

Appeal No. SC88685

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IN THE MISSOURI SUPREME COURT

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LINCOLN SMITH, *et al.*

Plaintiffs - Respondents

vs.

BROWN & WILLIAMSON TOBACCO CORPORATION

Defendant - Appellant

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ON TRANSFER FROM THE MISSOURI COURT OF APPEALS

FOR THE WESTERN DISTRICT

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SUPPLEMENTAL REPLY BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

**ARGUMENT ..... 1**

**I. PLAINTIFFS’ FAILURE-TO-WARN AND NON-LUNG CANCER  
CLAIMS WERE PRECLUDED BY THE PERSONAL INJURY ACTION  
SUMMARY JUDGMENT..... 1**

**A. The Claims at Issue Are Precluded Because Barbara Smith Could  
Not Have Brought Them Had She Survived. .... 3**

**B. The Personal Injury Summary Judgment Was Sufficiently Final to  
Have Preclusive Effect. .... 10**

**CONCLUSION ..... 17**

## TABLE OF AUTHORITIES

### Cases

<i>American Family Mut. Ins. Co. v. Hart</i> , 41 S.W.3d 504 (Mo. App. W.D. 2000).....	14
<i>Bank of Skidmore v. Bartram</i> , 142 S.W.2d 657 (Mo. App. K.C.D. 1940).....	3
<i>Boillot v. Conyer</i> , 887 S.W.2d 761 (Mo. App. E.D. 1994).....	14
<i>Donohue v. St. Louis Pub. Serv. Co.</i> , 374 S.W.2d 79 (Mo. 1963).....	4
<i>Firefighters Local Union No. 1784 v. Stotts</i> , 467 U.S. 561 (1984).....	15
<i>Gerlach v. Mo. Comm’n on Human Rights</i> , 980 S.W.2d 589 (Mo. App. E.D. 1998) .....	3
<i>In re Nangle</i> , 274 F.3d 481 (8th Cir. 2001).....	11, 12
<i>John Morrell &amp; Co. v. Local Union 304A of United Food &amp; Commercial Workers</i> , 913 F.2d 544 (8th Cir. 1990) .....	11, 12
<i>Kesterson v. State Farm Fire &amp; Cas. Co.</i> , 242 S.W.3d 712 (Mo. banc 2008).....	11
<i>Klein v. Abramson</i> , 513 S.W.2d 714 (Mo. App. K.C.D. 1974).....	5, 10
<i>O’Grady v. Brown</i> , 654 S.W.2d 904 (Mo. banc 1983) .....	12
<i>Olson v. Christian County</i> , 952 S.W.2d 736 (Mo. App. S.D. 1997).....	17
<i>Orion Financial Corp. v. American Foods Group, Inc.</i> , 201 F.3d 1047 (8th Cir. 2000)..	13
<i>Plaza Express Co. v. Galloway</i> , 280 S.W.2d 17 (Mo. banc 1955) .....	5
<i>Robinette v. Jones</i> , 476 F.3d 585 (8th Cir. 2007).....	11, 12, 13
<i>Schmelzer v. Central Furniture Co.</i> , 158 S.W. 353 (Mo. 1913) .....	6
<i>Smith v. Preis</i> , 396 S.W.2d 636 (Mo. 1965).....	5

<i>State ex rel. Burns v. Whittington</i> , 219 S.W.3d 224 (Mo. banc 2007).....	5
<i>Strode v. St. Louis Transit Co.</i> , 95 S.W. 851 (Mo. banc 1906).....	6
<i>United States v. Armour &amp; Co.</i> , 402 U.S. 673 (1971).....	15
<i>Welch v. Automobile Club Inter-Insurance Exchange</i> , 948 S.W.2d 718 (Mo. App. E.D. 1997) .....	17
<i>Wollen v. DePaul Health Center</i> , 828 S.W.2d 681 (Mo. banc 1992) .....	4
<i>Young v. Stensrude</i> , 664 S.W.2d 263 n.1 (Mo. App. E.D. 1984).....	3

**Statutes**

§ 537.020, R.S.Mo. (2000) .....	2, 4
§ 537.080, R.S.Mo. (2000) .....	passim
§ 537.085, R.S.Mo. (2000) .....	7

**Other Authorities**

46 Am. Jur. 2d <i>Judgments</i> § 184 (2008) .....	14
46 Am. Jur. 2d <i>Judgments</i> § 208 (1994) .....	14
Restatement (Second) of <i>Judgments</i> § 13 (1982).....	11

**Rules**

Fed. R. Civ. P. 25(a)(1) .....	8
Fed. R. Civ. P. 54(b).....	11

**11**

Mo. Const., Art. V, § 3 .....	6
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## ARGUMENT

### **I. PLAINTIFFS' FAILURE-TO-WARN AND NON-LUNG CANCER CLAIMS WERE PRECLUDED BY THE PERSONAL INJURY ACTION SUMMARY JUDGMENT.**

This Court, in its Order of February 21, 2008, directed the parties to file supplemental briefs addressing two issues that the Court identified. One of those issues was whether the preclusive effect of the prior federal court order “is an affirmative defense that must be pleaded in order to be raised in this case.” B&W, in its supplemental brief filed on April 7, 2008, demonstrated that it was not required to plead that preclusive effect. Rather, under § 537.080, R.S.Mo. (2000), plaintiffs had the burden of pleading and proving that their claims satisfied the statutory conditions precedent to recovery, including that Barbara Smith could have recovered damages for those claims “if death had not ensued.” (B&W Supp. Brief at 15-17)<sup>1</sup> In their supplemental brief, plaintiffs did not respond to B&W’s arguments on this issue, cite any contrary authority, or otherwise comply with this Court’s direction to address this issue. Plaintiffs’ silence compels the conclusion that they do not disagree with B&W’s showing, and B&W therefore will not address the issue further in this reply brief.

Nevertheless, plaintiffs do address the other issue this Court identified in its Order, which was “the preclusive effect of the orders in the federal district court case.” With

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<sup>1</sup> B&W also showed that, in any event, it had pled collateral estoppel as an affirmative defense. (B&W Supp. Brief at 18)

respect to this issue, B&W set forth the controlling federal precedent showing that the prior adjudication on the merits of a claim has issue preclusion effect, even if that adjudication is not final for purposes of appeal. In response, Plaintiffs argue that the Personal Injury Action summary judgment has no preclusive effect here because 1) there is no identity of parties between the Personal Injury Action and the Wrongful Death Action and 2) the Personal Injury Action summary judgment was not final for purposes of appeal. Both arguments, however, are without merit.

To make the first argument, plaintiffs ask this Court to ignore the plain language of § 537.080, which conditions the availability of a wrongful death claim on whether the decendent would have been precluded from recovering damages for that claim had death not ensued. Plaintiffs ignore the distinction between a survival action, which § 537.020, R.S.Mo. (2000), makes clear is the antithesis of a wrongful death action, and the injured person's own claim for personal injuries, which § 537.080 requires be evaluated to determine whether the statutory condition precedent for a wrongful death claim has been met. In the second argument, plaintiffs contend that an order must be final for purposes of appeal to have preclusive effect, without providing the Court with any authority that either supports that proposition or contradicts B&W's showing to the contrary. Plaintiffs' arguments therefore fail, and the preclusive effect of the Personal Injury summary judgment bars plaintiffs' failure-to-warn and non-lung cancer claims.<sup>2</sup>

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<sup>2</sup> Plaintiffs also argue that B&W has waived the issue of collateral estoppel, citing a footnote from the Court of Appeals decision in this case. Of course, the Court of Appeals

**A. The Claims at Issue Are Precluded Because Barbara Smith Could Not Have Brought Them Had She Survived.**

Plaintiffs' arguments in their supplemental brief either misstate or ignore the relationship between a wrongful death action and a survival action, as well as the elements of a wrongful death action.

At common law, all claims for personal injury abated upon the death of the injured person and could not be revived. *Bank of Skidmore v. Bartram*, 142 S.W.2d 657, 659 (Mo. App. K.C.D. 1940). By statute, however, Missouri has adopted a scheme permitting the prosecution of such claims after the death of the injured person. Under \_\_\_\_\_ opinion has no precedential effect after the transfer of this case to this Court. *Gerlach v. Mo. Comm'n on Human Rights*, 980 S.W.2d 589, 594 (Mo. App. E.D. 1998). In any event, the Court of Appeals was incorrect. B&W has consistently argued, both in the trial court and on appeal, that the Personal Injury Action summary judgment barred plaintiffs' failure to warn and non-lung cancer claims and that plaintiffs had failed to satisfy the statutory requirement of showing that Barbara Smith could have recovered damages on those claims, had she survived. Nevertheless, even if B&W's prior briefing had been deficient in its discussion of the preclusive effect of the Personal Injury Action summary judgment, any such deficiency has been cured by B&W's supplemental brief in this Court. *See Young v. Stensrude*, 664 S.W.2d 263, 265 n.1 (Mo. App. E.D. 1984) (alleged defect in original brief cured by filing of supplemental brief that addressed issue with leave of court).

this scheme, the manner in which a claim for a deceased person's personal injuries may be pursued depends on the cause of that person's death. If the death did not result from the injury allegedly caused by the defendant's tortious conduct, the claim for damages for that injury may be continued by the personal representative of the injured person's estate as a survival action pursuant to § 537.020 ("Causes of action for personal injuries, other than those resulting in death, . . . shall not abate by reason of [the injured person's] death, . . . but . . . shall survive to the personal representative of such injured party").

If, on the other hand, the death did result from the injury allegedly caused by the tortious conduct, the injured person's claim for damages for that injury abates. *See Donohue v. St. Louis Pub. Serv. Co.*, 374 S.W.2d 79, 81 (Mo. 1963) ("[U]nder the established law the action for personal injuries does not survive in case the injured party dies as a result of the injury.") (emphasis in original). Instead, § 537.080 has created a new cause of action that vests in certain classes of relatives of the deceased. As this Court has recognized, "[t]he language of the survivorship statute and the wrongful death statute are mutually antagonistic. The survivorship statute applies when the injury alleged did not cause death, and the wrongful death statute applies when the injury did cause death." *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992) (emphasis in original).

The fact that a wrongful death claim is a separate cause of action from a survival claim does not mean that it is entirely unrelated to the decedent's claim. "Although death is the necessary final event in a wrongful death claim, the cause of action is derivative of the underlying tortious acts that caused the fatal injury." *State ex rel. Burns v.*

*Whittington*, 219 S.W.3d 224, 225 (Mo. banc 2007). Thus, if the decedent could not have recovered damages for those wrongful acts, §537.080 prohibits a wrongful death claimant from recovering damages for those acts. In this case, Barbara Smith could not have recovered damages for B&W's alleged failure to warn or her non-lung cancer claims because those claims had been adjudicated against her in the Personal Injury Action. Plaintiffs' inability to satisfy the statutory condition precedent requires the conclusion that they failed to establish a right to recover damages under the Wrongful Death Act. See *Klein v. Abramson*, 513 S.W.2d 714, 717 (Mo. App. K.C.D. 1974) (“[T]he legislature saw fit to condition the right to sue for wrongful death upon the primary fact that the decedent could have maintained an action for damages for the injuries had he survived. If such condition cannot be shown, no cause of action for the wrongful death exists.”).

When viewed in the context of this statutory scheme, plaintiffs' attempt to deny the preclusive effect in this case of the Personal Injury Action summary judgment is unavailing. For example, the language plaintiffs quote from *Plaza Express Co. v. Galloway*, 280 S.W.2d 17, 23 (Mo. banc 1955), and *Smith v. Preis*, 396 S.W.2d 636, 640-41 (Mo. 1965), is entirely consistent with B&W's arguments in this case. (Pl. Supp. Brief at 23-24) *Plaza Express* and *Preis* hold only that plaintiffs in a wrongful death action would not be estopped by rulings in a survival action related to the same decedent. Those cases did not present or address the effect of rulings in a prior action in which the decedent herself had been the plaintiff; rather, this Court had already resolved that issue in favor of giving such rulings preclusive effect in a subsequent wrongful death action.

*Strode v. St. Louis Transit Co.*, 95 S.W. 851 (Mo. banc 1906); *Schmelzer v. Central Furniture Co.*, 158 S.W. 353 (Mo. 1913).

Plaintiffs also mischaracterize B&W's statements in its filings in the Interpleader Action in a fruitless attempt to create a conflict between those statements and B&W's position in this case.<sup>3</sup> B&W alleged in its Complaint for Interpleader that the Personal Injury Action summary judgment limited Barbara Smith to recovering damages for lung cancer on three specified legal theories (not including failure to warn). (2d Supp. L.F. 1908-09) B&W specifically alleged that both the Survival Action and any future wrongful death action would be similarly limited: "Under Missouri law, to obtain a verdict in the pending action, Barbara Smith's estate must prove that her lung cancer did not result in her death; but to obtain a verdict in the threatened wrongful death action, Barbara Smith's survivors must prove that her lung cancer caused her death." (2d Supp. L.F. 1909-10 (emphasis in original)) B&W maintained this position in all its filings in

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<sup>3</sup> B&W again renews its objection to the Court's consideration of evidence plaintiffs never presented to the trial court. Plaintiffs have neither offered authority permitting such consideration nor refuted the authority B&W has presented holding that such consideration is impermissible. (B&W Supp. Brief at 19-20) Regardless of whether plaintiffs' failure to support its position at trial with these materials was intentional or negligent, permitting plaintiffs to supplement the record on appeal with materials never reviewed by the trial court will require this Court to engage in *de novo* factfinding, in excess of its appellate jurisdiction in this case. *See* Mo. Const., Art. V, § 3.

the Interpleader Action, expressly stating: “[T]his Court’s summary judgment ruling dismissed the heart disease claims. [Citation omitted.] The wrongful death claimants cannot pursue any claim that Mrs. Smith was not permitted to bring during her life. MO. REV. STAT. § 537.080.1, 537.085.” (2d Supp. L.F. 1975)

Thus, B&W consistently asserted that both the Survival Action and any future wrongful death action were limited to those claims that had survived the Personal Injury Action summary judgment. Plaintiffs’ assertion that “B&W recognized that the Smith family had a ‘statutory right under Missouri law’ to pursue wrongful death damages for heart disease and COPD, despite the partial summary judgment order’s supposed ‘preclusion’ of these damages” (Pl. Supp. Brief at 21) is therefore wrong. B&W actually argued that plaintiffs had a statutory right to bring a wrongful death action based on Barbara Smith’s lung cancer, regardless of how implausible such a claim might be in light of the fact that she had died of a heart attack. (2d Supp. L.F. 1934)<sup>4</sup>

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<sup>4</sup> The relevant paragraph of B&W’s Suggestions reads:

Barbara Smith died of a myocardial infarction (heart attack) on May 25, 2000, eight years after her successful lung cancer surgery and apparent cure. Because Barbara Smith had successful lung cancer surgery in 1992, it seems implausible that the lung cancer or surgery could have caused her to die of a heart attack eight years later. Her family members nonetheless have a statutory right under Missouri law to file a wrongful death claim, however implausible it might be. Plaintiff’s counsel in the Survival Action

Plaintiffs also err when they contend that B&W's current position is inconsistent with its recognition in the Interpleader Action that a wrongful death action would require additional discovery and would be a different claim from the Survival Action. As B&W explained (2d Supp. L.F. 1929-30, 1936-38), new discovery would be required to establish the cause of Barbara Smith's death. Similarly, as explained above, Missouri law recognized that a wrongful death claim is separate and independent from a survival claim. None of these characteristics of a wrongful death action, however, changes the statutory requirement that plaintiffs were required to prove as a condition precedent for their action that Barbara Smith could have recovered damages for these claims had death not ensued. B&W's acknowledgement of the characteristics of a wrongful death action did not waive its right to insist that plaintiffs could not pursue claims that did not satisfy this condition precedent.<sup>5</sup>

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has only recently indicated that on any number of medical theories, the family may seek to link the lung cancer surgery to Barbara Smith's death. (2d Supp. L.F. 1934)

<sup>5</sup> Plaintiffs also erroneously assert that B&W waived preclusion by the Personal Injury Action summary judgment "by failing to oppose Plaintiffs' Motion for Substitution under Fed. R. Civ. P. 25(a)(1)." (Pl. Supp. Brief at 12 n.3) Presumably, plaintiffs are referring to the Motion for Substitution of a Party filed only on behalf of Lincoln Smith in his capacity as personal representative for the estate of Barbara Smith. (2d Supp. L.F. 2105-09) Their characterization of this motion as "Plaintiffs'" is at best inaccurate. This

Indeed, as pointed out in B&W's initial supplemental brief, plaintiffs' counsel stated at trial that the Personal Injury Action summary judgment "precluded some of Mrs. Smith's claims." (T. 3423) Although plaintiffs assert that B&W's reference to their counsel's statement distorted what was said, B&W's point here is simply that, at trial, plaintiffs' counsel acknowledged the obvious fact that the entry of partial summary judgment as to certain claims in the Personal Injury Action precluded Barbara Smith from further pursuing those claims in the Personal Injury Action. Nevertheless, plaintiffs now make the unexplained assertion that their counsel's next two comments somehow undercut that acknowledgment. In those comments, however, plaintiffs' counsel was not disputing the preclusive effect of the Personal Injury Action summary judgment in the Personal Injury Action. To the contrary, plaintiffs' counsel was arguing that the preclusion of Barbara Smith's claims in the Personal Injury Action should have no effect on plaintiffs' claims in the Wrongful Death Action because Barbara Smith was not a party to the Wrongful Death Action:

Essentially, the defendants are arguing that Judge Smith's order regarding summary judgment, which precluded some of Mrs. Smith's claims, but not \_\_\_\_\_ motion sought to permit only the personal representative to prosecute the claims that remained after the Personal Injury Action summary judgment in a survival action; it did nothing to alter the effect of the Personal Injury Action summary judgment, and had absolutely no bearing on the as-yet-unfiled Wrongful Death Action. B&W did not waive any arguments concerning the Wrongful Death Action by its response to this motion.

all of Mrs. Smith's claims, collaterally estops or precludes the claims in this case. And he can't argue that because there have to be different parties involved or there have to be -- the same parties have to be involved in both cases. And because that's not true here, because the wrongful death action is a completely separate and distinct action under the law involving completely different parties, his argument must fail.

(T. 3423-24) The distinction plaintiffs point to in this argument, however, is irrelevant; the wrongful death statute permits plaintiffs to recover only on claims for which Barbara Smith could have recovered, if death had not ensued. § 537.080.1; *Klein*, 513 S.W.2d at 717. Plaintiffs' acknowledgement that Barbara Smith was precluded from recovering on the claims dismissed by the Personal Injury Action summary judgment requires the conclusion that plaintiffs in this action are also precluded from recovering on those claims.

**B. The Personal Injury Summary Judgment Was Sufficiently Final to Have Preclusive Effect.**

In its Supplemental Brief, B&W clearly showed that federal law governs the preclusive effect of the Personal Injury Action summary judgment in this case and that, under federal law, finality for purposes of an order's preclusive effect is not determined by whether that order is final for purposes of appeal. (B&W Supp. Brief at 10, 12-14) Plaintiffs cite no controlling authority to support their contention that an order must be final for purposes of appeal for it to have preclusive effect. Nevertheless, they argue that the Personal Injury Action summary judgment had no preclusive effect because the

federal court did not certify it as final under Fed. R. Civ. P. 54(b). This argument is contrary to controlling federal law and must be rejected. See *Robinette v. Jones*, 476 F.3d 585, 589-90 (8th Cir. 2007); *In re Nangle*, 274 F.3d 481, 484-85 (8th Cir. 2001); *John Morrell & Co. v. Local Union 304A of United Food & Commercial Workers*, 913 F.2d 544, 564 (8th Cir. 1990); see generally Restatement (Second) of Judgments § 13 (1982) (“[F]or purposes of issue preclusion . . . , ‘final judgment’ includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.”).<sup>6</sup>

Plaintiffs contend that the relevant inquiry under § 537.080 is “what claims were available to Barbara Smith when she died.” (Pl. Supp. Brief at 25) Even if plaintiffs were using the correct standard for determining finality (which they are not), they erred in analyzing the language of § 537.080 in terms of what claims were available to a decedent as of the date of her death. This Court has specifically rejected plaintiffs’ position:

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<sup>6</sup> The Missouri cases plaintiffs cite are inapposite, in light of plaintiffs’ tacit concession that federal law controls this issue. Furthermore, it is not clear that these cases accurately state Missouri law concerning an order’s issue preclusion effect, in light of this Court’s recent recognition that Missouri law generally follows the Restatement (Second) of Judgments. *Kesterson v. State Farm Fire & Cas. Co.*, 242 S.W.3d 712, 717 (Mo. banc 2008).

The plain language of the statute itself does not condition recovery upon the existence of a right to sue at either the time of the injury or the time of death. Instead, it permits an action “[w]henever the death of a person results from any act ... which, if death had not ensued, would have entitled such person to recover damages in respect thereof ...” § 537.080. We interpret this provision to mean that a cause of action for wrongful death will lie whenever the person injured would have been entitled to recover from the defendant but for the fact that the injury resulted in death.

*O’Grady v. Brown*, 654 S.W.2d 904, 910-11 (Mo. banc 1983) (emphasis and ellipses in original). Thus, the test under the statute is not temporal, but rather cause-in-fact: if the only reason the decedent could not recover is that the injury resulted in death, a wrongful death claim may be brought; if the bar results from some other cause, like a prior adjudication or settlement of the claim, it may not be brought. Under the correct test, plaintiffs are barred from recovering on the failure to warn and non-lung cancer claims in their Wrongful Death Action.

Apparently recognizing that arguments ignoring the controlling law may not be persuasive, plaintiffs also attempt to distinguish the Eighth Circuit’s decision in *Robinette*. That the facts of *Robinette* are not identical to the facts of this case, however, does not make the principles that case states inapplicable here. *Robinette*, *Nangle*, and *John Morrell* all stand for the proposition that an order need not be final for purposes of appeal in order to be final for purposes of its preclusive effect. The fact that the

remaining claims in *Robinette* were voluntarily dismissed without prejudice by the plaintiffs does not change the applicability of that proposition in this case.<sup>7</sup>

Moreover, in purporting to describe the factual differences between *Robinette* and this case, plaintiffs completely misstate the language of the agreed order in the Interpleader Action. The pertinent paragraph of that order states:

3. The fact that the Survival Action is dismissed with prejudice as a consequence of this interpleader action shall not be used by Brown & Williamson as a defense to a wrongful death action arising from the death of Barbara Smith, if one is filed. Nonetheless, Brown & Williamson may raise and litigate any defense based upon fact or law that is available to it in any wrongful death action arising from the death of Barbara Smith, if one is filed.

(2d Supp. L.F. 2098) Nothing in the agreed order addresses the Personal Injury Action summary judgment. B&W agreed that it would not raise the dismissal with prejudice of

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<sup>7</sup> Furthermore, plaintiffs' assertion that this case is more closely analogous to *Orion Financial Corp. v. American Foods Group, Inc.*, 201 F.3d 1047 (8th Cir. 2000), is unfounded. *Orion* is inapposite because it did not involve the preclusive effect of a partial summary judgment, but rather its appealability, which as shown above is a wholly different issue. *Orion*'s holding that an appealable judgment may not be based on illusory stipulations is simply of no assistance to this Court in resolving the issues in this case.

the Survival Action as a defense to a wrongful death action; consistent with that agreement, it has not argued that this dismissal with prejudice barred plaintiffs' claims. B&W, however, made no agreement that it could not argue that the Personal Injury Action summary judgment barred some of plaintiffs' wrongful death claims. Under Missouri law, the dismissal of the Survival Action has no effect on the preclusive effect of the Personal Injury Action summary judgment on plaintiffs' wrongful death claims. Plaintiffs' arguments and assertions to the contrary are groundless and should be rejected.

Plaintiffs also incorrectly argue that the federal court, in accepting the agreed order submitted to it by the parties in the Interpleader Action, should be deemed to have expressed its own views in that order. Plaintiffs cite no authority to support this argument, and it is contrary to the law. A consent order "is different in nature from a judgment rendered on the merits, because it is primarily the act of the parties rather than the considered judgment of the court." *American Family Mut. Ins. Co. v. Hart*, 41 S.W.3d 504, 510 (Mo. App. W.D. 2000) (quoting 46 Am. Jur. 2d *Judgments* § 208 (1994)).<sup>8</sup> For this reason, a consent order "'does not represent the decision of a judge after a hearing upon disputed issues[,] but is 'an agreement between the parties which resolves their differences' and is 'contractual in nature.'" *Id.* (quoting *Boillot v. Conyer*, 887 S.W.2d 761, 763 (Mo. App. E.D. 1994)). The federal judge cannot properly be said to have expressed any independent view in accepting the parties' agreement.

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<sup>8</sup> This language is now found at 46 Am. Jur. 2d *Judgments* § 184 (2008).

For this same reason, plaintiffs' attempt to expand the scope of the agreed order beyond what the parties expressly agreed to must also fail. The United States Supreme Court has stated:

It is to be recalled that the "scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it" or by what "might have been written had the plaintiff established his factual claims and legal theories in litigation."

*Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 574 (1984) (quoting *United States v. Armour & Co.*, 402 U.S. 673 (1971)) (reversing court of appeals' construction of consent order to forbid actions not mentioned in order).

In this case, the plain language of the agreed order is consistent with the position B&W took throughout the Interpleader Action. B&W alleged in that case that both the Survival Action and any future wrongful death action were limited by the Personal Injury Action summary judgment. (2d Supp. L.F. 1975) Nothing within the four corners of the agreed order shows that B&W agreed to remove that limitation in exchange for a dismissal. Indeed, the deposition testimony of the expert for the defendants in the Interpleader Action (plaintiffs here), to the effect that Barbara Smith's death was caused

by her lung cancer (2d Supp. L.F. 2043-55), would in any event have required dismissal of the Survival Action as a matter of law.<sup>9</sup>

B&W, throughout this case, has defended itself in a manner consistent with the plain language of the agreed order. It has argued only that the claims dismissed as a result of the Personal Injury Action summary judgment could not be brought as wrongful death claims. (L.F. 23, 86, 1631-34; 2d Supp. L.F. 2112, 2120 n.4; T. 2112-13, 3361-65) It has never argued that the remaining claims that were the subject of the dismissal with prejudice of the Survival Action should be barred because of that dismissal. Plaintiffs' assertions to the contrary are false.

Furthermore, plaintiffs never asserted that the Interpleader Action agreed order defeated B&W's arguments until their substitute brief in this Court. Plaintiffs have offered no explanation for their failure to make this argument earlier. They cannot contend that they were ignorant of an agreed order that their counsel signed. The only plausible explanation for their failure to rely on the agreed order in opposing B&W's

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<sup>9</sup> Viewed in the context of the plain language of the agreed order and the applicable law, plaintiffs' assertion, unencumbered by any citation to the record or relevant authority, that "the federal court specifically ordered that its previous partial summary judgment order was not a 'valid and final judgment' by refusing to subsequently dismiss the Smith family's Wrongful Death Action and specifically reserving their right to bring such an action in the future, unfettered by any expressed limitations" (Pl. Supp. Brief at 15-16) is pure fantasy.

repeated motions in the trial court is that they did not believe that it meant what they now claim it means. Plaintiffs' failure to explain or excuse their silence should itself be deemed an admission against their position. Instead, plaintiffs brazenly blamed B&W for not including the agreed order in the record on appeal. Plaintiffs' desperate attempt to misdirect the Court's attention conveniently overlooks the fact that "[d]ocuments or other exhibits never presented to or considered by the trial court may not be introduced into the record on appeal." *Olson v. Christian County*, 952 S.W.2d 736, 738 (Mo. App. S.D. 1997); *see also Welch v. Automobile Club Inter-Insurance Exchange*, 948 S.W.2d 718, 719 n.1 (Mo. App. E.D. 1997) (same). Plaintiffs' failure to rely on the agreed order to oppose B&W's motions in the trial court should preclude them from doing so now.

### **CONCLUSION**

B&W requests that this Court hold that plaintiffs' failure-to-warn and non-lung cancer claims should not have been submitted to the jury. B&W further renews its request for the relief requested in its substitute brief filed in this Court.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE AND SERVICE**

I, Bruce D. Ryder, hereby certify as follows:

1. The attached brief complies with the limitations contained in Supreme Court Rule 84.06. The brief was completed using Microsoft Word for Windows, in Times New Roman, size 13 point font. Excluding the cover page, the signature block, and this certification of compliance and service the brief contains 4,033 words which does not exceed the 7,750 words allowed for a reply brief.

2. Pursuant to Supreme Court Rule 84.06(g), the CD-ROM filed with this brief contains a copy of this brief in Microsoft Word for Windows format. It was scanned for viruses on May 8, 2008, and is virus-free.

3. One true and correct copy of the attached brief was served on May 9, 2008, by mail, U.S. Postage prepaid, on Kenneth B. McClain and Scott B. Hall, Humphrey, Farrington & McClain, P.C., 221 West Lexington, Suite 400, P.O. Box 900, Independence, MO 64501, and Gregory Leyh, Leyh & Leyh, 104 N.E. 72<sup>nd</sup> Street, Suite 1, Gladstone, MO 64118, and an electronic copy was served by e-mail addressed to kbm@hfmlegal.com, sbh@hfmlegal.com, and gleyh@leyhlaw.com.

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