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JURISDICTIONAL STATEMENT

A Jackson County jury awarded Forest and Judy Hoskins \$3,000,000 in compensatory, and \$7,000,000 in punitive damages. The court entered judgment for \$7,556,264.39. Appellants claim §537.675 RSMo (2001) violates certain state and/or federal constitutional provisions. This Court's decision in *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 111 (Mo. banc 1996) expressly concluded that this Court has jurisdiction over those constitutional issues on appeal pursuant to Article 5, Section 3, of the Missouri Constitution.

STATEMENT OF FACTS

Appellant's Statement of Facts is incomplete, and therefore Respondents offer the following statement of facts to complete the picture and fully inform the Court on the issues.

Plaintiffs Forest "Dino" Hoskins and Judy Hoskins were married in September, 1965. (Tr. 534) Mr. Hoskins worked at several jobs after high school, but he never had any exposure to asbestos until he started working at the BMA Tower. (Tr. 556-557) In September, 1978, Mr. Hoskins became an "operating engineer" inside the BMA Tower. (Tr. 557-559) He did not work directly for Business Men's Assurance Company of America (BMA); instead, he worked for three separate companies (Penn Valley Management, B-G Maintenance and Kessinger-Hunter) that provided operating engineers to take care of the BMA Tower. (Tr. 558-559)

THE BMA TOWER

The BMA Tower was built in 1963. (L.F. 1163) Sprayed asbestos fire retardant was applied to the building during construction. (L.F. 1164) The product used was called "Sprayed Limpet Asbestos", a product manufactured by J. W. Roberts, Ltd., a subsidiary of Defendant T&N, Ltd. (Tr. 586-587) (T&N Ltd, or Turner and Newall, was acquired by Defendant Federal-Mogul Corporation in 1998. For purposes of this case,

Defendants T&N, Ltd. and Federal-Mogul were known as “Turner and Newall.”) (Tr. 126, 207, 586-587) The Sprayed Limpet Asbestos was placed on the structural steel of the BMA Tower during its construction in 1962 and 1963. (Tr. 587)

The BMA Tower is a nineteen story office building located at 31st and Southwest Trafficway, Kansas City, Missouri. (Tr. 223-224) On the first eighteen floors there were suspended ceilings; between the ceiling tiles and the next floor there are electrical conduit and feeders for the electricity for all the floors, telephone wiring, and heating and ventilation equipment. (Tr. 227-228) The space between the suspended ceiling tiles and the floor above was called the “soffit area or the return air plenum.” (Tr. 229-230) The nineteenth floor was the machine or mechanical room and there was not a suspended ceiling in that area. (Tr. 227)

The Limpet Asbestos was sprayed throughout the building, every place there was any steel. Since the building was constructed of steel I-beams, the Sprayed Limpet Asbestos was literally all over the building. (Tr. 228-229) For example, the Limpet Asbestos covered all of the suspended ceiling tiles on the first eighteen floors. The nineteenth floor (or mechanical room) had no suspended ceiling, so the Sprayed Limpet Asbestos on that floor was open and could be seen by anyone who worked on the nineteenth floor. (Tr. 231-232, 237)

OPERATING ENGINEERS

The “operating engineers” such as Plaintiff Dino Hoskins were involved in the physical operation of the BMA Tower. The operating engineers always worked for other companies, such as Penn Valley Management, but were supervised by BMA employees (Tr. 224-227) Among other things, the operating engineers would work above the suspended ceilings while they were installing electrical lines, low voltage lines, water lines, and similar equipment. To do so, the operating engineers would need to get in the soffit area or the return air plenum, which was approximately two and one-half to three feet of space between each suspended ceiling and the floor immediately above it. (Tr. 229-230) Mr. Hoskins and the other operating engineers regularly and routinely worked above the ceiling tiles in the soffit area and came into contact with asbestos, although they did not learn there was asbestos in the “Limpet” until 1988 or 1989. (Tr. 229, 231-234, 252-254, 312-315, 559-567) When they would get into that area, they came in contact with the Limpet which had come loose and fallen on top of the ceiling tiles. (Tr. 230) Not only would the operating engineers run conduit through the soffit area, but when they attached conduit hangers to the steel beams, they had to physically remove some of the Limpet so that they could get the clamp on the steel, to hold the conduit in place. (Tr. 232)

Co-workers of Mr. Hoskins testified that the Sprayed Limpet Asbestos was just about everywhere in the soffit area between the suspended ceilings and the next floor; there was never a time when they looked above the ceiling tiles and were unable to see the asbestos. (Tr. 253, 313) One of those co-workers, Lloyd Gregory, testified there were many times when he had to push up on one of the ceiling tiles to get into the soffit area and he noticed that the tile was much heavier than it should have been. Those tiles with the fallen asbestos on them weighed as much as 35 or 40 pounds. (Tr. 313-314). Not only was the Sprayed Limpet Asbestos all over the ceiling tiles in the soffit area, but the operating engineers also spent a lot of time on the nineteenth floor, which had a totally open ceiling and asbestos sprayed on the ceiling and steel beams. (Tr. 314)

MR. HOSKINS' EXPOSURE TO ASBESTOS

Until he started working inside the BMA Tower, Mr. Hoskins was never exposed to asbestos of any sort. (Tr. 557) From the time he started working in the BMA Tower in September of 1978 until 1989, Mr. Hoskins did not know that the fire retardant had asbestos in it. (Tr. 559) The operating engineers finally learned that there was asbestos in the fire retardant when BMA started conducting classes for the operating engineers in 1989. (Tr. 561)

Mr. Hoskins worked above the suspended ceiling tiles and got into the fire retardant (which he later learned was asbestos) the week he started working in the building. (Tr. 562) He worked in and around what he later learned was asbestos, without any sort of protective clothing or breathing apparatus, from 1978 to 1988 or 1989. (Tr. 562) During those years, there were times when he would be working above the suspended ceilings and had to remove portions of the Limpet, to do such things as run conduit and put beam clamps onto the structural steel. (Tr. 559-560). When Mr. Hoskins would open up ceiling tiles to do work in the soffit area, the asbestos would be on the tile itself and would fall on him. On occasion, the asbestos would actually be airborne. (Tr. 560-561)

Mr. Hoskins continued to work as an operating engineer inside the BMA Tower and in the asbestos until January, 1999, although after BMA started providing training in 1989, Mr. Hoskins and his co-workers were at least provided respirators. The operating engineers were not told about the need to wear respirators until 1988 or 1989; after being told to do so, they wore respirators whenever they worked above the ceiling. (Tr. 234-237, 254-256, 561-563) The operating engineers were also then told that they were not to remove any ceiling tiles without some sort of enclosure built below it. (Tr. 235) The precautions that were initiated in 1989 included medical exams for the operating engineers, who were given pulmonary function tests and chest x-rays on a yearly basis. (Tr. 566-567)

MR. HOSKINS' ASBESTOS-RELATED HEALTH PROBLEMS

In January, 1999, Mr. Hoskins had his annual pulmonary function test and chest x-ray. (Tr. 567-568) Before the exam, Mr. Hoskins noticed that he was having problems breathing; he attributed this to his age and physical condition. (Tr. 577) The physicians who conducted the pulmonary test were concerned with the initial results, so they had Mr. Hoskins do it again. The chest x-rays followed and the technician was concerned about his condition. (Tr. 568) Mr. Hoskins went to his family physician, who sent him for a CT scan and later referred him to Dr. Hamner Hannah, a thoracic surgeon. (Tr. 548-569, L.F. 993, 995-996) Dr. Hannah found it significant that Mr. Hoskins had a thirteen year exposure to asbestos and was concerned that Mr. Hoskins might have mesothelioma, a malignant tumor of the pleura surface, so he conducted a biopsy. (L.F. 996-998) The tissue sample removed during the biopsy was sent to a pathologist, Dr. Hal Marshall, who made the diagnosis of desmoplastic mesothelioma. (Exh. 16) (L.F. 999-1001, 1125-1128) Dr. Marshall is board certified in both anatomical and clinical pathology and he felt confident with his diagnosis of mesothelioma, particularly after he saw the report of Dr. Philip Lieberman, who had a reputation as a “very outstanding surgical pathologist” at Memorial Sloan-Kettering Hospital in New York City. (L.F. 1122-1123, 1128-1129)

Dr. Mark Myron is board certified in internal medicine and medical oncology; he generally sees patients who have been diagnosed with cancer and advises them as to treatment options. (L.F. 1096, 1098) He saw Mr. Hoskins after Dr. Marshall made the diagnosis of mesothelioma, which Dr. Myron described as a malignant disease that involves the pleura generally and which is not felt to be a curable disease even when diagnosed in a fairly early stage. (L.F. 1097) Dr. Myron testified there was a direct relationship between Mr. Hoskins' exposure to asbestos and the mesothelioma. (L.F. 1100-1101) He suggested Mr. Hoskins be seen by Dr. Valerie Rusch, a thoracic surgeon in New York City, who had extensive experience treating mesothelioma victims. (L.F. 1102) Dr. Myron continued to treat Mr. Hoskins after Dr. Rusch performed the relatively successful surgery, although he testified that Mr. Hoskins' prognosis remained guarded, that most mesothelioma patients have recurrence of the disease, and that mesothelioma is considered to be a non-curable disease, which means it is eventually going to cause the death of the patient. (L.F. 1104-1105)

Dr. Valerie Rusch is a thoracic surgeon who serves as Chief of the Thoracic Service in the Department of Surgery at Memorial Sloan-Kettering Cancer Center in Manhattan, New York. (L.F. 1037) Dr. Rusch was brought into the case by Dr. Myron and her initial consultation with Mr. Hoskins resulted in a diagnosis of desmoplastic mesothelioma. (L.F. 1041) She reported to Dr. Myron that the prognosis was poor, but that she

thought surgery to remove the pleura and underlying lung may be worth a try. (L.F. 1043-1044)

At the time Dr. Rusch first saw Mr. Hoskins, she had the tissue samples or slides that were taken during the biopsy performed by Dr. Hannah in Kansas City reviewed by Dr. Philip Lieberman, a board certified surgical pathologist who served as Chief of Surgical Pathology at Memorial Sloan-Kettering Center for over thirty years. (L.F. 934-935, 937) Dr. Lieberman's official departmental consult or pathology report noted that he had reviewed twenty slides from the biopsy conducted by Dr. Hannah and confirmed the diagnosis of desmoplastic malignant mesothelioma. (L.F. 937-938) Dr. Lieberman had experience in the diagnosis of desmoplastic mesothelioma and he was one of the founders of the American Journal of Surgical Pathology. (L.F. 936-937, 965, 972-973) Dr. Lieberman has never sent any material to the Canadian and the United States Mesothelioma Panel currently headed by Dr. Andrew Churg for its evaluation; the Panel usually sent cases to him. (L.F. 975)

Dr. Rusch's pre-operative diagnosis was right malignant mesothelioma and that was confirmed post-operatively. (L.F. 1044-1045) Dr. Rusch discovered during surgery that there was very little disease and that the tumor was a stage T1A tumor, which means it was considered a very early stage tumor. Therefore, she decided to only remove the pleura and keep the lung in place. (L.F. 1045-1046)

Dr. Rusch noted in her records that Mr. Hoskins had a history of positive asbestos exposure. (L.F. 1041, 1048) Both Dr. Myron and Dr. Hannah testified that Mr. Hoskins' mesothelioma was caused by exposure to asbestos. (L.F. 1100-1101, 1004-1005) Dr. Lawrence Repsher, a board certified pulmonary pathologist who was hired by the Defendants as an expert witness in the case, testified that Mr. Hoskins has amosite asbestos fibers in his lungs and that they came from the Sprayed Limpet Asbestos in the BMA Tower. (Tr. 696-697, L.F. 1019, 1021, 1027, Tr. 630-631)

TURNER AND NEWALL'S KNOWLEDGE OF ASBESTOS HAZARDS

As an aid to the Court, Plaintiff's counsel have prepared a timeline that demonstrates Turner and Newall's long history of knowledge regarding the dangers of asbestos. (See Appendix, A-1)

Because Turner and Newall stopped manufacturing Sprayed Limpet Asbestos over twenty years ago, the Defendants had no representative who could testify at trial from personal knowledge regarding its knowledge of asbestos hazards, when and how it learned of the relationship between mesothelioma and exposure to asbestos containing materials, and when and how it became aware that exposure to asbestos containing materials in office buildings may present health risks or hazards. (See the Notice to Take Deposition of Corporate Representative of T&N PLC and the response of defense attorney Margaret Chaplinsky to that Notice.) (A2-A7)

All the evidence that came directly from Turner and Newall was in the form of documents produced by the defense attorneys; the parties stipulated that all of those documents were and are authentic. (A8-A9) Many of the documents produced by defendants were not clear copies. Therefore Plaintiffs relied heavily on Dr. Castleman's testimony about those documents. For the Court's convenience, Plaintiffs have attached more legible copies (or retyped versions) of various documents admitted into evidence. The copies are attached to the original exhibits filed with this Court.

In addition to Turner and Newall's own documents and file materials, evidence of the Defendants' knowledge of asbestos hazards came from the testimony of Dr. Castleman and Dr. Repsher, the pulmonologist hired as an expert witness by Turner and Newall. Dr. Repsher told the jury that asbestos manufacturers "have known for a long time that inhaling asbestos fibers in significant concentrations over a period of time, no matter how they get into the air, are dangerous." (Tr. 746)

Dr. Castleman is an environmental consultant with a Chemical Engineering Degree, a Master's Degree in Environmental Engineering, and a Doctor of Science Degree from the Johns Hopkins School of Hygiene and Public Health. (Tr. 366) He has published approximately fifty articles and chapters in books dealing with asbestos and other toxic substances and he has qualified and testified as an expert witness in court in about 200 trials

throughout the United States. (Tr. 368, 378) He has consulted with the United States Department of Justice, a number of federal agencies, and attorneys representing Turner and Newall in some asbestos-related litigation. (Tr. 373-374, 378-379) Dr. Castleman authored a book entitled “Asbestos: Medical and Legal Aspects” that was first published in 1984. The fourth edition was published in 1996 and Dr. Castleman has spent approximately 9,000 hours in the preparation of his book and the various revisions. (Tr. 369-370) There are over 1,000 reference sources cited just in the first four chapters of his eleven chapter book and he has read each and every one of them. (Tr. 370) Dr. Castleman has reviewed “tens of thousands” of Turner and Newall documents. (Tr. 396)

One of the physicians hired by the Defendants as an expert witness, Dr. Repsher, has used the second edition of Dr. Castleman’s book (and perhaps the third) as the basis for some of his testimony regarding “state of the art.” Dr. Repsher views Dr. Castleman’s book (at least the second edition) as authoritative and he never found anything in the book that Dr. Repsher knew to be untrue. Dr. Repsher also has no reason to believe that the latest edition of the book is anything but authoritative. (Tr. 731-732)

In 1924, Turner and Newall began monitoring the medical literature as it developed regarding the health hazards of asbestos. (Tr. 396-397) A case report or medical summary on Nellie Curshaw, a Turner and Newall employee, was published in 1924 by Dr. W. E. Cooke. Dr. Cooke’s report

on Nellie Curshaw and follow-up research lead to a great deal more interest around the world in medical circles about asbestos related health problems and it lead to Turner and Newall starting to monitor the medical literature. (Tr. 387-388, 397)

Turner and Newall recognized asbestosis (which causes shrinkage of the lungs) as a health problem in 1930, which is when a Dr. Merewether published a report regarding the hazards of asbestos. (Tr. 388-390) Dr. Merewether noted in his work that asbestos related disease had a latency period measured in years, that asbestos dust has no warning properties, and that workers need to be told about the insidious threat that asbestos dust can pose to them by eventually killing them or causing total disability. (Tr. 453) Dr. Merewether also talked about the need for asbestos workers to protect themselves against the dust and the need for respiratory protection (respirators). (Tr. 452-453)

Sprayed asbestos was introduced as a product in 1932 and the British Medical Journal the “Lancet” reported that sprayed asbestos was a hazardous product. (Tr. 465) The Lancet study pointed out that even if sprayed asbestos is wet when you spray it, “it eventually dries out and you’ve got this dust all other [sic] the place.” (Tr. 465-466)

During the early 1930’s, the medical literature was reporting cases of asbestos related health problems not only among asbestos workers, but among the users of asbestos insulation products. “There were cases

reported among an insulation worker and a boiler riveter in 1933 and 1934, published in the British literature and in the United States.” (Tr. 391-392) According to Dr. Castleman, sprayed asbestos was known to be a mortal hazard since the 1930’s. (Tr. 463)

In 1935, case reports appeared in medical literature, both in Great Britain and in the United States, reporting that people with asbestosis had been getting lung cancer. From 1935 until 1950, there were additional reports in the literature regarding insulation workers and product users who suffered from asbestosis, lung cancer and mesothelioma (which was first designated as an asbestos disease by Dr. Wetler, a German pathologist, in 1943). (Tr. 392, 394-395, 399-400)

In 1936, Turner and Newall started identifying its own employees who died of the disease later designated as mesothelioma. William Pennington died in 1936; Edward Pilling died in 1939; John Scoura and John Greensmith died in 1946; Frederick Fowler died in 1949; Harold Kay died in 1952; Fred Butterfield died in 1957. (Tr. 401-402)

In 1947, an article in the New England Journal of Medicine reported a mesothelioma victim who had worked on ships around asbestos insulation; there was also the report of an insulation worker with mesothelioma in 1953. (Tr. 400-401) In 1955, Dr. Doll conducted a study of asbestos workers at a Turner and Newall plant which talked about mesothelioma; Turner and Newall attempted to suppress that study. (Tr.

400-401, 486) In 1956, Turner and Newall used its strategy of “running out the clock” in a case where one of its outside attorneys reported to its in-house counsel that it would be difficult for the victim to establish negligence if he did not survive; for that reason, it was best to delay the action and hope that the man died before the case was resolved. (Tr. 408-409, 417-418, 482-483)

In 1957, Turner and Newall research established that mineral wool would be a cheaper substitute for Sprayed Limpet Asbestos, but the switch would reduce the market for asbestos. In addition, mineral wool would not be a proprietary or patented product. (Tr. 454-455) Mineral wool is much less dangerous than asbestos and became the substitute for asbestos when asbestos was eventually banned in the United States. (Tr. 455-456)

In 1958, Dr. J. C. Wagner, who later wrote the paper that established it was absolutely known by 1960 that asbestos caused mesothelioma, informed Turner and Newall’s medical director that mesothelioma had been found with “undue frequency” in asbestos mining areas in South Africa. (Exh. 87) (Tr. 409, 418-421, 702-703) John Waddell, a Turner and Newall executive, read one of Dr. Wagner’s papers in 1959 which suggested that there was a serious hazard involving mesothelioma of the pleura in the Cape Asbestos fields. (Exh. 95) (Tr. 412-413, 421) On October 13, 1959, four representatives of Turner and Newall attended a meeting of the Management Committee of the Asbestos Research Council which discussed

that same paper. (Exh. 143) (Tr. 415-416, 421-423, 484-485) Turner and Newall and other asbestos companies were in contact with Dr. Wagner in the late 1950's and were closely monitoring his research. (Tr. 419, 421-423, 485)

On April 24, 1960, Dr. Wagner published his article entitled "Diffuse Pleural Mesothelioma and Asbestos Exposure in the North Western Cape Province." Dr. Repsher, a defense expert, testified that Dr. Wagner's paper established that it was **absolutely known by 1960 that asbestos caused mesothelioma.** (Tr. 202-203) This study reported that mesothelioma is caused by exposure to asbestos and can result from **non-occupational exposure** to the substance. Case 30, which was discussed in the article, pointed to the connection between mesothelioma and the **removal** of asbestos insulation. (Exh. 138) (Tr. 415, 423-425) According to Dr. Castleman, Dr. Wagner's study was significant because **it showed that the population at risk for asbestos related cancer** extended beyond the people who manufactured or mined asbestos and those who used asbestos products like insulators, but **extended also to the general population of people who are in an area where asbestos air pollution is being created.** In other words, the people at risk for asbestos related cancer included people who had an "environmental exposure" to asbestos. This was "**very scary information**" from the public health point of view. (Tr. 424-425)

On July 25, 1960, Turner and Newall's medical director, Dr. Knox, attended a conference in the United States and reported on a paper by a Dr. Webster which talked about mesothelioma tumors in connection with asbestos. (Exh. 103) (Tr. 414-415, 425-426) At the same time, the medical director for Keasbey and Mattison (a Turner and Newall subsidiary), Dr. Stabler, reported that a radiologist who had reviewed x-rays for his company had been unduly favorable to the worker and, since another radiologist had replaced the first one and begun the review of x-rays, fewer asbestos related abnormalities had been reported. (Tr. 414-415, 427-428) It was further reported at the conference that things were allowed to occur in the United States at Keasbey and Mattison that would have been unacceptable in Great Britain under that country's regulations and practices. (Tr. 426-428) There was also a discussion at the conference of a paper entitled "Non Occupational Asbestosis." (Exh. 103)

Robert A. Porter, a former president of Keasbey and Mattison, stated that in 1961 Turner and Newall gave only limited information on asbestos related health problems to its United States subsidiary. Keasbey and Mattison was never instructed by Turner and Newall to label products or otherwise inform product users of health hazards linked to asbestos exposure. (Exh. 147, pg. 8) (Tr. 416, 477-478) By 1961 and 1962, it was obvious to Turner and Newall that mesotheliomas were as prevalent among

industrial workers in Great Britain as they were among the asbestos miners and millers in South Africa. (Exh. 140) (Tr. 487-489)

In 1962, an internal Turner and Newall memo pointed out that even if the company succeeded in perfecting a way of applying asbestos by a dustless and safe method, which was a “big if,” the asbestos was still liable to come unstuck when somebody eventually came in to remove the asbestos. The executive writing the internal memo (Alexander Marshall) stated that he could not see much hope of rendering this safe from a health point of view, so that reliance would still have to be put on protective measures. (Tr. 383-386) Also in 1962 and 1963, Sprayed Limpet Asbestos was applied to the BMA Tower. A film of the application process shows that the worker spraying the Limpet on the building was not wearing a respirator. (Exh. 82) (Tr. 746-747)

Before July 1963, Turner and Newall warned its own employees about the dangers of exposure to Sprayed Limpet Asbestos and provided warnings through detailed instructions at the school for asbestos sprayers in the United Kingdom. No warnings were issued by Turner and Newall to its United States subsidiary, J. W. Roberts, until July of 1963. (Exh. 163) (Tr. 441-442, 449-451) Warnings were not provided to the applicators of Sprayed Limpet Asbestos until after it was applied to the BMA Tower. (Tr. 748) The warnings included in the notice from J. W. Roberts (a Turner and

Newall subsidiary) never reached the people applying the Limpet to the BMA Tower. (Exh. 82) (Tr. 442, 746-747)

TISSUE SAMPLES AND SLIDES

Two of the Defendants' Points Relied On discuss some comments made in closing argument by the Hoskins' attorney about some tissue samples or slides which were not shown by the defense attorneys to one of their hired medical witnesses, Dr. Andrew Churg. For that reason, this next subsection will discuss the facts surrounding the slides.

The Petition for Damages was filed March 6, 2000. (L.F. 26) On April 28, 2000, Plaintiffs sent a copy of all medical records in their possession to Margaret Chaplinsky, who claimed to be representing Defendants T&N PLC (Turner and Newall) and Federal-Mogul. Included in that set of medical records was a document that was stamped No. 00185, which was a "Department Consult" note from Sloan-Kettering Memorial Hospital for Cancer and Allied Diseases in New York. (A10-A11) The "Departmental Consult" was Dr. Philip Lieberman's formal report indicating that he had received 20 slides from Research Medical Center in Kansas City, retained 20 slides, and returned no slides. (Exh. 74)

On May 5, 2000, Plaintiffs sent to the defense attorneys their "Response to Uniform Request for Production of Documents and Things." Attached to the response was a "medical authorization" authorizing the

release of any and all records concerning the health of Forest D. Hoskins to Kalinowski & Chaplinsky, the Turner and Newall attorneys. The authorization specifically referred to Memorial Hospital Sloan-Kettering Cancer Center, Menorah Medical Center, and Research Medical Center. (A12-A16)

On August 4, 2000, the Hoskins' attorneys sent a letter to the defense attorneys which discussed the difficulty in getting access to tissue samples or slides that the defense attorneys wanted to have available for review by their hired experts. The letter specifically told the defense attorneys that the hospital in New York had said that a **court order** would be needed and the letter went on to suggest the possibility of a stipulation regarding access to the tissue samples and slides, although the defense attorneys were invited to check with the various hospitals to see what exactly was needed. (Exh. 288) That letter ultimately lead to a stipulation regarding the tissue samples which stated that any and all tissue samples could be released to The Accurso Law Firm (the Hoskins' attorneys). (L. F. 80)

On November 20, 2000, the Hoskins' attorneys wrote a letter to Margaret Chaplinsky (the Turner and Newall attorney) which accompanied "the following pathology slides and blocks" that had been received. That letter stated that six slides had been received from Menorah Medical Center and seventeen slides from Memorial Sloan-Kettering in New York City.

(Exh. 287) The medical records made it clear that the slides from Menorah Medical Center were the same as the slides from Research Medical Center referred to in Dr. Lieberman's report. (Exh. 74)

On January 11, 2001, the defense attorneys sent certain tissue materials and medical records to Dr. Andrew Churg, a pathologist in Vancouver, British Columbia, who has earned close to one million dollars for himself and his university over the years as a result of his medical/legal witness work. (Exh. 56) (L. F. 1560-1561) Dr. Churg shredded as many of the materials he received from the defense attorneys as he kept and he has no record of what he was actually sent. (L. F. 1514-1515) Dr. Churg does not know if he was provided all of the medical records by the defense attorneys and he only knows that he was given those things that are a part of Exh. 56. (L. F. 1551) Dr. Churg did receive a copy of Dr. Lieberman's report, since it was included in Exh. 56.

On January 28, 2001, Dr. Churg sent a report to the defense attorneys that referred to "17 slides labeled S99-12840 Memorial Hospital NYC" and six additional slides "labeled SP99-4622 Health Midwest Systems 99-10200 Memorial Hospital NYC." The report also acknowledged that Dr. Churg had received the "medical records and pathology materials" from Kalinowski & Chaplinsky. (Exh. 56) Dr. Churg concluded, based on what he was provided by the defense attorneys, that all

of Mr. Hoskins' treating doctors were wrong and that Mr. Hoskins did not have mesothelioma. (L.F. 1509)

On February 1, 2001, the defense attorneys applied for and the Honorable John R. O'Malley signed a "Commission to Take Out-Of-State Depositions" which specifically authorized the taking of the depositions of Dr. Valerie Rusch and Dr. Philip Lieberman in New York. (A17-A19) On February 6, 2001, the Honorable William F. Mauer signed a second version of the Commission which included the handwritten notation "**This order also authorizes the release of Mr. Hoskins' medical records and studies.**" (A20) On February 9, 2001, an attorney for Turner and Newall filed an affidavit in the Supreme Court of the State of New York in order to receive permission to take depositions of Dr. Lieberman and Dr. Rusch. (A23-A24) On February 13, 2001, the Honorable William J. Davis entered an "Order to Take Deposition by Oral Examination and Subpoena Duces Tecum for Use Without the State Under CPLR 3102(e)". That order directed both Dr. Rusch and Dr. Lieberman to appear for depositions and "produce all medical records, original chest x-rays, original CT scans, **original pathology slides and studies** at a deposition, and to allow for the copying of documents at the deposition, in connection with an action now pending in the Jackson County Circuit Court of the State of Missouri." (A21-A22)

On February 15, 2001, plaintiffs deposed Dr. Churg in Vancouver, Canada. At the conclusion of his deposition, Dr. Churg was asked by the Hoskins' attorney how many slides he had looked at and he responded by saying "Whatever there was. 17 slides plus 6 additional slides." He was then asked whether he knew how many slides Dr. Lieberman looked at and he responded "No." (L. F. 1573) None of the slides were marked as exhibits during the deposition and none were offered into evidence.

On February 19, 2001, defendants deposed Dr. Lieberman in New York. Dr. Lieberman testified that Exh. 74 reflected his conclusions and that he had analyzed the slides received from Kansas City. (L.F. 938) On cross-examination, Dr. Lieberman testified that he had reviewed the slides from Kansas City and that he had agreed with the Kansas City pathologist. (L.F. 943-944) Dr. Lieberman also testified that he had looked at the slides on the day of his deposition, noting that he "looked at all of the slides that they sent, of the original slides that were sent in." (L.F. 964) He also testified that he had never had any discussions with Plaintiffs' attorneys. (L.F. 963-964)

CLOSING ARGUMENT

During her opening statement, Turner and Newall's attorney told the jury that "After this lawsuit was started, **Turner and Newall spent some time and obtained those slides.** And we sent it to one of North America's,

possibly the best in the world, the best expert on the disease that's in question in this case, desmoplastic mesothelioma." (Tr. 213) She also told the jury that "Dr. Churg has looked at the slides from Mr. Hoskins' tissue and all of Mr. Hoskins' medical records from the time of diagnosis up until early this year." (Tr. 214)

Defendants' expert, Dr. Repsher, was asked a series of questions during cross-examination about the process of forming "expert" opinions. He testified to the following: (a) he is dependent upon the lawyers who must give him the information he needs, when he needs it (Tr. 766); (b) "the validity and accuracy of an expert's opinion, even if he happens to be the finest expert in the world, is dependent upon the facts that the expert considers in expressing his or her opinion" (Tr. 689); (c) "it's good scientific practice to get all of the available information before you give an opinion" (Tr. 689); (d) you do not want to express an opinion to a jury without knowing all the relevant facts (Tr. 690); (e) if just one key piece of evidence is not provided to the expert, it could undermine or destroy the validity of the opinion or cause the "opinions to fall tumbling down like a house of cards" (Tr. 690); (f) an expert's opinions are only as good as the relevant material that is available to the expert (Tr. 690); (g) from a scientific standpoint, when you talk about pathology, "the more tissue that you look at the more reliable your diagnosis is going to be" (Tr. 690-691). Dr. Repsher also said that his work on the *Hoskins* case was a "hurry up

job,” that he was “given very little time” by the lawyers who hired him and that he did not have a “complete data base” when he wrote his initial report. (Tr. 718, 765-766)

In her closing argument, the defense attorney argued that “nobody is attacking the science” of her hired experts. She said that Turner and Newall was “talking about their numbers. The substance can’t be argued with We’re trying to muddy the waters so that you won’t believe their opinions. But I think we need to look at the substance of those opinions.” (Tr. 907-908)

Finally, in Plaintiffs’ closing argument, the jury was reminded of the number of slides analyzed by Dr. Lieberman, the smaller number of slides analyzed by Dr. Churg, and the fact that Dr. Churg did not know how many slides Dr. Lieberman had looked at. (Tr. 930-935) Plaintiffs’ attorney then asked the jury on several occasions, without any objection, why Dr. Churg had not seen the other fourteen slides. (Tr. 935-937) The jury was also reminded that Defendants’ other hired medical witness, Dr. Repsher, had not been given all of the information available. (Tr. 938) After the closing argument ended and the alternate jurors were dismissed and the jury retired to the jury room, Defendant made several “mistrial motions” out of the presence and hearing of the jury. (Tr. 944-946)

JURY VERDICT, JUDGMENT AND AMENDED JUDGMENT

On March 8, 2001, the jury returned a verdict in favor of Plaintiffs and awarded compensatory damages of \$2,000,000.00 for Plaintiff Forest Hoskins and \$1,000,000.00 for Plaintiff Julia Hoskins. The jury also found the Defendant liable for punitive damages. The jury later returned a verdict in the amount of \$7,000,000.00 for punitive damages. (L.F. 695)

The original judgment, dated March 16, 2001, reflected the jury verdict. (L. F. 695-696) Plaintiffs then filed a motion to amend or correct the judgment to include prejudgment and post-judgment interest, as well as the full names of the Defendants. An affidavit and other supporting documents referred to a statutory settlement demand of \$7,000,000.00 that had been made back on March 15, 2000, and was deemed withdrawn as of May 17, 2000. (L. F. 697-705) An amended judgment was formally entered on May 17, 2001, in the amount of \$7,556,264.39, plus post-judgment interest on that amount from March 16, 2001, at the rate of nine percent per annum. (L.F. 899-902)

ARGUMENT¹

I. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS'/DEFENDANTS' MOTION FOR DIRECTED VERDICT ON THE PLAINTIFFS' CLAIM FOR PUNITIVE DAMAGES, IN GIVING PLAINTIFFS' INSTRUCTION 12, AND IN DENYING APPELLANTS'/DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON PUNITIVE DAMAGES BECAUSE:

A. PLAINTIFFS PROVED BY CLEAR AND CONVINCING EVIDENCE THAT THE DEFENDANTS KNEW OR SHOULD HAVE KNOWN THAT THEIR CONDUCT CREATED A HIGH DEGREE OF PROBABILITY OF INJURY AND SHOWED COMPLETE INDIFFERENCE TO OR CONSCIOUS DISREGARD FOR THE SAFETY OF OTHERS AND THEREBY MADE A SUBMISSIBLE CASE FOR PUNITIVE DAMAGES ON THE NEGLIGENCE THEORIES SUBMITTED IN INSTRUCTION 12.

B. PLAINTIFFS PROVED BY CLEAR AND CONVINCING EVIDENCE THAT THE APPELLANTS/DEFENDANTS HAD ACTUAL KNOWLEDGE OF THE DANGER TO PERSONS EXPOSED TO SPRAYED LIMPET AND PLAINTIFFS MADE A SUBMISSIBLE PUNITIVE DAMAGE

¹ . Per Rule 84.04(f) each of Respondents' Points corresponds to the identical point in the Appellants' Brief.

**CASE ON PLAINTIFFS' STRICT LIABILITY THEORIES SUBMITTED IN
INSTRUCTION 12.**

"Facts are stubborn things and whatever may be our wishes, our inclinations, or the dictums of our passions, they cannot alter the state of the facts and the evidence."

John Adams²

A. INTRODUCTORY MATTERS

1. Standard of Review

Point I does not consider the propriety of the punitive damage judgment, but the submissibility of the punitive damage case to the jury. The question is whether the trial court erred in submitting the punitive damage instruction to the jury at all.

On review, the plaintiff receives the benefit of all evidence and reasonable inferences supporting the submissibility of the punitive damage case. *Cole v. Goodyear Tire & Rubber Co.*, 967 S.W.2d 176, 183 (Mo. App. 1998).

² D. McCullough, John Adams, Simon & Schuster (New York) 2001 at 68.

“For common law punitive damage claims, the evidence must meet the clear and convincing standard of proof.” *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 111 (Mo. banc 1996). By its own plain language, a clear and convincing standard does not require doubt-free assurance, only evidence that is clear and readily convinces the trier of fact. “As we now construe the phrase, it really means that the court should be clearly convinced of the affirmative of the proposition to be proved. This does not mean that there may not be contrary evidence.” *Grissum v. Reesman*, 505 S.W.2d 81, 85-86 (Mo. 1974). While a preponderance of the evidence standard merely asks the jury to determine whether a particular fact is more likely than not true, *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992), a clear and convincing standard simply asks whether the evidence permits the trier of fact to reach its conclusion without significant hesitation. See, *In Re O’Brien*, 600 S.W.2d 695, 697 (Mo. App. W.D. 1980) *citing In Re Sedillo*, 84 N.M. 10, 498 P.2d 1353, 1355 (1972)(“evidence [that] must instantly tilt the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with an abiding conviction that the evidence is true”); and *In re J.D.K.*, 685 S.W.2d 876, 880 (Mo.App.1984)(there need not be one single event that “instantly tilts the scales”).

Appellants/Defendants admit that the question of submissibility for punitive damages “is a question of law within the reasoned discretion of the

trial court.” (App. Br. at 43, citing *Moon v. Tower Grove Bank & Trust Co.*, 691 S.W.2d 399, 401 (Mo. App. 1985). Judicial discretion is abused and reversal required only if the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable persons can differ about the propriety of the action taken by the trial court, then the appellate court cannot conclude that the trial court abused its discretion. *State ex rel. Webster v. Lehndorff Geneva*, 744 S.W.2d 801, 804 (Mo. banc 1988). *Accord, Anglim v. Missouri Pacific R. Co.*, 832 S.W.2d 298 (Mo. banc 1992).

In addition, this Court has said that it will apply a “special judicial scrutiny” to punitive damage cases. *Alcorn v. Union Pacific RR Co.*, 50 S.W.3d 226, 247 (Mo. banc 2001). This consideration necessarily involves a review of the factual basis for the jury’s decision, not second-guessing the jury, but determining whether the evidence presented is sufficiently weighty to justify damages that are designed to punish the defendants and/or deter similar conduct.

Given the abuse of discretion review standard to which appellants admit, and applying the clear and convincing evidence requirement of *Rodriguez* and the “special judicial scrutiny” announced in *Alcorn*, it appears that the standard of review requires this Court to consider whether any reasonable person could conclude that the propositions contained in

Instruction 12 are likely true and do so without significant hesitation. If any reasonable person could conclude without significant hesitation that appellants/defendants acts met the standards established for punitive damages, the punitive damages judgment in this case must be affirmed.

2. Introduction to Point I Argument

The legal standards that determine whether a plaintiff is entitled to submit punitive damages to a jury are well developed in Missouri. While the cases erect different standards depending on whether the case is submitted on a negligence theory or a strict liability theory, it is clear that punitive damages are available under both legal scenarios.

In this case, Plaintiffs submitted the punitive damages case to the jury on four independent legal theories: (1) negligent manufacture; (2) negligent failure to warn; (3) strict liability failure to warn; and (4) strict liability for a defective product. See, Instruction 12, (LF 664). The jury concluded that the Plaintiff was entitled to punitive damages. See, Verdict, Part IV (LF 689).

The defendants' conduct and the evidence in this case warrants submissibility of the punitive damages claim under the standards adopted in *Lopez v. Three Rivers Elec. Coop.*, 26 S.W.2d 3d 151, 160 (Mo. Banc 2001) and *Alcorn*. The jury heard clear and convincing evidence sufficient to support the punitive damage verdict on the negligence claims and on the strict liability claims.

The defendants try cleverly and diligently to turn this into a property damage case, relying heavily on property damage cases in which a governmental plaintiff sought recovery for asbestos contamination of a building. See, *Kansas City v. Keene Corp.*, 855 S.W.2d 360 (Mo. banc 1993) and *School District of Independence v. U.S. Gypsum Co.*, 750 S.W.2d 442 (Mo. App. W.D. 1988).

In those cases, the plaintiff claimed that the asbestos became friable without human intervention or disturbance and claimed damages to pay for the removal of asbestos as well as punitive damages. Those cases did not involve a person who **removed** asbestos as part of his work and who, as a result of that direct and anticipated exposure to a defendants' asbestos-containing product, developed a fatal illness. Defendants' lone personal injury case involving asbestos stands for the proposition that **punitive damages are submissible**

when there is evidence to show that a defendant had been put on notice of the fact 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....

Angotti v. Celetex Corp., 812 S.W.2d 742, 746 (Mo. App. W.D. 1991).

This conclusion is supported by this Court's recent decisions in *Lopez*, 26 S.W.2d 3d at 160 and *Alcorn*, 50 S.W.3d 226.

3. The Evidence³

Turner and Newall's own expert, Dr. Lawrence Repsher, could not have stated it more clearly when he testified that the asbestos manufacturers "have known for a long time that inhaling asbestos fibers in significant concentrations over a period of time, no matter how they get into the air, are dangerous." (Tr. 746)

Mr. Hoskins and other operating engineers testified to the following facts, which should be considered along with the testimony of Dr. Barry Castelman, the scientist who has devoted his professional career to studying the history of the asbestos industry:

- Plaintiff, Forest "Dino" Hoskins and other operating engineers regularly worked above the ceiling barrier at the BMA Tower and routinely came into contact with asbestos. (Tr. 229, 231-232, 252-254, 312-314, 559-567)

³. Once again, the Court is reminded that a timeline that sets forth the testimony is included in the Appendix for the Court's convenience. (See App A1)

- Plaintiff removed asbestos as part of his job in order to repair or replace electrical, plumbing and HVAC components. (Tr. 232, 559-60).
- Plaintiff and the other operating engineers were not warned about the need to wear respirators when working above the ceiling until 1988 or 1989. (Tr. 234-237, 561-563)
- Plaintiff and the other operating engineers wore respirators when working above the ceiling after being warned in 1988 or 1989. (Tr. 234-237, 254-256, 562-563)

Plaintiffs' witness, Dr. Castleman, testified as follows, beginning with a discussion of a key 1962 Turner & Newall document:

- “[By Dr. Castleman:] That’s the Alexander Marshall who was about to become the managing director of J.W. Roberts, the company that made the sprayed limpet. And he’s saying **the awkward thing about this is that even if we succeed in perfecting a way of applying the material by dustless and safe method, and that is a big if, we are still liable to come unstuck according to Mr. Smith when somebody**

eventually comes in to remove this asbestos. I cannot see much hope of rendering this safe from a health point of view. So that reliance would still have to be put in practice on protective measures.” (Tr. at 385-86).

- “A sprayed asbestos product was known to be a **mortal hazard** since the 1930’s.” (Tr. 463).
- Dr. Merewether **stressed the need for respiratory protection in 1930.** (Tr. 390, 453)
- “By the early thirties, the cases were being reported not only in asbestos worker[s] and asbestos mines and asbestos factories, but also in users of asbestos insulation products. There were cases reported among insulation workers and a boiler riveter in 1933 and 1934....” (Tr. 392).
- “Well, the insulation workers and product users continued to be numbered among the asbestos victims, not only with asbestosis as in the thirties but with lung cancer as well as with mesothelioma. Mesothelioma was first designated as an asbestos disease by a German pathologist in 1943.... His name was Welter, His article was published in the German medical

weekly. And then an abstract or a summary was published in the Bulletin of Hygiene in England, nine months after, right during the war. (Tr. 394-95).

- “Q. And based upon your review of tens of thousands of pages of Turner and Newall documents and thousands of pages of the industry organizations, have you been able to determine if Turner and Newall was actually monitoring the medical literature regarding the health hazards of asbestos as it was being developed?

* * *

A. Well, certainly it started at least as far back as the Nellie Curshaw case in 1924, published by Dr. Cook.” (Tr. 397)

- “Dr. Wires of Cape Asbestos, the other big asbestos company in England besides Turner and Newall, in 1949 reported a case of what he called endothelioma of the pleura, another way the doctors describe mesothelioma.” (Tr. 400).
- “Next is a man who worked as a goods loader named John Scoura, written up as endothelioma of the pleura in 1946.” (Tr. 402). (Emphasis added)

- On April 24, 1960, Dr. Wagner published his article entitled “Diffuse Pleural Mesothelioma and Asbestos Exposure in the North Western Cape Province.” That study reported that mesothelioma is caused by the exposure to asbestos and can result from non-occupational exposure to asbestos. Case 30, which was discussed in the article, pointed to a connection between mesothelioma and the removal of asbestos insulation. (Exh. 138) (Tr. 415, 423-425) According to Dr. Castleman, Dr. Wagner’s study was significant because it showed that the population at risk for asbestos related cancer extended beyond the people who manufactured or mined asbestos and those who used asbestos products like insulators, but extended also to the general population of people who are in an area where asbestos air pollution is being created; that was “very scary information” from the public health point of view. (Tr. 424-425)
- John Knox, the Turner and Nowall medical director attended a conference in New York in 1960. During that visit Dr. Knox also met with the president of Keasby and Mattison, a Turner and Newall subsidiary

in Pennsylvania (Tr. 416) to discuss “abnormal chest x-rays among their workers” (Tr. 426). Dr. Knox wrote to Turner and Newall that “the legislative framework under which industries operate in the U.S.A. makes it difficult for us here to follow the lines of thought which prompt action over there in the matter of standards of industrial practice. In many industries, the employer seems so far in front of legislation so as to have created a special of practice for themselves.” Without objection Dr. Castleman testified that Dr. Knox’s letter says that Turner and Newall “were not in any way bound by any other law other than their own consciences.” (Tr. 427-28).

- “[T]here were other entries in the voluminous literature showing that things happened at Keasby and Mattison that wouldn’t have been acceptable in England under the regulations and practices, in the home country of Turner and Newall but which Keasby and Mattison could get away with in the United States and Turner and Newall owned Keasby and Mattison.” (Tr. 428)

- “They’re finding mesothelioma in England throughout the shipyard trades that had been reported in the British Medical Journal in 1962.” (Tr. 432)
- No warnings were ever given to persons working with asbestos in the United States. (Tr. 451) However, warnings were given to English personnel handling asbestos. (Tr. 451) This created a double standard – one in which Americans were not warned and English workers were warned.

In addition to the evidence of general knowledge of the dangers of asbestos and specific knowledge in Turner and Newall of the danger of asbestos to persons coming into contact with the sprayed product, the jury heard without objection that defendants were aware of substitutes that had been developed by 1957 for sprayed asbestos insulation (Tr. 454) and despite the knowledge of the dangers of sprayed asbestos, did not take steps to employ the asbestos substitutes for profit reasons.

- “Well, they found that they could substitute rock wool, they could use mineral wool and ultimately substitute the asbestos. But then they wouldn’t [have] the patent protection and anybody would be able to use the same kind of mixture in a product. Their document in 1957 says among other things, the purpose of

adding asbestos and/or cement can be seen that of permitting the manufacturer to sell a proprietary article, meaning patented, to the contractor, who carries out the application. ... They operated asbestos mines. That would be a reduced market for the sale of asbestos ... and this particular product could even be endangered by that kind of competition.... (Tr. 454-55).

B. PLAINTIFFS PROVED BY CLEAR AND CONVINCING EVIDENCE THAT THE DEFENDANTS KNEW OR SHOULD HAVE KNOWN THAT THEIR CONDUCT CREATED A HIGH DEGREE OF PROBABILITY OF INJURY AND SHOWED COMPLETE INDIFFERENCE TO OR CONSCIOUS DISREGARD FOR THE SAFETY OF OTHERS AND THEREBY MADE A SUBMISSIBLE CASE FOR PUNITIVE DAMAGES ON THE NEGLIGENCE THEORIES SUBMITTED IN INSTRUCTION 12.

This Court has made it clear that punitive damages are appropriate in a negligence case where a defendant acts with “conscious disregard or complete indifference” and defendant knew or had reason to know that there was a “high degree of probability that the action would result in injury.” The Court defines “conscious disregard or complete indifference” as

an act or omission, though properly characterized as negligence, [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. Or there may be conscious negligence tantamount to intentional wrongdoing, as where the person doing the act or failing to act must be conscious ... from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally or probably result in injury.

Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc., 700 S.W.2d 426, 435 (Mo. banc 1985). *Accord, Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71, 74 (Mo. banc 1990) (“a claim for punitive damages is not inconsistent with a claim for negligence, so long as the evidence contains factual support for an award of punitive damages....”); *Alack v. Vic Tanney International of Missouri, Inc.*, 923 S.W.2d 330, 339 (Mo. banc 1996) (“[i]n a negligence case, punitive damages are awardable only if at the time of the negligent act, the defendant ‘knew or had reason to know that there was a high degree of probability that the action would result in injury [citation omitted]’”); *Lopez*. 26 S.W.3d 151, 160 (Mo. banc 2000).

In *Rinker v. Ford Motor Co.*, 567 S.W.2d 655, 667-68 (Mo. App. 1978), a negligent failure to warn case, the Court cited Ford's inactivity in remedying a known problem and held that the jury "could well conclude

that Ford consciously or knowingly elected to disregard what it well knew to be a genuine potential for danger." *Id.* at 668.

The issue of a defendant's failure to take remedial measures after discovering the problem was again cited in *Bhagvandoss v. Beiersdorf, Inc.*, 723 S.W.2d 392 (Mo. banc 1987) as justifying the punitive damage verdict in *Rinker*.

There [*Rinker*] the evidence showed that the manufacturer had prior notice of 29 instances in which the fast idle cam of an automobile had broken, and that the manufacturer knew that a broken fast idle cam could cause the throttle to jam open. The court held that this knowledge, and the manufacturer's total inaction following receiving knowledge, supported a finding of 'complete indifference to or conscious disregard to the safety of others.' *Rinker*, 567 S.W.2d at 667-68.

Id. at 398 (emphasis added). See, also *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155 (Mo. App. W.D. 1998) (upholding compensatory and punitive damages for failure to recall engines equipped with faulty nozzle guide vane). In *Barnett v. Turbomeca Engine Corp.*, 963 S.W. 2d 639 (Mo. App. W.D. 1998), the Court noted that *Turbomeca's* own "internal reports," along with other evidence, established that the defendant had

actual knowledge of the defect. *Barnett* at 651, citing *Angotti*, 812 S.W.2d at 751-752.

Evidence in this case is based on Turner and Newall's own internal documents, reports, asbestos trade industry documents and scientific literature monitored by Turner and Newall.

Rinker and the *Bhagvandoss* dicta are consistent with the broad rule that where death is a likely outcome of a negligent act, that ultimate harm raises the demands the law places on a tortfeasor and increases the appropriateness of a punitive judgment verdict.

The potential and seriousness of harm arising from a breach of duty is inevitably a part of the determination of whether conscious indifference to consequences has been established.

The level of care required is directly proportional to the potential for harm from the breach [of the duty].

Blum v. Airport Terminal Services, Inc., 762 S.W.2d 67, 73 (Mo. App. 1988).

On the negligence theory, this Court's inquiry is whether the evidence supporting punitive damages presented to the jury was clear and convincing⁴ and showed:

⁴ Instruction 4 informed the jury that the proper burden of proof on punitive damages was clear and convincing evidence. (LF 656).

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 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...

Instruction 12 (LF 664). MAI 10.07.

In *Wolf v. Goodyear Tire & Rubber Co.*, 808 S.W.2d 868 (Mo. App. W.D. 1991), the Court affirmed an award of punitive damages on a negligent failure to warn theory. In facts that are strikingly similar to those already recited, the Court recounted the presence of only five company memoranda in the 1970's acknowledging the danger presented by the multi-piece truck rim Goodyear sold, one of which spoke to the need to protect the Goodyear investment in its tube-type tire facilities that employed the exploding rim. Another memorandum showed an internal objection to including safety information in the printed material used to assist in sales of the rims.

Considering all of the evidence presented and expressly citing the Goodyear memoranda, the Court of Appeals concluded:

The office memos quoted above, together with the other evidence, leave *no doubt* that Goodyear was well aware of the safety hazard of the multi-piece rim and the high probability that injury would result from its design and failure to warn. Despite this knowledge Goodyear was making the same rim in 1984....

Id. at 873. (emphasis added) It is important to note that despite the subsequent adoption of the clear and convincing burden for punitive damages by this Court in *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 111 (Mo. banc 1996), the *Wolf* court found that the company memoranda met an even higher standard – “no doubt.”

The office memoranda, and asbestos industry documents, along with the scientific knowledge readily available to and monitored by Turner and Newall proved by clear and convincing evidence that Turner and Newall knew or should have known of a high degree of probability of injury to persons contacting Sprayed Limpet and that Turner and Newall operated with a complete indifference to or conscious disregard for the safety of others. Punitive damages were appropriate.

Defendants assert the negligence punitive damages submission was error because no evidence showed Turner and Newall knew that persons

working as operating engineers on HVAC equipment installed in areas exposed to Sprayed Limpet were in danger of lung disease. This argument is founded on *Kansas City v. Keene Corp.*, 855 S.W.2d 360 (Mo. banc 1993) as applied in *Alack*, 923 S.W.2d at 339.

Keene was a strict liability case, not a negligent failure to warn case. Kansas City sought actual damages and punitive damages because the asbestos “was dangerous to persons *other than* unprotected workers” who frequented Kansas City’s airport (“KCI”). *Id.* at 375 (emphasis added). This Court held that the defendant’s actual knowledge of health danger to workers constantly exposed to asbestos was not equivalent to specific knowledge that flaking and crumbling asbestos could harm the **general public** who came to KCI to board airplanes. *Keene* 855 S.W.2d at 375. This **lack of knowledge as to the danger facing patrons and below-the-ceiling-barrier workers** defeated the plaintiff’s punitive damage claim.

Alack extended *Keene*’s analysis from a strict liability setting into a negligence setting, without discussing or acknowledging that the two, distinct legal theories had become entwined for purposes of punitive damages analysis. *Alack*, a negligence case, said the “the evidence must show that, at the time of the act complained of, the defendant had knowledge of a high degree of probability of injury to a specific class of persons.” *Alack*, 923 S.W.2d at 339, citing *Keene* (a strict liability case.)

Assuming that the Court intended that result, Turner and Newall's argument attempts to avoid liability by defining the class of potential persons who could be injured by its reckless indifference and careless disregard too narrowly and by ignoring unchallenged evidence that Mr. Hoskins **removed** asbestos as part of his job, a specific kind of exposure to danger known to Turner and Newall to create a non-abatable health hazard. Even applying the *Keene/Alack* standard, the punitive damages judgment in this case must stand.

The classic example supporting punitive damages in a negligence case – firing a loaded gun at a moving train – defines the relevant class as all persons on the train. If an injury to a passenger or worker on the train occurs from the bullet, broken glass, or flying metal shards created when the bullet struck the train, punitive damages follow because of the state of mind of the shooter, not because of the location of the passenger or the exact nature of the injuries suffered.

In *Keene*, Kansas City's claim and this Court's decision did not focus on persons like the **plaintiff** in this case, Dino Hoskins, **whose job required him to come into direct contact with asbestos above the ceiling tile barrier**. Rather, *Keene* turned on Kansas City's claim that casual contact by workers and patrons at KCI – persons below the ceiling barrier who did not come into regular contact with the asbestos used at KCI – faced danger. Quite properly the Court concluded that these non-direct-

exposure persons were “not on the train” in *Keene* because there was no evidence presented to place them there.

But Mr. Hoskins fell within the class of persons Turner & Newall knew or should have known were subject to lung disease generally and mesothelioma specifically as a result of direct, frequent and reasonably anticipated contact with sprayed asbestos as a result of his frequent removal of the sprayed asbestos from the BMA building.

Unlike the facts in *Keene* and *Angotti*, the plaintiffs produced clear and convincing evidence that Turner and Newall had **actual knowledge** that its product was dangerous to a given class of individuals, namely unprotected workers regularly exposed to the product during its **application or removal**. (Tr. 383-384, 385-386, 390-392, 453, 463, 465-466) **Plaintiff** further established that he was within this given class of individuals, because he was an **unprotected worker regularly exposed to the product as well as during the removal** of the product. (Tr. 559-563)

From the 1930’s forward, scientific evidence reasonably available to Turner and Newall began to define the person “on the train.” See Appendix 1 (Timeline). First Turner and Newall learned that persons involved in mining, manufacturing or applying asbestos were at risk. Next the scientific knowledge actually known by Turner and Newall extended the danger zone to boiler riveters, shipyard workers, and loaders – persons who merely came into regular, direct contact with asbestos through their work.

By 1960, Turner and Newall actually knew that a person who would remove asbestos was in danger – “on the train” into which Turner and Newall fired when it sold the Sprayed Limpet in 1963 without a warning (at least in the United States) of the danger of unprotected exposure. And by 1962, Turner and Newall actually knew that a person who would **remove sprayed asbestos** was in danger and also “on the train.” Indeed, the jury heard that an internal Turner & Newall memorandum showed that company executives “cannot see much hope of rendering this safe from a health point of view.” (Tr. 386).

Unlike the evidence presented in *Keene* and *Angotti*, the evidence at the trial of this case clearly and convincingly established Turner and Newall’s knowledge that Sprayed Limpet Asbestos was dangerous not only to unprotected workers during application or removal (Tr. 383-384, 385-386), but also established Turner and Newall’s knowledge that the product was dangerous to a **much broader class of people**. The danger extended to **anyone** in the general population **who is in an area where asbestos air pollution is being created**. (Tr. 424-425) This indeed was “**very scary information**” from a public health point of view. (Tr. 424)

This is clear and convincing evidence – evidence that instantly tilts the scales in favor of the proposition that Turner and Newall knew the Sprayed Limpet could cause lung disease when people were exposed to it; that Turner and Newall knew or should have known that such conduct

created a high degree of probability of injury; and that Turner and Newall showed complete indifference to or conscious disregard for the safety of others.

Plaintiffs' evidence supporting the negligence theories made a submissible punitive damages case.

C. PLAINTIFFS PROVED BY CLEAR AND CONVINCING EVIDENCE THAT THE DEFENDANT HAD ACTUAL KNOWLEDGE OF THE DANGER TO PERSONS EXPOSED TO SPRAYED LIMPET AND PLAINTIFFS MADE A SUBMISSIBLE PUNITIVE DAMAGE CASE ON PLAINTIFFS' STRICT LIABILITY THEORIES SUBMITTED IN INSTRUCTION 12.

Appellants attack the submissibility of the strict liability punitive damage submission on two grounds. First, they contend that they did not have actual knowledge that their sprayed asbestos product, Sprayed Limpet, released fibers "years after application;" second, they assert that Mr. Hoskins was not among the persons or whom their asbestos product was unreasonably dangerous. Appellants' argument is an attempt to divert the Court's attention from the evidence by defining the class of knowledge they actually possessed and the class of workers about whom they possessed this knowledge so narrowly as to make them innocent of any wrongdoing in this case.

1. Appellants had actual knowledge that their sprayed asbestos product was dangerous to persons coming into regular contact with Sprayed Limpet after application.

Defendants claim that they had to have knowledge of a particularized hazard – that their sprayed asbestos product released into the atmosphere (became friable) – before liability for punitive damages attaches. Appellants rely on *School Dist. of Independence v. U.S. Gypsum Co.*, 750 S.W.2d 442, 446 (Mo. App. W.D. 1988) for this proposition. *School District of Independence* is, however, inapposite because that case involved a property damage claim by the Independence School District, not a personal injury claim by a person in day-to-day contact with defendants' product as a result of his regular removal of the product. The question addressed in *School District of Independence* was whether U.S. Gypsum had actual knowledge that its asbestos product would break loose over time – become friable – and fall into the air without any disturbance. In failing to show any evidence that the U.S. Gypsum knew that Audicote would become friable, the school district could not make its punitive damage case.

The issue for Mr. Hoskins' strict liability theories was whether Turner and Newall knew that its asbestos product presented a health hazard to persons in contact with and/or engaged in the removal of sprayed asbestos at the time Turner and Newall sold the Sprayed Limpet. The

evidence in the case was that sprayed asbestos products were known to be “mortal hazards” since the 1930’s. (Tr. 463). In addition to this general, actual knowledge, Turner and Newall had specific, internal, actual knowledge that persons removing asbestos faced a near-certain health hazard that Turner and Newall had no hope of abating:

[E]ven if we succeed in perfecting a way of applying the material by dustless and safe method, and that is a big if, we are still liable to come unstuck according to Mr. Smith when somebody eventually comes in to remove this asbestos. I cannot see much hope of rendering this safe from a health point of view.

(Tr. 385-86). (Emphasis added.) This is a 1962 document. (Tr. 386). What was the health hazard? Turner and Newall had actual knowledge that asbestos will become “unstuck” – that is free to float around in the atmosphere when human contact results in its disturbance or removal.

The 1962 document is significant because it shows that **Turner and Newall equates the danger of exposure to its product during its removal to the dangers of exposure to its product during its application, of which it had been aware since the early 1930’s.** (Tr. 390-392, 453, 463, 465-466)

Contrary to appellants’ assertion, this is evidence of Turner and Newall’s actual knowledge that Sprayed Limpet would find its way into

human lungs after application. Indeed, at the risk of belaboring the obvious, something can be removed only after it is applied. And Turner and Newall was worried about dust – mixing asbestos particulate with the atmosphere. Surely Turner and Newall did not believe that the health hazard faced by a person removing asbestos was the danger of a concussion from falling asbestos when its officers drafted the 1962 memorandum discussing dust and removal.

Turner and Newall's own document makes the point that its brief wishes was not so – actual knowledge of the health hazard to persons removing Sprayed Limpet.

This is clear and convincing evidence of actual knowledge in Turner and Newall of the health risks presented by Sprayed Limpet.

- 2. Appellants had actual knowledge that persons involved in removing asbestos faced a non-abatable health hazard. Mr. Hoskins, a person who removed asbestos, falls within the class of persons Appellants actually knew would be at risk.**

Appellants rely on *Keene* and *Angotti v. Celetex Corp.*, 812 S.W.2d 742 (Mo. App. W.D. 1991) for the proposition that actual knowledge of the health hazard to a particular class of workers is required to support punitive damages in an asbestos case. *Angotti* states the proposition this way:

This is not to say that punitive damages would not be recoverable when there is evidence to show that a defendant had been put on notice of the fact 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.

Did Appellants have notice that its sprayed asbestos 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. Again, the 1962 memorandum shows knowledge of the health hazard to persons **removing** previously applied sprayed asbestos.

The evidence showed that Mr. Hoskins removed asbestos as part of his job. ((Tr. 232, 559-60). He was clearly in the class of persons of whom Appellants had actual knowledge.

Appellants, saddled with the testimony concerning this damning internal document, now attempt to claim that the jury should not have heard the testimony or, if they should have heard it, it should not be accorded any weight. (App. Br. at 53).

First, Appellants claim that trial counsel objected to Dr. Castelman’s testimony. Curiously, Appellants do not assign error to the trial court’s

ruling permitting the testimony – they only note that some objection was made. If there is no claim of error, there is nothing for this Court to review. So that the Court is fully informed, Plaintiffs will address the innuendo.

The transcript reveals the following colloquy:

Ms. Chaplinsky: I have got an objection.

* * *

Ms. Chaplinsky: That's a direct quote from a document and I have no way of knowing if it's taken out of context or not without the document to see if it should be published to the jury. That's why I want to see the document."

"Mr. Accurso: That would be a subject for cross-examination, not admissibility. He's already read every one of these things.

"The Court: This is a Turner and Newall document?

"Mr. Accurso: "Yes.

"Ms. Chaplinsky: So it's been represented. I don't know that.

"The Court: Is it a Turner and Newall document?

"Mr. Accurso: Absolutely.

"The Court: They're saying it is. Overruled.

(Tr. 384-85). Defendants' counsel did not advance a best evidence objection, a hearsay objection, or any other objection to the admissibility of

Dr. Castleman's testimony on the subject of the 1962 document.

Defendants' counsel merely asked to see the document about which Dr. Castleman was speaking. The trial court determined that Dr. Castleman could testify since there was no objection to the contents of the document about which Dr. Castleman intended to testify.

The rule announced by this Court is:

When evidence of one of the issues in the case is admitted without objection, the party against whom it is offered waives any objection to the evidence, and it may be properly considered even if the evidence would have been excluded upon a proper objection.

Reinert v. Director of Revenue, 894 S.W.2d 162, 164 (Mo. banc 1995).

Moreover,

The purpose of a trial objection is to avoid error, not to create it. An objection to a question should be so specific that the trial court can realize what rule of evidence is being invoked and why that rule would exclude a responsive answer. [Citation omitted.] A bare objection to evidence on the grounds of relevancy and materiality is too general to preserve the trial court's ruling for appellate review.

Bailey v. Valtec Hydraulics, Inc. 748 S.W.2d 805, 808 (Mo. App. E.D. 1988); accord, *Callahan v. Cardinal Glennon Hospital*, 863

S.W.2d 852, 865 (Mo. banc 1993)(“since defendant failed to properly object to the admission of the evidence, plaintiffs' exhibit and the expert's testimony thereon could be considered in determining the sufficiency of the evidence even if it was hearsay.)

As noted, Appellants do not assign error to the trial court's decision to permit Dr. Castelman to testify as he did. The jury properly heard the evidence. Dr. Castleman's testimony is sufficient to show actual knowledge in Turner and Newall – through its own document -- by clear and convincing evidence of the health hazard presented to persons working to remove asbestos after its application.

3. This Court's recent precedents, *Lopez* and *Alcorn*, support the punitive damage submissions and verdicts in this case.

Recently this Court decided *Lopez* and *Alcorn*. In those cases, the Court noted that the absence of certain kinds of evidence militated against submissibility of punitive damages.

Weighing against submission of punitive damages ... and circumstances in which prior similar occurrences known to the defendant have been infrequent; the injurious event was unlikely to have occurred absent negligence on the part of someone other than the defendant; and, the defendant did not

knowingly violate a statute, regulation, or clear industry standard designed to prevent the type of injury that occurred. *Lopez*, 26 S.W.3d at 160, quoted with approval in *Alcorn*, 50 S.W.3d at 248.

Each type of evidence listed as absent in *Lopez* and *Alcorn* is present in this case:

(1) There were prior similar occurrences known to the defendants; (2) plaintiff, Mr. Hoskins, did not contribute to his injury through his own negligence nor did any other persons, other than the defendants in this case cause or contribute to cause Mr. Hoskins' injuries; and (3) the defendant committed acts or failures through its subsidiaries in the United States that were not acceptable under regulations and practices in England. In addition, (4) the evidence established a profit motive for defendants' failure to act to remove its products from the market despite its knowledge of the damage its products did to persons coming into contact with the sprayed asbestos during both application and removal and (5) defendants knew that its product created health hazards and could not be made safe.

Additionally, in accordance with the holdings in *Lopez* and *Alcorn*, Plaintiffs produced clear and convincing evidence at trial that Turner and Newall's conduct was **tantamount to intentional wrongdoing**:

1955 T&N attempted to suppress Dr. Doll's study. (Tr. 486)

- 3/27/56 From a tactical point of view (“running out the clock”), it’s best to delay this action and hope that the man dies before the case comes up for adjudication.
(Tr. . 418, 482-483)
- 1957 T&N research established that non-asbestos, mineral wool could be substituted for asbestos and was cheaper than Limpet asbestos, but conversion to mineral wool would reduce the market for asbestos. (Tr. . 454-455)
- 7/25/60 Things were allowed to occur in the United States at Keasbey and Mattison that wouldn’t have been acceptable in England (the “Double Standard”) under their regulations and practices. (Ex 103, pp. 426-428)
- 1961 T&N gives only limited information on asbestos related health problems to Keasbey & Mattison, its United States subsidiary. (Ex 147, p. 8) (Tr. 416, 447-448)
- 1962 Keasbey & Mattison (owned by T&N), was never instructed by T&N to label products or otherwise

inform product users of health hazards linked to asbestos exposure. (Ex 147, p. 8) (Tr. . 416, 447-448)

July 1963

T&N warned its own employees (the “Double Standard”) about the dangers of exposure to sprayed limpet asbestos and provided warnings through detailed instructions at the spray school for Limpet sprayers in the United Kingdom (Ex 163) (Tr.. 449-451)

No warnings to people, organizations, or companies in the U.S. (Ex 163) (Tr. 449-451)

Warnings were not provided to the applicators for sprayed limpet asbestos until after the sprayed limpet asbestos was applied to the BMA building. (Tr. 748)

Under the tests established in *Lopez* and *Alcorn*, Mr. Hoskins’ punitive damage case was submissible.

4. *Angotti* supports the punitive damage submissions and verdicts in this case.

In accordance with the holding in *Angotti v. Celetex Corp.*, 812 S.W.2d 742, 746 (Mo App W.D. 1991) Plaintiffs produced clear and

convincing evidence that Turner and Newall **consciously chose to ignore the information available** (See Timeline, App A1). The following testimony is particularly damning:

1930 Dr. Merewether published a report regarding the hazards of asbestos. In his report, Dr. Merewether **stressed the importance of “education of the worker to a sane protection of the risk”** (Tr. 390, 453)

Dr. Merewether also stressed **the need** for workers to protect themselves from asbestos dust by using **respiratory protection** (breathing through a filter – a respirator). (Tr. 390, 453)

1932 “Asbestos in the London Tube Railways” was published in Lancet, British medical journal, which stated that sprayed asbestos is a hazardous product (Tr. 465-466)

1930’s The deaths of **seven** of its own employees due to mesothelioma in 1936, 1939, 1946, 1949, 1952, and 1957. One of the employees, John Scoura, was a

goods loader whose main exposure would have been with finished products. (Tr. 401-402, 469-470)

Asbestos is **known** to be a **mortal hazard**. (Tr. 463)

Scientific and medical literature that users of asbestos insulation products were victims of asbestosis. There were cases of asbestosis among an insulation worker and a boiler riveter in 1933 and 1934 published in the literature in Britain and in the United States. (Tr. . 391- 392).

- 1947 The New England Journal of Medicine article regarding a Swedish man who worked on ships **around asbestos insulation** that had asbestosis and mesothelioma. (Tr. 400)
- 1953 Weiss in Germany publishes a case report concerning an **insulation worker** with mesothelioma. (Tr. 400-401)
- 1957 T&N research established that non-asbestos, mineral wool could be substituted for asbestos and was cheaper

than Limpet asbestos, but conversion to mineral wool would reduce the market for asbestos. (Tr. 454-455)

Mineral wool would not be proprietary or patented.
(Tr. 454-455)

4/24/60

“Diffuse Pleural Mesothelioma and Asbestos Exposure in the North Western Cape Province” by J.C. Wagner is published. This study points out that mesothelioma is caused by exposure to asbestos and can result from non-occupational exposure to asbestos. (Ex 138, p.260, p. 262 Case 4, p. 266 cases 15 and 24, p. 270) (Tr. 415, 423-425)

Dr. Wagner’s paper established that it was absolutely known by 1960 that asbestos caused mesothelioma.
(Tr. 702-703)

Case 30 points to the **connection between mesothelioma and removal** of asbestos insulation.
(Ex 138, p. 267) (Tr. 415)

The significance of this study was that it was shown that the population at risk for asbestos-related cancer extended beyond the people who manufacture or mine asbestos and those who use asbestos products like insulators, but also to the general application of people who are in an area where asbestos air pollution is being created (Tr. 424-25)

This was “very scary information” from the public health point of view. (Tr. 424-25).

1962

Memo from Alexander Marshall of T&N to another T&N executive. (Tr. 383-384, 385-386)

The awkward thing about this is that even if we succeed in perfecting a way of applying the material by dustless and safe method, and that is a big if, we are still liable to come unstuck according to Mr. Smith when somebody eventually comes in to remove this asbestos. I cannot see much hope of rendering this safe from a health point of view. So that reliance

would still have to be put in practice on
protective measures.

Instruction Number 5 given to the jury defined ordinary care and correctly instructed that Turner and Newall is held to the knowledge and skill of an expert. *Blum v. Airport Terminal Services, Inc.*, 762 S.W.2d 67, 74 (Mo. App. E.D. 1988). Turner and Newall raises no objection to this standard. In fulfilling its obligation as an expert, Turner and Newall is obliged to keep abreast of any scientific discoveries, is presumed to know the results of all such advances, and bears the duty to fully test its products to uncover all scientifically discoverable dangers before the product is sold. *LaPlant v. E. I. Du Pont De Nemours and Company*, 346 S.W.2d 231 (Mo. App. S.D. 1961). Turner and Newall's internal documents show that it was in fact keeping abreast of the scientific knowledge and knew of the dangers of its product.

The trial court did not err in submitting the punitive damage claims to the jury. Respectfully, this Court should deny Point I.

II. THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTION 12 BECAUSE THE EVIDENCE SUPPORTED EACH OF THE DISJUNCTIVE THEORIES SUBMITTED IN THAT INSTRUCTION IN THAT (1) UNDER THE NEGLIGENCE SUBMISSIONS, PLAINTIFFS PROVED THAT APPELLANTS/DEFENDANTS KNEW THAT ITS PRODUCT SPRAYED LIMPET CONTAINED ASBESTOS WHICH COULD CAUSE LUNG DISEASE WHEN PEOPLE WERE EXPOSED TO IT; (2) PLAINTIFFS PROVED THAT MR. HOSKINS WAS A PERSON WHO WAS REGULARLY EXPOSED TO SPRAYED ASBESTOS AND WHO REGULARLY REMOVED SPRAYED ASBESTOS; AND (3) PLAINTIFFS PROVED THAT APPELLANTS/DEFENDANTS KNEW OR SHOULD HAVE KNOWN THAT SPRAYED LIMPET ASBESTOS CREATED A HIGH DEGREE OF PROBABILITY OF INJURY TO PERSONS WHO WERE REGULARLY EXPOSED TO SPRAYED ASBESTOS OR WHO REMOVED SPRAYED ASBESTOS AFTER ITS APPLICATION.

Missouri law recognizes that disjunctive submissions are appropriate so long as each submission is supported by the evidence. *Stacy v. Truman Medical Center*, 836 S.W.2d 911, 925 (Mo. banc 1992). For the reasons expressed in Point I, each punitive damage submission was supported by the evidence.

Specifically, for the negligence theories, the evidence showed that defendants “knew or had information from which defendant Turner and Newall, in the exercise of ordinary care, should have known that such conduct created a high degree of probability of injury, and thereby showed complete indifference to or conscious disregard for the safety of others....” Instruction 12 (LF 664). MAI 10.07.

For the strict product liability claims, the evidence showed that Turner and Newall knew that its product was in a defective condition unreasonably safe when put to its reasonably anticipated use, that Turner and Newall knew that that condition existed when its product was manufactured and that Turner and Newall did not give an adequate warning of the danger. (Instructions 7, 8 and 12; MAI 25.04 and 10.06) (LF. 659, 664.)

Because Plaintiffs produced clear and convincing evidence of each of the elements of each of the disjunctive submissions under Instruction 12, the trial court did not err in submitting the punitive damages case to the jury.

Respectfully, this Court should deny Point II, for these, and the reasons previously discussed in Point I.

III. THE TRIAL COURT DID NOT ERR IN REFUSING TO DECLARE A MISTRIAL, IN REFUSING TO REOPEN THE EVIDENCE OR ALLOW ADDITIONAL ARGUMENT, AND IN DENYING APPELLANTS'/DEFENDANTS' MOTION FOR JUDGMENT N.O.V. OR, IN THE ALTERNATIVE, FOR A NEW TRIAL BECAUSE:

(A) DEFENDANTS' COUNSEL FAILED TO OFFER A TIMELY, PROPER OBJECTION LEAVING ONLY PLAIN ERROR REVIEW AVAILABLE TO DEFENDANT.

(B) PLAIN ERROR REVIEW IS NOT WARRANTED BECAUSE:

1. DEFENDANTS' COUNSEL ADMITTED THAT PLAINTIFFS' COUNSEL'S ARGUMENT WAS PROPER UNLESS PLAINTIFFS' COUNSEL ACCUSED DEFENDANTS' COUNSEL OF DESTROYING THE SLIDES WHICH PLAINTIFFS' COUNSEL DID NOT DO; AND

2. DEFENDANT'S COUNSEL ASKED THE TRIAL COURT TO REOPEN THE CASE TO SHOW THE JURY THAT DEFENSE COUNSEL HAD NOT DESTROYED THE SLIDES AND FOR NO OTHER PURPOSE; AND

3. PLAINTIFFS' COUNSEL'S ARGUMENT RAISED AN APPROPRIATE INFERENCE FROM THE EVIDENCE AND THE ARGUMENT OF DEFENDANTS' COUNSEL IN THAT APPELLANTS/DEFENDANTS SOUGHT AND OBTAINED COMPLETE, INDEPENDENT ACCESS TO THE RELEVANT MEDICAL RECORDS

THROUGH A NEW YORK COURT ORDER AND FAILED TO PROVIDE THEIR EXPERT WITH AN OPPORTUNITY TO REVIEW ALL OF THE EVIDENCE PRIOR TO HIS RENDERING AN OPINION AT TRIAL AS TO MR. HOSKINS' DISEASE.

A. INTRODUCTION AND SUMMARY OF POINT III ARGUMENT

The tone of Appellants' argument is troubling. As is sometimes the case, however, when appellate counsel's firm did not participate in the trial, a less-than-complete understanding of the facts leads to a stridency that full disclosure reveals is unwarranted.

An understanding of the entirety of the closing argument is necessary for this Court to appreciate this issue fully. As occurred with Point I, much of what follows focuses on the actual words used by the attorneys and the Court, not commentary on it by appellate counsel. This format is designed to assist the Court in concluding, as did the trial court, that there was no need for a mistrial because Plaintiffs' counsel's argument was proper. Because of the word limitations placed on briefs by this Court's Rules, only excerpts are provided, however. Plaintiffs invite the Court to read the entire argument for itself in determining the issues presented in Points III and IV. (See, A-44-79)

Appellants insist that their access to Mr. Hoskins' medical records was controlled by Plaintiffs' counsel. This is not the case, however. First, Plaintiffs' counsel abided by the letter and the spirit of the stipulation and

gave all of the records and slides which Plaintiffs' counsel received to defense counsel. It was obvious from the face of Dr. Lieberman's report to a diligent defense lawyer, however, that Plaintiffs' counsel had not received all of the slides.⁵

Second, and in addition to the slides Plaintiffs' counsel provided under the stipulation, defense counsel obtained an order from the New York Supreme Court (the trial bench) to obtain a complete set of slides and records directly from Mr. Hoskins' treating physicians in New York. (A-21-30). This gave defendants **greater** access to the slides than Plaintiff. Defendants obtained this order *fourteen weeks after the parties entered the stipulation* and approximately twelve weeks after the Plaintiffs' attorneys provided all of the slides they obtained from the New York hospital to defense counsel. The New York order permitted defendants full, independent and complete access to the 37 slides that had been created – 17 by Sloan-Kettering and 20 by Menorah Hospital in Kansas City. Dr. Andrew Churg, the defendants' expert, opined that Mr. Hoskins did not have the mesothelioma that plaintiffs' treating doctors had diagnosed. And

⁵ Because Mr. Hoskins' treating physicians in Kansas City and in New York had seen all of the slides in rendering their diagnosis of mesothelioma, there was no need for Plaintiffs' counsel to obtain these slides to prove their medical case.

defense counsel offered this opinion to the jury despite the now-admitted fact that Dr. Churg did not review all the slides the treating physicians used to diagnose Mr. Hoskins and despite the fact that defendants' attorneys demanded and received a judicial order giving them independent access to the slides prior to trial and prior to the presentation of Dr. Churg's opinion to the jury.

At trial, defense counsel assured the jury in opening statement that Dr. Churg's opinion was based on "all of Mr. Hoskins' medical records." (Tr. 214).

On review by this Court, the meaning of these facts is further informed by settled law. Defendants' counsel did not object to the plaintiffs' argument until after the close of all argument and after the jury retired to deliberate. (Tr. 945) Even had defendants made a timely, proper objection, the statements of Plaintiffs' counsel were proper argument, attacking the scientific basis for the defendants' chief theory of the case – that Mr. Hoskins never had mesothelioma at all.

B. STANDARD OF REVIEW

Review of a claim that the trial court erred in failing to interrupt closing argument in the absence of a timely objection is for plain error. *State v. Newman*, 699 S.W.2d 29, 32 (Mo. App. S.D. 1985). The doctrine of plain error may not be invoked to cure failure to make a proper and timely objection to the trial court unless a manifest injustice or miscarriage

of justice resulted from that statement by counsel in his closing argument. *Hensic v. Afshari Enterprises, Inc.*, 599 S.W.2d 522, 525 Mo. App. E.D. 1980).

Review of a trial court's decision not to grant a mistrial is for abuse of discretion. "Determining the prejudicial effect of final argument and the necessity of the drastic remedy of mistrial is in the sound discretion of the trial court, whose judgment will not be disturbed unless there was a manifest abuse of discretion." *Richardson v. State Highway and Transportation Comm'n.*, 863 S.W.2d 876, 881 (Mo. banc 1993). Judicial discretion is abused and reversal required only if the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable persons can differ about the propriety of the action taken by the trial court, then the appellate court cannot conclude that the trial court abused its discretion. *State ex rel. Webster v. Lehndorff Geneva*, 744 S.W.2d 801, 804 (Mo. banc 1988). *Accord, Anglim v. Missouri Pacific R. Co.*, 832 S.W.2d 298 (Mo. banc 1992).

"Counsel is traditionally given wide latitude to suggest inferences from the evidence on closing argument." *Carter v. Liberty Equipment Co., Inc.*, 611 S.W.2d 311, 315 (Mo. App. 1981). Even when opposing counsel proffers a timely objection, something absent in this case, "the trial court is

accorded broad discretion in ruling on the propriety of a closing argument to the jury and will suffer reversal only for an abuse of discretion. This is so ‘even though the inferences drawn are illogical or erroneous.’ *Eickmann v. St. Louis Public Service Co.*, 323 S.W.2d 802, 810 (Mo. 1959).” *Moore v. Missouri Pacific RR Co.*, 825 S.W.2d 839, 844 (Mo. banc 1992).

The Slide Timeline

- April 2, 1999 – 20 slides from Research Medical Center (Menorah) received by Memorial Hospital for Cancer, New York. Slides designated S99-04622.
- April 5, 1999 – Treating physician Lieberman reviews 20 slides (S99-04622) received from Menorah and diagnoses desmoplastic malignant mesothelioma. (A-11)
- April 27, 1999 – Forest Hoskins has surgery. Seventeen new slides created from tissue removed by Dr. Rusch during surgery.
- August 4, 2000 – Steinhilber letter indicating New York hospital will not release slides without court order (A 38)
- November 1, 2000 – Stipulation filed assuring joint access to slides received by law firms. (A 40-41)

- November 20, 2000 – Plaintiffs’ counsel sends 23 “pathology slide and blocks that we have received from Menorah ... and from Memorial Sloan-Kettering for his surgery on April 27, 1999.” (A 42-43)
- January 28, 2001 – Dr. Churg (defendants’ expert) issues report concluding that Mr. Hoskins does not have mesothelioma. Churg reviews Dr. Lieberman’s report noting 20 slides but sees only 6 of the initial 20 slides reviewed by the treating physicians to reach their diagnosis of mesothelioma and 17 of the surgery slides, for a total of 23 slides out of 37 known to exist.
- February 13, 2001 – Defendants obtain order from New York Supreme Court directing Drs. Rusch and Lieberman to produce “all ... original pathology slides and studies” relating to the treatment of Forest Hoskins. (A 21-22)
- February 15, 2001 – Churg deposition.
- February 19, 2001 – Lieberman deposition. All slides were available pursuant to New York court order and Dr. Lieberman testifies that he reviewed them immediately prior to the deposition.

The Closing Argument

Appellants' offer selections from the transcript to support their argument. Here is a more complete version that places the challenged comments in context. (See A 44-79)

[Opening Statement by Ms. Chaplinsky:] Turner and Newall spent some time and obtained these slides... Turner and Newall did that because they wanted to know whether or not Mr. Hoskins in fact had this disease, the desmoplastic mesothelioma. We wanted to be sure before we accepted the dire diagnosis and the fact that Mr. Hoskins had a terrible, terminal disease with a poor prognosis, that the world's foremost researcher on this disease said it was so or it wasn't.

* * *

Dr. Churg has looked at the slides from Mr. Hoskins' tissue and all of Mr. Hoskins' medical records from the time of diagnosis up until early this year. And it's Dr. Churg's opinion, with the benefit of the totality of Mr. Hoskins' medical condition and symptoms, by adding in the clinical course, and how Mr. Hoskins is doing today; it's his learned opinion that Mr. Hoskins does not and did not ever have a desmoplastic mesothelioma. (Tr. 213-14)

[Closing Argument by Ms. Chaplinsky:] . . . How about when Dr. Repsher put down the clinical reasons—and remember he’s a clinician—that he felt corroborated his opinion that this man does not now and never did have a mesothelioma. (Tr. 914)

* * *

I told you in my opening I wanted you to watch the doctors when they told you what they did have opinions on and when they wouldn’t give us our (sic) opinions. (Tr. 920)

* * *

Dr. Churg, who chairs the U.S./Canadian mesothelioma panel. And he can’t find one of the four criteria, not one of the four criteria that he sets out to distinguish desmoplastic mesothelioma from a reactive process. (Tr. 920)

* * *

The numbers are beginning to add up a little bit in this case, I remember Dr. Churg challenged plaintiff’s counsel. No, I’m completely neutral in this case. If you’ve got something you want me to look at, put it in front of me. But I’m just telling you that the evidence in this case right now is

that this man never had and does not have a desmoplastic mesothelioma. (Tr. 921)

* * *

Like Dr. Churg said, if you've got something that shows us now that he has mesothelioma, put it in front of us. (Tr. 925)

* * *

[Final closing argument by Mr. Accurso:] And even Dr. Repsher [defendants' expert] said that it's good scientific practice to look at all the available material because you wouldn't want to express your opinion to a jury without knowing all of the facts. And he said because if you know that there's one key piece of evidence, one key piece of evidence, missing that all of your opinions, every one of them, can come tumbling down like a house of cards. (Tr. 929)

* * *

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)

* * *

I'm going to show you some testimony that came from Lieberman, that's very, very important and you'll see why here in just a moment. This was his deposition back on February 19th....

“QUESTION: And in that capacity did you have the opportunity to be involved in the pathological diagnosis of tissue samples of the plaintiff, Mr. Hoskins?

ANSWER: Yes. From my review of the records it appears that there are two occasions.

QUESTION: One could have been a review of the initial slides that came from Kansas City on April 2nd, 1999. And the second would be the review of D. Rusch's surgical material that she removed on April 26th, 1999; is that correct?

ANSWER: Not completely correct. I examined the material, the original material, that was sent from the other hospital and the sheet that had the information on it, the surgical pathology request, and I also examined the electro microscopic finding from the resection that was done in this hospital.

QUESTION: You looked at the Kansas City material;
is that correct?

ANSWER: Yes.”

Let’s go on. Page 16

“QUESTION: Based on your review of the records
today can you tell me what you remember seeing the cells?

ANSWER: I don’t remember. I didn’t remember until
I looked at the slides.

QUESTION: And when did you look at the slides
again?

ANSWER: I looked at the slides today.”

It gets better. Let’s go to page 17.

“QUESTION: And which slides did you look at
today?

ANSWER: I looked at all of the slides that they sent
of the original slides that were sent in.

QUESTION: And what was the purpose of looking at
them today?

ANSWER: Because I was going to testify and I
wanted to make sure what I was dealing with.”

What else did he say? Let’s go to page 49

“QUESTION: Doctor, let me hand you what’s been marked as Exhibit 74, which is a copy of a department consult. I believe you looked at it earlier today and I think you brought a copy of Exhibit 74 with you. Correct?”

ANSWER: Yes, this is the same one I looked at before.

QUESTION: What is Exhibit 64 [sic], Doctor?”

He says, next page, page 50:

“ANSWER: This is the pathology report from my department indicating that I reviewed a pleural biopsy slide submitted, 20 slides, 20 slides in all.”

Twenty slides in all. Then same page, page 50, line 18:

“QUESTION: Doctor, in your capacity as a pathologist at the hospital did you look at some slides and some other material that came from Kansas City concerning the patient, Dino Hoskins?”

ANSWER: Only the slides and the paperwork.”

And then page 57:

“QUESTION: With respect to the work that you did, you reviewed the slides from Kansas City and you said you agreed with the Kansas City pathologist; is that correct?”

ANSWER: Right.”

Now let’s go to Exhibit 74, please. Go into where it says “diagnosis.” There’s a control right here. It says, “Slides received reviewed.” He received 20 and reviewed 20. And look at that number, SP99-4622. These are the slides that came from Menorah Hospital. Those are the 20 slides that Dr. Lieberman looked at in addition to the slides from Sloan-Kettering.

And why is that important? Now, we’re going to show you from Dr. Churg’s own report why that is important. Let’s pull up the first page of Exhibit 279. See a different control number here. That says the pathology consists of 17 slides labeled from Memorial Hospital in New York City. Seventeen from Sloan Memorial. But look at this, six additional slides are labeled SP99-4622, Health Midwest Systems. Six.

And what did he say in his deposition how many slides he looked at from Kansas City? Page 63, Dr. Churg’s deposition.

“QUESTION: How many slides did you look at in reaching your conclusion in this case?

ANSWER: Whatever there was.”

Seventeen, that's from Sloan-Kettering, plus six.

“QUESTION: Do you know how many slides that Dr. Lieberman looked at?

ANSWER: No.”

Well, she said it. She said the issue in this case is whether Dino Hoskins has mesothelioma. Then why didn't they give him 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. (Tr. 930-935)

* * *

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 [from the Kansas City hospital]. You go upstairs when you deliberate in this case and you ask yourselves, why, why are they doing this? (Tr. 936)

C. DEFENDANTS’ COUNSEL FAILED TO OFFER A TIMELY, PROPER OBJECTION LEAVING ONLY PLAIN ERROR REVIEW AVAILABLE TO DEFENDANT

“Where the defendant failed to make an objection to the argument at trial, the trial court did not abuse discretion in refusing to grant a new trial.”

Keene, 855 S.W.2d at 373.

Defendants’ counsel never objected to plaintiffs’ counsel’s argument, but only sought a mistrial (Tr. 945-46) or a directed verdict. (Tr. 960-961) After the jury retired the following exchange occurred:

Ms. Chaplinsky: Your Honor, defendant has several mistrial motions. Number one is, Your Honor, the slides. We got the slides from plaintiff. If things were held back, we didn’t hold anything back. There’s a stipulation regarding the chain of custody on these slides obtained by Mr. Accurso’s law firm. If something was held back, I didn’t hold it back. His office held it back. And I think that’s absolute mistrial material to make it look like I’m hiding something from my expert witness when I got it from them.

Mr. Accurso: We didn’t hold anything back.

Mr. Kalinoski [defendants’ other counsel]: Fine let’s go in front of the jury again and we’ll ---

The Court: No. We won’t go in front of the jury again....

(Tr. 945-46)(emphasis added).

Where there is no timely objection, only a request for a mistrial, review is for plain error only. *State v. Newman*, 699 S.W.2d 29, 32 (Mo. App. S.D. 1985)(“there is not ... an indication that defense counsel ... by conscious design ... waited to object until no action other than a mistrial would be effective. Nevertheless, the procedural result is the same and if the point is before us, it is only as a matter of plain error”).

Defendants take some comfort in *Heisler v. Jetco Service*, 849 S.W.2d 91 (Mo. App. E.D. 1993). They are mistaken in doing so because *Heisler* involves a plaintiff's failure to object to the defendant's closing argument. *Heisler* is little more than a variant of the invited error doctrine – that counsel may respond to matters improperly raised.

The court held that because the plaintiff knew it would have rebuttal argument, plaintiff could choose not to object and address an improper argument on plaintiffs' final closing argument. This is the significance of *Heisler's* statement, seized by defendants, that “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.

The proper conclusion to be drawn from *Heisler* is this: Where a party has no other opportunity to argue under the rules, it must object.

Defendants in this case failed to object even though they had no other opportunity to argue under the rules.

More important, *Heisler* turns on the trial court's failure to exercise its discretion.

Here, however, the trial judge did not purport to exercise discretion. He indicated sympathy with the plaintiffs' efforts but felt that he was legally bound to rule as he did [that in the absence of an objection he could not rule]. He thought that the plaintiff's proper remedy was to object to the defendants' empty chair argument, and we have concluded that this was not required [given the plaintiffs' opportunity to rebut].

Id. The trial court in this case exercised its discretion.

In the absence of a timely objection, only plain error review remains.

D. PLAIN ERROR REVIEW IS NOT WARRANTED BECAUSE

- 1. DEFENDANTS' COUNSEL ADMITTED THAT PLAINTIFFS' COUNSEL'S ARGUMENT WAS PROPER EXCEPT TO THE EXTENT THAT PLAINTIFFS' COUNSEL ACCUSED DEFENDANTS' COUNSEL OF DESTROYING THE SLIDES WHICH PLAINTIFFS' COUNSEL DID NOT DO.**

After the jury began its deliberations, but before the verdict on liability and compensatory damages, Mr. Kalinoski, one of defendants' counsel, attempted to persuade the trial court to reopen the evidence.

MR. KALINSOKI: It is our position that as a result of the statements of Mr. Accurso, which we believe, in our collective memory, is that he accused of us of destroying – by “us” I mean the lawyers who were working with Mr. Hoskins' tissue slides – of destroying some of them. And knowing that to be a false statement, still made that statement to the jury. And we can prove it's false to Your Honor.

And also if Your Honor doesn't want to hear it, I would just ask that I be allowed to make an offer of proof showing that we need some curative action taken by the Court. And the curative action we'd like taken by the Court is for the case to be reopened on the sole issue of whether or not these slides were destroyed. We'd like to put the evidence on and let the chips fall where they may.

* * *

MR. ACCURSO: I'd like to point out from the get-go that we gave the defense every piece of evidence that we had regarding these tissue slides. They had medical authorization, unrestricted, to get access to Mr. Hoskins' medical records at

any time they wanted. Their experts, as Dr. Churg testified at his deposition on page 73, is completely familiar with what he called – and he brought this up, the adversarial system.

Their experts reviewed all the medical records pointed out – Dr. Churg pointed out in his report, Exhibit 279, that's dated January 28th, that he only looked at six slides from Menorah Hospital. And Dr. Churg in his depositions on page 63 reiterated that. And he then stated he doesn't know how many slides that Dr. Lieberman looked at.

And what I said was in closing argument, my memory of it, is that they claim they gave these slides to the doctor, why didn't they give him the rest of them. If there's other slides, why didn't they get them? And I'll point out in the transcript of defense counsel's opening statement, she said after the lawsuit was filed that Turner and Newall spent some time in obtaining those slides. Well, she's put the burden on her own to get those slides.

What I argued was absolutely fair comment on what was in this case and the reasonable inferences there from.

* * *

MR. KALINOSKI: Your Honor, **everything Mr. Accurso said about his closing statement was proper.** All

that was proper argument. What he didn't say was that he accused us of destroying slides, destroying evidence and that's not appropriate, proper, or professional comment to make without evidence.

MR. ACCURSO: That comment was not made.

(Tr. 957-959)(emphasis added).

This Court can read the argument for itself. It was apparently the trial court's view, and the transcript supports that view, that Plaintiffs' counsel did not accuse defense counsel of destroying any evidence. That being the case, defendants' counsel admitted that the argument was proper and there was no claim of additional error before the trial court.

Why did defendants' counsel make this admission? Perhaps this is the reason: Had Dr. Churg appeared live at trial, Plaintiffs' counsel could have cross-examined him on his failure to review all of the slides. This inquiry would have revealed that defense counsel had not provided Dr. Churg with the slides to review, that his "diagnosis" of Mr. Hoskins' condition was founded on less-than-complete scientific evidence, that had he seen all of the slides, he, too, might have concluded that Mr. Hoskins had mesothelioma.

Even if this was not the reason for the defendants' counsel's admission, it is the law of Missouri. If the subject of Dr. Churg's failure to review all of the slides would have been proper cross-examination – and it

would have been – the inferences drawn in closing argument from the evidence the jury heard on the same subject was also proper. And as will be discussed in subsection 3, which follows shortly, this also explains defense counsel’s failure to object to the argument.

2. DEFENDANT’S COUNSEL ASKED THE TRIAL COURT TO REOPEN THE CASE TO SHOW THE JURY THAT DEFENSE COUNSEL HAD NOT DESTROYED THE SLIDES AND FOR NO OTHER PURPOSE

From the prior colloquy, the Court will recall that Mr. Kalinoski informed the trial court: “**And the curative action we’d like taken by the Court is for the case to be reopened on the sole issue of whether or not these slides were destroyed**. We’d like to put the evidence on and let the chips fall where they may. (Tr. 956-57)(emphasis added).

Later defense counsel repeated the limited request.

THE COURT: What’s your request that you’re asking the Court to do now?

MR. KALINOSKI: Our initial request is curative. It’s our obligation if it’s possible to be cured to ask for that first. **We’re asking for curative action by the Court to briefly reopen our case and to show the jury either that they were destroyed or not destroyed, just on that sole issue.**

(Tr. 959-60)(emphasis added).

The argument advanced by appellants/defendants on appeal is entirely different from the argument made by defense counsel to the trial court. Here the argument is that Plaintiffs' counsel wrongly argued that defense counsel had "withheld key evidence from their experts." (App. Br. at Point Relied On III.) At trial, defense counsel admitted that the argument made by Mr. Accurso was proper argument except as it claimed that defense counsel had destroyed evidence. And the record shows that Mr. Accurso made no such argument.

The trial court cannot be convicted of abusing its discretion where the record does not support the claim that defense counsel advanced at the trial court.

Defendants are left with a single hope – that this Court will conclude that an argument defense counsel believed was proper at trial created manifest injustice or miscarriage of justice.

3. PLAINTIFFS' COUNSEL'S ARGUMENT RAISED AN APPROPRIATE INFERENCE FROM THE EVIDENCE AND THE ARGUMENT OF DEFENDANTS' COUNSEL IN THAT THE EVIDENCE SHOWED THAT APPELLANTS/DEFENDANTS SOUGHT AND OBTAINED COMPLETE, INDEPENDENT ACCESS TO THE RELEVANT MEDICAL RECORDS THROUGH A NEW YORK COURT ORDER AND FAILED TO PROVIDE THEIR EXPERT WITH AN OPPORTUNITY TO REVIEW ALL OF THE EVIDENCE PRIOR TO HIS RENDERING AN OPINION AT TRIAL AS TO MR. HOSKINS' DISEASE.

Defendants made a strategic decision to try this case on their theory that Mr. Hoskins did not have mesothelioma. That was the focus of the defendant's short opening statement. It remained the focus of their evidence and their closing argument. This theory, if successful, had the advantage of premitting the jury's consideration of the aspects of defendants' behavior that warrant punitive damages – if Mr. Hoskins was not sick from asbestos, it would not matter how clear the evidence was of defendants' conscious disregard or complete indifference and knowledge of the high degree of probability that their product would result in injury.

Defendants placed all their eggs in that factual basket. Now that the eggs are broken, they want to try a new set of eggs in a different basket.

Defendants now say that “Mr. Accurso did not say anything to the jury about defendants hiding or withholding the evidence” in his initial closing argument. (App. Br. at 66) They also claim that Mr. Accurso attempted to “mislead the jury” by saving this argument until the defendant had no opportunity to respond. (App. Br. 66) From these premises they argue that Plaintiffs’ argument was improper because it did not rebut anything the defendant argued in the defendant’s portion of the closing argument, citing *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10, 18 (Mo. banc 1994).

Aside from its inaccuracy, defendants’ argument is a not-too-subtle attempt to divert this Court’s attention from the thrust of the closing argument of defense counsel – that Mr. Hoskins did not have mesothelioma at all – by an ad hominem attack on plaintiffs’ counsel, creating mischief where none existed and hoping by diversion to impugn Mr. Accurso’s wholly justified attacks on the less-than-complete scientific evidence upon which Dr. Churg relied to conclude and then to testify that Mr. Hoskins was not sick at all.

When defendants’ counsel asserted that defendants’ experts – “the finest in the world” – had concluded that Mr. Hoskins did not suffer from mesothelioma, it was appropriate for Mr. Hoskins’ counsel to rebut that

argument by attacking the scientific basis for the defense expert's opinion (Ms. Chaplinsky invited and mandated that rebuttal, saying "nobody is attacking the science of these gentlemen.").(Tr. 907) **This is particularly so when the defense knew or should have known from the reports and depositions available to them prior to trial that Mr. Hoskins' treating physicians looked at 37 slides and their expert viewed only 23 slides – and that they did not ask their expert to review all of the evidence even though it was available to the defense.**

Two possible scenarios for Dr. Churg's failure to review all of the evidence present themselves. First, one can assume that defense counsel knew that Dr. Churg had not reviewed all of the slides, needed the opinion he had offered on less-than-full information to support their theory of the case at trial, and decided they did not want to risk Dr. Churg's opinion changing to favor Mr. Hoskins if he, Dr. Churg, were to see all of the slides on which the treating physicians based their diagnosis of Mr. Hoskins's mesothelioma. Under this scenario, the risk defense counsel took was a strategic one, founded on a hope that plaintiffs' counsel would not catch the evidentiary gaps in the Churg opinion.

This scenario is a reasonable one and is consistent with defense counsel's decision not to object during Mr. Accurso's argument. The inference drawn by Mr. Accurso – that defense counsel did not want Dr. Churg to see all of the evidence – is also a reasonable one. "Counsel is

traditionally given wide latitude to suggest inferences from the evidence on closing argument.” *Carter*, 611 S.W.2d at 315. Even when opposing counsel proffers a timely objection, something absent in this case, “the trial court is accorded broad discretion in ruling on the propriety of a closing argument to the jury and will suffer reversal only for an abuse of discretion. This is so ‘even though the inferences drawn are illogical or erroneous.’ *Eickmann v. St. Louis Public Service Co.*, 323 S.W.2d 802, 810 (Mo. 1959).” *Moore*, 825 S.W.2d at 844.

This scenario also explains defendants’ counsel’s decision not to provide the jury with live testimony from Dr. Churg, an expert described by defendants’ counsel as “the world’s foremost researcher” on mesothelioma. (Tr. 214). By not bringing Dr. Churg to the jury in person, defendants’ counsel avoided the cross-examination that would have revealed the flaws in his methodology and in his opinions. Indeed, in Dr. Repsher’s cross-examination (a defense expert), Mr. Accurso set before the jury the need for an expert to base his opinion on complete evidence.

Q. [By Mr. Accurso]Let’s see if we can agree on this. Would you agree that the validity and accuracy of an expert’s opinion, even if he happens to be the finest expert in the world, is dependent upon the facts that the expert considers in forming and expressing his or her opinion? –

A Yes. That certainly can be true.

Q And when these lawyers, like these folks here, hire you, you tell them; give me all the facts; don't you?

A I would like to have all the facts that are available, yes, that are relevant. Some may not be relevant and that I don't care about.

Q You tell them, give me all the facts whether they support my opinion or whether they're inconsistent. Just give them all to me because I need to know it.

A Absolutely.

Q Because you know when you come in and speak to the jury, that you want to be right?

A I want to be as right as I can be, yes.

Q And you'd agree that its good scientific practice to get all the available material before you give an opinion?

A To get all the available material, yes.

Q And you don't want to express an opinion to a jury without knowing all the facts?

A Without knowing all the relevant facts.

Q Because you know, from your experience, if just one key piece of evidence is not provided to you, it could undermine or even destroy the validity of your opinion?

A Depending on that key piece of evidence.

Q Because your opinions are only as good as the material available to you, right?

A Only as good as the relevant material that is available to me, yes.

Q Would you agree from a scientific standpoint that when you talk about pathology, looking at tissue, that there's something called a sampling error?

A Certainly.

Q And you would agree sir, that the more tissue that you look at the more reliable your diagnosis is going to be as far as distinguishing the presence or absence of a particular lung disease?

A It makes no difference if you obtain the diagnostic finding in the biopsy, if you do not obtain the diagnostic finding in the biopsy then your statement is true

Q When did you ask to look at the slides in this case?

A There wasn't any lung tissue in this case.

Q What were the slides of? What did Dr. Churg look at?

A The slides were of pleural tissue.

Q Did you ask to look at those?

A No. I am not an expert at looking at pleural tissue....

(Tr. 689-692)(A-)

Under a second scenario, defense counsel could be unaware that Dr. Churg did not have all the slides when he prepared his report. If defense counsel were unaware, they would have had to be “unaware” of Dr. Lieberman’s report and “unaware” of the clear evidence contained in the medical records. This scenario is difficult to accept. Even so, failure of defendants’ counsel properly to prepare for trial does not render argument of a more-prepared counsel improper.

Under this scenario, the defendants had another opportunity to make themselves aware of Dr. Churg’s failure to review all of the twenty slides from Menorah. Turner and Newall had two attorneys at Dr. Lieberman’s deposition (Ms. Chaplinsky and Gary Casimer, the New York lawyer who obtained the court order to take the deposition) and they could have contacted Dr. Churg during or after that deposition and made arrangements to get all of the slides to Dr. Churg, who could have given another deposition and/or testified live at trial. (They also could have sent Dr. Churg to New York to attend Dr. Lieberman’s deposition and/or review the slides at Memorial Sloan-Kettering.)

On appeal, defendants address neither scenario. Instead, they insist that they relied on Mr. Hoskins’ attorneys to provide them with all the records and slides. This argument is flawed for at least two reasons: First,

Mr. Hoskins' attorneys never agreed to collect all of the slides, only to collect and hand over to defendants all of the slides that Memorial Sloan Kettering would release to Mr. Hoskins' attorneys. A careful reading of the stipulation and the correspondence to which defendants attach such importance with their newly-minted appellate argument shows that Mr. Hoskins attorneys gave defendants everything they had obtained.

Second, and even more damning for defendants' argument, defendants did not rely on Mr. Hoskins' attorneys to produce all of the slides. Instead, they obtained an order from the New York Supreme Court requiring Dr. Lieberman to "produce all medical records, ... original pathology slides and studies...." (A-21-23), again granting them greater access than Plaintiffs ever had. And defendants obtained this order more than fourteen weeks after the stipulation was entered and approximately twelve weeks after Mr. Hoskins' attorneys sent all the slides they had received to the defendants.⁶

⁶ Appellants/defendants cite an article in a newspaper, the National Law Journal, in which a juror explained her vote in the compensatory damages phase. The newspaper reports that the woman understood that Mr. Accurso had not argued that the slides were destroyed but that defense counsel had a motive in not providing Dr. Churg full access to the slides.

Conclusion

Given these undisputed facts, this Court can, respectfully, hardly conclude that the trial court abused its discretion in refusing to reopen the case or in refusing to sustain the motions for a mistrial or directed verdict. Point III should be denied.

The discussion of this portion of the argument (Ap. Br. at 82) is relegated to a footnote because the law clearly makes the argument improper.

First, newspapers are not evidence, nor are juror statements in a newspaper admissible. Second, and more important, the Mansfield Rule prohibits impeachment of a jury verdict by the testimony or affidavit of a juror after the jury is discharged. *Kemp v. Burlington No. R. Co.*, 930 S.W.2d 10, 13 (Mo. App. (1996)). This is a substantive rule of law in Missouri and courts routinely exclude evidence to impeach a verdict on the affidavits or testimony of jurors. *Id.*

A newspaper article is even less reliable than an affidavit. It is not testimony. Defendants' argument is improper and deserves no further response.

IV. THE TRIAL COURT DID NOT ERR IN EXCLUDING NON-MITIGATING EVIDENCE FROM THE PUNITIVE DAMAGES PHASE OF THE TRIAL (A) BECAUSE THE APPELLANTS/DEFENDANTS DID NOT PROPERLY PRESERVE THEIR CLAIM OF ERROR FOR APPELLATE REVIEW IN THAT APPELLANTS/DEFENDANTS FAILED TO MAKE AN OFFER OF PROOF IN A TIMELY MANNER; AND (B) BECAUSE THE EVIDENCE DID NOT TEND TO PROVE THAT APPELLANTS'/DEFENDANTS' CONDUCT IN FAILING TO WARN AND IN PRODUCING A DEFECTIVE, UNREASONABLY DANGEROUS PRODUCT WAS LESS CULPABLE.

A. STANDARD OF REVIEW

In reviewing a trial court's decision to omit evidence, this Court applies an abuse of discretion standard. The admissibility of evidence lies within the sound discretion of the trial court and will not be disturbed absent abuse of discretion. *Kansas City v. Keene Corp.*, 855 S.W.2d 360, 367 (Mo. banc 1993). "The trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration." *Oldaker v. Peters*, 817 S.W.2d 245, 250 (Mo. banc 1991) (citation omitted).

B. INTRODUCTION

Defendants assign error to the trial court's decision to exclude "all evidence of mitigation" during the punitive damage phase of the trial. (App.

Br. at 86). Because Turner and Newall never made an offer of proof during the punitive damage phase of the trial as to what the evidence would be, the point is not preserved for appellate review. Moreover, even had there been a proper and timely offer of proof, the evidence that would have been offered was not evidence in mitigation of punitive damages and was properly excluded.

C. THE APPELLANTS/DEFENDANTS DID NOT PROPERLY PRESERVE THEIR CLAIM OF ERROR FOR APPELLATE REVIEW IN THAT APPELLANTS/DEFENDANTS FAILED TO MAKE AN OFFER OF PROOF IN A TIMELY MANNER

When a trial court excludes evidence, the proponent of that evidence must make an offer of proof. *State v. Purlee*, 839 S.W.2d 584, 592 (Mo. banc 1992). An offer of proof serves two primary purposes: First, to preserve the record for appeal so the appellate court understands the scope and effect of the questions and proposed answers in considering whether the trial judge's ruling was proper; second, to permit the trial judge further to consider the claim of admissibility. *Evans v. Wal-Mart Stores*, 976 S.W.2d 582 (Mo. App. E.D. 1998). The trial court is not bound by an in limine ruling and may admit the evidence when offered at trial. *Id.* "The trial court cannot foresee the circumstances under which the matter may be presented at trial, or how trial developments preceding the attempt to introduce the questioned evidence may affect its admissibility. For these

reasons, an objection or offer of proof must be made so the trial court has the opportunity to consider such circumstances and developments and thus be enabled to make a reasoned and fully advised decision." *Id. quoting Robbins v. Jewish Hosp. of St. Louis*, 663 S.W.2d 341, 348 (Mo. App. E.D. 1983). If the evidence is still excluded upon offer of proof at trial, then the proponent of the evidence may predicate error on the exclusion. *Id.*

After the close of argument, and during their motion for a directed verdict, the defendants made an offer of proof regarding the evidence of the slides and the stipulation. The trial court refused the offer of proof. (Tr. 964, l. 4).

Attempting to transport that earlier offer of proof into their punitive damage point, defendants' brief states that defendants "advised the [trial] Court that they wished to call Mr. Accurso's paralegal, Rosemarie Allen, as a witness in Phase II..." because "Ms. Allen had sent the slides to defendants and would have had direct knowledge of how and from where the slides were obtained." (App. Br. at 86).

Defendants misstate the record. The request described in their brief occurred before the verdict on liability and compensatory damages. And the record shows that the trial court clearly restricted the offer of proof to the issue of the motion for directed verdict made while the jury deliberated on liability and compensatory damages.

THE COURT: The motion for a mistrial is overruled. It's a proper subject for me to consider on a motion for new trial. Anything else?

MR. KALINOSKI: I'd like to make an offer of proof for directed verdict, Your Honor.

THE COURT: Make any offer of proof you want.

MR. KALINOSKI: One thing, Your Honor – well, let me do this first. I have a copy of a letter dated November 29, 2000 from Rose Marie Allen, legal assistant to the Accurso Law Firm stating they sent, among other things, 17 pathology slides from Memorial Sloan Kettering to – the letter will speak for itself – to Margaret M. Chaplinsky. And we do not have the original copy. We would submit a photostatic copy for the record.

THE COURT: For the purposes of this hearing and the offer of proof, mark it as an exhibit. Only for the purposes of this hearing.

(Tr. at 961)(emphasis added). Defendant never raised the issue of Rosemarie Allen's purported testimony after the jury returned its liability verdict.

To preserve the issue of exclusion of evidence for appeal, an offer of proof demonstrating why the evidence is relevant and admissible must be

made at trial. *Liszewski v. Union Electric*, 941 S.W.2d 748, 751 (Mo. App. E.D. 1997). See also *Eckert v. Thole*, 857 S.W.2D 543, 546 (Mo. App. E.D. 1993). The offer of proof must be definite and specific. *Liszewski*, 941 S.W.2d at 751.

Here defendants' claim simply fails all tests for preservation of this issue for appellate review. There was no formal offer of proof made before the Court during the punitive damage phase. Defendants' earlier offer of proof, limited as indicated by the trial court, consisted of documents. It did not establish how the evidence defendants hoped to present was material to the issue of mitigation of damages nor did it establish that it was material on any issue before the jury in Phase II. Failure to supply this sufficient information in an offer of proof robs this Court of its ability to assess the relevance, materiality and force of the evidence. *Evans*, 976 S.W.2d 582.

Even more remarkable, defense counsel never even called the evidence mitigating evidence. The relevant portions of the transcript follow:

MR. KALINOSKI: We would like the opportunity to put evidence on now about the hiding of the slides, as well as other knowledge evidence on Turner and Newall because of the rebuttal argument. (Tr. 966-967, ll. 24-25 & 1-3).

The amount of punitive damages is going to be determined by culpability. We're entitled—especially since

this is an argument that was pressed on us during rebuttal and at no other time in the case. If there was a withholding of evidence, there was destruction of evidence, that's something that properly should have been brought out during discovery in this case. (Tr. 967-968, ll. 21-25 & 1-4).

* * *

THE COURT: Well, I'm going to give you—each side no more than 20 minutes regardless. Period. Overruled.

MR. KALINOSKI: Your Honor, about our request to put on evidence? That includes time to put evidence on?

THE COURT: It depends on what the evidence is. What evidence do you intend to put on?

MR. KALINOSKI: Like I said, we need to look at this transcript to see exactly—we don't want to put on evidence that doesn't belong in here, You Honor. We are not asking for some blanket permission.

THE COURT: You are right now. You're asking me for a blank check.

MR. KALINOSKI: Well, we want to just put in evidence that's relevant. The accusation—

THE COURT: You're going to have 20 minutes, period. Each side is going to have 20 minutes. Okay? (Tr. 968-969, ll. 25 & 1-20)

* * *

MR KALINOSKI: Your Honor, I would object to the limit of 20 minutes. I don't believe the rules require that the presentation be limited to any set time period. I would ask the Court to keep the issue open until we can make an intelligent decision, based on looking at Mr. Accurso's remarks.

THE COURT: You may or may not be able to do evidence. I'm telling you now I want to see some case law on just what evidence is permissible during this stage of the trial. (Tr. 971, ll. 10-21).

* * *

MR KALINOWSKI: The defendant would like to respond to the accusations in the rebuttal argument of Mr. Accurso that something was hidden and not turned over to their experts. (Tr. 972, ll. 5-8).

* * *

MR. KALINOSKI: Your Honor, just to make sure the record is clear, I'm only addressing what I think is something

that would be curative of what happened in the rebuttal argument. And it can be done in the second phase right now. I'm not saying anything about what should normally be in the second phase. I'm just saying because of what happened in rebuttal, and I would refer to pages 14, 15, 16 in the transcript, where the talk about hiding things and not turning things over is contained, the natural implication being they were destroyed. We can solve that misinformation real easily by letting the jury know that we turned over everything to our experts that was sent to us by the plaintiffs. (Tr. 974, ll. 8-24).

* * *

THE COURT: And there will be no evidence allowed over [sic] than financial, pertaining to the financial condition of the defendant." (Tr. 975, ll. 20-23).

In *Liszewski* plaintiff-appellant sought to admit testimony from his expert on alternative design. The trial court initially ruled a motion in limine against the plaintiff and when the plaintiff in that action made an offer of proof by voir dire the trial court overruled its prior motion in limine and allowed the expert to testify on the issue of negligent design. However, on direct examination the expert offered other evidence that caused the trial court to exclude alternative design testimony. The appellant did not, at that

point, attempt another offer of proof.

The appellant sought to excuse its failure to make an offer of proof by suggesting that its earlier voir dire established that the expert could and would testify on the issue of an alternative design. However, the court noted:

Appellants made no offer of proof of what would be Park's testimony regarding an alternative design or method of placement of the wires.

Although the record makes clear that Park believed Union Electric was negligent for failing to use an alternative method or design for the placement of the wires, any alternative method or design proposed by Park is not available of record. The record also does not reflect the basis for his opinion that Union Electric was negligent for the failure to use an alternative method or design. Those matters, as well as their relevancy and materiality, should have been addressed in an offer of proof. Absent that offer, this Court may not review the trial court's exclusion of the testimony.

Liszewski, 941 S.W.2d at 751-52.

Defendants assign error to the trial court's decision excluding "all

evidence of mitigation.” Yet, they do not point to an offer of any proof in the transcript that shows that they attempted to admit evidence in mitigation and were precluded from doing so. Instead, they argue that the trial court’s limitation on evidence of mitigation to that of financial worth was improper. Absent an offer of proof that is specific and addresses the relevance and materiality of the evidence sought to be admitted, there is nothing that this Court can review. *Id.*

Defendants may argue, however, that the exclusion of a category of evidence (evidence in mitigation) somehow permits them to come within the exception to the requirement of an offer of proof to preserve error. Those circumstances exist when: there is a complete understanding, based on the record, of the excluded testimony; the objection is to a category of evidence, rather than to specific testimony; and the record reveals the excluded evidence would have helped the proponent. *Id.* All those circumstances must be present before the Court can waive the requirement of an offer of proof as a condition of appellate review. Courts tend to apply the exception only in those cases where the record is clear as to what evidence has been excluded. *Russell v. Director of Revenue*, 35 S.W.3d 507 (Mo. App. ED 2001).

Assuming that the evidence excluded qualified as a category of evidence under *Liszewski*, the trial transcript does not support any claim that there is a “complete understanding” based on the record of the

evidence sought to be admitted. Defendants failed to set out how the evidence they wished to present would serve as mitigating evidence in the punitive damages phase. They do not suggest that this Court could have a complete understanding of the manner in which Rosemarie Allen's testimony would serve as mitigation in the punitive damages phase. Instead, defendants merely suggest that Rosemarie Allen was knowledgeable about the facts and circumstances surrounding the procurement of the slides. In *Russell*, complete understanding was present because the excluded evidence was self-explanatory – it consisted of written arrest records relating to a DWI arrest. Here, the Court would have to speculate on the content of Rosemarie Allen's testimony about the slides because there was no offer of proof to explain how this evidence helped explain away or ameliorate the conscious disregard displayed in defendants' conduct in failing to warn of the known dangers of its products or its continued marketing of a product it knew was unreasonably dangerous when used in a reasonably anticipated way.

Additionally, defendants cannot show that the excluded evidence would have assisted them in avoiding or limiting punitive damages. Although they style the evidence as “evidence in mitigation” there is no offer of proof that demonstrates that the evidence was competent or material on the issues of punitive damages (see *infra*).

Applying the *Liszewski* test, defendants have not brought themselves within the exception to the rule requiring an offer of proof to preserve error for appellate review.

D. THE EVIDENCE SOUGHT TO BE ADMITTED MERELY EXPLAINED TRIAL STRATEGY, IT DID NOT ATTEMPT TO MITIGATE OR EXPLAIN THE CONDUCT OF DEFENDANT IN THE MANUFACTURE AND DISTRIBUTION OF ASBESTOS PRODUCTS.

Mitigating circumstances regarding punitive damage claims are those that make defendant's conduct less culpable. *Moore v. Missouri-Nebraska Express, Inc.* 892 S.W.2d 696, 713 (Mo. App. WD 1994). The jury must take into consideration facts that properly relate to mitigation. *Id.* The amount of the punitive damage award must be equated to the degree of malice or criminality characterizing the actor's conduct for which punishment or determent is deemed necessary. *Id.*

The evidence that Appellants tried to admit in the penalty phase was not evidence in mitigation. In fact, defendants' counsel admitted that Mr. Accurso's argument was focused on defense counsel, not the defendants, their mindset or their conduct.

MR. KALINSOKI: It is our position that as a result of the statements of Mr. Accurso, which we believe, in our collective memory, is that he accused of us of destroying – by “us” I mean the lawyers who were working with Mr.

Hoskins' tissue slides – of destroying some of them.

(Tr. 956, ll. 19-25)(emphasis added).

Defendants don't seek to counter evidence presented. They seek to counter the closing argument interpreting that evidence. Defendants simply want another opportunity to place their spin on the evidence presented and want to have the last say on what inferences the jury can make from the evidence. In Missouri, that is the plaintiff's right, not the defendant's, because the plaintiff bears the burden of proof. As discussed above, however, defendants obtained a subpoena duces tecum which gave them greater access to the slides than plaintiffs had. Despite defendants' access to the slides, defendants' expert did not look at all of the slides.

Defendants rely heavily on *Maugh v. Chrysler Corporation*, 818 S.W.2d 658 (Mo. App. WD 1991). The issue presented in this case, however, is radically different from that presented in *Maugh*, a case in which the defendant automobile manufacturer attempted to introduce evidence of its attempt to supply a replacement vehicle twenty-four months after the fraudulent sale of the defective automobile in that case. The trial court refused to admit the evidence in the punitive damage phase. Chrysler appealed. The Court of Appeals held that the evidence was improperly excluded as it tended to mitigate the fraudulent conduct alleged.

[T]he court concludes on retrial that Chrysler's offer to

replace should be allowed in evidence to mitigate punitive damages. Though made close to 24 months after the act of fraud, and having tenuous connection to Chrysler's original motive at the time of sale, the court feels this defendant should not be penalized for trying to do the right thing.

Maugh, 818 S.W.2d at 664.

Here the conduct of defense counsel permitting Dr. Churg to testify without seeing all of the slides does not fit within the framework of conduct that attempts to explain the motive, intention or disposition of Turner and Newall in supplying a dangerous and defective product or failing to warn of the danger its product posed to people like Mr. Hoskins. It surely is not akin to the actions of Chrysler in *Maugh* where the defendant was “trying to do the right thing.”

At most, it explains counsel’s trial strategy in attempting to defend the actions of Turner and Newall in supplying a dangerous and defective product with no warning, despite its knowledge that the product could kill those who came in contact with it. Plaintiffs’ counsel did not argue that the failure of defendants’ experts to look at all of the slides was relevant to punitive damages. Plaintiffs made the argument in response to defendants’ claim that plaintiff did not have mesothelioma. The argument was directed to the issues of causation, not to punitive damages. (Tr. 887-892, 939-940, 943-944, 980-990).

Furthermore, the instructions given to the jury did not tell them that they could award punitive damages if they believed that defendants' counsel hid or failed to provide its experts with complete information. The instructions told them that they could award punitive damages if they believed that Turner and Newall knowingly manufactured a defective product or that Turner and Newall knew or should have known that its actions in selling a dangerous product without warning of its dangers was likely to lead to the injury of another person. The instructions informed the jury that the slide issue was not a factor to be considered in determining punitive damages. Juries are presumed to have followed the instructions given to them. *Rains v. Herrell*, 950 S.W.2d 585, 591 (Mo. App. S.D. 1999)

Although defendants claim that they should have been allowed to present evidence showing how they got the slides, the information simply has nothing to do with the tortious conduct for which plaintiffs sought punitive damages. When evidence is proffered which is unrelated to the tortious conduct for which damages are sought the evidence is inadmissible. *Olinger v. General Heating & Cooling Co.*, 896 S.W.2d 43 (Mo. App. 1994). The evidence did not speak to Turner and Newall's failure to manufacture a safe product or warn persons of the dangers of its product. It was therefore **not** evidence of mitigation and was properly excluded.

Defendants had the opportunity to present evidence regarding the defendants' conduct in the first phase of the trial. Defendants also had the opportunity to object to any argument that they believed was improper. They made no objection. Having chosen to take the calculated risk of silence they should not now be given a second bite at the apple by being allowed to rehash the issue in the punitive damage phase. If defendants are allowed to do so the punitive damages phase of each trial would be never ending. The court in *Barnett v. La Societe Anonyme Turbomeca France*, 963 S.W.2d 639 (Mo. App. 1998) acknowledged the problems associated with allowing extensive conduct evidence in the punitive damage phase.

Some states, including Minnesota and North Dakota, have attempted to handle this situation by allowing only purely compensatory evidence at the first stage, then combining punitive damage type evidence and net worth in the second stage. This method does allow the jury to hear the wealth of the defendants along with examples of its conduct. ... Needless to say, the other methods are not without pitfalls and problems such as unduly prolonging a trial.

Barnett, 963 S.W.2d 639 at 654.

Here defendants do not point to any reference in the transcript or elsewhere to evidence they sought to admit in the punitive damages phase of the trial that would have, in any way, pertained to the issues of motive,

intention or disposition of Turner and Newall. There was no offer of proof during the second phase of the trial that supports the argument now advanced by defendants on appeal.

Because there was no evidence that established that the evidence sought to be admitted was actual evidence of mitigation of the wrongful conduct for which defendants were assessed punitive damages, it was not a proper subject for mitigation testimony and was properly excluded. *See Maugh*, 818 S.W.2d at 663-665.

Respectfully, this Court should deny Point IV.

V. THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT THE JUDGMENT EXCEEDED \$7,000,000 AND AWARDING PLAINTIFFS PREJUDGMENT INTEREST.

A. STANDARD OF REVIEW

This is an issue of statutory construction, focusing on the meaning of the words “claim” and “judgment.” As this is a question of law, review is *de novo*. *Lester v. Sayles*, 850 S.W.2d 858 (Mo. banc 1993); *Brown v. Donham*, 900 S.W.2d 630 (Mo. banc 1995).

B. INTRODUCTION

Defendant’s argument on prejudgment interest revolves around two central themes: (1) the judgment did not exceed \$7,000,000; and (2) prejudgment interest does not apply to punitive damages. Neither argument carries the day.

Defendants readily admit that a \$7,000,000 demand was made before trial and rejected. They acknowledge the operation of § 408.040.2 RSMo (2001). They do not contest the availability of prejudgment interest before this Court, but rather suggest that credits available to them on the judgment obviate their responsibility for prejudgment interest.

Their argument can be distilled to an equation:

Compensatory Damages	\$2,000,000
+	\$1,000,000
Punitive Damages	\$7,000,000
-----	-----
Subtotal Amount	\$10,000,000
(Less Credit for Prior Compensatory Damages)	(\$3,000,000)
-----	-----
Equals Net Judgment	\$7,000,000

Defendants claim fails on two levels. First, the judgment and order as amended clearly shows a judgment in excess of \$7,000,000 without considering pre-judgment interest. (LF 899-901). The plain language of the prejudgment interest statute supports an award of prejudgment interest.

C. SECTION 408.040, RSMo.

The prejudgment interest statute, § 408.040, reads in relevant part as follows:

2. 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. Any such demand or offer shall be made in writing and sent by certified mail and shall be left open for sixty days unless rejected earlier.

§ 408.040.2 RSMo (2001)(Emphasis added)

The statute speaks in terms of the amount of the claim and the amount of the judgment or order. It specifically does not speak to the amount of the verdict, nor does it limit the claim to compensatory damages.

D. THE ORDER AND JUDGMENT EXCEEDED \$7,000,000

The judgment in this case provided:

Compensatory damages for Forest Hoskins	\$2,000,000.
Compensatory damages for Julia Hoskins	\$1,000,000
Credit “on the compensatory portion of this judgment”	\$3,000,000
Punitive Damages Award	\$7,000,000
Costs	\$10,627.99
-----	-----
Judgment Amount	\$7,010,627.99

(L.F. at 899-901). Thus the total amount of the judgment as entered by the court prior to an award of prejudgment interest fully exceeded the demanded amount of \$7,000,000. The trial court then went on to add prejudgment interest from May 17, 2000 and post judgment interest from March 16, 2001. (L.F. at 899-900)

Seeking to avoid the trial court's holding, defendants point to dicta in *Fisher v. Spray Planes, Inc.*, 814 S.W.2d 628 (Mo. App. E.D. 1991). In *Fisher* the plaintiff voluntarily dismissed his action and the clerk taxed costs and the court issued execution. Plaintiffs challenged the cost bill because there was no underlying judgment and because execution issued after the trial court lost jurisdiction over the judgment. The court held that no underlying judgment was required for the court to have jurisdiction. Thus *Fisher* stands for the proposition that a judgment is not required before a court can tax costs, not for the proposition that costs cannot be taxed in a judgment.

Indeed, a score of cases can be found where the trial court included costs as an element of its judgment. *See, e.g. Harrison v. Monroe County*, 716 S.W.2d 263 (Mo. banc 1986)⁷ (“The trial court assessed court costs against appellant in its judgment.”); *Burwick v. Wood*, 959 S.W.2d 951 (Mo. App. S.D. 1998) (Appellate court found trial courts taxation of disputed deposition costs appropriate, choosing not to follow *Fisher*). Additionally, § 492.590 RSMo. (2001) requires costs awarded for depositions be made part of the judgment itself:

⁷. The opinion in *Harrison* was later withdrawn but continues to be cited in discussions of costs.

The costs and expenses of depositions, whether originals or copies, or related court reporter, notarial, or other fees of recording the same, **shall be awarded as a judgment** in favor of the party or parties requesting the same, and collected in the manner provided by section 514.460, RSMo.

§ 492.590 RSMo (2001) (emphasis added).

Section 514.460 RSMo was transferred to section 488.432 RSMo. in 2000. That section provides that the amounts for deposits “**shall be awarded and collectible as a judgment** entered in said suit in favor of the prevailing party...” § 488.432 RSMo (2001) (emphasis added).

Among the purposes a judgment serves is to determine what the defendant against whom the judgment is rendered must pay. Section 408.040.2 provides for prejudgment interest if certain conditions are met. In this case, prejudgment interest is due if the amount the defendants must pay to remove the judgment exceeds \$7,000,000. The trial court’s Amended Judgment shows that the defendants must pay \$7,010,627.99. The trial court properly concluded that prejudgment interest is due in this case.

E. PUNITIVE DAMAGES ARE PART OF PLAINTIFF'S CLAIM AND NEED NOT BE BROKEN OUT SEPARATELY IN A DEMAND UNDER § 408.040.

Defendants claim that a failure to break down the settlement demand into compensatory and punitive components in some way eliminates the application of § 408.040. Applying a tortured analysis of the word “claim,” the defendant asks this Court to hold that punitive damages are not subject to an award of prejudgment interest because of how the word “claim” is construed in the contribution statute. Appellant argues “[a]pplying a consistent definition of ‘claim’ under §§ 537.060 and 408.040, the demand pursuant to § 408.040 to settle Mr. Hoskin’s claim for \$7 million must be construed as being a demand to settle only his compensatory claim.” (See App. Br. At 96).

At the time the settlement demand was made, defendants knew they were facing a punitive damages claim at trial. Plaintiffs had pleaded and were actively litigating a punitive damages claim. Thus the demand of \$7,000,000 transmitted while those assertions were alive in the case logically represented an amount that would resolve the whole of Plaintiffs’ claim against the defendants, not just a portion of the claim involving compensatory damages. There is no basis in the statutes to apply the construction sought by Appellant. See, *Call v. Heard*, 925 S.W.2d 840

(Mo. banc. 1996)(“we find nothing in the statute that precludes plaintiffs from combining demands on multiple claims into a single sum”).

F. PREJUDGMENT INTEREST ON PUNITIVE DAMAGES IS SUPPORTED BY THE STATUTORY LANGUAGE

Appellants suggest that prejudgment interest should not apply to the punitive damages award. No Missouri case supports this argument. Section 408.040.2 speaks in terms of “the amount of the judgment or order.” The statute speaks without limitation as to the type of judgment and without reference to any kind of damages the jury may award or the judgment may contain.

To reach the conclusion appellants suggest, this Court must add the words “for compensatory or actual damages” to the statute after “the amount of the judgment or order.” The intent of the legislature comes from the language of the statute, considering the words used in their plain and ordinary meaning, and giving meaning to the words used within the broad context of the legislature's purpose in enacting the law. *Younger v. Missouri Public Entity Risk Management Fund*, 957 S.W.2d 332, 336 (Mo. App. 1997). This is a fundamental rule of statutory interpretation. *Id.* “A legislative act's provisions must be construed and considered together and, if possible, all provisions must be harmonized and every

clause given some meaning." *Id.*, citing *Boyd v. Board of Registration for the Healing Arts*, 916 S.W.2d 311, 315, (Mo. App. 1995).

The plain meaning of the words “the amount of the judgment or order” allows for only one reasonable meaning. Because the amount of the judgment is greater than Mr. Hoskins’ prejudgment interest demand, an award of prejudgment interest on the full amount is proper. See, *Lester v. Sayles*, 850 S.W.2d 858, (Mo. banc 1993)(“As we have stated earlier, it is clear that prejudgment interest shall be based 'on all money due upon any judgment or order'”)(emphasis added)

Appellant cites cases from other jurisdictions holding that prejudgment interest does not exist for punitive damage claims, and suggests that public policy reasons are the basis. Plaintiffs disagree. These cases turn on peculiar language in the foreign statute not found in Missouri law.

In *Lakin v. Watkins Associated Indus.*, 863 P2d 179, 191-92 (Cal. 1993), the basis for the California Supreme Court’s holding is the language of the statute. There the court said: “The operative language of the first paragraph of [West. Cal. Civil Code] section 3291 [California Prejudgment Interest Statute] restricts the availability of prejudgment interest to ‘damages for personal injury.’” *Id.* at 192. It then held that punitive damages were not damages for personal injury. *Id.*

While some of the cases cited by defendants support the public policy argument advocated by defendants, in those cases the statutory language of the prejudgment interest statute and the conditions for granting prejudgment interest are arguably not as broad as that of Missouri. For that reason, this Court should apply the plain language of the Missouri prejudgment interest statute, not foreign derivatives and policy choices.

For example, in *General Motors Corp. v Moseley*, 447 S.E.2d 302, 314-15 (Ga. App. 1994) the Georgia court analyzed the Georgia prejudgment interest statute which provides for payment of prejudgment interest on “unliquidated damages” in a tort claim. The language of the statute spoke in terms of unliquidated damages and the appellate court could find no language in the statute that would permit its application to punitive damages. See, also *Bobich v. Stewart*, 843 P.2d 1232 (Alaska 1992)(prejudgment interest not due on punitive damages under Alaska Wage and Hour Act).

Missouri law speaks of claims, not unliquidated damages. The role of the Court is to interpret the statutory language as written. *State v. Knapp*, 843 S.W.2d 345, 347 (Mo. banc 1992). That requires looking at the plain language of the statute. *Id.* Here the plain language of the statute supports an award of prejudgment interest in this case.

Respectfully, this Court should deny Point V.

VI. SECTION 537.675.2 VIOLATES PLAINTIFFS' RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENT AND MO. CONST. ART. I, § 10.

Section 537.675, RSMo 1994, requires a plaintiff with a final judgment for punitive damages to pay half of those punitive damages to the Tort Victims' Compensation Fund. Although Plaintiffs have not challenged the constitutionality of the statute in this case on appeal, Plaintiffs have no interest in defending the constitutional validity of a statute that allows the state to take half the value of the punitive damages judgment plaintiffs received in this case.

A final judgment is the property of the plaintiff. Taking any portion of a party's final judgment without just compensation is a violation of the 5th and 14th Amendments. *See, Kirk v. Denver Pub. Co.*, 818 P.2d 262 (Colo. 1991). In addition, § 537.675.2 violates article I, section 10 of the Missouri Constitution.

CONCLUSION

Respondents ask this Court to affirm the judgment. Should this Court find that § 537.675.2 RSMo. (2001) violates the Missouri or United States Constitution, Respondents pray this Court will strike the constitutionally infirm statute and order that the award be paid *en toto* to plaintiffs.

Respectfully submitted,

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