APPENDIX

Table of Contents

Page

SJC-13778

ARMAND FONTAINE[1] vs. PHILIP MORRIS USA INC.

Middlesex. November 5, 2025. – April 22, 2026.

Present: Budd, C.J., Gaziano, Kafker, Wendlandt, Georges, Dewar, & Wolohojian, JJ.

Tobacco. Damages, Punitive, Wrongful death. Practice, Civil, Wrongful death, Damages, Instructions to jury, Burden of proof, Bifurcated trial, New trial, Judgment notwithstanding verdict. Jury and Jurors. Due Process of Law. Federal Preemption. Statute, Federal preemption. Witness, Expert.

Civil action commenced in the Superior Court Department on January 17, 2020.

The case was tried before Shannon Frison, J., and motions for a new trial and for judgment notwithstanding the verdict were heard by her.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Scott A. Chesin for the defendant.
Celene H. Humphries, of Florida (Andrew A. Rainer also present) for the plaintiff.

[1] Individually and as personal representative of the estate of Barbara Ellen Fontaine.

The following submitted briefs for amici curiae:
Kevin R. Palmer, Mark C. Fleming, & Adela Lilollari for Chamber of Commerce of the United States of America & another.
Paul R. Johnson & Frank J. Bailey for Pioneer New England Legal Foundation.
Christina S. Marshall & Kuong C. Ly for Parents Against Vaping e-cigarettes & others.
Robert S. Peck, of the District of Columbia, Thomas Bond, Thomas R. Murphy, Kevin J. Powers, & Anthony Tarricone for Massachusetts Academy of Trial Attorneys & another.
John S. Mills & Jonathan A. Martin, of Florida, & Walter Kelley for Public Health Law Center at Mitchell Hamline School of Law & another.
Thomas A. Burns, of Florida, & Michelle H. Blauner for Valerie P. Hans & others.

WOLOHOJIAN, J. This is a wrongful death action against a cigarette manufacturer whose products marketed under the names Marlboro and Parliament caused Barbara Fontaine to die of lung cancer.[2] After a four-week trial, a jury found that Philip Morris USA Inc. (Philip Morris or company) (1) committed a breach of the implied warranty of merchantability by failing to make or sell reasonable safer alternative types of cigarettes (specifically, cigarettes having very low levels of nicotine, that were noninhalable, or that were "[h]eat-not-burn"), (2) negligently designed its cigarettes, (3) negligently marketed its cigarettes to Barbara when she was a minor, (4) engaged in fraud, and (5) entered into a concerted action conspiracy with

[2] We hereafter refer to the members of the Fontaine family individually by their first names. For convenience, we also refer to Barbara's estate and Armand, Bryan, and Meghan Fontaine collectively as the "plaintiffs."

other tobacco companies and organizations. The jury further found that each of these actions caused Barbara's lung cancer and death, and they awarded compensatory and punitive damages. Specifically, the jury awarded a total of $8.014 million in compensatory damages among the four plaintiffs: (1) $2.5 million to Barbara's estate in compensation for her conscious pain and suffering plus $514,000 in reasonable and necessary medical bills, and (2) loss of consortium damages of $1 million to Barbara's husband (Armand), $1.5 million to her son (Brian), and $2.5 million to her daughter (Meghan). In addition, the jury awarded $1 billion in punitive damages. After trial, the judge remitted the punitive damages award to seven times the compensatory damages, i.e., to slightly more than $56 million.

Most of the issues Philip Morris raises in this appeal stem from the punitive damages award. To begin with, Philip Morris argues that the size of the jury's punitive damages award demonstrates in and of itself that the jurors were swept away by passion and prejudice such that the entire verdict must be set aside. Second, Philip Morris argues that the remitted award is constitutionally excessive. Third, it argues that the judge should have adopted two safeguards to prevent a "runaway" punitive damages award. Specifically, Philip Morris contends that the judge should have bifurcated the trial so as to avoid introducing evidence of the company's revenue during the

liability phase, and that the judge should have adopted and imposed a higher burden of proof by instructing the jury that punitive damages must be proved by clear and convincing evidence.

Philip Morris raises two additional arguments that are not related to the punitive damages award. First, it contends that the jury were erroneously permitted to impose liability on theories that are preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331 et seq. (Labeling Act). Second, Philip Morris contends that the judge should have excluded certain testimony that it contends led the jury to impose liability for the company's exercise of its right to defend itself in litigation.

We conclude that the judge had ample basis upon which to find that the jury were not inflamed by passion or prejudice and, accordingly, that the judge did not abuse her discretion in denying Philip Morris's motion for a new trial on that basis. We also conclude that the judge remitted the punitive damages to an amount that was within constitutionally permissible bounds. We further conclude that the judge did not abuse her discretion in denying Philip Morris's motion to bifurcate the trial. Nor did the judge err by declining to adopt or impose a higher burden of proof for the imposition of punitive damages, and we decline to adopt a higher standard now. We are also not

persuaded that the jury were permitted to find liability on theories preempted by the Labeling Act, or that they were drawn into imposing liability for the company exercising its right to defend itself in litigation. For these reasons, we affirm.[3]

Background. We set out here an overview of the evidence and proceedings below, reserving further detail for our later discussion of the issues raised on appeal.

Barbara was a regular smoker of cigarettes by 1971, when she was fifteen years old. From that time until she quit smoking in 2015, she smoked only two brands of cigarettes: Marlboro and Parliament (also called Parliament Lights), both of which were manufactured and marketed by Philip Morris. She switched to Parliament Lights around 1979, when the company's advertising led her to believe that they were less harmful because they were "light" and because of their recessed filter.[4]

---

[3] We acknowledge the amicus brief submitted in support of the defendant by the Chamber of Commerce of the United States of America and Washington Legal Foundation. We also acknowledge the amicus briefs submitted in support of the plaintiff by Parents Against Vaping e-cigarettes, the Institute for Health and Recovery, and Action on Smoking and Health; the Massachusetts Academy of Trial Attorneys and the American Association for Justice; the Public Health Law Center at Mitchell Hamline School of Law and the Massachusetts Association of Health Boards; and Professors Valerie P. Hans, Michael Heise, and Jennifer K. Robbennolt, as well as the amicus brief submitted in support of neither party by Pioneer New England Legal Foundation.

[4] In 1979, Philip Morris renamed the Parliament brand to Parliament Lights without changing its design.

Barbara became addicted to smoking, and her daily activities and routines were affected by her need to smoke.[5] Although she made several attempts over the years to quit, none was successful, even during her two pregnancies when her motivation was presumably high.[6] She finally succeeded in 2015 after a physician refused to perform a medical procedure unless she stopped smoking.[7] By that time, Barbara had smoked over a pack of (twenty) cigarettes each day for at least forty years.

Shortly after she quit smoking, Barbara was diagnosed with inoperable lung cancer. She died of that disease two years later, leaving behind Armand, her husband of twenty-seven years, and her two children, Brian and Meghan. She was sixty years old at the time of her death.

---

[5] Smoking was the first thing Barbara did in the morning and the last thing she did at night; she became edgy and irritable when forced to go without cigarettes during the day. She would leave restaurants and family gatherings in order to go outside to smoke, and interrupted movies and baseball games for smoking breaks. After she and Armand decided not to smoke inside their home, she took to smoking in her unheated garage, including during extreme cold weather.

[6] From 1989 to 2015, Barbara resorted to a variety of methods to quit smoking, including nicotine patches, nicotine gum, electronic cigarettes, prescription medication, tapering her cigarette use, going "cold turkey," and a visit to the "Mad Russian." See Levy, GURU: Yefim Shubentsov; A Rasputin for Smokers, N.Y. Times, Nov. 8, 1998.

[7] The record does not suggest that the procedure was related to Barbara's smoking.

On January 17, 2020, Armand, individually and in his capacity as Barbara's personal representative; Brian; and Meghan filed suit against Philip Morris, R.J. Reynolds Tobacco Company, and Demoulas Super Markets, Inc.[8] The complaint asserted claims for Barbara's wrongful death pursuant to G. L. c. 229, § 2, breach of the implied warranty of merchantability, negligent design, negligent marketing, fraud, civil conspiracy, and deceptive trade practices in violation of G. L. c. 93A. The plaintiffs sought damages for Barbara's wrongful death; her conscious pain and suffering before her death; her medical, burial, and funeral expenses; Barbara's lost earnings; and loss of consortium damages on behalf of Armand, Brian, and Meghan. Also sought were multiple damages and attorney's fees pursuant to G. L. c. 93A, and punitive damages. The judge reserved the G. L. c. 93A claim for herself; the other claims went to trial before a jury in 2022.

We need not belabor here the plaintiffs' evidence of Philip Morris's wrongful conduct over several decades. It suffices to say that its magnitude and weight was such that the company did not seriously attempt to refute it and, indeed, acknowledged to

[8] None of the claims against R.J. Reynolds Tobacco Company or Demoulas Super Markets, Inc., is implicated in this appeal. The claims against R.J. Reynolds Tobacco Company were dismissed prior to trial, and the jury found in favor of Demoulas Super Markets, Inc.

the jury that the company "said and did some things that should not have been said and should not have been done." But Philip Morris argued "this is not a case about whether the tobacco industry always did the right thing," and urged the jury to focus instead on its assertion that since 1999 (more than twenty-five years after Barbara began smoking), the company had been transparent with consumers about the risks of smoking, and that the company's previous bad acts were therefore things of the past.

The company also did not dispute (indeed, it acknowledged) that cigarettes are inherently dangerous and carcinogenic, can cause lung cancer, contain nicotine, and can be addictive. Instead, it stressed that cigarettes are not illegal despite their inherent health risks and that none of the four alternative cigarette designs put forward by the plaintiffs was viable, either for scientific or commercial reasons.

Nor did the company challenge that Barbara became addicted to cigarettes, or that smoking caused her lung cancer and death. However, the company forcefully argued that Barbara was an intelligent, motivated woman capable of making her own decisions and who understood the risks of smoking as a result of warning labels, health education in high school, and the experience of watching her mother die of lung cancer. The company also attempted to cast doubt on the evidence suggesting that Barbara

was influenced by Philip Morris's advertising, including its descriptions of Parliaments as "light" or as having recessed filters. And the company contended that Barbara's success in quitting smoking in 2015 showed that she could have stopped earlier, potentially saving herself from lung cancer.

After deliberating for three days, the jury found in favor of codefendant Demoulas Super Markets, Inc., and found in favor of the plaintiffs on all but one of the breach of implied warranty claims against Philip Morris. As we have already noted, the jury awarded $8,014,000 in compensatory damages, consisting of $2.5 million for Barbara's pain and suffering; $514,000 in medical expenses; and $1 million, $1.5 million, and $2.5 million, respectively, for Armand, Brian, and Meghan's loss of consortium. The jury also found Philip Morris liable for $1 billion in punitive damages based on both gross negligence and malicious, willful, wanton, or reckless conduct.

Thereafter, the judge found that Philip Morris had violated G. L. c. 93A in three respects. First, the judge found that the company committed a breach of the warranty of merchantability by selling unreasonably dangerous cigarettes to Barbara when, for decades, there were various safer alternatives that would have reduced the risks associated with the cigarettes it chose to sell instead. Second, the judge found that, after 1979, Philip Morris made false statements concealing material facts about the

dangers and addictiveness of smoking while knowing that the statements were false and misleading and with the intent for consumers such as Barbara to rely on them. Specifically, the judge found that the company knowingly made false and misleading representations concerning Parliaments being "light" and about their recessed filters, and that Barbara relied on those statements to her detriment. Third, the judge found that Philip Morris entered into a concerted action and power of coercion conspiracy with other tobacco companies to misrepresent material facts concerning the dangers of smoking, to confuse the public, and to create doubt and mislead the public about the health hazards and addictive nature of smoking. The judge further found that the company's violations of G. L. c. 93A were knowing and willful. These broad factual findings were supported by over one hundred subsidiary findings, which Philip Morris does not challenge in any way on appeal.[9]

Also posttrial, the parties filed cross motions for remittitur. Philip Morris sought remittitur of the punitive damages award to no more than the amount of the compensatory award or, in the alternative, a new trial. In response, the

[9] The judge awarded the plaintiffs their reasonable attorney's fees and costs. However, in light of the award of punitive damages, she did not impose multiple damages under G. L. c. 93A. She reserved the ability to revisit that decision should the punitive damages award be vacated on appeal.

plaintiffs took the position that, while remittitur was appropriate, a remitted punitive damages award equal to seven times the compensatory award would comport with due process, and urged the judge to adopt that figure. In addition, Philip Morris filed a motion for a new trial on the ground that the entire verdict was the product of passion and prejudice.[10]

After a hearing, the judge allowed the cross motions for remittitur and reduced the punitive damages to seven times the compensatory damages award, or slightly more than $56 million. In doing so, the judge considered all three of the guideposts identified in BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574-586 (1996) (BMW), and concluded that the remitted amount was within constitutional limits, particularly considering the nature of Philip Morris's conduct, the painful illness and death that conduct caused Barbara, and the deterrent function of punitive damages for a company of Philip Morris's immense wealth and profitability.

The judge rejected Philip Morris's claim that the jury were carried away by passion or prejudice, noting that the accusation

[10] Philip Morris also filed three motions for judgment notwithstanding the verdict. One challenged the sufficiency of the evidence on the fraud and conspiracy claims; one challenged the sufficiency of the evidence with respect to the implied warranty and negligence claims; and one challenged the sufficiency of the evidence concerning the negligent marketing claim. All three motions were denied.

was not supported by the record. Drawing in part on her own observations, the judge found that the jury's conduct throughout the lengthy trial demonstrated that their verdict was not affected by prejudice or passion. In particular, the judge noted the jurors' "pointed, thoughtful questions" for witnesses; the length of their deliberations; the jury's careful conduct of deliberations, including asking to view a defense exhibit and posing questions; the jury's return of a verdict that did not accept every theory of liability against Philip Morris and found no liability against the supermarket codefendant; the fact that the compensatory damages were less than requested by the plaintiffs; and that the jury drew nuanced distinctions in damages among the individual plaintiffs. These observations, combined with the fact that the jury were properly instructed as to the permissible bases for their verdict, and the fact that Philip Morris "offer[ed] virtually nothing other than the size of the award" to support its accusation of prejudice, led the judge to deny the defendant's motion for a new trial.

Philip Morris then appealed, seeking a new trial on all claims or, in the alternative, a new trial solely on punitive damages or further remittitur of the punitive award. We transferred the appeal to this court on our own initiative.

Discussion. We first turn to Philip Morris's arguments that are connected to the award of punitive damages and

thereafter discuss its arguments concerning preemption and evidentiary error.

1. Motion for a new trial; alleged passion and prejudice on the part of the jury in awarding punitive damages. Punitive, also sometimes called exemplary, damages are designed "to punish the defendant and to deter future wrongdoing." Laramie v. Philip Morris USA Inc., 488 Mass. 399, 406 (2021), quoting Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001). A "proper punitive damage award" is one that is "sufficient . . . to send a clear message to the [defendant] of condemnation for its reprehensible behavior." Aleo v. SLB Toys USA, Inc., 466 Mass. 398, 412 (2013), quoting Clifton v. Massachusetts Bay Transp. Auth., 445 Mass. 611, 624 (2005). But a new trial may be warranted when the jury award damages that are "greatly disproportionate to the injury proven or represen[t] a miscarriage of justice," Reckis v. Johnson & Johnson, 471 Mass. 272, 299 (2015), cert. denied, 577 U.S. 1113 (2016), quoting Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997), or "so great . . . that it may be reasonably presumed that the jury, in assessing them, did not exercise a sound discretion, but were influenced by passion, partiality, prejudice or corruption," Reckis, 471 Mass. at 299, quoting Bartley v. Phillips, 317 Mass. 35, 41 (1944).

Pointing solely to the size of the jury's punitive damages award, Philip Morris asks that such a presumption be drawn here and that we determine that the judge abused her discretion in concluding otherwise. "Abuse of discretion in granting or refusing a new trial on the ground of excessive damages can so seldom be found that actual instances in which this court has set aside the action of the trial judge . . . are almost nonexistent, and it has repeatedly been stated that occasions when this court can do so are exceedingly rare" (quotations omitted). Reckis, 471 Mass. at 299, quoting Loschi v. Massachusetts Port Auth., 361 Mass. 714, 715 (1972).

It is indeed true, as Philip Morris points out, that the jury's punitive damages award is the largest to have been awarded by a jury in Massachusetts (although not in the history of civil litigation elsewhere, including against Philip Morris).[11] However, such comparisons are of limited utility in

[11] The jury's $1 billion punitive damages award substantially outstrips the next largest punitive damages award in this jurisdiction, a $150 million award against a different tobacco company (reduced to $50 million by the judge). See Jones vs. R.J. Reynolds Tobacco Co., Mass. Super. Ct., No. 1684CV03277 (Suffolk County Apr. 10, 2024). That said, juries have awarded higher punitive damages in other jurisdictions. For example, a jury imposed a $3 billion award against Philip Morris in Boeken v. Philip Morris Inc., 127 Cal. App. 4th 1640, 1650 (2005), cert. denied, 547 U.S. 1018 (2006), and similar awards have been granted against other defendants. See, e.g., Exxon Shipping Co. v. Baker, 554 U.S. 471, 481 (2008) ($5 billion); Grefer v. Alpha Tech., 965 So. 2d 511, 514 (La. Ct. App. 2007), cert. denied sub nom. Exxon Mobil Corp. v. Grefer,

assessing whether a particular verdict is justified, see Reckis, 471 Mass. at 303 n.47 (rejecting "dangerous game" of comparing verdicts across similar cases), because a punitive damages award is "the product of numerous, and sometimes intangible, factors . . . unique to the particular case before [the jury]. Because no two cases are truly identical, meaningful comparisons of such awards are difficult to make," TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 457 (1993). Thus, whether a particular award is "so great" as to indicate prejudice or passion (citation omitted), Reckis, 471 Mass. at 299, should be determined principally by assessing whether it is disproportionate in light of the factors the jury could properly consider in the case before them -- not by comparing it to awards in other cases. See Bartley, 317 Mass. at 41 (new trial should be granted when damages are "greatly disproportionate to the injury proved" [citation omitted]).

A motion for a new trial on grounds of excessive damages should be assessed "on a survey of the whole case." Bartley, 317 Mass. at 41, quoting Davis v. Boston Elevated Ry., 235 Mass.

---

553 U.S. 1014 (2008) ($1 billion); Pilliod v. Monsanto Co., 67 Cal. App. 5th 591, 600 (2021), cert. denied, 142 S. Ct. 2870 (2022) ($1 billion); Ingham v. Johnson & Johnson, 608 S.W.3d 663, 721-722 (Mo. Ct. App. 2020), cert. denied, 141 S. Ct. 2716 (2021) ($3.15 billion). In each of those cases, reviewing courts treated remittitur, rather than a new trial, as sufficient to cure any excess in the verdict.

482, 496 (1920). The judge here conducted such a survey and made numerous findings based on the evidence and her firsthand observations of how the jury conducted its task. None of the judge's subsidiary findings is challenged as clearly erroneous on appeal. In these circumstances, our task is to determine whether the ultimate conclusion the judge drew from those findings -- namely, that a new trial was not required -- constitutes an abuse of discretion. See L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014), quoting Picciotto v. Continental Cas. Co., 512 F.3d 9, 15 (1st Cir. 2008) (abuse of discretion appears where judge makes "'a clear error of judgment in weighing' the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives" [citation omitted]). After surveying the whole case ourselves, we conclude that it does not, and we outline each of the salient considerations that lead us to this conclusion.

a. Jury instructions. We begin by observing that the jury were accurately instructed as to the appropriate bases for awarding punitive damages under G. L. c. 229, § 2, our wrongful death statute. That statute imposes a significant restraint on the award of punitive damages by requiring a heightened showing of culpability in order to award them. Specifically, punitive damages may only be awarded if "the decedent's death was caused by the malicious, willful, wanton or reckless conduct of the

defendant or by the gross negligence of the defendant." G. L. c. 229, § 2. The judge instructed the jury faithfully to the language of the statute, and carefully explained the meaning of the phrases "malicious, willful, wanton or reckless conduct" and "gross negligence" in a way that conveyed to the jury the high burden needed to establish them.[12] In addition, the judge instructed the jury that punitive damages could only punish Philip Morris for conduct that caused Barbara's lung cancer and death, stressing that they could not punish the company for harm suffered by any other individual. "The instructions thus

---

[12] The judge instructed:

> "A defendant has acted maliciously, wantonly, willfully, or recklessly only when the defendant inflicts injury intentionally or it is so utterly indifferent to the rights of others that the defendant acts as if . . . such rights did not exist. The injury is then a willful and not a negligent wrong.
>
> "Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence. Gross negligence is very great negligence. It is materially more lack of care than simple inattention. It is an aggravated act or omission which is more than a mere failure to exercise ordinary care.
>
> "A defendant is grossly negligent if it showed no concern for how persons may be affected by its failure to act with reasonable care. It is a needless and undeniable violation of legal duty respecting the rights of others.
>
> "Gross negligence is something less than willful, wanton, and reckless conduct. It falls short of being such reckless disregard of probable consequences as is equivalent to a willful or intentional wrong."

enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory." See Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991).

The special verdict slip also tracked the language of the statute and of the instructions. Specifically, the verdict slip required the jury to separately consider whether Philip Morris engaged in malicious, willful, wanton, or reckless conduct, or was grossly negligent, and whether, in either situation, the conduct caused Barbara's death. In short, both the instructions and the verdict slip focused the jury on the high standard needed to award punitive damages.

In addition, the judge gave accurate guidance to the jury regarding the considerations they could take into account in determining the amount of any punitive damages award. Specifically, the judge instructed the jury that they could consider the character and nature of Philip Morris's conduct as well as the company's wealth as those related to determining an amount that would be sufficient to punish the company's conduct and to deter any future acts.[13] See Restatement (Second) of

[13] Philip Morris objected to including wealth as a permissible consideration in assessing the size of a punitive damages award. The judge properly overruled that objection. See Laramie, 488 Mass. at 419.

Torts § 908(2) (1979) (character of defendant's conduct and defendant's wealth are proper considerations for punitive damages award). The judge also instructed the jury that they could consider the magnitude of any potential future harm if similar behavior were not deterred as well as any mitigating evidence demonstrating that there was no need for deterrence -- considerations relevant to Philip Morris's defense that its prior bad conduct was a thing of the past.

The judge also instructed the jury that they were to apply the law as she gave it to them; that they were not to be swayed by prejudice, sympathy, or personal like or dislike for either side; and that they were not to infer that Philip Morris acted improperly based on the fact that it contested liability and was defending itself.

In short, the jury were properly instructed on the law governing the award of punitive damages, including the heightened showing required by G. L. c. 229, § 2; were cautioned against making a decision based on prejudice or sympathy; and were told that the company was not to be punished for defending itself. We presume that the jury followed the instructions when rendering their verdict, see Reckis, 471 Mass. at 304 n.49, and the record suggests no reason to displace that presumption here.

b. Evidence of the nature and duration of the defendant's conduct. The nature and duration of the defendant's conduct are

"[p]erhaps the most important indici[a] of the reasonableness of a punitive damages award," Aleo, 466 Mass. at 414, quoting BMW, 517 U.S. at 575, and here there was virtually uncontested evidence showing Philip Morris's reprehensible conduct over decades. This included purposely designing its product to be addictive, targeting its advertising to children, and misleading the public as to the health dangers of cigarettes, all with full knowledge that cigarettes were the cause of widespread preventable death. Where, as here, the jury could have concluded, as the judge did, that the defendant's conduct was extremely reprehensible, a large punitive damages award may be the product of the jury's "exercise [of] a sound discretion," Coffin v. Coffin, 4 Mass. 1, 43 (1808), rather than of passion and prejudice.

The jury had before them the following evidence of Philip Morris's conduct. Philip Morris has long been in the business of manufacturing, marketing, and selling cigarettes, which are the leading cause of preventable death in the United States and the source of a worldwide epidemic of lung cancer. Smoking causes lung cancer because cigarette smoke contains multiple carcinogens that travel into the lungs when a smoker inhales. This relationship between smoking and lung cancer has been a matter of scientific consensus since approximately 1953. Because tobacco in its natural state produces smoke that is not

easily inhalable, cigarette manufacturers use a process called flue-curing to increase the inhalability, and hence the carcinogenicity, of the tobacco in cigarettes. Cigarette companies, including Philip Morris, have designed cigarettes for enhanced inhalability despite knowing since the 1950s the role inhalation plays in causing lung cancer and death.

No later than 1953, Philip Morris was aware of the adverse health effects of smoking and participated with other cigarette companies in a deliberate conspiracy to mislead the public about the nature and extent of those effects. This conspiracy, the existence of which was extensively corroborated by internal cigarette industry documents, was carried out by Philip Morris representatives who denied or cast doubt on the health effects of smoking cigarettes, as well as by published research funded by Philip Morris and other tobacco companies with the intent of obscuring the scientific consensus on the dangers of smoking. For example, Philip Morris publicly denied that there was any proof that cigarette smoke contained carcinogens, including in reports to the Surgeon General; it compared the dangers of cigarettes to those of applesauce or gummy bears and misleadingly stated that "if the company as a whole believed that cigarettes were really harmful, we would not be in the business." At the same time, company scientists were producing

internal research showing that carcinogens are in fact ubiquitous in smoke.

The evidence also showed that cigarettes are highly addictive due to containing nicotine, a chemical that occurs naturally in tobacco plants. Because nicotine has addictive properties comparable to those of heroin or cocaine, addicted cigarette smokers who try to quit smoking suffer severe cravings and withdrawal symptoms. The addictive quality of cigarettes was not only known to Philip Morris, but intentionally amplified and commercialized. Philip Morris carefully engineered its cigarettes to deliver the dosage of nicotine needed to keep smokers "hooked," internally analogizing customers to "a hungry rat in a cage" and acknowledging that without nicotine "the cigarette market would collapse." Nevertheless, as late as 1994, Philip Morris's president testified to Congress that nicotine was not addictive.

The company hid its knowledge of the harmful effects of smoking, including lung cancer and death, from the public and from health authorities, while simultaneously suppressing or destroying internal health-related research. The company's designers could control the addictiveness and toxicity of cigarettes, and Philip Morris intentionally designed its cigarettes to increase their addictiveness. During the same period when Philip Morris scientists were researching how much

nicotine a cigarette must contain to create and maintain addiction, company leadership deliberately chose not to pursue research into the level of carcinogens in cigarettes that would substantially reduce smokers' risk of cancer. Philip Morris scientists developed and produced denicotinized cigarettes specifically for the company's then president, who wished to avoid becoming addicted.

There was also evidence that since at least the 1950s, Philip Morris's advertising included campaigns targeted at teenagers because (as one internal Philip Morris document put it), "Today's teenager is tomorrow's potential regular customer . . . ." During the 1970s, Philip Morris's Marlboro brand became the most popular cigarette among teenagers, a fact the industry recognized as key to the company's future success. When Philip Morris scientists designed a cigarette that was less carcinogenic than prevailing models, company executives refused to use that design for Marlboro cigarettes because of concern that it would reduce the brand's sales.

Eventually, in response to public concern over the health risks of smoking, Philip Morris developed what it called "health reassurance" cigarettes, including the Parliament Lights brand that Barbara smoked. While Philip Morris never affirmatively stated that Parliament Lights were healthier than other cigarettes (and knew, from internal research, that they were

not), the company nonetheless marketed Parliament Lights by describing them as having a "recessed filter," by labeling them as "low tar" and "low nicotine," and via the word "light" itself, all of which the company understood from market research would create an impression in customers that Parliament Lights were safer than other cigarettes.[14] Philip Morris internally recognized that filters were an "advertising gimmick" rather than a health measure. At the same time Philip Morris was promoting Parliament Lights as a health reassurance product, it opposed development of products or information campaigns designed to help people quit smoking, such as by pressuring the makers of Nicorette gum, a smoking-cessation aid, not to publicize it.

Philip Morris did not deny that there was a conspiracy among tobacco companies, that the purpose of that conspiracy was to mislead the public as to the dangers of smoking, or that the cigarettes that Barbara smoked were addictive, dangerous,

[14] Although Parliament Lights in fact had less nicotine than other cigarettes, there was evidence showing that Philip Morris was aware of the tendency of addicted smokers to smoke more cigarettes or inhale more deeply to compensate for reduced nicotine intake. This phenomenon, known as "compensation," means that smokers of light cigarettes are typically exposed to the same amount of nicotine and carcinogens as other cigarette smokers.

cancer-causing products that led to her lung cancer and painful death.

The body of evidence concerning the company's reprehensible conduct over decades provided a robust basis upon which the jury could conclude without resort to passion or prejudice that the company had engaged in malicious, willful, wanton, or reckless conduct, and was grossly negligent, such that an award of punitive damages of significant magnitude was appropriate.

c. Harm to plaintiff. "Punitive damages are not intended to punish a defendant for its unlawful conduct generally, but to punish a defendant for its unlawful conduct that caused a plaintiff's specific harm." Laramie, 488 Mass. at 407. Here, there was ample evidence to show that Philip Morris's conduct caused Barbara's lung cancer and painful death.

Barbara became addicted to cigarettes by the time she was a teenager, and her addiction affected many aspects of her daily life thereafter. See supra. She was unable to quit smoking until 2015,[15] and her risk of lung cancer was directly proportional to the frequency and duration of her cigarette use

[15] Barbara's struggle in this regard was not unusual; although seventy percent of smokers indicate a desire to quit, only four percent of attempts are successful in the long term. The difficulty of the effort is compounded by exposure to cigarette advertising, which reinforces cigarette habits and enables smokers to rationalize their continued use despite widespread awareness of the health dangers of smoking.

over decades. Ultimately, her death of lung cancer was caused by her addiction to, and use of, Philip Morris's cigarettes. The jury could conclude that Barbara's addiction and death were caused by Philip Morris's decision to maintain nicotine levels at a level required to maintain addiction even while it knew of the harm that decision would cause smokers such as Barbara.

Philip Morris challenged none of the evidence concerning the addictive and ultimately fatal impact its conduct had on Barbara. Nor did it challenge the evidence concerning the pain and suffering she endured from smoking-induced lung cancer, including extreme pain, weakness, and weight loss, or the impact that her illness and premature death had on her husband and children.

d. Amount needed to punish and deter. "Punitive damages 'operate as "private fines" intended to punish the defendant and to deter future wrongdoing.'" Laramie, 488 Mass. at 406, quoting Cooper Indus., Inc., 532 U.S. at 432. For this reason, evidence of Philip Morris's revenue and assets was admissible to help the jury determine how large an award would be necessary to achieve those permissible effects. See Laramie, 488 Mass. at 419. The jury heard that for the fiscal year ending December 31, 2021, the company's net revenue was approximately $21.8

billion and its net earnings were approximately $7.7 billion.[16] Thus, the $1 billion punitive damages figure ultimately awarded by the jury represented roughly forty-eight days of Philip Morris's net earnings. A dispassionate and unprejudiced jury could conclude that a lesser award would not have been adequate to punish Philip Morris or deter its future misconduct in view of the company's revenue in combination with the extreme reprehensibility and harm caused by the company's conduct.

e. Other indicia of the jury's reasoned decision-making. As we have already noted, the judge relied in part on her own observations during the trial to conclude that the jury approached its task in a measured way. Her observations were buttressed by the following. First, the judge permitted the jurors to submit questions after each witness's testimony. The jury took all but one such opportunity, asking a total of seventy-one questions throughout the course of the trial. Our own review of the trial transcript shows that the jury's questions were focused, measured, and directed to the evidence. The questions demonstrate the care and attention with which the

[16] The company's financial performance in 2021 was not atypical. From 2017 to 2021, Philip Morris's yearly net revenues were approximately $21 billion, and its yearly net earnings ranged from around $5.3 billion to $7.7 billion.

jury approached their task, and in no way suggest that the jury were inflamed by prejudice or passion.

Second, the jury did not rush to judgment. Instead, they deliberated for three days, asking several questions during that time. Of note, the jury asked to examine physically a product model introduced by the defense. Also of note, the jury asked to know "[w]ho or what entity receives punitive damages" -- something that had not been made explicit in the instructions they had previously received.[17] Although we are hesitant to read too much into the jury's question, for purposes of this analysis it is safe to say that the question reflects the jury's attention to the details and consequences of their task and is at odds with a conclusion that they conducted their deliberations with passion or prejudice.

Third, the jury did not adopt wholesale the plaintiffs' view of liability or of damages. They rejected the claims against the supermarket codefendant, and also one of the theories of breach of implied warranty against Philip Morris. They also rejected plaintiffs' counsel's suggestion as to compensatory damages, both in the aggregate and as allocated

[17] The judge responded that punitive damages would go to Barbara's estate and redirected the jury's attention to the pages of the instructions concerning punitive damages if they were considering them.

among the individual plaintiffs, ultimately awarding $2.5 million less than requested.[18]

Fourth, this is not a case where counsel resorted to impermissible rhetoric or appealed to the jury's emotion or sympathy. Contrast Fitzpatrick v. Wendy's Old Fashioned Hamburgers of N.Y., Inc., 487 Mass. 507, 509-510, 517 (2021) (plaintiff's closing statement improperly appealed to jurors' "emotions, passions, prejudices, or sympathies" [citation omitted]). Although counsel drew the jury's attention to Philip Morris's revenue in closing argument, he did so only for the permissible purpose of asking the jury to consider what amount might be necessary to serve a deterrent purpose. Plaintiffs' counsel did not suggest any particular amount of punitive damages, let alone any amount approaching the $1 billion ultimately awarded by the jury.

Taking the case as a whole, as we must, we conclude that although the sheer magnitude of the punitive damages award undeniably reflects that the jury held strong views about the amount needed to punish and deter Philip Morris for its conduct, the judge did not abuse her discretion when she concluded that

[18] Plaintiffs' counsel suggested in closing that, in addition to the stipulated amount of Barbara's medical bills ($513,582.81), the jury award $2 million for Barbara's conscious pain and suffering; $5 million for Armand's loss of consortium; and $1.5 million each for Brian and Meghan's loss of consortium.

the verdict was not the product of passion and prejudice and denied Philip Morris's motion for a new trial.

2. Due process excessiveness. We turn next to Philip Morris's argument that the punitive damages award -- as remitted by the judge -- is excessive under the due process clause of the Fourteenth Amendment to the United States Constitution. In essence, Philip Morris contends that, because the approximately $8 million compensatory damages award was "substantial," the punitive damages award should be reduced to no more than a one-to-one ratio in order to avoid constitutional excessiveness. Because due process "prohibits the imposition of a '"grossly excessive" punishment' on a tortfeasor," Aleo, 466 Mass. at 412-413, quoting BMW, 517 U.S. at 562, courts must "review the [amount of a punitive award] to ensure that it is reasonable and not simply a criminal penalty," Aleo, 466 Mass. at 413, quoting Labonte, 424 Mass. at 826. Our review of a punitive award's reasonableness is de novo. See Cooper Indus., Inc., 532 U.S. at 436. See also Commonwealth v. Martinez, 487 Mass. 265, 267 (2021) (review of constitutional issues is de novo).

The assessment of the reasonableness of a punitive damages award for purposes of the due process clause is informed by three guideposts. BMW, 517 U.S. at 574-575. They are "(1) 'the degree of reprehensibility of the defendant's conduct,' (2) the ratio of the punitive award to the 'actual harm inflicted,' and

(3) a comparison of 'the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct.'" Aleo, 466 Mass. at 414, quoting BMW, 517 U.S. at 575-576, 580-581, 583. Although Philip Morris's argument asks us to focus only on the second guidepost, we consider all three.

a. Reprehensibility. The reprehensibility of a defendant's conduct is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." Aleo, 466 Mass. at 414, quoting BMW, 517 U.S. at 575. In assessing reprehensibility, we consider whether "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." Aleo, 466 Mass. at 414, quoting State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003) (State Farm).

We need not repeat the evidence concerning the company's reprehensible conduct over the decades during which it conspired to conceal the harms of smoking from the public, resulting in millions of people's illness and death, with gross disregard for

its customers' health and safety.[19] That conduct resulted in Barbara's addiction to a product that ultimately caused her painful death by cancer, and the jury determined that the conduct was malicious, willful, wanton, or reckless as well as grossly negligent. The judge justifiably described the defendant's actions as "among the most reprehensible." See Aleo, 466 Mass. at 415 (finding "substantial" reprehensibility when defendant's "grossly negligent" conduct "caused grievous physical harm, evinced an indifference to the safety of others, and involved repeated actions").

b. Ratio. Philip Morris correctly acknowledges that there is no "bright line" or "mathematical formula" to determine whether a particular ratio between compensatory and punitive damages is constitutional. BMW, 517 U.S. at 582-583. Rather, the question is "whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred" (emphasis omitted). Id. at 581. The United

[19] While an award of punitive damages must be based on the harm caused to the plaintiff and not on harm done to nonparties, harm to nonparties may be considered in assessing the reprehensibility of a defendant's conduct. See Philip Morris USA v. Williams, 549 U.S. 346, 353-355 (2007). Cf. State Farm, 538 U.S. at 423 (where punitive damages are based in part on recidivism, "courts must ensure that the conduct in question replicates the prior transgressions").

States Supreme Court has remarked that while "few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process," there is no "rigid benchmark"; higher ratios may be constitutional to punish a "particularly egregious act [resulting] in only a small amount of economic damages," whereas "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee" where compensatory damages are "substantial" (citation omitted). State Farm, 538 U.S. at 425. "The precise award in any case . . . must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." Id.

Here, the remitted $56 million punitive damages award was seven times the compensatory damages award and thus within the single-digit ratio generally treated as constitutional. See Aleo, 466 Mass. at 416-417. Philip Morris, however, argues that the "substantial" $8 million compensatory award merits a lower ratio. See State Farm, 538 U.S. at 425. In State Farm, the Supreme Court deemed "substantial" a $1 million compensatory award "for a year and a half of emotional distress," emphasizing that the harm was nonphysical, that the plaintiffs had "suffered only minor economic injuries," and that compensatory damages for emotional distress contain a condemnatory element that was "duplicated in the punitive award." Id. at 426. The Court thus

concluded that, particularly "in light of the substantial compensatory damages awarded," the facts of the case "likely would justify a punitive damages award at or near the amount of compensatory damages." Id. at 429. On remand, the Supreme Court of Utah disagreed, and determined that "in light of all of the [Federal] reprehensibility factors," a nine-to-one ratio of punitive to compensatory damages was appropriate. Campbell v. State Farm Mut. Auto. Ins. Co., 2004 UT 34, ¶ 41, cert. denied, 543 U.S. 874 (2004).

Just as State Farm depended on the facts presented in that case, so does this one. An amount that might be "substantial" as compensation for economic or emotional harm might not be viewed as such when, as here, it serves as compensation for personal injury or death. See Saccameno v. U.S. Bank Nat'l Ass'n, 943 F.3d 1071, 1090 (7th Cir. 2019), cert. denied sub nom. Saccameno v. Ocwen Loan Servicing, LLC, 590 U.S. 906 (2020) (treating $582,000 compensatory damages award as substantial in context of nonmalicious breach of contract, but noting that "[w]hat counts as substantial depends on the facts of the case, and an award of this size [or larger] might not mandate a 1:1 ratio on another set of facts"); Lompe v. Sunridge Partners, LLC, 818 F.3d 1041, 1069 n.28 (10th Cir. 2016) ("the maximum of punitive damages that comports with due process is highly dependent upon the relevant facts"). Accordingly, we observed

in Aleo that while the $2.64 million compensatory award in that case was substantial "by many measures, its significance pale[d] when viewed not as compensation for economic loss or emotional distress but for the loss of a young woman's life." Aleo, 466 Mass. at 417-418 (upholding punitive damages with ratio just under seven to one). See Ingham v. Johnson & Johnson, 608 S.W.3d 663, 723 (Mo. Ct. App. 2020), cert. denied, 141 S. Ct. 2716 (2021) (upholding punitive damages ratio of 5.72 to one with compensatory damages of $550 million in part because "[i]t is impossible to place monetary value on the physical, mental, and emotional anguish Plaintiffs suffered because of [ovarian cancer] caused by Defendants").

To be sure, the $8 million compensatory damages award in this case is a significant sum by many measures. But it is not an outlier in tobacco-related wrongful death actions here or elsewhere,[20] and it was intended not only as compensation for

[20] See Laramie, 488 Mass. at 401 ($11 million compensatory award); Evans v. Lorillard Tobacco Co., 465 Mass. 411, 415 (2013) ($71 million, remitted to $35 million). See also Boeken, 127 Cal. App. 4th at 1650 ($5.5 million compensatory award); Philip Morris USA Inc. v. Boatright, 217 So. 3d 166, 170, 172 (Fla. Dist. Ct. App. 2017), cert. denied, 586 U.S. 1203 (2019) ($15 million); Philip Morris USA, Inc. v. Cuculino, 165 So. 3d 36, 38 (Fla. Dist. Ct. App. 2015) ($5 million, reduced from $12.5 million after apportionment); Lorillard Tobacco Co. v. Alexander, 123 So. 3d 67, 70 (Fla. Dist. Ct. App. 2013) ($8 million, reduced from $20 million after remittitur and apportionment); R.J. Reynolds Tobacco Co. v. Townsend, 90 So. 3d 307, 309-310 (Fla. Dist. Ct. App. 2012) ($5.5 million, reduced from $10.8 million after apportionment).

Armand, Brian, and Meghan's loss of Barbara's companionship and care, but also for Barbara's own pain and suffering during her protracted battle with cancer, as well as her significant medical costs. We are accordingly not persuaded that $8 million is such "substantial" compensation as to require a reduced ratio with respect to punitive damages. We note further that neither this court nor the Supreme Court has ever held that the size of a compensatory award merits a reduced punitive damages ratio in a case such as this one, which involves knowing misconduct resulting in life-ending personal injury.

c. Comparable penalties. The third guidepost in assessing a punitive damages award's reasonableness is the comparison between the award and civil or criminal penalties available for comparable misconduct. Aleo, 466 Mass. at 418. A reviewing court should "accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue" (quotation and citation omitted). Id.

We begin by noting that the Legislature has declined to cap punitive damages for egregious misconduct resulting in wrongful death. The Massachusetts wrongful death statute authorizes a minimum punitive award of $5,000 where death was caused by the "malicious, willful, wanton or reckless conduct of the defendant or by the gross negligence of the defendant," with no maximum penalty. G. L. c. 229, § 2.

In addition, Philip Morris knowingly, intentionally, and willfully violated G. L. c. 93A[21] and, hence, its conduct could be penalized by trebling the plaintiffs' actual damages. See G. L. c. 93A, § 9 (3). The remitted punitive damages award was only three and one-half times the potential penalty under G. L. c. 93A, and we have previously approved a punitive award fourteen times higher than the applicable civil penalty in Aleo, noting that doing so was in line with decisions by the Supreme Court and other jurisdictions. See Aleo, 466 Mass. at 419-420, and cases cited.

Based on our review of the three guideposts, we uphold the judge's remittitur of the punitive damages award to $56 million. The extreme reprehensibility of Philip Morris's conduct clearly justifies a punitive damages ratio toward the upper end of the single-digit range. The compensatory damages award, while large, is not so substantial in comparison to the harm suffered as to require further remittitur. And the relationship between the remitted punitive damages award and comparable civil penalties is appropriate. The remitted award serves the goals of punishing Philip Morris's conduct and deterring similar future acts while comporting with due process.

[21] Philip Morris does not challenge the judge's G. L. c. 93A ruling on appeal.

3. Burden of proof for awarding punitive damages. Philip Morris asked the judge to adopt a clear and convincing evidence standard for the imposition of punitive damages and to instruct the jury accordingly. The judge properly declined to create new law in this regard, and instead instructed the jury consistent with our traditional standard of proof in civil cases: preponderance of the evidence. See Herman & MacLean v. Huddleston, 459 U.S. 375, 387 (1983) ("In a typical civil suit for money damages, plaintiffs must prove their case by a preponderance of the evidence"); Doe, Sex Offender Registry Bd. No. 380316 v. Sex Offender Registry Bd., 473 Mass. 297, 309 (2015) (Doe No. 380316) ("preponderance standard is generally applied in civil cases").

Philip Morris asks that we now adopt a clear and convincing evidence standard of proof for the imposition of punitive damages. That higher standard is not required under the Federal Constitution, see Haslip, 499 U.S. at 23 n.11, and Philip Morris does not argue that it is required under the Massachusetts Constitution. Instead, it argues that we should adopt the higher standard as a matter of our own authority because "particularly important individual interests or rights are at stake." Doe No. 380316, 473 Mass. at 309, quoting Craven v. State Ethics Comm'n, 390 Mass. 191, 200 (1983). We decline this invitation.

"Punitive damages are not allowed in this Commonwealth unless expressly authorized by statute." Flesner v. Technical Communications Corp., 410 Mass. 805, 813 (1991). Here, punitive damages were awarded pursuant to the wrongful death statute, G. L. c. 229, § 2, which, although requiring a heightened showing of culpability ("malicious, willful, wanton or reckless conduct" or gross negligence) before punitive damages may be awarded, does not require proof by clear and convincing evidence. In the absence of a statutory directive to the contrary, we have historically, and in a variety of contexts, applied "the baseline rule that the fact finder in a civil case usually employs a fair preponderance of the evidence standard." Andrews, petitioner, 449 Mass. 587, 591, 595 (2007) (declining to depart from general civil rule, "which we have been hesitant to do in the past," for purposes of G. L. c. 123, § 9 [b], allowing discharge or transfer of civilly committed persons). See Commonwealth v. James, 493 Mass. 828, 838 (2024) (declining to adopt higher standard of proof for civil forfeiture statute, G. L. c. 276, § 3, in absence of legislative provision). We see no reason to deviate from that approach here. Accord Freeman v. Alamo Mgt. Co., 221 Conn. 674, 682-683 (1992) (declining to impose clear and convincing standard for statutory punitive damages because "[a]bsent evidence of legislative intent to the contrary, we continue to presume that when a statutory private

right of action includes multiple damages, the plaintiff's burden of proof is the same as that in other tort cases").

We have required proof by clear and convincing evidence in cases that implicate basic rights, such as liberty, parental rights, or freedom of speech. See Doe No. 380316, 473 Mass. at 314 (classification as sex offender); MacDonald v. Caruso, 467 Mass. 382, 389-390 (2014) (termination of abuse protection order by defendant); Birchall, petitioner, 454 Mass. 837, 852-853 (2009) (civil contempt); Adoption of Helen, 429 Mass. 856, 859 (1999) (termination of parental rights); Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 870 (1975) (libel against public figure). But what is at stake here is merely a punitive financial penalty.

Philip Morris nevertheless urges that punitive damages are "quasi-criminal" by virtue of their condemnatory function, Cooper Indus., Inc., 532 U.S. at 432, and threaten important interests such as the ones described above. We are skeptical that punitive damages under the wrongful death statute expose a defendant to greater stigma than, for example, multiple damages imposed under G. L. c. 93A. Regardless, reputational harm is not comparable to the types of consequences, such as civil contempt or the loss of parental rights, that we have held cannot be imposed without clear and convincing evidence.

4. Bifurcation. A trial judge, other than one sitting in the District Court, may, under Mass. R. Civ. P. 42 (b), as amended, 423 Mass. 1402 (1996), bifurcate any claim or issue for trial "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy." "The decision to bifurcate is one within the sound discretion of the judge." Adams v. Adams, 459 Mass. 361, 392 (2011), S.C., 466 Mass. 1015 (2013). Here, Philip Morris argues that the judge abused her discretion in denying its motion to bifurcate the issue of punitive damages from the remainder of the trial and that as a result, introduction of evidence of the company's revenue prejudiced the jury's consideration of both liability and damages.

As we have already noted, evidence of the company's revenue was admissible with respect to the appropriate measure of punitive damages. See Laramie, 488 Mass. at 419. In considering bifurcation, the judge could consider that the revenue evidence would be only a small fraction of the evidence at trial,[22] and that the jury would be instructed as to the limited use to which the evidence could be put. Moreover, the

[22] As it turned out, testimony from Philip Morris's chief financial officer (including his direct examination, cross-examination, and redirect examination) consumed only twenty of the 5,821 pages of trial transcript.

judge was entitled to rely on plaintiffs' counsel's representation to her that counsel did not intend to make any improper use of the evidence, but rather intended to use it solely for the purpose we approved of in Laramie. And, as it developed, plaintiffs' counsel neither urged nor suggested to the jury that the evidence could be used for any purpose other than to assess the measure of punitive damages needed to punish and deter the company's conduct. Finally, as we have already discussed at length, there is nothing in the record to suggest that evidence of Philip Morris's revenue caused the jury to be swept away by emotion or to render a verdict that was not firmly rooted in the evidence. In the circumstances, we discern neither an abuse of discretion in the decision to deny bifurcation nor any prejudice resulting from it. See Dobos v. Driscoll, 404 Mass. 634, 644–645, cert. denied sub nom. Kehoe v. Dobos, 493 U.S. 850 (1989) (noting no case "in which the decision of a judge not to bifurcate a civil proceeding has been the ground for reversal").

To the extent Philip Morris asks us to adopt a rule requiring bifurcation in all cases involving punitive damages because "evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses," State Farm, 538 U.S. at 417, quoting Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994), we think no

such rule is necessary. The concern, if and when it arises in any particular future case, can be adequately addressed through a trial judge's discretionary decisions to limit the amount of such evidence admitted or to bifurcate in appropriate circumstances, or through remittitur. See State Farm, 538 U.S. at 418.

5. Federal Labeling Act preemption. The Federal Labeling Act provides detailed requirements for the warning labels that must appear on every cigarette package sold in the United States. Furthermore, the Labeling Act provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b). The preemptive scope of the Labeling Act "is governed entirely by the express language in [15 U.S.C. § 1334]," which is to be read narrowly "in light of the presumption against the pre-emption of state police power regulations." Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517-518 (1992).

Both statutory and common-law State claims based on theories that a defendant "should have included additional, or more clearly stated, warnings" than those required by the Labeling Act, or that are based on theories that a defendant's

advertising "neutralized the effect of federally mandated warning labels," are preempted by § 1334(b). Cipollone, 505 U.S. at 522, 524, 527. But the Labeling Act does not preempt claims that are "predicated not on a duty 'based on smoking and health' but rather on a more general obligation," such as "the duty not to deceive." Id. at 528-529. In other words, the Labeling Act "pre-empts only requirements and prohibitions -- i.e., rules -- that are based on smoking and health," not claims that assert "harms related to smoking and health." Altria Group, Inc. v. Good, 555 U.S. 70, 84 (2008).

a. Admission of evidence. Philip Morris does not assert that any of the plaintiffs' claims were preempted by the Labeling Act. Instead, it argues that it was error to admit evidence relevant to those nonpreempted claims (fraud, conspiracy, and breach of warranty) because that evidence may have also supported a preempted claim -- even though no such preempted claim was asserted in this case. Under this novel theory, Philip Morris contends that the judge erred in permitting the plaintiffs to cross-examine an expert witness concerning Philip Morris's decision to remove certain warning labels from brands it acquired from another cigarette manufacturer. That evidence was relevant to the plaintiffs' fraud and conspiracy claims because it tended to rebut Philip Morris's account of its efforts to avoid deceiving its

customers. State law fraud and conspiracy claims alleging breach of the "duty not to deceive" are not preempted by the Labeling Act. Cipollone, 505 U.S. at 528-530.

The fact that the evidence might have also been relevant to an unasserted preempted claim does not mean that it could not be admitted in connection with a nonpreempted claim that was asserted. See Altria Group, Inc., 555 U.S. at 82 n.9 (fact that evidence may have supported preempted claim does not bear on whether another claim is preempted by Labeling Act). "There is nothing new in the recognition that the same conduct might violate multiple proscriptions." Id. Every Supreme Court case assessing preemption under the Labeling Act has done so by examining the nature of the claim asserted, not by looking to the evidence needed to prove the claim. See id. at 82-83 (State fraud claims not preempted by Labeling Act); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 549-551 (2001) (regulations targeting cigarettes are preempted); Cipollone, 505 U.S. at 520-530 (claim-by-claim preemption analysis).

Our case law is in accord. In Laramie, 488 Mass. at 414, Philip Morris argued that the Labeling Act preempted admission of Federal Trade Commission reports that included statements that few consumers "notice or pay attention to" warning labels on cigarette packaging. We disagreed, reasoning that because "Philip Morris argued at trial that Laramie fully understood the

risks of smoking, in part due to the presence of the warning labels[, e]vidence that consumers did not notice or read the mandated warnings thus was relevant" to how consumers formed expectations about Philip Morris cigarettes and hence to the plaintiff's breach of warranty claim. Id. at 415. The same conclusion holds here.

b. Jury instructions. Philip Morris also argues that the judge should have instructed the jury that labels mandated by the Labeling Act are "adequate as a matter of law to warn [Barbara] and other members of the public of the hazards associated with smoking." The judge did not err in declining to give the proposed instruction. While the proposed instruction would have been correct had the plaintiffs asserted a failure to warn claim, it was misleading in the context of the duty-not-to-deceive claim the plaintiffs actually asserted. See Philip Morris USA Inc. v. McCall, 234 So. 3d 4, 17-18 (Fla. Dist. Ct. App. 2017) (where plaintiff did not assert failure to warn, jury instruction that Labeling Act-compliant cigarette manufacturers "cannot be the subject of any claim that the advertising undermined or neutralized the warnings or made them less effective" was likely to confuse jury and was reversible error).

Along the same lines, Philip Morris argues that the judge should have given an instruction that Philip Morris could not be held "liable based on any claim that its advertising undermined

or neutralized the Congressionally-mandated warnings or made them less effective." But because the plaintiffs did not assert any such claim, the proposed instruction risked confusing the jury by incorrectly implying that Federal law had some bearing on the claims that were before the jury for consideration.

Moreover, the judge instructed the jury that Federal law mandates warning labels on cigarette packages and advertisements and that "cigarette manufacturers are not required to provide any additional or stronger warnings"; the judge thus conveyed the import of the Labeling Act to the jury. "A trial judge has wide latitude in framing the language to be used in jury instructions as long as the instructions adequately explain the applicable law" (quotation and citation omitted). Luppold v. Hanlon, 495 Mass. 148, 158 (2025).

6. Failure to admit liability. Finally, Philip Morris contends that its due process right to defend itself in litigation, see Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007) (due process clause "prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense'" [citation omitted]), was infringed when one of the plaintiffs' experts was permitted to testify that the company had never fully acknowledged the harmful effects of its products. The judge permitted the testimony on the ground that evidence of Philip

Morris's present public position concerning its products was relevant to rebut the company's claim that it had been transparent about the health dangers of cigarettes since 1999.

The problem with Philip Morris's argument is that the record does not support it. Fairly read, the testimony cannot be understood to refer to Philip Morris's defense in litigation. Rather, its references to the company's website, newspapers, packaging, and "various other forums" would have made clear to the jury that the expert's testimony about what Philip Morris had admitted and acknowledged referred to Philip Morris's statements outside of the present litigation. Even if there were some possibility that the jury might draw a different inference from the testimony, any such risk was alleviated by the instruction that Philip Morris had the right to defend itself and that they could not "infer that [Philip Morris is] liable or otherwise acting improperly based on the fact that [it is] contesting liability and defending [itself]." Cf. Evans, 465 Mass. at 457 (no error in admitting evidence that could not be basis for liability but could be used in support of liability, where there was no risk of juror confusion).

Conclusion. For the reasons set out above, we affirm the judgment entered on December 14, 2023. We also affirm the

orders entered on January 5, 2024, denying Philip Morris's motions for judgment notwithstanding the verdict.[23]

So ordered.

[23] A party that prevails on a claim under G. L. c. 93A is statutorily entitled to recover reasonable appellate attorney's fees and costs with respect to the claims on which it prevailed. See Bonofiglio v. Commercial Union Ins. Co., 412 Mass. 612, 613-614 (1992). The party must have made the request for appellate attorney's fees in its brief. Fabre v. Walton, 441 Mass. 9, 10 (2004). Because the plaintiffs made such a request in their briefing, they may file a request for appellate attorney's fees and costs with this court within fourteen days of the date of the rescript of this opinion in accordance with the procedure described in Fabre, 441 Mass. at 10-11. The defendant shall then have fourteen days within which to respond.