

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

SUPPLEMENTAL BRIEF OF APPELLANT

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INTRODUCTION

Appellant Brown & Williamson Tobacco Corporation (“B&W”) submitted its second supplemental legal file (“2d Supp. L.F.”) on March 7, 2008, pursuant to this Court’s February 21, 2008 Order (“Order”). The Order further directed the parties to address “the preclusive effect of the orders in the federal district court case and whether such preclusive effect, if any, is an affirmative defense that must be pleaded in order to be raised in this case.” *Id.* With respect to the first issue, the summary judgment order against Barbara Smith has preclusive effect, as a matter of controlling federal and Missouri law, because it fully adjudicated Mrs. Smith’s failure to warn and non-lung cancer claims and there is no good reason to re-litigate them. Because Mrs. Smith could not have recovered damages on those claims had she lived, plaintiffs cannot do so in this wrongful death action.

As to the second issue, B&W was not required to plead as an affirmative defense that plaintiffs were precluded from asserting those claims. Instead, § 537.080, R.S.Mo. (2000), requires plaintiffs to plead and prove that Mrs. Smith could have recovered damages from B&W on those claims. In any event, B&W did plead collateral estoppel among its affirmative defenses. Furthermore, throughout this case B&W has repeatedly argued the preclusive effect of the federal court summary judgment, beginning with its motion for summary judgment. Plaintiffs have never objected that this issue was not properly raised in this case, but have always responded to B&W’s arguments on the merits.

The Court's Order also invited the parties to brief "any other issues that may be relevant to the issues in this case with respect to actions taken by the federal district court." An issue that arose during oral argument was the relevance, if any, of an agreed order memorializing the resolution of an interpleader action B&W filed. Although this court ordered B&W to submit that order in a supplemental legal file, it was never introduced into evidence in the trial court and should not be considered on appeal. Nevertheless, the language of that order, contrary to plaintiffs' argument, does not foreclose B&W from asserting the preclusive effect of the summary judgment entered in Mrs. Smith's case. To the contrary, the order expressly permitted B&W to assert any available defense to a future wrongful death action. B&W agreed only that it would not assert the dismissal with prejudice of the claims still remaining after the summary judgment as a defense to a wrongful death action. Plaintiffs' failure to rely on that order to oppose B&W's arguments at any stage before their substitute brief in this Court is further evidence that the order does not have the effect plaintiffs now claim.

Thus, this Court should hold, consistent with the plain language of § 537.080, that plaintiffs' claims based on failure to warn and injuries other than lung cancer are precluded by the adverse summary judgment entered against Barbara Smith, and the trial court erred in submitting those claims to the jury.

STATEMENT OF FACTS

The issues raised by the Court's February 21 Order and the Second Supplemental Legal File that B&W was ordered to file implicate four separate, but related, actions.

First, Barbara Smith filed in state court a personal injury action against B&W (the

“Personal Injury Action”) that was subsequently removed to the United States District Court for the Western District of Missouri. (L.F. 1484) *Second*, after Mrs. Smith’s death, the federal court granted her estate permission to substitute itself as plaintiff and continue to prosecute the action as a survival claim against B&W (the “Survival Action”). (2d Supp. L.F. 2110) *Third*, B&W filed an interpleader action in the same federal court (the “Interpleader Action”) to resolve which of two inconsistent claims -- the pending Survival Action or a potential wrongful death claim -- could proceed against B&W. (2d Supp. L.F. 1908) *Finally*, in March 2003, plaintiffs filed the wrongful death action that is the subject of this appeal (the “Wrongful Death Action”). (L.F. 1)

Barbara Smith filed her Personal Injury Action on March 22, 1996. (L.F. 1485) It alleged thirteen claims, including failure to warn.¹ It also alleged that her injuries included heart disease, COPD, addiction, and lung cancer. After the parties engaged in discovery for nearly three years, B&W moved for summary judgment on a variety of grounds. The federal court in the Personal Injury Action issued a lengthy opinion

¹ The alleged claims were for design defect (count I); failure to warn (count II); design defect/failure to make safe (count III); negligent research/testing (count IV); negligent advertising (count V); design defect/addiction (count VI); express warranty (count VII); implied warranty (count VIII); negligent misrepresentation (count IX); conspiracy (count X); fraudulent misrepresentation (count XI); medical monitoring (count XII); and punitive damages (count XIII). (L.F. 1484-1507)

granting most, but not all, of the relief sought in B&W's motion. With respect to Mrs. Smith's failure-to-warn claims, the court found:

The fatal flaw in Plaintiff's [failure-to-warn] claim is that *the record* demonstrates that no jury could conclude inadequate warnings prior to 1969 caused Plaintiff's injuries ... [T]he record conclusively demonstrates that Plaintiff made no effort to alter her behavior when presented with [the 1969 Surgeon General's] warning. Consequently, no reasonable juror could conclude that a warning offered earlier than 1969 would have altered Plaintiff's behavior ... [C]onsequently, the lack of a warning did not cause Plaintiff to smoke cigarettes. Defendant [B&W] is entitled to judgment on Count II.

(L.F. 1516-17) (emphasis added) After the court's order, only Mrs. Smith's design defect, negligent research/testing, and implied warranty claims remained, and she was barred from recovering damages for diseases other than lung cancer. *Id.*

Barbara Smith suffered a myocardial infarction and died on May 25, 2000. (2d Supp. L.F. 1972) B&W filed a Suggestion of Death on the Record. (2d Supp. L.F. 2102) Thereafter, Lincoln Smith, as personal representative of Mrs. Smith's estate, moved to be substituted as plaintiff in order to pursue a survival action under § 537.020, R.S.Mo. (2000). (2d Supp. L.F. 2105) The federal court granted that motion on July 13, 2000. (2d Supp. L.F. 2110) Trial was set in the Survival Action for October 30, 2000.

In a survival action, § 537.020 requires a plaintiff to prove, among other things, that the decedent's injuries did not cause her death. In a wrongful death claim, however, § 537.080 requires a plaintiff to prove that the injuries did cause her death. As expressly

permitted by Missouri law,² B&W commenced the Interpleader Action in September 2000 to avoid the possibility of exposure to two trials and two liability findings premised on inconsistent facts. (2d Supp. L.F. 1908) B&W named as defendants in the Interpleader Action both Mrs. Smith's estate (plaintiff in the separate, pending Survival Action) and Mrs. Smith's surviving family members (the potential plaintiffs in a wrongful death action) (collectively, the "Interpleader-Defendants"). The interpleader complaint explained that the Survival Action alleged only three claims (design defect, negligent testing/research, and implied warranty) causing one injury (lung cancer). (2d Supp. L.F. 1908 at ¶ 1) The Interpleader-Defendants (including plaintiffs in this case) did not disagree. (2d Supp. L.F. 2005 at ¶ 1) B&W sought two forms of relief: (1) a declaratory judgment as to whether "Smith's death was caused by her lung cancer and/or her lung cancer surgery" (2d Supp. L.F. 1913 at ¶ 27), and (2) an injunction staying both the Survival Action and any wrongful death action "until the threshold issues raised by this interpleader have been resolved." (2d Supp. L.F. 1914 at ¶ 29) The Interpleader

² See *Plaza Express Co. v. Galloway*, 280 S.W.2d 17 (Mo. banc 1955) (interpleader must be ordered to litigate question of what caused death when a party faces threat of liability under both the Survival Act and the Wrongful Death Act); *Smith v. Preis*, 396 S.W.2d 636, 641 (Mo. 1965) (interpleader is proper mechanism where defendant faced claims arising under both the Wrongful Death Act and the Survival Act); Rule 52.07 (state interpleader); Fed. R. Civ. P. 22 (federal interpleader).

Action was assigned to the same federal district judge, Ortrie Smith, who was presiding over the Survival Action.

In opposition to B&W's requested relief, the Interpleader-Defendants argued that there was no potential inconsistency entitling B&W to relief. They asserted that the Survival Action was premised on the claim that B&W's cigarettes were defectively designed because B&W added carcinogens or failed to remove them. (2d Supp. L.F. 1964) They also argued that if a wrongful death action were to be filed, it, too, would assert a design defect claim. *Id.* The Interpleader-Defendants never asserted that they would, or had any legal right to, re-assert in a wrongful death action the previously-dismissed failure-to-warn claim. In fact, when B&W pointed out that "the wrongful death plaintiffs cannot pursue any claim that Mrs. Smith was not permitted to bring during her life. MO REV. STAT. § 537.080.1, 537.085" (2d Supp. L.F. 1975), the Interpleader-Defendants did not dispute the point.

Rather, the main contested issue in the Interpleader Action was what caused Mrs. Smith's death. During discovery in the Interpleader Action, the Interpleader-Defendants jointly named an expert physician to opine on the cause of Barbara Smith's death. (2d Supp. L.F. 2031 at ¶ 11, 2075 at ¶ 11) That expert opined that Mrs. Smith's lung cancer caused her death. (2d Supp. L.F. 2031 at ¶ 12, 2075 at ¶ 12) Because the expert admittedly contradicted an essential element of Interpleader-Defendants' claims in the Survival Action, B&W moved for summary judgment. (2d Supp. L.F. 2022) Rather than grant summary judgment, the federal court suggested that Interpleader-Defendants could take steps to preserve their ability to try the Survival Action and wrongful death action in

one proceeding: “If all the potential plaintiffs are in a single suit, asserting the two contradictory claims, the jury can be instructed in a manner that permits a judgment on only one (or neither) claim. The goal of preventing inconsistent adjudications is assured and the plaintiffs would be limited to a single bite at the apple.” (2d Supp. L.F. 2095-96) (emphasis added). The parties thereafter entered into an agreed order in the Interpleader Action explaining that the Survival Action would be dismissed with prejudice, that its dismissal would not preclude a later wrongful death action, and that B&W was not waiving any of the legal or factual defenses available to it under the Wrongful Death Act. (2d Supp. L.F. 2097) The federal court entered a separate order approving the estate’s dismissal of the Survival Action with prejudice (L.F. 1536); thereafter, B&W dismissed the Interpleader Action. (2d Supp. L.F. 2101)

Two years later, on May 19, 2003, plaintiffs initiated this Wrongful Death Action. (L.F. 1) They alleged four claims: (1) failure to warn, (2) design defect, (3) fraudulent concealment and (4) conspiracy. The failure-to-warn claim corresponds to the failure-to-warn claim dismissed in the Personal Injury Action. (*Compare* L.F. 10-12 *with* L.F. 1493) B&W’s answer pleaded the affirmative defenses of “*res judicata* and/or collateral estoppel.” (L.F. 23)³

³ B&W amended its answer and affirmative defenses by interlineation on October 15, 2003 (L.F. 84), and filed another answer at the beginning of trial in response to plaintiffs’ amended petition. (L.F. 1368). In both instances, the affirmative defenses of “*res*

B&W moved for summary judgment in this case. Among other relief, B&W sought dismissal of the claims that had previously been disposed of by summary judgment in the Personal Injury Action, including the failure-to-warn and non-lung cancer claims. (L.F. 86) B&W argued that the Wrongful Death Act precluded plaintiffs as a matter of law from re-litigating claims adjudicated against Smith, so that re-asserting them here failed to state a claim under § 537.080. (2d Supp. L.F. 2112) The motion also argued that § 537.085 provided an “independent” reason for dismissal of these claims because *res judicata* and collateral estoppel are “applicable by operation of the Wrongful Death Act which expressly permits B&W to assert any defense it would have had against the decedent, including collateral estoppel.” (2d Supp. L.F. 2102 at n. 4)

B&W continued throughout this Wrongful Death Action to argue at every opportunity that plaintiffs’ failure-to-warn and non-lung cancer claims were precluded under § 537.080 and § 537.085, including in its motion for a directed verdict (L.F. 1238), at oral argument on the directed verdict motion (at which time it introduced as exhibits, without objections, the summary judgment order in the Personal Injury Action and the order of dismissal with prejudice in the Survival Action) (T. 2107-10; L.F. 1508-38), in its motion for Judgment Notwithstanding the Verdict Or, In The Alternative, A New Trial (L.F. 1625, 1694), at oral argument on that motion (T. 3365), and in its briefing on appeal to the Western District Court of Appeals and to this Court.

judicata and/or collateral estoppel” were asserted and were part of the operative pleadings at trial.

Despite B&W's repeated assertions that the Personal Injury Action summary judgment was final, plaintiffs never contested the finality of that order or its preclusive effect on Mrs. Smith's claims before filing their Substitute Brief in this Court. Instead, plaintiffs conceded that the summary judgment order was preclusive as to Barbara Smith, but argued that the Wrongful Death Act should nonetheless be construed to permit them to re-litigate the previously dismissed failure-to-warn and non-lung cancer claims. (T. 3424)

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.

A. The Federal Court Summary Judgment Should Have Been Given Preclusive Effect By The Trial Court.

One of the issues that the Court directed the parties to brief is the preclusive effect in this Wrongful Death Action of the orders entered in the federal district court cases. The law is clear that the summary judgment in B&W's favor on Barbara Smith's claims for failure to warn and for diseases other than lung cancer would have precluded her from

recovering damages for those claims, had she survived. The wrongful death statute only permits claims based on acts for which the decedent could have recovered damages, had her death not ensued. § 537.080. As a result, under § 537.080 plaintiffs were similarly precluded from bringing those claims, and the trial court erred in submitting those claims to the jury.

Missouri courts recognize that “[f]ederal law determines the effects under the rules of res judicata of a judgment of a federal court.” *Andes v. Paden, Welch, Martin & Albano, P.C.*, 897 S.W.2d 19, 21 (Mo. App. W.D. 1995) (quoting Restatement (Second) of Judgments § 87 (1982)); *see also State ex rel. J.E. Dunn Constr. Co. v. Fairness in Constr. Bd. of Kansas City*, 960 S.W.2d 507, 512 (Mo. App. W.D. 1997) (same). As a practical matter, however, the Eighth Circuit decisions on collateral estoppel apply essentially the same principles and analysis as Missouri cases. *See Canady v. Allstate Ins. Co.*, 282 F.3d 1005, 1016 n. 7 (8th Cir. 2002).

The Eighth Circuit has held that a court analyzing issue preclusion should consider five elements:

- (1) the party sought to be precluded in the second suit must have been a party, or in privity with a party, to the original lawsuit;
- (2) the issue sought to be precluded must be the same as the issue involved in the prior action;
- (3) the issue sought to be precluded must have been actually litigated in the prior action;
- (4) the issue sought to be precluded must have been determined by a valid and final judgment; and
- (5) the determination in the prior action must have been essential to the prior judgment.

Robinette v. Jones, 476 F.3d 585, 589 (8th Cir. 2007) (quoting *Anderson v. Genuine Parts Co.*, 128 F.3d 1267, 1273 (8th Cir. 1997)); *see also James v. Paul*, 49 S.W.3d 678, 682 (Mo. banc 2001) (setting forth alternate formulation of these elements).

In order for plaintiffs to have stated failure-to-warn or non-lung cancer claims under the Wrongful Death Act, they were required to establish that, if her death had not ensued, Barbara Smith would have been entitled to recover damages on those claims notwithstanding the summary judgment against her in the Personal Injury Action. Thus, under the express terms of the Wrongful Death Act, the party sought to be precluded under the collateral estoppel analysis is Barbara Smith, not plaintiffs. As she was the plaintiff in the Personal Injury Action, the first element of the issue preclusion analysis is satisfied.

The second, third, and fifth elements are also plainly satisfied. In their response to B&W's post-trial motion, plaintiffs acknowledged that the claims B&W argued were precluded were those "which the federal court judge dismissed on summary judgment in the personal injury action." (L.F. 1697) A comparison of the complaint and summary judgment order in the Personal Injury Action with the amended petition in this Wrongful Death Action demonstrates that the claims at issue were actually litigated in the Personal Injury Action, and that their determination was essential to the federal court's summary judgment for B&W on those claims.⁴ (L.F. 1206-23, 1484-1535)

⁴ Indeed, the federal court's summary judgment findings are consistent with B&W's arguments that plaintiffs failed to make a submissible case on the failure-to-warn claim.

determining the preclusive effect of a ruling is not governed by the ruling's appealability. Rather, "[r]ecent decisions have relaxed traditional views of the finality requirement in the collateral estoppel context by applying the doctrine to matters resolved by preliminary rulings or to determinations of liability that have not yet been completed by an award of damages or other relief, let alone enforced." *In re Nangle*, 274 F.3d 481, 484-85 (8th Cir. 2001) (quoting *John Morrell & Co. v. Local Union 304A of United Food & Commercial Workers*, 913 F.2d 544, 564 (8th Cir. 1990)) (internal quotations and citations omitted). "As Judge Friendly has explained, "[f]inality" in the context [of issue preclusion] may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again." *John Morrell*, 913 F.2d at 563 (quoting *Lummis Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2d Cir. 1961)).

In *Robinette*, the Eighth Circuit recently applied these principles in a situation analogous to this case. In *Robinette*, the plaintiffs brought a civil rights and state-law tort action against a city and several of its officials. 476 F.3d at 588. The federal district court granted motions to dismiss the claims against several of the defendants on the basis of sovereign and prosecutorial immunity. *Id.* The plaintiffs then voluntarily dismissed without prejudice the remaining claims in that lawsuit. *Id.* A few months later, the

842 (Mo. banc 1991) (after order dismissing fewer than all claims, voluntary dismissal without prejudice as to remaining claims causes prior order to become final for purposes of appeal).

plaintiffs filed a second lawsuit in which they reasserted, *inter alia*, the same claims that the court had previously dismissed on the basis of immunity. The district court in the second case applied collateral estoppel to dismiss the previously dismissed claims and granted summary judgment on the remaining claims. *Id.* On appeal, the Eighth Circuit affirmed, rejecting the plaintiffs’ argument that the order in the first case dismissing claims based on immunity was not a “valid and final judgment” for issue preclusion purposes. *Id.* at 589-90. The appellate court held that because, in the first case, the district court had thoroughly analyzed the issues relating to the immunity defenses, they “were ‘resolved by preliminary rulings’ and there is ‘no really good reason’ to litigate them again.” *Id.* at 589.

The same principles require the conclusion that the Personal Injury Action summary judgment is a “valid and final judgment” for purposes of issue preclusion in this case. The federal district court thoroughly analyzed and decided Barbara Smith’s claims for failure to warn and for diseases other than lung cancer. (2d Supp. L.F. at 1515-17, 1527-34) Those issues were resolved by the summary judgment and, as in *Robinette*, there is “no really good reason” to litigate them again. Rather, it would be unfair to B&W to require it to litigate these issues a second time after having prevailed on the merits of these issues in the Personal Injury Action.⁶

⁶ Analyzing the issues under Missouri law leads to the same result. As this Court has recently acknowledged, Missouri courts generally follow the Restatement (Second) of Judgments. *Kesterson v. State Farm Fire & Cas. Co.*, 242 S.W.3d 712, 717 (Mo. banc

In summary, all elements necessary to give preclusive effect to the Personal Injury Action summary judgment are established by the record in this case. The trial court therefore erred in submitting plaintiffs' failure-to-warn and non-lung cancer claims to the jury.

B. The Wrongful Death Act Requires Plaintiffs To Bring Themselves Within Its Strict Pleading and Proof Requirements.

The Missouri Wrongful Death Act created a right that did not exist at common law. *Sullivan v. Carlisle*, 851 S.W.2d 510, 512 (Mo. banc 1993); *Campbell v. Callow*, 876 S.W.2d 25, 26 (Mo. App. S.D. 1994). In enacting the Wrongful Death Act, “the legislature preempted the field and declared the nature of the action, *the conditions for the maintenance*, the damages and elements thereof receivable and the parties entitled to _____ (2008). Section 13 of that Restatement provides that, for purposes of issue preclusion, “‘final judgment’ includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.” Restatement (Second) of Judgments § 13 (1982). The authors of the Restatement explained that in deciding whether a decision constitutes a “final judgment” for issue preclusion, “the court should determine that the decision to be carried over was adequately deliberated and firm, even if not final in the sense of forming the basis for a judgment already entered.” *Id.*, comment g at 136. The Personal Injury Action summary judgment certainly satisfied that test, even before the remaining claims were voluntarily dismissed with prejudice in the Survival Action.

sue.” *Campbell v. Callow*, 876 S.W.2d at 28 (emphasis added). Among the conditions for maintaining a wrongful death action is the requirement that the act for which the defendant is allegedly liable was one “which, if death had not ensued, would have required [the decedent] to recover damages in respect thereof . . .” § 537.080.1.

Because the Legislature included this requirement in the definition of a wrongful death cause of action, the burden of pleading and proving that the decedent could have recovered damages for the act in question lies with the plaintiff, not the defendant. “[W]hen a cause of action requires proof that a statutorily-created condition precedent was met, the party with the obligation to meet the condition must not only plead compliance, but must prove it affirmatively.” *Cub Cadet Corp. v. Mopec, Inc.*, 78 S.W.3d 205, 212 (Mo. App. W.D. 2002) (quoting *Textron Fin. Corp. v. Trailiner Corp.*, 965 S.W.2d 426, 429 (Mo. App. S.D. 1998)) (holding that plaintiff’s failure to plead and prove compliance with notice requirements of § 400.9-504(3), R.S.Mo. (2000), precluded it from recovering deficiency judgment against defendant). *See also Space Planners Architects, Inc. v. Frontier Town-Missouri, Inc.*, 107 S.W.3d 398, 403 (Mo. App. S.D. 2003) (“the party claiming a statutory lien bears the burden of proving compliance with essential elements of the lien statute at issue.”).

Therefore, in order to assert a wrongful death action, plaintiffs were required to plead and prove compliance with the conditions precedent created by the Act. *Call v. Heard*, 925 S.W.2d 840, 850 (Mo. banc 1996). As this Court explained in *Call*, “[a] party suing under the [wrongful death] statute ... must bring himself in his pleading and proof strictly within the statutory requirements necessary to confer the right. Otherwise

his petition states no cause of action, and his proof is insufficient to sustain his judgment." *Id.* (emphasis added) (quoting *Nelms v. Bright*, 299 S.W.2d 483, 487 (Mo. banc 1957)).

An action under the Wrongful Death Act is proper only if the decedent could have recovered damages for the defendant's act "if death had not ensued." *Klein v. Abramson*, 513 S.W.2d 714, 717 (Mo. App. K.C.D. 1974) ("The clear meaning of this statute is that the legislature saw fit to condition the right to sue for wrongful death upon the primary fact that the decedent could have maintained an action for damages for injuries had he survived. If such condition cannot be shown, no cause of action for the wrongful death exists."). In this case, because plaintiffs failed to plead or prove that they could satisfy this statutory condition precedent to their failure-to-warn and non-lung cancer claims, they failed to state a claim for damages on those theories. Courts applying Missouri law have thrown out wrongful death claims that fail to satisfy this condition by holding that the plaintiff failed to carry his burden of pleading and proving compliance with the requirements of § 537.080.1, not by requiring the defendant to prove *res judicata* or collateral estoppel as an affirmative defense. *E.g.*, *Campbell v. Tenet Healthsystem, DI, Inc.*, 224 S.W.3d 632, 637-38 (Mo. App. E.D. 2007); *Klein*, 513 S.W.2d at 715-16; *see also Stern v. Internal Medicine Consultants, II, LLC*, 452 F.3d 1015, 1019-20 (8th Cir. 2006) (applying Missouri law).

Although this Court specifically requested that B&W brief whether the preclusive effect of the Personal Injury Action summary judgment was an affirmative defense that had to be pled, resolution of that issue against B&W would not dispose of this case.

B&W did plead collateral estoppel in its answers to plaintiffs' petitions. (L.F. 23, 84-85, 1376) Plaintiffs never objected to or challenged any of B&W's pleadings. In addition, B&W argued in support of its motion for summary judgment that collateral estoppel would have barred Barbara Smith from relitigating her failure-to-warn claims in this case. (2d Supp. L.F. 2120) Plaintiffs made no objection but responded to this argument on the merits. (L.F. 367-68)

Moreover, at every other stage of this case plaintiffs have responded to the merits of B&W's arguments on this issue, from B&W's directed verdict motion to its post-trial motion to appeal. Plaintiffs did not object when B&W introduced into evidence the summary judgment order and related pleadings from Barbara Smith's federal case. (T. 2107-10) Indeed, even in this Court plaintiffs have not asserted that B&W failed to properly raise the preclusive effect of the Personal Injury Action summary judgment.⁷ Thus, even if B&W had been required to raise plaintiffs' failure to satisfy the statutory condition precedent as an affirmative defense, and had failed to do so (neither of which is true), plaintiffs' failure to object compels the conclusion that the issue be "deemed to have been tried by implied consent of the parties and must be treated as though it had been raised in the pleadings." *Heins Implement Co. v. Mo. Highway & Transp. Comm'n*, 859 S.W.2d 681, 685 (Mo. banc 1993) (holding that res judicata defense had to be considered on its merits where plaintiffs did not object to defendant's failure to plead it).

⁷ Rather, this Court raised the issue *sua sponte* in its February 21, 2008 Order.

C. The Agreed Order from the Federal Court Interpleader Action Does Not Prevent B&W from Challenging Plaintiffs' Right to Bring a Wrongful Death Action Based on Failure To Warn.

Plaintiffs argued for the first time in this Court that an agreed order in the Interpleader Action, a separate case, permits them to escape in this case from the preclusive effect of the Personal Injury Action summary judgment against Mrs. Smith. Plaintiffs never made this argument before they raised it in their substitute brief and improperly submitted the agreed order in an Appendix. This Court post-argument ordered B&W to submit the agreed order and other filings from the Interpleader Action in a Supplemental Legal File. Although B&W has complied with the Court's order, it renews its objections to this Court's consideration of material that was not before the trial court. Appellate review is limited to that evidence which was properly before the trial court. *FDIC v. Warmann*, 859 S.W.2d 948, 952 (Mo. App. E.D. 1993). A prevailing party is not permitted to supplement the record on appeal with evidence that was not properly before the trial court in an attempt to bolster the grounds supporting affirmance of the judgment. *See Easy Returns Midwest, Inc. v. Schultz*, 964 S.W.2d 450, 454 (Mo. App. E.D. 1998). Nor should this Court go beyond the grounds plaintiffs asserted in the trial court to look for other reasons to affirm. *Cupp v. Nat'l R.R. Passenger Corp.*, 138 S.W.3d 766, 772-73 (Mo. App. E.D. 2004); *see generally Thummel v. King*, 570 S.W.2d 679, 686 (Mo. banc 1978) ("It is not the function of the appellate court to serve as advocate for any party to an appeal. . . . It would be unfair to the parties if it were

otherwise.”). Thus, this Court should disregard plaintiffs’ argument concerning the purported effect of the agreed order.

If this Court does consider plaintiffs’ argument, the record shows that the agreed order did not limit B&W’s right to rely on the preclusive effect of the Personal Injury Action summary judgment. B&W filed the Interpleader Action for the limited purpose of obtaining a judicial determination that Mrs. Smith’s remaining lung cancer claim should be pursued either in the estate’s pending Survival Action or in an as yet filed wrongful death action, but not both. Missouri law is clear, as the federal court agreed, that claims for Mrs. Smith’s alleged injuries should be litigated against B&W only once. (2d Supp. L.F. 1997, 2000)

The federal court recognized that B&W was entitled to some form of relief in the Interpleader Action. (2d Supp. L.F. 1994, 2000 at ¶ 1) It acknowledged that B&W faced a risk of double exposure to verdicts premised on conflicting facts and proposed a solution that mirrored the resolution ultimately negotiated by the parties. (2d Supp. L.F. 1997-99). The court suggested that Mrs. Smith’s family (plaintiffs here) could eliminate the need for interpleader relief by filing “a confession of judgment foreclosing their ability to assert claims involving Smith’s lung cancer beyond those pending in the underlying suit....The key is that there be some judicial action binding on all Defendants (plaintiffs, here) that precludes them from asserting any other claims relating to Smith’s lung cancer.” (*Id.*) (emphasis added) This is precisely the relief B&W was seeking. The court’s suggestion also underscored the fact that no one -- neither the court nor any of the parties, including the plaintiffs here -- ever contemplated or expressed the view that the

plaintiffs could file a wrongful death action and re-litigate the failure to warn and non-lung cancer claims that had previously been dismissed by the court. The court also proposed that Mrs. Smith's family members intervene in the Survival Action to assert their wrongful death claims, so that the court could protect against inconsistent verdicts by trying all the claims together. (*Id.*) The federal court never suggested that it would have permitted plaintiffs to assert claims that it had already dismissed as meritless, simply because they were alleged under the Wrongful Death Act.

Mrs. Smith's estate asserted in the Interpleader Action that her lung cancer caused her death, contradicting an essential element of its Survival Action, which required proof that the injury did not cause her death. § 537.020. The estate thus ultimately decided to dismiss the Survival Action and sought B&W's agreement that, if the Survival Action were dismissed, B&W would drop its Interpleader Action. B&W insisted that the Survival Action dismissal be "with prejudice" to ensure that the estate could not later re-assert the Survival Action. B&W also agreed that Mrs. Smith's family could pursue the claims remaining in the Survival Action in a wrongful death action, because that would be consistent with the relief sought in the Interpleader Action, consistent with the federal court's recognition that the Interpleader-Defendants could have only "one bite at the apple" (2d Supp. L.F. 2095-96), and consistent with Missouri wrongful death law as B&W had explicitly argued in the Interpleader Action. (2d Supp. L.F. 1975) To avoid any ambiguity over the limited nature of the agreement, the parties also provided that B&W would retain all of its legal and factual defenses against a wrongful death action were one to be filed. (2d Supp. L.F. 2097)

The agreed order was filed only in the Interpleader Action because it memorialized the terms under which B&W agreed to dismiss its interpleader complaint. It is itself not a dismissal of any claim. More importantly, it does not constitute a judicial determination regarding the finality or preclusiveness of the summary judgment order entered two years earlier against Mrs. Smith in the Personal Injury Action. Nor did the agreed order call for vacating the summary judgment order in the Personal Injury Action. The parties never briefed or argued those questions.⁸ In fact, until they filed their brief in this Court on December 7, 2007, plaintiffs never challenged in any of these cases the finality of the summary judgment order. To the contrary, plaintiffs conceded in this Wrongful Death Action that the Personal Injury summary judgment order precluded some of Mr. Smith's claims. (T. 3424)

Had plaintiffs here (who were also defendants in the Interpleader Action) wanted to extract an agreement from B&W that would have set aside the summary judgment ruling against Mrs. Smith on her failure-to-warn claim, they could have tried to do so. They did not, however, and no language in the agreed order purports to undo that summary judgment ruling. Rather, the only part of the agreed order that is pertinent to this Wrongful Death Action was that B&W agreed not to assert the dismissal with

⁸ B&W's Second Supplemental Legal File submitted pursuant to this Court's order contains every substantive filing made by the parties in the Interpleader Action. Those filings show that the finality and preclusive effect of the Personal Injury Action summary judgment order was never disputed.

prejudice of the claims remaining in the Survival Action⁹ as a basis to prevent Mrs. Smith's survivors from bringing *any* wrongful death claims predicated on alleged design defects in B&W's cigarettes. The parties' actions throughout this case are entirely consistent with this interpretation of the agreed order. B&W has never contended that Mrs. Smith could not have brought design claims had she lived and, thus, has never challenged under § 537.080 plaintiffs' assertion of those claims (although, of course, B&W has contested them on the merits). And until the last minute in this Court, plaintiffs never asserted that the agreed order had any effect at all on B&W's right to assert the preclusive effect of the Wrongful Death Action summary judgment.

Because the Survival Action had been dismissed with prejudice, in the absence of the agreed order B&W might have argued that the dismissal barred plaintiffs from re-litigating *any* claims Smith brought or could have brought. But this was not what the parties had agreed to when they resolved the Interpleader Action in federal court. B&W had agreed that the claims remaining in the Survival Action, *i.e.*, claims dismissed voluntarily without having been adjudicated against Mrs. Smith, could be pursued in a later wrongful death action despite the fact that the Survival Action was dismissed with prejudice. Similarly, plaintiffs never argued in the trial court that the agreed order

⁹ Those remaining claims were for design defect, fraudulent concealment, and conspiracy. The jury in this case rejected plaintiffs' fraudulent concealment and conspiracy claims. Therefore, those claims are no longer in issue here. B&W has challenged plaintiffs' design claims on various grounds that were fully briefed by B&W.

somehow barred B&W from asserting any legal or factual defense available to it under the Wrongful Death Act, demonstrating by their conduct their understanding that the agreed order would not support such an argument.

Even if plaintiffs had some relevant right under the agreed order (which they do not), their failure to assert the agreed order in the trial court and Court of Appeals is a waiver. Plaintiffs never presented any material from the Interpleader Action or referred to it in any way in response to B&W's motion for summary judgment or otherwise in this litigation until they submitted material from the Interpleader Action for the first time in their improper Appendix to their brief in this Court. Any objection based on that material was therefore waived and waived repeatedly. *See Sheehan v. Northwestern Mut. Life Ins. Co.*, 103 S.W.3d 121, 128-29 (Mo. App. E.D. 2002).

Moreover, plaintiffs' failure to argue the purported effect of the agreed order at any time in the trial court or Court of Appeals, or even to mention its existence, severely undermines their position that the agreed order represents B&W's agreement not to argue that the summary judgment precluded plaintiffs' failure-to-warn claims. If they truly believed that, they should have asserted it at the earliest opportunity, and their belated reliance on it in this Court is unfair: "[A] litigant cannot strategically lie behind the log until after the trial and the receipt of evidence, argument, and charge to the jury before raising an issue not found in the pleadings nor included in the pre-trial order and then raise it when it is too late for his opponent to do anything about it." *Glass Containers Corp. v. Miller Brewing Co.*, 643 F.2d 308, 312 (5th Cir. 1981) (quoting *Bettes v. Stonewall Ins. Co.*, 480 F.2d 92, 94 (5th Cir. 1973)).

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

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

1. The attached brief complies with the limitations contained in Supreme Court Rule 84.06. The brief was completed using Microsoft Word for Windows, in Times New Roman, size 13 point font. Excluding the cover page, the signature block, and this certification of compliance and service the brief contains 7,194 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 April 7, 2008, and is virus-free.

3. One true and correct copy of the attached brief was served on April 7, 2008, 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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