Nos. 19-1481 & 19-1602

United States Court of Appeals for the Eighth Circuit

HAMID ADELI,
Plaintiff-Appellee and Cross-Appellant,

v.

SILVERSTAR AUTOMOTIVE, INC.,
doing business as Mercedes-Benz of Northwest Arkansas,
Defendant-Appellant and Cross-Appellee.

On Appeal from the United States District Court
for the Western District of Arkansas
(Case No. 5:17-CV-05224-PKH)

BRIEF OF PLAINTIFF-APPELLEE AND CROSS-APPELLANT

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SUMMARY OF THE CASE AND ORAL ARGUMENT STATEMENT

The plaintiff bought a used car from defendant Silverstar Automotive based on assurances that Silverstar got an independent inspection and completed all needed repairs. Unbeknownst to the plaintiff, Silverstar was warned in the inspection that the car's exhaust header–which carries toxic gases away from the engine—was cracked, and that this obvious safety risk was in need of immediate repair. Silverstar declined the repair and hid the defect, which leaked carbon monoxide into the car and threatened to ignite a deadly explosion. Silverstar—a chain of thirteen dealerships—later admitted that this was no isolated incident.

The jury found Silverstar liable for breach of warranty, fraud, and deceptive trade practices, and awarded $5.8 million in punitive damages. The district court denied judgment as a matter of law but reduced the punitive damages. Silverstar appeals both rulings and the plaintiff cross-appeals for reinstatement of the full punitive-damages award. In assessing punitive damages, this Court considers not just actual but potential harm from the defendant's conduct. *See Asa-Brandt, Inc. v. ADM Inv'r Servs., Inc.*, 344 F.3d 738, 747 (8th Cir. 2003). Because the $5.8 million award is *less* than the foreseeable damages for the physical injury or death of the plaintiff and his family arising from Silverstar's fraud, it does not offend substantive due process.

The plaintiff requests 30 minutes of oral argument.

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INTRODUCTION

When Hamid Adeli saw Silverstar Automotive's ad for a used Ferrari, he was reassured by the ad's promise that the car had been inspected by one of the nation's most reputable Ferrari mechanics. He asked Silverstar for the inspection report and was sent documentation, pictures, videos, and other details that spoke to the car's quality. Given these seemingly forthcoming disclosures, Adeli felt that he could trust Silverstar. He bought the car and drove it home. But within minutes, both Adeli and his eight-year-old daughter—who was riding with him in the passenger seat—smelled gas. Several mechanics and inspections later, Adeli confirmed that Silverstar had sold him a deathtrap. The car's exhaust header—a critical part, responsible for carrying hot toxic gases away from the engine—was obviously cracked. It leaked carbon monoxide into the car and threatened to ignite explosive gases. It could have killed Adeli and his daughter on their drive home.

Worse, Silverstar knew about this crack and the deadly risk it posed. The mechanics who inspected the car had specifically warned Silverstar that it was an "obvious" safety threat and "needed replacing" immediately. But Silverstar declined to do so—and then hid this fact from Adeli by sending him the wrong inspection document and telling him that "all the service" had been completed. Worse still, this was no isolated incident: Silverstar, a company with thirteen dealerships and

thousands of customers, by its own admission has sold "plenty of cars that have cracks in the exhaust."

Silverstar's own general manager thought Adeli should be allowed to return the car. But he was overruled by the company's owners. At that point, Adeli's only recourse was to sue. A jury found Silverstar liable on each of Adeli's claims: breach of warranty, fraud, and deceptive trade practices.

Still maintaining it did nothing wrong, Silverstar's appeal attacks every aspect of the jury's verdict. Its lead argument is that it was entitled to judgment as a matter of law on each claim. But Silverstar doesn't come close to showing what the law requires: a "complete absence of probative facts to support the verdict." *Browning v. President Riverboat Casino-Missouri, Inc.*, 139 F.3d 631, 634 (8th Cir. 1998). To the contrary, an abundance of evidence supports each of the jury's findings. On the breach-of-warranty claim, the jury reasonably found that Silverstar created a warranty through its false written assurance that "all the service" was completed. The jury also reasonably found that Silverstar committed fraud by deliberately lying to Adeli despite warnings from its own mechanics, another prospective customer, and a federally mandated Buyer's Guide that identifies a cracked exhaust header as a "major safety defect." Silverstar's only argument for why it should prevail as a matter of law on this claim is that it lied to Adeli, but he shouldn't have fallen for the fraud. That is no basis for disturbing the verdict, and lacks any support in the case law. Nor

is there any authority for Silverstar's argument that its deception is somehow immunized from liability under the Arkansas Deceptive Trade Practices Act because its disclaimer complies with state law. The Arkansas Supreme Court recently rejected that very argument, and rightly so. *See Air Evac EMS, Inc. v. USAble Mut. Ins. Co.*, 533 S.W.3d 572, 575 (Ark. 2017).

The only question that remains is whether the U.S. Constitution authorizes judicial revision of the jury's $5.8 million punitive-damages award. The answer is no. Under Supreme Court and Eighth Circuit precedent, this Court must "consider the magnitude of the potential harm" to Adeli and his family of Silverstar's decision to sell a car with a deadly, known, and easily repairable defect, "as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." *Asa-Brandt, Inc. v. ADM Inv'r Servs., Inc.*, 344 F.3d 738, 747 (8th Cir. 2003). The Supreme Court has thus "eschewed an approach that concentrates entirely on the relationship between actual and punitive damages." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993). For example, if "a man wildly fires a gun into a crowd" and "no one is injured and the only damage is to a $10 pair of glasses," a jury could reasonably award "only $10 in compensatory damages" but far more in punitive damages. *Id* at 459. Under this approach, a $10 million punitive-damages award may be permissible even if the value of the potential harm "is not between $5

million and $8.3 million, but is closer to $4 million, or $2 million, or even $1 million." *Id.* at 462.

Here, "the record undoubtedly reflects the potential for substantial physical harm." Add. 6.[1] And that harm is not hard to quantify. The National Highway Transportation Safety Administration values each human life at $9.6 million. This Court recently upheld a $14 million compensatory-damages verdict for a car accident arising from a safety defect involving an exhaust header—$4.67 million for each of three wrongful deaths. *Adams v. Toyota Motor Corp.*, 867 F.3d 903, 911, 917 (8th Cir. 2017). And, last year, the Arkansas Supreme Court upheld a $5.21 million verdict arising from a car accident with no deaths. *Garrison v. Hodge*, 565 S.W.3d 107, 112 (Ark. Ct. App. 2018).

Once this potential harm is properly considered, it becomes apparent that this is not a case in which the punitive-damages award even *exceeds* the cost of the potential harm, let alone does so by some large or questionable ratio. This is a negative-ratio case. Because the jury's $5.8 million award is considerably less than the foreseeable cost of serious physical injury or death of Adeli and his family—to say nothing of the harm to the *other* potential victims of Silverstar's fraud—it is per se reasonable and should be reinstated in full.

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[1] The defendant-appellant and cross-appellee's addendum is cited as "Add.," and the plaintiff-appellee and cross appellants' addendum is cited as "Adeli Add."

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1332 because the plaintiff is a resident of Virginia, the defendant is a resident of Arkansas, and the amount in controversy exceeds $75,000. The jury returned a verdict finding Silverstar liable for $20,201 in actual damages and $5.8 million in punitive damages. The court entered judgment for Adeli on September 27, 2018, and an amended judgment reducing the punitive damages on February 7, 2019. On March 7, 2019, Silverstar filed a notice of appeal under Federal Rule of Appellate Procedure 3, and on March 20, 2019, Adeli timely cross-appealed from the district court's remittitur. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Sufficiency of the Evidence. Has Silverstar demonstrated that the jury's liability findings should be vacated on the ground that there was a complete absence of probative facts to support them? Apposite cases: *Bavlsik v. Gen. Motors, LLC*, 870 F.3d 800 (8th Cir. 2017); *Henderson v. Simmons Foods, Inc.*, 217 F.3d 612, 615 (8th Cir. 2000); *Browning v. President Riverboat Casino-Missouri, Inc.*, 139 F.3d 631, 634 (8th Cir. 1998).

2. Punitive Damages. Does substantive due process require judicial revision of the jury's punitive-damages award where that award is *less* than the magnitude of potential harm to the plaintiff that might have resulted from the defedant's conduct? Apposite cases: *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S.

443, 460 (1993); *Asa-Brandt, Inc. v. ADM Inv'r Servs., Inc.*, 344 F.3d 738, 747 (8th Cir. 2003).

STATEMENT OF THE CASE AND OF THE FACTS

I. The facts

A. Hamid Adeli buys a used car from Silverstar based on assurances that the car had passed a "Pre-Buy inspection" by a reputable dealer and was in "turnkey" condition.

Hamid Adeli, a husband and father of two young children, has been a car enthusiast as long as he can remember. Appx. 234. He now shares that passion with his son and community: On the weekends, he volunteers as a safety instructor for a nearby racetrack and is a familiar face at his local Cars and Coffee Club. Appx. 234–36. Adeli bought his first car when he was 19 years old, after working a summer of 60-hour weeks at the local Pizza Hut to save up the money. Appx. 237.

For a long time, Adeli has harbored a desire to buy a Ferrari—a brand prized around the world for its high-performance, high-quality cars. Appx. 242. To Adeli, the Ferrari F430 was the pinnacle of performance—he considered this model to be the "most reliable" one "of the recent Ferraris." Appx. 316. But he waited over a decade and saved up before he could purchase one. Appx. 242. The opportunity presented itself when he saw an advertisement for a used F430 on Autotrader.com. Appx. 243. The posting emphasized with several asterisks that a "Pre-Buy inspection" had been completed by Boardwalk Ferrari. Appx. 243, Adeli Add. 01. Adeli thought

the promised pre-purchase inspection by Boardwalk "was a big deal" and a "huge selling point" because Boardwalk "is a reputable Ferrari dealership." Appx. 243, 245. He responded to the advertisement and connected with the vendor, Silverstar, a chain of used-car dealerships in Arkansas. Appx. 244. Adeli's main point of contact was Michael Slone, part owner of Silverstar (and 22-year-old son to Silverstar Chairman and CEO David Slone). Appx. 250–51.

Throughout his interactions with Slone, Adeli perceived him as "honest" and "very up front." Appx. 246. So when Slone represented that the car was "turnkey" and "ready to go," Adeli believed him. Appx. 251. Adeli, who considers himself an "experienced" buyer, felt that Slone and his colleagues "really went out of their way" to share details about the car. Appx. 251. These details and the "descriptions of the vehicle in text messages and emails [became] part of the basis [for the] bargain." Appx. 324.

For example, Slone sent photos showing the car's rotors (the parts that a car's brake pads clamp down on to stop the wheels from spinning). Appx. 319. He sent videos so that Adeli could hear the rev of its engine. Appx. 318. He used documentation from Boardwalk Ferrari's pre-purchase inspection to represent to Adeli that Silverstar had taken care of all recommended repairs other than to the tire-pressure monitoring system. Appx. 245–46, 128. When Adeli pushed back on the asking price, Slone wrote back: "If all the service was not completed, I would do

90K, but I did the service and pre buy because it was the right thing to do." Appx. 100. Adeli felt that these disclosures left little doubt—Silverstar had the car inspected by a reputable dealer and spent the money to make sure it was up to snuff. Appx. 251. Even so, the parties failed to agree on a price and the deal broke down in two days. Appx. 254, 569.

A few days later, however, Michael Slone reached back out to Adeli to see if he was still interested in the car and the two eventually agreed on a price. Appx. 254–55, 295. Adeli soon made a down payment on the car and Silverstar arranged a set of documents for him. Appx. 295.

Silverstar gave Adeli the Buyer's Guide mandated by federal law, which indicated the warranty status of the car on the front page and included a sample list of "some major defects that may occur in used motor vehicles" on the back page. Appx. 43; 16 C.F.R. Pt. 455, fig. 3. On the front page, Silverstar checked the box next to the statement "as is—no warranty," which explained that the "dealer assumes no responsibility for any repairs regardless of any oral statements about the vehicle." Appx. 43. When he signed it, Adeli understood this to mean the car was "no longer under the manufacturer's warranty." Appx. 240. Adeli was also given a package of several other documents—a buyer's order, an odometer-disclosure statement, and a cooling-off notice. But, as Silverstar's general manager later explained, no single document served as a purchase contract. Appx. 414, 426.

B. As soon as he drives the car home, Adeli immediately smells a fuel leak and discovers a cracked exhaust header.

When the car was delivered from Arkansas to a dealership near his home in Virginia, Adeli brought his family with him to pick it up. Appx. 258. The thought of finally getting the car made his "heart[] pound[]"; he felt like a "kid[] all over again." Appx. 259. With "butterflies in [his] stomach," he got into the car with his "giggling" eight-year-old daughter in the passenger seat. Appx. 259–60.

But his enthusiasm quickly faded. "Pretty much immediately" after getting into the car, Adeli smelled gas. Appx. 260. At first, he thought it might be another vehicle on the road. *Id.* Then his daughter smelled it too. *Id.* By the time they reached home four miles away the car was "reeking" as if "somebody just dumped a gallon of gas next to the car." *Id.* Upon parking the car in the garage, the family could even smell the gas from the living room. Appx. 261.

After he got out of the car, Adeli fired off a text message to Michael Slone: "There is a serious fuel leak somewhere." Appx. 572. Having taken Silverstar's assurances at face value, Adeli was in disbelief: "You can't miss this. No way you would deliver a car like this knowingly. It's bad." Not wanting to further jeopardize his safety or the safety of his family, Adeli towed the car to Competizione, a mechanic shop where it could be inspected by "two of the most respected Ferrari techs in the country." Appx. 587.

When Adeli heard back from the mechanics, his "heart dropped." Appx. 265. He learned that "it was obvious that the [exhaust] headers . . . were cracked and leaking." Appx. 266. This was no small thing. An exhaust header, sometimes referred to as the exhaust manifold, is a critical component of the car—it draws hot toxic gases away from the engine to where they can be safely discharged. As someone who knows his way around cars, Adeli understood the major safety risk posed by cracked exhaust headers; they "run[] at 800-plus degrees" next to "leaking gas[es]." Appx. 248. He "freaked out," realizing that the day before, he had a car "sitting in [his] garage that[] [was] a bomb," and that he unknowingly placed his eight-year old daughter's life at risk. Appx. 134.

On his own initiative, Adeli then spent approximately $1,500 and took the car to a mechanic shop certified in Ferrari maintenance to assess what repairs would be necessary and how much they would cost. Appx. 270. The mechanic there, Joseph Easton, identified defects requiring $30,000 in repairs, just to "get the car in full safe running order." Appx. 271.

C. Even though Silverstar's own general manager believed that Adeli's purchase should have been rescinded, Silverstar's owners overruled him, followed their standard practice, and refused to do so.

With tens of thousands of dollars' worth of vital repairs staring him in the face, Adeli pleaded with Josh Guest, the general manager of the Silverstar dealership to

"[d]o the right thing" and refund the purchase—offering to pay return shipping himself. Appx. 271. Guest told Adeli he was "initially concerned as well." Appx. 593.

Even though Guest had never rescinded a single sale in his time working for Silverstar, he believed that Adeli should be allowed to return the car. Appx. 424–25, Appx. 409. Guest held this view because of the promises Silverstar had made to Adeli about the car's condition, and because of the seriousness of the problem. Appx. 411. But he was overruled by the owners, Michael Slone and David Slone. *Id* at 409. So, against his better judgment, Guest told Adeli no. Appx. 272, 590.

By way of explanation, Guest dutifully delivered the party line. He told Adeli that the company had "completed the full pre buy inspection" and paid for all the necessary repairs, adding that the inspection "erased any concerns" he had about the car. Appx. 102. Personally, Guest thought that if he knew there was a crack in the exhaust header before the sale, he would have told Adeli because the defect has critical and obvious safety implications. Appx. 409, 420.

But no one did, and Adeli came away feeling "angry, taken advantage of." Appx. 273. What was "very frustrating," he wrote in a text message to Silverstar, was "that the headers/manifold that did [the] damage, could and should have been replaced." Appx. 588. In response, Silverstar sent Adeli one final message: "we will not be offering any assistance going forward." Appx. 590.

D. Silverstar sold the car despite being warned in advance by its own experts that the car had a cracked exhaust header—an "obvious" safety problem—that "needed replacing."

What Adeli did not know was that this serious safety defect was no surprise to Silverstar. In fact, Silverstar had been specifically warned during the pre-purchase inspection that it needed to replace the cracked exhaust header before the car was put up for sale, and that failure to do so posed a serious safety risk.

Larry Neighbors, the Boardwalk Ferrari representative assigned to perform the pre-purchase inspection, had specifically informed Michael Slone and Silverstar that there was a cracked exhaust header "that needed replacing." Appx. 370. The exhaust header, he said, "needs to be fixed on this visit" because it is "an obvious need." Appx. 372–73. He quoted the price for the fix: $5,865. Appx. 450. Despite the part's importance, Silverstar declined the repair. Appx.371.

Neighbors wasn't the only one to warn Silverstar about the cracked exhaust header before it sold the car to Adeli. While Slone was talking to Adeli, he was also communicating with Vincent Tran, another prospective customer. Like Adeli, Tran requested a copy of the inspection report. Appx.109, Adeli Add. 02-03. But whereas Slone sent Adeli an invoice of repairs that omitted any mention of the exhaust header, Tran received the list of recommended services prepared by Boardwalk Ferrari. Appx. 450, Adeli Add. 02-03. Unlike the invoice that Adeli received, this list revealed that Silverstar had declined the exhaust header repair. Appx. 247.

This fact immediately caught Tran's eye. He wrote back within hours to tell Silverstar that he and others were "deeply concerned about the cracked exhaust." Adeli Add. 2–3. Tran's email informed Slone and Silverstar that the issue was "a VERY serious problem" that can "severely damage[]" the car by throwing fragments into the engine. Appx. 109; Adeli Add. 02. The very next day, Michael Slone reached back out to Adeli to close the deal. Adeli Add. 06-07.

E. Cracked exhaust headers pose an "imminent safety risk," are listed in the federally mandated Buyer's Guide as "major defects," and render a car "not ready for sale."

Neighbors and Tran were right to express alarm. Because the part plays a critical role in making cars safe, experts agree that a cracked exhaust header can be deadly. Joseph Easton, one of the mechanics who inspected the car after Adeli smelled gas, explained the two main reasons why a cracked exhaust header is an "imminent safety risk." Appx. 69.

Danger #1: poisonous gas. The first reason is that "harmful gas created by the engine" can leak through the crack into the cabin of the car. Appx. 209. When car engines create energy by igniting gasoline and oxygen, they produce extremely hot gas—from 800 to 1,000 degrees Fahrenheit at highway speeds—as well as poisonous byproducts like carbon monoxide. *See* Leland E. Shields, "Surface Temperatures: Underhood," in *Motor Vehicle Fire Investigation: Computer-Based Training*, U. of Wash. (2009), https://bit.ly/2YfwiKg. These hot byproducts travel through the

exhaust header, which acts like a bridge between the engine and the catalytic converter. *See How Does Your Car's Exhaust System Work?*, CARFAX (2019), https://bit.ly/2Nhx8p3. When the hot byproducts get to the catalytic converter, they are transformed into safer, cooler chemicals—carbon dioxide, water, and oxygen.

By creating this bridge, exhaust headers allow the catalytic converter to do its job, saving thousands of lives. Health researchers estimate that, in the first two decades or so after the catalytic converter was introduced, "11,700 unintentional motor vehicle-related [carbon-monoxide] poisoning deaths may have been averted." James A. Mott, et al., *National Vehicle Emissions Policies and Practices and Declining U.S. Carbon Monoxide Related Mortality*, 288 J. Am. Med. Ass'n. 988, 995 (2002).

A cracked exhaust header undoes these benefits. When the exhaust header leaks, the bridge collapses—making it as if the catalytic converter did not exist at all. This allows poisonous gas to escape into the cabin. To the car's occupants, this gas poses the same danger as the does the presence of carbon monoxide in homes. As Easton put it: the gas is a "silent killer. You won't know." Appx. 212. The poisonous byproducts would have nowhere to go but into the air and people's lungs and could "produc[e] unconsciousness and death in minutes." Mott, *Carbon Monoxide Related Mortality*, 288 J. Am. Med. Ass'n. at 988.

Danger #2: spontaneous combustion. The second risk of a cracked exhaust pipe is no less serious. The hot gases escaping the header could not only

poison the occupants; as Easton explained, they could also "instantly ignite [and] [b]urn the whole car down." Appx. 212.

Given these risks, it is no surprise that exhaust headers are taken seriously by governments and mechanics alike. The federally mandated Buyer's Guide that Silverstar handed Adeli, for example, includes a one-page "list of major defects that may occur in used motor vehicles." Pt. 455, fig. 3, https://bit.ly/2YZ3eXO. One major defect on this list is "Exhaust System Leakage." *Id.*

These dangers are also why Easton, the third mechanic consulted by Adeli, thought that the car "was not ready for sale" and the reason its condition "should have been disclosed" to Adeli by Silverstar. Appx. 215. To Kenneth Ambrose, Boardwalk Ferrari's CEO, Silverstar had crossed a line: to protect its customers' safety, Boardwalk simply "wouldn't sell a car with a cracked manifold." Appx. 339.

F. Despite the known safety risks, Silverstar—a company with more than a dozen dealerships and nearly a thousand cars in inventory—admits that it sells "plenty of cars that have cracks in the exhaust."

Nor was the sale to Adeli an isolated incident. Silverstar admitted that it sells "plenty of … cars that have cracks in the exhaust." Appx. 408, 435. The company's general manager claimed that cracked exhaust headers need not be "repaired for a customer to get a quality vehicle." Appx. 407. Silverstar has sold plenty of cars in its decades of operation and, today, its thirteen dealerships in Arkansas offer nearly

1,000 used cars for sale. Jamie Lareau, *Dealers can't even touch some hot brands*, Automotive News, May 25, 2015; *see* https://bit.ly/30IHHTO.

II. Procedural background

A. Adeli sues Silverstar for breach of warranty, fraud, and deceptive trade practices under Arkansas law.

After his efforts to persuade Silverstar to rescind the purchase proved unsuccessful, Adeli felt he had no choice but to assert his legal rights. Appx. 594. Had he purchased a *new* car, the problems he experienced wouldn't have occurred—new cars must meet a rigorous set of federal safety standards before they may be sold. *See, e.g.*, 49 C.F.R. Pt. 571. But those rules don't apply to the 39 million *used* cars sold each year, which are largely unregulated at the federal level. Cox Automotive, *Used Car Market Report & Outlook*, 16 (2018) http://bit.ly/2JLlSMk. So Adeli had to seek redress under state consumer-protection law. Given minimal federal regulation and limited public resources, private enforcement of these laws is the principal means of policing "deceptive suppression of negative, highly material information" about used cars, and thereby reducing "safety risks to consumers who drive vehicles with damaged electrical or mechanical components." *Prepared Statement of the Federal Trade Commission on Consumer Protection in the Used and Subprime Car Market*, House Committee On Energy And Commerce, Subcommittee on Commerce, Trade, and Consumer Protection, at 3 (2009) http://bit.ly/2Z2oPPo .

In Adeli's case, three claims were available under Arkansas law: (1) breach of warranty, (2) fraud, and (3) deceptive trade practices:

First, when a seller makes an "affirmation of fact or promise" about a car, and the consumer relies on that affirmation as "part of the basis of the bargain," that affirmation "creates an express warranty" that the goods will match the promise. Ark. Code Ann. § 4-2-313(1)(a). For a consumer to identify an express warranty, it is "not necessary . . . that the seller use formal words" like "warrant" or "guarantee." § 4-2-313(2).

Second, Arkansans harmed by a transaction can bring suit for common-law fraud if they justifiably relied on a "false representation … of a material fact" made by the seller. *Country Corner Food & Drug, Inc. v. First State Bank & Trust Co. of Conway*, 966 S.W.2d 894, 897 (Ark. 1998).

Third, the Arkansas Deceptive Trade Practices Act prohibits "[d]eceptive and unconscionable trade practices," including "[k]nowingly making a false representation" of goods. Ark. Code Ann. § 4-88-107(a)(1) . Unlike the FTC Act, after which it is patterned, the ADPTA provides a private right of action to "[a]ny person who suffers actual damage or injury as a result of an offense or violation" of the law. Ark. Code Ann. § 4-88-113(f).

B. Adeli proves all three claims at trial.

After discovery and motions practice, Adeli's case culminated in a jury trial. ECF No. 57–58. He pressed all three claims at trial. He argued that Silverstar breached its express warranty by failing to repair the cracked exhaust header. The jurors thus saw Silverstar's advertisement and the text message exchange between Adeli and Michael Slone, in which Slone falsely communicated to Adeli that "all the service" had been completed. Appx. 569.

Adeli further argued that Silverstar committed fraud and violated the ADTPA by intentionally misrepresenting the pre-purchase inspection. At first, Michael Slone testified that Boardwalk "never told [him] that there was a crack in the exhaust manifold." Appx. 443. The jury was then shown part of an email message that contradicted this story. Two days before selling the car to Adeli, Slone wrote to Boardwalk: "To my knowledge, there is a beginning crack in the exhaust. This is not included in the [inspection invoice]." Appx. 449. Faced with this evidence, Slone admitted that he knew about the cracked exhaust header repair, that he declined to repair it, and that he did not share any of this information with Adeli. Appx. 451–52.

Boardwalk CEO Kenneth Ambrose then put this nondisclosure in context. He said that Boardwalk "had no control over what [Silverstar] would or would not disclose" to Adeli. Appx. 337. Even if Adeli *had* asked Boardwalk for the list of

recommended services, Ambrose said Adeli would have been referred to Silverstar. Appx. 338. Silverstar had complete control over this information.

Adeli showed evidence that this misrepresentation was material. Numerous witnesses—including Neighbors, Ambrose, Ferrari mechanic Joe Easton, and even Silverstar's own sales manager (Joseph Guest)—all testified that they would have disclosed the cracked exhaust header. Appx. 215, 229, 373, 420.

C. The jury finds Silverstar liable to Adeli on all claims awarding him actual damages and punitive damages.

After Adeli rested his case, Silverstar moved for judgment as a matter of law on all claims. APPX. 474–75. The court denied the motion and submitted the case to the jury. The jury was instructed to "fix the amount of money which will reasonably and fairly compensate [Adeli] for the element of damage . . . proximately caused by" Silverstar." Appx. 503.

The jury was also instructed on punitive damages, which "punish a wrongdoer and . . . deter the wrongdoer and others from similar conduct." *Id.* Adeli was required to prove by "clear and convincing evidence either" that Silverstar acted "with malice or in reckless disregard of the consequences," or that Silverstar "intentionally pursued a course of conduct for the purpose of causing damage." Appx. 503–04.

In their closing argument, Adeli's counsel emphasized Silverstar's decision to know and hide the car's "tremendous safety concerns." Appx. 508. They reminded the jury of Joseph Easton's testimony: "a crack in the exhaust of a car can put carbon

monoxide into the car, and carbon monoxide kills people." Appx. 530. And they said punitive damages can deter dealers who sell cars "that have serious concerns" by "punish[ing] those who do that." Appx. 515. Silverstar's counsel then maintained that this case "shouldn't be about punishment." Appx. 528. Noting that Adeli bore the burden of proof on each claim, Silverstar's counsel told the jury that Silverstar "doesn't have to prove a thing." Appx. 529.

The jury found for Adeli on all counts. Appx. 532–33. It then awarded Adeli $20,201 in actual damages and $5.8 million in punitive damages. Appx. 533.

D. The court denies Silverstar's renewed motion for judgment as a matter of law.

After the jury returned its verdict, Silverstar again moved for judgment as a matter of law, which the court was again denied. The court first found that Adeli's testimony provided a "sufficient evidentiary basis" to interpret Silverstar's assurances as part of the agreement, "and from there to find a breach." Add. 16. Next, the court rejected Silverstar's argument that Adeli could not justifiably rely on its misrepresentations for the purpose of proving fraud. Add. 17. This claim, the court reasoned, was based on a misreading of precedent, and in any case, it added that adopting Silverstar's interpretation would allow used-car dealers throughout the state to escape liability for their "misrepresentations about a car's condition so long as the purchaser signs an as-is disclaimer." *Id.*

E. The court reduces the jury's punitive-damages award.

The court granted Silverstar's motion to reduce the punitive-damages award. The court conceded that "this is not a case where a party inflamed the jury . . . with emotional closing statements," but nonetheless held that, in its view, only "a maximum punitive damages award of" "$500,000 comports with due process." Add. 11. The court did not explain how it arrived at that number.

SUMMARY OF ARGUMENT

I. Each of the jury's liability findings is supported by sufficient evidence.

A. First, ample evidence supports the jury's finding that Silverstar breached its express warranty. Despite its own ad and assurances to Adeli that "all the service" was completed, Silverstar declined to repair the cracked exhaust header, rendering the car an imminent safety risk. Silverstar claims that these statements should not be considered part of the agreement because the documents *it* regards as the contract exclude a warranty and include a disclaimer. But its own general manager testified that these documents were not a final contract. Nor did they include a merger clause. And a reasonable jury could find that the disclaimer covered *manufacturer* warranties.

B. As for the jury's fraud finding, Silverstar does not deny that an abundance of evidence supports this finding. Instead, it pins the blame on Adeli, arguing that *he* was unreasonable to rely on *its* misrepresentations. Nothing supports that argument.

C. On the Arkansas Deceptive Trade Practices Act claim, Silverstar argues that it is entitled to judgment as a matter of law because its disclaimer complies with contract law. But this claim is not based on *the disclaimer*; it's based on Silverstar lying to Adeli and selling him a deathtrap. In any event, the Arkansas Supreme Court has rejected the very rule Silverstar proposes. *Air Evac EMS, Inc.*, 533 S.W.3d at 575–76.

II. The jury's award of $5.8 million in punitive damages is also reasonable. Substantive due process does not require *any* judicial revision to that award.

A.1. Silverstar's arguments to the contrary rest on the premise that only actual harm matters when evaluating a punitive-damages award. That premise is wrong. The Supreme Court has squarely rejected "an approach that concentrates entirely on the relationship between actual and punitive damages," instead instructing courts "to consider the magnitude of the *potential harm*" to the plaintiff "as well as the possible harm to other victims that might have resulted if similar future were not deterred." *TXO Prod. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993). This Court has held the same. *See, e.g.*, *Asa-Brandt, Inc. v. ADM Investor Servs., Inc.*, 344 F.3d 738, 747 (8th Cir. 2003) (upholding $1.25 million award based solely on potential harm).

2. The district court's opinion, for its part, correctly identified this rule of law. But then it failed to apply it, reducing the punitive-damages award to $500,000 based on a ratio that considered only the actual damages. Add. 10. That was error.

B. Applying the correct rule, the punitive-damages award should be upheld in full. All three of the Supreme Court's guideposts confirm that it is reasonable.

1. The first guidepost—the reprehensibility of the defendant's conduct—strongly supports the award. As the district court found, Silverstar committed "one of the more reprehensible acts of business fraud": "Making an affirmative misrepresentation about a car's condition" that put peoples' lives in danger. Add. 8.

2. The second guidepost—"the ratio between harm, or potential harm, to the plaintiff and the punitive damages award," *State Farm Mut. Aut. Ins. V. Campbell*, 538 U.S. 408, 425 (2003)—also firmly supports the award. Just as in *TXO*, which involved an award that was 526 times the amount of actual damages, the "relevant ratio" here is much less than it might seem because of the potential harm. *BMW of North America v. Gore*, 517 U.S. 559, 581 (1996) (discussing *TXO*). The ratio in this case, in fact, is negative: the potential harm *exceeds* the jury's award. *See, e.g.*, *Adams,* 867 F.3d at 917 (awarding nearly $5 million per plaintiff in wrongful-death case based on safety defect also involving exhaust header). The jury's $5.8-million award reasonably captures this serious, foreseeable potential harm.

3. The third guidepost—which considers penalties for comparable conduct, and encourages courts to "compare damages awarded in similar civil cases." *Ondrisek v. Hoffman*, 698 F.3d 1020, 1030 (8th Cir. 2012)—confirms what the first two guideposts already make clear. Had Adeli and his family suffered the physical injuries that

Silverstar's reprehensible conduct foreseeably set in motion, Silverstar would owe millions of dollars in damages. So the jury's award here is not "grossly out of proportion to the severity of the offense." *Asa-Brandt, Inc. v. ADM Investor Servs., Inc.*, 344 F.3d 738, 747.

STANDARD OF REVIEW

1. *Judgment as a matter of law*. A "party seeking to overturn a jury verdict based on the insufficiency of the evidence faces an onerous burden." *Henderson*, 217 F.3d at 615. It must show that no "reasonable jury" would have had a "legally sufficient evidentiary basis to find" as the jury did. Fed. R. Civ. P. 50(a).

Applying this standard de novo, this Court has repeatedly expressed its "hesitancy to interfere with a jury verdict," mindful of "the danger that the jury's rightful province will be invaded when judgment as a matter of law is misused." *Bavlsik*, 870 F.3d at 805. To guard against this danger, courts are required to "(1) consider the evidence in the light most favorable to the prevailing party, (2) assume that all conflicts in the evidence were resolved in favor of the prevailing party, (3) assume as proved all facts that the prevailing party's evidence tended to prove, and (4) give the prevailing party the benefit of all favorable inferences that may reasonably be drawn from the facts proved." *Id.*

2. *Remittitur*. This Court applies do novo review to the question whether a jury's punitive-damages award violates substantive due process. *Bryant v. Jeffrey Sand*

Co., 919 F.3d 520, 527 (8th Cir. 2019). Further, "[b]ecause the Arkansas courts employ the United States Supreme Court's due process analysis, [this Court] conflate[s] both state and federal review." *Ondrisek*, 698 F.3d at 1028; *see also Bryant*, 919 F.3d at 527 (applying federal standard in case involving Arkansas law).

ARGUMENT

I. There is no basis for overturning the jury's liability findings.

Silverstar "faces an onerous burden." *Henderson,* 217 F.3d at 615. On each claim, it tries to carry its burden by cherry-picking its favorite evidence—evidence that it wishes the jury had focused on to the exclusion of everything else in the record. But that is not the standard. Rather than show that *some* evidence, if taken in isolation, might support its desired outcome, Silverstar must show a "complete absence of probative facts to support the verdict." *Browning*, 139 F.3d at 634. It cannot do so. To the contrary, the evidence shows that Silverstar intentionally mispresented the car's condition to Adeli, and put him and his family in great danger in doing so.

A. The jury finding that Silverstar breached its express warranty is supported by sufficient evidence.

Silverstar first takes aim at the jury's breach-of-express-warranty finding. In doing so, Silverstar does not deny that it advertised the car as having passed a pre-purchase inspection by a respected Ferrari mechanic, and that it assured Adeli that "all the service" had been done on the car as a result of that inspection. Appx. 100, 243, 245. Nor does it deny that these express written statements were false. Instead,

Silverstar takes the position (at 13) that the jury should not have credited this evidence because the four documents Silverstar gave to Adeli constitute a "complete final written contract" that defeats any warranty it otherwise made to him.

But the jury was not required to agree. Silverstar's own general manager told the jury that none of those documents served as the final purchase contract. Appx. 414, 426. And this supposedly complete contract "does not contain a merger clause—an indication that the parties did not intend for the [terms] to be their complete agreement." *Armstrong Remodeling & Const., LLC v. Cardenas*, 417 S.W.3d 748, 754 (Ark. Ct. App. 2012). That means that it was up to the jury to determine whether Silverstar's other express written statements were also part of the parties' agreement. That includes, at a minimum, the text messages from Silverstar saying that all "all the service" had been completed, if not also its advertisement for the car. It was entirely reasonable for the jury to find that these statements relayed an "affirmation of fact" on which Adeli reasonably relied as "part of the basis [for his] bargain." Ark. Code Ann. § 4-2-313(1)(a); Appx. 324.

The "as-is" disclaimer, contained in the documents given to Adeli, does not require a different result. Under Arkansas law, express warranties and disclaimers "shall be construed wherever reasonable as consistent with each other." Ark. Code Ann. § 4-2-316(1). Any potential inconsistency between the two is a question of fact to be resolved by the jury. *See Little Rock Sch. Dist. of Pulaski City v. Celotex Corp.*, 574 S.W.2d

669, 673 (Ark. 1978) (en banc). Here, the jury resolved that question in favor of Adeli. There is no basis for this Court to usurp the jury's role and provide its own answer. Giving Adeli "the benefit of all favorable inferences," *Bavlsik*, 870 F.3d at 805, the evidence at trial was sufficient to show that he relied on the express warranty and that he understood the "as-is" provision to disclaim any *manufacturer* warranties. Appx. 240. Although Silverstar attempts to minimize the trial testimony and text messages as "parol evidence" (at 15), a reasonable jury could have used the evidence to understand the contract, the terms of which were not "intended by the parties as a final expression of their agreement." Ark. Code Ann. § 4-2-202.

In short, the jury was permitted to find that Silverstar broke its promise to Adeli by failing to repair a cracked exhaust that "need[ed] to be fixed," Appx. 372, and that, far from doing "all the service," Silverstar's choices created an "imminent safety risk" for Adeli and his family. Appx. 69. Ample evidence supports that finding.

B. Silverstar's sole challenge to the jury's fraud finding—that Adeli should not have relied on its misrepresentations—is baseless.

Silverstar next challenges the jury's fraud finding. This challenge is very limited: Silverstar does not dispute that the evidence at trial showed that it made material false representations about the car's condition, that it knew these representations were false, that it made the representations with the intention of inducing Adeli to rely on them, and that he did in fact rely on them, causing him not

only economic damage but also creating the serious potential for grave personal harm—all elements of a fraud claim. *See Star Cty. Sch. Dist. v. ACI Bldg. Sys., LLC*, 844 F.3d 1011, 1016 (8th Cir. 2017). Silverstar's argument, rather, is that Adeli's reliance on its misrepresentations was unreasonable *as a matter of law* because of the disclaimer.

There is no support for this argument. As Silverstar concedes (at 24), "reasonable reliance is ordinarily a question of fact" for the jury. *See Morris v. Knopick*, 521 S.W.3d 495, 501–02 (Ark. Ct. App. 2017). Although Silverstar claims that it becomes "a question of law when no reasonable jury could reach the conclusion that the buyer justifiably relied," that is just a description of the judgment-as-a-matter-of-law standard. This standard is not met here, and Silverstar makes no attempt to show that it is. And to the extent that Silverstar is arguing that "a party is not liable for its misrepresentations about a car's condition so long as the purchaser signs an as-is disclaimer," Add. 17, Arkansas courts have squarely rejected that argument. In Arkansas, "an 'as is' clause does not bar an action by the [seller] based on . . . fraud or misrepresentation." *Beatty v. Haggard*, 184 S.W.3d 479, 487 (Ark. Ct. App. 2004). And for good reason: a consumer can simultaneously agree to shoulder the costs of any future repairs and still reasonably rely on false statements about the car's condition.

In support of its effort to recast reliance as a question of law here, Silverstar cites two cases. Neither provides license for overturning the jury's fraud finding.

The first case, *Epley v. John Gibson Auto Sales,* does not discuss reliance at all, much less say anything about the effect of an "as-is" clause on this question. 514 S.W.3d 468 (Ark. Ct. App. 2016). There, the seller told a buyer that a car was in "good condition," and the court held that these words express merely an opinion, and so do not constitute a false representation *at all*. *Id.* at 471–72. By contrast, Adeli relied on a specific affirmation—that "all the service" was completed following Boardwalk's inspection—and this statement was false. Appx. 324, 569.

The second case is also inapposite. *See Yarborough v. DeVilbiss Air Power, Inc.*, 321 F.3d 728 (8th Cir. 2003). The plaintiffs in that case relied solely on an oral guarantee. In affirming summary judgment for the defendant, this Court held that the parties ("sophisticated businessmen represented by experienced counsel") had gone through too many iterations of drafting a contract for the plaintiffs to claim reliance on an oral guarantee. *Id.* at 731. The Court found it particularly significant that "a prior draft of the contract" was "explicitly altered after the alleged oral misrepresentation." *Id.* at 732. But the Court expressly cabined its holding to this specific scenario—involving "experienced plaintiffs, representation by competent counsel in the transaction, [and] changes to a written contract subsequent to an alleged oral misrepresentation." *Id.* "In these circumstances," the Court explained, "we believe that it would be unreasonable to rely on an oral guarantee when that guarantee was

quite obviously not included in the subsequent written draft of the contract." *Id* at 731.

By its terms, *Yarborough* is inapplicable. Adeli did not rely on an oral guarantee, nor was the contract altered after such a guarantee. And unlike the sophisticated parties in *Yarborough*, who had attorneys draft and redraft their written contract, Adeli and Silverstar disagree about what even *constitutes the contract*. It was thus the jury's job to decide whether Adeli reasonably relied on Silverstar's misrepresentations.

Silverstar also suggests (at 26) that Adeli's reliance is unreasonable as a matter of law because he should have investigated further. This is a confounding suggestion. Silverstar is essentially telling Adeli (its customer): "We may have lied to you, but you shouldn't have believed us." "A party to a business transaction," however, is generally "justified in relying on a misrepresentation of fact without investigation." *Yazdianpour v. Safeblood Techs., Inc.*, 779 F.3d 530, 536 (8th Cir. 2015). That is especially true here, where Silverstar shared a wide variety of disclosures "made to induce" Adeli "to refrain from seeking further information," and where the representations were "within the knowledge of the party making them." *Id.* (quoting *Lancaster v. Schilling Motors, Inc.*, 772 S.W.2d 349, 351 (Ark. 1989). In this case, Adeli made the initial mistake of believing that Silverstar was "very up front" with him. Appx. 251. Just because Silverstar betrayed his trust and misled him does not mean that his reliance on its statements was unreasonable as a matter of law.

C. Silverstar's argument for overturning the jury's ADPTA finding has been rejected by the Arkansas Supreme Court.

Silverstar also challenges the jury's ADTPA finding—the third claim on which the jury found it liable. Silverstar contends (at 26) that its misrepresentation "cannot, as a matter of law, constitute an unfair or deceptive trade practice under the ADTPA" because its disclaimer was "in compliance with UCC requirements." This is wrong for multiple reasons. For one thing, it misses the point. Adeli did not argue to the jury that the disclaimer *itself* was the deceptive trade practice; he argued that Silverstar lied to him and sold him a deathtrap. Appx. 134. The jury agreed.

For another, the Arkansas Supreme Court has rejected Silverstar's proposed rule, under which there could be no ADTPA violation without a separate violation of law. The court held that the ADPTA's safe-harbor provision "precludes claims only when the actions or transactions at issue have been specifically permitted or authorized under laws administered by a state or federal regulatory body." *Air Evac EMS, Inc.*, 533 S.W.3d at 575–76. Adeli's claim does not fit that description; Silverstar was not specifically authorized to lie to him.

Silverstar tries to make something of the fact (at 26) that, under the UCC, "[m]isrepresenting the condition of a used car is not a specifically listed prohibited act." But this view is again at odds with the Arkansas Supreme Court's interpretation of the ADTPA, which must be given a "liberal construction" in light of its broad text and purpose. *State ex rel. Bryant v. R & A Inv. Co.*, 985 S.W.2d 299, 302 (Ark. 1999). Here,

Silverstar lured Adeli and other customers by pushing all the right buttons, securing a pre-purchase inspection from "a reputable Ferrari dealership," and sharing with its customers misleading documents from that inspection. Appx. 243–46. When Adeli discovered that Silverstar sold him "a bomb," the dealership threw up its hands, pointed to the disclaimer, and refused to "offer[] any assistance going forward." Appx. 134, 590. The jury had more than sufficient evidence to reach its verdict. Complying with one provision of the UCC does not immunize deception.

II. Nothing in the U.S. Constitution requires judicial revision of the jury's punitive-damages award.

The only question left is whether substantive due process requires *any* judicial revision of the jury's original $5.8 million punitive-damages award. "Only when an award can fairly be categorized as 'grossly excessive,'" *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996), such it that "furthers no legitimate purpose and constitutes an arbitrary deprivation of property," *State Farm Mut. Aut. Ins. v. Campbell*, 538 U.S. 408, 417 (2003), is such revision compelled by the Constitution. The award here does not remotely fit that description. Indeed, this is a negative-ratio case. Because $5.8 million is *less* than the magnitude of "the *potential* harm the defendant's conduct could have caused" to Adeli and his family, *Philip Morris USA v. Williams*, 549 U.S. 346, 354 (2007), the jury's award was per se reasonable.

A. Any proper evaluation of the punitive damages award must consider the potential physical injury and death that might have resulted from Silverstar's conduct.

1. Silverstar's arguments all rest on the erroneous premise that "the punitive damages should be compared to the compensatory damages *only*" and that a showing of an acceptable ratio between those two numbers "is the *only* way that the award can satisfy due process." Silverstar Br. 42–44 (emphasis added). But the jury obviously sought to punish Silverstar for knowingly selling cars that are likely to injure or kill people, not merely for cheating customers out of the relatively small cost of necessary repairs. In a case like this—involving a small actual economic loss and far more substantial potential harm—Silverstar's approach makes no sense.

Supreme Court and Eighth Circuit precedent squarely forecloses this myopic focus. In the leading case on point, *TXO Prod. v. Alliance Res. Corp.*, 509 U.S. 443 (1993), the Supreme Court upheld "a $10 million punitive damages award—an award 526 times greater than the actual damages awarded by the jury" and, in doing so, made clear that the Court has "eschewed an approach that concentrates entirely on the relationship between actual and punitive damages." *Id.* at 460. Instead, "[i]t is appropriate to consider the magnitude of the *potential harm*" to the plaintiff "as well as the possible harm to other victims that might have resulted if similar future were

not deterred." *Id.* (emphasis in original). Every one of the Supreme Court's punitive-damages cases, before and after *TXO*, recognizes this rule.[2]

In the Eighth Circuit, it is likewise well established that, "in imposing punitive damages it is proper to consider not only the harm that actually resulted from the defendant's misdeeds but also the harm that *might* have resulted." *Dean v. Olibas*, 129 F.3d 1001, 1007 (8th Cir. 1997) (emphasis in original); *see Hallmark Cards, Inc. v. Monitor Clipper Partners, LLC*, 758 F.3d 1051, 1061 (8th Cir. 2014) (reaffirming the *TXO* rule and upholding punitive damages where "the compensatory damages might have been far higher (and the relative size of the punitive damages far lower)" if the defendant's conduct had its full effect). In *Asa-Brandt, Inc. v. ADM Investor Services Inc.*, 344 F.3d 738, 747 (8th Cir. 2003) , for example, this Court applied this rule to affirm $1.25 million in punitive damages and nominal compensatory damages based on the possibility that the defendant's fraudulent scheme might have caused millions of dollars worth of damage.

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[2] *Philip Morris USA*, 549 U.S. at 354 (reaffirming that it may be "appropriate to consider the reasonableness of a punitive damages award in light of the *potential* harm the defendant's conduct could have caused"); *State Farm*, 538 U.S. at 418 (instructing courts to consider "the disparity between the actual *or potential harm* suffered by the plaintiff and the punitive damages award"); *Gore*, 517 U.S. at 582 (holding a large award excessive where there was "no suggestion that Dr. Gore or any other BMW purchaser was threatened with any additional potential harm by BMW's nondisclosure policy"); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 (1991) (emphasizing the need for a "reasonable relationship between the punitive damages award and the *harm likely to result from the defendant's conduct* as well as the harm that actually has occurred").

Under this approach, courts do not insist that the range of potential harm be estimated with scientific certainty. A high ratio may "be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *Gore*, 517 U.S. at 582–83. As in *TXO*, a $10 million punitive-damages award may be permissible "even if the actual value of the potential harm" were "not between $5 million and $8.3 million, but closer to $4 million, or $2 million, or even $1 million." 509 U.S. at 461; *see id.* at 450 n.10 ("extrapolating" estimates for this broad range of potential harm); *Olibas*, 129 F.3d at 1007 (discussing "the harm that *might* have resulted," without any numbers) (emphasis in original). Punitive damages are thus appropriate so long as they "bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct." *TXO*, 509 U.S. at 460. When there is significant potential harm, courts should "not consider the dramatic disparity between the actual damages and the punitive award controlling." *Id.* at 461. The "touchstone is the potential harm that would likely have resulted from the dangerousness inherent in defendant's actual conduct"—for example, where, as here, a defendant puts "potentially dangerous products into the marketplace." *Pulla*, 72 F.3d at 659 (Byron White, J., sitting by designation).

Silverstar effectively asks this Court to extend the limits of substantive due-process to encompass a rule that "only" actual pecuniary loss, and not potential harm, should count in the analysis. Silverstar Br. 42–44. In light of all the binding

precedent to the contrary, this Court should decline to adopt Silverstar's pecuniary-loss-only rule. This Court has been "hesitant to extend substantive due process," and it should be especially reluctant to do so here. *Riley v. St. Louis Cty. of Mo.*, 153 F.3d 627, 631 (8th Cir. 1998); *see County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) ("[W]e have always been reluctant to expand the concept of substantive due process.").[3]

2. The district court identified the right rule of law but failed to apply it. It correctly observed that Silverstar's arguments erroneously "relie[d] only on the actual damages Adeli suffered," and that the "potential harms faced by Adeli and his passengers are not measured by the actual damages recovered." Add. 9–10. The court further acknowledged that "the record undoubtedly reflects the potential for substantial physical harm" and "supports the conclusion that the car was unsafe to drive." Add. 6. But the district court failed to appreciate the consequences that flowed from this recognition and ultimately reduced the punitive-damages award to

[3] While firmly entrenched in this Court's case law, the substantive-due-process limits on punitive damages have an uncertain status in the Supreme Court. The guideposts have only been endorsed by one sitting member of the Supreme Court, Justice Breyer. The other two sitting Justices on the bench when the guideposts were introduced have challenged their foundations. Justice Thomas "believe[s] that the Constitution does not constrain the size of punitive damages awards" at all and would "vote to overrule *BMW*." *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 443 (2001) (Thomas, J., concurring). And Justice Ginsburg has explained that the Court "is not well equipped" for such review and that it "has only a vague concept of substantive due process, a 'raised eyebrow' test, as its ultimate guide." *Gore*, 517 U.S. at 612–13 (Ginsburg, J., dissenting). The remaining Justices haven't weighed in.

$500,000 based on a ratio that considered only the actual damages. *Compare* Add. 10 (describing Adeli's case as presenting a "287-to-1-ratio") *with Gore*, 517 U.S. at 581 (describing the "relevant ratio" in *TXO* as "10 to 1," not 526 to 1). As Silverstar points out, the district court "did not explain" how it reached the $500,000 figure, "what constitutional standards were applied to reach that sum; what objective criteria, if any, supported its decision; whether any alternative sums were considered; or why it settled on this number." Silverstar Br. 28.

As we now explain, the jury's $5.8 punitive-damages award, when properly evaluated under the relevant constitutional guideposts, is not "so grossly excessive as to be beyond the power of the State to allow." *TXO*, 509 U.S. at 462.

B. The jury's full $5.8 million punitive damages award was appropriate under all three relevant guideposts.

Far from offending substantive due process, a $5.8 million award in this case was eminently reasonable. That amount is in fact *less than* the total foreseeable harm that could have reasonably resulted from Silverstar's reprehensible conduct. Thus, given that the primary rationale for punitive-damages constraints is ensuring "fair notice," *State Farm*, 538 U.S. at 417, there is no basis for reducing the jury's award here. Silverstar was plainly on notice of the potential consequences of fraudulently inducing Adeli to buy a defective car that could cause the death or physical injury of himself, his family, and other people.

Application of the three "guideposts" confirms that Silverstar had "adequate notice of the magnitude" of the potential punishment in this case: (1) "the degree of reprehensibility"; (2) "the disparity between the actual or potential harm suffered . . . and the punitive damages award"; and (3) "the difference between [this remedy] and the civil penalties authorized or imposed in comparable cases." *Id.* at 418. All three guideposts support the jury's award here. It should therefore be reinstated in full.

1. Silverstar's fraudulent conduct and disregard for the safety of its customers was extremely reprehensible.

The first factor is the "most important"—the "degree of reprehensibility of the defendant's conduct." *Id.* at 419. This factor takes into consideration whether the harm was "physical as opposed to economic"; whether "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others"; whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident"; whether "the conduct involved repeated actions or was an isolated incident"; and whether "the target of the conduct had financial vulnerability." *Id.* As this Court has explained, even "just one indicium of reprehensibility is sufficient to render conduct reprehensible." *May v. Nationstar Mortg., LLC*, 852 F.3d 806, 816 (8th Cir. 2017).

Silverstar's conduct checks all the boxes. As the district court found, "the record undoubtedly reflects the potential for substantial physical harm, and indicates that Silverstar maintained a reckless disregard of the health or safety of others." Add.

6. "The fact that those dangers never materialized into [actual] physical harm does not make Silverstar's conduct any less reprehensible." Add. 7. Further, as already discussed (and as the district court found), "the evidence demonstrated that Silverstar acted with intentional malice, trickery, or deceit." Add. 8. As the court recognized: "Making an affirmative misrepresentation about a car's condition, especially when the condition gives rise to safety concerns, is often considered one of the more reprehensible acts of business fraud." *Id.* Nor is there reason to believe that this act was isolated, for Silverstar admitted at trial to selling "plenty of cars" with this defect. Appx. 408, 435. And the targets of these practices are typically poorer people forced to buy used cars (even if Adeli himself does not meet this description).

Unwilling to acknowledge even one of these points, Silverstar contests all of them. It continues to assert that it did nothing wrong and that its false representations about the car's condition were entirely harmless and undeserving of punishment. Silverstar's failure to grasp, even now, the seriousness of its misconduct only serves to underscore the appropriateness of the jury's punitive-damages award.

Silverstar starts by downplaying the harm as "economic," as if this were just a case about "out-of-pocket expenditures." It asserts (at 31) that there was "no evidence of any non-monetary damages." But "the touchstone is the *potential harm* that would have likely resulted from the dangerousness inherent in defendant's actual conduct." *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 659 (8th Cir. 1995) (White, J., sitting by designation)

(emphasis added). As the court found, "Adeli presented evidence of the consequences of a cracked exhaust manifold," showing that it could "instantly ignite the leaking fuel and cause the entire car to catch fire," and that "harmful gas could enter the car and cause serious health conditions." Add. 6–7; *see* Appx. 545. The evidence thus showed that Silverstar's actions—declining to make the necessary repair, while misrepresenting to Adeli that the repair had been made—transformed the car into a "silent killer" and a "bomb" that posed an "imminent safety risk." Appx. 69, 134, 212. That is more than enough to satisfy the physical-harm criterion.

Moving on to the other criteria, Silverstar claims (at 36) that it couldn't have "recklessly disregard[ed] a safety hazard" because it wasn't aware that there was a safety issue at all. "No evidence was presented," says Silverstar (at 33), "that Slone knew of, or was informed of, any safety issues regarding the exhaust." This statement is at best misleading and at worst false. The evidence is clear: It shows that, before selling the car, Silverstar disregarded the safety warnings of multiple people—both Larry Neighbors, who Silverstar itself hired to do the pre-purchase inspection, and Vincent Tran, the other prospective customer. Appx. 372–73; Adeli Add. 2-3. After selling the car, Silverstar remained indignant when several other mechanics testified to the grave danger of a cracked exhaust header. Appx. 69, 212, 215, 339. Despite the explicit mention of "exhaust system leakage" on the used car buyer's guide as a "major safety defect," Silverstar told Adeli that they fixed anything that "would be a

concern to someone buying a 10 year old used vehicle." Appx. 593; 16 C.F.R. Pt. 455, fig. 3. By declining this essential repair, which would have cost just 5% of the sale price, Silverstar "prioritized monetary gain over the personal safety" of Adeli and its other costumers. *See Union Pac. R.R. Co. v. Barber*, 149 S.W.3d 325, 348 (Ark. 2004); *cf. Exxon Shipping Co. v. Baker*, 554 U.S. 471, 494 (2008) ("Action taken or omitted in order to augment profit represents an enhanced degree of punishable culpability.").

Silverstar maintains (at 34) that it did not recklessly endanger human life because this evidence shows only that the defect presented "*potential* safety issues," not that it was certain to harm someone. But this is no defense of its conduct. Uncertainty as to "the risk of releasing a possible [toxin] into the environment, even when, or perhaps especially when, the possibility is not well defined, counsels for the adoption of extraordinary precautions." *Action Marine, Inc. v. Cont'l Carbon Inc.*, 481 F.3d 1302, 1319 n.20 (11th Cir. 2007). That Silverstar "consciously ignored" those precautions "justifies extraordinary penalties." *Id.* If the issues were truly as trivial as Silverstar now asserts, it should have just told Adeli the truth—that it had declined this repair—instead of saying the opposite.

On the next factor (whether there was deceit or trickery), Silverstar attempts (at 36) to exonerate itself based on the fact that it "never made any affirmative statement" *specifically* about the exhaust header. The district court correctly rejected this argument. Add. 8. Reviewing the record, the court listed the many ways that

"Silverstar acted with intentional malice, trickery, or deceit, and this was not merely an accident." *Id.* Silverstar's "justification for declining the exhaust header repair was directly contradicted by the testimony of Larry Neighbors." *Id.* Silverstar then "told Adeli that all the repairs had been done even though he knew of the cracked exhaust header"—thus committing "one of the more reprehensible acts of business fraud" by "[m]aking an affirmative misrepresentation about a car's condition," when the car's actual condition "gives rise to safety concerns." *Id.* And the bad behavior didn't end there: After Adeli learned of the defect, Silverstar refused to let him return the car despite Guest's belief that it should do so. Add. 8–9. "[E]vidence of such deceit," as this Court has explained, "by itself can support a punitive damages award." *Hallmark Cards, Inc.*, 758 F.3d at 1061; *see Gore*, 517 U.S. at 560 (reiterating that "deliberate false statements" or "acts of affirmative misconduct" can support punitive damages).

Silverstar's argument, moreover, ignores the jury's findings, which are "relevant to a determination of reprehensibility." *May*, 852 F.3d at 816. Before awarding punitive damages, the jury was required to find by "clear and convincing evidence either" that Silverstar acted "with malice or in reckless disregard of the consequences," or that it "intentionally pursued a course of conduct for the purpose of causing damage." Appx. 503–04. The jury did so. And sufficient evidence supports those findings. Not only did Silverstar learn of the cracked exhaust header and its

urgency before it put the car up for sale, but it unilaterally decided to resume negotiations with Adeli and close the deal with him the day after learning *for the second time* that the cracked exhaust header could pose a serious safety risk. Adeli Add. 02, 06–07. So the evidence leaves no doubt: Silverstar "went forward with" the sale "despite its knowledge of, and decision to ignore," the defect. *See Diesel Mach., Inc. v. B.R. Lee Indus., Inc.*, 418 F.3d 820, 840 (8th Cir. 2005). Its malice is extremely reprehensible.

As for the remaining two criteria, Silverstar contends (at 31–33) that its conduct is less reprehensible because this was a one-off fraud and Adeli himself is not financially vulnerable. Properly understood, however, both of these factors support a finding that Silverstar acted reprehensibly. With respect to the former: Silverstar itself admitted that it has sold "plenty of" used cars with a cracked exhaust header, Appx. 408—the same safety defect that renders a car "not ready for sale" in the judgment of the mechanics hired by Silverstar. Appx. 215. This admission reveals that Silverstar's dangerous misconduct is standard business practice, and Silverstar does not point to any policy that it has implemented to prevent this from happening again.

With respect to the latter: There is no reason to analyze "financial vulnerability" solely in terms of Adeli when the misconduct likely affects others. Presented with evidence that Silverstar sold used cars with this same dangerous defect to other consumers, the jury reasonably concluded that Silverstar's conduct

"posed a substantial risk of harm" not only to Adeli and his family, but to other consumers of used cars and "to the general public, and so was particularly reprehensible." *Philip Morris USA*, 549 U.S. at 355. Research shows that these consumers of used cars are more likely to be poorer, younger, racial and ethnic minorities, and from rural communities. *See* U.S. Bureau of Labor Statistics, Consumer Expenditure Surv. Anthology 65 (2003). Thus, fraudulent business practices in used-car sales—particularly those that conceal or misrepresent problems with cars that pose serious safety concerns—are exactly the kind of reprehensible practices punishable by punitive damages.[4]

2. The jury's verdict appropriately captured the potential harm to Adeli, his family, and other victims.

The second guidepost also supports the jury's award. Although courts "have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award," *State Farm*, 538 U.S. at 425, a few things are clear from the cases.

First, as already discussed, the proper ratio "compares actual *and potential* damages to the punitive award." *Gore*, 517 U.S. at 582; *see Asa-Brandt*, 344 F.3d at 747. Thus, the Supreme Court upheld the punitive-damages award in *TXO* even though

[4] Contrary to Silverstar's suggestion (at 31–32), Adeli's experience with cars only illustrates why its practices are so harmful. Adeli is far more sophisticated about cars than most used-car buyers—and yet he still fell prey to Silverstar's deceit.

it was 526 times the actual damages—nearly double the disparity here. The Court did so because the potential harm was much more than the actual harm, likely exceeding $1 million. *Id.* For that reason, the "relevant ratio" was not 526 to 1, but "10 to 1." *Gore*, 517 U.S. at 581 (discussing *TXO*); *see Parsons v. First Investors Corp.*, 133 F.3d 525, 530–31 (8th Cir. 1997) ("Both the Supreme Court and our court have previously approved ratios of 10 to 1."). That ratio does not "jar one's constitutional sensibilities," particularly when the conduct is reprehensible. *TXO*, 509 U.S. at 462.

Second, this Court has held that a permissible ratio can be much higher than 10 to 1. In another case involving fraudulent misrepresentation by a used-car dealer, this Court affirmed a punitive-damages award where the relevant ratio was roughly 27 to 1. *See Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024 at 1026 (8th Cir. 2000). The Court held that there was "ample support" for the district court's determination that this ratio was "far from 'grossly excessive.'" *Id.* at 1027. Further, the Court was able to uphold this award without even considering potential harm.

Third, the Supreme Court has emphasized that "low awards of compensatory damages may properly support a higher ratio than high compensatory awards." *Gore*, 517 U.S. at 582. As the Court put it in *State Farm*, "because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those [that] have previously [been] upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic

damages.'" 538 U.S. at 425; *see Gore*, 517 U.S. at 582 ("A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine."); *see also Asa-Brandt*, 344 F.3d at 747 (affirming punitive-damages award of nearly $1.25 million in case involving only nominal damages).

The jury's award here fits comfortably within this precedent. For starters, this is the paradigmatic case where "a particularly egregious act has resulted in only a small amount of economic damages." *Gore,* 517 U.S. at 582; *see Pulla*, 72 F.3d at 660 (recognizing that selling "potentially dangerous products" justifies large punitive damages); *see also, e.g.*, *Bryant v. Jeffrey Sand Co.*, 919 F.3d 520, 528 (8th Cir. 2019) (hostile-work-environment case involving nominal damages and $250,000 in punitive damages). To say that this case is about only the cost of a replacement part is to trivialize the nature of Silverstar's misconduct and Arkansas's interest in punishing and deterring that misconduct. The state's interest reflects a "reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred." *Pulla*, 72 F.3d at 659.

Indeed, the potential harm that could have been suffered here *exceeds* the amount of the punitive-damages award—meaning that this case involves a *negative* ratio. The evidence at trial made clear that the potential harm included death or

serious bodily injury to Adeli and his family. The jury's $5.8-million award appropriately captures this serious, reasonably foreseeable potential harm.

Even the most conservative estimate of the potential harm in this case would show that the jury's award is well within constitutional bounds. For the award to exceed the ratio that this Court found was "far from" the limits in *Grabinski*, 203 F.3d at 1026, the potential harm would have to be under $200,000. But the National Highway Traffic Safety Administration, which identifies exhaust header leakage as a "major safety defect," values each human life at $9.6 million. Molly J. Morgan, *Guidance on Treatment of the Economic Value of a Statistical Life (VSL)*, U.S. Dep't of Transp., 2016 Adjustment, 1 (Aug. 8, 2016). And damages in wrongful-death cases thus routinely run into the millions of dollars per plaintiff. For example, in another case about a safety defect involving an exhaust header, this Court upheld a $14 million verdict against Toyota—$4.67 million for each wrongful death. *Adams,* 867 F.3d at 911, 917.[5]

[5] Many courts appropriately look to reported actual-damages awards as a measure of potential harm. *See, e.g., Craig v. Holsey*, 590 S.E.2d 742, 748 (Ga. Ct. App. 2003) ("Holsey could have died as a result of Craig's driving under the influence. … [A]wards for wrongful death can easily approach or exceed the amount of punitive damages awarded in the present case."); *Hundley ex rel. Hundley v. Rite Aid of S.C.*, Inc., 529 S.E.2d 45, 62 (S.C. Ct. App. 2000) ("[T]he amount of punitive damages awarded is reflective of the potential harm in this case. … The possibility that Rite Aid's wil[l]ful conduct could have resulted in the death of the Hundleys' daughter in this case was very real. … Even a cursory inspection of our case law demonstrates that an actual damage award far greater than that here would be expected in a wrongful death suit.").

Had Adeli and his daughter died or been seriously injured, Silverstar would owe compensatory damages in line with these examples, and that amount would likely eclipse the jury's punitive-damages award in this case. The projected lifetime earnings of Adeli and his daughter alone would exceed the jury's punitive-damages award. And this is to say nothing of the serious risk of catastrophic injury—in this case, severe burns from an explosion or brain damage from carbon-monoxide poisoning. In those scenarios, it would be necessary to add medical costs, custodial care, and loss-of-consortium figures on top of the lost-income calculation—generating a compensatory-damages figure that would dwarf the punitive damages amount here. *See, e.g.*, *Garrison v. Hodge*, 565 S.W.3d 107, 112 (Ark. Ct. App. 2018) (upholding $5.21 million in compensatory damages following a car accident that led to an amputated leg).

These amounts confirm that the jury's award is not "grossly out of proportion to the severity of the offense," *Asa-Brandt*, 344 F.3d at 747, but is instead well within the range of reasonableness. Nothing in the notion of substantive due process requires displacing the jury's considered judgment.

3. The jury's determination is consistent with comparable penalties and damages in analogous settings.

If any further confirmation were needed, the propriety of the jury's $5.8 million punitive-damages award is buttressed by the third guidepost, which considers

"civil or criminal penalties that could be imposed for comparable misconduct," *Gore* 517 U.S. at 583, and encourages courts to "compare damages awarded in similar civil cases." *Ondrisek*, 698 F.3d at 1030. As just mentioned, in similar cases—including an Eighth Circuit case involving deaths due in part to an exhaust-header defect, and an Arkansas case involving a car accident that produced serious injuries—courts have upheld damages equal to or several times higher than the punitive-damages awarded here. That NHTSA values each human life at $9.6 million alone justifies the award by comparison.

Silverstar could also have faced substantial sanctions under Arkansas and federal law. Just last year, the state revoked the business license of a used-car dealership and imposed on it a $647,053 fine for repeated violations of the ADTPA. John Lynch, *$647,053 in penalties levied on Arkansas used-car dealers*, Ark. Democrat-Gazette, Aug. 18, 2018. And the harm here is far more serious, that case involved purely economic harm. *Id.* Moreover, each violation of the FTC Act—which prohibits deceptive trade practices like those Silverstar was found liable for—carries a $42,530 penalty. 15 U.S.C. § 45(l); *Adjustments to Civil Penalty Amounts*, 84 Fed. Reg. 3980, 3980–82 (Feb. 14, 2019);. *See also* Press Release, *FTC Action Leads Arkansas Car Dealer to Pay $90,000 Civil Penalty for not Displaying 'Buyers Guides' on Used Cars*, FTC Jun. 10, 2015. Those dealers merely failed to show the sample defects list on the Buyer's Guide. *Id.* Silverstar did worse. It deliberately hid specific safety information

from its customers. The jury need only have estimated that Silverstar (a 30-year-old group of thirteen dealerships) sold a relatively small number of unsafe used cars in this manner to conclude that $5.8 million is an appropriate deterrent.

These "legislative judgments concerning appropriate sanctions for the conduct at issue" deserve "substantial deference" on their own, but they also accord with judicial sanctions in comparable cases involving dangerous consumer fraud. *Gore*, 517 U.S. at 583. Considered next to these decisions, the jury's verdict is well within the norm where "the sale of [a] defective product occurred" despite the seller's "knowledge that the product was dangerous to the user's health." *Boerner*, 394 F.3d, 602–03 (8th Cir. 2005) ($5,000,000 in punitive damages); *see also Hopkins v. Dow Corning Corp.* 33 F.3d 116, 127 (9th Cir. 1994) ($6,500,000 in punitive damages). There is a strong "basis for assuming that a more modest sanction would not have been sufficient to motivate full compliance." *Gore,* 517 U.S. at 585. Silverstar's brief makes clear that even now it does not acknowledge or understand the seriousness of its fraud. The $5.8 million in punitive damages are thus "reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence." *Id.* at 568.

CONCLUSION

The Court should affirm the order of the district court denying Silverstar's motion for judgment as a matter of law. The Court should also reverse the judgment

and remand for the district court to reinstate the original jury verdict of $5.8 million to punish and deter Silverstar's dangerous and fraudulent conduct.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,721 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Baskerville font. Additionally, this brief has been scanned for viruses with the most recent version of a commercial virus scanning program, VirusTotal, and according to the program is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Eighth Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

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