rules; they are fundamental principles embedded in due process. If a trial court neglects these principles, they should be vigilantly enforced by the appellate courts.

But there are further reasons that the unpleaded claim was not simply a matter within the trial court's discretion. Inasmuch as Petitioners avoided fundamental pleading

requirements, Petitioners' cause of action against Brown & Williamson was never subjected to legal scrutiny. Since Petitioners were not required to plead it, the claim was never tested by motion.

Whatever Petitioners argue with respect to the timeliness of their claims against American Tobacco, a later amendment to their Complaint, asserting claims against Brown & Williamson, would be time-barred. Such a new claim did not arise out of the conduct, transaction, or occurrence set forth in the original Complaint, and could not relate back to February 10, 1995, when they commenced this action. See Fla. R. Civ. Proc. 1.190(c). By ignoring pleading requirements, Petitioners evaded scrutiny of the timeliness of their new claim.

In addition, Petitioners were able to prevent a motion challenging the legal sufficiency of their cause of action for allegedly misleading Congress. If that cause of action had been alleged, it would have been challenged on the ground that no court can adjudicate whether Congress might have adopted different warning labels, as Petitioners claimed. For example, in *Lewis v. Brunswick Corp.*, 107 F.3rd 1494, 1505 (11th Cir. 1997), cert. granted, 118 S. Ct. 439 (1997), cert. dismissed, 118 S. Ct. 1793 (1998), the Eleventh Circuit held that claims predicated on conduct that allegedly misled federal agencies may not be adjudicated by courts:

> Permitting such claims would allow juries to second-guess federal agency regulators through the guise of punishing those whose actions are deemed to have interfered with the proper functioning of the regulatory process. If that were permitted, federal regulatory decisions that Congress intended to be dispositive would merely be the first round of decision making, with later more important rounds to be played out in

the various state courts.

For more compelling reasons -- applied with far greater force -- no court could ever properly adjudicate a lawsuit alleging that Congress would have adopted different legislation but for the defendant's conduct. See, *e.g.*, *In Re: Grand Jury*, 441 F.Supp. 1299, 1305 (M.D. Fla. 1977)("Neither the motives behind the legislative activity, nor the final product resulting from the legislative activity may be questioned by the courts or the executive branch."); see also *Baker v. Carr*, 369 U.S. 186, 209 (1962); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 509 (1975); *Coalition for Adequacy and Fairness v. Chiles*, 680 So.2d 400, 408 (Fla. 1996); *Alaska v. Tongass*, 931 P.2d 1016 (Alaska 1997).

The timeliness of Petitioners' unpleaded cause of action against Brown & Williamson, and the justiciability of that claim, were not matters within the trial court's discretion. But because Petitioners did not plead such a claim, they prevented any review of the timeliness and legal sufficiency of that cause of action.

D. The District Court Properly Ruled That Brown & Williamson Was Prejudiced Because Petitioners Ignored Basic Pleading Requirements.

Respondent was unfairly prejudiced by Petitioners' failure to plead their causes of action:

- Respondent never had the opportunity to challenge the timeliness and legal adequacy of the cause of action.
- Petitioners secured the unilateral ability to select the documents on which the unpleaded claim would be tried.
- Respondent was not allowed to cross-examine Feingold using

company documents not stolen and not furnished to Feingold before trial. (R 51: 1913-15, 1929.) They were not furnished because no underlying cause of action was alleged.

Petitioners prevented Respondent from fully defending the allegations. With notice that a cause of action was alleged, Respondent could have secured government documents showing the Surgeon General's awareness of the pharmacologic effects of nicotine in 1963, and could also have arranged testimony by an independent scientist (Dr. A.K. Armitage) who critiqued the Swiss research in 1963. Armitage could have described numerous flaws in the research, and Brown & Williamson' bona fide reasons for not producing the research to the Surgeon General. (R 17: 2852-2914; A 49-66.)

Petitioners prevented Respondent's expert, Dr. Thompson, from addressing Petitioners' allegations in full. (R 17: 2852-2914; A 49-66.)

The resulting prejudice to Respondent was not cured by the jury charge. The jury instructions did not erase the evidence and argument already admitted, and it did not erase the prejudice that resulted when Respondent was denied an opportunity to prepare its defense. Petitioners' evidence and argument concerning Brown & Williamson's allegedly "unethical conduct" was not addressed to any identifiable issue in the case, and could only have prejudiced the jury on the claims that were pleaded.

Petitioners quarrel with the District Court's statement that the Brown & Williamson documents they used at trial "were not discovered until after this claim was filed." 737 So.2d at 837. In fact, that is what the record shows -- Feingold testified that

he learned of the documents months after the lawsuit was filed (in July, 1995, from the *Journal of the American Medical Association*). (R 47: 1387, 1391, 1395-96.) Thus, at the time they filed their lawsuit, the theory of liability they espoused at trial -- that Brown & Williamson misled the Surgeon General and Congress -- could not even have occurred to Petitioners. The theory was not alleged in the Complaint, and it was never added by amendment.

It is no answer for Petitioners to assert that a few documents of Brown & Williamson were referenced in discovery shortly before trial. Petitioners listed 1,200 Brown & Williamson stolen documents as exhibits just three weeks before trial. (See R 6: 983-1018.) More importantly, *pleadings* are necessary to frame the issues for trial. Petitioners' use of the documents was not supported by any theory of liability that was ever alleged. As the District Court ruled, Petitioners' use of the documents exceeded permissible grounds "because of the manner in which this information was presented to the jury." 737 So.2d at 837.

CONCLUSION

The District Court's ruling should be affirmed, and the case should be dismissed as time-barred. Alternatively, the Court should direct that the verdict be set aside and that a new trial be held for the reasons found by the District Court.

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I certify that a copy of the foregoing was served upon the following by U.S. Mail this 30th day of July 1999:

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_____
BARRY RICHARD

IN THE SUPREME COURT OF FLORIDA

CARTER GRADY and MILDRED GRADY,

Petitioners,

CASE NO. 94,797

vs.

BROWN & WILLIAMSON TOBACCO CO., as successor by merger to The American Tobacco Co.,

Respondent.

REQUEST FOR ORAL ARGUMENT

Respondent requests oral argument.

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BARRY RICHARD

[1] See also *Schein v. Chasen*, 313 So.2d 739, 747 n. 1 (Fla. 1975)(decisions of courts of appeal "are conclusive on questions of Florida law when not in conflict with other decisions of this Court"); *Lake v. Lake*, 103 So.2d 639, 642 (Fla. 1958)(district courts of appeal "are and were meant to be courts of final, appellate jurisdiction"); *Ansin v. Thurston*, 101 So.2d 808, 811 (Fla. 1958)(jurisdiction of this Court is based on "decisions as precedents as opposed to adjudications of the rights of particular litigants").

[2] *Tanner v. Hartog*, 618 So.2d 177 (Fla. 1993), also shows that definitive knowledge is unnecessary to start the limitations period. There, the Court held that limitations in a medical malpractice case begins to run when the plaintiff has knowledge of the injury and "knowledge that there is a reasonable *possibility* that the injury was caused by medical malpractice." Id., at 181 (emphasis added).

[3] In a case involving Tennessee's harsh one-year limitations period, the Third DCA held that a "preliminary diagnosis" did not necessarily start the statute. *Colon v. Celotex Corp.*, 465 So.2d 1332, 1334 (Fla. 3rd DCA 1985). The precedential value of *Colon* is doubtful, because the court went to great length to allow the plaintiff's claim to proceed under Tennessee's restrictive one-year statute. Moreover, the Third DCA's opinion was quashed by this Court, because Florida's far more lengthy limitations period applied. *Celotex Corp. v. Meehan*, 523 So.2d 141 (Fla. 1988).

[4] See, *e.g.*, *Lutheran Hospital v. Levy*, 482 A.2d 23, 27 (Md. App.)(1984)(". . . limitations begins to run when a claimant gains knowledge sufficient to put her on inquiry. . . . The beginning of limitations is not postponed until the end of an additional period deemed reasonable for making the investigation."); *Franzen v. Deere & Co.*, 377 N.W.2d 660, 662 (Iowa 1985)("The period of limitations is the outer time limit for making the investigation and bringing the action.").

[5] Petitioners' contention that *Sonnenreich* was decided on the basis of implied preemption is wrong. The court applied express preemption, and held that under § 1334(b), "advertising" and "promotion" include all methods of communication between manufacturers and consumers.

[6] Petitioners argue that in parts of his testimony, Feingold criticized the warning that was placed on cigarette packages in 1966. (See Petitioners' Initial Brief, at 30.) Of course, the fact that in *that part* of his testimony Feingold was addressing warnings in effect prior to 1969 does not at all contradict the District Court's ruling that Petitioners were improperly allowed to suggest to the jury that additional warnings (i.e., the package insert) were required after 1969.