REL: March 1, 2019

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1170282

Merchants FoodService, a foreign corporation

v.

Denny Rice

Appeal from Mobile Circuit Court
(CV-15-900376)

MENDHEIM, Justice.

Merchants FoodService, a foreign corporation ("Merchants"), appeals from a final judgment entered by the Mobile Circuit Court following a jury verdict in a retaliatory-discharge action filed by Denny Rice. The jury

awarded Rice compensatory damages of $314,862.88 and punitive damages of $944,588.64. We affirm.

I. Facts

Merchants owns and operates a wholesale-food delivery business throughout the southeastern United States. Rice began working for Merchants in October 2012 as a delivery driver in its Mobile, Alabama, shuttle yard. The Mobile yard is in Merchants' Clanton division, which coordinates deliveries in Alabama for the company. Merchants' largest customer in the Mobile area was the Mobile School System. Rice was injured on the job, and, when he returned to work following his injury, Josh Averhart was the Clanton division's transportation manager. Immediately below Averhart was Rice's immediate supervisor, Brian Maryland.

On July 24, 2014, after Rice had finished his own deliveries, Rice decided to help another driver, Joe Paige, finish his deliveries. Rice drove his personal vehicle to help Paige unload food at Murphy High School in Mobile. The delivery for Murphy High School was 600 cases, and Paige testified that this required a driver to travel up and down the delivery ramp 40 to 50 times to complete the delivery.

According to Paige, the ramp on the Merchants' truck trailer that day did not fit the trailer. When that is the case, Merchants instructs its drivers to secure the ramp with straps, but, according to Paige, the straps have difficulty holding the weight of the cases, the cart, and a driver. On one of Rice's trips, as he was climbing up the ramp, a strap broke loose, causing Rice and the ramp to hit the ground. Rice landed awkwardly and jammed his neck and his back. Paige telephoned Maryland to report the accident. Rice attempted to work the next day, but with his injuries he was not able to perform any heavy lifting.

Rice saw a physician, who placed him on work restrictions. Because the restrictions prevented Rice from commercial driving or heavy lifting, there was no position at the Mobile shuttle yard for Rice to perform. As a result, Rice was on leave from work for approximately four and one-half months, and he received full worker's compensation benefits during that period. Rice regularly informed Maryland of his medical condition and return-to-work status during his absence. During Rice's absence, Merchants hired another driver to make deliveries from the Mobile shuttle yard.

On Wednesday, December 3, 2014, Rice's physician released him to return to work effective Monday, December 8, 2014. That same day, Rice provided Maryland with his physician's return-to-work clearance form, and, according to Rice, Maryland told him that he would get with a supervisor and place Rice back on the work schedule. Rice talked with Maryland again on December 7, 2014, and Maryland told Rice that he and Averhart wanted to meet with Rice at the Mobile shuttle yard at 5:30 a.m. the following morning, which was around Rice's usual starting time for making deliveries. On December 8, 2014, at 5:30 a.m., immediately after Rice got out of his vehicle at the Mobile shipping yard, Averhart and Maryland met Rice, and Averhart terminated Rice's employment with Merchants. According to Rice, Averhart told Rice that "[a]t this point we have more drivers than we do routes and we don't need you [any] more."

Rice testified that, after he was fired, he felt shocked, "like somebody had sucker punched me right in the face." He said he felt a lot of self-doubt, a lot of stress, and he was "was up at night trying to figure out how I'm going to take care of this, how am I going to fix this, how am I going to

pay the bills until [I get a job]." At times, he would wake up in the middle of the night in a sweat, and then he would pace up and down the hallway. Rice testified that he developed trust issues as a result of the firing. He also stated that he supports his fiancée Michelle and her two daughters and that he became a lot more irritable toward them after he lost his job. He stated that he and Michelle had planned to get married in 2015 but that their plans were indefinitely postponed because of his trust issues.

Following the termination of his employment with Merchants, Rice did not immediately begin looking for work because he knew that it was not a good time of the year for drivers to be hired. To meet expenses, Rice had to withdraw $20,000 from his 401(k) retirement account. Rice then studied for and took Alabama Department of Transportation tests to add further endorsements to his commercial driver's license ("CDL") so that he would be qualified to pull double-trailers and to transport hazardous substances. He knew that the added endorsements would make him a more marketable commercial driver. Rice also reached out to contacts in his field,

including a friend who worked at Estes Express Lines ("Estes").

In the spring of 2015, Rice applied for and obtained a job with Estes. Rice testified that, during his interview with Estes before he secured the job, most of his time was spent discussing the termination of his employment with Merchants. Rice testified that that experience contributed to his belief that his termination from Merchants could harm his future employability if he were unable to remain with Estes.

Rice began working for Estes on March 30, 2015. Estes pays its drivers by the hour. When he was initially hired by Estes, Rice earned $20.35 per hour. Eventually, he received a raise to $24.33 per hour. For Estes, Rice works an average of 50 hours per week or more. It is undisputed that Rice works 18 hours or more per week more for Estes than he did for Merchants, meaning that Rice works 936 hours more per year with Estes than he did with Merchants. During his first full year with Estes, Rice earned a total of $49,000.

Merchants does not pay drivers by the hour. Instead, it pays based on a productivity formula consisting of cases delivered, number of delivery stops, mileage, and whether the

full load is actually delivered. At trial, Rice testified that he worked an average of 32 hours per week for Merchants. Rice testified that he typically got off work in the early afternoon at one or two o'clock and that he had planned before he was injured to start a side business mowing lawns. Rice further testified that it was not possible to have such a side business with the extra hours he works for Estes.[1] According to Merchants' records, on average Rice earned $911.43 per week. According to Rice, his effective hourly rate at Merchants was $28.48 per hour. During his last full year with Merchants, Rice earned a total of $42,000.

On February 6, 2015, Rice sued Merchants in the Mobile Circuit Court alleging retaliatory discharge. Following discovery, on June 2, 2017, Merchants filed a motion for a partial summary judgment concerning the issue of "frontpay." Frontpay refers to future earnings awarded in lieu of being reinstated to a former position. In its motion, Merchants conceded that, if Rice had been discharged for filing a worker's compensation claim, he would be entitled to seek

[1]Two other drivers for Merchants also testified that they worked between 30 to 35 hours per week and that they were able to supplement their pay from Merchants with side jobs because they got off work early in the afternoon.

compensation for the earnings he would have received between the date his employment was terminated by Merchants (December 8, 2014), and the date he was hired by Estes (March 30, 2015) -- a total of $14,582.88. Merchants disputed, however, that Rice was entitled (1) to an award of any future earnings from the date he began working for Estes through a date just before the trial began (June 9, 2017)[2] -- a total Rice calculated to be $14,824.00 -- or (2) to an award of future earnings from the date of trial through Rice's estimated date of retirement at age 65 (April 1, 2031) -- a total Rice calculated to be $190,855.71. Merchants argued that, as a matter of law, Rice was not entitled to recover any future earnings because "he makes more money in his new job than he did with Merchants." In other words, Merchants asserted that "Alabama's law makes clear that because [Rice] currently takes home more money [with Estes] than while employed by Merchants, he has suffered no future lost wages or actual future economic damages that could entitle him to a front pay award."

[2]The trial actually began on June 12, 2017.

The trial court heard Merchants' argument on its motion for a partial summary judgment before the trial began, and it concluded:

> "I'm going to let the evidence come out and you can argue at the appropriate time. And you can, if you want to, bring it up on a motion for a directed verdict.[3] At this point I'm going to deny your motion for a summary judgment on that point and I'm going to let the evidence come in."

On June 6, 2017, Merchants filed a motion in limine in which it sought, among other things, to exclude former Merchants employee John Nims from testifying at trial. Nims worked for Merchants as a driver at the Pensacola, Florida, shuttle yard. On May 12, 2014, he was injured on the job, and, like Rice, he was placed on restriction from work by his physician for an extended period. During Nims's absence, Merchants hired another driver at the Pensacola shuttle yard to perform deliveries. On January 8, 2015, Nims was cleared to return to work for Merchants. Nims's employment was terminated on the day he returned to work, for the same reason that had been given to Rice, i.e., Merchants no longer had a position open for him because it had hired another driver to

[3]Effective October 1, 1995, the motion for a directed verdict was renamed a motion for a judgment as a matter of law. See Rule 50, Ala. R. Civ. P.

fill his position. Merchants did not attempt to place Nims in another position in the company. Nims filed a retaliatory-discharge action against Merchants that eventually was settled, with Merchants admitting no fault.

In its motion in limine, Merchants contended that Nims's testimony should be excluded because, it argued, even if Nims's employment termination was considered to be analogous to Rice's termination, one example does not establish a "pattern or practice" of retaliatory discharge by Merchants under Rule 404(b), Ala. R. Evid.[4] Merchants argued that, to fit within a "pattern or practice," there must be evidence of "a significant number of other employees in the plaintiffs' protected class" or evidence indicating that retaliatory discharge "was Merchants' 'standard operating procedure.'" (Quoting Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 876 (1984).) Rice responded that he was offering Nims's

[4]Rule 404(b), Ala. R. Evid., in relevant part, provides:

> "(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident ...."

testimony for the purpose of establishing intent on Merchants' part, not on the issue of punitive damages.

In a hearing on pending motions held a few days before the jury was empaneled, the trial court denied Merchants' motion in limine with regard to Nims, explaining:

> "Let's talk about what happened to Mr. Nims. If you look at the Alabama Rules of Evidence I think that in this particular situation this other act can be offered for the purpose for which [Rice is] offering this particular case to show that Merchants, I guess, arguably was at least in these two situations in the way they handled the return to work on the part of the injured worker. ...
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> "....
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> "... I'm going to deny [the motion in limine] as to Nims."

At trial, when Nims's video deposition was introduced, Merchants raised several objections to specific portions of his testimony but did not raise any objection predicated on the notion that Nims should not be permitted to testify at all.

At trial, Merchants defended its termination of Rice's employment by contending that Rice was one of eight delivery drivers covering eight delivery routes in Mobile; that Merchants could not hold Rice's delivery routes open during

his lengthy medical leave, part of which was during Merchants' busiest delivery season; and that, by the time Rice was cleared to return to work, Merchants had a full complement of eight delivery drivers and did not have enough volume to justify employing a ninth driver.

Rice introduced evidence indicating that Merchants' employee handbook contained a policy as to what should be done when an employee returns to work following a leave in which the employee received worker's compensation benefits. Specifically, Section 7.7 of the employee handbook provides:

> "Any employee returning from non-FMLA medical leave of absence under this Section will be allowed to return to his or her former position if there is an opening available. If there is no opening available, an effort will be made to place the employee in another available position for which he or she is qualified and capable of performing."

It is undisputed that Merchants did not follow the above-quoted policy with regard to Rice because Averhart did not make any effort to place Rice in another position in the company, even though Averhart testified that he was aware of the policy. Rice also introduced deposition testimony from one of Merchants' corporate witnesses, Jan Farve, who initially denied that Merchants had a policy for employees

returning from worker's compensation leave, but who later admitted that Merchants' managers should have followed the policy in Rice's case. Rice also introduced an e-mail sent from Farve to Averhart, Maryland, and another supervisor on January 8, 2015, after Farve learned that Nims's employment had been terminated:

> "With the changing federal WC [workers' compensation] laws....going forward we do not need to term someone right off of WC Leave. If their position isn't open any longer, we need to find something for them to do, and work the process. Thanks guys....[T]his one will probably come back to bite us, so stay tuned, I'll probably need y'all."

(Ellipses in original.)

Rice also introduced deposition testimony from Merchants employee Charles Tillman, who testified that in October 2014 he was placed in a new-driver recruiting position in Newberry, South Carolina, to recruit drivers for new business Merchants had acquired. Tillman stated that the Newberry location went from employing around 10 drivers to employing over 40 drivers. On November 19, 2014, Farve sent Merchants' chief executive officer Andy Mercier an e-mail asking him how many markets Merchants needed to "ramp up" recruitment in at that time, and Mercier responded: "All markets." In a November 25, 2014,

e-mail from Farve to a hiring recruiter, Farve stated that "[w]e are in a spot where we need to double our drivers for all branches." Rice also introduced evidence indicating that on December 19, 2014, 11 days after Rice's employment was terminated, Merchants posted an opening for a delivery driver for its Mobile shuttle yard. Rice also introduced other Merchants' job postings for drivers in Mobile and Pensacola between November 2014 and February 2015.

At the close of Rice's case-in-chief, Merchants made an oral motion for a judgment as a matter of law solely with respect to the issue of Rice's claim for lost future earnings.

> "MS. KAFFER [Merchants' counsel]: Yes, sir. Your Honor, we have a motion [for a] directed verdict[5] just on the issue of front pay damages. The lost pay damages from the time Mr. Rice started with the new employment.
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> "His own testimony is that in his new employment he makes more money than his old employment. For that reason and the undisputed evidence in the record he cannot prevail on the claim for lost pay from the time he started his new employment.
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> "Evidence that if [he] had more time off work he could have earned money with the lawn care business is too speculative to support the damages that he's claiming.

[5]See note 3, supra.

> "THE COURT: Go ahead, Mr. O'Hara [Rice's counsel]. Any other motions besides that, Ms. Kaffer?
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> MS. KAFFER: No, sir.
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> "THE COURT: Go ahead and address that one issue on the economic damages.
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> "MR. O'HARA: Judge, the law of Alabama on retaliatory discharge says that we're entitled compensatory damage and punitive damages just like any other tort. I believe that because of the difference in pay systems between Merchants and his new employer Estes we had to extract from Merchants' pay system an hourly wage, effective hourly wage, averaged over the period that he worked there. Doing that we made a -- we presented substantial evidence of loss in earning capacity and loss of wages. He made close to [$4.15] per hour less. On that basis I believe we presented substantial and sufficient evidence to allow the issue to go to the jury for them to determine whether we've met our burden and whether he's entitled to those lost future wages.
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> "THE COURT: Anything else, Ms. Kaffer?
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> "MS. KAFFER: No, Your Honor.
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> "THE COURT: I'm going to deny [Merchants'] motion and let it go to the jury on that issue. I think the[re is a] fact question[] with regard to the effect of the subsequent employment as compared to his prior employment."

Following the presentation of evidence from Merchants, the case proceeded to the jury-charge conference. Merchants did not move for a judgment as a matter of law at the close of all the evidence.

During the charge conference, Rice submitted a proposed jury instruction with regard to lost future earnings that tracked Alabama Pattern Jury Instruction -- Civil 11.17 for "Loss of Future Earnings or Future Earnings Capacity."[6] The

[6]Alabama Pattern Jury Instruction -- Civil 11.17 states:

> "(Name of plaintiff) says that (name of defendant)'s conduct caused (him/her) (to lose future earning capacity) (the loss of future earnings).
>
> "To decide the amount to compensate (name of plaintiff) for the (loss of future earnings) (loss of future earning capacity) you must first determine the effect, if any, the injury has upon (his/her) (future earnings) (earning capacity). To decide this question, consider the following:
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> "1. (Name of plaintiff)'s health, physical ability, and earning power or capacity before (his/her) injury, pain and suffering, and what they are now;
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> "2. The type and degree of (his/her) injury; and,
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> "3. Whether you are reasonably satisfied the injury is permanent, or if it is not permanent, how long it will last.
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> "If you decide that (name of plaintiff) (will lose future earnings) (has lost future earning capacity), you must then determine the amount (he/she) is reasonably certain to lose and reduce that amount to its present cash value."

1 Alabama Pattern Jury Instructions -- Civil 11.17 (3d ed. 2017).

trial court rejected the proposed instruction in favor of its own charge, explaining:

> "On the future earnings charge it implies that part of that is because of his physical limitations. I've taken all that out. It's strictly on his loss of earning capacity. They can look at his physical condition kind of -- Let me see how I put it in the charge so I can be clear on this. What I said was this regarding future earnings. Denny Rice's earning power or capacity before his injury and what they are now -- This is what they can consider with regard to the future lost wages. Denny Rice's earning power or capacity before his injury and what they are now, the type and degree of his alleged financial loss and whether or not the jury is reasonably satisfied there will be future financial loss and, if so, how long it will last. Here's the only thing that I think might be confusing to the jury. I disallowed [Rice's] expert. I don't know how else to handle this because it's a correct statement of the law. But if you decide that Denny Rice will lose future earnings and has lost future earning capacity, you must then determine the amount he is reasonably certain to lose and reduce that to present value. That's a correct statement of the law. I don't know how they will do it. They're just going to have to make their best effort at it, I suppose. There's been no testimony. I'm not aware of any formula to use as a matter of law. There may be one but I'm just not aware of it. I think they will have to use their own discretion on that."[7]

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[7]We note that the trial court was within its discretion to reject the pattern jury instruction. As this Court previously has observed:

> "While most pattern jury instructions may be properly used in the majority of criminal and civil cases, there may be some instances when using those

Neither party registered an exception to the trial court's ruling on this instruction.

As to lost future earnings, the trial court instructed the jury as follows:

> "Denny Rice says that Merchants FoodService's conduct caused him to lose future earnings. To decide that amount with regard to the loss of future earnings, you must first determine the effect, if any, the injury had on his future earnings. To decide this question you must consider the following. Number one, Denny Rice's earning power or capacity before this injury and what they are now and, two, the type and degree of the financial loss and, three, whether or not you are reasonably satisfied there will be future loss and how long it

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> pattern charges would be misleading or erroneous. In those situations, trial courts should deviate from the pattern instructions and give a jury charge that correctly reflects the law to be applied to the circumstances of the case. ... [A] trial court must diligently scrutinize the jury charges it gives -- even pattern charges -- on a case-by-case basis to ensure that they properly instruct the jury in accordance with applicable statutes and caselaw."

Ex parte Wood, 715 So. 2d 819, 824 (Ala. 1998).

Moreover, although when the Alabama Pattern Jury Instruction Committee was first created this Court declared that "[t]he publication by the Alabama Pattern Jury Instructions Committee of Alabama Pattern Jury Instructions in Civil Cases and their use by the trial judges of this state are recommended," Alabama Supreme Court Order, April 19, 1973, this Court does not preapprove Alabama Pattern Jury Instructions -- Civil. Therefore, as the Wood Court implied, the civil pattern jury instructions are a secondary source concerning the law they address.

> will last. If you decide that Denny Rice will lose future earnings then you must determine the amount that he is reasonably certain to lose and reduce that amount to its present value. Again, I want to tell you that in determining the loss of earnings it has nothing to do with his workman's compensation injury. This only pertains to the claim that he is making against [Merchants] for being wrongfully terminated."

Merchants did not object to this jury instruction.

The trial court also explained during the jury-charge conference that it believed Merchants was entitled to a limiting instruction with regard to Nims's testimony:

> "[Merchants' proposed charge number] 28. I am giving the [Rule] 404(b)[, Ala. R. Evid., instruction]. I think you're entitled to a limited instruction on that. I'm going to instruct them that the evidence regarding John Nims is admitted only for your consideration in determining whether Merchants acted with the intent to terminate [Rice] solely because he claimed workers' compensation benefits. I take out that next sentence, you cannot consider in assessing punitive damages because I think it's a little bit misleading and it's not in the pattern charges. So I'm not going to give that sentence. I will tell them, however, they are to consider this evidence along with the rest of the evidence but only for the purpose for which it was admitted."

Merchants did not object to the trial court's modification of Merchants' proposed instruction.

The trial court instructed the jury as follows with regard to Nims's testimony:

> "Now, I want to point out to you that the evidence regarding John Nims is admitted only for your consideration in determining whether Merchants acted with the intent to terminate Denny Rice solely because he claimed workers' compensation benefits. You will consider this evidence along with the rest of the evidence but only for the limited purpose for which it was admitted."

Merchants did not object to this instruction.

After the trial court gave its instructions to the jury, Merchants requested that the verdict form reflect that damages be divided into past and future damages, as § 6-11-1, Ala. Code 1975, allows.[8] After some discussion with the trial court and counsel for Rice, Merchants withdrew its request for a verdict form that distinguished between past and future

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[8]Section 6-11-1 provides:

> "In any civil action based upon tort and any action for personal injury based upon breach of warranty, except actions for wrongful death pursuant to Sections 6-5-391 and 6-5-410, the damages assessed by the factfinder shall be itemized as follows:
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> "(1) Past damages.
> "(2) Future damages.
> "(3) Punitive damages.
>
> "The factfinder shall not reduce any future damages to present value. Where the court determines that any one or more of the above categories is not recoverable in the action, those categories shall be omitted from the itemization."

damages.[9] Thus, the verdict form submitted to the jury asked the jury simply to distinguish between compensatory damages and punitive damages.

During jury deliberations, the jury asked a question concerning the proposed calculation of Rice's lost-earnings damages that Rice's counsel had presented in a trial exhibit during closing arguments. The jury noticed a calculation error in the trial exhibit and asked whether it could correct the error.[10] Merchants concedes that the trial court correctly

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[9]The parties and the trial court seemed to be unaware that in Clark v. Container Corp. of America, Inc., 589 So. 2d 184, 198 (Ala. 1991), this Court held unconstitutional the portion of § 6-11-1 that purported to prohibit a jury from discounting future damages to present value as being a violation of the right to trial by jury enshrined in Art. I, § 13, Ala. Const. 1901.

[10]Rice's counsel had calculated Rice's lost earnings from the time Rice's employment was terminated (December 8, 2014) to the date he started working for Estes (March 30, 2015) to be $14,582.88. He calculated the amount of lost future earnings from the date Rice started working for Estes (March 30, 2015) to a date just before trial (June 9, 2017) to be $14,824.00. He calculated Rice's lost future earnings from the date of trial (June 12, 2017) to the date of Rice's projected retirement at age 67 (July 25, 2036) to be $135,456.00. The total loss was calculated to be $165,132.88. The actual total amount is $164,862.88.

Not included in the lost-earnings calculation was Rice's claim for consequential damages as a result of his withdrawal of $20,000 from his 401(k) retirement account during his unemployment, the $7,000 in taxes he paid on that withdrawal,

instructed the jury that "a factual question about damages was within the province of the jury to resolve." Merchants' brief, p. 5.

The jury returned a verdict in Rice's favor, awarding compensatory damages in the amount of $314,862.88, and punitive damages in the amount of $944,588.64, for a total of $1,259,451.52. The jury did not indicate the basis for the compensatory-damages award. On June 20, 2017, the trial court entered a judgment on the jury verdict.

On July 19, 2017, Merchants filed a "Motion for Judgment as a Matter of Law, To Alter, Amend, or Vacate the Judgment, or, in the alternative, Motion for New Trial." In the motion, Merchants contended that there was not substantial evidence that Merchants had terminated Rice's employment solely because he made a claim for worker's compensation benefits. Merchants also argued that it was entitled to a judgment as a matter of law because Rice "made more money in his new job than he made at Merchants" and that, thus, the issue of lost future earnings was erroneously submitted to the jury. It contended that the verdict was against the great weight or preponderance

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and a lost rate of return in the stock market on the $20,000, which Rice calculated to be $5,065.

of the evidence or that it was contrary to law. Finally, in the alternative, Merchants argued that the compensatory damages and the punitive damages should be remitted as excessive under common law and on statutory and constitutional grounds. On the same date, Merchants filed a "Motion to Conduct Hammond/Green Oil Hearing and to Remit Damages." In that motion, Merchants contended that "the present punitive damages verdict is greater than any of the net punitive awards" affirmed in retaliatory-discharge cases in the past 20 years.

On September 5, 2017, Merchants filed an amended postjudgment motion in which it withdrew its argument "seeking judgment as a matter of law as to [Rice's] retaliatory discharge claim as a whole." Merchants repeated all the other arguments it had related in its original postjudgment motion.

On September 22, 2017, the trial court held a hearing on Merchants' postjudgment motion and its motion seeking remittitur of the compensatory-damages and punitive-damages awards.

On November 16, 2017, the trial court entered an order denying Merchants' postjudgment motion and its motion to remit

the compensatory-damages award and the punitive-damages award.[11] The order first addressed Merchants' arguments that the compensatory-damages award was excessive. The trial court noted that

> "[t]he verdict does not apportion or allocate between lost back pay, lost future pay, mental anguish, and other compensatory damages. The court cannot and will not speculate on such apportionment. If the evidence supports the compensatory damages award on any element of damages, or a combination thereof, the Court must defer to the jury's verdict."

As to mental anguish, the trial court declined to apply a "strict-scrutiny" standard to the evidence of mental anguish, pursuant to Kmart Corp. v. Kyles, 723 So. 2d 572, 578 (Ala. 1998), concluding that "Rice's testimony regarding his mental anguish was not scant within the meaning [of] Kmart." It added that, even if such a standard was applied, "Rice presented substantial evidence of his mental anguish."

With respect to lost future earnings, the trial court observed:

> "Rice testified that the circumstances under which he was fired by Merchants monopolized his job

[11]On October 16, 2017, the parties consented to an extension of time to November 16, 2017, for the trial court to rule on Merchants' postjudgment motion. Rule 59.1, Ala. R. Civ. P.

> interview with Estes. He testified that his firing and the lawsuit created a stigma during his job interview that led to him being hired at a lower hourly wage. Rice testified that, but for a friend that worked at Estes putting in a good word for him, he would not have received a job offer from Estes."

The trial court described Merchants' argument on this issue as seeking "to reweigh the competing testimony and exhibits, and substitute Merchants' version of the inferences to be drawn therefrom for those of the Jury regarding ... the amount of his lost wages and earning capacity." Overall, the trial court concluded that "the Jury's compensatory damages award is supported by substantial evidence and not against the great weight and preponderance of the evidence."

Regarding the punitive-damages award, the trial court recounted and examined each of the applicable factors for examining such an award expounded in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989), and Hammond v. City of Gadsden, 493 So. 2d 1374 (Ala. 1986). Following that examination, the trial court concluded that the punitive-damages award was not excessive.

Merchants appeals.

II. Standard of Review

Merchants challenges a number of aspects of the proceedings below.[12] Accordingly, multiple standards of review are involved in this appeal.

> "When reviewing a ruling on a motion for a JML [judgment as a matter of law], this Court uses the same standard the trial court used initially in deciding whether to grant or deny the motion for a JML. Palm Harbor Homes, Inc. v. Crawford, 689 So. 2d 3 (Ala. 1997). Regarding questions of fact, the ultimate question is whether the nonmovant has presented sufficient evidence to allow the case to be submitted to the jury for a factual resolution. Carter v. Henderson, 598 So. 2d 1350 (Ala. 1992). The nonmovant must have presented substantial evidence in order to withstand a motion for a JML. See § 12-21-12, Ala. Code 1975; West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989). A reviewing court must determine whether the party who bears the burden of proof has produced substantial evidence creating a factual dispute requiring resolution by the jury. Carter, 598 So. 2d at 1353. In reviewing a ruling on a motion for a JML, this Court views the evidence in the light most favorable to the nonmovant and entertains such reasonable inferences as the jury would have been free to draw. Id. Regarding a question of law, however, this Court indulges no presumption of correctness as to the trial court's ruling. Ricwil, Inc. v. S.L. Pappas & Co., 599 So. 2d 1126 (Ala. 1992)."

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[12]Merchants renews its argument that Rice was not entitled to any lost future earnings; Merchants challenges the sufficiency of the evidence for the compensatory-damages award with regard to both lost future earnings and mental anguish; and Merchants seeks revisitation of the punitive-damages award on a number of grounds.

Waddell & Reed, Inc. v. United Inv'rs Life Ins. Co., 875 So. 2d 1143, 1152 (Ala. 2003).

Our review of a judgment based on a jury verdict

> "begins with a presumption that a jury verdict is correct. White v. Fridge, 461 So. 2d 793, 794 (Ala. 1984); Alpine Bay Resorts, Inc. v. Wyatt, 539 So. 2d 160, 162 (Ala. 1988). The strength of the jury verdict is based upon the right to trial by jury. White v. Fridge, supra. This presumption of correctness is strengthened by the trial court's denial of a motion for a new trial. This Court has noted the following regarding this presumption:
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> > "'A jury's verdict is presumed correct and will not be disturbed unless plainly erroneous or manifestly unjust. This presumption of correctness is further strengthened when a motion for new trial is denied by the trial judge....
> >
> > "'In reviewing the correctness of a jury verdict, this Court must review the record in a light most favorable to the appellee.'
>
> "Continental Casualty Ins. Co. v. McDonald, 567 So. 2d 1208, 1211 (Ala. 1990) (quoting Pate v. Sunset Funeral Home, 465 So. 2d 347, 350 (Ala. 1984))."

Continental Eagle Corp. v. Mokrzycki, 611 So. 2d 313, 320 (Ala. 1992).

"This Court reviews an award of punitive damages de novo." Flint Constr. Co. v. Hall, 904 So. 2d 236, 254 (Ala. 2004).

III. Analysis

We begin by observing that Merchants does not contest liability in this appeal. It concedes that substantial evidence supports the conclusion that Rice's employment was terminated solely for filing a worker's compensation claim. Merchants rests this concession on the fact that Merchants did not follow its own policy that, if an employee's position has been filled when the employee returns from leave during which he or she received worker's compensation benefits, Merchants will attempt to find another position in the company for the employee.

A. Rice's Lost Future Earnings in Calculating Compensatory Damages

Merchants contends, as it did in its motion for a partial summary judgment before trial and in its motion for a judgment as a matter of law at the close of Rice's case, that, as a matter of law, Rice is not entitled to any lost future earnings -- earnings from after the date he started working for Estes up to the projected date of his retirement --

because the evidence showed that Rice earns more per year with Estes than he did with Merchants.[13]

Merchants' argument does not withstand close scrutiny. Merchants continuously focuses on the seeming incongruity of Rice seeking "lost earnings" when he earns more annually in his present position with Estes than he did in his previous position with Merchants. But Rice was not a salaried employee of Merchants or Estes, and no law has been called to our attention that requires the use of an annual-earnings lens as to lost future earnings.[14] Merchants' argument also ignores

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[13]Merchants did not file a Rule 50(a), Ala. R. Civ. P., motion for a judgment as a matter of law at the close of all of the evidence. This failure affects what issues Merchants has preserved for appellate review. "[I]ssues relating to the sufficiency of the evidence require a motion at the conclusion of all the evidence, but issues relating to pure questions of law do not." A.T. Stephens Enters., Inc. v. Johns, 757 So. 2d 416, 419 (Ala. 2000). See also 2 Champ Lyons, Jr. & Ally W. Howell, Alabama Rules of Civil Procedure Annotated § 50.2 (4th ed. 2004).

[14]

> "It is the appellant's burden to refer this Court to legal authority that supports its argument. Rule 28(a)(10), Ala. R. App. P., requires that the argument in an appellant's brief include 'citations to the cases, statutes, [and] other authorities ... relied on.' Consistent with Rule 28, '[w]e have stated that it is not the function of this court to do a party's legal research.' Spradlin v. Spradlin, 601 So. 2d 76, 78 (Ala. 1992) (citing Henderson v. Alabama A & M University, 483 So. 2d 392, 392 (Ala.

the fact that Rice earns more only because he works considerably more hours in his new job than he did in the position from which, the jury concluded (and Merchants does not dispute on appeal), he was wrongfully terminated. Specifically, Rice works an average of 18 hours per week more for Estes, which translates to 936 more work hours per year. Accordingly, when a comparison of Rice's per-hour wage is made between his position with Merchants and his position with Estes, Rice earns $4.15 per hour less with Estes than he did with Merchants. Thus, based on a per-hour scale, Rice does not earn more with Estes than he did with Merchants.[15]

> 1986) ('"Where an appellant fails to cite any authority, we may affirm, for it is neither our duty nor function to perform all the legal research for an appellant." Gibson v. Nix, 460 So. 2d 1346, 1347 (Ala. Civ. App. 1984).')) ."

Board of Water & Sewer Comm'rs of City of Mobile v. Bill Harbert Constr. Co., 27 So. 3d 1223, 1254 (Ala. 2009).

[15]In its appellate brief, Merchants complains about the fact that Rice converted the wages he earned with Merchants to a per-hour scale for the purpose of calculating damages when he was, in fact, paid based on a shipment formula. But Merchants did not object when Rice testified as to his hourly wage with Merchants, nor did it raise this issue in its postjudgment motion. In fact, a calculation by Merchants of Rice's average weekly earnings ($911.43) was entered as evidence at trial without objection, and dividing that amount by Rice's stated amount of average hours worked per week (32 hours) yields the exact hourly wage Rice provided

Merchants is essentially contending that anytime a person earns more annually in a new job than he or she did in the job from which the person was wrongfully terminated, that person, as a matter of law, cannot assert a claim for lost future earnings. But consider a hypothetical scenario in which a person earned $41,600 per year in an hourly wage position at a rate of $20 per hour, working 40 hours per week, before being wrongfully terminated. Suppose that same person manages to earn $41,600 after his or her employment is terminated, but the person does so by working two full-time, 40-hour-per-week jobs at a rate of $10 per hour. Under Merchants' theory, as a matter of law, the person would not be eligible to claim any lost future earnings, even though the person is working twice as many hours and working two jobs to earn the same amount he or she did in the job from which he or she was wrongfully

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($28.48). Furthermore, in its postjudgment motion, Merchants conceded that, if Rice's employment was terminated solely for filing a worker's compensation claim, Rice was entitled to $14,582.88 in lost wages for the period he was unemployed, an amount based on Merchants' calculation of Rice's average weekly earnings.

terminated. A person would effectively be penalized for his or her hard work following the wrongful termination.[16]

Furthermore, Merchants erroneously contends that Alabama law is clear that, if evidence shows that a retaliatory-discharge plaintiff earns more per year at a subsequent job than when he or she was employed by the defendant, the plaintiff cannot recover for lost future earnings. The authorities Merchants provides for its position do not state such a rule.

Merchants relies primarily on Lozier Corp. v. Gray, 624 So. 2d 1034 (Ala. 1993), a case in which the Court noted that the jobs the plaintiff Delaine Gray had obtained after being fired by Lozier "paid less per hour than her job at Lozier, but more than she had earned before working at Lozier." 624 So. 2d at 1037. After further analysis, the Court concluded that Gray had established only that she was entitled to damages for the period she was out of work, not for posttrial damages. Merchants apparently takes the Court's observation about Gray's earnings in subsequent jobs to mean that Lozier

[16]Conversely, if a rule of law existed as argued by Merchants, it would encourage able workers not to work in order to increase their damages awards. Our law of damages should not discourage the able-bodied from working.

stands for the proposition that a plaintiff who earns more after being wrongfully terminated is not entitled to damages for lost future earnings. But the Lozier Court never so stated, and there are at least two problems with understanding that case in that manner. First, the Court's analysis concerned whether Gray had established that she had suffered a reduction in her earning capacity, not whether she was entitled to lost future earnings. A distinction exists between those two concepts.[17] As the Lozier Court observed:

[17]Compare Black's Law Dictionary 1089 (10th ed. 2014) (defining "lost earning capacity" as "[a] person's diminished earning power resulting from an injury") with Black's Law Dictionary 621 (10th ed. 2014) (defining "lost earnings" as "[w]ages, salary, or other income that a person could have earned if he or she had not lost a job," and acknowledging that "[t]here can be past lost earnings and future lost earnings"). See, e.g., Edwards v. Stills, 335 Ark. 470, 507, 984 S.W.2d 366, 385 (1998) ("Loss of earnings and loss of earning capacity are two separate elements of damage. ... Damage resulting from loss of earning capacity is the loss of the ability to earn in the future."); Johnson v. LSU Med. Ctr., 867 So. 2d 884, 887 (La. Ct. App. 2004) ("Lost earning capacity is loss of a person's potential and is not necessarily determined by actual loss. ... The plaintiff need not be working or even in a certain profession to recover such an award. What is being compensated is the plaintiff's lost ability to earn a certain amount and she may recover such damages even though she may never have seen fit to take advantage of that capacity.").

If no distinction is made between the two concepts, then Merchants categorically loses its argument because numerous authorities have observed that "a plaintiff need not, as a

> "Gray alleged in the trial court that her future ability to obtain employment like the employment she had enjoyed in the past has been impaired because Lozier fired her. However, there was no evidence at trial that Lozier's termination of Gray caused Gray to be less marketable as an employee. In fact, as stated, Gray has been offered and has accepted at least four jobs since being terminated and is

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prerequisite to recovery [for loss of earning capacity], prove that in the near future he will earn less money than he would have but for his injury. Rather, a plaintiff must show that his injury has caused a diminution in his ability to earn a living." Gorniak v. National R.R. Passenger Corp., 889 F.2d 481, 484 (3d Cir. 1989). See also Wiles v. New York, Chicago & St. Louis R.R., 283 F.2d 328, 332 (3d Cir. 1960) ("We cannot agree with the conclusion reached by the court below that Wiles was not entitled to the damages awarded him by the jury for loss of future earnings. The evidence that Wiles is employed by the Railroad at a larger salary than that which he was receiving when he was injured is a facet of the issue of damages which the jury was entitled to take into consideration ...."); Donovan v. Port Auth. Trans-Hudson Corp., 309 N.J. Super. 340, 349, 707 A.2d 171, 175 (App. Div. 1998) (stating that "[t]he fact that plaintiff remained employed in a higher paying position, whether under those circumstances plaintiff was likely to look elsewhere for employment, and whether there was any real likelihood that the employer would terminate plaintiff under the circumstances are simply factors for the jury to consider in determining whether such [lost-earning-capacity] damages should be awarded"); Elliott v. U.S. Steel Corp., 194 F. Supp. 936, 938 (W.D. Pa. 1961) ("[T]he receipt of the same [or] greater wages after an accident does not negate nor control an award for loss of future earnings."); and Lashin v. Corcoran, 146 Conn. 512, 514, 152 A.2d 639, 641 (1959) ("Recovery of damages for loss of earning capacity is not merely a recovery for wages lost. Salary or wages earned at the time of the injury are merely evidential facts, relevant but not conclusive, in the inquiry as to the pecuniary value of the impairment of earning capacity which an injured person has sustained.").

> earning a greater wage than she earned before the Lozier employment."

624 So. 2d at 1037. The Court's observation about Gray's earnings after the termination of her employment with Lozier related to evidence of her lost earning capacity, not loss of future earnings. Second, the Lozier Court's overall analysis with regard to the compensatory-damages award concerned the sufficiency of the evidence to support the size of the jury's award, not whether Gray was prohibited as a matter of law from recovering a certain type of compensatory damages. The Lozier Court began its compensatory-damages analysis by observing that "we agree with Lozier that the jury erred. At most, there was evidence of only $11,053.50 in compensatory damages." 624 So. 2d at 1037. Following the analysis quoted above concerning the lack of evidentiary support for a loss of earning capacity, the Court also noted that "Gray presented no evidence that she suffered any mental anguish as a result of her termination." Id. The Court then provided a breakdown of the evidence as to Gray's actual lost wages. Tying all of this together, the Court concluded that the evidence showed that Gray was entitled to a compensatory-damages award of $11,053.50, not the $200,000 awarded by the jury. As we have

already noted, a challenge to the sufficiency of the evidence to support the compensatory-damages award is not available to Merchants. See note 13, supra.

Several other authorities cited by Merchants for its position on a plaintiff's eligibility for lost future earnings shed no light on this issue. In Motion Industries, Inc. v. Pate, 678 So. 2d 724, 733 (Ala. 1996), the Court's analysis of Pate's "lost earnings" makes it clear that Pate did not seek recovery for lost future earnings. The portion of the analysis Merchants cites in Flint Construction Co. v. Hall, 904 So. 2d 236, 253 (Ala. 2004), concerned a plaintiff's duty to mitigate damages, not whether a plaintiff is barred from seeking damages for lost future earnings if he or she receives a larger annual income from a job following his or her termination than he or she did from the job he or she held with the defendant. Ex parte Fort James Operating Co., 895 So. 2d 294 (Ala. 2004), was a worker's compensation action, not a retaliatory-discharge action, in which the defendant employer sought a setoff of worker's compensation benefits for sickness and accident benefits it had paid to the plaintiff as a result of his ankle injury. The Court concluded that Fort

James Operating Company was entitled to the setoff, an analysis with no relevance to Merchants' contention regarding lost future earnings. Merchants cites Black Creek, Inc. v. Wood, 69 So. 3d 172 (Ala. Civ. App. 2011), a no-opinion affirmance by the Court of Civil Appeals. Merchants presumably meant to cite Judge Terry Moore's opinion concurring in the result in that case, but his analysis of the plaintiff's lost-wages claim in that case does not discuss the proposition Merchants seeks to establish. Instead, Judge Moore discussed the rule that "'[a]n employee who is discharged solely for filing a workers' compensation claim, but who is ... unable to return to work, cannot recover damages for lost wages.'" Black Creek, 69 So. 3d at 174-76 (Moore, J., concurring in the result) (quoting Bleier v. Wellington Sears Co., 757 So. 2d 1163, 1172 (Ala. 2000)).

Finally, Merchants cites Continental Eagle Corp. v. Mokrzycki, 611 So. 2d 313 (Ala. 1992). If the distinction between lost future earnings and lost earning capacity is ignored (as Merchants seemingly asks us to do), Mokrzycki actually supports Rice's view rather than aiding Merchants' argument. In Mokrzycki, the defendant corporation,

Continental Eagle Corporation ("CEC"), contended that, when the jury awarded the plaintiff, David Mokrzycki, compensatory damages, it made the award "based on Mokrzycki's wages lost as a result of his on-the-job injury rather than on his wages lost as a result of his alleged termination." 611 So. 2d at 320. CEC argued that "wages lost as a result of a decrease in earnings capacity due to an injury are not compensable" in a retaliatory-discharge action because such wages were calculated "to compensate for Mokrzycki's back injury, rather than for his termination." Id. at 320, 321. This Court disagreed, reasoning:

> "The record indicates that even after his back surgery, Mokrzycki could have worked for CEC at the same rate of pay he was making before he injured his back and that he could have done so for 13 more years, until the age of 65. Mokrzycki argues that he thus sustained no decrease in earnings due to his back injury. The record further establishes that after CEC terminated Mokrzycki, his earnings decreased from $9 an hour at CEC to approximately $5 an hour. Reviewing the record in a light most favorable to Mokrzycki, as we are required to do, we conclude that the evidence supports an inference that Mokrzycki's loss in earnings capacity was proximately caused by CEC's wrongful termination of Mokrzycki."

611 So. 2d at 321. Thus, the Mokrzycki Court concluded that, where the evidence showed that the plaintiff was making less

per hour after his termination than he would have made had he been allowed to keep working for the defendant employer, he was entitled to damages for lost earning capacity.

Overall, a survey of other authorities concerning lost future earnings confirms what the trial court stated in explaining its jury instruction on this issue -- "I'm not aware of any formula to use as a matter of law" in determining such damages.[18] Annual income is one measure, and earnings per hour is another method, depending upon the circumstances.[19]

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[18]We note that calculating such earnings through the plaintiff's projected retirement age is not unusual. See, e.g., Barto v. Shore Constr., L.L.C., 801 F.3d 465, 475 (5th Cir. 2015) (observing that "[a] damages award for future lost wages should generally be based upon a [plaintiff's] work-life expectancy, meaning 'the average number of years that a person of a certain age will both live and work.'" (quoting Madore v. Ingram Tank Ships, Inc., 732 F.2d 475, 478 (5th Cir. 1984))).

[19]In Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 536 (1983), the United States Supreme Court stated: "[T]he first stage in calculating an appropriate award for lost earnings involves an estimate of what the lost stream of income would have been. The stream may be approximated as a series of after-tax payments, one in each year of the worker's expected remaining career." (Emphasis added.) The Court observed in a footnote that "another distorting simplification is being made here. Although workers generally receive their wages in weekly or biweekly installments, virtually all calculations of lost earnings, including the one made in this case, pretend that the stream would have flowed in large spurts, taking the form of annual installments." 462 U.S. at 534 n.11.

For example, in federal cases, several factors are considered in calculating "frontpay," aside from just the wages earned, regardless of how those earnings are calculated. See, e.g., Frazier v. City of Gadsden, No. 4:13-CV-757-VEH, May 13, 2016 (N.D. Ala. 2016) (not published in F. Supp.) (stating that, "'[i]n making a front pay determination, the court will examine factors such as the availability of employment opportunities, the period within which one by reasonable efforts may be reemployed, the employee's work and life expectancy, and other facts that are pertinent to prospective damage awards. The court also may consider such factors as whether plaintiff has reasonable prospect of obtaining comparable employment, whether the time period for the award is relatively short, whether the plaintiff intends to work or is physically capable of working, and whether liquidated damages have been awarded.'" (quoting Am. Jur. 2d Job Discrimination § 2641)); Ogden v. Wax Works, Inc., 29 F. Supp. 2d 1003, 1014-15 (N.D. Iowa 1998) (listing a "synthesis" of 11 factors culled from cases decided by the federal circuit courts of appeal that "may assist the district court in calculating a front pay award," but acknowledging that "[o]f

course this list is not all-inclusive"). Accord Mason v. Oklahoma Turnpike Auth., 115 F.3d 1442, 1458 (10th Cir. 1997) (observing that a request for frontpay requires the court to "consider many complicated and interlocking factors"). In short, the authorities are clear that the fact that a plaintiff earns more annually in a job following a wrongful termination does not preclude, as a matter of law, a recovery for lost future earnings, or even that lost future earnings must be measured based on annual income. Merchants has not demonstrated that, as a matter of law, Rice should have been precluded from recovering damages for lost future earnings.

Notable moreover, Merchants waived any right to challenge the sufficiency of the evidence as to this issue because of its failure to file a motion for a judgment as a matter of law at the close of all the evidence. Consequently, the trial court did not err in denying Merchants' motion for a judgment as a matter of law on this issue.

B. Other Arguments Concerning the Compensatory-Damages Award

Merchants presents a few arguments directed toward the sufficiency of the evidence to support the compensatory-damages award. It argues that the calculation for lost future

earnings is based on speculation, that Rice did not present competent evidence of perceived stigma stemming from the termination of his employment with Merchants, and that Rice offered "scant" evidence of mental anguish that does not withstand "strict scrutiny."

Before addressing the substance of the foregoing arguments, we note that there exist procedural hurdles that prevent us from reversing the judgment on these grounds. First, as we observed in Part A of this analysis, Merchants failed to move for a judgment as a matter of law under Rule 50(a), Ala. R. Civ. P., at the close of all the evidence. Accordingly, it waived any issues concerning the sufficiency of the evidence in the trial court, which includes arguments about the speculative nature of lost future earnings and weak evidence of stigma and mental anguish. Second, because the jury entered a general verdict awarding compensatory damages, Merchants needed to undermine each basis for the compensatory-damages award to warrant reversal of the judgment entered on that portion of the verdict. The same issue was addressed in Guyoungtech USA, Inc. v. Dees, 156 So. 3d 374, 384 (Ala. 2014):

"The verdict form distinguished between compensatory damages and punitive damages but did not ask the jury to itemize the individual components of the compensatory-damages award: lost future wages and mental anguish. Thus, the compensatory-damages award of $1 million (remitted to $300,000) might have been entirely for either lost future wages or mental anguish, or for some indiscernible combination of the two. If the trial court's evidentiary and instructional errors were confined solely to the calculation of lost wages or solely to the calculation of mental-anguish damages, we would not be in a position to review the compensatory-damages verdict. In that situation, the verdict could have represented solely the type of damages unaffected by the trial court's error.

"Reviewing a case in which the verdict form did not distinguish between compensatory damages and punitive damages, this Court declined to speculate as to how the damages were apportioned between those two components. 'We cannot say whether the [verdict] is right or wrong; we do not know what it represents, and it could be either right or wrong, i.e., either appropriate or excessive.' City Realty, Inc. v. Continental Cas. Co., 623 So. 2d 1039, 1046 (Ala. 1993). In that case, the Court also declined to remand the case for itemization of the verdict 'because the parties did not object to the undesignated verdict at trial.' Id.

"In Coastal Bail Bonds, Inc. v. Cope, 697 So. 2d 48 (Ala. Civ. App. 1996), the trial court refused the defendants' request for a verdict form differentiating between compensatory damages and punitive damages. The Court of Civil Appeals, affirming the judgment entered on the verdict, found the error to be harmless because the evidence supported assigning the entire award either to compensatory damages or to punitive damages. 'Obviously, since both extremes of compensatory and punitive damages are supported by the evidence, any

> combination of the two also is supported by the evidence.' 697 So. 2d at 52. Conversely, in this case, because the lost-wages and mental-anguish prongs of the compensatory-damages award are both infected by error, we may reverse without knowing how the jury allotted damages between lost wages and mental anguish. To paraphrase the Coastal court: Because neither extreme of lost-wages or mental-anguish damages is supported by the evidence, any combination of the two also is not supported by the evidence."

(Emphasis added.) See also Clarke-Mobile Ctys. Gas Dist. v. Reeves, 628 So. 2d 368, 369 (Ala. 1993) (noting that, "[i]n City Realty, Inc. v. Continental Casualty Co., 623 So. 2d 1039 (Ala. 1993), we recently held that we could not review an allegation that the jury's damages award was excessive where the award could have been either appropriate or excessive (depending on how the jury had apportioned damages), and where, without objection, the trial court had instructed the jury in terms of an undesignated award").

We noted in Part A of this analysis that Merchants concedes that Rice is entitled to past lost wages and consequential damages stemming from the termination of his employment. We also concluded that Merchants failed to demonstrate that Rice was not entitled to a recovery for lost future earnings as a matter of law. Because it is not our

province to parse a general verdict -- Merchants expressly approved the use of the verdict form after initially moving to have the verdict form changed to distinguish between past and future damages -- even if Merchants' arguments as to the sufficiency of the evidence did undermine one aspect of the compensatory-damages award, we still must affirm the judgment entered on that verdict because we cannot discern whether any damages were awarded as to that aspect of the award.

Even if Merchants could, as a matter of procedure, challenge the sufficiency of the evidence to support the compensatory-damages award, its arguments in that regard do not succeed. The basis for Merchants' contention that the lost-future-earnings damages are speculative is threefold. First, Merchants argues that Rice's calculation of lost future earnings had to be supported by expert testimony in order to decrease the speculative nature of the calculation. Second, it contends that Rice's testimony that he was planning to start a lawn-care business after he returned to work for Merchants following his injury is wholly speculative. Third, Merchants argues that Rice provided no competent evidence

indicating that termination of his employment stigmatized his future employability.

As to the lack of expert testimony concerning Rice's lost future earnings, it is true that, in some federal cases involving wrongful termination, experts have testified regarding lost earning capacity. But Merchants fails to provide any authority stating that expert testimony is required as a predicate to establishing lost future earnings.[20] See Rule 28(a)(10), Ala. R. App. P. We also note that federal cases have observed that "a front pay award will contain some

[20]In fact, in one of the cases Merchants cites in support of this argument, the court observed: "The cases do not indicate that expert testimony is necessary to make the correct determinations, although in at least one case an expert was used. ... Nevertheless, in other cases it appears that expert witnesses were not utilized." Fournerat v. Beaumont Indep. Sch. Dist., 6 F. Supp. 2d 612, 614 (E.D. Tex. 1998).

This Court has stated that, "[e]xcept in extreme and obvious cases, some direct evidence of the existence and extent of impaired earning capacity is necessary as the foundation upon which the jury may make an informed assessment of damages" and that "[t]he line between those cases requiring expert testimony to correlate physical impairment with impaired capacity to earn and those falling within the common knowledge and experience of lay persons is a fine one, and must be drawn on a case-by-case basis." Carnival Cruise Lines, Inc. v. Snoddy, 457 So. 2d 379, 382-83 (Ala. 1984). But again, that principle concerns physical impairment and its correlation with lost earning capacity, neither of which are at issue here.

degree of speculation," Ogden, 29 F. Supp. 2d at 1019, but that this fact will not prevent dispensing such awards. See, e.g., Donlin v. Philips Lighting North America Corp., 581 F.3d 73, 87 (3d Cir. 2009) (stating that "we will not refuse to award front pay merely because some prediction is necessary").

Regarding Rice's testimony about his desire to start a lawn-care business after he returned to work for Merchants following his injury, Merchants did not object at trial on the basis that Rice's testimony was speculative. See Davis v. Southland Corp., 465 So. 2d 397, 402 (Ala. 1985) ("Timely objection is a condition precedent to raising an error on appeal. Where a timely objection to the admission of evidence is not made, the party wishing to exclude the evidence cannot be heard to complain."). Moreover, it appears that Rice's testimony concerning establishing a potential lawn-care business was not a factor in Rice's calculations of lost future earnings.

Merchants' contention that Rice provided no competent evidence of stigma is also incorrect. It is true that the trial court sustained objections by Merchants to questions seeking to elicit testimony from Rice as to what Estes or

other potential employees may have perceived about the termination of his employment for Merchants. But the trial court allowed Rice to testify as to his own concerns regarding the effect that termination may have on his future employment prospects. More importantly, the basis of Rice's claimed damages for lost future earnings exists irrespective of any testimony about stigma. As we noted in Part A of this analysis, the focus of this portion of Rice's compensatory-damages claims was not lost earning capacity, but lost future earnings, a calculation solely based on the difference in hourly wages between Rice's position with Merchants and his position with Estes.

As noted above, Merchants also contends that Rice presented "scant" evidence of mental anguish that does not support a compensatory award for such damages. In general, with respect to damages for mental anguish, this Court has observed:

> "'"We recognize that mental anguish and emotional distress are not items for which a precise amount of damages can be assessed; thus, in considering whether a jury verdict for compensatory damages is excessive, we must view the

> evidence from the plaintiff's perspective and determine what the evidence supports in terms of the plaintiff's suffering."'"

AutoZone, Inc. v. Leonard, 812 So. 2d 1179, 1184 (Ala. 2001) (quoting Kmart Corp. v. Kyles, 723 So. 2d 572, 578 (Ala. 1998), quoting in turn Foster v. Life Ins. Co. of Georgia, 656 So. 2d 333, 337 (Ala. 1994)). See also Delchamps, Inc. v. Bryant, 738 So. 2d 824, 837 (Ala. 1999) (noting that "[t]here is no fixed standard for determining the amount of compensatory damages a jury may award for mental anguish. The amount of the damages award is left to the jury's sound discretion, subject to review by the court for a clear abuse of that discretion").

Merchants' argument centers on what this Court stated in Kmart Corp. v. Kyles, 723 So. 2d 572, 578-79 (Ala. 1998):

> "We now clearly allow the testimony of a witness as to his or her mental anguish. The question thus remains, in the present era, when we permit a witness to offer evidence as to the witness's own mental anguish, is indirect evidence of mental anguish alone sufficient to support a substantial verdict? We answer this question in the negative. We give stricter scrutiny to an award of mental anguish [damages] where the victim has offered little or no direct evidence concerning the degree of suffering he or she has experienced. See Foster v. Life Ins. Co. of Georgia, 656 So. 2d 333, 337 (Ala. 1994), where the Court stated:

> "'... In this case, the only evidence regarding Foster's mental anguish and emotional distress is her bare assertion that the discovery of fraud affected her 'a lot' and that she sued two months after the mental anguish and emotional distress began. From this limited evidence, we agree that the jury could infer that Foster suffered some measure of mental anguish and emotional distress from the realization that she had been paying over a fifth of her monthly income to an insurance company for a worthless policy; however, we hold that, even when viewed in a light most favorable to her, Foster's scant testimony of mental anguish and emotional distress, without more, does not support an award exceeding $120,000 for each of the two months before she sued. We conclude that the $250,000 compensatory damages award was excessive by $200,000.'"

In Kyles, the Court concluded that the plaintiff was not entitled to a compensatory-damages award that included damages for mental anguish because "[t]he plaintiff here did not testify about her mental anguish in this trial." 723 So. 2d at 579.

The Court later explained the holding in Kyles this way:

> "In Kmart Corp. v. Kyles, 723 So. 2d 572, 578 (Ala. 1998), we held that an award of mental-anguish damages was subject to a strict-scrutiny analysis if the plaintiff suffered no physical injury and offered little or no direct evidence concerning the mental suffering sustained as a result of the defendant's wrongdoing. Id. Our holding in Kyles did not alter the law as previously established in

> Alabama, that the presence of a physical injury or physical symptoms is not a prerequisite for a claim of damages for mental anguish, and that once the plaintiff has presented some evidence of mental anguish, 'the question of damages for mental anguish is for the jury.' Alabama Power Co. v. Harmon, 483 So. 2d 386, 389 (Ala. 1986). Our holding in Kyles simply addressed the strength of the presumption of correctness to be placed on the jury's award in cases where the plaintiff has suffered no physical injury or physical suffering and offers little or no evidence concerning the nature of his or her alleged mental anguish. See Kyles, 723 So. 2d at 578."

National Ins. Ass'n v. Sockwell, 829 So. 2d 111, 133-34 (Ala. 2002).

In its November 16, 2017, order denying Merchants' postjudgment motion, the trial court declined to apply the strict-scrutiny standard from Kyles, concluding that Rice "presented direct testimony of physical manifestations of mental anguish" and that "Rice's testimony regarding his mental anguish was not scant within the meaning [of Kyles]." Merchants disagrees with this conclusion, arguing that "Rice did not offer 'direct evidence,' under [Kyles], such as evidence of a mental breakdown or attempted suicide." Merchants' brief, p. 41.

Our cases do not indicate that "direct evidence" means only evidence of something so severe as a mental breakdown or

a suicide attempt. As Kyles and its progeny make clear, "direct evidence" of mental anguish means testimony from the plaintiff about the degree of mental suffering. See, e.g., Slack v. Stream, 988 So. 2d 516, 531–32 (Ala. 2008) (observing that the presumption in favor of a jury's verdict awarding mental-anguish damages "'is weakened and we strictly scrutinize such a verdict when a plaintiff who claims damages solely for mental anguish fails to offer his own testimony of the mental anguish he has suffered'" and that, "'[w]hen a plaintiff's testimony amounts to little more than the obvious notion that dealing with the traumatic event was "hard" or "humiliating," we have consistently remitted damages'" (quoting George H. Lanier Mem'l Hosp. v. Andrews, 901 So. 2d 714, 725–26 (Ala. 2004)); and Orkin Exterminating Co. v. Jeter, 832 So. 2d 25, 37 (Ala. 2001) (explaining that "[w]e remitted awards for mental-anguish damages in Alabama Power [v. Murray, 751 So. 2d 494 (Ala. 1999)], Delchamps[, Inc. v. Bryant, 738 So. 2d 824, 837 (Ala. 1999)], Oliver [v. Towns, 770 So. 2d 1059 (Ala. 2000)], and Kyles, not because of a lack of evidence indicating that the plaintiffs had experienced traumatic events, but because of the limited evidence

presented by each plaintiff regarding the emotional distress he or she had suffered as a result of the traumatic event").

In this case, Rice testified to experiencing shock from the sudden and unexpected termination of his employment; frequent sleepless nights during his unemployment and occasionally after finding a job, a lot of anxiety about what he was going to do, embarrassment, irritability, and a loss of trust towards his fiancée, her two children, and others, including putting off a wedding originally scheduled for 2015 because of this loss of trust; he testified that the event changed his whole sense of who he was. Merchants is correct that Rice did not testify to receiving counseling or to taking medication as a result of the mental stress he experienced, but he certainly presented direct evidence that was more than the "scant" testimony described in Kyles and other cases in which this Court remitted mental-anguish awards. Moreover, simple common sense dictates that a person who is wrongfully terminated from a job will suffer mental anguish. We find no error in the trial court's affirmation of the jury's verdict on this subject.

In sum, Merchants' failure to move for a judgment as a matter of law at the close of all the evidence, as well as the fact that the jury entered a general verdict as to compensatory damages, prevents us from reversing this portion of the judgment or from remitting those damages. Even without those procedural hurdles, however, we find no error in the trial court's decision to uphold the jury's compensatory-damages award.

C. The Propriety of the Punitive-Damages Award

Merchants also presents arguments as to why it believes that the punitive-damages award should be reversed or remitted. Specifically, it presents one argument as to the testimony of John Nims that it contends requires reversal of the entire judgment; barring that, it argues that the guideposts for punitive-damages awards set out in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), and the factors set forth in Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989), and Hammond v. City of Gadsden, 493 So. 2d 1374 (Ala. 1986), warrant a significant remittitur of the punitive-damages award.

1. The Admissibility of the Testimony of John Nims

First, Merchants contends that the trial court erred in admitting testimony from former Merchants employee John Nims concerning the termination of his employment with Merchants. Merchants argues that this testimony was "highly prejudicial pattern evidence that bore directly on Merchants' intent, a critical factor for the jury's consideration in deciding the appropriate amount of punitive damages." Merchants' brief, p. 50. It argues that this evidentiary mistake was so serious that Merchants is entitled to a new trial.

Citing federal cases, Merchants contends that, in order for evidence to be admissible as a "pattern or practice" under Rule 404(b), Ala. R. Evid., in a wrongful-termination case,

> "[t]he plaintiff must produce evidence that a significant number of other employees in the plaintiff's protected class (in this case, employees who filed worker's compensation retaliatory discharge claims) also were terminated; that is, the plaintiff must produce sufficient evidence that the unlawful discrimination was the employer's 'standard operating procedure.' Bazemore v. Friday, 478 U.S. 385, 399 (1986)."[21]

[21]Rule 404(b), Fed. R. Evid., provides, in part:

"(b) Crimes, Wrongs, or Other Acts.

"(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to

Merchants' brief, pp. 51-52. Merchants argues that "evidence that one other Merchants employee believes he was terminated for filing a worker's compensation claim is insufficient as a matter of law to show a 'pattern or practice' of retaliation." Id. at 53.

Before we address the substance of Merchants' argument, we must once again note a procedural issue. As we explained in the rendition of the facts, Merchants objected to the admission of testimony from Nims and two other witnesses in a motion in limine filed before trial. The trial court granted the motion with respect to the two other witnesses, but it denied it with respect to Nims. The problem for Merchants is that the trial court in no way indicated that its ruling with respect to Nims was absolute or unconditional. When Nims's video deposition was introduced at trial, Merchants did not reiterate its objection that the testimony should be

> prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> "(2) Permitted Uses; ... This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. ..."

disallowed as improper pattern or practice evidence. Later, during the jury-charge conference, Merchants submitted a proposed limiting instruction with respect to Nims's testimony that the trial court gave to the jury in a slightly modified form -- excising language admonishing the jury not to consider the testimony for purposes of punitive damages -- and again Merchants did not state any objection to the trial court regarding Nims's testimony or the jury instruction.

> "'"An appellant who suffers an adverse ruling on a motion to exclude evidence, made in limine, preserves this adverse ruling for post-judgment and appellate review only if he objects to the introduction of the proffered evidence and assigns specific grounds therefor at the time of the trial, unless he has obtained the express acquiescence of the trial court that subsequent objection to evidence when it is proffered at trial and assignment of grounds therefor are not necessary."'
>
> "Baldwin County Elec. Membership Corp. v. City of Fairhope, 999 So. 2d 448, 454 (Ala. 2008) (quoting Owens-Corning Fiberglass Corp. v. James, 646 So. 2d 669, 673 (Ala. 1994)). '[U]nless the trial court's ruling on a motion in limine is absolute or unconditional, the ruling does not preserve the issue for appeal.' Perry v. Brakefield, 534 So. 2d 602, 606 (Ala. 1988)."

Ex parte Jackson, 33 So. 3d 1279, 1283 (Ala. 2009).

The trial court denied Merchants' motion in limine with respect to Nims's testimony in ordinary fashion after hearing arguments concerning it, but Merchants did not seek or obtain any assurance from the trial court at that time that it need not renew its objection during the trial. Merchants presented a litany of objections to specific portions of Nims's video-deposition testimony at the time it was introduced, but it did not reiterate that it objected to the entire presentation of his testimony as being inadmissible pattern or practice evidence. Therefore, Merchants did not preserve this issue for appellate review. Furthermore, any complaint that allowing Nims's testimony for purposes of intent was too prejudicial because of the risk that it would be misused by the jury to punish Merchants when it considered punitive damages is also waived because Merchants did not object to the trial court's modified version of its proposed jury instruction on this issue.

Even if Merchants had not waived its objection to Nims's testimony, however, evidence regarding the termination of Nims's employment was not admitted to establish the reprehensibility of Merchants' conduct with regard to punitive

damages.[22] It was admitted to establish Merchants' intent with respect to whether it fired Rice in retaliation for his filing a worker's compensation claim. Rice alleged that his termination was a retaliatory discharge. Merchants countered that it terminated Rice's employment simply because it never employed more than eight drivers at its Mobile shipping yard, it had a full complement of drivers when Rice was cleared to return to work, and it had no room to support Rice's further employment with the company. In order to demonstrate that Merchants' defense was a pretext, Rice introduced evidence from a number of sources indicating that Merchants' claimed reason for terminating his employment was not plausible. As recounted in the rendition of facts, one key piece of evidence for demonstrating pretext was an e-mail from Farve to Averhart sent in the aftermath of Nims's termination that appeared to address how Averhart had mishandled the employment terminations of both Rice and Nims and admonished Averhart to

[22]Merchants is correct that such evidence cannot be used as a factor for gauging reprehensibility in the assessment of punitive damages. See State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 423 (2003) (stating that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis").

follow the policy in Merchants' employee handbook in the future. Thus, it was Merchants itself, through that e-mail, that first observed that it had mishandled the employment terminations of both Rice and Nims. Indeed, Rice's counsel discussed Nims's situation and that e-mail in his opening statement and used them to drive home the point that "[t]hey [Merchants] knew what they were doing wrong" when Merchants terminated Rice's employment. Further, during Nims's video deposition, when Merchants objected to one portion of his testimony, the trial judge reiterated to the parties why, in his mind, the testimony was relevant: "[Nims] was fired solely because he maintained a comp case then they fired him and they used a lack of work basis as the same one they used for Mr. Rice ...." Finally, as also previously noted, Merchants asked for, and received, a limiting instruction with respect to Nims's testimony that charged the jury in relevant part that "the evidence regarding John Nims is admitted only for your consideration in determining whether Merchants acted with the intent to terminate Denny Rice solely because he claimed workers' compensation benefits." In short, Merchants asks us to hold the trial court in error for admitting

evidence on a basis -- pattern and practice with respect to punitive damages -- for which it was not admitted during the trial. We decline to do so. See Harley-Davidson, Inc. v. Toomey, 521 So. 2d 971, 973 (Ala. 1988) ("'A party who invokes no further action by the court, thereby indicating his satisfaction, cannot complain of the court's failure to do what [it] was not asked to do.'" (quoting C.C. Hooper Café Co. v. Henderson, 223 Ala. 579, 582, 137 So. 419, 422 (1931))).

2. Remittitur of the Punitive-Damages Award

The remainder of Merchants' arguments address why it believes the punitive-damages award should be reduced according to the guideposts for punitive-damages awards from BMW and the factors related in Hammond and Green Oil.

> "Generally, 'the purpose of punitive damages is not to compensate the plaintiff but to punish the wrongdoer and to deter the wrongdoer and others from committing similar wrongs in the future.' Green Oil Co. v. Hornsby, 539 So. 2d 218, 222 (Ala. 1989). Therefore, punitive damages 'must not exceed an amount that will accomplish society's goals of punishment and deterrence.' Id. ..."

Alabama River Grp., Inc. v. Conecuh Timber, Inc., [Ms. 1150040, Sept. 29, 2017] ___ So. 3d ___, ___ (Ala. 2017).

"In reviewing a punitive-damages award, we apply the factors set forth in Green Oil [Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989)], within the framework of the 'guideposts' set forth in BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), and restated in State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408, 418, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). See AutoZone, Inc. v. Leonard, 812 So. 2d 1179, 1187 (Ala. 2001) (Green Oil factors remain valid after Gore).

"The Gore guideposts are: '(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.' Campbell, 538 U.S. at 418, 123 S.Ct. 1513. The Green Oil factors, which are similar, and auxiliary in many respects, to the Gore guideposts, are:

> "'(1) the reprehensibility of [the defendant's] conduct; (2) the relationship of the punitive-damages award to the harm that actually occurred, or is likely to occur, from [the defendant's] conduct; (3) [the defendant's] profit from [his] misconduct; (4) [the defendant's] financial position; (5) the cost to [the plaintiff] of the litigation; (6) whether [the defendant] has been subject to criminal sanctions for similar conduct; and (7) other civil actions [the defendant] has been involved in arising out of similar conduct.'

"Shiv-Ram, Inc. v. McCaleb, 892 So. 2d 299, 317 (Ala. 2003) (paraphrasing the Green Oil factors)."

Ross v. Rosen-Rager, 67 So. 3d 29, 41-42 (Ala. 2010). Merchants contends that these guideposts and factors dictate that there should be a significant reduction in the punitive-damages award. We address each relevant guidepost and factor in turn.

a. Gore Guidepost 1: Degree of Reprehensibility

> "'"[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."' [State Farm Mut. Auto. Ins. Co. v.] Campbell, 538 U.S. [4082] at 419 [(2003)] (quoting Gore, 517 U.S. at 575). When analyzing this first Gore factor, Campbell counsels courts to consider whether
>
> > "'the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.'
>
> "538 U.S. at 419."

Alabama River Group, ___ So. 3d at ___.

According to the rubric of State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003), three of the considerations do not support a finding of reprehensibility on

the part of Merchants: the harm caused by Merchants was not physical, it did not demonstrate a disregard for anyone's health or safety, and the termination of Rice's employment was a one-time event. The other two considerations, however, support a finding of reprehensibility.

Merchants terminated Rice's employment when he was in a financially vulnerable position. He had just come off an extended period of reduced pay resulting from his injury and he was let go at the end of the year, a time when, according to Rice, companies typically did not hire new truck drivers. This forced him to withdraw $20,000 from his 401(k) retirement account in order to make ends meet during his unemployment.

Rice also introduced substantial evidence demonstrating that Merchants' action was intentional. That evidence included: Averhart directly contradicted a policy in the employee handbook that he testified he was aware of; Farve admonished managers in an e-mail to follow the policy after the employment terminations of Rice and Nims, indicating that the corporation as a whole was aware of the policy and that it had violated the policy in Rice's case; Merchants insisted during trial that it had done nothing wrong because it had no

other positions to offer Rice -- despite considerable evidence introduced to the contrary.[23] Moreover, this Court has observed: "Retaliatory discharge has been condemned by the Legislature. The statutory scheme of allowing an employee to recover damages from an employer who discharges him solely because he filed a workers' compensation claim does not contemplate a negligent retaliatory discharge -- it deals exclusively with an intentional tort." Flint Constr. Co., 904 So. 2d at 254. Accepting Rice's view of the evidence, as we

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[23]In an effort to downplay the import of Averhart's actions and Farve's e-mail, Merchants argues that those facts

> "cut[] against the culpability of Merchants as an entity. Even if Averhart acted with discriminatory animus, his actions were not approved or condoned by Merchants' Organization, which had already established a legally compliant policy and acknowledged that Averhart had deviated from that policy. Indeed, the only reasonable conclusion to be drawn from the evidence that Averhart acted alone -- unprompted, unsupported, and unexplained by management -- is that Merchants lacked any ulterior motive and was blindsided by an administrative hiccup."

Merchants' reply brief, p. 23. This argument was not made at trial. At no point during the trial did Merchants admit it had wrongfully terminated Rice, nor did it distance itself in any way from Averhart's decision. Moreover, it is unclear how Averhart's action could be considered as separate from Merchants itself, and the jury clearly did not conclude that that was the case.

are required to do when reviewing a jury verdict at the request of the movant for a judgment as a matter of law, we conclude that Merchants' conduct is sufficiently reprehensible to support an award of punitive damages.[24]

b. Gore Guidepost 2: Disparity Between Harm that Occurred and Punitive-Damages Award

> "Under the second Gore guidepost, the [State Farm Mutual Automobile Insurance Co. v.] Campbell[, 538 U.S. 408 (2003),] Court refused to impose a 'bright-line ratio' of punitive damages to compensatory damages and reiterated its reluctance to 'identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. 517 U.S., at 582 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award"); TXO [Production Corp. v. Alliance Res. Corp., 509 U.S. 443], 458 [(1993)].' Campbell, 538 U.S. at 424–25. The Court continued, however, to note that its jurisprudence demonstrated that, 'in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.' 538 U.S. at 425. Because there are 'no rigid benchmarks,' the precise amount of punitive damages 'must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff. In sum, courts must ensure that the measure of punishment is both

[24]Because a review of the reprehensibility factor is more narrow under Gore and because we have concluded that Merchants' conduct was reprehensible under Gore, we need not readdress reprehensibility in our Hammond/Green Oil analysis. See Shiv-Ram, Inc. v. McCaleb, 892 So. 2d 299, 318 (Ala. 2003).

> reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.' Campbell, 538 U.S. at 425–26 (emphasis added)...."

Alabama River Group, ___ So. 3d at ___.

This Court has described a 3:1 ratio of punitive damages to compensatory damages -- the exact ratio at issue in this case -- as

> "'a ratio for which substantial support can be found under Alabama law.' [National Ins. Ass'n v.] Sockwell, 829 So. 2d [111,] 137 [(Ala. 2002)]. See also Shiv-Ram, Inc. v. McCaleb, 892 So. 2d 299, 317 (Ala. 2003) (holding that, under Gore and Campbell, a damages ratio of 'slightly less than three to one' was not unreasonable). This Court has even referred to the 3:1 ratio as a 'benchmark ratio discussed with approval in special writings of the Justices of this Court in various cases.' Southern Pine Elec. Coop. v. Burch, 878 So. 2d 1120, 1128 (Ala. 2003). See also Target Media [Partners Operating Co. v. Specialty Mktg. Corp.], 177 So. 3d [843,] 883 [(Ala. 2013)] (on return to remand) (affirming judgment in the 'thorough and well reasoned' trial-court order applying the 3:1 ratio as a 'benchmark'). Additionally, 3:1 was adopted by the legislature in § 6-11-21, Ala. Code 1975, as the maximum ratio for punitive-to-compensatory damages in cases such as the present one (and where the fixed-sum does not apply)."

Alabama River Group, ___ So. 3d at ___.

Merchants contends that a 3:1 ratio is not appropriate here because, it says, "the substantial compensatory award ... undoubtedly already contains a punitive component."

Merchants' brief, p. 27. For support, Merchants argues that the United States Supreme Court has held that "compensatory awards which include an amount for emotional distress, 'such as humiliation or indignation aroused by the defendant's act,' all on their own, contain a clear punitive component." Id. at 58 (citing Campbell, 538 U.S. at 426).

However, Merchants overstates the Campbell Court's exposition on this issue. The United States Supreme Court's conclusion that the compensatory award already contained a punitive element was specific to that case. In Campbell, the plaintiff alleged bad faith, fraud, and intentional infliction of emotional distress against his automobile-insurance carrier for the manner in which it represented him as the defendant in a tort action resulting from a vehicle accident. The jury awarded the plaintiff $2.6 million in compensatory damages (reduced to $1 million by the trial court) and $145 million in punitive damages. The Campbell Court observed that "it is a major role of punitive damages to condemn" outrageous and humiliating conduct. 538 U.S. at 426. It further noted that "the Campbells were awarded $1 million for a year and a half of emotional distress. This was complete compensation." Id.

Unlike in Campbell, the entire award in this case -- including punitive damages -- is $1.2 million, and a significant portion of the compensatory-damages award can be attributed to claimed past and future lost earnings, not just to emotional distress. It would be pure speculation to conclude that the compensatory award contains a punitive component in this case. Furthermore, the ratio is consistent with awards this Court has upheld in numerous other cases. For example, in AutoZone, Inc. v. Leonard, 812 So. 2d 1179, 1187 (Ala. 2001), a retaliatory-discharge action, this Court approved an award consisting of $75,000 in compensatory damages and $275,000 in punitive damages, a 3.67:1 ratio, where all the compensatory award except $3,000 was necessarily related to mental anguish.

Based on the foregoing, we find the ratio of punitive damages to compensatory damages to be reasonable.

c. Gore Guidepost 3: Similar Criminal or Civil Penalties

In general, this factor is inapplicable here because there is no law providing for the imposition of civil or criminal penalties for the conduct at issue. Merchants notes that in Lance, Inc. v. Ramanauskas, 731 So. 2d 1204, 1219

(Ala. 1999), with regard to this factor, the Court stated that, "under BMW v. Gore, we must compare the damages awarded in this case to damages awarded in similar cases."[25] This leads Merchants to list in a lengthy footnote verdicts in a number of retaliatory-discharge actions and to declare that "the punitive damages verdict [in this case] is more than twice as large as the highest verdict which has ever been affirmed in a retaliatory discharge case." Merchants' brief, p. 46 and n.11.

The list of cases in the footnote includes decisions from as far back as 1992. At first glance, the listing appears imposing, but on closer examination it does not provide substantial help to Merchants. For example, in most of the cases listed in which judgments based on verdicts were reversed, the judgment was reversed as to both the compensatory- and punitive-damages awards. Furthermore, only

[25]Merchants cites Guyoungtech USA, Inc. v. Dees, 156 So. 3d 374, 380-81 (Ala. 2014), for "comparing the verdicts in several retaliatory-discharge cases, emphasizing the fact that significantly lower verdicts had been awarded in cases where testimony and evidence indicated much more severe mental anguish effects." Merchants' brief, p. 60. But the cited portion of Guyoungtech mentions only two Court of Civil Appeals cases, and it cites them in reference to the size of the compensatory-damages awards in those cases.

four of the listed cases had compensatory-damages awards approaching the size of the compensatory-damages award in this case, and in all but one of those cases the judgments were reversed as to both the compensatory- and punitive-damages awards.[26] See Guyoungtech USA, Inc. v. Dees, 156 So. 3d 374 (Ala. 2014) (reversing judgment awarding $300,000 compensatory, $900,000 punitive); Jim Walter Res., Inc. v. Riles, 920 So. 2d 1023 (Ala. Civ. App. 2004) (reversing judgment awarding $685,000 compensatory, $500,000 punitive); and Alabama Power Co. v. Aldridge, 854 So. 2d 554 (Ala. 2002) (reversing judgment awarding $250,000 compensatory, $250,000 punitive). In the exception, Dunlop Tire Corp. v. Allen, 725 So. 2d 960 (Ala. 1998), this Court affirmed a judgment awarding $800,000 compensatory damages but remitted the entire punitive-damages award of $1.2 million, offering little

[26]In the listed cases, the largest compensatory-damages award affirmed was in Flint Construction Co. v. Hollander, 904 So. 2d 236 (Ala. 2004), in which this Court affirmed a judgment awarding $400,000 in compensatory damages and $200,000 in punitive damages. In Coastal Lumber Co. v. Johnson, 669 So. 2d 803 (Ala. 1995), the Court also affirmed a judgment entered on a $400,000 general verdict that did not differentiate between compensatory and punitive damages.

analysis as to why it did so.[27] These cases do not help with assessing the propriety of the size of the punitive-damages award alone.

Merchants also attempts to downplay cases in which judgments awarding substantial punitive damages were affirmed. For instance, in Heil Co. v. Crowley, 659 So. 2d 105 (Ala. 1995), this Court affirmed a judgment entered on a verdict awarding a retaliatory-discharge plaintiff $50,000 in compensatory damages and $500,000 in punitive damages, and in ConAgra, Inc. v. Turner, 776 So. 2d 792 (Ala. 2000), this Court affirmed a judgment entered on a verdict awarding $50,000 in compensatory damages and $250,000 in punitive damages. Merchants contends that Heil and ConAgra are not like this case because, it says, in those cases the defendants engaged in "plans" to cover up their real reason for terminating the plaintiffs' employment. But looking at the evidence in the light most favorable to Rice, Merchants also offered a false reason for terminating Rice's employment, and

[27]The entirety of the Dunlop Tire Court's analysis on punitive damages consisted of the following: "Because the plaintiff presented no clear and convincing evidence that Dunlop acted with oppression or malice, the award of punitive damages is reduced to $0." Dunlop Tire Corp., 725 So. 2d at 968.

it was fully aware that it had not complied with its own employment policies in doing so.

Moreover, in asking us to make a static comparison of punitive-damages awards in retaliatory-discharge cases, Merchants is implicitly contending that there should be a cap on the amount of punitive damages in such cases. We have never held that such a cap exists in any type of tort action, and such an idea would run contrary to the notion that the sanction of punitive damages is to be evaluated on a case-by-case basis.[28] See, e.g., BMW of North America, Inc. v. Gore, 701 So. 2d 507, 515 (Ala. 1997) (noting that "the reviewing court should apply all the Green Oil factors, including the three BMW 'guideposts,' on a case-by-case basis to determine whether a punitive damages award is excessive and, if so, to what extent it should be remitted"). In short, we are not

[28]This Court also held in Henderson v. Alabama Power Co., 627 So. 2d 878, 884 (Ala. 1993) (overruled on other grounds by Ex parte Apicella, 809 So. 2d 865 (Ala. 2001)), that the statutory cap on punitive damages imposed in the former § 6-11-21, Ala. Code 1975, violated the right to trial by jury enshrined in Art. I, § 11, Ala. Const. 1901. In Oliver v. Towns, 738 So. 2d 798, 804 n.7 (Ala. 1999), this Court called into doubt, but it did not overrule, that holding in Henderson.

convinced that Merchants' comparison argument warrants remittitur of the punitive-damages award in this case.

d. Green Oil Factor: Merchants' Profit from Misconduct

Merchants makes only one argument as to the Green Oil factors. Merchants contends that it did not profit from its misconduct. Rice argues, however, that this factor weighs against remittitur because terminating Rice's employment in the manner Merchants did may have had a "chilling effect" on other Merchants employees, and they may either decline to file worker's compensation claims or prematurely return to work as a result of the fear of being discharged. Therefore, Rice reasons, Merchants did profit from its wrongful termination of Rice.

The trial court concluded that it was "not satisfied that [Rice's] arguments relative to this factor are supported by the record and the Court will not speculate on the matter." We agree with the trial court that there is too much speculation and too little evidence to support a finding that this factor specifically weighs against remittitur.

Because Merchants does not raise any other Green Oil factors as relevant to a potential reduction in the punitive-damages award, we pretermit any discussion of those remaining factors.

In sum, none of the examined guideposts and factors weigh in favor finding that the punitive-damages award was excessive. The most important guidepost and factor, reprehensibility, supports the imposition of punitive damages, and there is not a large disparity between the compensatory and punitive damages in the jury's award. Therefore, the trial court's judgment denying Merchants' motion to remit the punitive-damages award is due to be affirmed.

IV. Conclusion

The trial court did not err in denying a judgment as a matter of law concerning whether Rice was eligible to seek lost future earnings as a component of damages in this action. Merchants waived any right to challenge the sufficiency of the evidence to support the compensatory-damages award, and its arguments seeking to do so are not well taken. Finally, our evaluation of the guideposts and factors for determining the propriety of the punitive-damages award yields the conclusion

that no remittitur of that award is warranted in this case. Accordingly, the trial court's November 16, 2017, order denying all of Merchants' postjudgment motions is due to be affirmed.

AFFIRMED.

Parker, C.J., and Wise, Bryan, and Stewart, JJ., concur.

Bolin, Sellers, and Mitchell, JJ., concur in the result.