

Appeal No. SC88685

IN THE MISSOURI SUPREME COURT

LINCOLN SMITH, *et al.*

Plaintiffs - Respondents

vs.

BROWN & WILLIAMSON TOBACCO CORPORATION

Defendant - Appellant

ON TRANSFER FROM THE MISSOURI COURT OF APPEALS

FOR THE WESTERN DISTRICT

SUBSTITUTE BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

This appeal is taken from: (1) the February 8, 2005 judgment of Division 16 of the Circuit Court of Jackson County entered in favor of respondents and against appellants for claims of personal injury based on negligence and product liability (L.F. 1477-79; Appendix at A1-A3); and (2) the Order of the same court denying Brown & Williamson Tobacco Corporation's Motion for Judgment Notwithstanding the Verdict or Alternatively, Motion for New Trial, entered May 23, 2005. (L.F. 1730; Appendix at A4) This appeal was originally within the general jurisdiction of the court of appeals under article V, section 3 of the Missouri Constitution. Pursuant to article V, section 10 of the Missouri Constitution, this Court now has jurisdiction of this appeal because a participating judge dissented from the majority opinion and certified that he deemed that opinion to be contrary to previous decisions of this Court and the court of appeals.

STATEMENT OF FACTS

The survivors of Barbara Smith (her surviving husband Lincoln Smith and children, collectively "plaintiffs") filed this action against Brown & Williamson Tobacco Corporation ("B&W") under the Missouri Wrongful Death Act to recover damages for Mrs. Smith's death, allegedly caused by smoking B&W's Kool cigarettes. Plaintiffs alleged claims for fraudulent concealment, conspiracy, negligence, and product liability. Plaintiffs did not assert that B&W made any fraudulent misrepresentations to Mrs. Smith. In Phase I of the trial, the jury returned verdicts for B&W on the concealment and conspiracy claims and a general verdict for plaintiffs on their negligent and strict liability

failure-to-warn and product defect claims. (L.F. 1419-20) The jury found that plaintiffs had suffered \$2 million in compensatory damages, but that Mrs. Smith was 75% responsible for her own injuries because, when she smoked cigarettes, she “knew of the danger . . . and appreciated the danger of its use” and she “voluntarily and unreasonably exposed herself to such danger.” (L.F. 1397, 1420) The 75% fault assigned to Mrs. Smith reduced the compensatory award to \$500,000. (L.F. 1420) The jury also found that B&W was liable for “aggravating circumstances.” (L.F. 1421) In Phase II, a one-day trial limited to determining the amount of punitive damages was held and the jury assessed \$20 million in punitive damages. (L.F. 1428) B&W timely appealed the trial court’s entry of judgment based on these verdicts.

A. Facts Relevant To The Questions Presented For Determination

1. Mrs. Smith’s Smoking History And The Known Risks Of Smoking

Barbara Smith moved to Kansas City in 1942 and married Lincoln Smith that year. She began smoking Lucky Strike cigarettes (not manufactured by B&W) sometime thereafter.¹ (Supp. L.F. 1757, 1780, 1841-42) After smoking Lucky Strikes for about 2 years, Mrs. Smith switched to Kool cigarettes, manufactured by B&W. (Supp. L.F. 1841, 1843, 1844) Plaintiffs’ expert, Dr. David Burns, testified that it was

¹ Mrs. Smith was deposed on November 20-21, 1996. Excerpts of her testimony were read to the jury on January 20, 2005. Her deposition testimony is included in the Supplemental Legal File.

well known for decades before the 1940s that smokers had difficulty in quitting and that nicotine was the pharmacologically active ingredient in tobacco that rendered smoking difficult to quit. (T. 2029-2034) By 1954, the relationship between smoking and lung cancer “received more widespread attention” than any other subject in the field of health. (T. 2046) By the mid-1960s, “substantial majorities” of Americans believed that cigarettes were harmful. (T. 2051)

In January 1964, the Surgeon General of the United States issued his first Report on smoking and health. (T. 2048-49) The Report was prepared by an “independent group of experts” reporting to the Surgeon General at the behest of the President. (*Id.*) They conducted a “sweeping review” of the scientific literature to address the role cigarettes played in causing disease. (T. 2048-51) The Report concluded that smoking caused fatal diseases, including lung cancer. (T. 1833, 2050-51) The Report also advised the public that the “best way to reduce the risk of death and diseases associated with smoking is to quit smoking.” (T. 2051) It received widespread television and radio coverage and was “front page news all over the country.” (T. 1833, 2050) Mrs. Smith remembered seeing the publicity surrounding the 1964 Report in the 1960s. (Supp. L.F. at 1836-37) According to plaintiffs’ own expert, by 1975 or 1976, more people were aware of the health risks of smoking than knew the name of the President of the United States. (T. 2058-59)

2. Health Warnings And Mrs. Smith’s Response

Shortly after the Surgeon General released his landmark 1964 Report, Congress conducted well-publicized hearings on the health risks of smoking and, in 1965, enacted

the Federal Cigarette Labeling and Advertising Act (“Labeling Act”), 15 U.S.C. §§ 1331 *et. seq.* The Labeling Act required that every package of cigarettes sold in the United States prominently display a health warning label:

CAUTION: CIGARETTE SMOKING MAY BE
HAZARDOUS TO YOUR HEALTH.

15 U.S.C. § 1333(a)(1) (1965). In 1969, Congress modified the health warning to read:

WARNING: THE SURGEON GENERAL HAS
DETERMINED THAT CIGARETTE SMOKING IS
DANGEROUS TO YOUR HEALTH.

15 U.S.C. § 1333(a)(1) (1970). In 1984, Congress again modified the statute and created a system of four rotating health warnings, including a warning that read:

SURGEON GENERAL’S WARNING: SMOKING
CAUSES LUNG CANCER, HEART DISEASE,
EMPHYSEMA, AND MAY COMPLICATE PREGNANCY.

15 U.S.C. § 1333(a)(1) (1984). (*See also* T. 2054-55.) Plaintiffs’ expert agreed that one of the government’s purposes in mandating these health warnings was to “inform the public.” (T. 2055)

Mrs. Smith was aware of the federally-mandated health warnings on all cigarette packages. (Supp. L.F. 1838) Yet she made no effort to quit or otherwise modify her smoking behavior in response to them. Indeed, the warnings had no impact on Mrs. Smith’s smoking decisions:

Q. What effect did those warnings have on your cigarette smoking?

A. None whatsoever.

(Supp. L.F. 1838) Mrs. Smith explained that she chose to continue to smoke because she enjoyed smoking and “I liked the cigarette I was smoking.” (Supp. L.F. 1857-58, 1884) Mrs. Smith said she “didn’t pay any attention” to anything written or said “about cigarette smoking and health or . . . addiction.” (Supp. L.F. 1857-58) In fact, plaintiffs stipulated Mrs. Smith never saw any advertisement by B&W or any statement by any other tobacco company about the lack of health risks from smoking. (T. 905-06)

3. Mrs. Smith’s Illnesses

When Mrs. Smith was diagnosed with heart disease in the 1980s, she did not try to quit smoking. (T. 1856, 2445, 2791) In 1990, her doctor told her she had emphysema and urged her to quit smoking, but she did not attempt to do so. (T. 1614, 1653) Later in 1990, she caught pneumonia, during which time she did not smoke. (Supp. L.F. 1852) Once she recovered, she testified that she did not want to smoke again, quit smoking without difficulty and never smoked again. (Supp. L.F. 1853-55, 1903) Mrs. Smith was diagnosed with lung cancer in 1992. (T. 1671) Her doctors removed part of one lung, and she was cancer-free thereafter. (T. 2593) Mrs. Smith also suffered from hypertension and diabetes, both of which are risk factors for heart disease but are not caused by smoking. (T. 2450, 2453) She also had coronary artery disease in her family history. (T. 2449-50) Additionally, Mrs. Smith had hyperlipidemia, which is not caused by smoking. (T. 2451, 2463)

4. Mrs. Smith's Prior Personal Injury Action Against B&W

In 1996, 4 years after she was diagnosed with lung cancer, Mrs. Smith sued B&W, alleging, among other things, that B&W failed to warn her of the health risks of smoking and that she suffered a number of illnesses as a result. (L.F. 0126) B&W removed the case to federal court. After extensive discovery, the federal court granted summary judgment on Mrs. Smith's negligence and products liability failure-to-warn claims, holding that she could not establish causation because she made no effort to alter her smoking behavior after the legally-adequate 1969 federal health warnings were placed on all cigarette packages.² (L.F. 1508-35; Appendix at A47-A74) The federal court also dismissed her claims for personal injury for angina, heart disease, COPD, emphysema, and addiction because they were barred by the statute of limitations, § 516.120(4), R.S.Mo. (2000). (L.F. 1534; Appendix at A73)

On May 12, 2000, more than a year after the federal court's dismissal of her failure-to-warn claims, Mrs. Smith died at age 73 from a heart attack. (T. 1896) After Mrs. Smith's death her estate continued the federal action until, at the request of her counsel, the federal court dismissed all remaining claims in the case *with prejudice* and entered final judgment. (L.F. 1536-38; Appendix at A75-A77) No appeal was ever taken from that final judgment or from the summary judgment rulings entered against Mrs. Smith.

² *Smith v. Brown & Williamson Tobacco Corp.*, No. 96-0459-CV-W-3, 1999 WL 33944680 (W.D. Mo. Jan. 29, 1999) ("*Smith I*").

B. Proceedings In This Case

In March 2003, almost 3 years after the federal court's dismissal with prejudice of her claims, plaintiffs filed this action under the Missouri Wrongful Death Act, seeking damages for her death from heart disease. Plaintiffs alleged the same concealment, conspiracy, defective design, and failure-to-warn claims that Mrs. Smith had asserted in the federal court. (*See* L.F. 00001, 1484-1507)

Plaintiffs did not present any evidence of the warning that B&W should have given before 1969, when the warning was warranted, what effect it would have had on Mrs. Smith, or that, had such warning been given, Mrs. Smith would have heeded it and thereby avoided her injuries. Plaintiffs also presented no evidence that Mrs. Smith relied in her smoking decisions on anything B&W ever said about Kool cigarettes. Indeed, Mrs. Smith could not recall anything that any cigarette company, including B&W, said about cigarettes or their health effects. (Supp. L.F. 1856-58) She testified that she did not know of anything that anyone could have told her that would have caused her to quit smoking before she decided to do so in 1990 while she was ill with pneumonia. (Supp. L.F. 1853, 1900) Plaintiffs stipulated that Mrs. Smith never saw any advertisement from B&W or any other statement from the tobacco industry about the lack of health risks from smoking. (T. 905-06) The only thing that Mrs. Smith saw about health risks from the tobacco industry were the legally-adequate and government-mandated health warning labels on the packages of Kool cigarettes that she smoked. (Supp. L.F. 1838)

Plaintiffs did not present any evidence that there was any specific defect in the Kool cigarettes smoked by Mrs. Smith. Kool cigarettes contained tobacco and nicotine, but, according to plaintiffs' own evidence, they did not pose a health risk any different from every other cigarette marketed during the time Mrs. Smith smoked. (*E.g.*, T. 847-48, 2103-05) Moreover, renowned scientists, working under the auspices of the National Cancer Institute, tried to develop a safer cigarette, but they were unable to do so. (T. 1961-65, 2066) Nor was B&W able to develop a safer cigarette. (T. 2096-97)

To this day, the federal government has no regulations or recommendations on how to make a safer cigarette. (T. 2064) Indeed, both the federal government and the State of Missouri define a "cigarette" as "tobacco wrapped in paper." 15 U.S.C. § 1332(1)(A) (2002); § 149.011(2), R.S.Mo. (2000). Plaintiffs' expert witness testified that there is simply no way to make such "cigarettes" safer:

- Q. You'll agree with me, Doctor, that if you define a cigarette as a device that burns tobacco, you don't believe that it's possible to make such a product safe that's burning tobacco?
- A. . . . I don't see a mechanism the way the product, as it's currently formulated, which is burning a loose, chopped up form of tobacco, plus tobacco reconstituted paper, I don't see how that would be made safe.
- Q. Because you're burning tobacco, an organic substance, which creates a smoke that contains, in its natural state,

carcinogens and irritants and other risks to human health;
correct?

A. That's correct.

Q. . . . You agree with the following statement from the
1981 Surgeon General's report that there's no safe
cigarette and there's no safe level of consumption?

A. Yes, that's correct.

(T. 2064-65)

Finally, the federal government and the State of Missouri have expressly endorsed the sale of all "cigarettes," despite their well known health risks, so long as they carry the federal health warnings. 15 U.S.C. § 1331 *et seq.*; § 149.200.1(1), R.S.Mo. (2000). Missouri, like the federal government, heavily taxes the lawful sale of cigarettes and thereby generates enormous revenues. *See* §§ 149.011, 149.015, R.S.Mo. (2000).

The jury returned defense verdicts on plaintiffs' fraudulent concealment and conspiracy claims, thus absolving B&W of any liability for intentional conduct toward Mrs. Smith. Over B&W's objection, the trial court submitted a general verdict form that combined the failure-to-warn and design claims under both negligence and strict liability into a single jury question. (L.F. 1419-1420) The jury returned a verdict for plaintiffs on the single question submitting both the negligent and strict liability failure-to-warn and product design claims. There is thus no way to determine on which of plaintiffs' theories the jury based its verdict. Even though neither B&W nor plaintiffs pleaded it (L.F. 1206,

1368), the trial court also submitted, over B&W's objection, a comparative fault instruction. (L.F. 1398)

The jury awarded \$2 million in compensatory damages on the combined negligence and product liability theories, but found that Mrs. Smith was 75% responsible for her own injuries because, when Barbara Smith smoked cigarettes, she "knew of the danger . . . and appreciated the danger of its use" and she "voluntarily and unreasonably exposed herself to such danger." (L.F. 1397, 1420) The 75% fault on the part of Mrs. Smith resulted in a \$500,000 compensatory award to Mrs. Smith's survivors. (L.F. 1420) In answer to a separate jury question, the jury found that B&W was liable for "aggravating circumstances" (L.F. 1421), and, after a further one-day trial on punitive damages, the jury assessed \$20 million in punitive damages. (L.F. 1428) The trial court entered judgment (L.F. 1477-79), and later denied B&W's motion for judgment notwithstanding the verdict or, alternatively, motion for a new trial without explanation. (L.F. 1730; Appendix at A4)

C. The Opinion Of The Court Of Appeals

On July 31, 2007, the majority of the Court of Appeals for the Western District issued an opinion holding that: (1) Mrs. Smith's personal injury action during her lifetime for injuries resulting from the same cause as her death did not preclude a wrongful death action by her survivors (plaintiffs); (2) plaintiffs made a submissible case on their negligence and strict liability failure-to-warn and product defect claims; (3) the comparative fault instruction given to the jury was proper, despite B&W's prior withdrawal of its assertion of comparative fault as an affirmative defense; (4) the

evidence did not support a punitive damages award on plaintiffs' claims of negligent failure to warn and design defect; and (5) the evidence did support the award of punitive damages on plaintiffs' strict liability product defect claim. *See Smith v. Brown & Williamson Tobacco Corp.*, No. WD 65542, 2007 WL 2175034 (Mo. App. W.D. July 31, 2007) ("*Smith II*"). The result of the majority's decision would have been to affirm the compensatory damages award, enter judgment in favor of B&W on plaintiffs' claims for punitive damages arising from negligent failure to warn and design defect, but reverse for a new trial on punitive damages solely on the design defect strict liability claim.

Judge Smart dissented, disagreeing with the majority's conclusions on two threshold issues. *See id.* at *60. First, Judge Smart dissented regarding the viability of plaintiffs' wrongful death claims in light of the prior dismissal of Mrs. Smith's personal injury claims. *Id.* at *60-64. Second, he found that plaintiffs did not make a submissible case regarding their failure to warn claims. *Id.* at *65-66. Judge Smart then exercised his authority granted by article V, section 10 of the Missouri Constitution and by Rule 83.03 of the Supreme Court Rules and transferred the case to this Court.

POINTS RELIED ON

- I. THE TRIAL COURT ERRED IN DENYING B&W'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFFS' CLAIMS FOR FAILURE-TO-WARN AND FOR HEART DISEASE, COPD/EMPHYSEMA, AND ADDICTION, BECAUSE PLAINTIFF FAILED TO STATE A CLAIM AS TO THOSE THEORIES AND INJURIES UNDER THE WRONGFUL DEATH ACT, IN THAT THOSE**

CLAIMS WERE FULLY ADJUDICATED ON THE MERITS AGAINST THE DECEDENT DURING HER LIFETIME.

Strode v. St. Louis Transit Co., 95 S.W. 851 (Mo. banc 1906)

Schmelzer v. Central Furniture Co., 158 S.W. 353 (Mo. 1913)

Campbell v. Tenet Healthsystems, DI, Inc., 224 S.W.3d 632

(Mo. App. E.D. 2007)

State ex rel. Thomas v. Daves, 283 S.W. 51 (Mo. banc 1926)

§ 537.080, R.S.Mo. (2000)

II. THE TRIAL COURT ERRED IN DENYING B&W'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFFS' FAILURE -TO-WARN CLAIMS, BECAUSE PLAINTIFFS FAILED TO PRESENT SUFFICIENT EVIDENCE TO MAKE A SUBMISSIBLE CASE ON THOSE CLAIMS, IN THAT THEY FAILED TO PROVE THAT ANY LACK OF WARNING BEFORE 1969 CAUSED MRS. SMITH'S DEATH.

Arnold v. Ingersoll-Rand Co., 834 S.W.2d 192 (Mo. banc 1992)

Klugesherz v. American Honda Motor Co., 929 S.W.2d 811 (Mo. App. E.D. 1996)

Mercantile Bank & Trust Co. v. Vilkins, 712 S.W.2d 1 (Mo. App. W.D. 1986)

III. THE TRIAL COURT ERRED IN DENYING B&W'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFFS' STRICT LIABILITY PRODUCT DEFECT AND NEGLIGENT DESIGN CLAIMS, BECAUSE PLAINTIFFS FAILED TO PRESENT EVIDENCE SUFFICIENT TO MAKE A SUBMISSIBLE CASE ON THOSE CLAIMS,

IN THAT PLAINTIFFS FAILED TO IDENTIFY OR PROVE ANY SPECIFIC DEFECT IN THE DESIGN OF KOOL CIGARETTES THAT RENDERED THEM DEFECTIVE OR UNREASONABLY DANGEROUS IN A WAY THAT CAUSED MRS. SMITH'S DEATH.

Richardson v. Holland, 741 S.W.2d 751 (Mo. App. S.D. 1987)

Siebern v. Missouri-Illinois Tractor & Equip. Co., 711 S.W.2d 935

(Mo. App. E.D. 1986)

IV. THE TRIAL COURT ERRED IN DENYING B&W'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFFS' STRICT LIABILITY PRODUCT DEFECT AND NEGLIGENT DESIGN CLAIMS, BECAUSE PLAINTIFFS FAILED TO MAKE A SUBMISSIBLE CASE ON THOSE CLAIMS, IN THAT PLAINTIFFS' CLAIMS BASED ON THE INHERENT RISKS OF CIGARETTES ARE BARRED BY FEDERAL CONFLICT PREEMPTION.

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)

Mash v. Brown & Williamson Tobacco Corp., 2004 U.S. Dist. LEXIS 28951

(E.D. Mo. Aug. 26, 2004)

Prado-Alvarez v. R.J. Reynolds Tobacco Co., 313 F. Supp.2d 61 (D.P.R. 2004)

V. THE TRIAL COURT ERRED IN DENYING B&W'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFFS' NEGLIGENT FAILURE-TO-WARN AND NEGLIGENT DESIGN CLAIMS, BECAUSE PLAINTIFFS FAILED TO MAKE A SUBMISSIBLE

CASE ON THOSE CLAIMS, IN THAT PLAINTIFFS FAILED TO SHOW THAT B&W OWED ANY DUTY TO THE DECEDENT IN LIGHT OF THE EVIDENCE THAT THE DANGERS OF SMOKING ARE COMMONLY KNOWN.

Stevens v. Durbin-Durco, Inc., 377 S.W.2d 343 (Mo. 1964)

Young v. Wadsworth, 916 S.W.2d 877 (Mo. App. E.D. 1996)

Allgood v. R.J. Reynolds Tobacco Co., 80 F.3d 168 (5th Cir. 1996)

VI. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON COMPARATIVE FAULT, BECAUSE THE PLEADINGS AND THE EVIDENCE PRESENTED DID NOT SUPPORT GIVING THOSE INSTRUCTIONS, IN THAT B&W DID NOT ASSERT COMPARATIVE FAULT AS AN AFFIRMATIVE DEFENSE AND DID NOT TRY COMPARATIVE FAULT BY IMPLIED CONSENT, AS THE EVIDENCE INTRODUCED BY B&W RELATING TO MRS. SMITH'S KNOWLEDGE AND CONDUCT RELATED DIRECTLY REBUTTED PLAINTIFFS' CASE-IN-CHIEF.

Lester v. Sayles, 850 S.W.2d 858 (Mo. banc 1993)

Heritage Roofing LLC v. Fischer, 164 S.W.3d 128 (Mo. App. E.D. 2005)

Grindstaff v. Tygett, 655 S.W.2d 70 (Mo. App. E.D. 1983)

§ 537.765.2, R.S.Mo. (2000)

VII. THE TRIAL COURT ERRED IN DENYING B&W'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON PUNITIVE

DAMAGES, BECAUSE PLAINTIFFS FAILED TO PRESENT THE CLEAR AND CONVINCING EVIDENCE REQUIRED TO MAKE A SUBMISSIBLE CASE ON THAT ISSUE, IN THAT THE EVIDENCE DID NOT SHOW THAT B&W'S CONDUCT THAT ALLEGEDLY CAUSED MRS. SMITH'S DEATH WAS TANTAMOUNT TO INTENTIONAL WRONGDOING.

Peters v. General Motors Corp., 200 S.W.3d 1 (Mo. App. W.D. 2006)

Ross v. Philip Morris & Co., 328 F.2d 3 (8th Cir. 1964)

VIII. THE TRIAL COURT ERRED IN DENYING B&W'S MOTION FOR NEW TRIAL ON PUNITIVE DAMAGES, BECAUSE THE SCOPE OF THE EVIDENCE IT PERMITTED THE JURY TO CONSIDER ON THE ISSUE VIOLATED B&W'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION, IN THAT IT ADMITTED EVIDENCE CONCERNING B&W'S CONDUCT THAT HAD NO NEXUS TO MRS. SMITH'S INJURIES.

State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003)

Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007)

U.S. Constitution, Amendment 14

IX. THE TRIAL COURT ERRED IN DENYING B&W'S MOTION FOR NEW TRIAL ON PUNITIVE DAMAGES, BECAUSE THE JURY INSTRUCTIONS VIOLATED B&W'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION, IN

THAT THE COURT REFUSED TO INSTRUCT THE JURY THAT (A) IT COULD NOT CONSIDER EVIDENCE OF B&W'S OUT-OF-STATE CONDUCT; (B) IT COULD NOT AWARD AN AMOUNT OF PUNITIVE DAMAGES THAT DOES NOT BEAR A REASONABLE RELATIONSHIP OR PROPORTION TO THE INJURY ACTUALLY CAUSED TO PLAINTIFFS; AND (C) IT COULD NOT CONSIDER EVIDENCE OF B&W'S CONDUCT THAT DID NOT CAUSE INJURY TO PLAINTIFFS OR THAT MAY HAVE CAUSED INJURY TO PERSONS OTHER THAN PLAINTIFFS.

State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003)

Philip Morris USA v. Williams, 127 S.Ct. 1057 (2007)

U.S. Constitution, Amendment 14

- X. THE TRIAL COURT ERRED IN DENYING B&W'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, ITS MOTION FOR NEW TRIAL, AND ITS REQUEST FOR REMITTITUR ON PUNITIVE DAMAGES. BECAUSE THE \$20 MILLION PUNITIVE DAMAGES AWARD EXCEEDS THE AMOUNT PERMISSIBLE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION, IN THAT (A) IT IS NOT SUPPORTED BY EVIDENCE OF COMMENSURATE DEGREE OF REPREHENSIBILITY IN B&W'S CONDUCT; (B) THE 40-TO-1 RATIO BETWEEN THE PUNITIVE DAMAGES AND THE SUBSTANTIAL COMPENSATORY**

**DAMAGES AWARDED PLAINTIFFS IS FAR GREATER THAN DUE
PROCESS PERMITS; AND (C) THE PUNITIVE DAMAGES AWARD
GREATLY EXCEEDS THE CIVIL PENALTIES AUTHORIZED IN
COMPARABLE CASES.**

State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003)

Williams v. ConAgra Poultry Co., 378 F.3d 790 (8th Cir. 2004)

Clark v. Chrysler Corp., 436 F.3d 594 (6th Cir. 2006)

U.S. Constitution, Amendment 14

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING B&W’S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFFS’ CLAIMS FOR FAILURE-TO-WARN AND FOR HEART DISEASE, COPD/EMPHYSEMA, AND ADDICTION, BECAUSE PLAINTIFF FAILED TO STATE A CLAIM AS TO THOSE THEORIES AND INJURIES UNDER THE WRONGFUL DEATH ACT, IN THAT THOSE CLAIMS WERE FULLY ADJUDICATED ON THE MERITS AGAINST THE DECEDENT DURING HER LIFETIME.

Plaintiffs claimed that B&W is liable to them for failing to warn Mrs. Smith of the health risks of smoking before July 1, 1969.³ The viability of that claim is governed by the Wrongful Death Act, § 537.080, *et seq.*, R.S.Mo. (2000), which defines the nature and scope of the claims that plaintiffs could assert upon Mrs. Smith’s death. It provides that a decedent’s survivors may bring *only* those claims for which the defendant “would

³ Plaintiffs’ failure-to-warn claims were limited to the period of time before July 1, 1969, because the trial court correctly ruled that all post-1969 claims arising from activities that post-date that period are preempted by the Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 (L.F. 1100-01). *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524 (1992) (holding that the 1969 Labeling Act expressly preempts all state common law damage claims against cigarette manufacturers premised on the supposed inadequacy of the federally mandated warnings).

have been liable” to their decedent “if death had not ensued.” Section 537.080.1. The record shows indisputably that B&W was not liable to Mrs. Smith and that she could not have recovered damages from B&W on any failure-to-warn claim and certain of her injury claims, “if death had not ensued.”

Before her death, Mrs. Smith brought a personal injury action against B&W in federal court in Kansas City, Missouri, seeking damages for injuries she allegedly suffered from smoking. She alleged all of the same injuries and asserted the same claims that plaintiffs allege here. In that prior action, the court granted summary judgment on Mrs. Smith’s failure-to-warn claims. *Smith I*, 1999 WL 33944680, at *5 (Appendix at A54-A56). It also dismissed all of Mrs. Smith’s claims to the extent they sought damages for her alleged heart disease, lung disease and nicotine addiction, leaving only a lung cancer claim. *Id.* at *15 (Appendix at A73). Mrs. Smith neither sought reconsideration nor appealed the judgment against her. Instead, her claims that survived summary judgment were voluntarily dismissed by her estate with prejudice. The court then entered final judgment against her estate and in favor of B&W on all of her dismissed claims. In short, before her death, a Missouri federal court, applying Missouri law to the *identical* failure-to-warn claims and many of the *identical* disease claims here, fully and finally adjudicated them *against* the decedent and in *favor* of B&W.

Under the plain language of the Wrongful Death Act, no failure-to-warn claim ever arose upon Mrs. Smith’s death. Nor did any claim arise alleging heart disease, lung disease, and nicotine addiction. Judgment against B&W should be reversed and this Court should direct the trial court to enter judgment in favor of B&W on plaintiffs’

failure-to-warn claim and all claims alleging heart disease, lung disease, and nicotine addiction.

A. Standard Of Review

Where, as a here, a trial court's ruling on a motion for JNOV is based on an issue of law, this Court reviews the trial court's denial *de novo*. *Jungerman v. City of Raytown*, 925 S.W.2d 202, 204 (Mo. banc 1996). The Court also reviews *de novo* questions of statutory interpretation, which are purely matters of law. *City of St. Joseph v. Village of Country Club*, 163 S.W.3d 905, 907 (Mo. banc 2005).

B. The Wrongful Death Act Precludes Any Claim For Which Plaintiffs' Decedent Could Not Have Recovered Damages Had She Survived

A survivor's right to seek damages for wrongful death was unrecognized at common law. *Miller v. Smith*, 921 S.W.2d 39, 44 (Mo. App. W.D. 1996). It exists in Missouri and most other states solely as a statutory remedy. *Powell v. American Motors Corp.*, 834 S.W.2d 184, 186 (Mo. banc 1992). Plaintiffs must strictly plead and prove each statutory element to recover. *Call v. Heard*, 925 S.W.2d 840, 850 (Mo. banc 1996). The Wrongful Death Act explicitly limits the cause of action to those claims for which the defendant would have been liable to the decedent had he or she lived:

Whenever the death of a person results from any act ... *which, if death had not ensued, would have entitled such person to recover damages in respect thereof*, the ... corporation which, would have been liable had death not ensued shall be liable in an action for damages, notwithstanding the death of the person injured.

§ 537.080.1, R.S.Mo. (2000) (emphasis added). Because judgment was entered against Mrs. Smith before she died on her claims for failure-to-warn and as to certain injuries, her surviving husband and children never acquired those claims upon her death. This has been the law of Missouri for over a century.

Missouri first enacted a wrongful death statute in 1855. *State ex rel. Thomas v. Daues*, 283 S.W. 51, 53 (Mo. banc 1926). It was taken nearly verbatim from a British statute, Lord Campbell's Act, enacted 9 years earlier in 1846. Fatal Accidents Act, 1846 (U.K.), 9 & 10 Vict., c. 93 (Lord Campbell's Act), fully set forth in S. Speiser & J. Rooks, "Recovery for Wrongful Death," 4th ed. (West 2005). Missouri's original enactment contained the same language as in Lord Campbell's Act, conditioned the existence of a wrongful death claim on proof that the decedent could have recovered on the same claim, and the defendant would have been liable, "if death had not ensued":

Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default, *is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages* in respect thereof, then, and every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.

State ex rel. Thomas, 283 S.W. at 54 (emphasis added) (quoting Rev. St. 1855, c. 51).

Missouri's reliance on and adoption of Lord Campbell's Act for the definition and scope of its own wrongful death action has long been acknowledged by this Court. *Powell*,

834 S.W.2d at 186 (“the overwhelming majority of states, including Missouri, have ‘Lord Campbell’ type statutes”); *Bates v. Sylvester*, 104 S.W. 73, 74 (Mo. 1907) (“Our damage act, [is] like Lord Campbell’s act, and similar statutes in almost all of the states in the Union. . .”).

The statutory language could not be more clear — it creates a wrongful death claim *only* where the claim is one for which the decedent could have recovered and the defendants would have been liable “if death had not ensued.” § 537.080.1. This Court held long ago that:

The statute, in our opinion, is unambiguous. Stating its effect in reverse, it means that any tort-feasor who would be liable in damages to a person injured would likewise be liable in damages for the death of such person in case death resulted from such injury.

Steggall v. Morris, 258 S.W.2d 577, 578 (Mo. banc 1953); *Campbell v. Callow*, 876 S.W.2d 25, 28 (Mo. App. S.D. 1994) (the Legislature intended § 537.080 to condition the right to bring a wrongful death claim on the “primary fact” that the decedent could have maintained his or her own action for damages; “[i]f such condition cannot be shown, *no cause of action for the wrongful death exists.*”) (emphasis added).

In *Strode v. St. Louis Transit Co.*, 95 S.W. 851 (Mo. banc 1906), a man was injured in a traffic accident and later settled his claims. Shortly thereafter, he died and his children filed a wrongful death action alleging that the same injuries caused his death. This Court held that the Wrongful Death Act precluded the survivors from pursuing claims previously disposed of by their father:

[T]he gist and foundation of the right in all cases is the wrongful act, and that for such wrongful act but one recovery should be had, and that if the decedent had received satisfaction in his lifetime, either by settlement and adjustment or by adjudication in the courts, no further right of action existed. . . . We therefore conclude . . . a settlement or adjustment *or an adjudication in court, by deceased during his lifetime, is a bar to any action by the widow or children.* . . .

Id. at 856 (emphasis added).

In *Schmelzer v. Central Furniture Co.*, 158 S.W. 353 (Mo. 1913), this Court followed *Strode* in a case involving a prior judgment against the decedent. In *Schmelzer*, the decedent filed an action for his injuries and received a judgment, but that judgment was reversed on appeal. After his death, his wife asserted the same claims in a wrongful death action that was dismissed by the trial court. This Court affirmed the dismissal, holding that it is “undoubtedly true” that “if a final and valid judgment on the merits had been rendered against [the plaintiff’s] husband in the former case she could not recover in this action.” *Id.* at 354 (citing *Strode*).

This is still Missouri law today. The Eastern District reached the same result only five months ago, affirming the dismissal of a wrongful death claim because the decedent had settled her claims before her death. *Campbell v. Tenet Healthsystem, DI, Inc.*, 224 S.W.3d 632 (Mo. App. E.D. 2007). The court held:

Here, we find no ambiguity. Section 537.080.1 is clear on its face. Only when death results from an act, which if death had

not ensued, would have entitled a person to recover damages, may a plaintiff recover for wrongful death.

...

Because the earlier settlement of [decedent's] personal injury claim would prohibit [decedent] from suing for personal injury if she had not died, by Section 537.080.1 her survivors are foreclosed from recovering for wrongful death.

Id. at 637-38 (citing *Strode*).⁴

These decisions rest on an unbroken chain of precedent in this Court dating back over 100 years and holding that when a decedent's claims are extinguished in an action brought during the lifetime of the decedent — either because the claim was settled, released, or reduced to a favorable or unfavorable judgment — the survivors cannot later re-litigate the same claims under the Wrongful Death Act. No Missouri case has reached any different result. *Zuber v. Clarkson Constr. Co.*, 315 S.W.2d 727, 733 (Mo. 1958) (“Plaintiffs [surviving children] may not maintain an action for the wrongful death of their father, if he could not have maintained an action for damages had he survived”); *Fitzpatrick v. Kansas City Southern Rwy. Co.*, 146 S.W.2d 560, 565 (Mo. 1940)

⁴ See also *Stern v. Internal Medicine Consultants, II, LLC*, 452 F.3d 1015 (8th Cir. 2006) (applying Missouri law, including *Strode*, the Eighth Circuit held that a mother was not permitted to re-assert in her wrongful death action the same claims that her son, the decedent, had settled and released before his death).

(wrongful death jury verdict for plaintiff reversed where decedent's contributory negligence meant that decedent "could not have maintained an action for damages had he survived"); *Worth v. St. Louis-San Francisco Rwy. Co.*, 69 S.W.2d 672, 674 (Mo. 1934) (affirming directed verdict for the defendant in wrongful death action where the decedent could not have recovered had he survived); *Schmelzer*, 158 S.W. at 354 (where a "final and valid judgment on the merits had been rendered against her husband in the former case, she [the surviving wife] could not recover in this [wrongful death] action"); *Strode*, 95 S.W. at 856 (in accord with the construction of Lord Campbell's Act by the courts of England and other states having similar wrongful death statutes, "[w]e therefore conclude . . . a settlement and adjustment or an adjudication in court, by deceased during his lifetime, is a bar to any action by the widow or children. . .").

This fundamental, statutory pre-condition to a wrongful death claim in Missouri is like that in nearly every other state that has enacted a wrongful death statute substantively similar to Lord Campbell's Act, and it continues overwhelmingly to be the majority rule. For example, the Arkansas Supreme Court, construing Arkansas' identically-worded wrongful death statute noted that "[a] comparison of Lord Campbell's Act with [that] of the Arkansas Act reveals striking similarity." *Simmons First Nat'l Bank v. Abbott*, 705 S.W.2d 3, 4 (Ark. 1986). The court held that Lord Campbell-type wrongful death statutes preclude the survivors from bringing any claim that their decedent had settled or "reduced to judgment," and it affirmed summary judgment for the defendants. *Id.* at 5. *Simmons* surveyed the application of Lord Campbell-type statutes by various states,

including Missouri, and concluded that this is the rule in “[t]he vast majority of other jurisdictions.” *Id.* (citing cases from 18 other states, including Missouri).

The result is the same in Illinois, where the courts have likewise found that “[t]he vast majority of other jurisdictions having legislation including the phrase ‘if death had not ensued’ have similarly held a settlement by the injured party or a suit reduced to judgment during the lifetime of the injured party barred a later suit by the next of kin.” *Kessinger v. Grefco, Inc.*, 623 N.E.2d 946, 951 (Ill. App. Ct. 1993) (citing decisions from 18 other states, including Missouri).

Leading commentators also agree. Prosser & Keeton states that:

[T]he majority of courts hold that . . . a judgment for or against the decedent in an action for his injuries commenced during his lifetime, or the compromise and release of such an action, will operate as a bar to any subsequent suit founded on his death.

W. Prosser & W. Keeton, *THE LAW OF TORTS* § 127, at 955 (5th ed. 1988) (footnotes omitted).⁵ The Restatement of Judgments provides that where a person is injured and files his or her own action and judgment is entered against him or her, “it precludes a wrongful death action by his beneficiaries to the same extent that the person himself

⁵ The Court of Appeals majority in this case cited Prosser for the contrary proposition.

That citation, however, is to a long-outdated edition of the treatise. *Smith II*, 2007 WL 2175034 at *18 (citing 1971 4th ed.). If Prosser ever disagreed with Missouri law, that position has since been superseded.

would have been precluded from bringing another action based on the same act. . . .”

RESTATEMENT (SECOND) OF JUDGMENTS § 46(1) (2005). The Restatement’s reporter further states that “[t]he clear weight of authority is that a prior judgment for or against the decedent precludes a wrongful death action by his beneficiaries” and that the only two jurisdictions reaching the opposite result are Ohio and California. *Id.* at Reporter’s Note.

C. Had Mrs. Smith Survived, She Could Not Have Recovered Damages From B&W On Any Failure-To-Warn Claim Or Any Claim For Heart Disease, Lung Disease and Nicotine Addiction

Plaintiffs did not meet the statutory pre-condition to bring a wrongful death action for the failure-to-warn claim or the previously dismissed injury claims because Mrs. Smith could not have recovered damages from B&W on those claims had she survived. The claims had been extinguished by a final judgment dismissing them long before this wrongful death action was filed.

In 1996, Mrs. Smith sued B&W alleging, among other claims, that B&W failed to warn her of the health risks of smoking and that smoking gave her cancer, heart disease, lung disease, and nicotine addiction. After full discovery, the *Smith I* court entered summary judgment in favor of B&W and against Mrs. Smith on those claims because she could not establish that the absence of any warning caused her alleged injuries. *Smith I*, 1999 WL 33994680 at *5. (Appendix A54-A56)⁶ Thus, Mrs. Smith’s failure-to-warn

⁶ The court also dismissed her claims based on heart disease, COPD/emphysema (*i.e.*, lung disease), and addiction on statute of limitations grounds. (Appendix at A73)

claim was fully and finally adjudicated against her. These dismissed claims and injuries are identical to those later alleged by plaintiffs in this wrongful death action.⁷

Mrs. Smith neither sought reconsideration of nor appealed the judgment against her. Moreover, her estate, which pursued her remaining claims after her death, stipulated their dismissal with prejudice in the federal case. (Appendix at A74-A76) As a consequence, the federal court's judgment in favor of B&W on Mrs. Smith's claims for failure-to-warn and for certain injuries became final and non-appealable and extinguished her right to recover on those claims.

Almost 3 years after the final judgment was entered in favor of B&W on Mrs. Smith's claims, her survivors filed this wrongful death case. Because the federal court had fully and finally adjudicated Mrs. Smith's failure-to-warn claim on the merits and certain injury claims in favor of B&W, there were no such claims for plaintiffs to assert in a wrongful death action because Mrs. Smith could not have recovered damages and B&W could not have been liable for any such claims "if death had not ensued." This Court should reverse the judgment against B&W on plaintiffs' failure-to-warn and the previously dismissed injury claims, and direct the trial court to enter judgment in favor of B&W.

⁷ During proceedings in the Western District Court of Appeals, plaintiffs agreed that the failure-to-warn claim tried here is identical to the claim asserted by Mrs. Smith in her prior personal injury action and dismissed on summary judgment. *Smith I*, at *4 n.5.

Plaintiffs' failure-to-warn and design defect claims were submitted to the jury together in a general verdict form. (L.F. 1419-20) As a result, there is no way to determine whether the jury based its verdict for plaintiffs on the extinguished failure-to-warn claim. Thus, B&W is entitled, at a minimum, to a new trial on plaintiffs' design defect claims. *See, e.g., Magnuson v. Kelsey-Hayes Co.*, 844 S.W.2d 448, 456 (Mo. App. W.D. 1992) ("when submitting to a jury multiple theories of recovery upon a single injury, there must be a submissible case on each theory of liability"); *Coggins v. Laclede Gas Co.*, 37 S.W.3d 335, 342 (Mo. App. E.D. 2001) ("Where two or more theories of liability are submitted to the jury and one of the theories of submission is found to be defective, a new trial must be granted if the jury returned a general verdict of liability.").

D. The Opinion Of The Western District Court Of Appeals In *Smith II* Does Not Provide Any Valid Reason To Depart From The Language Of The Wrongful Death Act Or To Abandon One Hundred Years Of Missouri Precedent

The majority opinion of the court of appeals below is the first and only court in Missouri to conclude that the Wrongful Death Act permits a plaintiff to relitigate the same claim against the same defendant, even after plaintiff's decedent unsuccessfully litigated it to a final adverse judgment. In fact, it would be the only decision to so hold in *any* jurisdiction with a statutory wrongful death scheme like Missouri's.

The majority's basic reasons for its sweeping revision of Missouri law were that: (1) in *O'Grady v. Brown*, 654 S.W.2d 904 (Mo. banc 1983), without expressly addressing

the issue, this Court overruled 100 years of Missouri cases beginning with *Strode*; (2) precluding plaintiffs from relitigating failure-to-warn and the dismissed disease claims conflicts with the purposes of the Wrongful Death Act; (3) in cases like *Strode* that have precluded these claims, the result turns on a view, rejected in *O’Grady*, that wrongful death claims are “transmitted” from the decedent; and (4) in Missouri, as some “minority” jurisdictions, damages recoverable in wrongful death differ from those recoverable in a personal injury action. *Smith II*, 2007 WL 2175034 at *17-*20. None of those reasons provides a valid basis for rewriting the Legislature’s determination, expressed in the Act’s plain language in § 537.080.1, that there is no wrongful death action for any claim for which the decedent could not have recovered had death not ensued.

Moreover, there are significant policy implications to changing Missouri law on this point. *Id.* at *63-*64 (Smart, J. dissenting). Overruling *Strode* and rewriting § 537.080.1 will radically change personal injury litigation by burdening plaintiffs’ ability to settle cases while also disincentivizing defendants. The decision is also likely to cause liability insurance premiums to rise to cover the uncertainty and increased costs of settling claims. Whether to alter the State’s substantive law in such a drastic fashion is a matter for the Legislature to decide. *Id.*

1. *O’Grady* Did Not Overrule *Strode*.

O’Grady did not, as the majority of the court of appeals held, overrule *Strode* by implication. *O’Grady* involved the death of a fetus. The parents brought a wrongful death action against doctors, alleging that they negligently caused the death of the fetus.

Relying on *State ex rel. Hardin v. Sanders*, 538 S.W.2d 336 (Mo. banc 1976), the trial court and the lower court of appeals held that there could be no wrongful death action for the death of an unborn fetus. *State ex. rel. Hardin* concluded that a fetus was not a "person" within in the meaning of the Wrongful Death Act and that, in any event, the Act required a showing that the decedent could have brought his or her own action "at the time the injury was sustained," which a fetus could not do. *O'Grady*, 654 S.W.2d at 906.

In 1979, before *O'Grady* was decided but after *State ex rel. Hardin*, the Wrongful Death Act was amended to expand the scope of recoverable damages. *Id.* at 907 n.2. The prior version of the Act had been construed to limit damages to "pecuniary" losses. The 1979 amendment broadened damages to include non-pecuniary measures such as "consortium, companionship, comfort." *Id.* at 907. This change indicated that the Legislature intended to provide compensation for losses of the kind experienced by parents of fetus who died before birth. *Id.* at 909. Therefore, this Court held that the term "person" should be construed to include a viable unborn fetus, which was consistent with the legislative history. *Id.* at 909-10. The Court therefore expressly overruled *State ex rel. Hardin* on this point. *Id.* at 911. Finally, the Court looked to the language in § 537.080.1 that requires courts to determine whether a decedent could have recovered "had death not ensued." Faithful to the Wrongful Death Act's plain language, the Court held that the Act permitted a claim where the decedent "would have been entitled to recover from the defendant *but for* the fact that the injury resulted in death." *Id.* at 910-11 (emphasis in original). The only circumstance that had prevented the fetus from bringing his or her own action was the happenstance of death *in utero*. Had the fetus

been born live and later perished, there would have been no debate over the validity of the parents' wrongful death action. *Id.* at 910.

The holding in *O'Grady* rested squarely on a legislative change to the statutory damage measure. Its holding was also expressed in the narrowest possible terms, stating that § 537.080 now provides a cause of action for the wrongful death of a viable fetus. *Id.* at 911. In this regard, the Court explained that it was not deciding anything further, including even whether on the same facts a *nonviable* fetus would have a claim. *Id.* When it overturned *State ex rel. Hardin*, moreover, the Court explicitly said so. *Id.*

O'Grady did not overrule *Strode*. *Strode* involved an adult who was injured and settled his claims. Unlike the fetus in *O'Grady*, it was not merely the fact of death that prevented the decedent in *Strode* from pursuing his claims. Rather, he chose to pursue his own claims and dispose of them in a manner he saw fit, and it was that choice, not his death, that precluded the wrongful death claims brought by his survivors.

No part of *O'Grady* is incompatible with *Strode*, much less overrules it. Contrary to the view expressed by the court of appeals majority below, *Strode* remains a vital part of Missouri law. Courts continue to cite and rely upon it today after *O'Grady* was decided. *Campbell*, 224 S.W.3d at 638 (relying on *Strode*, holding that where a decedent settled his claim before death, no wrongful death action for the same claim could arise

upon his death);⁸ *Stern v. Internal Medicine Consultants, II, LLC*, 452 F.3d 1015, 1017-18 (8th Cir. 2006) (same).

2. The Wrongful Death Act’s Plain Language Precluding Plaintiffs’ Claims Is Consistent With The Remedial Purposes Of The Wrongful Death Act.

The Court’s observation in *O’Grady* that the Wrongful Death Act is remedial was not new and marked no departure from established Missouri law. Lord Campbell’s Act was enacted originally to provide compensation for survivors of persons killed by tortious conduct where the common law had previously given no remedy. This Court long ago recognized the underlying remedial purpose of the Act. *See, e.g., State ex rel. Thomas*, 283 S.W. at 56 (“The very purpose of the Damage Act of 1855 was to give a cause of action where none existed at common law.”). Thus, the court of appeals majority below missed the point when it concluded that *O’Grady* “announced a major shift in the interpretation of Missouri’s wrongful death statute.” *Smith II* at *8 (quoting *Howell v. Murphy*, 844 S.W.2d 42, 46 (Mo. App. W.D. 1992)). *O’Grady* nowhere implied, much less held, that the Act’s remedial purpose gave *carte blanche* to ignore the Legislature’s plain language defining the scope of a wrongful death claim. Instead, the “shift” announced in *O’Grady* was the finding that a 1979 amendment to § 537.090, broadening

⁸ The majority and the dissent in *Smith II* agree that the majority’s reasoning is incompatible with *Campbell*. *Smith II* at *60 n.128, *63.

the types of recoverable damages, provided a basis for a wrongful death claim after the death of a viable fetus.

Unlike *O'Grady*, Mrs. Smith brought her claims against B&W during her lifetime. B&W defended against Mrs. Smith's claims *twice*. Nothing in *O'Grady*'s limited and narrow holding requires B&W to defend the same claims twice in separate trials. *O'Grady*'s holding bears no application to this appeal.

3. Whether a Wrongful Death Action Is “Transmitted” From The Decedent Or Arises From The Act As A “New” Claim Has No Bearing On The Result Under Missouri Law.

The court of appeals majority below concluded that *Strode*, as well as the majority of other jurisdictions, barred claims like plaintiffs' claims here based on their characterization of a wrongful death claim as “transmitted” or “derivative” of the decedent's own personal injury claim, a characterization rejected in *O'Grady* when this Court concluded that the Act “creates an independent cause of action.” *Smith II* at *9, *19, n.99; *O'Grady*, 654 S.W.2d at 910 (“the wrongful death act creates a new cause of action where none existed at common law”) (citation omitted). *O'Grady*'s characterization, however, is neither a new observation nor relevant to the issues in this case.

It is true that in *Strode* this Court stated in *dicta* that a wrongful death claim in Missouri was “transmitted” from the decedent's claim and did not arise independently under the Act. 95 S.W. at 853. Nevertheless, as the Court explained, its holding did not depend on this characterization of a wrongful death claim. If a decedent disposed of

a claim, either by settlement or adverse adjudication, no wrongful death action for the same claim could ever arise, “whether the right of action is a transmitted right or an original right; whether it be created by a survival statute or by a statute creating an independent right.” *Id.* at 856.

Justice Graves, who authored *Strode*, further clarified the matter 20 years later in *State ex rel. Thomas*. In that case, this Court held that a wrongful death claim is an independent cause of action, not a “transmitted” one. 283 S.W. at 56. In discussing the issue, Justice Graves quoted at length the language in *Strode*, emphasizing that its holding did not depend on whether a wrongful death claim is a “transmitted” right. *Id.* at 54. He concluded that citing *Strode* as authority for that characterization “was hardly justified.” *Id.*

As a result, *O’Grady’s* observation that a wrongful death claim is “independent” provides no basis on which to hold that *Strode* has been overruled or to distinguish Missouri’s long-standing construction of the Act from that of the overwhelming majority of jurisdictions that, like Missouri, hold that where a decedent has disposed of his claim, the Lord Campbell-type statutes explicitly provide that no wrongful death action later arises for the same claim.

**4. No Court In Missouri Or Anywhere Else Has Construed
A Wrongful Death Act Similar To The Missouri Act The Way
The Court Of Appeals Did.**

The court of appeals majority sought to find support from four “minority” jurisdictions, Georgia, Massachusetts, Ohio and California. *Smith II* at *15. The court

concluded that in each of those jurisdictions a decedent's heirs may bring a wrongful death claim even if the claim had been dismissed against the decedent in a prior personal injury action. *Id.* In each instance, the court of appeals was wrong.

Georgia's wrongful death act bears no resemblance to § 537.080. *See* Ga. Code Ann. §§ 51-4-1 and 51-4-2 (1998) (permitting a surviving spouse to recover "the full value of the life of the decedent," without any statutory limitation on the scope of the claim). The Georgia statute does not contain language limiting wrongful death claims to those on which a decedent could have recovered "had death not ensued." Ga. Code Ann. § 51-4-2 (1998). Thus, Georgia law provides no support for the court of appeals' decision.

The court of appeals cited to *McCarthy v. William H. Wood Lumber Co.*, 107 N.E. 439 (Mass. 1914), for Massachusetts' position. *McCarthy*, however, construed and applied a survival statute, Mass. Rev. L. Ch. 171, § 2 (1902), that is totally different than § 537.080. This Court has previously observed that Massachusetts is one of only two jurisdictions in which the right to recover in wrongful death does not arise from a Lord Campbell-type act; in fact, it does not arise in Massachusetts by statute at all. *Powell v. American Motors Corp.*, 834 S.W.2d 184, 186 (Mo. banc 1994). The statute at issue in *McCarthy* provided that the administrator of a decedent's estate may recover a fixed sum from a defendant who negligently caused the death. *McCarthy* described the Massachusetts statute as "penal in nature" — "in substance a fine imposed by the court" — and "not compensatory." 107 N.E. at 440. Thus, the Massachusetts scheme

does not provide any support for ignoring the plain language of the Missouri Wrongful Death Act.

The court of appeals cited *DeHart v. Ohio Fuel Gas Co.*, 85 N.E.2d 586 (Ohio Ct. App. 1948), for Ohio's position. But *DeHart* is no longer good law in Ohio. In *Thompson v. Wing*, 637 N.E.2d 917, 924 (Ohio 1997), the Ohio Supreme Court held that "the parties in a wrongful death action are barred by collateral estoppel from relitigating issues that were actually litigated and determined in the decedent's prior action against the defendant." Finally, *Smith II* relied on outdated California law when it cited *Kaiser Found. Hosp. v. Super. Ct. of Los Angeles County*, 254 Cal. App. 2d 327 (1967). *Smith II* at *15 n.69. The law in California today prohibits a wrongful death action that asserts a claim previously adjudicated against the decedent. *Brown v. Rahman*, 282 Cal. Rptr. 815, 1460-61 (Ct. App. 1991) ("Where the judgment was adverse to the decedent, however, the contemporary view, and the one to which we subscribe, is that the heirs are collaterally estopped from relitigating the issue."). Thus, in both Ohio and California, the result would be the same (though based on *res judicata* principles) as that required by § 537.080.1 and *Strode*.

The court of appeals also found that a "minority" of jurisdictions permit wrongful death plaintiffs to litigate claims previously adjudicated by their decedents because the damages recoverable in the two actions are "wholly distinct." *Smith II* at *19. For example, the court discussed *Alfone v. Sarno*, 432 A.2d 857 (N.J. 1981), at some length. *Smith II* at *15. In *Alfone*, the decedent's estate obtained a damage award in a personal injury action. In other words, unlike the situation here, the decedent was *successful* in the

prior determination. Later, decedent’s father filed a wrongful death action. The court allowed the wrongful death action, but only as to categories of damages that were not recoverable in the earlier action — that is, *only* damages that did not duplicate any damages previously awarded. *Alfone*, 432 A.2d at 862, 867. In setting forth its view of New Jersey law, the *Alfone* court was quite clear that in circumstances such as those here, where there was a judgment against the decedent, there could be no wrongful death action. The rule set forth by *Alfone* was explicit: a “defendant should be required to litigate only once the substantive issues concerning liability.” *Id.* at 110-11. The *Alfone* court held:

It would not be fair to one charged with liability for a wrongful act *to defend successfully* against the charge in a personal injury suit but subsequently be forced to defend a second time, possibly years later, for death resulting from those same injuries.

Id. at 111 (emphasis added).

Moreover, since 1979 Missouri law has permitted a substantial overlap in the damages recoverable by the decedent and those recoverable in a wrongful death action. In that year, the legislature amended § 537.090 to permit the trier of fact in a wrongful death action to “award such damages as the deceased may have suffered between the time of injury and the time of death. . . .” As this Court stated, “[t]hese changes resulted in a combined ‘death and survival’ statute.” *Sullivan v. Carlisle*, 851 S.W.2d 510, 515 (Mo. banc 1993). Cases from other jurisdictions that have no overlap in damages are

therefore distinguishable and provide no guidance in interpreting Missouri's statute. Even under New Jersey law, the result would be the same: plaintiffs here could not reassert in a wrongful death action claims previously dismissed against their decedent.

Despite the substantive differences between Missouri law and that of those minority jurisdictions, the minority jurisdictions recognize the obvious unfairness of exposing defendants to double liability for the same claims. In Missouri, the Legislature achieved the same result simply by defining a wrongful death action in the first instance to limit the action to those claims for which a decedent could have recovered had death not ensued. Section 537.080.1. In a companion provision, Missouri also expressly permits a defendant to assert any defense it could have asserted against the decedent. Section 537.085; *Miller*, 921 S.W.2d at 44 (“§ 537.085 reinforces the language in § 537.080”).⁹

⁹ The majority below concluded that B&W waived any *res judicata* argument under § 537.085. *Smith II* at *20 and ns. 100-01. There was no waiver. B&W asserted a *res judicata* affirmative defense in its answer. (L.F. 23) It cited and relied upon § 537.085 in its summary judgment and JNOV motions (L.F. 450, 452, 454-455, 1631-34), and its briefing in the appellate court. No Missouri case has held that wrongful death plaintiffs may obtain and re-litigate claims dismissed against their decedent, subject only to a later-asserted *res judicata* defense. Rather, the courts have recognized that § 537.085 reinforces the meaning of § 537.080. *Miller*, 921 S.W.2d at 44; *Stern*, 452 F.3d at 1019. B&W's position squares precisely with Missouri law: Where

The law of these minority states does not provide support for overturning Missouri law to impose a radically new approach in which a decedent's survivors can re-litigate the same claims that had been previously adjudicated against the decedent. Quite the opposite. They reaffirm the policy against duplicative claims as established by the Missouri Legislature and long-recognized by this Court's decisions construing the Act.

5. Drastically Revising Missouri Tort Law Has Policy Implications That Are Better Addressed By The Legislature.

The majority opinion below would radically change personal injury litigation in this State. As the dissent correctly noted, it would burden in unpredictable ways the ability of tort victims and defendants to settle claims. *Smith II* at *53. If a tort victim wanted to settle a claim, he or she likely would have to obtain releases from *all* relatives who potentially may be wrongful death beneficiaries upon the injured party's death. This would impede a defendant's willingness to settle, and it would inject a number of persons (who do not yet have a claim and may never acquire one) into the settlement process who could demand payment for their agreement or refuse to participate altogether. *Id.* at *63-*64. These impediments and uncertainties are avoided completely by the Wrongful

a decedent disposed of claims before her death, § 537.080 plainly states that a wrongful death action for the same claims cannot arise in the first instance. It is self-evident that had Mrs. Smith survived and sought to re-assert against B&W any of the claims that had been finally adjudicated against her, she would have been barred. Thus, under the Wrongful Death Act, her survivors' attempt to do the same thing fails to state a claim.

Death Act's plain language. *Id.* Instead, Missouri gives control of a person's injury claim to the injured party, who may settle it or litigate it, but binds her survivors by the result.

This Court should not embark on a course that has significant, but uncertain, policy implications and that raises a vast array of ancillary issues. *Powell*, 834 S.W.2d at 189. The Legislature is the proper body to make any such sweeping change in wrongful death law. *Id.* at 190 (embarking into a new area of litigation such as this lends itself better to prospective legislative enactment than to the case-by-case, issue-by-issue approach that this Court would be required to undertake if these causes of action were to be recognized by common law decision). As Judge Smart's dissent in the court of appeals noted, if the language of § 537.080.1 is to be ignored or rewritten, all of the negative and complicating implications for the torts process in Missouri should be studied and considered in advance by the Legislature. *Smith II* at *63.

* * *

For all of the above reasons, the Court should reverse the judgment against B&W and direct the trial court to enter judgment in favor of B&W on plaintiffs' failure-to-warn and previously dismissed injury claims. Because plaintiffs' failure-to-warn and design defect claims were submitted together to the jury in a general verdict form (L.F. 1419-20), there is no way to determine whether the jury based its verdict for plaintiffs here on the extinguished failure-to-warn claims. B&W is therefore also entitled, at a minimum, to a new trial on plaintiffs' design defect claims. *See, e.g.,*

Magnuson v. Kelsey-Hays Co., 844 S.W.2d 448, 456 (Mo. App. W.D. 1992); *Coggins v. Laclede Gas Co.*, 37 S.W.3d 335, 342 (Mo. App. E.D. 2001).

II. THE TRIAL COURT ERRED IN DENYING B&W’S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFFS’ FAILURE -TO-WARN CLAIMS, BECAUSE PLAINTIFFS FAILED TO PRESENT SUFFICIENT EVIDENCE TO MAKE A SUBMISSIBLE CASE ON THOSE CLAIMS, IN THAT THEY FAILED TO PROVE THAT ANY LACK OF WARNING BEFORE 1969 CAUSED MRS. SMITH’S DEATH.

A. Standard Of Review

“[R]eview of the denial of a motion for directed verdict and a motion for JNOV is essentially the same.” *Maldonado v. Gateway Hotel Holdings, LLC*, 154 S.W.3d 303, 307 (Mo. App. E.D. 2003) (citation omitted). The review “consists of determining whether the non-movant made a submissible case.” *Hemeyer v. Wilson*, 59 S.W.3d 574, 582 (Mo. App. W.D. 2001). This Court reviews the record to determine whether the plaintiff made a submissible case by introducing substantial evidence on every element, viewing the evidence in the light most favorable to the jury’s verdict. *Payne v. City of St. Joseph*, 135 S.W.3d 444, 449-50 (Mo. App. W.D. 2004). The Court reviews *de novo* whether the evidence in a given case is substantial. *Kenney v. Wal-Mart Stores, Inc.*, 100 S.W.3d 809, 813 (Mo. banc 2003).

B. Plaintiffs Failed To Prove That Mrs. Smith Would Have Heeded An Earlier Warning

B&W also is entitled to judgment on plaintiffs' failure-to-warn claims not only because they have no such claims under the Wrongful Death Act, but also because plaintiffs failed to establish that any failure by B&W to warn Mrs. Smith regarding the health risks of smoking before 1969 caused her death. This precise issue was thoroughly addressed by the federal court in the prior case brought by Mrs. Smith. Based on Mrs. Smith's own testimony, the federal court held that "no jury could conclude inadequate warnings prior to 1969 caused [Ms. Smith's] injuries." *Smith I* at *5. (L.F. 1516; Appendix A55) Because the evidence is uncontroverted that no warning prior to 1969 would have altered Mrs. Smith's smoking decisions, B&W is entitled to judgment notwithstanding the verdict on those claims.

To establish causation in their failure-to-warn claims, plaintiffs were required to prove that "a warning would have altered the [decedent's] behavior." *Arnold v. Ingersoll-Rand Co.*, 834 S.W.2d 192, 194 (Mo. banc 1992). Missouri aids plaintiffs in this regard by recognizing a presumption that a warning will be heeded. *Id.* This presumption, however, is rebuttable. *Klugesherz v. American Honda Motor Co.*, 929 S.W.2d 811, 814 (Mo. App. E.D. 1996).

Beginning in 1965, every package of cigarettes sold in the United States bore a warning that "cigarette smoking may be hazardous to your health." 15 U.S.C. § 1333(a)(1) (1965). The warning was modified in 1970 to read that "cigarette smoking is dangerous to your health." 15 U.S.C. § 1333(a)(1) (1970). Effective

October 12, 1985, Congress required that cigarette packages carry one of four rotating warnings, including a warning that stated: “SURGEON GENERAL’S WARNING: Smoking causes lung cancer, heart disease, emphysema, and may complicate pregnancy.” 15 U.S.C. § 1333(a)(1) (1984).

As in the federal court, the undisputed evidence in this case was that Mrs. Smith made no effort to alter her behavior when presented with the legally-adequate Surgeon General’s health warnings.¹⁰ Despite the presence of those warnings on cigarette packages, Mrs. Smith continued to smoke until 1990. (Supp. L.F. 1852) Indeed, although she had no recollection of when the warnings first appeared, she recalled that the warnings had no effect on her smoking:

Q. Were you a cigarette smoker after there were warnings on the side of the cigarette packages?

A. Yes.

Q. Do you remember when it was the warnings went on the sides of packages?

¹⁰ This case is thus factually dissimilar from *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76 (Mo. App. W.D. 2006), in which that plaintiff “presented evidence that, before 1969, there were no labels on cigarettes warning of the dangers of additive nicotine or carcinogens that could cause laryngeal cancer” and that “he was not aware of these dangers and would not have become a ‘confirmed Marlboro smoker’ if he had these specific warnings.” *Id.* at 108.

A. Around '92 or something like that or earlier. I don't remember.

Q. But you remember the fact that there was a time when you smoked and there wasn't warnings?

A. Yes.

Q. And there was a time when you smoked and there were warnings?

A. Yes.

Q. What effect did those warnings have on your cigarette smoking?

A. None whatsoever.

(Supp. L.F. 1838)

Mrs. Smith also ignored her children's admonitions to quit smoking.

(Supp. L.F. 1900) When Mrs. Smith was deposed in 1996, she could not identify anything that anyone could have told her that would have convinced her to try quitting smoking any sooner than she did. (*Id.*) She explained in simple terms that she ignored repeated warnings from multiple sources because she enjoyed smoking.

(Supp. L.F. 1857-58) "I liked the cigarette I was smoking." (Supp. L.F. 1884)

Moreover, her enjoyment of smoking is the reason she never even attempted to quit smoking at any time before 1990, when she did and was successful. (T. 1851)

Under these circumstances, the rebuttable heeding presumption on which plaintiffs rely is of no assistance to them. When a rebuttable presumption arises, if the party

against whom it operates introduces substantial contrary evidence, “the existence or nonexistence of the fact once presumed is to be determined from the evidence as if no presumption had ever been operative in the case.” *Mercantile Bank & Trust Co. v. Vilkins*, 712 S.W.2d 1, 3 (Mo. App. W.D. 1986) (quoting *JD v. MD*, 453 S.W.2d 661, 663 (Mo. App. Spfld. D. 1970)); *see also Michler v. Krey Packing Co.*, 253 S.W.2d 136, 139 (Mo. banc 1952). Here, the undisputed testimony of Mrs. Smith was that, notwithstanding both the multiple warnings on her package of cigarettes and the wishes of her children, she continued to smoke until she became ill with pneumonia. (Supp. L.F. 1852) Indeed, she could not identify any warning that would have convinced her to quit smoking before she did. (Supp. L.F. 1900) In the face of this evidence, the presumption that Mrs. Smith would have heeded any warning from B&W disappears. Plaintiffs presented no substantial evidence to support a finding that Mrs. Smith would have heeded any additional warning.¹¹

¹¹ When Mrs. Smith’s daughter, Toni Parker, was asked how she felt about her mother’s smoking in light of Ms. Parker’s belief that her mother did not know the risks of smoking, she replied: “I would have my mother today if she had have known.” (T. 1762) Testimony about one’s belief or feeling does not constitute substantial evidence and is of no probative force or evidential value, even if received without objection. *Powell v. State Farm Mut. Auto. Ins. Co.*, 173 S.W.3d 685, 690 (Mo. App. W.D. 2005); *Galovich v. Hertz Corp.*, 513 S.W.2d 325, 335 (Mo. 1974). This testimony, therefore, is not substantial evidence and does not make a submissible case.

Grady v. American Optical Corp., 702 S.W.2d 911 (Mo. App. E.D. 1985), does not require a different conclusion. Based on the facts, the *Grady* court concluded that the issue of whether the defendant's failure to warn caused the plaintiff's injury was for the jury. In that case, however, the evidence was that the warning provided by the defendant was removed from the safety glasses before they were provided to the plaintiff, not that the plaintiff ignored the warnings on each pack of cigarettes she smoked for 21 years. Furthermore, unlike in this case, the plaintiff in *Grady* did not testify that he could think of no warning that would have convinced him not to use the safety glasses. *Grady* therefore is distinguishable. Here, compelling and undisputed evidence establishes that the absence of a warning did not cause Mrs. Smith's death.

This conclusion is also supported by cases from other jurisdictions that have concluded that smokers have failed to establish the causation element of their failure-to-warn claims when the evidence showed that they continued smoking after the statutory warnings were required on cigarette packages. *Prado Alvarez v. R.J. Reynolds Tobacco Co.*, 405 F.3d 36, 43-44 (1st Cir. 2005); *Estate of White v. R.J. Reynolds Tobacco Co.*, 109 F. Supp. 2d 424, 435 (D. Md. 2000); *Viguers v. Philip Morris USA, Inc.*, 837 A.2d 534, 538 (Pa. Super. 2003), *aff'd*, 881 A.2d 1262 (Pa. 2005).

Because the evidence was uncontroverted that Mrs. Smith ignored all warnings she was given and could not describe any warning that could have changed her behavior, plaintiffs failed to make a submissible case on their failure-to-warn claims as a matter of law. *See Klugesherz*, 929 S.W.2d at 814 (affirming JNOV for defendants where evidence

established that no additional warning would have altered injured party's behavior). B&W is thus entitled to judgment on plaintiffs' failure-to-warn claims. As set forth above, the submission of a general verdict on plaintiffs' failure-to-warn and design claims also entitles B&W, at a minimum to, a new trial on plaintiffs' design defect claims. *See Coggins*, 37 S.W.3d at 342.

III. THE TRIAL COURT ERRED IN DENYING B&W'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFFS' STRICT LIABILITY PRODUCT DEFECT AND NEGLIGENT DESIGN CLAIMS, BECAUSE PLAINTIFFS FAILED TO PRESENT EVIDENCE SUFFICIENT TO MAKE A SUBMISSIBLE CASE ON THOSE CLAIMS, IN THAT PLAINTIFFS FAILED TO IDENTIFY OR PROVE ANY SPECIFIC DEFECT IN THE DESIGN OF KOOL CIGARETTES THAT RENDERED THEM DEFECTIVE OR UNREASONABLY DANGEROUS IN A WAY THAT CAUSED MRS. SMITH'S DEATH.

To establish liability for strict liability design defect or negligent design, plaintiffs were required to prove that there is "something wrong" with Kool cigarettes that caused Mrs. Smith's death. Plaintiffs submitted no such evidence, but instead attacked all cigarettes in general as inherently dangerous. Plaintiffs thus failed to identify or prove any specific defect in the design of the Kool cigarettes smoked by Mrs. Smith that rendered them unreasonably dangerous. As such, plaintiffs failed to make a submissible strict liability defect or negligent design case, and the trial court erred in denying B&W's motion for judgment notwithstanding the verdict on these claims.

A. Standard Of Review

This Court reviews the record to determine whether plaintiffs made a submissible case by introducing substantial evidence on every element, viewing the evidence in the light most favorable to the jury’s verdict. *See supra* at II.A. The Court reviews *de novo* whether the evidence in a given case is substantial. *See supra* at II.A.

B. Missouri Law Requires Proof Of A Specific Defect That Caused The Alleged Injury

To establish liability for strict liability defect claims, plaintiffs were required to prove that the specific design of Kool cigarettes was “unreasonably dangerous” and “defective” — in the words of the instructions given here, “were then in a defective condition unreasonably dangerous when put to a reasonably anticipated use” (L.F. 1391) — and that such condition caused Mrs. Smith’s death. § 537.760(3), R.S.Mo. (2000). Put another way, Missouri law requires that there be “something wrong” with the product that causes the harm. *Richardson v. Holland*, 741 S.W.2d 751, 753-54 (Mo. App. S.D. 1987). To establish a strict liability design defect claim, Missouri courts have required proof of a feasible and safer alternative design. *Siebern v. Missouri-Illinois Tractor & Equip. Co.*, 711 S.W.2d 935, 939 (Mo. App. E.D. 1986) (requiring that plaintiff “show that alternative designs . . . would have helped plaintiff survive”).¹² Missouri law is clear that strict liability is not “an enveloping net of absolute

¹² Although this Court in *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47 (Mo. banc 1999), refused to require a jury instruction on the role alternative designs play in proving

liability.” *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 375 (Mo. banc 1986) (citation omitted).

To succeed on a negligent design claim, plaintiffs were required to prove that B&W did something wrong that caused Mrs. Smith’s death. *Hatch v. V.P. Fair Found., Inc.*, 990 S.W.2d 126, 139 (Mo. App. E.D. 1999) (negligence is “predicated upon failure to observe a prescribed standard of care”); *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 863 (Mo. banc 1993) (“but for” causation required). As with strict liability, under negligence claims, a manufacturer is not an “insurer” for all injuries caused by its products. *Nesselrode*, 707 S.W.2d at 375.

C. Plaintiffs Based Their Design Claims Solely On The Theory That All Cigarettes Are Inherently Dangerous

Plaintiffs’ evidence attempted to show that Kool cigarettes caused Mrs. Smith’s death, not because of anything particular about their design, but *because they are part of a category of products called “cigarettes.”* Plaintiffs’ counsel argued this novel theory as the basis for liability in closing: “Any product that will cause a half million deaths is unreasonably dangerous.” (T. 3038) Missouri law, however, does not recognize such a theory. Rather, Missouri requires plaintiffs to prove that there is something wrong with the product’s design that caused the injury. *Richardson*, 741 S.W.2d at 753-54.

defects, the Court did not change earlier law or reject the common-sense notion that a product is not defective or *unreasonably* dangerous if it could not have been made safer.

The evidence from plaintiffs' own witnesses was that all "cigarettes," including the Kool cigarettes smoked by Mrs. Smith, are dangerous and present risks of injury to human health. (T. 847-48, 2105) Notably, both the federal government and the State of Missouri define a "cigarette" as "tobacco wrapped in paper." 15 U.S.C. § 1332(1)(A) (2002); § 149.011(2), R.S.Mo. (2000). Missouri has expressly endorsed the sale of all "cigarettes," despite their well known health risks, so long as they carry the federal health warnings. *See* § 149.200.1(1), R.S.Mo. (2000) (sale of cigarettes is legal in Missouri so long as the product carries "the precise package warning labels . . . specified in . . . the Federal Cigarette Labeling Act.").

Nevertheless, plaintiffs' own witnesses repeatedly emphasized that there is simply nothing about Kool cigarettes that is any different from other "cigarettes" or that could be changed in a way that would have prevented Mrs. Smith's injuries. For example, plaintiffs' expert testified:

Q. You'll agree with me Doctor, that if you define a cigarette as a device that burns tobacco, you don't believe that it's possible to make such a product safe that's burning tobacco?

A. . . . I don't see a mechanism the way the product, as it's currently formulated, which is burning a loose, chopped up form of tobacco, plus tobacco reconstituted paper, I don't see how that would be made safe.

Q. Because you're burning tobacco, an organic substance, which creates a smoke that contains, in its natural state, carcinogens and irritants and other risks to human health; correct?

A. That's correct.

(T. 2064-65) Plaintiffs' expert further agreed that all "cigarettes" as defined by federal and Missouri law present the same health risks:

[E]ven if a cigarette consisted of nothing more than tobacco rolled in paper it would present health risks similar to the cigarettes currently manufactured in the United States.

(T. 2062) He was adamant in his opinion that all cigarettes as a product category cannot be made safe: "[T]here is no such thing as a safe cigarette" and "[t]here's no safe cigarette and there's no safe level of consumption." (T. 2065, 2103) In fact, he agreed that there were no "cigarettes" on the market during the entire time that Mrs. Smith smoked that she could have smoked and avoided her injuries:

Q. So if we looked at commercial cigarettes that are available in the U.S. market during the time that Barbara Smith smoked, there's not another one that you can say she should have switched to that brand and she would not have become ill?

A. That's correct.

(T. 2105) Another witness called by plaintiffs to testify regarding cigarette design, Jeffrey Wigand, also readily admitted that there is no change that can be made to the design of Kool cigarettes that would make them safe or safer for consumers to smoke.

(T. 1248-49)

Richardson rejected a theory of categorical liability, similar to the one pursued by plaintiffs here, to prove that a handgun was defectively designed because it belonged to a "class of guns" called Saturday Night Specials. *Richardson*, 741 S.W.2d at 753. In *Richardson*, the plaintiff argued that, because "unreasonable dangerousness" is a jury question, proof that an entire class or category of products is unreasonably dangerous would be sufficient. *Richardson*, however, held that liability does not attach to "harm caused by products that might be considered (by some) to be socially undesirable because of the hazards they pose when they are perfectly made." *Richardson*, 741 S.W.2d at 753 (quoting 5 HARPER, JAMES, & GRAY, LAW OF TORTS, PRODUCTS LIABILITY, § 28.32A at 581 (2d ed. 1986)). Instead, a plaintiff must prove that there is "something wrong" with the product that caused the injury. *Richardson*, 741 S.W.2d at 753 (quoting 5 HARPER, JAMES & GRAY at 581). Specifically, "[f]or the handgun to be defective, there would have to be a problem in its manufacture or design, such as a weak or improperly placed part, that would cause it to fire unexpectedly or otherwise malfunction." *Id.* at 754. Otherwise, a manufacturer of handguns or cigarettes would be subject to absolute liability as an insurer — a theory that the Missouri Supreme Court has expressly rejected. *See Nesselrode*, 707 S.W.2d at 375; *see also Sandage v. Bankhead Enters., Inc.*,

177 F.3d 670, 673 (8th Cir. 1999) (“manufacturers are not liable ‘simply because the use of their products involve some risk’”).

The ramifications of imposing liability without any showing of something wrong with the specific product would be staggering. Liability would be imposed for entire categories of inherently dangerous products (*e.g.*, guns, alcohol, convertibles) even though there are no design changes or warnings that could render them safer without changing their fundamental characteristics. *Richardson* expressly rejected this attempt “to fasten strict liability upon the manufacturer . . . of a lawful product” based on a judicial determination that its risk “outweighs its social value.” *Richardson*, 741 S.W.2d at 756; *accord Spuhl v. Shiley, Inc.*, 795 S.W.2d 573, 580 (Mo. App. E.D. 1990) (“[T]he doctrine of strict liability under Restatement section 402A is not applicable unless there is a product failure or malfunction.”).

Courts across the country are in accord with Missouri law rejecting liability for products that, like cigarettes, have known risks. *See, e.g., Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206, 1209 (N.D. Tex. 1985) (holding that “the manufacturer [of a gun] is liable for injuries . . . only if [the] product is ‘defective’ — *i.e.*, has a defect in the sense that something is wrong with it”); *Marzullo v. Crosman Corp.*, 289 F. Supp. 2d 1337, 1343, n.6 (M.D. Fla. 2003) (holding that a BB gun is not unreasonably dangerous or defective because its risks are “a risk inherent in the use of the product”); *Greif v. Anheuser-Busch Cos.*, 114 F. Supp. 2d 100, 102 (D. Conn. 2000) (holding that a complaint that beer has anti-social effects and that the manufacturer should be responsible for all ultimate misuse of the product “essentially is a call for the

return of Prohibition”); *Delvaux v. Ford Motor Co.*, 764 F.2d 469, 474 (7th Cir. 1985) (holding that a convertible is not unreasonably dangerous or defective because there is nothing wrong with its design — “independently of any possible alternative designs or safety features”).

The determination whether a product that has inherent known risks should be removed from the market is for the Legislature, not a jury, and certainly not for different juries. *See Richardson*, 741 S.W.2d at 757 (determination on whether to impose liability or ban handguns is for the Legislature). But the Missouri Legislature, like Congress, has already decided that cigarettes are a legal product despite their known dangers, and continues through today to sanction their sale. *See* § 149.200.1(1), R.S.Mo. (2000) (cigarettes may be sold so long as they carry the federal health warning labels).¹³

D. Plaintiffs Failed To Present Evidence Sufficient To Make

A Submissible Case On Their Negligent Design Defect Claims

To establish negligent design plaintiffs were required to prove there is “something wrong” with the product to make a submissible case on their negligent design defect claim. *See Richardson*, 741 S.W.2d at 753. This Court has expressly rejected the notion that manufacturers are subject to absolute liability as insurers. *See Nesselrode*, 707 S.W.2d at 375.

¹³ As shown in Section IV, *infra*, Congress has acted to preempt any attempt to remove from the market or further regulate the sale of ordinary cigarettes.

B&W cannot be held liable for negligence when there was no way to design Kool cigarettes in a way that would have prevented Mrs. Smith's death. Missouri courts have required proof of a safer alternative design. For example, the court in *Siebern*, 711 S.W.2d at 939, required that plaintiff "show that alternative designs . . . would have been helpful plaintiff survive." B&W was not negligent if there was no way to design Kools to prevent Mrs. Smith's death. *See Stevens v. Durbin-Durco, Inc.*, 377 S.W.2d 343, 346 (Mo. 1964) (a manufacturer "is not liable as an insurer").

There is ample evidence from plaintiffs own witnesses that there is no such thing as a safe cigarette. (T. 1248-49, 2062, 2064-65, 2103, 2105) There is no evidence whatsoever that any characteristics of Kool cigarettes rendered them more likely to cause Mrs. Smith's death than any other cigarette. Indeed, plaintiffs' own evidence, undisputed by B&W, was that no change to Kool cigarettes' design would make them safe for consumers to smoke. (T. 1248-49) Plaintiffs' design expert also testified there is simply nothing about Kool cigarettes that is any different from other cigarettes or could be changed in a way to prevent Mrs. Smith's death.¹⁴ (T. 2065) Plaintiffs cannot override or change the legal definition of "cigarettes." Significantly, plaintiffs' expert testified

¹⁴ Moreover, the testimony from B&W was undisputed that the health risks or the quitting rates of smokers who smoke menthol cigarettes, such as Kools, is no different than non-menthol cigarettes. (T. 2245-47) Likewise, B&W presented undisputed evidence that additives in B&W's cigarettes do not create any greater health risks than "just tobacco in paper." (T. 2274)

unequivocally that “burning a loose, chopped up form of tobacco, plus tobacco reconstituted paper” is unsafe and presents the same health risks as Kools and “all other cigarettes.” (T. 2062, 2064-65)

To establish negligent design, plaintiffs were required to prove defendants did something wrong that caused the injury. *Hatch v. V.P. Fair Found., Inc.*, 990 S.W.2d 126, 139 (Mo. App. E.D. 1999). Generalized proof that all cigarettes cause disease does not satisfy plaintiffs’ burden to prove that a specific defect in the design of Kool cigarettes caused Mrs. Smith’s death. The uncontroverted record in this case is that the Kool cigarettes smoked by Mrs. Smith were no more dangerous than “tobacco wrapped in paper,” *i.e.*, all other ordinary cigarettes that can legally be sold in Missouri. Generalized proof that all cigarettes cause disease does not satisfy plaintiffs’ burden to prove that a specific defect in the design of Kool cigarettes proximately caused Mrs. Smith’s death. The trial court thus erred in submitting plaintiffs’ design defect claims to the jury, and the Court should enter judgment in favor of B&W on plaintiffs’ design defect claims. Because the jury returned a general verdict on plaintiffs’ failure-to-warn and design claims, B&W also is entitled, at a minimum, to a new trial on plaintiffs’ failure-to-warn claims. *See Coggins*, 37 S.W.3d at 342.

IV. THE TRIAL COURT ERRED IN DENYING B&W’S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFFS’ STRICT LIABILITY PRODUCT DEFECT AND NEGLIGENT DESIGN CLAIMS, BECAUSE PLAINTIFFS FAILED TO MAKE A SUBMISSIBLE CASE ON THOSE CLAIMS, IN THAT PLAINTIFFS’ CLAIMS BASED ON

THE INHERENT RISKS OF CIGARETTES ARE BARRED BY FEDERAL CONFLICT PREEMPTION.

In addition to the fact that plaintiffs' negligent and strict liability design defect claims are not recognized under Missouri law, these claims are preempted by federal law. The United States Supreme Court has held that federal policy, reflected in a multitude of cigarette-related laws and regulations dating back decades, precludes banning ordinary cigarettes. Congress has expressly permitted the manufacture, sale, and marketing (as well as heavy taxation) of cigarettes *despite* their well-known health risks. Federal law therefore precludes liability under state law tort theories that assess damages for the general health risks of cigarette smoking, as opposed to liability for specific defects in the design of particular cigarettes.

A. Standard Of Review

Where, as a here, a trial court's denial of a motion for JNOV is based on an issue of law, this Court reviews the trial court's denial *de novo*. *See supra* at I.A.. This Court also reviews *de novo* questions of statutory interpretation. *See supra* at I.A.

B. Plaintiffs' Product Defect Theory Is Preempted

The federal law and policy regarding the cigarette market is reflected in congressional action over many decades and was articulated by the Supreme Court in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). The Court held:

Congress . . . has foreclosed the removal of tobacco products from the market . . . More importantly, Congress has directly addressed the problem of tobacco and health through

legislation on six occasions since 1965. When Congress enacted these statutes, the adverse health consequences of tobacco use were well known, as were nicotine's pharmacological effects. Nonetheless, Congress stopped well short of ordering a ban.

Id. at 137-38 (citations omitted). The Court further held that it is federal policy to regulate rather than ban cigarettes in order to protect the national economy and that the regulation of the sale of cigarettes is a matter of federal, not state, concern. *Id.* “Congress’ decisions to regulate labeling and advertising and to adopt the express policy of protecting ‘commerce and the national economy . . . to the maximum extent’ reveal its intent that tobacco products remain on the market.” *Id.* at 139. “Cigarettes,” as defined by both Congress and the State of Missouri, “will continue to be sold in the United States.” *Id.*

Since *FDA*, many courts presiding over state law tort actions against cigarette manufacturers have held that certain defect claims are preempted because they conflict with established federal policy. Federal conflict preemption in cigarette litigation was succinctly summarized in a recent decision by the federal court in St. Louis involving another Missouri wrongful death claim arising from the death of a woman who also smoked Kool cigarettes: “Implied conflict preemption exists ‘where it is impossible for a private party to comply with both state and federal requirements or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Mash v. Brown & Williamson Tobacco Corp.*,

No. 4:03 cv 0485 TCM, 2004 U.S. Dist. LEXIS 28951, at *13 (E.D. Mo. Aug. 26, 2004) (quoting *Freightliner v. Myrick*, 514 U.S. 280, 287 (1995)).

Under the doctrine of conflict preemption, B&W “cannot be liable for merely manufacturing and marketing cigarettes that have health risks and are allegedly addictive.” *Prado-Alvarez v. R.J. Reynolds Tobacco Co.*, 313 F. Supp. 2d 61, 73 (D.P.R. 2004), *aff’d*, 405 F.3d 36 (1st Cir. 2005). A ruling that cigarettes are unreasonably dangerous *per se* would have the effect of imposing a ban on the manufacture and sale of cigarettes where Congress has not enacted a ban. *Badon v. R.J.R. Nabisco, Inc.*, 934 So. 2d 927 (La. App. 2006).¹⁵ Congress has already weighed the risk and utility of

¹⁵ Federal law precludes recovery on the ground that *all* cigarettes carry health risks or that they are inherently dangerous result because it amounts to a constructive ban. *See Mash*, 2004 U.S. Dist. LEXIS 28951, at *18 (“If the courts held that the nicotine in cigarettes was a design defect such holdings would result in a ban on tobacco products in contravention of *FDA*. . . . [I]n the instant case, the complained-of defect that is subject of Plaintiffs’ design defect allegations is *inherent to cigarettes*,” so they are dismissed) (emphasis added); *Cruz Vargas v. R.J. Reynolds Tobacco Co.*, 218 F. Supp. 2d 109, 117-18 (D.P.R. 2002) (relying on *FDA* and holding that claims that cigarettes are unreasonably dangerous are preempted because carcinogens and nicotine are inherent characteristics present in all cigarettes), *aff’d on other grounds*, 348 F.3d 271 (1st Cir. 2003); *Conley v. R.J. Reynolds Tobacco Co.*, 286 F. Supp. 2d 1097, 1107-08 (N.D. Cal. 2002) (state law tort claims preempted to the extent they are premised on health risks

using tobacco products and has made the decision that they should remain on the market. Plaintiffs' design defect claim is preempted unless plaintiffs can prove that it would have been a marketable reality and would have been technologically feasible to remove the design defect from the cigarette without changing the cigarette's fundamental composition and characteristic as a tobacco product.

As set forth *supra* at III.C, plaintiffs' evidence established only that all cigarettes carry the same health risks. Indeed, there is nothing that distinguishes the Kool cigarettes smoked by Mrs. Smith from generic "cigarettes" — "tobacco wrapped in paper" — as defined by Congress in 15 U.S.C. § 1332(1)(A) (2002) and Missouri state law in § 149.011(2), R.S.Mo. (2000). Plaintiffs' categorical theory of liability squarely conflicts with federal law, and B&W is entitled to judgment on plaintiffs' design claims. As noted above, because plaintiffs' defect and failure-to-warn claims were submitted together, reversal of plaintiffs' design claims also requires, at a minimum, a new trial on plaintiffs' failure-to-warn claims. *Coggins*, 37 S.W.3d at 342.

V. THE TRIAL COURT ERRED IN DENYING B&W'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFFS' NEGLIGENT FAILURE-TO-WARN AND NEGLIGENT DESIGN CLAIMS, BECAUSE PLAINTIFFS FAILED TO MAKE A SUBMISSIBLE

"so inherent in 'tobacco products' that it would not be scientifically or commercially feasible to remove the defect"); *Insolia v. Philip Morris Inc.*, 128 F. Supp. 2d 1220, 1224-25 (W.D. Wis. 2000) (same).

CASE ON THOSE CLAIMS, IN THAT PLAINTIFFS FAILED TO SHOW THAT B&W OWED ANY DUTY TO THE DECEDENT IN LIGHT OF THE EVIDENCE THAT THE DANGERS OF SMOKING ARE COMMONLY KNOWN.

Plaintiffs' negligent failure-to-warn and negligent design claims also fail as a matter of law because the health risks associated with smoking were open, obvious and commonly known to the public, as well as to Mrs. Smith. Mrs. Smith nonetheless continued smoking until 1990, well after the health risks associated with smoking were common knowledge.

A. Standard Of Review

This Court reviews whether plaintiffs made a submissible case by introducing substantial evidence on every element, viewing the evidence in the light most favorable to the jury's verdict. *See supra* at II.A. The Court reviews *de novo* whether the evidence in a given case is substantial. *See supra* at II.A.

B. Plaintiffs' Negligent Failure-To-Warn and Design Claims Fail Because Of The Common Knowledge Of The Risks Of Smoking

All of plaintiffs' negligence theories that might support the jury verdict — the negligent design and negligent failure-to-warn claims — also fail as a matter of law because the health risks associated with smoking have long been matters of public knowledge and were well known during the period that Mrs. Smith smoked. This common knowledge negates key elements of plaintiffs' negligence claims for failure to warn and design defect.

In any negligence action, “the plaintiff must establish that the defendant had a duty to protect the plaintiff from injury.” *Cupp v. Nat’l R.R. Passenger Corp.*, 138 S.W.3d 766, 771 (Mo. App. E.D. 2004) (internal quotations and citations omitted). In a negligent design claim, the defendant does not have a duty if the product’s danger or defect was “open, obvious and apparent.” *Stevens v. Durbin-Durco, Inc.*, 377 S.W.2d 343, 347 (Mo. 1964). Correspondingly, in a negligent failure-to warn-claim, the defendant has no duty to provide a warning if the product’s risks are “open and obvious” to the plaintiff or are “commonly known.” *Young v. Wadsworth*, 916 S.W.2d 877, 878 (Mo. App. E.D. 1996) (collecting citations). The open and obvious exception to the duty to warn in a negligence claim is therefore not limited to a visibly observable open and obvious danger, or to the circumstances in which the injured person had actual knowledge of the specific danger. *See Young*, 916 S.W.2d at 878; *Stevens*, 377 S.W.2d at 345.

The common knowledge doctrine is an objective one. *See Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 119 (3d Cir. 1992). Any purported subjective lack of awareness of the individual plaintiff (or decedent) is irrelevant to the doctrine’s applicability. *Id.* At least before *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76 (Mo. App. W.D. 2006), no Missouri court required disease or injury specific knowledge. Thus, where the dangers of cigarette smoking were commonly known, B&W did not have a duty to Mrs. Smith, and plaintiffs’ negligence claims must fail.

Here, there is no question that the health risks of smoking cigarettes were well known during the period that Mrs. Smith smoked. Courts in Missouri and throughout the country have found that the health risks of smoking cigarettes were common knowledge. In 1940, this Court acknowledged the dangers associated with cigarettes, declaring that it was “common knowledge” that cigarettes “produce tobacco addicts” and have “harmful properties.” *Ploch v. City of St. Louis*, 138 S.W.2d 1020, 1023 (Mo. 1940). Even earlier — in 1900 — the United States Supreme Court acknowledged the public’s “very general” belief that cigarette smoking was harmful. *See Austin v. Tennessee*, 179 U.S. 343, 348 (1900) (observing that “a belief in their deleterious effects [of cigarettes], particular upon young people, has become very general”), *aff’g Austin v. State*, 48 S.W. 305, 306 (Tenn. 1898) (taking “judicial cognizance” that “cigarettes are wholly noxious and deleterious to health. . . . Their use is always harmful, never beneficial. They possess no virtue but are inherently bad, and bad only.”); *see also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 513 (1992) (by 1962, “there were more than 7,000 publications examining the relationship between smoking and health”); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137 (2000) (“When Congress enacted these statutes [beginning in 1965] the adverse health consequences of tobacco use were well known, as were nicotine’s pharmacological effects”); *Zamboni v. Implement Dealers’ Mut. Fire Ins. Co.*, 218 N.W. 457, 458 (Minn. 1928); *Ex parte Hollowell*, 182 P.2d 771 (Okla. Crim. App. 1947).

A vast majority of the courts across the country, recognizing the widespread and decades-long publicity about the health risks related to smoking, have taken judicial

notice that these risks have been matters of common knowledge for decades or have held that plaintiffs' claims have failed in light of common knowledge. *See, e.g., Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 172 (5th Cir. 1996) (common knowledge barred claim by plaintiff who began smoking in 1936); *Tompkins v. R.J. Reynolds Tobacco Co.*, 92 F. Supp. 2d 70, 89 (N.D.N.Y. 2000) ("risks of smoking were common knowledge in 1938"); *Paugh v. R.J. Reynolds Tobacco Co.*, 834 F. Supp. 228, 230 (N.D. Ohio 1993) (dismissing claims of plaintiff who smoked from 1940 to 1990 because "the dangers posed by tobacco smoking have long been within the ordinary knowledge common to the community"); *Estate of White v. R.J. Reynolds Tobacco Co.*, 109 F. Supp. 2d 424, 434 (D. Md. 2000) ("general knowledge of the dangers of cigarette smoking dates back at least to 1952").

In this case, plaintiffs' evidence confirms that the public has long been aware of the dangers of smoking. For instance, plaintiffs' expert witness admitted that:

- For "150 years or so," it has been written in the lay media that the smoking habit can be very difficult to quit. (T. 2031-2032)
- In the early 1950s, there were important scientific publications regarding the link between smoking and disease. (T. 2042)
- Even before the publication of the 1964 Surgeon General's report, "there was a prior statement by the Surgeon General [discussing the health consequences of smoking] at the end of the 1950s." (T. 2047-2048)

- When the U.S. Surgeon General issued his report in 1964 concluding that smoking causes cancer, it was “front page news all over the country” and was covered on both television and radio. (T. 2049-2050)
- “[M]ore people are aware that smoking is a risky activity than know the name of the president of the United States.” (T. 2058-2059)
- If you ask people if smoking causes disease, they will respond “yes.” (T. 2059)
- By the mid-1960s, “substantial majorities” of Americans believed that cigarette smoking caused lung cancer. (T. 2050-2051)

For her part, Mrs. Smith knew that there were labels on cigarettes warning of the health risks of smoking. (Supp. L.F. 1838) Mrs. Smith also acknowledged that she had heard cigarette smoking described as an addiction. (Supp. L.F. 1833) And Mrs. Smith admitted that she learned that the Surgeon General was studying the subject of cigarette smoking, and she knew about his landmark 1964 report on smoking and health.

(Supp. L.F. 1836-37)

In light of the long-term public awareness of the dangers of smoking and Mrs. Smith’s own awareness, plaintiffs failed to make a submissible case that B&W had a duty under either of their negligence theories. The trial court therefore erred in denying B&W’s motion for judgment notwithstanding the verdict on plaintiffs’ negligent failure-to-warn and negligent design claims. Because the trial court erroneously submitted plaintiffs’ negligence claims together with their strict liability claims, it is impossible to know which theory was the basis of the jury’s verdict. Therefore, B&W is

entitled to, at a minimum, a new trial on the strict liability failure-to-warn and design defect claims as well. *Coggins*, 37 S.W.3d at 342.

VI. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON COMPARATIVE FAULT, BECAUSE THE PLEADINGS AND THE EVIDENCE PRESENTED DID NOT SUPPORT GIVING THOSE INSTRUCTIONS, IN THAT B&W DID NOT ASSERT COMPARATIVE FAULT AS AN AFFIRMATIVE DEFENSE AND DID NOT TRY COMPARATIVE FAULT BY IMPLIED CONSENT, AS THE EVIDENCE INTRODUCED BY B&W RELATING TO MRS. SMITH'S KNOWLEDGE AND CONDUCT DIRECTLY REBUTTED PLAINTIFFS' CASE-IN-CHIEF.

This Court has held that comparative fault may be submitted only if (1) the defendant has asserted it as an affirmative defense, or (2) the issue has been tried by implied consent. *Lester v. Sayles*, 850 S.W.2d 858, 868 (Mo. banc 1993). B&W did not plead comparative fault as an affirmative defense to the operative petition, it expressly disavowed it throughout the trial, and it introduced no evidence that related solely to that issue. Nevertheless, at plaintiffs' request and over B&W's objection (T. 2965-75), the trial court instructed the jury on comparative fault, allowing plaintiffs to hijack the defense strategy.¹⁶ This error requires a new trial.

¹⁶ See Instruction Nos. 12, 14, 16, and 18. (L.F. 1391, 1393, 1395, 1397; Appendix at A8-A11)

A. Standard Of Review

“Claims of instructional error present questions of law which we review *de novo*.” *Mehrer v. Diagnostic Imaging Ctr., P.C.*, 157 S.W.3d 315, 323 (Mo. App. W.D. 2005). A verdict directing instruction must be supported by substantial evidence, which is a legal question and not a matter of judicial discretion. *Vintila v. Drassen*, 52 S.W.3d 28, 40 (Mo. App. S.D. 2001). “When an erroneous instruction is given and the trial results in favor of the party at whose instance it was given, the presumption is that the error was prejudicial.” *Grindstaff v. Tygett*, 655 S.W.2d 70, 74 (Mo. App. E.D. 1983).

B. B&W Did Not Plead Comparative Fault As An Affirmative Defense

Several months before trial, B&W sought to amend its answer to eliminate any assertion of comparative fault. (L.F. 0083) The trial court granted B&W’s motion to amend. (L.F. 0360) At that point, B&W’s initial pleading was superseded. *See Bank of America, N.A. v. Stevens*, 83 S.W.3d 47, 56 (Mo. App. S.D. 2002). As such, the initial pleading was not before the court and could “not be considered for any purpose.” *State ex rel. Budd Co. v. O’Malley*, 114 S.W.3d 266, 271 (Mo. App. W.D. 2002). On the opening day of testimony, plaintiffs filed an amended petition, which was plaintiffs’ operative pleading at trial. (L.F. 1206) B&W’s answer to that petition did not assert comparative fault as a defense. (L.F. 1368) Thus, comparative fault was not at issue in the pleadings during trial.

Before trial, B&W asked the court to rule that comparative fault was not in the case and that plaintiffs were precluded from mentioning comparative fault during trial.

(T. 629-30, 633-34) Plaintiffs’ counsel explicitly stated why he wanted to force comparative fault into the case:

MR. McCLAIN: . . . It’s a thinly veiled attempt not to allow there to be an apportionment of fault because they believe — and here’s the reality — that if the jury has an opportunity to apportion fault, they will get some of it.

(T. 632) The trial court stated that it would rule at the close of the evidence. (T. 629, 634)

B&W told the Court and jury that it was not blaming Mrs. Smith or seeking a reduction in her damages due to her fault. (T. 3113-3114) Nevertheless, after the close of the evidence and on the eve of closing arguments, plaintiffs again requested a comparative fault instruction. B&W objected, but the trial court erroneously gave that instruction, (L.F. 1397; Appendix at A11) and permitted the jury to apportion fault on the verdict form. (L.F. 1419-20)

C. B&W Had The Right To Waive Or Withdraw The Affirmative Defense Of Comparative Fault

Rule 55.08 lists comparative fault as an affirmative defense that a defendant must plead. Failure to plead an affirmative defense constitutes waiver of that defense.

Lewis v. Snow Creek, Inc., 6 S.W.3d 388, 396 (Mo. App. W.D. 2000). The Missouri Legislature has provided that, in product liability claims, “[d]efendant may plead and prove the fault of the plaintiff as an affirmative defense.” § 537.765.2, R.S.Mo. (2000) (emphasis added). This Court has held that “comparative fault must be pled *as an*

affirmative defense.” Lester, 850 S.W.2d at 869 (emphasis added). In *Lester*, the defendants argued that comparative fault need not be pled as an affirmative defense and that the jury must be given a comparative fault instruction, if supported by the evidence, regardless of the pleadings. *Id.* at 867. This Court rejected that argument.¹⁷ *Id.* at 867-69. *Lester* is controlling on this issue and requires reversal in this case.¹⁸

¹⁷ In so ruling, *Lester* rejected an argument that dicta in *Earll v. Consolidated Aluminum Corp.*, 714 S.W.2d 932 (Mo. App. E.D. 1986), authorized a court to instruct on comparative fault even if the defendant had not pled the defense. *Lester*, 850 S.W.2d at 867-68 & n.9. The procedural posture in *Earll* was significantly different than in *Lester* or this case; in *Earll*, the defendant had pled comparative fault but chose not to submit a jury instruction. *Earll*, 714 S.W.2d at 935. Thus, as the *Lester* Court explained, *Earll* “was tried and evidence was introduced under the assumption that comparative fault was applicable.” *Lester*, 850 S.W.2d at 868. Accordingly, *Lester* makes clear that *Earll* has “no relation to the question at hand — whether comparative fault must be pled as an affirmative defense.” *Id.*

¹⁸ Courts in other jurisdictions have also recognized the common-sense principle that a plaintiff cannot force a defendant to invoke an unpled affirmative defense like comparative fault. *See, e.g., Bauer v. J.B. Hunt Transp., Inc.*, 150 F.3d 759 (7th Cir. 1998); *Goulah v. Ford Motor Co.*, 118 F.3d 1478 (11th Cir. 1997); *Kwiatkowski v. Bear, Stearns & Co.*, No. 96 Civ. 4798 (VM), 2000 WL 640625 (S.D.N.Y. 2000).

The adversarial legal system is based on the principle that the plaintiff has the right to control the claims he wishes to assert and the defendant has the right to control the defenses he wishes to assert. This Court recognized this principle in adopting Rule governing defenses. It would violate this core principle to permit a plaintiff to dictate both what claims he will or will not to assert and what defenses his opponent can or cannot assert. “[The adversarial] system, tested over the centuries, requires that each party be independent of the fetters imposed by counsel for an opposing party so that it may present every argument and assert every remedy that ethics and good conscience permit.” *State v. Planned Parenthood of Kansas*, 66 S.W.3d 16, 20 (Mo. banc 2002).

In *Smith II*, the court of appeals relied on its earlier decision, *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76, 117-24 (Mo. App. W.D. 2006), to reject the applicability of *Lester* to the comparative fault issues. *Thompson*, however, contrary to Rule 55.08 and § 537.765, R.S.Mo. (2000), viewed comparative fault as something other than an affirmative defense. 207 S.W.2d at 124. This view of comparative fault, however, was expressly rejected by this Court in *Lester*. The *Lester* defendants, like the *Thompson* plaintiffs, argued that a comparative fault instruction must be given in all cases in which the evidence showed fault may be attributed to more than one party, regardless of whether comparative fault had been pled. *Lester*, 850 S.W.2d at 867. The *Lester* court explicitly rejected the notion that comparative fault is anything other than an affirmative defense that must be pled by the defendant:

In our view, a plaintiff's comparative fault is a defense to defendant's liability just as contributory negligence, prior to *Gustafson*, was a defense to defendant's liability.

...

Although we acknowledge that comparative fault was designed to apportion fault rather than to operate as a complete defense, the obligation to plead affirmative defenses ought not be limited to complete defenses.

Id. at 868. The *Thompson* court's holding to the contrary is erroneous and should not be adopted by this Court or applied to this case.

D. Comparative Fault Was Not Tried By Implied Consent

Lester identified only one exception to its clear rule: a comparative fault instruction may be given where comparative fault is tried by the "express or implied consent of the parties" pursuant to Rule 55.33(b). 850 S.W.2d at 868-69. That did not happen here. "It is well settled that evidence will give rise to an amendment of pleadings by implied consent *only* when it bears *solely* on the proposed new issue and is not relevant to some other issue already in the case." *Id.* at 869 (emphasis added) (citations omitted). B&W introduced evidence relating to Mrs. Smith that — directly rebutted *prima facie* elements of plaintiffs' claims. For example, evidence of Mrs. Smith's smoking history rebutted essential elements of plaintiffs' failure-to-warn claims, including the requirement that defendant's failure to warn was both the cause-in-fact and the proximate cause of the injury. Evidence that Mrs. Smith continued to smoke despite

federal health warnings and other awareness was directly relevant to rebut the causation element of plaintiffs' failure-to-warn claims as well as whether there was any duty to warn at all — disputed elements of plaintiffs' claims.¹⁹ Evidence that Mrs. Smith smoked for reasons having nothing to do with nicotine or addiction (Supp. L.F. 1857, 1884) rebutted plaintiffs' assertion that she was addicted. Because none of B&W's evidence related *solely* to comparative fault, B&W cannot be held to have given its implied consent to trying that issue.

Notwithstanding the clear holding of *Lester*, the *Thompson* court stated a less stringent test for determining when comparative fault may be submitted when not pled: “Although a defendant may withdraw an affirmative defense, once the issue of a plaintiff's fault has been injected into the case by substantial evidence, the plaintiff may still request an instruction on comparative fault.” 207 S.W.3d at 123. Applying that test, the *Thompson* Court reviewed the evidence at trial only to see whether it supported a comparative fault defense, not to determine whether that evidence was relevant to the other issues in the case. *Id.* at 123-24.

¹⁹Evidence of Mrs. Smith's choice to smoke also went directly to the materiality and causation elements of plaintiffs' fraudulent concealment claim. *See* MAI 23.05. The fact that the jury found for B&W on plaintiffs' concealment claim and apparently agreed that no purported concealment was material to Mrs. Smith is indicative of the relevance of evidence introduced by B&W about influences other than warnings on Mrs. Smith's smoking decisions.

No justification exists for applying a less stringent standard than that set forth in *Lester* for determining when to submit comparative fault to the jury even though it has not been pled. The purpose of the standard is to determine when an issue has been tried by implied consent of the parties so that the pleadings may be deemed amended pursuant to Rule 55.33(b). If a party introduces or fails to object to evidence that is relevant to an issue already in the case, he cannot thereby be said to have consented to amending the pleadings to raise some other issue. See *Heritage Roofing, LLC v. Fischer*, 164 S.W.3d 128, 132-33 (Mo. App. E.D. 2005).

Application of the standard as stated in *Thompson* would result in inserting comparative fault into virtually every negligence and product liability case, whether or not it had been pled. As demonstrated by the discussion above, the plaintiff's conduct is relevant to whether the plaintiff's alleged injuries were caused by the defendant's conduct or product or by some other cause. Similarly, in failure to warn cases the plaintiff has the burden of proving that an additional warning would provide additional information, and the defendant should be entitled to present rebuttal evidence concerning the plaintiff's knowledge without being charged with impliedly consenting to the trial of issues not pled.

The *Thompson* court relied on *Earll* to support application of the test that it applied. As stated above, however, *Earll* involved a very different situation: the defendant had asserted comparative fault as an affirmative defense and never withdrew or abandoned it. Thus, *Earll* presented no issue of implied consent to amendment of the pleadings; no implied consent was necessary because the defense had already been pled.

Earll is therefore distinguishable and inapplicable, and provides no support for disregarding this Court's plain holding in *Lester*.

For all of these reasons, the trial court's submission of a comparative fault instruction despite B&W's abandonment of that defense before trial was error and requires a new trial.

E. Submission Of Comparative Fault Over B&W's Objection Was Prejudicial Error

The erroneous imposition of comparative fault against B&W's wishes thus clearly prejudiced B&W and merits a new trial. In particular, "[w]hen an erroneous instruction is given and the trial results in favor of the party at whose instance it was given" — as is the case here — "*the presumption is that the error was prejudicial.*" *Grindstaff*, 655 S.W.2d at 74 (emphasis added) (quotation omitted) (collecting citations). Plaintiffs bore the burden of proving that it was "more likely to be true than not true" that B&W's actions and product caused Mrs. Smith's injuries. Here, plaintiffs' counsel conceded that had plaintiffs not been allowed to submit comparative fault, "it would have been a defense verdict." (T. 3430) In any event, the trial court's decision to defer its ruling on comparative fault until the close of the evidence and then to permit plaintiffs unilaterally to inject comparative fault into the case was prejudicial to B&W. B&W would have sought to establish at trial and in argument that she was even more at fault than the 75% fault found by the jury.

The comparative fault instruction erroneously altered the contours of the case at the close of evidence after it was too late for B&W to adjust its strategy to argue the fault of Mrs. Smith. This prejudicial instructional error entitles B&W to a new trial.

VII. THE TRIAL COURT ERRED IN DENYING B&W'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON PUNITIVE DAMAGES, BECAUSE PLAINTIFFS FAILED TO PRESENT THE CLEAR AND CONVINCING EVIDENCE REQUIRED TO MAKE A SUBMISSIBLE CASE ON THAT ISSUE, IN THAT THE EVIDENCE DID NOT SHOW THAT B&W'S CONDUCT THAT ALLEGEDLY CAUSED MRS. SMITH'S DEATH WAS TANTAMOUNT TO INTENTIONAL WRONGDOING.

Reversal on any of Points I-VI also requires reversal of the punitive damages award. Aside from the trial court's reversible errors with regard to the jury's finding of liability and award of compensatory damages against B&W, plaintiffs failed to make a submissible case for punitive damages because plaintiffs failed to show by clear and convincing evidence that B&W's conduct was so egregious that it was tantamount to intentional wrongdoing. Therefore, the punitive damage award should be vacated.

A. Standard Of Review

Whether the evidence offered at trial was sufficient for an award of punitive damages is a question of law. *Peters v. General Motors Corp.*, 200 S.W.3d 1, 24 (Mo. App. W.D. 2006). Appellate authority reviews all the evidence and reasonable inferences therefrom in a light most favorable to the jury's verdict, disregarding evidence

to the contrary. *Seitz v. Lemay Bank & Trust Co.*, 959 S.W.2d 458, 461 (Mo. banc 1998). Missing evidence is not supplied, and the plaintiff is not granted unreasonable, speculative, or forced inferences. *Peters*, 200 S.W.3d at 24; *Steward v. Goetz*, 945 S.W.2d 520, 528 (Mo. App. E.D. 1997). “The evidence and inferences must establish every element and not leave any issue to speculation.” *Id.* (citation omitted).

With respect to punitive damages in particular, “careful judicial scrutiny is needed to determine whether the conduct was so egregious that it was ‘tantamount to intentional wrongdoing.’” *Alcorn v. Union Pacific R.R. Co.*, 50 S.W.3d 226, 248 (Mo. banc 2001) (quoting *Lopez v. Three Rivers Electric Cooperative*, 26 S.W.3d 151, 160 (Mo. banc 2000)). The imposition of punitive damages implicates both procedural and substantive Fourteenth Amendment due process concerns because an award of punitive damages is an exercise of state power. *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 434-35 (1994); *Peters*, 200 S.W.3d at 25.

B. Plaintiffs Failed To Show By Clear And Convincing Evidence That B&W’s Conduct Was Tantamount To Intentional Wrongdoing

1. A Heightened Standard Applies When Testing The Sufficiency Evidence in Support Of Punitive Damages.

The trial court instructed the jury to respond to three verdict directors: one for the claim of fraudulent concealment; one for the claim of conspiracy; and a third that combined the failure-to-warn and design defect claims. (L.F. 1419-20). The jury found for B&W on each of plaintiffs’ intentional tort claims. *Id.* Its verdict establishes that the jury rejected plaintiffs’ evidence offered to prove that B&W intentionally concealed from

Mrs. Smith the health risks of smoking or conspired with others to do so. (L.F. 1386-87; 1419)²⁰ The jury returned a plaintiffs' verdict on only the combined failure-to-warn and design defect claims. (L.F. 1419-20) Because the trial court failed to properly instruct the jury or to use a proper verdict form, it is impossible to know whether one or more of these claims led to the jury's verdict. The jury also concluded that Mrs. Smith was three times more culpable than B&W, assigning 75% fault to her and 25% to B&W, on the negligence and/or strict liability claims. *Id.*

“Ordinarily [exemplary] damages are not recoverable in actions for negligence, because negligence, a mere omission of the duty to exercise care, is the antithesis of willful or intentional conduct.” *Peters*, 200 S.W.3d at 24 (quoting *Hoover's Dairy Inc. v. Mid-America Dairymen, Inc.*, 700 S.W.2d 426, 435 (Mo. banc 1985) (quotation and citation omitted)). Punitive damages are properly submitted in a strict liability case only if there is clear and convincing evidence that defendants “placed in commerce an unreasonably dangerous product with actual knowledge of the product's defect.” *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155, 164-65 (Mo. App. W.D. 1997).

Clear and convincing evidence of this culpable mental state is required because a “[p]laintiff must prove that defendant's evil hand was guided by an evil mind.” *Burnett v. Griffith*, 769 S.W.2d 780, 787 (Mo. banc 1989). “Punitive damages are appropriate [therefore,] only when the defendant's conduct is outrageous due to evil

²⁰ Plaintiffs did not claim that B&W made any fraudulent misrepresentations to Mrs. Smith.

motive or reckless indifference to the rights of others . . . which must be proven by clear and convincing evidence.” *Peters*, 200 S.W.3d at 24; *Blue v.*

Harrah’s North Kansas City, LLC, 170 S.W.3d 466, 477 (Mo. App. W.D. 2005). *Peters*, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), summarized this exacting standard:

The circuit court must determine whether the evidence . . . is sufficient to permit a reasonable juror to conclude that the plaintiff established with convincing clarity — that is, that it was highly probable — that the defendants’ conduct was outrageous because of evil motive or reckless indifference.

Id. at 25-26.

In *Peters*, the court also emphasized that, because punitive damages are “harsh,” they should be reserved for “extraordinary” cases and “applied only sparingly.” *Peters*, 200 S.W.3d at 25 (citing *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996)). The clear and convincing evidence requirement is an exacting one in reviewing the submissibility of punitive damages: the Court “must scrutinize the evidence in much closer detail than it does in which the standard of proof is a mere preponderance.” *Peters*, 200 S.W.3d at 25; *Lopez-Vizcaino v. Action Bail Bonds, Inc.*, 3 S.W.3d 891, 893 (Mo. App. W.D. 1999). The higher standard of proof requires evidence “which instantly tilts the scales in the affirmance when weighed against evidence in opposition.” *Peters*, 200 S.W.3d at 25; *Lewis v. FAG Bearings Corp.*, 5 S.W.3d 579, 583 (Mo. App. S.D. 1999).

2. The Evidence Showed That Cigarettes Are Legal And Regulated Health Risks.

That cigarettes present inherent health risks has been part of the fabric of the law regarding cigarettes for decades. During the entire time Mrs. Smith smoked, the manufacture and sale of Kool cigarettes was legal in Missouri and throughout the United States, despite the health risks to smokers. *See* 15 U.S.C. § 1332(1)(A) (2002); § 149.011(2), R.S.Mo. (2000). As discussed above, since 1966, the government has mandated health warnings on all cigarette packages that were adequate to inform Mrs. Smith of all of the health risks of smoking. 15 U.S.C. § 1333(a)(1) (1965). During the entire time that Mrs. Smith smoked, the only reported case involving personal injury from smoking cigarettes held that there was no liability under Missouri law. *See Ross v. Philip Morris & Co.*, 328 F.2d 3 (8th Cir. 1964).

Although Missouri law on products liability has evolved since then, the result in *Ross* demonstrates that B&W was not acting maliciously or recklessly in selling cigarettes. For example, in 1965, the American Law Institute adopted Section 402A and Comment i thereto citing cigarettes as an example of a product that is not unreasonably dangerous or defective simply because, as constituted, it contains unalterable health risks:

Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption . . . That is not what is meant by “unreasonably dangerous” in this Section . . . *Good tobacco is not unreasonably dangerous*

merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous.

RESTATEMENT (SECOND) OF TORTS § 402A (1965), cmt. i (emphasis added). Missouri adopted 402A as its law just a few years later. *See Keener v. Dayton Elec. Mfg. Co.*, 445 S.W.2d 362 (Mo. 1969). Courts elsewhere, even in very recent years, have dismissed the vast majority of product liability cases involving cigarettes before trial.²¹

²¹ Courts across the country have variously rejected claims similar to those here because the health risks are well known (*Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 172 (5th Cir. 1996)), defendant's failure to warn did not cause the smokers any injury (*Waterhouse v. R.J. Reynolds Tobacco Co.*, 368 F. Supp. 2d 432, 438 (D. Md. 2005), *aff'd*, 162 Fed. Appx. 231 (4th Cir. 2006)), or plaintiffs failed to allege or prove any specific defect in the particular brand of cigarettes (*Johnson v. Brown & Williamson Tobacco Corp.*, 345 F. Supp. 2d 16, 20-21 (D. Mass. 2004); *Conley v. R.J. Reynolds Tobacco Co.*, 286 F. Supp. 2d 1097, 1109 (N.D. Cal. 2002); *Hite v. R.J. Reynolds Tobacco Co.*, 578 A.2d 417, 421 (Pa. Super. 1990)). Also, most courts have rejected such claims by applying the common-sense notion that the public has long been aware of health risks of smoking. As one court put it:

[S]ince 1965 all cigarette packaging has contained a rather sinister Surgeon General's warning. Many people have moderated or terminated their cigarette smoking as a result.

Thus, B&W had a good faith basis to believe that, in selling ordinary, unadulterated cigarettes, it was acting in a lawful and proper manner.

There was no evidence that B&W knowingly violated a “statute, regulation or clear industry standard designed to prevent the type of injury that occurred.” *Alcorn*, 50 S.W.3d at 248. To the contrary, the evidence is that all cigarettes sold by B&W contained the federally-mandated health-warnings and B&W complied with the federal government’s extensive regulations on cigarette advertising and marketing since their inception over 40 years ago in 1996. This compliance with applicable law is a factor weighing against the submission of punitive damages. *Id.*

Moreover, this Court has held that in order to support a claim for punitive damages, a defendant’s conduct must have been “tantamount to intentional wrongdoing.” *Peters*, 200 S.W.3d at 24. The jury’s verdict here supports the opposite conclusion. The jury found in favor of B&W on the *intentional* tort counts — fraudulent concealment and conspiracy. (L.F. 1419) The jury’s assessment of 75% fault to Mrs. Smith, and only 25% fault to B&W, also weighs heavily toward an award of punitive damages. *Alcorn*, 50 S.W.3d at 248 (a mitigating factor is if “the injurious event was unlikely to have occurred absent negligence on the part of someone other than the defendant.”). *Id.*; *see*

Those who have continued to smoke, the law deems, have
done so, however tragically, at their own risk.

Johnson v. Philip Morris, 159 F. Supp. 2d 950, 953 (S.D. Tex. 2001).

also *Werremeyer v. K.C. Auto Salvage Co.*, 134 S.W.3d 633, 636 (Mo. banc 2004) (citing the “comparative negligence” of the plaintiff as a mitigating factor).²²

Finally, to the extent that the jury based its finding of aggravating circumstances on failure to warn, the conduct occurred more than 35 years ago, followed by 35 years of undisputed compliance with the federally-mandated health warning requirements that are legally adequate as a matter of law to inform smokers of *all* health risks of smoking. *See* 15 U.S.C. § 1331(1) (2002) (the warning label ensures that “the public may be adequately informed about any adverse health effects of smoking”). B&W’s full compliance with federal law is a factor that also weighs against submission of punitive damages. *Alcorn*, 50 S.W.3d at 248. In *Alcorn*, this Court concluded that, even though a railroad may have been negligent in failing to upgrade a crossing and did not meet any industry standard, submission of punitive damages was not warranted: “[C]onformity with the regulatory process *does* negate the conclusion that the railroad’s conduct was tantamount to intentional wrongdoing.” *Id.* at 249 (emphasis added).

²² In *Alcorn*, this Court noted that, like here, only 25% of the fault for the personal injuries was attributed to defendant and suggested that this might weigh against submission of punitive damages, but did not decide the issue because it was not argued by defendant. *See Alcorn*, 50 S.W.3d at 248, n.22.

3. The Evidence On The Design Defect Claims Was Insufficient To Submit On Punitive Damages.

The evidence showed and B&W did not contest that smoking cigarettes, as a generic product, causes serious illness.²³ Plaintiffs affirmatively and expressly established that there was nothing about the design of Kool cigarettes that distinguished them from other ordinary cigarettes in terms of their danger to a smoker's health. The evidence was uncontroverted that there is no safe cigarette design and no safe level of consumption of any cigarettes, regardless of brand. Plaintiffs' only witnesses on cigarette design, Dr. Wigand and Dr. Burns, agreed on this point. Wigand was adamant: "There is no such thing as a safe cigarette." (T. 1455). So was Burns: "There's no safe cigarette and there's no safe level of consumption." (T. 2065) Wigand also agreed that neither the U.S. Public Health Service nor the Surgeon General has ever identified *any* cigarette design, even a theoretical one, that would be safer to smoke. (T. 1248-49)

There was evidence regarding past efforts by tobacco companies to develop and market radically-altered designs to address health risks, such as zero or extremely low tar products. The evidence in this regard was aptly summarized by the majority opinion below. *Smith II. Id.* at *56-*57. The evidence showed, however, that those efforts failed

²³ To be clear, B&W *did* contest whether cigarette smoking caused Mrs. Smith's fatal heart attack in 2000 at age 73, ten years after she had quit smoking, based on her significant risk factors for heart disease that are unrelated to cigarette smoking, including age, overweight, and hyperlipidemia.

in the laboratory or in the market; that no regulatory official or scientific authority ever concluded that any of them was safer to smoke; and that even today, every cigarette brand, style, and design on the market carries the government-mandated health warnings and not one of them is adjudged by any health authority as safer to smoke than any other.²⁴ *Id.*

Therefore, no reasonable jury could conclude that B&W designed Kool cigarettes with an outrageous or evil intent to cause Mrs. Smith's death.²⁵ Plaintiffs' evidence conclusively established that being in the cigarette business necessarily entails

²⁴ Though lacking personal knowledge, Dr. Burns claimed that in the 1970s a B&W employee threatened a competitor to discourage it from marketing a potentially safer cigarette design. (T. 1878) According to Dr. Burns, however, that design would *not* have reduced health risks at all. (T. 2064-65) Though the particulars of the design were in the 1970s and are today public information, no public health authority has endorsed the design as safer. Dr. Wigand claimed that B&W used menthol to mask the harshness of Kool smoke and to permit deeper inhalation. (T. 1166). But, like Dr. Burns, Dr. Wigand refused to say that removing menthol from Kool would ameliorate its health risks in any way. Thus, even viewed most favorably to plaintiffs, this evidence does not support a punitive damage award.

²⁵ Because the plaintiffs' verdict was given in a verdict director combining the failure-to-warn and design defect claims, it is impossible to tell which claim or claims provided the basis for the punitive damages award.

manufacturing a product with health risks that cannot be eliminated or diminished by any known design change. Similarly, the law recognizes that these health risks and, rather than banning cigarettes altogether, both the Missouri Legislature and the federal government strictly regulate the marketing of cigarettes and require specific health warnings. The evidence is insufficient to support a punitive damages finding of “aggravating circumstances” necessary to award punitive damages.

4. The Evidence On The Failure-To-Warn Claim Was Also Insufficient To Submit On Punitive Damages.

If the jury’s punitive damages award arose from a finding that B&W failed to warn Mrs. Smith before 1969, there is no evidence, much less clear and convincing evidence, that B&W intended wrongfully or with an “evil mind” to keep a warning from Mrs. Smith. It is uncontested that Mrs. Smith paid no attention to warnings and that she could think of nothing that anyone could have said to her that would have caused her to quit smoking. (Supp. L.F. 1838) She admitted that she could not recall nor identify anything B&W or any cigarette company ever said about the health effects of smoking and that she never heard of the industry’s trade association or its research funding organization, the Council for Tobacco Research. (Supp. L.F. 1856-57) Pre-1969 advertisements for Kool cigarettes were admitted into evidence, but plaintiffs stipulated, consistent with Mrs. Smith’s own testimony, that Mrs. Smith neither saw nor relied on any of them. (T. 905-06) The same is true for the “Frank Statement to Cigarette Smokers” (PX-148.1, Appendix at A78), an issue advertisement published on one day in

1954, which Mrs. Smith never saw. *Id.* This pre-1969 evidence says nothing about B&W's state of mind regarding whether to warn Mrs. Smith.

Other evidence from before 1969 was admitted to show what B&W knew about the health risks of smoking. It shows that B&W was aware of published and unpublished scientific information about the health risks of smoking and that at various times B&W debated the significance of some of the research and challenged government reports about the state of science. As the majority opinion in the court of appeals correctly concluded: "no evidence was presented suggesting that B&W was insincere in this denial." *Smith II.* at *54. Instead, plaintiffs argued that this evidence proved that B&W knew more about the health risks of smoking than did smokers like Mrs. Smith but that B&W *intentionally* withheld it from her. (T. 3002) But the jury rejected the concealment claim in its verdict for B&W. (L.F. 1419-20) Moreover, no evidence was presented regarding what kind of warning could have or should have been given before 1969.

Absent *any* evidence, much less clear and convincing evidence, that B&W intentionally withheld any warning that would have changed Mrs. Smith's smoking decisions, it cannot properly be concluded that lack of warnings about the health risks of smoking before 1969 arose from any "evil motive" or intentionally wrongful conduct by B&W. Accordingly, plaintiffs failed to make a submissible case under the clear and convincing evidence standard to support punitive damages for their failure-to-warn claim.

This Court should reverse the punitive damages judgment and enter judgment for B&W on plaintiffs' punitive damages claim. But in any event, because the failure-to-warn and design claims were submitted to the jury together in one verdict

director (L.F. 1419), if the evidence on either theory is insufficient to equal clear and convincing evidence, the punitive damages award must be set aside. *Coggins*, 37 S.W.3d at 342.

VIII. THE TRIAL COURT ERRED IN DENYING B&W'S MOTION FOR NEW TRIAL ON PUNITIVE DAMAGES, BECAUSE THE SCOPE OF THE EVIDENCE IT PERMITTED THE JURY TO CONSIDER ON THE ISSUE VIOLATED B&W'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION IN, THAT IT ADMITTED EVIDENCE CONCERNING B&W'S CONDUCT THAT HAD NO NEXUS TO MRS. SMITH'S INJURIES.

The trial court also committed several due process violations with respect to punitive damages in admitting evidence that is constitutionally prohibited under *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), and *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007). The trial court erroneously admitted evidence in Phase I of the trial, in which the jury determined liability for punitive damages, and then erroneously allowed the jury to consider this evidence (along with other newly but erroneously admitted evidence) in Phase II of the trial, which was limited to determining the amount of punitive damages.

The trial court violated *State Farm's* prohibition on basing a punitive damages decision on "out-of-state conduct" that has "no nexus to the specific harm suffered by the plaintiff." 538 U.S. at 420-21. Plaintiffs (1) presented old documents from a foreign company that was an indirect affiliate of B&W that played no role in designing or

marketing of the Kool cigarettes that Mrs. Smith smoked; (2) presented old documents regarding advice British lawyers gave to this foreign entity; (3) presented an old position statement of B&W and others published in newspapers more than 50 years ago that Mrs. Smith never saw; and (4) repeatedly played an old and undated domestic Kool advertisement that Mrs. Smith never saw.

Plaintiffs also presented evidence of alleged harm to others, including estimates that B&W's conduct (not based on the design or marketing of Kool cigarettes) resulted in the deaths of 10,000 Missourians who were not parties and who were not before the court. Then, in contravention of the express holding of the Supreme Court's recent decision in *Williams* and the standards set previously in *State Farm*, plaintiffs urged the jury to base the *amount* of its punitive damages award on this asserted harm to others.

The admission of this evidence for purposes of awarding punitive damages requires reversal for a new trial.

A. Standard of Review

“When punitive damages are awarded by a jury, both the trial court . . . and the appellate court review the award to ensure that it is not an abuse of discretion.” *Call v. Heard*, 925 S.W.2d 840, 849 (Mo. banc 1996); *see also Barnett v. La Societe Anonyme Turbomeca France*, 963 S.W.2d 639, 661 (Mo. App. W.D. 1997) (same). When constitutional violations are involved, “exacting appellate review” is required to ensure “that an award of punitive damages is based on an ‘application of law, rather than a decision maker’s caprice’” or other constitutionally impermissible evidence.

State Farm, 538 U.S. at 418.

B. The Jury Was Erroneously Presented Constitutionally Impermissible Evidence To Decide Whether There Were Aggravating Circumstances And Then To Determine The Amount Of Any Punitive Damages

During Phase I of the trial — in which the jury determined B&W’s liability for both compensatory and punitive damages and the amount of compensatory damages (but not the amount of punitive damages) — plaintiffs urged the jury to find aggravating circumstances entitling them to punitive damages based on constitutionally impermissible evidence. Then, during Phase II of the trial — which was limited to determining the amount of punitive damages — plaintiffs’ counsel urged the jury to use that impermissible evidence in setting the amount of punitive damages. The admission of this evidence for use in assessing punitive damages requires reversal under the Supreme Court’s decisions in *State Farm* and *Williams*.

In *State Farm*, the Supreme Court held that only evidence with a “nexus to the specific harm suffered by the plaintiff” may be used without compromising the defendant’s due process rights. *State Farm*, 538 U.S. at 422. Specifically, *State Farm* held that it violates due process to permit a jury to award punitive damages based on conduct that: (1) occurred outside of the state under whose law the punitive damages are assessed; and (2) is unlike the conduct for which the defendant was found liable. *Id.* at 421-22. “These limits are imposed because a defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.” *Id.*

After the trial and briefing and argument in this case in the court of appeals, the Supreme Court decided *Williams*, holding that “a jury may not . . . use a punitive

damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.” *Williams*, 127 S. Ct. at 1064. *Williams*, like this case, was a personal injury action brought on behalf of a deceased smoker alleging, among other claims, negligence against a cigarette manufacturer. *Id.* at 1060-61. The *Williams* court described the reasons that the Due Process Clause prohibits states from using harm to “strangers to the litigation” (*i.e.*, other smokers not before the court) in setting the amount of punitive damages awards:

In our view, the Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation. For one thing, the Due Process Clause prohibits a State from punishing an individual without first providing that individual with “an opportunity to present every available defense.” Yet a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant’s statements to the contrary.

For another, to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer — risks of arbitrariness, uncertainty and lack of notice — will be magnified.

Id. at 1063 (citations omitted).

The trial court committed constitutional error by admitting and permitting plaintiffs to rely upon evidence that runs afoul of these constitutional limitations. For example, plaintiffs relied heavily on a 1954 position statement (PX-148.1, Appendix at A78) sponsored by the major cigarette manufacturers that discussed the then-recent studies linking cigarette smoking to lung cancer. The statement ran in newspapers more than 50 years ago. Moreover, *plaintiffs stipulated that Mrs. Smith never saw or read the statement!* (T. 905-06) Plaintiffs also repeatedly played an old television ad for Kool cigarettes (PX-150.1) without presenting evidence of when or where it ran or that any smoker of B&W cigarettes in Missouri or elsewhere ever saw it, let alone made any smoking decisions based on it. They also stipulated that Mrs. Smith never saw this or any other ad for Kool cigarettes. (T. 905-06) Thus, under *State Farm*, this evidence

should have been excluded because it had no nexus to Mrs. Smith or her smoking decisions.

Plaintiffs also relied on a hearsay statement that a disgruntled, fired employee claimed that a former B&W CEO made (“hook ‘em young, hook ‘em for life”) when Mrs. Smith was in her sixties, at about the time she quit smoking in 1990. (T. 929-30, 962-63) Moreover, the statement (according to plaintiffs’ own witness) related to “moist snuff” — not cigarettes, and certainly not Kool cigarettes. (T. 1020) In short, the statement had nothing to do with Mrs. Smith’s injuries or personal smoking history and should not have been admitted. Plaintiffs’ counsel repeated this irrelevant, and highly inflammatory, statement in closing argument in urging the jury to find B&W liable for both compensatory and punitive damages. (T. 3022, 3122)

Plaintiffs also used a 1977 document from the files of British-American Tobacco Company (“BATCo.”), a British company owned by the then-parent of B&W,²⁶ that discussed the “Herzfeld Index.” (PX-270, Appendix at A74-A82) Plaintiffs did not establish the origin or significance of this document, but it apparently was developed by the Swiss Government and plaintiffs argued that it calculated the “cost” of deaths from cigarette smoking. There was no evidence linking this document to B&W or anything B&W did or did not do, let alone to its purported failure to warn before 1969, or to the design of Kool cigarettes. Plaintiffs’ counsel repeatedly referred to the “Herzfeld Index” in closing and in seeking \$200 million in punitive damages. (T. 3038, 3321) But, in

²⁶ BATCo. and B&W were separate companies that shared a common parent. (T. 2150)

State Farm, the United States Supreme Court admonished trial courts to exclude this kind of inflammatory, extra-territorial evidence because it suggests to the jury that it can consider evidence unrelated to any conduct of the defendant directed toward the plaintiff. 538 U.S. at 422-23. Here, the error is even more egregious than that addressed in *State Farm* because the evidence related to a *non-party* located outside of the United States that had no connection to Mrs. Smith or any other Missouri smoker.

A 1984 document (PX-391, Appendix at A83-A85) from 1984 that was located in B&W's files also discussed the "Herzfeld Index," but its origin was never explained. Indeed, the corporate positions and affiliations of the author and the recipients were never identified, and the purpose or significance of the document was never explained. Moreover, like the other "Herzfeld" document, this document does not even mention Kool cigarettes, let alone any purported flaw in their design or anything whatsoever to do with their marketing. Neither did plaintiffs link these documents to any harm to Mrs. Smith. Furthermore, they offered no evidence of the purported effect the Herzfeld Index would have had on Mrs. Smith had she known of it. This evidence from outside the United States was, in short, totally unconnected to Mrs. Smith. It strains credulity to contend that either of the "Herzfeld" documents had any effect whatsoever on any smoker or had any relationship to the design or marketing of Kool cigarettes. These documents should not have been admitted.

Similarly, plaintiffs offered a document authored by *British* lawyers representing *BATCo*. who had no connection to B&W. (PX-402, Appendix at A86-A90) This document was evidently produced by *BATCo*. in some other unidentified litigation in

discovery. There was no evidence that B&W received the document or took any action or inaction in response to it. It is a memo by a British lawyer, who does not and never has represented B&W, describing a meeting with BATCo. in London that was not attended by and did not involve anyone from B&W. Nonetheless, the trial court admitted this irrelevant hearsay document and permitted plaintiffs' counsel to read to the jury comments by the British lawyer referring to purported destruction of documents in England to protect BATCo. in litigation. (T. 2365-74) Once again, this document was not tied to B&W and certainly not to Mrs. Smith or the marketing or design of Kool cigarettes. These documents are prime examples of an attempt to punish B&W, not for the conduct injuring plaintiff, but for generalized bad conduct *by someone other than B&W*. *State Farm* expressly prohibits this kind of attack on a corporation. 528 U.S. at 423 ("A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.").

Plaintiffs, remarkably, relied on cigarette advertisements and statements made by B&W a half-century ago but *stipulated* that Mrs. Smith never heard or saw any of them. Furthermore, there were no claims for affirmative fraud or misrepresentation in the case. In any event, there certainly was no evidence that any smokers in Missouri saw these half-century old statements, let alone that they took any action in reliance thereon at the time or that decades later they were still making smoking decisions based on them. This evidence is completely untethered to Mrs. Smith or the circumstances of this case.

Plaintiffs instead have sought to justify the admission of this evidence as part of an effort by B&W to conceal the dangers of Kool cigarettes. But, in the liability phase of

the trial (Phase I), the jury found against plaintiffs on their concealment claim, so this evidence has nothing to do with the claims for design defect or failure to warn that were the only claims submitted to the jury as a possible basis for punitive damages.

State Farm's constitutional limitations prohibit this type of evidentiary free-for-all. *See State Farm*, 538 U.S. at 423 (“Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of the reprehensibility analysis. . . .”).

There is, in short, no nexus between any purported statements by B&W and Mrs. Smith. Furthermore, even if this evidence — most of it related to out-of-state conduct and none of it sufficiently connected (by plaintiffs’ stipulations and admissions) to Mrs. Smith — could be considered constitutionally permissible in Phase I to assess the question of liability for punitive damages (which it clearly was not), none of this evidence should have been permitted to be used in Phase II, which was limited to determining the amount of punitive damages. *See Williams*, 127 S. Ct. at 1063. Yet, plaintiff’s counsel expressly relied on this evidence — including, in particular, the 1954 position statement and the “Herzfeld Index” — in arguing to the jury in Phase II that the jury should base the amount of its punitive award on it. (T. 3321-22) Also in Phase II, plaintiffs were allowed to introduce, and then argue to the jury, evidence that B&W’s conduct allegedly resulted in the deaths of 10,000 Missourians, which indisputably was nothing but evidence of alleged harms to nonparties to this litigation. (T. 3244-47, 3267-68, 3275-76, 3292-94, 3300-02, 3318-23, 3348-49) Lacking any nexus to Mrs. Smith and the alleged harm caused to her, all of this evidence amounted to the very

kind of evidence of alleged harm to others that *Williams* expressly forbids a jury to use in awarding punitive damages “to punish a defendant directly on account of harms it is alleged to have visited on nonparties.” *Williams*, 127 S. Ct. at 1064.

Individually and collectively, the admission and use of plaintiffs’ constitutionally impermissible evidence constitutes reversible error and requires, at a minimum, a new trial on punitive damages.

IX. THE TRIAL COURT ERRED IN DENYING B&W’S MOTION FOR NEW TRIAL ON PUNITIVE DAMAGES, BECAUSE THE JURY INSTRUCTIONS VIOLATED B&W’S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION, IN THAT THE COURT REFUSED TO INSTRUCT THE JURY THAT (A) IT COULD NOT CONSIDER EVIDENCE OF B&W’S OUT-OF-STATE CONDUCT; (B) IT COULD NOT AWARD AN AMOUNT OF PUNITIVE DAMAGES THAT DOES NOT BEAR A REASONABLE RELATIONSHIP OR PROPORTION TO THE INJURY ACTUALLY CAUSED TO PLAINTIFFS; AND (C) IT COULD NOT CONSIDER EVIDENCE OF B&W’S CONDUCT THAT DID NOT CAUSE INJURY TO PLAINTIFFS OR THAT MAY HAVE CAUSED INJURY TO PERSONS OTHER THAN PLAINTIFFS.

A. Standard Of Review

In reviewing jury instructions for compliance with the Due Process Clause, the Court conducts an exacting *de novo* review. *State Farm*, 538 U.S. at 418, 422; *Alcorn v.*

Union Pacific R.R. Co., 50 S.W.3d 226, 247 (Mo. banc 2001) (“Submission of a punitive damages claim to the jury warrants special judicial scrutiny because the instructional standards for punitive damages are necessarily general.”). Claims of instructional error present questions of law that are reviewed *de novo*. *Mehrer v. Diagnostic Imaging Ctr., P.C.*, 157 S.W.3d 315, 323 (Mo. App. W.D. 2005) (citing *Harvey v. Washington*, 95 S.W.3d 93, 97 (Mo. banc 2003)).

B. Refusal To Submit B&W’s Proposed Instructions Regarding Punitive Damages Violated Due Process

The trial court violated B&W’s due process rights by refusing to submit instructions to the jury mandated by the United States Constitution in both phases of the trial. This refusal violated B&W’s due process rights and independently requires reversal for a new trial. Indeed, the United States Supreme Court’s decisions in *State Farm* and *Williams* mandate reversal based on the trial court’s refusal to give the requested instructions in Phase I regarding B&W’s alleged liability for punitive damages and in Phase II that was limited to determining the amount of punitive damages. *Williams* and *State Farm* establish that B&W’s requested instructions (L.F. 1451-1467; *see also* T. 3216-23, 3231-32, 3305-10) were required by due process to insure that the jury did not base its punitive damages award on constitutionally prohibited evidence or considerations.

State Farm set forth several “procedural and substantive constitutional limitations” on punitive damage awards and mandated that a jury cannot award punitive damages based on:

- “evidence of out-of-state conduct . . . that was lawful in the jurisdiction where it occurred”; or
- evidence of other conduct that did not affect the plaintiff and was not “similar to that which harmed them” and thus has no “nexus to the specific harm suffered by the plaintiff.”

538 U.S. at 416, 422-24. *State Farm* expressly held that “[a] jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.” *Id.* at 422 (emphasis added). This instruction is required because “[i]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of the State.” *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) (quoted with approval in *State Farm*, 538 U.S. at 421).

In *Williams*, the Supreme Court expressly held that a jury may *not* base an award of punitive damages on evidence of alleged injury to “strangers to the litigation” and that courts are required — as a matter of federal constitutional law — to provide protection against using such evidence to punish the defendant. 127 S. Ct. at 1063-65. *Williams* held that the Due Process Clause does not permit a jury to base an award of punitive damages “in part upon its desire to *punish* the defendant for harming persons who are not before the court (*e.g.*, victims whom the parties do not represent).” *Id.* at 1060. The Supreme Court clearly and expressly concluded that a jury may not “use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.” *Id.* at 1064. Therefore, the holding of *Williams* mandates, as a matter of due process, that “juries receive proper instruction on harm to nonparties.”

White v. Ford Motor Co., No. 05-15655, 2007 U.S. App. LEXIS 20724, at *24 (9th Cir. Aug. 30, 2007) (applying *Williams*, 127 S. Ct. at 1063-65).

In Phase I, B&W requested instructions mandated by *State Farm* to direct the jury's consideration regarding the existence of aggravating circumstances to find B&W liable for punitive damages:

- “The issue of defendant’s conduct that occurred outside Missouri or that did not cause injury to the plaintiffs is withdrawn from the case and you are not to consider such issues in determining whether defendant is liable for damages for aggravating circumstances.”

(L.F. 1345, Appendix at A12; *see also* T. 2984) B&W thereafter requested instructions for Phase II that set forth the due process limitations required by *State Farm* and *Williams*:

- “In determining the amount of damages for aggravating circumstances, you must not consider any evidence or argument that defendant’s conduct may have caused harm to persons other than plaintiffs” (L.F. 1459, Appendix at A18);
- “In determining the amount of damages for aggravating circumstances, you must not consider any evidence of defendant’s conduct that occurred outside Missouri or did not cause injury to plaintiffs” (L.F. 1458, Appendix at A17); and
- “The amount of damages for aggravating circumstances that you award must bear a reasonable relationship or proportion to the injury, harm or damage actually caused to the plaintiff by the defendant’s punishable misconduct.” (L.F. 1454, Appendix at A13)

See also L.F. 1455-63 (Appendix at A14-A22)). The trial court refused to give any of these instructions and instead, in Phase II, gave only two punitive damages instructions, both of which were drawn from the MAI. (T. 2976-78, 3216-23, 3231-32, 3305-10; L.F. 1401-02) The Supreme Court, however, has made unmistakably clear in *State Farm* and *Williams* that a jury cannot, as this one was allowed to, determine liability for punitive damages based on out-of-state conduct with no nexus to the plaintiffs *or* fix the amount of punitive damages based on unconstitutional considerations such as alleged harm to others and out-of-state conduct with no nexus to plaintiffs. *Williams*, 127 S. Ct. at 1063-65; *State Farm*, 538 U.S. at 422-24. Taking full advantage of the trial court's constitutional error, plaintiffs' counsel expressly asked the jury in Phase II to award punitive damages based on the purported effect of B&W's conduct on thousands of Missouri smokers over a ten-year period who were not before the court:

[A]s a cost of their business, a thousand Missourians die every year. It's just part of their business. And you've already found that they're conscious of it, and they are indifferent to it. In other words, they don't care about that. Ten thousand people died during the time that [Mrs. Smith] was sick. Ten thousand people died. Their sales are \$80 million a year. During the time that [Mrs. Smith] was sick, that's \$800 million . . . over the 10 years, over the decade, \$800 million is how much that they sold in this state. And their profit in just one year nationally is a billion dollars.

...

I'm asking you to assess the damages at \$200 million so that they will understand clearly, when they read this transcript, what you were doing; that you said we're going to take away the profit of what you did in this state for the 10 years that [Mrs. Smith] was sick.

...

[Take] away the profit from Brown & Williamson Tobacco Company because they killed 10,000 of our citizens.

(T. 3318-23; *see also* T. 3348-49) This argument was based on testimony from a medical doctor that the trial court erroneously admitted in Phase II of the trial (T. 3244-47, 3267-68, 3275-76, 3292-94, 3300-02) as well as the 1954 position statement and the "Herzfeld Index" that was constitutionally erroneously admitted into evidence in Phase I because they lacked any nexus to Mrs. Smith and were based on extraterritorial conduct. (T. 3318, 3321-22)

Plaintiffs' counsel's jury argument in Phase II in this case is remarkably similar to the jury argument made in *Williams* that led the Supreme Court to set aside the punitive damages award:

[T]hink about how many other Jesse Williams in the last 40 years in the State of Oregon there have been. . . .

In Oregon, how many people do we see outside, driving home . . . smoking cigarettes? Cigarettes . . . are going

to kill ten [of every hundred]. [And] the market share of Marlboros [*i.e.*, Philip Morris] is one-third [*i.e.*, one of every three killed].

127 S. Ct. at 1061. Under *Williams*, plaintiffs’ argument and unconstitutional evidence in Phase II of the trial require reversal of the punitive damages award. *Id.* at 1064 (“a plaintiff may show harm to others in order to demonstrate reprehensibility” but “a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.”). *Williams* held that protection such as B&W requested here is required. *Id.* at 1064-65.

Here, the evidence of alleged harm to 10,000 other Missourians is clearly constitutionally impermissible because it was presented in Phase II of the trial, dealing solely with the amount of punitive damages — not any finding of “reprehensibility.” Moreover, plaintiffs’ counsel expressly urged the jury to base the *amount* of its punitive damages award on evidence that was constitutionally impermissible for deciding liability for punitive damages (in Phase I of the trial), let alone for determining their amount in Phase II. (T. 3318, 3321-22)

The trial court erred as a matter of federal constitutional law when it did not give the jury any of the instructions required by *State Farm* and *Williams*. *See Williams*, 127 S. Ct. at 1065; *State Farm*, 538 U.S. at 418; *see also Grindstaff v. Tygett*, 655 S.W.2d 70, 74 (Mo. App. E.D. 1983) (“When an erroneous instruction is given and the trial results in favor of the party at whose instance was given, the presumption is that the error was prejudicial.” (internal quotations and citation omitted)); *Sand Hill Energy, Inc. v.*

Smith, 142 S.W.3d 153, 155-56 (Ky. 2004) (holding that refusal to give instructions required by *State Farm* is reversible error); accord *Merrick v. Paul Revere Life Ins. Co.*, Nos. 05-16380 & 05-17059, 2007 U.S. App. LEXIS 20959, at *24, *26 (9th Cir. Aug. 31, 2007) (reversing a punitive damages award where the trial court “erred in failing to instruct the jury that it could not punish the defendants for conduct that harmed only nonparties” and where, “[a]t most, [the trial court’s] instructions address[ed] liability for punitive damages but d[id] not prevent the jury from setting an amount of damages that includes direct punishment for harm to others.”); *White v. Ford Motor Co.*, No. 05-15655, 2007 U.S. App. LEXIS 20724, at *24 (9th Cir. Aug. 30, 2007) (same). Plaintiffs’ near-exclusive reliance on the constitutionally impermissible evidence in Phase II alone requires reversal of the punitive damages award and a new trial on punitive damages.

At a minimum *Williams* requires that the trial court should have provided B&W “some form of protection” against the risk of the jury punishing B&W for having purportedly caused injury to others. 127 S. Ct. at 1065; *see also id.* at 1064 (noting that, “given the risks of arbitrariness, the concern for adequate notice, and the risk that punitive damages awards can, in practice, impose one State’s (or one jury’s) policies (e.g., banning cigarettes) upon other States — all of which accompany awards that, today, may be many times the size of such awards in the 18th and 19th centuries — it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance” (citation omitted)). Because the trial court here did not take any action whatsoever to protect B&W against the jury’s use of constitutionally

impermissible evidence, the punitive damages award should be set aside and a new trial ordered on both liability for and the amount of punitive damages. *See id.* at 1065 (holding that “federal constitutional law obligates [states] to provide some form of protection in appropriate cases”).

X. THE TRIAL COURT ERRED IN DENYING B&W’S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, ITS MOTION FOR NEW TRIAL, AND ITS REQUEST FOR REMITTITUR ON PUNITIVE DAMAGES, BECAUSE THE \$20 MILLION PUNITIVE DAMAGES AWARD EXCEEDS THE AMOUNT PERMISSIBLE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION, IN THAT (A) IT IS NOT SUPPORTED BY EVIDENCE OF COMMENSURATE DEGREE OF REPREHENSIBILITY IN B&W’S CONDUCT; (B) THE 40-TO-1 RATIO BETWEEN THE PUNITIVE DAMAGES AND THE SUBSTANTIAL COMPENSATORY DAMAGES AWARDED PLAINTIFFS IS FAR GREATER THAN DUE PROCESS PERMITS; AND (C) THE PUNITIVE DAMAGES AWARD GREATLY EXCEEDS THE CIVIL PENALTIES AUTHORIZED IN COMPARABLE CASES.

The amount of the punitive damages award was 40 times the \$500,000 compensatory damages award. This ratio violates both due process and Missouri law

prohibiting excessive awards.²⁷ At minimum, the punitive damages should be vacated or reduced to a 1-to-1 ratio, either under the Due Process Clause to a constitutionally permissible level or by remittitur under Missouri law to a proper level.

A. Standard Of Review

The constitutionality of a punitive damages award is reviewed by this Court *de novo*. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) (mandating appellate courts conduct *de novo* review of a trial court’s application of three constitutional guideposts to the jury’s award). “Exacting appellate review

²⁷ Although the jury found plaintiffs suffered \$2,000,000 in compensatory damages, it determined that Mrs. Smith was 75% at fault, for a net compensatory award of \$500,000 — the appropriate amount to compare with the punitive damages award. *See Waddill v. Anchor Hocking, Inc.*, 78 P.3d 570 (Ore. Ct. App. 2003) (holding, after remand from the Supreme Court in light of *State Farm*, that where the jury assesses only a portion of the fault to defendant, the net compensatory damages are used for determining whether a punitive damage award violates due process); *Clark v. Chrysler Corp.*, 436 F.3d 594, 607 n.16 (6th Cir. 2006) (using, after remand from the Supreme Court in *State Farm*, the compensatory award reduced for the 50% fault of plaintiff as the amount to determine the ratio). Indeed, plaintiffs’ counsel here argued in his closing, during the punitive damages phase, that the award was \$500,000: “You didn’t award \$2 million. You found her damages to be \$2 million. The instructions say you awarded a half million dollars.” (T. at 3344)

ensures that an award of punitive damages is based upon an “application of law, rather than a decisionmaker’s caprice.” *State Farm*, 538 U.S. at 418 (2003) (citing *Cooper Industries, Inc.*, 532 U.S. at 436) (internal quotations omitted).

B. The Amount Of The Punitive Damages Award Violates Due Process

The Supreme Court has clearly articulated the constitutional guideposts for review of the amount of punitive damages awards: “(1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.” *Id* at 409.

“[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.” *Id.* at 419 (citation omitted). The Supreme Court has cautioned that “[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.” *Id.* at 423. Furthermore, “[i]n assessing reprehensibility . . . it is crucial that [the] court focus on the conduct related to the plaintiffs’ claim rather than the conduct of the defendant in general.” *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004). The Supreme Court mandated that “[i]t should be presumed that a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.” *State Farm*, 538 U.S. at 419.

To demonstrate reprehensibility, plaintiffs relied on evidence that was unconnected to any conduct of B&W's affecting Mrs. Smith or other smokers in Missouri. (*See infra* at VIII.B) The undisputed evidence was that the health risks of smoking had been known for decades, had been publicized widely well before the 1960s, and reached a crescendo in 1964 with the release of the landmark 1964 Surgeon General's Report. Moreover, even though the serious health risks of cigarette smoking were well known to both the federal government and the Missouri Legislature, they never imposed any ban on B&W's cigarettes or suggested any modification to their design. And, it is undisputed that B&W complied with all of the many federal requirements imposed on the marketing and sale of cigarettes. These circumstances weigh against awarding a high ratio. *See Clark v. Chrysler Corp.*, 436 F.3d 594, 603 n.12 (6th Cir. 2006).

The jury assigned an overwhelming percentage of fault (75%) to Mrs. Smith. In so doing the jury, according to the trial court's instruction, found that, "when the cigarettes were used, Barbara Smith knew of the danger . . . and appreciated the danger of its use," that she "voluntarily and unreasonably exposed herself to such danger," and that "such conduct directly caused or directly contributed to cause Barbara Smith's death." (L.F. 1397) Therefore, the impermissibly high punitive damages award can be explained only by (1) plaintiffs' heavy reliance on evidence purportedly regarding B&W that had no connection to Mrs. Smith or her injuries or (2) evidence that the company made and sold a legal, but hazardous product, that has carried a legally adequate health warning for

40 years and whose serious risks were known to Mrs. Smith. Neither of these circumstances establish reprehensibility meriting the punitive damages award.

The second guidepost focuses on the “ratio between harm, or potential harm, to the plaintiff and the punitive damages award.” *State Farm*, 538 U.S. at 424. The Supreme Court has made clear that “in practice, few awards exceeding a single-digit ratio between punitive damages and compensatory damages, to a significant degree, will satisfy due process.” *Id.* at 425. Indeed, “an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.” *Id.* Here, the 40-to-1 ratio is outside the bounds of constitutional impropriety.

Post-*State Farm* cases confirm that the high ratio of punitive damages in this case is unconstitutionally excessive. In *ConAgra Poultry*, 378 F.3d at 798-99, the Eighth Circuit court reduced the ratio to approximately 1-to-1. The original punitive award of \$6 million — 10 times the compensatory award — was excessive. “Six hundred thousand dollars is a lot of money. Accordingly, we find that due process requires that the punitive damages award on Mr. Williams’ harassment claim be remitted to \$600,000.” *Id.* at 799. In *Stogsdill v. Healthmark Partners, L.L.C.*, 377 F.3d 827 (8th Cir. 2004), a malpractice case involving the death of a patient, the court found a ratio of slightly more than 10-to-1 excessive. *Id.* at 833. Noting that the \$500,000 compensatory damages award was “substantial,” the court indicated that a 4-to-1 ratio was the appropriate due process maximum under the circumstances. *Id.* at 833. In *Clark*, 436 F.3d at 608, the Court, after remand by the United States Supreme Court in light of *State Farm*, reduced the ratio in a product defect wrongful death action (in which the jury

awarded \$235,000 in compensatory damages) from more than 10-to-2 to 2-to-1, for a punitive award of less than \$500,000.

The third *State Farm* guidepost, the “disparity between the punitive damages award and the ‘civil penalties authorized or imposed in comparable cases,’” also supports a substantial reduction in the punitive award. *State Farm*, 538 U.S. at 428 (quoting *Gore*, 517 U.S. at 575) (internal quotations omitted). Here, an unknown but possible basis for the jury’s liability verdict was plaintiffs’ failure-to-warn claims. The Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 (2002), requires warnings on cigarette packages. Yet neither the federal government nor the State of Missouri has condemned any failure to warn before the labeling act required warnings in 1965. (T. 2064) As to design, the federal government has been fully aware of the same “design” issues inherent in cigarettes for more than 100 years. *See Austin v. Tennessee*, 179 U.S. 343, 348 (1900); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). Yet, it has forbidden any attempt to further regulate or ban cigarettes — let alone to fine a cigarette manufacturer for selling them.

Finally, there was a good faith basis for B&W to believe that it was not doing anything wrong during the time that Mrs. Smith smoked in selling ordinary cigarettes. In 1964, *Ross v. Philip Morris & Co.*, 328 F.2d 3, 5, 10, 14 (8th Cir. 1984), rejected a design claim in a tobacco case similar to the one here. At that time, *Ross* was a definitive and authoritative case permitting the sale of ordinary cigarettes without incurring liability. A year later, the American Law Institute adopted § 402A of the Restatement (Second) of Torts (1965), including its Comment i that cited cigarettes as

a paradigm example of a product that is not defective or unreasonably dangerous: “Good tobacco is not unreasonably dangerous because the effect of smoking may be harmful . . .” *Id. Ross* and Comment i provide legally cognizable reasons to conclude that selling Kool cigarettes was lawful, and, at the very least, provide a good faith basis for B&W to believe that its conduct was lawful. To date no one — including the federal government, independent scientists, or plaintiffs — has identified a way to make a “cigarette,” as defined by Missouri and federal law, that does not have the same health risks as Kool cigarettes. This absence of an alternative design is yet another reason why a high ratio of punitive damages is inappropriate here. *See Clark*, 436 F.3d at 602-03 (absence of evidence that an alternative design would have prevented the harm and a “good-faith dispute” over whether testing of the product was necessary, there was not a sufficient “level of indifference to or reckless disregard for the safety of others” to support a high ratio of punitive damages); *Barber v. Nabors Drilling U.S.A., Inc.*, 130 F.3d 702, 710 (5th Cir. 1997) (reversing punitive damages award where there was a “good faith dispute” as to whether defendant’s conduct violated plaintiff’s rights).

The guideposts adopted by *Gore*, and reiterated in *State Farm*, demonstrate that the punitive damage award in this case is excessive and should have been vacated or remitted. Therefore, the trial court erred in refusing to correct the excessive award, and this Court should vacate it entirely or reduce it to no greater than a 1-to-1 ratio.

**C. At A Minimum, The Trial Court Should Have Ordered Remittitur Of
The Punitive Damages Award**

The trial court also erred under state law when it did not remit the punitive damages award. Under Missouri law, where a damage award is excessive because it is disproportionate to the evidence, the verdict “may be corrected by an enforced remittitur . . .” *Barnett v. La Societe Anonyme Turbomeca France*, 963 S.W.2d 639, 655 (Mo. App. W.D. 1997). Under § 537.068, R.S.Mo. (2000), remittitur is proper where “after reviewing the evidence in support of the jury’s verdict, the court finds that the jury’s verdict . . . exceeds fair and reasonable compensation for plaintiff’s injuries and damages.” For the same reasons as set forth above, this Court should remit the punitive damages award entirely or remit it no greater than a 1-to-1 ratio.

CONCLUSION

B&W requests that this Court vacate the judgment in favor of plaintiffs and remand the case with instructions to enter judgment in favor of B&W. In the alternative, B&W requests that this Court vacate judgment and remand the case for a new trial or, at a minimum, remit the punitive damages award.

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CERTIFICATE OF COMPLIANCE AND SERVICE

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

1. The attached brief complies with the limitations contained in Supreme Court Rule 84.06. The brief was completed using Microsoft Word for Windows, in Times New Roman, size 13 point font. Excluding the cover page, the signature block, and this certification of compliance and service, the brief contains 30,989 words, which does not exceed the 31,000 words allowed for an appellant's brief.

2. Pursuant to Supreme Court Rule 84.06(g), the CD-ROM filed with this brief contains a copy of this brief in Microsoft Word for Windows format. It was scanned for viruses on October 26, 2007, and is virus-free.

3. One true and correct copy of the attached brief was served on October 26, 2007, by mail, U.S. Postage prepaid, on Kenneth B. McClain, Humphrey, Farrington & McClain, P.C., 221 West Lexington, Suite 400, P.O. Box 900, Independence, MO 64501, and Gregory Leyh, Leyh & Leyh, 104 N.E. 72nd Street, Suite 1, Gladstone, MO 64118, and an electronic copy was served by e-mail addressed to kbm@hfmlegal.com and gleyh@leyhlaw.com.

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