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In the

In the Superior Court of Pennsylvania

1594 EDA 2024

SOOMI AMAGASU, both Individually and as Spouse and Power of Attorney for **FRANCIS AMAGASU**,
Plaintiff-Appellee,
v.
FRED BEANS FAMILY OF DEALERSHIPS, *et al.*
Appeal of: **MITSUBISHI MOTORS NORTH AMERICA, INC.**,
Defendant-Appellant.

BRIEF IN SUPPORT OF APPELLANT OF *AMICI CURIAE* THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, PENNSYLVANIA DEFENSE INSTITUTE, PHILADELPHIA ASSOCIATION OF DEFENSE COUNSEL, PENNSYLVANIA COALITION FOR CIVIL JUSTICE REFORM, AND PENNSYLVANIA CHAMBER OF BUSINESS & INDUSTRY

Appeal from the Judgment entered May 6, 2024, as corrected on May 7, 2024, in the Court of Common Pleas of Philadelphia County, at No. 2406, November Term, 2018, Sierra Thomas Street, J.

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STATEMENTS OF INTEREST OF *AMICI CURIAE*

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers.[1] Through PLAC, these companies seek to contribute to the improvement and reform of law in the United States and elsewhere, particularly the law governing the liability of product manufacturers and others in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries throughout the manufacturing sector. In addition, several hundred of the nation's leading product-liability defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,200 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management.

The Chamber of Commerce of the United States of America ("the U.S. Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests

[1] A list of current PLAC corporate members is available at https://plac.com/PLAC/Membership/Corporate_Membership.aspx.

of more than three 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 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 U.S. Chamber has filed many *amicus* briefs in significant punitive-damages cases.

The Pennsylvania Defense Institute ("PDI") is a non-profit association of defense attorneys and insurance company executives. PDI is a forum for developing public policy, exchanging ideas, and pursuing goals such as prompt, fair, and just claim resolution, improved administration of justice, enhancing the legal profession's public service, addressing court congestion and delays in civil litigation, and other public-minded activities. PDI represents its members in many areas, including legislation and litigation.

The Philadelphia Association of Defense Counsel ("PADC") is a non-profit association of approximately 300 lawyers from the five-county Philadelphia area. PADC protects and advances the interests of civil defendants and their counsel, disseminates knowledge within the defense trial

bar, speaks for civil defendants and their interests in the administration of justice, and encourages the highest standards of professional conduct.

The Pennsylvania Coalition for Civil Justice Reform ("PCCJR") is a statewide, nonpartisan alliance representing businesses, professional and trade associations, health care providers, energy development companies, nonprofit groups, taxpayers, and other entities across Pennsylvania. The PCCJR is dedicated to bringing fairness to litigants by elevating awareness of civil justice issues and advocating for reform.

The Pennsylvania Chamber of Business & Industry ("PA Chamber") is Pennsylvania's largest broad-based business association. Its nearly 10,000 current members throughout Pennsylvania employ more than half of the Commonwealth's private workforce. Its members range from small companies to mid-size and large business enterprises across all industry sectors. The Pennsylvania Chamber's mission is to advocate on public policy issues that will expand private sector job creation, to promote an improved and stable business climate, and to promote Pennsylvania's economic development for the benefit of all Pennsylvania citizens.

Few issues are more important to American product manufacturers and other businesses than the fair and lawful administration of punitive damages. *Amici* and their members have a strong interest in this case because plaintiffs

often ask juries to award punitive damages against corporate defendants on insufficient evidence and in amounts grossly disproportionate to plaintiffs' actual damages. *Amici* have a strong interest in ensuring that courts properly instruct the jury about punitive damages and faithfully apply the constitutional limitations on punitive-damage awards, including the requirement that any punitive-damage award bear a reasonable relationship to the amount of compensatory damages and actual harm sustained by the plaintiff, which the jaw-dropping $800,000,000 punitive award here does not.

This *amicus curiae* brief is respectfully submitted to the Court to address the public importance of these issues apart from and beyond the immediate interests of the parties to this case.

Pursuant to Pa. R.A.P. 531(b)(2), *amici* state that no person or entity, other than the *amici*, their members, and their counsel, paid for or authored this brief, in whole or in part.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Rules & Regulations

Other Authorities

BRIEF IN SUPPORT OF APPELLANT OF *AMICI CURIAE* THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, PENNSYLVANIA DEFENSE INSTITUTE, PHILADELPHIA ASSOCIATION OF DEFENSE COUNSEL, PENNSYLVANIA COALITION FOR CIVIL JUSTICE REFORM, AND PENNSYLVANIA CHAMBER OF BUSINESS & INDUSTRY

I. QUESTIONS PRESENTED FOR REVIEW

3. Whether JNOV … on punitive damages is required because plaintiffs failed to prove Mitsubishi acted with an evil motive or reckless indifference….

4. Whether a new trial is required because the trial court committed evidentiary and instructional errors that prevented the jury from fairly considering Mitsubishi's undisputed compliance with the Federal Motor Vehicle Safety Standards and industry standards and custom.

5. Whether substantial remittiturs are required because the $177 million compensatory damage award and the $800 million punitive damage award are both grossly excessive.

II. SUMMARY OF ARGUMENT

After setting plaintiffs' compensatory damages at nearly $177,000,000 in phase one of the trial, the jury added $800,000,000 in punitive damages in phase two—more than four times the compensatory award. *Amici curiae* address only punitive-damage issues.

First, the gigantic punitive award should be vacated and judgment n.o.v. entered because plaintiffs' evidence suggesting that defendant Mitsubishi should have done more testing—specifically, dynamic rollover testing that the National Highway Traffic Safety Administration ("NHTSA") does not

impose because such tests cannot reliably replicate real-life crash conditions—amounts only to negligence, if that, as the trial court's opinion demonstrates. The record lacks evidence of intent to injure or of the conscious disregard of a known risk that Pennsylvania law requires in a case involving mere omissions.

Second, in phase one, the jury was charged, specifically, that it should not consider evidence of Mitsubishi's compliance with government and industry standards. The evidentiary standard for phase two, however, was the opposite. Standards compliance is indisputably relevant to jury consideration of punitive damages. The trial court, although acknowledging relevance, refused to give any instruction except those in the Suggested Standard Jury Instructions ("SSJI"), despite the SSJI having no binding effect. The un-revised phase-one instruction thus left the jury with the mistaken impression that it should ignore standards evidence in the second, punitive phase as well. The misleading charge requires a new trial.

Third, by any measure the $177,000,000 compensatory verdict is "substantial," for purposes of due-process analysis. Where, as here, the compensatory award is substantial, the federal constitutional maximum for punitive damages approximates a one-to-one ratio. No punitive award significantly exceeding a compensatory award of this size has ever withstood

appellate review. Numerous punitive-damage verdicts have been held unconstitutional and reduced in cases with compensatory awards a fraction of the verdict here. For this reason, as well, this punitive verdict cannot stand.

III. ARGUMENT

A. Judgment N.O.V. Should Have Been Granted Against Plaintiffs' Punitive-Damages Claim, As Plaintiffs Had No Evidence Of Intentionally Malicious Conduct.

As the trial court's opinion states, the basis of this $800,000,000 punitive-damages verdict was *first*, that "that a rollover crash ... was a foreseeable event ... because it is a common type of car accident," and *second*, that "[d]espite this known, foreseeable risk, [defendant] conducted no testing for rollover crashes using this seatbelt design." Op. at 6.

"Foreseeability," however, "is a test of negligence." Riley v. Warren Manufacturing, Inc., 688 A.2d 221, 228 (Pa. Super. 1997) (quoting Berkebile v. Brantly Helicopter Corp., 337 A.2d 893, 900 (Pa. 1975)). "Foreseeability" of "risk" or "harm" is one of the five established factors for determining negligence duty. E.g., Klar v. Dairy Farmers of America, Inc., 300 A.3d 361, 371 (Pa. 2023); R.W. v. Manzek, 888 A.2d 740, 747 (Pa. 2005); Althaus v. Cohen, 756 A.2d 1166, 1170 (Pa. 2000). Indeed, this court has held that "reasonable foreseeability" is "[t]he test for negligence." Toney v. Chester

County Hospital, 961 A.2d 192, 199 (Pa. Super. 2008) (citation omitted), aff'd, 36 A.3d 83 (Pa. 2011).

As negligence is an insufficient basis for **punitive** damages, however, defendant Mitsubishi is entitled to judgment n.o.v. on that aspect of the verdict. "[P]unitive damages are an 'extreme remedy' available in only the most exceptional matters," "[t]hus a showing of mere negligence, or even gross negligence, will not suffice to establish that punitive damages should be imposed." Phillips v. Cricket Lighters, 883 A.2d 439, 445 (Pa. 2005) (citations omitted). Accord Takes v. Metropolitan Edison Co., 695 A.2d 397, 400 n.4 (Pa. 1997) ("neither negligence nor gross negligence can support an award for punitive damages"). For a plaintiff to receive punitive damages, "proof must be adduced that goes beyond a showing of negligence, evidence sufficient to establish that the defendant's acts amounted to intentional, willful, wanton or reckless conduct." Scampone v. Grane Healthcare Co., 169 A.3d 600, 627 (Pa. Super. 2017) (citation and quotation marks omitted). "Ordinary negligence, involving inadvertence, mistake or error of judgment will not support an award of punitive damages." Hutchinson v. Penske Truck Leasing Co., 876 A.2d 978, 983-84 (Pa. Super. 2005), aff'd, 922 A.2d 890 (Pa. 2007). Thus, in Pennsylvania:

> [T]here is a distinction between negligence and punitive damages claims, with a plaintiff being required to meet a far lesser burden

> to establish a negligence claim than that which is imposed in connection with a punitive damages claim. This distinction is an important one.

Phillips, 883 A.2d at 446.

Negligence is not enough—not even close—because, in Pennsylvania, punitive damages are "quasi-criminal" and "aimed at deterrence and retribution." Bert Co. v. Turk, 298 A.3d 44, 58 (Pa. 2023) (citations and quotation marks omitted). Such damages "are not a make-whole remedy. They are not awarded as an additional compensation but are purely penal in nature." Hoy v. Angelone, 720 A.2d 745, 749 (Pa. 1998) (citation omitted).

> Punitive damages ... are penal in nature and are intended to punish a tortfeasor and to deter the tortfeasor and others from similar conduct. Such damages are appropriate where the defendant's actions are so outrageous as to demonstrate willful, wanton or reckless conduct.

Dwyer v. Ameriprise Financial, Inc., 313 A.3d 969, 980-81 (Pa. 2024) (footnotes and quotation marks omitted). Thus, punitive damages are "over and above the amount necessary to compensate the injured party" and thus are "in effect a windfall to a fully compensated plaintiff." Feingold v. SEPTA, 517 A.2d 1277, 1276 (Pa. 1986) (citation and quotation marks omitted). They "are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's misconduct was especially reprehensible." Bert Co., 298 A.3d at 59 (citation and quotation marks omitted).

For these reasons, availability of punitive damages in Pennsylvania is limited to "rare instances" of "outrageous, extreme, egregious behavior." Hutchinson, 876 A.2d at 983 (citation omitted). "Punitive damages may be appropriately awarded only when the plaintiff has established that the defendant has acted in an outrageous fashion due to either 'the defendant's evil motive or his reckless indifference to the rights of others.'" Phillips, 883 A.2d at 188-89 (citation and quotation marks omitted). To justify punitive damages, the plaintiff must show that the defendant "had a subjective appreciation of the risk of harm to which the plaintiff was exposed" and that the defendant "acted, or failed to act ..., in conscious disregard of that risk." Hutchison v. Luddy, 870 A.2d 766, 772 (Pa. 2005) (citation omitted).

Conversely, punitive damages are not available where "there [i]s no evidence of an evil motive or a reckless indifference to [plaintiff's] safety." Id. at 773 (quoting Feld v. Merriam, 485 A.2d 742, 748 (Pa. 1984)). Such damages require "safeguards ... to protect against the[ir] arbitrary imposition." G.J.D. v Johnson, 713 A.2d 1127, 1131 (Pa. 1998). Punitive damages are "appropriate to punish and deter only extreme behavior and, even in the rare instances in which they are justified, are subject to strict judicial controls."

Martin v. Johns-Manville Corp., 494 A.2d 1088, 1096 (Pa. 1985) (plurality opinion).[2]

> [T]o justify an award of punitive damages, the fact-finder must determine that the defendant acted with a culpable state of mind, *i.e.*, with evil motive or reckless indifference to the rights of others. Since a culpable state of mind is required for an award of punitive damages, evidence of the defendant's knowledge or intention is highly relevant.

Hutchinson, 876 A.2d at 983-84 (citations omitted).

Pennsylvania law has always required "that the actor ... at least ... was aware that [the harm] was substantially certain to ensue." Evans v. Philadelphia Transportation Co., 212 A.2d 440, 443 (Pa. 1965). The record here does not approach this standard. The floor for punitive damages, "reckless indifference," demands a "higher degree of culpability" in Pennsylvania than in some other jurisdictions—evidence not only that the "actor knows, or has reason to know ... of facts which create a high degree of risk of physical harm to another," but further that the actor "deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk." The purpose of punitive damages is "to punish that person for such conduct." SHV Coal, Inc. v. Continental Grain Co., 587 A.2d 702, 704 (Pa.

[2] Abrogated on other grounds Kirkbride v. Lisbon Contractors, Inc., 555 A.2d 800 (Pa. 1989).

1991) (quoting Restatement (Second) of Torts §500, comment a (1965), and selecting the more rigorous standard). Pennsylvania appellate courts have repeatedly affirmed and reaffirmed that recklessness requires "deliberate" and "conscious" conduct to justify punitive damages. Hutchison, 870 A.2d at 771-72; Martin, 494 A.2d at 1096-98; Weston v. Northampton Personal Care, Inc., 62 A.3d 947, 1022 (Pa. Super. 2013); Snead v. Society for Prevention of Cruelty to Animals, 929 A.2d 1169, 1184 (Pa. Super. 2007), aff'd, 985 A.2d 909 (Pa. 2009); Moran v. G.&W.H. Corson, Inc., 586 A.2d 416, 423 (Pa. Super. 1991).

Sound policy supports this requirement of "deliberate" and "conscious" conduct. "It is impossible to deter a person from taking risky action if he is not conscious of the risk." Hutchison, 870 A.2d at 771 (quoting Martin, 494 A.2d at 1097 n.12). In sum, punitive damages are permissible under Pennsylvania law only—

> for conduct that is outrageous because of the defendant's evil motives or his reckless indifference to the rights of others. A court may award punitive damages only if the conduct was malicious, wanton, reckless, willful, or oppressive.

Rizzo v. Haines, 555 A.2d 58, 69 (Pa. 1989) (citations and quotation marks omitted).

The evidence here falls far short of that required under Pennsylvania's strict punitive-damages standard. *First*, this record contains no evidence that

the risk of rollover accidents was so high that injuries were "substantially certain." Plaintiffs did not even attempt to offer such data. Cf. Phillips, 883 A.2d at 446 (evidence that the type of product at issue "resulted in the deaths of 120 people per year, with an additional 750 people being injured" insufficient to permit punitive damages); Hutchinson, 876 A.2d at 988-89 (vacating punitive-damages award after excluding automobile accident statistics). Nor is there any evidence that defendant Mitsubishi consciously ignored information it possessed that its restraint-system design created a "high degree of risk" to its customers. Plaintiffs offer only "foreseeability." Nor, obviously, could the record contain evidence that defendant knew of the nonexistent risk information and "deliberately" took any act in "conscious disregard" or "indifference" to that risk.

The only affirmative evidence plaintiffs introduced was to claim that the defendant should have done more testing—specifically rollover testing. Tr. (10/20/23 p.m.) 76:13-78:24 (RR.554-55a). Even if true, that amounts at most to negligence, regardless of the gratuitous adjective, "egregious," used by one of plaintiffs' experts. Id. 77:5 (RR.555a). Plaintiffs offered no evidence that defendant Mitsubishi faked test results or violated applicable testing requirements. Rather, it was undisputed that: (1) defendant's testing met both applicable federal NHTSA regulations and industry standards, Tr.

(10/23/23 a.m.), 16:7-17 (RR.574a), and (2) that NHTSA has provided sound reasons for not requiring rollover tests for any car in any circumstance.[3] See Phillips, 883 A.2d at 447 (compliance "a factor to be considered"). NHTSA's decision demonstrates that failure to conduct rollover tests was anything but reckless, since in Pennsylvania recklessness "**must involve an easily perceptible danger of death or substantial physical harm**, and the probability that it will so result must be substantially greater than is required for ordinary negligence." Weston, 62 A.3d at 1022 (emphasis original) (quoting Restatement §500, comment a).

Unless plaintiffs are claiming that NHTSA itself acted maliciously or with reckless disregard, its decision establishes that reasonable people can, and do, agree that rollover testing does not increase safety. Imposing punitive damages under Pennsylvania law for such an objectively reasonable decision, would implicate, in this case, constitutional vagueness limitations, as states may not enforce a law that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its

[3] "No manufacturer required" rollover tests. Tr. (10/30/23) at 50:21 (RR.904a). NHTSA "said quite clearly that it [rollover testing] should not, cannot be used as a standardized test … because it's not repeatable." Id. at 67:10-16 (RR.921a) (referencing 74 Fed. Reg. 22348, 22388-89 (NHTSA May 12, 2009)). See Tr. (10/20/23, p.m.) at 92:5-6 (plaintiffs' expert Sicher agreeing that "rollover tests are not as repeatable") (RR.558a).

meaning and differ as to its application." United States v. Lanier, 520 U.S. 259, 266 (1997).[4]

Plaintiffs' expert testimony showed no more than general awareness of the dangers of rollover accidents. That is not enough. For punitive damages, the evidence must show that the defendant "actually perceived that its policy increased substantially the risk of harm." Hall v. Jackson, 788 A.2d 390, 404 (Pa. Super. 2001). "The mere fact that the defendant knew of a possibility of accidents and did not undertake additional safety measures is not sufficient by itself to support a claim for punitive damages." Livingston v. Greyhound Lines Inc., 208 A.3d 1122, 1130 (Pa. Super. 2019). As in Feld, "[t]he danger [from lack of testing] was not an easily perceptible one." 485 A.2d at 748.

Punitive damages "should not be meted out to every defendant who is found to have acted negligently" but "should be reserved for those cases in which the defendant has acted in a particularly outrageous fashion." Phillips, 883 A.2d at 446. Plaintiffs introduced no internal corporate documents

[4] Laws imposing penalties "must be so clearly expressed that the ordinary citizen can choose, in advance, what course it is lawful for him to pursue"; a "citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions"; and such laws "should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another." Connally v. General Construction Co., 269 U.S. 385, 393 (1926).

indicative of a "conscious" or "deliberate" decision to avoid conducting tests known to be necessary. Nor is there evidence that the defendant subjectively knew that its design performed less safely than a feasible design alternative. Indeed, there was no evidence of **even one** other injury arising from the purported defect in Mitsubishi's restraint system. Thus, this case had none of the extensive record that supported inadequate testing as a basis for punitive damages in Daniel v. Wyeth Pharmaceuticals, Inc., 15 A.3d 909, 932 (Pa. Super. 2011).[5]

In the product-liability context, an "evil motive" means "intentionally manufacturing a [product] with the express wish that" it will cause harm. Phillips, 883 A.3d at 447. The facts here do not even approach Pennsylvania's rigorous standard for an award of punitive damages—let alone support an award of $800,000,000. Mitsubishi is entitled to judgment n.o.v. against the award of punitive damages in this case.

[5] The record in Daniels included: (1) expert testimony that the defendant actually knew of an increased product risk and did no testing; (2) available statistics demonstrating a "substantially increased" risk; (3) harm to others; (4) a physiological basis for requiring additional testing; (5) "internal" corporate documents acknowledging the increased risk and the lack of sufficient studies; and (6) "although the FDA granted [defendant] permission to conduct the study, [it] never did so." See 15 A.3d at 931-32.

B. The Court Committed Reversible Error In Phase Two By Refusing To Countermand The Phase-One Jury Instruction That Standards Compliance Evidence Was Irrelevant.

In phase one of this bifurcated trial, the trial court instructed the jury that it could not consider evidence that the defendant's vehicle complied with Federal Motor Vehicle Safety Standards and automobile industry standards:

> Defendant Mitsubishi cannot escape a finding of defect because the occupant restraint system met industry customs or standards on safety.

Tr. (10/27/2023 p.m.) at 95:12-15 (RR.849a). The jury then reached its verdict on strict liability and compensatory damages. Tr. (10/30/2023) at 25:12-27:20 (RR.879-81a). Phase two, concerning punitive damages, commenced almost immediately.

While this court has held a product's compliance with government and industry standards is generally inadmissible to determine strict liability, Sullivan v. Werner Co., 253 A.3d 730, 747-48 (Pa. Super. 2021), aff'd by equally divided court, 306 A.3d 846 (Pa. 2023),[6] that is most emphatically **not** the case when punitive damages are at issue.

> [A]t the time [product] was sold, it complied with all safety standards. Of course, **compliance** with safety standards does not, standing alone, automatically insulate a defendant from

[6] Should that issue return to the Supreme Court, *amici* reserve the right to argue that Sullivan was wrongly decided. Schmidt v. Boardman Co., 11 A.3d 924, 941 (Pa. 2011).

> punitive damages; it **is a factor to be considered in determining whether punitive damages may be recovered**.

Phillips, 883 A.2d at 447 (emphasis added). Accord Nigro v. Remington Arms Co., 637 A.2d 983, 990-91 (Pa. Super. 1993) ("[c]ompliance with industry standard and custom weighs against Plaintiffs' argument of a culpable state of mind to underpin a demand for punitive damages, and further negates an inference of wanton indifference") (footnote omitted).[7]

Because of the radically different admissibility standards between phase one and phase two of this trial—with the jury having just been instructed that compliance evidence was not a basis to "escape liability"—defendant sought a jury instruction to clarify that compliance evidence was an exculpatory factor that the jury could consider. Tr. (10/30/2023 p.m.) at 37:7-38:2 (RR.891-92a). Defendant's Proposed Punitive Damages Instructions #5 (RR.1043a). The trial judge, although agreeing that compliance evidence was proper in phase two, Tr. (10/30/23 p.m.) at 37:7-38:2 (RR.891-92a), stated that she refused the instruction because she never gave any non-standard instructions unless both sides agreed. Plaintiffs objected, repeatedly, id. at 31:13-16; 32:9-11; 38:10-16, despite also agreeing

[7] Abrogated on other grounds Aldridge v. Edmunds, 750 A.2d 292 (Pa. 2000) (use of learned treatises).

that "[o]bviously, compliance with the governmental standards is something the jury can consider." Id. at 72:20-21 (RR.885-86a, 892a, 926a).

By rotely insisting on the Suggested Standard Jury Instructions, and only the SSJI—despite everyone acknowledging that the defendant was right that compliance evidence was admissible during the punitive-damages phase—the trial court committed reversible error, by leaving the jury with a false impression, based on the prior instruction, that the defendant's compliance evidence was not relevant to the punitive-damages analysis.

The SSJI are just that, suggestions. Commonwealth v. Eichinger, 108 A.3d 821, 845 (Pa. 2014) ("As the title implies, it [an SSJI] is merely a suggestion."). They are not anywhere near the legal gospel status the trial court afforded them. "The Suggested Standard Jury Instructions themselves are not binding and **do not alter the discretion** afforded trial courts in crafting jury instructions; rather, as their title suggests, the instructions are guides only." Id. (citation omitted) (emphasis added). The SSJI "have not been adopted by our supreme court," and when incorrect, courts should "ignore them entirely." Butler v. Kiwi, S.A., 604 A.2d 270, 273 (Pa. Super. 1992). They "exist only as a reference material available to assist the trial judge and

trial counsel in preparing a proper charge." Commonwealth v. Smith, 694 A.2d 1086, 1094 n.l (Pa. 1997).[8]

In this case, as mandated by Phillips, compliance evidence was "a factor to be considered" by this jury in phase two. 883 A.2d at 447. Thus, the trial court erred in never informing the jury of this key difference between phase one and phase two. Its elevation of the mere absence of an on-point SSJI over the Pennsylvania Supreme Court's holding in Phillips was simply wrong.

> [Such] reliance on Pennsylvania's Suggested Standard Civil Jury Instructions [wa]s misplaced. The suggested instructions are not binding. Rather, as their title suggests, the instructions are guides only. Precedential decisions by this Court, on the other hand, are mandatory and controlling.

Cowher v. Kodali, 283 A.3d 794, 808 (Pa. 2022) (Eichinger citation omitted).

"[W]hen a court instructs the jury, the objective is to explain to the jury how it should approach its task and the factors it should consider in reaching its verdict." Tincher v. Omega Flex, Inc., 104 A.3d 328, 351 (Pa. 2014) (quotation marks omitted) ("Tincher I"). "Error in a [jury] charge is grounds

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[8] See also Graham v. Check, 243 A.3d 153, 168 & n.42 (Pa. 2020) (rejecting SSJI (Civ.) 13.230 as "ill-advised"); Commonwealth v. Raymond, 233 A.3d 809, 819-20 & n.5 (Pa. Super. 2020) (jury instruction conforming to SSJI was inadequate and constituted reversible error); Tincher v. Omega Flex, Inc., 180 A.3d 386, 402 (Pa. Super. 2018) ("fundamental error" to charge jury using SSJI 16.10) ("Tincher II"); Commonwealth v. Nichols, 692 A.2d 181, 186-87 & n.4 (Pa. Super. 1997) (declaring counsel ineffective for failure to object to erroneous SSJI).

for a new trial if the charge as a whole ... has a tendency to mislead or confuse rather than clarify a material issue." Lageman v. Zepp, 266 A.3d 572, 589 n.78 (Pa. 2021). Here, the trial court's blind adherence to the SSJI led it to "g[i]ve a charge on a determinative issue that failed to conform to the applicable law," as stated in Phillips. Tincher II, 280 A.3d at 397-98.

Phillips establishes that compliance evidence is a "factor [the jury] should consider in reaching its verdict" within the meaning of Tincher I. This case is thus entirely analogous to Wood v. Smith, 495 A.2d 601, 604 (Pa. Super. 1985), except Wood involved non-compliance with applicable standards in a negligence case, rather than, as here, compliance with the same type of standards. Id. at 603. In Wood, the court's failure left the jury free to "assum[e] that since the defendants were not required by law to adhere" to industry standards, their failure to do so was irrelevant." Id. at 604. That was reversible error even though the instruction was not affirmatively erroneous:

> Where a charge is generally accurate, but misleads the jurors on a critical issue, a new trial should be granted. The charge ... was not inaccurate. It was, however, incomplete and misleading when reviewed in the totality of the circumstances. The issue ... is central to this case. Because of the trial court's error in charging on this issue ..., we must remand for a new trial.

Id. (citations omitted).

Here, even more so than in Wood, the charge in phase two was "incomplete and misleading." The "totality of circumstances" in this case

involve not only an omission, but the uncorrected effect of the phase-one charge that compliance evidence of the same sort as in Wood could not avoid liability. The trial court's flat refusal to give any instruction not found in the SSJI left the jury, as in Wood, free to assume that the prior instruction was still operative, and that the defendant's evidence of compliance was incapable of defeating punitive damages and could therefore be ignored.

While a court "may choose its own wording so long as the law is clearly, adequately, and accurately presented," when the "evidence supports a party-requested instruction on a theory or defense, a charge on the theory or defense is warranted." Tincher I, 104 A.3d at 408. Because "a verdict has meaning only in light of the charge under which it was delivered," the trial court's failure to counteract the lingering misimpression of its earlier charge rejecting compliance evidence in phase one, and to clarify that such evidence was a factor to consider in phase two, was "fundamental error" Tincher II, 280 A.3d at 407. That error requires a new trial.

C. The $800,000,000 Punitive-Damages Verdict Is An Unconstitutional Multiple Of The Already Excessive Compensatory Award.

After three seminal opinions from the United States Supreme Court and a multitude of state and federal appellate decisions interpreting them, it is now settled that where the compensatory award is "substantial"—and the

$177,000,000 compensatory award here certainly is[9]—a punitive-damages award generally should be capped at a 1:1 ratio under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, absent some other extraordinary circumstance. State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408, 425 (2003). Accord, e.g., Lompe v. Sunridge Partners, LLC, 818 F.3d 1041, 1073-74 (10th Cir. 2016); Willow Inn, Inc. v. Public Service Mutual Insurance Co., 399 F.3d 224, 235 (3d Cir. 2005); Boerner v. Brown & Williams Tobacco Co., 394 F.3d 594, 603 (8th Cir. 2005). The trial court's two-paragraph due process discussion, Op. at 24-26, nowhere addressed the impact of the "substantial" compensatory award under the mandatory, settled framework for punitive damages established by the U.S. Supreme Court.

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[9] When the $177 million compensatory verdict was returned, the trial court seemed shocked, stating on the record:

> I personally think that this is excessive. That's my opinion. Legally I don't think I can take it away from the jury just because I think it's excessive. I think the jury in their minds have already awarded punitive damages based on the numbers we heard.

Tr. (10/30/2023) at 40:3-8 (RR.894a). In light of the size of the compensatory verdict, pursuing punitive damages in "the second part of trial" was "kind of ridiculous." Id. at 41:11-12 (RR.895a). "[I]n my opinion, they've already made their decision." Id. at 41:7:8 (RR.895a).

Requiring a reasonable compensatory-punitive ratio helps ensure fairness and proportionality. "[P]erhaps [the] most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." BMW of North America, Inc. v. Gore, 517 U.S. 559, 580 (1996). Well over a century of common-law precedent demonstrates the "long pedigree" of "[t]he principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages." Id. at 580 & n.32.

The Court refined its ratio analysis in State Farm. Although the Court did not "impose a bright-line ratio," it held that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," 538 U.S. at 425, and that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." Id. Most relevant to this case, the State Farm Court introduced substantiality into the analysis, emphasizing that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limits of the due process guarantee." Id.

The Court underscored the importance of the 1:1 ratio in Exxon Shipping Co. v. Baker, 554 U.S. 471, 499 (2008), where it analyzed the

excessiveness of a $2.5 billion punitive-damage award under federal maritime common-law (not due-process) standards. "[T]he potential relevance of the ratio between compensatory and punitive damages is indisputable" and such ratios are "a central feature in our due process analysis." Id. at 507. The Court vacated that punitive award and held that a 1:1 ratio represented the "upper limit," given the substantiality of some $40 million in net verdicts and settlements in the case. Id. at 481, 513-14.[10]

The Exxon Court reached that conclusion after surveying state law, including the Restatement §500 standard used in Pennsylvania. Id. at 493-94. The Court also reviewed academic studies of the frequency and amounts of punitive damages verdicts. Id. at 496-500. The Court determined that the median punitive-to-compensatory damages ratio for all American jury and bench trials is about 0.65:1. Id. at 498 & n.14. That ratio, Exxon concluded, "probably marks the line near which cases like this one largely should be grouped," as the overall ratio "would roughly express jurors' sense of

[10] Exxon also mentioned another $125 million in fines and restitution assessed in related litigation. Id. at 479. Combined, the adjudicated penalties in Exxon thus approximated the compensatory award here.

reasonable penalties in cases with no earmarks of exceptional blameworthiness [or] modest economic harm." Id. at 513.[11]

Given the conduct at issue in Exxon—"reckless action, profitless to the tortfeasor, resulting in substantial recovery for substantial injury"—even a 3:1 ratio would be too high. Id. at 511. For all these reasons, the Court concluded, a 1:1 ratio, well above the nationwide median, provided a "fair upper limit." Id. at 513. The 1:1 ratio addressed the "real problem" of "the stark unpredictability of punitive awards." Id. at 499. That brought the Court full circle, to the original due process motivation in Gore, that a person is entitled to "fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." 517 U.S. at 574.

Granted, there is no "bright line or concrete limit on how to determine if an award of punitive damages meets constitutional muster." Bert Co. v. Turk, 298 A.3d 44, 60 (Pa. 2023). Nonetheless, throughout the country, appellate courts have followed the U.S. Supreme Court's "general principle that a plaintiff who receives a considerable compensatory damages award ought not also receive a sizeable punitive damages award absent special

[11] As discussed, supra, at 9-10, the only basis for punitive damages here was the defendant's failure to conduct certain tests. There is no evidence of malice or conscious intent to harm anyone.

circumstances." Bach v. First Union National Bank, 486 F.3d 150, 156 (6th Cir. 2007). As already discussed, the conduct here is not "particularly egregious," and almost every such decision has involved "substantial" compensatory awards far less than the verdict here. "[T]he facts and circumstances of each case are determinative in assessing the constitutionality of a punitive damages award." Bert Co., 298 A.3d at 62.

In Willow Inn, the Third Circuit applied the due process guideposts to a $150,000 punitive damage award imposed under Pennsylvania law—minuscule compared to the verdict here. That court recognized that, under Supreme Court precedent, "the ratio of punitive damages to the harm caused by the defendant is a tool to ensure that the two bear a reasonable relationship to each other." 399 F.3d at 233-34. The plaintiff in Willow Inn sought "additur" beyond its proven damages. The court "reject[ed] this approach," both "because [the plaintiff] did not prove [the necessary facts] at trial," and because "the $150,000 punitive damages award approaches the constitutional limit." Id. at 235.[12] The result here should be *a fortiori* from Willow Inn, by a multiple of over 5,000.

[12] See Jurinko v. Medical Protective Co., 305 F. Appx. 13, 28-30 (3d Cir. 2008) (punitive damages in Pennsylvania medical-malpractice insurance bad faith matter reduced to 1:1); Agrofresh, Inc. v. Essentiv LLC, 2020 WL 7024867, at *22 (D. Del. Nov. 30, 2020) ($6 million compensatory award was "substantial and greatly exceeded plaintiff's economic losses, justifying

Many appellate courts, federal and state, have reached the same result usually in the face of far less extreme verdicts, as these examples, all involving million-dollar-plus compensatory awards, illustrate:

- In Epic Systems Corp. v. Tata Consultancy Services, 980 F.3d 1117, 1144-45 (7th Cir. 2020), the court reduced punitive damages of $280 million where the compensatory award for theft of trade secrets was $140 million. Given the large compensatory award, "a 2:1 ratio exceeds the outermost limit of the due process guarantee" and the ratio "should not exceed 1:1 in this case."
- In Blood v. Qwest Services Corp., 224 P.3d 301 (Colo. App. 2009), aff'd, 252 P.3d 1071 (Colo. 2011), an $18 million compensatory award bore "a reasonable relationship to an "approximate 1:1 exemplary damages award" for severe and permanent injuries.
- In Johnson v. Monsanto Co., 266 Cal. Rptr.3d 111, 134 (Cal. App. 2020), the substantiality of a $10+ million compensatory award

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reduction of punitive award to 1:1) (applying Pennsylvania law); Inter Medical Supplies Ltd. v. EBI Medical Systems, Inc., 975 F. Supp. 681, 701 (D.N.J. 1997) ($100 million punitive award reduced to $50 million 1:1 ratio; "one naturally expects a much lower ratio when a substantial award of compensatory damages has been made"), aff'd, 181 F.3d 446 (3d Cir. 1999) (applying New Jersey law).

justified "reduc[ing] the award so that it maintains a one-to-one ratio" in a herbicide cancer case.

- In King v. U.S. Bank National Ass'n, 266 Cal. Rptr.3d 520, 570-71 (Cal. App. 2020), a nearly $8.5 million compensatory verdict in wrongful termination litigation demanded "a one-to-one ratio between compensatory and punitive damages" as the "constitutional limit."
- In Boerner, 394 F.3d at 603, a punitive-damages award for "callous disregard for the health consequences of smoking" "[wa]s excessive when measured against [a] substantial compensatory damages award," of over $4 million, and was reduced to "a ratio of approximately 1:1," since "there is no evidence that anyone at [the defendant] intended to victimize its customers." "Factors that justify a higher ratio ... [we]re absent."
- In Thistlethwaite v. Gonzalez, 106 So.3d 238, 268 (La. App. 2012), punitive damages against a drunk driver were reduced to $3.6 million, because "the high amount of compensatory damages awarded ... calls for a smaller ratio" of 1:1.
- In Lompe, 818 F.3d at 1065, a personal injury case, the court reduced a punitive award to equal the $1.95 million in compensatory damages,

because the "wrongful conduct consisted of a failure to act rather than any intent to injure through affirmative conduct."

- In Roby v. McKesson Corp., 219 P.3d 749, 798 (Cal. 2010), the court reduced a punitive-damage award in a wrongful termination case involving a $1.9 million compensatory award, because "punitive damages in an amount equal to compensatory damages marks the constitutional limit in this case and still provides the appropriate deterrence."[13]

This Court should follow the same path as these decisions. Any "analysis of the constitutionality of a punitive damages award must account for its impact on a defendant's right to due process." Bert Co., 298 A.3d at 71 (citation omitted). After pointing out that "potential harm" in that particular case could well have reduced the relevant punitive damages ratios to 1:1 or less, id. at 78-79, Bert also addressed substantiality. It emphasized

[13] Many decisions also apply the Exxon 1:1 ratio to punitive damages in cases with compensatory awards of under $1 million. E.g., Lawlor v. North American Corp., 983 N.E.2d 414, 433 (Ill. 2012) ($65,000); Bongiovi v. Sullivan, 138 P.3d 433, 452 (Nev. 2006) ($250,000); Roth v. Farner-Bocken Co., 667 N.W.2d 651, 670 (S.D. 2003) ($25,000); Saccameno v. U.S. Bank National Ass'n, 943 F.3d 1071, 1090 (7th Cir. 2019) ($582,000); Jones v. United Parcel Service, Inc., 674 F.3d 1187, 1206-08 (10th Cir. 2012) ($630,307); Williams v. ConAgra Poultry Co., 378 F.3d 790, 799 (8th Cir. 2004) ($600,000).

that a "multitude of factors" can "influence a determination of whether a compensatory damages award is or is not substantial," and "that the meaning of substantial is open to a variety of definitions." Id. at 81.

Unlike Bert, however, this case is not one "where reasonable minds may differ." Id. Rather, the verdict here is a gross outlier. The compensatory damage award here, $177,000,000, is almost 600 times the largest compensatory verdict in Bert. Id. at 61 ($300,000). To these *amici*'s knowledge, no compensatory verdict of this size for individual personal injuries in the nation: (1) has **ever** not been considered "substantial" for due-process purposes, nor (2) has any accompanying punitive-damages award exceeding the Exxon one-to-one ratio **ever** survived appeal.

Thus, the compensatory verdict here is undeniably "substantial" —larger than any of the above precedent, and exponentially larger than most. The plaintiff-husband's severe and permanent injuries have already been amply compensated, and the facts here do not reflect the sort of specific intent to harm that could justify anything exceeding a 1:1 punitive award.

Beyond impairing the fairness, predictability and proportionality of the legal system, verdicts, such as this, awarding unreasonable punitive damages "impose harmful, burdensome costs on society." Payne v. Jones, 711 F.3d 85, 94 (2d Cir. 2013). Not only does "an excessive verdict that is allowed to stand

establish[] a precedent for excessive awards in later cases," but "[t]he publicity that accompanies huge punitive-damages awards will encourage future jurors to impose similarly large amounts." Id. (citations omitted).

IV. CONCLUSION

For all of the above reasons, the Court should vacate the $800,000,000 award of punitive damages in this case. That mind-boggling verdict is unsupported by the evidence, the product of improper jury instructions, and unconstitutionally excessive.

Respectfully submitted,

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COMBINED CERTIFICATES OF COMPLIANCE AND SERVICE

I hereby certify that the foregoing brief complies with the word limit of Pennsylvania Rule of Appellate Procedure 531(b)(3). Specifically, it contains 6805 words based on the word count of Microsoft Word 2010, the word processing system used to prepare the brief.

I further certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information.

I further certify that on February 5, 2025, I caused true and correct copies of the foregoing Brief in Support of Appellant of *Amici Curiae* the Product Liability Advisory Council, Inc., Chamber of Commerce of the United States of America, Pennsylvania Defense Institute, Philadelphia Association of Defense Counsel, Pennsylvania Coalition for Civil Justice Reform, and Pennsylvania Chamber of Business & Industry to be electronically served on all parties listed in this Court's docket.

/s/ James M. Beck
James M. Beck

Dated: February 5, 2025