

Appeal No. SC88685

IN THE MISSOURI SUPREME COURT

BROWN & WILLIAMSON TOBACCO CORPORATION

Defendant - Appellant,

vs.

LINCOLN SMITH, *et al.*

Plaintiffs - Respondents

ON TRANSFER FROM THE MISSOURI COURT OF APPEALS

FOR THE WESTERN DISTRICT

SUPPLEMENTAL BRIEF OF RESPONDENTS

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INTRODUCTION

In its Supplemental Brief, Appellant Brown & Williamson Tobacco Corporation (“B&W”) asks this Court to give absolute preclusive effect to the federal court’s partial summary judgment order. In doing so, B&W would require this Court to engage in legal make-believe that would render a significant injustice upon the Smith family.

First, B&W asks this Court to pretend that the federal district court’s partial summary judgment order was made final under Fed. R. Civ. P. 54(b), even though the order was not expressly issued under Rule 54(b), B&W never requested certification of the order as final under Rule 54(b), and the federal district court neither considered nor granted such a request. Unless “expressly determined and directed” by the presiding federal court, a partial summary judgment order “shall not terminate the action as to any of the claims or parties, and *the order is subject to revision at any time* before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.” See Fed. R. Civ. P. 54(b) (emphasis added).

Second, B&W asks this Court to ignore its own subsequent agreement with the Smith family, memorialized in an Agreed Order signed by the federal court judge. In that Agreed Order, B&W promised that the Smith family could file a future wrongful death action unfettered by the federal court’s previous partial summary judgment in exchange for the Smith estate’s dismissal of their Survival

Action with prejudice. B&W asks this Court to read language into the Agreed Order that simply is not present anywhere in the agreement. Compare Supplemental Brief of Appellant at 21 (“B&W agreed that Mrs. Smith’s family could pursue the claims remaining in the Survival Action in a wrongful death action”) with Agreed Order, 2d Supp. LF 2098 (“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”). Alternatively, B&W again asks this Court to ignore its actions in interpleader, including the Agreed Order, because it was not properly made part of the record in this case (even though B&W was the party that raised on appeal the issue of the federal court’s “dismissal” and then proceeded to distort the appellate record by refusing to supply the appellate court with the full record from the federal proceedings).¹

¹As the Appellant, it was Brown & Williamson’s duty to compile the record on appeal. See Mo. R. Civ. P. 81.12 (c). B&W’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 B&W, 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

Third, B&W asks this Court to rule that collateral estoppel somehow applies to the federal court's interlocutory partial summary judgment order, even though the federal judge expressed his intent in subsequent orders that the summary judgment order was not final as to the Smith family's wrongful death action. Further, B&W judicially admitted in the federal case that none of the "five elements" for collateral estoppel apply to the Smith family's wrongful death claims. In fact, the two Missouri Supreme Court cases B&W exclusively relied upon in the Interpleader Action to force the Smith family to choose between their

federal court's actual Agreed Order of dismissal, which clearly stated that only the Survival Action was dismissed with prejudice. 2d Supp. LF 2097-2098. 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 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.

Survival Action and Wrongful Death Action now conclusively defeat its collateral estoppel argument. See Plaza Express Co. v. Galloway, 280 S.W.2d 17, 23 (Mo. banc 1955) (“We are aware of no principle, and none has been pointed out . . . by which either party-plaintiff [in a survival action and wrongful death action] would be estopped by a verdict or judgment in the other case as to any fact issue litigated in such other case”) (emphasis added); Smith v. Preiss, 396 S.W.2d 636, 640-641 (Mo. 1965) (“We know of no rule under the theory of estoppel by verdict whereby those who are the beneficiaries under the wrongful death act, when their interests are not identical to those who benefit from a testator’s estate, are or should be bound by the action of a person acting as executor of the estate when that action is contrary and adverse to the interest he is charged by law to represent in his separate capacity as statutory trustee for the benefit of those who take under the laws of descent, and vice versa”).

Other than these fictitious and artificial choices, B&W leaves this Court with no real legal or just reason to afford the federal district court’s partial summary judgment order any preclusive effect. In the absence of a rational and just reason to do so, this Court should hold that the partial summary judgment order had no preclusive effect on the Smith family’s wrongful death claims and, therefore, all of Barbara Smith’s claims were available to her upon her death.

STATEMENT OF FACTS

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. It is uncontroverted that the federal court did not issue its partial summary judgment order under Fed. R. Civ. P. 54(b), nor did it subsequently make the order final under Fed. R. Civ. P. 54(b). It is also uncontroverted that B&W never requested an interlocutory appeal of the federal court's partial summary judgment under 28 U.S.C. § 1292(b). On May 25, 2000, and approximately five (5) months after the partial summary judgment order was entered, Barbara Smith died. PTX # 156.1.

On June 1, 2000, B&W filed a suggestion of death under Fed. R. Civ. P. 25(a)(1). 2d Supp. LF 2103-2104. On June 27, 2000, Plaintiff Barbara Smith filed a motion for substitution of a party under Fed. R. Civ. P. 25(a)(1), substituting Mrs. Smith's spouse, Lincoln L. Smith, as the personal representative of Mrs. Smith's estate. 2d Supp. LF 2106-2109. Rule 25(a)(1) states that "If a party dies *and the claim is not thereby extinguished*, the court may order substitution of the proper parties." Fed. R. Civ. P. 25(a)(1) (emphasis added). B&W did not oppose

the Motion for Substitution in any way. Specifically, B&W did not claim that the federal court's previous partial summary judgment order "extinguished" the Smith family's wrongful death claims. The federal court granted the Plaintiff's unopposed motion on July 13, 2000. 2d Supp. LF 2111.

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." 2d Supp. LF 1908-1916. 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.

2d Supp. LF 2067-2073.

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. 2d Supp. LF 2039 and 2073. B&W 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.” 2d Supp. LF 2090. B&W even admitted that the Smith family had the “statutory right under Missouri law” to pursue wrongful death damages for heart disease and COPD, issues B&W now claims were “precluded” by the federal court’s earlier partial summary judgment order. 2d Supp. LF 1934 and 1936. B&W’s logic for its conclusion was that the Wrongful Death Action involved “brand new” and “different” claims, “different injuries”, “different plaintiffs”, “new discovery” and “new issues”. 2d Supp. LF 1929 and 1936.

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.

2d Supp. LF 2098.

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 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.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DENIED B&W'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFFS' CLAIMS FOR FAILURE TO WARN AND FOR HEART DISEASE, COPD/EMPHYSEMA AND ADDICTION, BECAUSE THE FEDERAL DISTRICT COURT NEVER MADE ITS

PARTIAL SUMMARY JUDGMENT ORDER FINAL UNDER RULE 54(B) AND SUBSEQUENTLY SIGNED AN ORDER (AGREED AND PRESENTED BY B&W) PRESERVING PLAINTIFFS' RIGHT TO BRING AN UNLIMITED WRONGFUL DEATH ACTION

A. B&W Should Be Bound By Its Choice Not to Request

Certification of the Federal District Court's Partial Summary Judgment Ruling Under Rule 54(b) and Its Knowing and Voluntary Agreement that the Smith Family Could Pursue a Future Wrongful Death Action, Unfettered By the Federal Court's Earlier Partial Summary Judgment, In Exchange for the Smith Estate's Agreement to Dismiss Their Survival Action With Prejudice

It is well-settled, black-letter law that partial summary judgments are neither final nor appealable. 15B Wright, Miller & Cooper, Federal Practice and Procedure § 3914.28 (1992) (“Summary disposition of fewer than all claims among all parties ordinarily is not final, where it involves complete disposition of some claims or a Civil Rule 56(d) ‘partial summary judgment’ determining that one or more issues do not need to be tried”). The only exception to this general rule is when the federal district court expressly issues its partial summary judgment order under Fed. R. Civ. P. 54(b) or certifies, upon request by a party, its order as an interlocutory appeal under 28 U.S.C. § 1292(b). See 15B Wright,

Miller & Cooper, Federal Practice and Procedure § 3914.28 (1998) (“A summary disposition of less than all claims among all parties is not final, unless judgment is entered under Civil Rule 54(b) or all other matters have been resolved by other orders”); 10 Wright, Miller & Kane, Federal Practice and Procedure § 2654 (1998) (“The rule does not require that a judgment be entered when the court disposes of one or more claims or terminates the action as to one or more parties. Rather, it gives the court discretion to enter a final judgment in these circumstances and it provides much-needed certainty in determining when a final and appealable judgment has been entered. As stated by one court, “if it does choose to enter such a final order, [the court] must do so in a definite, unmistakable manner.” Absent a certification under Rule 54(b) any order in a multiple-claim action, even if it appears to adjudicate a separable portion of the controversy, is interlocutory”). It is uncontroverted in this case that B&W never requested certification under 28 U.S.C. § 1292(b) and the federal district court did not issue its partial summary judgment order under Rule 54(b).²

²Missouri has adopted Fed. R. Civ. P. 54(b) and Missouri courts unanimously interpret the Rule in the same manner. See, e.g., Mo. R. Civ. P. 74.01(b); Norwine v. Norwine, 75 S.W.3d 340, 344 (Mo.App. S.D. 2002) (“The ‘partial summary judgment’ was merely an interlocutory judgment which could be added to, amended, or set aside by the court at any time prior to final judgment.

The Eighth Circuit has also held that a partial summary judgment becomes a final judgment once the remaining parts of the case are dismissed or otherwise resolved. Porter v. Williams, 436 F.3d 917, 919-920 (8th Cir. 2006). Therefore, if Barbara Smith had dismissed her Wrongful Death Action with prejudice or settled that Action prior to bringing it in state court, the partial summary judgment entered by the federal district court would have then become final. However, in this case, the parties specifically agreed that only the Smith estate’s Survival Action would be dismissed with prejudice and that the Smith family’s Wrongful Death Action would continue to exist until adjudicated at a later date.³ See Agreed Order, 2d

Consequently, the finding[s] in the ‘partial summary judgment’ is irrelevant because the doctrines of res judicata and collateral estoppel *apply only to final judgments*”) (emphasis in original); Enchanted Hills, Inc. v. Medlin, 892 S.W.2d 722, 723 (Mo. App. E.D. 1994) (“It is well settled that a partial grant of summary judgment, with additional issues remaining before the trial court, is interlocutory and has no res judicata effect”); Shelter Mutual Ins. Co. v. Vulgamott, 96 S.W.3d 96, 104 (Mo.App. W.D. 2003) (“A partial summary judgment is merely an interlocutory judgment which could be added to, amended, or set aside by the court at any time prior to final judgment”).

³B&W also waived any “preclusion” under the partial summary judgment order by failing to oppose Plaintiffs’ Motion for Substitution under Fed. R. Civ. P.

Supp. LF 2098. In support of this result, the federal district court specifically preserved all of B&W’s factual and legal defenses to any future Wrongful Death Action, except for one — B&W would not use the dismissal of the Smith estate’s Survival Action against the Smith family in the Wrongful Death Action when and if it was eventually filed.⁴ See Agreed Order, LF 2098. The federal district court’s Agreed Order also refused to limit the claims or damages available to the Smith family in their subsequent Wrongful Death Action based on the agreement knowingly entered by B&W. Therefore, not only did the federal court not “definitely” and “unmistakably” issue its partial summary judgment as a final order under Fed. R. Civ. P. 54(b), but the federal court also subsequently expressed

25(a)(1), which states:

If a party dies *and the claim is not thereby extinguished*, the court may order substitution of the proper parties.

Fed. R. Civ. P. 25(a)(1) (emphasis added).

⁴Not only did B&W use dismissal of the Survival Action against the Smith family in the subsequent Wrongful Death Action, it attempted to deceive the appellate court by claiming that the Smith family had dismissed their Wrongful Death Action rather than the Survival Action. See Brief of Appellant Brown & Williamson Tobacco Corporation at 29 (“Thereafter, her counsel made the decision to dismiss with prejudice what remained of the federal case”).

its intent in the Agreed Order (as proposed and agreed by the parties) that its interlocutory ruling was not final as to the Smith family's Wrongful Death claims.

B&W argues, however, that the standards for finality have been relaxed by the Eighth Circuit and that:

Finality in the context of issue preclusion may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again.

Supplemental Brief at Robinette v. Jones, 476 F.3d 585, 589 (8th Cir. 2007).

However, the federal district court in this case saw “good reason” for allowing the Smith family to pursue a future wrongful death action — the parties' agreement to preserve this right in exchange for the Smith estate's dismissal of the Survival Action with prejudice.⁵

⁵This is where B&W's reliance on Robinette falls apart. In Robinette, the plaintiffs dismissed their lawsuit voluntarily after a partial summary judgment involving an absolute bar to the entire action — i.e., sovereign and prosecutorial immunities. Had the parties in Robinette stipulated in an “agreed order” signed by the judge that the claims supposedly “adjudicated” by the partial summary judgment were still viable after the dismissal, the case would truly be analogous to this one. However, there was no such “agreed order” in Robinette and, therefore,

Those reasons were expressly embodied in the federal court's signed order and the case is inapposite. The case at bar is, however, analogous to another Eighth Circuit case — Orion Fin. Corp. v. Am. Foods Group, Inc., 201 F.3d 1047 (8th Cir. 2000).

In that case, the court entered partial summary judgment on the complaint and counterclaims. Following entry of the partial summary judgment order, the parties entered into a stipulation to obtain an appealable final order, but specifically retaining the right to resurrect stipulated claims depending on the outcome of appeal. The Eighth Circuit held that in light of the parties' stipulation, the partial summary judgment was "not final and thus not appealable." The court reasoned that "in the present case the parties wish to challenge on appeal *issues that are still within the lawsuit* and, if successful, challenge them again in further litigation."

This, of course, is similar to what the parties in the present case sought to accomplish through the Agreed Order. B&W sought dismissal of the Smith estate's Survival Action for all time and the Smith family sought to reserve their right to pursue all of their wrongful death claims. This Court should assume that neither party was naive in requesting and obtaining the desired relief from the federal district court. Allowing B&W to now breach that agreement in relation to the wrongful death claims would be analogous to allowing the Smith family to go back and pursue the Survival Action they dismissed with prejudice.

B&W's agreement that: (1) the Smith family's wrongful death action could be litigated again, if the Smith family chose to pursue such an action; (2) any future wrongful death action filed by the Smith family was not expressly limited by the federal court's partial summary judgment, and; (3) B&W reserved all of its defenses (additional evidence that the federal court intended to preserve all of the Smith family's wrongful death claims), except that it agreed not to use the dismissal of the Smith estate's Survival Action as a defense to a subsequent Wrongful Death Action.

The relaxed standards for finality cited by B&W do not apply to a situation like this, in which the federal court specifically ordered that its previous partial summary judgment order was not a "valid and final judgment" by refusing to subsequently dismiss the Smith family's Wrongful Death Action and specifically reserving their right to bring such an action in the future, unfettered by any expressed limitations.⁶ Cf. Orion Fin. Corp. v. Am. Foods Group, Inc., 201 F.3d 1047

⁶In fact, the federal district court had previously stated that claims that were supposedly "adjudicated" in the earlier partial summary judgment were still available to the Smith family through a wrongful death action. See 2d Supp. LF 1996-1997 (explaining that interpleader would have been unnecessary if the Smith family chose to bring a wrongful death claim for heart disease because although heart disease was not available in the Survival Action, these damages were still

(8th Cir. 2000), discussion *supra*, fn 2.

Unlike the defendants in Robinette, B&W entered an agreement in this case that it would not defend a later wrongful death action by arguing that the previous dismissal of the Survival Action barred or estopped the Plaintiffs in any way. The federal court and B&W at least implicitly admitted that the Smith family could pursue the claims at issue in the partial summary judgment by reserving B&W's right to "raise and litigate any defense based upon fact or law that is available to it in any wrongful death action arising from the death of Barbara Smith, if one is filed." LF 2098. Of course, the same language preserved the Smith family's ability to bring an open-ended wrongful death action, unfettered by the previous partial summary judgment order. Id.

The federal district court obtained this proposed agreement from the parties and then signed an order memorializing the agreement. Id. ("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 . . . the

available in the separate and distinct wrongful death action). Interestingly, even B&W conceded (according to the federal court) that Barbara Smith "died of a heart attack" and "COPD", an admission that these supposedly "precluded" damages were available to Barbara Smith's heirs in a wrongful death action. See 2d Supp. LF 1936 and 1995.

Survival Action should be dismissed with prejudice”). B&W should be precluded from entering into an agreement with the Smith family and the federal court and then self-servingly ignoring the same agreement on appeal. Or as B&W so aptly recites in its supplemental brief, “A litigant cannot strategically lie behind the log until after the trial . . . before raising an issue not found in the pleadings nor included in the pre-trial order and then raise it when it is too late for his opponent to do anything about it.”⁷ See Supplemental Brief of Appellant at 24. Even worse

⁷Interestingly, the case cited by B&W involved a defendant that failed to plead an affirmative defense and then argued that the issue was tried by implied consent, exactly like B&W’s argument in this case regarding its requirement to plead the preclusive effect of the federal court’s partial summary judgment and Agreed Order. See Supplemental Brief of Appellant at 17-18 (“Even if B&W had been required to raise plaintiffs’ failure to satisfy the statutory condition precedent as an affirmative defense, and had failed to do so, plaintiffs’ failure to object compels the conclusion that the issue be ‘deemed to have been tried by implied consent’”).

Plaintiffs generally agree with B&W that resolution of whether B&W raised the preclusive effect of the federal court orders as an affirmative defense will not dispose of this case, but for a different reason. Even if B&W had raised such an affirmative defense, it would not “undo” the interlocutory nature of the federal

in this case, B&W has raised an issue it expressly agreed not to raise as a defense of the Smith family's future Wrongful Death Action.

More importantly, B&W's approach — agreeing that the Smith family

court's partial summary judgment order and B&W's express agreement that the Smith family could pursue all of their wrongful death claims, unfettered by the earlier partial summary judgment in exchange for the Smith estate's dismissal of its Survival Action with prejudice.

Further, the appellate court determined that B&W subsequently waived any argument based on collateral estoppel. See Smith v. Brown & Williamson, 2007 WL 2175034 *20, fn 100 (Mo.App. W.D. 2007) (“Nowhere in its briefs does B&W argue or even set forth the phrase collateral estoppel, set forth the elements of collateral estoppel, identify the determinative findings of fact in the federal action, or demonstrate that the elements of collateral estoppel are satisfied. Further, B&W does not argue that Ms. Smith's survivors were in privity with her or that the personal injury suit and wrongful death action are identical causes of action so that the four elements of res judicata are satisfied, and the wrongful death action should be precluded based on ordinary res judicata . . . Because B&W has not argued ordinary res judicata or collateral estoppel, this court will not address the question of whether the elements of res judicata or collateral estoppel were satisfied in this situation”).

could pursue an unlimited wrongful death action and not specifying in the agreement that issues “decided” by the earlier partial summary judgment order were final or requesting certification of finality under Rule 54(b) — defeats the very purpose of finality and Rule 54(b). Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 512 (1950) (“The obvious purpose of Rule 54(b) is to reduce as far as possible the uncertainty and the hazard assumed by a litigant who either does or does not appeal from a judgment of the character we have here. It provides an opportunity for litigants to obtain from the District Court a clear statement of what that court is intending with reference to finality, and if such a direction is denied, the litigant can at least protect himself accordingly”); 10 Wright, Miller & Kane, Federal Practice and Procedure § 2654 (1998) (“Rule 54(b) eliminates any doubt whether an immediate appeal may be sought . . . If the court does not enter a Rule 54(b) order, the litigant knows that waiting until the disposition of the entire case before seeking an appeal will not lose the right to have the order reviewed”). Consequently, it is clear that the partial summary judgment order was never made final in regard to the Smith family’s Wrongful Death Action. Therefore, all of Barbara Smith’s claims were available upon her death.

B. B&W’s Judicial Admissions Before the Federal Court Directly Contradict the “Five Required Elements” for Issue Preclusion it Cites to This Court

In its Supplemental Brief in this Court, B&W pretends to “apply” the five elements of issue preclusion to this case and reaches the conclusion that “all elements necessary to give preclusive effect to the Personal Injury Action summary judgment are established by the record in this case.” Supplemental Brief of Appellant at p. 15. Of course, B&W fails to mention that its conclusions regarding these five elements are directly contrary to its emphatic and repeated admissions to the federal district court that the Smith estate’s Survival Action is completely different than the Smith family’s Wrongful Death Action.

After the federal district court had granted its non-final partial summary judgment, B&W filed a complaint in interpleader in an effort to force the Smith family to choose between their Survival Action (the continuation of Barbara Smith’s personal injury action under Missouri law⁸) and a separate Wrongful Death Action. While arguing to enjoin the Smith family from further pursuing their claims, B&W repeatedly admitted that the partial summary judgment order only related to Barbara Smith’s Survival Action and did not relate to the Smith family’s Wrongful Death claims.

For example, B&W recognized that the Smith family had a “statutory right under Missouri law” to pursue wrongful death damages for heart disease and

⁸See R.S. Mo. § 537.020 (“Causes of action for personal injuries, other than those resulting in death . . . shall not abate by reason of death”).

COPD, despite the partial summary judgment order's supposed "preclusion" of these damages. 2d Supp. LF 1934 and 1936. B&W's logic for its conclusion was that the Wrongful Death Action involved "brand new" and "different" claims, "different injuries", "different plaintiffs", "new discovery" and "new issues":

The pending Survival Action [and] wrongful death claim . . . are different claims with different proof requirements and different injuries.

Barbara Smith's recent death has given rise to different claims by different plaintiffs.

Wrongful death is a brand new claim here. New discovery (both fact and expert) is necessary to resolve the cause of death.

If the Smith family elects to pursue a wrongful death claim, then the parties must litigate new issues, involving new and different facts and different medical issues.

LF 1929 and 1936.

In other words, B&W took the opposite position before the federal court regarding issue preclusion. There, B&W's admissions defeated the five necessary elements for establishing collateral estoppel.

In a stunning "about face," B&W now disingenuously claims the party at issue in both the continued personal injury action and the wrongful death action are the same, Barbara Smith. Supplemental Brief of Appellant at 16. B&W also claims the issues involved in the personal injury action and wrongful death action

are the same and were “actually litigated”, despite its admission after entry of the partial summary judgment order that the wrongful death claims and facts were “brand new and different.” B&W even goes so far as to claim that Plaintiffs’ counsel “conceded” the application of collateral estoppel through its clever use of selective citation to the record in this case. In its supplemental brief, B&W alleges that the following snippet of oral argument in the trial court regarding post-trial motions is a concession by the Plaintiffs:

Essentially, the defendants are arguing that Judge Smith’s order regarding summary judgment, which precluded some of Mrs. Smith’s claims, but not all of Mrs. Smith’s claims, collaterally estops or precludes the claims in this case.

Supplemental Brief of Appellant at 12.

Of course, B&W conveniently ignores the next two sentences in Plaintiffs’ oral opposition:

And [they] can’t argue that because the same parties have to be involved in both cases. And because that’s not true here, because the wrongful death action is a completely separate and distinct action under the law involving completely different parties, [B&W’s] argument must fail.

Tr. 3424 (emphasis added).

This Court should give no credibility to B&W’s stunning and self-serving reversal in position. B&W was right the first time. A wrongful death action

involves “different plaintiffs”, “different injuries”, “different claims”, “different issues”, “different facts” and “new discovery”. In fact, the two Missouri Supreme Court cases B&W exclusively relied upon in the Interpleader Action now conclusively defeat its collateral estoppel argument. See Plaza Express Co. v. Galloway, 280 S.W.2d 17, 23 (Mo. banc 1955) (“We are aware of no principle, and none has been pointed out, in the doctrine of res judicata by which a judgment in either [the survival action or the wrongful death action] would bar the other, *or by which either party-plaintiff would be estopped by a verdict or judgment in the other case as to any fact issue litigated in such other case*”) (emphasis added); Smith v. Preiss, 396 S.W.2d 636, 640-641 (Mo. 1965) (“We know of no rule under the theory of estoppel by verdict whereby those who are the beneficiaries under the wrongful death act, when their interests are not identical to those who benefit from a testator’s estate, are or should be bound by the action of a person acting as executor of the estate when that action is contrary and adverse to the interest he is charged by law to represent in his separate capacity as statutory trustee for the benefit of those who take under the laws of descent, and vice versa”); see also O’Grady v. Brown, 654 S.W.2d 904, 910 (Mo. 1983) (“The wrongful death act creates a new cause of action where none existed at common law and did not revive a cause of action belonging to the deceased”). No amount of clever rhetoric from B&W can undo these established legal truths and judicial admissions.

In short, the federal district court, B&W and the Smith family agreed that

the partial summary judgment was neither final nor appealable for purposes of a wrongful death action. In exchange for the continued viability of *all* their wrongful death claims, B&W obtained the Smith family's agreement to dismiss their Survival Action with prejudice. B&W made no attempt to limit the Agreed Order in any way in regard to the Smith family's ability to bring a future Wrongful Death Action. This Court should not assume that B&W was naive in its understanding of the terms of the agreement, especially considering its ability to convince the Smith family to dismiss their Survival Action for all time. As a result, all of Barbara Smith's claims were available to her upon her death.

C. The Federal Court's June 6, 2001 Dismissal Order is Irrelevant to the Determination of the Claims Available to Barbara Smith When She Died

The federal district court entered its partial summary judgment order on January 29, 2000. LF 1287. The federal court neither issued its partial summary judgment under Rule 54(b) nor subsequently expressed an intent to make its order final. See supra. Barbara Smith died on May 25, 2000. PTX # 156.1. Almost a full year after Barbara Smith's death, the federal court dismissed the Smith estate's Survival Action according to the parties' agreement. 2d Supp. 2097-2101. Since the beginning of this appeal, B&W has argued that the federal court's partial summary judgment order, standing alone, "fully adjudicated" Barbara Smith's claims for failure-to-warn and for heart disease, COPD/emphysema and addiction.

Now, B&W claims that the partial summary judgment order became final when the federal court subsequently entered the May 6, 2001, Agreed Order dismissing the Smith estate's Survival Action.

Even if this were true, it would have no effect upon this Court's determination of what claims were available to Barbara Smith when she died. Because Barbara Smith died almost a full year before entry of the Agreed Order, all of her claims were still available upon her death, rendering the later Agreed Order irrelevant for purposes of determining her available claims under the Wrongful Death Act. Cf. R.S.Mo. § 537.080 (“ . . . if death had not ensued, would have entitled such person to recover damages . . . ”). In other words, the relevant question is whether the partial summary judgment order was final on May 25, 2000, and the obvious answer is that it was not.

CONCLUSION

Plaintiffs request that this Court hold that B&W's failure to certify the federal court's partial summary judgment under Rule 54(b) and subsequent express agreement to permit the Smith family to bring an unlimited Wrongful Death Action precluded it from later arguing that the federal court's partial summary judgment order was final. As a result, this Court should reinstate the jury's verdict and provide the further relief requested in Plaintiffs' Substitute Brief.

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 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 6,771 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 April 24, 2008, and is virus free.

3. One true and correct copy of the attached brief was served on April 25, 2008, by mail, U.S. Postage prepaid, on Bruce D. Ryder, Thompson Coburn, LLP, One U.S. Bank Plaza, St. Louis, MO 63101, Andrew R. McGaan, Kirkland & Ellis, LLP, 200 East Randolph Drive, Chicago, IL 60601, and William E. Marple, Jones Day, 2727 North Harwood Street, Dallas, TX 75201, and an electronic copy was served by e-mail, addressed to bryder@thomsoncoburn.com, amcgaan@kirkland.com, and wemarple@jonesday.com.

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