CASE NO. 1121091

IN THE SUPREME COURT OF ALABAMA

FARMERS INSURANCE EXCHANGE, et al.,

Appellants,

v.

ROBERT KYLE MORRIS,

Appellee.

From the Circuit Court of Mobile County, Alabama
Civil Action No. CV-2010-900355-JRL

APPELLEE'S BRIEF

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ORAL ARGUMENT REQUESTED

I. STATEMENT REGARDING ORAL ARGUMENT

Despite the time-honored requirement of the standard of review that all evidence and reasonable inferences be construed in the light most favorable to the verdict winner (Plaintiff/Appellee Kyle Morris), Defendants/Appellants Farmers Insurance Exchange ("Farmers"),[1] in their "Statement of Facts" misleadingly quote from and cite to *their* cross-examination of Plaintiff's witnesses and *their* direct examination of their own defense witnesses. Farmers cites testimony it elicited from witnesses twice as many times (i.e., 101 citations to defense evidence versus 51 citations to Plaintiff's evidence) in derogation of the standard of review.

Despite the equally ancient principle that this Court reviews only for errors committed in the trial court, Farmers'

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[1]The judgment, C3722, is against eleven Farmers entities: Farmers Group, Inc.; Farmers Insurance Exchange; Fire Insurance Exchange; Truck Insurance Exchange; Mid-Century Insurance Company; Farmers New World Life Insurance Company; Farmers Financial Solutions, LLC; Bristol West Insurance Company; Foremost Insurance Company Grand Rapids Michigan; Foremost Property & Casualty Insurance Company; and Foremost Signature Insurance Company. All eleven of these entities are appellants, C3903 and C3905 (supersedeas bond), but they make no distinction among themselves for sake of the appeal. *See* Br. p. 1 n. 2 and accompanying text, referring to them collectively as "Farmers." Mr. Morris does the same.

strategy on appeal is to reshape and mischaracterize what this case was (and is) about and how it was tried below so it can now try different issues on appeal.

As an example of Farmers' misdirection on appeal, its Statement Regarding Oral Argument mischaracterizes the principal issue in this appeal as "whether a plaintiff may evade a written contract by asserting reliance on a pre-contractual oral promise not to exercise that contract's at-will clause in a particular circumstance." To the contrary, the Circuit Court of Mobile County (veteran circuit judge John E. Lockett) instructed the jury not that this was a promissory fraud case (as Farmers would have it), but rather that this was a case involving fraud in the inducement:

> The plaintiff says that the false statement is that the plaintiff's continuing association with his father and The Morris Insurance Agency was not a problem and the association did not violate any of the rules, procedures, or policies of Farmers.

R916. This case is about whether Kyle Morris would ever have become a Farmers agent in the first place had Farmers truthfully answered when he repeatedly asked whether a continuing association with his father's insurance agency presented a problem with his accepting employment with Farmers.

Only by disregarding or distorting the evidence favorable to Plaintiff and mischaracterizing Plaintiff's fraudulent inducement claim as a promissory-fraud claim can Farmers (and their *amici curiae*) now suggest that Plaintiff's attorneys (and Judge Lockett) ignored or overlooked the reasonable reliance standard of *Foremost Ins. Co. v. Parham*, 693 So. 2d 409 (Ala. 1997). Only by skipping past its error-preservation and waiver problems as though they do not exist (*e.g.*, there is no written pre-verdict motion for JML and Farmers' oral JML motion failed to raise the damages issues it now asserts) can Farmers (and their *amici*) imply that this case should never have made it to a jury.

Oral argument would bring this Court into sharp focus about error preservation, the correct view of the evidence, and the unchallenged principle that an insurance agent may still, in conformance with *Patten v. Alfa Mut. Ins. Co.*, 670 So. 2d 854 (Ala. 1995) (the controlling decision repeatedly briefed and argued below, but never *once* mentioned in the Appellants' Brief or in the briefs of their *amici*), pursue a fraud-in-the-inducement claim against the insurer that hires him by misrepresenting the conditions of employment to induce him to accept the employment.

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III. STATEMENT OF JURISDICTION

Plaintiff/Appellee Kyle Morris ("Kyle" or "Mr. Morris") agrees that this Court has jurisdiction pursuant to § 12-2-7, Ala. Code 1975.

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V. STATEMENT OF THE CASE

Mr. Morris filed his Complaint in the Circuit Court of Mobile County on February 17, 2010. C56. He filed his Fifth Amended Complaint on June 20, 2012. C461. The eleven Farmers entities who were then the Defendants (and against whom the judgment was entered, C3722) answered on July 23, 2012. C510. *See* Appellants' Brief, p. 1, n. 2, referring to these eleven entities collectively as "Farmers."[2]

Farmers filed Motions for Summary Judgment on August 1 and 2, 2012, C526 and C851. Mr. Morris filed his opposition on August 22, 2012. C3264. After oral argument, the motions were denied on December 11, 2012. C3498.

A jury trial commenced on February 4, 2013, and after five days resulted in a verdict on February 8, 2013, in the amount of $600,000 compensatory damages and $1,800,000 punitive damages. C3720. The circuit court entered judgment on the verdict on February 13, 2013. C3722.

The record on appeal does not contain any written pre-

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[2]Mr. Morris treats all Defendants/Appellants as one under the collective noun "Farmers" (treating the collective noun as grammatically singular in the American fashion ("the crowd goes wild" vs. British "the crowd are loving it") but typographically plural (Farmers' misrepresentation")).

verdict motions by Farmers for judgment as a matter of law.[3]

On February 27, 2013, Farmers sought an order staying execution on the judgment pending resolution of its post-judgment motions. C3723. Mr. Morris opposed this motion. C3729. The circuit court required the posting of a bond in the amount of 125% of the judgment as a condition of any further stay of execution. C3751. On March 8, 2013, Farmers posted a $3 million supersedeas bond. C3757.

Farmers filed a Renewed Motion for Judgment as a Matter of Law or, in the Alternative, Motion for New Trial or for a Remittitur of the Verdicts on March 8, 2013. C3764.

Mr. Morris submitted post-judgment discovery requests. C3739. Despite Mr. Morris's repeated efforts to obtain substantive responses so that he could fully apprise the circuit court of Farmers' fraudulent scheme during a *de novo* review of the jury's punitive damages verdict pursuant to § 6-11-23, Ala. Code 1975, Farmers resisted providing meaningful answers, instead allowing the 90-day Rule 59.1, Ala. R. Civ.

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[3]Farmers' Statement of the Case asserts, Br. p. 4, that "the trial court denied Farmers' motions for judgment as a matter of law at the close of Morris' case and at the close of all evidence." However, Farmers cites only: "C.3722" (the judgment), "R.712-727," and "805-808" - obviously only oral, not written, JML motions. *See* Part A.1 of the Argument, *infra*.

P., clock to expire. C3791-92, C3795-3806, C3810-36, C3857, C3858-64, and C3884-88. Thus, Farmers' post-judgment motions for JML, new trial, and remittitur were denied by operation of law after 90 days, i.e., on June 6, 2013. Rule 59.1, Ala. R. Civ. P.

Farmers filed its Notice of Appeal on June 14, 2013. C3903.

VI. STATEMENT OF THE ISSUES

1. Did Farmers preserve for appellate review the damages issues it now asserts on appeal?

2. Did the circuit court err in permitting the jury to decide the reliance issue?

3. Did the evidence support the jury's compensatory damages verdict?

4. Has Farmers, after expressly disclaiming any adverse financial impact from the judgment as a basis for remittitur, demonstrated that the jury's punitive damages verdict of three times compensatory damages, which falls squarely within the limits imposed by § 6-11-21(a), Ala. Code 1975, and *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003), punishes Farmers too severely for its misconduct beyond the limits of due process?

VII. STATEMENT OF THE FACTS

The Court can get a proper overview of the case that was actually tried to the jury by reading the opening statement of Plaintiff's counsel, R126-164, which begins:

> When a company makes some representations to somebody to get them to do something that benefits that company, the representation should be true. When a company makes a representation to a person to get them to do something that benefits that company, that person has a right to expect that the representation is true. And when a company makes a representation to a person to get them to do something that benefits the company and that representation turns out not to be true, then that company is responsible for all the harm that the misrepresentation caused.

R126-127. Equally helpful to a correct understanding of the case that was actually tried to the jury is Plaintiff's closing argument, R854-882 and 895-908.

A. The Context - A Young Insurance Agent Beginning His Career

Mr. Morris presented to the jury evidence of the importance of the first few years of an insurance agent's career and those years' critical impact on his future income, through the testimony of his father, Farrell Morris, a 38-year Mobile, Alabama, insurance-agency owner who testified as an expert in the field of insurance sales. R681, 689.

Farrell Morris testified about his "experience regarding

how young agents' books of business change over time." R682-83. He described how he has brought in "quite a few young agents over the years." R683:2-3.

> I would bring them in ... new, just starting out and give them a small salary or a draw. Then as they started selling policies, I would give them part of the commission. At some point ... the salary would disappear and they would go to straight commission.

R683:3-8. Young agents' books of business (and income) grow over time through renewals and compounding:

> Starting out with nothing when you come to work. Initially you are selling policies and retaining most of these policies and renewing and selling new policies the next year. So, there is a constant growth, if you are doing what you should be doing.

R683:12-16. They "get a percentage of what the premiums are," so, "[a]s the premiums grow, the commissions grow." R683:19-21. Retention of customers for good agents is typically 90% or greater. R683:24-684:4. "We would expect to renew that amount of business each year and then add new business, write new policies on top of that also." R684:4-6. Customer loyalty is crucial - Farrell Morris still has customers "from the very first day I sold a policy, 38 years, that are still with me." R684:17-18. Typically a customer will stay with an agent 10+ years, "maybe 20 years if you are doing the job you should be doing, ... good service, giving them good coverage,

a good policy, then most customers get familiar with their agent and like to stay with their agent." R684:19-23.

Thus, the jury learned that the first few years of an insurance agent's career in building a book of business are crucial because those initial customers typically stay with the agent through most of his career and continue to renew their policies. This context explains why the fraud committed by Farmers was (and is) so odious. It also explains why Kyle asked about conflicts and ensured there was no problem remaining affiliated with his father's agency before accepting Farmers' offer of employment. This context also explains how the evidence of damages was properly presented.

B. Plaintiff's Evidence Met All The Elements of a Fraud Cause of Action

1. Farmers made a representation ...

In late 2006, Kyle Morris telephoned the Farmers district office to inquire about becoming a Farmers agent. His initial communications "probably went on for a couple of months." R586:2-3. He testified: "[A]fter I made the initial contact, ... they pretty much pursued me after that point, ... and basically every concern I had they cleared up to ultimately where I thought it was a pretty good situation for everybody, my customers, me, my father's agency." R586:3-8.

a. ... Both Orally ...

Kyle clearly and unequivocally and repeatedly asked about whether it was a problem for him to continue working with his father's independent agency:

> Q. Did you specifically ask Farmers on multiple occasions before agreeing to become a Farmers agent if your association and continuing association with the Morris Insurance Agency was a problem in any way for Farmers?
>
> A. I asked them multiple times and always got the same answer.
>
> Q. And what was that answer?
>
> A. The answer was [it] is in no way a problem and is actually a benefit to you. That is the way I believed it to be.

R586:9-17. Farmers District Office Manager Mike Dewey, and the two district office employees charged with recruiting and training new agents like Kyle, Steve Hunt and Heather Lowry, each confirmed that they told Kyle that his continuing association with his father's agency was not a problem. R215-17, 744, and 754.[4] Ms. Lowry confirmed that she told Kyle his

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[4]Farmers asserted before and during trial that Mr. Dewey, Mr. Hunt, and Ms. Lowry were independent contractors, not its agents, servants, or employees. Mr. Morris presented overwhelming evidence of Farmers' control over its District Office and personnel, *see e.g.* R195:15-17 "a district manager do[es] [p]retty much anything Farmers tell us to do") and R195-99 (Dewey describing Farmers' control of his office). Farmers abandoned its "independent contractor" defense on

association with his father would be a benefit, and not a problem. R744:3-21. Mr. Hunt confirmed that Kyle asked him about continuing with his father while also being a Farmers agent, that he relayed the question up the Farmers chain of command to the District Manager Mike Dewey, and that he relayed Dewey's answer to Kyle:

> Q. Did Mike Dewey inform you of the content of any discussions he had with anyone at the state office?
>
> A. Mike Dewey said that the state office said that Kyle was OK. That they were fine with his relationship with his dad. That they were OK with him being a Farmers agent.
>
> Q. At that time as far as you knew, did Kyle's situation of working in his father's independent insurance agency violate any of Farmer's rules, policies, or procedures?
>
> A. No. I was told it was OK by Farmers.

R754:10-19. *Cf.* R771:14-20. Hunt testified: "I was told by Mike Dewey that he ran it up to Farmers and they said it was OK." R781:8-9.

After Heather Lowry had met with Kyle on initial intake and referred him to Steve Hunt for follow-up, and before Mr. Hunt ever met with Kyle, Mr. Hunt was fully aware of Kyle's association with the Morris Insurance Agency and asked his

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appeal.

superior Mike Dewey whether that was OK. R770:5-9. "Before I even met with him, I was told it was OK." R770:8-9. After Mr. Hunt finished testifying, the Court asked a couple of questions, "for clarification." R781:23-24. Regarding this exchange where Mr. Hunt said "Before you met with Kyle, you were told it was OK," the Court asked "what do you mean by 'it'?" R782:13-16. Mr. Hunt answered:

> That Farmers was OK with Kyle's relationship as an independent agent with being in that office because there is no reason for us to spend a lot of time training somebody unless it is OK with Farmers.
>
> THE COURT: All right. Do you recall who told you it was OK?
>
> THE WITNESS: Mike Dewey.

R782:17-24.

Mike Dewey likewise confirmed that he inquired with Farmers State Executive Management Office in Birmingham and received the go-ahead:

> Q. Explain your involvement with the recruitment of Kyle Morris?
>
> A. Well, either Steve or Heather interviewed Kyle Morris, and they came to me and said we have somebody named Kyle Morris and here's the situation, can we proceed to recruit him.
>
> Q. What did they tell you, here's the situation?
>
> A. Something with the independent agency system, his father or his uncle or somebody.

Q. So Steve and Heather had met with Kyle. Kyle had some questions for them, or they had some questions about the situation which you defined as the relationship with ... his father's company, ... and they asked you if it was a problem?

A. They asked me if they could proceed with recruiting him.

Q. And what did you tell them?

A. I told them yes, after I called the state office and said here's what we've got, can we go ahead or not.

Q. Who did you talk to at the state office?

A. It would either be - It must have been Jeff [Withoft, Farmers' Division Marketing Manager in Birmingham, R784]. I'm going to say Jeff because Jeff's signature is on that pending file, and that would have been the first person I called.

Q. What did the state office tell you?

A. Yes.

...

Q. You, before you tell Steve and Heather it's OK, you call somebody at the state office?

A. Yes.

Q. Who you believe was Jeff, but it may have been somebody else at the state office?

A. Most likely Jeff.

Q. More likely than not, it was Jeff?

A. Correct.

Q. Jeff - you make the state office aware of the question that's been posed to you with regard to Kyle's relationship with his father's agency?

A. Yes.

Q. They tell you that that is OK?

A. Yes.

Q. You, in turn, then turn around and tell Steve and Heather that that's OK?

A. Yes.

Q. And then they follow up with Kyle and the recruitment of him becoming an agent.

A. Yes.

R215:17-R217:23. Mr. Dewey was "not aware of anything in place in writing that says you can't put somebody on that's already in the business or their dad's in the business," but nevertheless he "called the state office as [he] perceived maybe there was going to be a conflict here." R222:6-10. He did not want to train someone who would ultimately not go into the program, so he got prior approval from Farmers:

> So I called Farmers. Farmers gave me approval at the state office level, either Jeff [Withoft] or his superior, said it's OK to recruit Kyle. We put Kyle in the program.

R222:10-16. Mr. Dewey again confirmed that "Kyle was told he could go into the program even with the association of his

father." R236:18-19.

b. ... And By Accepting Kyle's Written Application ...

When Kyle applied to be a Farmers' agent, both his application and his resume identified his present association with the Morris Insurance Agency. Farmers' Alabama headquarters in Birmingham reviewed and approved these documents despite Kyle's affiliation with the Morris Insurance Agency, as explained by Alabama Division Marketing Manager Ed Stansel:

> Q. Okay. So ... in Kyle Morris's case, when he filled out an application with Farmers and he put information on that application, somebody with the Farmers office in Birmingham would have seen that information, looked over that information, and approved ... Kyle based on the information they had?
>
> ...
>
> A. That is correct.
>
> Q. And that would include both his previous employment history and his current employer, correct?
>
> A. That - that is correct.

R263-64.

> Q. ... I've handed you the first page of the personal history form, and would that have been the application that would have been sent to Farmers Insurance Companies in 2007?
>
> A. Yes. Yes, it would.

Q. And you've noticed I've highlighted an area, and it states that Kyle Morris is currently employed for the Morris Insurance Agency as a producer, slash, office manager. And under the column it says, reason for leaving. It says, still employed. And he reports to Farrell Morris, who is his father and the owner of the Morris Insurance Agency.

...

A. That is correct.

Q. And that was on the application that Kyle Morris sent to Farmers back in 2007?

A. It appears so, yes.

Q. Alright. So at the time Kyle became a Farmers agent back in 2007, Farmers would have been completely aware of the fact that he was currently employed with the Morris Agency in Mobile, Alabama?

A. Should have been, yes.

R265-66. Thus, Farmers' approval of Kyle's application constitutes yet another misrepresentation.

2. ... Of a material fact ...

Without the assurances from Steve Hunt and Heather Lowry that there was no problem with him continuing to work in association with his father's independent agency, Kyle would never have become a Farmers agent. "I was never looking to disaffiliate myself with my father's agency. [T]hat is something I was going to do and ... stick with for the rest of

my life." R584:11-14. He made this clear to Heather Lowry when he first spoke with her on the phone:

> [I] let her know who I was, what I did ... what my affiliation with my father's agency was. Let her know in no way do I want to cut off that relationship. ... [I]mmediately they began to tell me, ... oh, that is no problem and would actually be a benefit to me because as long as I write the policies that Farmers ... wanted to write ..., I would have all my father's agenc[y']s companies available to me to [write] any policies that they turn down or [did] not want to write for whatever reason.

R85:6-21.

> Q. Would you under any circumstances have agreed to become a Farmers agent if Farmers would have told you the association with your father and the Morris Insurance Agency was a problem?
>
> A. Absolutely not.

R586:22-R587:1.

3. ... That was false ...

a. The Evasive Attempt by Farmers Corporate Representative Keith Gockel to Avoid Admitting Falsity

Plaintiff called to the stand Keith Gockel, the corporate representative for Farmers. R334:10-335:1. Mr. Gockel established the falsity of the representation made to Kyle:

> Q. Under Farmers Companies policies, was it a conflict of interest for Kyle to maintain his relationship with his father's company when he became a Farmers agent?
>
> A. Yes, it was.

Q. And that's from day one?

A. Yes.

Q. When I say day one, I mean from February 8, 2007, it was unacceptable from that point forward for him to maintain a relationship with his father's company?

A. That is correct.

R342:13-22. Mr. Gockel was evasive, and the jury could have taken that very evasiveness into account in determining that Farmers' misrepresentation was intentional, gross, malicious, and sufficiently culpable to support punitive damages:

Q. And if he was told anything differently by anybody else, then that was false?

A. I can't speak with certainty what someone told him. But I can tell you that our procedure, it was a conflict of interest.

...

Q. ... Assuming that this is what Mr. Dewey testified to, if Mr. Dewey did, in fact, tell Kyle Morris that it was acceptable for him to go on to the program and keep the association with his father, that was false at the time it was told to Kyle?

A. It was mistaken, certainly.

Q. It was false?

A. I don't know if I would use that word, but he was mistaken if he thought that was the case.

R342:23-343:2, R344:2-10. See also R344:17 ("[i]t is an

inaccurate statement"); R344:19 ("I don't know if I can say it was false"); R363:23-25 ("The district office was inaccurate in their statement that the relationship was fine. Was that false or did they make a mistake, you would have to ask them."); R364:8-9 (Refusing to agree that the statement was false, calling it "not accurate"); R364:22-365:6 (refusing to agree that they made a misrepresentation of material fact to Mr. Morris). He did, however, agree that "[i]t was a problem," and that if Kyle was told that it was not, "Kyle should not have been told that." R345:5-11.

b. The Candid Admission of Falsity by Farmers Division Manager Jeff Withoft

The last testimony the jury heard was the following cross-examination of Mr. Withoft:[5]

> Q. If Kyle was told this, which has been all the testimony from him and everybody that he was actually told it was OK, and in reliance on that, he decided to become a Farmers agent, that was just a false statement told to Kyle Morris, wasn't it?
>
> A. Yes, it was.
>
> Q. No question about it, false. Whether it was intentionally, reckless, or innocent, it was a

[5]Farmers presented testimony from only three witnesses, Heather Lowry, Steve Hunt, and Jeff Withoft, R730-804, whose testimony confirmed and cemented the proof of the fraud that Plaintiff put on during his case in chief.

false statement told to Kyle Morris prior to him agreeing to become a Farmers agent; do you agree with that?

A. His having a relationship with his father's insurance does not meet the guidelines. So, it would be a false statement that it would be OK.

Q. I show you Mr. Dewey's testimony. "Well, Kyle was told it was not a conflict of interest for him to be associated with his father, correct, when he signed up to become a Farmers agent, correct?" He said, "Those words would not have been the words most likely used, but Kyle was told he could go into the program even with the association with his father." Now, there is absolutely no question, there is not even a dispute, is there, that that is false?

A. That is false.

R803:18-R804:15.

4. ... On which Kyle relied ...

Kyle asked on multiple occasions and received the same answer each time, that his continued association with his father's independent agency was in no way a problem and was actually a benefit. R586:9-17. He gave uncontroverted testimony that he relied upon the misrepresentations:

Q. ... Did you rely on the representations made to you by Farmer's Insurance before agreeing to become a Farmers agent?

A. I relied on what they told me.

R586:18-21. He would not have agreed to become a Farmers agent under any circumstances if Farmers had told him that the

association with his father and the Morris Insurance Agency was a problem. "Absolutely not." R586:22-587:1.

> Q. Would you have agreed, ever agreed to enter into this agreement or ever even gone to work for Farmers had the truth been told to you about your father's agency?
>
> A. No.
>
> Q. In other words, had Farmers told you the truth, would you ever have given Farmers an opportunity for you to sell policies for them for two and a half years[6] and terminate you for any reason whatsoever?
>
> A. I never would have went there.

R588:12-20. "[I]f they would have just told me accurately from the beginning, then I never would have had a Farmers Agency." R609:10-12.

5. ... And his reliance was reasonable ...

a. Kyle's Testimony

Kyle testified that he reviewed the documents Farmers gave him before signing them, but saw nothing in them inconsistent with the representation that his association with his father was not a problem.

> Q. ... Did you read these documents?
>
> A. Yes, I did.

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[6]Kyle was actually a Farmers agent for 34 months, from February 8, 2007, until December 16, 2009. R591-92.

Q. And you understood them the best you could, right?

A. I did.

Q. Was there anything in any of these agreements or any of the documents that were given to you that said your relationship with the Morris Insurance Agency was unacceptable?

A. Nothing in there said anything to do with that being a conflict of interest.

...

Q. Was there anything in the agreement that made you think the representations made to you by Farmers were false?

A. Nothing.

Q. We have seen the provision in the agreements that says your agency could be terminated with 90 days' notice. Did you read that provision as well?

A. I saw that.[7]

R587:11-588:11.

After he accepted the employment (in reliance upon the misrepresentations), he saw nothing in his online agent

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[7]On cross examination, Farmers elicited testimony from Kyle that confused the for-cause provisions allowing immediate termination with the provision allowing 90-day termination without cause. R649-52. Farmers cites this testimony in its attempt to recast the case as a promissory fraud that Farmers would not terminate Kyle. Br. p. 16. However, this testimony was <u>not</u> part of Plaintiff's proof, and Plaintiff never alleged or sought to prove that Kyle was promised he would not be terminated for continuing his relationship with his father.

training alerting him of any problem from his continued association with his father's agency:

> Q. During any of the training you saw, did you ever see any of the documents that you went through, anything about conflict of interest or your association with your father that you had been told was OK, being a conflict of interest?
>
> A. I have never seen anything that said anything about that.

R589:17-23. No one involved in his training ever alerted him to any problem either, even though "[e]veryone knew about" his association with his father's agency. R589:24-590:5.

> Q. All right. So there was no question that they knew the entire time you were with Farmers that you are in the Morris Insurance Agency and not in your own office?
>
> A. Yes, they had been to my office. It was no secret.

R590:18-21.

It was a goal of Kyle's to get his own office. R590:22-23. He testified that the Farmers personnel "wanted me to have that to have ... road frontage with the Farmers sign on the road." R590:23-591:5.

> Q. Was there ever a discussion from anybody at any time with you that you needed to get a new office or they were encouraging you to get a new office because there was some problem with your association with the Morris Insurance Agency?

A. No.

R591:9-14. Farmers knew that Kyle would not get an office at the very beginning of his agency, that he would do so "when [he] got [his] income up and could afford it and found the right place.... It was never like a deadline or hey, you have got to have an office."[8] R661:21-662:4.

The first time Kyle ever heard anyone from Farmers assert that there was a conflict of interest was when Ed Stansel (Jeff Withoft's replacement as Division Manager in Birmingham, R202-03) and Mike Dewey walked into his office on September 16, 2009, handed him a letter, and told him he was being terminated. R602:24-603:7. "I asked them, you know, I don't understand why?" R603:7-8. "They told me ... because my father was in the insurance business it was a conflict of interest and I was terminated." R603:17-19. He protested:

> Yeah. I just told them I didn't understand. You know, it's never been a problem. I was confused. They said something about an appeal board. So, I called and talked to them about that the next day. He [Stansel] basically told me it would be a waste of time.

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[8]In fact, Kyle was on the verge of opening his new office when he was terminated. R658 ("I had just bought a building over on Airport Boulevard"), R660 ("I actually got an office"). Even then, he was not going to disaffiliate with his father's agency but "would basically be working in and out of both offices." R591:1-3.

R603:23-604:2, R656-57.

> Q. Did Steve Hunt in any way ever communicate to you that the reason he thought you should get a new office had anything to do with there being a conflict of interest with the Morris Insurance Agency?
>
> A. No.
>
> Q. Why did he want you to get a new office or not even he want you, why did you both of you all discuss getting a new office?
>
> A. He wanted the Farmers storefront. You know, I guess, we kind of agreed it would be beneficial for Farmers.
>
> Q. All right. It might help you to sell more Farmers policies?
>
> A. Yeah.

R673:3-14.

In other words, neither before accepting Farmers' offer to become its agent nor anytime during his agency before his termination did Kyle have <u>any</u> basis for ever learning the falsity of the misrepresentations.

b. The 2003 Farmers Internal Policy Is Not Notice As A Matter Of Law Of The Falsity of Farmers' Misrepresentations

Farmers asserts that Kyle could not reasonably rely on its misrepresentations because a one-sentence, obscurely hidden and hard-to-find "policy" buried in its voluminous online documents contradicted them. This no-reliance defense

was rejected by the jurors for two obvious reasons: 1) Farmers' own training personnel were shown not to be aware of the provision, thereby making the contention that Kyle *should have known about it* implausible; and 2) this policy was not available for Kyle to find until months after he had signed the employment agreement in reliance upon Farmers' repeated misrepresentations, so it could not be a basis for a want of reasonable reliance because Kyle could have known about it, if at all, only *after* he acted to his detriment in accepting the offer of employment.

Plaintiff's Exhibit 100 was a copy of this document. It supports Mr. Withoft and Mr. Gockel's testimony that the statement made to Kyle was false, but it does not support Farmers' assertion that Kyle could not reasonably rely.

c. Steve Hunt's Testimony Confirms That Kyle Could Not Reasonably Have Discovered the Falsity of the Misrepresentations

Mr. Hunt demonstrated the unreasonableness of the suggestion that Kyle should have learned about the conflict from his agent training materials. Mr. Hunt went through extensive training because he trained others and was, in fact, Kyle's trainer. R771:21-772:3. He completed the same reserve training program that Farmers now cites (Br. 13-15, 37-40) as

providing evidence from which Kyle supposedly could not have relied on the misrepresentations. R772:4-12. He recognized Defense Exhibit 172, a printout of the training he did at Farmers, including the "Constructing Your Business" assessment, R772:18-25, R773:13-17.

Defendants' Exhibit 142 was the paperwork associated with the "Constructing Your Business" assessment. R773:23-774:7. Mr. Hunt was asked to find the section on conflict of interest. R774:8-14. After a "(short pause)" he said:

> A. You are going to have to help me out. I mean, I am trying - it is hard, isn't it? I don't see -
>
> Q. The reason you can't find it, I will represent to you, Mr. Hunt, is because the phrase conflict of interest is not in that document, OK?
>
> A. OK.
>
> Q. There is nothing in this document about maintaining an office in another agency, is there?
>
> A. I don't see anything.
>
> Q. And there is nothing in this document about family members who own and operate competing insurance agencies, is there.
>
> A. I don't see anything.
>
> Q. You don't remember that from participating in that very training, do you?

A. No.

R774:16-R775:5.

Counsel for Mr. Morris then took Mr. Hunt through the multiple steps required to dig down into the online training modules to the obscure policy provision that Farmers now cites as supposedly negating reasonable reliance. R775-780.

> Q. As the person responsible for training all the reserve agents in the Mobile district office, can you tell me where in that document that Kyle should have looked to find that information?
>
> A. I don't see it.

R775:23-776:2. He was directed to flip to the page with 11-19 at the bottom. R776:3-5. In the middle of the page, it refers a new agent to the Farmers Code of Business Ethics. R776:6-19. That section then refers the agent to a whole different document, the Agent's Guide. R776:20-23. Within Farmers' computer system, an agent could open the Agent's Guide. R777:2-7. To do so, you "click on the Managing tab, ... [a]nd then you have to click on My Operations, ... [a]nd then you can find the Agent's Guide." R777:6-13.

Defense Exhibit 141 is an excerpt from the Agent's Guide, which is a lengthy document, over 200 pages. R777:20-778:10. Defendants' Exhibit 141 is part of Section 3 out of 10

sections. R778:13-20. Section 3 of 10 has 13 subsections. Mr. Hunt was asked if he could tell which of those 13 subsections had conflict of interest information. R779:2-6. He answered: "I am not sure. I wouldn't know if there was a conflict of interest section." R779:7-8. Asked if any one of those 13 categories seemed obvious as the one it would be in, he answered: "Maybe responsibility." R779:10-11.

> Q. Well, it turns out that it is under the responsibility tab in the 7th of 13 categories listed there. Do you see that?
>
> A. Yes. ...
>
> Q. This is the second page of Defense Exhibit 141. This is just one page ... from those 13 categories from Section 3 out of 10 that was referred to on the 19th page of the Constructing Your Business module, OK. That is what we are looking at now.
>
> A. OK.
>
> Q. Do you see where it says, conflict of interest?
>
> A. Yes.
>
> Q. Then you have to go down to subsection 1. Do you see that?
>
> A. Yes.
>
> Q. And then you have to go all the way to the third paragraph; do you see that?
>
> A. Yes.
>
> Q. And only there, that's where Kyle should have

figured out that Farmers lied to him. Do you see that line?

A. I do.

Q. It says "An agent who offices with another agent is maintaining a conflict of interest."

A. I see that.

R779:12-780:12. The jury was free to conclude that if Farmers' own trainer did not know about this obscure, hidden, and hard-to-find policy provision, it would be unreasonable to expect his trainee (Kyle) to know about it.

6. ... And caused him injury.

Mr. Morris presented evidence of three types of damages: the expenses he incurred for Farmers business-related costs and equipment while working for Farmers; the commissions he lost by selling policies for Farmers rather than continuing to sell them at the Morris Insurance Agency; and mental anguish damages. *See generally* R872-880. Farmers does not challenge the business-expenses or mental-anguish damages, but only the lost-commission damages. Br. 41-52.

a. Business Expenses

Kyle presented substantial evidence of the business expenses he incurred to open and run his Farmers agency. R606-07; Plaintiff's Exhibit 155 (his agency's Profit and Loss

Statements for 2007, 2008, and 2009); R473:20-474:4 (legal expenses to establish the Morris Agency, LLC); R474:9-476:23 (describing the expenses, totaling $152,775.00). Kyle would not have incurred those expenses had Farmers not induced him to accept the employment. R476:24-478:8; R606-07.

b. Lost Commissions

Plaintiff called during his case in chief Mark Pawlowski, Farmers' business valuation expert. R456[9] (expertise); R458:25-459:4 (hired by the law firm representing Farmers in this case); C459 (Defendants' Expert Disclosures); C1005 (listing Pawlowski as "defendants' expert"). *See also* R447-51 (colloquy regarding whether Plaintiff could call Mr. Pawlowski as a witness during presentation of Plaintiff's evidence).

From the beginning of 2007 when Kyle became associated with Farmers until the end of 2009 when Farmers terminated Kyle's agency, "the net premium written by Mr. Morris" on Farmers' policies increased from $138,993.71 in 2007 to $637,357.12 in 2009. R471:3-12. Mr. Pawlowski testified that the "best evidence" of how productive Kyle Morris would have been if he had been selling insurance through his

[9]The transcript misspells Mr. Pawlowski's name as "Palowski."

father's agency[10] "would be to look at what he did while he was at Farmers during the same time period selling the same type of policies." R506:9-24.

He testified about what Kyle lost by accepting employment with Farmers:

> Q. So for example, if Kyle would not have become a Farmers agent and he would have continued to work for his father's agency, spent more time working for his father's agency, and sold the policies that were available to him through the various companies, available to him through his father's agency, he could have sold the same customers those policies as opposed to Farmers policies; would you agree with that?
>
> A. I agree with ... that, yes.
>
> ...
>
> Q. Would you agree then that Kyle gave up his ability to sell those customers those policies out of [his] dad's company, Morris Insurance Agency, when he agreed to become a Farmers agent and [sell] Farmers policies?
>
> A. Yes.
>
> Q. Being associated with the Morris Insurance Agency ... and being a licensed insurance agent, Kyle had the ability to go out and sell customers whatever insurance policies were available to Kyle to sell those customers through the Morris Insurance Agency; is that

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[10]Kyle "was working full time for Farmers Insurance" from the first day he became a reserve agent, working "night and day" for Farmers. R596:1-8. Thus, the Farmers sales are an accurate substitute for what he would have sold working full time with his father.

fair?

A. That is fair to say, yes.

R477:19-478:23.

i. "Substitution" As a Business Valuation Principle

Mr. Pawlowski explained the business valuation principle called substitution, by which "if you want to find out what somebody is likely to do in one type of business or one situation, you can look at a very similar business and performance in that same area and then you can have some ... predictability about how they are going to perform." R482:9-20. The "best evidence" we have of what Kyle would have done if he had stayed at the Morris Insurance Agency was what he did while he operated as a Farmers agent. R482:1-18. For example, Kyle's average retention ratio at Farmers was 96.39%, R481:2-6, so he would have a similar retention level if he had sold those customers policies through his father's agency. R481:23-482/5; *see also* R487:7-16.

Kyle's book of business when he was terminated by Farmers consisted of "310 policies [held by] a couple hundred customers." R495:4-8. In 2009, roughly 70% of Kyle's income was from the renewal of the policies he had sold in 2007 and 2008 and 30% of his income was from new business. R485:6-15.

At the end of 2009, the book of business reflected a net written premium of $637,357.12. R471:9-12. These 310 policies he could have sold through his father's agency formed the basis of Kyle's "lost opportunity cost" damages.

ii. Evidence of Lost Opportunity Costs

Farmers Corporate Representative Keith Gockel admitted that "by coming to Farmers to sell policies for Farmers based on representations made to him he gave up the ability to sell those customers at another insurance company, through another insurance company." R437:13-18. Farmers' expert Pawlowski described this as "lost opportunity costs."[11] R500:24-502:11. It is a basic principle of economics that if you are "going out and recovering old customers, you lose the opportunity, say, to be out chasing new business." R501:5-7. "So, if you have to go back and get old customers, you can't be selling

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[11]Farmers misleadingly points to Mr. Pawlowski's passing comment that lost opportunity costs are "fuzzy." Br. 23, citing R504:6-12. This brief reference is Farmers' only attempt to rebut Mr. Pawlowski's pervasively damning testimony, which was so bad for Farmers that it did not ask him a single question at trial, despite having retained and disclosed him as its expert witness - R507/8-9 ("reserve our examination"), R730-804 (defense case, Pawlowski not called). Plaintiff's world-renowned economics expert, Robert Hebert, Ph.D., refuted "fuzziness" by explaining that "lost opportunity cost" is a "bedrock" principle of economics. R551-53.

new customers." R501:22-25. Thus, even assuming Kyle could have retrieved his customer list with names, telephone numbers, and other contact information, he would lose the opportunity to sell new business if he tried to resell policies to the customers to whom he sold policies while he was working at Farmers.[12] R501:1-11.

Mr. Pawlowski conceded that an opportunity cost is a recognized cost, a real cost that has value. R504:14-20. By becoming a Farmers agent, Kyle lost the opportunity to sell policies elsewhere, which remains a lost opportunity cost if he were to try to go back and resell old customers new insurance policies with a different insurance carrier. R504:21-505:15. Conversely, if Kyle had never become a Farmers agent, he would never have been terminated by Farmers[13], and he would never have incurred the opportunity costs that he would now incur in reselling those policies, even assuming that he *could* get his former customers back.

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[12]Farrell Morris described a further impediment to reselling those policies - if you have spent three years telling prospects that the Farmers policy is a good policy, you lose credibility by coming back to them and trying to persuade them that a different policy is a *better* policy. R695-96.

[13]Farmers' corporate representative Gockel also testified that if Kyle had never gone to work for Farmers, Farmers "would have never been able to terminate him." R436:19-23.

R505:16-506:2. According to Mr. Pawlowski, the "best evidence" of these lost opportunity costs is the actual policies that Kyle sold while he was at Farmers. R506:7-24.

iii. Evidence of the Value of These Lost Opportunity Costs

Robert Hebert, Ph.D., former Auburn Economics Department chair and a world-renowned economist with a specialty in forensic economics, R510-20 (qualifications), testified as Plaintiff's expert witness on economic damages. R508-70.[14]

Dr. Hebert "tr[ied] to determine, as best we could with the information available, what would have happened ... if Kyle had not left his position with the Morris Insurance Agency." R520:8-17. He calculated only Kyle's lost commissions, not all of his damages. R520:18-22. He relied mainly upon documents provided by Farmers, principally the Statement of Operations, as it "was particular[ly] helpful [by] listing ... policies in force by different category, retention ratios, so forth and so on." R521:3-8.

Dr. Hebert agreed that the best evidence of the commissions Kyle would have earned at the Morris Insurance Agency was Kyle's actual earnings with Farmers. R521:15-522:1. He calculated the past loss from the date of

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[14]The transcript misspells Dr. Hebert's name as "Herbert."

termination to the end of 2012 and future damages from that point forward. R522:6-25. He constructed two tables, Plaintiff's Exhibit 135A. R526:21-24. The first table shows the present value of commissions that Kyle lost from January 2010 to the end of 2012. R527:2-5. The second table calculates commissions going forward from the beginning of 2013 through 2037. R527:6-10.

Kyle made commissions of $77,028.08 and $77,276.15 in 2008 and 2009, respectively. R524:2-R525:1. The latter figure reflects the 310 policies in force Kyle had at the end of 2009. R526:2-6. Dr. Hebert projected gross commissions for 2010 as the $77,276 commissions from 2009, "basically assuming that he ... would have done the same thing in [2010] in terms of commissions earned" as he did in 2009. R530:4-9.

Dr. Hebert used gross instead of net commissions to defer taking business expenses into account until a later step. R530:10-21. He agreed that if Kyle's father took 50% of Kyle's gross commissions for business expenses and would continue to do that going forward, "[t]hat makes it very straight forward. You just cut those numbers in half. You reduce them by 50% ... [to] account for what his contribution for business expenses would be." R530:22-531:18.

Dr. Hebert's calculations did not account for existing customers increasing the number of policies they had or increasing the amounts of coverage in force based on changed circumstances. R531:19-532:7. He did, however, adjust the projected gross commissions for inflation each year. R532:8-533:3. Using the consumer price index for insurance products, he calculated a weighted average of 2.33% per year inflation adjustment for the gross premiums. R533:4-535:5. Dr. Hebert also explained how he derived a weighted average retention ratio of 98.75% of the policies that Kyle sold while with Farmers.[15] R535:7-R539:11.

Using Kyle's experience at Farmers as the best indicator of policies he would have sold for the same three years at the Morris Insurance Agency, Dr. Hebert calculated renewal commissions on those policies by multiplying the gross premiums times the retention ratio. R539:13-540:18. The present value of the past lost commissions in 2010-2012 was $240,264.00. R540:20-542:14. If business expenses would be 50% of those commissions, the net of expenses to Kyle would be half of this amount. R542:15-543:4. Dr. Hebert discounted

[15]Although Mr. Pawlowski calculated a 96.39% average retention ratio, R481, Dr. Hebert's weighted average takes into account that Kyle had a higher retention ratio in the kinds of insurance for which he sold more policies, R537-39.

the future commissions on the existing policies to present value using a 2.81% discount rate. R543:13-547:19. He extended his table 25 years as a tool for the jury to use when determining the period for which to award damages based on the retention ratio and other evidence. R547:25-549:17. "I picked 25 years. That would take him to age 58 and a very successful agent may well be looking to retire at that point, but I am not making any expert judgment about that. ... [Y]ou don't have to accept the 25 years, but you can use the table as a guide." R548:14-20.[16] The present value for 25 years of lost future commissions was $1,889,671.00. Plaintiff's Exhibit 135A (admitted into evidence without objection, R702).

Plaintiff asked for 15 years' worth (the midpoint of Farrell Morris's testimony that an agent could expect to keep a customer for 10-20 years,[17] R684) of future commissions off

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[16]Again, Farmers takes out of context Dr. Hebert's comment on cross-examination that "how far you can go in the future" is "[p]roblematic [meaning that] we can't say anything conclusive about it." R557:14-18, cited in Br. 49. Dr. Hebert properly explained how his table provided a tool for the jury to use during its deliberations. R547:25-549:13.

[17]Adding the three years between termination and trial, the total of 18 years was within Farrell Morris's testimony that an agent can expect to keep a customer for 20 years. In any event, the jury gave Kyle only 60% of what he requested, or roughly 10 years' worth of renewal commissions (and

of this table, using the 2028 figure of $1,234,712, and dividing it in half to account for business expenses, a net amount of $617,356.00. R877:1-19. With the past lost commissions of $120,132.00 (half of the $240,264.00 in the first table of Plaintiff's Exhibit 135A), the damages Plaintiff requested for lost commissions totaled $737,488.00. R875:10-876:4, R877:20-22.

c. Mental Anguish

Farmers does not challenge the mental anguish damages. Br. 41-52. Kyle presented substantial evidence of the mental anguish caused by Farmers' unexpected termination of his thriving young agency in September 2009, effective between Thanksgiving and Christmas 2009, including its prohibiting him from contact his customers to explain. R602-10. His father described how it was "a kick in the gut" to Kyle, how it was "devastating" to him, and how it dramatically affected his personality and behavior. R697-98.

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similarly reduced business expenses and mental anguish damages, or some combination of the three).

VIII. STATEMENT OF THE STANDARDS OF REVIEW

A. Judgment As A Matter of Law

1. Preservation

> "It is a procedural absolute that a [post trial motion for a JML], based on the "insufficiency of the evidence," is improper, if the party has not moved for a [JML] on the same ground at the close of all the evidence."

Williford v. Emerton, 935 So. 2d 1150, 1154 (Ala. 2004); *Industrial Technologies, Inc. v. Jacobs Bank,* 872 So. 2d 819, 825 (Ala. 2003). "[A] [Rule 50(a)(2), Ala. R. Civ. P.] motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." *CNH America, LLC v. Ligon Capital, LLC,* [Ms. 1111204, Nov. 8, 2013, *6], 2013 WL 5966782, __ So. 3d __ (Ala. 2013).

2. Merits

> "When reviewing a ruling on a motion for a JML, this Court uses the same standard the trial court used initially in deciding whether to grant or deny the motion for a JML. ... Regarding questions of fact, the ultimate question is whether the non-movant has presented sufficient evidence to allow the case to be submitted to the jury for a factual resolution. ... The non-movant must have presented substantial evidence in order to withstand a motion for a JML. ... A reviewing court must determine whether the party who bears the burden of proof has produced substantial evidence creating a factual dispute requiring resolution by the jury. ... In reviewing a ruling on a motion for a JML, this Court views the evidence in the light most favorable to the non-movant and [draws] such reasonable inferences as the

jury would have been free to draw. ..."

GE Capital Aviation Services, Inc. v. PEMCO World Air Services, Inc., 92 So. 2d 749, 758-59 (Ala. 2012).

B. New Trial

Boudreaux v. Pettaway, 108 So. 3d 486 (Ala. 2012), states the standard of review on a motion for a new trial:

> "A motion for a new trial tests the weight and preponderance of the evidence.... A jury verdict is entitled to a presumption of correctness, and this Court will not reverse the denial of a motion for a new trial unless the evidence, seen in the light most favorable to the non-movant, shows that the jury verdict was plainly and palpably wrong."

108 So. 3d at 487, n. 1.

> Furthermore, a jury verdict is presumed to be correct.... In reviewing a jury verdict, an appellate court must consider the evidence in the light most favorable to the prevailing party, and it will set aside the verdict only if it is plainly and palpably wrong.

Lafarge North America, Inc. v. Nord, 86 So. 3d 326, 332 (Ala. 2011).

When considering the weight and preponderance of the evidence after a denial of a motion for a new trial, this Court must "decline to substitute [its] judgment for that of the jury in matters dealing with credibility of witnesses and weight of the evidence." *Williford v. Emerton*, 935 So. 2d at 1154; *Marsh v. Green*, 782 So. 2d 223, 227 (Ala. 2000).

C. Standard of Review As to Compensatory Damages Awards Alleged to be Excessive

1. Issue Preservation

The Court will not consider an alleged insufficiency of evidence to support a compensatory damages award where the defendant did not move for JML on the same ground at the close of all the evidence. *Williford v. Emerton,* 935 So. 2d at 1154.

2. Merits

This Court does not interfere with a compensatory award absent a strict showing under the following standard:

> "When a court is assessing whether compensatory damages are excessive, the focus is on the plaintiff. A court reviewing a verdict awarding compensatory damages must determine what amount a jury, in its discretion, may award, viewing the evidence from the plaintiff's perspective. ... When there is no evidence before the court of any misconduct, bias, passion, prejudice, corruption, or improper motive on the part of the jury, or when there is no indication that the jury's verdict is not consistent with the truth and the facts, there is no statutory authority to invade the province of the jury in awarding compensatory damages. See *Pitt v. Century II, Inc.*, 631 So. 2d 235 (Ala. 1993)."

New Plan Realty Trust v. Morgan, 792 So. 2d 351, 363-64 (Ala. 2000); *Prudential Ballard Realty Co. v. Weatherly*, 792 So. 2d 1045, 1049 (Ala. 2000); *Daniels v. East Alabama Paving, Inc.*, 740 So. 2d 1033, 1045 (Ala. 1999).

D. Punitive Damages Award Alleged to be Excessive

This Court reviews an "award of punitive damages *de novo*, with no presumption of correctness." *Boudreaux v. Pettaway*, 108 So. 3d at 504.

E. Issue Preservation and Waiver

"[A]ppellate courts can only review the actions of trial courts for alleged error, properly preserved and properly presented for review." *Bill Steber Chevrolet-Oldsmobile, Inc. v. Morgan*, 429 So. 2d 1013, 1015 (Ala. 1983). "[T]o preserve an alleged error of law for appellate review, the [defendant] must bring the alleged error to the attention of the trial court and receive an adverse ruling." *Grove Hill Homeowner's Ass'n, Inc. v. Rice*, 43 So. 3d 609, 613 (Ala. Civ. App. 2010); *Cottrell v. National Collegiate Athletic Ass'n*, 975 So. 2d 306, 349 (Ala. 2007). Alleged errors that are merely harmless, Ala. R. App. P. 45, are to be disregarded. *See Mock v. Allen*, 783 So. 2d 828, 835 (Ala. 2000).

IX. SUMMARY OF THE ARGUMENT

Farmers does not ask this Court to overrule[18] *Patten v.*

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[18]It is now too late to do so. "Arguments made for the first time in a reply brief are not properly before this Court." *Baldwin County Elec. Membership Corp. v. City of Fairhope*, 999 So. 2d 448, 462, n. 12 (Ala. 2008), citing *The Dunes of GP, L.L.C. v. Bradford*, 966 So. 2d 924, 929 (Ala.

Alfa Mut. Ins. Co. or *Environmental Systems, Inc. v. Rexham Corp.*, 624 So. 2d 1329 (Ala. 1993), which, together with the cases cited therein, defeat Farmers' "reasonable reliance" arguments. This failing and Farmers' failure to preserve the damages issues it argues defeat Farmers' appeal.

Even aside from those failings, all of Farmers' arguments are meritless because they rely upon misdirection. Its "no reasonable reliance as a matter of law" arguments depend upon (1) recasting Mr. Morris' fraud-in-the-inducement claim as a promissory-fraud claim and arguing that the 90-day termination clause contradicted the supposed promise that Mr. Morris would not be terminated due to his association with his father; (2) ignoring *Patten*, *Environmental Systems*, and the other cases holding that a merger clause does not bar a fraud-in-the-inducement claim; and (3) ignoring how hard it was to find the "conflict of interest" provision in its training materials while nevertheless arguing that that provision precluded reasonable reliance as a matter of law. Its arguments against the compensatory damages award rely on numerous misdirections, including its completely ungrounded assertion that Mr. Morris

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2007); and *Byrd v. Lamar*, 846 So. 2d 334, 341 (Ala. 2002).

was seeking compensatory damages based on commissions that he would have earned if he had continued to be a Farmers agent. Its punitive damages arguments rely on (1) ignoring the evidence of its intentional fraud, including the evidence of its financial incentive for recruiting Kyle on any pretense and then its financial incentive for arbitrarily terminating him on a basis directly contrary to the misrepresentations it made while recruiting him, and (2) failing to acknowledge its stonewalling to prevent Mr. Morris from discovering post-judgment evidence to prove that the intentionality of the fraud was supported by the pertinent § 6-11-23, *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989), factors including evidence of other similar incidents.

The jury was presented with a case of a national insurance company recruiting an attractive young insurance agent, taking advantage of his outstanding production during his probationary period, and then, as soon as the period when it could place production quotas on him expired, terminating him on an accusation of a conflict of interest that was contrary to repeated express misrepresentations Farmers made to him when it recruited him. The evidence supported the jury

finding of intentional fraud that underlay its award of punitive damages. There was evidence that by terminating Mr. Morris and transferring his book of business to another agent, Farmers would pay a new agent a lesser commission and thereby make more corporate profit off of the work Kyle had done. At the end of closing argument, R904-05, counsel for Mr. Morris argued this motive for Farmers' intentional fraud, and the jury agreed in its verdict awarding punitive damages. That verdict is supported by the evidence and the reasonable inferences therefrom.

The punitive damages award is further supported by the post-trial proceedings. In preparation for presenting "additional evidence," to show that "the defendant has been guilty of the same or similar acts in the past," as provided for in § 6-11-23(b), Ala. Code 1975, Mr. Morris propounded discovery seeking production from Farmers of evidence of other claims against it by other agents. Farmers resisted this discovery, even after the circuit court ordered it to respond, and then made another misrepresentation that there had been no other similar claims, so counsel for Mr. Morris filed an affidavit reciting that "[s]ince the jury's verdict in this matter on February 8, 2013, I have been contacted by former

Farmers' agents alleging that other similar misrepresentations were made to them by Farmers to induce them to become Farmers' agents." C3887. Farmers then allowed the 90-day period of Rule 59.1, Ala. R. Civ. P., to expire rather than truthfully respond to the overdue discovery requests as ordered.

X. ARGUMENT

A. Farmers' Entire Appeal Suffers From Deficient Preservation and Presentation of Issues

Every issue that Farmers attempts to raise is undermined and defeated by its failures to effectively preserve or present the issues for appellate review.

1. Only One Narrow JML Issue Was Preserved For Appeal

Farmers' appeal runs afoul of the "procedural absolute that a [post trial motion for a JML], based on the 'insufficiency of the evidence,' is improper, if the party has not moved for a [JML] on the same ground at the close of all the evidence." *Williford v. Emerton,* 935 So. 2d at 1154.

No written pre-verdict motion for JML appears in the record. *See* C3719-20.[19] Farmers states: "The trial court denied Farmers' motions for judgment as a matter of law at the

[19]Moreover, the docket sheet shows no filing of any pre-verdict motion for JML. C45 (no entries between 2/4/13 and 2/8/13, and no motions on those dates).

close of Morris' case and at the close of all evidence. (C3722 and R. 712-727, lines 2, 21 and 805-808, lines 19-1)." Br. p. 4. Page C3722, the judgment, does not indicate the filing of a pre-verdict JML motion. At line 2 of page 712 of the Reporter's Transcript, counsel for Farmers begins arguing a motion for JML. That argument continues through line 12 of page 717, with an intervening argument against Farmers' position by counsel for Mr. Morris at R715:19-716:18. A motion for JML "may be oral even though the better practice dictates a written motion for the sake of clarity and to prevent misunderstanding." *Pettway v. Pepsi Cola Bottling Co., Inc.*, 337 So. 2d 757, 759 (Ala. 1976). However, Farmers argued only that there could not be reasonable reliance because it supposedly had demonstrated "as to where in the evidentiary materials could Plaintiff have ascertained the falsity of the alleged misrepresentations." R712:8-11. Judge Lockett rejected this: "I will charge [the jury] that if they think a reasonably prudent person would have discovered these facts, exercised the ordinary care for his own interests, then he cannot recover." R717:24-718:6.[20] The other citation by

[20]The remainder of the passage cited by Farmers, R718-27, is not argument for JML but a colloquy between Judge Lockett and Plaintiff's counsel about the intentionality of Farmers'

Farmers is to its oral renewal of its earlier motion for JML, R805:19-808:1, arguing only that the reliance was not reasonable as a matter of law because the information in its online training program was accessible. R806:2-807:23.

In short, the only JML issue preserved was whether Kyle's reliance was reasonable in light of his access to online training. Secondarily, Farmers argued that there was no evidence of intentional misrepresentation because the recruiting agents did not know what the state executives knew in making the misrepresentation, R805-06, but it does not renew that argument as a JML issue on appeal.

2. Farmers' Arguments Against Compensatory Damages Are Not Directed To Any Ruling of the Circuit Court

Farmers does not specify any allegedly erroneous ruling while asserting its meritless criticisms of the compensatory damages award. This Court is a court of error correction, not a court of roving justice.

> This Court will not place a trial court " ' "in error on matters which the record reveals it neither ruled upon nor was presented the opportunity to rule upon." ' "

A.W. ex rel. Hogeland v. Wood, 57 So. 3d 751, 759 (Ala. 2010).

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misrepresentation. R718:9 (beginning "It is not necessarily in the motion here ...") - 727:21.

> The party seeking to place the trial court in error must establish in the record an adequate predicate for our review.

Zaden v. Elkus, 881 So. 2d 993, 1008 (Ala. 2003). "'It is the duty of ... the appellant[] to demonstrate an error on the part of the trial court ....'" *Arthur v. Bolen*, 41 So. 3d 745, 750 (Ala. 2010). "'[W]hen the appellant fails to invite the appellate court's review of any issues raised from the court below, the trial court's judgment is due to be affirmed.'" *J.K. v. UMS-Wright Corp.*, 7 So. 3d 300, 305, n. 6 (Ala. 2008). To secure a reversal, "the appellant has an affirmative duty of showing error upon the record." *Tucker v. Nichols*, 431 So. 2d 1263, 1264 (Ala. 1983).

Farmers' argument against the compensatory damages does not differentiate among JML, new trial, and remittitur. The argument is not preserved as a JML argument, as shown in the preceding section. If it is a new trial argument, it fails to point to any ground of the post-judgment motion, which was also defective for the same lack of specificity, C3764-89, or to any erroneous evidentiary or jury-charge ruling. *See* Br. 48-52. If the compensatory damages argument is intended as a remittitur argument, it fails for lack of citation to an authority for remittitur of compensatory damages either in the

post-judgment motion or in Appellants' Brief.

3. Farmers Waived Its Remittitur of Punitive Damages Arguments By Refusing To Comply With A Discovery Order

On March 21, 2013, Plaintiff filed his Motion To Continue [the] March 29, 2013, Hearing on Defendants' Post-Trial Motions, reciting the February 21, 2013, service on Defendants of Plaintiff's post-trial discovery requests (C3795-3806) and the lack of any response. C3791-92. The circuit court granted the motion to continue, setting the post-trial motions for hearing on April 26, 2013. C3809.

On April 10, 2013, Mr. Morris filed his "Motion to Compel and Motion to Continue Hearing on Defendants' Post-Trial Motions," attaching as Exhibit A Farmers' responses to the post-judgment discovery in which "Defendants altogether failed and refused to provide any meaningful or substantive responses to most of Plaintiff's post-judgment interrogatories. Instead, Defendants filed a litany of objections to Plaintiff's requests." C3810. The motion notes that Farmers "refused to respond to all of Plaintiff's discovery requests. In particular, Defendants refused to provide complete responses regarding other similar incidents. Exhibit C." C3810-11. The motion continues:

> 4. In Defendants' March 8, 2013, post-trial

> motion at page 24, they state: "There is *no* evidence that the representations here reflected any ongoing conduct by Farmers but at most are a one-off misunderstanding." Yet, Defendants now refuse to provide Plaintiff with discovery responses regarding whether the representations to Mr. Morris were in fact reflective of any ongoing wrongful conduct by Farmers.

C3811 (emphasis in original).

At the April 26, 2013, hearing, Mr. Morris argued that he could not respond to the post-judgment motions until he received full responses to his discovery. That argument was not transcribed, but its result is reflected in the April 29, 2013, order granting in part Plaintiff's motion to compel and requiring that

> Farmers shall respond to Plaintiffs request for other similar incidents, i.e., claims or lawsuits against Farmers by former agents where such agents claim misrepresentation of material facts by Farmers to induce them to become Farmers agents. Such claims shall be limited to the State of Alabama for the period of 2002 through 2012.

C3857.

On May 14, 2013, Plaintiff filed his Motion to Enforce Court Order, reciting that Farmers had not complied with the April 29th order. C3858-59. With his Supplement to Motion to Enforce Court Order, C3884-85, Plaintiff submitted an Affidavit of his counsel, J. Brian Duncan, Jr., stating:

> Since the jury's verdict in this matter of

> February 8, 2013, I have been contacted by former Farmers' agents alleging that other similar misrepresentations were made to them by Farmers to induce them to become Farmers' agents. At least one of these former Farmers' agents alleges that he made a claim to Farmers regarding similar misrepresentations made to him in Alabama between 2002 and 2012. I elect not to identify this person at this time because Farmers has now again been caught red-handed in a misrepresentation.

C3887-88. Farmers filed a response in opposition. C3889-91. That response ignored the April 29 order requiring Farmers to identify "other similar incidents, i.e., claims or lawsuits against Farmers by former agents where such agents claim misrepresentation of material facts by Farmers to induce them to become Farmers' agents." C3857. Instead, Farmers asserted that it had responded to the *initial* interrogatory: "'In the past 20 years, ***have Defendants voluntarily paid money to settle a claim*** or lawsuit alleging fraudulent representation made to potential agents for Defendants.'" C3890, quoting the original discovery request; emphasis by Farmers. This exchange of briefing, supplement to motion, and responses (C3889-3911) constituted the last filings before the 90-day period of Rule 59.1, Ala. R. Civ. P., expired on June 6, 2013. *See* C3912 (letter of transmittal of notice of appeal).

In short, the refusal of Farmers to provide any meaningful good-faith responses to Mr. Morris's post-judgment

discovery seeking other similar incident evidence demonstrates a deliberate choice by Farmers not to proceed to a hearing on its post-judgment motions in the face of the circuit court's order that it produce such evidence prior to the hearing.

Mr. Morris was statutorily entitled to this discovery to defend the jury's punitive damages verdict against Farmers' contention it was excessive:

> In all cases wherein a verdict for punitive damages is awarded, the trial court shall, upon motion of any party, either conduct hearings or receive additional evidence, or both, concerning the amount of punitive damages. Any relevant evidence, including but not limited to ... whether or not the defendant has been guilty of the same or similar acts in the past, ... shall be admissible; however, such information shall not be subject to discovery, unless otherwise discoverable, until after a verdict for punitive damages has been rendered.

§ 6-11-23, Ala. Code 1975 (emphasis added). *See also Green Oil Co. v. Hornsby,* 539 So. 2d 218 (Ala. 1989):

> "(2) The degree of reprehensibility of the defendant's conduct should be considered. 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 should all be relevant in determining the degree of this reprehensibility."

Id. at 223.

Judge Lockett could reasonably have concluded that

Farmers waived its right to a post-judgment review of the punitive damages verdict, given its willful refusal to provide evidence that was relevant and material to Plaintiff's opposition to its remittitur motion and § 6-11-23 review. This Court should similarly conclude that Farmers waived its right to *de novo* review by refusing to provide, even after a court order, the discovery to which Mr. Morris was entitled. Surely Farmers is due no reward for its conduct in these circumstances.

B. The Circuit Court Correctly Denied Farmers' Renewed Motion for JML

Fraud is statutorily defined: "Misrepresentations of a material fact made willfully to deceive, or recklessly without knowledge, and acted on by the opposite party, or if made by mistake and innocently and acted on by the opposite party, constitute legal fraud." Section 6-5-101, Ala. Code 1975. Kyle presented largely uncontradicted evidence that Farmers and its agents made a false representation of a then-existing material fact, that he reasonably relied upon the misrepresentation, that he changed his position in reliance upon the misrepresentation, and that in consequence he suffered economic and non-economic damages.

The circuit court twice[21] charged the jury with language approved in the Alabama Pattern Jury Instructions. R916-23. On appeal, Farmers challenges only the sufficiency of the evidence of Kyle's reasonable reliance upon its misrepresentations.

1. A Person Fraudulently Induced to Leave Employment May Sue for Fraud in the Inducement Even If the New Employment is At Will

Farmers ignores the controlling opinions supporting Mr. Morris's cause of action for fraud in the inducement. In *Kidder v. AmSouth Bank, N.A.*, 639 So. 2d 1361, 1363 (Ala. 1994), the Court "h[e]ld that Kidder may maintain an action alleging fraud in the inducement of her employment based upon alleged misrepresentations as to her working conditions." *Kidder* relied on *Smith v. Reynolds Metals Co.*, 497 So. 2d 93 (Ala. 1986), in which "this Court held that an employee could sue for a fraudulent misrepresentation that occurred before her employment ... and that, in her reliance, she had turned down other employment and educational opportunities." *Kidder*, 639 So. 2d at 1362, discussing *Smith*. In both *Smith* and *Kidder*, the fact that the new employment was at will barred a

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[21]The jury asked to be recharged on the elements of fraud, R943-44, and this was done. R945-51.

contract action alleging wrongful termination, but did not bar *the fraud actions*.

Patten v. Alfa Mut. Ins. Co., 670 So. 2d 854 (Ala. 1995) similarly holds that a fraud action will lie where an insurer fraudulently induces a person to become an agent. *Patten* is discussed in detail below because it is on all fours, and the "reliance" defense rejected by the Court in *Patten* is the same as the reliance defense that Farmers makes here.

In *Shaddix v. United Ins. Co. Of America*, 678 So. 2d 1097 (Ala. Civ. App. 1995), the Court of Civil Appeals followed *Kidder* and *Smith* in rejecting the defendant's interpretation of Alabama law as preventing an employee at will from maintaining a fraud action against his or her employer.

Farmers does not ask this Court to overrule *Kidder*, *Smith*, *Patten*, *or Shaddix*, or any of the other opinions supporting the judgment. "[T]his Court will not overrule precedents unless asked to do so, especially when there has been no argument for such a result." *Ex parte McKinney*, 87 So. 2d 502, 512 (Ala. 2011) (Shaw, Justice, concurring specially).

2. The JML As to Reasonable Reliance Was Correctly Denied

Farmers and its *amici* likewise ignore this Court's

dispositive holdings (cited repeatedly in the circuit court, C3265-66, C3285-86), that reliance may be reasonable in the face of merger and integration clauses. *Patten v. Alfa Mut. Ins. Co.*, 670 So. 2d at 857 ("'A stipulation in the written contract that there are no verbal understandings not incorporated herein does not estop the party to set up fraud in verbal misrepresentations inducing the contract as a whole. The law does not countenance a contract against the consequences of fraud.'"); and *Environmental Systems, Inc. v. Rexham Corp.*, 624 So. 2d 1379, 1383 (Ala. 1993) ("Thus, the law in this state renders an integration, a merger, clause ineffective to bar parol evidence of fraud in the inducement or procurement of a contract.").[22]

Patten is dispositive, holding that an insurance agent

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[22]Mr. Morris relied largely on *Patten* and *Environmental Systems* in his summary judgment opposition, C3264-86, and the circuit court denied both the motion for summary judgment and a motion to reconsider or for Rule 5 certification of this very issue. C3499, C3501-04, C3538. Ironically, in a supplement to its motion to reconsider, C3507-37, Farmers cited and attached a copy of this Court's now-withdrawn December 21, 2012, opinion in *Target Media Partners Operating Co., LLC v. Specialty Marketing Corp.*, Ms. 1091758, Dec. 21, 2012, 2012 WL 6634443 (Ala. 2012)(not published in Southern 3d). Yet another nail in the coffin of Farmers' "reasonable reliance" argument is the opinion this Court issued on second application for rehearing in *Target Media*, [Ms. Sept. 6, 2013, 2013 WL 4767022] __ So. 3d __ (Ala. 2013), withdrawing the erroneous language that Farmers initially relied upon.

may pursue a fraud claim against his employer insurance company if the conditions of employment are misrepresented to induce the agent to accept employment. These and other pertinent authorities[23] are ignored on appeal by Farmers (and its *amici*), even though Mr. Morris relied on them below as controlling, the circuit court shaped the trial in conformance with them, and they remain controlling for the outcome of this appeal. There was never any request by Farmers to overrule any of these, and it is too late to do so now.

a. Kyle's Reliance Was Reasonable Notwithstanding The Existence of Farmers' "Conflict of Interest" Document

i. The Initial Farmers Documents Did Not Contradict the Misrepresentation

In *Patten*, Alfa recruited Patten to work in its Alexander City office. 670 So. 2d at 855.

> With regard to the fraud claim, Patten contends that he was told he would have a $325,000 "book of Business" in Tallapoosa County, where he lived and had many friends and business contacts. Although Whiteside told him his book of business would be in Tallapoosa County, Patten claims Whiteside knew during the employment negotiations that Patten would

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[23]Including, in addition to the authorities cited in footnote 24 below, the secondary authorities cited in *Patten*, 670 So. 2d at 857, and *Environmental Systems*, 624 So. 2d at 1383: 3 S. *Williston on Contracts*, §§ 811-811A (3d ed. 1961); 3 A. Corbin, *Corbin on Contracts*, § 578, p. 405 n. 42 (3d ed. 1960 and 1991 supp.); *Restatement of Contracts* § 573 (1932); 37 Am. Jur. 2d *Fraud and Deceit* § 453 (1968).

> be expected to spend a portion of his time working in Coosa County, where he had no business contacts. ... Patten claims that the misrepresentations made by Alfa and Whiteside about where he would be working induced him to take a position he would not otherwise have considered.

670 So. 2d at 856. Not only is this fraud-in-the-inducement claim precisely parallel to Kyle Morris's claim, but also the defenses that the *Patten* Court rejected are just like Farmers' defenses here.

Pertinent here, Alfa argued that reliance was defeated by a provision in the agent's agreement that "Alfa may restrict the territory I may solicit in and ... assignment of any particular territory to me is not to be construed as a permanent assignment." The Court held to the contrary:

> Because Patten offered substantial evidence tending to show that the initial conditions of employment were misrepresented to him and that he justifiably relied on the misrepresentations in deciding to accept employment with Alfa, not withstanding the contractual provision stating that Alfa would have the right to reassign him after he was hired, his claim alleging fraudulent inducement should have been submitted to the jury.

670 So. 2d at 857.

Although this passage uses the phrase "justifiably relied," it does not turn on the distinction between justifiable and reasonable reliance; it simply uses the term that was the law at the time. Reliance is not reasonable when

the plaintiff "made a deliberate decision to ignore written contract terms," *Foremost*, 693 So. 2d at 421, but neither Mr. Patten nor Kyle did anything of the sort. Kyle read Farmers' documents and understood them the best he could, but saw nothing contradicting what he had been told. R587-88.

There was nothing - zero - in the employment agreement that could or should have alerted Kyle to investigate whether Farmers agents really truly meant what they said when they repeatedly told him there was no problem with his continuing his affiliation with his father's agency. The provision cited by Alfa in *Patten* did not contradict the misrepresentation of Mr. Patten's initial conditions of employment, and nothing in the documents that Kyle signed to become an agent contradicted Farmers' false statements that it had no policy making it a conflict of interest when a Farmers agent "offices with an agent or broker of another insurance company."

ii. Farmers' Obscure Internal Policy Provision Did Not Prevent Kyle from Continuing to Reasonably Rely on the Misrepresentation When He Signed the Career Agent Agreement

Farmers does not now contend that anything in the documents Kyle *initially* signed contradicted the misrepresentations that working with his father was not a problem. Instead, Farmers on appeal argues only that one

paragraph buried deep in online training materials provided to Kyle *months after* the false representations were made to him, and *after* he agreed to become a Farmers agent, establish as a matter of law that he could not reasonably have relied on the misrepresentations made to him *before* he accepted employment.

"It is axiomatic that one may not undo a fraud by subsequent acts." *Southern Life and Health Ins. Co. v. Turner*, 571 So. 2d 1015, 1020 (Ala. 1990), *vacated on other grounds*, 500 U.S. 901, *on remand*, 586 So. 2d 854 (Ala. 1991). "Clearly, one cannot rectify a fraud by subsequent conduct. Once the fraud is perpetrated, a cause of action has accrued." *National States Ins. Co. v. Jones*, 393 So. 2d 1361, 1367 (Ala. 1980). Kyle relied on the misrepresentation when he became a Farmers agent in reliance upon it, as Mr. Patten did in *Patten*, and the existence of a document that he did not have access to *at that time* cannot undo the fraud.

Farmers contends that Kyle had access to the "conflict of interest" provision and should have found it during his training as a reserve agent and thus, according to Farmers, could not have continued to rely on the misrepresentations when he signed the agreement to become a career agent in August 2007. Farmers asserts, Br. 15, that Kyle signed his

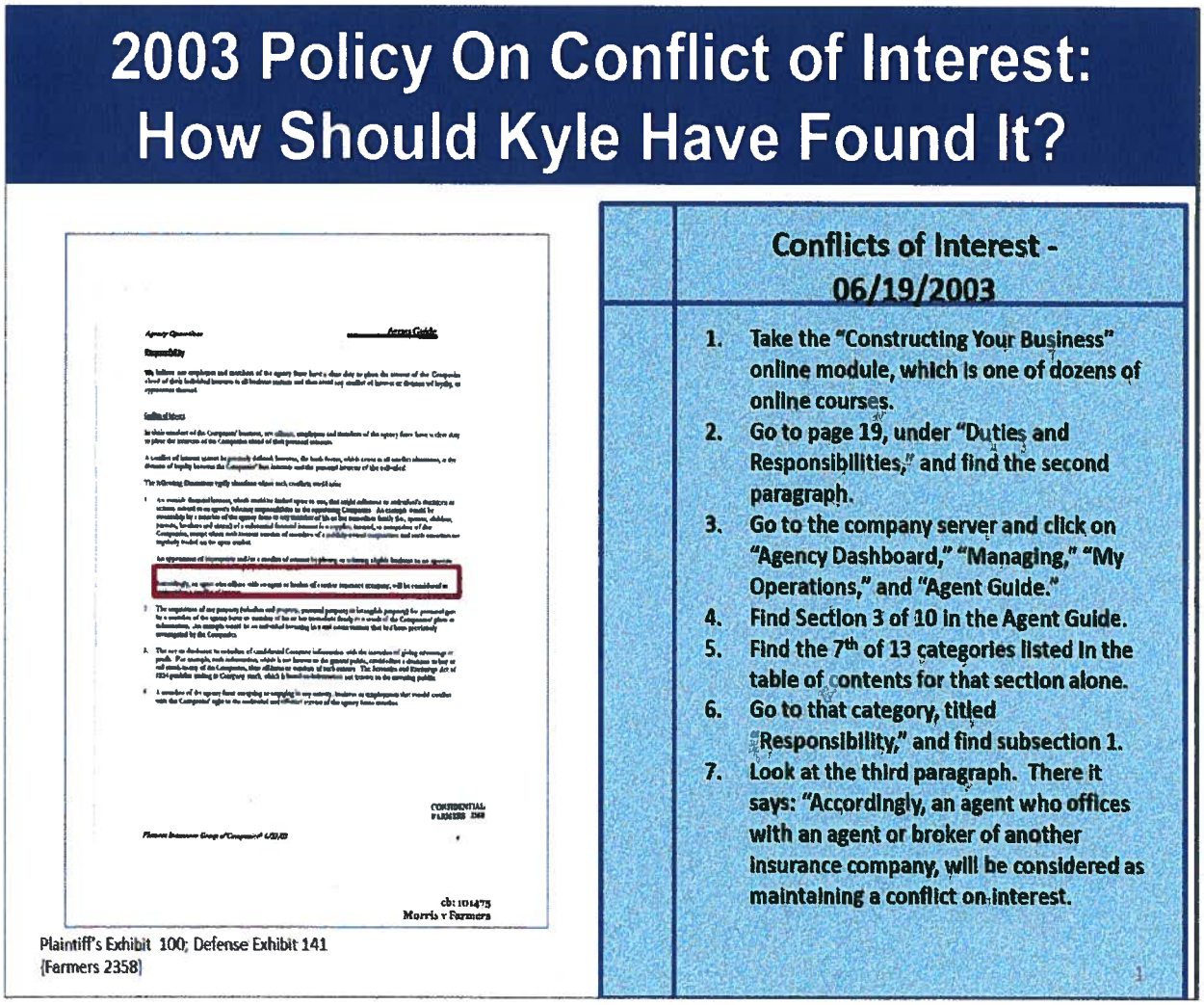
career agent agreement "two months after completing his training." Farmers then argues that, because of that training, he could not rely on the misrepresentation when he signed the career agent agreement or five months later when it became effective and he became a career agent in August 2007. Br. 37-40. This again is an instance of an argument in the Appellant's Brief untethered to any ruling below - there is no showing that this contention was raised or ruled upon in the circuit court.

Even if the argument were preserved, it is meritless. Any contention of reliance on the training materials (whether supposedly before or after Kyle changed his position and became a Farmers agent) was abundantly refuted at trial.

First, Mr. Morris testified that he never saw the materials Farmers now points to. *E.g.*, R589. Second, Mr. Hunt and Ms. Lowry, who completed the same training as Kyle, both testified that they had never seen this provision. R744-45 (Lowry), R771-80 (Hunt). Mike Dewey testified that he did not know such a provision existed. R222. Steve Hunt testified not only that he did not know about it but also that he had not found it when he had taken the very same training. R775. Mr. Hunt could not even find it in the materials when

asked to do so on the witness stand. R775-779.

The evidence thus established that it was unreasonable to expect anyone to find the particular training materials Farmers cites as precluding, as a matter of law, reasonable reliance. The jury was shown a demonstrative aid that was consistent with Kyle's testimony (R632-40) and Steve Hunt's testimony (R771-80) about how hard it was to find the "conflict of interest" provision:



Plaintiff's closing argument summarizes just how obscure and difficult to find this particular provision actually is. R867-70.

Under the circumstances, whether Kyle reasonably relied on Farmers' misrepresentation was patently a jury question.

Farmers' legal argument that its "conflict of interest" provision buried deep within its training materials bars reasonable reliance as a matter of law is answered by *Potter v. First Real Estate Co., Inc.*, 844 So. 2d 540 (Ala. 2002); and *Ex parte Seabol*, 782 So. 2d 212 (Ala. 2000). In *Potter* the Court held that the plaintiffs were <u>not</u> barred by an obscure provision in a survey that contradicted the misrepresentation that the property was not in a flood plain. In *Seabol* the Court held that the plaintiff, a realtor, was <u>not</u> barred by a provision in his mortgage from bringing a fraud action against his attorney and bank.

Potter recites how it and *Seabol* differ from *Foremost*, focusing on the facts that the documents in *Seabol* and *Potter* "were 'not as easily understood' as those in *Foremost*." *Potter*, 844 So. 2d at 547, quoting *Seabol*, 782 So. 2d at 216. After analyzing *Foremost*'s treatment of *Hickox v. Stover*, 551

So. 2d 259 (Ala. 1989); and *Hicks v. Globe Life & Acc. Ins. Co.*, 584 So. 2d 458 (Ala. 1991), *Potter* holds:

> Viewing the *Foremost* Court's description of the problem in *Hicks* as permitting a fraud case to go to the jury in all circumstances where all the plaintiff had to say was that he did not, in fact, know what the contract said, it is consistent with *Foremost* to recognize a jury question in a fraud case where the plaintiff's ignorance of the contents of a document is reasonable under the circumstances.
>
> Such a result conforms to earlier Alabama cases decided before the adoption of the justifiable-reliance standard....

844 So. 2d at 549 (emphasis added).

The Farmers documents "were 'not as easily understood' as those in *Foremost*." *Potter*, 844 So. 2d at 547, quoting *Seabol*, 782 So. 2d at 216. Steve Hunt - who worked for the state Farmers office in Birmingham when he testified, R752, and thus had incentive to testify favorably to Farmers - gave testimony favorable to Mr. Morris, establishing that even an experienced Farmers agent who trained other Farmers agents could not find the obscure provision Farmers now cites. Thus, if anything, the documents here are not as easily understood as those in *Potter* and *Seabol*.

As to the "conflict of interest" provision, therefore, Mr. Morris presented substantial evidence, and the circuit court correctly denied JML. Mr. Morris presented "a jury

question in [his] fraud case where the plaintiff's ignorance of the contents of a document is reasonable under the circumstances." *Potter*, 844 So. 2d at 549 (emphasis added).

b. The Merger Clause and the 90-day Termination Provision Have Even Less Effect on Fraud In the Inducement

It makes no difference that Kyle's employment was "at will." An at-will employee can bring a fraud claim against his or her employer for misrepresentations that induce the employee to accept the employment. *Kidder v. AmSouth Bank, supra; Smith v. Reynolds Metals Co., supra; Patten v. Alfa Mut. Ins. Co., supra; Borum v. Alabama Inter-Forest Corp.*, 719 So. 2d 851, 853 (Ala. Civ. App. 1998); *Shaddix v. United Ins. Co.*, 628 So. 2d at 1099-1100. In any event, the 90-day termination provision cited by Farmers has nothing to do with Kyle's cause of action. As Farmers through Mr. Gockel admitted, R342, Kyle's continuing association with his father's agency was a conflict from the day he became a reserve agent, and this condition of initial employment is what Farmers misrepresented to Kyle. As in *Patten*, this misrepresentation is actionable, and the 90-day termination provision does not contradict it.

The Court has likewise rejected Farmers' notion (Brf., p. 2) that a merger/integration clause defeats a claim for fraud.

Patten at 857; *see also Environmental Systems, Inc. v. Rexham Corp.*, 624 So. 2d at 1383 (also omitted by Farmers and its *amici*) (holding that "an integration clause" is "not applicable to exclude evidence relating to a fraud claim"... "'To hold otherwise is to encourage deliberate fraud.'"). In *Environmental Systems*, the Court stated:

> "This holding ensues from the rule that when an agreement has been induced by deliberate fraud, the written document reciting that agreement is void and is 'of no more binding efficacy ... than if it had no existence, or was a piece of waste paper.'"

Id. at 1385 (citations omitted).[24] *Ex Parte Lumpkin*, 702 So.

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[24]This holding that a merger clause does not bar a fraud action is a time-honored principle. *See, e.g., Downs v. Wallace*, 622 So. 2d 337, 342 (Ala. 1993) ("To hold otherwise is to encourage deliberate fraud."); *Dixon v. SouthTrust Bank of Dothan, N.A.*, 574 So. 2d 706, 708 (Ala. 1990) ("Under Alabama law, an action alleging fraud in the inducement is an action in tort, and in such a case the parol evidence rule does not apply."); *Ramsay Healthcare, Inc. v. Follmer*, 560 So. 2d 746, 748 (Ala. 1990) ("the parol evidence rule applies to contract actions, not actions in tort. Parol evidence is ordinarily admissible to show that a written agreement was procured by fraud."); *Curry Motor Co., Inc. v. Hasty*, 505 So. 2d 347, 351 (Ala. 1987) ("Parol evidence of fraud is always admissible, even though there is a completely integrated writing."); *Hall v. Integon Life Ins. Co.*, 454 So. 2d 1338, 1343 (Ala. 1984) ("Parol evidence is always admissible to show that the written instrument was procured by fraud"); *Parker v. McGaha*, 321 So. 2d 182, 185 (Ala. 1975) ("Evidence of fraud is always admissible, even though there is a completely integrated writing."); *Nelson Realty Co. v. Darling Shop of Birmingham, Inc.*, 267 Ala. 301, 101 So. 2d 78, 83 (1957) ("Nor does a written contract estop the parties from showing fraud in the inducement .... The action is such cases is based upon

2d 462, 467 (Ala. 1997) is especially pertinent as it is a post-*Foremost* opinion continuing to acknowledge that merger and integration clauses do not defeat fraudulent inducement claims.

This Court has likewise rejected Farmers' other contention (Br. 35-37) that a general disclaimer clause can defeat a claim for fraud. Only when the specific representation is expressly disclaimed in a contemporaneously executed document may a contracting party claim there is no reliance. *See Environmental Systems* at 1385, n.7 (citing cases). Here, there was zero mention in the contemporaneously

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the fraud in the procurement of the contract, and not upon the contract itself."); *Alabama Power Co. v. Pierre,* 236 Ala. 521, 183 So. 665, 669 (1938) (if "there was a 'catch' in [the contract], and [the plaintiff was] deceived thereby, - thus constituting a fraud impairing its validity[,] [t]his may be shown by parol. 3 Williston On Contracts, Section 634; *Bristow v. Jones,* 1 Ala. 159; 22 Corpus Juris 1215"); *Brenard Mfg. Co. v. Pearson,* 213 Ala. 675, 106 So. 171, 172 (1925)("The fact that the agreement was in writing did not preclude the admission of parol evidence of the fraud or misrepresentation alleged in the plea."); *Alabama Machinery & Supply Co. v. Caffey,* 213 Ala. 260, 104 So. 509, 511 (1925) ("a stipulation in the written contract that there are no verbal understandings not incorporated therein does not estop the party to set up fraud in verbal misrepresentations inducing the contract. ... The law does not countenance a contract against the consequences of fraud."); *Thweatt v. McLeod,* 56 Ala. 375 (1876); and *Dixon v. Barclay,* 22 Ala. 370 (1853).

executed employment agreement that *could* have put Kyle on notice that he should question or not rely upon Farmers' misrepresentations about his continued association with his father's agency.

These clauses in the agency agreements cannot preclude reasonable reliance as a matter of law. As shown in section A.1. of the Argument, above, Farmers did not preserve any other JML ground. The circuit court correctly denied the motion for judgment as a matter of law.

3. *Gardner*, A Promissory Fraud Case, Is Inapplicable

Farmers places most of the weight of its argument on *Gardner v. State Farm Mut. Auto Ins. Co.*, 822 So. 2d 1201 (Ala. Civ. App. 2001).[25] Br. 31-32, 35-37. That case is entirely distinguishable, both because it is a promissory-fraud case and because it involves issues arising ten years after Ms. Gardner became an agent, not, as here, a putative conflict of interest that existed before Kyle became a Farmers agent. Gardner became an agent in 1986 and difficulties with her performance arose beginning in 1996. 822 So. 2d at 1203-04. After Alfa discovered serious problems in her agency in

[25]*Affirmed, Ex parte Gardner*, 822 So. 2d 1211 (Ala. 2001) (not addressing the fraud issue).

1997, it terminated her agency in 1997 or 1998. *Id.* at 1205. Gardner's fraud claim was that "she was told by a State Farm representative that the Agent's Agreement would be terminated only for theft, that the statement was false, and that she had suffered damage as a result of the fraudulent misrepresentation."

The Court of Civil Appeals rejected Gardner's fraud claim with the following analysis:

> Because the Agent's Agreement clearly provided that it was terminable at will and because it contained a merger clause superseding any prior written or oral agreements and providing that it could be amended only in writing, we conclude that Gardner could not have reasonably relied upon any agent's alleged statement telling her that she could be terminated only for theft.
>
> In addition, Gardner's claim alleging promissory fraud must also fail, because she presented no evidence tending to show that State Farm representatives, at the time they allegedly made the statement telling her that she would not be terminated except for theft, intended to deceive her. A present intent to deceive is an essential element of promissory fraud.

822 So. 2d at 1209. Kyle has never alleged that Mr. Hunt or Ms. Lowry promised that he would not be terminated because of his association with his father's agency, so *Gardner* is simply inapplicable. Furthermore, it is also inapplicable because it concerned issues that arose ten years after Ms. Gardner became

an agent, whereas here, the misrepresentation concerned a Farmers policy in existence at the time Kyle was considering whether to apply for a Farmers agency that conflicted with the known and disclosed fact of his association and his intention to continue associating with his father.

C. The Circuit Court Correctly Denied the Motion for a New Trial, and Farmers Fails to Show Otherwise

To the extent that Farmers argues for a new trial, it fails to specify where it preserved any sufficiently egregious trial error(s) that might warrant such extraordinary relief. It is Farmers' burden to demonstrate preserved error and to present this Court with the legal authorities entitling it to the relief sought. *See* the authorities cited in Parts VIII. B. and E. and X. A. 2., above. Farmers fails to demonstrate any error, much less some properly preserved error of such gravity or weight that any relief might be due in light of Alabama's harmless error rule. Ala. R. App. P. 45.

1. Farmers Did Not Preserve an Issue Challenging The Compensatory Damages

Farmers did not argue in its oral pre-verdict motions that Mr. Morris had failed to present substantial evidence of the damages he was seeking. R712-27, R805-08. At the close of Plaintiff's case, Farmers did re-argue a pre-trial motion

to strike Dr. Hebert's testimony on damages and to strike Plaintiff's evidence of damages. R703-12. The circuit court denied the motion, holding that "we have got a jury question on the issue." R711-12.

To the extent this might be construed as a JML argument, it is waived by failure to renew it at the close of all the evidence. R805-07. To the extent it could be construed as a ground for a new trial or for a remittitur, the Appellant's Brief is deficient for failure to point to a ground in the post-judgment motion requesting a new trial on this ground and for failure to argue with specificity and citation to authority that the rejection of such a ground was reversible error. If the Court disagrees with this analysis and deems an appealable issue to be presented, the factual recitation above and the argument below show that Farmers is wrong and that there is no error.

2. Farmers' Arguments Are Wrong

A plaintiff induced by a misrepresentation to leave employment to take at-will employment with the defendant "would be entitled to damages for all injuries proximately caused by the misrepresentation," *Kidder v. AmSouth Bank, N.A.*, 639 So. 2d at 1363.

Farmers makes arguments that simply do not correspond to the evidence, to Plaintiff's theory of the case, or to the jury instructions. First, it argues that Kyle sought damages

> premised solely on what Morris might have made from Farmers had he continued as a Farmers agent. On top of that, Hebert assumed, speculatively, that Morris would have remained a Farmers agent, with ongoing repeat business for two decades, despite the at-will Agent Agreement.

Br. 41 (emphasis in original). To the contrary, as set forth in the Statement of Facts, Kyle sought damages for commissions he would have earned if he had not left his full-time employment at the Morris Insurance Agency. Farmers' expert, Mr. Pawlowski, testified *without objection* that the best evidence of the policies Kyle would have sold at the Morris Insurance Agency in 2007, 2008, and 2009 was the policies he sold working for Farmers, R906, and that the best evidence of the retention ratio on those policies was the retention ratio at Farmers, R482. Agreeing with and using this evidence from Farmers' own expert, Dr. Hebert simply made economic calculations based on that "best evidence."

Farmers actually cites *Kidder* as holding that the "damages for inducing [a] person to leave one employment for new employment is limited to loss resulting from giving up the former employment." Br. pp. 42-43, summarizing *Kidder*. Kyle

agrees, and that is the evidence that he submitted to the jury, and that is how the jury was instructed, R930-32.

Farmers makes a similarly peculiar argument when it asserts that, "In Reality, Morris Did Not Lose Income." Br. 44-48. Three points answer this argument: (1) Kyle did not seek damages for commissions earned in 2007, 2008, and 2009, treating the income he earned at Farmers in those years as offsetting the income he would have earned in those years at Morris Insurance Agency writing the equivalent policies. (2) Although Kyle earned some income from Morris Insurance Agency in those three years, 80% of this income (R694) was attributable to work he did before 2007 and only proves the point that good agents continue to earn commissions in later years on policies written in preceding years. (3) Kyle received a salary in 2010 and 2011 because he took over management duties at Morris Insurance Agency until his father came back out of semi-retirement, R616-17, which would not have affected his renewal commissions if he had sold the 310 policies with net $637,000 premiums at Morris Insurance Agency instead of at Farmers. Farmers' argument that Kyle cannot recover damages because he made more in 2008 and 2009 than he did in 2005 and 2006, or because he made income in 2010 and

2011, is incorrect and presents no error.

Farmers makes a passing comment that "there was no evidence that another carrier would have paid Morris the same commission rates as Farmers." Br. 47. It cites no objection on this basis, because there was none. Over and above that sufficient answer, the argument is wrong because of the testimony, without contradiction or cross-examination, that the best evidence of what Kyle would have made at Morris Insurance Agency, under the business valuation principle of substitution, was what he *did* make at Farmers. Furthermore, Kyle testified that with insurers generally, "the agent gets a small percentage, maybe 10 or 15% of the total annual premiums." R578. Farmers did not offer evidence that Farmers paid higher commissions, or object to any lack of evidence of commission paid by the companies for which the Morris Insurance Agency wrote policies, or argue that the evidence was deficient in this respect, so Farmers cannot now attack the verdict and judgment on this belated new basis.

Farmers next argues that "Morris' Expectation Damages Evidence Was Speculative And Improper." Br. 48-50. This argument depends upon cherry-picking the defense evidence, contrary to the standard of review. Only once, Br. 22, does

Farmers' brief contain the phrase "retention ratio," and it is just a passing description of Dr. Hebert's evidence. Nowhere does Farmers acknowledge Farrell Morris's testimony that an agent can expect to keep the same customers for 10 to 20 years or more.

Farmers' last attack on the compensatory damages, asserting that the compensatory damages award "Is Excessive And Must Be Reversed As It Necessarily Includes Projected Lost Net Commissions," Br. 51-52, simply repeats the errors of its earlier arguments.

3. The Compensatory Award Is Supported By The Evidence

"'Compensatory damages are designed to make the plaintiff whole by reimbursing him or her for the loss or harm suffered.'" *Slack v. Stream*, 988 So. 2d 516, 533 (Ala. 2008). "General tort law permits recovery of all damages proximately caused by the wrongful acts of the defendant." *Continental Eagle Corp. v. Mokrzycki*, 611 So. 2d 313, 320 (Ala. 1992). The wrongdoer bears the risk of any uncertainty over damages caused by its misconduct. *Smith v. Atkinson,* 771 So. 2d 429, 436-37 (Ala. 2000). "To deny the injured party the right to recover any actual damages in such cases, because they are of a nature which cannot be thus certainly measured, would be to

enable parties to profit by, and speculate upon, their own wrongs." *Id.* at 436. Kyle proved his damages with sufficient specificity, see Part VII.B.6., above, but if there was any uncertainty, Farmers cannot take advantage of it and profit by its own wrongs, especially when it failed to timely and properly preserve any such issue for appellate review.

The circuit court instructed the jury consistently with this law and with the pattern jury instructions. R931-32. Farmers raises no issue as to these instructions. The jury properly followed them and properly awarded $600,000 in compensatory damages, well under the $1,000,000 requested and justified by the evidence.

In arguing that the fraud damages are not the same as contract damages based on wrongful termination, counsel analogized the book of business that Kyle would have built at Morris Insurance Agency in 2007-2009 to an annuity that would produce an income stream:

> MR. DUNCAN: No, Your Honor, they wouldn't [be the same] because the difference is on the breach of contract can be future expectancy damages, which we are not trying to get future expectancy damages.
>
> If we were here saying that Kyle Morris had he stayed at Farmers would have gotten future damages out in the future, then that would be our breach of contract claim, trying to get future damages, which we are not trying to recover. We are not trying to

> say had he stayed at Farmers he would have sold more policies, had he done anything at Farmers he would have gotten future damages at Farmers. That would be the breach of contract claim.
>
> What we have said is clearly a claim under Alabama fraud law that you can - whatever you gave up in reliance on the fraud, you are entitled to recover, if you present substantial evidence.
>
> What we have is Kyle's book of business that he would have developed over his agency at the Morris Insurance Agency. He gave that up over at Farmers.
>
> So, what we have done is said the best evidence of what he gave up through their expert, a CPA and business valuation expert, is the book of business over at Farmers. I use the term substitute that, that is what he would have had he not ever left. So, it is all reliance damages.
>
> Now, on the reliance damages, that asset that he has built <u>that book of business has a revenue [stream] just like an annuity</u> would out into the future. So, he has given up that as well as the growth on that business.
>
> So, we have strictly stayed within the law of fraud throughout this case from day one that all we are trying to do is get what would Kyle have had had he not relied on the fraud, changed his position, and come over to Farmers.

R708-09 (emphasis added). Mr. Duncan so well demonstrated in this argument the correctness of Kyle's claim, theory, and evidence, and the inappositeness of Farmers' misdirected attacks, that it is hard to see how better to conclude our argument.

In the end, Farmers has not met the strict standard for

interference with a compensatory award. *New Plan Realty Trust,* 792 So. 2d at 363-64; *Daniels v. East Alabama Paving,* 740 So. 2d at 1145. Its challenge to the compensatory damages, whether viewed as a JML issue, a new trial issue, or a remittitur issue (it does not clearly say which it is arguing for), is due to be denied.

D. The Punitive Damages Award is Not Excessive

1. Farmers Committed A Highly Culpable Intentional Fraud

Jeff Withoft, Farmers' division manager in Birmingham, "more likely than not" was the Farmers officer in the state office who made the initial false representation to be passed on to Michael Dewey. R216-217. If it was not Withoft, it was his superior, Randy Cooper, Farmers' state executive director. R222:13-16 ("either Jeff or his superior"), R797:10-12. Withoft knew at the time of Kyle's recruitment in 2007 that Farmers "had a written policy that made [Kyle's] continuing relationship with his father's insurance company, the Morris Insurance Agency, a conflict of interest and unacceptable to the companies." R798:2-11. He had actual knowledge of that policy in 2007 "[a]s did the district manager and others responsible for recruiting, yes." R798:12-14. Moreover, Mr. Cooper was "aware that it would be a conflict of interest."

R799:18-800:1. One of these two men told Michael Dewey to hire Kyle, and Withoft approved Kyle's application. There was thus clear and convincing evidence that Mr. Withoft or Mr. Cooper, the highest Farmers executives in the State of Alabama, was the original source of intentional misrepresentations of a material fact to Kyle Morris[26], misrepresentations made for the sake of recruiting Kyle as a Farmers agent.

Mr. Withoft testified, however, that "No one contacted me by telephone from the district office" regarding Kyle Morris becoming a reserve agent. R786:8-12. The jury was entitled from the other testimony to find that Mr. Withoft was wilfully swearing falsely to cover up his fraudulent misrepresentation. As in *Target Media Partners Operating Co. LLC v. Specialty Marketing Corp.*, [Ms. 1091758, Sept. 6, 2013, 2013 WL 4767022, *20] ___ So. 3d ___, ___ (Ala. 2013), "the jury was free to,

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[26]"In Alabama, it is not necessary to prove that the misrepresentation was made directly to the person who claims to be injured." *Ex parte Daimler Chrysler Corp.*, 952 So. 2d 1082, 1090 (Ala. 2006). Farmers argues incorrectly, Br. 10 (Withoft's denial) and 55 (Hunt and Lowry "ignorant"), that Withoft made no misrepresentation to Kyle, but the circumstances establish without doubt that Withoft intended for Kyle to rely on the misrepresentation by becoming a Farmers agent, and that the misrepresentation was repeatedly made to Kyle on behalf of Farmers, by its agents, servants, or employees Mr. Hunt and Ms. Lowry.

and did, assign little or no credibility or weight to the testimony of" the defense witness who denied an intent to deceive. "The absence of an admission of an intent to deceive by one who harbors an intent to deceive cannot be the *sine qua non* of a viable [intentional]-fraud action." *Id.*, WL at *20-*21, ___ So. 3d at ___.

> Circumstantial evidence can be used to establish an intent ... to deceive. Indeed, because proof of an alleged tortfeasor's thoughts is, by its nature, difficult, circumstantial evidence often is the only way to prove [intentional] fraud.
>
> ...
>
> ... A defendant's intent to deceive can be established through circumstantial evidence that relates to events that occurred after the alleged misrepresentations were made. ...

Target Media, 2013 WL 4767022 at *20, ___ So. 3d at ___ (citations and internal punctuation omitted).

2. All Statutory and Judicial Standards For Review of Punitive Awards Are Satisfied Here

The jury's verdict awarding $600,000.00 in compensatory damages and $1,800,000.00 in punitive damages complies with § 6-11-21(a), Ala. Code 1975, where the legislature expressly provided that punitive damages are acceptable so long as they do not exceed a ratio of three times compensatory damages or $500,000.00, whichever is greater.

Moreover, the jury's verdict is completely consistent with the guideposts mandated by *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), as shown below.

3. Farmers Disclaims Adverse Financial Impact

Farmers "disclaims reliance on its financial position as a reason for remitting the punitive damages award." Post-judgment motion, C3786, n. 16. *See also* Farmers' March 8, 2013, Responses to Plaintiff's Post-Trial Consolidated Discovery Requests, C3818, ¶ 9, ("Farmers has expressly disclaimed reliance on its financial position as a ground for remitting the amount of punitive damages awarded by the jury."); *id.* ¶¶ 10-15, 18-21 (same).

Indeed, Farmers posted a $3 million supersedeas bond, C3757, thereby further demonstrating its ability to pay the judgment in full without any evidence or contention of <u>any</u> adverse financial impact. Thus, this Court's task in conducting its *de novo* review is only to determine whether the jury's verdict punishes Farmers too severely for the misconduct found by the jury. Farmers bears the burden of <u>proving</u> excessiveness. *McDowell v. Key*, 557 So. 2d 1243, 1249 (Ala. 1990). It is not sufficient for Farmers simply to

allege excessiveness; it must prove it by submitting evidence that "will justify interference" with the jury's constitutionally-protected verdict. *Fuller v. Preferred Risk Life Ins. Co.*, 577 So. 2d 878, 886 (Ala. 1991); *Associates Financial Services Co. of Alabama, Inc. v. Barbour*, 592 So. 2d 191, 198-99 (Ala. 1991).

4. The Due Process Factors Support Upholding The Award

The *Hammond v. City of Gadsden,* 493 So. 2d 1374 (Ala. 1986)/*Green Oil/BMW v. Gore* analysis involves the balancing of two competing constitutional concerns: the constitutional protection afforded the jury's verdict on the one hand and defendants' right not to be deprived of property without due process on the other. However, to succeed on a motion for remittitur, a defendant must submit sufficient evidence to "*justify interference,*" 577 So. 2d at 886, 592 So. 2d at 198-99, with the verdict. If the defendant does not do this, the Court may not interfere with the verdict.

In this case, Farmers elected not to present any evidence that the jury's punitive damages verdict, if not remitted, will deprive it of property without due process of law, i.e., that Farmers will be punished more severely than necessary to accomplish society's goals of punishment and deterrence.

Accordingly, the jury's constitutionally protected verdict should be left intact.

a. Reprehensibility of the Conduct

This Court should be satisfied that the jury was presented with evidence from which it could - and obviously *did* - conclude, in keeping with the circuit court's clear instructions on the law of fraud, that Farmers' conduct was reprehensible indeed.

Although *Gore, Hammond*, and *Green Oil* counsel that a court should examine reprehensibility in evaluating a punitive damages verdict for excessiveness, it cannot be ignored that reprehensibility is <u>the</u> factor which the jury principally considers in reaching its punitive damages verdict in the first instance. In other words, the size of the verdict reflects the jury's assessment of the enormity of the wrong.[27] Hence, the jury's assessment of the reprehensibility of the

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[27]In *Cooper Industries v. Leatherman*, 532 U.S. 424 (2001), the Court acknowledged that the factors of "[t]he character of the defendant's conduct" and "[t]he defendant's motive" "may have depended on specific findings of fact" as to which a reviewing court may <u>not</u> "disregard such jury findings." 532 U.S. at 439, n. 12. Thus, while adopting *de novo* review as to the <u>amount</u> of punitive damages, the Court acknowledged that the jury's finding as to <u>culpability</u> is <u>within the constitutional prohibition preventing a court from substituting itself for the jury as a finder of fact</u>.

misconduct, as reflected by the size of its verdict, is constitutionally entitled the greatest deference. U.S. Const. Amend. VII; Ala. Const. 1901, Art. I, § 11. Any determinations about the reprehensibility of the conduct is a matter principally within the jury's province.

In this case there is clear and convincing evidence of each of the requisite elements of fraud, including first and foremost an intentional misrepresentation by Farmers. Farmers' senior Division management made misrepresentations that were directly contrary to Farmers' then-existing written policies. Mr. Gockel and Mr. Withoft both testified that they knew Farmers' policy at the time Kyle was recruited. Mr. Withoft further testified that he would have expected Randy Cooper, Farmers' head executive in Alabama, and Michael Dewey, its Mobile district manager, to both have known about the policy.

Farmers asserts that a knowingly false statement did not occur since Hunt and Lowry testified that they did not know the statement was false when it was made by them on behalf of Farmers. Farmers overlooks controlling law. *It is the knowledge of the corporation that is important:*

> "The Alabama Supreme Court has declared in a number of fraud cases that a culpable intent by any of the

corporate agents involved in a transaction amounts to corporate fraud, regardless of the fact that other corporate agents, participating in the transaction or otherwise, had no such fraudulent intent.

> " 'It is axiomatic that a corporate employee's individual defense of lack of intent does not of itself end the inquiry with respect to the corporation's requisite intent to defraud. The corporation is acting as a legal entity and, if an individual corporate agent's conduct, though not fraudulent of itself, combines with the conduct of other corporate agents so as to amount to corporate fraud, the corporation may not escape liability simply by pointing to one *innocent* link in the chain.'

"*Leisure American Resorts, Inc. v. Knutilla*, 547 So. 2d 424, 426 ([Ala.] 1989) (emphasis in original).

"The Alabama Supreme Court has 'repeatedly held that a corporation cannot escape liability in fraud cases by showing that the agent through whom it acted was without knowledge of the true facts. The issue in those cases is whether the corporation had knowledge of the true facts.' *Shelter Modular Corp. v. Cardinal Enterprises, Inc.*, 347 So. 2d 1334, 1338 (Ala. 1977).

"Just because 'the corporation's left hand did not know what its right hand was doing,' the corporation is nonetheless liable because of the principles of traditional agency law. *Leisure American*, 547 So. 2d at 427, quoting and referencing in particular *Bolton Ford of Mobile, Inc. v. Little*, 344 So. 2d 1208 (Ala. 1977)."

Townsend Ford, Inc. v. Auto-Owners Ins. Co., 656 So. 2d 360, 362 (Ala. 1995).

The jury was presented with credible evidence that Farmers knew the representation was false. That is all Alabama law requires. Additionally, the jury was able to judge the demeanor of Farmers' representatives as they testified and was free to conclude that any one of them was not telling the truth about their role and/or the extent of their knowledge when they made the misrepresentation to Kyle.

There was clear and convincing evidence from which a jury could and did conclude that Farmers intentionally made a false representation to Kyle (an established insurance agent) to get Kyle's existing customers in a scheme whereby Farmers pushed him to maximize his production, and then terminated him one month after his production requirements ended so it could keep the book of business and all the corresponding renewed premiums:

Kyle's book of business was assigned a new agent, and the new agent received *reduced commissions* on this book of business, meaning that Farmers pocketed the difference.

In post-judgment discovery, Plaintiff sought to prove that Kyle was only one victim among many, and that Farmers had figured out a highly profitable fraudulent scheme that was facilitated by its at-will employment agreements. Unfortunately, Farmers withheld substantive discovery responses and elected to let the clock expire on its post-judgment motions rather than comply with the circuit court's order compelling appropriate responses to the other similar incidents discovery.

b. Similar Criminal and Civil Sanctions

Other civil frauds causing high compensatory damages support high punitive awards. *CNH America, LLC v. Ligon Capital, LLC*, __ So. 3d at __, 2013 WL 5966782 at *17, $3.8 million compensatory and $7.6 million punitive; *Target Media*, $377,800 compensatory and $1,133,400 punitive (remanded for further review). This factor supports the award here.

c. Impact on the Parties

As noted, Farmers "disclaims reliance on its financial position as a reason for remitting the punitive damages

award." C3786, post-judgment motion, n. 16; C3818-26, ¶¶ 9-15, 18-21. This factor therefore emphatically supports a refusal to interfere with the jury award.

d. Whether Defendants Profited From Their Activities

Farmers profited and continues to profit today from its fraudulent misrepresentations. Farmers wrested away over 200 of Kyle's customers and over $600,000 a year in annual premiums from these customers. Additionally, when Farmers terminated Kyle, it reassigned his customers to other agents who received smaller renewal commissions, and Farmers pocketed the difference. This factor supports the award, especially in light of Farmers' willful refusal to comply with the post-judgment discovery order which would have revealed a pattern of profiteering at the expense of new agents terminable at will.

e. The Costs of Litigation

Green Oil, 539 So. 2d at 223, counsels that this Court must consider whether the punitive damages award sufficiently rewards the Plaintiff's counsel for assuming the risk of bringing the lawsuit and encourages other plaintiffs to bring wrongdoers to trial. Counsel for Mr. Morris were prepared to offer evidence of the costs of this litigation, if a hearing

had been held. Even without itemized evidence of the litigation expenses, their scale is evident from the length of the 25-volume record, which demonstrates numerous hard-fought pre-trial motions as well as the ongoing difficulty of taking the case to trial and final judgment. This Court should leave this properly supported fraud verdict intact to offset the deterrent effect of the extraordinary expenses and litigation risks of such cases, and to continue the noble societal purposes of bringing such wrongdoers to justice. This factor thus warrants leaving the judgment entered upon the jury's verdict fully intact.

f. Mitigating Factors

There are none.

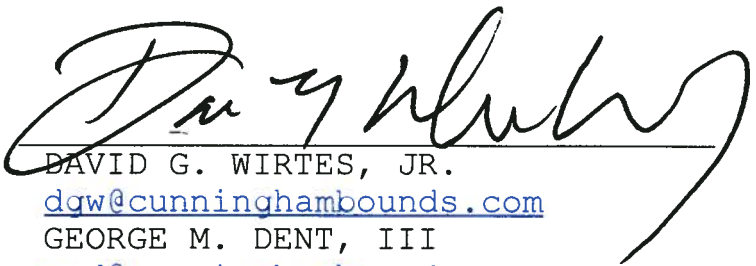
XI. CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

CUNNINGHAM BOUNDS, LLC

Attorneys for Plaintiff/Appellee

BY: 

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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 11th day of December, 2013, filed the foregoing with the Clerk of the Court via the Alabama Appellate Court Electronic Filing system, and that the following parties have been served a copy of same either by electronic mail and/or by United States mail, first-class postage prepaid, as follows:

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