

S.C. NO. 1020629

IN THE SUPREME COURT OF ALABAMA

THE TERMINIX INTERNATIONAL COMPANY, LP,

Appellant,

v.

LUCILLE DEVERS, etc.,

Appellee.

On Appeal from the Circuit Court for Madison County,
Alabama, CA No. CV-99-2477

BRIEF OF APPELLEE
LUCILLE DEVERS

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STATEMENT REGARDING ORAL ARGUMENT

While the appellee, Lucille Devers, stands ready, willing and able to provide oral argument in this case, the appellee respectfully contends that oral argument would not materially aid the resolution of this case. The legal issues on appeal are simple and straightforward.

TABLE OF CONTENTS

STATEMENT REGARDING ORAL ARGUMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vii

STATEMENT OF THE CASE 1

 I. INTRODUCTION 1

 II. THE CLAIMS PRESENTED 1

 III. THE COURSE OF THE PRE-TRIAL PROCEEDINGS 2

 A. Requests for Arbitration by Terminix 2

 B. Pre-trial Discovery and Evidentiary Proceedings 4

 C. Efforts to Delay Trial by Terminix 7

 IV. THE TRIAL OF THE CASE 10

 V. POST-TRIAL PROCEEDINGS 10

STATEMENT OF THE ISSUES 12

STATEMENT OF THE FACTS 13

 A. Overview 13

 B. Lucille Devers' Residency at Greystone 13

 C. The Known Danger Presented by Fire Ants 16

 D. Terminix's Pest Control Service at Greystone 19

 E. The Terrible Injuries Suffered by Lucille Devers 24

STATEMENT OF THE STANDARD OF REVIEW 28

SUMMARY OF THE ARGUMENT 30

ARGUMENT 33

I. WHETHER THE TRIAL COURT WAS CORRECT IN DENYING TERMINIX'S ATTEMPT TO REQUIRE A NON-SIGNATORY TO ARBITRATE HER TORT LAW CLAIMS AGAINST IT BASED UPON SOUND FEDERAL AND STATE LAW 33

 A. Both Federal and State Law Prohibit Terminix From Requiring Mrs. Devers to Arbitrate Her Tort Law Claims 33

 B. Lucille Devers Did Not Rely Upon the Pest Control Agreement Between Greystone and Terminix to Prove Her Tort Law Claims 34

II. WHETHER THE TRIAL COURT WAS CORRECT IN ADMITTING CERTAIN AFTER-ATTACK EVIDENCE WHEN THAT EVIDENCE WAS RELEVANT AND ADMISSIBLE UNDER ALABAMA'S RULES OF EVIDENCE 41

 A. Counsel for Terminix International Opened the Door to Evidence Concerning Todd Fritz's Actions After the Attack Upon Devers 42

 B. Counsel for Terminix International Allowed Admission of the Defendant's Post-Attack Actions Without Objection 44

 C. The Evidence Introduced by Devers Concerning Todd Fritz's Actions Following the Ant Attacks Does Not Involve Remedial Measures 46

 D. Even If This Evidence Is Considered Remedial in Nature It Would Remain Admissible Under Alabama Law 48

III. WHETHER THE TRIAL COURT WAS CORRECT IN NOT GRANTING YET ANOTHER ATTEMPT BY TERMINIX TO DELAY THIS CASE ON THE EVE OF TRIAL 52

IV. WHETHER THE TRIAL COURT WAS CORRECT IN REJECTING TERMINIX'S ATTEMPT TO ATTACK

A JURY VERDICT FOR COMPENSATORY DAMAGES
BASED UPON THE TERRIBLE INJURIES SUSTAINED
BY LUCILLE DEVERS 57

V. WHETHER THE TRIAL COURT WAS CORRECT IN
UPHOLDING THE JURY'S VERDICT FOR PUNITIVE
DAMAGES WHERE THAT VERDICT MEETS ALL
STANDARDS OF FEDERAL AND ALABAMA LAW 64

A. Lucille Devers Presented Clear And
Convincing Evidence of Wantonness 64

B. The Punitive Damages Award In This
Case Meets All Standards of
Constitutionality 70

1. THE *BMW* GUIDEPOSTS 70

a. The Reprehensibility of
the Defendant Terminix
International's Conduct 70

b. The Ratio of the Compensatory
Damages Award to the Punitive
Damages Award 73

c. Sanctions For Comparable
Misconduct 74

2. THE *HAMMOND/GREEN OIL* FACTORS 74

a. The Punitive Damages Award
and the Actual or Likely Harm
Caused 74

b. The Reprehensibility of
Terminix's Conduct 76

c. Terminix International's
Profit From Its Misconduct 77

d. Terminix International's
Financial Position 77

e. Cost of Litigation 78

f. Criminal Sanctions 80

g. Other Civil Actions 80

CONCLUSION 80

CERTIFICATE OF SERVICE 81

TABLE OF AUTHORITIES

CASES

Federal

AT&T Tech, Inc. v. Comm. Workers of America,
475 U.S. 643 (1986) 35

BMW of North America v. Gore,
517 U.S. 599 (1996) 70, 71

*Prentiss & Carlisle Co., Inc. v. Koehring-Waterous
Timberjack, Inc.*, 972 F.2d 6 (1st Cir. 1992) . . . 47

Prima Paint Corp. v. Flood & Conklin Mfg. Co.,
388 U.S. 395 (1967) 35

*Rocky Mountain Helicopters, Inc. v. Bell Helicopters
Textron Div. of Textron, Inc.*,
805 F.2d 907 (10th Cir. 1986) 47

State

Aetna Life Ins. Co. v. Lavoie,
505 So. 2d 1050 (Ala. 1987) 75, 76

Alabama Power Co. v. Mosley,
318 So. 2d 260 (Ala. 1975) 58

Alfa Mut. Ins. Co. v. Roush,
723 So. 2d 1250 (Ala. 1998) 65, 69

Auto Zone, Inc. v. Leonard,
812 So. 2d 1179 (Ala. 2001) 57

Conagra, Inc. v. Turner,
776 So. 2d 792 (Ala. 2000) 71

Cook's Pest Control v. Boykin,
807 So. 2d 524 (Ala. 2001) 33, 36, 39, 40

Cooper & Co. v. Lester,
832 So. 2d 628 (Ala. 2000) 74, 78

Davis v. Southland Corp.,
465 So. 2d 397 (Ala. 1985) 28

Ex parte McFadden Engineering, Inc.,
835 So. 2d 996 (Ala. 2002) 29

Ex parte Old Mountain Properties, Ltd.,
415 So. 2d 1048 (Ala. 1982) 57

Ex parte Roberson,
749 So. 2d 441 (Ala. 1999) 28,40

Foster v. Life Ins. Co. of Georgia,
656 So. 2d 333 (Ala. 1994) 58

Freeman v. State,
555 So. 2d 196 (Ala.Crim.App. 1988) 43

Green Oil Co. v. Hornsby,
539 So. 2d 218 (Ala. 1986) 70-71, 75, 76

Hall v. Hall,
421 So. 2d 1270 (Ala.Civ.App. 1982) 41

Hammond v. City of Gadsen,
493 So. 2d 1374 (Ala. 1986) 76

Holland v. First Nat'l Bank of Brewton,
519 So. 2d 460 (Ala. 1987) 51

Hyde v. Wages,
454 So. 2d 926 (Ala. 1984) 49

Kitchens v. Maye,
623 So. 2d 1082 (Ala. 1993) 52

K-Mart Corp. v. Kyles,
723 So. 2d 572 (Ala. 1998) 58, 63

Lance, Inc. v. Ramanauskas,
731 So. 2d 1204 (Ala. 1999) 65

Modern Woodmen of America v. McElroy,
815 So. 2d 520 (Ala. 2001) 35

Nat'l Ins. Ass'n v. Sockwell,
829 So. 2d 111 (Ala. 2002) 63-64

Northeast Alabama Reg'l Med. Ctr. v. Owens,
584 So. 2d 1360 (Ala. 1999) 29, 57

Orkin v. Jeter,
832 So. 2d 25 (Ala. 2001) 61-63, 73

Plenkers v. Chappelle,
420 So. 2d 41 (Ala. 1982) 43

Precise Engineering, Inc. v. LaComber,
624 So. 2d 1339 (Ala. 1993) 48

Prudential Ballard Realty Co., Inc. v. Weatherly,
792 So. 2d 1045 (Ala. 2000) 73

U.S. Petroleum Corp. v. Hines,
770 So. 2d 589 (Ala. 1999) 80

Winn Dixie of Montgomery, Inc. v. Colburn,
709 So. 2d 1222 (Ala. 1998) 71

Statutes

Federal

9 U.S.C. § 2 35

State

ALA. CODE § 6-11-20 et seq. (1975) 64, 65, 70

Other Authorities

ALA. R. EVID. 105 51

ALA. R. EVID. 407 46-47, 51

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STATEMENT OF THE CASE

I. INTRODUCTION

This appeal comes from an *ore tenus* trial in which the jury awarded damages to Lucille Devers against the Defendants Huntsville Health Services, Inc., d/b/a Greystone Retirement Community and Assisted Living Centers of Alabama, LLC ("Greystone") and the Defendant Terminix International Company L.P. ("Terminix").

II. THE CLAIMS PRESENTED

On December 28, 1999, Lucille Devers filed this suit through her daughter and next friend Jeanne Hupfer (C.15-20). Devers' initial complaint attempted to assert claims against the owner and operator of the assisted living facility where she resided when she suffered two consecutive nights of attacks by thousands upon thousands of swarming fire ants. (*Id.*). On April 13 and May 12, 2000, after receiving some discovery responses, Lucille Devers amended her complaint to correctly denominate the Greystone Defendants. (C.62-79).

On August 24, 2000, Greystone filed a Third Party Complaint against Terminix. (C.124-147). However, on September 10, 2001, the trial court granted Greystone's

motion to dismiss its separate claims against Terminix. (C.341-342). The trial of this case and this subsequent appeal do not include any claims between Greystone and Terminix.

On June 19, 2001, Lucille Devers amended her complaint to assert claims against Terminix. (C.249-280). Devers did not pursue or allege any claim against Terminix for breach of contract. (*Id*). Devers' claims against Terminix seek recovery based solely on Alabama tort law. (*Id.*). Devers' final complaint, as amended, makes absolutely no reference to any pest control contract (C.288-321).

III. THE COURSE OF THE PRE-TRIAL PROCEEDINGS

The preparation of this case for trial involved extensive discovery, a large volume of motions, and simultaneous litigation in both Federal and State court. The Clerk's record alone devotes at least 916 pages to the pre-trial filings of the parties. In an effort to summarize the pre-trial proceedings, counsel has organized them into several broad categories discussed below.

A. Requests for Arbitration by Terminix

On January 8, 2001, Terminix filed a motion seeking to compel arbitration of Greystone's claims. (C.196-205).

However, this request was rendered moot when Greystone subsequently dismissed its claims.

On June 19, 2001, Devers amended her complaint to assert tort law claims against Terminix. (C.249-280). In response, on July 25, 2001, Terminix filed a Petition to Compel Arbitration in The United States District Court for the Northern District of Alabama. (C.1165-1166). After more than a year of litigation in Federal Court, Judge Sharon Blackburn issued a detailed written opinion denying the Petition and employing sound principles of Federal and State law. (C.1491-1504).¹

On July 31, 2001, Terminix filed a motion in State Court specifically requesting a stay of Devers' tort claims pending resolution of its Federal Petition or, in the alternative, an Order dismissing the tort claims as subject to arbitration. (C.283-287). On September 21, 2001, the trial court issued Orders denying the separate motions to stay and to dismiss Devers' claims as subject to arbitration. (C.343-344). Terminix never appealed the Order

¹ Terminix International specifically alleged in its Petition the existence of diversity jurisdiction as a basis for Federal Court jurisdiction. However, promptly upon receiving an adverse decision, Terminix then filed a Motion to Vacate, now claiming a lack of subject matter jurisdiction.

denying its request for arbitration, although an appeal if taken, is required within 42 days.

B. Pre-Trial Discovery and Evidentiary Proceedings

This case involved substantial time and expense by Devers' counsel just to obtain basic discovery necessary for trial. Judge Smith, who monitored the pre-trial proceedings, made the following accurate assessment of the discovery process:

The course of discovery in this case reveals that Devers' counsel engaged in significant work both to prepare the case for trial and to prevent Terminix International's repeated attempts to prevent a trial in multiple forums. During the discovery phase of this case, Devers' counsel traveled to multiple states for necessary depositions, retained multiple expert witnesses, and concurrently litigated certain issues in four different forums. Terminix International initiated petitions not only in Federal District Court, but also in the Eleventh Circuit Court of Appeals prior to trial. During the jury trial, Terminix International also filed an emergency mandamus petition with the Alabama Supreme Court. In order to obtain basic discovery, Devers' counsel had to repeatedly seek court intervention.

(C.1528). Because of the voluminous record, the undersigned will limit the discussion to pertinent highlights of the discovery process as it relates to Terminix.

On June 19, 2001, Devers propounded Interrogatories and a Request for Production to Terminix. (C.386-391). On

August 6, 2001, Terminix objected to Devers' discovery requests, refusing to answer any of the inquiries. (C.322-336). In September, 2001, the trial court denied Terminix's motions seeking a stay and arbitration. (C.343-344). Yet, Terminix continued to refuse to respond to basic discovery.

On February 19, 2002, Terminix responded to Devers' attempt at deposing its corporate representatives and employees who had been to Greystone by filing a motion for protective order. (C.368-372). Again, Terminix sought a blanket stay of discovery. (C.371).

In mid-February, 2002, Judge Blackburn held a telephone conference with counsel for all parties concerning the Federal Petition. (C.383). At that time, Judge Blackburn told all parties her intention to deny the Terminix Petition. She inquired of Terminix's counsel the amount of time they needed before trial, and they told her 90 days. Whereupon, Judge Blackburn urged Terminix to participate in discovery and even extracted an agreement from all counsel to seek a 90-day continuance for Terminix's benefit. (*Id.*). Yet, a month later, Terminix had still not answered the long-overdue discovery from Devers. On March 20, 2003, Devers filed a motion to compel responses to the discovery

she had propounded over 9 months earlier. (C.384-392). The trial court then ordered Terminix to respond within 20 days. (C.384). On April 5, 2002, Devers' counsel even entered into a consent protective order to facilitate Terminix's response to the long-overdue discovery. (C.394-397). When Terminix still refused to respond, the trial court entered an additional Order mandating responses within 7 days. (C.393). On April 16, 2002, Terminix finally responded to some of Devers' discovery filed the preceding year. (C.418-442). Even then, Terminix maintained voluminous objections to the long-overdue discovery. (*Id.*).

On May 9, 2002, as a result of Terminix's repeated failure to respond properly to discovery, Devers filed a second motion to compel. (C.459-184). Still, Terminix did not fully respond to discovery. On June 14, 2002, the Friday before trial, Devers filed a motion for default judgment against Terminix. (C.733-739). At this point, Terminix had still withheld even the most basic discovery, including service tickets and end-of-the-day reports concerning treatment at Greystone. (*Id.*). Additionally, many of the documents that had been produced were illegible

copies. (*Id.*). As Judge Smith stated, Terminix International continued to evade basic discovery even after the trial began:

In the instant case, Terminix International obstructed discovery. Terminix has failed to comply with three separate Orders entered by the Court. Terminix International has violated the Court's Pre-Trial Order on discovery. Terminix International continued to produce documents during the third day of the trial.

(C.815-816) (footnote omitted).

C. Efforts to Delay Trial by Terminix

Concurrently with its refusal to participate in the discovery process and efforts to block this litigation in Federal Court, Terminix repeatedly requested delays of the trial. Terminix initially refused to participate at all in the pre-trial process. This refusal persisted until at least March, 2002, despite both the trial court's written Order refusing to grant a stay and the express commitment from Devers' counsel to not contend that Terminix had waived its misplaced arbitration defense through such participation. (C.343-344;C.392-393). In her February, 2002, teleconference, Judge Blackburn related that she intended to rule against the Federal Petition. (C.383). At that point, Terminix had persisted in refusing to

participate in discovery despite the denials from both forums of its requests for a stay. However, to accommodate Terminix's concern that it was now facing a trial after its delays, Judge Blackburn extracted an agreement from all counsel to join in a request for a continuance. (C.383). Thereafter, the trial court granted the request and re-scheduled the trial for May 20, 2002. Due to the cessation of jury trials, this trial date was subsequently re-scheduled to June 17, 2002. (C.622). On May 22, 2002, counsel for Terminix filed yet another motion seeking a continuance of the June trial date, this time asserting that counsel had other trials set after Devers' case and that one of Terminix International's counsel planned to attend a baseball game the week of trial. (C.622-625).

On June 12, 2002, counsel for Terminix again moved for a continuance. (C.726-729). Now, Terminix asserted it had been prejudiced by learning "just last week" that Mrs. Devers had received extensive medical treatment including hospitalizations. (C.727). However, on March 27, 2001, 15 months before trial, Greystone and Terminix deposed Mrs. Devers' daughter, Jeanne Hupfer. In deposition, Hupfer testified that Mrs. Devers' condition worsened following

the attack, requiring hospitalization at Hartselle Hospital. On January 18, 2002, Dr. John Davis, the Medical Director of the Psychiatric Unit at Hartselle Hospital, testified in a deposition attended by Terminix. (C.730-732; R.19). In his deposition, Dr. Davis testified, in detail, concerning Devers' hospitalizations and medical treatment. (R.681-687). During the deposition, Greystone's counsel even noted that he was viewing parts of the hospital records as he questioned the witness. (R.709-710). Additionally, Devers' counsel elicited testimony that the ant attacks necessitated these hospitalizations. (R.698). Terminix possessed ample knowledge months before the trial concerning Mrs. Devers' hospitalizations.

On the morning of trial, Terminix once again requested a continuance. In addition to its prior arguments, Terminix now alleged prejudice due to Devers' designation of Ronald Bateman as a witness. (R.21-26). Bateman was a management employee at Terminix at the time Devers was attacked and had visited and serviced Greystone. (*Id.*). Despite a specific interrogatory from Devers seeking the names of any employees who had been to Greystone, Terminix failed to divulge Bateman's identity. Devers discovered this fact

through independent investigation. She then immediately disclosed Bateman and Terminix deposed him prior to trial. (*Id.*).

Finally, during the trial, Terminix filed an emergency *mandamus* petition with this Court seeking an immediate stay. (C.892-901;R.807-808). This final attempt at a continuance involved a witness previously designated by Terminix as its corporate representative. (*Id.*). However, Terminix had wrongfully withheld discovery during his earlier deposition. This matter is thoroughly detailed in an Order issued by the trial court during the trial. (C.811-817).

IV. THE TRIAL OF THE CASE

The trial of Lucille Devers' tort claims commenced on June 17, 2002, and lasted 9 days. At the conclusion of the trial, the jury carefully considered the evidence and awarded compensatory and punitive damages against both Greystone and Terminix.

V. POST-TRIAL PROCEEDINGS

Following the trial, both Greystone and Terminix filed post-trial motions. On July 15, 2002, Terminix filed a Rule 59(e) motion on the issue of arbitration, an issue decided

by the trial court in September, 2001. (C.917-924). On July 29, 2002, Terminix filed a second post-trial motion seeking an alteration of the jury's verdict. (C.1135-1148). In its supporting brief, Terminix raised 18 separate issues, many of which involved evidence admitted with absolutely no objection at trial. (*Id.*).

On July 18, 2002, Greystone filed two post-trial motions. The first sought a new trial or judgment as a matter of law. (C.1104-1109). The second sought a review and remittitur of the damage award. (C.1110-1130).

Based upon an agreement among all parties, the trial court extended the briefing schedule and hearing of all post-trial motions beyond 90 days from the judgment. (C.1160-1161). On November 14, 2002, the trial court heard oral argument and allowed evidence on the applicable punitive damage review factors. (C.1505). On December 12, 2002, the trial court entered an extensive order denying the post-trial motions of Greystone and Terminix. (C.1505-1530). In this Order, the trial court also thoroughly reviewed and analyzed the punitive damage award in light of current law. (C.1518-1528). Both Terminix and Greystone have appealed the jury verdict rendered against them.

STATEMENT OF THE ISSUES

- I. WHETHER THE TRIAL COURT WAS CORRECT IN DENYING TERMINIX'S ATTEMPT TO REQUIRE A NON-SIGNATORY TO ARBITRATE HER TORT LAW CLAIMS AGAINST IT BASED UPON SOUND FEDERAL AND STATE LAW
- II. WHETHER THE TRIAL COURT WAS CORRECT IN ADMITTING CERTAIN AFTER-ATTACK EVIDENCE WHEN THAT EVIDENCE WAS RELEVANT AND ADMISSIBLE UNDER ALABAMA'S RULES OF EVIDENCE
- III. WHETHER THE TRIAL COURT WAS CORRECT IN NOT GRANTING YET ANOTHER ATTEMPT BY TERMINIX TO DELAY THIS CASE ON THE EVE OF TRIAL
- IV. WHETHER THE TRIAL COURT WAS CORRECT IN REJECTING TERMINIX'S ATTEMPT TO ATTACK A JURY VERDICT FOR COMPENSATORY DAMAGES BASED UPON THE TERRIBLE INJURIES SUSTAINED BY LUCILLE DEVERS
- V. WHETHER THE TRIAL COURT WAS CORRECT IN UPHOLDING THE JURY'S VERDICT FOR PUNITIVE DAMAGES WHERE THAT VERDICT MEETS ALL STANDARDS OF FEDERAL AND ALABAMA LAW

STATEMENT OF FACTS

A. Overview

This is a case in which an elderly lady, Lucille Devers, suffered two nights of torture by thousands upon thousands of fire ants as she lay in her bed at Greystone. These attacks occurred after Greystone repeatedly ignored warnings of ant infestations in its facility. Similarly, Terminix failed, month after month, to take even the most basic action it knew to be necessary in order to prevent obviously present fire ants from entering the facility and attacking Lucille Devers. These attacks, the first of which Greystone concealed, caused devastating and permanent injuries to Mrs. Devers. For simplicity, counsel will focus in this brief upon those facts pertinent to the claims against Terminix.

B. Lucille Devers' Residency at Greystone

Lucille Devers was 79 years old in August, 1999, when fire ants attacked her in her bed at Greystone. (R.78). Mrs. Devers had lived a productive life. She had worked over 20 years for a grocery company. (R.81). She had also managed a public relations facility for Mars Hill Bible College in Florence, Alabama. (R.80). She, herself, had

served as the primary caregiver for an ailing husband until he passed away. (R.83-84).

Throughout her adult life, Lucille Devers experienced manageable problems with nervousness and depression. (R.81-83). Prior to Greystone, Mrs. Devers had been living independently in a retirement community in South Carolina, near her eldest daughter. (R.96). However, in March, 1998, that daughter passed away suddenly, unexpectedly, and prematurely. (R.100-101). Mrs. Devers somehow felt responsible for her daughter's death. (*Id.*). She incorrectly felt that she had worried her daughter to death. (*Id.*). Mrs. Devers believed that the Lord was punishing her for her past sins. (*Id.*).

Jeanne Hupfer is Mrs. Devers' youngest daughter and lives in Huntsville, Alabama. (R.76;R.79). Immediately after her sister's death, Hupfer traveled to South Carolina to help her mother. (R.100-101). When Hupfer returned to Huntsville, she began looking for a place where her mother could live. (R.101-102). Her mother needed some care but wanted to live independently of her children. (R.103). Hupfer subsequently chose Greystone, a facility close to her own home. (R.102).

Greystone is an assisted living center. (R.378). It housed a number of elderly ladies in need of various levels of physical and medical assistance. (*Id.*). At trial, one of Greystone's owners, James Turnipseed, agreed that most of the facility's elderly residents needed some assistance with basic activities of daily living. (R.381-382).

When Hupfer decided to move her mother to Greystone, she met with Sandy Smith, then the facility's Director, and discussed her mother's mental condition. (R.102-104).² She also provided Greystone with records from her mother's treating psychiatrist. (*Id.*). In April, 1998, Devers moved into Greystone. (R.105-107).

Although she interacted with the other residents and resident attendants at Greystone, Mrs. Devers was a quiet lady. (R.108-109). She incorrectly thought she was ugly, that she smelled bad, and that others really did not like her. (R.108). Yet, Devers still enjoyed her daughter and son-in-law, and they loved her dearly.

Jeanne Hupfer was an active caregiver. She visited her mother at least twice a week. (R.108). Her son-in-law,

² According to the witnesses at trial, Sandy Smith showed concern for the facility's elderly residents but was fired and replaced with a marketing specialist who would instead concentrate on selling beds. (R.222-224; R.282-286; R.298-299; R.307).

Gwynne, also visited frequently, bringing her a milkshake a couple of times each week. (*Id.*; R.237-238). Mrs. Devers enjoyed the frequent visits with her family. (*Id.*).

C. The Known Danger Presented By Fire Ants

Fire ants are common in the Southeastern United States. (R.405). They can vary both in size and color, ranging from red to black. (*Id.*). They are aggressive. (R.407).

Fire ants live in colonies. (R.405-406). Their presence is easily detectable upon inspection. (*Id.*). Within a colony, there are various types of ants, including the queen, large ants that protect the colony, babysitters for the eggs, and foragers. (R.406). The foragers search for food in the area around the colony. (*Id.*). According to Dr. Arthur Appel, an entomology professor at Auburn, a colony would have to be present for several months before it could contain and support thousands of foragers looking for food. (R.407-408).³

Fire ants are omnivorous. (R.407). That is, they feed upon and consume anything they can get their jaws on, including other living animals. (*Id.*). The thousands upon

³ According to those who witnessed the attacks upon Lucille Devers, thousands upon thousands of fire ants were present in her room and bed. (R.131-132; R.216-220).

thousands of fire ants that swarmed and attacked Lucille Devers were consuming her as she lay in her bed. Dr. Appel is familiar with ant attacks upon humans and even a resulting death. (R.413). He has given presentations within the pest control industry on the danger posed by indoor fire ant attacks on humans. (*Id.*).

Stoy Hedges is the top technical executive at Terminix. (R.1155). He has authored a widely distributed field guide on pests, including fire ants. (R.760-761;R.1149). In his guide, Hedges explained that fire ants are the most important ant, from a human health perspective, due to their propensity for stinging. (R.1149-1150). According to Hedges, it was common knowledge, prior to the attacks upon Devers, that fire ants would readily enter structures and could cause death. (R.1150). At trial, Bruce Alverson, a former executive at Terminix's largest franchise, readily agreed that the danger posed by fire ants to humans was commonly known by the pest control industry prior to 1999. (R.1150).

Likewise, Roger Gold, an entomologist who teaches within the pest control industry, testified that it was foreseeable that fire ants would attack humans within a

facility, if permitted. (R.568-569). According to Terminix employees, Greystone is categorized as a "sensitive" account due to its nature as a facility for infirm individuals. (R.789; R.1040-1041).

Fire ants communicate both chemically and by sound. (R.410-411). Often, through this coordinated communication, all the foragers present will begin stinging their prey at once. (*Id.*). Fire ants inject venom into their prey as they sting. (R.409). They use their venom to kill, subdue, and partially digest their food. (R.410). Fire ant venom is deadlier than that of a rattlesnake. (R.409). Ant venom injected into humans causes cell necrosis. (R.410). Fire ants sting their prey multiple times. (*Id.*). Likewise, they do not bite and retreat. Fire ants use their mandibles or jaws to bite down on their prey and then rotate in a circular pattern, stinging the victim over and over. (R.567-568). Fire ants then continue feeding on their victim until the food source is totally consumed. (R.412).

Although dangerous if unchecked and untreated, fire ant invasions are easily preventable. Expert entomologists agreed that it was reasonable to expect that thousands of

fire ants could be kept from invading a structure. (R.417-418).

D. Terminix's Pest Control Service at Greystone

Terminix undertook to provide pest control at Greystone, beginning in 1994. (R.478). Initially, Greystone consisted of two large residential buildings. (R.470-472; R.478). In 1998, Greystone added a third building ("Building 3"). (*Id.*). Mrs. Devers resided in Building 3, room 303, at the time she was viciously attacked in August, 1999. Building 3 at Greystone, similar to the other two buildings, was approximately 8,000 square feet, consisting of 16 residential rooms, 17 bathrooms, and a kitchen area. (R.385-387). The Terminix technician who provided monthly service to Building 3 and all of Greystone since its inception was Todd Fritz.⁴ (R.742).

According to the top Terminix executive, Stoy Hedges, the most important part of pest control is the inspection. (R.118). Smith, Huntsville's Service Manager, agreed and

⁴ Richard Smith, the Huntsville branch Service Manager, testified that he has never had anyone fail to pass training to be a service technician. (R.756-757). Prospective employees are given a test during training. However, they are also conveniently given manuals to look up the answers to the test questions and are not given any time constraints within which to complete the exam. (R.757)

even admitted that if a proper inspection was not completed, then everything else was "irrelevant." (R.759).

Although a proper inspection is absolutely critical to pest control, Terminix assigned Fritz alone to handle over 200 monthly commercial accounts. (R.1034). Many of these were "sensitive" accounts involving nursing homes, daycare facilities, and hospitals. (R.1065). These accounts included facilities as large as a Target Warehouse Distribution Center on I-565. (R.1064).

Despite the known importance of a proper inspection, Terminix made it impossible for Fritz to inspect his accounts. According to the service records, Fritz breezed through Greystone in record time each month.⁵ For example, Fritz treated Greystone in only 12 minutes the month before the attack upon Devers, far less than the 40 minutes Hedges agreed were necessary for a legitimate inspection. (R.1069; R.1159-1162). According to the "call back" records, Fritz had so many accounts he could not even visit them all each month. (R.813). Yet, month after month Fritz's superiors at Terminix approved his time slips and accepted the clients'

⁵ These slips were received and approved by the branch Service Manager each month. (R.806-807; R.1287-1290).

money as if he had really performed the service. (R.991-992).

According to Hedges, the second most important factor in controlling fire ants concerns the pesticides used. (R.1177-1179). According to Smith, the local service manager, treatment for ants requires that the technician apply granules in a broadcast application around the building on every visit, regardless of whether the technician visually detects an infestation. (R.776-777). Yet, when confronted with the service and chemical records at trial, Smith admitted that month after month preceding the attacks, Fritz failed to apply any of the necessary granules. (R.781-789). In fact, from the time he began servicing Building 3 up to the attacks, Fritz only applied granules on one occasion, months before the attacks.⁶ (R.783).

Terminix cannot evade knowledge or complicity in Fritz's lack of treatment. Its technician completed paperwork for management each month proving his own failure to inspect and treat Greystone. (R.807). Except for the

⁶ Greystone employees were continuously seeing fire ant mounds just outside Building 3. (R.221-222; R.503-509).

one-time treatment with granules months before the attacks upon Devers, Terminix did not take any measures to prevent an ant infestation at any time before the attacks. (R.779-801).⁷

Why would Terminix assign its technician far more accounts than he could service and then encourage his failure to inspect and treat those accounts? According to the evidence, Terminix instituted specific bonus procedures to encourage its employees to take on too many accounts and use far less than adequate chemicals. As Smith admitted on cross-examination, it was not to his advantage as a Terminix executive to slow the technician down or tell him to use more chemicals. (R.811).

Fritz, the technician, receives a base salary. (R.804-806; R.811). He receives no overtime pay. (R.811). However, he does receive bonuses based upon the number of accounts he is assigned. (R.804-806; R.811). For Fritz, these bonuses almost doubled his salary. (R.806). This structure encouraged him to accept far too many accounts and spend as little time as possible on each.

⁷ When called to the scene the morning after the second attack upon Devers, Fritz saw fire ants. Yet, he still took no measures to prevent future infestation and invasion. (R.801-803).

Smith, the local service manager, also receives bonuses. His bonuses depend, in part, on the number of accounts handled by each technician. (R.810-813). Thus, he is encouraged to retain too few technicians and to require them to service accounts stretching all across North Alabama. (*Id.*). Smith also receives bonuses based specifically on lowering pesticide usage. (*Id.*). The less poison used, the greater the bonus paid by Terminix to its local managers. (*Id.*). Smith's compensation increases as he over-assigns accounts to his technicians and then cuts their pesticide usage, a tragic combination which led to these horrible attacks.

The jury also heard testimony from Ronald Bateman, the pest control supervisor at the Huntsville branch in August, 1999, when Devers was attacked.⁸ (R.1282-1286). Bateman was the man who actually possessed the key to the chemical cage containing the branch's inventory of pesticides. (R.1291-1294). According to Bateman, Terminix regularly ran completely out of chemicals and would not even allocate money to purchase additional stock. (*Id.*). In fact,

⁸ Terminix International attempted to prevent the discovery of this witness by omitting his name from its discovery responses.

Terminix ran out of the granules necessary to prevent the attacks on Devers months before the attacks and had not bought replacements. (*Id.*). In response to requests for needed chemicals, the Service Manager simply informed Bateman that the profit margin was too low. (R.1290-1291).

E. The Terrible Injuries Suffered by Lucille Devers

During the nights of August 22 and 23, 1999, thousands upon thousands of fire ants swarmed and attacked Lucille Devers. According to Linda Law, who discovered Mrs. Devers on the second morning, ants were coming out of every orifice of her body. (R.217). The attacks were so severe and hideous that Law, herself a previously normal lady, now suffers nightmares and sleeplessness. (R.220-221).

Beyond question, Mrs. Devers experienced manageable mental health problems before the fire ant attacks. How did Mrs. Devers suffer from those horrible attacks? According to Dr. Preston, from 1955 until 1990, the year of her heart attack, Mrs. Devers held employment and was completely functional in society. (R.920-921). In 1990, following her heart attack, she suffered a depressive episode and attempted suicide. (R.920). But afterwards she improved and again continued to function and interact

socially with others. (R.922). Mrs. Devers continued to suffer depression and some incorrect thoughts that others did not like her and that God was punishing her for her earlier suicide attempt. (R.930). Nevertheless, she continued to function, socialize, and enjoy her family. (R.920-921).

For two consecutive nights, Mrs. Devers suffered attacks of unspeakable horror. According to Dr. John Davis, the psychiatrist who treated her following these attacks, she fully felt the pain of the ants stinging and consuming her. (R.706). Her mental condition in no way diminished the pain of each sting. (*Id.*). Dr. Preston described her pain as beyond the realm of normal human experience. (R.936-937).

Mrs. Devers' damages did not end with two nights of unimaginable pain. The injury damaged her in the worst way possible by permanently robbing her of the last of her ability to function psychologically and interact with her family. After the attacks, Mrs. Devers was hospitalized in psychiatric wards for 84 days. (R.934). She required multiple electroconvulsive treatments (ECT or shock). During shock treatment, the patient is strapped down and an

electrical current is sent through her brain. (R.926-927). The patient undergoes convulsions so severe that broken bones and teeth often occur. (*Id.*). These treatments, although utilized years ago on patients, are now reserved as a life- saving measure for those who have lost basic bodily function. (*Id.*).

According to Dr. Davis, attacks of the type suffered by Mrs. Devers validate and permanently affix in the patient the underlying delusion. (R.699). Dr. Preston explained that, without the validating effect of the attacks, Mrs. Devers' mental condition would have been receptive to treatment. (R.936). Now, it is not.

Dr. Davis explained that even a person in normal mental health would suffer psychological repercussions, perhaps including the initiation of psychosis, from such fire ant attacks. (R.702-703). In Mrs. Devers' case, the attacks affixed and worsened the psychosis as well as validated her belief she was being punished by God. (R.703). Based on the facts, Dr. Davis concluded that the ant attack trauma worsened Devers' psychological condition, throwing her into a state of psychotic depression. (R.706).

At trial, Dr. Preston explained the existence of delusions, such as Mrs. Devers' irrational thought that people did not like her or that she was being punished by God. (R.929-932). Dr. Preston then explained that not only did the attacks affix and worsen her delusions, but that she now began to hallucinate as well. (R.931-932). According to Dr. Preston, hallucinations are actually problems perceiving with the senses. (*Id.*). That is, a person sees things that are not present.

Lucille Devers had never experienced an hallucination before these horrible events. (*Id.*). She had mental illness, but it was manageable. She had enjoyment of life. Following those two horrible nights, Lucille Devers began a decline which culminated in her giving up. She no longer ate. She no longer could care at all for herself. She could not use the toilet. She was found in the fetal position on the bathroom floor, and shock was necessary time and again to give her a chance at life. (R.162-165). At trial, Dr. Preston specifically explained by psychological measurements how Mrs. Devers can now no longer function at all. (R.921-923; R.928).

STATEMENT OF THE STANDARD OF REVIEW

To the extent that Terminix correctly or fully cites Alabama Law on the standard of review, Devers will not simply repeat the statement authored by Terminix. However, Devers does submit that the standard offered by Terminix should be supplemented as follows:

I. **ARBITRATION:** On September 21, 2001, the trial court denied Terminix's motion seeking arbitration. Under Alabama law, Terminix was required to appeal this decision, if it desired to do so, within 42 days. *See, Ex parte Roberson*, 749 So. 2d 441, 446 (Ala. 1999). Terminix did not appeal the trial court's decision denying arbitration. Thus, any review of the arbitration issue is now untimely.

II. **EVIDENCE:** Terminix failed to specifically object to much evidence at trial of which it now complains; therefore, any error in the admission of such evidence is not properly preserved for review on appeal. *See, Davis v. Southland Corp.*, 465 So. 2d 397 (Ala. 1985).

III. **DENIAL OF TRIAL CONTINUANCE:** Discovery matters are within the trial court's sound discretion, and its ruling on those matters will not be reversed absent a showing of abuse of discretion and substantial harm to the appellant.

See, *Ex parte McFadden Engineering, Inc.*, 835 So. 2d 966, 1002 (Ala. 2002).

IV. **COMPENSATORY DAMAGES:** Compensatory damage verdicts should not be disturbed absent a clear showing that the verdict is the product of bias, passion, prejudice, corruption, or other improper motive. See, *Northeast Alabama Reg'l. Med. Ctr. v. Owens*, 584 So. 2d 1360, 1366 (Ala. 1999).

SUMMARY OF THE ARGUMENT

This Court should affirm the trial court's order denying Terminix's motions seeking to compel Devers, a non-signatory to the Terminix-Greystone contract, to submit her valid tort law claims to binding arbitration. Devers' tort law claims are wholly independent of any contract. Devers did not rely upon the Terminix-Greystone agreement to prove her tort law claims. Nothing in the law prohibits Devers from discussing the contract to rebut extra-tort defenses raised by Terminix. Both the trial court and Federal Court properly denied the unfounded attempts to force Devers into arbitration. Terminix's repeated, and now untimely, requests for arbitration should be denied.

This Court should affirm the trial court's correct ruling to admit "after attack" evidence. Terminix opened the door to evidence concerning its technician's actions after the attack upon Devers. This fact alone justified Devers' introduction of evidence in rebuttal. Additionally, Terminix allowed other instances of post-attack actions to be admitted into evidence without objection. Even if considered a remedial measure, the post-attack evidence at issue falls within the "other purpose" exception to the

rules of evidence. The evidence at issue is directly relevant and material to essential issues in this case including the knowledge and intent of Terminix. Finally, the trial court provided a limiting instruction to the jury, as specifically endorsed by our Rules of Evidence.

This Court should affirm the trial court's decision not to allow Terminix another continuance after its repeated efforts to hinder and delay this litigation. Terminix's lack of preparedness for trial was due solely to its own decision, not those of the trial court or Mrs. Devers. Terminix possesses no legitimate basis upon which to attack the trial court's decision denying another requested continuance on the eve of trial.

This Court should affirm the jury's award of compensatory damages. The jury's compensatory award is well supported by the evidence and cannot be legitimately questioned by Terminix. The injury in this case resulted in pain beyond the realm of normal human experience and devastating permanent injuries which robbed a frail, elderly lady of her remaining ability to function.

This Court should affirm the Jury's award of punitive damages. The evidence overwhelmingly reveals that Terminix

engaged in wanton conduct that directly resulted in the severe and permanent injuries suffered by Lucille Devers. As a result, the jury properly considered and awarded punitive damages against Terminix. It is beyond question that the punitive verdict falls within accepted Constitutional guidelines. Indeed, the punitive verdict falls well below the parameters of Constitutionality. As such, this verdict should be affirmed in its entirety.

ARGUMENT

I. WHETHER THE TRIAL COURT WAS CORRECT IN DENYING TERMINIX'S ATTEMPT TO REQUIRE A NON-SIGNATORY TO ARBITRATE HER TORT LAW CLAIMS AGAINST IT BASED UPON SOUND FEDERAL AND STATE LAW

A. Both Federal and State Law Prohibit Terminix From Requiring Mrs. Devers To Arbitrate Her Tort Law Claims

Lucille Devers has litigated this question of arbitration concurrently in two different forums. The issues surrounding Terminix's claim for arbitration are simple and have been exhaustively briefed in both Federal and State Court. Lucille Devers is neither a party to any contract with Terminix nor an intended third-party beneficiary of any Terminix contract. In this case, Devers pursued only tort law claims against Terminix. None of her claims are contractual in nature.

The present case is factually identical to *Cook's Pest Control, Inc. v. Boykin*, 807 So. 2d 524 (Ala. 2001), in which a request for arbitration was denied on two separate grounds. Similarly, Judge Blackburn carefully considered Terminix's Petition seeking arbitration and held it to be ill-founded upon multiple Federal and State law grounds. (C.1491-1504). Rather than re-argue matters exhaustively

briefed, counsel would invite this Court to review Judge Blackburn's decision as well as the prior briefs filed in Federal Court. Under well-settled law, Devers' claims are not subject to arbitration.

B. Lucille Devers Did Not Rely Upon the Pest Control Agreement Between Greystone and Terminix To Prove Her Tort Law Claims.

In its brief, Terminix expressly claimed several times that Devers filed affidavits in Federal Court stating that, in presenting her case in State Court, she would not reference the Terminix contract. (Terminix brief, p.31). Counsel invites this Court to review the actual affidavits filed by S.A. Watson, Jr. and Jeanne Hupfer. (C.1186-1192). The affidavits state the undisputed truth that Lucille Devers was not a party to any contract with Terminix, does not base her claims on any contract, bases her claims on independent tort duties, and makes no reference to any contract between Greystone and Terminix in her complaint, as amended. The affidavits never state that no mention will be made by anyone at trial of a contract.⁹ (*Id.*).

⁹ Indeed Terminix made the first reference to the contract at trial. (R.200-201).

Appellate courts have consistently held that "[a]rbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Modern Woodmen of Am. v. McElroy*, ___ So. 2d ___ (Ala.2001) (quoting *AT&T Tech, Inc., v. Comm. Workers of Am.*, 475 U.S. 643, 648 (1986)). Lucille Devers and Terminix have no contractual relationship, and Devers has certainly never agreed to submit any disputes to binding arbitration. Likewise, under Alabama law, Devers is not a third-party beneficiary of a contract entered into between two independent parties prior to her residency at Greystone.¹⁰

Terminix's efforts to force a non-signatory who presents only tort claims against it to submit to binding arbitration, defy the very purpose and intent of the Federal Arbitration Act (FAA). The primary purpose of the FAA is to "make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

In an effort to circumvent clear law, Terminix incorrectly asserts that Devers relied upon the contract at

¹⁰ Judge Blackburn discussed Alabama third-party beneficiary law in her written opinion.

trial and should, therefore, be compelled to arbitrate her tort law claims. Terminix apparently contends that the mere mention of the word "contract" or any reference to a "contract" requires arbitration. This position is contrary to both Federal and State law. Nothing in the law prohibits the mention of the contract or its terms or prohibits a plaintiff from discussing the contract to rebut extra-tort defenses raised by a defendant. *See, Boykin, supra*, at 528.

In its brief, Terminix extracts certain instances in the transcript where Devers' counsel mentioned the contract and then urges the erroneous conclusion that the mere mention of the agreement shows a reliance upon its terms as an essential element of Devers' tort claims. Terminix's argument is incorrect. Moreover, Terminix neglects to inform this Court that reference to the contract by Devers' counsel occurred only after Terminix injected its provisions into the trial through numerous previous witnesses, thereby opening the door to a necessary discussion by all of the parties.

Terminix's very first question to the very first witness at trial was about its contract. (R.200-201). Terminix questioned Jeanne Hupfer, Devers' first witness,

as well as Greystone employees Linda Law, Cassie Wise, Mary Matthews, and Greystone Administrator Claudette Davis, about its contract all before the first mention of any contract by Devers' counsel. (R.200-201,229,231,288-289,294-295,303-304,337-338,351).

A review of the transcript reveals that Terminix's strategy was to attempt to limit its duties to those specifically set out in words in the contract. Likewise, Greystone's counsel erroneously attempted to argue that by entering into a pest control agreement, Greystone satisfied all standards imposed on it by Alabama law. To rebut the extra-tort defenses proffered by Terminix, beginning with the very first question to the very first witness, Devers' counsel was required to address the agreement.

During the questioning of pest control expert, Dr. Gold, Terminix clearly revealed its strategy of erroneously trying to limit its duties to the language of the contract. (R.611-617). Implicit in the line of questioning from Terminix's counsel was the asserted, but erroneous, defense that the contract alone defines and limits its duties. In line with that erroneous defense, Terminix attempted to show that, under the contract, monthly service was

adequate, control of pests did not mean eradication, and "you get what you pay for," that is, if Greystone wanted no pests, it would have signed an eradication contract. It was only to deal with such employment of the contract by Terminix that Devers mentioned the contract at all.

For example, Devers' counsel questioned Hedges about the "integrated pest management approach." In the thousand pages of preceding testimony, Terminix's primary defense was that Devers' tort claims should be limited by the contract which was a contract for only "control" of pests. Through questioning of Hedges, Devers' counsel revealed for the jury that a contract for monthly service does not excuse Terminix from keeping the facility pest free, as Terminix's counsel had repeatedly suggested. (R.1233-1235). Additional questioning to both Hedges and Smith rebutted Terminix's extra-tort defense by pointing out that an integrated pest management (IPM) system is inherent in Terminix's approach regardless of any contract. (R.1273-1275). The IPM system involved specific steps that the local technician is required to perform according to standards in the industry, but which he consistently failed

to perform when servicing the "sensitive account" at Greystone. (R.1216-1220).

Terminix itself injected the contract and its terms into the trial of this case, then incredibly advances the argument that, somehow, Lucille Devers is judicially estopped from denying arbitration because she responded. At no point did Lucille Devers assert any inconsistent positions. Rather, Devers consistently asserted that her claims against Terminix are based upon Alabama tort law. When faced with Terminix's attempts to raise contract terms as defenses, Devers again asserted a position entirely consistent with her claims from the outset, i.e., that the contract cited by Terminix does not limit or define the scope of its common law duties to her. A party certainly should not be allowed to claim estoppel when that party injected the issue at trial.

Terminix incorrectly argues that *Boykin, supra*, prohibits a plaintiff from mentioning a contract at all. However, once Terminix brought up the contract and discussed it repeatedly in a specific effort to establish a defense limiting its tort law duties, Devers was well

within her rights under Alabama law to rebut that evidence by discussing the contract.

In the remainder of its brief on the arbitration issue, Terminix re-hashes its same argument that either the contract defines its duties or that Devers is a third-party beneficiary of the contract. Devers takes great issue with Terminix's interpretation of the cases it cites. The law on this issue, including the cited cases, was thoroughly briefed in filings already a part of the record in this case. (C.1369-1399). In addition, both this Court in *Boykin, supra*, and the Federal Court in its written opinion in this case considered and rejected precisely the same arguments.

Lucille Devers' tort claims are not subject to arbitration. Both the trial court and Federal Court properly denied the unfounded attempts to force Mrs. Devers into arbitration. Terminix's repeated, and now untimely,¹¹ requests for arbitration should be denied.

¹¹ See, *Ex parte Roberson*, 749 So. 2d 441 (Ala. 1999) ("Obviously the 42 days had begun running upon the denial of the motion to compel arbitration. The right to appeal did not wait in limbo until the proponent of arbitration filed the Rule 59(e) motion or otherwise conceived a desire for review" *Id.* at 447).

II. WHETHER THE TRIAL COURT WAS CORRECT IN ADMITTING CERTAIN AFTER-ATTACK EVIDENCE WHEN THAT EVIDENCE WAS RELEVANT AND ADMISSIBLE UNDER ALABAMA'S RULES OF EVIDENCE

Terminix presently cites 4 areas of evidence following the vicious fire ant attacks: (1) chemical usage after the attacks; (2) time spent at Greystone on visits after the attacks; (3) the lack of any change in the number of accounts after the attacks; and (4) the failure to discipline its technician after the attacks. Remarkably, Terminix now challenges evidence concerning the number of accounts maintained after the attacks or discipline instituted after the attacks, although it failed to object at all to this evidence at trial. A review of the cited transcript pages reveals that its only objection was to evidence regarding actual treatment to the facility after the attacks. Counsel for Terminix, requested a standing objection only to "treatment records after she was bitten." (R.800). A litigant cannot raise an issue when it did not object during the course of the trial.¹² However, even if

¹² See, *Hall v. Hall*, 421 So. 2d 1270 (Ala.Civ.App. 1982) ("a party who has knowledge of facts, cannot normally withhold from a court his objections based upon such information, and thereby gamble upon the final results of the litigation, and, upon an adverse judgment, successfully raise such an issue for the first time through post-judgment motions." *Id.* at 1271.)

Terminix had objected to other after-event evidence, it clearly was admissible.

At trial, Terminix's only objection was to evidence of certain treatment, or lack thereof, after the attacks. In that regard, Devers introduced evidence concerning the actions of Terminix technician Fritz on August 24, 1999, when he responded on the morning of the attack, and on September 11, 1999. Although this after-attack evidence was relevant and properly admitted at trial, Devers would note that she did not actually introduce this after-attack evidence. Terminix first introduced the evidence into the trial.

A. Counsel for Terminix International Opened The Door To Evidence Concerning Todd Fritz's Actions After The Attack Upon Devers

Claudette Davis, Greystone's administrator at the time of the attacks, testified very early in the trial. Devers called Davis as a witness and questioned her concerning Greystone's actions before the attacks. Counsel also questioned Davis concerning her investigation of the attacks. At the conclusion of this examination, Terminix then conducted a detailed cross-examination of Davis concerning the remedial activities of its technician Fritz

at the site after the attack. (R.353;R.356;R.359-360). Specifically, Terminix elicited testimony from Davis concerning whether Fritz was present when she arrived at the scene, and whether he was working to remedy the ant infestation. Terminix then elicited testimony of its employee's remedial measures at the scene. Indeed, Terminix brought out with pride Fritz's two hours of inspection and chemical applications following the attacks to correct the infestation. (R.360). This was the very first occasion where any party discussed remedying the problem. Terminix, not Devers, expressly placed remedial measures before the jury by pointing out evidence that its technician had spent two hours at Greystone remedying the infestation after the attacks, as opposed to his visits which normally lasted mere minutes.

Alabama law has long held that when a party introduces evidence that may be illegal, its opponent then has the right to rebut that evidence with evidence that might otherwise not be admissible. *Freeman v. State*, 555 So. 2d 196, 206 (Ala.Crim.App. 1988); *Plenkens v. Chappelle*, 420 So. 2d 41, 45 (Ala. 1982). Under this "curative admissibility" doctrine, it is inconsequential whether the

initial evidence was admitted with or without an objection. *See, Plenkens, supra.* Devers certainly had the right to introduce evidence to rebut the specific evidence proffered by Terminix showing how wonderfully its service technician responded after the attack. Certainly, one cannot claim that remedial measures have been introduced into this case when it was guilty of opening the door to such evidence.

B. Counsel for Terminix International Allowed Admission of The Defendant's Post-Attack Actions Without Objection

Even without the curative admissibility doctrine, Terminix cannot now complain about evidence of its activities following the attacks. On several occasions prior to the testimony now challenged by Terminix, documents detailing both Fritz's inspection and specific chemical applications at Greystone following the attacks were admitted without objection. This evidence was first introduced without objection during the testimony of Turnipseed, a Greystone owner. (R.385; Ex.118-Y).

This evidence was again discussed and utilized by Devers' counsel during the examination of Dr. Gold, one of Greystone's experts. In fact, when Devers' counsel raised

this evidence with the trial court, Terminix's counsel specifically responded as follows:

Mr. Heflin: Your Honor, Mr. McGrath showed me these, but I think the entire package ought to be handed to them, because there is an entire package that goes from January of '98 through August of 1999 and that shows all the treatments. (Including the technician's actions on site after the attack).

(R. 581). Not only did Terminix not object to evidence of its actions after the attack, it specifically insisted on the admission of these actions into evidence.

Later, during the examination of Dr. Gold, Greystone offered into evidence documents detailing the inspection and treatment performed by Terminix after the ant attacks. (See, Ex. G-15). Again, this exhibit was admitted without objection from Terminix. Greystone's counsel then proceeded to question Dr. Gold thoroughly concerning the technician's post-attack inspection and remedial treatment. (R.624-626). Again, Terminix did not object to these questions eliciting information concerning its post-attack activities.

Terminix cannot now claim error related to questions concerning its post-attack activities, including chemical applications and inspections, when the record is replete with prior instances where this evidence was admitted

without objection. Certainly, Terminix cannot open the door and then complain about what enters.

C. The Evidence Introduced By Devers Concerning Todd Fritz's Actions Following The Ant Attacks Does Not Involve Remedial Measures

Terminix now objects to evidence that it did not alter or increase its chemicals after the attacks, did not alter or increase its time at Greystone after the attacks, did not decrease its accounts after the attacks, and did not discipline Fritz after the attacks. However, this evidence does not constitute evidence of remedial measures.

According to Rule 407, Ala. R. Evid:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This Rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as providing ownership, control, or feasibility of precautionary measures, if controverted, or impeachment (emphasis added).

None of the actions at issue constitute any type of remedial measure. By its language, Rule 407 only applies to remedial actions. This distinction is further highlighted in *McElroy's Alabama Evidence*, which states that, "[e]xclusion under the Rule only arises when the measures

are remedial in nature." *McElroy's*, § 189.02 (1). Other treatises agree that the exclusionary rule only applies to evidence of actions that, if taken prior to the event, would have made it less likely to occur. See, *Weissenberger's Alabama Evidence* 81 (2000). Likewise, other courts have held that non-remedial measures are not excludable under the Rule. See, *Rocky Mountain Helicopters, Inc. v. Bell Helicopters Textron Div. of Textron, Inc.*, 805 F.2d 907, 918 (10th Cir. 1986); *Prentiss & Carlisle Co., Inc. v. Koehring-Waterous Timberjack, Inc.*, 972 F.2d 6, 10 (1st Cir. 1992). Terminix's inspections and other actions after the attack, since they were not remedial in nature, do not fall within the general exclusionary provisions of Rule 407, *Ala. R. Evid.* Remedying a bad situation should not be discouraged by citing the action as admission of wrong. However, here there was no remedy at all. As a result, there could be no admission of wrong. Quite the contrary, this defendant did nothing different.

Terminix's own witnesses agree that it did nothing on the day of the attacks to eliminate the colony of fire ants infesting Greystone. (R.801-803). In fact, Terminix undertook no remedial measures and did absolutely nothing

different after the attacks. Thus, the remedial measures rule is inapplicable to the evidence at issue. As the evidentiary rules related to remedial measures are inapplicable to these events, one must look only to the general, liberal rules of materiality and relevance to determine whether this evidence is admissible. Clearly, the events surrounding the attack and Fritz's actions at the facility in August and September, 1999, are relevant upon multiple grounds, including intent and knowledge. Thus, the evidence at issue was properly admitted by the trial court.

D. Even If This Evidence Is Considered Remedial In Nature It Would Remain Admissible Under Alabama Law

Assuming, *arguendo* and contrary to the trial proceedings and evidence, that the actions at issue were remedial in nature and had not previously been injected into evidence by Terminix, such evidence would still have been properly admitted by the trial court. "[E]vidence of subsequent remedial measures is inadmissible unless that evidence is offered for limited purposes other than to show antecedent negligence." *Precise Engineering, Inc. v. LaCombe*, 624 So. 2d 1339, 1341 (Ala. 1993).

Devers did not offer the evidence at issue to prove negligent or culpable conduct. Rather, Devers offered the evidence on the issue of Terminix's knowledge, intent, and state of mind. Subsequent remedial measures are clearly admissible for multiple purposes, including knowledge, intent, and state of mind where it is an issue in the case. See, *McElroy's Alabama Evidence*, § 189.02(7), p. 858; *Hyde v. Wages*, 454 So. 2d 926, 930 (Ala. 1984).

Terminix's state of mind, knowledge and intent were clearly at issue at trial. The testimony revealed that the technician, Fritz, received bonuses based specifically on his production. (R.804-811). To that end, Fritz was assigned far more accounts than he could properly service each month. Spending far less time at Greystone than Terminix's own chief technician insisted was necessary to treat the facility properly each month combined with Terminix's complicity in that situation, are clear and relevant evidence of intent and/or state of mind. As Terminix so aptly intimated in its brief, wantonness requires proof of a certain intent or state of mind, i.e., a "conscious" disregard of duty or "knowledge" of the hazards. (Terminix brief, pp.71-72). Thus, evidence of the

time spent by the individual who chiefly handled the treatments at the facility on the months in question is relevant evidence concerning state of mind, intent, and knowledge. Clearly, this evidence is relevant upon these necessary elements of a wantonness claim.

Additionally, such evidence is even more relevant to the state of mind, intent, and knowledge of Fritz's superiors at Terminix. Fritz completed paperwork for his superiors upon each visit to Greystone which noted the time he spent at the facility, detailed his inspection of the facility, and related the chemical treatments used. (R.1288). Both Fritz and his superiors received bonuses based on the volume of accounts. Management also received a bonus for the amount of chemicals saved. (R.810-813). Terminix's company policy rewarded "run through" inspections, inadequate treatments, and the undertaking of far too many accounts. Rewarding the use of inadequate bug poison and insufficient time on tasks militates against proper service. Moreover, these policies explain why Terminix looked the other way while month after month its technician inspected and treated Greystone in a grossly inadequate manner. Evidence that Fritz's superiors knew and

consciously allowed him to provide inadequate service even after these terrible attacks is directly relevant to the issue of intent, a necessary element in several of Devers' claims, including her claims for wantonness and for negligent and/or wanton supervision, retention, and training.

Likewise, the above evidence also constitutes relevant impeachment evidence after Terminix elicited testimony to prove that its technician performed in an exemplary way following the attacks. Even if the evidence at issue is considered as a remedial measure, it clearly falls within the "other purpose" exception to Rule 407, Ala. R. Evid. and is admissible. See, *Holland v. First National Bank of Brewton*, 519 So. 2d 460, 462 (Ala. 1987).

Finally, the trial court fully resolved any and all concerns related to this evidence by proposing and giving a limiting instruction for Terminix's benefit. Such an instruction is completely proper and even encouraged under the Alabama Rules of Evidence. See, Rule 105, Ala. R. Evid. The evidence at issue of Terminix's activities at Greystone was properly admitted into evidence in this case. As a

result, the trial court's decision on this issue should be affirmed.

III. WHETHER THE TRIAL COURT WAS CORRECT IN NOT GRANTING YET ANOTHER ATTEMPT BY TERMINIX TO DELAY THIS CASE ON THE EVE OF TRIAL

"A decision to deny a motion for continuance is within the sound discretion of the trial court and will not be reversed unless there has been an abuse of discretion." *Kitchens v. Maye*, 623 So. 2d 1082, 1087 (Ala. 1993). In this case, the record readily reveals that any lack of preparation time was due to express decisions by Terminix not to participate in preparation activities. Terminix attempted every conceivable means to hinder and delay Devers from reaching a trial of her claims. These efforts included motions to stay in the trial court, a separate Petition in Federal Court to stay the case, and a lengthy refusal to either participate in, or allow, discovery. The trial court acted properly in denying Terminix's baseless attempt to achieve yet another continuance on the eve of the trial.

In its post-trial motions, Terminix initially argued it could not participate in the discovery process for a lengthy period of time, without waiving its arbitration

defense. (C.917-924). This argument is without merit. First, Terminix's motion requesting a stay and arbitration was denied in September, 2001, and never appealed. Second, although Terminix's legal position on the issue of waiver is subject to debate, the facts in this case reveal that waiver is not an issue. Devers consistently agreed never to contend that participation in discovery constituted a waiver of any arbitration claim. This assurance was documented by letters from Devers' counsel and repeatedly placed on the record in depositions in this case.

Despite court orders and assurances, Terminix continued to refuse to participate in discovery. Terminix's efforts to obfuscate discovery are discussed in detail in Devers' briefs on the various post-trial motions, in the Order entered by the Court during the trial, and in the preceding Statement of the Case. (C.1400-1487;C.1505-1530).

Terminix based its earlier motions for continuance on reasons which included a baseball game and an allegation of prejudice when Devers' counsel independently discovered a witness who Terminix had failed to disclose in response to a direct interrogatory. In its appeal, Terminix abandons all but one of its earlier alleged reasons for a

continuance, focusing solely upon the medical records of Devers' hospitalization. In addition, Terminix also alleges the trial court erred concerning its representative, Hedges.

In its motion to continue, Terminix incorrectly claimed it had "just learned" within the last week about Devers' hospitalizations. (C.727). But, in its current appeal, Terminix alters its argument, claiming "surprise" by evidence of medical records. (Terminix brief, p.63). However, that claim also is incorrect.

As the preceding Statement of the Case reveals, Devers' hospitalizations and their connection to the ant attacks presented absolutely no surprise to Terminix. Over a year before the trial, Devers' daughter testified in deposition concerning the hospitalizations. Months before trial, the parties deposed the physician in charge of the actual hospitalization and referred to parts of the records during that deposition. (C.730-732).

Now, Terminix alters its argument to claim surprise as a result of the actual medical record evidence. As noted above, Terminix knew of the hospitalizations over a year before trial. Devers, in her pre-trial disclosures many

months before trial, stated that she reserved the right to use the records from her physicians and hospitals, including Dr. Davis. Over six months before trial, the parties deposed Dr. Davis, the Medical Director at Hartselle Hospital. In that deposition, the parties actually held and reviewed parts of the hospital records at issue as well as extensively questioned the physician concerning these records of his treatment. (R.709-710). Furthermore, Devers' counsel specifically elicited testimony that the attacks worsened Devers' condition and necessitated the treatment described in the records. (R.698). Terminix knew many months before trial that Devers claimed the ant attacks caused devastating injuries, worsened her mental health, and resulted in hospitalizations.

Similarly, Terminix was notified of Dr. Preston's involvement in the case and of his availability for deposition long before trial. Hupfer, in her deposition, testified that her mother had seen Dr. Preston. Dr. Davis, in his deposition, testified that Dr. Preston had inquired concerning Lucille Devers' treatment at Hartselle Hospital. (C.729-732). Surprisingly, Terminix consciously delayed

deposing Dr. Preston until only one week before trial. Neither the hospitalization records nor Dr. Preston's involvement came as any surprise to Terminix.

When Terminix objected to records of the medical charges and hospitalizations, the trial court specifically excluded evidence of over \$100,000.00 in charges. And, although the trial court agreed to allow admission of the records, Devers' counsel never offered them into evidence. Indeed, Devers' counsel never even exhibited the records to a witness at trial, although the other parties did.

Terminix's contentions concerning Hedges' attendance at trial are equally without merit. After hearing extensive arguments, the trial court conducted its own research and entered a 7 page Order giving sound legal and factual reasons for compelling Hedges to appear at trial. (C.811-817). During the trial, Terminix filed an emergency *mandamus* petition which this Court denied.

Terminix's refusal to allow its representative, Hedges, to be deposed until two weeks before trial coupled with its refusal to comply with three separate Orders concerning discovery, created the very situation of which Terminix now complains. In that context, the trial court acted properly

in ordering the attendance of Terminix's corporate representative. Such discretionary authority is clearly vested in the trial court. See, *Ex Parte Old Mountain Properties, Ltd*, 415 So. 2d 1048, 1050 (Ala. 1982). That discretion was thoroughly discussed by the trial court in its Order which stands without need of further supplement.

IV. WHETHER THE TRIAL COURT WAS CORRECT IN REJECTING TERMINIX'S ATTEMPT TO ATTACK A JURY VERDICT FOR COMPENSATORY DAMAGES BASED UPON THE TERRIBLE INJURIES SUSTAINED BY LUCILLE DEVERS

Alabama law has consistently held that jury verdicts carry a presumption of correctness. See, *Auto Zone, Inc. v. Leonard*, 812 So. 2d 1179, 1183 (Ala. 2001). Compensatory damage verdicts, in particular, should not be disturbed absent a clear showing that the verdict is the product of bias, passion, prejudice, corruption, or other improper motive. *Northeast Alabama Reg'l. Med. Ctr. v. Owens*, 584 So. 2d 1360, 1366 (Ala. 1999). Absolutely no suggestion can be made by anyone that such occurred in this case.

Terminix questions damages based upon mental anguish as well as pain and suffering. In that regard, this Court has long held:

[t]here is no fixed standard for ascertainment of compensatory damages recoverable...for physical pain and mental suffering and that the amount of such [an] award is left to the sound discretion of the jury, subject only to correction by the court for clear abuse or passionate exercise of that discretion.

Alabama Power Co. v. Mosley, 318 So. 2d 260, 266 (Ala. 1975). Since damages for mental anguish and emotional distress are not items for which a precise amount can be ascertained, this Court "must view the evidence from the plaintiff's perspective and determine what the evidence supports in terms of the plaintiff's suffering." *K-Mart Corp. v. Kyles*, 723 So. 2d 572, 578 (Ala. 1998) (quoting *Foster v. Life Ins. Co. of Georgia*, 656 So. 2d 333, 337 (Ala. 1994)).

The evidence in this case clearly reveals that Lucille Devers suffered a devastating and painful personal injury beyond anything imaginable to the normal person. The psychiatrist and clinical psychologist who testified at trial both maintained that the attacks experienced by Devers inflicted pain beyond bounds any normal human could bear without psychological damage. (R.937;R.706-707). These attacks caused unspeakable pain and suffering and

exacerbated the plaintiff's fragile condition to the point of totally destroying her quality of life.

Over the course of two consecutive nights, thousands upon thousands of swarming fire ants viciously attacked Mrs. Devers. She endured horrible stings and bites, which produced a level of pain intolerable to a normal person. Expert witnesses testified that fire ants do not merely sting a person one time. Instead, they bite down on the skin and then turn in a circular motion stinging time and time and time again. (R.567-568). According to Dr. Appel, ants are omnivorous. They were consuming Mrs. Devers alive. (R.407). Linda Law could scarcely describe the horrible scene she witnessed as ants stung Devers all over her body entering and leaving her orifices. (R.220-221). Law suffered great pain and scarring from just the minimal stings she experienced. (*Id.*). She still suffers nightmares from the horrible event. (*Id.*). How can Terminix International even attempt to minimize the excruciating pain this elderly lady endured? The pain of these two nights alone justifies the compensatory award in this case.

Moreover, this Court should not accept Terminix's characterization of the damages as falling only in the

realm of pain and mental anguish. Truly, the real damages just begin with those two nights of horror. These attacks, allowed by the defendants, permanently damaged Mrs. Devers and took away her ability to live as a normal human.

Lucille Devers never suggested that her mental health was perfect.¹³ According to all experts, her underlying problems were a basis for the much greater damage that she suffered as a result of Terminix's and Greystone's concurring dereliction of duty. Before the attacks, Lucille Devers functioned and enjoyed her life. Her daughter, as well as several Greystone employees, testified that, prior to the attacks, Devers was friendly, able to care for herself, able to communicate and engage in conversation with others, and able to perform basic tasks for herself. (R.77-96;R.352-354). Although a private person, she was able to engage in social activities. (R.108-109). These attacks permanently changed and destroyed all of that. Mrs. Devers spent 84 days hospitalized in psychiatric wards where she required multiple shock treatments.¹⁴ (R.934). At

¹³ Virtually any resident of a nursing home or assisted living facility would be subject to the ready defense that she had a pre-existing condition.

¹⁴ Terminix International cannot legitimately deny the overwhelming evidence of the devastating and permanent effect these attacks had upon Lucille Devers. Thus, Terminix

trial, Dr. Preston described ECT therapy, a treatment now reserved for use only as a last resort, life saving measure. (R.926-927). This treatment requires sedating and strapping the patient down and then sending electrical voltages through their brain which induce convulsions strong enough to break bones. (*Id.*). According to quantitative psychological measurements, Mrs. Devers now barely functions at all. (R.928). The jury, properly instructed, had the duty to assess the compensatory value of physical pain beyond a level within the normal range of human experience. The jury had to determine the compensatory value of robbing a frail, elderly lady of her mental and emotional ability to live her life. No verbal description could convey or encompass the depth of such damages. Lucille Devers relies upon the record, which clearly demonstrates the magnitude of the damages in this case.

Terminix misplaces its reliance on *Orkin v. Jeter* as a basis for challenging compensatory damages in this case. Moreover, Terminix omits much of the relevant information

International broadly claims prejudicial evidence of wealth and possible injuries was introduced despite the fact that Terminix International raised no such objections at trial.

from *Jeter* in its discussion of that case. *Jeter* is noteworthy because this Court approved an award of \$200,000.00 based upon minimal evidence of *Jeter's* mental anguish and emotional distress. That is, before *Jeter* learned how she had been defrauded by Orkin "she was happy." *Orkin v. Jeter*, 832 So. 2d 25, 36 (Ala. 2001). Although *Jeter* testified about mental anguish and emotional distress over her home, there was no evidence of treatment. *Jeter* stands in stark contrast to the present case where Mrs. Devers suffered unimagineable physical pain, endured lengthy hospitalizations and shock treatments, and lost her remaining ability to function psychologically as a normal human being.

In *Jeter*, this Court held that "a trial court may not substitute its judgment for that of the jury when the jury has returned a compensatory verdict that is supported by the record." *Id.* at 36. Only in certain situations can a trial judge reduce or increase the amount of a verdict to reflect a different amount to which the parties are entitled as a matter of law. These situations arise when it is shown that the jury was biased or acted out of passion, prejudice, corruption, or other improper motive.

Id. Nothing in this record remotely suggests such improper behavior. In addition, a jury verdict awarding damages for mental anguish is subject to strict scrutiny if, and only if, the plaintiff has not suffered any physical injury and offers little or no direct evidence concerning the degree of mental suffering experienced. *Id.* (citing *K-Mart Corp. v. Kyles*, 723 So. 2d 572, 578 (Ala. 1998)). Again, that is not the case here.

In *Jeter*, the record contained absolutely no evidence of any physical injury and little or no evidence concerning the degree of mental suffering experienced by the plaintiff, other than the testimony of her children who were not medical professionals. *Jeter* is clearly unlike the case at bar. Lucille Devers suffered physical injury which took weeks to heal, and extraordinary pain. Her psychological injuries necessitated significant medical care from mental health professionals. The record is replete with medical and non-medical testimony concerning the terrible physical injuries suffered by Mrs. Devers, the extent of her suffering, and the permanent injuries inflicted upon her. *Jeter, supra*, is inapplicable where a plaintiff has suffered physical injury or pain in

conjunction with emotional distress. See, *Nat'l Ins. Ass'n v. Sockwell*, 829 So. 2d 111, 134 (Ala. 2002). In *Sockwell*, this Court concluded that because the plaintiff suffered physically as a result of the alleged misconduct, the strict scrutiny standard would not apply and the only basis for questioning a compensatory award was whether that award was based upon passion, bias, corruption, or other improper motive. *Id.* at 134.

In this case, the jury's verdict is well supported by the evidence. The record contained overwhelming evidence of the terrible pain and permanent injuries sustained by Lucille Devers. Terminix cannot legitimately question this jury verdict. Thus, the attempt to challenge the compensatory award must fail.

V. WHETHER THE TRIAL COURT WAS CORRECT IN UPHOLDING THE JURY'S VERDICT FOR PUNITIVE DAMAGES WHERE THAT VERDICT MEETS ALL STANDARDS OF FEDERAL AND ALABAMA LAW

A. Lucille Devers Presented Clear and Convincing Evidence of Wantonness.

Under *Ala.Code* § 6-11-20, a jury may award punitive damages where clear and convincing evidence reveals that the defendant engaged in certain enumerated conduct, including wantonness. Clear and convincing evidence is

evidence which produces in the mind of the jury a firm conviction as to the elements of the claim and the high probability as to the correctness of the conclusion. Clear and convincing evidence requires a level of proof less than beyond a reasonable doubt. Ala. Code § 6-11-20(b)(4).

Terminix erroneously implies that a finding of wantonness requires proof that it knew fire ants were outside Lucille Devers' room immediately before the attack or that its terrible conduct would likely result in injury specific to Mrs. Devers. Wantonness certainly does not require knowledge of an impending event just before it occurs or specific knowledge of the exact individual who will be injured. *See, Lance, Inc. v. Ramanauskas*, 731 So. 2d 1204 (Ala. 1999). "To prove wantonness, it is not essential to prove that the defendant entertained a specific design or intent to injure the plaintiff." *Alfa Mut. Ins. Co. v. Roush*, 723 So. 2d 1250, 1256 (Ala. 1998). Rather, wantonness is simply "[c]onduct which is carried on with a reckless or conscious disregard of the rights or safety of others." Ala. Code § 6-11-20(b)(3).

The evidence in this case does not merely reach the level of clear and convincing; instead, the evidence

overwhelmingly reveals that Terminix engaged in wanton conduct which directly resulted in severe and permanent injuries to Lucille Devers. Pest control experts, including two Terminix executives, unanimously agreed that fire ants are aggressive, are vicious, cause human death, and will readily enter structures. (R.1149-1150). Their testimony confirmed that these facts were well known both by the pest control industry and specifically by Terminix. (R.1149-1150). Smith, Terminix's local service manager, admitted that Greystone was a "sensitive account." (R.789). The evidence is overwhelming that Terminix knew fire ants posed a danger to individuals, especially elderly residents of a long-term care facility in this region. Terminix certainly cannot deny it was conscious of the danger posed by fire ants. Terminix's failure to inspect and failure to treat Greystone reveal a total disregard of the known danger related to fire ant attacks.

Terminix executives, Hedges and Smith, described procedures which they knew should have been followed to treat Greystone. Smith admitted that granules must be applied around the perimeter on each monthly visit to prevent dangerous fire ant infestations. (R.776-777). Yet,

during the entire time Terminix treated Devers' building at Greystone prior to the attack, granules were utilized on only one monthly occasion. (R.781-783). It is certainly no wonder fire ant mounds existed outside the windows.

Hedges and Smith admitted that the inspection was the most important part of the monthly visit. A proper inspection is essential to locate pests, identify avenues of entry, and discover any factors which might encourage an infestation. (R.1170-1177; R.759). Yet, Fritz breezed through Greystone's 8,000 square foot facility so quickly each month that it was impossible for him to perform a legitimate inspection. Terminix's own designated corporate representative, Hedges, agreed that the time spent by the technician was grossly inadequate. Yet, with records in its hands, Terminix did nothing to change this lack of service in the months and years leading up to the attack.

Testimony by Terminix employees revealed that, time and time again, the technician applied inadequate amounts or types of chemicals necessary to keep pests, including fire ants, from infesting Greystone. (R.1291-1294). Terminix cannot claim that Fritz acted without its knowledge. Each time Fritz visited Greystone he submitted paperwork

detailing his exact time at the facility and the chemicals he used. (R.807;R.1286-1289). His superiors knew that the inspections and treatments at Greystone were grossly substandard. Yet, they did nothing to change or improve this treatment.

The most convincing evidence of Terminix's knowledge came from Ron Bateman, the witness Terminix concealed. According to Bateman, the Huntsville branch did not even purchase or maintain sufficient granules in the months preceding the ant attack. (R. 1290-1291). Bateman held the key to the chemical cage while employed by Terminix and knew the branch did not have sufficient supplies. (R. 1291-1294). Furthermore, Bateman testified that Terminix's actions in spending insufficient time and applying insufficient chemicals was profit-motivated and endemic throughout North Alabama. (*Id.*).

Terminix consciously disregarded known risks and known procedures necessary to protect vulnerable individuals from deadly ant infestations. Terminix consciously disregarded known dangers and known standards in the treatment it provided. The reason why is answered in one word -- money. The preceding Statement of Facts describes the bonus

structure Terminix implemented both to maximize the number of accounts handled by its employees and to minimize the treatment provided. This evidence clearly reveals that Terminix put policies and procedures in place to encourage employees to consciously disregard the known risks. It also explains why Fritz consciously chose not to inspect or treat Greystone month after month. He and his supervisors were enticed to flaunt the requirements by the lure of potentially unlimited monetary bonuses offered by Terminix.

In an effort to excuse the terribly egregious conduct of its employees in disregarding the risk to elderly patients at Greystone each month, Terminix cites *Roush, supra*. However, Terminix's reliance on *Roush* is misplaced. In *Roush*, an Alfa agent was able to misappropriate money simply because the company had not instituted a safeguard to prevent that conduct. See, *Roush, supra*, at 1250. The case at bar does not involve tortious conduct which occurred simply due to a failure to devise an appropriate policy. Rather, this case involves a terrible injury that occurred because Terminix consciously disregarded known risks and known procedures to eliminate those risks. In fact, Terminix not only consciously disregarded both the

known risks and known procedures, but instead, affirmatively instituted procedures to encourage its employees to consciously disregard the right and safety of people with whom it came into contact. The evidence goes far beyond the level necessary under *Ala. Code* § 6-11-20. As a result, the jury properly considered and awarded punitive damages against Terminix.

B. The Punitive Damage Award In This Case Meets All Standards of Constitutionality

The jury's award of punitive damages in this case was appropriate and falls well within the bounds of constitutionality based on the guideposts established in *BMW of North America, Inc. v. Gore*, 517 U.S. 599 (1996), as well as the factors set forth in *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 223-24 (Ala. 1986). As such, this verdict should not be disturbed.

1. THE BMW GUIDEPOSTS

a. The Reprehensibility of the Defendant Terminix International's Conduct

Considered by the United States Supreme Court as the most important guidepost in determining the reasonableness of a punitive damage award, this first factor required the court to assess the evidence to assure that the punitive damages award accurately reflects the enormity of the offense.

Conagra, Inc. v. Turner, 776 So. 2d 792, 796 (Ala. 2000). This factor includes a consideration of "the existence and frequency of similar past conduct." *BMW, supra*, at 512. Additionally, "indifference to or a reckless disregard for the health and safety of others," is an aggravating factor in examining the reprehensibility of conduct. *Winn Dixie of Montgomery, Inc. v. Colburn*, 709 So. 2d 1222 (Ala. 1998) (quoting *BMW, supra*, at 576).

The evidence in this case reveals just such reprehensibility. Terminix knew about fire ants. They knew the danger posed by fire ants readily invading buildings and attacking vulnerable humans. Terminix knew that Greystone was a special facility housing frail and elderly individuals. Armed with this explicit knowledge, Terminix consciously chose to disregard the health and safety of the most vulnerable members of our society.

Terminix knew how to properly treat a structure to prevent ant infestations. Its employees testified that a structure must be thoroughly inspected throughout the inside and around the entire perimeter of the outside, that granules should be placed around the perimeter of the outside every month to prevent fire ant infestations, and

that sufficient applicable chemicals should be applied to prevent such infestations. (R.1170-1179; R.776-777). Terminix employees admitted they knew that sufficient time and resources must be expended to prevent fire ant infestations. Terminix's expert, Dr. Goddard, admitted that deaths had been occurring from fire ant attacks for years and that Mississippi alone had suffered 13 such attacks in nursing homes and extended care facilities. (R.1402).

Terminix consciously chose to disregard the known risk for profit. Evidencing further reprehensibility, the technician responsible for servicing Devers' building was not reprimanded or counseled in any form or fashion. At trial, the technician was still responsible for servicing over 200 monthly commercial accounts out of the same branch office. The technician had not changed the amount of time he was spending at accounts following the attacks. The technician met with Terminix's top technical director in preparation for their depositions and that director expressed no criticisms of his performance. In fact, only two weeks prior to trial, absolutely nothing was done to caution local branches to assure that inspections and

treatment were not being sacrificed for the lure of unlimited bonuses. (R.815-816).

At trial, absolutely nothing had been altered to protect residents of health care facilities being serviced by Terminix from being subjected to another fire ant attack in the future. The reprehensibility in this case is incomparable. Therefore, this factor justifies the imposition of every dollar of the punitive damages award assessed by the jury against Terminix.

b. The Ratio of the Compensatory Damages Award To the Punitive Damages Award

In *Prudential Ballard Realty Co., Inc. v. Weatherly*, 792 So. 2d 1045 (Ala. 2000), this Court indicated that a benchmark ratio of three times compensatory damages is useful where substantial compensatory damages have been awarded. An even higher ratio can be justified where the plaintiff is financially vulnerable or elderly, as is Lucille Devers. See, *Jeter, supra*, at 40. When the punitive award against Terminix of \$1,750,000.00 is compared to the compensatory award of \$1,850,000.00 for which Terminix is liable, the actual ratio is less than 1 to 1, well below the allowable benchmarks.

c. Sanctions For Comparable Misconduct

Terminix cites statutory provisions which indicate a violation of certain regulations could subject it to a misdemeanor penalty including a fine up to \$500.00 or injunctive relief preventing it from performing pest control services. In *Cooper & Co. v. Lester*, this Court stated, "[a]n administrative slap on the wrist does nothing to make the plaintiffs whole, nor adequately punishes the wrongdoer. This element supports a finding that the punitive damages awarded were not excessive." 832 So. 2d 628, 643 (Ala. 2000).

Similarly, in this case, the cited code sections would completely fail to provide any deterrence to Terminix or others. Thus, this factor also supports the contention that the punitive award in this case was clearly not excessive.

2. THE HAMMOND/GREEN OIL FACTORS

a. The Punitive Damages Award And The Actual or Likely Harm Caused

"Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually occurred. If the actual or likely harm is slight, the damages should be

relatively small. If grievous, the damages should be much greater." *Green Oil, supra*, at 223 (quoting *Aetna Life Ins. Co. v. Lavoie*, 505 So. 2d 1050, 1062 (Ala. 1987)). The pain suffered in this case by Mrs. Devers was at a level entirely beyond the normal realm of human experience. The physical wounds lasted weeks.

Additionally, these terrible attacks permanently robbed the plaintiff, already elderly and with diminished mental health, of her remaining capacity to function psychologically. This demonstrable and measurable physical and mental harm clearly supports the present verdict for punitive damages.

Fire ant attacks can easily result in anaphylactic shock, cerebral hemorrhage, and death to susceptible people. Thankfully, Mrs. Devers did not suffer those effects. Regardless, the potential harm from such attacks is so great that the punitive damages awarded must stand as a warning not only to Terminix but to all who take on this duty. Tragically, fire ant attacks had taken more than eighty human lives before this trial. (R.1428). A disregard for such potential harm and the actual harm suffered should warrant the most severe punishment allowable.

b. The Reprehensibility of Terminix's Conduct

Under *Hammond* and *Green Oil*, this Court considers:

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.

Hammond v. City of Gadsen, 493 So. 2d 1374 (Ala. 1986);
Green Oil, supra, at 223 (quoting *Lavoie, supra*, at 1062).

As the Court considers the duration of the wrongful conduct and awareness of the hazard, it must remember that Terminix knew the propensity of fire ants to attack individuals. Furthermore, Terminix knew long before August, 1999, that Greystone was a facility full of elderly residents. Terminix treated Greystone for several years. Month after month, the technician filled out paperwork documenting his careful inspection of Greystone. In reality, he blew through the facility in minutes. Had Terminix's technicians and supervisors looked up long enough from their bonus checks, each would have recognized the clear evidence of fire ants. Terminix's dereliction was terrible and warrants the punitive damages award in this case.

c. Terminix International's Profit From Its Misconduct

Terminix International contends it has not "profited" from any misconduct, but the evidence tells a different story. Terminix made a conscious decision to inadequately treat Greystone based only on profit. The bonus scheme instituted by Terminix to generate greater profits at the expense of its clients was discussed in preceding parts of this brief. Terminix has actively sought profits by encouraging grossly inadequate service to its customers. Their financial information reviewed by the trial court post-trial suggests that they have been wildly successful. The punitive damage award in this case is an essential measure to remove the defendant's destructive and dishonest policies.

d. Terminix International's Financial Position

In this case, the punitive award will tragically have only a small impact upon Terminix, which possesses insurance coverage in the amount of \$26,000,000.00 for this claim. However, even in the absence of insurance, the award would only have a minimal impact upon Terminix.

According to 1999 tax returns, the punitive award represents less than one day of receipts.

e. Cost of Litigation

Under this factor, "[t]he Court shall consider the collective costs of litigation to encourage plaintiffs to bring wrongdoers to trial and to reward the plaintiffs' counsel for assuming the risk of bringing the lawsuit." *Lester, supra*, at 645. In evaluating litigation costs, the Court should not only consider the actual money expended, but also indirect costs including the time necessary to get the case ready for trial and the extent of work necessary to complete the case. *Id.* Devers' expenses prior to appeal were approximately \$40,460.22.

In addition, the case consumed almost three years of legal work from the date of the attacks just to the date of the jury's verdict. As the evidence so readily reveals, Mrs. Devers is an elderly, frail lady. A wrongdoer must not be allowed to delay justice. Such a delay would essentially amount to a denial of justice in the case of an elderly plaintiff. Counsel must be rewarded and encouraged for every effort to obtain justice in light of a defendant

who has engaged in every conceivable attempt to delay a resolution of the case at trial.

The course of discovery in this case reveals that counsel engaged in significant work both to prepare the case for trial and to prevent the defendant's repeated attempts to prevent a trial by jury. Plaintiff's counsel traveled to multiple states for necessary depositions, retained multiple expert witnesses, and simultaneously litigated issues in both Federal and Alabama court. In order to obtain basic discovery, counsel had to repeatedly seek court intervention. The actual trial required three full-time attorneys on behalf of Mrs. Devers as well as two additional attorneys just to defend Terminix's challenges in Federal Court. Devers pursued her claims in State Court while defending a pre-emptive Petition to conclusion in Federal Court. Following each decision, Terminix sought higher appellate review.

This case required a monumental devotion of time and expense to reach a verdict. The attorney who handled the technical pest control aspects of the case attended seven days of depositions in multiple states in the last two weeks before trial. Terminix's production of documents

just before the trial increased Devers' time and risk. She now faced the concurrent tasks of beginning a trial and thoroughly reviewing document production. As such, this factor supports a finding that the award of punitive damages in this case is not excessive.

f. Criminal Sanctions

In this case, Terminix has suffered no criminal sanctions. Thus, this factor does not mitigate the punitive damages award in this case. See, *U.S. Petroleum Corp. v. Hines*, 770 So. 2d 589, 594 (Ala. 1999).

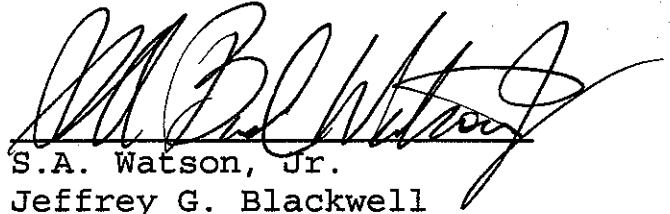
g. Other Civil Actions

No other civil actions against Terminix have been filed in Alabama that present the same type of claim. Similarly, no actions at all have been filed which have penalized Terminix for its egregious conduct. Thus, this factor does not weigh in mitigation of the punitive damages verdict in this case.

CONCLUSION

For all the foregoing reasons, the jury verdict in this case is due to be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing brief by placing a copy of the same in the United States Mail, First Class, postage prepaid, and properly addressed to the Appellant as follows:

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