

Appeal No. SC88685

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IN THE MISSOURI SUPREME COURT

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LINCOLN SMITH, *et al.*

Plaintiffs - Respondents

vs.

BROWN & WILLIAMSON TOBACCO CORPORATION

Defendant - Appellant

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ON TRANSFER FROM THE MISSOURI COURT OF APPEALS  
FOR THE WESTERN DISTRICT

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REPLY BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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## ARGUMENT

Defendant-Appellant Brown & Williamson Tobacco Corporation (“B&W”) stands on the arguments it made in its opening brief on Points III, IV, and V. Its reply arguments as to the remaining points are below.

### **I. PLAINTIFFS COULD NOT PURSUE WRONGFUL DEATH CLAIMS FOR FAILURE TO WARN OR CERTAIN DISEASES. (POINT I)**

Plaintiffs do not dispute that Mrs. Smith’s failure-to-warn claim and her heart disease, COPD/emphysema and addiction claims were decided against her on summary judgment prior to her death. They do not dispute that that judgment is final. They also do not dispute that, as a consequence of these facts, Mrs. Smith could not have recovered damages from B&W on any of those claims had she survived. Under the plain language of the Wrongful Death Act (“Act”), these facts mandate that plaintiffs cannot relitigate those claims in a wrongful death action against B&W. This is because the Act does not create in the first instance a wrongful death action for any claim that was adjudicated against the decedent during her life.

Plaintiffs cite no Missouri case reaching a different result because there is none. Instead, they make three arguments. The first is that B&W agreed in a different case (an interpleader action) that plaintiffs could relitigate the claims decided against Mrs. Smith on summary judgment in her personal injury action. Plaintiffs have never made this argument in four years of litigating this case through trial and on appeal. It is also unsupported by any record evidence. Plaintiffs inappropriately rely upon extra-record materials that should be stricken. Even so, the extra-record materials, which plaintiffs

never presented to the trial court or the court of appeals, would not change the result required by the Act. They show that Mrs. Smith's estate (not the plaintiffs here) voluntarily dismissed Mrs. Smith's tort claims that had survived summary judgment but had not gone to trial and that B&W agreed, consistent with Missouri law, that plaintiffs could pursue *those claims* in a wrongful death action. The voluntary dismissal of personal injury claims that had not been adjudicated for or against the decedent does not foreclose a later wrongful death action asserting those same claims. In the extra-record materials (which plaintiffs fail to quote in full), B&W expressly reserved its right to assert all of the factual and legal defenses available to it under the Act. That includes its right to seek dismissal of claims adjudicated against Mrs. Smith during her life, which did not exist at the time of her death and for which no wrongful death action ever arose.

Plaintiffs' second argument makes a distinction between "actions" and "claims" that is nowhere recognized in Missouri wrongful death law and, if followed, would produce results expressly prohibited by the Act and this Court's decisions. Under their theory, the Act *permits* plaintiffs to re-litigate any and all claims adjudicated against their decedent provided they identify just one viable claim the decedent herself could have had. If this were the law, the Act's limitations would be meaningless. Contrary to plaintiffs' argument (which no judge on the court of appeals adopted), the language of the Act and case law construing it requires claim-by-claim determinations of the viability of a wrongful death action.

Finally, plaintiffs argue that the Act's remedial purposes permit them to relitigate claims dismissed against their decedent. Again, they cite no case law approving this

result. This Court has repeatedly held that the Act allows “one recovery,” not two, for tortious conduct resulting in injury and death. Mrs. Smith obtained a full adjudication of her failure-to-warn and certain disease claims, and plaintiffs later obtained full adjudication of the remaining claims, fully satisfying the Act’s remedial purposes.

**A. The Agreement Between B&W And Mrs. Smith’s Estate Did Not Create A Wrongful Death Action For Any Claim Adjudicated Against Plaintiffs’ Decedent During Her Lifetime.**

Plaintiffs’ first argument rests on the bizarre and incorrect contention that B&W agreed not to assert a key argument that it has consistently made throughout the trial court and appellate proceedings in this case. In fact, B&W never agreed that plaintiffs could relitigate failure-to-warn and disease claims that had been dismissed against Mrs. Smith.

Plaintiffs’ contention is based on materials that were not before the trial court and are not part of the record on appeal. Rather, plaintiffs have simply harpooned materials into an improper “Appendix” and then submitted a meritless argument based on them. (Plaintiffs’ Brief 15-24) “Such tactics are improper, unfair to opposing counsel and burdensome to this Court.” *Jones v. Keller*, 850 S.W.2d 383, 384 (Mo. App. E.D. 1993). Accordingly, B&W objects to plaintiffs’ improper attempt to inject materials outside the record into this case and urges the Court to disregard both those materials and the arguments based upon them. *See id.*; *8182 Maryland Assocs., L.P. v. Sheehan*, 14 S.W.3d 576, 587 (Mo. banc 2000) (materials not submitted in the trial court will not be considered on appeal); *Sher v. Chand*, 889 S.W.2d 79, 84 (Mo. App. E.D. 1997) (same).

Indeed, plaintiffs have never before raised this issue. Nor did they ever before attempt to submit their extra-record materials to any court, despite having many unfettered opportunities to do so from the first time B&W raised the Act's statutory limitations as a bar to some of plaintiffs' claims early in the trial court proceedings. For example, plaintiffs did not raise their contention or submit the extra-record materials in response to B&W's motion for summary judgment (L.F. 86) or B&W's motion for directed verdict (L.F. 1238); at the argument on B&W's motion for directed verdict (T. 2107) or the conference on jury instructions (T. 2959-85); in response to B&W's motion for JNOV and/or new trial (L.F. 1625); or at the argument on the motion for JNOV and/or new trial (T. 3357). They also did not seek to include these materials in the Legal File on appeal. Plaintiffs' failure to assert this contention until now confirms its lack of merit, particularly when they and the decedent were represented by the same counsel at all times in both the federal case and this case.

Moreover, plaintiffs' attempt to shift the obligation to include these materials to B&W (Plaintiffs' Brief 17-18) would turn Missouri appellate procedure on its head. In fact, B&W acted correctly; these materials "could not properly have been included in the legal file because it was not before the trial court." *Jones*, 850 S.W.2d at 383-84. In any event, B&W had no reason to submit materials from a different case that merely evidence the parties' rights to do what they have done in this case.

Even if, notwithstanding B&W's objections, this Court were to consider these materials, they show that B&W preserved its right to challenge plaintiffs' assertion of claims that were adjudicated against Mrs. Smith in her lifetime:

Nonetheless, Brown & Williamson may raise and litigate any defense based upon fact or law that is available to it in any wrongful death action arising from the death of Barbara Smith, if one is filed.

(Plaintiffs' "Appendix" at A192) Plaintiffs' Brief omitted this provision of the agreed order in the interpleader action. The agreed order is clear beyond dispute that it leaves the parties exactly where they are here: B&W agreed that it would not assert that the Act's statutory bar was triggered by the voluntary dismissal with prejudice of the survival claims that had *not* been adjudicated against Mrs. Smith in federal court, but B&W preserved the right to assert that the claims that *had* been adjudicated against her could not be resurrected under the Act.

B&W has abided by that agreement, as the record properly before this Court shows. B&W has not asserted that the Act precludes all of plaintiffs' claims. To the contrary, B&W has asserted only that plaintiffs' claims based on failure to warn and claims based on heart disease, COPD/emphysema, and addiction may not be brought under the Act because those claims were adjudicated against Mrs. Smith by the federal court during her lifetime.<sup>1</sup>

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<sup>1</sup> B&W cited plaintiffs' voluntary dismissal with prejudice of the federal court action only to demonstrate the uncontradicted fact that neither Mrs. Smith nor her survivors sought reconsideration of or appealed from the summary judgment against her on her failure-to-warn claims and claims based on heart disease, COPD/emphysema, or

(Continued...)

Rather than tax this Court with an extended account of the tortuous history of the extra-record materials from a separate interpleader action or respond in depth to the rabbit trail that plaintiffs ask this Court to follow, suffice it to say that B&W was faced with a pending survival action in which Mrs. Smith's estate had claims – other than failure to warn and claims based on heart disease, COPD/emphysema, and addiction – as well as the possibility of a future wrongful death action. Missouri law provides that a defendant facing the prospect of defending those two separate, but overlapping, actions may file an interpleader action to determine which of the two claims may be asserted and ensure that the defendant does not risk two adverse judgments on inconsistent theories of liability.<sup>2</sup> *Smith v. Preis*, 396 S.W.2d 636 (Mo. 1965).

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addiction. Instead, they allowed that ruling to become final without challenge. (B&W's Brief 6, 28)

<sup>2</sup> A significant risk of inconsistency exists because, under Missouri law, a survival action is a claim of the decedent's estate, while a wrongful death action is a claim of the decedent's statutorily-designated survivors. *See Smith*, 396 S.W.2d at 638. In addition, although the two actions require the same underlying elements of a cause of action, a survival action plaintiff can recover only if the defendant's conduct *did not cause the decedent's death*, while a wrongful death a plaintiff can recover only if the defendant's conduct *did cause the decedent's death*. *Id.* at 639.

B&W's interpleader action was aimed at resolving this conflict. The extra-record order in the interpleader action was the mechanism by which the risk of double recovery and/or inconsistent results between the survival and wrongful death actions was resolved. It let the claims that had been resolved against Mrs. Smith during her lifetime become final but recognized that the remaining claims could proceed in a later wrongful death action.

In sum, plaintiffs' first contention with respect to the previously resolved claims is without any record support or merit. This Court should reject it out of hand.

**B. The Wrongful Death Act Does Not Permit Relitigation of Claims  
Adjudicated Against the Decedent.**

Contrary to plaintiffs' assertion, B&W is not arguing that, when some of Mrs. Smith's claims were adjudicated against her on summary judgment, her survivors were barred from bringing a wrongful death action on *any* basis. (Plaintiffs' Brief 27-28) To the contrary, the Act only precludes plaintiffs from relitigating claims adjudicated against Mrs. Smith during her life. B&W never sought dismissal on this ground of plaintiffs' product defect or intentional tort claims, because they were not adjudicated against Mrs. Smith.

The Act does not contain any provision to resurrect "claims" that the decedent did not have at the time of her death merely because she might have had an "action" based on other claims. If Mrs. Smith's "death had not ensued," no one could reasonably argue that she would have been entitled to "recover damages" from B&W based on B&W's alleged failure to warn, despite the fact that she was permitted to pursue other claims against

B&W. Indeed, no judge of the court of appeals adopted plaintiffs' argument that the Act permits them to relitigate claims decided against their decedent based on a distinction between "claims" and "actions."

Plaintiffs' theory conflicts with the Act's plain language. Section 537.080.1 provides that a wrongful death action arises from the "death" of a person caused by a defendant's "act" or "conduct." Here, plaintiffs alleged a variety of *different* acts and conduct which they contend caused Mrs. Smith's death. Only one is a failure to warn; others include defective product design, fraudulent concealment, and conspiracy. Plaintiffs were permitted to pursue claims under the Act to the extent their decedent could have "recover[ed] damages in respect thereof." *Id.* This language requires determining whether the decedent could have recovered damages arising from each alleged act or conduct. As to the alleged failure to warn, Mrs. Smith could not have recovered "damages in respect thereof," even if a different conclusion might follow as to other alleged acts or conduct.

Similarly, § 537.085 provides that a "defendant may plead and prove as a defense any defense which the defendant would have had against the deceased in an action based upon the same act ... had death not ensued." By these terms, the Act again provides for a claim-by-claim approach to determining the viability of a wrongful death action.

Because B&W could defend against any further failure-to-warn claims by Mrs. Smith or her estate on the basis of the prior summary judgment order, a wrongful death action asserting the same claim is statutorily invalid, too. *Andes v. Paden, Welch, Martin & Albano*, 897 S.W.2d 19, 21-22, 23 (Mo. App. W.D. 1995) (a federal court's dismissal has

a “preclusive effect on a subsequent action filed in the state courts of Missouri”). But, by contrast, the summary judgment order would not be a defense to the design defect claim in a wrongful death action, because that ruling did not adjudicate that claim against Mrs. Smith.

**C. The Act’s Remedial Purposes Are Fully Served Here.**

Plaintiffs rely on *O’Grady v. Brown*, 654 S.W.2d 904 (Mo. banc 1983), arguing that the Act’s remedial purposes are not satisfied unless they can relitigate claims dismissed against their decedent during her lifetime. As B&W explained in its opening brief, however, *O’Grady* did not approve relitigation in wrongful death of any claim decided against a decedent during her life. Plaintiffs are wrong that any other result would permit B&W “to escape the jury’s verdict.” (Plaintiffs’ Brief 32) B&W faced trial on all of Mrs. Smith’s claims during her life. In that process, some of her claims were dismissed after a full and fair hearing. Mrs. Smith’s estate dismissed the remaining claims voluntarily before trial. Those claims later went to trial in this wrongful death action. Simply stated, Missouri law requires B&W to defend against each claim only once, not twice, whether in a personal injury action, a survival action or a later wrongful death action. *Strode v. St. Louis Transit Co.*, 95 S.W. 851, 856 (Mo. banc 1906) (“for such wrongful act but one recovery should be had”); *State ex rel. Thomas v. Daves*, 283 S.W. 51, 56 (Mo. banc 1926) (“the law contemplates but one satisfaction for the same negligence”); *Campbell v. Tenet Healthsystem, DI, Inc.*, 224 S.W.3d 632, 638 (Mo. App. E.D. 2007) (the “but one recovery” principle affirmed in *Strode* “echoes a longstanding rule of Missouri law”).

## **II. PLAINTIFFS FAILED TO MAKE A SUBMISSIBLE CASE ON THEIR FAILURE-TO-WARN CLAIMS. (POINT II)**

Mrs. Smith testified that 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. (Supp. L.F. 1900) She also testified that the Congressionally mandated health warnings that were on cigarette packages since 1966 had no effect whatsoever on her cigarette smoking. (Supp. L.F. 1838) Plaintiffs presented Mrs. Smith's testimony to the jury in their case and are bound by it. *See Stark v. American Bakeries Co.*, 647 S.W.2d 119, 121 (Mo. banc 1983). Plaintiffs presented no competent contrary evidence to support the causation element of their failure-to-warn claims, and B&W is entitled to judgment notwithstanding the verdict on those claims.

Plaintiffs attempt to misdirect this Court by accusing B&W of omitting testimony that B&W actually quoted verbatim in its brief. (*Compare B&W's Brief 44-45 with Plaintiffs' Brief 46*) A review of the entirety of Mrs. Smith's testimony demonstrates that B&W's characterization of the record is correct: Mrs. Smith paid no heed for more than 20 years to all warnings, including the federal label warnings that were legally adequate as a matter of law.<sup>3</sup> Plaintiffs' argument that Mrs. Smith was unaware of the risks of

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<sup>3</sup> Plaintiffs incorrectly assert that post-1969 evidence is irrelevant because their failure-to-warn claims are preempted as to conduct after June 30, 1969. In fact, preemption does

(Continued...)

smoking in the face of these warnings does not establish the missing element of plaintiffs' case and in fact confirms that she would not have heeded any warning B&W might have given before July 1, 1969.

Plaintiffs rely on *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10, 14 (Mo. banc 1994), to argue that the presumption that a person would heed an adequate warning requires the denial of a motion for JNOV in all failure-to-warn cases. *Tune*, however, is distinguishable: there is no indication that the defendant in that case presented any evidence to rebut the presumption. When, as here, the uncontradicted evidence shows that Mrs. Smith failed to heed legally adequate warnings for more than 20 years, the presumption is negated, and the case must be decided on the evidence actually presented. *Klugesherz v. American Honda Motor Co.*, 929 S.W.2d 811, 814 (Mo. App. E.D. 1996); *Michler v. Krey Packing Co.*, 253 S.W.2d 136, 139 (Mo. banc 1952).

Plaintiffs rely on the testimony of Mrs. Smith's children as to their beliefs and feelings concerning what their mother might have done had her purported knowledge been different. That testimony, however, has no probative force or evidential value. *See Powell v. State Farm Mut. Auto. Ins. Co.*, 173 S.W.3d 685, 690 (Mo. App. W.D. 2005). In the absence of any evidence upon which the jury could properly find that Mrs. Smith would have heeded a warning, plaintiffs did not make a submissible case on their failure-

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not affect the relevance of Mrs. Smith's failure to heed warnings after that date to show that she would not have heeded earlier warnings.

to-warn claims. *See Kelly v. State Farm Mut. Auto. Ins. Co.*, 218 S.W.3d 517, 521 (Mo. App. W.D. 2007) (in reviewing case for submissibility, court will not “supply missing evidence nor grant the plaintiff the benefit of any unreasonable, speculative, or forced inferences”).

### **III. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON COMPARATIVE FAULT. (POINT VI)**

Plaintiffs wrongly argue that this Court ruled on B&W’s comparative fault argument in *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76 (Mo. App. W.D. 2006). This Court’s only order in *Thompson* denied, without expressing any opinion on the merits, an application for transfer. Transfer, an “extraordinary remedy” according to Rule 83.04, is discretionary under Article V, § 10 of the Constitution. This Court’s denial of transfer in *Thompson* therefore has no precedential value. *See Lipton Realty, Inc. v. St. Louis Housing Authority*, 705 S.W.2d 565, 570 (Mo. App. E.D. 1986) (denial of discretionary writ of prohibition, without passing on merits, has no precedential value).

But this Court *has* decided a case that supports B&W’s argument on comparative fault: *Lester v. Sayles*, 850 S.W.2d 858 (Mo. banc 1993). *Lester* unequivocally held that, for comparative fault to be the subject of a jury instruction, it “must be pled as an affirmative defense.” 850 S.W.2d at 869. The only exception to this rule is when the evidence gives rise to an amendment of pleadings by implied consent; that, however, occurs *only* when the evidence “bears solely on the proposed new issue and is not

relevant to some other issue already in the case.” *Id.* Neither the rule nor the exception applies here.

Plaintiffs argue that *Lester*'s pleading requirement was met here because B&W's original answer asserted comparative fault. But that answer was superseded by the time of trial, and so it was of no relevance to the issues tried. The pleadings in effect at trial did not raise comparative fault.<sup>4</sup> Plaintiffs also argue that the evidence presented here supported giving a comparative fault instruction, but they fail to apply the test *Lester* set forth and make no showing that any evidence related solely to comparative fault. In fact, as demonstrated in B&W's opening brief, all the evidence plaintiffs cite refuted elements of plaintiffs' claims, such as causation.

A defendant is entitled to waive comparative fault, just like any other affirmative defense. This Court has condemned attempts by trial courts to dictate a party's litigation

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<sup>4</sup> That fact distinguishes this case (and *Lester*) from *Earll v. Consolidated Aluminum Corp.*, 714 S.W.2d 932 (Mo. App. E.D. 1986). Plaintiffs' assertion that *Lester* discussed *Earll* “approvingly” is belied by this Court's conclusion in *Lester* that the cited passage was dicta and had “no relation to the question at hand.” 850 S.W.2d at 868. Likewise, *Henderson v. Terminal RR. Ass'n*, 736 S.W.2d 594 (Mo. App. E.D. 1987), does not help plaintiffs; the court there held only that, if a defendant refuses to submit a comparative fault instruction, it cannot later complain about the trial court's failure to give such instruction. B&W, of course, makes no such complaint here.

strategy: “In the conduct of his client’s cause, the right of counsel, within the law, to determine questions of trial tactics, or policy or strategy is one the courts must not infringe.” *Mavrakos v. Mavrakos Candy Co.*, 223 S.W.2d 383, 388 (Mo. 1949). The trial court erred in dictating B&W’s trial strategy and instructing the jury on comparative fault.

**IV. THE TRIAL COURT ERRED IN DENYING B&W’S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON PUNITIVE DAMAGES. (POINT VII)**

**A. Plaintiffs Failed to Make a Submissible Case on Punitive Damages.**

Plaintiffs do not dispute, and their experts testified at trial, that cigarettes have been legal to manufacture and sell in Missouri at all relevant times, notwithstanding their well known health risks. (B&W’s Brief 50-53) Since 1966, the federal government has mandated health warnings on all cigarette packages. 15 U.S.C. § 1333(a)(1) (1965). B&W’s Kool cigarettes have been in full compliance with the warnings laws at all times. The federal government has never banned the sale of cigarettes or mandated any alteration in their design. Moreover, as *plaintiffs’* cigarette design expert testified, there is not now and has never been any way to modify the design of cigarettes, including the Kool cigarettes Mrs. Smith smoked, to make them safer to smoke.<sup>5</sup> (B&W Brief 84-85)

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<sup>5</sup> Plaintiffs contend that the testimony of their witnesses on this issue is “negative” or inferential and should be disregarded. (Plaintiffs’ Brief 85) In fact, B&W’s brief shows

(Continued...)

This testimony affirmatively included the Kool cigarettes Mrs. Smith smoked. Thus, even though plaintiffs' witnesses testified that Kool smoke had higher nicotine levels than other cigarettes and that B&W added menthol to Kool to mask the harshness of the smoke, there was *no* evidence that these facts made Kool more dangerous than any other cigarette. *Id.* Plaintiffs' claims in their brief to the contrary (*e.g.*, Plaintiffs' Brief 84) cite to no supporting record evidence because there is none.

Instead, plaintiffs focus on evidence that, they argue, shows that B&W "lied" to consumers about health risks and "actively suppressed" health information.<sup>6</sup> Plaintiffs, \_\_\_\_\_ by direct quotes that plaintiffs' witnesses unequivocally testified that no cigarette design or brand is safer than any other and that they could identify no theoretical design that would be safer. There is no contrary evidence to disregard because this was the *only* evidence regarding cigarette design and safety. Plaintiffs are bound by their witnesses' testimony. *Stark*, 647 S.W.2d at 121.

<sup>6</sup> Plaintiffs argue that B&W knew before 1969 that nicotine was addictive but failed to inform cigarette smokers. But Mrs. Smith admittedly paid no attention to anything B&W said and ignored for decades the health warnings on cigarette packages. (Supp. L.F. 1838) Also, as the record shows, the federal government decided not to define nicotine as addictive in 1964, only to change its mind in 1988. (PX 151.1 (p. 351); PX 151.17 (p. 9)) At no time, however, including the nearly twenty years since that decision, has Congress decided to include that conclusion in the health warnings. For these reasons,

(Continued...)

however, fail to explain how the inferences they would draw from the evidence support submitting punitive damages here. Plaintiffs never asserted a fraudulent misrepresentation claim because, as Mrs. Smith testified and as plaintiffs stipulated at trial, she *never* saw or was aware of any B&W or industry advertisements or public statements that appeared at any time, much less prior to 1969, including the evidence plaintiffs rely on extensively in their brief. (T. 905-06) Finally, despite the fact that plaintiffs were permitted to offer this evidence that was admittedly unconnected to Mrs. Smith and her smoking, the jury rejected plaintiffs' fraudulent concealment claim and returned a verdict in B&W's favor. (L.F. 1419-20) This evidence does not support the submissibility of punitive damages.

The court of appeals properly applied the exacting standards that this Court has set for the review of the submissibility of punitive damages. In particular, it assessed whether plaintiffs had presented clear and convincing evidence that B&W's actions were tantamount to intentional wrongdoing by intending, with an evil motive, to harm Mrs. Smith. It correctly concluded that the evidence did not rise to that level and that a new trial was required.

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the fact that B&W did not tell smokers before 1969 that nicotine was addictive, at a time when the federal government did not take that position, does not constitute clear and convincing evidence of aggravating circumstances.

**B. B&W Did Not Waive The Submissibility Issue.**

Plaintiffs contend that B&W did not raise the submissibility of punitive damages in its motions for direct verdict at the close of plaintiffs' case or the close of evidence. (Plaintiffs' Brief 77-78) This Court should not consider plaintiffs' contention because they did not raise it in the court of appeals. *See Blackstock v. Kohn*, 994 S.W.2d 947, 953 (Mo. banc 1999); *see also* Rule 83.08 (a "substitute brief in this Court ... shall not alter the basis of any claim that was raised in the court of appeals brief"). Plaintiffs fully briefed the merits of the submissibility of their punitive damages claims, and the court of appeals decided the issue.

Furthermore, plaintiffs' contention is without merit. In B&W's written motions for directed verdict, it raised and fully briefed plaintiffs' failure "to make a submissible case for each claim" and specifically laid out the insufficiency of the evidence to support those claims. (L.F. 1238, 1241-48, 1365) In fact, as plaintiffs acknowledge, B&W specifically mentioned plaintiffs' failure to make a submissible punitive damages case based on fraudulent concealment or conspiracy. (Plaintiffs' Brief 78) B&W's motions, however, were not limited to those two claims. Rather, B&W asserted: "**B&W Is Entitled To A Directed Verdict On The Issue of Punitive Damages Because Plaintiffs Have Failed To Make A Submissible Claim.**" (L.F. 1248) This point was reiterated and elaborated on: "plaintiffs have failed to make a submissible claim for punitive damages" because plaintiffs did not establish a nexus between B&W's purported bad conduct and the specific harm suffered by Mrs. Smith. (L.F. 1249) B&W also presented oral argument as to the specific reasons that plaintiffs failed to make a submissible case

on each of their claims. (T. 2118-25, 2132-33, 2956-57) B&W's motion for JNOV also unquestionably brought to the trial court's attention the lack of submissibility of punitive damages. (L.F. 1625, 1644-66) Therefore, the submissibility of plaintiffs' punitive damages claims is properly before this Court for full appellate review.

Moreover, even if plaintiffs were correct that B&W did not specifically mention the words "punitive damages" in their motions for directed verdict, B&W's arguments in its directed verdict motions included these words by operation of law. To make a submissible case for punitive damages, plaintiffs were required to prove every element of their underlying tort claims by the higher and more exacting "clear and convincing" standard of proof. *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 111 (Mo. banc 1996). Because plaintiffs failed to make a submissible case for compensatory damages, *ipso facto* they failed to make a submissible case on punitive damages. *See LLP Mortgage, Ltd. v. Marcin, Inc.*, 224 S.W.3d 50, 56 (Mo. App. W.D. 2007) (if plaintiff failed to make submissible prima facie tort claim, court need not address submissibility of punitive damages). Thus, B&W's challenge to the submissibility of plaintiffs' claims necessarily encompassed a challenge to the submissibility of punitive damages for those claims.

Plaintiffs cite *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155 (Mo. App. W.D. 1997), to argue that failure to specifically raise the submissibility of aggravating circumstances in a motion for directed verdict waives the issue for appellate review. (Plaintiffs' Brief 77-78) Unlike in *Letz*, however, here B&W raised the issue of submissibility of aggravating circumstances in its motions for directed verdict. When an

issue has been brought to the trial court's attention in a motion for directed verdict, the issue is preserved for appellate review. *Kaplan v. U.S. Bank, N.A.*, 166 S.W.3d 60, 69, n.2 (Mo. App. E.D. 2003) (motion for directed verdict will be "construe[d] liberally if the basis for it is apparent and the record reveals that the trial court was fully aware of the movant's position."). *See also Stipp v. Meadows*, 996 S.W.2d 764, 766 (Mo. App. S.D. 1999) (specific after-trial motion preserves issues even if motion for directed verdict was not specific); *Gillenwaters Building Co. v. Lipscomb*, 482 S.W.2d 409, 411 (Mo. 1972) (holding that issues were preserved for appeal; "[w]e have been rather liberal in considering assignments raising the sufficiency of the evidence").

**V. THE TRIAL COURT VIOLATED B&W'S DUE PROCESS RIGHTS BY PERMITTING THE JURY TO CONSIDER EVIDENCE THAT HAD NO NEXUS TO MRS. SMITH'S INJURY. (POINT VIII)**

Plaintiffs erroneously suggest that B&W is arguing that evidence was improperly admitted for purposes of *compensatory* damages. (*E.g.*, Plaintiffs' Brief 88) In fact, however, it was the admission of constitutionally impermissible evidence for purposes of awarding punitive damages that requires reversal for a new trial. In that regard, plaintiffs do not dispute that "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 Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003).

Plaintiffs simply refuse to acknowledge that *State Farm* set forth constitutional limits on the types of evidence that could be submitted to a jury in determining liability

for punitive damages. *Phillip Morris USA v. Williams*, 127 S. Ct. 1057, 1064 (2007), further expressly held that a jury may not base the amount of punitive damages on harm caused to persons other than the plaintiff. Plaintiffs seek to justify the admission of cigarette ads and statements made by B&W a half-century ago (Plaintiffs' Brief 94), but they do not dispute that Mrs. Smith never heard or saw any of them. In any event, there were no claims for affirmative fraud or misrepresentation in the case. And there was no evidence that any other smoker in Missouri saw or relied on these half-century-old statements. Likewise, plaintiffs do not dispute that Mrs. Smith never heard the hearsay statement ("hook 'em young, hook 'em for life") that was made when she was in her sixties, around the time she quit smoking. Moreover, plaintiffs' brief repeatedly insists that Mrs. Smith never heard, saw, or paid attention to *any* information about smoking's health risks. (*E.g.*, Plaintiffs' Brief 2-3, 8-9, 41-43) Thus, there is no nexus between any purported "representations" by B&W and any action or inaction by Mrs. Smith. *See State Farm*, 538 U.S. at 422 (only evidence with a "nexus to the specific harm suffered by the plaintiff" may be used without compromising the defendant's due process rights).

Plaintiffs also relied extensively on documents (from outside the United States) "received" by someone at a separate corporate entity owned by B&W's British parent company. (*E.g.*, Plaintiffs' Brief 94-96) Yet, plaintiffs did not link those documents to any harm to Mrs. Smith. Moreover, plaintiffs failed to identify what action, if any, B&W should have taken and what purported effect the information in the documents would have had on Mrs. Smith had she known it. Thus, this evidence from outside the United

States was totally unconnected to Mrs. Smith and should not have been part of the jury's consideration of punitive damages. *See State Farm*, 538 U.S. at 421-22.

Plaintiffs purport to justify the admission of this evidence and instances of B&W's awareness of the health risks of smoking as part of an effort by B&W "to conceal the dangers of Kool cigarettes." (Plaintiffs' Brief 96 (emphasis added)) But the jury found against plaintiffs on their concealment claim and thereby rejected the notion that concealment should give rise to punitive damages. Thus, this evidence has nothing to do with the claims for design defect or failure to warn that may have been the basis of the punitive damages award. *State Farm's* constitutional limitations prohibit this type of evidentiary free-for-all when a jury is considering an award of punitive damages. *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. . . .").

Finally, there is no doubt that, in Phase II of the trial (which was limited solely to determining the amount of punitive damages), it was improper to allow use of old cigarette ads and actions by some other entity outside the United States that had no nexus whatsoever to plaintiffs' failure-to-warn or design claims or to Mrs. Smith. *Williams*, 127 S. Ct. at 1063-64. Moreover, in Phase II, the trial court permitted plaintiffs to introduce evidence of thousands of deaths purportedly caused by smoking and then to rely repeatedly on it in closing argument. (T. 3244-47, 3267-68, 3275-76, 3292-94, 3300-02, 3318-23, 3348-49)

Plaintiffs' response concerning this evidence in Phase II simply misses the point of *Williams*. Plaintiffs argue that *Williams* permits this evidence to determine liability for punitive damages in the first instance because it goes to "reprehensibility." (Plaintiffs' Brief 90, 93-94) But in *Williams*, liability for and the amount of punitive damages were submitted together. Here, the determination of the amount of punitive damages was bifurcated from liability. Thus, in Phase II, the limitations on evidence that the jury could consider became much more restricted. At that point, evidence of harm to others became impermissible. *Williams*, 127 S. Ct. at 1063-64. That the use of this evidence prejudiced B&W cannot be seriously disputed because plaintiffs' counsel relied on almost nothing else in his Phase II presentation and closing argument as to the amount of punitive damages the jury should award.

Accordingly, the trial court's failure to exclude impermissible evidence requires reversal of the award of punitive damages.

## **VI. THE INSTRUCTIONS ON PUNITIVE DAMAGES WERE ERRONEOUS AND PREJUDICIAL. (POINT IX)**

The United States Supreme Court held in *Williams* that a defendant is entitled to protection from a jury basing the amount of a punitive damages award even "in part upon its desire to *punish* the defendant for harming persons who are not before the court (*e.g.* victims when the parties do not represent)." *Williams*, 127 S. Ct. at 1060 (emphasis in original). This was no idle or passing comment. Rather, the failure of the trial court to protect B&W against "such an award would amount to a taking of 'property' from [B&W] without due process." *Id.*

Plaintiffs' only argument on the trial court's failure to give proper instructions is that B&W's proposed jury instructions were not consistent with the holding in *Williams* because they did not acknowledge that the jury may consider potential harm to others in determining reprehensibility. (Plaintiffs' Brief 98-100) Plaintiffs' argument relies on a comparison of the jury instruction requested by the defendant Philip Morris in *Williams* with the one requested by B&W here. But in so doing, Plaintiffs fail to recognize that in *Williams*, liability for and the amount of punitive damages were submitted to the jury together. By contrast, B&W requested, and the trial court granted, bifurcation of the trial on liability for punitive damages (Phase I) from that on the amount of punitive damages (Phase II). (See L.F. 743-44; T. 34-35) Thus, reprehensibility already had been considered and determined in Phase I dealing with liability. In Phase II, the amount of punitive damages was the only issue before the jury. Accordingly, B&W's requested instructions in Phase II in this case seeking to limit the jury's consideration to the harm to plaintiffs were in perfect harmony with the *Williams* holding. (See L.F. 1458-59, B&W Appendix at A17-A18) The trial court's failure to give them or to provide any other form of protection to B&W violated *Williams*' constitutionally mandated requirement and requires reversal. See, e.g., *White v. Ford Motor Co.*, 500 F.3d 963, 977 (9th Cir. 2007).

In this case, B&W suffered clear prejudice from the failure to instruct the jury to limit the scope of its consideration in Phase II to harm suffered by plaintiffs. Plaintiffs introduced evidence on the purported effect of B&W's conduct on thousands of Missouri smokers who were not parties, and plaintiffs relied on this evidence in closing argument in Phase II to implore the jury to award a huge amount of punitive damages.

(T. 3318-23; 3348-49) *See Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007, 1017 (9th Cir. 2007) (“A jury instruction ... that allows (or does not preclude) direct punishment for nonparty harm ... invites precisely the improper jury speculation – as to, for example, the number of non-party victims or the extent of their injury – that *Williams* sought to avoid.”).

At the same time, although plaintiffs’ brief fails to address it, *State Farm* mandates 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.” 538 U.S. at 422. This instruction was required in both Phase I and Phase II because of, among other things, the improper introduction of documents related to another company’s activities in a foreign country. (L.F. 1345, 1454, 1458; B&W’s Appendix at A12-A13, A17; *see also* T. 2984) This is particularly true when there was no evidence that anything to do with the foreign documents was unlawful in Britain (or anywhere else). B&W is entitled to a new trial on punitive damages for this reason as well.

**VII. THE 40-TO-1 RATIO BETWEEN PUNITIVE DAMAGES AND COMPENSATORY DAMAGES IS FAR GREATER THAN DUE PROCESS PERMITS, AND THE AWARD IS EXCESSIVE. (POINT X)**

Plaintiffs attempt to evade the Supreme Court’s admonition that “an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety,” *State Farm*, 538 U.S. at 425, by relying on *Williams v. Philip Morris, Inc.*, 92 P.3d 126 (Or. Ct. App. 2004). Plaintiffs’ reliance on the intermediate Oregon appellate court’s decision ignores the fact that, in defiance of *State Farm*, that

court held that it had virtually unrestrained discretion to approve a grossly higher ratio (more than 80-to-1) because, as plaintiffs characterize it, due process “limits *do not apply in cigarette cases.*” (Plaintiffs’ Brief 105) Although plaintiffs still cling to this earlier iteration of the *Williams* case, the United States Supreme Court has twice granted review of the case and most recently, in February 2007, vacated the judgment of the Oregon courts for the second time. *See Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1062 (2007). In *Williams*, the Supreme Court held that *all* defendants, specifically including tobacco companies, are protected by the Due Process Clause. *Id.* at 1063.

B&W cited recent cases that have applied *State Farm* and limited punitive damages to ranges of less than 4-to-1. (B&W’s Brief 107-11) In line with those cases, the Court of Appeals for the Eastern District this week reversed a \$2.8 million punitive damages award that reflected a triple-digit ratio between compensatory and punitive damages, which “raise[d] a presumption of unconstitutionality per the holding in *Campbell.*” *Kelly v. Bass Pro Outdoor World, LLC*, No. ED 88392 (Mo. App. E.D. Dec. 18, 2007). Here, when plaintiffs’ evidence involved events that occurred decades ago or at another company overseas, and that admittedly had no nexus to Mrs. Smith, the need to punish B&W is nonexistent or at the very least greatly diminished. Moreover, B&W has complied with the federal warning requirements and all other applicable federal and Missouri laws and regulations, and no alternatively designed cigarette that B&W could have marketed would have eliminated the health risks. These circumstances also militate in favor of vacating the punitive damages award or greatly reducing it. *See Clark v. Chrysler Corp.*, 436 F.3d 594, 602-03 (6th Cir. 2006). Moreover, as explained in B&W’s

opening brief, under Missouri law, the award was excessive and should be remitted. Therefore, this Court should vacate the punitive damages award or remit it to 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.

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 7570 words, which does not exceed the 7750 words allowed for a reply brief.
2. Pursuant to Supreme Court Rule 84.06(g), the CD-ROM filed with this brief contains a copy of this brief in Microsoft Word for Windows format. It was scanned for viruses on December 20, 2007, and is virus-free.
3. One true and correct copy of the attached brief was served on December 21, 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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