



**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

LINCOLN SMITH, ET AL.,)
)
Appellant-Respondent,)
)
v.) WD71918 (Consolidated with WD71919)
)
BROWN & WILLIAMSON TOBACCO) Opinion filed: October 2, 2012
CORPORATION,)
)
Respondent-Appellant.)

**APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
The Honorable Marco A. Roldan, Judge**

Before Court En Banc: James E. Welsh, Chief Judge, James M. Smart, Jr., Judge,
Joseph M. Ellis, Judge, Victor C. Howard, Judge, Thomas H. Newton, Judge,
Alok Ahuja, Judge, Mark D. Pfeiffer, Judge, Karen King Mitchell, Judge,
Cynthia L. Martin, Judge, Gary D. Witt, Judge, and Jacqueline Cook, Special Judge

The survivors of Barbara Smith ("the Smiths") appeal from a judgment, entered following remand from this Court for retrial solely on the issue of punitive damages,¹

¹ Section 537.090, RSMo 2000, "provides that in wrongful death cases 'the mitigating and aggravating circumstances attending the death may be considered by the trier of facts' in assessing damages." **Smith v. Brown & Williamson Tobacco Corp.**, 275 S.W.3d 748, 810 (Mo. App. W.D. 2008). "[I]n *Call v. Heard*, 925 S.W.2d 840, 847-48 (Mo. banc 1996), the [Missouri] Supreme Court jettisoned the term 'aggravating circumstances damages' for 'punitive damages,' thereby solidifying its holding in *Bennett v. Owens-Corning Fiberglass Corporation*, 896 S.W.2d 464, 466 (Mo. banc 1995), that aggravating circumstances damages are the equivalent of punitive damages." **Collins v. Hertenstein**, 90 S.W.3d 87, 96 (Mo. App. W.D. 2002) (quoting **Bennett v. La Societe Anonyme Turbomeca France**, 963 S.W.2d 639, 659 n.8 (Mo. App. W.D. 1997)). "Hence, this opinion, following the Supreme Court of Missouri's

finding Brown & Williamson Tobacco Corporation (B&W) liable for punitive damages and awarding the Smiths \$1,500,000. B&W cross-appeals contending that the Smiths failed to make a submissible case for punitive damages. Because the trial court exceeded the scope of this Court's mandate on remand, the cause must be reversed and remanded for retrial limited solely to the amount of punitive damages to be awarded to the Smiths.

Mrs. Smith was born on May 13, 1927. In 1944, Mrs. Smith began smoking Kool cigarettes, which were manufactured by B&W. In the early 1980s, Mrs. Smith developed angina. In 1990, a physician informed Mrs. Smith that she had "respiratory trouble" that was the beginning stage of emphysema. After the doctor told her that she was "going to have to quit smoking because it was going to kill her if she didn't," Mrs. Smith quit smoking within the year. Mrs. Smith was diagnosed with lung cancer in 1992. Part of one lung was removed, and Mrs. Smith was apparently cancer free thereafter. On May 12, 2000, Mrs. Smith died from a heart attack at age 73.

In March 2003, Mrs. Smith's survivors filed suit against B&W in Jackson County under the Missouri Wrongful Death Act, § 537.080. They asserted claims for negligent design, negligent failure to warn, strict liability product defect, fraudulent concealment, and conspiracy.

Because the Smiths sought an award of punitive damages, trial was bifurcated pursuant to § 510.263. In the first phase of trial, the jury returned a verdict for B&W on

opinion in *Call*, refers to the Wrongful Death Act's aggravating circumstances damages as punitive damages." **Barnett**, 963 S.W.2d at 659 n.8.

the fraudulent concealment and conspiracy claims but returned a verdict in favor of the Smiths on the negligent design, negligent failure to warn, and strict liability product defect claims, awarding \$2 million in compensatory damages. The jury further found that Ms. Smith was 75% at fault; accordingly, the trial court reduced the compensatory damages to \$500,000. In the second phase of trial, the jury found that B&W was liable for "aggravating circumstances" and assessed \$20 million in punitive damages. B&W timely appealed from that judgment.

On appeal, this Court affirmed the compensatory damages awarded against B&W on the plaintiffs' claims for negligent design, negligent failure to warn, and strict product liability. However, we held that, of the three claims upon which the jury returned a verdict in favor of the Smiths, a submissible case for punitive damages was only made on the strict liability product defect claim. ***Smith v. Brown & Williamson Tobacco Corp.***, 275 S.W.3d 748, 823 (Mo. App. W.D. 2008). Because the verdict did not reflect what portion of the punitive damages were related to that claim, we reversed the \$20 million punitive damages award against B&W and remanded the case for a new jury trial "on the punitive damages as to the strict liability product defect claim only." ***Id.***

On remand, the trial court determined that the issue of punitive damages on the strict liability product defect claim would again be bifurcated. In the first phase, the jury was to determine if punitive damages were warranted on that claim and, if so, in the second phase, they would assess the amount of the award. The trial court ruled that the evidence in the first phase of trial would be limited to that presented in the first trial but that new evidence could be presented during the second phase of trial.

The case was tried, and in the first phase, the jury found B&W liable for punitive damages on the strict liability product defect claim. During the second phase, B&W presented evidence that any punitive damages award would actually be paid by R.J. Reynolds Tobacco Company, which had acquired the right to manufacture Kools subsequent to the filing of the suit, and argued that R.J. Reynolds did not deserve to be punished with punitive damages. Following the second phase, the jury returned a verdict awarding the Smiths \$1.5 million in punitive damages. The Smiths appeal from that judgment, and B&W cross-appeals.

We initially address B&W's claims on cross-appeal, both of which challenge the trial court's denial of its motion for judgment notwithstanding the verdict. When reviewing a trial court's denial of JNOV, "[t]his Court must determine whether the plaintiff presented a submissible case by offering evidence to support every element necessary for liability." ***Fleshner v. Pepose Vision Institute, P.C.***, 304 S.W.3d 81, 95 (Mo. banc 2010). "Evidence is viewed in the light most favorable to the jury's verdict, giving the plaintiff all reasonable inferences and disregarding all conflicting evidence and inferences." ***Id.*** We "will reverse the jury's verdict for insufficient evidence only where there is a complete absence of probative fact to support the jury's conclusion." ***Dhyne v. State Farm Fire & Cas. Co.***, 188 S.W.3d 454, 457 (Mo. banc 2006).

In its first point on cross appeal, B&W contends that the trial court erred in failing to grant JNOV because the Smiths failed to make a submissible case for punitive damages for strict liability product defect. B&W claims that the Smiths failed to present

clear and convincing evidence of aggravating circumstances related to the conduct for which the jury in the original trial found B&W liable on that count.²

"A submissible case [for punitive damages] is made if the evidence and the inferences drawn therefrom are sufficient to permit a reasonable juror to conclude that the plaintiff established with convincing clarity – that is, that it was highly probable – that the defendant's conduct was outrageous because of evil motive or reckless indifference." *Smith*, 275 S.W.3d at 811. Specific to their claim for punitive damages on their strict liability product defect claim, the Smiths had to present clear and convincing evidence that B&W "placed in commerce an unreasonably dangerous product with actual knowledge of the product's defect." *Id.* at 812 (internal quotation omitted).

In the appeal from the first trial, this Court examined the evidence "to determine whether, as a matter of law, it was sufficient to submit the claim for punitive damages." *Id.* at 811. We held that the evidence presented at the first trial was sufficient to support a punitive damages award on the strict liability product defect claim. *Id.* at 823. Accordingly, there was "sufficient evidence of conduct tantamount to intentional wrongdoing to submit the issue [of punitive damages] to the jury." *Id.*

B&W has failed to indicate how the evidence presented in the first phase of the trial on remand differed significantly from that presented in the original trial, and we

² B&W also attempts to argue that certain evidence was erroneously admitted into evidence during the first phase of trial because it related to claims other than the strict liability product defect claim. It claims that its right to due process was violated by the admission of such evidence. These claims were not raised in the point relied on and are, therefore, not properly before this Court for review. See *Moore v. State*, 318 S.W.3d 726, 729 (Mo. App. E.D. 2010) ("Claims of error that first appear in the argument portion of a brief but are not included in the point relied on are not preserved for review.").

perceive of no significant differences in the evidence. Indeed, on remand, the trial court limited the evidence presented in the first phase of the second trial to evidence that had been presented in the previous trial, and the evidence admitted at trial was almost identical to the first trial. In both trials, Dr. David Burns and Dr. Jeffrey Wigand testified extensively about the defects and dangers inherent in Kool cigarettes.

Dr. Burns testified about Brown's knowledge and conduct regarding the design, manufacture, advertising, and public position it took on the denial that its cigarettes are addictive or cause disease. He explained to the jury that B&W's knowledge of the dangerous and addictive qualities of its cigarettes and its conduct in light of that knowledge was "one of the largest public health frauds that occurred in the last half century." Dr. Burns stated that B&W's conduct:

is a very clear example of a tobacco company attempting to sell its product to someone who is already sick, and that product is going to add further harm to that individual who is already sick. So it's a conscious and deliberate effort to increase profits at the expense and injury of the individual who responds to this message.

Dr. Wigand testified that, while he worked at B&W, the company president's favorite saying was "hook'em young, hook'em for life" in reference to nicotine addiction. Dr. Wigand stated that he was trained by B&W not to write anything down that could be potentially used in litigation and that an attorney followed him around so that his conversations could be considered privileged. He said that minutes from meetings were changed to remove any information harmful to B&W's interests.

Drs. Burns and Wigand both described the distinctive characteristics of Kool cigarettes, including a high level of nicotine combined with menthol to ameliorate the

harshness so that the smoker would be more likely to breathe deeply. Both stated unequivocally that Kool cigarettes, specifically, are defective and unreasonably dangerous. The fact that the doctors made isolated statements in their testimony suggesting that all cigarettes are inherently dangerous and defective does not negate the effect of their Kool-specific testimony.

And, as was the case in the first trial, there was

sufficient evidence of conduct tantamount to intentional wrongdoing to submit the issue to the jury. In the light most favorable to submissibility, [B&W] had an active process of creating controversy regarding the health risks of smoking and planned to dispute every Surgeon General's report, regardless of what it was based upon. Further, [B&W] had policies of preventing harmful information from becoming available to the public and established procedures to ensure negative information did not reach the public. This rises to the level of clear and convincing.

Id. The trial court did not err in denying B&W's motion for JNOV as the evidence was again sufficient to support a punitive damages award on the strict liability product defect claim. Point denied.

In its second point on cross-appeal, B&W again contends that the trial court erred in failing to grant JNOV, claiming that the Smiths failed to make a submissible case for punitive damages for strict liability product defect by failing to introduce evidence that Kool cigarettes posed any risks different than the inherent risk in all cigarettes and that such claims are preempted by federal law.

This claim is barred by the law of the case doctrine. "The doctrine of law of the case provides that a previous holding in a case constitutes the law of the case and precludes relitigation of the issue on remand and subsequent appeal." ***Walton v. City***

of Berkeley, 223 S.W.3d 126, 128-29 (Mo. banc 2007). "The doctrine insures uniformity of decisions, protects the parties' expectations, and promotes judicial economy." *Id.* at 129.

In our previous opinion, this Court held that the Smiths' claims related to strict liability product defect and negligent design were not preempted by federal law. *Smith*, 275 S.W.3d at 798-99. We also concluded that there was "sufficient evidence to make a submissible case on the claim that [B&W]'s cigarettes were unreasonably dangerous" and that "[t]he evidence presented went beyond a categorical attack on the danger of cigarettes in general" and "demonstrated specific design choices by [B&W] that had the potential to affect Ms. Smith's health during the period of time she smoked." *Id.* at 796. The same evidence that supported our conclusion in the first case was also present in the trial on remand. We, therefore, again reject B&W's argument. Point denied.

We next turn to the Smiths' claims on appeal. In their first point, the Smiths contend that the trial court erred in allowing B&W to introduce evidence of B&W's "merger" with non-party R.J. Reynolds,³ as well as evidence of R.J. Reynolds' conduct,

³The Smiths use of the term "merger" is a misnomer because the companies did not actually merge. "In a merger, two constituent corporations combine to create one corporation. In such a transaction, one of the corporations is usually considered the surviving or successor corporation even though there may be a subsequent name change." *Hagan v. Val-Hi, Inc.*, 484 N.W.2d 173, 176 (Iowa 1992). "[T]he merged corporation does not cease functioning. Rather, following merger the merged corporation and its assets continue to function as a part of the successor corporation in its business and income-producing activities." *Schmidt v. Financial Res. Corp.*, 680 P.2d 845, 847 (Ariz. App. 1984). "[T]he universal rule applicable to mergers or consolidations is that, by operation of law, the successor corporation assumes all debts and liabilities of the predecessor corporation precisely as if it had incurred those liabilities itself." *Krull v. Celotex Corp.*, 611 F.Supp. 146, 148 (N.D. Ill. 1985); *Fitzgerald v. Pratt*, 585 N.E.2d 1222, 1227 (Ill. App. 1992). "[T]he surviving corporation stands in the shoes of the disappearing corporation in every respect. And that concept is uniformly codified in every merger statute." *Krull*, 611 F.Supp. at 148; see also *Aetna Life & Cas. v. United Pac. Reliance Ins. Cos.*, 580 P.2d 230, 232 (Utah 1978) ("[T]he surviving corporation . . . simply stands in the same position as that occupied by the merged corporation . . .").

as a defense in the second phase of trial. The Smiths argue on appeal that the trial court exceeded the scope of this court's mandate in allowing B&W to argue that any punitive damages award would be paid by R.J. Reynolds and using evidence of R.J. Reynolds' historical corporate citizenship in order to mitigate B&W's punitive damages. In this, they are clearly correct.

Initially, however, we note that B&W contends that any challenge to the evidence related to R.J. Reynolds was not preserved for appeal and/or was waived because the Smiths failed to object when much of this evidence was offered and even presented evidence related to R.J. Reynolds themselves. With regard to preservation of their objection, the trial court granted the Smiths a continuing objection to any evidence related to R.J. Reynolds, and, prior to closing argument, B&W expressly stipulated that the Smiths' claim that the admission of evidence and argument related to R.J. Reynolds exceeded the scope of the prior mandate was properly preserved for appeal. Both parties acknowledged at oral argument that the issue of admitting evidence about R.J. Reynolds was discussed throughout the course of the trial and was repeatedly objected to by the Smiths. R.J. Reynolds stipulation at trial forecloses it from making a preservation challenge now on appeal.

. . . prior to the merger."); *Eaton v. Weaver Mfg. Co.*, 582 F.2d 1250, 1252 n.1 (10th Cir. 1978) ("[T]he resulting corporation stands in the shoes, in effect, of the merged corporations.").

In the transaction between B&W and R.J. Reynolds, which occurred while the first case was pending, B&W transferred its cigarette manufacturing operations to R.J. Reynolds in exchange for forty-two percent of Reynolds American, Inc., the company that owns R.J. Reynolds. B&W thereby became a holding company, and it changed its name to Brown & Williamson Holdings, Inc. Similar to a merger, as part of the deal, R.J. Reynolds assumed responsibility for the existing liabilities of B&W.

As to waiver, in addition to granting a continuing objection, prior to the start of the second phase of the trial on remand, the trial court ordered that the record reflect that the Smiths' were not waiving their claim that the admission of new evidence was improper even though the Smiths would be arguing about and introducing new evidence. R.J. Reynolds offered no objection or comment at that time. The record does not reflect any intent by the Smiths to waive their right to challenge the admission of the R.J. Reynolds evidence. Indeed, they repeatedly voiced their objections at every phase of retrial. There was no waiver.

Regarding the substance of the Smiths' claim on appeal, "[a] trial court upon remand has a duty to proceed in accordance with the mandate and the result contemplated in the appellate court's opinion." ***Motor Control Specialties, Inc. v. Labor & Indus. Relations Comm'n***, 323 S.W.3d 843, 853 (Mo. App. W.D. 2010) (internal quotation omitted). "The mandate serves the purpose of communicating the judgment to the lower court, and the opinion, which is a part thereof, serves in an interpretative function." ***Pope v. Ray***, 298 S.W.3d 53, 57 (Mo. App. W.D. 2009) (internal quotation omitted). "It is well settled that the mandate is not to be read and applied in a vacuum. The opinion is part of the mandate and must be used to interpret the mandate." ***Bird v. Missouri Bd. for Architects, Prof'l Engineers, Prof'l Land Surveyors & Landscape Architects***, 309 S.W.3d 855, 860 (Mo. App. W.D. 2010) (quoting ***Frost v. Liberty Mut. Ins. Co.***, 813 S.W.2d 302, 304-05 (Mo. banc 1991)). "When determining its authority on remand, the trial court should be guided by the mandate, but also by the opinion and result contemplated by the appellate court."

Bryant v. Bryant, 351 S.W.3d 681, 687 (Mo. App. E.D. 2011). "When specific directives are provided to the trial court, the mandate itself is specific and the trial court cannot modify, alter, amend, or deviate from the appellate court's judgment." **Motor Control Specialties, Inc.**, 323 S.W.3d at 853. "Proceedings that are contrary to the directions of the mandate are unauthorized and unenforceable." **Pope**, 298 S.W.3d at 57.

This Court's mandate, issued on January 28, 2009, read, in relevant part, "Now on this day the judgment is affirmed in part and reversed in part, and the cause is remanded to the Circuit Court of Jackson County for further proceedings, all in accordance with the Opinion of this Court herein delivered." Obviously, this mandate could not be understood without the context of this Court's opinion.

In our prior opinion, we analyzed the evidence related to punitive damages and concluded that the evidence supported an award of punitive damages against B&W on the strict liability product defect claim but not on the other two claims. Because the judgment rendered by the jury did not reflect how much, if any, of the punitive damages awarded against B&W was related to the strict liability product defect claim, this Court could not determine how much, if any, of the punitive damages award to vacate. For this reason, we reversed the \$20 million punitive damages award and remanded the case "to the jury for a new trial on the punitive damages as to the strict liability product defect claim only." **Smith**, 275 S.W.3d at 823. In our opinion, we noted the original case was bifurcated and conducted in accordance with § 510.263.3. **Id.** at 811. That statutory provision states that,

[i]f during the first stage of a bifurcated trial the jury determines that **a defendant is liable** for punitive damages, that jury shall determine, in a second stage of trial, the amount of punitive damages to be awarded **against such defendant**. Evidence of **such defendant's net worth** shall be admissible during the second stage of such trial.

§ 510.263.3 (emphasis added). Section 510.263.3 clearly and unambiguously mandates complete identity between the defendant in the first phase of trial and the defendant in the second phase. In remanding the case for retrial of the issue of punitive damages, we clearly contemplated that the identity of the defendant in the first and second phases of trial would again be B&W, the party found liable for strict liability product defect in the affirmed portion of the first trial. Our mandate required that the jury on remand determine if punitive damages should be awarded **against B&W** on the strict liability product defect claim and to then determine how much, if any, punitive damages to assess **against B&W** related to that claim.

In the first phase of the new trial, the jury considered evidence that had been presented at the first trial and determined that punitive damages should be awarded on that claim. During the second phase of retrial, however, the trial court allowed B&W to present evidence related to non-party R.J. Reynolds Tobacco, which had assumed responsibility for B&W liabilities as part of corporate transactions that occurred while the original trial was pending. B&W defended itself by presenting extensive evidence of R.J. Reynolds's historical corporate citizenship and research and marketing efforts to reduce the negative effects of its products and arguing that any punitive damages award would be paid by R.J. Reynolds rather than B&W. Neither this line of defense

nor any of the evidence used to support it were presented at the first trial, and none of the parties challenged the exclusion of this evidence by the trial court in the original trial.

By allowing this evidence and argument related to R.J. Reynolds to be used as a defense in the second trial, the trial court allowed B&W to effectively substitute defendants and to argue that non-party R.J. Reynolds should not have to pay punitive damages. Such evidence and argument were clearly beyond this Court's mandate and inconsistent with § 510.263.3.

The case at bar is analogous to *Pope v. Ray*, 298 S.W.3d 53, 58 (Mo. App. W.D. 2009), wherein this Court reversed the original judgment and remanded for a new trial solely on the issue of damages. On remand, the plaintiff argued for the first time that an arbitration award entered against the defendant's partner should be used to establish the total amount of damages that had been sustained by the plaintiff. *Id.* In the second appeal, this Court held that the trial court exceeded the scope of this Court's mandate in applying the arbitration award, which had existed at the time of the first appeal, because the opinion clearly did not in any way contemplate applying the arbitration award to the defendant. *Id.* Likewise, in the case at bar, nothing in this Court's prior opinion and mandate could be viewed as contemplating the admission of evidence related to non-party R.J. Reynolds for the purpose of mitigating punitive damages against B&W.

The wrongful death action against B&W was filed long before the transaction between B&W and R.J. Reynolds. Any reasonable due diligence would have revealed to R.J. Reynolds the exposure to potential punitive damages posed by the present action against B&W and others like it. Allowing this financial transaction and corporate

reshuffling to serve to shield the surviving corporation from punitive damages would make no logical sense. R.J. Reynolds assumed the risk when it agreed to the transaction with B&W, and its ultimate liability for the judgment rendered in this case should have no bearing on the amount awarded.

By allowing B&W to introduce such evidence and to argue that R.J. Reynolds should not be punished for B&W's actions, the trial court exceeded the scope of this Court's mandate.⁴ The award made in the second phase of trial is, therefore, void. *Pope*, 298 S.W.3d at 57. Point granted.⁵

In their remaining point, the Smiths claim that the trial court erred in denying their motion for new trial due to juror misconduct in failing to disclose certain information. As the only prejudice asserted by the Smiths relates to the jury's assessment of the amount of punitive damages and we have already determined that retrial of that issue is necessary, we need not address this point.

⁴ We reach this conclusion only with regard to evidence and argument related to R.J. Reynolds offered to mitigate punitive damages against B&W. By this, we are referring to evidence offered to suggest that a non-party is being punished by the award of punitive damages against B&W or to credit B&W for acts of corporate citizenship performed by a non-party. Any other evidence or discussion related to R.J. Reynolds would be subject to the exercise of the trial court's discretion with respect to logical and legal relevance.

⁵ The Dissent expresses concern that our decision in this case will somehow wreak mischief in future cases. Given the exceedingly limited scope of our opinion, such concern is wholly unwarranted. This holding merely applies to those rare instances in which (a) we have affirmed the liability of a party for punitive damages in the first phase of trial bifurcated under § 510.263.3 but (b) remanded for a redetermination of the punitive damages awarded against that defendant and (c) where that defendant is allowed on remand, over the objection of the plaintiff that such evidence and argument exceeds the scope of our mandate, to pursue a defense that it is actually another, innocent non-party that will be punished by the award.

The judgment is reversed and the cause is remanded for a new trial solely to determine the amount of punitive damages to be assessed against B&W.⁶

/s/ Joseph M. Ellis

Joseph M. Ellis, Judge

Howard, Newton, Pfeiffer, Mitchell, Martin, and Witt, JJ., and Cook, Sp. J., concur;
Ahuja, J. dissents in separate opinion filed;
Welsh, C.J. and Smart, J. concur in opinion of Ahuja, J.
Hardwick, J. not participating.

⁶ Had B&W and R.J. Reynolds fully merged, the evidence and argument would likewise have been improper. By statute in Missouri and the states in which B&W and R.J. Reynolds were incorporated, Delaware and New Jersey, any action or proceeding pending at the time of a merger may be prosecuted by the plaintiff as if the merger had not taken place. **§ 351.450(5)** RSMo 2000; **Del. Code Ann. tit. 8, § 261**; **N.J. Stat. Ann. §§ 17:27-5 & 17:27-5.4**; see also **Model Business Corporation Act § 11.07, "Effect of Merger or Share Exchange"**. These statutes prevent corporations from playing a shell-game and merging to avoid or mitigate exposure to damages. "[I]t would be a travesty of justice and pervert the intent of the statute if a corporation could rid itself of its obligations by merging with another corporation." **Schweiner v. Hartford Accident & Indemnity Co.**, 354 N.W.2d 767, 771 (Wis. App. 1984) (internal quotation omitted). Thus, had the companies fully merged, the Smiths would have the statutory right to have evidence of the merger and R.J. Reynolds obligation to pay any award excluded from the case.



**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

LINCOLN SMITH, et al.,)
Appellants-Respondents,)
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BROWN & WILLIAMSON TOBACCO) **FILED: October 2, 2012**
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Respondent-Appellant.)

DISSENTING OPINION

I respectfully dissent. As we instructed in *Smith v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748 (Mo. App. W.D. 2008) (“*Smith I*”), the trial court conducted a re-trial only as to punitive damages, only on the Smiths’ strict liability product defect claim, and only against Brown & Williamson (“B&W”). That is all that our mandate required; the trial court complied with those dictates. This Court’s opinion and mandate in *Smith I* did not address – expressly or by implication – the scope of the evidence that would be admissible on remand in determining the amount of punitive damages to be imposed against B&W. Indeed, our opinion in *Smith I* addressed *no issues* concerning the nature or scope of the proceedings which might occur in the second stage of a bifurcated punitive damages trial, in which the jury determined the amount of the punitive damages award. Although it may be that “B&W defended itself by presenting extensive evidence of R.J. Reynolds’s historical corporate citizenship and research and marketing efforts,” Maj. Op. at 12, that did not result in R.J. Reynolds being “effectively

substitute[d]” as the defendant as the majority contends. *Id.* at 13. B&W was undeniably the only defendant on trial during the remand proceedings. While evidence concerning R.J. Reynolds’ conduct might be of questionable *relevance*, the Smiths have made clear on appeal that they raise no relevance issue independent of their contention that admission of the R.J. Reynolds evidence exceeded the scope of the mandate.¹

Analysis

As the majority recounts, in *Smith I* the Smiths were awarded punitive damages on their claims for negligent failure to warn, negligent design, and strict liability product defect in a single verdict director. 275 S.W.3d at 812. Because of the way in which the case was submitted to the jury, this Court held that, “if a submissible case as to punitive damages was not presented as to all three claims, a new trial must be granted.” *Id.* The Court concluded that the Smiths had presented a submissible punitive damages case on their strict liability product defect claim, but not on their claims for negligent failure to warn or negligent design. *Id.* at 823. The Court accordingly ordered that “the case is remanded to the jury for a new trial on punitive damages as to the strict liability product defect claim only.” *Id.* This Court’s mandate provided no further direction: it stated only that the case was remanded for further proceedings “in accordance with the Opinion of this Court.”

Although it does not expressly say so, the mandate in *Smith I* plainly ordered a retrial on punitive damages against a specific party: B&W. The majority states that, “[i]n remanding the case for retrial of the issue of punitive damages, we clearly contemplated that *the identity of the*

¹ B&W argues that the Smiths failed to preserve for appeal the issue on which the majority reverses, because the Smiths themselves presented evidence and argument concerning R.J. Reynolds’ conduct. I need not address this preservation argument: even if preserved, the Smiths’ contention that the trial court exceeded the mandate of *Smith I* cannot justify reversal.

defendant in the first and second phases of trial would again be B&W.” Maj. Op. at 12 (emphasis added). I agree: punitive damages may only be awarded against the defendant whom the jury has found liable for compensatory damages in the first stage of a bifurcated trial, and that defendant was plainly B&W. Given that the case was remanded for a retrial of punitive damages on a specific claim against a specific defendant, the circuit court could not, on remand, conduct a trial involving issues beyond punitive damages, or in which punitive damages were awarded against another party, or on a different legal basis.²

While *Smith I* specified the claim, the relief, and the defendant which would be the subject of the re-trial, it decided only the *submissibility* of the Smiths’ claim for punitive damages, an issue which is addressed in the first stage of a bifurcated punitive damages trial. The Court’s determination that the Smiths had made a submissible case for punitive damages on their strict liability product defect claim, but not on their negligent failure to warn or negligent design claims, was based on the Court’s consideration of only the evidence which had been submitted in the first stage of the first trial. Significantly, *Smith I* did not address *any* issue concerning the scope of the evidence which had been admitted in the second stage of the first trial, when the jury determined the *amount* of the punitive damages to be awarded against B&W; nor did *Smith I*

² See, e.g., *Denny v. Guyton*, 57 S.W.2d 415, 417-21 (Mo. banc 1932) (where Supreme Court in prior appeal reversed and remanded “for such further proceedings as may be necessary to determine the issue of accounting only,” trial court on remand could not consider defendant’s new defenses to joint venture and fraud claims determined in first trial); *Brooks v. Kunz*, 637 S.W.2d 135, 137-38 (Mo. App. E.D. 1982) (where partition claim remanded to trial court for new trial “at which evidence of the respective contributions of the parties to the acquisition of the farm property should be adduced,” trial court exceeded the appellate mandate by permitting plaintiff to amend her petition to allege an implied contract between plaintiff and defendant to divide the property); *Langdon v. Koch*, 435 S.W.2d 730, 733-34 (Mo. App. 1968) (where case remanded “for retrial of the issue of damages only,” defendant on remand could not assert defense that plaintiff was not the real party in interest entitled to recover for property damage to vehicle).

address any issue concerning the scope of the evidence which might be admissible in a *future* second-stage proceeding, if such a proceeding were even to become necessary.

The Smiths emphasize the statement from *Smith I* that “the conduct at issue for th[e] [strict liability product defect] claim is B&W’s act of manufacturing or selling defective or unreasonably dangerous cigarettes.” 275 S.W.3d at 822. But this statement only specifies the conduct which could give rise to B&W’s *liability* for punitive damages, an issue determined in the first stage of trial. The trial court complied with this aspect of our mandate by strictly limiting the evidence in the first stage of the re-trial to the evidence this Court had reviewed in *Smith I* in finding the punitive damage claim to be submissible. The quoted statement says nothing, however, concerning the evidence which may properly be considered in the second stage of a punitive damages trial, where the *amount* of punitive damages is determined. Moreover, caselaw establishes that evidence concerning a defendant’s conduct, beyond the conduct which caused the plaintiff’s injuries, may be admissible in mitigation of a punitive damage award, at least in certain circumstances. *See generally Maugh v. Chrysler Corp.*, 818 S.W.2d 658, 662-64 (Mo. App. W.D. 1991) (discussing admissibility of post-injury conduct of defendant to mitigate punitive damages). Under this caselaw, our specification in *Smith I* of the conduct which could support punitive damages *liability* did not necessarily dictate the scope of the evidence which could be considered once liability was found. It is not tenable to argue that *Smith I* addressed these questions, *sub silentio*.

In determining the scope of the *Smith I* mandate, it is also significant that our prior decision expressly refused to address evidentiary issues, even with respect to the *first* stage of the punitive damages trial. In the prior appeal, B&W argued (in its Point VII) that a variety of evidence

admitted in the first stage of trial violated its right to due process, because that evidence “had no nexus to Mrs. Smith’s injuries.” Appellant’s Br. at 59, *Smith v. Brown & Williamson Tobacco Corp.*, No. WD65542 (Mo. App. W.D. filed Apr. 28, 2005). It is noteworthy that, among other things, B&W’s Point VII challenged the admission of documents generated by British-American Tobacco Company (“BATCo”), a sister corporation of B&W, and by BATCo’s lawyers. B&W’s Brief argued that the BATCo documents were irrelevant, because “*the evidence related to a non-party* located outside of the United States that had no possible connection to Mrs. Smith,” and because “[t]here was no evidence linking th[e] document[s] to B&W or anything B&W did or did not do.” *Id.* at 62-63. *Smith I* did not resolve this issue; instead, it held that, “[g]iven the disposition of Point IX [challenging the admissibility of the Smith’s punitive-damage case], ***these points need not be addressed.***” 275 S.W.3d at 823-24 (emphasis added). The Court evidently found it unnecessary to address B&W’s arguments concerning the admissibility of evidence in the first stage of the trial because reversal was required for independent reasons, and the evidentiary issues might not recur on remand. This rationale applies with even greater force to evidentiary issues concerning the *second* stage of trial: when *Smith I* was issued, there was every possibility a second trial stage might not even be necessary, if the jury failed to find B&W liable for punitive damages in the first stage. When *Smith I* explicitly refused to decide evidentiary issues concerning the *first* stage of trial, there is simply no basis to conclude that it decided – explicitly or implicitly – evidentiary issues concerning the *second* stage.³

³ The majority opinion states that “none of the parties challenged the exclusion of this evidence [of R.J. Reynolds’ conduct] by the trial court in the original trial.” Maj. Op. at 13. Although this statement is not further explained, it apparently refers to the fact that, prior to the first trial, B&W filed a motion *in limine* seeking to exclude evidence concerning R.J. Reynolds, which the trial court sustained. The Smiths did not oppose the motion, however, and – as the majority opinion acknowledges, *id.* at 12-13 – neither party sought to introduce evidence of

The second trial fully complied with the mandate in *Smith I*. Consistent with this Court’s mandate, the trial which occurred on remand was limited to the Smiths’ strict liability product defect claim, and determined only B&W’s liability for punitive damages, and the amount of punitive damages to be awarded against B&W; claims were not asserted, or tried, against any other party, on any other legal theory, or seeking any other form of relief. The verdict director in the first stage of the bifurcated punitive-damages trial plainly focused the jury on whether B&W should be held liable for punitive damages.⁴ In its verdict, the jury found “that *defendant Brown & Williamson Tobacco Corporation* is liable for damages for aggravating circumstances.” (Emphasis added.) Similarly, in the second stage of the trial, the jury was instructed that,

R.J. Reynolds’ conduct during the trial itself. “Rulings on motions in limine are interlocutory and subject to change during the course of the trial.’ ‘A motion in limine, by itself, preserves nothing for appeal.’” *Marquis Fin. Servs. of Ind. Inc. v. Peet*, 365 S.W.3d 256, 260 (Mo. App. E.D. 2012) (quoting *Hancock v. Shook*, 100 S.W.3d 786, 802 (Mo. banc 2003); other citations omitted). Because neither party attempted to introduce evidence concerning R.J. Reynolds’ conduct during the first trial, the trial court did not actually “exclude” any evidence or finally decide the admissibility issue – such evidence was simply *not offered*. The issue therefore could not have been raised in the appeal which led to the *Smith I* decision.

⁴ The verdict director in the first stage, Instruction No. 8, provided:

If you believe:

First, at the time defendant Brown & Williamson Tobacco Corporation sold the cigarettes *the defendant knew* of the defective condition and danger of the cigarettes, which was found by the first jury as described in paragraph 2 of instruction number 7, and

Second, *defendant thereby showed* complete indifference to or conscious disregard for the safety of others,

Then, in Verdict A, you may find *that defendant Brown & Williamson Tobacco Corporation is liable* for damages for aggravating circumstances.

If you find that defendant Brown & Williamson Tobacco Corporation is liable for damages for aggravating circumstances in this stage of the trial, you will be given further instructions for assessing the amount of damages for aggravating circumstances in the second stage of the trial.

(Emphasis added.)

[i]n addition to the compensatory damages awarded by the jury in the previous trial, you may assess an additional amount as damages for aggravating circumstances in such sum as you believe will serve *to punish defendant Brown & Williamson Tobacco Corporation* for the conduct for which you found that defendant Brown & Williamson Tobacco Corporation is liable for damages for aggravating circumstances and will serve *to deter defendant Brown & Williamson Tobacco Corporation* and others from like conduct.

(Emphasis added.) The jury’s verdict states that “[w]e, the undersigned jurors, assess damages for aggravating circumstances *against defendant Brown & Williamson Tobacco Corporation* at \$1.5 million.” (Emphasis added.) Consistent with the mandate in *Smith I*, and with the jury’s verdicts in the two stages of the punitive damages re-trial, judgment was entered against B&W only. The circuit court’s judgment states: “**IT IS THEREFORE ORDERED AND ADJUDGED** that judgment is entered for damages for aggravating circumstances in favor of [the Smiths] and *against Defendant Brown & Williamson Tobacco Corporation* in the amount of One Million Five Hundred Thousand Dollars (\$1,500,000.00).” (Italics added).

The majority suggests that our mandate was violated because, “[b]y allowing this evidence and argument related to R.J. Reynolds to be used as a defense in the second trial, the trial court allowed B&W to *effectively substitute defendants* and argue that non-party R.J. Reynolds should not have to pay punitive damages.” Maj. Op. at 13 (emphasis added). I am not aware of any statute, rule, or caselaw which recognizes an “effective substitution” of parties as a legal construct. To the contrary, caselaw is clear that the “parties” to a lawsuit are those who are formally named, or formally added by court order, to a civil action, and against whom a judgment may be entered. Thus, in *Munson v. Director of Revenue*, 783 S.W.2d 912 (Mo. banc 1990), the Missouri Supreme Court held that the Director of Revenue could not appeal a court order granting hardship driving privileges to an individual, when the procedure specified by

statute for obtaining such privileges “is without question an *ex parte* proceeding.” *Id.* at 914.

The Court found that the Director was not a “party” entitled to appeal, even though various statutes granted the Director “significant authority to represent the public interest in the proper operation of motor vehicles,” and even though the relevant statute required the trial court to notify the Director when hardship privileges were granted. *Id.* The Court explained:

The Director suggests that the appearance by the prosecuting attorney in the trial court allows the Director to claim that he is a party. The Director did not seek to obtain party status in the trial court, although the records in the Prewitt and Munson proceedings reflect that a prosecuting attorney was present in each. The record does not reflect whether the prosecuting attorney participated. In any event, an appearance does not confer party status:

Persons who are not parties of record to a suit have no standing therein which will enable them to take part in or control the proceedings. If they have occasion to ask relief in relation to the matters involved, they must either contrive to obtain the status of parties in the suit or they must institute an independent suit. One who is not a party to the record is not a party to the cause, although he or she may be interested, and in deciding who are parties to the record, the courts will not look beyond the record. Thus, before a person may interpose a defense to an action, it is essential that he make himself a party on the record.

Ordinarily, then, the term “party,” when applied to judicial proceedings, means one who is a party in a legal sense and is bound by the proceedings, or an interested litigant, or a person whose name is designated on the record as plaintiff or defendant.

Id. at 915 (emphasis added; citations omitted). As we explained in a recent case, “[t]here are generally only two ways to become a party to litigation . . . : (1) a person can be a named party in the original pleadings, or (2) the person can later be added as a party through joinder or intervention.” *Underwood v. St. Joseph Bd. of Zoning Adjustment*, 368 S.W.3d 204, 209 (Mo. App. W.D. 2012); *accord, In re R.R.R.*, 236 S.W.3d 103, 105 (Mo. App. S.D. 2007). R.J.

Reynolds did not become “the defendant” when this case was retried, even though B&W sought to capitalize on its relationship to R.J. Reynolds to mitigate its punitive damages exposure.

Even the Smiths recognize that B&W was, and has remained, the party-defendant throughout this protracted litigation. Although the majority now finds that R.J. Reynolds was “effectively substituted” as the defendant, the Smiths’ counsel emphasized at oral argument that R.J. Reynolds was “*a stranger to the litigation, not a defendant, not substituted.*”

Despite the majority’s contrary suggestions, this appeal does not involve any issue concerning the identity of the “party” against whom punitive damages were tried, and awarded; it concerns an issue of the scope of the admissible evidence used to establish the amount of a defendant’s punitive-damages liability. No substitution of parties occurred; B&W remained the defendant throughout. B&W was simply permitted to present evidence, and argue, that R.J. Reynolds’ conduct should redound to B&W’s benefit, and should be considered in mitigation of the punitive damages to which B&W would otherwise be subject. The majority opinion acknowledges as much, stating that “B&W *defended itself* by presenting extensive evidence of R.J. Reynolds’s historical corporate citizenship and research and marketing efforts.” Maj. Op. at 12 (emphasis added). While B&W may have “*defended itself*” by attempting to exploit R.J. Reynolds’ good deeds, this did not result in an “effective substitution” of parties.⁵

Pope v. Ray, 298 S.W.3d 53, 58 (Mo. App. W.D. 2009), is not to the contrary. In *Pope*, this Court reversed an earlier judgment in a personal-injury action, and remanded “for a new trial on

⁵ In a similar vein, politicians frequently seek to curry favor with voters by prominently featuring their parents, their spouses, their children, their friends, and even their pets in their campaigns. Despite such tactics (which may be of questionable relevance, in political campaigns as much as here), no one could mistake the identity of the candidates on whom voters cast their ballots.

the issue of damages only.” *Pope v. Pope*, 179 S.W.3d 442, 466 (Mo. App. W.D. 2005) (en banc). On remand, the trial court held that the defendant was bound by the amount of plaintiff’s damages determined in a separate arbitration conducted against other parties, and that a new damages trial was accordingly unnecessary. We reversed, holding that “[t]his court’s opinion directed the trial court to conduct a new trial on damages; it did not in any way contemplate, over the objection of any of the parties, applying the arbitration award to Dr. Ray.” 298 S.W.3d at 58. This case is wholly unlike *Pope*, where the trial court refused to conduct the new trial which our mandate directed. The re-trial which we ordered occurred in this case.

I recognize that, separate and apart from the dictates of our prior mandate, there may be serious questions whether evidence of R.J. Reynolds’ conduct is *relevant* to the determination of the amount of punitive damages to which B&W should be subjected (although the issue is complicated by the fact that R.J. Reynolds is affiliated with B&W, is the current manufacturer of Kool cigarettes, and has apparently assumed B&W’s liability for any judgment in this case). *See Maugh*, 818 S.W.2d at 662-64. But even if the record suggests a substantial relevance question, the Smiths do not argue on appeal that the R.J. Reynolds evidence was irrelevant (except to the extent that their mandate argument could be deemed a species of “relevance” objection). Indeed, the Smiths have *expressly disclaimed* any general relevance argument, stating in their Reply Brief that “[t]he relevant issue before this court is not whether the trial court abused its discretion in admitting particular evidence; instead, it is whether the trial court exceeded its jurisdiction in interpreting the scope of this court’s prior mandate and limited remand.” Any reservations that the judges of this Court may have as to the relevance of the R.J. Reynolds evidence – reservations which I share – cannot serve as the basis for reversal.

It is perhaps understandable that, rather than generally arguing that the trial court abused its discretion in admitting irrelevant evidence of post-injury conduct to mitigate punitive damages, the Smiths have instead chosen to limit their argument to the claim that the trial court committed legal error, reviewable *de novo*, by admitting evidence that exceeded our mandate in *Smith I*. But the Smiths' attempt to re-characterize the issue as a legal question subject to a favorable standard of review does not permit us to ignore the fact that their arguments have nothing to do with the mandate we issued in the prior appeal. The simple fact is, the Smiths' arguments challenge the admission of evidence of questionable relevance – questionable for reasons independent of our mandate in *Smith I*. Although they may well have had persuasive strategic reasons for doing so, in my view the Smiths' attempt to turn this evidentiary issue into a violation of our prior mandate is like trying to fit a square peg into a round hole – and is no more successful.

Besides its effect on the outcome of this important case, I am also concerned with the mischief the majority's analysis will wreak in future cases. By converting an evidentiary ruling into a violation of the mandate in a prior appeal, the majority opinion will engender considerable confusion among trial courts and litigants seeking to determine what they can, and cannot, do in trial-court proceedings following an appellate remand. We can expect that, in future appeals following proceedings on remand, appellants will seek to recast their garden-variety claims of error as arguments that the mandate of a prior appeal was violated.

Conclusion

Because our opinion and mandate in *Smith I* did not address the scope of the evidence admissible during the second stage of the re-trial of punitive damages, I respectfully dissent from

the majority's conclusion that the trial court exceeded our mandate by admitting evidence of R.J. Reynolds' conduct during those proceedings. I would affirm the circuit court's judgment.⁶

/s/Alok Ahuja
Alok Ahuja, Judge

⁶ I concur in the result reached by the majority with respect to the points raised by B&W. Although extended discussion is unnecessary, I do not believe the Smiths' jury non-disclosure arguments justify reversal, because the Smiths failed to preserve the arguments in their motion for a new trial, and because they failed to present evidence to establish that a particular challenged juror harbored a bias against their claims at the time of *voir dire*.

