IN THE SUPREME COURT OF FLORIDA

GRADY CARTER AND
MILDRED CARTER,
Petitioners,

vs.

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

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

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

PETITIONERS' REPLY BRIEF

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The following abbreviations are used:
R -- Record on appeal
A -- Appendix

1. THE DISTRICT COURT MISAPPLIED EXISTING LIMITATIONS LAW

a. The Carters do not seek a change in the law; the existing test under Florida law is "knowledge of injury" plus "possibility of negligence," not "possibility of injury"

Respondent Brown and Williamson Tobacco Corporation (B&W) tries a debater's trick in accusing us of arguing for a change in the law, when really it is *B&W* which requires a substantial change in law to support its position. We assert that knowledge of injury, not "possibility of injury" has long been required under Florida law to commence limitations, as demonstrated by *Tanner v. Hartog*, 618 So.2d 177 (Fla. 1993), *University of Miami v. Bogorff*, 583 So.2d 1000 (Fla. 1991) and *Copeland v. Armstrong Cork Co*., 447 So.2d 922 (Fla. 3d DCA 1984), *approved in part Celotex Corp. v. Copeland*, 471 So.2d 533 (Fla. 1985). B&W suggests that Florida law requires only *possibility of injury* by incorrectly citing *Tanner* as holding that limitations begins to run "when the Plaintiff was aware of a 'reasonable possibility' that he had sustained an injury due to malpractice" and incorrectly citing *Bogorff* as holding that "knowledge to a reasonable possibility" [of what--we ask?] will begin limitations. B&W Answer Brief pp. 17, 6. This led to the District Court's error in holding that "probability of injury" is sufficient.

In *Bogorff* the injury, quadriplegia and brain damage (not symptoms but plainly, actionable, permanent, injuries) was known shortly after the doctor injected the drug. *Bogorff's* "possibility" was that a *defective drug caused the injury*. In *Tanner* this Court did not waver from the longstanding rule requiring knowledge of injury. This Court *did* address the concern that commencing limitations upon knowledge of injury alone can cause harsh results, where the nature of the injury does not in itself communicate that it was caused by negligence. To ameliorate the harsh results *Tanner* refined the prior limitations rule, and held that limitations commences at the time plaintiff has both knowledge of the injury *and* knowledge that there is a reasonable possibility that the injury was *caused by negligence*. *Id.* at 181-82; *Accord*, *Musculoskeletal Inst. Chartered, et al v. Parham*, 24 Fla. L. Weekly S120, 122 (Fla. 1999). The intent of *Tanner* was not to create even harsher results by announcing a test that commences limitations earlier than a plaintiff has knowledge of injury. **B&W and the District Court**

have confused or improperly combined *knowledge of injury* with *knowledge of the possibility of negligence*.

b. B&W contends that the correct test is unworkable, but really it is B&W's "possibility of injury" test that is unworkable

B&W argues that the knowledge of injury standard for commencing limitations 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." To the contrary, the statutory requirement of *due diligence* prevents stale claims. What would really be unworkable is mere "possibility of injury." If used as B&W suggests, i.e. to eliminate the jury's role (because almost anything would lead to a "possibility"), this test would embroil trial and appellate courts in endless witch hunts for passing symptoms or isolated medical records. Latent disease cases, especially, would be effectively barred after exposure, regardless of the date of manifestation of serious disease, because every cough, sickness, or bad day, coupled with known exposure, could trigger limitations, and the jury's role would be ignored.[1]

B&W further argues that the *Tanner* standard is unworkable because we contend it would require knowledge of lung cancer type, cigarette brand toxicity, and the contribution of post-1972 cigarette smoking to his injury. B&W misstates our argument at pp. 22-23, Initial Brief. These are questions going only to the second prong of the limitations test -- knowledge of the possibility that the product was defective or the manufacturer was negligent. On our record, they cannot be ignored; there is no suggestion that lung cancer in itself communicated the possibility that B&W was negligent.

c. Although diagnosis is not "necessary" to commence limitations, this does not imply that it is never "permissible" for diagnosis to do so, and Bogorff does

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[1]B&W's concept of the statute of limitations as a period of investigation after a possible injury, to discover whether an injury has occurred, confuses our statute of limitations with that of a statute of repose. *Universal Eng. Corp. v. Perez*, 451 So.2d 463, 465 (Fla. 1984); *Bauld v. J.A. Jones Const. Co*., 357 So.2d 401,402 (Fla. 1978). B&W's non-Florida case citations are not instructive. Our limitations statute, contrary to many others, requires knowledge of the facts giving rise to the cause of action *before* limitations commences.

not so hold

B&W devotes much space to arguing that a diagnosis is not "necessary" to commence limitations. We agree and have not argued to the contrary. There are cases in which the statute begins without a diagnosis of disease. In some the injury is immediately known. In others the principles of constructive knowledge will permit the jury to impute knowledge to a plaintiff who does not diligently pursue a diagnosis.

But it is not logical to conclude that it is *forbidden* to consider a diligently pursued diagnosis the date limitations commences. "Not necessary" does not mean "never permissible." For example, A, in apparent good health, is found to have asbestosis at a yearly physical. Assume the doctor further states that asbestosis is due to defective asbestos products. In this case the dates of actual knowledge of injury, constructive knowledge of injury, diagnosis, and knowledge of the possibility of negligence, all coincide, proving that the statute of limitations *may* start at diagnosis. Is Mr. Carter's case different because he had symptoms of hemoptysis which led him to the examination? Is Mr. Carter's case different because his diagnosis occurred of necessity over a ten-day period? Was the jury compelled to conclude that limitations commenced at mid-diagnosis?

Cases cited by B&W hold that a diagnosis was not required. However, no case holds that, as a matter of law, a diagnosis *cannot* be the date plaintiff discovers or should discover the facts giving rise to the cause of action. The District Court misconstrued and misapplied *Bogorff* in so concluding, as demonstrated by the many cases cited in our earlier brief that held that the statute did start at diagnosis.[2] *Bogorff* is distinguishable, because it was not a latent disease case--the ill effects of the defendant's drug manifested shortly following its injection. *Id.* at 1004. It also is distinguishable because diligence was not exercised by the plaintiff. The statement in *Bogorff* that knowledge to a "legal certainty" is not required was made in the context of this court's discussion that diligence is required to obtain knowledge. Read in its proper context, the statement simply means

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[2] *See also Barron v. Shapiro*, 565 So.2d 1319 (Fla 1990), where following surgery in August, 1979, the plaintiff's eyesight deteriorated and he was diagnosed as blind on Dec. 31, 1979. This court concluded that plaintiff was on notice of injury as of the date the blindness was *diagnosed*, not earlier, despite eyesight deterioration.

that a plaintiff cannot contend limitations should be delayed until he obtains legal confirmation that he has a cause of action, where he should earlier have known of the cause of action with the exercise of due diligence. This is evident from the citation in *Bogorff* to *Steiner v. Ciba-Geigy Corp*., 364 So.2d 47 (Fla. 3d DCA 1978) as authority for this statement. There, the Third District rejected the plaintiff's suggestion that commencement of limitations awaited advice by a competent authority (a lawyer) that he had a cause of action, because of plaintiff's earlier knowledge that the drug caused his blindness. Thus, *Bogorff* does not hold that as a matter of law a jury cannot conclude that a diagnosis commences limitations. **Florida law does not prohibit a factfinder from deciding that the date of diagnosis coincides with the date of diligently pursued knowledge of injury.**

d. Requiring "misdiagnosis" misconstrues Copeland and would be impossible to implement

The District Court misconstrued the *Copeland* cases by finding them limited to circumstances of "misdiagnosis." Under the District Court's rationale, only if there is a misdiagnosis can the jury decide whether limitations awaits a correct diagnosis. If there is no misdiagnosis, then the statute runs, as a matter of law, before the correct diagnosis. But when? What would be the situation *the day before* the misdiagnosis? Wouldn't it be equivalent to the situation if the misdiagnosis had never occurred? Or does the statute begin to run, then reverse itself after the misdiagnosis?

While a misdiagnosis is evidence from which a jury *can* conclude that a plaintiff does not have sufficient knowledge of a product-related injury, it is not the *only* evidence that can create a jury issue. The significance of the *Copeland* cases is not that they define the nature of the evidence that can create a jury issue, limiting same to cases where a plaintiff has been “misdiagnosed.” Instead, the *Copeland* cases more broadly hold that determination of when a plaintiff has discovered his product-related injury is an "inherently debatable" question that is to be decided by the jury, unless reasonable people could not disagree. *Copeland v. Armstrong Cork Co.*, *supra* at pg. 926; *Celotex Corp. v. Copeland, supra*, at pg. 539. Likewise *Ash v. Stella*, 457 So.2d 1377 (Fla. 1984), is erroneously cited by B&W as a case where a misdiagnosis created the jury issue. To the contrary, *Ash* held that even a correct diagnosis did not, as a matter of law, start

limitations, because it was tentative in nature, and could not be confirmed until test results were received. *Id*. pg. 1379. **Misdiagnosis is one, but not the only, circumstance in which a jury could conclude that actual or constructive knowledge of injury had not occurred.**

e. B&W misses the point of Copeland in arguing that symptoms alone constitute "injury" in a latent disease case

B&W argues that symptoms such as coughing up blood constitute "injury" as a matter of law. This is inconsistent with the *Copeland* latent disease cases, which make it clear that the latency of a "creeping" disease can create questions for the jury as to when a plaintiff has knowledge that he or she has an "injury" that may be legally cognizable, not a passing symptom. For example, can the significance of symptoms be apprehended without expert consultation, or for that matter the relation of the symptoms to the product in question?

In *Celotex Corp. v. Meehan,* 523 So.2d 141,149-50 (Fla. 1988) this Court agreed that latent disease cases present factual issues as to when the injury manifests: "In most personal injury cases, the fact of injury is easily discernable. However, in cases involving latent injury, where the effects of exposure to the disease-causing product do not become evident for twenty to twenty-five years after initial contact, the time and place of injury necessarily is obscure." **Symptoms, without actual or constructive knowledge of what they represent and what caused them, are not an automatic start to the statute.**

f. B&W ignores the conflicts in the testimony, which conflicts were resolved by the jury against B&W

B&W argues as if it is entitled to all presumptions in its favor, despite a jury verdict on proper instructions against it. B&W cites testimony from Mr. Carter that prior to diagnosis he "knew" he had cancer, but fails to cite contemporaneous testimony that he did not know. R53:2187, 2297; A1. B&W ignores this conflict in the testimony. The jury heard the nuances of speech and saw the demeanor of the witness, and evaluated Mr. Carter's statement that "in his mind" he knew he had cancer, as a figure of speech and an expression of fear, not as actual knowledge. (*E.g.* "I just *knew* I'd get audited.")

Furthermore, B&W makes the conclusory statement that there was no jury

question presented because "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." B&W Answer Brief at 9 n.4. This ignores conflicting evidence that Mr. Carter had been exposed at work to tuberculosis; that he knew that the symptoms thereof included coughing up blood; that he immediately sought medical advice and was told prior to 2/10/91 that he may in fact have tuberculosis, or pneumonia, two non-product-related diseases; that while he also was told of the possibility of lung cancer, which he feared, his doctors could not tell him he had lung cancer before appropriate tests. R53:2178-79, 2181-83; R39:554, 558. Based on these facts, it was up to the jury, not the District Court, to determine whether Mr. Carter had reason to believe he did not have a product-related disease prior to 2/10/91.

Similarly, B&W argues that a 2/4/91 x-ray report says "carcinoma," triggering limitations. However, it also says "tuberculous process," demonstrating that further tests were needed to determine what the x-ray showed. There is no evidence Mr. Carter saw, or had a duty to see, this report prior to 2/10/91. Even if imputed to him, its contents were ambiguous due to Dr. Yergin's own timely communication to Mr. Carter, which did not recite that lung cancer had been found. The jury resolved this conflict against B&W. **Re-evaluation of the factual evidence is not the proper function of the appellate court.** *Helman v. Seaboard Coastline R. Co*., 349 So.2d 1187 (Fla. 1977).

g. "Imputation" of medical records is a special case of constructive knowledge; it cannot be applied blindly without consideration of the patient's opportunities for communication, knowledge, and understanding

B&W and the District Court singularly rely on "imputation of knowledge" to Mr. Carter of the impression of COPD on Dr. Yergin's 2/5/91 chart for evidence he had knowledge of product-related COPD as of that date.[3] Imputation is only an expression of the "should have known with the exercise of diligence" concept in the statute. Whether Mr. Carter should have known every sentence in his chart prior to 2/10/91 was a factual

[3]B&W's brief at 18 falsely suggests that Mr. Carter was told of COPD on 2/5/91. The record is silent as to *when* he was told, and in fact suggests it was later than 2/10/91. *See,* R53:2307-09.

question reasonably resolved by the jury based on the evidence of diligence. From the time his symptoms first occurred on 1/29/91, Mr. Carter pursued knowledge of their cause, submitted to all tests, kept all appointments, had all appropriate consultations. B&W never challenges Mr. Carter's diligence, except for the disingenuous statement that "if Carter failed to ask for a diagnosis [of COPD], he cannot take advantage of his own fault." B&W Brief p. 18. It is hard to imagine how, on 2/5/91, Mr. Carter could have asked for a diagnosis of something he knew nothing about. Was he reasonably required to *demand* to see Dr. Yergin's 2/5/91 chart, even as Yergin was writing it, and ask questions about each impression, even as he talked to Dr. Yergin? The focus of the medical effort on 2/5/91 was on the more serious potential diseases of tuberculosis, pneumonia or lung cancer, not COPD. (Moreover, COPD was not *attributed to B&W's product* on the chart, and therefore even blind imputation would not have given Mr. Carter knowledge of *product-related* illness prior to 2/10/91.) **In circumstances where the patient has timely, contemporaneous discussions with his treating physicians, due diligence can be discharged without imputation.**

h. The separate disease rule provides an alternative basis for upholding the jury's verdict on limitations

The separate disease rule, stated in *Eagle-Picher Industries, Inc. v. Cox*, 481 So.2d 517 (Fla. 3d DCA 1985), is in accord with the majority of national jurisdictions and represents the best logical treatment of multiple-injury, latent-disease cases involving asbestos, cigarettes, DES, and similar carcinogens. The alternative--that a trivial disease such as a respiratory infection may trigger the limitations on a yet-undiagnosed cancer claim--is unworkable and would lead to a multiplicity of "future cancer" claims from uninjured individuals. The separate disease principle would require B&W to prove limitations had run against both COPD and lung cancer.

B&W's argument that where an injury, although slight, is sustained in consequence of the wrongful act of another, limitations begins at once, is not an answer to the separate disease rule. As was noted in *City of Miami v. Brooks*, 70 So.2d 306 (Fla. 1954), the rule relied on by B&W is based on *Cristiani v. City of Sarasota*, 65 So.2d 678 (Fla. 1953), which had nothing to do with separate diseases. The rule of *Cristiani* is that when

negligence is obvious (for example, an automobile accident, different from our latent disease case) and what appears to be a slight injury is sustained, limitations commences notwithstanding that the full extent of that injury is not then known. This concept is further not applicable here because COPD and lung cancer are separate diseases--COPD does not with time turn into lung cancer.

Secondly, B&W narrowly interprets *Eagle Picher* to only those situations where, presumably, an entire limitations period for a first disease has ended before a separate disease is discovered. This narrow and complex rationale for *Eagle Picher* fails to do justice to the separate disease concept, and produces spurious results. Under B&W's reasoning, if 3.9 years elapses between a first and second, separate, disease, the second action is barred if not filed within 0.1 years; however, if 4 years elapses, four *more* years may elapse before the second action is barred. This is unworkable. Moreover, a plaintiff may well decide not to file suit for a first, perhaps trivial injury, which would be, under B&W's analysis, at the plaintiff's peril of losing the claim for the second disease within an unpredictably short time. *See Eagle Picher* at 521-26. Although the separate disease rule is not necessary to decide this case (because *neither* of the Carters' claims were barred as argued above), **the simple, workable *Eagle Picher* rule is that truly separate diseases have truly separate statutes of limitations.**

2. THE JURY DID NOT AWARD DAMAGES BASED ON ANY FEDERALLY PREEMPTED CLAIM

a. The lower court's preemption ruling was correct

B&W's criticism of the trial court's ruling is a ruse. The ruling was correct according to *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) and the weight of authority since then.[4]

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[4]*See Burton v. R.J. Reynolds Tobacco Co*., 916 F. Supp. 1102, 1104 (D. Kan. 1996) (denying motion to dismiss fraudulent concealment claim on pre-emption grounds because "Defendants could have [revealed their knowledge of the dangers of smoking cigarettes] by disclosing their medical and scientific studies to the medical community for publication . . .); *Mangini v. R.J. Reynolds Tobacco Co*., 7 Cal. 4th 1057, 1068, 875 P.2d 73 (Cal. Sup. Ct.), cert. denied, 513 U.S. 1016 (1994) (under California deceptive trade practices act, a claim seeking to enjoin cigarette advertising targeting minors and causing them to become addicted to nicotine was not preempted by the Labeling Act because the predicate legal duty – not to engage in unfair competition – was not based on

b. The package insert was admitted as a sample pre-1970 warning demonstrating feasibility, not as a post-70 "nonadvertising" communication

B&W, in an argument invented just for this appeal, wrongly characterizes our theory of admission for the package insert. We did *not* seek its admission as a post 1970 warning on the theory that it did not constitute "advertising or promotion." We have never argued that at all. The advertising and promotion issue[5] is a red herring in this appeal. The issue was raised at summary judgment but played no role at trial, as we indicated in our initial brief at 42-44. We certainly admit that a package insert is an area potentially covered by the labeling act; a claim cannot be based on failure to have, after 1970, a package insert such as the one suggested. **Failure to warn before 1970 *is* actionable, and the insert was admissible as a feasible, pre-70 warning.**

c. Counsel was not required to restate the parameters and limitations of our failure to warn claim in every single question, statement, or argument; likewise the package insert was not required to have date references attached, so long as the court correctly instructed the jury on the date limitations of the failure-to-warn claim

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smoking and health); *Iowa v. R.J. Reynolds*, Civ. No. CL 71048, Order (Iowa Dist. Ct. 5th Jud. Dist. Polk County Aug. 26, 1997), (refusing to dismiss claims relating to "false and misleading public statements."); *Castano v. American Tobacco Co.*, 870 F. Supp. 1425, 1432-33 (E.D. La. 1994) (following *Cipollone* and denying motions to dismiss fraud, deceit, and consumer protection/deceptive trade practice claims based on pre-emption); *McGraw v. American Tobacco Co.*, Civ. No. 94-C-1707, Letter Order at 3 (W. Va. Kanawha County Mar. 31, 1997) ("After careful review of [*Cipollone*] and other opinions and the complaint, the Court finds that the allegations of fraudulent concealment, conspiracy and the claims relating to minors extend far beyond advertising and labeling, and are not preempted").

[5]A cigarette manufacturer's protection under the Labeling Acts extends only to communications about cigarettes and health in cigarette *advertising and promotions*, as argued in our initial brief. In our initial brief we pointed out that B&W had never identified any *evidence*, in this case, that was admitted as a post-1970 failure to provide warnings through channels of communication other than advertising and promotion. B&W's answer brief focuses only on the *sample package insert*. This was not admitted on any such theory, but was strictly pre-1970. Whether, and to what extent, post-1970 nonadvertising communications are required or preempted is an interesting legal issue but is not necessary to decide this case.

B&W selectively cites passages in the record where the term "inadequate warning" was used without time limitation (i.e. "pre-1970.") Restating temporal limitations in every question or answer would be an impossible task, and is hardly required. Nor was the package insert required to have "pre-1970" physically stamped on every page. Those parameters and limitations were expressed and stated correctly in the court's instruction, which is unchallenged in this appeal and hardly mentioned by B&W. B&W argues that the jury disregarded correct instructions and considered the insert a post-70 claim. *We invite scrutiny of the package insert itself, included in our Appendix to Initial Brief*. The insert is not dated, nor does it need to be, given its context and the instruction.

Furthermore, B&W is logically incoherent in arguing about scientific content of the label. As we stated in the initial brief, we deny that any scientific content was post-70 (B&W seems to take issue with one section out of about 30). Where is the record authority that the science was unknown or unknowable before 1970?[6] B&W never questioned Dr. Feingold on this point. Besides, an adequate warning must contain information that was *knowable* (not just known) to B&W using reasonable diligence. Furthermore, how would the jury ever *know* if some obscure scientific point discussed on the sample warning was knowable even after 1970, unless someone told them. And if they didn't know, how could the sample warning in itself be a post-70 claim? **The jury instruction ended any ambiguity (which we deny) in dating the failure to warn evidence.**

d. Silent criticism of the post-70 warning implied from the excellence and completeness of the sample package insert is not a post-70 claim and is perfectly acceptable

B&W's next logically erroneous point is that the warning is so complete it makes the later, post-70 warnings seem pitiful in comparison. As we noted in our initial brief, the factual issue of whether the post-70 warnings were or were not adequate at various times and circumstances *is* a material issue, bearing on consumer expectation and Mr.

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[6]B&W cites to a scientific article identified in interrogatories not read to the jury. B&W's answer brief at 30-31. The single article was not exhaustive nor historically oriented. In fact, DNA mutations, the subject of B&W's current complaints, were discovered in the 1960's.

Carter's conduct. Such factual issues are permissibly explored, so long as no *claim* is made for inadequate post-70 warning. **"Criticism" of the post-70 warning solely by silent comparison to a superior sample warning could not, by the wildest stretch of the imagination, in the face of a jury instruction to the contrary, be equated to a claim against the post-70 warnings.**

e. B&W led the District Court to error in an implied preemption analysis

Although B&W now disputes it, B&W led the court below into erroneous implied preemption. B&W's statement that the court followed the statute is a non-sequitur. The analysis and result were pure implied preemption, error in light of *Cipollone*. As to *Philip Morris v. Harshbarger*, 122 F. 3d 58 (1st. Cir. 1997), we stand by our analysis and quotation in our initial brief.

3. THERE WAS NO "UNPLEADED CLAIM", ONLY RELEVANT, ADMISSIBLE EVIDENCE TO PROPERLY IMPEACH AND REBUT B&W'S CONTENTIONS

a. The totality of the record evidence cited by B&W fails to establish an "unpleaded claim"

A further B&W fantasy is the Carters' scheming to prosecute an unpleaded claim. B&W relies upon fragmented testimony and comments before the jury, appearing in only 16 pages of the 7,655 page record[7], *to which B&W largely failed to object*. These sparse citations do not stand for the propositions asserted by B&W; rather, they are misleading[8], taken out of context, or simply nonsensical[9]. Attached at A2 are all 16 pages relied upon by B&W. Our brief's length limitation precludes detailed comment here; we offer the

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[7] R38:382-83, 401-404; R46:1346, 1348-49; R47:1387-91, 1395-96; A2.

[8] For example, at pages 35 and 36 of its brief B&W argues that the trial court made a pretrial ruling that the unpleaded claim "had become provable due to the merger" between B&W and ATC. The court did no such thing, but instead, merely denied B&W's pretrial motion to exclude certain documents from evidence. R33: 563-66, A3.

[9] For example, at page 35 of its answer brief B&W cites R35:7-8; A4, in support of its argument that the trial court "repeatedly overruled its objections to the unpleaded claim"; incredibly, that portion of the record merely reflects a sidebar conference *concerning jury selection*.

Court the record pages cited, on the conviction that they do not establish what B&W contends.

b. The abuse of discretion standard applies

B&W argues that an abuse of discretion standard does not apply because a "matter of pleading" is involved. But the substance of B&W's contention is that the *admission of certain evidence* constituted an unpleaded claim. Such evidence issues are resolved by an abuse of discretion standard. *Sims v. Brown*, 574 So.2d 131 (Fla. 1991). Having failed to find an abuse of discretion in the admission of evidence, the District Court cannot void the jury verdict merely because it disagreed with the way the evidence was presented. *Sims,* at 134.

c. B&W does not dispute the relevance of the challenged evidence

B&W does not dispute the fact that B&W's conduct could be relevant for purposes *other than* an "unpleaded claim" against it. B&W aggressively asserted that cigarette smoking was not addictive[10]. The trial court correctly permitted us to impeach B&W with its *own research* concluding smoking was addictive.

d. The jury was frequently told and properly instructed about the relationship between B&W and ATC.

The jury was correctly instructed and reminded (a) that B&W was the named defendant[11] and (b) that the conduct of its former subsidiary ATC was at issue.[12] B&W

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[10]Thompson depo., 17, 76-79, 133-34; R38:430-33, 435. In addition B&W attempted to bolster this assertion with evidence that the 1964 U.S. Surgeon General's report concluded that smoking was a "habit" rather than an "addiction". R38:432; R61:3274, 3291-93. We properly countered with evidence demonstrating that the 1964 report was not authoritative on that issue because the Surgeon General did not have the benefit of B&W's research.

[11]Plaintiff was not required to say "B&W as successor..." in every sentence, nor was plaintiff required to refer separately to ATC, which was no longer in existence. B&W was the named defendant, and even B&W referred to itself as B&W. R:36:117, 170-71; R37:231, 259; R65:4001.

[12]*See,* R35:4-5, (preliminary instruction); R35:12 (B&W's jury voir dire); R38:352 (plaintiffs' opening); R38:418 (B&W's opening); R65:3936-37, R65:3989-90 (plaintiffs' closing); R66:4127-28 (jury instruction with both a and b above.).

argues only that the instruction came too late. A jury's verdict carries with it a *presumption of regularity*, and the jury is *presumed to have done its duty* and followed the court's instructions. *Bowser v. Harder*, 98 So.2d 752 (Fla. 2nd DCA), *cert. dism'd* 101 So.2d 817 (Fla. 1957); *McDonald v. State*, 47 So.2d 485 (Fla. 1908).

e. There was no unfair prejudice in the use of B&W's documents

B&W contends we somehow prevented its expert psychiatrist, one Dr. Thompson, from fully addressing B&W's documents. B&W brief at 43. In fact B&W, in possession of its own documents well in advance of trial, did not provide them to Dr. Thompson until the day before he testified at trial! R60:3242. Having withheld the documents from its own expert B&W cannot now complain that his testimony, R60:3216-19, would have been better had he gotten the documents earlier. **B&W cannot manufacture its own prejudice.**