

IN THE COURT OF APPEALS
STATE OF ARIZONA, DIVISION ONE

MINNIE MAE DOUGLAS and OLLIE
DOUGLAS JR., her husband,

Plaintiffs/Appellees,

v.

DAIMLERCHRYSLER
CORPORATION f/k/a CHRYSLER
CORPORATION, a Delaware
Corporation; EARNHARDT'S
GILBERT DODGE, INC., an Arizona
Corporation,

Defendants-Appellants.

No. 1 CA-CV 04-0554

Maricopa County
Superior Court
No. CV2001-019659

**BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES
AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS/APPELLANTS**

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States (“the Chamber”) is the world’s largest business federation, representing an underlying membership of more than 3,000,000 businesses and organizations of every size. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases that have raised issues of vital concern to the nation’s business community.

Punitive damages are a singularly important concern of the nation’s business community. Historically, Arizona has been among the vanguard of states announcing strict legal principles designed to ensure that punitive damages remain an extraordinary sanction for conduct that approaches criminal proportions. The Chamber believes that, if the punitive judgment against DaimlerChrysler Corporation (“DCC”) is allowed to stand, this case will represent a disturbing move in the opposite direction, toward treating punitive damages as simply another element of tort damages. The undisputed evidence is that DCC’s choice of the Ram’s seatback design was based upon and supported by the expert opinion of its engineers — and that the

experts at other automakers and the federal agency with responsibility for automobile safety agreed with its choice. Under Arizona's strict standards, DCC should have been granted judgment on punitive damages: The facts of this case are simply inconsistent with a finding that DCC acted with an "evil mind" under any standard of proof, let alone Arizona's "clear and convincing" standard. And even if the evidence in this case justified a punitive award of some amount, a \$50,000,000 punishment that is over 13 times the compensatory damages attributable to DCC's conduct is grossly excessive when, as here, the compensatory damages are substantial and there is no evidence of intentional malice or other highly reprehensible conduct.

This verdict can be affirmed only by watering down both Arizona's strict standards for the imposition of punitive damages and the U.S. Supreme Court's guideposts for evaluating the amount of punitive awards. Weakening either of those safeguards against arbitrary punitive awards would have a significant negative impact not only on the Chamber's members, but also on the public generally, which is sure to suffer the consequences of the overdeterrence that such a decision would wreak. Accordingly, the Chamber has a strong interest in conveying its views on these important issues.

ARGUMENT

I. THIS CASE DOES NOT SATISFY ARIZONA'S STRINGENT STANDARD FOR THE IMPOSITION OF PUNITIVE DAMAGES.

A. Punitive Damages Are Available Only To Punish The Most Egregious Misconduct.

Arizona has long followed the rule that “punitive damages * * * should be appropriately restricted to only the most egregious of wrongs.” *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 331, 723 P.2d 675, 680 (Ariz. 1986). Specifically, “the species of intentional conduct necessary for recovery of tort damages in a bad faith case may fall short of what is required for a punitive damage award”; “mere negligence is not enough, even though it is so extreme and egregious to be characterized as ‘gross’” (*Rawlings v. Apodaca*, 151 Ariz. 149, 162, 726 P.2d 565, 578 (Ariz. 1986)); and, in the context of product liability, “[t]he fact that a manufacturer continues to market a [dangerous] product is not in itself enough” (*Volz v. Coleman Co.*, 155 Ariz. 567, 570, 748 P.2d 1191, 1194 (Ariz. 1987)). Indeed, the Supreme Court of Arizona has “expressly rejected awarding punitive damages based on gross negligence or mere reckless disregard of the circumstances.” *Id.* Instead, consistent with their intended purpose of punishment — normally the domain of criminal law — Arizona limits punitive damages to “conduct involving some element

of outrage similar to that usually found in crime.” *Rawlings*, 151 Ariz. at 162, 726 P.2d at 578 (internal quotation marks and citation omitted).

There are several reasons that limiting the availability of punitive damages in this way is good policy. First, an insufficiently restrictive standard “leads to misapplication of the extraordinary civil remedy of punitive damages, * * * overextends the availability of punitive damages, and dulls the potentially keen edge of the doctrine as an effective deterrent of truly reprehensible conduct.” *Linthicum*, 150 Ariz. at 331, 723 P.2d at 680 (internal quotation marks and citation omitted).¹ Second, if the bar is lowered, businesses may be “overdeterred” and make bad decisions (or may avoid action entirely) “to avoid the risk of a punitive damages award” — a result that “would be bad policy as well as bad law.” *Gurule v. Ill. Mut. Life & Cas. Co.*, 152 Ariz. 600, 601-02, 734 P.2d 85, 86-87 (Ariz. 1987).² Third, “[w]hen punitive damages are loosely assessed, they become onerous not only to

¹ See also *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 657 (Md. 1992) (quoting *Linthicum*); *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985).

² See also *Linthicum*, 150 Ariz. at 332, 723 P.2d at 681; *Loitz v. Remington Arms Co.*, 563 N.E.2d 397, 403 (Ill. 1990) (“Threatened with liability for large punitive awards, product manufacturers may curtail their research and development of new and beneficial products.”); *In re Exxon Valdez*, 270 F.3d 1215, 1244 (9th Cir. 2001) (“Every large company knows that it cannot exercise absolute control over all its employees, so if there is too much risk in performing some activity, the entire activity may be avoided as a preferable alternative to bearing potentially infinite costs of avoiding the harm, and society would lose the benefit of the productive activity.”).

defendants but [to]the public as a whole.” *Linthicum*, 150 Ariz. at 332, 723 P.2d at 681. In other words, when punitive damages are treated like just another element of tort damages, they become a thinly veiled method of transferring additional wealth, over and above that required for compensation, from defendants —and thus, ultimately, other consumers — to people who have suffered particularly sympathetic injuries.

1. Punitive damages are available only when the defendant has acted with an “evil mind.”

In order to restrict punitive damages to the most egregious cases — and, conversely, foreclose them in most cases (*see Medasys Acquisition Corp. v. SDMS, P.C.*, 203 Ariz. 420, 424, 55 P.3d 763, 767 (Ariz. 2002) (“punitive damages should rarely be awarded”)) — the Supreme Court of Arizona has held that “[s]omething more than the mere commission of a tort is always required for punitive damages.” *Rawlings*, 151 Ariz. at 162, 726 P.2d at 578; *see also Linthicum*, 150 Ariz. at 326, 723 P.2d at 675. The “something more” is proof that the defendant acted with an “evil mind”: It is this “‘evil mind’ *in addition to* outwardly aggravated, outrageous, malicious, or fraudulent conduct which is required for punitive damages.” *Linthicum*, 150 Ariz. at 331, 723 P.2d at 680 (emphasis added). This means that “the propriety of awarding punitive damages turns upon the defendant’s state of mind.” *Gurule*, 152

Ariz. at 602, 734 P.2d at 87.³ “It is only when the wrongdoer should be consciously aware of the evil of his actions, of the spitefulness of his motives or that his conduct is so outrageous, oppressive or intolerable in that it creates a substantial risk of tremendous harm to others that the evil mind required for the imposition of punitive damages may be found.” *Linthicum*, 150 Ariz. at 330, 723 P.2d at 679. The evil mind requirement “is satisfied by evidence that defendant’s wrongful conduct was motivated by spite, actual malice, or intent to defraud or defendant’s conscious and deliberate disregard of the interest and rights of others.” *Volz*, 155 Ariz. at 570, 748 P.2d at 1194 (internal quotation marks and citation omitted).

2. The defendant’s evil mind must be proved with clear and convincing evidence.

Arizona not only requires a heightened substantive standard before punitive damages are available, it also requires that this standard be proved by clear and convincing evidence. *See, e.g., Linthicum*, 150 Ariz. at 332, 723 P.2d at 681 (“punitive damages should be awardable only upon clear and convincing evidence of the defendant’s evil mind.”) (citation omitted). This heightened standard of proof recognizes the quasi-criminal nature of punitive damages and serves to reduce the risk

³ Indeed, “[t]he quality of defendant’s conduct is relevant and important only because it provides one form of evidence from which defendant’s motives may be inferred.” *Gurule*, 152 Ariz. at 602, 734 P.2d at 87.

that those who are not morally culpable will be erroneously stigmatized (and financially burdened) by the imposition of such damages.⁴ But the purposes of adopting a heightened standard of proof cannot be accomplished merely by adding the words “clear and convincing” to pattern jury instructions. Courts must also apply this standard when reviewing the sufficiency of the evidence. *See Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 132, 907 P.2d 506, 518 (Ariz. Ct. App. 1995). Regrettably, the case law giving content to this standard is relatively sparse, but a number of guiding principles nonetheless may be gleaned from it.

First, it goes without saying that the standard requires a higher level of certainty than the preponderance standard. As the Arizona Supreme Court has put it, to be clear and convincing, the evidence must show that the fact in question is “highly probable.” *State v. King*, 158 Ariz. 419, 424, 763 P.2d 239, 244 (Ariz. 1988); *accord Orkin Exterminating Co. v. Traina*, 486 N.E.2d 1019, 1022 (Ind. 1986) (the clear and convincing evidence standard “is but minutely below the ‘reasonable doubt’ standard”); *In re Angelia P.*, 623 P.2d 198, 204 (Cal. 1981) (clear and convincing evidence must “leave no substantial doubt” and must be “sufficiently strong to

⁴ *See, e.g., Owens-Corning Fiberglas Corp. v. Garrett*, 682 A.2d 1143, 1162 (Md. 1996); *Kansas City v. Keene Corp.*, 855 S.W.2d 360, 378 (Mo. 1993) (Holstein, J., concurring); *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 938 (D.C. 1995), *amended*, 681 A.2d 1097 (D.C. 1996); *Masaki v. General Motors Corp.*, 780 P.2d 566, 575 (Haw. 1989); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 458 (Wis. 1980).

command the unhesitating assent of every reasonable mind”) (internal quotation marks omitted); *In re Sedillo*, 498 P.2d 1353, 1355 (N.M. 1972) (the evidence must “instantly tilt the scales” in favor of the proposition sought to be established so that “the fact finder’s mind is left with an abiding conviction that the evidence is true”); *Greener v. Greener*, 212 P.2d 194, 205 (Utah 1949) (“for a matter to be clear and convincing to a particular mind it must at least have reached the point where there remains no serious or substantial doubt as to the correctness of the conclusion”); *Fred C. Walker Agency, Inc. v. Lucas*, 211 S.E.2d 88, 92 (Va. 1975) (the evidence must be sufficient to “produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established”) (internal quotation marks omitted).

Second, the standard of proof does not exist in a vacuum, but rather can only be sensibly defined in relation to the nature of the facts that must be proven. In the context of punitive damages, the clear and convincing evidence standard can be understood only when taken together with Arizona’s *substantive* standard for punitive liability. Together, the substantive and procedural standards yield a general requirement of proof by clear and convincing evidence that the defendant acted with an “evil mind.” In the context of product liability, this standard suggests that there must be proof that the defendant had actual knowledge that its product was

dangerously defective and, in deciding to sell it anyway, was utterly indifferent to the harms that the product was likely to cause.

To meet the clear and convincing standard when proving a culpable mental state, the evidence must consist of more than simply the kind of inferences that might support a finding of liability for the underlying tort. As the Indiana Supreme Court explained in adopting the clear and convincing evidence standard:

[I]t is incongruous to permit a recovery of that to which there is no entitlement [*i.e.*, punitive damages] upon evidence that barely warrants a recovery of that which is the plaintiff's absolute right [*i.e.*, compensatory damages]. Yet, that is precisely what may occur when the inference of obduracy, from which punitive damages may flow, is permissible, but not compelled, from the same conduct from which compensatory damages flow, as a matter of right. To avoid such occurrences, punitive damages should not be allowable upon evidence that is merely consistent with the hypothesis of malice, fraud, gross negligence or oppressiveness. Rather some evidence should be required that is inconsistent with the hypothesis that the tortious conduct was the result of a mistake of law or fact, honest error of judgment, overzealousness, mere negligence or other such noniniquitous human failing.

Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349, 362 (Ind. 1982); *see also Traina*, 486 N.E.2d at 1024 (the evidence must “exclude the hypothesis that the defendant’s conduct, for which [the jury] has awarded compensatory damages, although wrongful, was, nevertheless, not committed with the element of obduracy charged”); *Madill Bank & Trust Co. v. Herrmann*, 738 P.2d 567, 571 (Okla. Ct. App. 1987) (under “clear and convincing” standard “fraud may not be inferred from acts which are

consistent with honesty of purpose”). In other words, if the evidence is susceptible to two inferences, one of culpable mental state and the other of non-culpable mental state, it does not satisfy the “clear and convincing” standard.

In the products liability context, this means that punitive damages should be permitted only when (i) there is no plausible claim that the design is not defective and (ii) the evidence clearly and convincingly excludes the possibility that the defendant’s decisions with respect to the product were made in good faith. As one leading commentator on punitive damages has explained:

In the defect ‘no man’s land,’ punitive damages simply have no place. If such [design] decisions fall within any reasonable distance of the ‘defect line,’ even if in hindsight proven wrong, fairness requires that they ordinarily be judged to have been made in good faith. Stated in another way, even if the product is finally found ‘defective,’ the case for punitive damages almost always will be quite weak if a plausible case for nondefectiveness was made the other way. Such damages usually will not be appropriate unless the product was very defective, and plainly so, at the time it was sold. *A plaintiff usually should be entitled to a directed verdict on defectiveness, or close thereto, before the punitive damages issue is properly before the jury at all.*

David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 38 (1982) (emphasis added; footnotes omitted).

Third, in applying the clear and convincing evidence standard when reviewing a verdict, courts may not disregard the defendant’s evidence. Rather, the plaintiff’s

evidence must be weighed against evidence in opposition. *See, e.g., Hyatt Regency Phoenix Hotel Co.*, 184 Ariz. at 132; *see also Sedillo*, 498 P.2d at 1353; *McBee v. Dennis*, 229 P.2d 179, 182 (Okla. 1951); Ala. Code § 6-11-20(b)(4)). It is only when the plaintiff's evidence so greatly outweighs the defendant's as to permit a reasonable jury to unhesitatingly exclude the possibility that the defendant's conduct was the product of mistake, legitimate difference of opinion, or other innocent mental state that the evidence suffices to allow the jury to consider a claim for punitive damages.

This is not to say, however, that the clear and convincing evidence screen is an impenetrable barrier. A range of claims — unsurprisingly the ones to which punitive damages were limited for most of the country's history — would continue to support awards of punitive damages.

For example, certain torts, by their very nature, have no innocent explanation. Most obvious among this group, but by no means the only ones, are murder, torture, and many other categories of battery. *See, e.g., Haralson v. Fisher Surveying, Inc.*, 201 Ariz. 1, 4, 31 P.3d 114, 117 (Ariz. 2001) (citing “terrorist attacks or bombings, mass murders, and serial killings” as types of conduct that may justify punitive damages against the tortfeasor's estate); *Cruz v. Montoya*, 660 P.2d 723 (Utah 1983) (punitive damages awarded to victim of brutal bar-room beating).

Acts of domestic violence also usually lack any benign explanation. As one court has explained, “it is difficult to imagine an instance of domestic violence that does not include the requisite element of evil mindedness or bad motive. * * * [T]he defendant’s only conceivable purpose * * * was to intentionally and maliciously torture the plaintiff. * * * It cannot be argued that torture such as reported here is not an evil-minded act warranting * * * punitive damages.” *Sielski v. Sielski*, 604 A.2d 206, 209-210 (N.J. Super. Ct. Ch. Div. 1992); *see also Haralson*, 201 Ariz. at 4, 31 P.3d at 117 (citing *Caron v. Caron*, 577 A.2d 1178, 1180 (Me. 1990), for proposition that punitive damages are available in cases involving spouse or child abuse).

Similarly, in fraud cases involving some form of a premeditated scam, evidence sufficient to establish the elements of the tort will also serve to negate any non-culpable explanation for the conduct. *See, e.g., Neibel v. Trans World Assurance Co.*, 108 F.3d 1123, 1126 (9th Cir. 1997) (affirming punitive award for tax fraud scheme that “preyed on * * * middle class Americans with little experience with the tax laws or the legal system”); *General Resources Org., Inc. v. Deadman*, 907 S.W.2d 22, 32 (Tex. Ct. App. 1995) (affirming punitive award resulting from a gold scam in which defendants intended to “defraud investors of large amounts of money”); *Linkers Pte., Ltd. v. Int’l Polymers, Inc.*, 1996 U.S. Dist. LEXIS 10276 (S.D.N.Y. 1996)

(defendants who committed multiple scams involving gross and wanton fraud were liable for punitive damages).

Moreover, even in cases that do not involve inherently-malicious torts, some categories of evidence might suffice to support a finding of punitive liability under the clear and convincing standard. For instance, the hypothesis of a non-culpable explanation may be negated through “smoking-gun” documents — *i.e.*, documents that unambiguously reflect an awareness that the actor’s conduct is wrongful and an indifference to the consequences and/or an intention to attempt to conceal the conduct.⁵ Similarly, “whistleblower” testimony — the testimony of a present or former employee that the company was animated by malice or callous disregard rather than good faith — may be sufficient to make out a prima facie case for punitive damages. Finally, admissions and other inculpatory statements of the defendant or the defendant’s agents, when not taken out of context so as to make the innocent look sinister, may suffice at least to preclude a directed verdict at the close of the plaintiff’s case. Of course, even in cases involving these types of evidence, punitive damages may not be appropriate if there are significant questions about the reliability of the

⁵ By contrast, documents that are subject to conflicting interpretations — one culpable and one non-culpable — would be insufficient to satisfy the plaintiff’s burden. *See* pages 9-10, *supra*.

inculpatory evidence or if the defendant puts on countervailing evidence that reestablishes the possibility of a non-culpable explanation.

The design and manufacture of automobiles, or component seatbacks, is not inherently evil-minded, and none of the types of inculpatory evidence discussed above was presented here. Plaintiffs did not produce internal documents or witnesses saying that DCC decided to use the Ram's seatback design despite knowledge that plaintiffs' preferred seatback design was objectively safer and in conscious disregard of the safety of drivers and passengers. That failure of proof should have resulted in a directed verdict for DCC even before DCC began its defense. Moreover, as we next discuss, insofar as plaintiffs had any evidence at all that could be said to meet Arizona's substantive standard for punitive liability, that evidence plainly was not "clear and convincing" when measured against the undisputed evidence introduced by DCC.

B. DCC's Evidence Should Have Foreclosed An Award Of Punitive Damages.

Courts have recognized several categories of evidence that, either individually or together, strongly support the conclusion that the defendant had a non-culpable mental state and hence, when weighed against the plaintiff's evidence, should dictate

a directed verdict in favor of the defendant under the clear and convincing evidence standard. Several of those factors are present here.

1. Punitive damages are improper when the defendant has fully satisfied all government safety regulations.

“Punitive damages, unrelated to compensation for any injury or damage sustained by a plaintiff, are ‘regulatory’ in nature rather than compensatory.” *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 274-275 (1984) (Powell, J., dissenting). Federal and state courts throughout the country have held, therefore, that compliance with federal or state regulations undermines the plaintiff’s claim for punitive damages.⁶ In many such cases, moreover, courts have explicitly held that compliance

⁶ See, e.g., *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1316-17 (5th Cir. 1995) (vacating punitive award in part because no government or agency had ever required the use of leg guards on motorcycles); *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1058 n.20 (11th Cir. 1994) (the fact that NHTSA had declined to require additional warnings precluded finding of wantonness necessary for imposition of punitive damages); *Boyette v. L.W. Looney & Son, Inc.*, 932 F. Supp. 1344, 1348 (D. Utah 1996) (punitive damages were unavailable because defendant’s warnings complied with federal regulations); *Sloman v. Tambrands, Inc.*, 841 F. Supp. 699, 703-704 n.8 (D. Md. 1993) (compliance with federal regulations precludes finding of malice, barring claim for punitive damages); *Olsen v. United States*, 521 F. Supp. 59, 67-70 (E.D. Pa. 1981) (punitive damages unavailable for failure to perform roof crush tests that were not required by federal motor vehicle safety regulations), *aff’d by Ford Motor Co. v. Cooper*, 688 F.2d 823 (3d Cir. 1982) (table); *Stone Man, Inc. v. Green*, 435 S.E.2d 205, 206 (Ga. 1993) (as a general rule, punitive damages are improper when a defendant has complied with environmental or safety regulations); *In re Miamisburg Train Derailment Litig.*, 725 N.E.2d 738, 752 (Ohio Ct. App. 1999) (upholding summary judgment on punitive damages because “[n]o reasonable person could reconcile the appellees’ compliance with the regulation in question with the

with Federal Motor Vehicle Safety Standards (“FMVSS”), such as the seat-design regulation involved in this case, creates a substantial impediment to any award of punitive damages.⁷

Here, NHTSA’s “Seating Systems” regulation, FMVSS 207, requires manufacturers to use seatbacks that can withstand 3,300 inch-pounds of rearward force. 49 C.F.R. § 571.207. That standard has been repeatedly upheld despite arguments identical to those put forward by plaintiffs’ expert, D’Aulerio, in this case.

notion that their behavior was somehow ‘outrageous,’ ‘flagrant,’ or criminal’”); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 233 n.41 (5th ed. 1984) (“In most contexts * * * compliance with a statutory standard should bar liability for punitive damages.”); Paul Dueffert, Note, *The Role of Regulatory Compliance in Tort Actions*, 26 HARV. J. LEGIS. 175, 200 (1989) (same); David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 41-42 & n.196 (1982) (compliance with NHTSA standards “should be * * * a conclusive defense” to punitive damages). *Cf. Lopez v. Three Rivers Elec. Coop., Inc.*, 26 S.W.3d 151, 160 (Mo. 2000) (en banc) (factors weighing against submitting punitive damages claim to jury include that “defendant did not knowingly violate a statute, regulation, or clear industry standard designed to prevent the type of injury that occurred”).

⁷ *See, e.g., Brand v. Mazda Motor Corp.*, 978 F. Supp. 1382, 1394-95 (D. Kan. 1997); *Welch v. General Motors Corp.*, 949 F. Supp. 843, 844-846 (N.D. Ga. 1996); *Chrysler Corp. v. Wolmer*, 499 So. 2d 823, 826 (Fla. 1986) (punitive damages unavailable as a matter of law in part because defendant’s vehicle had satisfied FMVSS 207); *Miles v. Ford Motor Co.*, 922 S.W.2d 572, 589-90 & n.7 (Tex. Ct. App. 1996) (observing that “most commentators suggest that compliance with a statutory standard should bar liability for punitive damages,” and holding that compliance with FMVSS precludes finding of “conscious indifference to the safety of the product users, or * * * conscious indifference to an extreme degree of risk”), *aff’d in part, rev’d in part on other grounds*, 967 S.W.2d 377 (Tex. 1998).

Indeed, on November 16, 2004, NHTSA terminated rulemaking proceedings that were considering, once again, whether the standard should be changed, explaining that “[i]mproving seating system performance is more complex than simply increasing the strength of the seat back” and “[c]omprehensive information needed to determine that proper balance is not available, although there has been work on pieces of the problem.” 69 Fed. Reg. 67,068-69 (Nov. 16, 2004). In other words, the relevant federal agency in charge of automobile safety concluded that there is currently insufficient evidence to justify a change in the regulation. Moreover, DCC’s own voluntary testing of the Dodge Ram showed that the seatback could withstand 11,200 inch-pounds of force, over three times the strength required by FMVSS 207 (AP168), and even D’Aulerio conceded that it could withstand more than twice the force required by the regulation (AP75-76).

The jury’s finding of punitive liability cannot be squared with DCC’s voluntary decision to design its vehicles to satisfy safety standards three times as rigorous as those imposed by the federal agency authorized by Congress to regulate vehicle safety. To put it bluntly, it is inexplicable how a manufacturer that on its own initiative designs a vehicle that not only satisfies, but exceeds, all applicable government safety regulations, can nonetheless be found guilty *by clear and convincing evidence* of “intend[ing] to injure the plaintiff” or “pursu[ing] a course of

conduct knowing that it created a substantial risk of significant harm to others.”
Rawlings, 151 Ariz. at 162, 726 P.2d at 578.

Such an outcome not only is contrary to Arizona law, it is unsound as a matter of public policy. Upholding an award of punitive damages here would send a message to automakers that they must design every vehicle so that it functions in a crash like a tank. In other words, the threat of punitive liability for making products that comply with all applicable safety standards would force manufacturers to disregard those standards and aim for indestructibility, thereby raising the price of passenger automobiles — not to mention maintenance, fuel consumption, environmental harm, and other costs — to such extreme levels that many consumers would no longer be able to afford a car. One of the reasons why Congress created a regulatory agency like NHTSA was to strike an objective balance between the many competing concerns surrounding automobile safety (*see* 49 U.S.C. § 30101, 30111); and that also is why courts across the country recognize that compliance with NHTSA regulations should foreclose punitive damages. There can be no doubt, in other words, that allowing any amount of punitive damages to stand in this case would “entirely supplant[]” a federal regulatory scheme (*Silkwood*, 464 U.S. at 265 (Blackmun, J., dissenting)) carefully wrought by Congress to balance the host of complicated considerations of feasibility,

practicality, risk, and benefit that go into the determination of proper vehicle safety design.

2. Punitive damages are improper when the defendant has met or exceeded all industry standards for product safety.

Courts throughout the country have also concluded that “[c]ompliance with industry standard and custom serves to negate conscious disregard and to show that the defendant acted with a nonculpable state of mind,” thus precluding punitive liability. *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993).⁸ That

⁸ *Accord Ford v. GACS, Inc.*, 265 F.3d 670, 678 (8th Cir. 2001) (granting judgment as a matter of law on punitive damages claim, in part because product design at issue was industry standard at the time product was manufactured); *Satcher*, 52 F.3d at 1316-1317 (vacating punitive award in part because the defendant’s decision not to include leg guards on motorcycles was consistent with that of all other manufacturers); *Alley v. Gubser Dev. Co.*, 785 F.2d 849, 856 (10th Cir. 1986) (reversing denial of directed verdict on punitive damages where defendant’s conduct was consistent with industry practice); *Liesener v. Weslo, Inc.*, 775 F. Supp. 857, 862 (D. Md. 1991) (“it is not reckless conduct for manufacturers to follow accepted industry standards, even if counsel has urged a more cautious approach”); *American Cyanamid Co. v. Roy*, 498 So. 2d 859, 862-63 (Fla. 1986) (reversing denial of directed verdict on punitive damages in large part because defendant’s warning comported with industry standards); *In re Miamisburg Train Derailment Litig.*, 725 N.E.2d at 752 (upholding summary judgment on punitive damages, in part, because defendants were “acting according to industry standards”); *Lane v. Amsted Indus., Inc.*, 779 S.W.2d 754, 759 (Mo. Ct. App. 1989) (“Compliance with industry standard and custom impinges to prove that the defendant acted with a nonculpable state of mind * * * and hence to negate any inference of complete indifference or conscious disregard for the safety of others[,] the proof [that] punitive damages entails.”); *Nigro v. Remington Arms Co.*, 637 A.2d 983, 990 (Pa. Super. 1993) (“Compliance with industry standard and custom tends to support the defense that Remington acted with a nonculpable state of mind, and would negate an inference of wanton indifference to the rights of

logic compels the conclusion that DCC's compliance with industry standards precludes punitive liability here.

As we understand it, the uncontroverted evidence at trial was that the seatback in the 1996 Ram was "similar" to that used in other contemporaneous extended cab pickups. AP81-82, 169-170, 235; DCC Exhibit 266. That evidence conclusively demonstrates that the Ram's design comported with the industry standard. D'Aulerio nonetheless testified that the Ram — and by extension virtually all other 1990s extended cab pickups — was defectively designed. AP59-60. But unless this Court believes that plaintiffs proved by clear and convincing evidence that virtually the entire automobile industry is guilty of "conduct involving some element of outrage similar to that usually found in crime" (*Rawlings*, 151 Ariz. at 162, 726 P.2d at 578), DCC's selection of a seatback design that comported with the design choices of the majority of automakers cannot be the basis for imposing punitive damages.

others."); *see also* *Zaccone v. American Red Cross*, 872 F. Supp. 457, 462 (N.D. Ohio 1994) (undisputed evidence that blood bank comported its conduct to industry procedures defeats negligence claim where there is no evidence that the industry "lagged behind' in adopting reasonably prudent measures to protect the blood supply"); *see generally* David G. Owen, 49 U. Chi. L. Rev. at 40-41 ("[r]arely will an entire industry act with flagrant impropriety against the health and safety of the consuming public, and running with the pack in general should shield a manufacturer from later punishment for conforming to the norm").

3. A genuine dispute among experts as to product design safety precludes a finding, by any standard, let alone clear and convincing evidence, that DCC acted with an evil mind in choosing between those expert opinions.

Evidence of the existence of a genuine dispute among experts as to the safety of a product or the propriety of challenged conduct weighs heavily against the conclusion that the defendant harbored a punishable state of mind.⁹ In this case, D'Aulerio claimed that a less flexible seatback would have performed better than the Ram's design. AP59-60. Indeed, he claimed that a stronger, less flexible, seatback would be safer in all situations. *Id.* By contrast, the DCC engineers who designed the

⁹ See, e.g., *Mercer v. Pittway Corp.*, 616 N.W.2d 602, 618 (Iowa 2000) (concluding that, where there was reasonable disagreement among experts about adequacy of product design and testing, rational fact finder could not as a matter of law hold defendant liable for punitive damages even though it could reasonably find liability on plaintiff's underlying tort claims); *Loitz v. Remington Arms Co.*, 563 N.E.2d at 407 (reversing punitive award in part because there was a good faith disagreement among metallurgical experts regarding the safety of the material used in making the gun barrel that exploded, causing plaintiff's injury); *Hillrichs v. Avco Corp.*, 514 N.W.2d 94, 100 (Iowa 1994) (affirming j.n.o.v. on punitive damages because "an award of punitive damages is inappropriate where room exists for reasonable disagreement over the relative risks and utilities of the conduct and device at issue"); *Owens-Corning Fiberglas Corp. v. Garrett*, 682 A.2d 1143, 1163-1165, 1167-1168 (Md. 1996) (reversing punitive award in part because there was a genuine scientific dispute regarding the safety of the product at issue); *Satcher*, 52 F.3d at 1317 (vacating punitive award in part because "there is a genuine dispute in the scientific community as to whether leg guards do more harm than good"); *Burke v. Deere & Co.*, 6 F.3d 497, 511 (8th Cir. 1993) (reversing denial of j.n.o.v. because "[a]n award of punitive damages is not appropriate when room exists for reasonable disagreement over the relative risks and utilities of the conduct at issue"); see also Owen, *supra*, 49 U. CHI. L. REV. at 38.

Ram's seat concluded that D'Aulerio's less-flexible design, while perhaps safer in some types of crashes, would provide no benefit in most situations and would actually be more dangerous in some situations, especially out-of-place occupant collisions. AP135-136, 152-159. The experts at NHTSA agreed that there was insufficient evidence that plaintiffs' preferred design was objectively safer to warrant changing the federal government's standards for seat strength. FMVSS 207; *see also* 69 Fed. Reg. 67,068-69.

In short, the record, viewed in the light most favorable to the plaintiffs, reflects a genuine dispute among experts as to the comparative safety of the Ram's seatback design.¹⁰ Even if D'Aulerio's view of the matter was correct, there is no question that DCC's position was supported by its own fully qualified experts, the experts at most other automobile manufacturers, and the experts at the federal regulatory agency charged with supervising automobile safety. Under Arizona's high standard of proof, that should be sufficient to preclude punitive liability.

Moreover, it is particularly inappropriate to award punitive damages when, as here, experts disagree about both the safety benefits and the safety costs of the competing design (as opposed to when there is disagreement only about whether the

¹⁰ The jury's split vote (8-2) on liability for compensatory damages shows that the evidence was conflicting regarding whether the Ram's seatback design was defective at all.

financial, environmental, or other costs of a competing design warrant its acknowledged safety benefits). If DCC had adopted D'Aulerio's design, it would certainly have found itself subject to lawsuits by plaintiffs who suffered out-of-place occupant injuries and who would use the opinions of DCC's own experts against it. In other words, where there is no platonic ideal of safety, but competing designs involve trading safety in some situations for increased risk in others, manufacturers should be insulated from punitive damages as long as they make a choice somewhere on the spectrum of alternatives that reasonably balance the competing factors.

* * * * *

Under the clear and convincing evidence standard, a finding of punitive liability in this case was foreclosed by the undisputed evidence that DCC complied with applicable federal safety standards as well as industry standards for safety and safety testing, by the good faith disagreement (at most) among experts as to the virtues of the Ram's seatback design, and by the lack of other evidence that clearly and convincingly proved that DCC selected its seatback design with an "evil mind." To ensure that this case does not serve as the vehicle for eviscerating Arizona's high standard for punitive liability, this Court should reverse the punitive portion of the judgment and order that judgment be entered in favor of DCC.

II. THE PUNITIVE AWARD IS UNCONSTITUTIONALLY EXCESSIVE.

In *State Farm*, the U.S. Supreme Court expressed “concerns over the imprecise manner in which punitive damages systems are administered,” reiterated its admonition that “punitive damages pose an acute danger of arbitrary deprivation of property,” and made clear that reviewing courts must undertake “[e]xacting appellate review” in order to ensure that punitive awards are “based upon an application of law, rather than a decisionmaker’s caprice.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417-418 (2003) (internal quotation marks and alterations omitted). Echoing Arizona’s high standards, the Court admonished that “punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.” *Id.* at 419. Moreover, it explained, even when some amount of punitive damages is warranted after consideration of the degree of the defendant’s culpability and the amount of the compensatory damages, the punishment must go “no further” than necessary to satisfy the state’s legitimate interests in punishment and deterrence. *Id.* at 420.

Beyond these general pronouncements, *State Farm* provided much-needed guidance for determining whether any particular punitive award is excessive and, if so, the amount to which it must be reduced to comport with due process. Although

adhering to the three guideposts it had established in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) — (i) the degree of reprehensibility of the conduct; (ii) the relationship between the punitive damages and the actual or potential harm to the plaintiff; and (iii) the legislatively established fine for comparable conduct — the Court indicated that any punitive award must be “both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.” *State Farm*, 538 U.S. at 426. We take that to mean that in any particular case there is a range of constitutionally permissible ratios of punitive to compensatory damages, the upper bound of which is a function of two principal variables — the degree of reprehensibility of the conduct and the amount of the compensatory damages. The maximum permissible ratio is directly related to the former and inversely related to the latter. In other words, for any particular degree of reprehensibility, as the compensatory damages increase, the maximum permissible ratio decreases. And for any particular amount of compensatory damages, the less reprehensible the conduct, the lower the constitutionally permissible ratio.¹¹ More specifically, the following

¹¹ The third guidepost — the legislatively established fine for comparable conduct — serves as a check on the conclusions drawn from application of the other two guideposts. For example, here, as DCC points out, the maximum possible fine as of 1996 for willfully selling a fleet of vehicles containing a safety defect is \$800,000. 49 U.S.C. § 30165(a) (1996). Consideration of that legislatively established fine confirms the conclusion discussed below that a \$50 million punitive award is unconstitutional.

general framework may be discerned from the Supreme Court’s discussion of the ratio guidepost.

First, “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” *Id.* Such ratios “may comport with due process” only if the compensatory damages are “small” and the conduct is “particularly egregious.” *Id.* at 425.

Second, “an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.” *Id.* While the Court thus appears to view 4:1 as an outside limit for most cases of high reprehensibility, its discussion may allow room for a ratio between 4:1 and 9:1 when the conduct is highly reprehensible and the compensatory damages are neither especially large nor especially small. *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 1602 (2004), in which the Ninth Circuit approved a 7:1 ratio, is a good example of a case that fits within this category: The compensatory damages there were \$360,000, and the conduct, racial and ethnic discrimination, was deemed by the Court to be separated from the conduct in *State Farm* by a “substantial” “gulf.” *Id.* at 1043.

Third, though “not binding,” the “long legislative history” of double (1:1), treble (2:1), and quadruple (3:1) damages is “instructive.” *State Farm*, 538 U.S. at

425. From this it may be inferred that, when the compensatory damages are substantial, ratios of up to 3:1 may be permissible *if* the conduct is determined to be highly reprehensible. One recent example of such a case is *Romo v. Ford Motor Co.*, 113 Cal. App. 4th 738 (2003). In *Romo*, the three survivors of an automobile accident whose injuries were found to have been caused in part by a defect in the vehicle were awarded \$4,574,429 in compensatory damages. In addition, they and the estates of family members who died in the accident were jointly awarded \$290 million in punitive damages. Though convinced of “the extreme reprehensibility of defendant’s actions” (*id.* at 763), the court of appeal held that the punitive award was unconstitutionally excessive. The court concluded that, in view of the substantial magnitude of the compensatory damages awarded to the survivors, a 3:1 ratio of punitive to compensatory damages was “constitutionally reasonable” punishment for what was done to them. *Id.*¹²

Ratios in this range would also be permissible in a case in which the damages, though moderate in amount, fully compensate for the injury and the conduct is not on the high end of the reprehensibility spectrum. *See, e.g., Park v. Mobil Oil Guam, Inc.*, 2004 WL 2595897, at *12-*16 (Guam Nov. 16, 2004) (upholding reduction of 56:1

¹² Because state law drastically limited the damages awarded to the estates of the three deceased family members, the court added \$10 million of punitive damages to punish for their loss of life. *Id.*

ratio to 3:1 where compensatory damages were \$50,000 and defendant's "conduct was not 'a particularly egregious act'" (quoting *State Farm*, 538 U.S. at 425 (quoting *BMW*, 517 U.S. at 582)).

Fourth, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." See *State Farm*, 538 U.S. at 425. A recent example is *Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004). In *Williams*, a case involving racial harassment in the workplace, the Eighth Circuit held that a \$6,063,750 punitive award that was just over ten times the plaintiff's \$600,000 compensatory award was unconstitutionally excessive and ordered a remittitur to the amount of compensatory damages, explaining:

Mr. Williams's large compensatory award * * * militates against departing from the heartland of permissible exemplary damages. The Supreme Court has stated that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." Mr. Williams received \$600,000 to compensate him for his harassment. Six hundred thousand dollars is a lot of money. Accordingly, we find that due process requires that the punitive damages award on Mr. Williams's harassment claim be remitted to \$600,000.

Id. at 799 (citation omitted).

Application of this framework to the facts of the present case compels the conclusion that a 1:1 ratio or lower is the constitutional maximum here (assuming that any punishment at all is permissible).

To begin with, plaintiffs' compensatory damages attributable to DCC's conduct are \$3,750,000 — a "substantial" amount in any sense of the word.¹³ That fact alone should rule out any ratio above 4:1. But, as discussed above, when compensatory damages are substantial, ratios between 1:1 and 4:1 are warranted only if the punishable conduct is highly reprehensible. Based on its understanding of the record, the Chamber submits that DCC's conduct can be deemed to be highly reprehensible only in the fictional land in which "all the children are above average." *See* Garrison Keillor, Monologue Excerpt (Feb. 15, 2003), *available at* <http://prairiehome.publicradio.org/programs/20030215/forward>.

¹³ It is important to note *State Farm's* injunction that the denominator of the punitive/compensatory ratio is limited to harm and potential harm to the plaintiffs, not society in general. *State Farm*, 538 U.S. at 418 (characterizing second guidepost as "the disparity between the actual or potential harm *suffered by the plaintiff* and the punitive damages award") (emphasis added); *id.* at 424 (same); *see also Continental Trend Res., Inc. v. OXY USA Inc.*, 101 F.3d 634, 639-640 (10th Cir. 1996) ("In figuring harm both actual and potential harm may be considered. But it must be harm to these plaintiffs, not to others."). Indeed, any other approach would run afoul of the Court's admonition against "adjudicat[ing] the merits of other parties' hypothetical claims," which was born out of a concern about imposition of "multiple punitive damages awards for the same conduct." *State Farm*, 538 U.S. at 423.

The fact that this case involves a serious personal injury doesn't change that conclusion. Unlike many other classes of torts, product liability claims by definition involve physical injury. The reprehensibility guidepost would be deprived of any constraining force if every product case in which the standard for punitive liability was met is deemed to involve highly reprehensible conduct warranting a higher ratio of punitive to compensatory damages than an intentional tort causing the same amount of damages. For the same reason, the jury's finding that DCC recklessly disregarded safety does not suffice to establish high reprehensibility. All product liability cases in which punitive damages are imposed must involve (at least) evidence from which reckless disregard for safety could be inferred. It cannot in itself be a sufficient basis for imposing high levels of punitive damages, let alone deviating from *State Farm's* guidance on permissible ratios.

Instead, reviewing courts must drill down to another level of specificity to place product liability cases on a spectrum of reprehensibility. Although we do not purport to be exhaustive in cataloging relevant considerations, some obvious ones are:

- A decision to use a particular design that arises out of good-faith engineering judgment is less reprehensible than a decision that results from management pressure to "cut corners."
- A decision to use a design that complies with government safety standards is less reprehensible than one that ignores such standards.

- A decision to use a design that is common in the industry is less reprehensible than a decision to eschew safety features that are common in the industry.
- A decision to use a particular design made after substantial safety testing is less reprehensible than one made with minimal or no testing.
- A decision to use a particular design is less reprehensible if the design has resulted in comparatively few injuries than if it has resulted in a disproportionately high number of injuries.
- A defendant's conduct is less reprehensible if the defendant has taken meaningful post-accident remedial measures.

It is only after considering these and other factors that a court is in a position to determine whether a product liability case — even one in which people died or suffered serious injuries — entails high reprehensibility.

Taking these factors into account, it should be clear that DCC's conduct in this case is on the low end of the reprehensibility scale as compared to other product liability cases. DCC's design decision was in compliance with both industry standards and federal regulations, was made in the context of a legitimate disagreement between experts, and was made in a transparent fashion after exhaustive testing. Accordingly, any punitive award in excess of the very substantial amount of compensatory damages for which DCC was held liable would be neither "reasonable" in relation to the degree of reprehensibility of DCC's conduct nor "proportionate to the amount of harm to the plaintiff[s]" (*State Farm*, 538 U.S. at 426).

Indeed, even a 1:1 ratio may exceed the amount necessary to punish and deter and hence be unconstitutional. In *State Farm*, the Supreme Court recognized that compensatory damages have a deterrent effect in their own right, admonishing that “punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.”¹⁴ 538 U.S. at 419; *see also Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (“[d]eterrence * * * operates through the mechanism of damages that are compensatory”) (emphasis added); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) (“The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.”); *United States v. Bailey*, 288 F. Supp. 2d 1261, 1281

¹⁴ This is particularly important when, as here, the compensatory award includes a large non-economic component because, in such circumstances, “there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both.” *Id.* at 426 (quoting Restatement (Second) of Torts § 908, cmt. c (1977)); *see also Romo*, 113 Cal. App. 4th at 752 (“Further, the [United States Supreme Court] instructed that we must look at the *nature* of the compensatory damages award, with the result that a lower multiplier will be appropriate if the compensatory damages award for the particular tort already compensates for the ‘outrage and humiliation’ that punitive damages are primarily intended to condemn.”) (quoting *State Farm*, 538 U.S. at 426) (emphasis in original); *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651, 670 (S.D. 2003) (holding \$500,000 punitive award excessive, in part because “not only was Roth completely compensated for his economic injuries by the large compensatory damage award, but we find also that the compensatory damages in this case contained a punitive element”).

(M.D. Fla. 2003) (setting aside \$3,000,000 punitive award “in its entirety” because, among other things, the compensatory damages exceeded the gain to the defendant, making “the imposition of further sanctions to achieve punishment or deterrence” unnecessary); *Lane v. Hughes Aircraft Co.*, 993 P.2d 388, 400 (Cal. 2000) (Brown, J., concurring) (“[L]arge compensatory damage awards not based on a defendant’s ill-gotten gains have a strong deterrent and punitive effect in themselves. The magnitude of such awards should be considered in deciding whether and to what extent punitive damages should be imposed.”).

Here, the large compensatory damages far outstrip whatever ill-gotten gain DCC could be said to have reaped from having elected not to use the stiffest possible seatback (and not to have forgone the safety benefits associated with a more flexible one). Accordingly, those damages are more than adequate by themselves to impart the appropriate quantum of deterrence and punishment. Any additional punishment in the form of punitive damages should be strictly limited.

CONCLUSION

This Court should grant judgment to DCC on punitive liability or, at minimum, reduce the award of punitive damages to less than the amount of compensatory damages attributable to DCC’s conduct.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 14, I certify that the attached brief uses proportionately spaced type of 14 points or more, is double-spaced using a Times New Roman font and contains 8,452 words.

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