No. ED113318

In the Missouri Court of Appeals
Eastern District

JAMES GRAHAM,
Respondent,

v.

GIVAUDAN FLAVORS CORP.,
Appellant

Appeal from the Circuit Court of Ralls County, Missouri
No. 20MM-CV00011
The Honorable Rachel Bringer Shepherd, Circuit Judge

Brief of Amici Curiae the Chamber of Commerce of the United States of America and the Missouri Chamber of Commerce and Industry in Support of Appellant Givaudan Flavors Corp.

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INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America (U.S. Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the federal and state courts. To that end, the U.S. Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Missouri Chamber of Commerce and Industry (Missouri Chamber) is a Missouri not-for-profit company. It is the largest statewide general business organization in Missouri. Together with local chambers of commerce, it represents the interests of nearly 75,000 employers. Similar to the U.S. Chamber, the Missouri Chamber represents the interests of its members in matters before the Missouri General Assembly, Missouri's Executive Branch, and the federal and state courts within Missouri. To that end, the Missouri Chamber regularly files amicus curiae briefs in cases like this one, that raise issues of concern to Missouri's business community.

Both the U.S. Chamber and the Missouri Chamber have a strong interest in the outcome of this products-liability case. Appellant Givaudan Flavors Corporation (Givaudan) manufactures flavors that are used in foods. Respondent James Graham (Graham) alleges he developed an illness from exposure to Givaudan's flavors. The trial court below refused to allow Givaudan to put on evidence that other companies' flavors besides its own were present at the plant where Graham worked. (R2214:20-R2215:1, R2560:1-R2575:4, R2579:6-R2585:2, R2588:10-R2599:19, R2679:14-R2683:11; D148, App.3-5). That evidence would have shown that Givaudan's flavors made up only a small proportion of all flavors used at the plant and that the majority of flavors containing the ingredients at issue were other companies' flavors. It also refused to admit evidence that the ingredients at issue in this case are also present in cigarette smoke, thus providing an alternative source of causation. (R2545:4-R2559:25, R2574:25-R2583:2 (App.29-38), R3161:11-R3174:9; D242-D247 (TX2319) at 50-51, 62-65; D254 (TX3511) at 5-6; D248-D249 (TX2870, TX2978). All of this evidence would have countered Graham's position that Givaudan's actions—as opposed to those of an absent third-party—caused his alleged injuries.

The trial court's rulings excluding such evidence contradict decades of Missouri precedent holding that a defendant may introduce evidence of alternative causation and third-party fault as a means of defeating the

plaintiff's case-in-chief, and not just for apportionment purposes. Even worse, the trial court upheld a facially unconstitutional 37:1 ratio of punitive to compensatory damages flagrantly violating both federal due process standards and § 510.265's[1] cap on punitive damages. Amici's brief discusses how this decision, if not reversed, will harm the wider business community.

[1] Unless otherwise noted, all statutory references are to the most recent version of the Missouri Revised Statutes.

ARGUMENT[2]

I. Verdicts must be based on the rule of law, not irrational fear. (Points IV and VI).

A. Missouri has always allowed jurors to consider third-party fault and alternative causation in determining whether the defendant is at fault.

The trial court violated Missouri law by denying Givaudan its right to introduce evidence of third-party and alternative source causation as a defense to liability. The court's exclusion of evidence that flavors produced by non-parties may have caused Plaintiff's injury, and that the cigarettes he smoked also contain the ingredients in question, is deeply unfair and simply has no basis in Missouri caselaw.

Ninety years ago, the Missouri Supreme Court held that so long as a defendant denies the allegations in a plaintiff's petition, it is "proper to show any facts which tend to establish that [the] defendant . . . [is] not guilty of any negligence charged." *Hornsby v. Fisher*, 85 S.W.2d 589, 591 (Mo. 1935). That court subsequently made clear that such evidence can include evidence of third-party fault. *See Birmingham v. Smith*, 420 S.W.2d 514, 516-17 (Mo. 1967). And in 1991, it rejected the very argument that the trial court adopted below—that evidence of third-party fault is only appropriate to apportion damages among co-defendants at trial. *See Oldaker v. Peters*, 817 S.W.2d 245,

[2] To the extent this Court's local rules require it, amici incorporate by reference Givaudan's jurisdictional statement and its statement of facts.

252 (Mo. 1991). In a situation like the one at bar here, "[t]he issue . . . is not apportionment, but the alleged negligence of [the defendant]. [The] [d]efendant may introduce any evidence that tends to establish that she is not guilty of the negligence charged." *Id*. This includes evidence that a nonparty caused the plaintiff's alleged injuries. *See id*. at 253.

Subsequent rulings confirm this interpretation. *See Whisenand v. McCord*, 996 S.W.2d 562, 531 (Mo. App. W.D. 1999) (ruling the "[d]efendant may . . . introduce evidence that someone else is the sole cause of the accident . . . ."); *Mengwasser v. Anthony Kempker Trucking, Inc.*, 312 S.W.3d 368, 373 (Mo. App. W.D. 2010) ("The rules of evidence do not prevent a defendant from arguing that the action of a third person, even a non-party, was the sole cause of the plaintiff's injuries."); *Beverly v. Hudak*, 545 S.W.3d 864, 876 (Mo. App. W.D. 2018) ("[B]oth as a matter of law and as a matter of logic, evidence that a third party caused the injury may be relevant and necessary to the jury's determination of the negligence and causation issues." (quoting *Mengwasser*, 312 S.W.3d at 373)).

Nor is this principle limited to simple automobile accident negligence cases like *Oldaker*. *Beverly* was a complex medical malpractice lawsuit.

Beverly, 545 S.W.3d at 868-69.[3] As such, the concept is equally applicable to complex toxic tort cases like this one. *See Vila v. Philip Morris USA, Inc.*, 215 So.3d 82, 85-86 (Fla. Ct. App. 2016) (ruling cigarette manufacturer properly presented such a defense in strict liability case).

Missouri caselaw thus firmly establishes, contrary to the trial court's rulings below, that evidence of third-party fault is admissible for the defendant to demonstrate that it did not cause the plaintiff's alleged injuries. Graham's theory of the case was that his injuries resulted from being exposed to Givaudan's flavors—which he maintains contain toxic ingredients—while working in a third-party plant. Givaudan sought to introduce mitigating evidence to contest this, including evidence: (1) that flavors from other manufacturing companies—which also contained the ingredients at issue—were present in even greater quantities than Givaudan's at the plant where Graham worked; and (2) that the ingredients at issue in this case are also present in cigarette smoke, thus providing an alternative source of causation given that Graham was a smoker. All of this was relevant to demonstrate that an entity or source other than Givaudan caused Graham's alleged injuries.

[3] The opinion in *Beverly*, moreover, was joined by Supreme Court Judge Zel M. Fischer sitting by designation on the Western District. *Beverly*, 545 S.W.3d at 868.

As the plaintiff, Graham had the burden of proof to demonstrate his theory of the case—that is, that his illness was caused by exposure to Givaudan's flavors. *See Revis v. Bassman*, 604 S.W.3d 644, 659 (Mo. App. E.D. 2020). As such, it was for the jury to determine whether (1) he was, in fact, exposed to Givaudan's flavors; and (2) if he was, whether he was exposed in an amount sufficient to cause his alleged illness. Givaudan's evidence of third-party and alternative-source causation was thus relevant to rebut Graham's case-in-chief on both of these points: had the jury been able to consider this excluded evidence, it may reasonably have concluded that Givaudan's flavors were not a factual or proximate cause of Grahm's injury. Givaudan was entitled to argue that any of the other entities or sources—either singly or collectively—were responsible for Graham's alleged injuries. But because the trial court prohibited Givaudan from admitting such evidence, it was unable to present such evidence. The trial court's exclusion of this evidence is reversible error. And as discussed further below, the trial court's failure to adhere to this clear Missouri precedent undermines the rule of law and unfairly enabled Graham to make inappropriate, "reptile tactic" arguments to the jury.

B. The trial court's exclusion of third-party evidence enabled trial counsel to exploit the jury's emotions through "reptile" tactics, thus undermining the rule of law.

Over the past decade-and-a-half, the plaintiff's bar has generated excessive jury verdicts through abusive trial practices known as "reptile tactics." These tactics "manipulate jurors to award damages based on raw emotion and perceived threats rather than the evidence presented at trial." Cary Silverman and Christopher E. Appel, U.S. Chamber Inst. for Legal Reform, *Nuclear Verdicts: An Update on Trends, Causes, and Solutions* 32 (2024), *available at* bit.ly/46MNehk. They "aim to instill a sense of danger in jurors' minds to suggest that unless they render a verdict that 'sends a message and effectively punishes the defendant, they are doing a disservice to the community and endangering the public and themselves." *Id*

Reptile tactics have their origin in a 2009 book "coauthored by a trial lawyer and a jury consultant" that brought such tactics into the mainstream of the plaintiff's bar. *Id*. (citing Don Keenan & David Ball, *Reptile: The 2009 Manual of the Plaintiff's Revolution* (2009)). Such "tactics can be persuasive in the courtroom because they elicit strong negative emotions from jurors while diverting jurors' attention away from facts and evidence needed to evaluate whether a defendant is responsible for a plaintiff's injury and, if so, an amount that is reasonable compensation." *Id*. at 33. Moreover, "[b]y playing to jurors' emotions and making cases less about facts and law,

plaintiffs' lawyers may circumvent prohibitions against certain conduct known to inflame juror passions and prejudice." *Id*. Thus, reptile tactics are unlawful, and in this case the trial court's exclusion of the third-party and alternative source evidence enabled plaintiff's counsel to exploit these tactics against the jury.

Plaintiff's counsel here engaged in a classic example of improper reptile tactics during closing argument by urging the jury to punish Givaudan based on emotion instead of rendering a verdict based on the law. Counsel told the jurors, "Your seats have power," (R.3410a:3), and that "[t]oday is the day to hold this corporation accountable." (R.3410:10-11). He claimed that Givaudan was liable because it allegedly injured Graham by failing to remove the ingredients at issue despite knowing that they were toxic. The court's erroneous decision to preclude admission of Graham's exposure to the ingredients from other sources exacerbated the unfairness to Givaudan of this argument.

During closing argument, plaintiff's counsel even went so far as to blame Givaudan for being the sole cause of harming unnamed non-parties outside of Missouri: "If [Givaudan's] flavorist had been told in 1995, [y]ou probably need to take diacetyl [one of the ingredients] out, it's gone and we're not sitting here, neither are the people at the . . . plants, neither are the people in Ohio, neither are the people in California or all across our country who were

devastated by this." (R.3405:14-19). He concluded, "This is your chance to send a message to this company that in this community, you can't do this. You absolutely can't do this." (R.3481:6-8).

With the trial court prohibiting Givaudan from arguing and proving that third-party flavors and cigarette smoke also contain the ingredients at issue, Givaudan could not adequately respond to opposing counsel's insinuation that had Givaudan removed one of its ingredients in 1995, the trial would not even be happening. With Givaudan being unable to present evidence of other companies' flavors or that the ingredients at issue are present in cigarette smoke, Graham's attorneys were able to distort the case into one about Givaudan and its broader corporate conduct instead about who and what actually caused their client's alleged injuries. *See* Silverman and Appel, *supra.*, at 32. ("Plaintiff's lawyers prefer to 'try the company' instead of the case.").

This verdict, driven by plaintiff's counsel's improper, emotionally based arguments—made possible by the court's erroneous rulings—should not stand. Such a verdict weakens respect for the rule of law and creates the impression that businesses in Missouri will be unable to fully defend themselves in court. "A defining characteristic of a stable and just society is that the law is applied even-handedly." *Id.* at 51. But that did not happen below, and a new trial is necessary. This Court should also take this

opportunity to set precedent prohibiting similar "try the company instead of the case" tactics that encourage jurors to step outside their role as neutral finders of fact.

II. The 37:1 ratio of punitive–to compensatory damages flagrantly violates both the U.S. Constitution and Missouri's statutory damages cap, causing serious harm to Missouri businesses if left uncorrected. (Points IX and XI).

The Missouri General Assembly enacted § 510.265 to impose a cap on punitive damages in response to excessive tort awards. The statute specifically provides that an award of punitive damages may not exceed "[f]ive times the net amount of the judgment awarded to the plaintiff against the defendant." § 510.265. The trial court accordingly had a nondiscretionary statutory obligation to reduce the jury's excessive 37:1 ratio of punitive to compensatory damages.

The 37:1 ratio of punitive to compensatory damages cannot stand because it also facially violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. As Givaudan notes in its opening brief (App.Br.65), a ratio greater than single digits is appropriate only in the most "exceptional" of cases. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 502 (2008). No such exceptional circumstances exist here, and the record certainly contains no evidence of any. And where a jury's award of compensatory damages is "substantial," the U.S. Supreme Court has indicated that the maximum

appropriate ratio is 1:1. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425-26 (2008) (suggesting, in a case where $1 million in compensatory damages were awarded, that "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee").

For the reasons stated above, this Court should order a new trial on liability. But at an absolute minimum, this Court should reduce the punitive damages ratio to 1:1. The compensatory damages of $1,529,500 are "substantial," and nothing in the record suggests that this is an exceptional case that warrants a higher ratio. Ample precedent, including from the Eighth Circuit, supports such a reduction on federal due process grounds. *See, e.g.*, *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005) (reducing the jury's punitive award from $15 million (3:1 ratio) to $5 million (1.25:1 ratio), because the award "is excessive when measured against the substantial compensatory-damages award"); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) (reducing to 1:1 ratio because "plaintiff's large compensatory award . . . militates against departing from the heartland of permissible exemplary damages."); *Rubinstein v. Administrators of Tulane Educ. Fund*, 218 F.3d 392, 408-09 (5th Cir. 2000); *Saccameno v. U.S. Bank Nat'l Assn.*, 943 F.3d 1071, 1078 (7th Cir. 2019) (reducing a punitive-damages award of $3 million to the size of the

compensatory-damages award of $582,000 where the defendant's "atrocious record keeping" led to years of harassment of a mortgagee); *Jones v. United Parcel Serv., Inc.*, 674 F.3d 1187, 1207-08 (10th Cir. 2012) (determining an award of $2 million unconstitutional where there were "substantial" compensatory damages of $630,307 and ordering a reduction of punitive damages to equal the compensatory damages); *Bach v. First Union Nat. Bank*, 486 F.3d 150, 156 (6th Cir. 2007) (concluding an award of over $2 million in punitive damages should be reduced to $400,000, which was the amount of compensatory damages); *see also Payne v. Jones*, 711 F.3d 85, 103 (2d Cir. 2013) (10:1 ratio might be permissible if compensatory damages were $10,000, but 1:1 ratio would be "very high" if compensatory damages were $300,000).

Nor is the harm from the flagrantly unconstitutional punitive-damages award limited to Givaudan. Studies have demonstrated that excessive punitive damages awards can have a crippling effect on the business community beyond merely the defendants facing those awards. From 2013 to 2022, Missouri ranked within the top ten states that produced the most "nuclear" jury verdicts of $10 million or more. Silverman and Appel, *supra.*, at 2, 3, 16. Of these nuclear verdicts, a plurality (36.7%) stemmed from product-liability trials. *Id.* at 28. The consequences of such excessive verdicts for businesses are not academic—such a "perceived liability risk can

influence where businesses choose to locate or do business." Daniel McKnight and Paul Hinton, *Tort Costs in America: An Empirical Analysis of Costs and Compensation of the U.S. Tort System* 6 (3d ed. 2024), available at bit.ly/4lQ43we. "Ultimately, excesses in the tort system have been linked to lower worker productivity and employment, and these effects can be severe in industries subject to widespread litigation." *Id*. "[A] state's litigation environment is likely to impact important business decisions, including where to locate or to do business." *Id*. at 52. When jury verdicts do not accurately reflect the amount of compensatory damages a plaintiff is entitled to, "the incentives shift to do business elsewhere." *Id*.

The trial court's punitive damages award is contrary to both the U.S. Constitution and Missouri law, not to mention fundamental fairness and common sense. The Court should reverse and order a new trial, or otherwise reduce the punitive-damages award to the amount of compensatory damages.

CONCLUSION

This Court should reverse.

Respectfully submitted,

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CERTIFICATION PURSUANT TO RULE 84.06(C)

Pursuant to Rule 55.03(a), I certify that I signed the original version of this brief, and that this brief contains all other information required by Rule 55.03. I further certify that this brief contains a total of **2,925** words, not including those sections excluded from the word count under Rule 84.06(b).

/s/ John M. Reeves

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing brief and accompanying appendix were filed with the Court's electronic filing system on ********,** with notice of case activity to be generated and sent electronically by the Clerk of the Court to all counsel of record.

/s/ John M. Reeves