SUPERIOR COURT OF PENNSYLVANIA

No. 2811 EDA 2024

Paul Gill and Diane Gill, h/w
v.
Shell Oil Company, Berryman Products, Inc., Univar USA, Inc., Ashland, LLC, Brenntag Southwest, Union Oil Company of California, Blaster Corporation, Illinois Tool Works, Inc., Henkel Corporation, Root Oil Company, Exxon Mobil Corporation, United States Steel Corporation, Radiator Specialty Company, Atlantic Richfield Company, CRC Industries, Inc., Sunoco, LLC (R&M) Sun Company, Safety-Kleen Systems, Inc.

Appeal of: Exxon Mobil Corporation

***Amicus Curiae* Brief of the United States Chamber of Commerce, Pennsylvania Chamber of Business and Industry, Pennsylvania Coalition for Civil Justice Reform, American Property Casualty Insurance Association, National Federation of Independent Business Small Business Legal Center, Inc., Insurance Federation of Pennsylvania, Pennsylvania Manufacturers' Association, and Washington Legal Foundation in Support of Appellant**

Appeal of the Judgment entered on September 23, 2024 in the Philadelphia Court of Common Pleas, Docket No. 200501803

Robert M. Palumbos
Ryan F. Monahan
DUANE MORRIS LLP
30 S 17th Street
Philadelphia, PA 19103

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

STATEMENT OF INTEREST[1]

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 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. 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 Pennsylvania Chamber of Business and Industry is the largest broad-based business association in Pennsylvania. It has close to 10,000 member businesses throughout Pennsylvania, which employ more than half of the Commonwealth's private

[1] No party's counsel authored this brief in whole or in part, and no person or entity, other than the amici, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

workforce. Its members range from small companies to mid-size and large business enterprises across all industry sectors in the Commonwealth. 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.

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

The American Property Casualty Insurance Association ("APCIA") is the leading national trade association for home, auto, and business insurers. With a legacy dating back 150 years, APCIA promotes and protects the viability of private competition to benefit consumers and insurers. APCIA's member companies

represent 67 percent of the U.S. property and casualty insurance market and 70.8% of the Pennsylvania market. On issues of importance to the insurance industry and marketplace, APCIA advocates sound public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and submits amicus curiae briefs in significant cases before federal and state courts.

The Insurance Federation of Pennsylvania ("IFP"), a non-profit organization, is Pennsylvania's leading insurance trade association and represents over 200 insurance companies in Pennsylvania. The IFP's members encompass insurers of all sizes and issue all types of insurance policies. The aforesaid membership represents approximately half of the insurance premium volume written in the Commonwealth of Pennsylvania. The IFP is committed to ensuring a balanced and fair insurance environment in Pennsylvania and routinely serves as the voice of the insurance industry in litigation in the Commonwealth where the industry's interests are implicated. The IFP enjoys a well-

earned reputation for integrity in the pursuit of its members' interests.

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as an amicus curiae in state courts of last resort, including this one, to champion these values. *See, e.g.*, *The Bert Co. v. Turk*, 298 A.3d 44 (Pa. 2023); *Cantor Fitzgerald L.P. v. Ainslie*, 312 A.3d 674 (Del. 2024); *Frlekin v. Apple*, 457 P.3d 526 (Cal. 2020).

The National Federation of Independent Business Small Business Legal Center, Inc. ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. ("NFIB"), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their

businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

Since 1909, the Pennsylvania Manufacturers' Association ("PMA") has served as a leading voice for Pennsylvania manufacturing, its 560,000 employees, and the millions of additional jobs in supporting industries. PMA seeks to improve the Commonwealth's competitiveness by promoting pro-growth public policies that reduce the cost of creating and keeping jobs in Pennsylvania.

Amici have an interest in this case because it concerns the unsettling trend of increasingly large noneconomic damages awards in Pennsylvania, many of which are against businesses. This Court's review of large jury awards, and the appropriate standards for such review, is of critical importance to Amici.

ARGUMENT

This case joins a trend of eye-popping noneconomic damages awards. The jury rendered a verdict of $725.5 million against Appellant ExxonMobil Corp. ("Exxon") comprised entirely of

noneconomic damages. Punitive and economic damages were not even presented to the jury.

How a jury might arrive at such a large number is a mystery. Noneconomic damages for pain and suffering, embarrassment and humiliation, and loss of life's pleasures are inherently subjective to each plaintiff. As a result, they are by their nature susceptible to arbitrary and unpredictable calculations. Without proper guardrails and careful judicial review, they invite consideration of impermissible factors, such as a desire to punish the defendant for its conduct. If left unchecked, noneconomic damages raise a host of federal and state due process concerns. They also erode trust in the reliability of our civil justice system and impose social costs through price increases and reductions in services to cover the cost of the verdicts.

This case is a stark illustration of the need to provide trial courts with guidance for assessing noneconomic damage awards in Pennsylvania—and an opportunity for this Court to provide that guidance. Although noneconomic damages are described as a necessary part of "mak[ing] the plaintiff whole," *Bert Co. v. Turk*,

298 A.3d 44, 58 (Pa. 2023) (quoting *Feingold v. SEPTA*, 517 A.2d 1270, 1276 (Pa. 1986)), the size of the award in this and other recent cases suggests the awards are exceeding that goal. The subjective nature of a plaintiff's noneconomic damages weighs in favor of heightened scrutiny of such awards. It is this Court's obligation to keep noneconomic damages rational, nonarbitrary, evidence-based and compensatory through principled guidelines.

I. Large Noneconomic Damages Awards Are a Growing Strain on The Tort System

A. Noneconomic Damages Awards Have Recently Exploded In Size.

Historically, the availability of noneconomic damages did not raise serious concern because "personal injury lawsuits were not very numerous and verdicts were not large." Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective Review of the Problem and the Legal Academy's First Responses*, 34 Cap. U. L. Rev. 545, 560 (2006). Further, before the twentieth century, courts typically reversed large noneconomic awards. *See* Ronald J. Allen & Alexia Brunet, *The Judicial Treatment of Noneconomic Compensatory Damages in the Nineteenth Century*, 4 J. Empirical Legal Stud. 365, 369 (2007). In

fact, a study found "literally no cases affirmed on appeal prior to 1900 that plausibly involved noneconomic compensatory damages in which the total damages (noneconomic and economic combined) exceeded $450,000 [in 2007 dollars]" (about $700,000 today). *Id.* That began to change in the second half of the twentieth century, when "[t]he volume of lawsuits increased and the dollar amount of collectible jury awards and settlements were much higher than in the past." Merkel, *supra*, at 560.

This upward trend has continued. In a study assessing verdicts that exceed $10 million dollars (known as "nuclear" verdicts), the U.S. Chamber's Institute for Legal Reform found that the median verdict rose nationally by more than 50% from 2013 ($21 million) to 2022 ($36 million). Cary Silverman & Christopher Appel, *Nuclear Verdicts: An Update on Trends, Causes, and Solution*, U.S. Chamber of Commerce Institute for Legal Reform at 3 (May 2024). In 2022, there were 115 verdicts in the United States that exceeded $100 million. *Id.* The study analyzed 1,288 verdicts exceeding $10 million. *Id.* Only 25% of those verdicts involved punitive damages awards, and economic

damages only comprised 10% of the total amount awarded. *Id.* Noneconomic damages thus play an outsized role in modern jury awards.

Pennsylvania is not immune to this trend. In 2022, tort verdicts amounted to $19,489,000,000, equaling 2.14% of Pennsylvania's GDP and $3,752 *per household*. David McKnight and Paul Hinton, *Tort Costs in America: An Empirical Analysis of Costs and Compensation of the U.S. Tort System*, U.S. Chamber of Commerce Institute for Legal Reform at 21 (Nov. 2024). From 2013 to 2022, 39 tort cases (excluding medical malpractice and federal cases) involved verdicts of $10 million or more. While many of those verdicts arose in Philadelphia County, other counties produced similarly large verdicts, including Westmoreland, Allegheny, Lancaster, and Dauphin. This past year alone, in addition to this case, a jury awarded $250 million in noneconomic damages, which was subsequently remitted to $50 million. *Mckivison v. Monsanto Co.*, 1845 EDA 2024, 1846 EDA 2024 (Pa. Super. 2025) (appeal pending).

B. Large Noneconomic Damages Awards Raise Constitutional and Social Concerns.

Excessive noneconomic damages awards have reached the point that they no longer can be ignored as outliers. They have significant legal and social consequences that this Court should consider each time it reviews the denial of remittitur of a multi-million-dollar verdict.

1. Due Process. Noneconomic injuries are subjective by their nature leaving jurors more susceptible to valuing them based on improper considerations. As a result, noneconomic damages awards are "highly variable, unpredictable, and abjectly arbitrary." Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 S.M.U. L. Rev. 163, 185 (2004); Stephen D. Sugarman, *A Comparative Look at Pain and Suffering Awards*, 55 DePaul L. Rev. 399, 399 (2006) (noting pain and suffering awards in the United States are nearly ten times those in most other nations). Arbitrary decision-making is the hallmark of a due process violation. *See, e.g.*, *Shoul v. Commonwealth, Dep't of Transp., Bureau of Driver Licensing*, 173 A.3d 669, 676 (Pa. 2017) (recognizing that federal due process

protections guard against "arbitrary and unjust proceedings" and "against arbitrary and unjustified laws" (internal citations omitted)).

In Pennsylvania, when trial judges instruct juries on noneconomic damages, they typically inform them that there are four categories of recovery for past and future damages: (1) physical and mental pain and suffering; (2) embarrassment and humiliation; (3) loss of ability to enjoy the pleasures of life; and, when applicable, (4) disfigurement. P.S.S.J.I (Civil) § 7.110. Those categories, by their nature, are subjective to each plaintiff, and difficult to meaningfully define. Moreover, a jury is often instructed that "[t]here is no mathematical formula or schedule for you to use in determining fair and reasonable money damages for the type of [injury] discussed," "[n]o one is permitted to suggest a specific figure or amount for the types of damages," and that the jury should "use [its] common sense, human experience, and collective judgment to determine an amount representing a fair and reasonable recovery for these types of damages." *Id.*

The highly subjective nature of a plaintiff's noneconomic injuries and the lack of readily defined, precise criteria for proving and measuring those injuries "rais[e] substantial doubts as to whether the law is evenhanded in the administration of damages awards or whether it merely invites the administration of biases for or against individual parties." Dan B. Dobbs & Robert L. Caprice, *Law of Remedies*, § 8.14, at 683 (3d ed. 2018). Such arbitrary decision-making raises serious due process concerns.

In the absence of precise criteria for proving and measuring noneconomic damages, elements of punishment, retribution, and the need to send a message often find their way into trial, frequently leading to the jury's treatment of noneconomic damages as *punitive damages*. *See, e.g.*, *Young v. Washington Hosp.*, 761 A.2d 559 (Pa. Super. 2000) (quoting *Narciso v. Mauch Chunk Twp.*, 87 A.2d 233, 234 (Pa. 1952)) ("It is well established that any statements by counsel, not based on evidence, which tend to influence the jury in resolving the issues before them solely by an appeal to passion and prejudice is improper and will not be countenanced."); *Foster v. Crawford Shipping, Co.*, 496 F.2d 788,

792 (3d Cir. 1974) (awarding new trial based in part on counsel's statement that "you [the jurors] are the collective conscience of this community, and I ask that you let the word go out from this courtroom that . . .you are not going to tolerate the kind of shenanigans that went on in this case").

This case is no exception. Plaintiffs' counsel made multiple arguments unrelated to the alleged harm done to Plaintiffs that appear designed to inflame the jury. *See, e.g.*, May 1, 2024 Trial Tr. at 22:12-14 (eliciting testimony that ExxonMobil sold over 12.5 billion gallons of gasoline annually, writing the number on an easel, and adding $3 per gallon to the easel); *id.* at 91-92 (asking questions about the effect of fossil fuels on global warming despite motion in limine precluding such statements). And the concern of jurors being swayed by improper considerations is not a hypothetical one. After trial, one juror tied the exorbitant verdict to "climate change," described Exxon as "objectively a villain," and claimed that the jury "rocked [Exxon's] world for $725.5M." Defendant Exxon Mobil Corp.'s Motion to Supplement *Nunc Pro Tunc* Its Motion For Post Trial Relief With Evidence of Jury Bias,

Misconduct, and Prejudicial Extraneous Information ¶¶ 10-16 (Sept. 11, 2024).

The size of the award in this case, in addition to the statements of a juror about deliberations, shows that noneconomic damages were punitive, not compensatory. *See Bert Co.*, 298 A.3d at 58. When the size of a noneconomic damages award suggests that the award is punitive, not compensatory, a defendant's due process rights are implicated for the additional reason that an award of punitive damages is subject to a higher standard. *See Doe v. Wyoming Valley Health Care Sys., Inc.*, 987 A.2d 758, 768 (Pa. Super. 2009) ("[P]unitive damages are an 'extreme remedy' available only in the most exceptional circumstances."); *Philip Morris USA v. Williams*, 549 U.S. 346, 352-53 (2007) ("Unless a State insists on proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of 'fair notice . . . of the severity of the penalty that a State may impose.'" (quoting *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996))). In cases like this, noneconomic damages stray from their compensatory purpose, exceed the goal

of making a plaintiff whole, and implicate a defendant's due process rights.

2. Rule of Law. The general expectation of the American jury system is that defendants will face liability and damages in a fair, consistent, and predictable manner. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (holding due process prizes predictability in the legal system). The subjective nature of a plaintiff's potential noneconomic damages, and the difficulty proving and measuring them objectively, means the amount of such damages often varies significantly from case to case, even for similar injuries. When plaintiffs receive radically different sums for the same or substantially similar injury, it undermines these rule-of-law principles with irrationality and unpredictability. The average observer cannot help but view the system as a lottery.

Such arbitrariness does irreparable damage to the civil legal system. As one scholar put it, when courts tolerate arbitrary results, "The Emperor, then, really has no clothes. Permitting noneconomic compensatory damages in the absence of a clearly articulated fact of the matter established by reliable evidence is

nothing more than an open invitation to judges or jurors to transfer the assets of one party to another. This is the antithesis of the rule of law." Ronald J. Allen, et al., *An External Perspective on the Nature of Noneconomic Compensatory Damages and Their Regulation*, 56 DePaul L. Rev. 1249, 1259-60 (2007).

3. Social Costs. The practical reality of verdicts awarding large noneconomic damages is that someone must pay them. The net effect is a tort tax on society: the cost of these excessive awards to plaintiffs is ultimately passed on to consumers, employees, and retirees through price increases, reduced wages, and lower investment returns. Studies show that large noneconomic damages awards can increase the costs of goods and services and inhibit job growth and new investment in business and industry. *See* Silverman, *supra*, at 46.

To give three examples, in the trucking industry, larger verdicts have contributed to dramatic increases in insurance costs for motor carriers, which forced many carriers out of business, and required the others to increase their transportation rates that they charge customers in the supply chain. *Id.* at 47. Ultimately,

those costs are borne by the consumer. *Id.* In healthcare, the cost of higher settlements, verdicts, defending claims, and increasing unpredictability are reflected in rising liability insurance premiums for doctors and other medical professionals. *Id.* at 48. And in construction, large awards have driven up the cost of construction projects. *Id.* In New York, for example, employers are subject to absolute liability for falls at construction sites (as opposed to being compensated through a workers' compensation system). *See id.* at 21-22 (citing *Rocovich v. Consolidated Edison Co.*, 583 N.E.2d 932, 934 (N.Y. 1991)). As a result of large verdicts, costs of every construction project in the state have increased, and many insurers will not underwrite New York construction projects. *See id.* at 48.

Escalating litigation expenses are a primary driver of rising insurance premiums. *See, e.g.*, Thomas Holzheu & James Finucane, "US liability claims: the shadow of social inflation still looms," Swiss Re Institute (Sept. 28, 2023), available at https://tinyurl.com/yeywzbzd (last visited June 21, 2025) (finding that "US liability claims costs have risen by an annual average of

16% over the last five years, well above average rates of economic inflation at around 4%"). Noneconomic damages awards are a large part of these increasing costs, as the verdicts discourage settlements and encourage protracted litigation.

Yet, these awards permeate innumerable aspects of Americans' daily lives. They increase the costs of food, housing, health care, and other critical goods and services, as well as insurance for things such as a car, home, or other property. Silverman, *supra*, at 49. Those social costs can be reduced by limiting noneconomic damages to their purpose: compensating the plaintiff for his or her harm.

II. The Court Should Set Appropriate Guardrails on the Imposition of Large Noneconomic Damages Awards.

Given the difficulty proving and measuring a plaintiff's subjective noneconomic damages, there is a serious risk that a jury's determination of the amount to award may not match the evidence. There is also a risk that, when measuring noneconomic damages, the jury may consider improper factors other than making the plaintiff whole. These concerns support heightened scrutiny of large noneconomic damages awards at the trial level,

as well as more meaningful appellate review of a trial court's decision not to remit such awards.

Fortunately, existing law gives courts helpful tools to scrutinize large noneconomic damages awards. Under current law, a court may reduce an award when it "is plainly excessive and exorbitant." *Haines v. Raven Arms*, 640 A.2d 367, 369 (Pa. 1994). "The question is whether the award of damages falls within the uncertain limits of fair and reasonable compensation or whether the verdict so shocks the sense of justice as to suggest that the jury was influenced by partiality, prejudice, mistake, or corruption." *Id.*

To constrain and structure the discretion granted under this broad "shocks the conscience" test, *id.*, this Court articulated six factors for reviewing jury awards in *Kemp v. Philadelphia Transportation Co.*, 361 A.2d 362 (Pa. Super. 1976). Under that framework, "[i]n determining whether a jury's award of damages is supported by the evidence," courts should consider:

1) the severity of the injury;

> 2) whether the injury is demonstrated by objective physical evidence or subjective evidence;
>
> 3) whether the injury is permanent;
>
> 4) the plaintiff's ability to continue employment;
>
> 5) disparity between the amount of out of pocket expenses and the amount of the verdict; and
>
> 6) damages plaintiff requested in his complaint.

Smalls v. Pittsburgh-Corning Corp., 843 A.2d 410, 415 (Pa. Super. 2004) (citation omitted).

This six-factor test is non-exhaustive. *See*, *e.g.*, *Brown v. End Zone, Inc.*, 259 A.3d 473, 486 (Pa. Super. 2021); *Spencer v. Johnson*, 249 A.3d 529, 572 (Pa. Super. 2021). Notably, it does not incorporate all of the factors that Pennsylvania Rule of Civil Procedure 223.3 instructs juries to consider when setting noneconomic damages, including "the age of the plaintiff," "the extent to which the injuries affect the ability of the plaintiff to perform basic activities of daily living and other activities in which the plaintiff previously engaged," "the duration and nature

of medical treatment," and "the health and physical condition of the plaintiff prior to the injuries."

This case provides the Court with the opportunity to clarify that, when courts review noneconomic damages awards for excessiveness, they should consider as part of their analysis *all* factors that juries are instructed to consider when setting those awards. Indeed, Judge Bowes, joined by Judge Gantman, endorsed precisely that approach in a concurring memorandum in *Polett v. Public Communications, Inc.*, 2016 WL 3154155, at *6 (Pa. Super. 2016) (en banc) (nonprecedential). Courts cannot properly review noneconomic damages awarded under Rule 223.3 for excessiveness unless they consider the factors that the jury was instructed to consider in setting those damages.

Listing the *Kemp* factors and the Rule 223.3 factors "is only the first step. How a trial court should analyze the factors is just as important." *Id.* at *6. While there may "be some measure of subjectivity in determining the value of another's pain and suffering, or embarrassment and humiliation," Judge Bowes wrote in *Pollet*, "that is no bar to developing a predictable and consistent

framework from which [courts] can appraise those circumstances." *Id.* at *6 n.4. Through its decision here, the Court should provide greater clarity and predictability in how to apply those factors.

First, courts assessing remittitur should conduct "an even-handed assessment" of the evidence, not "a sufficiency analysis" that construes the evidence in the light most favorable to the plaintiff. *Id.* at *7. "[T]he issue in remittitur is not merely whether the evidence is sufficient to support the verdict, but whether the award is reasonable based on the proven damages. A reasonableness determination requires an even-handed and balanced assessment of the evidence accepted by the jury." *Id.* Such an assessment "permits the trial court, and in turn, this Court, to ascertain whether the amount of the verdict bears a rational relationship to the loss suffered." *Id.* at *8.

The trial court failed to apply an even-handed approach to the damages evidence in this case. After reciting the six *Kemp* factors in its Rule 1925 opinion, the trial court recounted *only* Plaintiffs' evidence in favor of each factor and, based on that one-sided view of the evidence, found that the *Kemp* factors weighed in

favor of the damages award. But the *Kemp* factors are not merely a box that trial courts check on their way to affirming even astronomical jury awards. Rather, they are intended to guide trial courts through a meaningful and balanced assessment of whether the evidence reasonably supports the jury's verdict.

Second, courts should put significantly more weight on the second and fifth *Kemp* factors, which consider whether only subjective evidence supports the noneconomic damages and the relationship between economic and noneconomic harm. Increased emphasis on these factors will provide an appropriate and meaningful guardrail on noneconomic damages. The risk of jury bias or an improper intent to punish is highest when an award of noneconomic damages is supported only by the subjective testimony of the plaintiff, as was the award in this case. Likewise, the jury has no objective basis for a large award of noneconomic damages where there is no evidence of economic damages. Significant noneconomic damages would be expected to result from or cause significant economic damages. The lack of evidence

of economic damages accordingly suggests that the plaintiff has not suffered significant noneconomic damages.

In this case, Plaintiffs voluntarily dismissed their economic damages claims, leaving the jury without any objective evidence to compare its noneconomic damages award. The trial court found the lack of evidence of economic damages weighed in Plaintiffs' favor. *See* Tr. Op. at 351. This gets the analysis precisely backwards. A plaintiff should not be able to escape a comparison of economic and noneconomic damages by foregoing their economic damages altogether. Instead, courts should weigh the total lack of economic damages as an inherently limiting factor on noneconomic damages and as strong evidence that a large award of noneconomic damages is excessive.

The lack of economic damages is not only a relevant factor for a court reviewing an award of noneconomic damages, but also a relevant factor for the jury to consider setting that award. When determining noneconomic damages, juries are instructed to consider "the extent to which the injuries affect the ability of the plaintiff to perform basic activities of daily living and other

activities in which the plaintiff previously engaged," and "the duration and nature of medical treatment." Pa.R.Civ.P 223.3. Those factors permit the jury weigh the economic impact on the plaintiff—or lack thereof—by considering the plaintiff's continued employment or medical costs. Accordingly, at trial, defendants should be permitted to comment on the lack of economic damages evidence or, if necessary, present to the jury evidence of the small economic harm to counter the evidence of noneconomic harm.

Finally, when gauging whether an award of noneconomic damages is excessive, "it is sensical to compare it with other such awards and the facts of those cases . . . . The awards in other cases would not be binding . . . but instead would merely serve as guideposts for what a usual or proper award looks like . . . ." *Kimble v. Laser Spine Institute, LLC*, 264 A.3d 782, 806 (Pa. Super. 2021) (concurring, in part, Bender, P.J.E.); *see also Tong-Summerford v. Abington Mem. Hosp.*, 190 A.3d 631, 652 (Pa. Super. 2018) (stating that the "jury's award of $1.5 million is consistent with other Pennsylvania verdicts"). Nonetheless, in some cases, courts unnecessarily hinder their review of jury

awards by refusing to compare them to verdicts in similar cases. *See Kimble*, 264 A.3d at 803 ("We decline to overturn this jury's voice based on verdicts from other jurors, who heard different cases based on different evidence and different testimony.").

Comparison to other verdicts is especially appropriate when the same claim is litigated against the same defendant for similar underlying conduct. *Compare Caranci v. Monsanto*, 2025 WL 1340970 (Pa. Super. May 8, 2025) (affirming $25 million in compensatory damages and $150 million in punitive damages) *with Monsanto v. Melissen*, Case No. 210602578 (C.C.P., Phila. Cty.) ($3 million in compensatory; $75 million in punitive damages) *and Martel v. Nouryon Chemicals*, Case No. 210900084 (C.C.P., Phila. Cty.) ($3 million in punitive damages; $500,000 in compensatory). The fact that "each case is different" does not preclude comparisons. Litigants present analogous cases all the time, and judges routinely decide whether to apply precedent based on factual similarities and distinctions. A comparison of verdicts, and the evidence that supports them, is no different.

Without such comparisons, courts are deprived of a meaningful tool to determine whether a verdict is excessive.

While deference to the jury's decision is appropriate, other awards should, at a minimum, serve as guideposts to determine whether an award is outside the bounds of normal awards for similar injuries. Here, no compensatory damages award comes close to the verdict in this case, and the few verdicts of similar size involve *punitive* damages. *See, e.g.*, *Amagasu v. Mitsubishi*, 1594 EDA 2024 (Pa. Super.) (appeal pending) ($800,000,000 punitive damages award; $177,000,000 compensatory damages award); *McKivision*, 1845 EDA 2024, 1846 EDA 2024 ($2.25 billion punitive damages award, remitted to $400 million; $250 million compensatory damages award, remitted to $50 million). The lack of comparable verdicts involving exclusively noneconomic damages should be a clear sign that the verdict in this case "shocks the conscience."

This case presents the opportunity for this Court to clarify that such comparisons are appropriate, reliable tools to assess

noneconomic damages, and conclude that the lack of comparable verdicts to this case supports remittitur.

CONCLUSION

This case is part of a trend of excessive awards of noneconomic damages in Pennsylvania. The Court should strengthen the guardrails on such awards by clarifying the factors under existing law that empower meaningful judicial review. Under any reasonable standard, an award of $725 million in noneconomic damages shocks the conscience. The Court should reverse the denial of a new trial or, in the alternative, remittitur.

/s/ Robert M. Palumbos
Robert M. Palumbos
Ryan F. Monahan
DUANE MORRIS LLP
30 S 17th Street
Philadelphia, PA 19103
(215) 979-1111

June 23, 2025

CERTIFICATES OF COMPLIANCE

1. I certify that this document complies with the word limit of Pa.R.A.P. 531(b)(3) because, excluding the parts of the document exempted by Pa.R.A.P. 2135(b), this document contains 5,614 words.

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

/s/ Robert M. Palumbos
Robert M. Palumbos
Pa. I.D. 200063
DUANE MORRIS LLP
30 South 17th Street
Philadelphia, PA 19103
(215) 979-1111

June 23, 2025