

Appeal No. SC88685

IN THE MISSOURI SUPREME COURT

BROWN & WILLIAMSON TOBACCO CORPORATION,

Defendant - Appellant,

v.

LINCOLN SMITH, *ET AL.*,

Plaintiffs - Respondents

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

SUBSTITUTE BRIEF OF RESPONDENTS

ORAL ARGUMENT REQUESTED

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STATEMENT OF FACTS

Contrary to the standard of review, Brown &Williamson’s brief fails to present the facts in the light most favorable to the verdict. This Court must ignore all facts recited by Brown &Williamson (“B&W”) that are contrary to the verdict.

1. Mrs. Smith’s Smoking History and Her Lack of Knowledge Regarding the Dangers of Smoking Kool Cigarettes

Barbara Smith was born on May 13, 1927. LF 1758. She moved to Kansas City in 1942 and married Lincoln Smith, her husband of 58 years, that same year. LF 1757 and 1780-1781. Mrs. Smith began smoking Lucky Strike cigarettes manufactured by B&W’s predecessor in interest, the American Tobacco Company, at that time. LF 1841. After smoking Lucky Strikes for a little more than one year, Mrs. Smith switched to Kool cigarettes manufactured by B&W. LF 1841, 1843-1844. B&W advertised Kool cigarettes during Mrs. Smith’s entire smoking history as “remedies” for colds and flu. PTX # 48 and 144.41. In 1954, B&W informed its smoking customers that Kool cigarettes do not cause lung cancer (according to “distinguished authorities”) and “are not injurious to health.” PTX # 148.1. In 1967, B&W claimed that it was a “fact” that “there is no causal relationship between smoking and disease” and that the Surgeon General’s Report of 1967 “conceded” that smoking does not cause disease. PTX # 389. B&W further claimed that the idea that smoking causes disease is “anti-smoking propaganda” and that “the country’s most eminent men of medicine and science” had “testified before the U.S. Congress” that smoking does not cause disease. Id. Four years after Barbara Smith quit smoking, B&W still did “not accept the claim that smoking is addictive.” PTX # 395. In fact, B&W’s CEO testified in 1994 that nicotine is not addictive. PTX # 386 at p. 236. B&W maintained these positions

with the general public until at least 1997, more than 7 years after Barbara Smith quit smoking. PTX # 33; Tr 886-887.

Barbara Smith knew of no risks associated with cigarettes until at least two years after she quit smoking. LF 1838. No one in school told her smoking was harmful. LF 1830. The dental school where she worked for more than 18 years had no rules regarding smoking and Barbara never worked in a place where she could not smoke. LF 1830. Mrs. Smith never had any rules about smoking in her home. Id. She could not remember talking to her children about the health risks of smoking. LF 1832. Her parents did not talk to her about the health risks of smoking. Id. Prior to 1990, no doctor ever told Barbara she should quit smoking. LF 1832. She never told anyone she was “addicted” or “hooked on cigarettes.” LF 1833-1834. No doctor ever told her she was addicted. LF 1833. Mrs. Smith never saw a warning regarding the health risks of cigarettes until 1992. LF 1838. She never saw anything in the newspaper about the risks of smoking until 1999, more than 9 years after she quit smoking. LF 1834. When asked why she had filed her personal injury lawsuit, Barbara Smith responded “I want people to realize how harmful it is and what it can cause.” LF 1904.

Someone told Mrs. Smith about the 1964 Surgeon General’s Report. LF 1837. She could not recall what, if anything, she heard about the 1964 Report. Id. Specifically, she could not recall whether the 1964 Report had concluded that smoking was “bad for your health” or “caused cancer.” LF 1837. Dr. Burns testified that the campaigns by the public health community to educate the public about the dangers of smoking following the 1964 Report were unsuccessful. Tr 2058.

Barbara Smith’s children also testified that their mother was unaware of the dangers

of smoking. Barbara's son, Mike Smith, testified that his mother "didn't have a clue" that smoking was harmful. Tr 1648. Barbara's daughter, Toni Parker, also testified that her mother was unaware of the dangers of smoking. Tr 1762. Ms. Parker testified that "I would have my mother today if she had have known." Id.

2. B&W's Superior Knowledge of the Specific Dangers of Kool Cigarettes

B&W should have known that Kool cigarettes are addictive since at least 1939, more than 4 years before Barbara Smith began smoking Kool cigarettes. PTX # 343 ("the general, world-wide, reason for smoking is largely the nicotine in the tobacco"). In 1959, B&W initiated research projects aimed at "increas[ing] our knowledge of the physiological effects of smoking." PTX # 65. B&W later admitted that these research projects were initiated in 1959 to prove that "we are in a nicotine rather than a tobacco industry." PTX # 5. In 1962, B&W admitted that "what we need to know above all things is what constitutes the hold of smoking, that is, to understand addiction . . . the work proposed should lead to an understanding of the mechanism which creates addiction." PTX # 65. In 1963, B&W recognized that research it had performed on the alleged "benefits" of nicotine "delivers to the industry what well may be its first effective instrument of propaganda counter to that of the American Cancer Society, et al, damning cigarettes as having a causal relationship to cancer of the lung." PTX # 1. B&W also admitted in 1963 that:

Moreover, nicotine is addictive. We are, then, in the business of selling nicotine, an addictive drug . . . but cigarettes have certain unattractive side effects: (1) they cause lung cancer; (2) they contribute to certain cardiovascular disorders; (3) they may well be truly causative in emphysema, etc., etc.

PTX # 1.

In 1978, B&W recognized again that nicotine is “addictive” and a “poison”, but that its consumers, like Barbara Smith, did not know these facts. PTX # 3. Up until the year Barbara Smith quit smoking, B&W secretly admitted internally that “the ultimate product of the tobacco industry is nicotine” PTX # 58. In 1969, B&W concluded that Kool cigarettes contained the highest “extractable nicotine delivery” of any cigarette on the market. PTX # 188 at p. 17.

B&W should have known that Kool cigarettes cause heart disease, peripheral vascular disease and cancer since at least 1939, more than 4 years before Barbara Smith began smoking Kool cigarettes. PTX # 343 (“smoking seems to produce what is known as ‘tobacco heart’ [and] peripheral constriction of the blood vessels . . . tars have been found capable of producing cancers”). PTX # 343. In 1959, B&W began researching a “safer” cigarette designated “Ariel.” PTX # 65. The goal of this project was to create a cigarette that delivered nicotine “while at the same time avoiding the *well-known disadvantages* inherent in actual cigarette smoking . . . in other words, a satisfying smoke which, within present knowledge is ‘healthy’.” PTX # 212; 278. In 1965, B&W recognized that “scientists were unanimous in their opinion that smoke is weakly carcinogenic” and “that efforts should be made to reduce this activity.” PTX # 7. B&W also admitted that it had sponsored research that confirmed “a carcinoma in a mouse lung by direct smoke inhalation” and that this same research “accepts the existing epidemiologic evidence of a causal connection between smoking and health.” Id.; PTX # 184.

In 1967, B&W admitted that “smoking is now irreversibly associated with health” and its “R&D scientists” assumed that “if there is no inhaling, there is no lung cancer or

respiratory problems.” PTX # 268. In 1969, B&W held a “research conference” that concluded “the Industry has to recognize the possibility of distinct adverse health reactions to smoke aerosol: (a) lung cancer (b) emphysema and bronchitis.” PTX # 361. In 1977, B&W admitted that “the case against smoking . . . has long ceased to be an area for scientific controversy.” PTX # 10. That same year, B&W concluded that cardiovascular disease causes “15%[-25%] of all deaths by cigarette smoking” and “95% of all lung cancer deaths are caused by smoking cigarettes.” PTX # 270. B&W concluded that the tar and nicotine deliveries found in the Kool cigarettes Barbara Smith smoked caused “496,663” to “700,173” deaths every year. Id.

Despite its substantial knowledge of the specific dangers of Kool cigarettes, B&W publicly denied that Kool cigarettes were addictive or that they caused any disease. PTX # 33 (“When he arrived at Brown & Williamson in May, 1995, Mr. Brookes found a hostile and uncooperative relationship between the company and others who were interested in smoking and health issues and policy, including the government and public health officials”), PTX # 148.1 (“there is no proof that cigarette smoking is one of the causes [of lung cancer] . . . we believe the products we make are not injurious to health”); PTX # 386 at p. 236; 389 (“there is no clinical evidence of a causal relationship between smoking and disease”); PTX # 395 (“the company does not accept the claim that smoking is addictive”); Tr 886-887 (“they repetitively said we must still not know the answers . . . when, in fact, the scientific question about whether smoking caused disease had long since been settled”). Instead, B&W actively marketed Kool cigarettes as health remedies. PTX # 48 and 144.41 (“KOOL maintained a three share level for over 30 years (through mid-60s) while positioning itself as a specialty cigarette to be smoked only for remedial or medicinal purposes”). B&W even

sought to “design products to ‘intercept’ people who are trying to give up smoking.” PTX # 66.

3. Mrs. Smith and B&W’s Failure to Warn

It was undisputed at trial that from 1942 until 1966, B&W provided no warnings of any kind to Mrs. Smith regarding the dangers of smoking. Tr 2054; LF 1758 at 9:1-2 and 1839 at 90:6-7; see also PTX #32, at 176. In 1966, B&W was forced by Congress to provide the following caution statement on all packages of Kool cigarettes:

Caution: Cigarette smoking may be hazardous to your health. 15 U.S.C. § 1333(a)(1) (1965).

Barbara Smith never saw this caution statement. LF 1838.

In 1969, Congress forced B&W to change the caution statement to the following warning:

Warning: The Surgeon General has determined that cigarette smoking is dangerous to your health.

15 U.S.C. 1333(a)(1) (1970).

Barbara Smith never saw this warning. LF 1838.

In 1984, Congress again forced B&W to provide four rotating health warnings on its cigarette packages. U.S.C. 1333(a)(1) (1984). Barbara Smith did not see any of these warnings until 1992, more than two years after she quit smoking. LF 1838; Tr 1618 and 1652.

Dr. Burns testified that the “principal driving force” behind these warnings was to “standardize a warning label rather than to actually communicate with the public.” Tr 2055-2056. Dr. Burns also testified that “people tend not to look at the warning label. And when

you ask smokers where they get their information about smoking, they very seldom tell you that it's from the warning label." Tr 2056. Mrs. Smith did not see any warning on cigarette packages until 1992. LF 1838. Mrs. Smith testified that the only magazine she read during her smoking history was Ladies Home Journal. LF 1835. No evidence was presented at trial that Ladies Home Journal carried any articles about the dangers of smoking. Mrs. Smith testified repeatedly that she continued to smoke Kool cigarettes because she was "addicted." Tr 1833-1834 and 1851.

4. Mrs. Smith's Smoking-Related Diseases

In 1990, Mrs. Smith was told by a doctor that she had "respiratory trouble" that was the beginning stages of emphysema. Tr 1614. The same doctor told Mrs. Smith that she was "going to have to quit smoking because it was going to kill her if she didn't." Id. For three weeks, Mrs. Smith's children "stood guard" over her in an effort to help her quit smoking. Tr 1615. During this time, Mrs. Smith was "throwing up" and "had the shakes real bad." Id. Mrs. Smith was also uncharacteristically belligerent. Tr 1615. She was so sick "she thought she was going to die." Tr 1616. The doctor told Barbara she was "having nicotine withdrawals." Id. Before her death in 2000, Barbara Smith suffered from five separate smoking-related diseases: lung cancer, chronic obstructive pulmonary disease ("COPD"), peripheral vascular disease ("PVD"), carotid artery disease and heart disease. Tr 772-800.

5. Plaintiffs' Overwhelming Evidence that Mrs. Smith Would Have Heeded an Adequate Warning and the Specific Defects of Kool Cigarettes

Prior to 1990, Barbara Smith had no idea that the Kool cigarettes she smoked caused lung cancer, heart disease, chronic obstructive pulmonary disease ("COPD"), peripheral vascular disease ("PVD"), addiction, or death. Tr 1648, 1762, 1830-1834, 1838 and 1904.

Mrs. Smith quit smoking immediately after she first received an adequate warning regarding the dangers of smoking. Tr 1606, 1614, 1667-1668 and 1670. Mrs. Smith did not see any warnings on the packages of Kool cigarettes she smoked until 1992. LF 1838.

B&W's former director of research, Jeffrey Wigand, testified that B&W engineered Kool cigarettes to contain more nicotine than any other cigarette in the market. Tr 979-980. This fact was confirmed by B&W's internal company documents. PTX # 188. Dr. Wigand also explained how B&W used menthol to mask the harshness of Kool cigarettes, allowing smokers like Barbara Smith to breathe more smoke deeper into the lungs. Tr 981-982. Dr. Wigand further testified that for more than 30 years B&W added coumarin, a known carcinogen, to the Kool cigarettes smoked by Mrs. Smith. Tr 1062-1063 and 1233. Mrs. Smith was diagnosed with lung cancer in 1992. Tr 699.

Dr. David Burns, one of the world's leading experts on tobacco-related disease, testified that Kool cigarettes are highly engineered devices. Tr 808-809 and 814-815. B&W manufactures Kool cigarettes in this way "to make the cigarette more attractive, more palatable, easier to smoke." Tr 808-809. Dr. Burns testified that the effect of these engineering changes in cigarette manufacture has been "more lung cancer." Tr 810-823. Finally, Dr. Burns testified that Kool cigarettes are "unreasonably dangerous." Tr 823-824.

Plaintiffs presented overwhelming evidence that B&W developed a truly safer cigarette in the early 1960s, at least 30 years before Barbara Smith was diagnosed with any smoking-related disease. See, e.g., PROPOSAL FOR FURTHER RESEARCH CONTRACTS WITH BATTELLE, February 13, 1962, PTX # 65 at p. 14 ("RESEARCH PROPOSAL FOR PROJECT ARIEL . . . The device should meet the psychological aspects of smoking and conform in use to the usual habits of confirmed smokers. The formation of

tar and carbon monoxide, as in the case of the smouldering reaction of conventional smoking, should be avoided”); Notes of Meeting to Discuss Present Position of Ariel, February 11, 1964, PTX # 255 at p. 2 (“The present Ariel project finishes on February 29, 1964. It has achieved sufficient success to render it certain that we shall wish to continue with the further development of this type of smoking device”); NICOTINE ADMINISTRATION: ARIEL SMOKING DEVICES, August 2, 1966, PTX # 278 at 301099890 and 301099900 (“In summary, the ARIEL design provides (1) a physiologically active aerosol of known qualitative and quantitative composition, and (2) an aerosol of controllable particle size and stability. In other words, a satisfying smoke which, within present knowledge, is ‘healthy’ . . . The present position with the research shows that the original objective is feasible and achievable”); PROJECT GREENDOT, 1987, PTX # 276 at 400452856 (“BAT research work into a device producing a highly modified smoke delivery began over 25 years ago with Project ARIEL . . . The objective was ‘to produce a device from which the smoker could receive sufficient nicotine to give satisfaction, unaccompanied by the products of combustion and pyrolysis associated with normal cigarette smoking.’ Interest in the project waned and work was halted in 1967 because ‘the need for such a device was not apparent’ ”).

In fact, B&W also opposed the development of safer cigarettes by other tobacco companies. Tr 1877-1878. Other “renowned scientists” were unable to develop a safer cigarette because B&W concealed its sophisticated knowledge of the dangers of cigarettes that would have led to such a breakthrough. Tr 2066-2068. Although the federal government and the State of Missouri define a “cigarette” as “tobacco wrapped in paper”, Kool cigarettes are “highly-engineered” devices. Tr 808-823.

6. Plaintiffs’ Survival Action Against B&W

In 1996, Barbara Smith filed an action against B&W in state court alleging that the Kool cigarettes she smoked for more than 47 years caused her to develop several serious (and ultimately fatal) health problems. LF 126-148. B&W successfully removed the case to federal court. LF 1278-1284. The federal district court granted partial summary judgment on some of Barbara Smith's claims, but preserved others. LF 1286-1313. The federal district court also dismissed Barbara Smith's damages claims for addiction, COPD, angina, arteriosclerotic heart disease or emphysema as barred by the specific statute of limitations for personal injuries, R.S.Mo. § 516.120(4) (2000). Id. The federal court never made its partial summary judgment order final under Fed. R. Civ. P. 54(b). Barbara Smith died approximately five (5) months later on May 25, 2000. PTX # 156.1.

On September 22, 2000, B&W filed an interpleader action against Barbara Smith's estate, alleging that the Estate was required to choose between the Survival Action and the Wrongful Death Action to protect B&W against "the risk of multiple suits, liability and damages." Appendix at A9-A17. During the pendency of the interpleader action, B&W filed a "Proposed Stipulation of Fact" with the federal court, admitting that "Lincoln Smith was substituted as the plaintiff" and that:

The Court gave the potential Death Action plaintiffs an opportunity to renounce their claim that lung cancer and lung cancer surgery caused death.

The potential Death Action plaintiffs declined, as was their right, to renounce their potential lung cancer-based wrongful death claim.

The court ordered that the interpleader should proceed.

Appendix at A161-A167.

Throughout the interpleader action, B&W proclaimed that the Smiths had made their

choice, giving up their Survival Action and choosing to proceed with their Wrongful Death Action. Appendix at A133 and A167. Brown & Williamson claimed that it was the Smiths “right” to pursue a wrongful death action and that Lincoln Smith was “giving up nothing by choosing a wrongful death action over the Survival Action” because “regardless of which action proceeds, if it is successful, he will recover.” Appendix at A184. On May 6, 2001, the federal court entered an “Agreed Order” by the parties, signed by Brown & Williamson. The Order stated that:

The Parties have by this proposed order now reported to the court that they reached agreement over the issues disputed in the interpleader, including specifically an agreement that, based upon the evidence developed in discovery, *the Survival Action should be dismissed with prejudice.*

Based upon these findings and the agreement of the Parties, the Court hereby ORDERS that:

Interpleader-defendants Lincoln Smith, as personal representative of the Estate of Barbara Smith, deceased, who is also plaintiff in the Survival Action, *shall forthwith dismiss the Survival Action with prejudice.*

Upon *dismissal of the Survival Action with prejudice* and approval of such dismissal by the Court, this interpleader action shall also be dismissed with prejudice.

The fact that the Survival Action is dismissed with prejudice as a consequence of this interpleader action shall not be used by Brown & Williamson as a defense to a wrongful death action arising from the death of Barbara Smith, if one is filed.

Appendix at A192.

Despite its agreement with the Plaintiffs and the federal court, B&W subsequently centered its legal defense of the Plaintiffs' Wrongful Death Action around the dismissal of Barbara Smith's Survival Action with prejudice. Tr 2111-2112. B&W then misled the appellate court into believing that Barbara Smith's heirs had knowingly dismissed their *Wrongful Death Action* with prejudice by omitting material documents from the federal case and breaching its agreement with the Plaintiffs and the federal court. Now, B&W asks this Court to deny Barbara Smith's heirs any recovery for her wrongful death based on its knowing deception.

7. Comparative Fault

B&W pled comparative fault as an affirmative defense, not just once, but several times in its original answer. LF 0017-0035. B&W performed substantial discovery regarding Mrs. Smith's fault. LF 1750-1907. After completing its discovery regarding Barbara Smith's fault, B&W withdrew its affirmative defenses relating to comparative fault and unilaterally sought to prevent the Plaintiffs from submitting a comparative fault instruction. LF 1646 and 2966-2969. B&W made great use of its discovery regarding Mrs. Smith's fault at trial, arguing repeatedly to the jury that Mrs. Smith's death was the result of her "informed choice" to begin and continue smoking. LF 1822-1823, 1836, 1851, 1855-1858, 1884, 1900, 1902, 1903, 3078, 3094, 3104 and 3114. This Court recently refused to accept transfer on the same issue in Brown & Williamson v. Thompson, SC88067.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DENIED DEFENDANTS' MOTION FOR DIRECTED VERDICT AT THE CLOSE OF THE EVIDENCE AND MOTION

**FOR JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV) ON
PLAINTIFFS' CLAIMS FOR FAILURE TO WARN AND FOR HEART
DISEASE, COPD/EMPHYSEMA AND ADDICTION.**

A. Standard of Review

In an appeal from a trial court's order sustaining or denying a motion for judgment notwithstanding the verdict, the primary question for this Court is whether the plaintiff made a submissible case, which is the same standard applied to a trial court ruling on a motion for directed verdict. See Benoit v. Missouri Highway and Transportation Commission, 33 S.W.3d 663 (Mo. Ct. App. 2000); Ralph v. Lewis Bros. Bakeries, Inc., 979 S.W.2d 509 (Mo. Ct. App. 1998). This Court, in evaluating whether a submissible case has been made, is required to view the record in the light most favorable to the plaintiff, and the plaintiff is to be afforded the benefit of all reasonable inferences that may be drawn from the evidence. See Cook v. Smith, 33 S.W.3d 548 (Mo. Ct. App. 2000); Morgan v. Union Pacific R.R. Co., 979 S.W.2d 477 (Mo. Ct. App. 1998). Further, this Court must disregard evidence contrary to the jury's verdict. Seitz v. Lemay Bank and Trust Co., 959 S.W.2d 458, 461 (Mo. banc 1998). Where 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*. Jungerman v. City of Raytown, 925 S.W.2d 202, 204 (Mo. banc 1996).

**B. The Smith Estate's Dismissal With Prejudice of Its *Survival Action* Was
Not A Full and Final Adjudication On the Merits of the Beneficiaries'
"Mutually Exclusive" *Wrongful Death Action***

Brown & Williamson's entire argument before this Court hangs on the allegation that Barbara Smith chose to allow dismissal with prejudice of all her claims for damages "during

her lifetime.”¹ See Substitute Brief of Appellant at p. 19 (“In short, before her death, a Missouri federal court fully and finally adjudicated [Barbara Smith’s claims] against the decedent and in favor of B&W”). In his dissenting opinion, Judge Smart acknowledged his frustration with this aspect of the procedural history in this case:

If I understand this history correctly, this procedural history compels a conclusion that the personal injury claims were finally adjudicated. *If the procedural history were otherwise*, or if the plaintiffs had presented a compelling argument that the resolution of the personal injury claim was not an adjudicated resolution, *I would concur with the result reached by the majority on this issue*.

Smith v. Brown & Williamson Tobacco Corp., 2007 WL 2175034 at *60, (Mo.App. W.D. 2007) (Smart, J., dissenting) (emphasis added).

In fact, a close review of the record in this case reveals that the procedural history *was* otherwise and “the resolution of the personal injury claim was not an adjudicated resolution.”

¹Barbara Smith never reached a final adjudication of any of her claims “during her lifetime” since she died on May 25, 2000 and the Stipulated Order of Dismissal is dated June 6, 2001. Compare PTX # 156.1 with LF 1314-1316. As discussed more fully below, the federal court’s partial summary judgment order was not a final adjudication. See, e.g., E.I. Dupont de Nemours & Co. v. Unites States Camo Corp., 19 F.R.D. 495, 498 (W.D.Mo. 1956) (“When a Court enters a partial, interlocutory summary adjudication, pursuant to Rule 56(d), it does not render a final judgment which is appealable, but only an order as to uncontroverted facts, which, being interlocutory, is subject to revision or modification”).

Brown & Williamson admitted this fact on the record in the federal case and even entered into an agreement with the Smiths and the federal court that “the fact that the Survival Action is dismissed with prejudice shall not be used by Brown & Williamson as a defense to a wrongful death action arising from the death of Barbara Smith, if one is filed.” Appendix at 192. Setting aside Brown & Williamson’s blatant breach of its agreement in the case *sub judice*, Judge Smart’s dissent suffers from his understandable misconception of the record, encouraged by Brown & Williamson’s misrepresentation of the proceedings in the federal case and its careful concealment of the true procedural posture of this case in the underlying appellate record.²

²As the Appellant, it was Brown & Williamson’s duty to compile the record on appeal. See Mo. R. Civ. P. 81.12 (c). Brown & Williamson’s failure to provide the appellate court with a copy of the Agreed Order of dismissal at issue was a breach of this duty. The appellate court is entitled to assume that omitted portions of the record were unfavorable to Brown & Williamson, and that is why they were not included. See, e.g., Runny Meade Estates, Inc. v. Datapage Technologies Int’l, Inc., 926 S.W.2d 167, (Mo.App. E.D. 1996). This certainly explains why B&W failed to include the federal court’s actual Agreed Order of dismissal, which clearly stated that only the Survival Action was dismissed with prejudice. Appendix at A191-A194. This Court must presume that the omitted federal documents support the trial court’s decision, i.e., Barbara Smith did not finally adjudicate her claims “during her lifetime.” Further, this Court “shall” correct “of its own initiative” material omissions from the record on appeal. See Mo. R. Civ. P. 81.12(f) (“If anything material is omitted from the record on appeal, the appellate court of its own initiative shall direct that

1. Judge Smart’s Dissent Is Based Entirely Upon an Inaccurate Procedural History for This Case Created and Perpetuated by Brown & Williamson

Judge Smart based his entire legal analysis on the following purported fact — “the personal injury claims were finally adjudicated.” See Smith v. Brown & Williamson Tobacco Corp., 2007 WL 2175034 at *60 (Mo.App. W.D. 2007) (Smart, J., dissenting). From this single, erroneous premise flows the remainder of Judge Smart’s dissent, including his concerns about double recovery, proper statutory interpretation, and the possible involvement of the legislative branch. Id. However, this Court need not reach the theoretical implications of Judge Smart’s dissent, since there was never a final adjudication of anything in the federal case except the Smith Estate’s “mutually exclusive” Survival Action.

2. The True Procedural History of This Case Reveals that Brown & Williamson Strongly Supported and Even Stipulated to the Beneficiaries’ Future Ability to Maintain a Wrongful Death Action

The federal court action for personal injuries caused by smoking was filed by Barbara

the omission be corrected”). This rule was promulgated by this Court for the very reason at issue in this case — the avoidance of a manifest injustice, here the denial of any damages for Barbara Smith’s wrongful death, caused by an appellant’s knowing and material omission in the record on appeal.

Smith in 1996. LF 1484-1507. Barbara Smith died on May 25, 2000. PTX # 156.1. Mrs. Smith's husband, Lincoln Smith, was substituted as "personal representative for the Estate of Barbara Smith" on July 13, 2000. Appendix at A3. Trial in the Survival Action was set for October 30, 2000. Appendix at A10. On September 15, 2000, Lincoln Smith informed Brown & Williamson that "the plaintiffs intended also to file a wrongful death claim against Brown & Williamson." Appendix at A3. On September 19, 2000, the parties conferred about "plaintiffs intentions regarding a wrongful death action." Appendix at A10. On September 22, 2000, Brown & Williamson filed a Complaint for Interpleader, claiming that it would face "mutually exclusive" and inconsistent claims. Appendix at A9-A17. Brown & Williamson's Complaint sought to prevent the Smiths from "trying the pending [Survival] action and then, regardless of the result in that case, trying a wrongful death case in a separate trial." Appendix at A11. Brown & Williamson's Interpleader action sought declaratory relief and an injunction prohibiting the Smith family from filing a wrongful death action "until the threshold issues raised by this interpleader action have been resolved." Appendix at A15.

The federal court was generally sympathetic to Brown & Williamson's argument. The Court issued an Order on October 11, 2000 finding that:

Missouri courts have also observed that the survival claim is brought by the decedent's personal representative on behalf of the estate, whereas the wrongful death claim is brought on behalf of one or more family members in their individual capacity. *Consequently, a judgment in one case has no preclusive effect over the other.*

Appendix at A92 (*citing Plaza Express v. Galloway*, 280 S.W.2d 17, 23 (Mo. 1955) (emphasis

added).³

The Court further found that although “B&W is entitled to some sort of relief, [the court] is not yet prepared to enjoin/continue the underlying suit.” Appendix at A91. The Court invited the interpleader defendants (the Smith Estate and the wrongful death beneficiaries) to consider and choose among several possible options, including confess judgment foreclosing certain claims, seek leave to assert wrongful death claims and then dismiss those claims with prejudice, or other possibilities. Appendix at A94-A95. As Brown & Williamson would later admit in a May 1, 2001 Proposed Stipulations of Fact:

The potential Death Action plaintiffs declined, as was their right, to renounce their potential lung cancer-based wrongful death claim.

Appendix at A167.

The original trial date in the survival action was continued to allow for the resolution of the issues raised by the interpleader case. Brown & Williamson filed a Motion for Summary Judgment on its interpleader claims on April 20, 2001. In its Motion, Brown & Williamson alleged that:

³The Missouri Supreme Court cases relied upon by Brown & Williamson and the court in the federal case are dispositive of the issue now before this Court. See, e.g., Smith v. Preiss, 396 S.W.2d 636, 640-641 (Mo. 1965) (holding that an adjudication in a survival action does not preclude a wrongful death action because “not only do the parties represented by [the plaintiff] in his two capacities not have the same interest, their interests are in conflict, and the legal rights he represents are different, and in fact are adverse to each other”).

Brown & Williamson filed this action, and the Court permitted it to proceed, because Brown & Williamson faced the possibility of both a Survival Action and a Death Action arising from Mrs. Smith's lung cancer . . . the Court vacated the earlier trial date in the Survival Action and permitted this interpleader action to proceed, in conformity with Missouri law, after the interpleader-defendants declined to state that they would not assert a Death Action premised on the lung cancer. That decision has now been made unanimously by all of the interpleader-defendants. They all now contend that Mrs. Smith's lung cancer and lung cancer surgery were a direct cause of her death.

Of course, Brown & Williamson's disagreement with the interpleader-defendants' position regarding the cause of death will ultimately be resolved at the trial of the Death Action, if the family decides to file one. In this case, however, the threat of liability premised on factually inconsistent verdicts has disappeared because the Survival Action has disappeared.

By asserting that Mrs. Smith's death was caused by lung cancer and lung cancer surgery, the Estate and the potential Death Action plaintiffs have agreed that the only potential cause of action against Brown & Williamson is a Death Action.

Appendix at A126-A127 and A133 (emphasis added).

Brown & Williamson subsequently filed Reply Suggestions in Support of its Motion for Summary Judgment, in which it said:

If the Family files a proper wrongful death claim at some point, it will have

another day in court. Also, Lincoln Smith is, in one sense, giving up nothing by choosing a wrongful death action over the Survival Action, because he is the sole beneficiary under Mrs. Smith's will. Regardless of which action proceeds, if it is successful, he will recover, either as the Estate's heir or as a wrongful death plaintiff.

Appendix at A184.

The federal court denied B&W's Motion for Summary Judgment, but ordered that the Smiths "shall have until June 4, 2001 to seek leave to file an Amended Complaint asserting both survival and wrongful death claims." The federal Court stated that it was "inclined to treat the request favorably. Appendix at A190.

As discussed below, the Smiths never got the opportunity to seek leave since Brown & Williamson agreed to dismiss the Survival Action with prejudice and never raise the dismissal as a defense in the Smiths' subsequent wrongful death action.

3. The Federal Court Entered an Agreed Order Memorializing the Smith Estate's Agreement to Dismiss Its Survival Action With Prejudice in Return for Brown & Williamson's Promise Not to Use the Dismissal as a Legal Defense to the Future Wrongful Death Action

Following the federal court's invitation to the Smith family to file appropriate papers indicating how they wished to proceed in litigation following the death of Barbara Smith, an agreement was reached between Brown & Williamson and the Smiths and memorialized in an Order from the federal court. The Smith Estate agreed to dismiss its Survival Action with prejudice and later pursue a wrongful death action (as Brown & Williamson had suggested

in its motion for summary judgment).⁴ In return, Brown & Williamson promised that:

The fact that the Survival Action is dismissed with prejudice as a consequence of this interpleader action shall not be used by Brown & Williamson as a defense to a wrongful death action arising from the death of Barbara Smith, if one is filed.

Appendix at A192.

The day after entry of the Agreed Order, the survival action was dismissed with prejudice consistent with the terms of the Agreed Order. See Appellant's Appendix at A75-A77.

As a result of the plain language of the Agreed Order, Brown & Williamson was prohibited from using the fact that the Survival Action was dismissed with prejudice as a defense to this Wrongful Death Action. Brown & Williamson has ignored its obligation in this regard, and has also failed to inform the appellate court and this Court of the terms of the Agreed Order. Brown & Williamson's appellate arguments contravene its duties under the Agreed Order and are designed to mislead this Court.

C. Brown & Williamson Now Disingenuously Claims that the Smith Estate's Dismissal of the Survival Action With Prejudice Somehow Bars the Beneficiaries' "Mutually Exclusive" Wrongful Death Claim

Despite its admissions to the contrary in the federal case and its promise not to raise the dismissal as a legal defense, Brown & Williamson has consistently maintained in this appeal that "Barbara Smith made the decision to dismiss with prejudice what remained of the

⁴The Estate's dismissal of the Survival Action with prejudice mooted the interpleader action, which was simultaneously dismissed with prejudice. Appendix at A195.

federal case.” See Brief of Appellant Brown & Williamson Tobacco Corporation at p. 23; Substitute Brief of Appellant at p. 18. The multiple errors in Brown & Williamson’s fraudulent argument deserve to be unraveled.

1. The Federal Court’s Partial Summary Judgment Was Not a Full and Final Adjudication

The federal court rendered a partial summary judgment against Barbara Smith on some of her claims. Under black letter federal and Missouri law, a partial summary judgment is not a final, appealable order, but merely provides guidance to the parties for purposes of the trial in the case at bar. See, e.g., 10A Wright, Miller & Kane, Federal Practice and Procedure § 2715 (1998) (“Rule 54(b) states that ‘in the absence of such determination and direction [for the entry of judgment], any order or other form of decision, however, designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties.’ Therefore, *unless the court makes its order final under Rule 54(b), the grant of a summary judgment on less than the entire litigation normally is not appealable until the full case reaches judgment*”) (emphasis added); 10B Wright, Miller & Kane, Federal Practice and Procedure § 2737 (1998) (“As was pointed out in the 1948 Advisory Committee Notes to Rule 56, a subdivision (d) order is not a judgment at all but ‘merely a pretrial adjudication that certain issues shall be deemed established for the trial of the case.’ *It also follows that an order issued pursuant to Rule 56(d) has no preclusive impact, since the trial court retains jurisdiction to modify the order at any time prior to the entry of a final judgment*”) (emphasis added); E.I. Dupont de Nemours & Co. v. Unites States Camo Corp., 19 F.R.D. 495, 498 (W.D.Mo. 1956) (“When

a Court enters a partial, interlocutory summary adjudication, pursuant to Rule 56(d), it does not render a final judgment which is appealable, but only an order as to uncontroverted facts, which, being interlocutory, is subject to revision or modification”); Childress Painting & Assoc., Inc., v. John Q. Hammons Hotels Two, 106 S.W.3d 558, 561 (Mo.App. W.D. 2003) (“A summary judgment for a defendant on less than all the theories pled by the plaintiff for recovery does not constitute a full summary judgment, but only a partial summary judgment, which is not a final judgment subject to our review”). In short, all of Barbara Smith’s claims were still available to her after the federal court’s partial summary judgment order and they remained available to her until her death on May 25, 2000.⁵

2. The Smith Estate’s Dismissal of the “Mutually Exclusive” Survival Action With Prejudice Did Not Act as an Adjudication of the Smith Beneficiaries’ Wrongful Death Action

Through filing an interpleader action, Brown & Williamson forced the Smiths to choose between two “inconsistent” claims — a survival action vesting in the Smith Estate and a wrongful death action vesting in the beneficiaries. Brown & Williamson argued in the

⁵It should also be noted here that the federal court’s dismissal of some of Mrs. Smith’s damages premised on the personal injury statute of limitations is inapplicable to a wrongful death action, which operates under a separate limitations period controlled by an entirely different Statute. Compare R.S.Mo. § 516.120(4) with R.S.Mo. § 537.100. In short, the claims of the wrongful death beneficiaries did not even arise until Barbara Smith’s death on May 25, 2000 (more than five months after the federal court’s partial summary judgment order). PTX # 156.1.

federal case that the Smiths had chosen the wrongful death action and admitted that the beneficiaries would “have another day in court” regarding these claims. Appendix at A184. In accord with Brown & Williamson’s suggestion, the Smith Estate chose to dismiss its Survival Action and the beneficiaries chose to pursue their Wrongful Death Action. Appendix at A191-A194. Since a survival action and a wrongful death action are “mutually exclusive” claims, the dismissal of one has no preclusive effect on the other. See, e.g., Smith v. Preiss, 396 S.W.2d 636, 640-641 (Mo. 1965) (holding that an adjudication in a survival action does not preclude a wrongful death action because “not only do the parties represented by [the plaintiff] in his two capacities not have the same interest, their interests are in conflict, and the legal rights he represents are different, and in fact are adverse to each other”). Brown & Williamson admitted this fact throughout the federal case and even agreed that it would not raise the dismissal of the Estate’s Survival Action as a defense to the future Wrongful Death Action. Brown & Williamson can not have it both ways. The survival and wrongful death actions cannot be “mutually exclusive” for purposes of the interpleader case, and fundamentally identical for purposes of this appeal.

D. The Dismissal of a Few *Claims* Against a Decedent Does Not Prevent the Heirs of that Decedent From Maintaining a Wrongful Death *Action*

B&W argues that the federal court’s partial summary judgment ruling regarding Mrs. Smith’s personal injury *claims* somehow barred Lincoln Smith (and Mrs. Smith’s children) from maintaining an *action* for wrongful death.⁶ B&W was unable to offer any authority for

⁶As discussed above, a partial summary judgment is not a full and final adjudication of *any* claims. See supra.

this position at trial and, apparently, has had no more success after researching Missouri law for the past 3 years. This is because no Missouri case holds that the partial summary judgment rulings of a federal court judge in a personal injury action bind the rulings of a state court judge in a wrongful death action. Relying on the “plain language of the Wrongful Death Act” (Substitute Brief of Appellant at pp. 30), B&W reaches the unfounded conclusion that Plaintiffs’ *action* for wrongful death is “permanently extinguished” since a few, but not all, of Barbara Smith’s personal injury *claims* were dismissed on summary judgment.⁷ However, B & W fails to overcome glaring analytical gaps in its reasoning, gaps resulting from a misinterpretation of the “plain language” of the Wrongful Death Act and an unsupported theory regarding Missouri case law.

B&W argues that the Wrongful Death Act bars a wrongful death plaintiff’s individual “claims.” However, the Wrongful Death Act says nothing about a plaintiff’s ability to maintain “claims.” Instead, the Wrongful Death Act bars any “action” which could not have been maintained by the decedent.⁸ In other words, the Wrongful Death Act prevents a

⁷The federal court’s partial summary judgment did not dismiss Barbara Smith’s *actions* for negligence and strict liability. LF 1286-1313.

⁸Missouri cases reveal that wrongful death actions are only barred to the extent that the legislature has prohibited decedent from pursuing *any action* for personal injuries during her lifetime. The clear intent of this provision is to restrict the right to sue under the wrongful death statute to situations where the decedent could have brought a suit for damages for decedent’s injuries. Strode v. St. Louis Transit Co., 95 S.W. 851 (Mo. banc 1906) (holding that monetary settlement during lifetime of decedent barred a second recovery in wrongful death action); Miller v. Smith, 921 S.W.2d 39, 44 (Mo. App. W.D. 1996)

decendent's heirs from pursuing an *action* which the decedent could not have pursued during

(holding that wrongful death action could be barred by official immunity doctrine); see also Fugate v. Fugate, 582 S.W.2d 663 (Mo. banc 1979) (holding that wrongful death action could be barred by parental immunity doctrine); Lawrence v. Board of Police Com'rs., 604 F.Supp. 1229, 1233 (E.D. Mo. 1985) (holding that wrongful death action could be barred by official immunity doctrine); State ex rel. Sisters of St. Mary v. Campbell, 511 S.W.2d 141, 147-148 (Mo. App. 1974) (holding that wrongful death action could be barred by charitable immunity doctrine).

The leading commentators cited by Defendants agree with the Missouri courts:

The original [wrongful death] Act, however, contained an express provision limiting the death action to those cases where the deceased might have recovered damages if he had lived . . . *It obviously is intended to prevent recovery for death where the decedent could never at any time have maintained an action*, as, for example, where there was simply no tortious conduct toward him.

PROSSER & KEETON, THE LAW OF TORTS § 127 (5th ed. 1988) (emphasis added).

This logic follows the “plain language” of the Wrongful Death Act:

Whenever the death of a person results from any act . . . which, if death had not ensued, would have entitled such person to recover damages

R.S. Mo. 537.080(1).

During her lifetime, Barbara Smith received no satisfaction for her claims against Brown & Williamson, not was she legally barred from recovery.

her life. See, e.g., Super v. White, 18 S.W.3d 511, 516 (Mo. App. W.D. 2000) (. . . the right to sue for wrongful death is conditioned on the fact that the decedent could have maintained an *action* for damages for the injuries sustained had he or she survived”).⁹ The Wrongful Death Act’s “clear meaning” permits the trial judge in the wrongful death action to decide whether the plaintiff’s claims are viable so long as the plaintiff would have had the right to maintain *any action* for personal injuries during her lifetime. B&W’s arguments either ignore or confuse this critical distinction.

Both the federal and state court judge agreed that nothing barred Barbara Smith from maintaining an *action* for damages against Brown & Williamson Tobacco Company. However, in this new wrongful death action, the state court allowed the wrongful death plaintiffs to pursue *claims* which the federal court judge dismissed on partial summary judgment in the personal injury action. If B&W’s arguments were correct, the state court trial judge in a wrongful death action would be bound by the decision of a federal court judge dealing with different issues in a different case under Missouri law. In short, the trial judge in the wrongful death action would be bound to follow the non-final opinions of the personal injury judge regarding the viability of a wrongful death plaintiff’s claims, even if those opinions were incorrect. As B&W’s 3 years of legal research proves, this is obviously not the law. Since no clear principle of law barred Barbara Smith from bringing an action for damages against defendants and she never received any satisfaction for her damages during

⁹In Super, this Court went on to hold that the only requirement of the language cited by B&W is that the decedent’s heirs show the requisite elements of the claim underlying the wrongful death action. Super, 18 S.W.3d at 516.

her lifetime, her heirs were able to bring any wrongful death claims which the trial court agreed were permitted under Missouri law.

**E. Brown & Williamson’s Technical Interpretation the Wrongful Death Act
Would Defeat Its Legislative Purpose**

In O’Grady v. Brown, this Court noted that:

The wrongful death act creates a new cause of action where none existed at common law . . . the right of action thus created is neither a transmitted right nor a survival right. The plain language of the statute itself does not condition recovery upon the existence of a right to sue at either the time of the injury or the time of death. Instead, it permits an action ‘whenever the death of a person results from any act.’

O’Grady v. Brown, 654 S.W.2d 904, 910 (Mo. banc 1983).

In other words, the statute asks the relatively simplistic question, “If Barbara Smith had lived, would she have been entitled to damages?” If the Court answers this question “yes”, construing the term “damages” in a manner that effectuates the purposes of the statute, Barbara Smith’s heirs could properly maintain an action for wrongful death. Further, no language in the statute would lead this Court to answer this question in the negative. See O’Grady, 654 S.W.2d at 909 (“Nothing in the language of the statute prevents this conclusion”).

This result best comports with the three-fold legislative purpose of the Wrongful Death Act as enunciated in O’Grady:

We can discern three basic objectives behind the statute: to provide compensation to bereaved plaintiffs for their loss, to ensure that tortfeasors pay

for the consequences of their actions, and generally to deter harmful conduct which might lead to death.

O'Grady v. Brown, 654 S.W.2d 904, 909 (Mo. banc 1983).

If Brown & Williamson were able to escape the jury's verdict against it for wrongful death based on a partial summary judgment ruling by a federal court in Mrs. Smith's personal injury action, Brown & Williamson would suffer no consequences for its conduct resulting in Mrs. Smith's death (and the resulting injury to Mrs. Smith's heirs) and there would be no deterrent effect for tortfeasors that kill.¹⁰ In short:

[I]t would be more profitable for Brown & Williamson to kill [Barbara Smith] than to scratch [her].

Id. at 909.

Or, as Justice Cardozo so eloquently stated:

It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied. There are times when uncertain words are to be wrought into consistency and unity with a legislative policy which is itself a source of law, a new generative impulse transmitted to the legal system.

O'Grady v. Brown, 654 S.W.2d at 909 (*quoting* Van Beeck v. Sabine Towing Co., 300 U.S.

¹⁰In the context of this discussion of the legislative purposes behind the Act, it is important to remind this Court of the extreme reprehensibility of the conduct in this case that resulted in Barbara Smith's death and led the jury to its punitive verdict. See Statement of Facts, *supra*.

342, 350-351 (1937).

The legislative policy at issue here is to compensate the heirs of a deceased plaintiff and hold tortfeasors responsible for acts that kill. The “uncertain words” in the Wrongful Death Act, here “damages”, must be construed to effectuate the purposes of the Act and yield to rigid constructions that would “perpetuate the very evils to be remedied.” “The term must therefore be construed in light of the purpose for which this statute was passed.” Id. at 909.

If adopted by this Court, Brown & Williamson’s proposed construction of the statute would result in a proliferation of technical arguments that would erode the three-fold purpose of the Wrongful Death Act. Tortfeasors that kill would be encouraged to turn highly technical procedural arguments into shields against unfavorable jury verdicts. O’Grady teaches against these kinds of rigid and nonsensical interpretations of the statute.¹¹

¹¹In fact, O’Grady construed the language of the Act liberally in an effort to uphold the purpose of the Act. As the O’Grady Court announced in relation to the maintenance of an action for the death of a viable fetus:

Nothing in the language of the statute prevents this conclusion.

O’Grady, 654 S.W.2d at 909.

Similarly, nothing in the language of the statute prevents a decedent’s heirs from maintaining a wrongful death action when partial summary judgment was rendered in the decedent’s personal injury action. This is in keeping with the idea that remedial statutes, like the Wrongful Death Act, should be construed liberally to effect their purpose and the “greatest public good.” See, e.g., Holtcamp v. State of Missouri, 2007 WL 2700551 at *3 (Mo.App. W.D. 2007), *application for transfer denied*, (“Remedial statutes should be

II. THE TRIAL COURT CORRECTLY DENIED DEFENDANTS' MOTION FOR DIRECTED VERDICT AT THE CLOSE OF THE EVIDENCE AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV) ON PLAINTIFFS' FAILURE-TO-WARN CLAIMS.

A. Standard of Review

In an appeal from a trial court's order sustaining or denying a motion for judgment notwithstanding the verdict, the primary question for the appellate court is whether the plaintiff made a submissible case, which is the same standard applied to a trial court ruling on a motion for directed verdict. See Benoit v. Missouri Highway and Transportation Commission, 33 S.W.3d 663 (Mo. Ct. App. 2000); Ralph v. Lewis Bros. Bakeries, Inc., 979 S.W.2d 509 (Mo. Ct. App. 1998). The appellate court, in evaluating whether a submissible case has been made, is required to view the record in the light most favorable to the plaintiff, and the plaintiff is to be afforded the benefit of all reasonable inferences that may be drawn from the evidence. See Cook v. Smith, 33 S.W.3d 548 (Mo. Ct. App. 2000); Morgan v. Union
construed liberally to include those cases which are within the spirit of the law and all reasonable doubts should be construed in favor of applicability to the case. Furthermore, remedial statutes should be construed in order to accomplish the greatest public good"); Holt v. Burlington Northern R.R. Co., 685 S.W.2d 851, 855 (Mo.App. W.D. 1984), *mot. for reh'g. and/or transfer overruled and denied*, ("In O'Grady, the supreme court held that the wrongful death statute is a remedial act and should not be strictly construed but should be construed with a view to promoting the apparent objectives of the act"). It should be noted here that B&W agrees that "the Wrongful Death Act is remedial." Substitute Brief of Appellant at p. 32.

Pacific R.R. Co., 979 S.W.2d 477 (Mo. Ct. App. 1998). Further, the appellate court must disregard evidence contrary to the jury’s verdict. Seitz v. Lemay Bank and Trust Co., 959 S.W.2d 458, 461 (Mo. banc 1998).

B. Plaintiffs Are Entitled To the Legal Presumption That an Adequate Warning Would Have Been Heeded

B&W argues that Plaintiffs failed to make a submissible failure to warn claim because Barbara Smith would not have altered her behavior even if an adequate warning had been given. In Missouri, it is presumed that a plaintiff would have altered her behavior in light of an adequate warning “[i]f there is sufficient evidence from which a jury could find that the plaintiff did not already know the danger” Tune v. Synergy Gas Corp., 883 S.W.2d 10, 14 (Mo. banc 1994). The Missouri Supreme Court expressly recognized the strength of this presumption and its effect on a motion for JNOV:

In this instance, the term “presumption” is used to mean “makes a *prima facie* case,” i.e., **creates a submissible case** that the warning would have been heeded.

Id. (emphasis added).¹²

¹²B&W relies primarily on Arnold v. Ingersoll-Rand Co. and Klugesherz v. American Honda Motor Co., Inc. to support their argument. However, both cases are inapplicable to the present case. In Arnold, the plaintiff failed to present any evidence suggesting that a warning would have imparted additional information:

. . . the testimony of each of [plaintiffs’ witnesses, including plaintiff’s employer and co-workers] indicated that they all knew that there was a danger

The proper inquiry is not whether Barbara Smith knew the general dangers associated with the product, but whether she knew the *specific* dangers. Cole v. Goodyear Tire & Rubber Co., 967 S.W.2d 176, 185 (Mo. App. E.D. 1993). Therefore, in the context of Defendants' JNOV motion, if Plaintiffs presented any probative evidence that Barbara Smith did not know cigarettes caused lung cancer, heart disease, chronic obstructive pulmonary disease ("COPD"), peripheral vascular disease ("PVD"), addiction and death prior to 1969, Plaintiffs have created a submissible case that a warning would have been heeded.¹³ Tune, 883 S.W.2d at 14; see also Williams v. Daus, 114 S.W.3d 351, 358-359 (Mo. App. S.D. 2003) ("We can only reverse the trial court's decision on appeal when there is a complete absence of probative facts to support the verdict"). Plaintiffs' evidence on this point was overwhelming.

C. Plaintiffs Presented Overwhelming Evidence that Defendant's Failure to

of an explosion if gas fumes accumulated in the shop.

Arnold v. Ingersoll-Rand Co., 834 S.W.2d 192, 194 (Mo. banc 1992).

The plaintiff in Klugesherz "concede[d] that he does not contend that [the injured minor] would have heeded any warning." See Klugesherz v. American Honda Motor Co., Inc., 929 S.W.2d 811, 814 (Mo.App. E.D. 1996). In this case, Plaintiffs submitted substantial evidence that Barbara Smith knew of no risks associated with cigarettes prior to 1969 and actually heeded the first adequate warning given. See infra.

¹³Judge Roldan held that the Federal Cigarette Labeling and Advertising Act preempted Plaintiffs' post-1969 failure to warn claims. As a result, post-1969 evidence is irrelevant to Plaintiffs' failure to warn claims.

Warn Caused Barbara Smith's Death

Plaintiffs' evidence revealed that B&W failed to provide any warning to Barbara Smith from 1942 until 1966. LF 1758 and 11839; see also PTX #151.18, at 176. From 1966 until 1969, the United States Congress forced the recalcitrant cigarette industry to place the following caution statement on packages of cigarettes:

CAUTION: Cigarette Smoking May Be Hazardous to Your Health.

PTX # 151.18, Reducing the Health Consequences of Smoking, a Report of the Surgeon General, 1989 at p. 176.

This caution statement was inadequate, essentially informing smokers that smoking "may or may not be hazardous." Barbara Smith testified that she never saw this warning on packages of KOOL cigarettes:

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

A: Around '92 or something like that

Tr 1838.

Further, B & W, the definitive expert on the KOOL cigarettes smoked by Mrs. Smith,¹⁴ stated publicly that its cigarettes did not cause any human disease:

Distinguished authorities point out that there is no proof that cigarette smoking is one of the causes [of lung cancer].

. . .

¹⁴B&W's sole corporate representative at trial, Sharon Blackie, admitted that B&W was the "expert in making [Kool cigarettes]." Tr 2198.

We believe the products we make are not injurious to health.

...

Despite all the headlines, there is no clinical evidence of a causal relationship between smoking and disease . . . The body of medical and laboratory research provides no conclusive proof that smoking causes cancer and other diseases in humans.

PTX # 148.1, A Frank Statement to Cigarette Smokers, appearing in the Kansas City Times on Monday, January 4, 1954 and signed by the President of Brown & Williamson; PTX # 389, Message from E.P. Finch, President of Brown & Williamson to public, dated October 3, 1967.

In fact, B & W advertised KOOL cigarettes as a remedy for disease during the entire period that it claims Mrs. Smith should have known KOOL cigarettes were harmful:

KOOL maintained a three share level for over 30 years (through mid-60's) while positioning itself as a specialty cigarette to be smoked only for remedial or medicinal purposes.

...

KOOL comfort for "Smoker's Throat." Tests show KOOLS taste 30 [degrees] COOLER.

...

Fighting sniffles . . . Colds or flu? Even then . . . KOOL'S taste wins through!
Switch to KOOLS for that clean, KOOL taste in your mouth!

PTX # 48, "Limited" Brown & Williamson memorandum from A.J. Mellman to R.A. Blott, et al., March 25, 1983; PTX # 144.41, KOOL ad copy from 1946-1948.

B & W also publicly denied that cigarettes were addictive:

. . . the company, along with many independent scientists, does not accept the claim that smoking is addictive.

PTX # 395, E-mail from Sharon Boyse to Southampton regarding Allegation about Brown & Williamson, dated June 23, 1994.

If B & W, the self-proclaimed expert on KOOL cigarettes, believed its cigarettes did not cause any human disease, and even touted KOOL cigarettes as a remedy for human disease, how could Barbara Smith, a layperson, be expected to know the specific dangers of smoking KOOL cigarettes?¹⁵

Finally, Barbara Smith never testified that she knew prior to 1969 that KOOL cigarettes caused lung cancer, heart disease, chronic obstructive pulmonary disease (“COPD”), peripheral vascular disease (“PVD”), addiction, or death. In fact, the overwhelming evidence in this case proved that Barbara Smith *did not know* that KOOL cigarettes caused disease from the time she started smoking until at least 1990.

Barbara Smith knew of no risks associated with cigarettes until a doctor warned her in 1990 that cigarettes were harmful. Tr 1614. No one in school told her smoking was harmful. LF 1830. The dental school where she worked for more than 18 years had no rules regarding smoking. *Id.* In fact, Barbara never worked in a place where she could not smoke. LF 1830. Barbara never had any rules about smoking in her home. *Id.* She could not remember talking to her children about the health risks of smoking. LF 1832. Her parents

¹⁵For this reason, B&W’s argument that the hazards of smoking were “open, obvious and commonly-known” must also fail, since such hazards were not “obvious” to Brown & Williamson.

did not talk to her about the health risks of smoking. Id. Prior to 1990, no doctor ever told Barbara she should quit smoking. LF 1832. She never told anyone she was “addicted” or “hooked on cigarettes.” LF 1833-1834. No doctor ever told her she was addicted. LF 1833. Mrs. Smith never saw a warning regarding the health risks of cigarettes until 1992. LF 1838. She never saw anything in the newspaper about the risks of smoking until 1999, more than 7 years after she was diagnosed with lung cancer. LF 1834. When asked why she had filed her personal injury lawsuit, Barbara Smith responded “I want people to realize how harmful it is and what it can cause.” LF 1904.

Barbara Smith’s children similarly testified that their mother was unaware of the dangers of smoking. Barbara’s son, Mike Smith, testified that his mother did not have any idea that smoking was harmful:

Q: Do you have any reason to believe that your mother knew about all this stuff when she was [B&W’s] customer?

A: She didn’t have a clue.

Tr 1648.

Barbara’s daughter, Toni Parker, also testified that her mother was unaware of the dangers of smoking:

Q: Do you have any reason to believe that your mother, Barbara, knew at the time she started smoking cigarettes in the 1940s that Kool cigarettes caused disease?

A: No.

Q: Do you have any reason to believe that she learned that in the 1950s and the 1960s?

A: No.

Q: Do you have any reason to believe that your mother, Barbara, knew that Kool cigarettes were nicotine delivery devices?

A: No, she did not.

Q: Toni, how do you feel, knowing that she didn't know that, and she smoked those cigarettes anyway?

A: I would have my mother today if she had have known.

Tr 1762.

Since Barbara Smith did not know the specific dangers of smoking KOOL cigarettes, it is presumed she would have altered her behavior if B & W had provided an adequate warning. As a result, Plaintiffs made a *prima facie* case that a warning would have been heeded. See Tune, 883 S.W.2d at 14.

However, in this case the Court need not presume that Barbara Smith would have altered her behavior in light of an adequate warning, since the evidence revealed that Mrs. Smith quit smoking immediately after she first received an adequate warning:

Q: Ever note any health problems that she had from smoking at any time?

A: No, not until about 1990. Mom seemed to be in very good health.

.....

Q: Dr. Burns was here and he told us in 1990 she had respiratory problems?

A: Yes.

Q: That were diagnosed as the beginning stages of emphysema?

A: Yes.

Q: And there was some concern that she might have had cancer, but she didn't?

A: Yes.

Q: That's the first step. Now, when did she quit smoking; was it then or was it in 1992 when it was actually cancer?

A: No, she quit, I believe, it was 1990.

Tr 1606 and 1614.

Q: Did Dr. Nelson make a recommendation at that time [1990] regarding her smoking?

A: Yes.

Q: What was it?

A: She needed to quit.

.....

Q: From that time on, did she ever have a cigarette again?

A: No, she never did.

Tr 1667-1668 and 1670.

D. This Court Must Disregard B&W's Creative Spin on the Evidence Presented at Trial

Defendant's brief ignores the overwhelming evidence that Barbara Smith would have heeded, and, in fact, did heed, an adequate warning and, instead, creates new testimony in an effort to convince this Court that Barbara Smith would not have heeded a warning. When reviewing the denial of JNOV motions, this Court must disregard all evidence contrary to the jury's verdict. See, e.g., Seitz v. Lemay Bank and Trust Co., 959 S.W.2d 458, 461 (Mo. banc

1998) (noting that all contrary evidence and inferences are disregarded when appellate court reviews the denial of motions for judgments notwithstanding the verdict).

In its brief, B&W disingenuously claims that Mrs. Smith was aware of the “publicity surrounding the 1964 Surgeon General’s Report” that found a causal link between cigarette smoking and cancer. Substitute Brief of Appellant at p. 3. However, Mrs. Smith’s actual trial testimony was the direct opposite of B&W’s claim:

Q: Do you remember hearing or reading anything about the Surgeon General of the United States studying the subject of cigarette smoke?

A: Yes. I heard about it.

Q: When and how did you hear about it?

A: . . . I guess someone had told me about it.

Q: Do you recall what it was you had read or heard about it?

A: I don’t remember.

Q: And do you recall that the Surgeon General had concluded that cigarette smoking was bad for your health?

A: I don’t remember.

Q: Do you recall that the Surgeon General had concluded that cigarette smoking caused cancer?

A: I don’t remember.

LF 1836-1837.

Apparently, the 1964 Surgeon General’s Report had such a profound impact on Mrs. Smith that she could not remember anything about its content. B&W can not confer knowledge on Mrs. Smith by putting words in her mouth after her death.

Similarly, B&W claims that “the uncontroverted evidence likewise demonstrates that warnings made no difference to Mrs. Smith.” Substitute Brief of Appellant at p. 44. B&W then proceeds to selectively cite testimony by Mrs. Smith that supports its thesis:

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.

Substitute Brief of Appellant at p. 45; LF 1838.

However, B&W omits the rest of Mrs. Smith’s testimony:

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

A: Around ‘92 or something like that

Tr 1838.

It is difficult to understand how the evidence “demonstrates” that pre-1969 “warnings made no difference to Mrs. Smith” when Mrs. Smith testified that she was never given a warning of any kind prior to 1992.

B&W’s “testimony” regarding the reason Mrs. Smith continued smoking is also disingenuous. B&W claims that Mrs. Smith continued smoking because “she enjoyed smoking.” Substitute Brief of Appellant at p. 45. However, Mrs. Smith testified repeatedly that she continued smoking because she was addicted:

Q: Have you ever described yourself as being addicted to anything?

A: To cigarette smoking.

. . .

Q: You consider yourself to have been addicted?

A: If you smoke a pack of cigarettes a day, I would imagine you are addicted.

...

Q: What does it mean to you to be addicted to cigarette smoke?

A: Something that you have to have.

...

Q: Had you ever made any effort to quit smoking before you quit?]

A: No.

Q: Why not?

A: Just something that you had to have.

Tr 1833-1834 and 1851.

Defendants' contrary and often misleading references to the evidence must be disregarded. Further, the appellate court must disregard evidence contrary to the jury's verdict. Seitz v. Lemay Bank and Trust Co., 959 S.W.2d 458, 461 (Mo. banc 1998) (holding that when reviewing the denial of a motion for JNOV, an appellate court must disregard evidence contrary to the jury's verdict).

III. THE TRIAL COURT CORRECTLY DENIED DEFENDANTS' MOTION FOR DIRECTED VERDICT AT THE CLOSE OF THE EVIDENCE AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV) ON PLAINTIFFS' STRICT LIABILITY PRODUCT DEFECT AND NEGLIGENT DESIGN CLAIMS.

A. Standard of Review

In an appeal from a trial court's order sustaining or denying a motion for judgment notwithstanding the verdict, the primary question for the appellate court is whether the plaintiff made a submissible case, which is the same standard applied to a trial court ruling on a motion for directed verdict. See Benoit v. Missouri Highway and Transportation Commission, 33 S.W.3d 663 (Mo. Ct. App. 2000); Ralph v. Lewis Bros. Bakeries, Inc., 979 S.W.2d 509 (Mo. Ct. App. 1998). The appellate court, in evaluating whether a submissible case has been made, is required to view the record in the light most favorable to the plaintiff, and the plaintiff is to be afforded the benefit of all reasonable inferences that may be drawn from the evidence. See Cook v. Smith, 33 S.W.3d 548 (Mo. Ct. App. 2000); Morgan v. Union Pacific R.R. Co., 979 S.W.2d 477 (Mo. Ct. App. 1998). Further, the appellate court must disregard evidence contrary to the jury's verdict. Seitz v. Lemay Bank and Trust Co., 959 S.W.2d 458, 461 (Mo. banc 1998).

B. Plaintiffs Presented Overwhelming Evidence of the Unreasonable Danger of Kool Cigarettes

In Missouri, a product is defective if the jury finds that it is unreasonably dangerous. See, e.g., Nesselrode v. Executive Beechcraft, Inc., 707 S.W.2d 371, 378 (Mo. banc 1986) (“Under our model of strict tort liability the concept of unreasonable danger, which is determinative of whether a product is defective in a design case, is presented to the jury as an ultimate issue without further definition”). Plaintiffs presented overwhelming evidence to the jury of the unreasonable danger of Kool cigarettes. For example, B&W's former director of research, Jeffrey Wigand, testified that B&W engineered Kool cigarettes to contain more nicotine than any other cigarette in the market:

Q: And tell us in regard to the Kool cigarette, whether or not, compared

with other cigarettes that were national best sellers, whether it had a higher or lower content of nicotine?

A: I think if one looks historically, and I mean a long time, Kool cigarettes had the highest amount of nicotine than any product on the marketplace and had the highest amount of what was called free nicotine . . . that means nicotine, without its sort of ball and chain, it's superactive nicotine, it's like free base cocaine . . . Much effort, at least on my watch and before I got there was how to make nicotine that was locked up like a walnut inside the shell outside the shell. They got the nut, which was the free nicotine, faster and better.

. . .

Q: Well, tell us then what do tobacco companies do to break — I'm talking just about Kool cigarettes now — to break through that and get free nicotine to the smoker?

A: Well, there are a number of ways of doing it. And one is how do you change pH? . . . If you treat nicotine that is in the plant leaf and you treat it with chemicals that free up the nicotine, it actually changes its pH from one state to another state. And it's called free nicotine. There was an obsession, an intense effort within Brown & Williamson, before I got there, to get and manage free nicotine.

Tr 979-980.

Dr. Wigand's testimony was confirmed by B&W's own internal documents, proving that Kool had the highest level of "extractable nicotine" on the market. See, e.g., PTX # 188

at p. 17.

Dr. Wigand also explained how B&W used menthol to mask the harshness of Kool cigarettes:

Q: Now, tell us how menthol comes into play so you can deliver more nicotine to a Kool smoker?

A: Well, Kools were traditionally noted for their harshness and impact. Impact means the effect of nicotine on the body. And one way you mask or you facilitate — I only can give you an example from medical school when I took gross anatomy. The smells were bad. And so I took Vicks Vaporub and put it under my nose because it masked the smells. Kool cigarettes and smoke — naturally is very harsh and irritating — both nicotine and the components in there. So in order to make it easier to smoke something that the body says I don't want to do — we can't get monkeys in a lab to smoke — was to put menthol into it. Menthol allows you to defeat the body's normal processes and to breathe it in, not only breathe it in, but also breathe it in deeper.

Q: Was that known within the Brown & Williamson Tobacco Company when you worked there?

A: It was clearly known that menthol, among other additives, ameliorated harshness.

Q: And also that Kool cigarettes were the highest free nicotine cigarette on the market?

A: That's correct.

Tr 981-982.

Dr. Wigand further testified that for more than 30 years B&W added coumarin, a known carcinogen, to the Kool cigarettes smoked by Mrs. Smith. Tr 1062-1063 and 1233. It was uncontroverted at trial that Mrs. Smith was diagnosed with lung cancer in 1992. Tr 699.

B&W ignores Plaintiffs' substantial evidence regarding the specific defects in Kool cigarettes and argues that Plaintiffs' experts claimed Kool cigarettes were no different than any other cigarette, defining a "cigarette" as "tobacco rolled in paper." Substitute Brief of Appellants at pp. 51-52. B&W continues by arguing that Plaintiffs' product defect claim was simply that all cigarettes have "inherent" risks. Again, B&W's arguments are directly contrary to the evidence presented during trial. Dr. David Burns, one of the world's leading experts on tobacco and disease, explained that cigarettes are not just "tobacco rolled in paper", but highly engineered devices:

A: . . . the early understanding of a cigarette is you take tobacco leaves, you dry them up, chop them up, roll them up in paper, and you smoke it. And most folks starting out, working on tobacco as a science, sort of think that that's correct. And it isn't, quite frankly. Over the last 40 to 50 years there have been tremendous changes in the way cigarettes are made. They are now a highly engineered product, such that there are very precise specifications as to how they manufacture the product to accomplish certain kinds of things that relate to what the smoker gets and what the smoker perceives as they inhale that cigarette. That's to make the cigarette more attractive, more palatable, easier to smoke.

Tr 808-809.

Dr. Burns went on to describe in detail these engineering changes to cigarettes and the effects of these changes despite alleged reductions in tar and nicotine by B&W:

A: Cigarettes today are capable of causing as much or more lung cancer than the cigarettes 40 years ago.

Q: And is that due to the engineering of the cigarettes?

A: That's due to the engineering of the cigarettes, yes.

Tr 810-823.

In other words, an engineered cigarette contains risks that are not “inherent” in unadulterated “tobacco rolled in paper.” See Dr. Wigand's description of the “engineered” dangers of Kool cigarettes, *supra*. In fact, Dr. Burns testified that the Kool cigarettes smoked by Mrs. Smith were manufactured by B&W using the same engineering changes:

Q: Dr. Burns, is this a fair and accurate depiction of the way that Kool cigarettes are manufactured, in general?

A: Yes.

Tr 814-815.

Dr. Burns further testified that because B&W “did something wrong”, there was “something wrong” with their product, i.e., Kool cigarettes:

Q: Dr. Burns, do you have an opinion as to whether or not Kool cigarettes are unreasonably dangerous?

A: Yes. In my opinion, the level of risk of smoking Kool cigarettes is a level of risk that no reasonable person would voluntarily assume.

Q: All right. And do you hold that opinion to a reasonable degree of medical certainty?

A: Yes, I do.

Tr 823-824.

C. Missouri Law Does Not Require Evidence of a Safer Alternative Design In Order to Establish a Strict Liability Product Defect Claim

In a single sentence of its brief, B&W claims that Missouri law requires evidence of a safer alternative design to support a product defect claim. See Substitute Brief of Appellants at pp. 51-52. As support for its position, B&W cites *dicta* from a case that has been expressly overruled. In Siebern v. Missouri-Illinois Tractor & Equip., 711 S.W.2d 404, 412 (Mo. Ct. App. 1983), the Missouri Court of Appeals for the Eastern District stated in *dicta* that plaintiffs must show alternative designs were available. Id. at 939. The Siebern court offered no legal basis or citations for its *dictum*. Id. Four years later, the Missouri Court of Appeals for the Eastern District expressly rejected the “reasonable alternative design test”, thereby overruling Siebern:

Dorel’s final argument in its first point on appeal is that we should adopt the reasonable alternative design test of the Restatement (Third) of Torts. However, our Supreme Court has refused to adopt the Restatement (Third), and likewise, we refuse to adopt it in this case.

Uxa by Uxa v. Marconi, 128 S.W.3d 121, 130 (Mo. Ct. App. E.D. 2003) (citing Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47, 65 (Mo. *banc* 1999)).¹⁶

As the Eastern District recognized, the holding of Marconi was influenced by the controlling case on design defect authored by an *en banc* panel of the Missouri Supreme

¹⁶Unsurprisingly, B&W’s brief fails to make any mention of Marconi.

Court. Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47 (Mo. banc 1999). Instead of addressing this case in any meaningful way, B&W cleverly relegates Rodriguez to an obscure footnote and ignores its holding:

This Court again declines the invitation to adopt the reasonable alternative design/risk-utility theory.

Id. at 65; Substitute Brief of Appellant at pp. 49-50, fn 12.

To foreclose any doubt as to the relevancy of B&W's argument, the Third Restatement's approach has been expressly rejected by the Missouri legislature in R.S. Mo. § 537.760, codifying Restatement (Second), § 402A. R.S. Mo. § 537.760 ("To submit a verdict directed in which the reasonable alternative design/risk utility elements from the Restatement (Third) are substituted for the 'unreasonably dangerous' standard does not comport with the statutory elements of section 537.760").

Even if such evidence were required under Missouri law, Plaintiffs presented overwhelming evidence that B&W developed a truly safer cigarette in the early 1960s, at least 30 years before Barbara Smith was diagnosed with any smoking-related disease. See Statement of Facts Section 5, *supra*. B&W shut down this project, designated Ariel, "in 1967 because the need for such a device was not apparent." PROJECT GREENDOT, 1987, PTX # 276 at 400452856 ("BAT research work into a device producing a highly modified smoke delivery began over 25 years ago with Project ARIEL . . . The objective was 'to produce a device from which the smoker could receive sufficient nicotine to give satisfaction, unaccompanied by the products of combustion and pyrolysis associated with normal cigarette smoking.' Interest in the project waned and work was halted in 1967 because 'the need for such a device was not apparent' "). In fact, B&W also opposed the development of safer

cigarettes by other tobacco companies. Tr 1877-1878. Other “renowned scientists” were unable to develop a safer cigarette because B&W concealed its sophisticated knowledge of the dangers of cigarettes that would have led to such a breakthrough. Tr 2066-2068.

IV. THE TRIAL COURT CORRECTLY DENIED DEFENDANTS’ MOTION FOR DIRECTED VERDICT AT THE CLOSE OF THE EVIDENCE AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV) ON PLAINTIFFS’ STRICT LIABILITY PRODUCT DEFECT AND NEGLIGENT DESIGN CLAIMS REGARDING THE ISSUE OF “CONFLICT PREEMPTION”

A. Standard of Review

In an appeal from a trial court’s order sustaining or denying a motion for judgment notwithstanding the verdict, the primary question for the appellate court is whether the plaintiff made a submissible case, which is the same standard applied to a trial court ruling on a motion for directed verdict. See Benoit v. Missouri Highway and Transportation Commission, 33 S.W.3d 663 (Mo. Ct. App. 2000); Ralph v. Lewis Bros. Bakeries, Inc., 979 S.W.2d 509 (Mo. Ct. App. 1998). The appellate court, in evaluating whether a submissible case has been made, is required to view the record in the light most favorable to the plaintiff, and the plaintiff is to be afforded the benefit of all reasonable inferences that may be drawn from the evidence. See Cook v. Smith, 33 S.W.3d 548 (Mo. Ct. App. 2000); Morgan v. Union Pacific R.R. Co., 979 S.W.2d 477 (Mo. Ct. App. 1998). Further, the appellate court must disregard evidence contrary to the jury’s verdict. Seitz v. Lemay Bank and Trust Co., 959 S.W.2d 458, 461 (Mo. banc 1998).

B. The United States Supreme Court Held that Product Defect Claims and Negligent Design Claims In an Individual Smoker’s Case Are Not Preempted by Federal Law

B&W argues that “federal conflict preemption” foreclosed Plaintiffs’ strict liability product defect and negligent design claims. It is noteworthy that B&W’s conflict preemption analysis completely ignores the seminal (and only) preemption decision of the United States Supreme Court relating to cigarette litigation, Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992). Rather than analyzing, or even mentioning Cipollone, B&W relies almost entirely upon an errant decision by a federal magistrate in St. Louis, Missouri, Mash v. Brown & Williamson Tobacco Corp.¹⁷ Of course, B&W also neglects to inform this Court that Mash was recently overruled by the Eighth Circuit’s decision in Boerner:

Because “Congress’ enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not pre-empted”, we conclude that the doctrine of conflict preemption is inapposite in this case and that Boerner’s claims are not foreclosed.

¹⁷B&W also cites FDA v. Brown & Williamson Tobacco Corp. for the proposition that Congress has “foreclosed the removal of tobacco products from the market.” Brief of Appellants at p. 43. However, the holding in FDA had nothing to do with the issues before this Court, i.e., the preemption of an individual smoker’s tort claims. Instead, FDA addressed whether Congress had given the FDA authority to regulate tobacco products under principles of administrative law. See FDA v. Brown & Williamson, 529 U.S. 120, 120-121 (2000).

Boerner v. Brown & Williamson Tobacco Co., 394 F.3d 594, 600 (8th Cir. 2005).

B&W's selective citation to a single, irrelevant case is evidence of the frailty of its legal argument.

Cipollone, the controlling case interpreting preemption under the Federal Cigarette Labeling and Advertising Act ("FCLAA") in the context of an individual smoker's claims, also held that "conflict preemption" is inapplicable to the FCLAA:

[T]he pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in 5 of each Act. When Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue . . . "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation.

Cipollone v Liggett Group, Inc., 505 U.S. 504, 517 (1992) (overruling the Court of Appeals opinion that conflict preemption applies to the FCLAA).

Moreover, Cipollone held that the FCLAA does not expressly preempt an individual smoker's product defect claims:

For example, as respondents concede, § 5(b) does not generally pre-empt "state law obligations to avoid marketing cigarettes with manufacturing defects or to use a demonstrably safer alternative design for cigarettes." For purposes of § 5(b), the common law is not of a piece.¹⁸

¹⁸It is interesting to note that the same Defendant who here argues that the Act preempts strict liability product defect claims conceded that the Act does not preempt

Cipollone, 505 U.S. at 524.

Nor are negligent design claims preempted:

The Act does not, however, pre-empt petitioner's claims that rely solely on respondents' testing or research practices or other actions unrelated to advertising or promotion.

Cipollone, 505 U.S. at 524-525.

Because B & W ignores Cipollone's explicit statement that conflict preemption does not apply to the FCLAA and defect claims are not expressly preempted, it supplies no answer to the argument advanced repeatedly by Plaintiffs during the pre-trial and trial debates relating to preemption. Against the unambiguous declaration of the United States Supreme Court and the concurrence of the Eighth Circuit Court of Appeals, a ruling by a wayward federal magistrate is of no serious legal consequence. This Court should reject B&W's misplaced legal analysis relating to preemption under the FCLAA.

V. THE TRIAL COURT CORRECTLY DENIED DEFENDANT'S MOTION FOR DIRECTED VERDICT AT THE CLOSE OF THE EVIDENCE AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV) ON PLAINTIFFS' NEGLIGENT FAILURE-TO-WARN AND NEGLIGENT DESIGN CLAIMS REGARDING THE ISSUE OF DUTY

A. Standard of Review

In an appeal from a trial court's order sustaining or denying a motion for judgment notwithstanding the verdict, the primary question for the appellate court is whether the

such claims before the United States Supreme Court.

plaintiff made a submissible case, which is the same standard applied to a trial court ruling on a motion for directed verdict. See Benoit v. Missouri Highway and Transportation Commission, 33 S.W.3d 663 (Mo. Ct. App. 2000); Ralph v. Lewis Bros. Bakeries, Inc., 979 S.W.2d 509 (Mo. Ct. App. 1998). The appellate court, in evaluating whether a submissible case has been made, is required to view the record in the light most favorable to the plaintiff, and the plaintiff is to be afforded the benefit of all reasonable inferences that may be drawn from the evidence. See Cook v. Smith, 33 S.W.3d 548 (Mo. Ct. App. 2000); Morgan v. Union Pacific R.R. Co., 979 S.W.2d 477 (Mo. Ct. App. 1998). Further, the appellate court must disregard evidence contrary to the jury's verdict. Seitz v. Lemay Bank and Trust Co., 959 S.W.2d 458, 461 (Mo. banc 1998).

B. The Dangers of Kool Cigarettes Were Not “Commonly Known” During the Time Barbara Smith Was a Smoker

B&W argues that it had no duty to warn Mrs. Smith or design a safe product because the dangers of smoking were commonly known during the time Mrs. Smith smoked Kool cigarettes. Although B&W now charges the general public with full knowledge of the dangers of smoking since the 1940s, B&W consistently disclaimed that its products were dangerous in any way until at least 1998. For example, B&W stated in 1954 that:

Distinguished authorities point out that there is no proof that cigarette smoking is one of the causes [of lung cancer] . . . We believe the products we make are not injurious to health.

PTX # 148.1.

In 1967, B&W's official position was:

FACT: Despite all the headlines, there is no clinical evidence of a causal

relationship between smoking and disease. Only a statistical association has been made. Even the Surgeon General's Report of 1967 conceded that these statistics do not prove causal relationship. The body of medical and laboratory research provides no conclusive proof that smoking causes cancer and other diseases in humans . . . some of the country's most eminent men of medicine and science — from such renowned institutions as Bellevue Hospital, Columbia University Medical School, Yale University Medical School, and New York Medical College — have testified before the U.S. Congress that the charges against tobacco remain unproved.

PTX # 389.

During the entire time B&W claims “everyone knew”, it was advertising KOOL cigarettes as a “remedy” for colds and flu:

KOOL maintained a three share level for over 30 years (through mid-60's) while positioning itself as a specialty cigarette to be smoked only for remedial or medicinal purposes.

KOOL comfort for “Smoker's Throat.” Tests show KOOLS taste 30 [degrees] COOLER.

Fighting sniffles . . . Colds or flu? Even then . . . KOOL'S taste wins through!
Switch to KOOLS for that clean, KOOL taste in your mouth!

PTX # 48, “Limited” Brown & Williamson memorandum from A.J. Mellman to R.A. Blott, et al., March 25, 1983; PTX # 144.41, KOOL ad copy from 1946-1948.

In 1978, B&W admitted internally that:

Very few consumers are aware of the effects of nicotine, i.e., its addictive

nature and that nicotine is a poison.

In 1994, Sharon Boyse, the sole corporate representative of B&W at trial, stated that:

. . . the company, along with many independent scientists, does not accept the claim that smoking is addictive.

PTX # 395.

B&W's CEO, "Tommy" Sandefur, testified in 1994 that nicotine is not addictive. PTX # 386 at p. 236. B&W's position was no different at trial. In fact, B&W's brief even disclaims the fact that it knew of the dangers of smoking during the entire time Mrs. Smith smoked Kool cigarettes:

. . . 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.

Brief of Appellant at p. 86.

If the dangers of Kool cigarettes were not "open and obvious" and "commonly known" to the experts who designed them,¹⁹ how could these same dangers be "open and obvious" to a layperson like Mrs. Smith.

Moreover, the Plaintiffs offered overwhelming evidence at trial that Mrs. Smith did not know the dangers of smoking:

Q: Do you have any reason to believe that your mother, Barbara, knew at the time she started smoking cigarettes in the 1940s that Kool

¹⁹At trial, the evidence proved that B&W was the "expert" in the design of Kool cigarettes and that Mrs. Smith did not know the dangers of smoking. Tr 2198.

cigarettes caused disease?

A: No.

Q: Do you have any reason to believe that she learned that in the 1950s and the 1960s?

A: No.

Q: Do you have any reason to believe that you mother, Barbara, knew that Kool cigarettes were nicotine delivery devices?

A: No, she did not.

Q: Toni, how do you feel, knowing that she didn't know that, and she smoked those cigarettes anyway?

A: I would have my mother today if she had have known.

Tr 1762; see also Section II, *supra*.

The two Missouri cases relied upon by Defendants hold that the manufacturer of a product has a duty to “remote users” whenever the dangers of its product are “hidden” or “concealed.”²⁰ See Stevens v. Durbin-Durco, Inc., 377 S.W.2d 343, 347 (Mo. 1964) (“... in

²⁰B&W also argues that courts “throughout the country” have taken judicial notice that the risks of smoking were “common knowledge.” Substitute Brief of Appellant at p. 64. As usual, B&W’s interpretation of these cases is erroneous. For example, the sole issue presented on appeal in Austin was whether the act in question was an infringement upon the exclusive power of Congress to regulate commerce between the states. Far from endorsing the concept of “common knowledge”, the U.S. Supreme Court expressly disagreed with the Tennessee’s Court judicial notice of the dangers of smoking:

cases dealing with a manufacturer's liability for injuries to remote users, the stress has always been upon the duty of guarding against hidden defects and of giving notice of concealed dangers").

In Stevens, a worker with 17 years of experience handling a simple device used to bind loads on large trucks suffered severe injuries when he applied too much force to the binder.

The worker did so despite the fact that he was aware "up to the very instant of the accident" of the dangers of his actions. Stevens, 377 S.W.2d at 345. Just before the accident happened, the plaintiff told his co-worker to "get his head out of the way before it tears it off." Stevens, 377 S.W.2d at 345.

In Young, the plaintiff sued his physician for failing to warn him not to drive while taking a prescription medication. Young v. Wadsworth, 916 S.W.2d 877 (Mo. App. E.D. 1996). However, the plaintiff had experienced several "blackouts" while taking this medication, including one while driving his car, yet he continued to drive. Id. at 878. The court held that it was "common sense that a person subject to sudden unexpected blackouts should not operate a motor vehicle." Young, 916 S.W.2d at 878. In both cases cited by

[N]or are we now prepared to take judicial notice of any special injury resulting from their [cigarettes'] use or to indorse the opinion of the Supreme Court of Tennessee that "they are inherently bad and bad only."

Austin v. State, 48 S.W. 305 (Tenn. 1899), *aff'd*, 179 U.S. 343, 348 (1900).

Moreover, it is difficult to understand how any court could take "judicial notice" of the dangers of smoking decades before B&W and the medical and scientific communities recognized those same dangers. See supra.

B&W, there was no latent or hidden danger in the products at issue.

The facts of this case are different. The Kool cigarettes smoked by Mrs. Smith were a highly engineered and complex product. Tr 808-824. B&W engineered Kool cigarettes to contain coumarin, a carcinogen, and increased levels of “free nicotine”, i.e., nicotine more readily available to the user. See Section III, *supra*. While there was evidence of B&W’s knowledge of these dangers at trial, B&W presented no evidence that Mrs. Smith was aware of these dangers, or any other dangers related to smoking. Although B&W attempts to infer in its brief that Mrs. Smith was fully aware of these dangers and that the public knew, these inferences must be disregarded. Seitz v. Lemay Bank and Trust Co., 959 S.W.2d 458, 461 (Mo. banc 1998) (holding that when reviewing the denial of a motion for JNOV, the appellate court must disregard all evidence and inferences contrary to the jury’s verdict). Of course, B&W makes no attempt to explain the paradox inherent in its “common knowledge” argument — if everyone knew about the dangers of Kool cigarettes, why did the experts who designed the product not know until 8 years after Barbara Smith quit smoking?

VI. THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY ON COMPARATIVE FAULT

A. Standard of Review

The issue of whether the jury was properly instructed is a question of law. See Rudin v. Parkway School Dist., 30 S.W3d 838, 841 (Mo. Ct. App. 2000). However, the appellate court reviews evidence and inferences in the light most favorable to submission of instruction and disregards all contrary evidence and inferences. See Wright v. Barr, 62 S.W.3d 509 (Mo. Ct. App. 2001). See also Burns v. Elk River Ambulance, Inc., 55 S.W.3d 466, 477 (Mo. Ct. App. 2001) (when question on appeal is whether instruction is confusing or misleading,

appellate court reviews trial court's determination for whether there was an abuse of discretion). On appeal, instructions are presumed correct. See Leonard Missionary Baptist Church v. Sears Roebuck and Company, 42 S.W.3d 833 (Mo. Ct. App. 2001); Rishel v. Kansas City Public Service Co., 129 S.W.2d 851 (Mo. 1939). The burden of proof regarding a claim of instructional error rests with the party alleging error. See Van Volkenburgh v. McBride, 2 S.W.3d 814 (Mo. Ct. App. 1999). Moreover, instructional error does not *per se* mandate reversal. Id. at 821. Instead, reversal is only required in cases where the error is prejudicial. Id.

B. This Court Already Passed on the Comparative Fault Issue Raised by Brown & Williamson in Thompson v. Brown & Williamson

Brown & Williamson raised the exact same point relied on in Thompson v. Brown & Williamson Tobacco Corp., et al., 207 S.W.3d 76, (Mo.App. W.D. 2007), *application for transfer denied*. In Thompson, the appellate court factually distinguished Lester because in that case defendants “had not originally pled the affirmative defense of comparative fault and had been denied the opportunity to amend their pleadings to reflect that defense.” Thompson, 207 S.W.3d at 37. In this case and Thompson, Brown & Williamson:

[D]id originally plead the affirmative defenses of comparative fault. On the eve of trial, they attempted to withdraw the defense and the jury's consideration of comparative fault and, in essence, attempted to turn the concept of comparative fault from a shield to a sword. The ultimate question to be answered here is, therefore, different than in Lester: Can a defendant withdraw an affirmative defense of comparative negligence and prevent the plaintiff from seeking a comparative fault instruction when the evidence

presented at trial would support such an instruction?

Smith v. Brown & Williamson Tobacco Corp., 2007 WL 2175034 at *41; Thompson, 207 S.W.3d at 37.

In answering this question in the negative, the appellate court held that:

Comparative fault is not merely an affirmative defense, which the defendants have a right and an obligation to plead if they so choose. It is a substantive basis of liability which applies to the very core of the manner in which the claim is proven or not proven, and the State of Missouri has chosen for reasons of fairness to adopt a system of comparative apportionment of fault. To permit a defendant to withdraw comparative fault from the jury's consideration would have the effect of reinstating contributory negligence as a complete bar to a plaintiff's claim.

Thompson, 207 S.W.3d at 39.

The appellate court cited a string of Missouri cases, including Lester, supporting the idea that "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." Thompson, 207 S.W.3d at 38. In both this case and Thompson, the appellate court concluded that "substantial evidence exists in this record to support the giving of the comparative fault instruction." Smith, 2007 WL 2175034 at *45; Thompson, 207 S.W.3d at 38.

C. The Trial Court Did Not Commit Reversible Error By Instructing the Jury On Comparative Fault

B & W's confusion regarding the issue of comparative fault is evident from the following statements: "Brown & Williamson did not raise comparative fault as an affirmative

defense in its pleadings. To avoid doubt on this issue, Brown & Williamson expressly withdrew any and all defense implicating comparative fault months before trial.” LF 1646. B&W’s assertion begs the question — If B & W did not “plead comparative fault as an affirmative defense” as it claims in its brief before this Court, what was it expressly withdrawing? Of course, the truth is that B & W *did* raise affirmative defenses implicating comparative fault, *did* perform substantial discovery regarding Barbara Smith’s fault, and *did* benefit from this substantial discovery by presenting evidence at trial that Barbara Smith was at fault for her injuries. B&W then sought to foreclose the Plaintiffs from submitting an instruction on comparative fault. B&W should not be permitted to avoid the consequences of its pleadings and trial strategies.

B&W’s analysis of the comparative fault issue relies exclusively on Lester v. Sayles, 850 S.W.2d 858 (Mo. 1993). B&W badly misreads Lester by claiming it stands for the proposition that “comparative fault is an affirmative defense that belongs solely to a defendant. Substitute Brief of Appellant at p. 71. In fact, on the very page in Lester to which B&W directs the Court’s attention (p. 868), Lester discusses approvingly Earll v. Consolidated Aluminum Corp., 714 S.W.2d (Mo. Ct. App. 1986), which held as follows:

[W]e believe that, in a negligence case, where there is evidence from which a jury could find that plaintiff’s conduct was a contributing cause of his damages, unless the parties agree otherwise, the case should be submitted to the jury under the instructions and verdict forms approved by the Supreme Court for use in comparative fault cases *regardless of whether the defendant submits an affirmative defense or not.*

Earll, 714 S.W.2d at 937 (emphasis added).

After discussing Earll, the Lester court indicated that “it [Earll] has no relation to the question at hand – whether comparative fault must be pled as an affirmative defense.” Lester, 850 S.W.2d at 868.

This case is much more analogous to Earll than to Lester. For example, in Earll as in this case, the defendant initially asserted an affirmative defense of comparative fault but then abandoned it later in the litigation. See Earll, 714 S.W.2d at 935. In sharp contrast to the facts of Earll and this case, Lester involved a defendant that never asserted an affirmative defense of comparative fault. Lester, 850 S.W.2d at 862. In other words, in a case factually analogous to this one because there was evidence from which a jury could find that plaintiff’s conduct was a contributing cause of her damages, a Missouri appellate court decided that a comparative fault instruction should be used regardless of whether the defendant submits an affirmative defense of comparative fault or not. See Earll, 714 S.W.2d at 935.

D. B&W Pled the Affirmative Defense of Comparative Fault and Then Used the Defense as a Tool for Gathering Substantial Discovery Regarding Barbara Smith’s Fault

In its initial answer, B&W pled the affirmative defense of comparative fault at least five separate times. See LF 0023, 0024 and 0025 (B&W’s Sixth, Seventh, Eighth, Eleventh and Thirteenth Affirmative Defenses); see also R.S. Mo. § 537.765. B&W then capitalized on its pleadings by performing substantial discovery regarding the alleged fault of Barbara Smith. The majority of this discovery involved posing leading questions to Mrs. Smith during her depositions. For example, B&W attempted to establish, *inter alia*, that:

- Barbara Smith was the “kind of person” who made careful, informed decisions. LF 1822-1823.

- Mrs. Smith was the “kind of person who stays up on current events.” LF 1836.
- Barbara Smith never tried to quit smoking before she actually quit in 1990 because she “enjoyed” smoking. LF 1851 and 1856.
- Mrs. Smith had no difficulty quitting, despite the fact that other people do have difficulty. LF 1855-1856.
- Mrs. Smith never tried “lower tar or lower nicotine” cigarettes (cigarettes B&W falsely claims are healthier) because she “liked” Kool cigarettes. LF 1884.
- No one could have told Mrs. Smith anything that would have convinced her to quit smoking. LF 1900.
- Anyone can quit smoking if they are sufficiently “motivated.” LF 1902.
- Mrs. Smith quit smoking because she “wanted to quit.” LF 1903.

The tenor of B&W’s questions of Mrs. Smith was clear — Barbara Smith’s death was the result of her own informed choices. B&W would never have obtained this discovery without the benefit of its pleading asserting the affirmative defense of comparative fault. Having done so and obtained substantial discovery regarding Barbara Smith’s “fault”, B&W then sought to withdraw its affirmative defenses and unilaterally force the Plaintiffs to try the case on an “all or nothing basis.”

E. Having Obtained Substantial Discovery Regarding Barbara Smith’s “Fault”, B&W Wasted No Opportunity to Litigate Comparative Fault Before the Jury

With the benefit of the substantial discovery B&W obtained from Mrs. Smith regarding her fault (under the guise of asserting the affirmative defense of comparative fault), B&W litigated Barbara Smith's fault before the jury at every opportunity. B&W emphasized Barbara Smith's "choice" to smoke KOOL cigarettes, that her "choice" was "voluntary," that she didn't want to quit because she enjoyed smoking, and that the consequences of her "choice" are her sole responsibility. LF 1822-1823, 1836, 1851, 1855-1858, 1884, 1900, 1902, 1903, 3078, 3094, 3104 and 3114. One need only look to B&W's "Statement of Facts" in this appeal to see the clear truth hidden behind its rhetoric.

First, B&W's Statement purports to recite the "facts" regarding "Mrs. Smith's Smoking History and The Known Risks of Smoking." The obvious premise of B&W's recitation is that Mrs. Smith knew the dangers of smoking and made an informed "choice." Substitute Brief of Appellant at pp. 2-3. The second section of B&W's "Statement of Facts" purports to describe "Health Warnings and Mrs. Smith's Response." Again, B&W clearly states that Mrs. Smith was at fault for her "choice" to smoke:

She explained that she chose to continue to smoke because she enjoyed smoking . . . Mrs. Smith said she "didn't pay any attention" to anything written or said "about cigarette smoking and health or . . . addiction."

Substitute Brief of Appellant at p. 5.

Apart from being false, B&W's recitation of the "facts" clearly implicates Mrs. Smith as the responsible party.

Of course, as B&W's "Statement of Facts" affirms, these were the same issues of Barbara Smith's fault litigated by B&W during the entire trial. See Substitute Brief of Appellant at pp. 2-10 (citing transcript pages where B&W asserted these arguments). The

following statement in B&W's closing exemplifies its entire trial strategy:

That's what this claim is. Mrs. Smith bought Kool cigarettes and smoked them. Developed some illnesses and died of a heart attack that is not connected to the smoking and is here to say, through her family, we want to be paid a lot of money for that.

Tr 3114.

Therefore it was Defendant — not Plaintiffs — that injected the issue of comparative fault into this case. After trying the case by using Barbara Smith's "choice" and consequent "responsibility" as a prominent theme in its presentation of evidence, B&W now seeks to avoid the legal consequences of its trial strategy.

For example, B&W suggests that its emphasis on Barbara Smith's "choice" to smoke and consequent "personal responsibility" during the trial was solely for the purpose of rebutting plaintiff's failure to warn claims and Plaintiffs' assertion she was addicted. Substitute Brief of Appellant at pp. 72-73. B&W's claim is belied by its pleadings asserting comparative fault and its own actions at trial. Obviously, the true purpose of submitting such general statements about Barbara Smith's decision to smoke was to inject her fault in the case and convince the jury to find against Barbara Smith. B&W would have then (had it been allowed to do so by this Court) capitalized on a situation of its own creation — i.e., eroding away B&W's fault while simultaneously increasing Mrs. Smith's fault above 50% — and then forcing the jury to make an all or nothing choice.²¹ The Missouri Court of Appeals for the

²¹B&W's trial strategy, if successful, would have the practical effect of returning Missouri to a contributory fault state. B&W could then plead the affirmative defense of

Western District recognized the error in permitting a party to pursue such a strategy.²² Henderson v. Terminal R.R. Ass'n, 736 S.W.2d 594, 599 (Mo.App. W.D. 1987) (holding that the strategy employed by B&W carries the potential for “sandbagging” because it affords the appellant a “second bite at the apple” if the verdict is not in his favor).

VII. THE TRIAL COURT CORRECTLY DENIED DEFENDANTS’ MOTION FOR DIRECTED VERDICT AT THE CLOSE OF THE EVIDENCE AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV) ON

comparative fault, perform discovery on this issue, remove it before trial, inject it into the trial proceedings and convince a jury to find for B&W if the smoker (in the collective mind of the jury) was more than 50% at fault. The Missouri legislature has expressly forbid this situation from occurring:

Contributory fault, as a complete bar to plaintiff’s recovery in a products liability claim, is abolished. The doctrine of pure comparative fault shall apply to products liability claims as provided in this section.

R.S.Mo. § 537.765.

²²It is interesting to note that an extrajurisdictional case cited by B&W also recognized the danger inherent in allowing B&W’s trial strategy. Kwiatkowski v. Bear, Stearns & Co., Inc., 2000 WL 640625 at *4 (S.D.N.Y. 2000) (holding that a defendant who has not pled comparative faults should not be permitted to “surprise plaintiffs” with “new evidence of plaintiff’s culpability at trial”).

PUNITIVE DAMAGES

A. Standard of Review

In an appeal from a trial court's order sustaining or denying a motion for judgment notwithstanding the verdict, the primary question for the appellate court is whether the plaintiff made a submissible case, which is the same standard applied to a trial court ruling on a motion for directed verdict. See Benoit v. Missouri Highway and Transportation Commission, 33 S.W.3d 663 (Mo. Ct. App. 2000); Ralph v. Lewis Bros. Bakeries, Inc., 979 S.W.2d 509 (Mo. Ct. App. 1998). The appellate court, in evaluating whether a submissible case has been made, is required to view the record in the light most favorable to the plaintiff, and the plaintiff is to be afforded the benefit of all reasonable inferences that may be drawn from the evidence. See Cook v. Smith, 33 S.W.3d 548 (Mo. Ct. App. 2000); Morgan v. Union Pacific R.R. Co., 979 S.W.2d 477 (Mo. Ct. App. 1998). Further, the appellate court must disregard evidence contrary to the jury's verdict. Seitz v. Lemay Bank and Trust Co., 959 S.W.2d 458, 461 (Mo. banc 1998).

B. Brown & Williamson's Failure to Raise the Issue of Submissibility Regarding Plaintiffs' Punitive Damages Claims for Strict Liability and Negligence in a Motion for Directed Verdict Waived Its Right to Appellate Review and the Appellate Court Was Required to Determine, *Sua Sponte*, Whether B&W Had Preserved This Issue Before Considering the Point on Its Merits

The Missouri Supreme Court requires a defendant to "state the specific grounds" supporting its motion for directed verdict. Mo. R. Civ. P. 72.01(a). "A motion for directed verdict that does not include specific reasons or grounds for the motion neither presents a

basis for relief in the trial court nor is sufficient to preserve the issue for appellate review.” See, e.g., Letz v. Turbomeca Engine Corp., 975 S.W.2d 155, 163 (Mo.App. W.D. 1997). In this case, Brown & Williamson filed a Motion for Directed Verdict at the close of Plaintiffs’ evidence, renewing its Motion at the close of all the evidence. Neither motion raised the issue of submissibility in regard to Plaintiffs’ punitive damages claims for strict liability and negligence. In fact, the only submissibility issue raised by B&W in regard to punitive damages was specific to Plaintiffs’ fraudulent concealment and conspiracy claims:

Plaintiffs have failed to make a submissible claim for damages on their fraudulent concealment or conspiracy claim because

LF 1248-1249.

Notably, it was only after the jury returned a punitive damages verdict for Plaintiffs on their strict liability and negligence claims that B&W recognized its error and raised, for the first time, the issue of submissibility in regard to Plaintiffs’ claims. LF 1644-1646. Nothing in the appellate opinion addresses the failure by B&W to specifically raise this issue in its two Motions for Directed Verdict. The appellate court erred in addressing the substance of B&W’s point on appeal regarding the submissibility of Plaintiffs’ punitive damages claims for strict liability and negligence without first reviewing whether B&W had preserved this issue for appeal. See, e.g., Pope v. Pope, 179 S.W.3d 442, 451 (Mo.App. W.D. 2005) (“Before considering the point on the merits, we are first required to determine, *sua sponte*, whether any of these issues are preserved for our review”).

C. The Court’s Application of the Law to the Facts Was Illogical and Relied Upon Negative Evidence and Inferences Presented by B&W to the

Exclusion of the Evidence Most Favorable to Plaintiffs

The appellate court also erred in its application of the standard of review for the submissibility of Plaintiffs' punitive damages claims. The Court began its analysis of the issue with a proper statement of Missouri law:

The evidence and reasonable inferences drawn therefrom are considered in a light most favorable to the plaintiff. Any unfavorable evidence or inferences are disregarded.

See Lincoln Smith, et al. v. Brown & Williamson Tobacco Corp. (WD65542), July 31, 2007 Opinion at p. 82; see also Joel Bianco Kawasaki Plus v. Meramec Valley Bank, 81 S.W.3d 528, 537 (Mo. banc 2002).

In fact, a reviewing court "will not overturn a verdict unless there is a complete absence of probative facts to support it." Meramec Valley Bank, 81 S.W.3d at 537.

The appellate court never held that "there was a complete absence of probative facts to support" the jury's punitive verdict in this case. In fact, the Court cited some of the probative facts supporting the punitive verdict in its opinion. However, the Court then proceeded to discard the evidence most favorable to the Plaintiffs and rely upon negative evidence and inferences presented in B&W's biased recitation of the "facts" to reach its conclusion that Plaintiffs had not made a submissible case for punitive damages.

Regarding Plaintiffs' negligent failure to warn claim, Plaintiffs presented evidence that B&W knew more than 4 years prior to Barbara Smith's use of Kool cigarettes that all cigarettes were addictive.²³ B&W continued to secretly admit that nicotine is addictive during

²³This Court failed to even address Plaintiffs' substantial evidence that B&W had

the 50 years Barbara Smith was a loyal Kool smoker:

Moreover, nicotine is addictive. We are, then, in the business of selling nicotine, an addictive drug.

Hook 'em young. Hook 'em for life.

PTX # 1; Tr 962-963 and 1019-1020 (Mantra of B&W's CEO, "Tommy" Sandefur, during the late 1980s and early 1990s).

By 1962, B&W also admitted that its knowledge of nicotine addiction was "far more extensive than exists in published scientific literature." PTX # 10. Amazingly, the public health community would not discover that nicotine was addictive for another 26 years (only 2 years before Barbara Smith quit smoking). Tr 889.

Instead of using its superior knowledge to reduce the obvious danger of addiction for its customers, B&W used its knowledge to increase the amount of nicotine in Kool cigarettes, thereby generating profits at the expense of addicted, dying smokers. See Lincoln Smith, et al. v. Brown & Williamson Tobacco Corp. (WD65542) July 31, 2007 Opinion at p. 89. B&W was fully informed that its smokers were unaware of the addictive effects of smoking, yet it

specific knowledge of the smoking-related diseases suffered by Barbara Smith but failed to issue any warning regarding these diseases prior to July 1, 1969. See, e.g., Tr 805-808; 868-872; 887-890; PTX # 343; PTX # 1. In fact, Plaintiffs presented substantial evidence that B&W lied to its consumers, informing them that Kool cigarettes do not cause disease and even marketing Kools as health "remedies" in the face of its knowledge that Kools cause serious disease. Tr 872-876; PTX # 148.1; PTX # 389.

refused to provide any warning to its consumers that nicotine is addictive.²⁴ PTX # 3; Tr 890-891; Tr 871, 872, 1459 and 1460. But B&W's misconduct went even farther, it publicly attacked the medical community's findings that cigarettes were dangerous and nicotine was addictive. Tr 875-887 and 890-891; PTX # 375 and 386 at p. 236.

After analyzing this evidence, the appellate court concluded that:

B&W was aware [prior to 1969] that nicotine is addictive and attempted to increase the amount of nicotine in Kool cigarettes (the brand smoked by the decedent) so as to make Kool cigarettes more addictive and, accordingly, more profitable . . . B&W set out intentionally to not know that smoking was harmful . . . it conducted the wrong type of research and attacked contrary scientific findings. In essence, it set out to remain ignorant and apparently succeeded. Further, it was unwilling to share what it had learned.²⁵

²⁴Importantly, this favorable evidence was not addressed by the Court. The Court also failed to address the substantial evidence of B&W's consistent public statements that nicotine is not addictive in an attempt to suppress the efforts of the public health community to warn smokers of the dangers of cigarettes. Tr 875-887 and 890-891; PTX # 375 and 386 at p. 236.

²⁵The appellate court concluded that B&W's knowledge of nicotine addiction and subsequent increase in the nicotine content of Kool cigarettes went solely to the claim of fraudulent concealment. However, the Court failed to address why this evidence in the context of B&W's failure to provide any addiction warning to its consumers prior to 1969 does not show that B&W manufactured and sold unreasonably dangerous cigarettes (i.e.,

Opinion at pp. 91 and 92.

However, the Court then illogically held that intentionally “remain[ing] ignorant” and “attack[ing] contrary scientific findings” is not conduct that rises to the level of punitive damages.²⁶ The Court’s holding thereby establishes that a company that knows that its products are dangerous and actively suppresses the truth is less blameworthy than a company

cigarettes deliberately designed to be more addictive to smokers) without giving an adequate warning (when it was uncontroverted that B&W never warned its customers that cigarettes are addictive).

²⁶The appellate court fails to explain how it was possible for B&W to know that nicotine was addictive and subsequently succeed in “remaining ignorant” of the same fact — all the while informing its consumers that nicotine is not addictive and increasing the addiction of its own cigarettes for profit — without engaging in conduct “tantamount to intentional wrongdoing.” The question for this Court is:

Was it reasonable for the jury to punish a sophisticated, international corporation for possessing superior knowledge that its cigarettes are addictive, burying its head in the sand to avoid liability, using its superior knowledge to make cigarettes more addictive (effectively killing its customers for profit), and not only refusing to warn its own customers but consistently lying to them about whether cigarettes are addictive?

that knows that its products are dangerous and does nothing. In short, the appellate court would reward a company that knows the truth, fails to provide a warning and then takes the additional step of actively stifling the efforts of others to provide a warning. Surely, this is not the kind of policy this Court wishes to encourage.

Regarding Plaintiffs' negligent design claim, the appellate court acknowledged that: [T]he evidence establishes that B&W stopped trying to develop a safer cigarette for fear it would hurt the sales of its normal "non-safe" cigarette. Further it attempted to persuade other tobacco companies not to pursue a safer cigarette for similar reasons. The implication is that B&W was more concerned with profits than with the development of a safe cigarette.

Lincoln Smith, et al. v. Brown & Williamson Tobacco Corp. (WD65542) at 97.

When viewed in the light most favorable to the Plaintiffs, this evidence standing alone establishes that B&W sold unsafe cigarettes while intentionally denying its smoking public access to a safer cigarette.²⁷ B&W admitted that its 1962 "Ariel" cigarette was a "healthy"

²⁷The appellate court ignored Plaintiffs' substantial evidence that B&W failed to remove coumarin and other ingredients from cigarettes that it knew caused cancer and the other smoking-related diseases suffered by Barbara Smith. See, e.g., Tr 1062-1065. The Court also failed to mention Plaintiffs presented substantial evidence that B&W used menthol to numb the smoker's lungs so they could breathe more of the known toxic substances in Kool cigarettes into the lungs. Tr 874-875 and 985-987.

Moreover, the appellate court ignored the fact that Missouri law does not even require the presentation of evidence of an alternative design in order to submit a negligence claim.

cigarette. PTX # 278 at 301099890 and 301099900. Plaintiffs' experts testified that B&W's 1962 "Ariel" design was a feasible safer cigarette that could have prevented Mrs. Smith's smoking-related illnesses. Tr 892-893 and 1343.

However, the appellate court then went out of its way to find and rely upon negative evidence and inferences presented by B&W to "undo" its punitive findings:

Nonetheless, both Dr. Burns and Dr. Wigand, Ms. Smith's survivors' primary witnesses, testified that it is not possible to make a safe cigarette. The three brands currently on the market that may be characterized as "safer" have not been proven safer and still bear the Surgeon General's warning.²⁸

See, e.g., Thompson v. Brown & Williamson Tobacco Corp., 207 S.W.3d 76, 89 (Mo.App. W.D. 2006), *application for transfer denied*, (finding "no Missouri authority that alternative design is a requirement in a negligence claim"). Therefore, the proper focus in a negligent design claim is not whether the tortfeasor failed to use ordinary care to design an alternative product that was safer, but whether the tortfeasor failed to use ordinary care to improve the safety of the product actually used by the victim. B&W presented no evidence during the trial that it improved the safety of Kool cigarettes. In fact, the only evidence presented at trial was that B&W, through design changes, knowingly made Kool cigarettes more dangerous. The appellate court asked the wrong question on this issue and, consequently, got the wrong answer.

²⁸All of this evidence was elicited by Brown & Williamson's lawyers during cross-examination.

Opinion at p. 97.

This reliance on “negative evidence and inferences” to the exclusion of the substantial evidence in favor of Plaintiffs’ claims would effectively allow the appellate courts to overturn every jury verdict by concluding that the jury “failed to adequately consider the other side of the story.” However, the jury has the unique opportunity to observe credibility and demeanor. Existing Missouri law prevents this kind of appellate fact-finding by requiring the appellate court to give the jury the benefit of the doubt in its review and application of the evidence and “not overturn a verdict unless there is a complete absence of probative facts to support it.” Joel Bianco Kawasaki Plus v. Meramec Valley Bank, 81 S.W.3d 528, 537 (Mo. banc 2002).

D. Plaintiffs Presented Substantial Evidence that B&W’s Conduct Was Outrageous

To make a submissible case for punitive damages, the Plaintiffs were required to present substantial evidence establishing that B&W’s conduct was “outrageous because of defendant’s evil motive or reckless indifference to the rights of others.” See, e.g., Cohen v. Express Financial Svcs., Inc., 145 S.W.3d 857, 865-866 (Mo. App. W.D. 2004). Substantial evidence is competent evidence from which the trier-of-fact can reasonably decide the case. Id. In a negligence case, punitive damages may be awarded if the defendant knew or had reason to know a high degree of probability existed that the action would result in injury. Letz v. Turbomeca Engine Corp., 975 S.W.2d 155, 164 (Mo. App. W.D. 1998). To submit punitive damages to the jury in a strict liability case, a plaintiff must present evidence that the defendant placed in commerce an unreasonably dangerous product with actual knowledge of

the product's defect. Id. at 164-165.

Plaintiffs presented overwhelming evidence that B&W should be subject to punitive damages. For example, Plaintiffs presented evidence that B&W had reason to know that Kool cigarettes were addictive and caused cancer since at least 1939, more than 4 years before Barbara Smith began smoking Kool cigarettes. PTX # 343. B&W admitted that it was in the “business of selling an addictive drug.” PTX # 1. In fact, the favorite “mantra” of B&W’s CEO while safely sequestered within corporate headquarters was “Hook ‘em young, hook ‘em for life.” Tr 962-963 and 1019-1020. B&W knew that “95% of all lung cancer deaths are caused by smoking” and assumed that “smoking causes 25% of heart disease.” PTX # 270. B&W even calculated the number of smokers its products would kill every year based on the same diseases suffered by Barbara Smith. Id.

B&W used its substantial knowledge regarding the dangers of smoking in “outrageous” ways. For example, B&W manipulated the delivery of nicotine in Kool cigarettes so that the smoker would become more addicted. PTX # 188; Tr 979-980. B&W added menthol to Kool cigarettes to mask the harshness of the additional nicotine delivery and allow smokers to breathe the dangerous carcinogens in smoke deeper into their lungs. Tr 981-982. B&W marketed the filtered cigarettes smoked by Barbara Smith as healthier alternatives to unfiltered cigarettes, all the while knowing that she was not reducing her risk by smoking such cigarettes. PTX # 407. B&W even halted the development of a “healthy” cigarette in the 1960s because “the need for such a device was not apparent.” PTX # 278 and 276.

With full knowledge of the dangers of smoking Kool cigarettes, B&W set out on a 50-year scheme to assure its smokers that Kool cigarettes were completely safe. PTX # 148.1,

389 and 33. B&W even advertised the Kool cigarettes Mrs. Smith smoked as “remedies” for disease. PTX #144.41; 150.1 and 48. B&W took full marketing advantage of the fact that it knew Kool cigarettes were addictive, but smokers like Barbara Smith did not know. PTX # 3. It is difficult to imagine a case involving more outrageous conduct given the sophisticated knowledge B&W possessed regarding the dangers of Kool cigarettes.

VIII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF B&W’S CONCEALMENT DURING THE COMPENSATORY DAMAGES PHASE OF THE TRIAL

A. Standard of Review

On appeal, a trial court's ruling regarding the acceptance or rejection of evidence will not be disturbed unless there is an apparent abuse of discretion. See, Whitworth v. Jones, 41 S.W.3d 625, 627 (Mo. Ct. App. 2001); A.G. Edwards & Sons, Inc. v. Drew, 978 S.W.2d 386, 390 (Mo. Ct. App. 1998). The trial court abuses its discretion when the ruling is clearly against the logic of the circumstances before it and is so unreasonable and arbitrary as to shock the sense of justice and indicate a lack of judicial consideration. Drew, 978 S.W.2d at 390. To constitute grounds for reversal, the appellate court must find that the trial court's error in admitting evidence was prejudicial. Id. at 392. Further, an appellate court cannot reverse a judgment unless it finds the error committed materially affected the merits of the action. Id.

B. The Supreme Court’s Decision In Campbell Is Neither Novel Nor Exceptional

The Supreme Court regarded its decision in Campbell as anything but new or

exceptional, emphasizing that “under the principles outlined in BMW, this case is neither close nor difficult.” State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003).²⁹ In fact, Campbell expressly reaffirmed and applied each prong of BMW’s three-part test for reviewing punitive damages awards. Id. at 418-429. Significantly for this case, Campbell restated that one of the most important factors is whether:

The tortious conduct evinced an indifference to or a reckless disregard for the health or safety of *others*.³⁰

Campbell, 538 U.S. at 419 (emphasis added).

Applying these well-established criteria to the facts in Campbell, the Supreme Court

²⁹B&W recently argued this same issue in a consolidated tobacco personal injury case before the West Virginia Supreme Court. Rejecting B&W’s argument, the Court stated:

As the members of this Court have noted before, State Farm v. Campbell presented no new law in the field of punitive damages. The case was nothing more than a summary, a collation, of prior case law.

In re: Tobacco Litigation, 624 S.E.2d 738, 749 (2005) (*citing* Boyd v. Goffoli, 608 S.E.2d 169 (2004)).

³⁰The Supreme Court’s repeated emphasis on the economic rather than physical nature of the Campbell’s injuries strongly suggests that lower courts should make a more generous allowance for punitive damages in tort cases involving real or threatened public safety or health issues. See, e.g., Campbell, 538 U.S. at 426 (noting that “there were no physical injuries” and “the Campbells suffered only minor economic injuries”).

held that the “fundamental reason” for the unconstitutionality of the punitive damages award was that the Utah courts “relied upon” grossly dissimilar conduct, going so far as to award punitive damages “to punish and deter conduct that bore *no relation* to the Campbells’ harm.” Id. at 422 (emphasis added). Thus, the punitive damages award upheld by the Utah courts punished State Farm not for its mistreatment of the Campbells or similarly-situated insureds, but for State Farm’s mishandling of insurance claims “that had nothing to do with” the “third party lawsuit” at issue in that case. Id. at 423-424. As a result, the Supreme Court’s decision regarding the reprehensibility of State Farm’s conduct in Campbell was extremely narrow:

In this case, because the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis.

Id. at 424.

C. Campbell Held That Evidence of Conduct Similar to That Which Harmed a Plaintiff Is Relevant to the Reprehensibility Analysis

In Campbell, the Supreme Court reaffirmed the broad legal principle that evidence of a defendant’s “other acts” may be used both to assess the reprehensibility of the defendant’s conduct and to measure an appropriate punitive damages award. See Campbell, 538 U.S. at 422 (holding that even “lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant’s action in the State where it is tortious”); BMW of North America, Inc. v. Gore, 517 U.S. 559, 577 (1996) (“Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance”).

Because it is reasonable to assume that a plaintiff has been made whole for his injuries through compensatory damages, the long-standing legal justification for punitive damages has been that such damages address the legitimate interests of the general public in punishing wrongdoing and deterring future misconduct by the defendants or others. Campbell, 538 U.S. at 419. Therefore, punitive damages were created to address and have always addressed harm to persons other than the plaintiff. The calculus has always been, the greater the danger to the largest number of people, the higher the amount of punitive damages:

It is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the *possible harm to other victims* that might have resulted if similar future behavior were not deterred.

TXO Prod. Corp. v. Alliance Res. Corp., et al., 509 U.S. 443, 460 (1993) (emphasis added).

Campbell does nothing to disturb this basic principle of law. In fact, Campbell encourages the consideration of "other acts" evidence by directing courts to evaluate whether a defendant's "tortious conduct evinced an indifference to or a reckless disregard for the health or safety *of others*" and whether the conduct "involved *repeated* actions." Campbell, 538 U.S. at 419 (emphasis added). Moreover, Campbell never restricted courts to the narrow consideration of how the defendant's conduct affected the health or safety of just the plaintiff or to myopically judge whether the defendant had engaged in "repeated misconduct" toward the plaintiff alone. Instead, Campbell clarified the kinds of "other acts" evidence that are permissible in determining both a plaintiff's entitlement to punitive damages and the amount of the punitive damages award.

Specifically, Campbell sanctioned the consideration of “other acts” evidence exactly like that at issue in this case. Campbell, 538 U.S. at 410 (“Because the Campbells have shown no conduct similar to that which harmed them, the only relevant conduct to the reprehensibility analysis is that which harmed them”). Notably, Campbell does not instruct courts to reject as irrelevant or constitutionally impermissible: (1) conduct directed toward a plaintiff simply because such conduct also affected others, or; (2) “repeated misconduct” directed toward others. Id. at 418-424. (“We have instructed courts to determine the reprehensibility of a defendant by considering whether . . . the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of *others* . . . the conduct involved repeated actions or was an isolated incident . . .”). Campbell also specifically sanctioned the use of out-of-state conduct, whether lawful or unlawful. Campbell, 538 U.S. at 421.

D. Williams Strengthened the Supreme Court’s Opinion that Evidence of Harm to Others is Relevant to the Reprehensibility Analysis

Just as it has done with State Farm, B&W misconstrues the holding of Williams, claiming that it acts as an outright constitutional ban on the use of evidence of harm to others in the context of punitive damages. Of course, the result of B&W’s argument is absurd — i.e., a tortfeasor who harmed thousands could pretend to be no less reprehensible than a tortfeasor who only harmed a single individual. The West Virginia Supreme Court recently addressed the same issue under Campbell and Williams (in the context of a tobacco personal injury case) and held:

The circuit court found in its order setting aside its original trial plan, and the

defendants agree, that ‘the conduct of a party against whom punitive damages are sought must have a direct nexus to a specific person who claims to have been damaged by that conduct.’ We reject the circuit court’s application of Campbell.

In re Tobacco Litigation, 624 S.E.2d 738, 742 (W.Va. 2005).³¹

In reality, Williams dispelled all doubt that each piece of punitive evidence must relate to a specific Plaintiff. Williams approved of the use of evidence of harm to others as a justification for increasing the punitive multiplier for a specific plaintiff:

Philip Morris does not deny that a plaintiff may show harm to others in order to demonstrate reprehensibility. Nor do we . . . we recognize that conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few. And a jury consequently may take this fact into account in determining reprehensibility.

Williams, 127 S.Ct. at 1064 (noting it is appropriate in such cases to “impose a stiffened penalty for the latest crime”).

E. The Evidence B&W Challenges Involves the Same Conduct that Harmed Barbara Smith

The evidence at issue in this case was “similar to that which harmed [Barbara Smith].” Campbell, 538 U.S. at 424. First, B&W complains of two public statements to smokers that concealed the known dangers of smoking. PTX # 148.1 and 150.1. It was uncontradicted at

³¹The West Virginia Supreme Court later rejected a writ of prohibition requesting relief for the same reason under Williams.

trial that both statements were made by B&W regarding Kool cigarettes. Tr 627 (MR. MCGAAN: It looks like a Brown & Williamson Kool ad, from television”). The first, “A Frank Statement to Smokers”, claimed that B&W believed its Kool cigarettes were “not injurious to health.” PTX # 148.1. Since this statement ran in the Kansas City Star on January 4, 1954, it was not out-of-state conduct. Id.

The second, a black and white television ad from the late 1950s, similarly claimed that Kool cigarettes were “snow fresh” and generally portrayed Kool cigarettes in a healthy light. PTX # 150.1. These statements were false in light of B&W’s knowledge of the dangers of smoking. See, e.g., PTX # 343. Moreover, B&W refused to retract its position on these issues over time as its knowledge increased regarding the specific dangers of smoking. Instead, B&W continued to advertise its Kool cigarettes as a “remedy” for disease and inform smokers that its cigarettes posed no dangers. PTX # 389 and 48. At the same time B&W was assuring the public of the safety of Kool cigarettes, its internal communications were much different. For example, B&W’s CEO recited the following “mantra” within the privacy of corporate headquarters:

Hook ‘em young, hook ‘em for life.²⁹

²⁹Although B&W insincerely claims this favorite saying of its CEO was purely related to a “moist snuff” product, Dr. Wigand testified otherwise:

Q: Was it known within the company then that if you addicted a smoke early in life they would be a smoker for life?

A. Yes. Well, as long as they could live their life.

Tr 1020.

Tr 962-963 and 1019-1020.

Moreover, the ultimate man in charge of B&W's operations, Patrick Sheehy, requested and received a "calculation" of the number of deaths caused by B&W's cigarettes due to heart disease and lung cancer. PTX # 270; Tr 933-934, 1000, 1186, 1344 and 1349.³⁰ The "calculation" relevant to Kool cigarettes revealed that more than 700,000 people died every year from the same diseases suffered by Mrs. Smith. Id.

In an effort to prevent this information from reaching consumers like Barbara Smith, Plaintiffs presented evidence that B&W shipped "sensitive" documents overseas to their BAT affiliates, who subsequently destroyed them. PTX # 402; see also PTX # 4, 119, 120, 121, 122, 314, 326, 372, 384, 399, 400 and 410. This concerted effort by B&W and its affiliates to conceal the dangers of Kool cigarettes apparently had its intended effect on Barbara Smith:

Q: Do you have any reason to believe that your mother, Barbara, knew
at the time she started smoking cigarettes in the 1940s that Kool

Barbara Smith began smoking at the age of 16. LF 1757-1758, 1780-1781, 1841-1844.

³⁰At trial, B&W claimed there was no "foundation" for the admission of this document. In response, Plaintiffs introduced PTX # 390 and PTX # 391. These two documents proved that B&W was present at the "CAC" meeting where the "Herzfeld index" was discussed and that B&W itself later adopted the "Herzfeld index." The man who asked for the "Herzfeld index", Sir Patrick Sheehy, was the chairman of BAT Industries and "was involved in the micromanagement of B&W." Tr 933-934, 1000, 1186, 1344 and 1349. B&W's brief self-servingly omits this important background information.

cigarettes caused disease?

A: No.

Q: Do you have any reason to believe that she learned that in the 1950s and the 1960s?

A: No.

Q: Do you have any reason to believe that you mother, Barbara, knew that Kool cigarettes were nicotine delivery devices?

A: No, she did not.

Q: Toni, how do you feel, knowing that she didn't know that, and she smoked those cigarettes anyway?

A: I would have my mother today if she had have known.

Tr 1762; see also Section II, *supra*.

This evidence, when viewed in the light most favorable to Plaintiffs, tends to prove that B&W's conduct was "outrageous because of the defendant's evil motive or reckless indifference to the rights of others." Carpenter v. Chrysler Corp., 853 S.W.2d 346, 365 (Mo. App. 1993). Because the conduct contained in this evidence is not only "similar", but exactly the same as the conduct that harmed Mrs. Smith, there are no Constitutional concerns.

IX. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING B&W'S PROPOSED INSTRUCTIONS REGARDING PUNITIVE DAMAGES

A. Standard of Review

The issue of whether the jury was properly instructed is a question of law. See Rudin v. Parkway School Dist., 30 S.W3d 838, 841 (Mo. Ct. App. 2000). Where not-in-MAI

instructions are requested, the appellate court reviews the instruction to determine whether it followed the applicable substantive law, whether it was appropriate to the facts of the case, and whether it could readily be understood by the jury. See Reis v. Peabody Coal Co., 997 S.W.2d 49 (Mo. Ct. App. 1999); Stalcup v. Orthotic & Prosthetic Lab, Inc., 989 S.W.2d 654 (Mo. Ct. App. 1999). On appeal, instructions are presumed correct. See Leonard Missionary Baptist Church v. Sears Roebuck and Company, 42 S.W.3d 833 (Mo. Ct. App. 2001); Rishel v. Kansas City Public Service Co., 129 S.W.2d 851 (Mo. 1939). The burden of proof regarding a claim of instructional error rests with the party alleging error. See Van Volkenburgh v. McBride, 2 S.W.3d 814 (Mo. Ct. App. 1999). Moreover, instructional error does not *per se* mandate reversal. Id. at 821. Instead, reversal is only required in cases where the error is prejudicial. Id.

B. B&W's Proposed Instructions Violated the Holdings of the United States Supreme Court Regarding Punitive Damages

Building on its erroneous interpretation of State Farm and Williams, B&W next argues that the trial court failed to properly instruct the jury regarding punitive damages. In support of its argument, B&W again ignores the central teachings of Williams. Williams held that evidence of harm to others may be used for purposes of determining a defendant's reprehensibility, but may not be used to punish a defendant. Philip Morris USA v. Williams, 127 S.Ct. 1057, 1065 (2007). The concern in Williams arose because Philip Morris had requested a jury instruction containing this exact language (in short, a constitutionally permissible instruction):

You may consider the extent of harm suffered by other in determining what the

reasonable relationship is between Philip Morris' punishable misconduct and harm caused to [the plaintiff], but you are not to punish the defendant for the impact of its alleged misconduct on other persons

Williams, 127 S.Ct. 1064.

In fact, the Supreme Court noted the propriety of Philip Morris' requested instruction:

The instruction that Philip Morris said the trial should have given distinguishes between using harm to other as part of the "reasonable relationship" equation and using it directly as a basis for punishment.

Id.

The trial court in Williams rejected Philip Morris' requested instruction, even though it was a proper statement of the applicable substantive law. Williams, 127 S.Ct. at 1061.

Williams held that, in order to avail itself of constitutional due process protections, a defendant must request the appropriate relief. In this case, B&W's tendered jury instructions (unlike Philip Morris' instructions in Williams) failed to properly "distinguish between" using harm to others as a basis for determining reprehensibility versus using harm to others as a basis for punishment. In fact, B&W's instructions clearly violated Williams by asking the trial court to exclude *all* evidence of harm to others.

Compare B&W's tendered instructions:

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.*

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 the plaintiffs.

See LF 1458-1459 (emphasis added).

with the holding in Williams:

We recognize that conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few. And *a jury consequently may take this fact into account in determining reprehensibility.*

Williams, 127 S.Ct. 1065.

and Philip Morris' tendered instruction in Williams:

You may consider the extent of harm suffered by others in determining what the reasonable relationship is between any punitive award and the harm caused to [the plaintiff] by Philip Morris' misconduct

Williams, 127 S.Ct. at 1061 (emphasis added).

The trial court properly refused B&W's tendered instructions as a misstatement of the applicable substantive law. See Reis v. Peabody Coal Co., 997 S.W.2d 49 (Mo. Ct. App. 1999); Stalcup v. Orthotic & Prosthetic Lab, Inc., 989 S.W.2d 654 (Mo. Ct. App. 1999) (holding that when non-MAI instructions are requested, the appellate court reviews the instruction to determine whether the instructions followed the applicable substantive law).

X. THE TRIAL COURT CORRECTLY DENIED DEFENDANTS’ MOTION FOR DIRECTED VERDICT AT THE CLOSE OF THE EVIDENCE, MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV), MOTION FOR NEW TRIAL AND ITS REQUEST FOR REMITTITUR REGARDING THE JURY’S PUNITIVE DAMAGES AWARD

A. Standard of Review

In an appeal from a trial court’s order sustaining or denying a motion for judgment notwithstanding the verdict, the primary question for the appellate court is whether the plaintiff made a submissible case, which is the same standard applied to a trial court ruling on a motion for directed verdict. See Benoit v. Missouri Highway and Transportation Commission, 33 S.W.3d 663 (Mo. Ct. App. 2000); Ralph v. Lewis Bros. Bakeries, Inc., 979 S.W.2d 509 (Mo. Ct. App. 1998). The appellate court, in evaluating whether a submissible case has been made, is required to view the record in the light most favorable to the plaintiff, and the plaintiff is to be afforded the benefit of all reasonable inferences that may be drawn from the evidence. See Cook v. Smith, 33 S.W.3d 548 (Mo. Ct. App. 2000); Morgan v. Union Pacific R.R. Co., 979 S.W.2d 477 (Mo. Ct. App. 1998). Further, the appellate court must disregard evidence contrary to the jury’s verdict. Seitz v. Lemay Bank and Trust Co., 959 S.W.2d 458, 461 (Mo. banc 1998).

Generally, the issue of damages is left to the discretion of the jury. Emery v. Wal-Mart Stores, Inc., 976 S.W.2d 439, 448 (Mo.banc 1998); Foster v. Catalina Industries, 55 S.W.3d 385 (Mo. App. S.D. 2001). An appellate court must ordinarily “defer to the jury’s and the trial judge’s determination of damages because they are in much better positions than the appellate

court to assess the credibility of damage witnesses and to determine the appropriate compensation.” Foster, 55 S.W.3d at 392. In reviewing whether a verdict is excessive, the court is limited to a consideration of the evidence which supports the verdict excluding that which disaffirms it. Lopez v. Three Rivers Electric Cooperative Inc., 92 S.W.3d 165, 175 (Mo.App. E.D. 2002), *reh’g and transfer denied*. An appellate court will only interfere with a jury verdict if the court is “shocked” and “convinced” the jury and trial court abused their discretion and rendered a “manifestly unjust” verdict. Emery , 976 S.W.2d at 448; see also Fust, 913 S.W.2d at 49.

The Due Process Clause of the Fourteenth Amendment only prohibits the imposition of “grossly excessive or arbitrary” punitive damage awards. State Farm, 538 U.S. at 416. The Supreme Court has “consistently” held that there is no “mathematical formula” for determining whether any particular punitive award is “grossly excessive” and that such determinations are case specific. Id. at 424-425. The amount of punitive damages should reflect the enormity of the defendant’s offense and be related to actual or potential harm resulting therefrom. Henderson v. Fields, 68 S.W.3d 455, 486-487 (Mo. App. W.D. 2001). In determining whether the amount of a punitive award is “grossly excessive”, the United States Supreme Court has “instructed courts” to consider three criteria: (1) the degree of reprehensibility of the defendant’s misconduct (“the most important indicium of a punitive damages award’s reasonableness”); (2) the disparity between the harm (or potential harm) suffered by the plaintiff (or “other victims”) and the punitive award, and; (3) the difference between the punitive damage award and the civil penalties authorized or imposed in comparable cases. State Farm, 538 U.S. at 418; TXO, 509 U.S. at 460. The appellate court must review the trial

court's determination of the constitutionality of the punitive award *de novo*, deferring to the trial court's findings of fact, unless they are clearly erroneous. Krysa v. Payne, 176 S.W.3d 150, 156 (Mo. App. W.D. 2005).

B. The Proper Amount of Compensatory Damages for Determining the Punitive Damages Ratio is \$2 Million

B & W is incorrect to claim that the proper amount of compensatory damages for use when determining the punitive damages ratio is \$500,000, which is the amount remaining after Barbara Smith's fault has been applied (\$2 million x 75% fault). See Brief of Appellant at p. 81, fn 18. In support, B & W directs the Court's attention to an appellate opinion from Oregon, Waddill v. Anchor Hocking, Inc., 78 P.3d 570 (Or. Ct. App. 2000). See Brief of Appellant at p. 81, fn 18. On the basis of B & W's fidelity to principles of Oregon law, B&W suggests that the punitive damages award in this case should be \$500,000, or a 1-to-1 ratio. B & W's argument is misleading for at least two reasons.

In TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993), the Supreme Court held that it was appropriate to consider the plaintiff's actual damages in relation to the potential damage that could have been caused by defendant's conduct. TXO, 509 U.S. at 460.

State Farm affirmed the use of evidence of potential harm in determining the amount of punitive damages. See State Farm, 538 U.S. at 424 (. . . we have been reluctant to identify concrete constitutional limits on the ratio between harm, *or potential harm*, to the plaintiff and the punitive damages award") (emphasis added).

In this case, the \$2 million in compensatory damages awarded by the jury is a

reasonable measure of the potential harm to Barbara Smith and the possible harm to other Missourians caused by defendant's wrongful conduct. See Williams, 127 S.Ct. at 1065 (upholding use of evidence of harm to others in determining the punitive damages ratio)³¹ Consequently, a ratio of 10 to 1 is supported by TXO and should be used by this Court when assessing the constitutionality of punitive damages.

1. B & W Failed To Inform This Court That Waddill, Which It Relies Upon, Was Distinguished by Williams v. Philip Morris

The Waddill case upon which B & W relies involved a personal injury arising out of a fishbowl accident. The plaintiff in Waddill suffered relatively minor injuries when the glass fishbowl she was carrying – filled with water and fish – shattered while she was carrying it. The glass lacerated her left wrist and right index finger. Waddill, 78 P.3d at 574. After reviewing the facts of the case in light of State Farm, the Oregon Court of Appeals concluded that “the maximum constitutionally permissible award in this case is four times the compensatory damages for which the defendant is responsible, or \$403,416,” Id. at 576. By no coincidence, B&W requested that the Court instruct the jury in this case to limit their punitive award to a 4 to 1 ratio. R 0006. The trial court wisely rejected B&W's proposed instruction. Tr 3231-3232.

B&W fails to inform this Court that the *same* Oregon Court of Appeals that decided Waddill also decided that Waddill's limits *do not apply in cigarette cases*. See Williams v.

³¹Plaintiffs presented substantial evidence during phase II of the trial that B&W had harmed at least 10,000 other Missourians with the same conduct that harmed Barbara Smith. Tr 3244-3247.

Philip Morris Inc., 92 P.3d 126, 141-143 (Or. Ct. App. 2004) (Waddill's ratio of 4 to 1 does not apply to cigarette cases where the history of fraud is decades long and the threat to public health is of a different magnitude).³² In cigarette cases, by sharp contrast to cases such as Waddill:

[t]here is evidence concerning other Oregon victims of defendant's decade's long fraudulent scheme. The tobacco industry and defendant directed the same conduct toward thousands of smokers in Oregon. They all received the same representations, from the same entities, and through the same media, and the industry intended to induce Oregon smokers to act on those representations in the same way. That conduct was a fundamental part of defendant's business strategy; Williams was simply one of its many Oregon victims. In that sense, this case is more like Gore than State Farm.

Williams, 92 P.3d at 141-142. The Oregon Court of Appeals also recognized that a case involving particularly reprehensible conduct culminating in a person's death deserves much greater punishment than a case involving unremarkable conduct that culminated in relatively minor hand injuries:

In comparison, defendant's actions in this case are far more egregious than Key's actions in *Bocci* . . . That difference in magnitude of harm places this

³²Although the United States Supreme Court subsequently reviewed the due process concerns in this case, it did not reach the issue of whether the punitive award was constitutionally excessive. See Williams, 127 S.Ct. at 1065 ("we shall not consider whether the award is constitutionally 'grossly excessive'").

case in a different class from the cases that we have described. Here, the harm caused was physical rather than economic and, for Williams, the most serious physical harm possible, his death.

Id. at 143.

In other words, as the Supreme Court has emphasized, each case must be examined under its particular facts. State Farm, 538 U.S. at 425 (“The precise award in any case, of course, must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff”). B&W encourages this Court to follow the precedent of an Oregon case involving relatively minor hand lacerations caused by a defective fishbowl rather than a decision by the same Court in a wrongful death case involving cigarettes. B&W can not erase this distinction by ignoring it.

In Williams (the case involving cigarettes and wrongful death), the Oregon Court of Appeals upheld a punitive damages award of \$79.5 million, more than an 80 to 1 ratio. So even if we use the figure of \$500,000 as the benchmark for assessing the ratio (rather than then \$2 million actually awarded by the jury), the punitive damages ratio in this case is only 40 to 1, approximately half of what was approved by the Oregon Court of Appeals after applying State Farm. If we use the proper ratio of 10 to 1 (i.e., the \$2 million actually awarded by the jury), the ratio here is 8 times less than was upheld by the Oregon courts in a similar case. Moreover, the United States Supreme Court expressly held in State Farm that a ratio of more than 526:1 may be appropriate in the right case:

... because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld [i.e., 526:1]

may comport with due process where “a previously egregious act has resulted in only a small amount of economic damages.

State Farm v. Campbell, 538 U.S. 408, 425 (2003).

C. Analysis Of The Gore Factors Supports The Jury’s Punitive Damages Award of \$20 Million

In BMW North America, Inc. v. Gore, the United States Supreme Court instructed courts reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff (and other victims) 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. See State Farm, 538 U.S. at 418.

According to the Supreme Court, the reprehensibility of the defendant’s conduct is the “most important indicium of the reasonableness of a punitive damages award.” Id. at 419. This Court must determine the reprehensibility of B&W’s conduct by considering whether: (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident, and; (5) the harm was the result of intentional malice, trickery, or deceit rather than mere accident. State Farm, 538 U.S. at 419. In evaluating the reprehensibility of a defendant’s actions, this Court must defer to the factual findings of the jury and the trial court and limit itself to a consideration of the evidence which supports the verdict excluding that which disaffirms it. Krysa v. Payne, 176 S.W.3d 150 (Mo. App. W.D. 2005). In this case, Plaintiffs’

evidence of reprehensibility would support a punitive award against B&W much larger than \$20 million.

In this case, B&W, *inter alia*: (1) knew at least 4 years before Barbara Smith began smoking that Kool cigarettes were addictive and caused disease (PTX # 343); (2) knew that “95% of all lung cancer deaths are caused by smoking” and assumed that “smoking causes 25% of heart disease” (PTX # 270); (3) calculated the number of smokers its products would kill every year (700,000) based on the same diseases suffered by Barbara Smith (PTX # 270); (4) with full knowledge of the dangers of smoking, intended to “hook” young people to its products “for life”, all the while knowing that its smokers did not know that its products were addictive (Tr 962-963 and 1019-1020; PTX # 3); (5) manipulated the delivery of nicotine in Kool cigarettes so that the smoker would become more addicted (PTX # 188; Tr 979-980); (6) intentionally added menthol to Kool cigarettes to mask the harshness of the additional nicotine delivery and allow the smokers to breathe the dangerous carcinogens in smoke deeper into their lungs (Tr 981-982); (7) intentionally marketed the filtered cigarettes smoked by Barbara Smith as healthier alternatives to unfiltered cigarettes, all the while knowing that Mrs. Smith was not reducing her risk by smoking such cigarettes (PTX # 407); (8) halted the development of a “healthy” cigarette in the 1960s because “the need for such a device was not apparent” (PTX # 278 and 276); (9) with full knowledge of the dangers of smoking, set out on a 50-year scheme to assure its smokers that Kool cigarettes were completely safe (PTX 148.1, 389 and 33), and; (10) intentionally advertised the Kool cigarettes Mrs. Smith smoked as “remedies” for disease (PTX #144.41; 150.1 and 48). As a result, Mrs. Smith suffered years of pain and illness, culminating in her death.

Plaintiffs also presented evidence that at least 10,000 other Missourians had been killed by the same misconduct. Tr 3244-3247. According to Williams, it was permissible for the jury to take this conduct into account in determining reprehensibility and awarding a “stiffened penalty for the latest crime.” Williams, 127 S.Ct. at 1065.

Even Brown & Williamson agrees that a single-digit ratio will “satisfy due process.” Substitute Brief of Appellant at p. 109. Assuming a 9 to 1 ratio (resulting in an \$18,000,000 punitive award), the jury in this case certainly did not award a “stiffened penalty” that would engage due process concerns. This is especially true in light of B&W’s extremely reprehensible conduct in this case. In fact, it is difficult to imagine a case involving more “reprehensible conduct” given the sophisticated knowledge B&W possessed regarding the dangers of Kool cigarettes.

The Supreme Court of the United States reiterated the following legal principles relating to the second guidepost: “[t]urning to the second Gore guidepost, we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award.” State Farm, 538 U.S. at 1524. The Supreme Court emphasized that the ratio must take into consideration the following categories of harm: (1) actual harm to the plaintiff; (2) potential harm to the plaintiff; (3) actual harm to other similarly situated victims, and; (3) potential harm to other similarly situated victims (to promote deterrence). TXO, 509 U.S. at 460. The Court added that where “a particularly egregious act has resulted in only a small amount of economic damages”, a ratio greater than 526:1 may comport with due process. State Farm, 538 U.S. at 425. Higher ratios may also be appropriate when “the injury is hard to detect or the monetary value of noneconomic harm might have been

difficult to determine.” Id.; see Williams, 92 P.3d 126 (Or. App. 2003). “The precise award in any case, of course, must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.” State Farm, 538 U.S. at 425.

In this case, it is obvious that a 10 to 1 ratio is well within constitutional limits. The compensatory award in this case was minimal — five plaintiffs were jointly awarded \$500,000. Tr 1419-1421. This was not complete compensation given that it was undisputed at trial that Mrs. Smith’s medical and funeral expenses were \$315,000. Tr 3043. Moreover, the harm was not economic in nature. Mrs. Smith suffered years of pain and illness, culminating in her death. Cf. State Farm, 538 U.S. at 426 (“The harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries”). Further, there is no evidence that the punitive award in this case duplicated any element of the compensatory award. In fact, it would be difficult to imagine how the jury’s \$500,000 award to five plaintiffs contained any element of punishment or deterrence for a company whose annual profits in Missouri exceed \$80 million. Tr 3267-3268.

Also relevant to the constitutionality of a punitive damage award is evidence regarding the amount of potential but unrealized harm to the plaintiff and other victims. “Potential harm” serves to deter similar future misconduct by the defendant. TXO, 509 U.S. at 460. In this case, Plaintiffs presented evidence that B&W’s misconduct had resulted in actual harm to at least 10,000 other victims in Missouri. Tr 3244-3247. This harm was the same as that suffered by Barbara Smith, i.e., death. Id. Since Plaintiffs’ expert testified that B&W’s conduct in the State of Missouri kills 1,000 additional smokers every year, the future “potential harm” to Missouri smokers is even greater. The magnitude of this harm supports a punitive damages ratio much

higher than 10 to 1. This paltry amount of damages could not possibly punish and deter B&W, a company that receives \$80 million of annual profit from its sale of cigarettes in Missouri. Tr 3267-3268. Finally, the award in this case comports with punitive damages awards in other cases involving the same issues. In another individual wrongful death case involving cigarettes, the Oregon Supreme Court upheld a punitive damages ratio of more than 80 to 1. Williams, 92 P.3d 126 (Or. App. 2003). In addition, a Missouri appellate court recently affirmed a punitive ratio of 27 to 1 in a case involving only economic damages. See Krysa v. Payne, 176 S.W.3d 150 (Mo. App. W.D. 2005).

B&W offers only speculation relating to the third guidepost and therefore a response is not required. It is interesting to note, however, that Missouri imposes a civil penalty for cigarette packages sold without adequate warnings in the amount of 500% of the retail value of the cigarettes. R.S. Mo. §§ 149.200 and 149.203. In this case, B&W failed to provide Barbara Smith with any warning about the known dangers of smoking for at least 22 years. Plaintiffs' expert testified that B&W receives \$80 million annually from its sale of cigarettes in Missouri. Tr 3267-3268. The jury's punitive damages award in this case is well below the "civil penalties authorized in comparable cases."

In sum, an award of \$20 million in punitive damages is well within acceptable limits imposed by Supreme Court jurisprudence. The award represents a 10 to 1 ratio in a case involving the health and safety of thousands of Missouri residents and, as such, comports with constitutional principles.

CONCLUSION

For the reasons stated above, Plaintiffs request the Court to deny the Substitute Brief of

Appellant, including all requests and Points Relied On and affirm the judgment of the trial court.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Scott B. Hall, hereby certify as follows:

1. The attached brief complies with the limitations contained in Supreme Court Rule 84.06. The brief was completed using Corel WordPerfect, 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 27,888 words, which does not exceed the 27,900 words allowed for a respondent'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 WordPerfect format. It was scanned for viruses on December 6, 2007 and is virus-free.

2. One true and correct copy of the attached brief was served on December 7, 2007, by mail, U.S. Postage prepaid on: Robert H. Klonoff, JONES DAY, 51 Louisiana Avenue, N.W., Washington, D.C. 20001, Casey O. Housely, ARMSTRONG TEASDALE LLP, 2345 Grand Boulevard, Suite 2000, Kansas City, Missouri 64108, and Andrew R. McGaan, KIRKLAND & ELLIS LLP, 200 East Randolph Drive, Chicago, Illinois 60601 and an electronic copy was served by e-mail addressed to rhklonoff@JonesDay.com, chousley@armstrongteasdale.com and amcgaan@kirland.com.

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