

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

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LINCOLN SMITH, ET AL.,

Respondents

v.

BROWN & WILLIAMSON TOBACCO CORPORATION.

Appellant

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WD65542

DATE: December 16, 2008

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**Appeal From:**

Circuit Court of Jackson County, MO  
The Honorable Marco Antonio Roldan, Judge

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**Appellate Judges:**

Division Two: Harold L. Lowenstein, P.J., and James M. Smart, J., and Robert G. Ulrich, Sr. J.

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**Attorneys:**

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**MISSOURI APPELLATE COURT OPINION SUMMARY  
MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

**LINCOLN SMITH, ET AL., Respondents, v. BROWN &  
WILLIAMSON TOBACCO CORPORATION, Appellant**

**WD65542**

**Jackson County**

Brown & Williamson Tobacco Corporation (B&W) appeals the judgment entered against it in favor Barbara Smith's survivors under Missouri's wrongful death statute, section 537.080, RSMo, for claims of personal injury based on negligence and product defect. B&W argues that the trial court erred in overruling its motion for judgment notwithstanding the verdict, motion for a new trial on punitive damages, motion for judgment overruling the verdict and motion for new trial; in instructing the jury on comparative fault after B&W withdrew the affirmative defense; and its request for remittitur on punitive damages.

**AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.**

**Division Two holds:**

(1) Section 537.080 does not bar a wrongful death action by a decedent's survivors where the decedent brought a personal injury action during her lifetime for injuries resulting from the same cause of her death because: the language of the wrongful death statute requires only that there be some tort for which the defendant could be found liable as opposed to the decedent actually being able to bring suit at the time of injury or death; the manifest purpose of the wrongful death statute is to compensate bereaved plaintiffs; Missouri's wrongful death statute is an independent cause of action; and the damages recoverable for wrongful death differ from those recoverable in a personal injury action.

(2) Where sufficient evidence was presented from which a jury could conclude that a decedent did not know of the danger of smoking cigarettes, the rebuttable presumption as to causation in failure to warn cases that the decedent would have heeded a warning if she knew of the danger arose, and a submissible case has been made that the decedent was injured as a direct result of the product manufacturer selling the product without a warning.

(3) While potentially useful, it is not necessary for Smith to prove the existence of a feasible and safer alternative design in order to establish a strict liability design defect claim where Missouri has rejected the "reasonable alternative/risk utility " test and the "consumer expectation" test set forth in the Restatements.

(4) Sufficient evidence was presented that a particular brand of cigarettes was dangerous in a manner different from the ordinary class of cigarettes where the evidence was that the particular brand at issue: contained more free nicotine than other cigarettes; was intentionally designed to allow the smoker to inhale the smoke more deeply; contained a blend of tobacco intended to ensure certain nicotine delivery; was a highly engineered product; was protected by confidentiality agreements not to disclose trade secrets; contained numerous harmful additives; and contained the most scientifically tested filter in the world.

(5) Where the evidence presented demonstrated that the tobacco company at issue made specific design choices that had the potential to negatively impact a smoker's health, any argument that federal law preempts claims based upon the general health risks of cigarette smoking, as opposed to claims based upon specific defects in the design of a particular cigarette, is without merit.

(6) Where the open and obvious exception to the duty to warn in a negligence claim requires a visibly observable open and obvious danger or that the injured person have actual knowledge of the specific danger, the issue was for the jury given that reasonable minds could differ as to whether public knowledge about the health risks of developing disease and nicotine addiction from smoking cigarettes was so certain and generally known that a tobacco company had no duty to protect a smoker from injury.

(7) As set forth in *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76 (Mo. App. W.D. 2006), where sufficient evidence was presented to support the giving of a comparative fault instruction, it was not error for such an instruction to be given even if the defendant has withdrawn its assertion of comparative fault as an affirmative defense.

(8) Insufficient evidence was presented that a tobacco company's act of manufacturing or selling unreasonably dangerous cigarettes without giving an adequate warning prior to July 1, 1969, was tantamount to intentional wrongdoing where the evidence demonstrated that the tobacco company was aware that nicotine is addictive and attempted to increase the amount of nicotine in cigarettes so as to make them more addictive and more profitable, yet it consistently denied that cigarettes were harmful and no evidence demonstrated that the tobacco company was insincere in its denial.

(9) Insufficient evidence was presented that a tobacco company's act of designing cigarettes containing harmful constituents and failing to use ordinary care to design a safer cigarette was tantamount to intentional wrongdoing where the evidence demonstrated that the tobacco company stopped trying to develop a safer cigarette for fear it would hurt overall sales, but that, regardless, it was not possible to make a safe cigarette.

(10) Sufficient evidence was presented that a tobacco company's act of manufacturing or selling defective or unreasonably dangerous cigarettes was tantamount to intentional wrongdoing where the evidence demonstrated that the tobacco company: had an active process of creating controversy regarding the health risks of smoking; planned to dispute every Surgeon General's Report, regardless of its basis; had policies of preventing harmful information from becoming available to the public; and established procedures to ensure negative information did not reach the public.

**Opinion by Ulrich, Sr. J.**

December 16, 2008

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**MISSOURI APPELLATE COURT OPINION SUMMARY**

**MISSOURI COURT OF APPEALS, WESTERN DISTRICT  
Dissenting opinion by Judge James M. Smart, Jr.**

Lincoln Smith, et al.  
Respondents,  
v.  
Brown & Williamson Tobacco Corporation  
Appellant.

**WD 65542**

In the Opinion Dissenting in Part, the author maintains that the majority errs in holding that the failure-to-warn claim was submissible because the plaintiffs failed to show causation. In particular, the dissent argues, the plaintiffs failed to show that the deceased would have heeded a package warning if one had been given because the evidence, including the deceased's own admissions, show that no warning would have been effective. For the same reason, it is error to hold that there was a presumption that a warning would have been heeded if given. A presumption cannot be applied when the affirmatively introduced evidence demonstrates the contrary of the presumption.

The Opinion Dissenting in Part also disagrees with the majority's statutory analysis, suggesting that such analysis is both unnecessary and erroneous. The analysis is erroneous in that it fails to apply the plain language of section 537.080 and undermines the legislative prescription, which provides that the settlement or adjudication of a tort claim by the tort victim precludes a later wrongful death by the tort victim's survivors. This plain language has been consistently enforced for over 100 years by the courts of Missouri, and was not changed by the Missouri Supreme Court in the 1983 decision in *O'Grady v. Brown*, 65 S.W.2d 904 (Mo. banc 1983).

**Dissenting Opinion by James M. Smart, Jr., Judge**

December 16, 2008

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