Appeal No. SC92961

IN THE SUPREME COURT OF MISSOURI

LINCOLN SMITH, ET AL.,

Appellants/Cross-Respondents,

vs.

BROWN & WILLIAMSON TOBACCO CORP.,

Respondent/Cross-Appellant.

On Appeal from the Circuit Court of Jackson County, Missouri
16th Judicial Circuit
The Honorable Marco Roldan

SUBSTITUTE BRIEF OF RESPONDENT/CROSS-APPELLANT

Bruce D. Ryder, No. 28013
Thompson Coburn LLP
One US Bank Plaza
St. Louis, Missouri 63101
(314) 552-6000 (Phone)
(314) 552-7000 (Fax)
bryder@thompsoncoburn.com

Jeffrey S. Bucholtz (Rule 9.03)
King & Spalding LLP
1700 Pennsylvania Avenue, N.W.
Washington, DC 20006
(202) 737-0500 (Phone)
(202) 626-3737 (Fax)
jbucholtz@kslaw.com

William L. Durham II (Rule 9.03)
King & Spalding LLP
1180 Peachtree Street, NE
Atlanta, GA 30309
(404) 572-4600 (Phone)
(404) 572-5100 (Fax)
bdurham@kslaw.com

Attorneys for Respondent/Cross-Appellant Brown & Williamson Tobacco Corp.

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STATEMENT OF ISSUES

After the first trial in this case, the Court of Appeals remanded for "a new trial on punitive damages as to the strict liability product defect claim only." *Smith v. Brown & Williamson Tobacco Corp.* ("*Smith I*"), 275 S.W.3d 748, 823 (Mo. App. W.D. 2008). In doing so, the court explained that the strict liability product defect claim for which the first jury could have found Brown & Williamson Tobacco Corporation ("B&W") liable was not "a categorical attack on the danger of cigarettes in general," but instead turned on "specific design choices made by B&W that had the potential to affect [Barbara] Smith's health during the time period she smoked." *Id.* at 796. The Court of Appeals' decision and basic due process principles required Plaintiffs on remand to make a submissible case for punitive damages limited to the same strict liability product defect claim for which the first jury could have found B&W liable.

Plaintiffs failed to do so. Far from pointing to some unique defect in the Kool cigarettes Barbara Smith smoked that made them different from ordinary cigarettes and caused her illness, Plaintiffs' own witnesses repeatedly conceded that Kool cigarettes present the same dangers as ordinary cigarettes, and Plaintiffs pointed only to those ordinary dangers associated with all cigarettes to support their claim. Moreover, instead of limiting themselves to the strict liability product defect claim on which the court remanded, Plaintiffs essentially replayed all of the evidence from the first trial, including evidence relating to the claims they lost (concealment and conspiracy) and the claims the court found Plaintiffs could not submit for punitive damages (failure to warn and negligent design). As a matter of law, this was insufficient proof of liability for punitive

damages "as to the strict liability product defect claim only." *Id.* at 823. It also rendered Plaintiffs' claim for punitive damages dependent upon a theory of liability that is foreclosed by federal law, which preempts state tort claims based on nothing more than the manufacture or sale of ordinary cigarettes. Accordingly, B&W moved for, but was denied, directed verdict and judgment notwithstanding the verdict and now appeals seeking a judgment in its favor.

Plaintiffs filed an appeal seeking another new trial in hopes of obtaining more than the $1.5 million in punitive damages that the second jury awarded. But their alleged grounds for a new trial are meritless. Plaintiffs first contend that the trial court should not have permitted B&W to introduce evidence about R.J. Reynolds, the company that now operates the domestic cigarette business once run by B&W, in the phase of the new trial in which the jury considered the amount of punitive damages to award. Plaintiffs' assertions that this evidence was barred by the Court of Appeals' mandate are not borne out by the record, as neither the court's opinion nor its mandate addressed the subject at all. Not only was there no such mandate, but evidence as to B&W's current circumstances and the role of R.J. Reynolds was directly relevant to the amount of punitive damages necessary to deter B&W and others from engaging in the underlying conduct again. It is undisputed that B&W no longer sells cigarettes in the United States market, that R.J. Reynolds is the company that now sells Kool cigarettes, and that any punitive damages award would be paid by R.J. Reynolds, all of which makes evidence concerning R.J. Reynolds and its current relationship with B&W highly relevant. In any event, Plaintiffs waived any objection to this evidence. Plaintiffs filed a pre-trial

objection seeking to exclude it, but their objection was overruled. Rather than standing on their objection to preserve it for appeal, Plaintiffs elected to preemptively attack and introduce evidence about R.J. Reynolds in their own case, thereby abandoning any challenge to its admission.

Plaintiffs alternatively contend that the jury that awarded them $1.5 million in punitive damages was somehow biased against them. That charge is not only remarkable; it is baseless. Plaintiffs allege that a juror supposedly failed to disclose that one of his relatives had a smoking-related disease and that he thought tobacco claims were frivolous. Yet Plaintiffs failed to preserve the first claim in their motion for a new trial and provided no admissible (or even inadmissible) evidence that supported either claim. Accordingly, the trial court correctly denied Plaintiffs' request for a new trial on these grounds.

The simple fact is that the new trial in this case resulted in a very substantial $1.5 million judgment in Plaintiffs' favor. B&W submits that it was and is entitled to judgment notwithstanding the verdict. But, in all events, Plaintiffs were afforded a full opportunity to try their case and should not be given yet another trial.

JURISDICTIONAL STATEMENT

Plaintiffs filed an action against B&W under the Missouri Wrongful Death Act alleging fraudulent concealment, conspiracy, negligence, and strict liability product defect. *Smith I*, 275 S.W.3d at 758–59. In 2005, a jury returned a verdict in favor of B&W on the fraudulent concealment and conspiracy claims and a verdict in favor of Plaintiffs on the negligence and strict liability claims. *Id.* at 759. The jury awarded $2

million in compensatory damages, which was reduced to $500,000 because the jury found Barbara Smith 75 percent at fault, and $20 million in punitive damages. *Id.* B&W appealed, and the Court of Appeals, Western District, affirmed the jury's liability verdict and compensatory damages award but reversed the punitive damages verdict after concluding that Plaintiffs presented a submissible case for punitive damages on only one of the three claims submitted to the jury in a general verdict. *Id.* at 823.[1] The court remanded "for a new trial on punitive damages as to the strict liability product defect claim only." *Id.*

On remand, the trial court held a new trial at which a new jury found B&W liable for punitive damages and awarded Plaintiffs $1.5 million. L.F. 1039, 1066; Pls.' App. 9–10.[2] The trial court entered judgment on the jury's verdict on August 25, 2009, and denied all parties' post-trial motions on December 21, 2009. L.F. 1067–68, 1515–16; Pls.' App. 11–14. B&W filed a notice of appeal from that judgment on December 30, 2009, and Plaintiffs filed a notice of appeal on December 31, 2009. L.F. 1517, 1526.

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[1] The Court of Appeals issued its initial opinion in 2007, but the dissenting judge transferred the case to this Court pursuant to Rule 83.03. After briefing and argument, the Court retransferred the case to the Court of Appeals. The Court of Appeals then issued a new opinion materially identical to its first one.

[2] B&W will cite to materials in the Appendix for Substitute Brief of Appellants-Respondents Smith as "Pls.' App. __"; it will cite to materials in its Appendix filed with this Brief as "B&W App. __".

After the parties filed their notices of appeal, it came to their attention that the judgment had not been apportioned as required by § 537.095.3, R.S. Mo. (2000). Accordingly, the parties filed a joint motion to remand for the limited purpose of filing an amended judgment showing apportionment. The Court of Appeals granted that motion, and the trial court entered an amended judgment on September 9, 2011. Supp. L.F. 1, B&W App. A1.

On October 2, 2012, the en banc Court of Appeals, Western District, issued an opinion rejecting B&W's arguments for judgment notwithstanding the verdict but accepting Plaintiffs' argument that introducing evidence about B&W's current status and the role of R.J. Reynolds during phase two of the new trial violated the Court of Appeals' mandate in *Smith I*. *See Smith v. Brown & Williamson Tobacco Corp.* ("*Smith II*"), Nos. WD71918, WD71919, 2012 WL 4497553 (Mo. App. W.D. Oct. 2, 2012). The court reversed and remanded, but instead of remanding for a new trial on both liability for and (if necessary) the amount of punitive damages, it "remanded for a new trial solely to determine the amount of punitive damages to be assessed against B&W." *Id.*, 2012 WL 44975533, at *7. B&W moved for rehearing and in the alternative asked the Court of Appeals to transfer the case to this Court, but the Court of Appeals denied both requests on October 30, 2012. B&W then applied to this Court for transfer, and the Court accepted the application and ordered the case transferred on December 18, 2012. This Court has jurisdiction of the case pursuant to Article V, Section 10 of the Missouri Constitution.

STATEMENT OF FACTS

A. The First Trial

This case arises out of the death of Barbara Smith in 2000. Ms. Smith smoked Kool cigarettes from the 1940s until 1990, when she quit upon being urged to do so by her doctor. *Smith I*, 275 S.W.3d at 758. Ten years later, Ms. Smith died from a heart attack. *Id.* During the time Ms. Smith smoked them, Kool cigarettes were manufactured and sold by Brown & Williamson Tobacco Corporation. In 2004, the domestic tobacco business of B&W was combined with the tobacco business of R.J. Reynolds under the umbrella of a new company re-named R.J. Reynolds Tobacco Company ("R.J. Reynolds"). T. 3199 (Testimony of Thomas Adams). B&W is now known as Brown & Williamson Holdings, Inc., and it is a holding company that does not engage in the active conduct or operation of any tobacco business in the United States. T. 3200. Kool cigarettes previously manufactured by B&W are now manufactured and sold by the new company named R.J. Reynolds, as they have been since mid-2004. T. 3200.

This litigation began nearly eight years ago, when the survivors of Ms. Smith (collectively, "Plaintiffs") brought an action under the Missouri Wrongful Death Act against B&W. The action alleged the following claims: negligence based on alleged failure to warn, failure to establish a reasonable dose, and failure to establish a safer cigarette; strict liability based on the allegation that Kool cigarettes were defective and unreasonably dangerous; fraudulent concealment; and conspiracy. *See id.* at 760. Plaintiffs sought punitive damages on all claims. Plaintiffs' claims were tried before a single jury in a bifurcated trial in 2005. *See* § 510.263.1, R.S.Mo. (2000); Pls.' App. 16

("All actions tried before a jury involving punitive damages … shall be conducted in a bifurcated trial before the same jury if requested by any party."). Before that trial began, B&W elected not to introduce evidence relating to the transaction between B&W and R.J. Reynolds in 2004 and moved to exclude such evidence. WD65542 L.F. 00752–53;[3] Pls.' App. 5–6. Plaintiffs did not oppose that motion, and the trial court entered an *in limine* order sustaining it. WD65542 L.F. 01100; Pls.' App. 7.

After the lengthy first phase of the trial, during which evidence on all of Plaintiffs' claims was presented together, the jury returned a verdict making three separate liability findings. First, the jury found for B&W on the fraudulent concealment claim. WD65542 L.F. 01419. Second, the jury found for B&W on the conspiracy claim. *Id.* Third, the jury assessed 25 percent of fault to B&W and 75 percent of fault to Barbara Smith on Plaintiffs' strict liability and/or negligence theories. WD65542 L.F. 01420. The verdict form permitted the jury to assess fault to B&W as long as the jury found B&W liable under *any* of the strict liability or negligence theories, and it did not require the jury to separately specify its finding as to each claim, *i.e.*, to specify whether any liability finding was based on one, some, or all of Plaintiffs' claims. *Id.* The basis for the jury's verdict

[3] The trial court record and transcript relating to the first trial in this case were included in the legal file for the *Smith I* appeal, No. WD65542. In this appeal, the Court of Appeals granted B&W's motion to transfer the record on appeal from No. WD65542 into this appeal. B&W will cite to matters contained in the legal file from the *Smith I* appeal as "WD65542 L.F. ____."

in favor of Plaintiffs thus remains unknown. The jury found Plaintiffs' compensatory damages to be $2 million, but in light of the jury's assessment of 75 percent comparative fault to Ms. Smith, the trial court reduced the compensatory damages award to $500,000. WD65542 L.F. 01477–78.

Finally, the jury found B&W liable for aggravating circumstances with respect to Plaintiffs' strict liability and/or negligence claims. WD65542 L.F. 01421. Again, the verdict form authorized the jury to return such a finding as long as it found aggravating circumstances for *any one* of the strict liability or negligence claims; it did not require the jury to specify which claim or claims provided the basis for that finding. *Id.* The trial then proceeded to a second phase to determine what amount of punitive damages, if any, should be awarded. At the conclusion of the second phase, the jury returned a $20 million punitive damages award. WD65542 L.F. 01428.

B. The First Appeal

B&W appealed, and the Court of Appeals ultimately affirmed in part, reversed in part, and remanded for a new trial on punitive damages for strict liability product defect. *Smith I*, 275 S.W.3d 748. The court affirmed the jury's general liability verdict on Plaintiffs' strict liability and negligence claims, rejecting B&W's arguments that, *inter alia*, Plaintiffs failed to make a submissible claim on any of the theories presented in that verdict.

With respect to Plaintiffs' strict liability product defect claim, B&W argued that Plaintiffs failed to make a submissible claim that Kool cigarettes were defective or unreasonably dangerous because their "evidence showed that there is nothing about Kool

cigarettes that is different from any other cigarette." *Id.* at 794. Reviewing Plaintiffs' evidence in detail, the court disagreed. The court specifically found that "[t]he evidence presented went beyond a categorical attack on the danger of cigarettes in general" and instead "demonstrated specific design choices made by B&W that had the potential to affect Ms. Smith's health during the time period she smoked." *Id.* at 796. The court reiterated that point in response to B&W's argument that federal law preempts state tort claims based on nothing more than the manufacture or sale of ordinary cigarettes. The court concluded that B&W's preemption claim failed "by the terms of its own argument" because Plaintiffs "did more than present evidence that all cigarettes carry the same health risks." *Id.* at 798.[4]

After finding that Plaintiffs had made a submissible case for liability as to the negligence and strict liability claims presented in the general liability verdict, the court turned to the jury's aggravating circumstances verdict. The verdict form permitted the jury to find aggravating circumstances based on *any* of the negligence and strict liability

[4] Despite holding that under the facts of the case it need not reach the legal merits of B&W's preemption argument, the court noted its disagreement with the legal theory that tort claims based on the manufacture or sale of ordinary cigarettes are preempted. *See Smith I*, 275 S.W.3d at 798–99. In light of the court's rejection of B&W's preemption argument as a matter of fact, the court's discussion of the legal question was dictum. *Id.* at 798 ("This court need not determine whether B&W's statement of the law is accurate.").

claims and did not require the jury to specify its finding as to each. The court therefore explained that "if a submissible case as to punitive damages was not presented as to all three claims, a new trial must be granted" to ensure that the jury did not base its punitive damages award on a claim for which no submissible case was made. *Id.*[5]

Considering each of those claims in turn, the court first explained that "the precise conduct at issue [as to each potential basis for punitive damages] must be identified." *Id.* at 814. Beginning with Plaintiffs' negligent failure to warn claim, the court identified that conduct as "selling unreasonably dangerous cigarettes without giving an adequate warning prior to July 1, 1969." *Id.*[6] The court concluded that Plaintiffs' evidence could not support a finding of aggravating circumstances on that theory by clear and convincing evidence, both because Plaintiffs' "evidence does not establish that B&W knew cigarettes were dangerous fifty years" ago and because Plaintiffs' evidence regarding B&W's

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[5] Although the jury's general verdict finding liability with regard to Plaintiffs' negligence and/or strict liability claims similarly did not require the jury to find B&W liable on *each* of those claims, WD65542 L.F. 01421, the court nonetheless stated that "[t]he jury found B&W liable for negligent failure to warn, negligent design, *and* strict liability product defect." *Smith I*, 275 S.W.3d at 812 (emphasis added).

[6] "The Federal Labeling and Advertising Act preempts claims against tobacco manufacturers based on their duty to warn of the risks of smoking cigarettes after 1969." *Smith I*, 275 S.W.3d at 784 n.103.

alleged "'scheme' to lie to smokers … goes to the claims of fraudulent concealment and conspiracy, for which the jury found B&W not liable." *Id.* at 819.

Turning next to Plaintiffs' negligent design claim, the court identified the conduct at issue as allegations that B&W "designed cigarettes containing harmful constituents and either failed to use ordinary care to design a safer cigarette or failed to adequately warn of the risk from the harmful constituents prior to July 1, 1969." *Id.* Reviewing in detail Plaintiffs' evidence with respect to alternative design, the court explained that Plaintiffs' own witnesses "testified that it is not possible to make a safe cigarette" and therefore found that there was no clear and convincing evidence that B&W's failure to do so "was tantamount to intentional wrongdoing." *Id.* at 821. As to the allegedly insufficient pre-1969 warnings, the court rejected that theory for the same reasons it rejected Plaintiffs' negligent failure to warn claim. *Id.*

Finally, the court addressed Plaintiffs' theory of strict liability product defect, for which the court identified the relevant conduct as "manufacturing or selling defective or unreasonably dangerous cigarettes." *Id.* at 822. The court found that Plaintiffs had made a submissible punitive damages claim based on strict liability product defect and "remanded to the jury for a new trial on punitive damages as to the strict liability product defect claim only." *Id.* at 823; *see also* Pls.' App. 1 (Mandate, *Smith v. Brown & Williamson Tobacco Corp.*, No. WD65542 ("[T]he 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.")).

Because the court vacated the jury's aggravating circumstances finding (and corresponding punitive damages award) and ordered a new trial as to punitive damages, it expressly declined to address B&W's additional challenges to the punitive damages award, including B&W's claims that the scope of the evidence presented and the jury instructions given in both phases of the trial violated B&W's due process rights under the Fourteenth Amendment to the U.S. Constitution. *Id.* at 823–24. The court explained that "[g]iven the disposition of [B&W's submissibility challenge], these points need not be addressed." *Id.* The court's opinion thus did not address the evidence that would be admissible if the new trial were to reach a second phase to determine the proper amount of punitive damages.

C. The Second Trial

After the case was remanded, both parties submitted briefing as to the manner in which the new trial should proceed (L.F. 28-56), and the trial court made a number of rulings in that respect. Pursuant to § 510.263, the trial court granted B&W's request that the trial again be bifurcated, so that the jury would decide during the first phase whether B&W was liable for punitive damages and would then (if necessary) decide in the second phase what amount of punitive damages to award. L.F. 58, Pls.' App. 2. Because in a typical case the same jury determines both underlying liability and liability for punitive damages based on evidence presented in the first phase of the trial, the trial court also ruled that the evidence during phase one of the new trial would be limited to the evidence presented in the first trial. *Id.* But because liability would no longer be at issue in the second phase, the court concluded that no such limitation would be necessary if there

were a second phase. L.F. 59, Pls.' App. 3. Accordingly, the court ruled that in any second phase of the trial, "the parties can present new evidence that falls within the purview of Missouri statutes and Missouri Common Law." *Id.*

During phase one, consistent with that ruling, Plaintiffs attempted to carry their burden to obtain punitive damages for strict liability product defect by offering the same evidence they had presented at the first trial. The first trial, however, had included several claims no longer at issue, and much of that evidence thus related to claims other than strict liability product defect. In addition, much of that evidence had already been found insufficient to support a verdict for punitive damages. Even as to Plaintiffs' evidence relating to strict liability product defect, although they called the same witnesses and offered the same exhibits as at the first trial, their witnesses did not give the same testimony.

In particular, although the Court of Appeals made clear that Plaintiffs' strict liability product defect claim was submissible only because their evidence did *not* simply show that all cigarettes are defective and unreasonably dangerous and instead showed "design choices" specific to Kools, *Smith I*, 275 S.W.3d at 796, Plaintiffs' experts admitted on cross-examination at the second trial that Kools were no more dangerous than any other cigarettes to those who smoke them. *See, e.g.*, T. 1200–01, 1241–42, B&W App. A7-A10 (Dr. Burns agreeing that both menthol and nonmenthol cigarettes are defective and unreasonably dangerous to those who smoke them and that menthol does not make cigarettes more dangerous); T. 1214–18, B&W App. A8-A9 (Dr. Burns testifying to no knowledge that any brand of cigarettes is more or less dangerous to those

who smoke it); T. 1202-03, B&W App. A7 (Dr. Burns agreeing that all cigarettes are "[u]nreasonably dangerous and defective for the people who use them"); T. 1911, B&W App. A12 (Dr. Wigand: "There will never be a safe cigarette or a safer cigarette on the market."). And Plaintiffs relied expressly and extensively on evidence that was generic to all cigarettes and in no way specific to Kools. *See, e.g.*, T. 1035–40, 1050–81 (Dr. Burns relying on evidence regarding all instances of lung cancer tied to smoking any brand of cigarettes and testifying at length about diseases that smoking any brand of cigarette can cause). Although Plaintiffs did present the same evidence as at the first trial that Kool cigarettes differ from other brands in certain ways (such as the use of menthol), the critical difference is that at the second trial their experts conceded that the aspects of Kools' design that make them different from other brands have no effect on the relevant question, namely, whether Kools are more dangerous than ordinary cigarettes such that B&W's conduct in selling Kools with that design can be deemed tantamount to intentional wrongdoing.

In light of these deficiencies in Plaintiffs' evidence, B&W moved for a directed verdict at the close of Plaintiffs' case on the ground that Plaintiffs failed to make a submissible case for aggravating circumstances. L.F. 350–64. The trial court denied the

motion. T. 1963, 1981.[7] The jury returned a verdict in phase one of the trial in Plaintiffs' favor. L.F. 1039, Pls.' App. 9.

Before the second phase of the trial began, Plaintiffs reiterated their position that B&W should not be allowed to introduce evidence relating to R.J. Reynolds. T. 2420. Although they purported to maintain their objection to such evidence, Plaintiffs also made clear that in light of the trial court's denial of their motion *in limine* they would present such evidence in their own case. *Id.* Plaintiffs then discussed R.J. Reynolds at length in their opening statement and questioned each of their witnesses about R.J. Reynolds as well, eliciting testimony about its supposed misconduct in the manufacturing and marketing of cigarettes. *See, e.g.*, T. 2422, 2424–30 (Pls.' Phase Two Opening Statement); T. 2453, 2460–67 (Testimony of Dr. Wigand); T. 2652–61(Testimony of Dr. Burns). Plaintiffs also presented extensive testimony about R.J. Reynolds' financial status and asked the jury to award an amount of punitive damages tied to R.J. Reynolds' officers' compensation. T. 2546–74 (Testimony of Dr. John Ward); T. 3344 (Pls.' Phase Two Closing Argument). B&W presented testimony from Dr. James Figlar, a former B&W scientist now at R.J. Reynolds, who testified about current circumstances and the company's ongoing efforts to be entirely open about the risks of smoking and to develop alternative products that will be safer for its customers. T. 2755–2963. At the end of the

[7] B&W moved for directed verdict at the close of the evidence in phase one, at the close of Plaintiffs' evidence in phase two, and at the close of all the evidence. L.F. 1008–10, 1040–42, 1043–45. The trial court also denied those motions. T. 2219, 2753, 3324.

phase two trial, the jury returned a $1.5 million punitive damages verdict. L.F. 1066; Pls.' App. 10.

D. Post-Trial Proceedings

After the trial, B&W filed a motion for judgment notwithstanding the verdict, renewing arguments it raised during trial in motions for a directed verdict. L.F. 1192–1209. In its post-trial motion, B&W argued, *inter alia*, that Plaintiffs failed to make a submissible case for punitive damages in light of evidentiary failings and federal preemption. L.F. 1192–1201. B&W also filed a motion for a new trial, alleging various errors in the trial court's evidentiary rulings and jury instructions. L.F. 1229–49.

Despite having obtained a $1.5 million verdict in their favor, Plaintiffs also filed a motion for a new trial, arguing, *inter alia*, that there were juror nondisclosures during voir dire. L.F. 1088–1112. Plaintiffs' motion generally alleged that "several jurors held strong biases against and predetermined views of tobacco litigation" but "did not disclose these biases and prejudices during voir dire." L.F. 1109. Plaintiffs further alleged that certain jurors "believed that tobacco litigation was frivolous but did not disclose such opinions during jury selection despite clear questions that should have prompted a response." *Id.* Plaintiffs requested an evidentiary hearing at which they "expect[ed] to present evidence in the form of witness testimony and affidavits that will demonstrate certain jurors either intentionally or unintentionally failed to disclose their strong biases and prejudices against tobacco litigation." L.F. 1110.

Although B&W argued that no evidentiary hearing should be held because Plaintiffs failed to supply any supporting affidavits or sworn testimony to substantiate

their nondisclosure allegations, the trial court nonetheless held a hearing. At that hearing, Plaintiffs focused almost exclusively on Juror Mackison, who was not one of the jurors identified in their post-trial motion. Plaintiffs first argued that Juror Mackison failed to disclose during voir dire a predetermined view that this and other tobacco litigation is frivolous. T. 3400–01. They attempted to prove this allegation by calling another juror, Juror Thompson, to testify regarding Juror Mackison's statements throughout the trial. B&W objected, arguing that this testimony was inadmissible as both an invasion into the privilege of the jury and hearsay. T. 3407. The court sustained the objection, ruling that questions regarding statements during deliberations invaded the privilege and questions regarding statements outside deliberations sought to elicit hearsay. T. 3408, 3413.

Plaintiffs next called Juror Mackison and asked him whether he believed this was a frivolous lawsuit. T. 3423. He answered that he did not and that he "thought it was an interesting case." T. 3423–24. The court allowed Plaintiffs to question Juror Mackison about statements he made outside of deliberations, and Juror Mackison testified that he did not recall ever stating that he thought the case was frivolous. T. 3424–25. Although Plaintiffs also attempted to question him regarding his views of the case throughout deliberations, the court rejected that line of questioning as an invasion of the privilege. T. 3425–26. Plaintiffs then recalled Juror Thompson in an attempt to impeach Juror Mackison's testimony. The court reiterated its ruling that Juror Thompson's testimony was inadmissible but allowed Plaintiffs to make an offer of proof. T. 3440. During that offer, Juror Thompson testified that although he recalled Juror Mackison referring to the case as frivolous, he did not "know exactly when he started expressing that" view and he

could not say whether it was from "the very beginning of the trial." T. 3441. He again confirmed on cross-examination that the only statements he recalled from Juror Mackison were "after we were jurors." T. 3444.

During the hearing, Plaintiffs argued for the first time that Juror Mackison failed to disclose during voir dire that his mother had died of chronic obstructive pulmonary disease (COPD), a condition that is sometimes related to smoking. T. 3400–01. B&W objected that Plaintiffs had not properly preserved this issue because it was not mentioned in Plaintiffs' post-trial motion, which referenced only other jurors' answers to voir dire questions regarding frivolous lawsuits. T. 3403. The trial court sustained the objection and ruled the entire line of questioning inadmissible. T. 3421–23. The court nevertheless permitted Plaintiffs to make an offer of proof, during which Juror Mackison testified that he did not know until after the trial that his mother, who quit smoking 11 years before her death, had died of COPD. T. 3428–30. He further testified that although he knew she had trouble breathing after she had surgery for what he believed was pancreatic cancer, he did not realize her cause of death was COPD or smoking-related, or that she had a lung disease, until he looked at her death certificate after the trial. T. 3430.

The court also allowed Plaintiffs to make an offer of proof of potential impeachment testimony from Juror Thompson. During that offer, Juror Thompson testified that he did not remember Juror Mackison stating outside of deliberations that his mother died of smoking, but he did remember Juror Mackison stating that she had COPD. T. 3442. When asked about whether Juror Mackison knew whether his mother's COPD was related to her smoking, Juror Thompson responded, "I don't know that he said that it

was caused by smoking, but I believe it was an inference in our minds that it was caused by smoking due to the information we saw of what smoking causes." T. 3443.

After the evidentiary hearing, the trial court issued an order denying both parties' post-trial motions in full. L.F. 1515–16; Pls.' App. 13–14. In that order, the court reiterated its ruling that Plaintiffs' evidence with respect to juror nondisclosure was inadmissible as to both the COPD nondisclosure allegation and the frivolous litigation allegation. *Id.*

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN DENYING B&W'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, BECAUSE PLAINTIFFS FAILED TO MAKE A SUBMISSIBLE CASE FOR PUNITIVE DAMAGES FOR STRICT LIABILITY PRODUCT DEFECT, IN THAT PLAINTIFFS FAILED TO PRESENT CLEAR AND CONVINCING EVIDENCE OF AGGRAVATING CIRCUMSTANCES BASED ON THE SAME CONDUCT FOR WHICH THE FIRST JURY COULD HAVE FOUND B&W LIABLE.

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003)

White v. Ford Motor Co., 500 F.3d 963 (9th Cir. 2007)

U.S. Constitution, amend. XIV

II. THE TRIAL COURT ERRED IN DENYING B&W'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, BECAUSE PLAINTIFFS FAILED TO MAKE A SUBMISSIBLE CASE FOR

PUNITIVE DAMAGES FOR STRICT LIABILITY PRODUCT DEFECT, IN THAT PLAINTIFFS FAILED TO PRESENT EVIDENCE BASED ON ANYTHING OTHER THAN THE RISKS INHERENT IN ALL CIGARETTES, WHICH UNDER FEDERAL LAW MAY NOT SERVE AS A BASIS FOR PUNITIVE DAMAGES.

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)

Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000)

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING B&W'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, BECAUSE PLAINTIFFS FAILED TO MAKE A SUBMISSIBLE CASE FOR PUNITIVE DAMAGES FOR STRICT LIABILITY PRODUCT DEFECT, IN THAT PLAINTIFFS FAILED TO PRESENT CLEAR AND CONVINCING EVIDENCE OF AGGRAVATING CIRCUMSTANCES BASED ON THE SAME CONDUCT FOR WHICH THE FIRST JURY COULD HAVE FOUND B&W LIABLE.

The second trial in this case suffered from a fundamental defect arising out of the nature of the evidence Plaintiffs presented. Plaintiffs were required to make a submissible case for punitive damages based on the same conduct for which the first jury could have found B&W liable for strict liability product defect. The Court of Appeals identified that conduct as "manufacturing or selling defective or unreasonably dangerous cigarettes." *Smith I*, 275 S.W.3d at 822. Plaintiffs thus had to prove by clear and

convincing evidence that B&W's conduct relating to selling Kool cigarettes was so culpable as to be tantamount to intentional wrongdoing. Plaintiffs tried to meet this burden by showing that B&W designed Kools to be especially dangerous—the theory that the Court of Appeals had found submissible. But Plaintiffs failed to prove that theory at the second trial because their own experts conceded that Kools were no more dangerous than any other cigarettes. Plaintiffs' case thus was nothing more than a categorical attack on all cigarettes. Moreover, Plaintiffs also tried to meet their burden by presenting evidence not tied to B&W's design of Kools, such as alleged concealment of the dangers of smoking. That evidence, however, related to claims for which punitive damages were no longer available after the Court of Appeals' remand and could not meet Plaintiffs' burden of presenting a submissible case for punitive damages based on "the strict liability product defect claim only." *Smith I*, 275 S.W.3d at 823.

A. Standard of Review

The submissibility of a punitive damages claim is a question of law that this Court reviews de novo. *Gilliland v. Mo. Athletic Club*, 273 S.W.3d 516, 520 (Mo. banc 2009). The Court reviews the record in the light most favorable to the jury's verdict to determine whether a submissible case was made. *Lester v. Sayles*, 850 S.W.2d 858, 871 (Mo. banc 1993).

B. Plaintiffs Failed to Present Clear and Convincing Evidence of Aggravating Circumstances Relating to the Design of Kool Cigarettes.

It is a fundamental tenet of due process under the Fourteenth Amendment to the U.S. Constitution that a defendant may not be punished for conduct for which it has not

been found liable. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003) ("A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages."). For a number of reasons, the Court of Appeals' limited remand posed an acute risk of running afoul of that principle. First, it is unknown whether the first jury actually found B&W liable for strict liability product defect at all, because the jury returned a general verdict on Plaintiffs' negligence and strict liability claims and was not required to specify whether it found B&W liable for one, some, or all of those claims. But even assuming (as the Court of Appeals did) that the first jury found B&W liable for strict liability product defect, Plaintiffs presented a variety of different theories to substantiate that claim, and it is unknown which theory or theories formed the basis of the jury's assumed finding on that claim. Finally, much of the evidence from the first trial related to fraudulent concealment and conspiracy, two claims for which the jury found B&W not liable at all, as well as to negligent failure to warn and negligent design, two claims for which the Court of Appeals found B&W not liable for punitive damages.

As a result, to make a submissible case for punitive damages on strict liability product defect at the second trial, Plaintiffs needed to make their case based on the same theory of strict liability product defect that the Court of Appeals held made that claim submissible in the first place. *See White v. Ford Motor Co.*, 500 F.3d 963, 975 (9th Cir. 2007) (reversing punitive damages verdict where "the jury may not have been focused properly on the conduct actually found culpable by the first jury"). Plaintiffs could not

carry that burden by relying on evidence and theories that were rejected by the first jury's verdict and the Court of Appeals' opinion.

Plaintiffs, however, failed to tie their claim for punitive damages to the theory on which the Court of Appeals held that the first jury could have properly found B&W liable for strict liability product defect. After the first trial, B&W argued to the Court of Appeals that Plaintiffs failed to make a submissible case of strict liability product defect because Plaintiffs "merely presented evidence that Kool cigarettes are dangerous solely because they belong to a class of products labeled cigarettes." *Smith I*, 275 S.W.3d at 795. The court rejected that argument *as a matter of fact*. Reviewing evidence from Dr. Wigand and Dr. Burns regarding the unique composition of Kool cigarettes, the court concluded that Plaintiffs' evidence "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 time period she smoked." *Id.* at 796.

That holding, reinforced by due process requirements, defined and limited the punitive damages claim that Plaintiffs could pursue on remand. To make a submissible case for punitive damages on remand in conformity with the Court of Appeals' mandate and fundamental due process principles, Plaintiffs had to present clear and convincing evidence of intentional wrongdoing with respect to the same theory, namely, that Kool cigarettes are somehow more dangerous than other cigarettes, and that this unique defect was the source of Ms. Smith's injuries. They plainly did not do so. Quite the contrary, Plaintiffs all but abandoned that argument during the new trial. They instead claimed that they did not need to show anything except that cigarettes that contain nicotine are

unreasonably dangerous and that Kool cigarettes contain nicotine. *See, e.g.*, T. 2245 (Pls.' Closing Argument) ("the product was defective because it contained—it contained the addictive substance nicotine"). Moreover, Plaintiffs' own witnesses testified repeatedly and adamantly that the design of Kool cigarettes did not make them more or less dangerous for those who smoke them and that no cigarette is more or less dangerous than any other. *See, e.g.*, T. 1201–03, B&W App. A7 (Testimony of Dr. Burns) (agreeing that all cigarettes are unreasonably dangerous to those who smoke them); T. 1911, B&W App. A12 (Testimony of Dr. Wigand) ("There will never be a safe cigarette or a safer cigarette on the market.").

As the foregoing makes clear, unlike what the Court of Appeals found to be the case at the first trial, Plaintiffs failed to point on remand to any "specific design choices by B&W [with respect to Kool cigarettes] that had the potential to affect Ms. Smith's health during the time period she smoked." *Smith I*, 275 S.W.3d at 796. Plaintiffs made no showing whatsoever that a defect unique to Kools harmed Ms. Smith. As a result, Plaintiffs failed to demonstrate by clear and convincing evidence that B&W was liable for punitive damages based on the conduct for which the first jury could have found it liable for strict liability product defect, and therefore failed to make a submissible case for punitive damages "as to the strict liability product defect claim *only*," *id.* at 823 (emphasis added), as the Court of Appeals ordered.

Aside from their failed attempt to demonstrate that Kool cigarettes are more dangerous than other cigarettes, the bulk of the evidence that Plaintiffs presented at the second trial was irrelevant, as it pertained to issued foreclosed by the Court of Appeals'

decision in *Smith I*. In the first trial, Plaintiffs presented the jury with no fewer than five theories of liability: fraudulent concealment, conspiracy, negligent failure to warn, negligent design, and strict liability product defect. WD65542 L.F. 01419–20. By the time the case was remanded for a new trial on punitive damages, only one of those theories (strict liability product defect) remained in the case. The logical consequence of the significant reduction in the scope of the issues in the second trial should have been a corresponding reduction in the scope of the evidence in the second trial. Instead, Plaintiffs presented nearly all the same evidence they presented in the first trial.

For example, although the Court of Appeals made clear after the first trial that Plaintiffs' evidence regarding B&W's alleged "'scheme' to lie to smokers" could not be used to support an aggravating circumstances finding because such evidence "goes to the claims of fraudulent concealment and conspiracy, for which the jury found B&W not liable," *Smith I*, 275 S.W.3d at 819, Plaintiffs on remand introduced and relied upon nearly all the same evidence of the alleged "scheme" that the first jury rejected. *See, e.g.*, T. 1093 (Testimony of Dr. Burns) (tobacco industry collectively perpetrated "one of the largest public health frauds that occurred in the last half century"); T. 2268–70, 2278–88 (Pls.' Phase One Closing Argument) (arguing at length that B&W's conduct was particularly egregious because it concealed health risks from the public). Indeed, Plaintiffs acknowledged as much and claimed it was appropriate to do so because B&W's purported concealment of the risks of smoking showed B&W's general "reprehensibility." T. 887–91. But as the U.S. Supreme Court has made clear, due process does not permit the adjudication—or re-adjudication, as was the case here—of

claims not before the court "under the guise of the reprehensibility analysis." *Campbell*, 538 U.S. at 423. Plaintiffs' failure to abide by that restriction ran afoul of the Supreme Court's admonition that "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Id.*

In the same vein, Plaintiffs repeatedly relied upon evidence related to theories that the Court of Appeals expressly rejected as a basis for punitive damages in the first appeal. For example, in relation to Plaintiffs' negligent failure to warn claim, the Court of Appeals specifically found that Plaintiffs' "evidence d[id] not establish that B&W knew cigarettes were dangerous" before 1969 and accordingly held that this claim was not submissible. *Smith I*, 275 S.W.3d at 814–19. Yet in phase one of the new trial, Plaintiffs pursued this rejected claim, presenting the same evidence from the first trial regarding B&W's alleged knowledge of the risks of smoking decades ago. *See, e.g.*, T. 1095–1100 (Testimony of Dr. Burns) (relying on same 1963 statements of B&W that Court of Appeals found insufficient to prove knowledge by clear and convincing evidence in the first trial). And Plaintiffs relied extensively on evidence relating to B&W's failure to design a safer cigarette, despite the Court of Appeals' express finding that Plaintiffs did not meet their burden in the first trial of showing that that failure "was tantamount to intentional wrongdoing." *Smith I*, 275 S.W.3d at 821; *see, e.g.*, T. 1618–67 (Testimony of Dr. Wigand) (testifying in detail about B&W's failed efforts to produce a safer cigarette). The Court of Appeals' remand "for a new trial on punitive damages as to the strict liability product defect claim *only*," *Smith I*, 275 S.W.3d at 823 (emphasis added), did not entitle Plaintiffs to relitigate the claims on which they had lost. Indeed, Plaintiffs

themselves seem to recognize as much, as they repeatedly emphasize in their opening brief that the new trial should have been limited to B&W's "liability for punitive damages *based on its conduct that gave rise to the prior jury's finding it liable for strict liability*." Pls.' Br. 46 (emphasis added); *see also, e.g.*, Pls.' Br. 40.

In short, Plaintiffs cannot salvage the verdict below by pointing to their efforts to obtain a punitive damages award utterly disconnected from the basis for the strict liability product defect liability and submissibility findings. In accordance with the Court of Appeals' conclusions in *Smith I*, the only way that Plaintiffs could make a submissible case for punitive damages at the new trial was by presenting evidence that characteristics unique to Kools made them more dangerous than ordinary cigarettes and caused Ms. Smith's injuries. Instead, Plaintiffs' own experts expressly disavowed that theory. As a result, the second jury could not validly impose liability on B&W, and judgment notwithstanding the jury's verdict should be entered in B&W's favor.

II. THE TRIAL COURT ERRED IN DENYING B&W'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, BECAUSE PLAINTIFFS FAILED TO MAKE A SUBMISSIBLE CASE FOR PUNITIVE DAMAGES FOR STRICT LIABILITY PRODUCT DEFECT, IN THAT PLAINTIFFS FAILED TO PRESENT EVIDENCE BASED ON ANYTHING OTHER THAN THE RISKS INHERENT IN ALL CIGARETTES, WHICH UNDER FEDERAL LAW MAY NOT SERVE AS A BASIS FOR PUNITIVE DAMAGES.

As a result of the same evidentiary failings, Plaintiffs' claim for punitive damages is preempted by federal law. Federal policy dictates that the sale of ordinary cigarettes is lawful. Accordingly, a punitive damages award based on nothing more than manufacturing and selling ordinary cigarettes is preempted by federal law. Because Plaintiffs failed to present evidence that the dangers related to Kool cigarettes were greater than the dangers related to ordinary cigarettes, Plaintiffs failed to present a submissible claim for punitive damages that was not preempted by federal law.

A. Standard of Review

The submissibility of a punitive damages claim is a question of law that this Court reviews de novo. *Gilliland*, 273 S.W.3d at 520. The Court reviews the record in the light most favorable to the jury's verdict to determine whether a submissible case was made. *Lester*, 850 S.W.2d at 871.

B. Plaintiffs' Punitive Damages Claim Is Preempted by Federal Law.

1. Federal Law Preempts Conflicting State Law.

The Supremacy Clause of the United States Constitution dictates that the laws of the United States "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Any state law that conflicts with federal law is therefore "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *see also Johnson v. State*, 366 S.W.3d 11, 26 (Mo. banc 2012) ("Under the Supremacy Clause, state laws and constitutional provisions are preempted and have no effect to the extent they conflict with federal laws." (internal quotation marks omitted)).

State laws may be preempted in three ways: (1) "by *express* language in a congressional enactment," (2) "by *implication* from the depth and breadth of a congressional scheme that occupies the legislative field," or (3) "by *implication* because of a conflict with a congressional enactment." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (emphasis added). A federal law thus need not contain an express preemption provision to have the effect of preempting state laws. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 867, 869–74, 884 (2000) (state law action for failing to provide airbag preempted because it conflicted with federal safety standard). Rather, any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" is preempted. *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (internal quotation marks omitted).

2. Federal Law Preempts State Laws that Seek to Impose Liability for Manufacturing or Selling Ordinary Tobacco Products.

The U.S. Supreme Court has concluded that "Congress … has foreclosed the removal of tobacco products from the market." *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 137 (2000). As the Court explained in reaching that conclusion, "Congress has directly addressed the problem of tobacco and health through legislation on six occasions since 1965" and has repeatedly "stopped well short of ordering a ban" of tobacco products. *Id*. at 137–38. Congress has done so even though "the adverse health consequences of tobacco use were well known, as were nicotine's pharmacological effects." *Id.* at 138. In light of those and other factors, "Congress' decisions … reveal its intent that tobacco products remain on the market. Indeed, the collective premise of these statutes is that cigarettes and smokeless tobacco will continue to be sold in the United States." *Id*. at 139. Accordingly, "[a] ban of tobacco products" would "plainly contradict congressional policy." *Id.*

Because federal law dictates that it is not only lawful, but necessary, to maintain the production and marketing of tobacco products, any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of" that policy is preempted. *Arizona*, 132 S. Ct. at 2501 (internal quotation marks omitted). In keeping with that understanding, many courts have concluded that federal law preempts imposition of liability under state tort laws when that liability is based on nothing more than the manufacture or sale of ordinary cigarettes. For example, a federal district court in Missouri dismissed as preempted by *FDA* a design defect claim where "the

complained-of defect" was "inherent to cigarettes." *Mash v. Brown & Williamson Tobacco Corp.*, No. 4:03CV0485 TCM, 2004 WL 3316246, at *6 (E.D. Mo. Aug. 26, 2004); *see also Conley v. R.J. Reynolds Tobacco Co.*, 286 F. Supp. 2d 1097, 1109 (N.D. Cal. 2002) ("plaintiffs' design defect claims are preempted because, if successful, they would result in an across-the-board ban on tobacco products, in contravention of the Supreme Court's holding in *FDA*").

Similarly, in *Insolia v. Philip Morris Inc.*, 128 F. Supp. 2d 1220 (W.D. Wis. 2000), the court held that a claim seeking to assert liability for simply selling or manufacturing cigarettes would be preempted because Congress '"has foreclosed the removal of tobacco products from the market." *Id.* at 1223–24 (quoting *FDA*, 529 U.S. at 137). As the *Insolia* court explained, when "Congress gives express sanction to an activity, the states cannot declare that activity tortious." *Id.* at 1224 (citing *Geier*, 529 U.S. 861); *see also Tuosto v. Philip Morris USA Inc.*, 05 Civ. 9384 (PKL), 2007 WL 2398507, at *12 (S.D.N.Y. Aug. 21, 2007) ("allowing the allegation that cigarettes in general are defective to constitute a claim for improper design would contradict congressional policy deeming the sale of cigarettes legal" (citing *FDA*, 529 U.S. at 137–39)); *Cruz Vargas v. R.J. Reynolds Tobacco Co.*, 218 F. Supp. 2d 109, 118 (D.P.R. 2002) ("to the extent that Plaintiffs seek to impose tort liability against Defendant Reynolds merely for manufacturing and selling cigarettes, we find Plaintiffs' claims to be preempted"), *aff'd on other grounds*, 348 F.3d 271 (1st Cir. 2003); *Badon v. R.J. Reynolds Tobacco Co.*, 934 So. 2d 927, 934 (La. Ct. App. 2006) (claim that cigarettes are unreasonably dangerous *per se* is preempted because it "would have the effect of

imposing a ban on the manufacture/sale of cigarettes where Congress has not enacted a ban").

Although this Court has not addressed whether claims based on the manufacture or sale of ordinary cigarettes are preempted by federal law, the Court of Appeals rejected a similar argument in *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76, 92–93 (Mo. App. W.D. 2006). *Thompson*'s reasoning is unpersuasive. The court distinguished *FDA* on the ground that it is a case about the FDA's authority to regulate cigarettes, rather than about state tort law regimes. But that argument ignores the fact that the *reason* the Supreme Court concluded that the FDA could not regulate cigarettes was that the FDA had no authority to do anything but ban cigarettes entirely, a result that would "plainly contradict congressional policy that tobacco products remain on the market." *FDA*, 529 U.S. at 139. The *Thompson* court made no effort to explain why Congress' judgment that cigarettes shall remain lawfully on the market precludes the FDA from banning the manufacture or sale of cigarettes, but permits states to achieve the same result by imposing liability and even punitive damages based on the manufacture and sale of ordinary cigarettes. The better-reasoned answer is that states, just like federal agencies, cannot adopt legal regimes that conflict with Congress' considered determination to "foreclose[] the removal of tobacco products from the market." *Id.* at 137.[8]

[8] Like the Court of Appeals in *Smith I*, *see* Part II.B.3, *infra*, the Court of Appeals in *Thompson* also concluded that the plaintiffs' "evidence went beyond a categorical attack

Moreover, *Thompson* did not involve punitive damages and thus did not address the specific question presented in this appeal, which is whether the imposition of *punitive* damages based on the manufacture and sale of ordinary cigarettes conflicts with the federal policy against banning tobacco products. Compensatory and punitive damages serve different purposes. Whereas compensatory damages are designed to make a plaintiff whole, the "well-established purpose of punitive damages is to inflict punishment and to serve as an example and a deterrent to similar conduct." *Call v. Heard*, 925 S.W.2d 840, 849 (Mo. banc 1996); *see also Vaughn v. N. Am. Sys., Inc.*, 869 S.W.2d 757, 759 (Mo. banc 1994) (punitive damages are awarded to "punish[] the wrongdo[er] defendant and … deter[] defendant and others from similar wrongful conduct in the future" (internal quotation marks omitted)). That makes the conflict with federal law all the more acute in this case, where Plaintiffs seek to impose punitive damages on B&W for selling cigarettes that were no more dangerous than ordinary cigarettes. It is one thing for states to declare tortious an activity to which "Congress gives express sanction," *Insolia*, 128 F. Supp. 2d at 1224, but it is another thing entirely for states to deliberately seek to *punish* and *deter* such conduct. Because a legal regime designed to do so "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Arizona*, 132 S. Ct. at 2501 (internal quotation

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on the danger of cigarettes in general." *Thompson*, 207 S.W.3d at 95–96. Accordingly, the *Thompson* court actually had no need to resolve the preemption question, as the case did not involve the imposition of damages for the sale of ordinary cigarettes.

marks omitted), any attempt to impose punitive damages based on the manufacture and sale of ordinary cigarettes is even more clearly preempted by federal law.

3. Plaintiffs' Punitive Damages Claim Is Preempted Because Plaintiffs Failed to Demonstrate that Kool Cigarettes Are More Dangerous than Ordinary Cigarettes.

The Court of Appeals in *Smith I* rejected B&W's preemption argument because it concluded that Plaintiffs "did more than present evidence that all cigarettes carry the same health risks" and instead "demonstrated that B&W made specific design choices that had the potential to negatively impact Ms. Smith's health." *Smith I*, 275 S.W.3d at 798. In light of that finding, the court concluded that it "need not determine whether B&W's" preemption argument "is accurate" as a matter of law. *Id.*[9] Whatever might be said about the Court of Appeals' characterization of the *first* trial, that is plainly not what happened at the second trial. Plaintiffs did not make a submissible case for punitive damages with respect to the same conduct that formed the basis for liability; in other

[9] Although the court went on to state that federal law does *not* preempt claims based on the manufacture or sale of ordinary cigarettes, it did so only after noting that it "need not" address the question. Accordingly, the court's subsequent discussion of the legal question of preemption was dictum and thus is not law of the case. *See State ex rel. Chiavola v. Vill. of Oakwood*, 931 S.W.2d 819, 823 (Mo. App. W.D. 1996). In any event, the court did not address the distinct question of whether federal law permits the imposition of *punitive* damages for the sale of ordinary cigarettes.

words, they did not demonstrate by clear and convincing evidence that B&W acted with complete indifference to or conscious disregard for the safety of others *by designing Kool cigarettes in a manner that made them more dangerous than ordinary cigarettes*. Quite the contrary, as explained in Part I, *supra*, Plaintiffs' own witnesses explicitly rejected the notion that Kool cigarettes are somehow more dangerous than other cigarettes.[10]

To be sure, Plaintiffs' experts testified at length about "the distinctive characteristics of Kool cigarettes." *Smith II*, 2012 WL 4497553, at *3. But those very same experts then categorically disclaimed any suggestion that those characteristics made Kool cigarettes more dangerous than other cigarettes. For example, Plaintiffs' expert Dr. Burns:

- stated that all cigarettes are "[u]nreasonably dangerous and defective for the people who use them" (T. 1202, B&W App. A7);
- repeatedly and emphatically testified that the design of Kool cigarettes made them no more or less dangerous than any other cigarette (T. 1200, 1203, 1212–19, B&W App. A7-A9);

[10] Because the question in this appeal is whether Plaintiffs' evidence at the *second* trial made a submissible case for punitive damages for strict liability product defect that was not preempted by federal law, the Court of Appeals' findings regarding the evidence at the *first* trial are neither law of the case nor relevant.

- could not identify a single brand that was any less dangerous than Kool cigarettes, even when presented with an array of all sorts of "ordinary" brands of cigarettes (T. 1213–19, B&W App. A8-A9);
- agreed that menthol does not make cigarettes more dangerous and that both menthol and nonmenthol cigarettes are defective and unreasonably dangerous to those who smoke them (T. 1200–01, 1241–42, B&W App. A7, A10); and
- testified to no knowledge that any brand of cigarettes is more or less dangerous to those who smoke it (T. 1214–18, B&W App. A8-A9).

Plaintiffs' expert Dr. Wigand similarly testified that "[t]here will never be a safe cigarette or a safer cigarette" than Kool cigarettes. T. 1911–12, B&W App. A12. Indeed, even Plaintiffs' own counsel argued during closing argument that Kool cigarettes were defective not because they were different from other cigarettes or somehow were more dangerous than necessary, but simply because they "contained the addictive substance nicotine." (T. 2245, Pls.' Phase One Closing Argument).

That is exactly the kind of claim that the federal policy against banning tobacco products prevents. Indeed, as a logical consequence of the fact that federal law prevents imposition of liability for the sale of ordinary cigarettes, courts have specifically deemed preempted state product defect claims that are based on the presence of nicotine in a cigarette. *See, e.g., Mash*, 2004 WL 3316246, at *6; *Conley*, 286 F. Supp. 2d at 1109.

"Congress, when it passed various forms of legislation regulating tobacco, and the [Supreme] Court, when it determined that the FDCA was preempted by Congress, were aware of the stimulative and addictive qualities of nicotine in tobacco products." *Mash*, 2004 WL 3316246, at *6. Yet Congress made a deliberate decision to continue to permit the production and marketing of ordinary tobacco products containing nicotine. Accordingly, "[i]f the courts held that the nicotine in cigarettes was a design defect such holdings would result in a ban on tobacco products in contravention of *FDA*." *Id.* Thus, because "the design defect of which plaintiffs complain is that the cigarettes contained nicotine and delivered nicotine to the decedent's body—that is, that they were 'tobacco products'—plaintiffs' design defect claims are preempted." *Conley*, 286 F. Supp. 2d at 1109.

Plaintiffs cannot escape this problem by pointing to evidence that Kool cigarettes contained a different level of nicotine than other cigarettes because Plaintiffs "failed to demonstrate how manipulation of nicotine levels could be considered a design defect." *Johnson ex rel. Estate of Johnson v. Brown & Williamson Tobacco Corp.*, 345 F. Supp. 2d 16, 21 (D. Mass. 2004). In fact, Plaintiffs' own experts testified—repeatedly—that the specific level of nicotine in Kool cigarettes did *not* render them any more or less dangerous than other cigarettes. T. 1200–03, 1212–19, 1241–42, 1911–12, B&W App. A7-A10, A12. Nor is plaintiffs' claim saved by their evidence regarding the presence and level of menthol in Kool cigarettes. First of all, because menthol, like nicotine, is routinely present in ordinary cigarettes, deeming cigarettes defective simply because they contain menthol would create the same conflict preemption problem as deeming them

defective simply because they contain nicotine. *See Johnson*, 345 F. Supp. 2d at 21 (to "single out menthol cigarettes and label them as being generally defective" "would impermissibly override the congressional decision to allow the[] continued sale" of ordinary cigarettes). Moreover, as with nicotine, Plaintiffs' own experts adamantly denied that the presence or level of menthol in Kool cigarettes made them more or less dangerous or defective than other cigarettes. T. 1200–01, 1241–42, B&W App. A7, A10.

In short, Plaintiffs failed to demonstrate at the second trial by clear and convincing evidence that B&W acted with complete indifference to or conscious disregard for the safety of others by designing Kool cigarettes in a manner that made them more dangerous than ordinary cigarettes. Because imposing punitive damages based on the manufacture and sale of ordinary cigarettes would directly conflict with the established federal policy that manufacturing or selling ordinary cigarettes is not only lawful, but necessary and beneficial to interstate commerce, *see FDA*, 529 U.S. at 137–38, Plaintiffs failed to make a submissible claim for punitive damages for strict liability product defect that is not preempted by federal law. Accordingly, judgment notwithstanding the jury's verdict should be entered in B&W's favor.

III. PLAINTIFFS' POINT I PROVIDES NO BASIS FOR RELIEF BECAUSE EVIDENCE REGARDING R.J. REYNOLDS WAS BARRED BY NEITHER THE MANDATE NOR THE LAW OF THE CASE AND, IN ANY EVENT, WAS ADMITTED WITHOUT PROPER OBJECTION.

Seeking yet another bite at the punitive damages apple, Plaintiffs claim they are entitled to a new trial because the trial court exceeded the scope of the Court of Appeals'

Smith I mandate when it admitted evidence relating to R.J. Reynolds in phase two of the new trial. That argument finds no support in law or fact. First, the admission of R.J. Reynolds evidence was not error. The Court of Appeals in *Smith I* "remanded to the jury for a new trial on punitive damages as to the strict liability product defect claim only." 275 S.W.3d at 823. And that is precisely what happened. The trial court conducted a bifurcated new trial: In phase one, the new jury determined whether Plaintiffs were entitled to punitive damages on the strict liability count, and in phase two, the jury determined the amount of punitive damages. Although, as explained in Part I, *supra*, the mandate significantly limited the evidence that Plaintiffs should have been able to rely upon to prove *entitlement* to punitive damages in phase one, neither the mandate nor the Court of Appeals' opinion addressed what evidence could be admitted in *phase two*. Nor was the admission of evidence relating to R.J. Reynolds foreclosed by the law of the case doctrine, as this issue was not raised and could not have been raised before the Court of Appeals in *Smith I*. In any event, Plaintiffs waived any objection to the admission of such evidence when they chose to preemptively present it in their own case, rather than waiting until B&W sought to admit it and then objecting.

A. Standard of Review

As Plaintiffs agree (Pls.' Br. 38), an appellate court reviews a trial court's evidentiary rulings for abuse of discretion. *Ziolkowski v. Heartland Reg'l Med. Ctr.*, 317 S.W.3d 212, 216 (Mo. App. W.D. 2010). Under that standard, the Court "presume[s] the trial court's finding is correct, and reverse[s] only when the ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to

shock the sense of justice and indicate a lack of careful consideration." *Id.* (internal quotation marks omitted)

B. Introduction of Evidence About R.J. Reynolds During Phase Two of the New Trial Was Within the Scope of the Court of Appeals' Mandate.

The Court of Appeals' mandate in *Smith I* did not bar the admission of evidence relating to R.J. Reynolds in phase two of the new trial. The mandate itself did nothing more than incorporate the reasoning set forth in the court's opinion. Pls.' App. 1 (Mandate) ("[T]he 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."). And the opinion simply stated that "the case is remanded to the jury for a new trial on punitive damages as to the strict liability product defect claim only." *Smith I*, 275 S.W.3d at 823. Nothing in that language or anywhere else in the opinion supports the evidentiary restriction Plaintiffs sought to impose on phase two of the new trial. Quite the contrary, *Smith I* makes abundantly clear that questions about the proper conduct of phase two remained open on remand.

That much is plain from the Court of Appeals' treatment of the points raised on appeal. In *Smith I*, B&W raised numerous challenges to the first jury's punitive damages award, including challenges to the submissibility of Plaintiffs' various claims for punitive damages, as well as challenges to the evidence admitted, the jury instructions given, and the amount of punitive damages awarded. *Id.* But the Court of Appeals resolved only the

submissibility issues. Because the court found that only one of the claims upon which the first jury might have based its aggravating circumstances finding was submissible, the court vacated the first jury's punitive damages verdicts in their entirety and remanded for a new trial limited to strict liability product defect. As a result of that ruling, the court had no occasion to consider any of B&W's other arguments regarding what evidence could and could not be admitted during either phase of the punitive damages trial. Indeed, the court expressly declined to consider those arguments. *Id.* at 823–24 ("Given the disposition of [the submissibility challenge], these points need not be addressed.").

In light of the Court of Appeals' express refusal to consider any evidentiary questions from the first punitive damages trial, the trial court correctly concluded that *Smith I* and its mandate did not speak to the scope of the evidence that would be admissible in the second phase of the second trial.[11] Because the Court of Appeals vacated the first jury's *phase one* punitive damages verdict, the court did not review *at all* phase two of the first trial and thus could not have imposed any limitations on how that

[11] To be clear, that does not mean the Court of Appeals' *Smith I* opinion had no effect whatsoever upon what evidence was admissible in either phase of the new trial. As explained in Part I, *supra*, in light of the due process requirement that any finding of liability for punitive damages must be based on the same conduct for which the first jury could have found B&W liable, Plaintiffs' evidence during the *liability* phase of the new trial should have been restricted to evidence related to the first jury's strict liability product defect verdict.

phase would proceed. A mandate that neither expressly nor implicitly addresses the admissibility of certain evidence cannot stand as a bar to the introduction of such evidence on remand.

Quite the contrary, a trial court on remand has "the power to make all necessary rulings on undisposed points." *McDonald v. McDonald*, 795 S.W.2d 626, 628 (Mo. App. E.D. 1990) (internal quotation marks omitted). "This flexibility is required because the mandates and opinions of [appellate courts] are not self-executing." *Id.* (citing *Durwood v. Dubinsky*, 361 S.W.2d 779 (Mo. 1962)). Indeed, it is error for a trial court to read unwarranted limitations into a mandate, even when the Court of Appeals ordered a specific remand. *See Gerken v. Sherman*, 351 S.W.3d 1, 7 (Mo. App. W.D. 2011) (holding trial court erred when, on specific remand, it refused to consider defendant's statute of limitations defense after appellate court on first appeal considered and rejected a different statute of limitations defense). Accordingly, the trial court did not contravene the Court of Appeals' mandate by admitting evidence relating to R.J. Reynolds during phase two of the new trial.

Plaintiffs' argument to the contrary conflates the first and second phases of the new punitive damages trial. According to Plaintiffs, B&W offered evidence relating to R.J. Reynolds as a new "defense" to liability for punitive damages, which, in turn, permitted the second jury to find B&W "not liable" on a theory that was not presented to the first jury. *See* Pls.' Br. 36, 44. Not so. In accordance with the trial court's ruling on the scope of proceedings on remand (L.F. 58–59, Pls.' App. 2–3), B&W offered R.J. Reynolds evidence only at the second phase of the new trial, *when the jury had already*

found B&W liable for punitive damages. The evidence therefore could not have operated as a "defense" to liability for punitive damages, but was instead provided to assist the jury in its assessment of *the amount* of punitive damages. Plaintiffs' claim that this evidence injected a new "defense" into the case is thus both legally and factually erroneous. B&W's use of R.J. Reynolds evidence in no way revisited the first jury's liability finding or the second jury's aggravated circumstances finding in phase one of the new trial.

The Court of Appeals made the same mistake in contending that B&W "effectively substitute[d]" R.J. Reynolds as the defendant in phase two. *Smith II*, 2012 WL 4497553, at *7. As the dissenting judges correctly explained, *id.* at *11–*12, B&W did not rely on evidence relating to R.J. Reynolds in an attempt to convince the jury that R.J. Reynolds was the true "defendant" and should not be held liable for B&W's past conduct. B&W relied on such evidence to show current circumstances highly relevant to the need for deterrence, including both the fact that B&W no longer sells cigarettes as well as the remedial actions of the new company, R.J. Reynolds, that now sells the former B&W brands. Because punitive damages are intended to punish and deter future wrongdoing, *see Call*, 925 S.W.2d at 849, it is well settled that "mitigating … circumstances[] must be taken into consideration" when assessing the proper amount of punitive damages. *Pisha v. Sears Roebuck & Co.*, 496 S.W.2d 280, 285 (Mo. App. 1973); *see also Propes v. Griffith*, 25 S.W.3d 544, 551 (Mo. App. W.D. 2000) ("[M]itigating circumstances may be considered … in all cases involving punitive damages." (internal quotation marks omitted)). And this Court has held specifically that

"*remedial and corrective action by defendant or the industry of which defendant is a member* and the specific financial condition of the defendant are among factors that may mitigate against assessment of such damages." *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464, 468 (Mo. banc 1995) (emphasis added); *see also Maugh v. Chrysler Corp.*, 818 S.W.2d 658, 663 (Mo. App. W.D. 1991) (defendant's actions following conduct that formed basis for liability are relevant to punitive damages determination).

In light of those settled principles, it was not only appropriate but essential that the jury understand that (1) B&W no longer engages in the active conduct or operation of any tobacco business in the United States; (2) Kool cigarettes are now manufactured and sold by R.J. Reynolds; and (3) R.J. Reynolds will be responsible for payment of any punitive damages award. The jury could not make a fair assessment of how to punish and deter the underlying tortious conduct without being made aware of those highly relevant facts and the efforts that have been taken to remedy and prevent reoccurrence of the underlying wrongs. *See Drayton v. Jiffee Chem. Corp.*, 591 F.2d 352, 366 (6th Cir. 1978) (affirming lower court's finding in bench trial that punitive damages were not necessary for deterrence upon showing of evidence that product manufacturer "had been acquired by Clorox Corporation and that the new management demonstrated greater concern for the consuming public and had 'successfully purged' itself of any pre-existing misconduct"); *cf. Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1215 & n.27 (6th Cir. 1988) (noting that evidence of improving industry practices and change in corporate ownership can weigh against punitive award). Indeed, Plaintiffs have never argued,

either in the trial court or on appeal, that the R.J. Reynolds evidence was not relevant; they instead rely solely on the contention that the evidence—no matter how relevant—was implicitly barred by the mandate.

Accordingly, there is simply no merit to the contention that B&W somehow substituted R.J. Reynolds as a new defendant in phase two. The jury at all times was told that B&W is the defendant in this case, and B&W is the party against which the jury entered its punitive damages award. *See* L.F. 1021, 1039, 1047, 1066. The jury considered evidence relating to R.J. Reynolds only in the context of determining what, if any, amount of punitive damages award was appropriate against B&W. The trial court in no way contravened the Court of Appeals' mandate to conduct "a new trial on punitive damages as to the strict liability product defect claim only," *Smith I*, 275 S.W.3d at 823, by allowing the jury to consider that highly relevant evidence when determining what amount of damages to award.

The cases Plaintiffs cite lend no support to their contention that the trial court contravened the Court of Appeals' mandate. Those cases involve direct contradiction with either the instructions contained in the mandate or the holdings set forth in the opinion, neither of which occurred here. In *Pope v. Ray*, 298 S.W.3d 53 (Mo. App. W.D. 2009), for example, the Court of Appeals remanded for a new trial on damages. *Id*. at 56. But instead of conducting a new trial, the lower court simply decided to adopt as its judgment an arbitration award issued in a parallel proceeding. *Id*. at 58. Unquestionably, the trial court violated the mandate by doing so because the "remand directed the trial court to take a specific action" that it did not take. *Id.*; *see also Guidry v. Charter*

Commc'ns, Inc., 308 S.W.3d 765, 770 (Mo. App. E.D. 2010) (concluding that trial court violated mandate to hold "a new trial on damages" when it determined damages itself instead of conducting a trial). Here, by contrast, the trial court did exactly what the Court of Appeals ordered in *Smith I*: It conducted a new trial on punitive damages as to the strict liability product defect claim. And because the *Smith I* court expressly declined to consider what evidence could be introduced in the second phase of that new trial, the trial court could not possibly have run afoul of the mandate by resolving that question in the first instance.

This case is also readily distinguishable from *Brooks v. Kunz*, 637 S.W.2d 135 (Mo. App. E.D. 1982), in which the trial court exceeded the mandate by reopening an issue that the Court of Appeals had already resolved. *Brooks* involved a property dispute in which the trial court had concluded after the first trial that the parties took title to property as tenants in common and were each entitled to half of the proceeds from its sale. *Id.* at 137. During the first appeal, the Court of Appeals agreed that the property had been taken as tenants in common, but concluded that it should be apportioned according to each tenant's contributions, not divided equally, and therefore "remanded for a new trial at which evidence of the respective contributions of the parties to the acquisition of the farm property should be adduced." *Id*. at 138 (internal quotation marks omitted). On remand, rather than limit itself to that instruction, the trial court allowed the plaintiff to raise a new claim that she and the defendant had an implied contract to share the property. *Id.* In doing so, the trial court impermissibly considered an issue not properly before it because the legal question of apportionment had already been settled

by the first appeal, leaving only the factual question of contribution for remand. *Id.* Again, no comparable circumstances exist here. Allowing B&W to present evidence relating to R.J. Reynolds posed no danger of reopening any issues settled by the first appeal because the Court of Appeals in *Smith I* did not decide whether Plaintiffs were entitled to punitive damages at all, let alone resolve any questions regarding what evidence could be presented to determine the proper amount of damages if the new jury found B&W liable during the first phase of the new trial.

Outcom, Inc. v. City of Lake St. Louis, 996 S.W.2d 571 (Mo. App. E.D. 1999), is even further off point. There, the Court of Appeals had "remanded to give the parties the opportunity to present evidence and for the court to determine the validity of the other provisions [of Ordinance 962] under the three part test of section 226.540.7." *Id*. at 574 (internal quotation marks omitted). After that mandate issued, however, Ordinance 962 was repealed, rendering the case moot absent evidence that a vested interest had arisen under the ordinance while it remained in effect. *Id*. at 576. Because the Court of Appeals found that no such vested interest existed, it concluded that compliance with the mandate was impossible due to mootness and that the trial court exceeded the mandate by resolving the validity of a *different* ordinance enacted after the case was remanded. *Id*. Plainly, no such mootness or impossibility problem exists here.

Plaintiffs also cite *Langdon v. Koch*, 435 S.W.2d 730 (Mo. App. 1968), but that case only undermines their argument. While the Court of Appeals in *Langdon* noted that the trial court exceeded the mandate by reconsidering on a remand for a new trial on damages only a liability issue that had been "settled" by the first trial and appeal, the

court also approved of the trial court's admission of "*considerable additional evidence* upon the issue of damages" that was not presented in the first trial. *Id.* at 732–33 (emphasis added). That a remand on *damages only* did not permit the trial court to reopen *liability* questions in no way supports Plaintiffs' attempt to read into the Court of Appeals' mandate in this case a novel and implicit limitation that the new jury consider only the same evidence presented at the first trial. *See also Bus. Men's Assurance Co. of Am. v. Graham*, 984 S.W.2d 501, 506 (Mo. banc 1999) (trial court on specific remand received new evidence); *Butcher v. Main*, 426 S.W.2d 356, 358 (Mo. 1968) (In a new trial on remand, "new and controlling facts [may be] produced. Often a second appeal presents a totally different case from that appearing on the first appeal." (internal quotation marks omitted)); *accord Pinkston v. Ellington*, 845 S.W.2d 627, 629 (Mo. App. E.D. 1992); *Affiliated Acceptance Corp. v. Boggs*, 917 S.W.2d 652, 658–59 (Mo. App. W.D. 1996).

In short, the mandate and opinion in *Smith I* did not address, let alone limit, what evidence the jury could consider in phase two of the new trial. Nor did the introduction of evidence relating to R.J. Reynolds inject a new "defense," a new "defendant," or any confusion into that proceeding. Accordingly, B&W's use of R.J. Reynolds evidence in phase two in no way conflicted with the mandate to conduct "a new trial on punitive damages as to the strict liability product defect claim only." *Smith I*, 275 S.W.3d at 823.

C. Introduction of Evidence Relating to R.J. Reynolds Was Not Barred by the Law of the Case Doctrine.

Plaintiffs' contention that evidence relating to R.J. Reynolds was barred by the law of the case is equally meritless. The trial court's only ruling in the first trial with respect to such evidence was to sustain an uncontested motion *in limine* to exclude evidence relating to the transaction between B&W and R.J. Reynolds. L.F. 1132, Pls.' App. 7. It is well-settled that an order on a motion *in limine* is an interlocutory ruling that "preserves nothing for appeal." *State v. Purlee*, 839 S.W.2d 584, 592 (Mo. banc 1992); *see also State v. Cole*, 71 S.W.3d 163, 175 (Mo. banc 2002). And neither party sought appellate review of the trial court's ruling relating to R.J. Reynolds evidence after the first trial. Where, as here, "the issue[] raised on this appeal [was not] addressed previously by this court," a party is left "arguing that the trial court[] … violated *its* previous ruling," which is "not a proper application of the 'law of the case' doctrine." *Angoff v. Am. Fin. Sec. Life Ins. Co.*, 891 S.W.2d 833, 836 (Mo. App. W.D. 1994). Accordingly, the trial court's unreviewed *in limine* ruling was no more binding in the second trial that it was in the first. *Taylor v. Keirn*, 622 S.W.2d 778, 784 (Mo. App. W.D. 1981) (ruling on motion *in limine* not res judicata in subsequent new trial); *Dierman v. Bemis Bros. Bag Co.*, 129 S.W. 229, 230 (Mo. App. 1910) ("When the case is tried anew, the rulings of the court on the former trial are in no sense res adjudicata.").

That makes this case readily distinguishable from *Langdon*, in which the defendant attempted to raise an issue on appeal of the second trial that he could and should have raised in his first appeal. *Langdon*, 435 S.W.2d at 733; *see also S.M. &*

M.M. v. E.M.B.R. (*In re Adoption of C.M.B.R.*), 332 S.W.3d 793, 823 (Mo. banc 2011) (law of the case applies to issues that could have been raised in first appeal); *Walton v. City of Berkeley*, 223 S.W.3d 126, 130 (Mo. banc 2007) (applying law of the case to an issue that the party "had every reason to include [in the first appeal], and no strategic reason to omit"); *Williams v. Kimes*, 25 S.W.3d 150, 154 (Mo. banc 2000) (applying law of the case to an issue that "could and should have been raised" in prior appeal). Here, there was nothing for B&W (or Plaintiffs) to raise after the first trial because nothing was preserved, and nothing was finally decided, by the trial court's interlocutory ruling on B&W's uncontested motion *in limine* before the first trial. Put simply, "[w]here the issues or evidence on the retrial are different from those vital to the first adjudication and opinion, the law of the case does not conclude [sic] either the trial court or the appellate court on remand." *Pinkston*, 845 S.W.2d at 629–30 (internal quotation marks omitted). Because the admissibility of R.J. Reynolds evidence was not finally decided by the trial court and was not before the Court of Appeals in *Smith I*, the law of the case doctrine has no application here.

D. Plaintiffs Waived Any Objection to Admission of Evidence Relating to R.J. Reynolds by Preemptively Presenting It in Their Own Case.

As Missouri courts have repeatedly held, "to properly preserve an objection to the admission of evidence, … the movant must wait until an attempt is actually made to introduce evidence and then must make a specific objection to its admission." *State v. Mickle*, 164 S.W.3d 33, 56 (Mo. App. W.D. 2005); *see also Bowls v. Scarborough*, 950 S.W.2d 691, 702 (Mo. App. W.D. 1997) ("In order to preserve any error [as to admission

of challenged evidence], Appellants were required to await an attempt by Respondents to introduce evidence … and to object at that time."); *Anderson v. Rojanasathit*, 714 S.W.2d 894, 896 (Mo. App. E.D. 1986) ("Plaintiffs' remedy was to resist [introducing the challenged evidence] and preserve error on matters considered in the ruling on the motion in limine, if any."). After losing a motion *in limine*, a party cannot preemptively inject the challenged evidence into the case "in the pursuit of reasonable trial strategy, and then, turn around on appeal and claim that the same evidence was inadmissible and prejudicial." *State v. Carollo*, 172 S.W.3d 872, 876 (Mo. App. S.D. 2005). Accordingly, "regardless of any trial strategy that may have been reasonably precipitated by [the *in limine*] ruling, the appellant's pre-emptive introduction of the challenged evidence waive[s] his objection thereto on appeal." *Mickle*, 164 S.W.3d at 57.

Applying those settled principles to the facts of this case, it is clear that Plaintiffs waived any objection to the admission of evidence relating to R.J. Reynolds. During phase two of the new trial, after the trial court rejected their attempt to bar B&W from presenting evidence relating to R.J. Reynolds, Plaintiffs chose to offer the evidence preemptively in their own case. In the first moments of their opening statement, Plaintiffs defined the question before the jury as "how do we punish Brown & Williamson Tobacco Company and the new company, Reynolds American Tobacco Company, which is owned 40 percent by Brown & Williamson and is the maker of Kools today, and deter them from engaging in the bad conduct that you've already found." T. 2422. Plaintiffs went on to discuss R.J. Reynolds repeatedly throughout their opening statement, making very specific reference to the products, marketing, technology, and

development of R.J. Reynolds. T. 2424–27. Plaintiffs then immediately asked their very first witness, Dr. Wigand, to discuss the new products that R.J. Reynolds, not B&W, has produced in recent years. T. 2453, 2460, 2464. Plaintiffs did the same during the testimony of Dr. Burns, T. 2652–74, and also elicited detailed testimony regarding R.J. Reynolds' financial status from Dr. Ward, T. 2546–74. Accordingly, by the time B&W first presented any testimony relating to R.J. Reynolds, T. 2755–56, Plaintiffs had already made R.J. Reynolds the focal point of their own case.

That Plaintiffs purported to introduce the evidence without "waiving [their] right" to continue to object to the trial court's *in limine* ruling is irrelevant. T. 2420. A party's tactical decision to preemptively present challenged evidence waives any objection to the evidence, notwithstanding the party's professed desire to have it both ways. *See Mickle*, 164 S.W.3d at 57; *see also Anderson*, 714 S.W.2d at 896 ("Plaintiffs' remedy was to resist and preserve error on matters considered in the ruling on the motion in limine, if any."). Any holding to the contrary would require the Court to "turn [its] back[] on well settled and well-reasoned law as to the preservation of error with respect to motions *in limine*." *Mickle*, 164 S.W.3d at 56; *see also, e.g.*, *Carollo*, 172 S.W.3d at 876; *Smith v. Associated Natural Gas Co.*, 7 S.W.3d 530, 536–37 (Mo. App. S.D. 1999) (after motion *in limine* was denied, plaintiffs waived evidentiary objection when, "as part of their apparent trial strategy in their opening statements and in their case in chief," they referred to the challenged evidence); *State v. Idlebird*, 896 S.W.2d 656, 663 (Mo. App. W.D. 1995) (defendant waived any objection to evidence when he preemptively injected it into

case after trial court denied his motion *in limine*), *overruled on other grounds by State v. Williams*, 126 S.W.3d 277 (Mo. banc 2004).

Notwithstanding decades of case law to the contrary, the Court of Appeals ruled that B&W "stipulated" that Plaintiffs were in fact preserving their objection to the R.J. Reynolds evidence even while preemptively introducing it. *See Smith II*, 2012 WL 4497553, at *5. B&W did no such thing. In the exchange the Court of Appeals referenced, after Plaintiffs had presented their R.J. Reynolds evidence and before closing arguments began, the parties put a number of evidentiary objections on the record to avoid the necessity of interrupting with constant objections throughout the closing arguments. For that limited purpose, B&W stipulated that Plaintiffs' objection to discussion of R.J. Reynolds evidence *during the closing argument* was preserved. T. 3321. But the record makes clear that B&W did not—and could not—stipulate that the objection "was properly preserved *for appeal*," *Smith II*, 2012 WL 4497553, at *5 (emphasis added). When particular evidence has been admitted, it is in the record and the parties thus may refer to it in their closing arguments. *See State v. Colbert*, 949 S.W.2d 932, 942 (Mo. App. W.D. 1997). But stipulating to Plaintiffs' discussion during closing argument of evidence relating to R.J. Reynolds that had been admitted cannot retroactively permit Plaintiffs to complain about its admission when Plaintiffs offered that evidence themselves.

Simply put, "[a] party who has conveyed information to a jury during its opening statement or who has introduced evidence concerning a certain fact may not on appeal complain that his opponent was allowed to introduce related evidence in rebuttal or

explanation." *Boyer v. Eljer Mfg., Inc.*, 830 S.W.2d 535, 537 (Mo. App. S.D. 1992); *Bushong v. Marathon Elec. Mfg. Corp.*, 719 S.W.2d 828, 841 (Mo. App. S.D. 1986) (same). Plaintiffs, by preemptively offering negative evidence about R.J. Reynolds, "cannot now complain because the opposing party offered evidence to the contrary. The sour must be taken with the sweet." *Vanneman v. W.T. Grant Co.*, 351 S.W.2d 729, 731 (Mo. 1961); *Watson v. Landvatter*, 517 S.W.2d 117, 122 (Mo. banc 1974). Accordingly, Plaintiffs' disagreement with the trial court's ruling notwithstanding, Plaintiffs waived any valid objection to the R.J. Reynolds evidence.

IV. PLAINTIFFS' POINT II PROVIDES NO BASIS FOR RELIEF BECAUSE PLAINTIFFS' JUROR NONDISCLOSURE CLAIMS WERE UNPRESERVED AND/OR UNPROVEN.

Plaintiffs also make the remarkable argument that they are entitled to yet another trial because the jury that awarded them $1.5 million in punitive damages was somehow biased against them. That claim fails both procedurally and on its merits. First, Plaintiffs' allegation that Juror Mackison failed to disclose his mother's medical history was not properly preserved for the trial court or this Court's review. Even were that not the case, Plaintiffs' offer of proof demonstrates no nondisclosure that would entitle them to a new trial. Second, Plaintiffs failed to present any evidence—admissible or inadmissible—to substantiate their allegation that Juror Mackison failed to disclose a preexisting bias about tobacco litigation. Accordingly, the trial court acted well within its discretion in denying Plaintiffs' motion.

A. Standard of Review

A trial court's ruling on a motion for a new trial based on juror nondisclosure is reviewed for abuse of discretion. *Johnson v. McCullough*, 306 S.W.3d 551, 555 (Mo. banc 2010). "A trial court abuses its discretion if its 'ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.'" *Id.* (quoting *Wingate by Carlisle v. Lester E. Cox Med. Ctr.*, 853 S.W.2d 912, 917 (Mo. banc 1993)).

B. Plaintiffs Did Not Preserve Their Allegation that Juror Mackison Failed to Disclose that His Mother Suffered From a Smoking-Related Lung Disease.

It is well settled that alleged errors based on "matters discovered after trial must be specifically set out in the motion for new trial." *Heinen v. Healthline Mgmt., Inc.*, 982 S.W.2d 244, 248 (Mo. banc 1998); *see also* Rule 78.07 ("Allegations of error based on matters … becoming known after final submission to the court or jury shall be stated specifically [in a motion for new trial]."), B&W App. A4. Accordingly, "[t]he allegations in a motion for new trial must be sufficiently definite to direct the court's attention to the particular acts or rulings asserted to be erroneous." *Lohsandt v. Burke*, 772 S.W.2d 759, 760 (Mo. App. W.D. 1989) (holding generalized allegation that jurors "failed to answer inquiries on voir dire to the prejudice of plaintiff" insufficient to preserve allegations of juror nondisclosure of religious views and relative's past injuries).

Plaintiffs' argument that this is a rule of appellate preservation rather than admissibility of evidence misses the point. After the 30-day period following entry of

judgment, the trial court's authority to grant a new trial is limited to grounds raised in a timely filed post-trial motion. *See State ex rel. Mo. Highway & Transp. Comm'n v. Christie*, 855 S.W.2d 380, 382 (Mo. App. W.D. 1993) (reversing grant of new trial based on ground not asserted in post-trial motion). The motion for new trial may not be amended by the presentation of evidence that untimely raises a ground not asserted in the motion. *Nash v. Ozark Barbeque, Inc.*, 901 S.W.2d 353, 359 (Mo. App. S.D. 1995). Because a trial court cannot grant a new trial based on an untimely argument, a trial court may not consider evidence supporting such an argument and is therefore correct to rule it inadmissible.[12]

And, as is evident from this Court's opinion in *Heinen*, the rule that any error alleged must be set forth "specifically" in the motion must be strictly applied in the

[12] Although Plaintiffs cite five cases for the proposition that evidentiary hearings may be held and juror testimony may be offered to support a nondisclosure claim, none of those cases involved an attempt to present evidence relating to an issue not raised in the motion for new trial. *See Peth v. Heidbrier*, 789 S.W.2d 859, 862 (Mo. App. E.D. 1990) (holding that court should have held evidentiary hearing on properly preserved nondisclosure claim); *Knothe v. Belcher*, 691 S.W.2d 297, 299 (Mo. App. W.D. 1985) (same); *Portis v. Greenhaw*, 38 S.W.3d 436, 444–45 (Mo. App. W.D. 2001) (faulting moving party for failing to present any evidence at hearing); *State v. Mayes*, 63 S.W.3d 615, 626 (Mo. banc 2001) (same); *State v. Dunn*, 21 S.W.3d 77, 84 (Mo. App. S.D. 2000) (same).

context of juror nondisclosure. In *Heinen*, the party alleging juror nondisclosure presented evidence to the trial court that certain jurors failed to provide truthful answers to two questions, one regarding prior personal injury "lawsuits" and another regarding prior personal injury "claims." *Heinen*, 982 S.W.2d at 247–48. Because the party's new trial motion alleged juror misconduct only "through the concealment of *suits*," this Court concluded that "the issue of undisclosed 'claims' is not preserved for review." *Id.* at 248 (emphasis added). Accordingly, the Court refused to take into consideration any evidence relating to nondisclosure of past "claims" when reviewing the trial court's ruling ordering a new trial. *Id.* As *Heinen* thus makes clear, *each* alleged instance of juror nondisclosure must be set forth with specificity to be preserved in a post-trial motion.

Applying that rule here, the trial court was plainly correct to exclude all evidence relating to Juror Mackison's alleged nondisclosure of his mother's medical history. Plaintiffs' new trial motion said nothing whatsoever about nondisclosure of family members who had COPD or any other smoking-related or lung diseases. Nor, for that matter, did it say anything about Juror Mackison. Instead, the motion alleged only that jurors "believed that tobacco litigation was frivolous but did not disclose such opinions during jury selection despite clear questions that should have prompted a response." L.F. 1109; *see also id.* ("several jurors held strong biases against and predetermined views of

tobacco litigation" but "did not disclose these biases and prejudices during voir dire").[13] Accordingly, the trial court correctly held that Plaintiffs failed to preserve their allegation of nondisclosure of medical history and correctly excluded all evidence relating to that allegation.

In any event, even had Plaintiffs preserved that allegation, the testimony they presented in their offer of proof did not prove the nondisclosure they alleged. Juror Mackison testified that he did not know his mother had died of COPD—indeed, that he did not even know what COPD meant—until *after* the trial. T. 3418, 3430–31. He further testified that, although he knew his mother "didn't breathe well," he thought she had died of pancreatic cancer and did not know she had also had a lung disease until he reviewed her death certificate and investigated her death after the trial. T. 3430. Plaintiffs seek to rely on Juror Thompson's testimony, but that evidence is independently

[13] To the extent Plaintiffs attempt (Pls.' Br. 49) to shoehorn their COPD nondisclosure claim into their general claim regarding "strong biases against and predetermined views of tobacco litigation," L.F. 1109, that attempt fails. Given that an allegation of nondisclosure of jurors' past "suits" is insufficient to preserve an allegation of nondisclosure of jurors' past "claims," *Heinen*, 982 S.W.2d at 248, *a fortiori* Plaintiffs' allegation of nondisclosure of predetermined views did not preserve an entirely unrelated allegation regarding the medical history of jurors' family members.

inadmissible as an invasion of the juror's privilege and hearsay. *See infra* pp. 60-64. Accordingly, Plaintiffs' argument would have failed even if they had timely raised it.[14]

In sum, the trial court correctly sustained B&W's objection to Plaintiffs' evidence on this point because Plaintiffs failed to preserve this allegation in their motion for a new trial. Even were that not the case, Plaintiffs' offer of proof showed no nondisclosure that would entitle them to a new trial. Accordingly, the trial court did not err, let alone abuse its broad discretion and issue a ruling "so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration," *McCullough*, 306 S.W.3d at 555, by denying Plaintiffs' request for a new trial on this ground.

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[14] In any event, Plaintiffs at most presented evidence of *unintentional* nondisclosure, which "may or may not demand a new trial." *Williams v. Barnes Hosp.*, ; 736 S.W.2d 33, 37 (Mo. banc 1987); *see also State v. McFadden*, --- S.W.3d ----,) 2013 WL 331119, at *2 (Mo. banc Jan. 29, 2013) (concluding that trial court did not err in declining to declare mistrial based on unintentional juror nondisclosure). As Juror Mackison explained, he did not answer affirmatively to a question regarding family members with a "lung problem" because he did not know at the time that his mother's breathing trouble was caused by a lung problem. T. 3430–31. "[W]here nondisclosure is found to be both unintentional and reasonable, the relevant inquiry becomes whether, under the circumstances, the juror's presence on the jury did or may have influenced the verdict so as to prejudice the party seeking a new trial." *Williams*, 736 S.W.2d at 37.

C. Plaintiffs Provided No Evidence, Admissible or Otherwise, that Juror Mackison Failed to Disclose His Views Regarding the Merits of Tobacco Litigation.

Nor did the trial court err by denying Plaintiffs' request for a new trial on the ground that Juror Mackison failed to disclose a predetermined view that tobacco litigation is frivolous. The trial court correctly ruled the bulk of the testimony Plaintiffs sought to present on this point inadmissible, and the only admissible evidence did not support Plaintiffs' allegation.

"It is a 'well-founded and long-established rule, based on sound public policy, ... that the affidavit or testimony of a juror is inadmissible and is not to be received in evidence for the purpose of impeaching the verdict of a jury.'" *Wingate*, 853 S.W.2d at 916 (quoting *Smugala v. Campana*, 404 S.W.2d 713, 717 (Mo. 1966)). Plaintiffs sought to elicit Juror Thompson's testimony for the sole purpose of proving the alleged bias of Juror Mackison, which was purportedly demonstrated to Juror Thompson throughout the trial proceedings. That clear attempt to elicit juror testimony regarding issues inherent in the jury's verdict was plainly barred by the juror's privilege rule.

Plaintiffs' sole argument to the contrary is to attempt to characterize Juror Thompson's testimony as relating to conduct outside of deliberations. In doing so, Plaintiffs wholly ignore the distinction between matters inherent in versus extrinsic to a jury's verdict. To the extent a juror may testify about matters even touching upon jury deliberations, a juror may do so only when those matters concern *extrinsic* effects on the jury, such as when "a juror visits an accident scene without the court's authorization and

then shares his observation with fellow jurors, or when a juror brings a newspaper into the jury room and reads an article from it to the venire." *Self v. Brunson*, 213 S.W.3d 149, 155 (Mo. App. E.D. 2006) (internal quotation marks omitted).[15] Moreover, even in such circumstances, Missouri courts have held that testimony may be admitted only if *both* parties "acquiesce in the proposition that the juror is competent to give such testimony." *Neighbors v. Wolfson*, 926 S.W.2d 35, 37 (Mo. App. E.D. 1996); *see also Travis v. Stone*, 66 S.W.3d 1, 4 (Mo. banc 2002) (allowing, in absence of objection, juror testimony regarding his unauthorized visit to the crime scene while trial was ongoing); *Stotts v. Meyer*, 822 S.W.2d 887, 890 (Mo. App. E.D. 1991) (same).

An allegation that a juror "acted on improper motives, reasoning, beliefs, or mental operations," by contrast, is a quintessential example of a matter inherent in the verdict. *Neighbors*, 926 S.W.3d at 37; *see also Ledure v. BNSF Ry. Co.*, 351 S.W.3d 13, 23 (Mo. App. S.D. 2011) (concluding that "jurors were not entitled to testify about" another juror's purportedly biased statements made before deliberations began). Juror testimony on such matters is inadmissible regardless of whether it is presented in support of a claim of juror nondisclosure. Indeed, this Court has expressly deemed such evidence inadmissible in materially identical circumstances. In *Wingate*, the plaintiff sought to

[15] This Court has recognized a very limited exception to this rule "[w]hen a juror makes statements evincing ethnic or religious bias or prejudice during deliberations." *Fleshner v. Pepose Vision Inst, P.C.*, 304 S.W.3d 81, 89 (Mo. banc 2010). Plaintiffs do not and cannot rely on that exception here.

show that a juror failed to disclose during voir dire a predetermined bias against people who bring lawsuits. *See Wingate*, 853 S.W.2d at 916. To do so, the plaintiff presented depositions from other jurors attesting to statements the juror in question allegedly made both inside and outside of the jury's deliberations. *Id.* ("The depositions included comments made by the allegedly biased juror during the trial's recesses and deliberations."). The Court refused to take that evidence into consideration on appeal—even though the trial court had admitted the depositions—on the ground that the jurors' depositions were inadmissible "because they impeach the verdict." *Id.*

As *Wingate* thus makes clear, the trial court correctly sustained B&W's objection to Plaintiffs' attempt to elicit testimony from Juror Thompson regarding Juror Mackison's views of this litigation. It makes no difference that Plaintiffs sought to elicit such testimony to show Juror Mackison's alleged bias at the time of voir dire, or that Plaintiffs sought to elicit testimony regarding Juror Mackison's statements outside of deliberations. The dispositive question under *Wingate* is whether the testimony concerned matters inherent in the verdict, *id.* at 916; because it plainly did, the trial court correctly ruled it inadmissible.

Plaintiffs cite no case that even remotely suggests the contrary. For example, Plaintiffs argue that in *State v. Edmonds*, 188 S.W.3d 119 (Mo. App. S.D. 2006), the case the trial court cited in its ruling, the juror statements at issue were made during deliberations. But nothing in *Edmonds* gives any indication that the timing of the statements factored into the court's analysis or that the court would have permitted a juror to testify about another juror's "reasoning, beliefs, or mental operations" if only the

testimony were limited to statements made outside of deliberations. Beyond that, Plaintiffs simply point to cases in which a court mentioned the possibility of juror testimony, but each case is distinguishable because the court was referring to testimony from the juror accused of nondisclosure, not hearsay testimony from one juror for purposes of impeaching another. *See Mayes*, 63 S.W.3d at 626 (faulting party for failing to offer affidavit or testimony from juror accused of nondisclosure); *Portis*, 38 S.W.3d at 444–45 (same); *Dunn*, 21 S.W.3d at 84 (same). In any event, as no juror testimony was presented in any of these cases, none decides whether testimony about a juror's beliefs or mental processes would have been admissible despite the longstanding juror's privilege.

Plaintiffs also ignore the fact that Juror Thompson's testimony was textbook hearsay. "A hearsay statement is any out-of-court statement that is used to prove the truth of the matter asserted and which depends upon the veracity of the statement for its value." *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 59 (Mo. banc 1999). Testimony offered by one juror "for the express purpose of proving the truth of the matter purportedly asserted [to] by [another] [j]uror … constitute[s] inadmissible hearsay" and therefore may not be used to prove juror misconduct. *Williams v. Daus*, 114 S.W.3d 351, 369 n.9 (Mo. App. S.D. 2003); *see also Ledure*, 351 S.W.3d at 23 n.4. Plaintiffs plainly offered Juror Thompson's testimony for the truth of the matter asserted, namely, that Juror Mackison held the view that this case was frivolous and failed to disclose that view. The trial court thus correctly ruled that to the extent any of Juror Thompson's testimony

was not barred by the juror's privilege, it was independently inadmissible as hearsay.[16] T. 3414; L.F. 1516, Pls.' App. 14.

As a result, the only admissible evidence presented at the evidentiary hearing was Juror Mackison's own testimony that he did not consider this litigation frivolous, but rather found the case interesting. And even Plaintiffs' inadmissible offer of proof from Juror Thompson failed to prove any nondisclosure. Juror Thompson conceded that he did not "know exactly when [Juror Mackison] started expressing" his purported view that this litigation was frivolous, and he could not say whether it was from "the very beginning of the trial." T. 3441. Accordingly, even if it were not inadmissible as hearsay and a violation of the juror's privilege, Juror Thompson's testimony would not have proven one way or another whether Juror Mackison believed tobacco litigation was frivolous *during voir dire*. The trial court thus did not err, let alone abuse its broad discretion, by denying Plaintiffs' motion for a new trial based on an alleged nondisclosure they failed to prove.

[16] For the same reason, Juror Thompson's testimony regarding Juror Mackison's knowledge of his mother's health condition would have been inadmissible hearsay even if Plaintiffs' claim had been preserved.

V. IF THE COURT FINDS REVERSIBLE ERROR, THE ONLY PROPER REMEDY IS A NEW TRIAL ON BOTH LIABILITY FOR AND AMOUNT OF PUNITIVE DAMAGES.

For all the reasons just discussed, the trial court acted well within its discretion when it denied Plaintiffs' motion for a new trial. But in the event this Court concludes otherwise, the Court should reject Plaintiffs' requests for either a new trial limited to the amount of punitive damages or a remand to the Court of Appeals to determine whether the $20 million punitive damages verdict in the first trial comports with constitutional principles (and presumably, if it does, to enter a judgment for that amount).[17]

At the outset, this Court need not consider these arguments because Plaintiffs have not preserved them. Rule 84.04(a)(6) requires an appellant's brief to contain a conclusion "stating the precise relief sought." Plaintiffs' brief in the Court of Appeals requested only "remand for a jury trial on damages in accordance with this court's prior opinion." Pls.' Ct. App. Br. 57. Because the Court of Appeals' prior opinion called for a new trial on *all* punitive damages issues as to Plaintiffs' strict liability product defect

[17] Plaintiffs' request for this alternative relief appears to be limited to their first point relied on. Pls.' Br. 47–49, 64. Because Plaintiffs' argument in their second point relied on is that the verdict was tainted by jury bias or prejudice, they would not be entitled to a limited new trial even if they had requested such relief. *Taylor v. St. Louis Pub. Serv. Co.*, 303 S.W.2d 608, 611–12 (Mo. 1957); *Sansone v. St. Louis County*, 838 S.W.2d 16, 17–18 (Mo. App. E.D. 1992).

claim, *see Smith I*, 275 S.W.3d at 823, this request excluded the alternative remedies Plaintiffs now request. Nor did Plaintiffs mention these alternative remedies anywhere in the argument portion of their Court of Appeals brief. Having failed to raise these issues in that brief, Plaintiffs are precluded from doing so here. *Linzenni v. Hoffman*, 937 S.W.2d 723, 726–27 (Mo. banc 1997); Rule 83.08(b).

If the Court nonetheless chooses to consider the alternative relief Plaintiffs now request, Plaintiffs should fare no better. Plaintiffs' arguments overstate the powers Rule 84.14 grants an appellate court. As this Court recently recognized, under Rule 84.14, "[a]n appellate court may give judgment as the circuit court ought to have given, but only in circumstances that indicate there is no further need for proceedings in the circuit court." *DeBaliviere Place Ass'n v. Veal*, 337 S.W.3d 670, 679 (Mo. banc 2011). Missouri law and B&W's due process rights under the Fourteenth Amendment to the U.S. Constitution both require that the proper remedy, in the event the Court rules for Plaintiffs on either of their points relied on, is to order a new trial on both liability for and the amount of punitive damages.

A. A New Trial as to Only the Amount of Punitive Damages Is Not a Permissible Remedy.

When issues are intertwined, an error that affects one of those issues requires a new trial as to all of them. *Zibung v. Union Pac. RR. Co.*, 776 S.W.2d 4, 6 (Mo. banc 1989); *Massman Constr. Co. v. Mo. Highway & Transp. Comm'n*, 948 S.W.2d 631, 634 (Mo. App. W.D. 1997) (holding that trial court erred in limiting new trial to issue of damages when that issue was "significantly intertwined" with issue of liability). The

U.S. Supreme Court has similarly recognized that if a new trial on only one of multiple interwoven issues cannot be held without confusion and uncertainty, permitting it to proceed "would amount to a denial of a fair trial." *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931).

The issues of liability for and the amount of punitive damages are inextricably intertwined. When a claim for punitive damages is submitted, the jury is instructed that if it finds that a defendant's conduct showed complete indifference to or conscious disregard for the safety of others, it may award the plaintiff as punitive damages such sum as it believes will serve to punish the defendant and deter the defendant and others from like conduct. *See, e.g.*, MAI 10.06. Thus, as this Court has recently recognized, "the level of punitive damages is not really a 'fact' 'tried' by the jury." *Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC*, 361 S.W.3d 364, 376 n.3 (Mo. banc 2012) (quoting *Cooper Indust., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 437 (2001)). Rather, the jury's "imposition of punitive damages is an expression of its moral condemnation." *Id.* In other words, the amount of punitive damages the jury awards is not an objective factual determination, but rather a qualitative judgment of the conduct that the jury found to meet the standard for imposing punitive damages.

If a jury is asked to determine only the *amount* of punitive damages to award, however, it cannot know whether the prior jury's finding that punitive damages are warranted was based on all or only a portion of the evidence before it, and, if the latter, what portion the prior jury found warranted punishment. It cannot be assumed that the first jury accepted all the evidence presented in support of the defendant's liability for

punitive damages or even viewed it in the light most favorable to the plaintiff. *See Koppe v. Campbell*, 318 S.W.3d 233, 248 (Mo. App. W.D. 2010) (the jury "may believe or disbelieve any portion" of the evidence presented (internal quotation marks omitted)); *Pitts v. Garner*, 321 S.W.2d 509, 514 (Mo. 1959) ("The issue of liability in this case is not to be confused with the issue of submissibility."). It thus would be fundamentally unfair to permit a different jury, which did not decide and does not know what conduct its punitive damages award is supposed to be calibrated to punish or deter, to guess at the amount of punitive damages appropriate to punish that unknown conduct. Any amount the second jury picks will necessarily be arbitrary.

The Legislature recognized the intertwined nature of the issues of liability for and the amount of punitive damages, and the fundamental unfairness of allowing two different juries to decide those intertwined issues separately, when it enacted § 510.263, R.S.Mo. (2000). In addition to requiring the court to bifurcate these issues if a party so requests, the statute also requires the *same jury* that determines the defendant's liability for punitive damages to assess the amount of punitive damages: "If 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." § 510.263.3, Pls.' App. 16 (emphasis added). Remanding this case for a new trial on the amount of punitive damages only thus is prohibited by both statute and case law.

In addition, because this case involves punitive damages, this Court must take great care to ensure that any remedy it orders protects B&W's due process rights under

the Fourteenth Amendment to the U.S. Constitution. The U.S. Supreme Court has repeatedly held that courts awarding punitive damages must adopt and follow procedures that adequately protect the defendant's due process rights. *See, e.g.*, *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *Campbell*, 538 U.S. 408; *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994). While punitive damages awards "serve the same purposes as criminal penalties," defendants subjected to punitive damages in civil cases "have not been accorded the protections applicable in a criminal proceeding," which "increases our concerns over the imprecise manner in which punitive damages systems are administered." *Campbell*, 538 U.S. at 417. Thus, "the Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as 'grossly excessive.'" *Philip Morris USA*, 549 U.S. at 353. A procedure that requires a jury other than the one that determined liability for punitive damages to determine the amount of punitive damages to assess would violate B&W's due process rights because it invites—indeed, guarantees—the very sort of arbitrariness that the U.S. Supreme Court has held is forbidden by the Fourteenth Amendment.

Plaintiffs' arguments supporting their proposed remedy make little sense. Although both § 510.330, R.S.Mo. (2000), and Rule 78.01 permit a new trial to be granted as to part of the issues in a case, as noted above, that permission does not encompass authority to grant a limited new trial when issues are significantly intertwined. *Zibung*, 776 S.W.2d at 6; *Massman Constr. Co.*, 948 S.W.2d at 634. *Lilly v. Boswell*, 242 S.W.2d 73 (Mo. 1951), which predates *Zibung*, is not inconsistent. The sentence

immediately following Plaintiffs' quote from that case makes this clear: "The trial court did not err in ordering a new trial on the issue of damages only, *unless, for some reason appearing upon the record as a whole, a substantial right of defendants was denied*." 242 S.W.2d at 78 (emphasis added). Here, the record and the law demonstrate that B&W's substantial rights would be denied by a new trial limited to the amount of punitive damages.

Plaintiffs also rely on *McCrainey v. Kansas City Missouri School District*, 337 S.W.3d 746, 755–56 (Mo. App. W.D. 2011), in which the court upheld a trial court's order that a new trial be held limited to the amount of punitive damages. In so ruling, the court relied solely on *Burnett v. Griffith*, 769 S.W.2d 780, 791 (Mo. banc 1989). *McCrainey*, 337 S.W.3d at 755–56. *Burnett*, however, does not support this result. In *Burnett*, the Court held that a new trial on *all* issues was not necessary when the error affected only punitive damages and that issue was sufficiently distinct from the issue of compensatory damages. *Burnett*, 769 S.W.2d at 790–91. This Court therefore ordered a new trial on the entire "issue of punitive damages," comprising both the liability for and amount of those damages, just as the Court of Appeals did in *Smith I*. This Court did not order a new trial in which the jury would consider only the amount of punitive damages without also having found the defendant liable for punitive damages. The opinion in *McCrainey* also does not indicate that the parties raised or the court considered either the language of § 510.263.3 or the due process concerns created by permitting different juries to decide liability for and the amount of punitive damages. *McCrainey* therefore is not precedent on this issue. *See Parker v. Bruner*, 683 S.W.2d 265, 265 (Mo. banc 1985)

("[T]he authority of the decision as a precedent is limited to those points of law which are raised by the record, *considered by the court*, and necessary to a decision." (emphasis added)). To the extent this Court nonetheless believes that *McCrainey* supports an amount-only remand here, B&W requests that the Court overrule *McCrainey* on this issue.

B. A Remand to the Court of Appeals to Consider Reinstating the First Jury's Punitive Damages Award Is Not a Permissible Remedy.

Plaintiffs also propose that this Court remand the case to the Court of Appeals to determine whether the $20 million punitive damages verdict returned by the first jury "comports with the constitutional principles previously briefed by the parties but not reached by the appellate court in its 2009 [sic; 2008] opinion." Pls.' Br. 48–49, 64–65. While Plaintiffs do not say so expressly, presumably they intend to ask the Court of Appeals to reinstate the $20 million punitive damages award if the court were to find that it "comports" with those constitutional principles. This Court lacks the authority to grant such relief for several reasons.

First, the trial court's first judgment as to punitive damages became a nullity when the *Smith I* court reversed it. *See Serafin v. Med 90, Inc.*, 963 S.W.2d 362, 363 (Mo. App. E.D. 1998); *Breece v. Jett*, 583 S.W.2d 573, 574 (Mo. App. E.D. 1979). Even if the Court of Appeals were to conclude that B&W's constitutional challenges in *Smith I* to that portion of the original judgment lacked merit, that court could not now resurrect the nullified judgment. The *Smith I* punitive damages verdict was based on the first jury's deliberations on three claims, two of which the Court of Appeals subsequently held

should not have been submitted. That error required the court to vacate the first jury's punitive damages verdict in its entirety, as it could not be determined which of the claims provided the basis for the first jury's decision to award punitive damages or the amount at which it arrived. *Smith I*, 275 S.W.3d at 823–24. To reinstate the same verdict as to the strict liability product defect claim alone would reintroduce the very error that the Court of Appeals' vacatur was intended to remedy.

Second, to the extent Plaintiffs are suggesting that the Court of Appeals is authorized to unilaterally increase the amount of the *existing* punitive damages award, they are mistaken. As stated above, Rule 84.14 authorizes an appellate court to give only the judgment the circuit court ought to have given. *DeBaliviere Place Ass'n*, 337 S.W.3d at 679. Circuit courts (and therefore appellate courts) lack the authority to simply increase the amount of a jury verdict, but rather must use the procedure of additur. § 537.068, R.S.Mo. (2000); Rule 78.10. Additur is permitted only if "the jury's verdict is inadequate because the amount of the verdict is less than fair and reasonable compensation for plaintiff's injuries and damages." § 537.068. That standard can never be met as to a punitive damages award because punitive damages are not compensatory. *State ex rel. Smith v. Greene*, 494 S.W.2d 55, 60 (Mo. banc 1973). Furthermore, even if it could be met, a court cannot simply increase the judgment but must give the defendant the option of either consenting to the additur or requiring a new trial. *Tucci v. Moore*, 875 S.W.2d 115, 116–17 (Mo. banc 1994). Thus, Plaintiffs' proposed remedy is contrary to established law and procedure.

Finally, this proposed remedy also would violate B&W's due process rights under the Fourteenth Amendment to the U.S. Constitution. As discussed above, due process requires states to adopt procedures that protect defendants from excessive and arbitrary punitive damages awards. *Philip Morris USA*, 549 U.S. at 353. "Unless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system … may threaten 'arbitrary punishments,' i.e., punishments that reflect not an 'application of law' but 'a decisionmaker's caprice' …." *Id.* at 352 (quoting *Campbell*, 538 U.S. at 416, 418). A plaintiff has no similar protectable interest in receiving a particular amount of punitive damages. Plaintiffs cannot complain merely because they receive a smaller amount of punitive damages than they hoped for, because punitive damages "are not a matter of right but rest in the discretion of the [trier of fact]." *Kennedy v. Jasper*, 928 S.W.2d 395, 401 (Mo. App. E.D. 1996) (citing *Coats v. News Corp.*, 197 S.W.2d 958, 962 (Mo. 1946)) (trial court's refusal to set aside $25 punitive damages award as inadequate was not an abuse of discretion). Thus, not only do Plaintiffs have no right to demand that a court increase the amount of punitive damages awarded by the jury, but permitting a court to do so would violate B&W's federal due process rights.

C. If the Court Orders Any New Trial, It Should Provide Guidance on How that Trial Should Proceed.

In light of the foregoing, if this Court finds for Plaintiffs on either of their points relied on, the only appropriate remedy would be to remand for a new trial on *both* liability for *and* the amount of punitive damages on Plaintiffs' claim for strict liability

product defect. While B&W contends there is no basis for any remand, in the event the Court orders one, B&W respectfully requests that the Court provide additional guidance as to how the new trial should proceed. *See Ritzheimer v. Marshall*, 168 S.W.2d 159, 166 (Mo. App. 1943) ("In view of the fact that this case may be tried again, we think it is not improper to advert to a few other points which the parties have discussed in their briefs."). The trial court on remand erroneously rejected a number of B&W's evidentiary and instructional arguments, in large part as a result of confusion regarding the scope of the Court of Appeals' mandate. To avoid similar error on remand that might ultimately necessitate yet another new trial, this Court should clarify to the greatest extent possible the manner in which any new trial should proceed.

For example, if a third jury is to decide whether and to what extent punitive damages are appropriate, this Court should explain how the new jury should be advised of and take into consideration the first jury's findings. As detailed in Part I, *supra*, the first jury's findings should have significantly limited the evidence and arguments available to Plaintiffs on remand because the first jury found B&W not liable for fraudulent concealment or conspiracy and held Plaintiffs' negligent design and failure to warn claims not submissible for punitive damages. Yet, the trial court denied B&W's motion and repeated requests to exclude evidence relating to concealment and conspiracy. L.F. 207–18, 334. The court then compounded that error by refusing B&W's request to inform the second jury of *all* the first jury's findings, including its finding that B&W was not liable for conspiracy or concealment, L.F. 261–71, as well as B&W's subsequent request that the court at least give withdrawal instructions to make

clear to the second jury that those issues were not before it, L.F. 1024–28, 1049–52 (B&W's Proposed Instructions B–F and N–P); B&W App. A14-A18, A26-A28. As a result, there was a significant risk that the second jury might violate B&W's due process rights (and this Court's mandate) by punishing B&W for conduct for which B&W had already been found not liable. This Court should make clear that the trial court should not commit the same errors if there is another remand. *See White*, 500 F.3d at 975 (trial court erred by failing to inform second jury of first jury's findings in defendant's favor).

The trial court also refused to allow B&W to argue that Ms. Smith's 75 percent comparative fault was a factor mitigating against punitive damages (L.F. 333; T.2221-22), even though such evidence was critically relevant to the jury's assessment of the reprehensibility of B&W's conduct. *See Lopez v. Three Rivers Elec. Coop., Inc.*, 26 S.W.3d 151, 160 (Mo. banc 2000) (jury may take into consideration when assessing punitive damages whether "the injurious event was unlikely to have occurred absent negligence on the part of someone other than the defendant"); *see also White*, 500 F.3d at 975 (trial court erred by not allowing jury to consider plaintiffs' comparative fault as relevant to reprehensibility).

Similarly, despite this mitigating circumstance, the court not only refused to instruct the jury that it could take Ms. Smith's fault into consideration when determining liability for punitive damages, L.F. 1030; B&W App. A20 (B&W's Proposed Instruction H), but also refused to give at either phase of the new trial any version of the Missouri Approved Instruction that provides that the jury "may take into consideration any mitigating circumstances attendant upon the fatal injury" when assessing damages.

MAI 6.01 [1996 Revision]; L.F. 1023, 1048; B&W App. A13, A25 (B&W's Proposed Instructions A and M). It is well settled that a court must give an MAI instruction so long as it is applicable, which it was in this instance. *See Clark v. Mo. & N. Ark. RR.*, 157 S.W.3d 665, 671 (Mo. App. W.D. 2004); *see also* Rule 70.02(b). If a new trial is to take place, this Court should make clear that the trial court should not repeat these errors.

By the same measure, this Court should clarify to what extent the evidence in any new trial may differ from the evidence in the first trial. During the first phase of the remand, the trial court concluded that the parties should be limited to presenting the same evidence that they presented to the first jury, so as to conform as closely as possible to the rule that "[a]ll actions tried before a jury involving punitive damages … shall be conducted in a bifurcated trial before the same jury if requested by any party." § 510.263.1, R.S.Mo. (2000); Pls.' App. 18. But the manner in which the trial court applied that ruling was inequitable. As to B&W, the court took this same-evidence principle to the extreme and limited B&W to literally reading the transcript of its unavailable witness's testimony from the first trial.[18] Yet as to Plaintiffs, the court allowed live testimony despite the obvious risk that such testimony would not be identical to the evidence at the first trial, and then allowed Plaintiffs to elicit testimony that went well beyond the scope of the witnesses' testimony at the first trial. Should this

[18] B&W's sole witness on strict liability product defect from the first trial was unavailable to testify because she no longer worked for the company and no longer lived in the United States.

Court deem yet another trial necessary, it should make clear that both parties may present testimony from live witnesses, so long as that testimony is limited to the only claim that is relevant after the first jury's verdict and the Court of Appeals' decision in *Smith I*, namely, Plaintiffs' strict liability product defect claim that B&W engaged in intentional wrongdoing by making design choices specific to Kool cigarettes that made them more dangerous than ordinary cigarettes.

Finally, if the Court orders a new trial, it should address the due process concerns B&W raised in both trials regarding the scope of the evidence and the jury instructions. The U.S. Supreme Court has made clear that a jury may not use punitive damages to punish a defendant for conduct that did not injure the plaintiff and may not base punitive damages on harm to nonparties. *See Philip Morris USA*, 549 U.S. at 353–57; *Campbell*, 538 U.S. at 422–24. Yet Plaintiffs were permitted to adduce all manner of evidence on remand that bore no relationship at all to B&W's manufacturing or sale of Kool cigarettes, let alone to Ms. Smith or the injury that the first jury found that B&W caused her. B&W not only challenged the admission of that evidence (at both the first trial and the second), but also requested numerous jury instructions intended to make clear to the jury that its punitive damages verdict could not be based on conduct that did not harm Ms. Smith and that it could not calculate damages based on harm to nonparties. L.F. 1023–34, 1048–60; B&W App. A13-A37.

For example, during the first phase of the new trial, the court refused to instruct the jury that it could not consider the conduct of entities not at issue in the case, conduct by B&W that did not injure Ms. Smith, or conduct that occurred outside Missouri, was

lawful where it occurred, and had no nexus to Ms. Smith. L.F. 1027–28, 1031–32; B&W App. A17-A18, A21-A22 (B&W's Proposed Instructions E–F, I–J). Similarly, during the second phase, the court refused to instruct the jury that it could not consider evidence relating to how many deaths in the United States are caused by tobacco-related diseases, and it again refused to instruct the jury regarding evidence of lawful out-of-state conduct that had no nexus to Ms. Smith. L.F. 1055, 1057–58; B&W App. A32, A34-A35 (B&W's Proposed Instructions T, V–W). If there is to be another trial in this case, this Court should instruct the trial court not to repeat these errors.

CONCLUSION

This Court should reverse and render judgment notwithstanding the verdict for B&W. If this Court decides that B&W is not entitled to judgment in its favor, this Court should reject Plaintiffs' arguments for a new trial and affirm. If this Court decides that Plaintiffs are entitled to relief on either of their points relied on, it should remand for a new trial as to both liability for and (if necessary) amount of punitive damages on Plaintiffs' strict liability product defect claim.

Respectfully submitted,

THOMPSON COBURN LLP

By /s/ Bruce D. Ryder

Bruce D. Ryder #28013
One U.S. Bank Plaza
St. Louis, MO 63101
(314) 552-6000 (Phone)
(314) 552-7000 (Fax)
bryder@thompsoncoburn.com

Jeffrey S. Bucholtz
King & Spalding LLP
1700 Pennsylvania Avenue, N.W.
Washington, DC 20006
(202) 737-0500 (Phone)
(202) 626-3737 (Fax)
jbucholtz@kslaw.com

William L. Durham II
King & Spalding LLP
1180 Peachtree Street, NE
Atlanta, GA 30309
(404) 572-4600 (Phone)
(404) 572-5100 (Fax)
bdurham@kslaw.com

Attorneys for Respondent/Cross-Appellant Brown & Williamson Tobacco Corp.

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Bruce D. Ryder, hereby certify as follows:

1. The attached brief complies with the limitations contained in Supreme Court Rule 84.06. The brief was completed using Microsoft Word for Windows, 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 23,645 words which does not exceed the 31,000 words allowed for a respondent/cross-appellant's brief.

2. One true and correct copy of the attached brief was filed electronically with the Clerk of the Court, to be served by operation of the Court's electronic filing system on Susan Ford Robertson and Kenneth B. McClain this 15th day of March, 2013.

/s/ Bruce D. Ryder
Bruce D. Ryder #28013
Thompson Coburn LLP
One U.S. Bank Plaza
St. Louis, MO 63101
(314) 552-6000 (Phone)
(314) 552-7000 (Fax)
bryder@thompsoncoburn.com