No. 24-

IN THE

Supreme Court of the United States

J. MICHAEL WHITE, ECO-PRESERVATION SERVICES L.L.C., SERMA HOLDINGS, LLC, AND BUILDER1.COM LLC,

Petitioners,

v.

LINDSAY DAVIS, AND BENJAMIN DAVIS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has held that a private actor making it's own choices under authority granted to it by the state, and acting on those choices, is not a state actor. The town of Lake View granted White authority to collect sewer charges and fees from customers and White chose to act in accordance with his authority. Did the court of appeals err when it held that White was state actor?

This Court has held that a punitive damages award should bear some reasonable relationship to the corresponding award of compensatory damages. The jury awarded punitive damages of $2,443,000 on certain of the plaintiffs' claims, and awarded compensatory damages of only $9 on those same claims. Did the court of appeals err when it found the 271,444 to 1 ratio of punitive to compensatory damages to be a reasonable relationship?

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

Petitioners (appellants-defendants below) are J. Michael White, ECO-Preservation Services L.L.C., Serma Holdings, LLC, and Builder1.com LLC.

Respondents (appellees-plaintiffs below) are Lindsay Davis, Benjamin Davis, Nicole Slone, Jonathan Slone, Monica Lawrence, and Jonathan Lawrence.

Petitioners ECO-Preservation Services L.L.C., Serma Holdings, LLC, and Builder1.com LLC have no parent corporations, and no publicly held corporation owns more than 10% of the equity in those parties.

RELATED CASES

Lindsay Davis and Benjamin Davis v. J. Michael White, ECO-Preservation Services L.L.C., Serma Holdings, LLC, and Builder1.com LLC, United States District Court for the Northern District of Alabama, 7:17-cv-01533-LSC. Judgment entered July 28, 2022.

Nicole Slone and Jonathan Slone v. J. Michael White, ECO-Preservation Services L.L.C., Serma Holdings, LLC, and Builder1.com LLC, United States District Court for the Northern District of Alabama, 7:17-cv-01534-LSC. Judgment entered July 28, 2022.

Monica Lawrence and Jonathan Lawrence v. J. Michael White, ECO-Preservation Services L.L.C., Serma Holdings, LLC, and Builder1.com LLC, United States District Court for the Northern District of Alabama, 7:17-cv-01535-LSC. Judgment entered July 28, 2022.

Lindsay Davis and Benjamin Davis, et al., v. J. Michael White, ECO-Preservation Services L.L.C., Serma Holdings, LLC, and Builder1.com LLC, United States Court of Appeals for the Eleventh Circuit. Judgment entered June 20, 2024.

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No. 24-

IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners J. Michael White, ECO-Preservation Services L.L.C., Serma Holdings, LLC, and Builder 1.com, LLC respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The court of appeals opinion (App. A) is unreported but can be located at *Davis v. White*, Nos. 22-12913, 22-12915, 22-12916, 2024 U.S. App. LEXIS 14975 (11th Cir. June 20, 2024).

The district court opinion (App. C) denying White's motion for remittitur is are unreported but can be located at *Davis v. White*, 2022 U.S. Dist. LEXIS 137841, 2022 WL 3083458 (N.D. Ala., Aug. 3, 2022).

The district court opinion (App. D) denying White's motion or judgment as a matter of law is unreported in any official or unofficial reports.

JURISDICTION

The court of appeals entered its judgment on June 20, 2024. App. A. The court of appeals entered its order denying a timely petition for rehearing *en banc* on August 2, 2024. App. E. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1, provides

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law

Section 1983 of Title 42 of the United States Code provides

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. The financing, construction, and grant of authority to operate the sewer system and collect sewer charges and fees.

Michael White, acting by and through his related companies (collectively, "White"), constructed a comprehensive sewer system that included means of collecting raw sewage, treating the sewage, discharging the treated wastewater, and billing and collecting for

the sewer services. App. A., 4a. White constructed the sewer system to service a residential development that he constructed near the town of Lake View, Alabama ("Lake View"). *Id*. After White completed the residential development and the sewer system, Lake View proposed an agreement whereby White's sewer system would treat Lake View's wastewater. *Id*.

One catch, however, was that Lake View did not have a wastewater collection system in place. *Id*. Accordingly, as part of the agreement between Lake View and White, White agreed to finance Lake View's construction of a collection system that would feed into White's treatment and discharge facilities. *Id*. Pursuant to the Lake View-White financing agreement, Lake View created the Government Utility Services Corporation ("GUSC") and transferred Lake View's rights in its sewer system to GUSC, including the right to establish rates and collect charges and fees for sewer services. *Id*. Similarly, GUSC entered into an agreement with White, transferring to White GUSC's rights to establish rates and collect charges and fees. *Id*, at 4a-5a. Eventually, GUSC defaulted on its obligations to White under the financing agreement. *Id*, at 5a. As part of a series of forbearance agreements, GUSC granted White additional authority to administer Lake View's sewer system. *Id*.

White thereafter exercised its authority, including its authority to collect charges and fees for sewer services. *Id*. To this end, and in accordance with the original agreements between GUSC and White, and in accordance with the forbearance agreements, White levied charges and fees against sewer system customers, disconnected defaulted customers' water service, and required payment

of all outstanding balances before a defaulted customer could challenge charges or fees. *Id*, at 5a-6a.

B. The district court proceedings.

The plaintiffs in the underlying action commenced the cases in the district court, which asserted jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. The plaintiffs alleged state law claims of (i) deprivation of property rights, (ii) nuisance, (iii) trespass, and (iv) outrage related to White's collection and enforcement procedures and actions. *Id*, at 8a-9a. Additionally, the plaintiffs alleged a federal due process claim under 42 U.S.C. § 1983, that White was a state actor that had violated their due process rights by enforcing its customer-default remedies. *Id*.

At trial, the jury found in favor of the plaintiffs (*id*, at 9a) and awarded the plaintiffs cumulative nominal compensatory damages of $9 for their due process, deprivation, nuisance, and trespass claims (the "Non-Outrage Claims"), and awarded the plaintiffs cumulative punitive damages of $2,443,000. *Id*, at 9a-10a. *See also id*, at 27a ("Recall that the jury awarded compensatory damages only on the outrage claims. For every other claim upon which the plaintiffs succeeded, the jury awarded $1 in nominal damages and then imposed anywhere from $30,000 to $702,000 in punitive damages."). Similarly, the jury awarded the plaintiffs cumulative compensatory damages of $300,000 on their state law outrage claims (the "Outrage Claims"), and awarded punitive damages of $2,000,000. *Id*.

White challenged the jury's findings by seeking a judgment as a matter of law and remittitur. *Id*, at 10a. The

district court denied both motions. App. C and D. White appealed the district court's denial of the motions. App. A.

C. The appellate court proceedings.

On White's appeal, the court of appeals affirmed the jury's findings that White was a state actor. *Id*, at 13a. Focusing solely on the nexus/joint action element, the court of appeals reasoned from the connections between White and GUSC, in particular GUSC's "encouragement for and ratification of the defendants' collections policies and efforts, as well as the public corporation's anticipated financial benefits from those efforts" that the jury had a reasonable basis for finding that White was a public actor. *Id*.

As to White's appeal of punitive damages, the court of appeals affirmed the compensatory damages and most of the punitive damages, but remanded some of the punitive damages on the state law claims that did not comply with Alabama law. App. A, at 27a. The court of appeals reasoned that the punitive-compensatory damages ratio for the jury's award was reasonable. App. A, at 36a-37a.

REASONS FOR GRANTING THE PETITION

I. The court of appeals departed from this Court's established precedent on the issue of whether a private actor making its own choices as authorized by the state, and acting on those choices, is a state actor.

This Court has a well-developed corpus of law holding that a private actor's action, as authorized by the state,

does not make the private actor a state actor. As a beginning point, in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), this Court held that a state's mere acquiescence in a private action does not convert that action into state action. 419 U.S. at 357 ("Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into 'state action'"). In *Jackson*, a utility provider terminated a customer's electrical service and the customer asserted a section 1983 claim that the utility provider was a state actor because the state had approved the utility provider's termination procedure. *Jackson*, 419 U.S. at 348. The Court rejected the customer's logic that the utility's choice to terminate service was state action because the state had both "authorized and approved" the utility provider's termination procedures. *Id*, at 354.

This Court revisited this issue again in *Flagg Brothers, Inc. v. Brooks*, 439 U.S. 149 (1978). In *Flagg*, the Court determined whether a warehouseman's proposed sale of goods entrusted to him for storage, as permitted by New York Uniform Commercial Code was a private act and not a state act. *Flagg*, 439 U.S. at 151. Again, the Court rejected the notion that a private actor's use of state sanctioned private remedies or procedures constituted state action. *Id*, at 166 ("Here, the State of New York has not compelled the sale of a bailor's goods, but has merely announced the circumstances under which its courts will not interfere with a private sale.").

Next, this Court in *Blum v. Yaretsky*, 457 U.S. 991 (1982) affirmed the *Jackson* "sufficiently close nexus test"

and further described that test as protective. *Blum*, 457 U.S. at 1004. In *Blum*, a private nursing home made the choice to transfer Medicaid patients to a lower level of care and the state social service officials affirmed the choice to discontinue benefits unless the patients accepted a transfer. *Id*, at 995. In response, the plaintiffs asserted a claim against the state alleging that the state was responsible for the nursing home's choice. *Id*. The Court in *Blum* rejected the plaintiff's assertion that the state was an actor reasoning that the state did not exercise any coercive power over the private actor. *Id*, at 1004. The Court explained that the purpose of the close nexus test was "to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Id*. (emphasis in original).

Finally, in *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999), this Court again held that a private actor was not a state actor when it acted in accordance with a state's prescribed and established regulations. In *Sullivan*, the plaintiffs claimed that private insurers withheld payment of workers' compensation benefits pursuant to the procedure set forth in the Pennsylvania workers' compensation statute. *Sullivan*, 526 U.S. at 50. According to the plaintiffs, the insurers' choice to withhold payment was attributable to the state. *Id*, at 53. The plaintiffs reasoned that, in amending the workers' compensation statute to provide insurers the option to withhold payment, the state had "authorized" and "encouraged" the insurers' choice. *Id*. While recognizing a certain logic in the plaintiffs' reasoning, the Court rejected that reasoning, characterizing the state's act as "subtle encouragement" that was not significant. *Id*.

Accordingly, the Court concluded that "finding of state action on this basis would be contrary to the essential dichotomy between public and private acts that our cases have consistently recognized." *Id.* (cleaned up).

In contrast, the court of appeals in the present case sidestepped this Court's precedents. The court of appeals held that GUSC acted when it granted White authority to chose whether to implement and then execute the collection procedures. App. A, at 13a (focusing on GUSC's "encouragement for and ratification of the defendants' collections policies and efforts, as well as the public corporation's anticipated financial benefits from those efforts"). According to the court of appeals, GUSC's grant of that authority to choose was tantamount to authorization or encouragement. But "exercise of the choice allowed by state law where the initiative comes from [the private actor] and not from the State, does not make [the private actor's] action in doing so 'state action' for purposes of the Fourteenth Amendment." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357 (1974); see also *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 54 (1999) (holding that "permission of a private choice cannot support a finding of state action"). Here, the court of appeals erred in disregarding the Court's consistent articulation of the test for when a private actor becomes a state actor.

II. The court of appeals erred when it found the 271,444 to 1 ratio of punitive to compensatory damages to be a reasonable relationship.

This Court has recognized two factors when considering the ratio of punitive damages to compensatory damages. First, the Court stated in *State Farm* that

the egregiousness of a defendant's conduct is relevant to determining the appropriate ratio. S*tate Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425-26 ("In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered."). Therefore, the degree of reprehensibility plays a role in the analysis of the second guidepost. Highly reprehensible conduct supports a higher ratio. Second, greater ratios "may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages." *Id*, at 425. Therefore, the reprehensibility of conduct and the relatively insubstantial amount of compensatory damages support a higher ratio.

Nevertheless, the court of appeals affirmed the jury's award in this case that results in a 271,444:1 ratio. While this Court has not set a bright-line constitutional limit on the ratio of punitive to compensatory damages, it described the 500:1 ratio in *Gore* as "breathtaking" and noted such high ratios must "raise a suspicious judicial eyebrow." 517 U.S. 559, 583 (1996) (quoting *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 481 (1993) (O'Connor, J., dissenting)). Recognizing these limits, the court of appeals has appropriately restricted punitive damages in other cases. Indeed, the court of appeals has approved of punitive damages ratios as high as 2,173:1. *See Kemp v. Am. Tel. & Tel. Co.*, 393 F.3d 1354, 1357 (11th Cir. 2004). (reducing the punitive award from $1,000,000 (a 8692:1 ratio) to $250,000 on compensatory damages of $115.05 and noting a single-digit multiplier would not effectively deter future misconduct); *see also Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1339 (11th Cir. 1999) (affirming district court's entry of judgment awarding punitive damages at 100:1 ratio).

The court of appeals thus rejected both this Court's guidance and precedents and its own precedents when affirming the punitive damages award. The punitive damages of $2,443,000 related to $9 worth of compensatory damages is not reasonably proportionate under any standard. This Court should therefore grant White's petition.

III. Conclusion

Faithful adherence to the "state action" requirement of the Fourteenth Amendment requires careful attention to the gravamen of the plaintiffs' complaint. Here the court of appeals did not pay careful attention. Rather, the court of appeals turned the adage of "don't just stand there, do something" on its head by finding a state's act of merely "standing there" as "doing something" and thereby imputing White with the mantle of state actor. Similarly, the court of appeal exceeded this Court's and its own precedents when it affirmed a punitive damages award that was hundreds of thousands times larger than a nominal compensatory damages award. This Court should grant White's petition and issue the writ of certiorari.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JUNE 20, 2024

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-12913

LINDSAY DAVIS, BENJAMIN DAVIS,

Plaintiffs-Appellees,

versus

J. MICHAEL WHITE, ECO-PRESERVATION SERVICES L.L.C., SERMA HOLDINGS LLC, BUILDER1.COM LLC,

Defendants-Appellants,

AKETA MANAGMENT GROUP, *et al.*,

Defendants.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 7:17-cv-01533-LSC

No. 22-12915

NICOLE SLONE, JONATHAN SLONE,

Plaintiffs-Appellees,

Appendix A

versus

J. MICHAEL WHITE, ECO-PRESERVATION SERVICES L.L.C., SERMA HOLDINGS LLC, BUILDER1.COM LLC,

Defendants-Appellants,

AKETA MANAGMENT GROUP, *et al.*,

Defendants.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 7:17-cv-01534-LSC

No. 22-12916

MONICA LAWRENCE, JOHN LAWRENCE, JR.,

Plaintiffs-Appellees,

versus

J. MICHAEL WHITE, ECO-PRESERVATION SERVICES L.L.C., SERMA HOLDINGS LLC, BUILDER1.COM LLC,

Defendants-Appellants,

AKETA MANAGMENT GROUP, *et al.*,

Defendants.

Appendix A

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 7:17-cv-01535-LSC

Before WILLIAM PRYOR, Chief Judge, and JORDAN and BRASHER, Circuit Judges.

PER CURIAM:

A sewer company that partnered with and serviced a small town in Alabama imposed hundreds of thousands of dollars in false charges on customer accounts, refused to answer the customers' complaints, shut off their water service, placed liens on their homes, and pursued criminal charges against them. Three affected families sued that sewer company. Their cases were consolidated for trial, and the jury found the sewer company liable for violating the Due Process Clause of the Fourteenth Amendment as well as committing the state law torts of trespass, nuisance, deprivation of property rights, and outrage. The jury's awards in the three cases total $300,009 in nominal and compensatory damages and $4,443,000 in punitive damages. The defendants appeal the district court's denials of their motions for judgment as a matter of law and for remittitur. We affirm the jury's liability verdicts and leave in place many of the punitive damages awards. We reverse a few of the jury's punitive damages awards that appear to exceed a statutory cap under Alabama law and remand for the district court to modify those awards as appropriate.

Appendix A

I.

When defendant Michael White developed a subdivision near what is now Lake View, Alabama, he needed to build a sewer system to service that development. White's sewer system comprised multiple entities—one that operated the effluent collection system, one that operated a wastewater treatment plant, one that operated the pipeline that discharged the treated wastewater, and one that handled customer billing and collection. For ease of reading, we simply refer to White and all his entities collectively as "the defendants."

Shortly after the defendants constructed the private sewer system, officials from the Town of Lake View approached them to talk about piping Lake View sewage through their treatment plant and discharge pipeline. The defendants agreed. The Town did not yet have a collection system. The defendants agreed to finance the construction of that system.

As part of the financing arrangement, the Town created the Government Utility Services Corporation. The Town transferred to this public corporation the rights over the Town's sewer system, including the authority to set rates for sewer services and to collect for services rendered. As part of that transfer, the public corporation had the ability to transfer any unpaid and uncollectable fees to the Town; the Town would reimburse the public corporation for 90 percent of the amounts due. On the same day that the Town-public corporation conveyance took place, the public corporation entered a similar deal

with the defendants. The public corporation transferred its assets and rights to the defendants, including the authority to set rates and collect for services rendered. And, when unable to collect amounts due, the defendants could transfer the debts to the public corporation, with the public corporation then becoming responsible for 90 percent of the amounts due.

The public corporation and defendants only became more intertwined over time. The public corporation eventually defaulted on its financial obligations to the defendants. That led to a series of forbearance agreements, one of which contained a concession from the public corporation to the defendants of "sole and exclusive authority to establish Wastewater Standards, Rules, Regulations, Policies, and Procedures for the operation of the" sewer system. In the same board meeting at which that forbearance agreement was ratified, the public corporation also adopted the defendants' wastewater standards "as they exist, and as they may be changed or amended from time to time" by the defendants.

The standards the defendants instituted were harsh, to say the least. If a customer fell behind on payments, the defendants were empowered to disconnect that customer's water service—even though the defendants did not themselves provide the water service. The defendants would disconnect water by placing a lock on the home's water valve. To effectuate their ability to do that, the defendants and their agents were given a right of entry to all properties serviced by the sewer system, conditioned only on the presentation of credentials before

entering the property. If the lock was tampered with or a customer otherwise managed to discharge water into the sewer system, the defendants imposed a penalty of $5,000 per day and reserved the right to press criminal charges. Customers could not make partial payments toward an outstanding balance. And White testified at trial that a customer could dispute a charge only after the customer had paid the disputed amount in full.

This system had the effect of escalating minor billing disagreements into major, life-altering, downward spirals. A customer could quickly find himself under a mountain of debt and without access to water because of the defendants' own mistake. If the defendants erroneously charged a customer's account with fees too large for the customer to pay all at once, the customer would be unable to contest the charge, the customer's water would be shut off, and the charges would keep piling up month to month, making it even less possible for the customer to pay in full to contest the original charge or get access to water. Eventually, the debt would be insurmountable.

This is exactly what the plaintiffs in these consolidated cases said happened to them. Each case involves a married couple who got crosswise with the defendants about their sewer bills.

The first case was brought by Lindsay and Benjamin Davis. The Davises bought a home serviced by the defendants. After they took title, but before they ever moved in, the defendants terminated water services to the home by placing a lock on the water valve. The

Davises were given no notice of the termination and did not otherwise authorize the defendants' entry onto their property. For whatever reason, when the Davises did move in, there was no lock on the water valve and the water was on in the home. The defendants said that the Davises must have broken the lock and therefore charged the Davises' account a tampering and illegal discharge fee. The defendants threatened to shut off the water again unless all back dues and penalties were paid. The Davises tried to make partial payments, which were declined. The Davises tried to dispute the payment but were told they could not until their account balance was paid. The Davises' outstanding balance eventually soared to $133,000. The defendants filed a lien on the Davises' home. Throughout the entire ordeal, the Davises felt "hopeless" and worried they would lose their home based on uncontestable fees that were erroneously charged to their sewer account.

The second case was brought by Nicole and Jonathan Slone. While living in a home serviced by the defendants, the Slones decided to move to Kentucky for a few months to look for work. Before moving, they called the defendants to suspend services while they were gone. The defendants said services would be suspended. Yet, upon their return, the Slones were greeted with a $2,000 sewer bill. When asked about the suspension of services, the defendants informed the Slones that the defendants have an "always-on" policy. The Slones tried to make partial payments, which were rejected, and made inquiries to the defendants about the charges, which were ignored. The defendants eventually terminated the Slones' water service without any prior notice that they would be entering the Slones'

property. The Slones had to use water from their pool to flush the toilet, they had to buy bottled water for drinking and cooking, and they had to shower at friends' houses. This period was especially difficult on the Slones' autistic and mute child. After about two weeks, someone (but not the Slones) cut the lock on their water valve. The defendants notified the Slones that they would be incurring additional fees for tampering with the lock and for unauthorized water discharge. Failure to pay would result in a lien on their home and criminal charges, the defendants said. The defendants followed through on both threats—filing a police report against the Slones and a lien on their property. The Slones' sewer bill climbed to $180,000.

The third case was brought by Monica and John Lawrence. Unannounced, the defendants locked the Lawrences' water valve. That same night, Monica broke the lock. The defendants later removed the lock but notified the Lawrences that they were being fined for tampering and illegal discharge. The defendants likewise threatened to (and eventually did) file criminal charges and liens on the home. They rejected partial payment and ignored attempts to dispute the charges. The looming threat of criminal convictions and foreclosure caused the Lawrences sleepless nights and anxiety. Their sewer bill reached $165,000.

The Davises, the Slones, and the Lawrences sued the defendants in federal court. As relevant here, they alleged that the defendants were state actors and were thus required by the United States Constitution to provide due

process before terminating water services or assessing the fees charged in these cases. They also alleged that the defendants' actions constituted trespass, deprivation of property rights, nuisance, and outrage in violation of Alabama law.

The cases were consolidated for trial. The jury found for the Davises and the Lawrences (but not the Slones) on the federal due process claims. The jury found for the Slones and the Lawrences (but not the Davises) on the state law deprivation of property rights claims. The jury found for the Slones and the Lawrences (but not the Davises) on the nuisance claims. The jury found for each couple on the trespass and outrage claims.

Although each individual spouse was a plaintiff in these actions, the verdict forms treated each married couple as a unit and instructed the jury to award damages to each married couple, not each spouse.

The Davises' awards were: $1 in nominal damages and $375,000 in punitive damages on their federal due process claim; $1 in nominal damages and $30,000 in punitive damages on their trespass claim; and $100,000 in compensatory damages and $1,000,000 in punitive damages on their outrage claim.

The Slones' awards were: $1 in nominal damages and $665,000 in punitive damages on their state law deprivation of property rights claim; $1 in nominal damages and $105,500 in punitive damages on their nuisance claim; $1 in nominal damages and $30,000 in

punitive damages on their trespass claim; and $100,000 in compensatory damages and $500,000 in punitive damages on their outrage claim.

The Lawrences' awards were: $1 in nominal damages and $450,000 in punitive damages on their federal due process claim; $1 in nominal damages and $702,000 in punitive damages on their state law deprivation of property rights claim; $1 in nominal damages and $55,500 in punitive damages on their nuisance claim; $1 in nominal damages and $30,000 in punitive damages on their trespass claim; and $100,000 in compensatory damages and $500,000 in punitive damages on their outrage claim.

Altogether, the jury awarded $300,009 in nominal and compensatory damages and $4,443,000 in punitive damages. The defendants sought judgment as a matter of law and remittitur. The district court denied those requests. The defendants timely appealed.

II.

We review *de novo* the denial of a motion for judgment as a matter of law. *St. Louis Condo. Ass'n, Inc. v. Rockhill Ins. Co.*, 5 F.4th 1235, 1242 (11th Cir. 2021). We view the trial record in the light most favorable to the jury's verdict. *Id.* We will reverse only if the facts and inferences drawn from those facts "point overwhelmingly" against the jury's verdict. *Action Marine, Inc. v. Cont'l Carbon Inc.*, 481 F.3d 1302, 1309 (11th Cir. 2007) (citation and internal quotation marks omitted).

A denial of a motion for remittitur is reviewed for abuse of discretion. *Goodloe v. Royal Caribbean Cruises, Ltd.*, 1 F.4th 1289, 1292 (11th Cir. 2021). A district court may abuse its discretion by applying the wrong legal standard, following improper procedures, basing its decision on clearly erroneous findings of fact, or applying the law incorrectly. *Loc. 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp.*, 762 F.3d 1248, 1253 (11th Cir. 2014).

III.

The defendants launch multiple attacks on the jury's liability verdicts. They ask that we overturn the jury's verdicts on the due process claims because the evidence was insufficient to establish that defendants were state actors and because, even if they were state actors, the plaintiffs were afforded constitutionally sufficient process. They challenge the jury's verdicts on the state law deprivation of property rights claims, asserting no such claim exists under Alabama law. Finally, they say the district court erred in submitting the outrage claim to the jury because the facts here are insufficient to meet the high bar set by the Supreme Court of Alabama's outrage precedents.[1]

---

1. The defendants also challenge on appeal the jury's liability verdicts as to the state law claims of nuisance and trespass. Those challenges are unpreserved, as the defendants did not raise the issues in their Rule 50(a) Motions for Judgment as a matter of law. *See* Sept. 1, 2021 Trial Tr. at 161:19-168:19 (no discussion of trespass or nuisance claims going to the jury); Sept. 2, 2021 Trial Tr. at 124:20-125:25 (contesting only the evidence in support of

Appendix A

A.

The district court was correct not to disturb the jury's liability verdicts with respect to plaintiffs' federal due process claims brought under 42 U.S.C. § 1983. The Due Process Clause provides, "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Supreme Court "consistently has held that 'some kind of hearing is required at some time before a person is finally deprived of his property interests.'" *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 16, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 557-58, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974)). Accordingly, the Supreme Court has made clear that due process requires an opportunity to contest potential overcharges before a public utility may terminate services. *Id.*

Here, the jury found that the Davises and the Lawrences suffered deprivations without first being afforded the opportunity to contest the accuracy of the defendants' accounts in violation of the Fourteenth Amendment. There was more than enough evidence in the trial record to support those findings. The Lawrences suffered water shutoffs because they had overdue balances on their account; the Davises had false fees assessed against them and their property, which

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mental anguish damages and punitive damages instructions with respect to the trespass claim and implicitly accepting submission of the nuisance charge to the jury). We address the defendants' preserved damages arguments related to those claims later in this opinion.

the defendants conceded during trial was sufficient to constitute a deprivation under the Due Process Clause, *see* Sept. 2, 2021 Trial Tr. at 130:14-132:6 (discussing jury instructions). And White's own testimony to the jury was that customers could contest fees only after paying them. *See id.* at 129:18-23; Sept. 1, 2021 Trial Tr. at 223:8-22. Nevertheless, the defendants make two arguments on appeal contesting their liability.

The defendants first argue that they cannot be liable under the Due Process Clause because that clause applies only to government employees or entities, which the defendants are not. True, the defendants are private persons and entities. But a private person or entity is deemed a part of the state when, as the jury found here, "public and private actors place[] themselves into a position of interdependence with each other such that they [are] each joint participants in violating the Plaintiffs' constitutional rights[.]" Jury Instructions at 7; *see also Willis v. Univ. Health Servs., Inc.*, 993 F.2d 837, 840 (11th Cir. 1993). Given the connections between the public and private actors here—e.g., the public corporation's encouragement for and ratification of the defendants' collection policies and efforts, as well as the public corporation's anticipated financial benefit from those efforts—the jury was entitled to find that the defendants were public actors here. *See generally Blum v. Yaretsky*, 457 U.S. 991, 1004-05, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982) (setting out the nexus/joint action test); *Focus on the Fam. v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1278 (11th Cir. 2003) (same).

The defendants next contend that, notwithstanding the absence of pre-deprivation procedures, there were post-deprivation opportunities for plaintiffs to contest their fees and correct their accounts. Specifically, the defendants say that plaintiffs could (and should) have instituted arbitration proceedings pursuant to the service agreements or sued in state court under causes of action provided for by Alabama state property and tort law. To be sure, the Supreme Court has recognized that, in certain circumstances, post-deprivation process may be sufficient to satisfy the Due Process Clause. But such situations involve "random and unauthorized" action by government officials such that it would be "impossible" for the government to "predict" that the challenged action would occur and thus "impossible" to provide pre-deprivation process. *See Zinermon v. Burch*, 494 U.S. 113, 129, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990); *Hudson v. Palmer*, 468 U.S. 517, 532-33, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984). The deprivations here occurred pursuant to a preformulated policy. And there was evidence of pre-deprivation discussions and strategizing about what steps the defendants would take against the plaintiffs. Furthermore, even after the deprivations, the defendants did not allow any challenges to those actions until the fees had been paid in full. Nothing about the defendants' conduct in these cases was randomized or unpredictable.

B.

The district court was likewise correct not to upset the jury's verdicts on the state law claims of "deprivation of property rights" and the tort of outrage.

The defendants argue that Alabama state law does not recognize a "deprivation of property rights" claim. That argument is incorrect. Section 6-5-210 of the Alabama Code creates a "right of action" for "unlawful interference" with the property rights of any "owner of realty with title." Ala. Code § 6-5-210; *see also Willow Lake Residential Ass'n, Inc. v. Juliano*, 80 So. 3d 226, 247-48 (Ala. Civ. App. 2010). An owner "has the right to bring [an] action" under that provision. *Martin v. City of Linden*, 667 So. 2d 732, 736 (Ala. 1995). The defendants also argue that any such claim would be subsumed within the due process claim. They cite no authority for that proposition. And it certainly doesn't appear that the jury considered the claims to be identical, as it ruled for the Davises on due process but against them on deprivation of property rights, and it ruled for the Slones on deprivation of property rights but against them on due process. Those rulings are not inconsistent because the two claims are not the same. They targeted different harms and conduct. *See* Jury Instructions at 6, 12-13.

As for the tort of outrage claim, the defendants say the tort is extremely narrow and that by submitting the claim to the jury on these facts, a federal district court inappropriately expanded state tort common law. We disagree. The facts here are sufficiently analogous to the Supreme Court of Alabama's outrage precedents (and our previous interpretations of those precedents) to have warranted submission to the jury. *See T.R. by and through Brock v. Lamar Cnty. Bd. of Educ.*, 25 F.4th 877, 890-91 (11th Cir. 2022) (noting that the tort of outrage is not limited to the precise "scenarios where the Alabama Supreme Court has found outrage before").

One line of the Supreme Court of Alabama's outrage precedents concerns bad faith and abusive tactics to coerce settlements of insurance disputes. The critical fact in those cases is whether the defendant resorted to such tactics with the intent to cause the plaintiff severe emotional distress and essentially force the plaintiff to settle. *See ITT Specialty Risk Servs., Inc. v. Barr*, 842 So. 2d 638 (Ala. 2002); *Cont'l Cas. Ins. v. McDonald*, 567 So. 2d 1208 (Ala. 1990); *Nat'l Sec. Fire & Cas. Co. v. Bowen*, 447 So. 2d 133 (Ala. 1983). If so, the tort of outrage may be available, so long as the conduct to which the defendant resorted is sufficiently egregious.

Plaintiffs' claims here satisfy the Supreme Court of Alabama's standard for the tort of outrage. As the district court noted when deciding to submit the outrage claims to the jury, the evidence would "clearly" allow for the conclusion that the defendants' conduct—imposing significant false fines and fees, refusing to accept partial payment, declining to entertain disputes to those charges without full payment, taking out liens on plaintiffs' homes, filing criminal charges, and terminating access to the basic human need of water—was intentionally designed to (and did in fact) inflict emotional distress so severe that no reasonable person could be expected to endure it. *See* Sept. 2, 2021 Trial Tr. at 126:1-129:11, 132:16-134:8.

IV.

The defendants also contest the jury's damages awards. The defendants first argue that punitive damages should not have been allowed at all on several of the claims.

And even if punitive damages were appropriate in general, defendants contend that the awards here were unlawfully excessive.

A.

The defendants argue that the district court should not have allowed the jury to award punitive damages on the due process, trespass, and nuisance claims. We disagree. "[A] jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983). Alabama law provides for punitive damages on trespass claims when the trespass was "intentionally and purposefully committed" in "known violation of the owner's . . . right to the possession" and without lawful excuse. *Foust v. Kinney*, 202 Ala. 392, 80 So. 474, 475 (Ala. 1918). Punitive damages may be awarded for nuisances that are "wanton" or "attended by circumstances of aggravation." *Seale v. Pearson*, 736 So. 2d 1108, 1113 (Ala. Civ. App. 1999) (citation and internal quotation marks omitted).

To state those legal standards is to resolve the issues. As already noted, there was sufficient evidence for the jury to find that the defendants' insufficient procedures were intentional, designed to harm customers, and calculated to force them to pay erroneously imposed charges. The evidence was also sufficient for the jury to find that the defendants' agents entered plaintiffs' properties without

notice, which was required by the very standards the defendants themselves authored. Punitive damages were thus appropriate for the due process and trespass claims. And the jury was certainly entitled to find that the defendants wantonly interfered with plaintiffs' enjoyment of their property by terminating essential services and hanging the threat of foreclosure over plaintiffs' heads, such that punitive damages were also appropriate on the nuisance claims.

B.

The defendants next attack the amounts of the punitive damages awards. These attacks take three forms: (1) some of the awards overlap and are therefore unlawful double recoveries; (2) even if there is no overlap, some of the awards are excessive under the federal or state constitutions; and (3) even if there are no constitutional problems, some of the awards exceed an Alabama statutory cap. We address each issue in turn.

1.

Invoking the general rule against double recoveries, the defendants ask us to zero out the punitive damages awards on some of the claims. They say that only one of the awards on the trespass and nuisance claims can remain in effect because those two awards are predicated on the same fact—that defendants' agents entered plaintiffs' properties without consent or any other legal justification. The defendants make the same argument with respect to the awards for the state law deprivation of property rights

claim and the Fourteenth Amendment due process claim: Both claims are based on deprivations of property and thus the awards completely overlap.

The defendants' double recovery concerns are unfounded. The jury's punitive damages awards are each linked to claims that protect distinct legal rights and interests. As we have already explained, the state law deprivation of property rights claims and the Fourteenth Amendment due process claims are not the same. Neither are the trespass and nuisance claims. The "same conduct" will "often" give rise to liability for both because trespass and nuisance are "separate torts for the protection of different interests." *Borland v. Sanders Lead Co.*, 369 So. 2d 523, 527 (Ala. 1979). The mere fact that defendants simultaneously violated numerous legal rights and interests does not create a double recovery issue. *See id.*; *cf. Johns v. A.T. Stephens Enters. Inc.*, 815 So. 2d 511, 517 (Ala. 2011) ("[A] single transaction can support an award of damages for both breach of contract and fraud when there is sufficient evidence in the record to support each claim and each award.").

2.

Next, the federal and state constitutional arguments. Both the Supreme Court of the United States and the Supreme Court of Alabama have enumerated multi-factor tests to assess the constitutionality of punitive damages awards. *See State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134

L. Ed. 2d 809 (1996); *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989); *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986). Here, the pertinent factors are "the degree of reprehensibility" of the defendants' conduct and "the disparity between the harm or potential harm suffered by" the plaintiffs and the awards of punitive damages. *Gore*, 517 U.S. at 574-75; *Green Oil Co.*, 539 So. 2d at 223.

a.

In assessing the constitutionality of any punitive damages award, the reprehensibility of the defendant's conduct is the "most important" consideration. *State Farm*, 538 U.S. at 419 (citation omitted); *Pensacola Motor Sales, Inc. v. Daphne Auto., LLC*, 155 So. 3d 930, 949 (Ala. 2013). By awarding punitive damages, the jury necessarily found that defendants acted "with malice, oppression, fraud and/or suppression." Jury Instructions at 18. Such findings are hardly surprising in light of the evidence that the defendants imposed hefty false charges, refused partial payments, ignored any attempts to dispute the false charges without full payment, placed liens on plaintiffs' homes, and instituted criminal process against them. And all of that was of course in addition to the fact that the defendants unjustifiably deprived the Slones and Lawrences of water, the most basic of human needs. The reprehensibility factor thus weighs heavily in favor of upholding the jury's punitive damages awards here.

b.

The defendants next say that the disparity between the harm the plaintiffs suffered and the punitive damages awards renders the latter excessive. Recall that the jury awarded compensatory damages only on the outrage claims. For every other claim upon which the plaintiffs succeeded, the jury awarded $1 in nominal damages and then imposed anywhere from $30,000 to $702,000 in punitive damages. The defendants argue that any punitive damages award that is more than four times the compensatory damages awarded violates the United States Constitution and that any punitive damages award that is more than three times the compensatory damages awarded violates the Alabama Constitution. *See State Farm*, 538 U.S. at 425 ("[A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety."); *S. Pine Elec. Coop. v. Burch*, 878 So. 2d 1120, 1128 (Ala. 2003) ("A ratio of 3:1 is presumptively reasonable." (citation and internal quotation marks omitted)).

The defendants' mechanical application of ratios is misguided. Those numbers are "guideposts," not ironclad rules. *See Gore*, 517 U.S. at 574, 582-583. And the compensatory-to-punitive analysis is especially unhelpful when the plaintiff suffered little economic harm or was awarded only nominal damages. In such cases, adherence to a strict compensatory-to-punitive test would undermine the imposition of punitive damages as an exercise of the federal and state governments' authority to "punish[] unlawful conduct and deter[] its repetition." *Gore*, 517

U.S. at 568, 582-83; *see State Farm*, 538 U.S. at 425. Accordingly, "several of our sister courts have held that the single-digit ratio analysis does not apply to punitive awards accompanying nominal damages," *Jester v. Hutt*, 937 F.3d 233, 242 (3d Cir. 2019) (collecting cases), or to cases in which "a jury only awards . . . a small amount of compensatory damages," *Saunders v. Branch Banking & Tr. Co. of Va.*, 526 F.3d 142, 154 (4th Cir. 2008) (collecting cases).

None of that is to say a jury's punitive damages award can be entirely untethered from a defendant's conduct. It just means that, when a jury does not award compensatory damages or otherwise make a finding of some actual harm, we need a different starting point for our analysis. Because the point of punitive damages is to punish past misconduct and deter similar misconduct in the future, we think it important to consider what the defendant stood to gain and what harm the plaintiffs could have suffered. Those considerations will better enable us to determine whether the punitive damages awards here are reasonable punishment and deterrence measures. *See Gore*, 517 U.S. at 581 n.34; *Mobile Infirmary Med. Ctr. v. Hodgen*, 884 So. 2d 801, 816-18 (Ala. 2003).

Had the defendants' process played out as intended, they stood to gain hundreds of thousands of dollars in false service charges and unjustified fees and expenses. The defendants would have received that money either directly from the plaintiffs or by enforcing the liens placed on the plaintiffs' homes and compelling foreclosure

proceedings. Correspondingly, the plaintiffs stood to lose hundreds of thousands of dollars—either in cash, home equity, or both—and would have suffered the severe emotional distress that goes along with such significant and unjustified losses. Their freedom was also in jeopardy, as the defendants were pursuing criminal charges. Any "shock" from the "disparity between the punitive award[s] and the compensatory award[s]" therefore "dissipates when one considers the potential loss to [the plaintiffs] . . . had [the defendants] succeeded in [their] illicit scheme." *Gore*, 517 U.S. at 581 n.34 (quoting *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 462, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993)). The punitive damages awarded here are reasonable both to punish defendants and to deter them and others from committing similar torts.

3.

The defendants also contend that many of the punitive damages awards for the state law claims are excessive under Alabama statutory law. An Alabama statute provides that "no award of punitive damages shall exceed three times the compensatory damages of the party claiming punitive damages or five hundred thousand dollars ($500,000), whichever is greater." Ala. Code § 6-11-21(a). The $500,000 cap is adjusted for inflation. *See id.* § 6-11-21(f).

The district court concluded that this statute did not apply because "no Plaintiff received more than $500,000 in

punitive damages per claim from any Defendant[.]"[2] The district court's analysis treats each spouse as an individual plaintiff, splits the punitive damages award down the middle between each, and then uses each spouse's half as the relevant number for purposes of determining the statute's applicability. So, with the Davises' tort of outrage award, for example, the district court was saying that the jury's $100,000 compensatory damage award and $1,000,000 punitive damage award breaks down into $50,000 in compensatory damages each for Lindsay Davis and Benjamin Davis, as well as $500,000 in punitive damages each for Lindsay and Benjamin. Put another way, what looks like one punitive damages award of $1,000,000 is, to the district court, really two $500,000 awards, one to each spouse as an individual party.

We disagree with the district court. The statute imposes the higher of two potential caps on an "award": (1) "three times the compensatory damages of the party claiming punitive damages" or (2) "five hundred thousand dollars ($500,000)." Ala. Code § 6-11-21(a). We believe the correct way to implement the $500,000 cap (as opposed to the three times compensatory damages cap) is to look at the amount of each punitive damages award on the verdict form. The award is either below the cap or above the cap. It's as simple as that.

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2. The defendants also argue that a separate damages cap, applicable to "small businesses," requires reducing the punitive damages awards. *See* Ala. Code § 6-11-21(b)-(c). The district court rejected that argument, and we find no clear error in its fact-intensive determination that the defendants were not small businesses under the statute.

The district court's recognition that each spouse is a separate party does not change the result. The higher of the two statutory caps for all the claims in these cases is the flat $500,000 cap. That is the only cap that matters for our purposes. Unlike the cap for "three times the compensatory damages of *the party* claiming punitive damages," the $500,000 cap is not evaluated on a per party basis. *Id.* (emphasis added). And the record makes clear that the "awards" here were to each couple as a unit. The jury instructions treated each married couple as a single unit, and for each claim, the jury entered a single award to each couple on the verdict form. Likewise, the district court's final judgments treated each married couple as having one "Fourteenth Amendment *Claim*," one "Trespass *Claim*," one "[Outrage] *Claim*," one "Private Nuisance *Claim*," and one "Deprivation of Property Rights *Claim*," with the full amount of each jury award given to the relevant married couple, not distributed in halves to each spouse. So the district court's decision to treat each couple as two separate parties for purposes of remittitur was irrelevant—either way, there is still only one "award" on each claim to assess against the $500,000 cap.

For their part, the defendants ask that we "aggregate" each married couple's punitive damages from the trespass, private nuisance, and deprivation of property rights claims and then impose the cap to that number. Using the Slones as an example, the defendants would have us bundle the $30,000 trespass award, the $105,000 nuisance award, and the $665,000 deprivation of property rights award and allow the Slones to receive only $500,000 to cover those

three claims. The defendants support that consolidation request by stating that the "statutory cap applies to each 'occurrence,'" and "Alabama courts have held that all injuries that stem from a single proximate cause are the result of a single 'occurrence.'" They further contend that the trespass, nuisance, and deprivation of property rights claims "are all based on a single event in which [the defendants'] agent entered upon the [plaintiffs'] land and turned off their water supply[.]"

The defendants' argument is based on an irrelevant provision of the statute and a misreading of the jury's verdicts. That is, they cite "occurrence" language in Alabama Code Section 6-11-21(c), which defines a "[s]mall business" as one "having a net worth of two million dollars ($2,000,000) or less at the time of the occurrence made the basis of the suit." That statutory provision is not the one we are applying. Adding to the irrelevance of that particular argument, the defendants' support for the definition of "occurrence" is an insurance coverage dispute case that pre-dates the punitive damages statute by about fifteen years. *See Home Indem. Co. v. Anders*, 459 So. 2d 836 (Ala. 1984). And to round things out, the defendants are simply incorrect that the trespass, nuisance, and deprivation of property rights claims all arose from the same event. The jury instructions allowed (and in some instances required) the jury to base its verdicts for each claim on different facts. *See* Jury Instructions at 9-13.

In short, because there is no argument that the higher cap is three times the compensatory damages of the party seeking punitive damages, Alabama law requires that

each award of punitive damages be capped at $500,000, adjusted for inflation. That means that each award arising from a state law claim must be assessed for whether it is above that cap. The three $30,000 punitive damages awards arising from the trespass claims are clearly permissible. As are the Slones' $105,500 nuisance award and the Lawrences' $55,500 nuisance award. So too for the Slones' and Lawrences' $500,000 outrage awards. But the Slones' $665,000 award for deprivation of property rights, the Lawrences' $702,000 award for deprivation of property rights, and the Davises' $1,000,000 award for outrage are in excess of $500,000.

Because the $500,000 punitive damages cap adjusts for inflation, *see* Ala. Code. § 6-11-21(f), we cannot implement the cap ourselves in the first instance. On remand, the district court should reconsider the applicability of Alabama's statutory punitive damages cap to any award that is nominally over $500,000. Specifically, it should determine whether any are above an inflation-adjusted punitive damages cap and, if so, then it should remit them to that inflation-adjusted amount.

V.

The judgment of the district court is **AFFIRMED in part and REVERSED in part**. These cases are **REMANDED** for further proceedings.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JUNE 20, 2024

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-12913

LINDSAY DAVIS, BENJAMIN DAVIS,

Plaintiffs-Appellees,

versus

J. MICHAEL WHITE, ECO-PRESERVATION SERVICES L.L.C., SERMA HOLDINGS LLC, BUILDER1.COM LLC,

Defendants-Appellants,

AKETA MANAGMENT GROUP, et al.,

Defendants.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 7:17-cv-01533-LSC

Appendix B

No. 22-12915

NICOLE SLONE, JONATHAN SLONE,

Plaintiffs-Appellees,

versus

J. MICHAEL WHITE, ECO-PRESERVATION SERVICES L.L.C., SERMA HOLDINGS LLC, BUILDER1.COM LLC,

Defendants-Appellants,

AKETA MANAGMENT GROUP, et al.,

Defendants.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 7:17-cv-01534-LSC

Appendix B

No. 22-12916

MONICA LAWRENCE, JOHN LAWRENCE, JR.,

Plaintiffs-Appellees,

versus

J. MICHAEL WHITE, ECO-PRESERVATION SERVICES L.L.C., SERMA HOLDINGS LLC, BUILDER1.COM LLC,

Defendants-Appellants,

AKETA MANAGMENT GROUP, et al.,

Defendants.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 7:17-cv-01535-LSC

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: June 20, 2024

For the Court: David J. Smith, Clerk of Court

APPENDIX C — MEMORANDUM OF OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, FILED AUGUST 3, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

No. 7:17-cv-01533-LSC

LINDSAY DAVIS, BENJAMIN DAVIS,

Plaintiffs,

v.

J. MICHAEL WHITE, *et al.*,

Defendants.

No. 7:17-cv-01534-LSC

NICOLE SLONE AND JONATHAN SLONE,

Plaintiffs,

v.

J. MICHAEL WHITE, *et al.*,

Defendants.

Appendix C

No. 7:17-cv-01535-LSC

MONICA LAWRENCE AND JOHN LAWRENCE,

Plaintiffs,

v.

J. MICHAEL WHITE, *et al.*,

Defendants.

Filed August 3, 2022

MEMORANDUM OF OPINION AND ORDER

Before the Court is Defendants' Motion for Remittitur in the combined cases, consisting of the Davis, Sloane, and Lawrence Plaintiffs. Defendants submitted a Motion for Remittitur on May 5, 2022, and Plaintiffs submitted their responses on May 13, 2022. (Doc. 231 and Doc. 234). Upon consideration, and for the reasons set forth herein, the motion is due to be denied.

I. STANDARD OF REVIEW

In the Eleventh Circuit, a court may order remittitur and reduce the punitive damages awarded by the jury. The remedy for a damages award that is "outside the bounds of evidence is for the 'district court [to] reduce the award to the maximum amount established by the evidence.'" *Hicks v. City of Tuscaloosa*, 2016 WL 1180119, at *7 (N.D. Ala.,

2016) (quoting *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1268 (11th Cir. 2008); *Sand v. Kawasaki Motors Corp. U.S.A.*, 513 Fed. Appx. 847, 855 (11th Cir. 2013) ("In general, a remittitur order reducing a jury's award to the outer limit of the proof is the appropriate remedy where the jury's damage award exceeds the amount established by the evidence.") (quoting *Goldstein v. Manhattan Industries, Inc.*, 758 F.2d 1435, 1448 (11th Cir. 1985)). Therefore, if legal error is detected in an award of damages, a court may opt for remittitur to remedy instead of granting a new trial.

II. ANALYSIS

The punitive damages for each claim that Defendants address in their Motion are as follows. The Sloane Plaintiffs were awarded $1.00 in nominal damages and $30,000.00 in punitive damages on their Trespass claim; $1.00 in nominal damages and $105,500.00 in punitive damages on their Private Nuisance claim; $1.00 in nominal damages and $665,000.00 in punitive damages on their Deprivation of property rights claim; and $100,000.00 in compensatory damages and $500,000.00 in punitive damages on their Outrage claim. The jury awarded the Davis Plaintiffs $1.00 in nominal damages and $375,000.00 in punitive damages on their §1983 claim; $1.00 in nominal damages and $30,000.00 on their Trespass claim; and $100,000 in compensatory damages and $1,000,000.00 in punitive damages on their Outrage claim. The jury awarded the Lawrence Plaintiffs $1.00 in nominal damages and $450,000.00 in punitive damages on their §1983 claim; $1.00 in nominal damages and $30,000.00

on their Trespass claim; $1.00 in nominal damages and $5,500.00 in punitive damages for their Private Nuisance claim: $1.00 in nominal damages and $702,000.00 in punitive damages on their Deprivation of Property Rights claim; and $100,000.00 in compensatory damages and $500,000.00 in punitive damages on their Outrage claim.

There are three issues for the Court to determine: (1) whether the punitive damages for the federal claims are excessive under the *Gore* and *State Farm* factors; (2) whether the punitive damages for the state law claims are excessive under both *Gore/State Farm* and the *Hammond/Green Oil* factors; and (3) whether Defendants' businesses are small businesses under Ala. Code § 6-11-21(c).

A. Punitive Damages Under Federal Law

Excessive punitive damage awards against a tortfeasor for violations of state law violate the Due Process Clause under the Fourteenth Amendment and excessive punitive damages for violations of federal law violate the Due Process Clause under the Fifth Amendment. When considering the amount of punitive damages, the Supreme Court's factors in *Gore* and *State Farm* apply. Those factors examine: (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. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003). Because all federal and state claims arise from the

same actions by Defendants, the Court will analyze the factors for all claims together when appropriate.

1. Degree of Reprehensibility

The first factor, reprehensibility, is the most important factor when determining if the amount of punitive damages violated due process concerns. *BMW of North America v. Gore*, 517 U.S. 559 (1996). Here, Defendants ask this Court to interpret such a requirement very narrowly, asking for a showing of "intentional malice, trickery, [or] deceit." (Doc. 199.) Defendants also state that due to the lack of multiple incidents per Plaintiff, Defendants' actions are not reprehensible. The Court disagrees. The 11th Circuit recognizes a broader definition of reprehensibility, considering factors such as whether the conduct evinced an indifference to or a reckless disregard for the health or safety of others, as well as whether the target of the conduct was financially vulnerable. *Goldsmith v. Baby Elevator Co., Inc.*, 513 F.3d 1261, 1283 (11th Cir. 2008).

Defendants' actions were nothing but reprehensible. Defendants' actions had serious, lingering effects on Plaintiffs. Defendants' actions prevented Plaintiffs from accessing essential utilities without regard for Plaintiffs' due process rights. Defendants cut off Plaintiffs' utilities to strong arm payment of clearly invalid charges. Defendants insisted on ignoring partial payments and accruing an excessive sum. And Defendants threatened foreclosure and criminal prosecution if Plaintiffs did not pay the unsupportable and excessive fees. As a result, Plaintiffs suffered serious harm. Considering the amount

of the invalid charges levied by the defendants and the financial position of Plaintiffs, Defendants' suggestion that this conduct did not affect financially vulnerable targets is clearly misplaced. The factors in *Goldsmith* regarding reprehensibility confirm the punitive damages are not excessive.

2. Proportionality

a) Proportionality of Federal Claims

When determining whether an award of damages is excessive, the court should also look to the proportionality of the awarded damages to the amount of harm. *Gore*, 517 U.S., at 575. When making this comparison, the Court should compare the amount of awarded damages to the actual harm that has occurred, not necessarily compare the awarded compensatory damages to the amount of awarded punitive damages. *SE Prop. Holdings, LLC v. Judkins*, 822 F. App'x 929, 937 (11th Cir. 2020). For the 1983 claims, this analysis is the most rational approach, even though Defendants ask the Court to compare the punitive damages to the awarded *nominal damages.* Such comparison results in a ratio of 375,000:1 and 450,000:1 for each Defendant. (Doc. 231). That approach misconstrues the *Gore* factor. The 11th Circuit has not *specifically* addressed whether the Court should compare punitive damages to nominal damages like Defendants propose. However, in *Kemp*, the 11th Circuit allowed a 23:1 ratio to stand, stating that a court should not rigidly rely on the ratio when reliance on the ratio would subvert traditional purposes of punitive damages. *Kemp v. Am. Tel. & Tel.*

Co., 393 F.3d 1354, 1364-65 (11th Cir. 2004). Further, sound logic and the disapproval of Defendants' theory in Alabama state courts as well as the 2nd, 3rd, 4th, 5th, 6th, and 9th Circuits suggests that Defendant's argument is misplaced. *Tanner v. Ebbole*, 88 So. 3d 856, 876 (Ala. Civ. App. 2011); *Patterson v. Balsamico*, 440 F.3d 104, 121 (2d Cir. 2006); *Jester v. Hutt*, 937 F.3d 233, 242 (3d Cir. 2019); *Saunders v. Branch Banking and Tr. Co. Of VA*, 526 F.3d 142 (4th Cir. 2008); *Williams v. Kaufman Cnty.*, 352 F.3d 994 (5th Cir. 2003); *Romanski v. Detroit Ent., L.L.C.*, 428 F.3d 629 (6th Cir. 2005); *Arizona v. ASARCO LLC*, 773 F.3d 1050 (9th Cir. 2014).

As the *Gore* and *Judkins* courts discussed, a better measurement would be the actual harm suffered by Plaintiffs. Here, when compared to the amount that Defendants claimed Davis and Lawrence owed, the ratio becomes a multiple of 2.82 for the Davises ($133,085.68 to $375,000) and 2.72 for the Lawrences ($165,502.94 to $450,000), both of which are well within the *Gore* guideposts. (Doc 208). As Plaintiffs point out, the excessive charges and collection tactics form the basis of the suit, both of which resulted in the 1983 claims. (*Id.*) Regardless of how one measures the actual harm suffered by Plaintiffs, the Court finds that the punitive damages are proportional.

b) Proportionality of State Law Claims

All punitive damages awarded for Plaintiffs' state law claims are proportional. For the Outrage claims, the only claim where compensatory damages were awarded,

the compensatory-punitive damages were 10:1 for the Davises and 5:1 for the Slones and Lawrences. Defendant concedes that the ratios for the Outrage claims are not grossly disproportionate. (Doc. 231 at 4 n. 1 ("The ratios range in grossly disproportionate numbers in all claims with the exception of the Outrage claim. . . .").)

For Plaintiffs' Trespass, Private Nuisance, and Deprivation of Property Right claims, Defendants argue that the punitive damages were grossly disproportionate because the jury only awarded $1 in nominal damages. For the reasons discussed above as to the federal law claims, the Court finds the punitive damages awarded for the state law claims to be proportional. When looking at the amount Defendants alleged each Plaintiff owed and the reprehensible actions of Defendants, the amount given for each claim to each plaintiff is proportional for the state law claims.

3. Comparing Civil Penalties

The third factor instructs the Court to analyze the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. Here, Plaintiff concedes that there is no law providing for the imposition of civil or criminal penalties for the conduct at issue. As a result, this factor seems to weigh in favor of Defendants. However, the circumstances of this case are unique. Here, Defendants positioned themselves in the roll of a government entity—except a government entity would be regulated by ordinances or statutes and thus prevented from imposing

clearly outrageous rates and fees. A government regulated utility would also be required to provide Plaintiffs due process. Instead, Defendants utilized unbridled authority to ravage the Plaintiffs, stripping them of basic rights with no due process. There is no comparable civil or criminal penalty because most, if not all, other utility companies would be prevented from acting in such a manner. These Defendants' actions were completely unchecked, and as such, this factor does not signal for a reduction in the jury's award of damages.

Even if this factor favored a reduction, one factor weighing in favor of a reduction when the other factors weigh against it is not enough to overturn the jury's award of punitive damages. There is no reason to reduce the punitive damages.

B. Punitive Damages Under Alabama Law

Alabama caps punitive damages at the greater of either three times compensatory damages or five hundred thousand dollars. Ala. Code § 6-11-21(a). Here, no Plaintiff received more than $500,000 in punitive damages per claim from any Defendant; therefore, § 6-11-21(a)'s cap does not apply.

Further, under Alabama law, when determining whether the punitive damages for the state law claims are excessive, the Court looks to the *Gore* guideposts, and the guidelines set out in *Hammond v. City of Gadsden* and *Green Oil v. Hornsby.* Under Alabama law, the Court looks to the following factors when determining if punitive

damages are excessive: (1) the "reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually occurred"; (2) "the degree of reprehensibility of the defendant's conduct . . . including the duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or 'cover-up' of that hazard, and the existence and frequency of similar past conduct" (3) if the wrongful conduct was profitable to the defendant; (4) the financial position of the defendant; (5) the cost of litigation; (6) if criminal sanctions have been imposed; and (7) if there have been other civil actions against the same defendant based on the same conduct." *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 224 (Ala. 1989). In addition, Courts may also look to: the nature and the extent of any effort the defendant made to remedy the wrong and the opportunity or lack of opportunity plaintiff gave the defendant to remedy the wrong complained of (Ala. Code § 6-11-23(b)); the desirability of discouraging others from similar conduct; and the impact on innocent third parties. *Am. Emps. Ins. Co. v. S. Seeding Servs., Inc.*, 931 F.2d 1453, 1457 (11th Cir. 1991) Here, each claim results from Defendants' actions of going onto Plaintiffs' property and turning off utility services, with minimal difference between each specific incident. As such, all of Plaintiffs' claims are analyzed together.

1. Harm from Defendants' Conduct

Weighing against Defendants is the relationship between the harm that occurred from Defendants' conduct and the punitive damages. Here, Defendants' conduct

aimed to force Plaintiffs into having no choice but to comply with the excessive charges of Defendants or else be denied necessary utilities. Defendants also threatened criminal prosecution or foreclosure if Plaintiffs did not comply with Defendants' charges. Plaintiffs had no real choice given those two options. The harm to Plaintiffs resulting from either criminal prosecution or foreclosure greatly exceeds the amount of punitive damages Defendants would currently pay.

Further, Defendants also offer a similar argument regarding the proportionality of the punitive damages to the amount in compensatory or nominal damages in the 1983 claims to show the awarded punitive damages are excessive. As discussed with the 1983 claims, when nominal damages are awarded, the proper ratio is between the harm caused to the plaintiffs and the punitive damages. Here, the ratio of the punitive damages is not excessive, as it aligns in a fair ratio with the actual harm suffered. Regarding the claim of outrage, in which Plaintiffs received compensatory damages, the highest ratio is 10:1. While 10:1 is on the higher end, this court has upheld such a ratio in prior cases. *Brim v. Midland Credit Management, Inc.*, 795 F. Supp. 2d 1255, 1264 (N.D. Ala. 2011). As such, the relationship between the amount of harm and the amount in punitive damages weighs against remittitur.

2. Reprehensibility

For the same reasons discussed when determining whether the punitive damages violated federal law,

the Court finds Defendants' actions tremendously reprehensible and worthy of the amount of punitive damages awarded.

3. Profitability

Because Defendants stood to profit based on their conduct also weighs against remittitur. Here, it is near impossible to imagine another reason why Defendants took the actions against the plaintiffs other than profit. Defendants sought to get some sort of compensation, either in the form of payments from Plaintiffs or, as threatened, by obtaining compensation through foreclosure or criminal proceedings. Once Defendants went onto Plaintiffs' property to turn off the utilities, Plaintiffs had no real choice other than to pay Defendants. Since there is no evidence that Defendants simply wanted to deprive Plaintiffs of utilities solely out of malice or hatred, profit is the only logical reason for their conduct.

4. Financial Position of Defendants

The strongest factor in favor of Defendants is the impact of the punitive damages on their financial position. Defendants point to the Alabama Supreme Court's language in *Green Oil*, which states that punitive damages should sting, not destroy. *Green Oil v. Hornsby*, 539 So.2d 218, 222 (Ala. 1989). Regardless of the calculation of the net worth of Defendants' businesses, the total punitive damages are currently $4,393,000. Such an award may, in fact, significantly hinder Defendants' ability to continue operating in their current state. Nevertheless, this factor

alone does not make the punitive damages worthy of remittitur.

5. Costs of Litigation

Regarding the 1983 claims, the Davis Plaintiffs have requested attorney fees of $191,300.83. (Doc. 182.) And the Lawrence Plaintiffs have requested $168,210.83. The Court does not find that this factor weighs in favor of Defendants. Defendants argue that the amount of fees is evidence of Plaintiffs attempting to profit from the litigation. The Court disagrees.

6. Criminal Sanctions

No criminal sanctions have been brought against Defendants. For the reasons stated when analyzing the *Gore* factors, the unique circumstances of this case make this factor less relevant.

7. Other Civil Actions

No other civil actions have been brought against Defendants. For the reasons stated when analyzing the *Gore* factors, the unique circumstances of this case make this factor less relevant.

8. Defendants' Attempt to Remedy Wrong

To show that Defendants' attempted to remedy the wrong, Defendants argue that they removed the liens placed on Plaintiffs' homes voluntarily "shortly

before the trial commenced," did not press any criminal charges against Plaintiffs who they contend tampered with the water shut-off mechanisms, and that "each set of Plaintiffs has received essentially free sewer services for approximately four years." This is not enough to show that Defendants' attempted to remedy the wrong. Defendants would not take any partial payments when Plaintiffs attempted to pay them. During the trial, evidence demonstrated that Plaintiffs attempted to make partial payments by submitting checks each month to Defendants for what would have been the standard sewer charges. Defendants through counsel, rejected those payments each month by returning them. Each time, Defendants, through counsel, informed Plaintiffs that the entire balance, including all Defendants contended was owed, had to be repaid. Each time, Defendants' previous counsel added interest as well the attorney's fees that Defendants had incurred up to that point defending the litigation to their already outrageously excessive balance. Such amount was then included as a lien on each of the plaintiffs' homes. This made Plaintiffs unable to sell their homes. Plaintiffs, who could not sell their homes because of the liens, became prisoners in their own homes without any recourse other than their suits. Plaintiffs' monthly sewer bills were only $92 per month. Plaintiffs' standard sewer charges over the four years, had Defendants not assessed outrageous fees, would have been approximately $4,416. Instead, as of May 3, 2021, Defendants claimed that over the four years: (1) the Davises owed $133,085.68; (2) the Lawrences owed $165,502.94; and (3) the Slones owed $179,614.00. Defendants did not attempt to remedy the wrong and this factor favors upholding the awarded punitive damages.

9. Impact on Innocent Third Parties

The impact the punitive damages may have on innocent third parties may favor Defendants. Defendants provide necessary utilities to a community. If this court sustains the award, Defendants may choose to raise rates and spread the loss to average citizens. However, the punitive damages given, as discussed below, will discourage Defendants from doing such conduct to other persons in the community. Allowing Defendants to continue their conduct by reducing the jury's award, thus making their conduct financially beneficial to Defendants, cuts against the purpose of such damages. As a result, this factor does not mandate remittitur.

10. Desire to Discourage Conduct

Finally, the desire to prevent others from engaging in similar conduct as Defendants weighs heavily against remittitur. Defendants state that this factor does not weigh against remittitur since utility companies will simply not change their current practices. (Doc 199.) However, the current verdict would clearly deter similarly situated private sewer companies from doing this in the future. (*Id.*) As it stands, the punitive damages, in this case, would deter companies from doing similar actions. Further, the speculation by Defendants that even if companies who engage in similar conduct get notice of the risk of punitive damages, the ruling will not dissuade companies is illogical. Therefore, the desirability to discourage others weighs against remittitur.

C. Defendants Are Not Small Businesses Under § 6-11-21(c)

"[I]n all civil actions where entitlement to punitive damages shall have been established under applicable law against a defendant who is a small business, no award of punitive damages shall exceed fifty thousand dollars ($50,000) or 10 percent of the business' net worth, whichever is greater." Ala. Code § 6-11-21(b). A "small business" means a "business having a net worth of two million dollars ($2,000,000) or less at the time of the occurrence made the basis of the suit." Ala. Code § 6-11-21(c).

Defendants state that under Ala. Code § 6-11-21(c), Defendants are a small business and are entitled to a cap on punitive damages. The dispute between Plaintiffs and Defendants regarding whether the statute should apply lies within the competing definitions of "net worth". Plaintiffs contend that net worth should be calculated by general accounting principles, a calculation given by Plaintiffs' expert, Don Woods. (Doc. 231 Ex. C). Woods's calculation shows that all Defendants' businesses exceed $2,000,000 in net worth. In contrast, Defendants contend that net worth should be calculated according to the definition given in Ala. 1975 § 40-14A-23(b), the Alabama Business Privilege and Corporation Shares Tax Act of 1999. Defendants provide a calculation through their expert, Ben Schillaci, that shows all Defendants' businesses are below $2,000,000. Therefore, to determine whether the cap on punitive damages applies, the Court must determine the appropriate definition of "net worth" within Ala. Code § 6-11-21(b).

Appendix C

1. The Definition of Net Worth in § 6-11-21(c)

"The fundamental rule of statutory construction is that this Court is to ascertain and effectuate the legislative intent as expressed in the statute. *League of Women Voters v. Renfro*, 292 Ala. 128, 290 So.2d 167 (1974). In this ascertainment, *we must look to the entire Act instead of isolated phrases or clauses; Opinion of the Justices*, 264 Ala. 176, 85 So.2d 391 (1956)." *Darks Dairy, Inc. v. Alabama Dairy Comm'n*, 367 So.2d 1378, 1380 (Ala.1979). Further, when discerning legislative intent, a Court must look to the language of the statute. *Ex parte Waddail*, 827 So.2d 789, 794 (Ala. 2001). If the language, giving it its plain and ordinary meaning, is unambiguous, there is no further need for the court to provide construction. *Id.*

Within § 6-11-21(c), there is no mathematical calculation to determine what net worth should mean. "Net worth" stands alone, inviting conflicting definitions from the parties and their respective experts. Defendants ask this Court to accept the definition of net worth in Ala. § 40-14A-23(b). There, the definition comes within the larger statutory text of the Alabama Business Privilege and Corporation Shares Tax Act of 1999. When determining privilege tax, net worth is "an amount equal to the sum, but not less than zero, of the capital accounts of the owners of the limited liability entity determined as of the first day of the taxable year of the entity" and includes "compensation, distributions or similar amounts paid or accrued to each direct or indirect partner or member to the extent the amounts exceed $500,000 with respect to

each partner or member in the determination period." Ala. Code § 40-14A-23. Plaintiffs ask the Court to adopt the definition of net worth according to generally accepted accounting principles like Ala. Code § 8-7A-10. Generally accepted account principals instruct the Court to find the difference between Defendants' fair market value of assets and liquidation value of liabilities.

If the Court were to follow Defendants' proposed calculation, the Court would reach a faulty result. Defendants' expert, Schillaci, contends that Builder1.com, LLC and SERMA Holdings, LLC would have a net worth of $694,000. Further, Schillaci contends that Eco-Preservation Services, LLC would have a maximum net worth of $793,000. Allowing Defendants to escape from paying punitive damages when their conduct was reprehensible only because the Court applies a definition of net worth found in the tax code is an absurd result and against the intent of the Alabama legislature.

Further, Defendants incorrectly state that § 40-14A-23(b) is the only other place in the Alabama Code where net worth is defined. For example, the term "net worth" is used in §§ 8-7A-10; 11-51-154; 40-2A-7; and 11-51-191. Each of those uses provides a definition more like Plaintiffs' definition than the definition proposed by Defendants found in § 40-14A-23(b), in that each require net worth to be calculated by generally accepted accounting principles, basing net worth on fair market value, or as shown by an entities latest financial statement.

Given that § 6-11-21(c) regards a punitive damage cap, not issues of privilege taxes, the definition of net

worth should be the most commonly accepted definition. Without direction by the Alabama legislature, a definition of net worth when calculating how much a company owes in privilege taxes is not the most commonly accepted definition. The legislature, when enacting § 6-11-21(c), could have incorporated the definition in § 40-14A-23(b). However, the legislature did not. Given the silence on the definition, §§ 8-7A-10; 11-51-154; 40-2A-7; and 11-51-191 offer other guidance contradicting § 40-14A-23(b). All the above Code sections state that net worth is calculated based on fair market value or in accordance with generally accepted accounting principles.

Further, the Northern District in *Wilson v. Gillis Advertising Co.*, 145 F.R.D. 578, 582 (N.D. Ala. 1993) suggests that, within the same code section, net worth should be defined under general accounting principles. The combination of the Code's alternate definitions of net worth, the Northern District's approval of a similar definition within the structure of Ala. Code § 6-11-23 and the illogical nature of extending a one-off definition within the Privilege and Corporation Shares Tax Act to apply to a punitive damages cap all lend themselves to applying generally accepted accounting principles.

Even Defendants' expert admits that he did not calculate the net worth of Defendants. (Doc. 227-2 at 43.) Plaintiffs' counsel asked Defendants' expert, "In this case, what did you do to determine net worth?" (*Id.*) Defendants' expert responds, "Well, I didn't determine net worth. . . . I came up with an estimated valuation." (*Id.*) The relevant statutes in Alabama do not look to the

valuation of the company. The statute looks to net worth. Therefore, the Court will base its opinion on whether Defendants are small businesses using Plaintiffs' expert who followed generally accepted accounting principles when determining Defendants' net worth.

Thus, if by Plaintiff 's expert's calculations Defendants' net worth is lower than $2,000,000, then the cap on punitive damages in § 6-11-21(c) will apply.

2. Defendants Are Not Small Businesses

Defendants filed a Motion to Strike stating that, even if the Court decides that Plaintiffs' definition of net worth is correct, the Court should not rely on Woods's calculations because they are based on the impermissible hearsay of Boozer Downs, attorney for the Town of Woodstock. This motion is due to be denied. Woods uses, against Defendants' assertions, multiple documents and figures to find Defendants' net worth.

When calculating his opinion, Woods' relied in part on the affidavit of Downs that states he had a conversation with Defendant Mike White where White verbally offered to sell the entire sewer system to the town of Woodstock Alabama for either $10 or $11 million. It also states that in 2009, White offered to sell the town just the sewer collection system for $3 Million. Woods incorporated Downs's statements when determining the value of the sewer system, a key component of the valuation of Defendants' businesses. While Down's affidavit may not be admissible, there is no rule of evidence nor case law to prevent Woods from incorporating the affidavit into

his analysis of the net worth of Defendants' businesses. It is reasonable for an accountant to rely on the value Defendant White would be willing to sewer collection system when determining fair market value of the asset. Plaintiff does not aim to introduce Downs' affidavit into evidence, nor does Woods solely use Downs's affidavit to calculate net worth. Along with tax returns and other exhibits, Woods uses the affidavit to obtain a reasonable figure for the sewer system Defendants own. Therefore, as Woods's calculation follows the appropriate calculation of net worth, and the evidence used to calculate the net worth against Defendants' assertions is appropriate, his calculation is the correct formulation.

a) Defendant SERMA Holdings, LLC & Builder1.com, LLC

Builder1.com, LLC is part of SERMA. Thus, both parties analyzed SERMA Holdings, LLC only. The report of Woods states the appropriately calculated net worth of SERMA Holdings. In 2017, at the time of the occurrence, the net worth of SERMA Holdings LLC was above $2,000,000. (Doc. 231 Ex. C). Further, since 2017, SERMA's net worth has never been below $2,000,000. (*Id.*) Therefore, SERMA Holdings is not a small business under § 6-11-21(c).

b) Defendant Eco-Preservation Services LLC

The report of Woods states the appropriate and accurate net worth of Eco-Preservation Services. At the

time of the occurrence, the net worth of Eco-Preservation Services LLC was above $2,000,000. (Doc. 231 Ex. C). Further, since 2017, Eco-Preservation Services' net worth has never been below $2,000,000. (*Id.*) Therefore, Eco-Preservation Services is not a small business under § 6-11-21(c).

Since none of Defendants' businesses are below $2,000,000 in net worth, the businesses are not subject to the cap on punitive damages in § 6-11-21(c). Further, Defendants' arguments regarding the definition of "occurrence" are irrelevant since Defendants would need to be subject to the cap on punitive damages to dispute such an issue.

III. CONCLUSION

Given that neither the *Gore* factors nor *Hammond/Green Oil* factors weigh in favor of remittitur, the Court sustains the award of punitive damages against Defendants. Further, as to Defendants SERMA, Builder1, and Eco-Preservation LLC, the small business cap § 6-11-21(c) does not bar the current amount in punitive damages. Defendants' net worth exceeds $2,000,000 under the appropriate calculation, and Defendants are not small businesses.

Defendants' Motion for Remittitur and Motion to Strike is **DENIED**. The case is **ORDERED** to remain closed.

Appendix C

DONE and **ORDERED** on August 3, 2022.

/s/
L. Scott Coogler
United States District Judge

APPENDIX D — MEMORANDUM OF OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, WESTERN DIVISION FILED JULY 28, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

No. 7:17-cv-01533-LSC

LINDSAY DAVIS, BENJAMIN DAVIS, *et al.*,

Plaintiffs,

v.

J. MICHAEL WHITE, *et al.*,

Defendants.

No. 7:17-cv-01534-LSC

NICOLE SLONE AND JONATHAN SLONE, *et al.*,

Plaintiffs,

v.

J. MICHAEL WHITE, *et al.*,

Defendants.

Appendix D

No. 7:17-cv-01535-LSC

MONICA LAWRENCE AND JOHN LAWRENCE, *et al.*,

Plaintiffs,

v.

J. MICHAEL WHITE, *et al.*,

Defendants.

Filed July 28, 2022

MEMORANDUM OF OPINION AND ORDER

On August 14, 2020, the Court entered a final judgment against Defendants J. Michael White, SERMA Holdings, LLC, ECO Preservation Systems, and Builder1.com ("Defendants"). In the three cases consolidated for trial, the jury awarded a total of $4,693,000.00 to Plaintiffs Lindsay and Benjamin Davis, Nicole and Jonathon Slone, and Monica and John Lawrence ("Plaintiffs"). Before the Court is Defendants' Motion for Judgment as a Matter of Law and Defendants' Motion to Alter, Amend, or Vacate Judgments or, in the alternative, Motion for a New Trial. (Doc. 199). All motions are due to be denied.

Following a jury verdict, a party may file a renewed motion for judgment as a matter of law. Fed R. Civ. P. 50(b). Because a Rule 50(b) motion is a "renewed" motion, the party filing it must have previously moved the court for

judgment as a matter of law under Rule 50(a). *Shannon v. BellSouth Telecomms., Inc.*, 292 F.3d 712, 717 n. 3 (11th Cir. 2002). Furthermore, if "a party asserts new grounds in its renewed motion for judgment as a matter of law that it did not assert in its initial motion for judgment as a matter of law, a court 'may not rely on the new grounds to set aside the jury's verdict.'" *Id.* (quoting *Ross v. Rhodes Furniture Inc.*, 146 F.3d 1286, 1289 (11th Cir. 1998)). In ruling on a renewed motion for judgment as a matter of law, a court may: "(1) allow judgment on the verdict, if the jury returned a verdict; (2) order a new trial; or (3) direct the entry of judgment as a matter of law." Fed. R. Civ. P. 50(b).

Additionally, the 11th Circuit has held that "in ruling on a party's renewed motion under Rule 50(b) … a court's sole consideration of the jury verdict is to assess whether that verdict is supported by sufficient evidence." *Chaney v. City of Orlando*, 483 F.3d 1221, 1227 (11th Cir. 2007) (citing *Lipphardt v. Durango Steakhouse of Brandon*, Inc., 267 F.3d 1183, 1186 (11th Cir. 2001)). However, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1193 (11th Cir. 2004) (citing *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000)). So, "[t]he jury's verdict must stand unless 'there is no legally sufficient evidentiary basis for a reasonable jury to find for the party on that issue.'" *Shannon*, 292 F.3d at 715 (quoting Fed. R. Civ. P. 50(a)(1)).

Appendix D

Federal Rule of Civil Procedure Rule 59 explicitly permits the alteration or amendment of a prior judgment. Fed. R. Civ. P. 59(e). Furthermore, Rule 59(e) "has been interpreted as permitting a motion to vacate a judgment." *See Ferguson v. Allen*, No. 3:09-cv-0138-CLS-JEO, 2017 U.S. Dist. LEXIS 98759, at * (N.D. Ala. Jun. 27, 2017) (quoting 11 Wright, Miller & Kane, *Federal Practice and Procedure* § 2810.1, at 150 & n. 1 (2012)). Rule 59 also provides that a district court "may, on motion, grant a new trial on all or some of the issues—and to any party— . . . for any reason for which a new trial has heretofore been granted in an action at law in federal court[.]" Fed. R. Civ. P. 59(a)(1)(A).

The decision of whether to grant a motion to alter, amend, or vacate judgment, or a motion for new trial, is committed to the "sound discretion of the district court." *American Home Assurance Co. v. Glenn Estess & Associates, Inc.*, 763 F.2d 1237, 1238-39 (11th Cir. 1985); *see also Knight through Kerr v. Miami-Dade County*, 856 F.3d 795, 807 (11th Cir. 2017). Generally speaking, "[t]he only grounds for granting [a motion to alter, amend, or vacate a judgment] are newly-discovered evidence or manifest errors of law or fact." *United States v. Marion*, 562 F.3d 1330, 1335 (11th Cir. 2009) (quoting *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007)).

Here, Defendants' motions rest on a variety of arguments like: (1) the Court incorrectly ruled on two questions of law in finding that the White Defendants' conduct constituted state action thereby subjecting them to liability under § 1983, and that the state remedies

available to Plaintiffs did not bar their § 1983 claims; (2) Court erred by failing to grant Defendants' Motion for a Judgment as a Matter of Law on the trespass, nuisance, deprivation of property rights, and outrage claims; (3) the Court erred when it charged the jury that, in order for a pre-deprivation hearing to be sufficient, the hearing must be held by an impartial party; and (4) the Court erred when it entered judgment without directing the jury to further consider its answers because the jury verdicts were inconsistent.

After a close review of the record and Defendants' argument, the Court finds no reason to grant Defendants' Motion for Judgment as a Matter of Law, Defendants' Motion to Amend, Alter, or Vacate Judgment, or to grant a new trial. The Court did not err by denying Defendants' Motion for a Judgment as a Matter of Law. The Court correctly ruled on all questions of law, gave proper jury instructions based on the applicable law, and finds that the verdict was supported by sufficient evidence. Thus, Defendants' Motion for Judgment as a Matter of Law, Motion to Alter, Amend, or Vacate Judgements and Motion for New Trial are **DENIED**. The case is **ORDERED** to remain closed. The Court will take up Defendants' Motions for Remittitur at a later date.

DONE and **ORDERED** on July 28, 2022.

/s/_____
L. Scott Coogler
United States District Judge

APPENDIX E — DENIAL OF PETITION FOR REHEARING *EN BANC* OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED AUGUST 2, 2024

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-12913

LINDSAY DAVIS, BENJAMIN DAVIS,

Plaintiffs-Appellees,

versus

J. MICHAEL WHITE, ECO-PRESERVATION SERVICES L.L.C., SERMA HOLDINGS LLC, BUILDER1.COM LLC,

Defendants-Appellants,

AKETA MANAGMENT GROUP, et al.,

Defendants.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 7:17-cv-01533-LSC

Appendix E

No. 22-12915

NICOLE SLONE, JONATHAN SLONE,

Plaintiffs-Appellees,

versus

J. MICHAEL WHITE, ECO-PRESERVATION SERVICES L.L.C., SERMA HOLDINGS LLC, BUILDER1.COM LLC,

Defendants-Appellants,

AKETA MANAGMENT GROUP, et al.,

Defendants.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 7:17-cv-01534-LSC

No. 22-12916

MONICA LAWRENCE, JOHN LAWRENCE, JR.,

Plaintiffs-Appellees,

versus

Appendix E

J. MICHAEL WHITE, ECO-PRESERVATION SERVICES L.L.C., SERMA HOLDINGS LLC, BUILDER1.COM LLC,

Defendants-Appellants,

AKETA MANAGMENT GROUP, et al.,

Defendants.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 7:17-cv-01535-LSC

Filed April 2, 2024

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before WILLIAM PRYOR, Chief Judge, and JORDAN and BRASHER, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Panel Rehearing also is DENIED. FRAP 40.