

**Summary of SC92961, *Lincoln Smith, et al. v. Brown & Williamson Tobacco Corporation***

Appeal from the Jackson County circuit court, Judge Marco A. Roldan

Argued and submitted May 21, 2013; opinion issued Sept. 10, 2013

**Attorneys:** The Smith survivors were represented by Kenneth B. McClain and Scott B. Hall of Humphrey, Farrington & McClain in Independence, (816) 836-5050, and Susan Ford Robertson and J. Zachary Bickel of The Robertson Law Group in Kansas City, (816) 221-7010. Brown & Williamson was represented by Jeffrey S. Bucholtz of King & Spalding in Washington, D.C., (202) 737-0500; Bruce D. Ryder of Thompson Coburn LLP in St. Louis, (314) 552-6000; and William L. Durham II of King & Spalding in Atlanta, (404) 572-4600.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** Both the survivors of a woman who had smoked for many years and a tobacco company appeal a judgment, following a retrial, finding the tobacco company liable and awarding punitive damages. In a 6-0 decision written by Judge Zel M. Fischer, the Supreme Court of Missouri affirms the judgment. The court of appeals' mandate in the first appeal did not address any issues concerning what evidence could be presented at the retrial of punitive damages, and the circuit court did not err in overruling either the survivors' motion for new trial or the tobacco company's motion for judgment notwithstanding the verdict.

**Facts:** Barbara Smith smoked Kool cigarettes, manufactured by Brown & Williamson Tobacco Corporation, for more than 45 years. She quit smoking in 1990 on her doctor's advice. She was diagnosed with lung cancer two years later but died of a heart attack in May 2000. In March 2003, Smith's survivors sued Brown & Williamson for wrongful death, raising five claims. The jury returned a verdict finding Brown & Williamson liable on three of the five claims, finding Smith 75 percent at fault. It awarded the Smiths \$500,000 in compensatory damages and \$20 million in punitive damages. The court of appeals affirmed the compensatory damages award but reversed the punitive damages award, finding the Smiths made a submissible case for punitive damages only on the claim for strict liability product defect. The court remanded (sent back) the case for a new jury determination of punitive damages for that claim only. On remand, the circuit court again bifurcated (split) the trial into two parts. First, it had the jury determine whether punitive damages were warranted for that claim, limiting the evidence to that presented in the original trial. After the jury found Brown & Williamson liable for punitive damages on the strict liability product defect claim, the court allowed the parties to present new evidence regarding the assessment of punitive damages. During this second stage, Brown & Williamson presented evidence that any punitive damages award would be paid by the R.J. Reynolds Tobacco Company, which had acquired the right to manufacture Kool cigarettes after the Smiths filed their suit, and argued that Reynolds did not deserve to be punished with punitive damages. The jury awarded the Smiths only \$1.5 million in punitive damages. Both the Smiths and Brown & Williamson appeal.

**AFFIRMED.**

**Court en banc holds:** Because the court of appeals' mandate in the first appeal did not address any issues concerning what evidence could be presented at the retrial of punitive damages, and because the circuit court did not err in overruling either the Smiths' motion for new trial or Brown & Williamson's motion for judgment notwithstanding the verdict, the circuit court's judgment is affirmed.

(1) The court of appeals' remand in the appeal of the prior trial was a general remand. A remand that says that further proceedings are expected to be "in accordance with the opinion" is a general remand. At retrial following a general remand, new evidence may be produced. Here, the court of appeals specified the claim, the relief and the defendant that would be the subject of the retrial, deciding only the submissibility of the Smiths' claim for punitive damages. It addresses the conduct that could give rise to Brown & Williamson's liability for punitive damages – an issue determined in the first stage of retrial. Neither the mandate nor the opinion of the court of appeals addressed – either expressly or by implication – the scope of evidence that would be admissible during any second stage of retrial, if such a proceeding were to become necessary. When the first appellate opinion was issued, there was every possibility a second stage might not even be necessary on retrial if the jury failed to find Brown & Williamson liable for punitive damages in the first stage. Because it explicitly refused to decide evidentiary issues concerning even the first stage of the original trial, there is no basis to conclude that it decided – explicitly or implicitly – evidentiary issues concerning any second stage of retrial. As such, with regard to ordering a retrial relative to punitive damages, the prior opinion was a general remand, and the evidence and jury instructions were in conformity with this remand.

(2) The circuit court did not err in overruling the Smiths' motion for a new trial based on alleged juror nondisclosure.

(a) Questions the Smiths asked during jury selection were not sufficient to satisfy Rule 78.07, which requires that, in a motion for a new trial, allegations of errors be stated specifically. In the context of juror nondisclosure, Missouri courts strictly apply this rule. It is insufficient simply to allege in a motion for new trial that jurors failed to disclose biases against tobacco litigation. As to the allegation that one juror failed to disclose his mother's respiratory disease, the Smiths did not raise this claim in a timely manner. Because this claim never was properly before the circuit court, the circuit court did not err in excluding another juror's testimony about this claim.

(b) The testimony the Smiths sought to introduce about one juror's alleged bias against tobacco litigation is exactly the type of evidence that violates the state's well-founded and long-established rule that the testimony of a juror is inadmissible and cannot be used to impeach (discredit) the jury's verdict. It is entirely appropriate to permit testimony of an allegedly biased juror to prove that the juror has a particular bias, but it is inappropriate to do so by inquiring as to what the juror said or thought about the merits of the case during the trial. Any testimony about any juror's thought process or feelings violates the rule and is inadmissible to prove juror misconduct. Further, testimony the Smiths sought to introduce does not show the juror was biased against tobacco litigation at the time of jury selection.

(3) The trial court did not err in overruling Brown & Williamson's motion for judgment notwithstanding the verdict because evidence on retrial was sufficient to support a punitive damages award on the strict liability product defect claim.

(a) The court of appeals held that the evidence presented at the original trial was sufficient to support a punitive damages award on the strict liability product defect claim, and the evidence admitted at retrial was almost identical to that presented in the original trial.

(b) The court of appeals also held that the Smiths' claims related to strict liability product defect and negligent design were not preempted by federal law. It also concluded that there was sufficient evidence to make a submissible case on the claim that Brown & Williamson's cigarettes were unreasonably dangerous and that the evidence presented went beyond a categorical attack on the danger of cigarettes in general and demonstrated specific design choices by Brown & Williamson that had the potential to affect Smith's health during the time she smoked. These previous holdings constitute the law of the case, and relitigation of the issue on remand and subsequent appeal is precluded.