SC No.: 92961

IN THE MISSOURI SUPREME COURT

LINCOLN SMITH, ET AL., Appellants-Respondents

v.

BROWN & WILLIAMSON TOBACCO CORP., Respondent-Appellant

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

Substitute Brief of Appellants-Respondents Smith

Kenneth B. McClain # 32430
Scott Hall # 50793
Humphrey, Farrington & McClain
221 West Lexington, Suite 400
Independence, MO 64051
816-836-5050 (phone)
816-836-8966 (fax)
kbm@hfmlegal.com

Susan Ford Robertson #35932
J. Zachary Bickel # 58731
The Robertson Law Group, LLC
1044 Main St., Suite 500
Kansas City, MO 64105
816-221-7010 (phone)
816-221-7015 (fax)
susanr@therobertsonlawgroup.com

Attorneys for Appellants-Respondents Smith

Table of Contents

Table of Cases and Authorities 3

Statement of the Issues.....6

Jurisdictional Statement 7

Statement of Facts 9

Points Relied On 32

Argument.....36

Standard of Review 38, 51

Conclusion.....64

Appendix 66

Certificate of Service and Compliance 67

Table of Cases and Authorities

Cases

Beggs v. Universal C.I.T. Credit Corp.,

387 S.W.2d 499 (Mo. banc 1965). 51-53, 60

Board of Regents for Southwest Missouri State

Univ. v. Harriman, 857 S.W.2d. 445 (Mo.App. 1993) 39

Breckle v. Hawk's Nest, Inc., 42 S.W.3d 789 (Mo.App. 2001) 39

Brooks v. Kunz, 637 S.W.2d 135 (Mo.App. 1982) 41

Burnett v. Griffith, 769 S.W.2d 780 (Mo. banc 1989) 48

Durwood v. Dubinsky, 361 S.W.2d 779 (Mo. 1962) 38

Frost v. Liberty Mut. Ins. Co., 813 S.W.2d 302 (Mo. banc 1991) 46

Greenbriar Hills Country Club v. Dir. Of Revenue, 47 S.W.3d 346

(Mo. banc 2001) 47

Keltner v. K-Mart Corp., 42 S.W.3d 716 (Mo.App. 2001).....52, 53

Knothe v. Belcher, 691 S.W.2d 297 (Mo.App. W.D. 1985) 56

Langdon v. Koch, 435 S.W.2d 730 (Mo.App. 1968) 41

Lilly v. Boswell, 242 S.W.2d 73 (Mo. 1951).....47

Lohsandt v. Burke, 772 S.W.2d 759 (Mo.App. 1989) 16, 55

Massey v. Carter, 238 S.W.3d 198 (Mo.App. 2007) 61

McBurney v. Cameron,

248 S.W.3d 36 (Mo.App. 2008) (en banc).....51

McCrainey v. Kansas City Missouri School Dist., 337 S.W.3d 746 (Mo.App. 2011). 48

Overlap, Inc. v. A.G. Edwards & Sons, Inc., 318 S.W.3d 219 (Mo.App. 2010). 52, 53

Outcom, Inc. v. City of Lake St. Louis, 996 S.W.2d 571 (Mo.App. 1999).....39

Peth v. Heidbrier, 789 S.W.2d 859 (Mo.App. 1990).....8, 56

Pollard v. Whitener, 965 S.W.2d 281 (Mo.App. 1998).....52

Pope v. Ray, 298 S.W.3d 53 (Mo.App. 2009) 38, 39, 41, 45

Portis v. Greenhaw, 38 S.W.3d 436 (Mo.App. 2001). 56, 62

Rock v. McHenry, 115 S.W.3d 419 (Mo.App. 2003).....38

Sapp v. Morrison Brothers Co., 295 S.W.3d 470 (Mo.App. 2009).....51

Smith, et al. v. Brown & Williamson Tobacco Corp., 275 S.W.3d 748 (Mo.App. 2009)..... 36-38, 40, 49

Smith, et al. v. Brown & Williamson, 2012 WL 4497555 (October 2, 2012).....8

State v. Dunn, 21 S.W.3d 77 (Mo.App. 2000).....56, 62

State v. Edmonds, 188 S.W.3d 119 (Mo.App. 2006).....16, 22

State v. Mayes, 63 S.W.3d 615 (Mo. banc 2002).....56, 62

State v. Pettaway, 81 S.W.3d 126 (Mo.App. 2002).....39

Student Loan Mktg. Ass'n v. Raja,

914 S.W.2d 825 (Mo.App. 1996).....39

Strickland v. Tegeler, 765 S.W.2d 726 (Mo.App. 1989).....53, 60, 61

Tillis v. City of Branson,

975 S.W.2d 949 (Mo.App. 1998).....39

Walton v. City of Berkeley, 223 S.W.3d 126 (Mo. banc 2007).....45

Williams v. Barnes,

736 S.W.2d 33 (Mo. banc 1987).....52, 53, 56, 60, 61

Wilmes v. Kimes, 25 S.W.3d 150 (Mo. banc 2000) 45

Ziolkowski v. Heartland Regional Medical Center,

317 S.W.3d 212 (Mo.App. 2010).....38

Missouri Constitution and Statutes

Mo. Const. Art. I Sec. 22 (a).....51

Section 510.263 R.S.Mo 47

Section 510.330 R.S.Mo. 47, 48

Section 512.020 R.S.Mo. 8

Mo.R.Civ.Proc. 78.01 48

Mo.R.Civ.Proc. 78.05 56

Mo.R.Civ.Proc. 84.14 .....37, 48

Statement of the Issues

Appellants Smith bring two issues before this court. First, whether the trial court violated the law of the case and exceeded the scope of the appellate court's prior mandate issued following its opinion in *Smith, et al. v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748 (Mo.App. 2009). In its limited remand, the appellate court ordered a new trial against Brown & Williamson on punitive damages only, based on the appellate court's underlying affirmance of the prior jury's finding of strict liability product defect.

The trial court improperly permitted defendant Brown & Williamson to adduce evidence of a prior merger between Brown & Williamson and R.J. Reynolds and evidence of the conduct of non-party R.J. Reynolds asserted as a defense to avoid the imposition of an award of punitive damages, when this evidence was excluded from, and the defense was never presented, to the prior jury who determined the underlying liability of Brown & Williamson upon which the claim for punitive damages rests.

Second, whether the trial court erred in denying the Smiths' motion for new trial based on juror intentional nondisclosure when a juror intentionally concealed material information requested during voir that revealed bias and prejudice, and in ruling that the offered testimony of the juror who intentionally concealed material information of bias and prejudice, and a fellow juror who corroborated the other

juror's statements of bias and prejudice stated repeatedly during trial, prior to the jury's deliberations, is inadmissible in a post-trial evidentiary hearing.

Jurisdictional Statement

Appellants Smith appeal the trial court's August 25, 2009 judgment entered on the August 20, 2009 jury verdict finding Brown & Williamson liable for punitive damages and awarding the Smiths $1,500,000 in punitive damages. The trial occurred after the appellate court issued a limited remand ordering a new trial against Brown & Williamson for punitive damages based on strict liability product defect. *Smith, et al. v. Brown & Williamson Tobacco Corp*., 275 S.W.3d 748, 823, 824 (Mo.App. 2009).

The appellate court had previously affirmed the prior judgment entered on the jury's verdict in 2005, against Brown & Williamson for liability for negligent design, negligent failure to warn and strict liability, and awarding the Smiths $2,000,000, but reduced to $500,000 based on the jury's determination of fault (75% to Barbara Smith and 25% to Brown & Williamson). The prior jury had awarded the Smiths $20,000,000 in punitive damages. *Id*., at 784-822.

The appellate court reversed and remanded for a new trial on the Smiths' claim for punitive damages based on the jury's liability finding against Brown & Williamson for strict liability product defect. *Id*., at 823, 824. The appellate court found that punitive damages were only proper as to the strict liability product defect claim, but since the verdict form did not separate out the jury's findings of

punitive liability for negligence, failure to warn and strict liability, a new trial was necessary. *Id*. On remand, the Smiths presented evidence supporting their request for punitive damages of $50,000,000. As the 2005 jury awarded $20,000,000 in punitive damages and the 2009 jury awarded $1,500,000 in punitive damages (based upon the erroneous rulings permitting evidence and a defense of a non-party), the Smiths have statutory authority to appeal the judgment that was less than the relief sought. Section 512.020 R.S.Mo. 1986 (App. 19); *Peth v. Heidbrier*, 789 S.W.2d 859, 861 (Mo.App. 1990) (plaintiff has statutory authority to appeal the judgment which was less than the relief sought).

The appellate court, en banc, issued its opinion on October 2, 2012 reversing the trial court's judgment and ordering a new trial on the amount of punitive damages only. *Smith v. Brown & Williamson*, 2012 WL 4497555 (October 2, 2012). The appellate court found that the trial court had exceeded the scope of the appellate court's 2009 mandate during the second phase of the bifurcated trial on punitive damages by permitting evidence of a non-party to be adduced in defense of any amount of punitive damages to be awarded. Upon the request of Brown & Williamson, this court accepted transfer on December 18, 2012 and has jurisdiction pursuant to Article V, Section 3 of the Missouri Constitution.

Statement of Facts

On January 28, 2009 the appellate court issued its limited mandate following its opinion of December 16, 2008 ordering a new trial on punitive damages on strict liability product defect. *Smith, et al. v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748, 822, 823 (Mo.App. 2009). (Mandate attached at App. 1.)

Following the remand, the trial court entered two orders addressing the scope of the retrial on punitive damages. The trial court's June 15, 2009 order states that the trial would proceed on the issues of liability and the amount of punitive damages, the trial would be bifurcated, and that no further discovery would be allowed. (L.F. 57.) The June 23, 2009 trial court order states:

1. On December 16, 2008, the Western District of the Court of Appeals partially reversed this Court stating, "Thus the case is remanded to the jury for a new trial on punitive damages as to the strict liability product defect claim only."
2. The previous jury's verdict of compensatory damages based on a finding of liability of strict liability product defect was not disturbed by the Court of Appeals.
3. In a bifurcated trial, pursuant to Section 510.263 R.S.Mo. (2000), the determination by a jury as to liability for compensatory damages and the determination of liability for punitive damages occurs in the first stage

> of the trial. These determinations are made by the jury based on the evidence heard in the "first stage of the trial."
>
> WHEREFORE IT IS ORDERED AND ADJUDGED that in the first state of the retrial to determine the liability of punitive damages, the parties' evidence is limited to the evidence presented in the first trial.
>
> IT IS FURTHER ORDERED AND ADJUDGED that if a second stage of the trial is necessitated, the parties can present new evidence that falls within the purview of Missouri Statutes and Missouri Common Law.

(L.F. 58, 59; App. 2.)

The Smiths agreed with the trial court to limit the evidence presented during the first phase to the evidence offered in the previous trial. (Tr. 59, 60.) The Smiths objected prior to and during the trial court's ruling that permitted new evidence to be adduced during the second phase of the trial to be in error as outside the scope of the appellate court's mandate and error invited by Brown & Williamson. (Tr. 59, 60, 2755, 3320.)

Evidence in the 2009 trial

During the second phase of the underlying trial, Brown & Williamson presented two witnesses. Neither testified regarding Brown & Williamson. Instead, both testified regarding R.J. Reynolds: 1) James Figlar, vice president of cigarette product development testified regarding R.J. Reynolds' efforts to develop reduced-risk tobacco products, the R.J. Reynolds product stewardship

program, and the current regulatory environment in which R.J. Reynolds operates in (Tr. 2764-2943, 2963-2964, 3119-3177); and 2) Thomas Adams, chief financial officer and executive vice-president of R.J. American, Incorporated, testified regarding the prior merger between Brown & Williamson and R.J. Reynolds and current financial condition of R.J. Reynolds (Tr. 3190-3257.) The Smiths objected prior to trial and again prior to and during phase two on the basis that this evidence was outside the scope of the remand as ordered by the appellate court. (Tr. 59, 60, 2755, 3320.)

Figlar told the jury that Brown & Williamson does not make and sell cigarettes any more, as it no longer exists. (Tr. 2763.) Figlar walked the jury through the history of R.J. Reynolds, from its inception in 1875 through its current state-of-the-art manufacturing plants and the research it has done for decades, including its long-held devotion to the development of smokeless and oral tobacco products. (Tr. 2764-2943, 2963-2964, 3119-3177.) He repeatedly told the jury about research conducted by R.J. Reynolds over the years, including the more than one billion dollars R.J. Reynolds had spent trying to develop the Premier and Eclipse products, and millions of dollars assisting farmers to convert their barns so that they could make low-TSNA flue-cured tobaccos, and money and efforts spent on the development of oral tobaccos. (Tr. 2722, 2892, 2893, 2854-2876, 2878-2894, 2905-2943, 2963, 2964, 3122-3125, 3140-3148.) Figlar contrasted the behavior of R.J. Reynolds from Brown & Williamson, including

the areas of transparency and product research, development and safety and he described in detail the research conducted by by R.J. Reynolds through the years on the effects of menthol and other additives in cigarettes. (Tr. 2779-2785; 2797-2804, 2813-2822.)

Thomas Adams testified that the Reynolds Tobacco Company acquired Brown & Williamson Tobacco Company in 2004. (Tr. 3197.) He described in detail the merger and the financial details of R.J. Reynolds, including cash of $2.2 billion, liabilities of $2.4 billion and net income of $1.8 billion for 2008. (Tr. 3225, 3226.) He told the jury that Reynolds Tobacco Company acquired Brown & Williamson in 2004 and so it won't be Brown & Williamson, but instead R.J. Reynolds who will pay any punitive award in this case if one is awarded. (Tr. 3197-3200.)

Evidence in the 2005 trial and jury findings

The above evidence and defense were not offered in the first case. In the prior trial, Brown & Williamson argued that although the U.S. tobacco assets of Brown & Williamson Tobacco Corporation had already merged with R.J. Reynolds Tobacco Company to form a new company called R.J. Reynolds Tobacco, the merger was not relevant and would confuse the jury and all evidence of the merger should be excluded. (L.F. 1120, 1121; 2005 trial transcript at 35-38; App. 4.) The trial court sustained Brown & Williamson's motion in limine to exclude all evidence or reference to the merger. (L.F. 1132; App. 7.)

Accordingly, there was no testimony, exhibits or argument made or jury instruction offered during either phase of the trial regarding the merger or any conduct of non-party R.J. Reynolds used by Brown & Williamson to avoid liability for negligence, failure to warn, strict liability product defect, or punitive damages in either phase. In the first trial the verdict was in favor of the Smiths against Brown & Williamson on their claim for wrongful death based on failure to warn, negligence and product defect. (L.F. 45-47.) The jury apportioned fault 25% to Brown & Williamson and 75% to Barbara Smith. (L.F. 46.) The jury awarded damages of $2,000,000. (L.F. 46.) The jury also found that Brown & Williamson "is" liable for aggravating circumstances. (L.F. 47.)

The 2009 jury instructions and jury findings

The 2009 jury was instructed in the first phase:

1. The plaintiffs in this case are the four adult children of Barbara Smith, who died of a smoking-related illness on May 25, 2000.
2. This case was tried to a jury in January, 2005, and the jury found that Brown & Williamson's Kool cigarettes were "unreasonably dangerous" and, therefore, defective. The jury also found that Brown & Williamson's Kool cigarettes directly caused or directly contributed to cause the death of Mrs. Smith.
3. At the conclusion of the first trial, the jury awarded the Plaintiffs $2,000,000 in compensatory damages. The jury also found that Brown

> & Williamson was 25% at fault for Barbara Smith's death and Mrs. Smith was 75% at fault. The court reduced Mrs. Smith's damages to $500,000 based on this allocation of fault.

(L.F. 1020; Tr. 70, 71.) The jury was instructed that if it believed that at the time that Brown & Williamson sold the cigarettes the defendant knew of the defective condition and danger of the cigarettes, which was found by the first jury and that defendant showed complete indifference to or conscious disregard for the safety of others then the jury may find that defendant Brown & Williamson is liable for aggravating circumstances. (L.F. 1021.)

The jury found that defendant Brown & Williamson "is" liable for damages for aggravating circumstances. (L.F. 1039; App. 9.)

The 2009 jury was instructed in the second phase:

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

> You may consider harm to others in determining whether defendant's conduct showed complete indifference to or conscious disregard for the safety of others. However, in determining the amount of any award of damages for aggravating circumstances, you must not include damages for harm to others who are not parties to this case.

(L.F. 1047.) The jury awarded $1,500,000 in damages for aggravating circumstances. (L.F. 1066; App. 10.) The trial court entered judgment on the verdict. (L.F. 1067, 1068; App. 11.)

The Smiths' post-trial motions

The Smiths filed post-trial motions asking for the trial court to vacate and set aside the judgment and order a new trial because the trial court's allowance of evidence of the Brown & Williamson-R.J. Reynolds merger and the conduct of non-party R.J. Reynolds violated the law of the case and the scope of the appellate court's prior mandate and that a new trial was also warranted on the basis of juror intentional nondisclosure. (L.F. 1088-1191.) An evidentiary hearing occurred on the issue of juror nondisclosure. (Tr. 3396-3455.) The trial court denied all post-trial motions and with respect to the issue of juror nondisclosure the trial court's order read as follows:

The trial court's post-trial order:

> Specifically, Plaintiff raises two points of juror nondisclosure that deal with the same juror. First. Plaintiffs raised the issue that the juror

failed to disclose that the juror's mother died from lung cancer. Defendants objected to the evidence on the basis that the subject matter of the questions on voir dire, that the juror allegedly failed to answer, was not set out in the motion for new trial. The objection was sustained and Plaintiffs made an offer of proof. This Court reiterates its ruling that the evidence is not admissible. *Lohsandt v. Burke*, 772 S.W.2d 759 (Mo.App. W.D. 1989). Secondly, Plaintiff's attemped to adduce evidence that the same juror failed to disclose his opinion that the lawsuit of the plaintiffs was "frivolous." Plaintiff's evidence consisted of the hearsay testimony from another juror. Defendants objected citing *State v. Edmonds*, 188 S.W.3d 119 (Mo.App. S.D. 2006). This Court sustained the objection and the Plaintiffs made an offer of proof. This Court reiterates its ruling that the evidence is not admissible." (L.F. 1515, 1516; App. 13.)

Voir Dire

During voir dire, counsel for the Smiths explained the importance of understanding bias and prejudice:

…He mentions this term bias. And we generally think of words like bias and prejudice in a negative sense outside this kind of setting. But really bias just means "I'm leaning one way or the other" and prejudice means "I've prejudged it," in other words I've made my mind up about an issue. It doesn't have any of the connotations that we frequently think about being

prejudiced. It simply means, I've already made my mind up about that issue and you've got a hill to climb to convince me otherwise. And if that's the situation you're coming in with, then it's probably better you not sit on this jury because we do have a lot of people to select form that might not have that view." (Tr. 88.)

One of the first areas of inquiry by counsel for the Smiths was the subject matter of frivolous lawsuits.

Questions regarding frivolous lawsuits

Does anyone here believe that there are just too many lawsuits? How many people believe that? I've got my hand up too. Because lots of the lawsuits that are filed keep me from getting my cases up to trial. And I kind of think my cases are pretty important. They involve important issues.

But do you think in general—who has strong opinions—I saw most hands go up that there are too many lawsuits. How many people right now, knowing what you know, think that this case is a case that shouldn't have been filed? Okay, all right. Let's see, let me find my chart. I have put it down here.

Let's see, Juror 16, Ms. Rish. I'm going to get a highlighter here so I can keep track of the people. Who else has a hand up " (Tr. 92, 93.)

Seventeen members of the panel raised their hand, but not Mr. Mackison. (Tr. 92-94.) Follow-up questions were asked as to whether any were leaning

toward Brown & Williamson. (Tr. 95.) Members of the panel asked for an explanation of the difference between the money the family had already received and the money they were seeking in this trial jurors began discussing the difficulty in the notion of awarding punitive damages in a case where the decedent had been found to be at 75% at fault for smoking. (Tr. 96-100.) Members on the panel also started discussing family members who had died of smoking:

> Venireperson Anderson: I didn't hear you say something about, number one, punishment, and , number two, awarding the family—my father passed away from cancer. I mean, you know, I don't think I need to say any more. I'm afraid I might be saying things I shouldn't be. But the cancer situation, my mother had emphysema from the smoking. My dad had, I mean there's a lot of things people can sue people over and get gratuities, but what is that gonna – I mean, we need laws against—I don't know.
>
> Mr. McClain: You don't think—you've already made you mind up about a lot of these issues, right?
>
> Venireperson Anderson: Yes, sir. (Tr. 100.)

The discussion went back to the questions regarding frivolous lawsuits.

> "But I wanted to talk in general about lawsuits outside of this realm, outside of this tobacco lawsuit. Is there anybody else that has concerns about lawsuit in general? You just don't think that, you think the system is out of

> control or think that – you've heard about some things that you thought were crazy, that you think about when came to court this morning? Anybody have any concerns regarding lawsuits in general? I don't see any hands. I generally get a hand about McDonald's coffee." (Tr. 107.) "Okay, now we've got somebody. Now, I want it to be somebody who didn't raise their hand already about this lawsuit and thinking that it was crazy. But I want to hear from other people about McDonald's coffee or any other kind of cases you've thought you heard about. Who here has heard about the McDonald's coffee and thought about it for more than half a second?" (Tr. 108.)

Follow-up questions were asked including: " But what I'm hearing is you think that the dangers of cigarettes are open and obvious." (Tr. 110.) "Who else has a concern about frivolous lawsuits or lawsuits you're worried about?" (Tr. 114.) Follow up questions were asked: "So it's fair to say right now you're leaning to Brown & Williamson on this issue about whether they should be punished?" Venireperson Rutherford: "Well, my take is that this shouldn't even be a lawsuit." (Tr. 114.)

Others were asked "Anyone else with a—yes, Juror No. 9 is Ms. Smithey? Yes, ma'am." She answered: " I would have to agree with it being a silly lawsuit and I would probably weigh on more their side. I'm a smoker and I know that's my choice to smoke." (Tr. 115.) How many people right now, knowing what you

know, think that this case is a case that shouldn't have been filed?" (Tr. 92.) "So in general you just don't think that this case should come to trial and it would be better for you not serve on this case. Is that fair, Mr. Pointer?" (Tr. 122.) "Who else had a hand up? Yes, sir, Juror No. 58, Mr. – didn't you answer the question you don't think this case should be in court anyway? Didn't you say that?" (Tr. 122.)

> "So it's fair to say right now you're leaning to Brown & Williamson on this issue about whether they should be punished?"
>
> Venireperson Rutherford: "Well, my take is that this shouldn't be a lawsuit." McClain: "Right. So that's – you're against me. Not personally. But my position, right"
>
> Venireperson Rutherford: "Right."
>
> "Thank you, Ms. Rutherford. I appreciate that. Anyone else with a – yes, Juror No. 9 is Ms. Smithey? Yes, ma'am.
>
> Venireperson Smithey: "I would have to agree with it being a silly lawsuit and would probably weigh on more their side. I'm a smoker and I know that's my choice to smoke."

(Tr. 114, 115.)

The questioning continued with venirepersons who raised their hands on whether they felt this case was frivolous. (Tr. 115-143.) Venireperson Jacka: "I guess I'm undecided whether it's worthy to be tried." (Tr. 119.)

> Venireperson Pointer: "I was involved in a lawsuit when I was 14. I was ran over by a drunk driver. They drove up on the sidewalk. And I have a plate with six screws through my left arm. And I don't see Anheuser-Busch going to trial. Because they supplied the alcohol…They paid my medical bills. And that was it. And that's all the courts would give me. I didn't get punitive damages—because this affects me the rest of my life."

(L.F. 121.) He agreed that it was better for him not to serve as a juror on this case. (Tr. 124.) Counsel for the Smiths asked if there was anyone else who had concerns about lawsuits. (Tr. 125, 126.)

Counsel for the Smiths asked about whether venirepersons felt that smoking was a personal choice and these type of lawsuits should not be brought. (Tr. 129-132.) Some did not feel that this case was frivolous. (Tr. 136.) Counsel for the Smiths against asked if anyone has any questions or thinks they should have answered a question previously. (Tr. 173.) During later questions Venireperson Greathouse answered "Because my mom smoked Kools for years and she has all kinds of problems. She never sued anybody, and I don't think that I could give punitive damages to anybody." (Tr. 191.) Others answered regarding that because of prior family experiences they could not be fair: Venireperson Wilson: "My father passed away from lung cancer. My smoked for 20 years and had problems because of it. She stopped and she's getting a little bit better now, but yeah I'm

already—it would sway my—I'm already" Mr. McClain: "You already think you couldn't be fair?" Venireperson Wilson: "Yeah." (Tr. 207, 208.)

Questions regarding lung problems

During questioning on other subjects various venirepersons continued to bring up smoking and how it has affected them and their family. (Tr. 246, 258-261.) Counsel for the Smiths then asked:

> "Here is a question that kind of came up, people had mentioned it kind of in passing, so I better ask everybody about it. Who here has had a family member with a lung problem? Who has had a family member with a lung problem? Whether it be lots of people. I think I've got to ask everybody." (Tr. 260.)

Follow-up questions were asked as to what kind of lung problem and whether those people smoked and whether the venireperson's experiences would affect their ability to be fair and impartial. (L.F. 260-331.) Venireperson Mackie answered that his grandparents both had emphysema, COPD and heart disease. (Tr. 261.) When asked "Does the issue that your grandfathers both suffered from a tobacco-related disease impact your ability to be fair and impartial in the case" the answer was "Among other things, yes." (Tr. 262.) The next venireperson discussed a brother who had been diagnosed with COPD after smoking. (Tr. 262, 263.)

Venireperson Small disclosed that he had spots on his lungs from smoking and it would be difficult for him to be fair and impartial. (Tr. 267-269) Venireperson McKinney disclosed that he had a stepfather smoked Kools, who "had lung problems" but who died from MRSA. (Tr. 269-274.) He revealed that he also smoked but when asked multiple questions on whether he could be fair and impartial on the issue that would be decided he answered that he could. (Tr. 271-274.)

Counsel for the Smiths asked "Who else had a lung injury in the first row? Anybody else? How about the second row?" (Tr. 274.) Venireperson Meara disclosed that her mother-in-law had a lung disease but it was not smoking related. (Tr. 274, 275.) Venireperson Cunnius revealed a grandfather who dies from lung cancer but who did not smoke. (Tr. 275-277.) Venireperson Thompson disclosed a grandfather who smoke and had lung cancer. (Tr. 277.) Venireperson Switzer had an aunt with lung cancer. (Tr. 278.) Venireperson Mullien revealed several family members with "lung issues," including a grandmother who died of lung cancer and smoked the day she died in the hospital. (Tr. 278.)

Counsel for the Smiths continued: "Who else had a lung situation?" (Tr. 285.) Venireperson Kelly revealed a father who died of lung cancer and venireperson Benham had a father with emphysema. (Tr. 285, 286.) Venireperson Hembree revealed a father who smoked heavily and died of lung cancer. (Tr. 287.) Venireperson Mitchem revealed a father who died of lung cancer. (Tr. 287, 288.)

Counsel for the Smiths asked "Anybody else with lung issues?" (Tr. 289.) Venireperson Lewis disclosed that her son had been diagnosed with COPD and that he is a smoker. (T. 289.) Venireperson Schloman revealed that she had a grandmother who had breathing problems but died of a heart attack. (Tr. 290.) Venireperson Swope disclosed a grandmother who had emphysema and died of lung cancer and a father diagnosed with COPD. (Tr. 291.) Venireperson Dodson disclosed that he had a lung disease. (Tr. 291, 292.) Venireperson Hall's father died of lung disease. (Tr. 293.) Venireperson Jacka disclosed a grandmother who died of smoking-related emphysema. (Tr. 294.) Venireperson Covert had a grandfather with "lung issues" who smoked. (Tr. 295.) Venireperson McConnell revealed that she quit smoking 11 years ago but who had been diagnosed with COPD, bronchitis and asthma. (Tr. 296.) Venireperson Perry revealed a mother-in-law had lung cancer. (Tr. 298.) Venireperson Tillman revealed that she had several family members with lung issues, including emphysema, asthma and lung cancer. (Tr. 298.)

Counsel for the Smiths asked "Anybody else? Did I get everybody on lung questions?" (Tr. 300.) The following morning he asked: "Did anyone think overnight, you know, there was something that came up that I really wish I could change my answer, or there was something that I should have answered yesterday, or this morning, whenever you thought about it, last night? Is there anybody in that situation that thinks that they had something else that they needed to tell us

about and wish they had and kind of passed over it?" (Tr. 333, 334.) "Anyone else that had a question or something that you think, I should have told you about this, or you did some further thinking about it last night and have something to add?" (Tr. 336.)

Counsel for Brown & Williamson emphasized the importance of disclosing information, experiences and opinions regarding cigarettes and smoking: "Obviously, the case is about cigarettes, so I'm really very anxious to talk to everybody that smoked cigarettes or had someone in your family incurring injury from cigarettes or believes they have been harmed by secondhand cigarette smoke, all of those type things." (Tr. 473.)

Counsel for Brown & Williamson continued:

> "As you heard this is a case being brought by the Smith Family. You met the four adult children of the Smiths here early yesterday morning. The case relates to, of course, the death of their mother, Barbara Smith. Please – how many people have lost a parent within the last five years or so? Lots of hands. Lots of numbers. Let me ask, who feels that, given what you know about this case about it involving a claim being brought by the children related to the loss of their mother, who feels like your own experience with the loss of your parents would be something that might be on your mind as you listen to the evidence in this case? Anybody?" (Tr. 478.)

Venireperson Mackison never revealed any answers to the areas of inquiry outlined above and he served on the jury. He was asked questions about damage caps and limits and answered that "My opinion doesn't concern the tobacco industry. It's with healthcare." (Tr. 544-547.) Counsel for the Smiths asked; "Should I ask you anything else, Mr. Mackison?" He answered: "No." (Tr. 547.) Counsel for Brown & Williamson asked a few follow-up questions of venireperson Mackison on whether he understood the burden of proof the plaintiffs must meet to get an award in this case. (Tr. 732-734.)

The evidentiary hearing on the Smiths' post-trial motions

At the post-trial motion hearing the trial court Juror Mackison was asked whether he recalled the questions asked of any family members with lung problems and whether he believed the Smiths' case to be frivolous. He responded by stating that at the time the questions were asked he believed that he could be a fair and impartial juror and that he did not think the case was frivolous; he thought it was interesting. (Tr. 3423, 3424, 3426, 3427.) He denied that he ever stated that the lawsuit was frivolous during the trial outside of deliberations. (Tr. 3424, 3425.) Mackison stated that he found out only after the Smith trial that his mother had COPD. (Tr. 3417.)

The trial court refused to permit Juror Mackison to answer questions posed by counsel for the Smiths on whether he failed to disclose that his mother had lung

problems. (Tr. 3416-3423.) Counsel for the Smiths made the following offer of proof.

Offer of proof from Juror Mackison:

Q: Mr. Mackison, do you recall that I asked questions of all jurors about any persons that had relatives with lung injuries?

A: Yes.

Q: And you didn't answer that question, did you?

A: No. I didn't know it at the time. I told you I didn't know that until I looked at the death certificate.

Q: And you looked at your mother's death certificate after the trial began?

A: No, sir, after the trial finished.

Q: And so throughout this time period you were unaware that your mother had died of a lung illness? Is that your testimony under oath, sir?

A: That is true, yes. I was unaware of it.

Q: You didn't know she had any lung problems?

…

A: I knew she had trouble breathing.

Q: And so the question that I asked the jurors that we've already to His Honor was "Did any of your family members ever have any lung problems?" And you didn't answer that question?

A: I don't remember you asking that question, I'm sorry.

Q: “Who here had a family member with a lung problem? Who has had a family member with a lung problem?” You were sitting here. You didn’t raise your hand in that regard. Did you know your mother had a lung problems at the point I was asking the questions?

…

A: Say it again, please.

Q: Mr. Mackison, the question was asked: “Who here has had a family member with a lung problem?” Your mother had a lung problem, isn’t that true?

A: I found out after reading the death certificate. She died right after surgery of cancer of I believe it was the pancreas. And I thought that’s what her death was from. And I didn’t know until afterwards, when they were trying to wean her off the respirator, they said that because of her diminished lung capacity from the years of smoking, even though she had quit 11 years before that, that that was a contributing factor.

Q: Mr. Mackison, you just told us a second ago you knew she had lung problems; isn’t that true

…

A: That I knew she had lung problems? I knew she had—I mean, she was overweight, she didn’t breathe well. No, she---I don’t remember. Okay, I

thought it was---I guess I was looking at it if that's what killed her and I didn't believe it was the case at the time.

Q: That wasn't the question. The question was lung problems; isn't that true?? And you told our researcher that her lung capacity diminished to 20% when she finally quit smoking. That's what you told our investigator.

A: Yes, sir, I did. I found that out after the jury---after everything was over because I looked into it.

Q: And you told him also, didn't you, that ever since you were a little kid, let's say 1964 through '65, I begged my mother to quit smoking and she said that on the few enjoyments she gets out of life that she's not going to. So the old saying where its cutting years off my life, she goes, I'd rather cut it off and enjoy smoking. Didn't you tell him that?

…

A: Yes, sir, I did say that.

Q: And so you knew from the time that you were a kid that her smoking was cutting off years of her life; is that right?

A: I've known ever since I was a little kid that smoking was bad for you. Yes, I tried to talk her into quitting.

Q: And you knew she had breathing problems at the time you were sitting her in the jury box; am I right?

A: No. I didn't know that that's why she had died.

Q: But, Mr. Mackison, there was no question about your mother dying here. It was, "Who has had family members with lung problems," correct?

A: Okay.

Q: And your mother had a lung problem, didn't she?

A. I didn't know that she did. (Tr. 3428-3433.)

The trial court also refused to allow Juror Thompson to answer questions from counsel for the Smiths on how he had heard Juror Mackison state repeatedly throughout the trial (prior to the jury deliberations) that he thought the Smiths' case was frivolous. The Smiths made the following offer of proof.

Offer of proof of Juror Thompson

Q: Mr. Thompson, did Mr. Mackison, outside of the context of deliberations during the trial, express the view that this was a frivolous lawsuit?

…

A: Yes.

Q: And did he say it many times?

A: Yes.

Q: And did it even become irritating to you that he said it so often?

A: Yes.

Q: And did he begin expressing that viewpoint from the beginning of the trial, outside—well, there was no deliberations, so from the beginning of the trial?

A: I don't know exactly when he started expressing that. So I couldn't give you as to the very beginning of the trial. So I don't know exactly when but he did express it multiple times.

…

Q: Did he ever express the idea outside of deliberations of his mother having COPD during the pendency of the trial?

A: Yes.

…

Q: And so if we just had a witness who was just here saying, I discovered it after the trial happened, you said that---you say that he said it during the trial, his mother had COPD, correct?

A: Yes.

Q: And that was caused by smoking?

A: 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. (Tr. 3441-3443.)

Points Relied On

I.

The trial court erred in permitting Brown & Williamson to adduce evidence of the 2004 Brown & Williamson-R.J. Reynolds merger and conduct of non-party R.J. Reynolds asserted as a defense in the second phase of the underlying trial in an attempt to avoid the imposition of a punitive damages award because the trial court violated the law of the case and scope of the appellate court's mandate rendering the trial court's judgment null and void in that it is violative of the appellate court's limited remand to permit Brown & Williamson to attempt to avoid the imposition of a punitive damages award based upon evidence of a non-party that was excluded from and a defense that was never presented to the prior jury who determined the underlying liability of Brown & Williamson for strict liability product defect upon which the current claim for punitive damages rests.

Pope v. Ray,

298 S.W.3d 53(Mo.App. 2009).

Smith, et al. v. Brown & Williamson Tobacco Corp.,

275 S.W.3d 748 (Mo.App. 2009).

Outcom, Inc. v. City of Lake St. Louis,

996 S.W.2d 571 (Mo.App. 1999).

Walton v. City of Berkeley,

223 S.W.3d 126 (Mo. banc 2007).

II.

The trial court erred in sustaining Brown & Williamson's objections to the offered testimony of Jurors Mackison and Thompson and in denying the Smiths' motion for new trial on the basis of juror intentional nondisclosure of material information requested during voir dire because these rulings were an abuse of the trial court's discretion in that clear questions were asked calling for disclosure of material information disclosing juror bias and prejudice in this wrongful death case against a tobacco company for punitive damages only and the testimony of jurors Mackison and Thompson was proper and established that juror Mackison intentionally concealed his belief that the case was frivolous and that his mother had been a long-time smoker who had lung problems.

Strickland v. Tegeler,

765 S.W.2d 726 (Mo.App. 1989).

Beggs v. Universal C.I.T. Credit Corp.,

387 S.W.2d 499 (Mo. banc 1965).

Williams v. Barnes,

736 S.W.2d 33 (Mo. banc 1987).

Peth v. Heidbrief,

789 S.W.2d 859 (Mo.App. 1990).

Argument

I.

The trial court erred in permitting Brown & Williamson to adduce evidence of the 2004 Brown & Williamson-R.J. Reynolds merger and conduct of non-party R.J. Reynolds asserted as a defense in the second phase of the underlying trial in an attempt to avoid the imposition of a punitive damages award because the trial court violated the law of the case and scope of the appellate court's mandate rendering the trial court's judgment null and void in that it is violative of the appellate court's limited remand to permit Brown & Williamson to attempt to avoid the imposition of a punitive damages award based upon evidence of a non-party that was excluded from and a defense that was never presented to the prior jury who determined the underlying liability of Brown & Williamson for strict liability product defect upon which the current claim for punitive damages rests.

After affirming the prior jury's verdict against Brown & Williamson on the Smiths' claims for actual damages for negligence, failure to warn and strict liability product defect, the appellate court ordered a new trial on one issue—the liability of Brown & Williamson for punitive damages based on its liability for strict liability product defect. *Smith, et al. v. Brown & Williamson Tobacco Corp.*,

275 S.W.3d 748 (Mo.App. W.D. 2009). During the retrial, the trial court improperly permitted Brown & Williamson to adduce evidence of a prior merger between Brown & Williamson and R.J. Reynolds and of the conduct of non-party R.J. Reynolds to avoid the imposition of an award of punitive damages, when this evidence and defense were never presented to the prior jury.

The trial court's ruling violated the law of the case and exceeded the scope of the appellate court's prior mandate, rendering its judgment null and void. The appellate court properly found that the trial court had exceeded the scope of its prior mandate and reversed for a new trial for a determination of the amount of punitive damages only. No party asserted error in the manner in which the first phase of the bifurcated trial on punitive damages was conducted.

This court should reverse the trial court's judgment and exercise its discretion in the appropriate relief to order. Missouri Rule of Civil Procedure 84.14 affords this court wide discretion in permitting this court to reverse and remand for a new trial on some or all of the issues or to give such relief as the trial court ought to give in order to finally dispose of the case. (App. 22.) In light of the trial court's failure to follow the scope of the appellate court's prior mandate, this court should reverse and remand for a new trial on liability and amount of punitive damages; the amount of punitive damages only; or to send this case back to the appellate court for it to determine whether the original $20,000,000 punitive verdict comports with the constitutional principles previously briefed by the parties

but not reached by the appellate court in its 2009 opinion (the appellate court finding that points VII, VIII and X raising constitutional issues regarding the punitive damages award need not be addressed in light of the limited remand for a new trial on the submissibility of liability for punitive damages issue). *Smith*, 275 S.W.3d at 823, 824.

Standard of review

A trial court's rulings on the admission or exclusion of evidence are reviewed under an abuse of discretion standard. *Ziolkowski v. Heartland Regional Medical Center*, 317 S.W.3d 212, 216 (Mo.App. 2010); *Rock v. McHenry*, 115 S.W.3d 419, 420 (Mo.App. 2003).

On remand the scope of the trial court's jurisdiction is defined by the appellate court's mandate. *Pope v. Ray*, 298 S.W.3d 53, 57 (Mo.App. 2009). The mandate communicates the judgment to the lower court and the opinion, which is a part thereof, serves an interpretive function. *Id.; Durwood v. Dubinsky*, 361 S.W.2d 779, 783 (Mo. 1962). Any orders or adjudications entered by the trial court must be confined to those that are necessary to execute the appellate court's judgment as set forth in the mandate. *Pope*, 298 S.W.3d at 57. Proceedings that are contrary to the directions of the mandate are unauthorized and unenforceable. *Id.*

In the context of a retrial that is to occur following a limited remand with specific directions, the trial court is duty bound to render a judgment that strictly

conforms to the mandate and the court is without power to modify, alter, amend or otherwise depart from the appellate court's directions. *Id*.; *State v. Pettaway*, 81 S.W.3d 126, 130 (Mo.App. 2002); *Student Loan Mktg. Ass'n v. Raja*, 914 S.W.2d 825, 829 (Mo.App. 1996). Under Missouri law, a "general remand" is one without specific directions that leaves all issues open to consideration in the new trial. *Pope*, 298 S.W.3d at 57; *Outcom, Inc. v. City of Lake St. Louis*, 996 S.W.2d 571, 574 (Mo.App. 1999). In contrast, when an appellate court remands with specific directions, the trial court is obligated by the mandate and the corresponding opinion to act in accordance with the specific direction. *Id*.

The appellate courts, in reviewing actions of the trial court on remand, will look to the mandate in conjunction with the results contemplated by the appellate opinion. *Tillis v. City of Branson*, 975 S.W.2d 949, 951 (Mo.App.1998). Thus, the mandate serves the purpose of communicating the judgment of the appellate court to the lower court, and the opinion, which is part thereof, serves an interpretative function. *Board of Regents for Southwest Missouri State Univ. v. Harriman*, 857 S.W.2d, 445, 449 (Mo.App. 1993). A trial court's proceedings contrary to the appellate court's opinion and mandate are null and void. *Breckle v. Hawk's Nest, Inc*., 42 S.W.3d 789, 792 (Mo.App. 2001).

The trial court exceeded the scope of the appellate court's mandate by permitting evidence from Brown & Williamson of the merger and conduct of non-party R.J. Reynolds in an attempt to avoid the imposition of a punitive damage award.

The appellate court's mandate in *Smith, et al. v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748 (Mo.App. 2009) states: "Now on this day the judgment is affirmed 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." (App. 1.) The appellate court's opinion states in its direction to the lower court: "Thus the case is remanded to the jury for a new trial on punitive damages as to the strict liability product defect claim only."

The appellate court affirmed the prior jury's verdict finding liability against Brown & Williamson for negligence, negligent failure to warn and strict liability product defect. The remand was limited in ordering a new trial only on whether *Brown & Williamson's conduct* (that supported the jury's finding of liability for strict liability product defect) supported the Smiths' claim for punitive damages.

This *limited remand* did not permit Brown & Williamson to attempt to avoid liability for punitive damages by adducing evidence and a defense based on *non-party R.J. Reynolds' conduct.* In the context of this limited remand, the punitive damage trial must be based on the same conduct of the same defendant who was found liable on the underlying claim of strict liability product defect. *See*

Pope, 298 S.W.3d at 57, 58; *Brooks v. Kunz*, 637 S.W.2d 135, 136-38 (Mo.App. 1982) (trial court exceeded jurisdiction by allowing amendment of pleading and assertion of new theory of liability following limited remand); *Langdon v. Koch*, 435 S.W.2d 730 (Mo.App. 1968) (where appellate court mandate remanded for new trial on damages only, defendant would not be permitted to raise new defenses to liability).

In the prior trial, Brown & Williamson argued that though the U.S. tobacco assets of Brown & Williamson Tobacco Corporation had already merged with R.J. Reynolds Tobacco Company to form a new company called R.J. Reynolds Tobacco, the merger was not relevant and would confuse the jury and all evidence of the merger should be excluded. (L.F. 1120, 1121; 2005 trial transcript at 35-38; App. 4.) The trial court sustained Brown & Williamson's motion in limine to exclude all evidence or reference to the merger. (L.F. 1132; App. 7.)

Accordingly, there was no testimony, exhibits or argument ever made or jury instruction offered *during either phase* of the 2005 trial regarding the merger or any conduct of non-party R.J. Reynolds used by Brown & Williamson to avoid liability for negligence, failure to warn, strict liability product defect, or for punitive damages. During the punitive damages phase of the prior trial Brown & Williamson did not seek to offer any evidence of the prior merger or of any conduct of non-party R.J. Reynolds to avoid the imposition of any punitive damage

award. Instead, *all of the evidence adduced was on Brown & Williamsons' conduct and financial condition.* (2005 trial transcript 3237-3311.)

As a result, the jury in the prior trial based its punitive award verdict solely upon the conduct of Brown & Williamson, who appealed the actual and punitive awards but raised no issue of the admissibility of the merger or any evidence or defense relating to non-party R.J. Reynolds. *None* of the issues raised by Brown & Williamson in the prior appeal had anything to do with the merger or any conduct of R.J. Reynolds as it related to Brown & Williamson's assertions that it had no actual or punitive liability for any of the claims brought by the Smiths.

However, in the second phase of the 2009 retrial, *Brown & Williamsons' entire defense and all of the evidence adduced was based on the merger and on the conduct of non-party R.J. Reynolds*. During the second phase Brown & Williamson presented two witnesses. Neither testified regarding Brown & Williamson. Instead, both testified regarding R.J. Reynolds: 1) James Figlar, vice president of cigarette product development testified regarding R.J. Reynolds' efforts to develop reduced-risk tobacco products, the R.J. Reynolds product stewardship program, and the current regulatory environment in which R.J. Reynolds operates in (Tr. 2764-2943, 2963-2964, 3119-3177); and 2) Thomas Adams, chief financial officer and executive vice-president of R.J. American, Incorporated, testified regarding the prior merger between Brown & Williamson

and R.J. Reynolds and current financial condition of R.J. Reynolds (Tr. 3190-3257.)

Figlar told the jury that Brown & Williamson does not make and sell cigarettes any more as it no longer exists. (Tr. 2763.) Figlar walked the jury through the history of R.J. Reynolds, from its inception in 1875 through its current state-of-the-art manufacturing plants and the research it has done for decades, including its long-held devotion to the development of smokeless and oral tobacco products. (Tr. 2764-2943, 2963-2964, 3119-3177.) He repeatedly told the jury about research conducted by R.J. Reynolds over the years, including the more than one billion dollars R.J. Reynolds had spent trying to develop the Premier and Eclipse products, and millions of dollars assisting farmers convert their barns so that they could make low-TSNA flue-cured tobaccos, and money and efforts spent on the development of oral tobaccos. (Tr. 2722, 2892, 2893, 2854-2876, 2878-2894, 2905-2943, 2963, 2964, 3122-3125, 3140-3148.) Figlar contrasted the behavior of R.J. Reynolds from Brown & Williamson, including the areas of transparency and product research, development and safety and he described in detail the research conducted by by R.J. Reynolds through the years on the effects of menthol and other additives in cigarettes. (Tr. 2779-2785; 2797-2804, 2813-2822.)

Thomas Adams testified that the Reynolds Tobacco Company acquired Brown & Williamson Tobacco Company in 2004. (Tr. 3197.) He described in

detail the merger and the financial details of R.J. Reynolds, including cash of $2.2 billion, liabilities of $2.4 billion and net income of $1.8 billion for 2008. (Tr. 3225, 3226.) He told the jury that Reynolds Tobacco Company acquired Brown & Williamson in 2004 and so it won't be Brown & Williamson, but instead R.J. Reynolds who will pay any punitive award in this case if one is awarded. (Tr. 3197-3200.)

The Smiths objected prior to trial and again prior to and during phase two on the basis that this evidence was outside the scope of the remand as ordered by the appellate court. (Tr. 59, 60, 2755, 3320.) It is outside the scope of the appellate court's limited remand to permit Brown & Williamson to attempt to avoid the imposition of a punitive damage award based on a defense and evidence never presented in the prior trial (and in fact excluded at the request of Brown & Williamson).

The prejudice of the trial court's improper permission of this evidence is evident. In the prior trial the jury, when faced only with the evidence of Brown & Williamson's conduct, awarded the Smith's $20,000,000 in punitive damages. However, the jury upon the retrial, when provided days of evidence of the asserted decades-long benevolent conduct of R.J. Reynolds, awarded $1,500,000 in punitive damages. The Smiths were prejudiced and are aggrieved by the award based upon the erroneous allowance of Brown & Williamson to essentially avoid punitive damages liability by arguing that Brown & Williamson doesn't exist

anymore and R.J. Reynolds did not and will not engage in the conduct similar to Brown & Williamson.

It was improper, prejudicial and outside the scope of permissible issues on remand, to permit Brown & Williamson to change the limited retrial to encompass issues, evidence and defenses based on the conduct of non-party R.J. Reynolds. The merger occurred before the first trial. If Brown & Williamson wanted to adduce evidence of non-party R.J. Reynolds (on the issues relevant to liability for actual or punitive damages), it could have done so but it chose the opposite approach. It requested and obtained an order excluding this evidence from both phases of the prior trial. The trial court exceeded the scope of the appellate court's prior mandate and the judgment should be set aside and a new trial ordered consistent with the appellate court's prior mandate. *Pope*, 298 S.W.3d at 58 (matters in existence and known to the parties and court could have been addressed in the prior opinion, but allowing respondent to "reserve" issues omitted from their original appeals to be decided later does not advance judicial economy"); *Walton v. City of Berkeley*, 223 S.W.3d 126, 129, 130 (Mo. banc 2007) (the law of the case not only bars relitigation of issues not expressly raised and decided on appeal, but also those that could have been raised but were not; *Wilmes v. Kimes*, 25 S.W.3d 150, 154 (Mo. banc 2000).

The appellate court's limited remand did not permit Brown & Williamson to attempt to avoid liability for punitive damages by adducing evidence and a

defense based on non-party R.J. Reynolds' conduct. In the context of this limited remand, the punitive damage trial must be based on the same conduct of the same defendant who was found liable on the underlying claim of strict liability product defect. Brown & Williamson' belated attempt to avoid the imposition of any punitive damage award through a defense based on evidence of the merger and the conduct of non-party R.J. Reynolds violates the law of the case and exceeds the scope of the appellate court's mandate.

Brown & Williamson sought transfer arguing that the 2005 remand could not be interpreted to affect anything to occur in phase two of a retrial because the appellate court never reached any issues as to phase two of the prior trial. This argument is misplaced. An appellate court's limited remand is interpreted to not only by what is clearly stated but also by what is contemplated by the appellate court by necessary implication. *Frost v. Liberty Mut. Ins. Co.*, 813 S.W.2d 302, 305 (Mo. banc 1991). The appellate court's limited remand, as defined by the mandate and interpreted by the opinion, contemplated that the trial court was to conduct a retrial on the limited issue of Brown & Williamson's liability for punitive damages based on its conduct that gave rise to the prior jury's finding it liable for strict liability. The limited action for the jury to determine liability for punitive damages was required to be tried in the same nature against the same defendant as was done in the first trial.

This court has wide discretion in determining the appropriate relief.

Brown & Williamson's argues in its transfer application that the "same jury" has to determine liability for punitive damages and the amount assessed. Section 510.263 R.S.Mo. (App. 16.) However, this argument lacks support. Section 510.330 R.S.Mo. has given trial and appellate court's the right to grant a new trial on limited issues since 1945. (App. 18.) The legislature is presumed to know existing law when enacting a new piece of legislation. *Greenbriar Hills Country Club v. Dir. Of Revenue*, 47 S.W.3d 346, 352 (Mo. banc 2001).

In *Lilly v. Boswell*, 242 S.W.2d 73, 78 (Mo. 1951), this court rejected a defendant's assertion that a new trial limited to the amount of damages violated a defendant's constitutional rights. This court explained that the General Assembly's enactment of the Civil Code, effective January 1, 1945, Section 510.330 R.S.Mo. 1949 provided that a new trial may be granted on "all or part of the issues after trial by jury." This court found that the legislature had given sanction to what this court had previously permitted and had continued to recognize thereafter. This court found that this was consistent with the federal rules and federal cases. *Id*., internal citations omitted. This court reasoned:

> Cases cited by defendants from other jurisdictions are not controlling or persuasive. We are obligated to follow the directions of the Civil Code. Furthermore, properly administered, the practice is to be commended. There can be no sound reason for requiring a litigant to submit to the

hazards and expense of resubmitting the issue of liability where the issue of damages can be tried anew without prejudice." *Id*.

This has been recognized as appropriate when the relief granted is a new trial on the amount of punitive damages only. *McCrainey v. Kansas City Missouri School Dist*., 337 S.W.3d 746, 755, 756 (Mo.App. 2011). In *McCrainey*, the defendant argued that the same jury must determine liability and amount of punitive damages. *Id*. The appellate court rejected this argument relying on *Burnett v. Griffith*, 769 S.W.2d 780 (Mo. banc 1989), where this court found that where there was no error in the jury's finding of liability, the plaintiff should not have to risk the verdict where the only remaining issue was with regard to punitive damages. *Id*. The rules of civil procedure are consistent with Section 510.330 R.S.Mo. and Rule 78.01 (App. 20) that give the trial court the discretion to award a new trial on damages only.

Furthermore, Rule 84.14 affords this court wide discretion and provides that this court may reverse and remand for a new trial on some or all issues or give such relief as the trial court ought to give in order to finally dispose of the case. (App. 22.) In this case, such relief could include granting of a new trial on liability and the amount of punitive damages; a new trial on the amount of punitive damages only; or to remand this case to the appellate court for it to determine whether the original $20,000,000 punitive verdict comports with the constitutional principles previously briefed by the parties but not reached by the appellate court

in its 2009 opinion (the appellate court finding that points VII, VIII and X raising constitutional issues regarding the punitive damages award need not be addressed in light of the limited remand for a new trial on the submissibility of liability for punitive damages issue). *Smith*, 275 S.W.3d at 823, 824.

II.

The trial court erred in sustaining Brown & Williamson's objections to the offered testimony of Jurors Mackison and Thompson and in denying the Smiths' motion for new trial on the basis of juror intentional nondisclosure of material information requested during voir dire because these rulings were an abuse of the trial court's discretion in that clear questions were asked calling for disclosure of material information disclosing juror bias and prejudice in this wrongful death case against a tobacco company for punitive damages only and the testimony of jurors Mackison and Thompson was proper and established that juror Mackison intentionally concealed his belief that the case was frivolous and that his mother had been a long-time smoker who had lung problems.

The trial court erred in denying the Smiths' motion for new trial based on juror intentional nondisclosure. Juror Mackison intentionally concealed material information called for during voir dire, and the trial court erred in excluding the offered testimony of Mackison and fellow juror Thompson (who corroborated Mackison's bias and prejudice). Clear questions were asked during voir dire that called for disclosure of opinions, biases and prejudices held by members of the panel relating to whether this case was viewed by any of them to be frivolous and

whether any had family members who had suffered from lung problems, including those related to smoking. Mackison intentionally concealed that his mother, a long-time smoker, had lung problems and that he felt the Smiths' case was frivolous. The Smiths were denied their constitutional right to a trial by a fair and impartial jury. A new trial is warranted.

Standard of review

In reviewing the trial court's denial of a motion for new trial based on juror nondisclosure, this court reviews de novo the threshold determination of whether the questions asked of the panel were clear. *Sapp v. Morrison Brothers Co*., 295 S.W.3d 470, 474 (Mo.App. 2009); *McBurney v. Cameron*, 248 S.W.3d 36, 42 (Mo.App. en banc 2008). If this court objectively determines that the questions asked were reasonably clear, then an abuse of discretion standard is applied as to whether the trial court abused its discretion in deciding if a nondisclosure was intentional. *Id*.

The Smiths were denied their constitutional right to a fair and impartial jury because of juror nondisclosure.

Both parties in a lawsuit have the constitutional right to a fair and impartial jury. Mo. Const. Art. I Sec. 22 (a) (App.. 15); *Beggs v. Universal C.I.T. Credit Corp*., 387 S.W.2d 499, 503 (Mo. banc 1965). The essential purpose of voir dire is to provide for the selection of fair and impartial jurors through the asking of questions which call for answers that may serve as the basis for cause challenges

and to learn facts that may be useful in intelligently exercising peremptory challenges. *Keltner v. K-Mart Corp*., 42 S.W.3d 716, 721 (Mo.App. 2001); *Pollard v. Whitener*, 965 S.W.2d 281, 286 (Mo.App. 1998). It is the duty of each venireperson to fully, fairly and truthfully answer all questions directed to him and to the panel generally so that challenges may be intelligently exercised. *Keltner*, 42 S.W.3d at 721. A venireperson is not the judge of his or her own qualifications. *Id.; Beggs*, 387 S.W.2d at 503.

Whether intentional or unintentional, the concealment of material information on voir dire by a prospective juror deprives the litigants of the opportunity to exercise cause and preemptive challenges in an intelligent and meaningful manner. *Williams v. Barnes*, 736 S.W.2d 33, 36 (Mo. banc 1987). Both parties are entitled to unbiased jurors and if a juror intentionally withholds material information requested on voir dire, bias and prejudice are inferred from the concealment. *Id*., at 36, 37. For this reason, a finding of intentional concealment has "become tantamount to a per se rule mandating a new trial." *Id*., at 37.

Intentional nondisclosure occurs when: 1) there exists no reasonable inability to comprehend the information solicited by the question asked of the prospective juror; and 2) where it develops that the prospective juror actually remembers the experience or that it was of such significance that his purported forgetfulness is unreasonable. *Overlap, Inc. v. A.G. Edwards & Sons, Inc.*, 318 S.W.3d 219, 224 (Mo.App. 2010). If a venireperson's nondisclosure during voir

dire is intentional, this court infers bias and prejudice and a finding of intentional concealment has become "tantamount to a per se rule mandating a new trial." *Id.*, *quoting Williams*, 736 S.W.2d at 37.

A new trial is not mandated when the concealed information does not bear on the case or on the prospective juror's ability to fairly evaluate the evidence. *Keltner*, 42 S.W.3d at 724. A prospective juror's litigation history is deemed material but situations other than prior litigation history has also been deemed material and when intentionally concealed, warrant a new trial. *See Beggs*, 387 S.W.2d at 503 (nondisclosure of repossessions was held to be material in action by truck owner against finance company for unlawfully taking truck and towing it in manner to cause damage where panel was asked if anyone ever had trouble with a financing company); and *Strickland v. Tegeler*, 765 S.W.2d 726 (Mo.App. 1989) (in malpractice action for injuries sustained to infant daughter during delivery, failure of juror to reveal that she had two relatives who had congenital arm defects required new trial).

Clear questions were asked of the panel of whether any had family members with lung problems and whether any felt the Smiths' case was frivolous.

Clear questions were repeatedly asked of the panel of whether any had family members with lung problems and whether any viewed the Smiths' case as frivolous. The detailed statement of facts shows that counsel for the Smiths

repeatedly asked whether any on the panel had family members with lung problems and whether any on the panel viewed this case as frivolous. (Tr. 92-208, 246-300.) Multiple members volunteered and discussed at length who in their family had lung problems and whether the problems related to smoking and whether the panel member felt that this type of case was frivolous. (Tr. 92-208, 246-300.) With the blatant exception of Mackison, the remainder of the panel freely disclosed their opinions, beliefs and experiences in the areas inquired of and this permitted the Smiths to make intelligent choices on their challenges for cause for venirepersons who revealed biases and prejudices. However, Juror Mackinson intentionally concealed that his mother was a long-time smoker who had lung problems, and that he believed the Smith's case to be frivolous.

The post-trial evidentiary hearing.

During the post-trial evidentiary hearing on the Smiths' post-trial motions, Juror Mackison stated that at the time questions were asked of the venire panel as to whether any believed the case to be frivolous, he answered that he believed that he could be a fair and impartial juror and that he did not think the case was frivolous; he thought it was interesting. (Tr. 3423, 3424, 3426, 3427.) He denied that he ever stated that the lawsuit was frivolous during the trial outside of deliberations. (Tr. 3424, 3425.) Mackison stated that he found out only after the Smith trial that his mother had COPD. (Tr. 3417.)

The trial court erred in refusing the offered testimony of Juror Mackison.

At the post-trial motion hearing the trial court refused to permit Juror Mackison to answer many questions posed by counsel for the Smiths as to whether Mackison knew his mother was a smoker and whether he stated throughout the trial that he thought the case was a frivolous lawsuit. (Tr. 3416-3423.) In its order denying the Smiths' motion for a new trial, the court explained its reasons for the exclusion of the offered testimony:

> Specifically, Plaintiff raises two points of juror nondisclosure that deal with the same juror. First, Plaintiffs raised the issue that the juror failed to disclose that the juror's mother died from lung cancer. Defendants objected to the evidence on the basis that the subject matter of the questions on voir dire, that the juror allegedly failed to answer, was not set out in the motion for new trial. The objection was sustained and Plaintiffs made an offer of proof. This Court reiterates its ruling that the evidence is not admissible. *Lohsandt v. Burke*, 772 S.W.2d 759 (Mo.App. W.D. 1989).

The trial court was wrong in several respects. *Lohsandt* does not hold that the testimony of a juror is *inadmissible*. *Lohsandt* never even discusses this issue. Instead, in *Lohsandt* the only issue addressed was whether the underlying post-trial motion sufficiently preserved the asserted error of juror nondisclosure for *appellate review*. *Lohsandt*, 772 S.W.2d at 760. *Lohsandt* provides no support for the trial court in this case holding that the offered testimony of Juror Mackison was

inadmissible to prove that Juror Mackison intentionally concealed material information requested during voir dire.

Evidentiary hearings are proper to provide evidence of juror misconduct or nondisclosure. Mo.R.Civ.Proc. 78.05 (App. 21); *Peth v. Heidbrief*, 789 S.W.2d 859, 862 (Mo.App. 1990) (appellate court found that trial court erred in denying evidentiary hearing); *Knothe v. Belcher*, 691 S.W.2d 297, 298, 299 (Mo.App. 1985). Affidavits or testimony from any juror or other witness is appropriate to prove the alleged juror misconduct either contemporaneous with the motion or later during evidentiary hearings. *Portis v. Greenhaw*, 38 S.W.3d 436, 445 (Mo.App. 2001) (this court holding that when a defendant alleges juror misconduct, he is responsible for presenting evidence through testimony or affidavits of "any juror, or other witness" either at trial or at the hearing on his motion for new trial); *State v. Mayes*, 63 S.W.3d 615, 625. 626 (Mo. banc 2002); *State v. Dunn*, 21 S.W.3d 77, 84 (Mo.App. 2000).

Furthermore, the Smiths properly raised and preserved the issue of juror nondisclosure in their post-trial motion. *Williams*, 736 S.W.2d at 36. They asserted that various jurors "held strong biases against and predetermined views of tobacco litigation" and they did not disclose these biases and prejudices during voir dire. (L.F. 1108-11.) The offered testimony during the post-trial hearing that demonstrated Juror Mackison intentionally concealed material information that

revealed bias and prejudice. The trial court erroneously excluded the offered testimony of Juror Mackison.

Offer of proof of Juror Mackison:

Q: Mr. Mackison, do you recall that I asked questions of all jurors about any persons that had relatives with lung injuries?

A: Yes.

Q: And you didn't answer that question, did you?

A: No. I didn't know it at the time. I told you I didn't know that until I looked at the death certificate.

Q: And you looked at your mother's death certificate after the trial began?

A: No, sir, after the trial finished.

Q: And so throughout this time period you were unaware that your mother had died of a lung illness? Is that your testimony under oath, sir?

A: That is true, yes. I was unaware of it.

Q: You didn't know she had any lung problems?

…

A: I knew she had trouble breathing.

Q: And so the question that I asked the jurors that we've already to His Honor was "Did any of your family members ever have any lung problems?" And you didn't answer that question?

A**:** I don't remember you asking that question, I'm sorry.

Q: “Who here had a family member with a lung problem? Who has had a family member with a lung problem?” You were sitting here. You didn’t raise your hand in that regard. Did you know your mother had a lung problems at the point I was asking the questions?

…

A: Say it again, please.

Q: Mr. Mackison, the question was asked: “Who here has had a family member with a lung problem?” Your mother had a lung problem, isn’t that true?

A: I found out after reading the death certificate. She died right after surgery of cancer of I believe it was the pancreas. And I thought that’s what her death was from. And I didn’t know until afterwards, when they were trying to wean her off the respirator, they said that because of her diminished lung capacity from the years of smoking, even though she had quit 11 years before that, that that was a contributing factor.

Q: Mr. Mackison, you just told us a second ago you knew she had lung problems; isn’t that true?

…

A: That I knew she had lung problems? I knew she had—I mean, she was overweight, she didn’t breathe well. No, she---I don’t remember. Okay, I

thought it was---I guess I was looking at it if that's what killed her and I didn't believe it was the case at the time.

Q: That wasn't the question. The question was lung problems; isn't that true? And you told our researcher that her lung capacity diminished to 20% when she finally quit smoking. That's what you told our investigator.

A: Yes, sir, I did. I found that out after the jury---after everything was over because I looked into it.

Q: And you told him also, didn't you, that ever since you were a little kid, let's say 1964 through '65, I begged my mother to quit smoking and she said that on the few enjoyments she gets out of life that she's not going to. So the old saying where its cutting years off my life, she goes, I'd rather cut it off and enjoy smoking. Didn't you tell him that?

…

A: Yes, sir, I did say that.

Q: And so you knew from the time that you were a kid that her smoking was cutting off years of her life; is that right?

A: I've known ever since I was a little kid that smoking was bad for you. Yes, I tried to talk her into quitting.

Q: And you knew she had breathing problems at the time you were sitting her in the jury box; am I right?

A: No. I didn't know that that's why she had died.

Q: But, Mr. Mackison, there was no question about your mother dying here. It was, "Who has had family members with lung problems," correct?

A: Okay.

Q: And your mother had a lung problem, didn't she?

A. I didn't know that she did. (Tr. 3428-3433.)

Juror Mackison intentionally concealed material information asked for during voir dire.

Juror Mackison's conduct demonstrates an intentional concealment of material information called for during voir dire on both the issues of whether he had any family members with lung problems and whether he considered the case at hand to be frivolous. His reasons for nondisclosure are not reasonable or credible. In the context of the questions asked and the answers provided by the other venirepersons, disclosure by Mackison was required and the trial court abused its discretion in denying the motion for new trial. *Williams*, 736 S.W.2d at 38 (juror's explanation for his nondisclosure was not reasonable under the circumstances and "pales in the light of the other jurors' responses during voir dire); "*Beggs*, 387 S.W.2d at 504 (question whether anyone on the panel had "any trouble with any finance company in any way shape or form" compelled disclosure of repossessions whether or not suits were filed); *Strickland*, 765 S.W.2d at 727 (question of who on panel had any member of their immediate family with limitation of motion of their arm or any extremity called for disclosure of juror's niece and nephew born

with arm deformity); *Williams*, 736 S.W.2d at 38 (juror's expressed confusion over meaning of the word "claim" held unreasonable and disclosure of prior settlement was required); *Massey v. Carter*, 238 S.W.3d 198, 202 (Mo.App. 2007) (failure to disclose prior lawsuits in response to question of whether anyone had ever been sued by anyone held unreasonable). As in *Williams* and *Strickland*, Juror Mackison's reasons for nondisclosure "unduly taxes our credulity." *Strickland*, 765 S.W.2d at 728; *Williams*, at 38 and a new trial is warranted.

The trial court erred in prohibiting the testimony of Juror Thompson.

The trial court also improperly prohibited the testimony of Juror Thompson who offered testimony that Juror Mackison commented throughout the case that he felt it was frivolous and that Mackison's mother had been a long-time smoker who had died from COPD. At the post-trial motions hearing, counsel for the Smiths asked Juror Thompson what he heard Juror Mackison say throughout the course of the trial prior to deliberations. The trial court prohibited the testimony. (Tr. 3413, 3414.) The trial court refused to permit the testimony of Juror Thompson ruling that it was improper for one juror to impeach another juror as to juror misconduct. (Tr. 3438-3440, 3450; L.F. 1515, 1516; App. 13.) In its post-trial order the trial court explained its ruling:

> Plaintiff's attemped to adduce evidence that the same juror failed to disclose his opinion that the lawsuit of the plaintiffs was "frivolous." Plaintiff's evidence consisted of the hearsay testimony from another juror.

> Defendants objected citing *State v. Edmonds*, 188 S.W.3d 119 (Mo.App. S.D. 2006). This Court sustained the objection and the Plaintiffs made an offer of proof. This Court reiterates its ruling that the evidence is not admissible."

(L.F. 1515, 1516; App. 13.)

Again the trial court was wrong in excluding the testimony of a juror. *Edmonds* is not factually or legally similar. The Smiths did not offer the testimony of Juror Thompson to *impeach the jury's verdict* or to offer what discussions occurred *during the jury's deliberation*. *Edmonds*, 188 S.W.3d at 123. Instead, the relevant rule is that it is appropriate to permit other jurors to offer testimony of what occurred outside of the deliberations. *State v. Mayes*, 63 S.W.3d 615, 625, 626 (Mo. banc 2002) (a defendant alleging juror misconduct through nondisclosure during voir dire must present 'evidence *through testimony or affidavits of any juror or other witness either at trial or at the hearing on his motion for new trial*", *quoting; Portis v. Greenhaw*, 38 S.W.3d 436, 445 (Mo.App. 2001) (emphasis added)*; State v. Dunn*, 21 S.W.3d 77, 84 (Mo.App. 2000).

Offer of proof of Juror Thompson

> Q: Mr. Thompson, did Mr. Mackison, outside of the context of deliberations during the trial, express the view that this was a frivolous lawsuit?
>
> …

A: Yes.

Q: And did he say it many times?

A: Yes.

Q: And did it even become irritating to you that he said it so often?

A: Yes.

Q: And did he begin expressing that viewpoint from the beginning of the trial, outside—well, there was no deliberations, so from the beginning of the trial?

A: I don't know exactly when he started expressing that. So I couldn't give you as to the very beginning of the trial. So I don't know exactly when but he did express it multiple times.

…

Q: Did he ever express the idea outside of deliberations of his mother having COPD during the pendency of the trial?

A: Yes.

…

Q: And so if we just had a witness who was just here saying, I discovered it after the trial happened, you said that---you say that he said it during the trial, his mother had COPD, correct?

A: Yes.

Q: And that was caused by smoking?

A: 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. (Tr. 3441-3443.)

The trial court erred in excluding the above testimony and in denying the Smiths' motion for new trial. Clear questions were asked that called for the disclosure of material information that showed biases or prejudices. Juror Mackison intentionally concealed material information requested during voir dire. The Smiths were denied a fair and impartial jury and a new trial is warranted.

Conclusion

This court should reverse and remand in conformity with the appellate court's prior mandate. The intentional concealment by Juror Mackison of material information requested during voir dire that showed his bias and prejudice deprived the Smiths of their constitutional right to a fair and impartial jury. They are entitled to a new trial. Also because the trial court's order permitting Brown & Williamson to offer evidence and pursue a defense not present before the prior jury, the scope of the appellate court's prior mandate was exceeded. The trial court's judgment is null and void and the Smiths are entitled to a new trial on the liability and a determination of the amount of punitive damages; a new trial on the amount of punitive damages only; or to remand this case to the appellate court for it to determine whether the original $20,000,000 punitive verdict comports with the constitutional principles previously briefed by the parties but not reached by

the appellate court in its 2009 opinion; or whatever just relief this court deems appropriate pursuant to its wide discretion afforded under law.

/s/ Susan Ford Robertson
Susan Ford Robertson #35932
The Robertson Law Group, LLC
1044 Main, Suite 500
Kansas City, MO 64105
816-221-7010 (phone)
816-221-7015 (fax)
susanr@therobersonlawgroup.com

/s/ Kenneth B. McClain
Kenneth B. McClain #32430
Scott Hall #50793
Humphrey, Farrington & McClain, P.C.
221 West Lexington, Suite 400
Independence, MO 64051
816-836-5050 (phone)
816-836-8966 (fax)
kbm@hfmlegal.com
sbh@hfmlegal.com

Attorneys for Appellants-Respondents Smith

Appendix

Mandate	A-1
Trial court order setting scope of evidence	A-2
Brown & Williamson motion to exclude merger	A-4
2004 trial court order excluding evidence of merger	A-7
2009 verdict finding liability for punitive damages	A-9
2009 verdict awarding $1,500,000 in punitive damages	A-10
Judgment	A-11
Order denying the Smiths' motion for new trial	A-13
Mo.Const. Art. I Sec. 22 (a)	A-15
Section 510.263 R.S.Mo.	A-16
Section 510.330 R.S.Mo.	A-18
Section 512.020 R.S.Mo.	A-19
Mo.R.Civ.Proc. 78.01	A-20
Mo.R.Civ.Proc. 78.05	A-21
Mo.R.Civ. 84.14	A-22

Certificate of Service and Compliance

Susan Ford Robertson, hereby certifies that on February 15, 2013, she electronically filed Substitute Brief of Appellants-Respondents Smith by use of Missouri's electronic filing system upon: Mr. Bruce Ryder and Mr. Jason Wheeler, Thompson Coburn, L.L.P., One US Bank Plaza, St. Louis, MO 63101 as counsel for Respondent Brown & Williamson. I also certify that the attached brief complies with the Supreme Rule 84.06(b) and contains 13,542 words, excluding the cover, the certification and the appendix as determined by Microsoft Word software.

/s/ Susan Ford Robertson
Susan Ford Robertson, Attorney