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Rules

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JURISDICTIONAL STATEMENT

This is an appeal from an action in which plaintiffs sought damages for personal injuries that plaintiff Forest Hoskins allegedly suffered as the result of exposure to asbestos dust. The action was tried to a jury in the Circuit Court of Jackson County, Missouri. On May 17, 2001, the trial court entered its amended judgment on the jury's verdict in favor of plaintiffs, granting defendants' a credit of \$3 million on the compensatory damages and entering judgment for \$7 million in punitive damages against defendants Federal Mogul Corporation and T & N Ltd. Defendants timely filed their Notice of Appeal to this Court on June 26, 2001.

The issues on appeal include whether Missouri's general punitive damages statute, section 510.263 RSMo, and Missouri's punitive damages extraction statute, section 537.675 RSMo, violate the United States and Missouri constitutions. Challenges to these statutes provide a proper basis for this court's jurisdiction. *See Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 52-53 (Mo. banc 1999). Because the validity of state statutes is at issue, this court has exclusive appellate jurisdiction. Mo. Const. Art. V, § 3. Furthermore, jurisdiction is proper in this court because this case presents several issues of general interest and importance. Mo. Const. Art. V, § 10; *see Rodriguez*, 996 S.W.2d at 54.

STATEMENT OF FACTS

This is an appeal from a judgment for \$3 million in compensatory damages and \$7 million in punitive damages in an asbestos personal injury case. Plaintiffs Forest Hoskins and Judy Hoskins sued defendants Business Men’s Assurance Company of America (“BMA”), Federal-Mogul Corporation (“Federal-Mogul”), and T & N Ltd. (“T & N”)¹ for personal injuries allegedly suffered by Mr. Hoskins as a result of his alleged exposure to asbestos dust from Sprayed Limpet, a fireproofing product manufactured by a former United Kingdom subsidiary of T & N.² Plaintiffs claimed that Mr. Hoskins had contracted mesothelioma, a rare and deadly form of cancer, while working as an operating engineer in a building owned by BMA in Kansas City, Missouri (“the BMA building”), beginning 15 years after application of the fireproofing in the building.

In their petition, plaintiffs asserted a strict liability product defect claim against Federal-Mogul and T & N, a premises liability claim against BMA, and strict liability failure to warn, breach of warranty, negligence, and false representation claims against all defendants. L.F. 26-49. Plaintiffs also sought punitive damages from all defendants. L.F. 26-49.

¹ Plaintiffs also sued TAF International Ltd., a long defunct former U.K. subsidiary of T & N, but dismissed that defendant prior to the case going to the jury.

² Federal-Mogul acquired T & N in March 1998. The parties stipulated that Federal-Mogul never manufactured or sold the product at issue in this litigation. Tr. 587.

On the eve of trial, plaintiffs settled their claims against BMA for \$5 million, and proceeded to trial against Federal-Mogul and T & N. L.F. 625, 1003. At the conclusion of the trial, the jury awarded Mr. Hoskins \$2 million in compensatory damages, and awarded Mrs. Hoskins \$1 million on her claim for loss of consortium. L.F. 689. The jury then awarded \$7 million in punitive damages. L.F. 691.

The issues on appeal include the submission of plaintiffs' claim for punitive damages, despite their failure to prove defendants' actual knowledge that their conduct or product was unreasonably dangerous to Mr. Hoskins; plaintiffs' counsel's mischaracterization of defendants' conduct in reviewing and evaluating plaintiffs' medical material; and the trial court's erroneous decision to allow only financial evidence in the punitive damages phase of the trial.

Application Of Sprayed Limpet In The BMA building

In the early 1960's J.W. Roberts Ltd., a former United Kingdom unit (subsidiary) company of Turner and Newall Limited (now known as T & N Ltd.), manufactured a product called Sprayed Limpet Asbestos ("Sprayed Limpet"). Tr. 587. Sprayed Limpet consisted of 60% asbestos fibers, 38% Portland cement and 2% mineral oil. Tr. 587. J. W. Roberts sold Sprayed Limpet to a head licensee who would, in turn, resell it to duly sub-licensed contractors in the United States. One of the uses of Sprayed Limpet was as a fireproofing material. Tr. 587. In that type of application, Sprayed Limpet was sprayed onto the structural steel of buildings during construction to retard the spread of flames in order to save lives in a catastrophic fire. Tr. 587.

Sprayed Limpet was applied as a fire retardant to the structural steel of the BMA building during its construction in 1962 and 1963. Tr. 228-229, 587. There was no evidence that Sprayed Limpet was applied in the BMA building after 1963.

The BMA building has 19 floors. Tr. 224. On the first 18 floors, there are floor-wide suspended tile ceilings above which run electrical, heating, ventilation and air-conditioning equipment. Tr. 227-28, 232. The space between the suspended ceilings and the floors above was called the “soffit” or “return air plenum.” Tr. 229-30. Estimates of the height of the soffit ranged from 2½ to 4 feet. Tr. 229, 252. On the first 18 floors, Sprayed Limpet could be seen in the area above the suspended ceiling tiles. Tr. 228-30. The 19th floor of the building is the “Mechanical Room,” housing heating and air-conditioning equipment for the building. Tr. 224, 227. The 19th floor had no suspended ceiling, and in-place Sprayed Limpet was visible to those working on the floor. Tr. 227, 258.

Forest Hoskins’ Work In The BMA Building

In 1978, 15 years after the Sprayed Limpet had been applied during the construction of the BMA building, plaintiff Forest Hoskins began working as an operating engineer at the building. Tr. 558. Mr. Hoskins worked at the BMA building until 1999. Tr. 558-59. Like the other operating engineers, Mr. Hoskins was not employed by BMA, but worked for a series of third-party contractors hired to provide operating engineers for the building. Tr. 558-59. The primary role of operating engineers was to maintain the heating and air conditioning equipment in the building. Tr.

251, 559. This involved both servicing existing equipment and installing new equipment. Tr. 251, 559-560.

Mr. Hoskins and other witnesses who had worked at the BMA building – Harry Mosby, Lester Taylor, and Billy Gregory – testified about the manner in which operating engineers might have become exposed to dust from the Sprayed Limpet during the time Mr. Hoskins worked in the building.

Operating engineers sometimes worked in the soffit area above the suspended tile ceilings on the first 18 floors. Tr. 230-32, 252, 312-13, 560. Some of the Sprayed Limpet that had been applied to the building above the suspended ceiling had come loose and had fallen onto the ceiling tiles. Tr. 230, 253, 313, 560-61. Mr. Mosby testified that Sprayed Limpet had started falling onto the ceiling tiles by 1966, and Mr. Hoskins said more Sprayed Limpet continued to accumulate on the tiles in the years after he began working in 1978. Tr. 231-32, 563. According to plaintiffs' witnesses, Sprayed Limpet had fallen onto the tiles "just about everywhere." Tr. 253, 313. When operating engineers worked above the suspended ceilings, they sometimes would have to move the ceiling tiles onto which Sprayed Limpet had fallen. Tr. 313-14, 567. In the 24 years he worked in the BMA building, Mr. Gregory had to lift ceiling tiles weighted down with 35 to 40 pounds of Sprayed Limpet 200 to 300 times. Tr. 313-314. In addition, the operating engineers sometimes dislodged the Sprayed Limpet when they attached conduit or performed other work above the suspended ceiling. Tr. 232. As a result of these conditions, at various times during his work at the BMA building Mr. Hoskins was exposed to dust from the Sprayed Limpet. There was testimony that operating engineers

working in the area above the suspended ceiling sometimes – in a “worst case scenario” – would become coated with dust from the Sprayed Limpet that had come loose. Tr. 241, 254, 565-66.

In addition to working on the other floors, operating engineers on the average would spend 25% to 50% of their time working on the 19th floor where they might be exposed to dust from the Sprayed Limpet. Tr. 237, 314. Sprayed Limpet sometimes would come loose from the surfaces on the 19th floor to which it had been applied, resulting in dust falling on those working on that floor. Tr. 237-38, 258.

BMA’s Knowledge Of Limpet And Testing Program

Mark Crew was a long-time BMA employee and was the building manager when Mr. Hoskins began working in the BMA building. As building manager, Mr. Crew was in charge of safety at the building. L.F. 1179. By 1978, Mr. Crew knew that asbestos-containing fireproofing had been used in the BMA building and was concerned about health problems potentially caused by exposure to asbestos dust. L.F. 1164, 1165-68, 1172-73, 1177. Mr. Crew also knew in 1978 that the operating engineers might be exposed to asbestos when performing their jobs. L.F. 1171.

After Mr. Crew became aware in 1978 of potential health hazards from exposure to asbestos dust, he arranged for air quality testing in the building. L.F. 1165, 1167; Ex. 35. The tests indicated that levels of asbestos in the air inside the building were only slightly higher than in the outside air and were well within then acceptable concentration levels. Tr. 511-13; L.F. 1168; Exs. 236, 238. BMA did not, however, conduct any testing of the air quality in the space above the suspended ceilings. L.F. 1168, 1173.

Although BMA sent letters describing the test results to tenants of the building, BMA never notified any of the companies providing operating engineers about the asbestos-containing fireproofing or the air quality testing BMA had performed. L.F. 1174-75; Ex. 238.

In 1987, additional testing indicated unacceptable levels of asbestos dust in the building. Tr. 511-13; Exs. 154-55. In response to these test results, BMA began holding classes to inform workers in the building about potential health risks from exposure to dust-containing asbestos. Tr. 234-36, 240, 256, 263, 315-16, 561. In addition to the classes, Mr. Hoskins and other operating engineers began wearing protective equipment, including respirators, when working in areas in which they might be exposed to asbestos-containing dust. Tr. 234-36, 255-56, 315-16, 562. Prior to 1987 or 1988, the operating engineers had not worn any protective equipment when working above the suspended ceiling or on the 19th floor. Tr. 237, 255-56. Mr. Hoskins, Mr. Taylor and Mr. Gregory testified that prior to the classes in 1987 or 1988 they were not aware that there were any health risks associated with working around Sprayed Limpet. Tr. 240, 256, 263, 315-16.

Mr. Hoskins' Diagnosis And Treatment

In 1999, Mr. Hoskins performed poorly on a pulmonary function test given as part of a regular physical exam. Tr. 567-68. Subsequent x-rays raised concerns about possible disease processes in Mr. Hoskins' lungs. Tr. 568. Dr. Hamner Hannah, a thoracic surgeon, performed a biopsy of Mr. Hoskins' lung at Menorah Medical Center ("Menorah") in Kansas City on February 16, 1999. In his post-operative report, Dr. Hannah stated that Mr. Hoskins' entire lung was surrounded by "adhesions," or bands of

scar tissue. L.F. 1007, 1110. Adhesions can result from a number of causes, including inflammatory diseases, bacterial pneumonia, fungal infections, tuberculosis, chest trauma and some cancers. L.F. 1008.

After examining the lung tissue taken during the biopsy, Dr. Hal Marshall, a pathologist in Kansas City, diagnosed Mr. Hoskins as having desmoplastic mesothelioma. L.F. 1127-28. Mesothelioma is a rare form of cancer that has been associated with exposure to asbestos, and desmoplastic mesothelioma is, in turn, an extremely rare form of mesothelioma. L.F. 1028, 1055, 1128. Mesothelioma is a generally fatal disease, and patients diagnosed with desmoplastic mesothelioma rarely survive for more than a few months, unlike Mr. Hoskins, who is alive today. L.F. 1028, 1055, 1116, 1158.

Based on the diagnoses of Drs. Marshall and Hannah, Mr. Hoskins consulted with Dr. Valerie Rusch at Memorial Sloan-Kettering Cancer Center in New York (“Memorial Sloan Kettering”). L.F. 1039-40. Dr. Rusch is a thoracic surgeon with experience in treating patients diagnosed with mesothelioma. L.F. 1037-38. Mr. Hoskins gave Dr. Rusch a history including shortness of breath and a cough during the previous six months. L.F. 1040. Because Mr. Hoskins had minimal symptoms of mesothelioma and appeared to be in “exceptionally good condition,” Dr. Rusch felt that he might benefit from surgery to remove his lung. L.F. 1043-44. When Dr. Rusch performed the surgery, however, she found that Mr. Hoskins’ lung was not surrounded by adhesions as reported by Dr. Hannah, but, in fact, was afflicted with “very little disease.” L.F. 1045. Dr. Rusch was surprised by the small amount of disease that she found. L.F. 1052-53. Dr. Rusch

found only a “few plaque-like areas” of what appeared to be early stage tumors. L.F. 1045. Based on her findings, she elected not to remove the lung. L.F. 1045-46. Instead, she removed only the pleura (the membrane that lines the lung), and left the lung itself in place. L.F. 1046. She recommended, and Mr. Hoskins received, post-surgical radiation therapy. L.F. 1046-47.

Dr. Philip Lieberman, a pathologist also working at Memorial Sloan-Kettering, diagnosed Mr. Hoskins as having desmoplastic mesothelioma based on his microscopic examination of tissue sample slides from Menorah and information regarding Mr. Hoskins’ immunohistochemistry. L.F. 946. In making his diagnosis, Dr. Lieberman examined twenty slides of tissue taken during Mr. Hoskins’ biopsy at Menorah Medical Center in Kansas City and “more than three” slides of tissue removed by Dr. Rusch during the surgery at Memorial Sloan Kettering. L.F. 937, 949. Dr. Lieberman’s diagnosis was based on the slides from Menorah in Kansas City. L.F. 937-38. Dr. Lieberman did not find any evidence of mesothelioma in the tissue samples taken during Dr. Rusch’s surgery. L.F. 949-50; Ex. 75.

Subsequent to the surgery and radiation treatments, Mr. Hoskins continued to experience shortness of breath and restrictions on his pulmonary capacity and function. Tr. 277-78. Dr. Everett Murphy, one of Mr. Hoskins’ treating physicians, does not believe that Mr. Hoskins’ condition will improve and does not believe he will be able to return to his previous employment as an operating engineer. Tr. 286-87. Dr. Murphy testified that Mr. Hoskins may have had some restriction to his vital capacity from his cancer originally, but any cancer had been removed and any further restriction Mr.

Hoskins was experiencing at the time of trial was the result of the surgery and radiation, not a recurrence of any cancer. Tr. 293-294. As of the trial date, Mr. Hoskins had no recurrence of any disease, and had gained weight since the surgery. L.F. 1112-13, 1116.

Defendants' Medical Experts

Dr. Andrew Churg testified for defendants. Dr. Churg is a member of the Mesothelioma Panel, a group of doctors recognized as having unique and specific experience in diagnosing mesothelioma. L. F. 1380-1382. Dr. Churg testified that the medical information and pathology materials regarding Mr. Hoskins' disease were inconsistent with desmoplastic mesothelioma. L.F. 1325-26, 1329, 1335, 1337-38, 1341. In addition, Dr. Churg stated that the fact that Mr. Hoskins had survived more than two years after diagnosis and had gained weight indicated that Mr. Hoskins had not suffered from desmoplastic mesothelioma. L.F. 1344, 1359. In Dr. Churg's opinion, Mr. Hoskins had a benign proliferation of mesothelial tissue. L.F. 1390, 1399, 1419.

Dr. Lawrence Repsher, who is board-certified in pulmonary disease, testified on behalf of the defendants. Tr. 629, 630. Based on his review of Mr. Hoskins' medical records, Dr. Repsher testified that, although there is some indication that Mr. Hoskins has circumscribed pleural plaques (a non-impairing indicator of exposure to asbestos), he did not see any clinical evidence of asbestosis, a specific type of pneumoconiosis (a dust disease of the lung) related to the inhalation of asbestos fibers. Tr. 650-51. Dr. Repsher also did not believe that Mr. Hoskins suffers from desmoplastic mesothelioma. The bases for Dr. Repsher's diagnosis included the following: (1) Mr. Hoskins' initial chest x-ray and CT scan showed evidence only of diffuse pleural plaques, and did not show any

evidence of a tumor; (2) Dr. Rusch did not find a cancerous tumor when she operated on Mr. Hoskins; (3) Mr. Hoskins' chest x-rays and CT scans taken most recently prior to trial showed no change in his condition, when someone with mesothelioma would likely show a marked deterioration; and (4) there was no evidence of any cancer or tumor present in the pleura as recently as a month prior to trial. Tr. 661-64, 667-72, 755-57. Dr. Repsher's clinical assessment of Mr. Hoskins' condition was consistent with the pathologic diagnosis of Dr. Churg. Tr. 666-667.

Dr. Repsher agreed that if the pleural plaques in Mr. Hoskins' lungs were due to asbestos, then he would have had enough asbestos fibers in his lungs to cause mesothelioma. Tr. 705-706. Dr. Repsher further acknowledged that the nature of Mr. Hoskins' exposure to asbestos – modest in duration and intensity – is characteristic of what one sees in patients with mesothelioma. Tr. 706. Dr. Repsher also stated that Mr. Hoskins probably has amosite asbestos in his lungs, and that amosite is a more “potent” asbestos in terms of causing mesothelioma. Tr. 696-97, 699.

Plaintiffs' Evidence Regarding The Knowledge Of Health Risks Of Exposure To Asbestos Dust

Plaintiffs relied on the testimony of Barry Castleman in an attempt to support their liability and punitive damage claims. Castleman, who holds a Ph.D., identifies himself as an “environmental consultant.” Tr. 366. Castleman has published approximately fifty articles and chapters, thirty to forty of which have “something to do” with asbestos. Tr. 368. He has written one book, entitled “Asbestos: Medical and Legal Aspects.” Tr. 369. The first edition of the book, which Castleman describes as a history of “the asbestos

public health problem,” essentially consists of his doctoral thesis. Tr. 369. Since 1979, he has participated in approximately 200 trials – most involving asbestos related claims – as a retained expert witness, almost always on behalf of plaintiffs. Tr. 378. Dr. Castleman is not a physician, and is not an expert in toxicology, pathology, radiology or epidemiology.

Referring to the most recent edition of his book and the documents discussed in that book – the book itself was never marked as an exhibit or introduced into evidence – Castleman was permitted to give his assessment of the progression of knowledge about the health risks associated with exposure to asbestos-containing products.³

Castleman testified that he reviewed thousands of pages of Turner & Newall documents and thousands of pages of documents from industry organizations such as the Asbestosis Research Council. Tr. 397. Based on this review, he opined that T & N had monitored the developing medical literature regarding the potential health hazards of exposure to asbestos. Tr. 397-98. These documents included medical articles prior to 1962 suggesting that certain types and levels of exposure to asbestos dust was associated with certain pulmonary diseases, including lung cancer and mesothelioma. Tr. 397-401. None of these articles referred to or discussed jobs or exposures similar to that of Mr.

³ Castleman also was permitted to discuss documents that were never separately identified for the record, marked as exhibits, or introduced into evidence. *E.g.* Tr. 383-85.

Hoskins, or discussed exposure to amosite asbestos, the type of asbestos that the parties agree was used in the Sprayed Limpet at issue in this case. Tr. 397-401, 467-70.

Castleman discussed a number of case studies involving individuals diagnosed with various pulmonary diseases between the late 1930's and the early 1960's. Tr. 392-94. Over defendants' objection, Castleman testified that these case studies indicated a causal relationship between exposure to asbestos dust and certain forms of pulmonary disease. The subjects of the case studies were individuals who were working in or living near asbestos mines or who were involved in the actual manufacture or application of asbestos-containing products. Tr. 392-94.

In his book, Castleman included a chart he had prepared entitled "Mesothelioma at T & N Companies in Britain." Tr. 401. Castleman described the chart of "mesothelioma deaths" among former employees of different T & N companies. Tr. 401-403, 469. With one exception, those on the list were exposed while working in factories manufacturing asbestos-containing products, "where there was raw asbestos being mixed at some stage with other ingredients" to make the finished product. Tr. 470. Castleman identified the other individual in his chart as a "loader of goods" who was "only handling, I would think, finished product" at the factory. Tr. 470.

Castleman also referred to a 1962 memorandum "from one Turner & Newall executive to another" purportedly stating that, even if T & N succeeded in perfecting a safe way of applying the material, "we were still liable to come unstuck according to Mr. Smith when somebody eventually comes in to remove the asbestos." Tr. 384-86.

Castleman did not identify “Mr. Smith” and the document to which Castleman was referring was never produced at trial or introduced into evidence.

In addition, Castleman discussed, and the Court admitted into evidence, several documents he claimed had been found in T & N’s files. Tr. 406-16, 417-47; Exs. 85, 86, 87, 88, 90, 91, 95, 99, 100, 103, 138, and 143; Appendix at A1-A62.⁴ The dates of these documents ranged from 1956 to 1976. The documents dated before 1963 (the last possible date of sale of the Sprayed Limpet used in the BMA building) included a letter from a solicitor in England about an employee’s asbestosis claim (Ex. 86, A4); a memorandum referring to a 1959 paper by a physician, Dr. J. C. Wagner, regarding “pathological aspects of asbestosis” in South Africa (Ex. 95, A22); minutes of a 1959 meeting of the Asbestosis Research Council referring to Dr. Wagner’s 1959 paper (Ex. 143, A58); a 1960 paper prepared by Dr. Wagner discussing case studies of individuals from the asbestos mining regions of South Africa diagnosed with mesothelioma (Ex. 138, A46); and a 1960 report by a T & N medical officer about a visit to the United States to attend the International Congress on Occupational Diseases and visit facilities of other manufacturers of asbestos-containing products (Ex. 103, A29). Although these documents reflect developing information regarding pulmonary diseases among mining, manufacturing, and insulation workers, none contain reports or discussions of any health

⁴ Copies of Exhibits 85, 86, 87, 88, 90, 91, 95, 99, 100, 103, 138 and 143 are attached in an appendix to this brief.

hazards associated with exposure to a finished in-place asbestos product or any information suggesting that Sprayed Limpet released asbestos fibers into the air years after its application.

Over defendants' objection, Castleman was also permitted to discuss several documents dated after the sale of the Sprayed Limpet used in the BMA building. Exs. 85, 87, 88, 90, 91, 99, and 100; Tr. 407-414. Plaintiffs argued that the documents were admissible on the issue of notice and product defect, and the trial court admitted the documents after concluding that defendants had a continuing duty to warn of the sale of the Sprayed Limpet for use in the BMA building. Tr. 142, 221-22. Exhibit 85 is a December 1964 report of several pending asbestosis claims involving present or former T & N employees. A1. The document is not about post-application exposure to any asbestos-containing product. Exhibit 87 is a 1967 letter from Dr. J. F. Knox, a T & N medical officer, expressing a qualified acceptance of an association between mesothelioma and some forms of asbestos dust exposure. A7. Exhibit 88 is a 1964 summary report of a conference on the biologic aspects of asbestosis, including references to exposures experienced by workers in factories making asbestos-containing products and insulators. A10. Exhibit 90 is a 1968 memorandum entitled "Control of the Cancer Hazard Due to Asbestos to the General Population." A17. Exhibit 91 is a 1978 document discussing conditions in Britain with regard to the handling of waste asbestos. A74. The document refers to exposure of workers in asbestos textile factories, insulators, and dockyard workers. Exhibits 86, 88 and 91 all refer to an association between mesothelioma and exposure to crocidolite asbestos, and the lack of evidence of an

association between mesothelioma and amosite asbestos, the type of asbestos the parties agree was used in the Sprayed Limpet at issue in this case. Exhibit 99 is notes of a 1967 T & N Board Meeting which refers to asbestosis among factory and insulation workers. A23. Exhibit 100, dated in 1969, is a memorandum discussing asbestosis, cancer and mesothelioma among asbestos industry workers and contains the statement that, “with mesothelioma, no dose [of asbestos], no matter how small, can at present be presumed to be safe.” A27; Tr. 413, 442-44. None of the post-1963 documents introduced through Castleman suggests any knowledge prior to 1964 about releases of asbestos fibers by Sprayed Limpet years after application or any concerns about health risks associated from exposure to fireproofing materials or similar products containing asbestos after application.

Castleman testified that by 1957, T & N had conducted research concerning available substitutes for asbestos, and found that it could substitute rock or mineral wool for asbestos for use in fireproofing products. Tr. 454. According to Castleman, T & N was reluctant to use a product containing rock or mineral wool because it would not have the same kind of patent protection as asbestos-containing fireproofing and would have been less profitable. Tr. 454-55. Castleman described mineral wool as much less dangerous than asbestos, and said that mineral wool was later used as a substitute. Tr. 455-456.

In March, 1967, J. W. Roberts Ltd. ceased the manufacture and distribution of Sprayed Limpet for sale in the United States. Tr. 587. Castleman testified that in 1963 T & N sent ACandS, its head licensee for Sprayed Limpet in the United States at the time, a

notice warning about potential health hazards if safety precautions were not taken in spraying the fireproofing material. Tr. 442. According to Castleman, assuming the Sprayed Limpet was applied to the BMA building prior to July of 1963, no warning about safety precautions of the type being used in England would have reached the persons applying the Sprayed Limpet to the BMA building. Tr. 442.

Plaintiffs also elicited testimony from Dr. Repsher regarding the progression of knowledge regarding risks of exposure to asbestos dust. Dr. Repsher testified that by 1960 mesothelioma had been associated with certain exposures to asbestos as a matter of epidemiology, and it appeared clear to Dr. Repsher by 1960 that certain types of asbestos exposure could cause mesothelioma. L.F. 1029; Tr. 699-700. He also believed that Dr. Wagner's 1960 paper discussing case studies of mesothelioma in persons living in the asbestos mining region of South Africa (Ex. 138) was credible, reliable literature that certain exposures to asbestos could cause mesothelioma. L.F. 1029; Tr. 701-03. According to Dr. Repsher, asbestos manufacturers have known for a long time that inhaling asbestos fibers in significant concentrations over a period of time is dangerous. Tr. 746.

Dr. Repsher testified that it is unreasonably dangerous for someone to be in the presence of friable airborne asbestos particles without a respirator. Tr. 745-46. Dr. Repsher agreed that Sprayed Limpet coming loose from the beams at the BMA building so that particles became airborne could be a dangerous condition for someone working without a respirator. Tr. 743-44.

Plaintiff also elicited the following testimony from Castleman about whether Sprayed Limpet was defective and unreasonably dangerous.

Q. Doctor, I want you to assume that in 1962 and 1963 that sprayed limpet asbestos manufactured by Turner and Newall was sprayed and applied on to the B.M.A. tower; would you assume that to be true?

A. Yes.

Q. And I want you to assume as true that in 1966 when workers would get above the ceiling and look above the ceiling tiles that there would be this dust from the limpet resting on the ceiling tiles; would you assume that as true?

A. Yes.

Q. And I want you to assume as true that a gentleman by the name of Lloyd Gregory testified in this courtroom that since 1970 when he got his head above the ceiling there was also sprayed limpet asbestos. And he testified that between 1970 and the time that he retired on about two hundred occasions he had to lift the ceiling tiles up and they weighed 30 to 40 pounds as a result of limpet that had piled up on the tops of the ceiling tiles; would you assume that as true?

A. Yes.

Q. Assuming those things to be true, do you have an

opinion within a reasonable degree of engineering certainty as to whether the sprayed limpet asbestos that was applied to the BMA Building was defective?

A. Yes.

Q. What is that opinion?

A. I think it was unreasonably dangerous.

Q. And with the asbestos sitting on top of the ceiling tile does that meet the definition of friable?

A. Sure.

Q. What does friable mean?

A. It means that something can be crushed in your hand, but this sounds like it was already crushed. It was dust, dust falling.

Q. And when you've got asbestos fibers sitting on top of ceiling tiles in an occupied building, do you have an opinion to within a reasonable degree of engineering certainty as to whether that is an immediate threat of the release of asbestos fibers?

A. Obviously, it is.

Q. Do you have an opinion to within a reasonable degree of engineering certainty as to whether that is an unreasonably dangerous condition?

A. Yes.

Q. What is that opinion?

A. I believe that is an unreasonably dangerous condition.

Tr. 459-60.

Plaintiffs' Verdict Directors

Plaintiffs submitted their claims against Federal-Mogul and T & N asserting theories of strict liability defective design, strict liability failure to warn, negligent manufacture and negligent failure to warn. L.F. 659, 660, 661.⁵ Plaintiffs submitted their punitive damages claim under the following instruction.

INSTRUCTION NUMBER 12

If you find in favor of plaintiff Forest D. Hoskins under Instruction Number 9, and if you believe that:

First, at the time defendant Turner and Newall manufactured the Sprayed Limpet, defendant Turner and Newall knew the Sprayed Limpet contained asbestos which could cause lung disease when people were exposed to it, and

Second, defendant Turner and Newall knew or had information from which defendant Turner and Newall, in the

⁵ Copies of the Instructions 7, 8, 9, 12 and 15 are included in the addendum to this brief.

A69-73.

exercise of ordinary care, should have known that such conduct created a high degree of probability of injury, and

Third, defendant Turner and Newall thereby showed complete indifference to or conscious disregard for the safety of others, or

If you find in favor of plaintiff Forest D. Hoskins under Instruction Number 7 and if you believe:

First, at the time defendant Turner and Newall manufactured the Sprayed Limpet, defendant Turner and Newall knew of the defective condition and danger submitted in Instruction Number 7, and

Second, defendant Turner and Newall thereby showed complete indifference to or conscious disregard for the safety of others, or

If you find in favor of plaintiff Forest D. Hoskins under Instruction Number 8 and if you believe:

First, at the time defendant Turner and Newall manufactured the Sprayed Limpet, defendant Turner and Newall knew of the danger submitted in Instruction Number 8, and

Second, defendant Turner and Newall thereby showed complete indifference to or conscious disregard for the safety

of others,

then in Verdict A, you may find that defendant Turner and Newall is liable for punitive damages.

If you find that defendant Turner and Newall is liable for punitive damages in this stage of the trial, you will be given further instruction for assessing the amount of punitive damages in the second stage of the trial.

L.F.664; A72.

Plaintiffs' Closing Argument

The parties' medical experts disagreed over whether Mr. Hoskins had ever suffered from mesothelioma. *See* pp. 15-19, *supra*. During his final closing argument plaintiffs' counsel, for the first time, accused defendants of deliberately failing to provide Dr. Churg, or Dr. Churg of failing to review, all available tissue samples and slides necessary to accurately diagnose Mr. Hoskins' condition. After comparing the number of slides Dr. Lieberman had analyzed in diagnosing Mr. Hoskins' condition and the number of slides Dr. Churg had analyzed, plaintiffs' counsel made the following argument.

Then why didn't . . . [defendants] give . . . [Dr. Churg] the other 14 slides? Why didn't they show him the 14 slides? Why didn't he look at those 14 slides? What are they trying to hide? Why wasn't that brought out?. . . Why didn't they show it to this fellow that's supposed to be the world's greatest, world's greatest expert? . . .

The doctors that tried to save Dino's life and have tried to extend his life, they looked at all of it. And . . . [defendants] didn't show it to . . . [Dr. Churg] or he didn't see it. One or the other. Either he didn't get it or he didn't look at it. Either way, that's where the tissue is that shows it's mesothelioma.

And remember Dr. Hannah said I took a generous biopsy. He took a lot of tissue. But Dr. Churg, for some strange reason, didn't get to look at 14 of the 20 slides. You go upstairs when you deliberate in this case and you ask yourselves why, why are they doing this? . . .

* * *

Maybe they just didn't like the opinions of Dr. Lieberman and the other six doctors that are trying to save Dino Hoskins' life. So they found another doctor to look at some of the evidence. It's obvious. It's the same thing they have been doing since 1924. They don't give you the truth. They don't give you all of the evidence and they expect you to just sit there and accept it. What they've done is obscene.

Tr. 935-937.

At the end of plaintiffs' argument, defendants moved for a mistrial. Tr. 945-46. Defendants pointed out that there was no evidence that they had withheld any slides from

Dr. Churg. Tr. 945-46. Defendants requested that they be allowed to explain to the jury the chain of custody of the slides and made an offer of proof of documents establishing that plaintiffs' counsel had assumed responsibility for obtaining Mr. Hoskins' slides for use by all parties, that plaintiffs' counsel had sent slides to defendants' attorneys without ever indicating that there were other slides available, and that defendants had given to Dr. Churg all of the slides that plaintiffs' counsel had given them. Tr. 946, 960-963; Exs. 287, 288, 289; A63-4, A67-8. Defendants showed the Court a Stipulation signed by counsel for the parties and filed with the Court on November 2, 2000, in which the parties agreed that "any and all" tissue samples, including slides, in the possession or control of Memorial Sloan Kettering "be released to the Accurso Law Firm." Ex. 290; A65-A66. The Stipulation further provided that the tissue samples "will be made available at the same time to all parties to this lawsuit."⁶ Defendants had entered into the Stipulation in response to correspondence from plaintiffs' counsel stating that defendants would have difficulty in gaining access to the slides or tissue samples in the possession of Memorial Sloan Kettering. Ex. 287; A67-8. The trial court refused to reopen the case to permit the introduction of exhibits showing the chain of custody of the slides, refused to permit defendants to explain why they had given Dr. Churg the slides they had, and denied the motion for mistrial. Tr. 946, 960-64.

⁶ Copies of Exhibits 287, 288 and 290 (the Stipulation) to this brief are attached in the appendix to this brief. A63-68.

The jury returned its verdict awarding a total of \$3 million in compensatory damages to plaintiffs - \$2,000,000 to Mr. Hoskins and \$1,000,000 to Mrs. Hoskins – and finding that defendants were liable for punitive damages. Defendants then expressed their intention, in the second phase of the trial, to present their evidence that they had entered into a stipulation under which plaintiffs’ counsel were responsible for obtaining any and all slides and making them equally available to all parties; that they had received slides from plaintiffs’ counsel pursuant to that stipulation; and that they had given Dr. Churg all the slides that plaintiffs’ counsel had given them. Tr. 966-67. Plaintiffs objected that the evidence was not relevant to the amount of punitive damages. The trial court precluded defendants from presenting any evidence or argument explaining what slides they had provided to their experts and where they had obtained those slides, and ruled that the second phase of the trial would be strictly limited to evidence and argument regarding only financial information. Tr. 975, 976. After deliberating, the jury awarded \$7 million in punitive damages. L.F. 691.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION FOR DIRECTED VERDICT ON PLAINTIFFS' CLAIM FOR PUNITIVE DAMAGES, IN GIVING PLAINTIFFS' INSTRUCTION 12, AND IN DENYING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON PUNITIVE DAMAGES, FOR THE REASON THAT PLAINTIFF FAILED TO PROVE (1) THAT, AFTER APPLICATION, SPRAYED LIMPET HAD A PROPENSITY TO RELEASE FIBERS INTO THE AIR, (2) THAT DEFENDANTS HAD ACTUAL KNOWLEDGE THAT THE SPRAYED LIMPET POSED A HEALTH HAZARD TO PERSONS LIKE MR. HOSKINS WORKING IN THE BMA TOWER YEARS AFTER APPLICATION OF THE FIREPROOFING, OR (3) THAT DEFENDANTS KNEW OR SHOULD HAVE KNOWN THAT THEIR SALE OF SPRAYED LIMPET CREATED A HIGH DEGREE OF PROBABILITY OF INJURY TO PERSONS WORKING IN THE BUILDING 15 YEARS AFTER APPLICATION OF THE PRODUCT. THERE WAS NO EVIDENCE THAT DEFENDANTS HAD ACTUAL KNOWLEDGE THAT AFTER APPLICATION SPRAYED LIMPET TENDED TO RELEASE ASBESTOS FIBERS INTO THE AIR OR THAT AN ASBESTOS-CONTAINING FIREPROOFING PRODUCT POSED RISKS OF LUNG DISEASE TO PERSONS IN A BUILDING 15 YEARS AFTER THE FIREPROOFING HAD BEEN APPLIED.

Kansas City v. Keene Corp., 855 S.W.2d 360 (Mo. 1993)

Angotti v. Celotex Corp., 812 S.W.2d 742 (Mo. App. 1991)

Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc., 700 S.W.2d 426

(Mo. banc 1985)

Sch. Dist. of City of Independence v. U.S. Gypsum Co., 750 S.W.2d 442

(Mo. App. 1988)

II. THE TRIAL COURT ERRED IN GIVING INSTRUCTION 12 FOR THE REASON THAT THE EVIDENCE DID NOT SUPPORT EACH OF THE DISJUNCTIVE THEORIES OF RECOVERY OF PUNITIVE DAMAGES IN THAT PLAINTIFFS FAILED TO PROVE (1) THAT AFTER APPLICATION SPRAYED LIMPET HAD A PROPENSITY TO RELEASE FIBERS INTO THE AIR, (2) THAT DEFENDANTS HAD ACTUAL KNOWLEDGE THAT THE FIREPROOFING PRODUCT SPRAYED LIMPET POSED A HEALTH HAZARD TO PERSONS LIKE MR. HOSKINS WORKING IN THE BMA TOWER AFTER APPLICATION OF THE FIREPROOFING, OR (3) THAT DEFENDANTS KNEW OR SHOULD HAVE KNOWN THAT THEIR SALE OF SPRAYED LIMPET CREATED A HIGH DEGREE OF PROBABILITY OF INJURY TO PERSONS WORKING IN THE BUILDING 15 YEARS AFTER APPLICATION OF THE PRODUCT. THERE WAS NO EVIDENCE THAT DEFENDANTS KNEW THAT AFTER APPLICATION SPRAYED LIMPET TENDED TO RELEASE ASBESTOS FIBERS INTO THE AIR OR THAT SPRAYED LIMPET POSED RISKS OF LUNG DISEASE TO PERSONS IN A BUILDING 15 YEARS AFTER THE PRODUCT HAD BEEN APPLIED.

Stacy v. Truman Medical Ctr., 836 S.W.2d 911 (Mo. 1992)

Deckard v. O'Reilly Automotive, Inc., 31 S.W.3d 6 (Mo. App. 2000)

Kansas City v. Keene Corp., 855 S.W.2d 360 (Mo. 1993)

III. THE TRIAL COURT ERRED IN REFUSING TO DECLARE A MISTRIAL, IN REFUSING TO REOPEN THE EVIDENCE OR ALLOW ADDITIONAL ARGUMENT, AND IN DENYING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL BECAUSE PLAINTIFFS' CLOSING ARGUMENT WAS IMPROPER

AND PREJUDICIAL IN THAT: (1) PLAINTIFFS' COUNSEL, FOR THE FIRST TIME IN HIS FINAL CLOSING ARGUMENT TO THE JURY, ARGUED THAT DEFENDANTS HID AND WITHHELD RELEVANT EVIDENCE FROM THEIR EXPERTS WHEN (A) THE PARTIES HAD ENTERED INTO A STIPULATION UNDER THE TERMS OF WHICH PLAINTIFFS' COUNSEL WERE TO OBTAIN AND PROVIDE ALL AVAILABLE MEDICAL SLIDES TO DEFENDANTS; (B) DEFENDANTS PROVIDED TO THEIR EXPERTS ALL SLIDES THEY HAD RECEIVED FROM PLAINTIFFS' COUNSEL PURSUANT TO THE STIPULATION; AND (C) THERE WAS NO EVIDENCE THAT DEFENDANTS HAD WITHHELD ADDITIONAL SLIDE EVIDENCE; AND (2) PLAINTIFFS' FINAL CLOSING ARGUMENT LEFT THE JURY WITH THE ERRONEOUS AND PREJUDICIAL IMPRESSION THAT DEFENSE COUNSEL HAD KNOWINGLY AND WILLFULLY WITHHELD KEY EVIDENCE FROM THEIR EXPERTS AND THAT DEFENSE COUNSEL HAD ATTEMPTED TO MISLEAD THE JURY THROUGH TAINTED EXPERT TESTIMONY, WHICH INFLAMED THE JURY AND PREJUDICED THE DEFENDANTS IN THE JURY'S DELIBERATIONS ON LIABILITY AND DAMAGE ISSUES.

Tune v. Synergy Gas Corporation, 883 S.W.2d 10 (Mo. 1994)

Shaw v. Terminal Railroad Assn. of St. Louis, 344 S.W.2d 32 (Mo. 1961)

Heisler v. Jetco Service, 849 S.W.2d 91 (Mo. App. 1993)

Pride v. Lamberg, 366 S.W.2d 441 (Mo. 1963)

IV. THE TRIAL COURT ERRED IN EXCLUDING ALL EVIDENCE EXCEPT EVIDENCE OF THE FINANCIAL CONDITION OF THE DEFENDANT IN THE SECOND PHASE OF THE TRIAL BECAUSE MITIGATING EVIDENCE RELATING TO THE CIRCUMSTANCES UNDER WHICH DEFENDANTS OBTAINED MEDICAL SLIDES WAS RELEVANT AND ADMISSIBLE IN THAT

SUCH EVIDENCE, INCLUDING (1) THE STIPULATION BETWEEN THE PARTIES UNDER WHICH PLAINTIFFS' COUNSEL WERE TO OBTAIN ANY AND ALL SLIDES AND MAKE THEM EQUALLY AVAILABLE TO ALL PARTIES; (2) EVIDENCE OF WHICH SLIDES PLAINTIFFS' COUNSEL PROVIDED TO DEFENDANTS; AND (3) EVIDENCE THAT DEFENDANTS PROVIDED ALL OF THE SLIDES THEY RECEIVED FROM PLAINTIFFS TO THEIR EXPERTS WAS RELEVANT TO THE JURY'S CONSIDERATION OF THE SIZE OF THE AWARD APPROPRIATE TO PUNISH DEFENDANTS' CONDUCT WHEN THE CONDUCT BEING PUNISHED INCLUDED ALLEGED HIDING AND WITHHOLDING OF EVIDENCE AS PART OF A PATTERN OF UNTRUTHFULNESS, WHEN THERE WAS NO EVIDENCE IN THE CASE TO WARRANT SUCH AN ARGUMENT AND DEFENDANTS HAD ALREADY BEEN DENIED THE OPPORTUNITY TO ADDRESS THAT ISSUE WITH THE JURY IN THE FIRST PHASE OF THE BIFURCATED TRIAL.

Maugh v. Chrysler Corp., 818 S.W.2d 658 (Mo. App. 1991)

Olinger v. General Heating & Cooling Co., 896 S.W.2d 43 (Mo. App. 1994)

Tune v. Synergy Gas Corporation, 883 S.W.2d 10 (Mo. 1994)

Holcroft v. Missouri-Kansas-Texas Railroad Co., 607 S.W.2d 158

(Mo. App. 1980)

§ 510.263 R.S.Mo. (Supp. 2002)

V. THE TRIAL COURT ERRED IN AWARDING PLAINTIFFS PREJUDGMENT INTEREST BECAUSE PREJUDGMENT INTEREST IS NOT AUTHORIZED UNDER MISSOURI LAW IN THAT (1) PREJUDGMENT INTEREST IS ONLY RECOVERABLE UNDER § 408.040 R.S.MO. (2001) WHEN THE AMOUNT OF

THE JUDGMENT EXCEEDS THE DEMAND FOR PAYMENT AND IN THIS CASE THE JUDGMENT DID NOT EXCEED THE DEMAND; AND (2) THE FINAL JUDGMENT CONSISTED SOLELY OF PUNITIVE DAMAGES AND AN AWARD OF PREJUDGMENT INTEREST ON PUNITIVE DAMAGES DOES NOT SERVE THE PUBLIC POLICIES ON WHICH MISSOURI'S PREJUDGMENT INTEREST STATUTE, § 408.040.2 RSMO (2001), ARE BASED.

Vincent v. Johnson, 833 S.W.2d 859 (Mo. 1992)

Brown v. Donham, 900 S.W.2d 630 (Mo. 1995)

Quality Business Accessories, Inc. v. National Business Products, Inc.,
880 S.W.2d 333 (Mo. App. 1994)

General Motors Corp. v. Moseley, 447 S.E.2d 302 (Ga. App. 1994)

§ 408.040 R.S.Mo. (2001)

§ 537.060 R.S.Mo. (2000)

VI. THE TRIAL COURT ERRED IN SUBMITTING PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES AND IN DENYING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON THE CLAIM FOR PUNITIVE DAMAGES BECAUSE SECTION 537.675.2, PURPORTING TO AUTHORIZE SUCH DAMAGES AND AUTHORIZING THE PAYMENT OF A PORTION OF SUCH DAMAGES TO THE STATE OF MISSOURI, IS INVALID, FACIALLY AND AS APPLIED, AND VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 21 OF THE MISSOURI CONSTITUTION AND THE TAKINGS CLAUSES OF THE UNITED STATES AND MISSOURI CONSTITUTIONS IN THAT THE STATUTE, WHICH HAS THE EFFECT OF FORCING A TORT DEFENDANT TO PAY MONEY TO THE STATE, IMPOSES A PENAL FINE, BUT THERE ARE

INADEQUATE STANDARDS FOR THE IMPOSITION AND REVIEW OF SUCH DAMAGES AND INADEQUATE PROCEDURAL SAFEGUARDS TO PROTECT THE DEFENDANTS' RIGHTS, AND THE STATUTE EFFECTS THE IMPOSITION OF AN EXCESSIVE FINE, DISPROPORTIONATE TO THE CONDUCT AT ISSUE IN THE CASE AND EFFECTS THE TAKING OF DEFENDANT'S PROPERTY FOR PUBLIC USE.

General Motors Corp. v. Director of Revenue, 981 S.W.2d 561 (Mo. banc 1998)

Browning-Ferris Indus. Of Vermont, Inc. v. Kelco Disposal, Inc.,

492 U.S. 257 (1989)

Austin v. United States, 509 U.S. 602 (1993)

Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 104 (Mo. banc 1996)

§ 537.675 R.S.Mo. (2000)

§ 560.021 R.S.Mo. (2000)

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION FOR DIRECTED VERDICT ON PLAINTIFFS' CLAIM FOR PUNITIVE DAMAGES, IN GIVING PLAINTIFFS' INSTRUCTION 12, AND IN DENYING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON PUNITIVE DAMAGES, FOR THE REASON THAT PLAINTIFF FAILED TO PROVE (1) THAT, AFTER APPLICATION, SPRAYED LIMPET HAD A PROPENSITY TO RELEASE FIBERS INTO THE AIR, (2) THAT DEFENDANTS HAD ACTUAL KNOWLEDGE THAT THE SPRAYED LIMPET POSED A HEALTH HAZARD TO PERSONS LIKE MR. HOSKINS WORKING IN THE BMA TOWER YEARS AFTER APPLICATION OF THE FIREPROOFING, OR (3) THAT DEFENDANTS KNEW OR SHOULD HAVE KNOWN THAT THEIR SALE OF SPRAYED LIMPET CREATED A HIGH DEGREE OF PROBABILITY OF INJURY TO PERSONS WORKING IN THE BUILDING 15 YEARS AFTER APPLICATION OF THE PRODUCT. THERE WAS NO EVIDENCE THAT DEFENDANTS HAD ACTUAL KNOWLEDGE THAT AFTER APPLICATION SPRAYED LIMPET TENDED TO RELEASE ASBESTOS FIBERS INTO THE AIR OR THAT AN ASBESTOS-CONTAINING FIREPROOFING PRODUCT POSED RISKS OF LUNG DISEASE TO PERSONS IN A BUILDING 15 YEARS AFTER THE FIREPROOFING HAD BEEN APPLIED.

Under Missouri law, plaintiffs were required to prove that T & N knew at the time of sale that Sprayed Limpet was defective and unreasonably dangerous because it had a propensity to release fibers into the air and posed a health risk to persons like Mr. Hoskins. Notwithstanding plaintiffs' evidence of developing knowledge of health risks associated with certain types of asbestos exposure in the 1950's and early 1960's,

plaintiffs did not present any evidence that T & N knew that in-place Sprayed Limpet released asbestos fibers into the air after application, that Sprayed Limpet had a propensity to come loose from the surfaces to which it had been applied and create dusty conditions, or that it was unreasonably dangerous to maintenance workers or other building occupants years after application. Because the record lacks any evidence of the required knowledge, defendants were entitled to a directed verdict on plaintiff's claim for punitive damages.

A. Standard Of Review

The sufficiency of the evidence to support a claim for punitive damages is a question of law within the reasoned discretion of the trial court. *Moon v. Tower Grove Bank & Trust Co.*, 691 S.W.2d 399, 401 (Mo. App. 1985). In assessing whether the plaintiff made a submissible claim for punitive damages, the appellate court reviews the evidence in the light most favorable to the plaintiff, affording the plaintiff the benefit of all reasonable inferences supported by the evidence. *See Cole v. Goodyear Tire & Rubber Co.*, 967 S.W.2d 176, 183 (Mo. App. 1998). The Court's review is not limited to isolated facts, but includes all of the evidence adduced in plaintiffs' behalf. *Budding v. Garland Floor Co.*, 939 S.W.2d 419, 421 (Mo. App. 1996). However, the Court does not supply missing evidence or ignore evidence binding on the plaintiff, or give the plaintiff the benefit of unreasonable, speculative or forced inferences. *Steward v. Goetz*, 945 S.W.2d 520, 538 (Mo. App. 1997). The Court need not disregard all evidence unfavorable to appellant, but rather must disregard only defendants' evidence unfavorable to plaintiffs. *Budding*, 939 S.W.2d at 421.

Under a normal burden of proof, plaintiff must support each element of his claim with “substantial” evidence. *Poluski v. Richardson Transp.*, 877 S.W.2d 709, 713 (Mo. App. 1994); *see also Mathis v. Jones Store Co.*, 952 S.W.2d 360, 366 (Mo. App. 1997) (“If one or more of the elements of a cause of action are not supported by substantial evidence, a motion for directed verdict and for judgment N.O.V. should be granted”). Substantial evidence is competent evidence from which a trier of fact can reasonably decide the case. *Garrett v. Overland Garage & Parts, Inc.*, 882 S.W.2d 188, 191 (Mo. App. 1994).

Under this Court’s holding in *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 111 (Mo. banc 1996), the evidence supporting each element of a claim for punitive damages must not only be “substantial,” it must be “clear and convincing.” As recognized by Missouri appellate courts, the clear and convincing standard should require that the plaintiff’s evidence instantly tilts the scales in his favor when weighed against evidence in opposition, and the fact finder’s mind must be left with an abiding conviction that the evidence is true. *See Lewis v. FAG Bearings Corp.*, 5 S.W.3d 579, 582-83 (Mo. App. 1999); *Marsh v. State*, 942 S.W.2d 385, 390 (Mo. App. 1997). This rigorous standard is consistent with the established principle that the remedy of punitive damages is “so extraordinary or harsh that it should be applied only sparingly.” *Alcorn v. Union Pacific R.R. Co.*, 50 S.W.3d 226, 247-48 (Mo. 2001), quoting *Rodriguez*, 936 S.W.2d at 110; *see also Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71, 75 (Mo. banc 1990) (“the uniform tenor of the recent cases is that punitive damages are to be the exception rather than the rule”). Because instructional standards for punitive damages are

necessarily general, submission of a punitive damage claim to the jury requires “special judicial scrutiny” to determine whether the conduct was so egregious that it was “tantamount to intentional wrongdoing.” *Alcorn*, 50 S.W.3d at 247-48; *see also Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001).

B. Plaintiffs Failed To Prove That Defendants Had Actual Knowledge That Sprayed Limpet Released Asbestos Fibers After Application Or That It Was Unreasonably Dangerous To A Person Working In A Building Several Years After The Fireproofing Had Been Applied.

Plaintiffs submitted their punitive damage claim on strict liability theories of product defect and failure to warn. Instruction 12; L.F. 664; A73. In a claim seeking damages based on strict liability, punitive damages may be awarded only where the defendant actually knew of the defect and danger of the product and, by selling the product, showed complete indifference to and conscious disregard for the safety of others. *Kansas City v. Keene Corp.*, 855 S.W.2d 360, 374 (Mo. 1993), citing *Angotti v. Celotex Corp.*, 812 S.W.2d 742, 746 (Mo. App. 1991). Missouri does not permit submission of a punitive damages claim in a product liability case on a theory of constructive knowledge, or what a party should have known. *Angotti*, 812 S.W.2d at 746; *see also Sch. Dist. of Independence v. U.S. Gypsum Co.*, 750 S.W.2d 442, 446 (Mo. App. 1988) (requiring “actual knowledge of product defect”). *Keene*, *Angotti* and *U.S. Gypsum* all involved claims relating to asbestos.

Moreover, “complete indifference or conscious disregard” refers to “an act or omission, though properly characterized as negligent, [that] manifest[s] such reckless indifference to the rights of others that the law will imply that an injury resulting from it was intentionally inflicted.” *Alack v. Vic Tanny Int’l of Mo., Inc.*, 923 S.W.2d 330, 339 (Mo. banc 1996) (quoting *Hoover’s Dairy, Inc.*, 700 S.W.2d at 435); *see also Lopez v. Three Rivers Elec. Coop.*, 26 S.W.3d 151, 160 (Mo. banc 2000). (“The defendant’s conduct must be tantamount to intentional wrongdoing where the natural and probable consequence of the conduct is injury”); *Alcorn*, 50 S.W.3d at 248 (Careful judicial scrutiny needed to determine whether the conduct was “so egregious that it was tantamount to intentional wrongdoing”).

1. Plaintiffs Failed To Prove That Defendants Had Actual Knowledge That Sprayed Limpet Had A Propensity To Release Asbestos Fibers Into The Air Years After Application.

As noted above, plaintiffs submitted their punitive damages claim based on testimony that Sprayed Limpet was unreasonably dangerous because it released asbestos fibers into the air creating a health risk to those working around it. To make a submissible case, plaintiffs therefore had to prove that defendants, at the time of sale, knew that after application Sprayed Limpet had a propensity to release fibers into the air. *Sch. Dist. of Independence v. U.S. Gypsum Company*, 750 S.W.2d 442, 446 (Mo. App. 1988) (plaintiff required to prove actual knowledge of product’s propensity to release fibers). Plaintiffs failed to prove the required knowledge.

There was no evidence that in-place Sprayed Limpet released asbestos fibers into the air, much less that defendants had knowledge that it did so. Plaintiffs instead claimed that the Sprayed Limpet was defective and unreasonably dangerous because it fell from the surfaces to which it had been applied at the BMA building, resulting in dusty conditions for the operating engineers working in the soffit area. *See* Tr. 459-60 (Castleman's testimony that Sprayed Limpet was defective and unreasonably dangerous); *see also* Tr. 343, 346-47 (plaintiffs' counsel contends that the Hoskins' claim of defect is similar to that of plaintiffs in *Keene*: the sprayed product falling in small pieces resulting in the release of asbestos fibers). Plaintiffs presented testimony that Sprayed Limpet had been lying in piles on the tiles of the suspended ceiling in the building and that those who had worked in the soffit areas had been exposed to the dust created by the fallen asbestos. *See* pp. 12-14, *supra*. When plaintiffs' expert witness Barry Castleman was asked to give his opinion about whether the Sprayed Limpet was defective and unreasonably dangerous, he was specifically asked to assume the Sprayed Limpet had fallen from the surfaces to which it had been applied, was lying in piles on the ceiling tiles, and, because of that condition, was releasing dust into the air. Tr. 459-60; pp.26-28, *supra*. Plaintiffs' witnesses also testified that Sprayed Limpet dust would fall from the exposed areas on the 19th floor onto the workers below. Tr. 237-38, 258.

However, plaintiffs did not present *any* evidence that defendants knew that Sprayed Limpet had a propensity to release asbestos into the air after its initial application. There was no evidence that there was a prior problem with Sprayed Limpet (or any other sprayed fireproofing product) coming loose and creating dusty conditions

after application, much less that defendants had any knowledge of such a problem. There was no evidence that, in any building before or since the BMA building, Sprayed Limpet had *ever* come loose in the manner described by plaintiffs' witnesses.

In their attempt to prove knowledge, plaintiffs only presented evidence of a developing knowledge of potential health hazards associated with certain types of exposure to asbestos. But the evidence of a general knowledge of hazards associated with exposure to asbestos dust under entirely different working or manufacturing conditions is not sufficient to prove defendants' knowledge that the product was unreasonably dangerous because it had a propensity to release asbestos fibers into the air. *See Sch. Dist. of Independence v. U.S. Gypsum*, 750 S.W.2d at 448 (documents that related only to defendant's general knowledge of the hazards of asbestos exposure "had no tendency to prove . . . [defendant's] knowledge of . . . [fireproofing product's] propensity to release asbestos fibers into the atmosphere").

Plaintiffs failed to present any evidence, much less clear and convincing evidence, that defendants had actual knowledge that, years after its initial application, in-place Sprayed Limpet would release asbestos fibers or that Sprayed Limpet would fall away from the surfaces to which it had been applied and create dusty conditions. Because of this failure of proof, defendants were entitled to a directed verdict on plaintiffs' claim for punitive damages. *See Sch. Dist. of Independence v. U.S. Gypsum*, 750 S.W.2d at 446. ("The School District's allegation of defect in the product Audicote was that Audicote released asbestos fibers into the atmosphere. To make a submissible case for punitive

damages, the School District was required to produce evidence that USG had actual knowledge of the product Audicote’s propensity to release asbestos fibers”).

2. Plaintiffs Failed To Prove That Sprayed Limpet Was Unreasonably Dangerous To The Class Of Persons Of Which Mr. Hoskins Was A Member.

This Court in *Keene* and the court of appeals in *Angotti* also have explicitly held that the elements of knowledge and conscious disregard require a plaintiff seeking punitive damages to prove that the defendant had actual knowledge that the product was dangerous to the particular class of persons of which the plaintiff was a member. Plaintiffs failed to prove the required knowledge.

Keene involved a claim for actual and punitive damages based on the use of an asbestos fireproofing spray – similar to Sprayed Limpet – in the construction of the Kansas City International Airport. The plaintiff’s theory of liability in *Keene* was similar to plaintiffs here – that the fireproofing was subject to “dusting” and “flaking,” which created an unreasonable danger of injury to airport employees and patrons and required removal of the fireproofing at great cost to the plaintiff.⁷ Kansas City presented evidence that as of 1972, the date of sale, defendant Keene was aware that the product was dangerous to unprotected workers regularly exposed to the product during “its

⁷ As noted above, the Hoskins’ attorney argued to the trial court that their theory of defect and unreasonable danger was similar to that of the plaintiffs in *Keene*. Tr. 343, 346-47.

manufacture, application or, perhaps, removal.” *Id.* at 375. Indeed, except for a later date of sale in *Keene*, the factual scenario in *Keene* is similar to the factual scenario in the present case, including a similar type of sprayed fireproofing product. Kansas City also pointed to an admission by a Keene employee that fireproofing would be disturbed during renovation or demolition. *Id.* The jury awarded Kansas City punitive damages, and the trial court granted judgment notwithstanding the verdict.

Affirming the trial court, and applying a preponderance of the evidence standard, this Court held that Kansas City was required to prove that, at the time of sale, defendants had actual knowledge that its fireproofing product was unreasonably dangerous to employees and patrons of the airport. 855 S.W.2d at 375. This Court stated that Kansas City’s evidence of risks to those involved in the manufacture and application of asbestos-containing materials was insufficient to prove actual knowledge of health risks to other classes of persons. *Id.* (“The evidence of knowledge of the danger to unprotected construction workers is insufficient to establish that Keene exhibited a complete indifference or conscious disregard to the safety of KCI employees or patrons using the terminals”). The same conclusion is required here.

In *Angotti*, the court of appeals, reversing a jury verdict awarding punitive damages to a personal injury plaintiff, specifically discussed the level of knowledge required to support a claim for punitive damages in an asbestos personal injury case. *Angotti* alleged that he was suffering from asbestosis as a result of his work as an insulator applying asbestos-containing products from 1948 to 1982. *Id.* at 745. Mr. Angotti presented evidence of a developing knowledge of the harmful effects of exposure

to asbestos, including health problems experienced by persons exposed during the mining and manufacturing processes. *Id.* at 747-48. Also applying a preponderance of the evidence standard, the court of appeals held that evidence of knowledge of asbestosis among workers at a manufacturing facility was not proof that by the mid-1960's defendant Celotex had actual knowledge that the product was unreasonably dangerous to an insulator like Mr. Angotti. *Id.* at 747. *See also Hogan v. Armstrong World Industries*, 840 S.W.2d 230, 233 (Mo. App. 1992) (ordering a directed verdict in favor of Celotex based on analysis in *Angotti*.)

Angotti also makes clear that the test is one of actual knowledge at the time of sale, not evidence of hypotheses or expressions of concern that exposures of a lesser degree may someday be considered dangerous: “[a] forecast of what may be determined in the future does not establish present knowledge that a health hazard existed for those working as insulators.” *Id.* at 750.

Plaintiffs failed to meet their burden of proof under *Keene* and *Angotti*. Plaintiffs failed to present any evidence, much less clear and convincing evidence, that T & N had actual knowledge that Sprayed Limpet was unreasonably dangerous to someone like Mr. Hoskins, who would be working around the fireproofing 15 years after application.

Plaintiffs attempted to prove the required knowledge through the testimony of Barry Castleman and the exhibits introduced through him. Relying on his book, which was never offered into evidence, Castleman was permitted to testify at length about the developing knowledge of an association between certain types of exposure to asbestos dust and certain pulmonary diseases during the first three quarters of the twentieth

century. Castleman identified case studies and other documents discussing asbestosis and cancer among those working in or living near asbestos mines, working in factories involved in the actual manufacture of asbestos-containing products, or working as insulators who actually applied asbestos-containing fireproofing or insulation on their full-time jobs. Tr. 392-94. However, there was no showing that any of these jobs, or the exposure they entailed, were in any way comparable to what Mr. Hoskins was doing in the BMA building, much less that defendants had actual knowledge of any similarity.

Castleman also discussed a list he had prepared of T & N employees who died of mesothelioma, all but one of whom worked in a factory using “raw asbestos” to make brake linings or “whatever.” Tr. 470. The only exception on that list was a “loader” at the factory who, Castleman speculated, was handling finished products. Tr. 470 (“he was only handling, I would think, finished product”). Even assuming Castleman’s unfounded speculation about the activities of a “loader of goods” is competent evidence, evidence of disease in a single individual loading goods in a factory where raw asbestos was used to manufacture products is not evidence of actual knowledge of a health risk to someone performing maintenance and improvement tasks in a building 15 years after fireproofing has been applied.

Castleman’s reference to a 1962 T & N memorandum – discussed over defendants’ objection and never introduced into evidence – is equally insufficient. Because the document was never presented or introduced into evidence, it is impossible to determine its exact contents or determine whether Castleman is quoting or paraphrasing. Tr. 384-86. Castleman refers to an apparent statement “that we are still

liable to come unstuck according to Mr. Smith [not identified] when somebody eventually comes in to remove this asbestos.” Tr. 385-86. Even if Castleman’s testimony about the undisclosed document is entitled to any weight, this oblique reference to asbestos removal certainly is not clear and convincing evidence that defendants had actual knowledge that the Sprayed Limpet was unreasonably dangerous to someone with exposure similar to Mr. Hoskins.

Equally unavailing are the documents plaintiffs actually did introduce into evidence through Castleman. See Exs. 85, 86, 87, 88, 90, 91, 95, 99, 100, 103, 138, and 143; A1-A62. Some of those that pre-date 1963 – the latest possible date of sale in this case – reflect concerns about a possible connection between certain types of exposure to certain kinds of asbestos and certain pulmonary diseases. However, none of these pre-sale documents suggest that persons with jobs or exposure similar to those of Mr. Hoskins were developing pulmonary disease, or even were at risk of doing so.⁸

⁸ In order to prove that defendants knew that Sprayed Limpet was unreasonably dangerous to someone like Mr. Hoskins, working in the building 15 years after application, plaintiffs had to prove by clear and convincing evidence that defendants knew Sprayed Limpet had a “propensity to release asbestos fibers” after application. See *U.S. Gypsum*, 750 S.W.2d at 446. As demonstrated above, plaintiffs failed to present any evidence that T & N knew, at the time of sale, that after application Sprayed Limpet tended to release asbestos fibers into the air. See pp. 46-9, *supra*.

Exhibit 86 is a 1956 letter from a solicitor in England regarding a pending asbestos claim. A4. The letter is silent as to the nature of the claimant's exposure. Exhibit 143, minutes of a 1959 meeting of the Management Committee of the Asbestosis Research Council, includes a reference to a 1959 report by Dr. J. C. Wagner regarding incidents of mesothelioma in inhabitants of an asbestos mining region of South Africa. A58. Exhibit 95 is a 1959 T & N memorandum again referring to Dr. Wagner's 1959 report. A22. Neither Exhibit 143 nor 95 describe the type of exposure involved – except that those involved lived in an area where raw asbestos was being mined – or suggest that exposure to finished in-place products years after application is unreasonably dangerous. Dr. Wagner's 1959 report was never introduced into evidence. Exhibit 138 is a 1960 paper by Dr. Wagner discussing 33 mesothelioma case studies of persons from the same asbestos mining region of South Africa, where raw asbestos was being mined and processed. A72. All but one of the 33 persons had a history of significant exposure to asbestos either from working in or living near the mines or performing insulation or other similar work. The remaining case study did not indicate a history of exposure. All of these case studies involved a substantially different type of exposure than that experienced by Mr. Hoskins. Exhibit 103, which is a 1960 report about Dr. Knox's visit to the United States for a meeting of the International Congress on Occupational Health, contains no discussion of health risks to anyone with jobs or exposure similar to those of Mr. Hoskins. A29.

The remaining exhibits – 85, 87, 88, 90, 99 and 100 – all post-date the last possible date of sale of the Sprayed Limpet used in the BMA building, and thus have no

relevance to the issue of defendant's knowledge at the time of the sale. None of these exhibits even suggest, much less establish by clear and convincing evidence, that in 1963 T & N had actual knowledge that Sprayed Limpet was unreasonably dangerous to someone working as an operating engineer – or in a similar capacity – after the application of the product. *See* pp. 23-4, *infra*; A1, A7, A10, A17, A23, A27, A74.

Angotti acknowledged that punitive damages might be recoverable “when there is evidence to show that a defendant had been put on notice . . . that relevant information in regard to the dangerousness of a product was available to show that the product was *actually known* to constitute a health hazard to a given class of individuals, and the defendant consciously chose to ignore the available information.” *Id.* at 746 (emphasis added). Despite the evidence in *Angotti* that, at the time of sale, asbestos was known to be dangerous to some classes of persons, the court found “the evidence did not establish that [defendant] . . . was put on notice and consciously chose to ignore information that showed its products were actually known to be harmful to insulators.” *Id.* at 748. As in *Angotti*, plaintiffs did not present any evidence that defendants were put on notice of and chose to ignore available information that Sprayed Limpet was known to be harmful for persons performing equipment maintenance in buildings in which the fireproofing had been applied years before.

Keene and *Angotti* were both decided under a preponderance of the evidence standard. Both require evidence that defendants had actual knowledge prior to sale that Sprayed Limpet was unreasonably dangerous to someone like Mr. Hoskins, working in a

building in which the fireproofing had been applied years before. Now *Rodriguez* requires plaintiffs to prove knowledge by clear and convincing evidence.

Plaintiffs did not prove the required knowledge, and the trial court erred in submitting plaintiffs' punitive damage claim based on strict liability.

C. **Plaintiffs Failed To Prove That Defendants Had The Knowledge Required To Submit A Claim For Punitive Damages Based On Their Negligence Claim.**

Plaintiffs also submitted their claim for punitive damages based on theories of negligent manufacture and negligent failure to warn. *See* Instructions 9 and 12, L.F. 661, 664. Instruction 12 required plaintiffs to prove that, at the time of manufacture, T & N “knew the Sprayed Limpet contained asbestos which could cause lung disease when people were exposed to it” – that is, that defendants had actual knowledge that, after application, Sprayed Limpet could cause lung disease to people with exposure similar to that of Mr. Hoskins. *See Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc.*, 700 S.W.2d 426, 437 (Mo. banc 1985); *Bostic v. Bill Dillard Shows, Inc.*, 828 S.W.2d 922, 925-26 (Mo. App. 1992) (“In fact, ‘actual knowledge of the dangerous condition is generally required’”), quoting *Hoover's Dairy*. As demonstrated above, pp. 46-9, there is no evidence that, at the time of manufacture or sale of Sprayed Limpet for use in the BMA building, T & N knew that Sprayed Limpet had a propensity to release asbestos fibers after application or that after application it was dangerous to the class of persons working in a building in which the fireproofing had been applied. Plaintiffs' evidence at most discussed developing general knowledge of possible health risks to those exposed as a result of the mining of raw asbestos or the actual manufacture or application of

asbestos-containing products. *See* pp. 49-56, *supra*. This is not enough under the law of Missouri.

Under plaintiffs' Instruction 12, submission of punitive damages in a negligence case also required clear and convincing evidence that defendants (1) knew or "had information from which defendant, in the exercise of ordinary care," should have known that the negligent manufacture (otherwise undefined) or negligent failure to warn created an unreasonable risk with a high degree of probability of injury to plaintiff, and (2) defendants showed complete indifference to or conscious disregard for the safety of plaintiff. L.F. 664; *Rodriguez*, 936 S.W.2d at 111; *Lopez v. Three Rivers Elec. Coop.*, 26 S.W.3d 151, 160 (Mo. banc 2000); *Alack v. Vic Tanny Int'l of Mo., Inc.*, 923 S.W.2d 330, 338-39 (Mo. banc 1996); *Hoover's Dairy*, 700 S.W.2d at 435-36; *Bostic*, 828 S.W.2d at 925-26.

As in the case of a claim based on strict liability, the defendant's knowledge must be specific to the plaintiff. There must be clear and convincing evidence that the defendant had knowledge that the act complained of posed a high probability of danger to the specific class of persons of which the plaintiff was a member. *Alack*, 923 S.W.2d at 338. "Vague and generalized knowledge of danger is insufficient" to support an award of punitive damages. *Id.* at 339; *see also Kansas City v. Keene Corp.*, 855 S.W.2d at 315 (evidence of a generalized knowledge that asbestos posed a danger to certain unprotected construction workers was not sufficient to warrant submission of punitive damages based on threat of harm to those outside that class of workers).

Plaintiffs failed to present any evidence that T & N knew, or had information from which it should have known, that its allegedly negligent conduct created a high probability of injury to Mr. Hoskins' class of persons. Instruction 12; *Alcorn*, 50 S.W.3d at 247; *Hoover's Dairy*, 700 S.W.2d at 436; *Alack*, 923 S.W.2d at 338; *Bostic*, 828 S.W.2d at 925. As discussed above, there was no evidence that, at the time of sale, T & N had information that its conduct in manufacturing Sprayed Limpet or selling it without a warning "posed an unreasonable risk that was highly probable to result in substantial injury to" maintenance personnel working around Sprayed Limpet after its application in a building. *Alack*, 923 S.W.2d at 338; *Hoover*, 700 S.W.2d at 436. Also, as discussed above, there was no evidence that after application Sprayed Limpet had a propensity to release asbestos dust into the air and thereby pose an unreasonable danger to people like Mr. Hoskins.

Punitive damages require clear and convincing evidence of intentional misconduct and a conscious disregard for the safety or well-being of the plaintiff. This burden requires clear and convincing evidence that T & N knew, at the time it sold the product, that it was creating a substantial risk of injury to plaintiff and that T & N acted anyway. Plaintiffs failed to prove this required knowledge, and defendants were entitled to a directed verdict or judgment notwithstanding the verdict on plaintiffs' claim for punitive damages. This Court should reverse the judgment awarding plaintiff punitive damages in this case and remand with directions to the trial court to enter judgment in favor of defendants on plaintiffs' claim for punitive damages.

II. THE TRIAL COURT ERRED IN GIVING INSTRUCTION 12 FOR THE REASON THAT THE EVIDENCE DID NOT SUPPORT EACH OF THE DISJUNCTIVE THEORIES OF RECOVERY OF PUNITIVE DAMAGES IN THAT PLAINTIFFS FAILED TO PROVE (1) THAT AFTER APPLICATION SPRAYED LIMPET HAD A PROPENSITY TO RELEASE FIBERS INTO THE AIR, (2) THAT DEFENDANTS HAD ACTUAL KNOWLEDGE THAT THE FIREPROOFING PRODUCT SPRAYED LIMPET POSED A HEALTH HAZARD TO PERSONS LIKE MR. HOSKINS WORKING IN THE BMA TOWER AFTER APPLICATION OF THE FIREPROOFING, OR (3) THAT DEFENDANTS KNEW OR SHOULD HAVE KNOWN THAT THEIR SALE OF SPRAYED LIMPET CREATED A HIGH DEGREE OF PROBABILITY OF INJURY TO PERSONS WORKING IN THE BUILDING 15 YEARS AFTER APPLICATION OF THE PRODUCT. THERE WAS NO EVIDENCE THAT DEFENDANTS KNEW THAT AFTER APPLICATION SPRAYED LIMPET TENDED TO RELEASE ASBESTOS FIBERS INTO THE AIR OR THAT SPRAYED LIMPET POSED RISKS OF LUNG DISEASE TO PERSONS IN A BUILDING 15 YEARS AFTER THE PRODUCT HAD BEEN APPLIED.

Plaintiffs submitted their claim for punitive damages under one theory of negligence and two theories of strict liability. They submitted these alternative theories in the disjunctive. As a result, they were required to present clear and convincing evidence supporting each element of each of the three separate theories of recovery. *Stacy v. Truman Med. Ctr.*, 836 S.W.2d 911, 925 (Mo. 1992); *Deckard v. O'Reilly Automotive, Inc.*, 31 S.W.3d 6, 17-18 (Mo. App. 2000); *see also Kansas City v. Keene Corp.*, 855 S.W.2d 360, 370 (Mo. 1993) (The failure to warn claim and the defective product claim can both be made if there is evidence to support each theory). If plaintiffs

failed to prove any of their theories of recovery, then this Court should remand the case for a new trial.

A claim for punitive damages based on negligence and a claim for punitive damages based on strict liability both require proof that, at the time of sale, defendant actually knew that its product or conduct created an unreasonable risk of harm to plaintiff. *See Hoover's Dairy*, 700 S.W.2d at 435-36; *Alack*, 923 S.W.2d at 338; *Angotti*, 812 S.W.2d at 747-48. As demonstrated in Point I, plaintiffs failed to make a submissible case under any of their theories of liability for punitive damages, and the Court should reverse outright the judgment for punitive damages in their favor. If the Court concludes the tests under negligence and strict liability are materially different, the Court must evaluate the sufficiency of plaintiffs' proof as to each claim. For the reasons discussed in Point I, if the Court finds that plaintiffs made a submissible case on less than all three theories of recovery submitted in Instruction 12, defendants are entitled to a new trial on the issue of punitive damages.

III. THE TRIAL COURT ERRED IN REFUSING TO DECLARE A MISTRIAL, IN REFUSING TO REOPEN THE EVIDENCE OR ALLOW ADDITIONAL ARGUMENT, AND IN DENYING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL BECAUSE PLAINTIFFS' CLOSING ARGUMENT WAS IMPROPER AND PREJUDICIAL IN THAT: (1) PLAINTIFFS' COUNSEL, FOR THE FIRST TIME IN HIS FINAL CLOSING ARGUMENT TO THE JURY, ARGUED THAT DEFENDANTS HID AND WITHHELD RELEVANT EVIDENCE FROM THEIR EXPERTS WHEN (A) THE PARTIES HAD ENTERED INTO A STIPULATION UNDER THE TERMS OF WHICH PLAINTIFFS' COUNSEL WERE TO OBTAIN

AND PROVIDE ALL AVAILABLE MEDICAL SLIDES TO DEFENDANTS; (B) DEFENDANTS PROVIDED TO THEIR EXPERTS ALL SLIDES THEY HAD RECEIVED FROM PLAINTIFFS' COUNSEL PURSUANT TO THE STIPULATION; AND (C) THERE WAS NO EVIDENCE THAT DEFENDANTS HAD WITHHELD ADDITIONAL SLIDE EVIDENCE; AND (2) PLAINTIFFS' FINAL CLOSING ARGUMENT LEFT THE JURY WITH THE ERRONEOUS AND PREJUDICIAL IMPRESSION THAT DEFENSE COUNSEL HAD KNOWINGLY AND WILLFULLY WITHHELD KEY EVIDENCE FROM THEIR EXPERTS AND THAT DEFENSE COUNSEL HAD ATTEMPTED TO MISLEAD THE JURY THROUGH TAINTED EXPERT TESTIMONY, WHICH INFLAMED THE JURY AND PREJUDICED THE DEFENDANTS IN THE JURY'S DELIBERATIONS ON LIABILITY AND DAMAGE ISSUES.

The last thing a jury hears before retiring to deliberate is the final closing argument of plaintiffs' counsel.⁹ In this case, that argument went far beyond the bounds of permissible argument. Plaintiffs' counsel, for the first time in his final closing argument, wrongly accused defendants' counsel of hiding or withholding key evidence

⁹ Defendants will use the terminology favored by the Court *Tune v. Synergy Gas Corporation*, 883 S.W.2d 10, 17 fn. 1. (Mo. 1994). Counsel's argument following the evidence is referred to as "closing argument." Plaintiffs' opening and closing portion of the closing argument are referred to as "plaintiffs' initial closing argument" and "plaintiffs' final closing argument." Defendants' argument is referred to as "defendants' closing argument." Some of the cases cited in this brief also use the term "rebuttal" when referring to plaintiffs' final closing argument.

from defendants' experts. The evidence consisted of certain tissue slides that were prepared following a biopsy and surgery performed on Mr. Hoskins in Kansas City and New York, respectively. Plaintiffs' counsel characterized the failure to provide all of the slides to defendants' pathology expert as "obscene" and argued to the jury that this was part of an ongoing pattern of untruthfulness. Counsel's argument was false and improper and was clearly intended to convince the jury that defendants intentionally concealed relevant evidence from their experts in order to mislead the jury as to the nature of Mr. Hoskins' medical condition. The trial court's failure to grant any relief in the face of this improper argument requires a new trial.

A. Background

1. The Stipulation.

The facts relating to the slides and the parties' stipulation concerning them are of paramount importance to the consideration of this issue. This is not the usual case where each side acts on its own to identify and obtain evidence for its own experts. Because of the restrictive position taken by Memorial Sloan-Kettering Hospital in New York, and concerns among counsel that all parties be assured of equal and timely access to any and all tissue slides from Mr. Hoskins' surgeries, the parties entered into a stipulation regarding the slides. That stipulation provided:

It is hereby agreed and stipulated to that **any and all tissue samples removed from the person of Forest D. Hoskins**, date of birth: October 30, 1945; Social Security Number: 497-46-2243, including but not limited to original slides, recut slides, tissue blocks

or frozen sections in the possession and/or control of Memorial Sloan-Kettering Cancer Center and Memorial Hospital for Cancer and Allied Diseases relating to his surgery on April 27, 1999, and for which a report was issued labeling these tissue samples as S99-12849, **be released to The Accurso Law Firm**, 4646 Roanoke Parkway, Kansas City, Missouri 64112.

It is further agreed and stipulated that these tissue samples will be made available at the same time to all parties to this lawsuit (or their representatives).

Ex. 290; A65-6. (emphasis added).

This stipulation was the result of discussions among counsel prompted by defendants' request that Mr. Hoskins sign a medical authorization that would specifically give defendants access to tissue samples. One of plaintiffs' counsel, Steven Steinhilber, wrote to defendants explaining that Memorial Sloan-Kettering had advised that tissue samples would not be released without a court order, that a medical authorization would not allow defendants to obtain the tissue samples, and suggesting that the parties enter into a stipulation that would allow all parties equal access to the tissue samples. Ex. 288; A63. The parties signed the stipulation on November 1, 2000, and filed it on November 2, 2000. Ex. 290; A65-6. On November 20, 2000, Rosemarie Allen, a legal assistant with The Accurso Law Firm, sent pathology slides and blocks to defendants' counsel, Margaret Chaplinsky, which Ms. Allen identified as follows:

Enclosed please find the following pathology slides and blocks that we have received from Menorah Medical Center regarding Forest Hoskins [sic] surgery on February 16, 1999, and from Memorial Sloan-Kettering for his surgery on April 27, 1999.

They are as follows:

1. Menorah Medical Center: six (6) pathology slides; six (6) pathology blocks.
2. Memorial Sloan-Kettering: seventeen (17) pathology slides; ten(10) pathology blocks.

Ex. 287; A67. While plaintiffs' counsel continued to provide medical records to defendants up to the eve of trial, they never provided any additional slides beyond the twenty-three slides referred to in Ms. Allen's November 20, 2000 letter.

Plaintiffs deposed defendants' pathology expert, Dr. Andrew Churg, on February 15, 2001, less than two weeks before trial. In that deposition, plaintiffs' counsel asked Dr. Churg how many slides he had reviewed. L.F. 1434. Dr. Churg testified that he reviewed "17 slides plus six additional slides," the same slides plaintiffs' counsel had provided to defendants on November 20, 2000. L.F. 1434. Dr. Churg specifically asked plaintiffs' counsel to show him any slide evidence which demonstrated that Mr. Hoskins had mesothelioma:

A: [by Dr. Churg] No, I'm talking about if you have evidence right now, clinical evidence right now that he's got a mesothelioma, show me the evidence and I'll tell you whether

I agree with it. You know, if you can show me something that looks like a mesothelioma, maybe I would change my mind....I'm absolutely neutral about this matter. I will evaluate it. You guys have got to give me the information.

L.F. 1354-55.

At that time, plaintiffs' counsel did not indicate that he was aware of any slides beyond those plaintiffs had provided on November 20, 2000, and on which Dr. Churg had based his opinion.

2. Closing Argument.

During his initial closing argument, Mr. Accurso did not say anything to the jury about defendants hiding or withholding evidence. For the first time in his final closing argument – to which defendants had no opportunity to respond – Mr. Accurso argued that defendants had withheld or hidden evidence from their experts in an effort to mislead the jury. The following excerpts are from plaintiffs' final closing argument.

Well, she said it. She said the issue in this case is whether Dino Hoskins has mesothelioma. Then why didn't they give [Dr. Churg] the other 14 slides? Why didn't they show him the 14 slides? Why didn't he look at those 14 slides? What are they trying to hide? Why wasn't that brought out? Why didn't they talk about that? Why didn't they show it to this fellow that's supposed to be the world's greatest, world's greatest expert? The numbers don't add up, she's right. The numbers don't add up.

The doctors that tried to save Dino's life and have tried to extend his life, they looked at all of it. And they didn't show it to him or he didn't see it. One or the other. Either he didn't get it or he didn't look at it. Either way, that's where the tissue is that shows it's mesothelioma.

And remember Dr. Hannah said I took a generous biopsy. He took a lot of tissue. But Dr. Churg, for some strange reason, didn't get to look at 14 of the 20 slides. You go upstairs when you deliberate in this case and you ask yourselves, why, why are they doing this?

Tr. 935-36.

* * *

Now, if for some reason you were to consider accepting the arguments that they make about their two doctors that they've paid a lot of money to and haven't shown all the evidence to.

Tr. 938.

* * *

They brought in a couple of high paid experts. They didn't give them all the facts . . .

Tr. 942.

* * *

Dr. Churg's science is seriously, hopelessly and fatally flawed. The question you get to answer is why did the defendants allow that to happen? When you go back up in that jury room you ask yourselves why would they let that happen? Why would they bring that sort of flawed science and stick it in front of our nose and expect us to buy it?

Tr. 930.

* * *

Maybe they just didn't like the opinions of Dr. Lieberman and the other six doctors that are trying to save Dino Hoskins' life. So they found another doctor to look at some of the evidence. It's obvious. It's the same thing they've been doing since 1924. They don't give you the truth. They don't give you all the evidence and they expect you to just sit there and accept it. What they've done is obscene.

Tr. 937.

3. Relief Requested.

At the conclusion of Mr. Accurso's final closing argument, but before the case was submitted to the jury, defendants' counsel moved for a mistrial on the basis of the improper argument. Tr. 945-946, 957. The relief was denied. Tr. 946, 960. Defendants' counsel then asked that they be allowed to address the jury on the issue of the slides. Tr.

946, 960. That relief was also denied. Tr. 946, 960. Defendants' counsel then made an offer of proof which demonstrated the existence of the stipulation, the discussions surrounding it, and the correspondence from The Accurso Law Firm establishing what slides had been provided to them. Tr. 961-962; Exs. 287, 288, 289, 290; A63-8. The offer of proof was refused. Tr. 964.

After the jury returned its verdict, but before the commencement of the second phase of the trial when the amount of punitive damages would be determined, defendants' counsel requested permission to present evidence concerning the slides to mitigate the effect of Mr. Accurso's improper final closing argument. Tr. 966-967. The request was denied and the parties were limited to introducing evidence relating solely to the financial condition of the defendants. Tr. 975, 976.

In their Motion For Judgment Notwithstanding The Verdict, Or, In The Alternative, For A New Trial, defendants asserted all of the foregoing points of error and requested a new trial. L.F. 721. The motion was overruled and the relief was denied in its entirety. L.F. 897.

This Court has recognized that an objection to inflammatory, prejudicial argument can properly be made at the conclusion of the offending argument. *Holtz v. Daniel Hamm Drayage Co.*, 209 S.W.2d 883, 887 (Mo. 1948). On this issue, *Holtz* cites *London Guar. & Acc. Co. v. Woelfle*, 83 F.2d 325 (8th Cir. 1936), which contains a thorough discussion of the history of the rules regarding objections to improper closing argument. The court reasoned that if arguments of counsel are taken down by a court reporter, there

is no reason why remarks claimed to be improper should not be excepted to at the conclusion of the argument and out of the hearing of the jury. The court noted:

To interrupt the argument of opposing counsel is often a hazardous thing to do. It may create more prejudice than it removes. It leads to controversies between counsel which interfere with the orderly conduct of the trial. Jurors do not ordinarily know the difference between proper and improper argument. They easily obtain the impression that objecting counsel is unfair and is trying to keep them from hearing something of consequence. . . . The truth is that when a lawyer departs from the path of legitimate argument, he does so at this own peril and that of his client, and if his argument is both improper and prejudicial, then he has destroyed any favorable verdict that his client may obtain unless, in some way, his error has been cured prior to the submission to the jury.

Id. at 343.

In keeping with the rationale of *London Guarantee*, under circumstances similar to those in this case, the court in *Heisler v. Jetco Service*, 849 S.W.2d 91 (Mo. App. 1993) found “no waiver in the omission of an objection” during the closing argument, stating:

The jury heard the defense argument, which had a tendency to mislead. Plaintiffs' counsel might well believe that potential

damage had been done, and that the preferred course of action was to set the record straight. When a door is opened it is not always necessary to ask the court to slam it. Opposing counsel, rather, may elect to walk through it.

Id. at 94.

A timely record was made in this case. The trial court was afforded the opportunity to declare a mistrial or to provide no less than four forms of curative relief, all of which were denied.

B. Standard Of Review

This court reviews a trial court's refusal to declare a mistrial or other relief, and the denial of a defendants' motion for a new trial for an abuse of discretion. *Pierce v. Platte-Clay Electric Coop., Inc.*, 769 S.W.2d 769, 778 (Mo. 1989); *Kansas City v. Keene Corp.*, 855 S.W.2d 360, 372 (Mo. 1993); *Shaw v. Terminal R.R. Assn. of St. Louis*, 344 S.W.2d 32, 36-37 (Mo. 1961).

C. Plaintiffs' Final Closing Argument Was Improper

The permissible scope of plaintiffs' final closing argument was described by this Court in *Tune, supra*: “[I]n the final portion of the closing argument a plaintiff can argue anything that plaintiff argued in the initial portion of the closing argument and rebut anything that the defendant argued in defendant's portion of the closing argument.” *Tune*, 883 S.W.2d at 18. Mr. Accurso's claim that defendants had withheld evidence from their experts was not a reiteration of arguments stated or implied in his initial closing argument. In fact, Mr. Accurso did not say anything in his initial closing

argument about defendants hiding or withholding evidence. Rather, his justification for claiming in final closing argument that defendants had withheld slides from their experts was that Ms. Chaplinsky had somehow invited his argument by stating to the jury in her opening statement that defendants had spent “some time” obtaining slides. Tr. 958.

A fair reading of Ms. Chaplinsky’s remarks in her opening statement (Tr. 213) makes clear that she was not referring to any independent attempt to obtain the slides **after** the parties entered into the stipulation, but rather to defendants’ attempt to obtain slides **before** plaintiffs had proposed the stipulation. In addition, Ms. Chaplinsky’s closing argument regarding the strength of defendants’ case and the credibility of defendants’ experts was made on the presumption that, pursuant to that stipulation, plaintiff had provided all available slides in order for defendants’ experts to conduct a complete pathological review.

1. The Slides.

Mr. Accurso argued to the trial court that defendants' counsel should have known there were more slides because of the discrepancy between the number of slides plaintiffs sent to defendants and the deposition testimony concerning the number of slides reviewed by plaintiffs’ expert, Dr. Lieberman. Tr. 1024-25. Mr. Accurso’s argument stressed the identification numbers of the various sets of slides from the two hospitals. The following is a recap what is now known – but of which defendants’ counsel was not informed by plaintiffs’ counsel at the time of trial – about what slides existed and were available to plaintiffs and the experts who would testify on their behalf.

Slides were created by two hospitals, Menorah Medical Center in Kansas City and Memorial Sloan-Kettering Cancer Center in New York. Mr. Hoskins had a biopsy at Menorah on February 16, 1999. Menorah created slides from the biopsy and assigned the pathology number SP99-04622 to those slides. Those slides were analyzed in Kansas City by Dr. Hal Marshall and by two of his colleagues at Research Medical Center. Ex. 16. Dr. Marshall's Pathology Report does not identify the number of slides created or analyzed. Ex. 16.

Dr. Philip Lieberman, the chief of pathology at Memorial Sloan-Kettering, received 20 Menorah slides on April 2, 1999. Ex. 74. Dr. Lieberman reviewed the slides and prepared a Departmental Consult dated April 5, 1999, which identified the material received as 20 slides, with a pathology number of SP99-04622. Memorial Sloan-Kettering assigned its own "Accession #" to these same slides: S99-10200. Ex. 74. Thereafter, Memorial Sloan-Kettering records refer to these 20 "Menorah slides" by using the Memorial Sloan-Kettering identification number S99-10200. *See e.g.* Ex. 75. The Departmental Consult notes under "Disposition of Material" state that the Menorah slides were retained by Memorial Sloan-Kettering: "Slides received/retained/returned: 20/20/0." Ex. 74. These slides are referred to herein as the "biopsy slides."

Dr. Valerie Rusch operated on Mr. Hoskins on April 27, 1999. She submitted surgical specimens to the Memorial Sloan-Kettering pathology department for analysis. Those specimens were assigned the Memorial Sloan-Kettering identification number S99-12849, and were initially analyzed by Dr. William Gerald. L.F. 977; Ex. 75. Blocks

and slides were prepared from the specimens. There were 10 blocks and 18 slides.

Ex. 75. These slides are referred to herein as the “surgical slides.”

Dr. Gerald asked Dr. Lieberman to do electromicroscopy on the surgical slides. L.F. 949. Dr. Lieberman reviewed these materials and found no tumor cells and was therefore unable to do electromicroscopy. L.F. 940; 950. Ex. 75. Dr. Lieberman’s Supplementary Report dated May 14, 1999, does not state the number of surgical slides he reviewed. Ex. 75. In his deposition, he testified that he reviewed “more than three.” L.F. 949.

The following is a recap of what the record reveals about the identification of the slides:

| <u>Source/Location</u> | <u>Identification No.</u> | <u>No. of Slides</u> |
|---|--|------------------------|
| <u>Menorah (biopsy slides)</u> | Menorah #S99-4622/ | 20 |
| These slides were sent to Memorial Sloan-Kettering prior to Mr. Hoskins' surgery in April of 1999 and were assigned a Memorial Sloan-Kettering identification number as well. | Memorial Sloan-Kettering #S99-10200 | |
| <u>Memorial Sloan-Kettering</u> <u>(surgical slides)</u> | Memorial Sloan-Kettering #S99-12849 | 10 blocks 18 blocks |

The Menorah biopsy slides remained at Memorial Sloan-Kettering. Dr. Lieberman still had the slides at Memorial Sloan-Kettering on the morning of his deposition, February 19, 2001, a week before trial, and reviewed them that morning. L.F. 964.

2. Plaintiffs' Counsel Did Not Provide All Of The Memorial Sloan-Kettering Slides To Defendants.

Even though the stipulation expressly addressed “any and all tissue samples,” including slides in the possession of Memorial Sloan-Kettering, plaintiffs' counsel did not provide all of those slides to defendants. Plaintiffs provided only six of the 20 Menorah

biopsy slides and 17 of the 18 Memorial Sloan-Kettering surgical slides. Ex. 287; A67. Defendants had relied on plaintiffs' counsel to obtain “any and all” slides pursuant to the stipulation. Defendants received slides from plaintiffs with a letter identifying the sources as both Menorah and Memorial Sloan-Kettering. Ex. 287; A67. They in turn provided these exact slides to their pathology expert, Dr. Churg. Ex. 279. Defendants were never informed that plaintiffs had given them an incomplete set of slides.

It is important to keep in mind that plaintiffs proposed the very stipulation upon which defendants relied to their detriment. Defendants had begun the process of obtaining slides on their own. It was plaintiffs' counsel who suggested that the parties proceed by way of stipulation because of Memorial Sloan-Kettering's position about the slides, and so that all parties would have access to the same materials. Plaintiffs' counsel knew that the treating physicians at Memorial Sloan-Kettering already had all of the relevant slide evidence. Ex. 288; A63. Therefore, plaintiffs did not have to worry about obtaining information for the experts who would testify for them, because all of plaintiffs' expert testimony concerning pathology came from Mr. Hoskins' treating physicians. Consequently, even without the stipulation, plaintiffs' counsel were assured that their testifying doctors would have all of the evidence.

3. There Was No Factual Basis For The Assertion That Defendants Hid Or Withheld Evidence.

There is no evidence in the record that defendants' counsel or their experts had obtained additional slides beyond those received from plaintiffs on November 20, 2000, pursuant to the stipulation. There was no evidence that either Dr. Churg or defendants'

counsel in fact were aware that there were slides in addition to the twenty-three sent by plaintiffs' counsel. Dr. Churg testified that he did not know how many slides Dr. Lieberman had reviewed. L.F. 1434.

Mr. Accurso's final closing argument intentionally led the jury to believe that defendants' counsel had additional slides, which they chose to withhold from their experts. L.F. 936. Before Mr. Accurso argued to the jury that defendants "hid" and "withheld" key evidence, he was required to have a factual basis for his assertion that defendants actually had such evidence in the first place. There is no evidence that defendants ever had any slides other than those plaintiffs sent them pursuant to the stipulation. Therefore there was no basis in the record for Mr. Accurso to argue that defendants intentionally "hid" or "withheld" evidence. Defendants could not hide or withhold what they were never given.

Mr. Accurso knew that the only slides defendants had were the ones his office provided, because, under the terms of the stipulation, Memorial Sloan-Kettering was to release the slides only to The Accurso Law Firm. Ex. 290. Presumably, Mr. Accurso also knew that the 20 biopsy slides from Menorah had been sent to Memorial Sloan-Kettering in March 1999 and had remained at Memorial Sloan-Kettering thereafter. Plaintiffs' expert, Dr. Lieberman, still had the slides at Memorial Sloan-Kettering on February 19, 2001, the morning of his deposition. L.F. 964. He reviewed the slides that very morning in preparation for his deposition. L.F. 964.

Mr. Accurso told the trial court that any failure of defendants to obtain all slides was defendants' fault, not his. According to Mr. Accurso, if defendants failed to

ascertain what slides existed and how to get them themselves, their own lack of diligence was responsible for the incomplete information given to their experts. Tr. 1023-26.

However, the stipulation directing Memorial Sloan-Kettering to release any and all slides in its possession to plaintiffs' counsel was pointless if defendants were, according to Mr. Accurso, also under an obligation to obtain the same slides on their own. In this case, defendants' counsel had no reason to question whether they would be given all of the available slides. Plaintiffs' contention that defendants "could have known" or "should have known" about the other slides is founded on speculation, ignores defendants' justifiable reliance on the stipulation, and simply does not support the prejudicial and inflammatory argument made by Mr. Accurso. This misleading argument was calculated to inflame the jury, to convince them to award a punitive damage verdict (by linking the charge with supposed examples of historical "concealment" of medical evidence by T&N), and to enhance the amount of any punitive damage award they might return.

The final closing argument of plaintiffs' counsel transformed this case from one in which there was a misunderstanding about the number of available slides into a case where a tactical decision was made to deliver an inflammatory final closing argument laced with false accusations of intentional concealment and wrongdoing which defendants were helpless to counter. The record also shows that plaintiffs' counsel strategically waited to make these allegations until his final closing argument, when he knew defendants would have no opportunity to respond. During his final closing argument, Mr. Accurso was ready with visual aids showing the jury specific excerpts from the testimony of Dr. Lieberman concerning the slides.

Defendants have no way of knowing when plaintiffs' counsel discovered that there were additional slides that they had failed to provide to defendants. However, there is no scenario which excuses or justifies the final closing argument in this case. If plaintiffs' counsel discovered that there were additional slides sometime prior to trial, they should have provided those slides to defendants pursuant to the stipulation. At the very least, they should have advised defendants' counsel of the existence of the additional slides at Memorial Sloan-Kettering so defendants could have taken some action prior to trial. Sitting mute while in the possession of that information was not an option in light of the stipulation between the parties.

If, on the other hand, plaintiffs' counsel only discovered that there were additional slides sometime during the trial, they should have either raised the issue with defendants' counsel and the court, or, at the very least, refrained from accusing defendants of trying to deceive the jury with "obscene" conduct. Even if plaintiffs' counsel only discovered the discrepancy during trial, defendants could not fairly be accused of knowing it at some earlier point in time.

Whether defendants' counsel could have determined that the slides sent by plaintiffs' counsel on November 20, 2000, constituted less than for the total number of slides is not the issue. Defendants' counsel did not realize there were more slides and did not know the true number of slides. In the absence of supporting evidence, it was highly improper for plaintiffs' counsel to argue that defendants' counsel knowingly and intentionally hid or withheld evidence. *See Cook v. Cox*, 478 S.W.2d 678, 681 (Mo. 1972) (Grant of new trial affirmed where bias and prejudice had been created by

counsel's stating and inferring that defense counsel was deceiving the jury.); and *Tucker v. Kansas City Southern Ry.*, 765 S.W.2d 308, 310 (Mo. App. 1988) (Grant of new trial affirmed where overall tenor of closing argument was inflammatory, unwarranted and unfair.).

D. Defendants Were Denied The Opportunity To Cure The Error.

Defendants requested a mistrial immediately after plaintiffs' final closing argument, which was denied. Tr. 945-46. Declining to declare a mistrial, the trial court should have given defendants some opportunity to cure the prejudice engendered by plaintiffs' improper closing argument. Although they were not even required to request such relief once plaintiffs' final closing argument had misled the jury, defendants nonetheless asked to be allowed to respond to the improper argument by addressing the jury on the issue of the slides. Tr. 946. That request was denied. Tr. 946. Had the trial court allowed defendants to set the record straight at that point, the error might have been cured. The trial court's failure to do so was prejudicial error. *See Tune*, 883 S.W.2d at 22 ("The prejudicial effect [of improper final closing argument] may have been cured if defense counsel had been given an opportunity to reply to the increased specific amount, but we find no requirement that defendant's counsel request this uncommon remedy"), citing *Sullivan v. Hanley*, 347 S.W.2d 710, 716 (Mo. App. 1961).

Defendants continued their effort to cure the effect of the unfairly prejudicial argument made by plaintiffs' counsel. Defendants made an offer of proof of evidence that would have shown the jury the stipulation, the circumstances of its negotiation, and the exact slides plaintiffs' counsel provided to defendants pursuant to the stipulation. Tr.

960-62. This information would have at least allowed the jury to understand that defendants gave their experts all of the slides they had been given by plaintiffs pursuant to the terms of the stipulation. The jury would have known that defendants did not hide or withhold evidence. The offer of proof was refused. Tr. 964.

The trial court erred in denying defendants the opportunity to set the record straight with this additional evidence. Additional evidence was needed to fully inform the jury of the plaintiffs' involvement in the procurement of the slides, and the evidence "could and should have been obtained" at the time of the alleged error when it was first called to the trial court's attention. *Fitzpatrick v. St. Louis-San Francisco Ry.*, 327 S.W.2d 801, 808 (Mo. 1959). The trial court abused its discretion in refusing the introduction of additional evidence explaining the chain of custody of the slides and in taking "no action other than denying the motion for mistrial." *Id.*; see also *Pride v. Lamberg*, 336 S.W.2d 441, 445 (Mo. 1963) ("When there is no inconvenience to the court or unfair advantage to one of the parties, there is an abuse of discretion and a new trial will be directed upon a refusal to reopen a case and permit the introduction of material evidence, that is evidence that would substantially affect the merits of the action and perhaps alter the court's decision").

The trial court sent the case to the jury without affording defendants any relief from Mr. Accurso's unduly prejudicial argument. The jury returned a substantial verdict against defendants and found them liable for punitive damages. Defendants next immediately requested relief that would have kept the poisonous effect of the final closing argument from extending to the second, punitive damage assessment phase of the

trial. Tr. 966-67. After Mr. Accurso's final closing argument, defendants advised the court that they intended to call Ms. Allen and present evidence to the jury to explain exactly what plaintiffs' counsel had done to obtain the various materials, including what they obtained from which institutions, and what was provided to defendants. Tr. 963. Defendants were not allowed to present any evidence on this issue. Tr. 975-76. The trial court ruled that evidence in the second phase of the case would be limited to information regarding the financial condition of the defendants. Tr. 975-76. The trial court's limitation was prejudicial and erroneous. See Point IV, *infra*, on the issue of the improper limitation of evidence in the second phase of the trial.

E. Defendants Were Prejudiced.

The prejudicial effect of Mr. Accurso's final closing argument was undeniably reflected in the verdicts. Mr. Accurso pounded repeatedly in his final closing argument that defendants were hiding things, could not be trusted, and had intentionally misled the jury by limiting the evidence their experts saw. The indelible portrait of chicanery and dishonesty Mr. Accurso painted in his final closing argument permeates the verdicts in this case. The jury forewoman who was interviewed by the National Law Journal specifically referred to Mr. Accurso's argument regarding the slides in discussing the jury's verdict. The forewoman is quoted as saying: "[The argument about the slides] made me think that somebody was trying to hide things from him, that there were things (the defense) didn't want him to see." L.F. 893A.

Even without this confirmation of prejudice from the jury forewoman, the prejudice has been established in this case as a matter of law. In *Lester v. Sayles*, 850

S.W.2d 858, 864 (Mo. banc 1993), this Court held that the party responsible for the error relating to argument "should be charged with a presumption that the error was prejudicial". *See also Tune*, 883 S.W.2d at 22 (recognizing presumption that improper argument was prejudicial). The *Tune* decision was in the context of argument on damages, but its rationale has been extended to cases involving other types of argument as well. *See also Meyers v. Southern Builders, Inc.*, 7 S.W.3d 507, 513 (Mo. App. 1999); *Williams v. Casualty Reciprocal Exchange*, 929 S.W.2d 802, 807 (Mo. App. 1996); *Aliff v. Cody*, 26 S.W.3d 309, 321 (Mo. App. 2000); *Giddens v. Kansas City Southern Ry.*, 937 S.W.2d 300, 307 (Mo. App. 1996); and *Peaker v. Stokes*, 1999 WL 304343 (Mo. App. 1999).

Indeed, the presumption of prejudice is especially appropriate in this case because of the pervasive negative image created by the false and misleading statements made in the final closing argument. Mr. Accurso's argument regarding the slides went well beyond mere comment on an apparent discrepancy in the evidence reviewed by different experts in the case, and expressly encouraged the jury to believe that defendants had engineered a false record. Mr. Accurso repeatedly asked why defendants had hidden evidence from their experts. The honest answer – which defendants were not allowed to give to the jury – was that defendants did not hide anything, and that they had given their experts all of the slides they had received from plaintiffs' counsel in reliance on the stipulation. Plaintiffs' counsel's weak contention that defendants should have been able to figure out that there were more slides does not justify the misleading and inflammatory accusations of his final closing argument.

Without any of the relief requested, the jury deliberated on liability issues with Mr. Accurso's improper argument still ringing in their ears. It is impossible to say that those verdicts were not tainted by the improper argument. When the jury retired in the second phase to determine the amount of punitive damages, they again did so with Mr. Accurso's unrebutted characterization of defendants' behavior as "obscene," as part of a 75 year pattern of untruthfulness, and as part of an intentional plan to deceive or mislead the jury. Again, it is impossible to say that the \$7 million punitive damage award was not influenced by the improper argument.

Defendants went to trial relying on the letter and spirit of the stipulation recommended by plaintiffs, and then were confronted with plaintiffs' false and prejudicial charges of misconduct. They sought relief from the trial court and that relief was denied. The only way to cure the extremely prejudicial effect of the argument of plaintiffs' counsel is to order a new trial on all issues. *See Shaw*, 344 S.W.2d at 37 ("No one can say what verdict this jury might have returned if the arguments had proceeded in the regular course, and if defendant's counsel had been permitted to answer the argument on injuries and damages"); *Heisler*, 849 S.W. 2d at 94-95 ("The right of retaliation to misleading argument is well recognized. . . . The plaintiffs should have been allowed to correct the misleading intimations by pointing to the record").

Mr. Accurso's final closing argument was improper and prejudicial. Defendants are entitled to a new trial on all issues.

IV. THE TRIAL COURT ERRED IN EXCLUDING ALL EVIDENCE EXCEPT EVIDENCE OF THE FINANCIAL CONDITION OF THE DEFENDANT IN THE

SECOND PHASE OF THE TRIAL BECAUSE MITIGATING EVIDENCE RELATING TO THE CIRCUMSTANCES UNDER WHICH DEFENDANTS OBTAINED MEDICAL SLIDES WAS RELEVANT AND ADMISSIBLE IN THAT SUCH EVIDENCE, INCLUDING (1) THE STIPULATION BETWEEN THE PARTIES UNDER WHICH PLAINTIFFS' COUNSEL WERE TO OBTAIN ANY AND ALL SLIDES AND MAKE THEM EQUALLY AVAILABLE TO ALL PARTIES; (2) EVIDENCE OF WHICH SLIDES PLAINTIFFS' COUNSEL PROVIDED TO DEFENDANTS; AND (3) EVIDENCE THAT DEFENDANTS PROVIDED ALL OF THE SLIDES THEY RECEIVED FROM PLAINTIFFS TO THEIR EXPERTS WAS RELEVANT TO THE JURY'S CONSIDERATION OF THE SIZE OF THE AWARD APPROPRIATE TO PUNISH DEFENDANTS' CONDUCT WHEN THE CONDUCT BEING PUNISHED INCLUDED ALLEGED HIDING AND WITHHOLDING OF EVIDENCE AS PART OF A PATTERN OF UNTRUTHFULNESS, WHEN THERE WAS NO EVIDENCE IN THE CASE TO WARRANT SUCH AN ARGUMENT AND DEFENDANTS HAD ALREADY BEEN DENIED THE OPPORTUNITY TO ADDRESS THAT ISSUE WITH THE JURY IN THE FIRST PHASE OF THE BIFURCATED TRIAL.

As the trial entered its second phase, defendants requested the opportunity to present evidence to inform the jury about the stipulation between the parties under which plaintiffs' counsel were to obtain the slides and make any and all slides equally available to all parties. Tr. 972; 974. Defendants advised the Court that they wished to call Mr. Accurso's paralegal, Rosemarie Allen, as a witness in Phase II. Tr. 963. Ms. Allen had sent the slides to defendants and would have had direct knowledge of how and from where the slides were obtained. Defendants also asked that they at least be allowed to inform the jury that they had received the slides from plaintiffs pursuant to the stipulation

and in turn had provided those slides to their experts. Tr. 972. The trial court denied all of this relief, ruling that evidence in the second phase of the case would be limited to information relating to the financial condition of the defendants. Tr. 975-76.

In reviewing a trial court's decision to admit or exclude evidence, this Court applies an abuse of discretion standard. *Holtmeier v. Dayani*, 862 S.W.2d 391, 404 (Mo. App. 1993). That standard must be applied in the context of each individual case to determine where the line between discretion and error lies. In this case, the trial court did not simply exclude certain pieces or categories of evidence. The court excluded all mitigating evidence of any kind. The only evidence allowed was evidence relating to the financial condition of the defendants. There is no statutory or common law basis for such a limitation.

In deciding the amount of punitive damages to assess, the jury was considering the complete range of conduct argued by Mr. Accurso in his closing argument. As discussed in Point III, *supra*, Mr. Accurso's final closing argument, with its assertions of intentional hiding and withholding of evidence, was improper. Plaintiffs cannot rebut the presumption of prejudice, the effect of which necessarily carried over to the second phase of the trial. Defendants were entitled to try to mitigate the effect of that prejudice in Phase II by introducing evidence and making argument that would have allowed the jury to learn the circumstances concerning the review of Mr. Hoskins' slides. Defendants should also have been allowed to explain to the jury that slides were provided to defendants pursuant to the stipulation and that they had given their experts all of the slides they had received from plaintiffs. Plaintiffs would likewise have had the

opportunity to present any evidence in their possession which might have shown that defendants had more slides and hid or withheld them. There was no such evidence.

Even if the Court should conclude that Mr. Accurso's final closing argument was not so improper as to require reversal, the exclusion of all evidence except that relating to the financial condition of the defendants in Phase II was still erroneous and prejudicial, because the excluded evidence was relevant to the conduct being punished and the size of the award designed to punish such conduct.

Section 510.263 R.S.Mo. (Supp. 2002) provides for a bifurcated trial. The statute does not allow evidence of the financial condition of the defendant into the first phase of the trial (§ 510.263.2), but does allow it in the second phase (§510.263.3), when the jury would determine the amount of any punitive damage award. The legislature limited the introduction of financial information to the only phase of the trial where it was relevant, but nowhere in the statute did the legislature suggest that evidence relevant to the amount of the punitive damage award is inadmissible. Indeed, it has long been the law of Missouri that defendants may admit evidence tending to mitigate punitive damages. *Beggs v. Universal C.I.T. Credit Corp.*, 409 S.W.2d 719, 724 (Mo. 1966); *Olinger v. General Heating & Cooling Co.*, 896 S.W.2d 43, 49 (Mo. App. 1994); and *Maugh v. Chrysler Corp.*, 818 S.W.2d 658, 662 (Mo. App. 1991). *Maugh* recognized that there are many factors a jury may consider when assessing punitive damages, including: the degree of malice, positive wrongdoing or criminality characterizing the act; the character of the defendant; and all circumstances surrounding the bad act, including mitigating

circumstances. *Id.* Examples of mitigating circumstances include the absence of malice, the presence of good faith, and that the defendant acted under the advice of counsel. *Id.*

Plaintiffs' counsel maligned defendants' character with his final closing argument by accusing defendants of hiding evidence as part of an ongoing pattern of untruthfulness. The jury considered this alleged misconduct in both phases of the trial. Defendants were entitled to demonstrate to the jury that their actions in connection with the slides – actually the actions of their counsel – were done in good faith and in reliance on the parties' stipulation regarding the slides.

Mitigating evidence is relevant in the second phase of the trial because of the relationship between the size of a punitive damage award and the conduct being punished. *Holcroft v. Missouri-Kansas-Texas R.R.*, 607 S.W.2d 158, 163 (Mo. App. 1980). In Phase II, the jury was told it could assess punitive damages in an amount that would “punish and deter defendant Turner and Newall for the conduct for which you found that defendant Turner and Newall is liable for punitive damages and will serve to deter defendant Turner and Newall and others from like conduct.” Tr. 970; L.F. 668. By precluding defendants from addressing the issue of the slides in Phase II, after having already denied any relief on that issue in Phase I, the trial court improperly denied defendants the opportunity to present to the jury evidence conclusively rebutting plaintiffs' accusations and thereby tending to mitigate punitive damages.

The trial court's exclusion of all mitigating evidence in the second phase of the trial is presumptively prejudicial error. *Tune*, 883 S.W.2d at 22. The presumption of prejudice cannot be rebutted. Even if the Court affirms the submissibility of plaintiff's

punitive damage claim, the punitive damage award must still be reversed and a new trial ordered for reconsideration of the punitive damages award.

V. THE TRIAL COURT ERRED IN AWARDING PLAINTIFFS PREJUDGMENT INTEREST BECAUSE PREJUDGMENT INTEREST IS NOT AUTHORIZED UNDER MISSOURI LAW IN THAT (1) PREJUDGMENT INTEREST IS ONLY RECOVERABLE UNDER § 408.040 R.S.MO. (2001) WHEN THE AMOUNT OF THE JUDGMENT EXCEEDS THE DEMAND FOR PAYMENT AND IN THIS CASE THE JUDGMENT DID NOT EXCEED THE DEMAND; AND (2) THE FINAL JUDGMENT CONSISTED SOLELY OF PUNITIVE DAMAGES AND AN AWARD OF PREJUDGMENT INTEREST ON PUNITIVE DAMAGES DOES NOT SERVE THE PUBLIC POLICIES ON WHICH MISSOURI'S PREJUDGMENT INTEREST STATUTE, § 408.040.2 RSMO (2001), ARE BASED.

The trial court awarded prejudgment interest under § 408.040 R.S.Mo. (2001), which allows an award of prejudgment interest when the amount of money due on a judgment exceeds the settlement demand. *Lester v. Sayles*, 850 S.W.2d 858, 873 (Mo. banc 1993). Prejudgment interest was not recoverable in this case. First, the final judgment in the case – the amount of money due – did not exceed the amount of the settlement demand. Second, the final judgment was solely for punitive damages and prejudgment interest should not be recoverable on a punitive damage award.

Construction of a statute is a question of law that this Court reviews *de novo*. *Delta Air Lines, Inc. v. Director of Revenue*, 908 S.W.2d 353, 355 (Mo. banc 1995).

On March 15, 2000, approximately one year before trial, plaintiffs' counsel sent a \$7 million settlement demand to Federal-Mogul and T&N Ltd. The demand was not

broken down between compensatory and punitive damages. L.F. 702-703. The demand was not met within 60 days. L.F. 701.

On February 23, 2001, the Friday before trial, a \$5 million settlement was reached between plaintiffs and BMA which settled all of the claims of both plaintiffs. The existence and amount of the settlement were acknowledged on the record by plaintiffs' counsel on March 8, 2001. L.F. 1003. The Release and Settlement Agreement between plaintiffs and BMA was executed on March 13, 2001. L.F. 802-809.

Also on March 8, the jury returned verdicts for compensatory damages in favor of Mr. Hoskins in the amount of \$2,000,000 and in favor of Mrs. Hoskins and in the amount of \$1,000,000. L.F. 688-689. The jury also returned a verdict in favor of Mr. Hoskins for \$7,000,000 in punitive damages. L.F. 691.

Also that day, counsel for defendants requested that the court apply a set-off of \$5 million, such amount representing the stipulated amount of the agreement between plaintiffs and BMA. Tr. 1003-04. The trial court entered its original judgment on March 16, 2001. L.F. 695-96. The original judgment did not reflect any reduction in the \$10 million in verdicts.

Defendants timely moved to amend the judgment, requesting that the trial court reduce the judgment pursuant to § 537.060 R.S.Mo. (2000) to reflect the \$5 million BMA settlement. L.F. 706-712; 798-832. Plaintiffs also moved to amend the judgment pursuant to § 408.040, asking the trial court to award prejudgment interest on the total verdict of \$10 million. L.F. 697-705. The trial court entered an Amended Judgment on May 17, 2001: (a) entering compensatory judgments of \$2 million and \$1 million in favor

of Forest and Julia Hoskins, respectively; (b) applying a credit of \$3 million against the compensatory judgment; (c) entering judgment in favor of Mr. Hoskins for \$7 million in punitive damages; and (d) awarding prejudgment interest on the punitive damage verdict of \$7 million. L.F. 899.

A. The Award Of Prejudgment Interest Was Erroneous Because The Final Judgment Did Not Exceed The Settlement Demand.

1. The Judgment Entered By The Trial Court Equaled, But Did Not Exceed The Amount Of The Demand.

The verdicts were for \$3 million in compensatory damages and \$7 million in punitive damages. L.F. 688-691. After receiving the verdicts, the trial court was required to subtract the amount of the BMA settlement before entering judgment. The method of calculating a final judgment was set forth by this Court in *Vincent v. Johnson*, 833 S.W.2d 859, 864 (Mo. 1992):

To calculate a final judgment when a credit is used (instead of jury apportionment), the trial court must first determine what the plaintiff is entitled to receive as a result of the jury verdict, and then subtract from this sum the settlement.

See also Angotti, 812 S.W.2d at 745 (“The trial court adjusted the verdict to reflect pre-trial settlements received by respondents from others originally named as defendants.”); *Hutchison v. Missouri Highway and Transp. Comm’n*, 996 S.W.2d 109 (Mo. App. 1999) (The court entered a judgment of \$0.00 after applying a setoff in the amount paid to plaintiff in a settlement with a former co-defendant.); *Teeter v. Missouri*

Highway and Transp. Comm'n, 1994 WL 80441 at *2 (Mo. App. 1994) (The trial court subtracted amounts of settlements with defendants from the damages set by the jury, reduced that amount by the percentage of fault assessed to plaintiff, and then entered judgment in that final amount.)

Applying the *Vincent v. Johnson* formula in this case, the trial court was required to (a) start with the verdicts totaling \$10 million; next (b) subtract the amount of the settlement (\$3 million), and then (c) enter a final judgment in the amount of the difference - \$ 7 million.

Plaintiffs' settlement demand was \$7,000,000. L.F. 702-703. That amount equals, but does not exceed, the amount of plaintiffs' settlement demand and plaintiffs were not entitled to an award of prejudgment interest under § 408.040.

2. Costs Are Not Part Of The Judgment.

Plaintiffs have argued that because they were awarded costs, the judgment exceeded \$7 million. The recovery of costs is mandated by Supreme Court Rule 77.01 and is not actually part of the judgment. Indeed, a judgment for costs is not necessary because the assessment of costs is a ministerial function to be performed by the clerk of the court. *See Fisher v. Spray Planes, Inc.*, 814 S.W.2d 628, 631-32 (Mo. App. 1991) ("The clerk in the first instance is required by law to tax these costs, as a ministerial duty. . . . There is no statutory requirement that taxing of fixed, statutory costs be included in a judgment"). *See also Quality Business Accessories, Inc. v. Nat'l Bus. Products, Inc.*, 880 S.W.2d 333, 335 (Mo. App. 1994) ("the court clerk is required pursuant to § 514.260 to tax the costs, as a ministerial duty."); and *St. Louis 221 Club v.*

Melbourne Hotel Corp., 227 S.W.2d 764, 771 (Mo. App. 1950). Further evidence that costs are separate from the judgment is found in Supreme Court Rule 77.07, which provides that an execution may issue for costs "either before or after final judgment." Finally, prevailing plaintiffs automatically recover their costs without regard to whether the final judgment was greater or less than any settlement demand.

The original judgment entered by the trial court on March 16, 2001, sets forth judgments for compensatory and punitive damages and, as a separate and concluding statement, adds : "Costs are assessed against Defendants and in default of payment, let execution issue." L.F. 695-696. The original form of judgment was prepared by the trial court itself. The amended judgment entered May 17, 2001 (L.F. 899) was drafted by plaintiffs' counsel after parties had briefed the issue of prejudgment interest. Rather than following the format of the trial court's original judgment with a separate assessment of costs, the Amended Judgment drafted by plaintiffs' counsel recites the assessment as a "judgment." The self-serving characterization of the cost award as a "judgment" does not alter the actual status of the cost award and does not transform it from an "assessment" into part of the "judgment" within the meaning of § 408.040.

It is also interesting to note that the trial court did not consider the cost award to be part of the judgment when calculating the amount of prejudgment interest due or in calculating the amount of the supersedeas bond. The prejudgment interest award of \$545,636.40 did not include prejudgment interest on costs. L.F. 900-901. Likewise, in its calculation of the amount of the supersedeas bond, the court again recognized that costs were a separate component, distinct from the judgment. L.F. 901.

The Amended Judgment, both in the calculation of prejudgment interest and in setting the amount of the supersedeas bond, confirms that the trial court did not consider costs to be part of the judgment for purposes of awarding or calculating the amount of prejudgment interest.

3. The Settlement Demand Must Be Construed As Relating To The Claim For Compensatory Damages Only.

Defendants had requested that plaintiffs' claim be reduced by \$5 million pursuant to § 537.060. The trial court determined that defendants were entitled to a credit against compensatory, but not punitive, damages and limited the reduction to \$3 million, the amount of the compensatory verdicts. Defendants acknowledge this court's dicta in *State ex rel. Hall v. Cook*, 400 S.W.2d 39, 42 (Mo. 1966) stating that the contribution statute, § 537.060 does not apply to punitive damages. However, even if § 537.060 does not apply to punitive damages, the construction of the term "claim" in that statute is still relevant to the determination of whether prejudgment interest is recoverable under § 408.040.

Sections 408.040 and 537.060 both speak in terms of a "claim."

§ 408.040 provides in pertinent part:

In tort actions, if a claimant has made a demand for payment of a claim or an offer of settlement of a claim, to the party, parties or their representatives and the amount of the judgment or order exceeds the demand for payment or offer of settlement, prejudgment interest, at the rate specified in subsection 1 of this section, shall be calculated from a date

sixty days after the demand or offer was made, or from the date the demand or offer was rejected without counter offer, whichever is earlier . . .

Section 537.060 provides in pertinent part:

When an agreement by release, covenant not to sue or not to enforce a judgment is given in good faith to one of two or more persons liable in tort for the same injury or wrongful death, such agreement . . . shall reduce the claim by the stipulated amount of the agreement, or in the amount of consideration paid, whichever is greater.

The term “claim” is not defined in either statute. Both statutes deal with tort actions and the effect of a demand and settlement in that context. There is nothing in either statute to indicate that the legislature meant the term “claim” to be interpreted differently in the two statutes. Because of the inter-relationship between the two statutes, especially when an award of prejudgment interest is at issue, the term “claim” must be given the same meaning under both statutes. To construe the term “claim” one way under one statute, but a different way under the other is fundamentally unfair.

This Court has stated that under § 537.060 “claim” means the compensatory claim and not the punitive damage claim. *Hall*, 400 S.W.2d at 42. Applying that same construction to §408.040, “claim” must also mean the compensatory claim. A different analysis might arguably apply if a plaintiff makes a demand that delineates between actual and punitive damage claims. That was not done here. In the absence of specific

demands for actual and punitive damages that allow the court to evaluate actual and compensatory judgments separately, a demand under § 408.040 to settle “a claim” must be construed as meaning only the compensatory damage claim. Accordingly, only the judgment for compensatory damages should be considered under § 408.040 when determining whether the amount of the judgment exceeded the demand.

Applying a consistent definition of “claim” under §§ 537.060 and 408.040, the demand pursuant to § 408.040 to settle Mr. Hoskins’ claim for \$7 million must be construed as being a demand to settle only his compensatory claim. The compensatory verdicts in this case, which totaled \$3 million, did not exceed the \$7 million demand, and plaintiffs are not entitled to an award of prejudgment interest under § 408.040.

The amount of the judgment did not exceed plaintiffs’ settlement demand in this case and, therefore, the trial court erred in awarding prejudgment interest. Even if this Court affirms any of the liability verdicts, the judgment must be vacated and remanded with instructions to enter an amended judgment without prejudgment interest.

B. Prejudgment Interest Should Not Have Been Awarded On Punitive Damages.

Even if the Court somehow concludes that the judgment of \$7 million exceeded plaintiffs’ settlement demand for \$7 million, the trial court still erred in awarding prejudgment interest. After the compensatory verdicts were reduced to zero pursuant to § 537.060, the only remaining award was for punitive damages. As a matter of law, Mr. Hoskins is not entitled to prejudgment interest on his punitive damages award.

Awards of prejudgment interest under section 408.040.2 serve two public policies. First, prejudgment interest compensates plaintiffs for the loss of the use of money

damages that might result from delays in litigation. Second, where liability and damages are fairly certain, prejudgment interest promotes settlement and deters defendant from receiving unfair benefits from delays in litigation. *Brown v. Donham*, 900 S.W.2d 630, 632-33 (Mo. banc 1995). Neither of those policies is served by an award of prejudgment interest on punitive damages.

Punitive damages do not compensate the plaintiff for any loss sustained as a result of the defendant's conduct and do not reflect amounts of money that the plaintiff would have had earlier but for the delays in litigation. Instead, punitive damages represent a windfall to the plaintiff and a means of punishing the defendant. *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71, 76 (Mo. banc 1990); *Barnett v. La Societe Anonyme France*, 963 S.W.2d 639, 659 (Mo. App. 1997), *cert. denied*, 525 U.S. 827 (1998).

As for the second public policy, both liability for and the amount of punitive damages are inherently uncertain due to the lack of precise legal standards relating to their imposition and the inevitable emotional factors that all too often come into play in cases like this. Where the amount due is not ascertainable, the imposition of prejudgment interest cannot be supported. *Brown*, 900 S.W.2d at 634.

T & N is not aware of any Missouri appellate decision in which the court permitted an award of prejudgment interest on punitive damages. However, courts of other jurisdictions have considered the issue and, for the reasons discussed above, concluded that prejudgment interest is not recoverable on punitive damages. *See Lakin v. Watkins Associated Indus.*, 863 P.2d 179, 191-92 (Cal. 1993); *General Motors Corp. v. Moseley*, 447 S.E.2d 302, 314-15 (Ga. App. 1994); *Bobich v. Stewart*, 843 P.2d 1232,

1236-37 (Alaska 1992); *Coates v. Wal-Mart Stores, Inc.*, 976 P.2d 999, 1011-12 (N. M. 1999); *Belinski v. Goodman*, 354 A.2d 92, 96 (N.J. Super. 1976); *Ellis County State Bank v. Kever*, 888 S.W.2d 790, 797-98 (Tex. 1994); *Hagan v. Val-Hi, Inc.*, 484 N.W.2d 173 (Iowa 1992); *Dees v. American Nat'l. Fire Ins. Co.*, 861 P.2d 141, 151 (Mont. 1993); *Seaward Construction Co., Inc. v. Bradley*, 817 P.2d 971 (Colo. 1991); *Ramada Inns, Inc. v. Sharp*, 711 P. 2d 1 (Nev. 1985); *Murphy v. United Steelworkers of America*, 507 A.2d 1342, 1346 (R.I. 1986); and *D'Arc Turcotte v. Estate of La Rose*, 569 A.2d 1086, 1088 (Vt. 1989).

The trial court erred in awarding plaintiff prejudgment interest on his award of punitive damages. If this Court affirms the award of punitive damages, the Court should hold that prejudgment interest does not apply to the punitive damage award.

VI. THE TRIAL COURT ERRED IN SUBMITTING PLAINTIFFS CLAIM FOR PUNITIVE DAMAGES AND IN DENYING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON THE CLAIM FOR PUNITIVE DAMAGES BECAUSE SECTION 537.675.2, PURPORTING TO AUTHORIZE SUCH DAMAGES AND AUTHORIZING THE PAYMENT OF A PORTION OF SUCH DAMAGES TO THE STATE OF MISSOURI, IS INVALID, FACIALLY AND AS APPLIED, AND VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 21 OF THE MISSOURI CONSTITUTION AND THE TAKINGS CLAUSES OF THE UNITED STATES AND MISSOURI CONSTITUTIONS IN THAT THE STATUTE, WHICH HAS THE EFFECT OF FORCING A TORT DEFENDANT TO PAY MONEY TO THE STATE, IMPOSES A PENAL FINE, BUT THERE ARE INADEQUATE STANDARDS FOR THE IMPOSITION AND REVIEW OF SUCH

DAMAGES AND INADEQUATE PROCEDURAL SAFEGUARDS TO PROTECT A DEFENDANT'S RIGHTS, AND THE STATUTE EFFECTS THE IMPOSITION OF AN EXCESSIVE FINE, DISPROPORTIONATE TO THE CONDUCT AT ISSUE IN THE CASE AND EFFECTS THE TAKING OF DEFENDANT'S PROPERTY FOR PUBLIC USE.

The Missouri statute allocating half of any punitive damage award to the state is constitutionally invalid. This particular question of the constitutionality of section 537.675.2 of the Revised Statutes was raised but not decided in *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47 (Mo. banc 1999). If this Court should determine that Mr. Hoskins made a submissible case on punitive damages and that there was no error in the jury instructions on that issue, it should determine that section 537.675.2 is invalid, facially and as applied in this case.

In determining constitutional questions, the Court presumes the validity of the statute unless it clearly contravenes a constitutional provision, adopts any reasonable reading of the statute that will allow its validity, and resolves any doubts in favor of constitutionality. *General Motors Corp. v. Director of Revenue*, 981 S.W.2d 561, 566 (Mo. banc 1998).

The statutory scheme of section 537.675.2 has the effect of taking money from a tort defendant (in this case, potentially several million dollars) and depositing it with the state for the benefit of the Tort Victims Compensation Fund. Because the statute has the effect of forcing a tort defendant to pay money to the state, it converts an award of punitive damages into a penal fine. *See Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 263-64 (1989); *Id.* at 298-99 (O'Connor, J., concurring);

see also McBride v. General Motors Corp., 737 F. Supp. 1563, 1578 (M.D. Ga. 1990) (Georgia's split-recovery statute "convert[ed] the civil nature action of the prior Georgia punitive damages statute into a statute where fines are being made for the benefit of the State").

Moreover, a defendant on whom such a fine is imposed is given none of the protections that normally attend the imposition of a fine as required by the United States and Missouri Constitutions. The jury is provided no guidance as to the amount they may assess. The statute, which sets no limits on the amount of punitive damages, does not even meet the fundamental requirement that it give notice of the conduct that will result in money being taken from the defendant and paid to the state. *See State v. Young*, 695 S.W.2d 882, 886 (Mo. banc 1985) (statute that fails to provide a person of ordinary intelligence with adequate notice of the proscribed conduct is unconstitutional and void); *Labor's Educational & Political Club-Independent v. Danforth*, 561 S.W.2d 339, 347 (Mo. banc 1977) (statute that failed to provide adequate notice as to whether conduct was illegal was unconstitutional).

Nor does the statute give any notice of the amount of money that may be taken from the defendant and paid to the state. *See Giaccio v. State of Pa.*, 382 U.S. 399, 401-03 (1966) (statute that required jury to determine whether an acquitted defendant should pay court costs was so vague and standardless as to be unconstitutional, regardless of whether it was characterized as "penal" or "civil"). Section 537.675 does not require that the amount paid be proportional to the defendant's conduct, and it allows extremely

disparate amounts to be assessed against different defendants for similar conduct. For all of these reasons, the statute is invalid, facially and as applied.

This appeal presents the issue that this Court did not reach in *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d at 53: “whether the payment of one-half of punitive damage awards into the state fund for tort victims’ compensation is a violation of the Excessive Fines Clause.” In *Browning-Ferris*, the United States Supreme Court expressly left unresolved the question whether the Clause applies where, as here, the government shares in the punitive damages award. 492 U.S. at 275, n.21. As noted in Justice O’Connor’s opinion, concurring in part and dissenting in part, “the Court suggests . . . that the Excessive Fines Clause will place some limits on awards of punitive damages that are recovered by a governmental entity.” *Id.* at 298-99.

In *Austin v. United States*, 509 U.S. 602, 606 (1993), the Court held that the Excessive Fines Clause is applicable to civil forfeitures. Because a civil forfeiture constitutes a punishment for an offense, the Court held that it is subject to the limitations of the Excessive Fines Clause. 509 U.S. at 622. The Court stated that “a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.” *Austin*, 509 U.S. at 610 (quoting *U.S. v. Halper*, 490 U.S. 435, 448 (1989); see also *U.S. ex rel. Smith v. Gilbert Realty Co.*, 840 F.Supp. 71, 74 (E.D. Mich. 1993) (in a qui tam action, civil penalty in which United States would share was punishment, subject to limitations of Excessive Fines Clause).

Under this standard, it cannot be disputed that punitive damages as imposed in Missouri are punishment. The courts of this state have emphasized repeatedly their retributive and deterrent purposes. *See Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996); *Vaughan v. Taft Broadcasting Co.*, 708 S.W.2d 656, 660 (Mo. banc 1986); *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155, 164 (Mo. App. 1997); *see also McBride v. General Motors Corp.*, 737 F.Supp. 1563, 1578 (M.D. Ga. 1990) (recognizing that “the excessive fines clause of both the state and federal constitutions would be implicated” by a tort reform statute, under which the state had the right to share in punitive damages awards).

Because the state shares in every punitive damages award pursuant to section 537.675.2, and because punitive damages are imposed for the purpose of punishment, such awards are subject to the limitations of the Excessive Fines Clauses of the Eighth Amendment to the Constitution of the United States and Article I, Section 21 of the Missouri Constitution. Pursuant to the Excessive Fines Clauses, penalties that are grossly disproportionate to the gravity of the offense must be set aside. *See U.S. v. Bajakajian*, 524 U.S. 321, 118 S.Ct. 2028, 2036-38 (1998) (holding that forfeiture of \$357,144 for failure to report transportation of more than \$10,000 outside of United States was excessive fine).

The punitive award in this case, in the principal sum of \$7,000,000 of which \$3,500,000 would be payable to the state, is grossly disproportionate to the conduct charged. Absent a showing of pecuniary gain from the offense, the maximum criminal fine that can be imposed against a corporation under Missouri law is \$10,000 when the

corporation has been convicted of a felony under a state statute giving notice that the conduct is prohibited. § 560.021.1, RSMo. Here, sums hundreds of times greater than the maximum criminal fine are to be taken from defendants paid over to the state.

Second, the extraction statute violates the Takings Clauses of the United States and Missouri Constitutions. *See Kirk v. Denver Pub. Co.*, 818 P.2d 262, 270-72 (Colo. 1991). Here, defendants' private property has been taken for public use, as the Tort Victims Compensation Fund is meant to distribute funds from defendants to tort victims who have no relationship to defendants.

For all of these reasons, the award of punitive damages in this case failed to comport with constitutional norms and must be reversed.

CONCLUSION

In their attempt to recover damages from defendants, plaintiffs not only failed to make a submissible case for punitive damages, but also relied on a final closing argument that falsely accused defendants of deceiving the jury by hiding evidence, when there was no evidence supporting such an accusation. For these and the other reasons discussed above, the judgment of the trial court cannot stand. This Court should reverse outright the judgment for punitive damages and remand with directions that the trial court enter judgment in favor of defendants on that claim. If the Court does not reverse outright the punitive damages award, then it should reverse and remand for a new trial on all issues. If the Court does not reverse outright the punitive damages award or order a new trial on all issues, the Court should reverse and remand for a new trial on the issue of the amount of punitive damages. In the alternative, if the Court does not reverse the award of punitive damages or order a new trial on all or some issues, then it should order that the judgment be amended to delete any prejudgment interest awarded to plaintiffs.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Brief of Appellant includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this Brief of Appellant is 24,847.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29th day of March, 2002, a true and correct copy of the foregoing document and a disk containing the document were sent via overnight delivery to:

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