2014 WL 6803460 (Ala.) (Appellate Brief)
Supreme Court of Alabama.

NINETEENTH STREET INVESTMENTS INC., Ibrahim S.
Sabbah & Sabbah Bros. Enter. Inc., Defendants-Appellants,
v.
Sharon Robertson TAMMY HARDIN Tisha Owens Bobby Waldrop
Michael Waldrop Susan Green Jennifer Vickery, Plaintiff-Appellees.
1.

Nos. 1131285, 1131380, 1131381.
October 27, 2014.

On Appeal from the Circuit Court of Jefferson Cty. Bessemer Division, Honorable Eugene R. Verin presiding
Case No. CV-07-633
Case No. CV-07-797
Case No. CV-07-783

Brief of Appellants

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*i STATEMENT REGARDING ORAL ARGUMENT

The Appellants request oral argument. Oral argument will assist this Honorable Court in understanding the impermissible peremptory strikes, the erroneous and excessive award of punitive damages, and the erroneous piercing of the corporate veil. Because the decisional process would be greatly aided by oral argument, pursuant to Rules 28(a)(1) and 34(a), Ala. R. App. P., ORAL ARGUMENT IS REQUESTED in the case at bar.

*v STATEMENT OF JURISDICTION

This appeal from a final judgment entered by the Circuit Court of Jefferson County, Bessemer Division is brought under Alabama Code (1975) §12-2-7. The amount in controversy exceeds Fifty Thousand Dollars ($50,000.00). A Notice of Appeal was timely filed. Under the Alabama Rules of Appellate Procedure, Rules 3 and 4, this Court has jurisdiction, properly invoked, of this matter.

*1 STATEMENT OF THE CASE

Nature of the Case.

The consolidated actions are based on allegations that Brittany Caffee, a minor, became intoxicated following an alleged purchase of alcoholic beverages and that, as a result of her intoxication, she crashed her vehicle, causing the death of one minor passenger and injury to two other minor passengers. C. 58-63, 77-80, 94-98, 257-262, 383-410, 527-534, 590-596, 809-818,840-848,2286-2304, 2355-2370, 2372-2374, 3201-3205 The passengers were also drinking. *Id.* This matter is a direct appeal from the Final Consolidated Judgment of the Circuit Court of Jefferson County, Bessemer Division, entered on December 20, 2013, in the consolidated actions against The Nineteenth Street Enterprises, Inc. (“Nineteenth Street”), Sabbah Brothers Enterprises, Inc. (“SBE”) and Ibrahim Sabbah (“Sabbah”) (collectively, “Appellants”). C. 1708-36 In its Final Consolidated Judgment, the trial court ruled on the corporate existence of Nineteenth Street, entered judgment in the amount of the jury verdict assessed in the first phase of the trial, and effectively denied ***2** both Appellants' November 1, 2013 Motion for Judgment as

a Matter of Law at the Close of Plaintiffs' Case and Appellants' February 7, 2013 Motion for Judgment as a Matter of Law at the Close of Plaintiffs' Case and at the close of all evidence. C. 1708-36, 3213-24, 3237-48

Appellants also appeal from the trial court's June 20, 2014 Order denying Appellants' Motion for Judgment Notwithstanding the Verdict, Motion for New Trial and/or Remittitur, which was filed on January 21, 2014. C.4485-94 Alternatively, Appellants appeal from the trial court's February 28, 2011 Order denying their Motions for Summary Judgment, filed on February 1, 2011. C. 962-86, 990-1001

Course of the Proceedings.

On May 11, 2007, Sharon Robertson ("Robertson") filed an action (Case No. 68-CV-2007-633) against Nineteenth for the death of her minor son, Timothy Andrew Robertson ("Drew") under the Dram Shop Act, *Ala. Code* § 6-5-71, and the Wrongful Death of Minor Statute, *Ala. Code* § 6-5-391. C. 58-63 Robertson filed five Amended Complaints on the following dates: May 21, 2007; June 6, 2007; May 22, 2008; January 27, 2009; and February 22, 2010. C. 74-81, 91-99, 254-62, 383-92, 809-18

***3** On June 13, 2007, Jennifer Vickery ("Vickery") (Case No. 68-CV-2007-783) and Michael Waldrop ("Waldrop") (Case No. 68-CV-2007-797) brought their own personal injury compensatory and punitive damages claims against Nineteenth under the Dram Shop Act. [1] C. 395-410

On June 15, 2007, Tammy Hardin ("Hardin"), the mother of Brittany Caffee, filed a cross-claim in the Robertson action (Case No. 68-CV-2007-633), asserting a punitive damages claim against Nineteenth Street under the Civil Damages Act, *Ala. Code* § 6-5-70. [2] C. 527-34, 590-96

On February 1, 2011, Appellants filed Motions for Summary Judgment, seeking dismissal of all claims for lack of evidence that Nineteenth Street sold or provided alcohol to a minor and, further, showing that liability should not be imposed upon SBE or Sabbah for the alleged wrongful conduct of Nineteenth Street. C. 962-86, 990-1001 The trial court denied the Motions for Summary Judgment on February 28, 2011. C. 1179

***4** On February 7, 2013, following the first phase of the trial, Nineteenth Street filed a Motion for Judgment as a Matter of Law at the Close of Plaintiffs' Case and at the close of all evidence. C. 3213-24 On January 21, 2014, following the second (non-jury) phase of the trial, Appellants filed a Motion For Judgment as a Matter of Law at the Close of Plaintiffs' Case. C. 3237-48 These Motions for Judgment as a Matter of Law were effectively denied in the trial court's Final Consolidated Judgment, entered on December 20, 2013. C. 3256-84

Disposition in the Court Below.

On February 8, 2013, following the first phase of the trial, a jury verdict was rendered against Nineteenth for $15,150,000. C. 1710-11 Of this amount, $1,650,000 was designated compensatory damages and $13,500,000 was designated as punitive damages. Id.

On December 20, 2013, following the second phase of the trial, which was held without a jury in late October 2013, the trial court signed the proposed order submitted by the Plaintiffs/Appellees, entitled "Final Consolidated ***5** Judgment." C. 1681-1706, 1708-36; R. Proceeding 25-28 [3] As set forth in the Final Consolidated Judgment, the trial court ruled to pierce the corporate veil of Nineteenth Street, thereby binding SBE to the judgment against Nineteenth, and then ruled to pierce the Corporate Veil of SBE to Hold Mr. Sabbah personally liable for the judgment.C. 1732 The trial court rendered judgment against Appellants, jointly and severally, in the following amounts: (1) in favor of Sharon Robertson in the amount of $7,000,000.00; (2) in favor of Jennifer Vickery in the amount of $3,900,000.00; (3) in favor of Michael Waldrop in the amount of $3,750,000.00; and (4)

in favor of Tammy Hardin in the amount of $500,000.00. C. 1734-36 The trial court's December 20, 2013 Final Consolidated Judgment also denied Appellants' November 1, 2013 and February 7, 2013 Motions for Judgment as a Matter of Law. C. 1711-12

On January 21, 2014, Appellants filed a Motion for Judgment Notwithstanding the Verdict, Motion for New Trial and/or Remittitur. C. 4485-4594 On June 20, 2014, the ***6** trial court issued an Order denying Appellants' Motion for Judgment Notwithstanding the Verdict, Motion for New Trial and/or Remittitur. C. 4694-98

STATEMENT OF ISSUES

I. Appellants are entitled to a new trial because the trial court erroneously denied Appellants' jury composition challenges in violation of *Batson* and its progeny.

II. Appellants are entitled to a new trial or, alternatively, remittitur because the trial court erroneously failed to remit the punitive damages award, which was excessive and based on bias, passion and prejudice.

III. The trial court erroneously disregarded the corporate structure of Nineteenth Street and erroneously applied the equitable theories of veil-piercing and alter-ego.

STATEMENT OF THE FACTS

This consolidated action arises from an automobile accident that occurred on the evening of May 2, 2007 when Brittany Caffee was driving a vehicle in which Drew Robertson, Michael Waldrop and Jennifer Vickery were passengers. C. 809-18,840-48, 2590-2600 Appellees alleged that Caffee, who was 19 years old on May 2, 2007, purchased ***7** alcohol from a convenience store operated by Nineteenth Street, located at 600 14th Street, Bessemer, Alabama, for consumption by all of the Appellees. Id. Appellees alleged that Caffee became intoxicated as a result of consuming said alcohol, and that she subsequently caused the vehicle to crash into a tree, resulting in the death of her passenger Drew Robertson, and injury to the remaining minor passengers. *Id.*

Appellees Robertson, Vickery and Waldrop filed suits against Nineteenth Street, alleging causes of action under Alabama's Dram Shop Act, § 6-5-71, Alabama Code(1975), and Alabama's Civil Damages Act, § 6-5-70, Alabama Code (1975). C. 58-63, 77-80, 94-98, 257-262, 383-410, 527-534, 590-596, 809-818,840-848,2286-2304, 2355-2370, 2372-2374, 3201-3205 Appellee Hardin also filed suit against Nineteenth Street, alleging a cause of action under Alabama's Civil Damages Act, § 6-5-70, Alabama Code (1975). C. 527-34, 590-96, 840-48 Appellees also alleged that "Defendants failed to adhere to the legal requirements and formalities of corporate form and governance" and sought to pierce the corporate veil, alleging that "Defendant Nineteenth Street is so organized and controlled, and its business conducted ***8** in such a manner, as to make it the mere adjunct, instrumentality, or alter ego of Defendant SBE and/or Ibrahim Sabbah." C. 809-18,840-48, 2590-2600

SBE owned a building located at 600 14th Street, Bessemer, Alabama, it did not sell alcohol at this location, and it did not sell any alcohol to Caffee on May 2, 2007. C. 925-29, 945-47 Mr. Sabbah owned all of the stock of SBE, and did not sell alcohol. Id., id. Mr. Sabbah is the sole shareholder, officer and director of SBE. C. 1010 SBE was incorporated in March, 2000. Id.

In March 2000, SBE operated a convenience store at 31 19th Street South, in Bessemer, Alabama, known as the Red Rock Stop. C. 1011-12 Subsequently, SBE began a second convenience store known as Red Rock Stop Number 2. C. 1013 SBE was doing business as Red Rock Stop Number 1 and Red Rock Stop Number 2, operating convenience stores, beginning sometime after March 2000 through 2006. Id. SBE d/b/a Red Rock Number 2 ceased operations in December 2006. C. 1043 SBE had no management of any convenience store since December 31, 2006. Id.

After December 31, 2006, SBE's business was limited exclusively to the ownership of property and the rental of ***9** such property to others. *Id.* Its properties were located at 600 14th Street and at 31 19th Street. C. 1011-13 SBE had no management responsibility for the operation of any convenience store. *Id.*

In January 2004, SBE owned the building located at 31 19th Street, Bessemer. Id. Nineteenth Street was not a tenant of that building. Id. Prior to December 2006, Nineteenth Street had no relationship with either of the Red Rock Stores. Id.

SBE acquired the property at 600 14th Street in 2005 or 2006 from Holmes Oil Company. C. 1026-31 The property had been operated as a gas station/convenience store prior to the acquisition of the property by SBE. Id. SBE acquired from Holmes Oil Company the real estate, the building and the gas pumps. *Id.* At the time SBE bought the property from Holmes Oil Company, there was no business in the convenience store. *Id.* SBE took out a mortgage and made a loan through Compass Bank when it purchased the real estate at 600 14th Street, and Mr. Sabbah was a personal guarantor on that loan. I*d.*

Nineteenth Street was incorporated in January 2004 by Ayman Yousef Nasser. C. 1035 At the time of Nineteenth ***10** Street's incorporation, Yousef Nasser was the sole shareholder and sole officer and director. Id. Thereafter, SBE and Nineteenth Street had a written lease regarding the 600 14th Street property. C. 1043-47 Prior to February 2007, SBE merely leased out the property and acted as the landlord to Nineteenth Street. R. 691-94 Other than a landlord/tenant relationship, SBE did not have any legal or equitable relationship in the convenience store business at 600 14th Street. Id.

Before February 2007, SBE had no shares, management, or interest in Nineteenth Street, nor did SBE have any interest in the business known as Liberty Highway 150 Convenience Store, which later became known as the 14th Street BP. *Id.* SBE did not have any ownership of any type in Nineteenth Street prior to February 3, 2007. Id. Nineteenth Street and SBE maintained separate **financial** books and records. *Id.*

Apart from the lease between SBE and Nineteenth Street, no written agreements or contracts existed between SBE and Nineteenth Street. R.P. 699 In February 2007, SBE acquired all of the shares of Nineteenth Street. R.P. 691-94 After SBE acquired the shares of Nineteenth Street, the ***11** store's name changed from Liberty to BP. *Id.* After Yousef Nasser resigned his positions as officer and director of Nineteenth Street, Mr. Sabbah became the sole officer and director of Nineteenth Street. *Id.* Thereafter, SBE owned all of the shares in Nineteenth Street and Mr. Sabbah was president and director of Nineteenth Street. *Id.*

After purchasing Nineteenth Street, Nineteenth Street and SBE were operated as separate businesses, or separate entities. C. 1053-55 The two companies were separate from each other and had no obligation to pay each other's bills. *Id.* SBE and Nineteenth Street had a corporate lawyer, Andrew LaPlante, who maintained the records of SBE and Nineteenth Street. *Id.* Nineteenth Street paid its employees out of its own checking account. *Id.* Nineteenth Street paid SBE rent like any other tenant. *Id.* Nineteenth Street and SBE file separate income tax returns every year. *Id.* SBE was not involved in the sale of alcohol at the 600 14th Street location, the 14th Street BP location. R.P. 699-704

STANDARD OF REVIEW

In reviewing the denial of a motion for new trial, this Court asks whether the trial court committed an "error of ***12** law ... properly preserved by the party making the application" or committed an **abuse** of discretion. *Clark v. Austin,* 34 So. 2d 683 (Ala. 1948); *Mutual Savings Life Ins. Co. v. Smith,* 765 So. 2d 652 (Ala. Civ. App. 1998) (*citing Ala. Code* (1975) § Section 12-13-11 (a) (8) and Ala. R. Civ. P. 59(a)). A trial court's conclusions on legal issues carry no presumption of correctness on appeal. *Ex parte Cash,* 624 So. 2d 576, 577 (Ala. 1993). This court reviews the application of law to facts *de novo. Allstate Ins. Co. v. Skelton,* 675 So. 2d 377 (Ala. 1996) ('W here the facts before the trial court are essentially undisputed and the controversy involves questions of law for the court to consider, the trial court's judgment carries no presumption of correctness.')).

This court applies a *de novo* standard of review to a trial court's determination regarding the constitutionality of punitive damages awards. *Acceptance Ins. Co. v. Brown,* 832 So. 2d 1, 24 (Ala. 2001) *(citing Cooper Indus., Inc. v. Leatherman Tool Group,*

Inc., 532 U.S. 424, 436 (2001)). In applying the de novo standard of review to a constitutional challenge to the amount of the punitive-damages award, this Court must review the evidence and the law without ***13** deference to the jury's award or to the trial court's rulings. *Horton Homes, Inc. v. Brooks*, 832 So. 2d 44 (Ala. 2001).

Appellate review of a trial court's ultimate conclusion on discriminatory intent in ruling on a *Batson* claim is the clearly erroneous standard of review. *Ex parte Nettles*, 435 So. 2d 151, 153 (Ala. 1983); *Sharp v. State*, 2010 WL 753324 (Ala. Crim. App. 2010).

This Court reviews a trial court's determination to disregard the corporate entity under the ore tenus standard of review; however, when the trial court improperly applies the law to the facts, no presumption of correctness exists as to the trial court's judgment under the ore tenus rule. *Heisz v. Galt Industries, Inc.*, 93 So. 3d 918 (Ala. 2012); *Bradley v. Bauldree*, 101 So. 3d 221 (Ala. Civ. App. 2012).

The standard of review for a motion for judgment as a matter of law and for a judgment notwithstanding the verdict is identical, as they both challenge the sufficiency of the evidence. *J.B. Hunt Transport, Inc. v. Credeur*, 681 So. 2d 1355 (Ala. 1996). That standard is whether the nonmovant has presented substantial evidence in support of each element of his claim; if he has not, then ***14** the motion should be granted. *Malcolm v. King*, 686 So. 2d 231 (Ala. 1996).

SUMMARY OF THE ARGUMENT

Appellants are entitled to a new trial based on the trial court's erroneous denial of Nineteenth Street's jury composition challenges to the racially discriminatory use of peremptory strikes. The trial court **abused** its discretion in finding that the reasons given by counsel for Appellees in striking the venire members were not merely pretextual. Because the trial court's evaluation does not withstand scrutiny, the judgment must be reversed

Under a de novo review, the punitive damages award is due to be remitted because the amount of the punitive damages verdict is excessive and is based on bias, passion and prejudice. Moreover, the trial court erroneously failed to remit the punitive damage verdict in light of each of the factors recognized by this Court in *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989), and *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986).

The trial court's erroneous ruling to disregard the corporate structure and existence of Nineteenth Street must be reversed because the evidence does not support the trial ***15** court's findings of inadequacy of capital, fraud, or alter-ego, as required by Alabama law to pierce the corporate veil. The trial court's piercing of the corporate veil is due to be reversed with instructions to recognize Nineteenth Street's corporate existence.

ARGUMENT

I. Nineteenth Street is Entitled to a New Trial Because the Trial Court Erroneously Denied Appellants' Jury Composition Challenges in Violation of Batson and Its Progeny.

By denying Nineteenth Street's jury composition challenge, the trial court violated Nineteenth Street's right to a fair trial, as articulated in *Batson* and its progeny, thus mandating a new trial. *See Batson v. Kentucky*, 476 U.S. 79 (1986). The trial court failed to apply established law to the facts and improperly accepted Appellees' proffered reasons for their racially discriminatory peremptory challenges at face value, such that this Court must reverse the trial court's judgment and order a new trial. C. 4694-98; R.T.E. 234

A. A New Trial Is Necessary To Ensure Meaningful Protection Against Purposeful Racial Discrimination In Jury Selection.

***16** In *Batson*, the United States Supreme Court held that the Equal Protection Clause of the United States Constitution prohibits the prosecution from exercising its peremptory strikes to remove blacks from a black defendant's jury solely on the basis of their race. *Id.* In *Powers v. Ohio*, 499 U.S. 400 (1991), the Court extended Batson to the striking of blacks from a white defendant's jury. This Court, in *White Consolidated Industries, Inc. v. American Liberty Insurance Co.*, 617 So. 2d 657 (Ala. 1993), extended *Batson* to the striking of white venire members.

It is well-established that Alabama prohibits the racially discriminatory use of peremptory strikes and that "the defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." "*See Ex parte Branch*, 526 So. 2d 609, 621 (Ala. 1987); *Ex parte Jackson*, 516 So. 2d 768 (Ala. 1986); *Batson*, 476 U.S. at 86. This Court has held that the rules articulated in *Batson* apply equally to peremptory challenges exercised by the defense to peremptory challenges in civil, as well as criminal trials. *Looney v. Davis*, 721 So. 2d 152, 164 (Ala. 1998). "The removal of even one juror for a racially discriminatory reason is a ***17** violation of the equal protection rights of both the excluded juror and the party challenging the peremptory strike." *Id.* at 163 (emphasis supplied).

Alabama courts adhere to a three-step process for evaluating claims of discrimination. First, the defendant must make a prima facie showing that the plaintiff has exercised peremptory challenges on the basis of race. *Ex parte Floyd*, 2012 WL 4465562 (Ala. 2012). Second, if the requisite showing has been made, the burden shifts to the plaintiff to articulate a race-neutral explanation for striking the jurors in question. *Id.* (citing *Batson*, 476 U.S. at 96-98). Specifically, the plaintiff must "articulate a clear, specific, and legitimate reason for the challenge which relates to the particular case to be tried, and which is nondiscriminatory." *Ex parte Branch*, 526 So. 2d at 623. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination:
In *Smith v. Jackson*, 770 So. 2d 1068, 1072-73 (Ala. 2000), the supreme court stated: "Under Alabama law, the trial judge must 'evaluate the evidence and explanations presented' and 'determine whether the explanations are sufficient to overcome the presumption of bias.' *Branch*, 526 So. 2d at 624. 'The trial judge cannot merely accept the specific reasons given... at face value; ***18** the judge must consider whether the facially neutral explanations are contrived to avoid admitting the acts of group discrimination.' *Id.*"

Oblander v. USAA Cas. Ins. Co., 792 So. 2d 1103, 1108 (Ala. Civ. App. 2000).

During jury selection, Appellees used 10 of their 13 peremptory strikes to remove 10 of the 22 Caucasian jurors on the venire, while striking only three of the 20 African-American venire members. C. 491; R.T.E. 193 In the process, Appellees excluded almost 50 percent of the Caucasian jurors, compared to only 15 percent of the African-American jurors. The venire in this case consisted of 42 prospective jurors, which was comprised of 22 Caucasian persons (11 of whom were from the city of Hoover, Alabama) and 20 African-American persons. R.T.E. 178-83, 193 The resulting jury of 12 individuals, plus two alternate white jurors, was comprised of nine (9) African-American jurors and five (5) Caucasian jurors. *Id.* Mr. Sabbah is Caucasian.

Nineteenth Street timely objected to the Appellees' pattern of peremptory strikes against Caucasian venire members, because the sole basis for these strikes was race. R.T.E. 178-232 The trial court found that Nineteenth ***19** Street had shown a prima facie case of race discrimination in Appellees' use of peremptory strikes and required Appellees to articulate their reasons for the strikes of the Caucasian jurors. C. 4695, R.T.E. 178-234Once the trial court ordered Appellees to give race-neutral reasons for their strikes, the burden then shifted to Appellees to "articulate a clear, specific, and legitimate reason for the challenge which relates to the particular case to be tried, and which is nondiscriminatory." *Oblander*, 792 So. 2d at 1108. The Appellees did not furnish "a neutral explanation" for their discriminatory strikes of a disproportionate number of Caucasian jurors. *Batson*, 476 U.S. at 78. Instead, Appellants' proffered reasons simply exposed the discriminatory use of their peremptory challenges, as their reasoning was not applied equally to both Caucasian and African-American jurors. R.T.E. 178-232 Moreover, Appellees relied upon assumed group traits that were not applicable to a specific challenged juror. Id.

This Court has long recognized certain "kinds of evidence that could be used to show sham or pretext when the reasons for striking a juror are not obviously ***20** contrived." *Oblander*, 792 So. 2d at 1111-12 (citing *Ex parte Branch*, 526 So. 2d at 624). Specifically, other than reasons that are obviously contrived, the following types of evidence can be used to show sham or pretext: (1) the reasons given are not related to the facts of the case; (2) there was a lack of questioning to the challenged juror, or a lack of meaningful questions; (3) disparate treatment in that persons with the same or similar characteristic as the challenged juror are not struck; (4) disparate examination of members of the venire when questions likely to disqualify a juror are asked to black jurors and not to white jurors; (5) the prosecutor used challenges to remove the only blacks remaining on the venire; and (6) an explanation based on a group bias where the group trait is not shown to apply to the challenged juror. *Ex parte Floyd*, 2012 WL 4465562, *5 (Ala. 2012).

The trial court improperly failed to apply these legal standards to the facts despite the fact that Appellees' reasons were patently pretextual. While appellate review of a trial court's ruling on discriminatory intent on a *Batson* claim is generally the clearly erroneous standard, when the trial court improperly applies the law to the facts, the ***21** trial court's judgment carries no presumption of correctness, and this Court reviews the application of law to facts de novo. See *Ex parte Nettles*, 435 So. 2d at 153; *Ex parte Cash*, 624 So. 2d at 577.

B. Appellees' Reasons for Striking Caucasian Jurors Were A Pretext For Racial Discrimination.

As set forth fully in the record, Appellees purported to have non-discriminatory reasons for having used 10 of their 13 peremptory strikes to remove 10 of the 22 Caucasian jurors on the venire. R.T.E. 178-232 However, the record reveals that the reasons provided by Appellees to the trial court were merely a sham or pretext for racial discrimination of Caucasion jurors. See *Ex parte Floyd*, 2012 WL 4465562, *5; *Oblander*, 792 So. 2d at 1108.

Appellees first struck ***Juror 13, Matthew John Cuthbert, Caucasian Male,*** stating that he lived "in Hoover, Alabama in Russet Meadows, which is ***a relatively affluent neighborhood***", that he was in computer Web management, "he identified his wife Misty as being on staff at Homewood Church of Christ which Appellees believed to have strict beliefs with respect to whether lawsuits should or should not be filed." R.T.E. 199 Appellees next struck ***Juror 31, Lori Polk, Caucasian Female,*** stating that she "expressed ***22** some significant misgiving at ruling on this particular type of case", that "her husband works in the claims department of Progressive Insurance", and she "is in the nursing profession". R.T.E. 200

Appellees struck **Juror 41, Brian David Toth, Caucasian Male** because he "identified himself as an employee of the Southern Company which is the parent company to Alabama Power" and "Alabama Power is extremely active in the Business Council of Alabama, which is often an anti-lawsuit and anti-plaintiff organization." R.T.E. 202-03 Appellees emphasized that "he was in, ***obviously, upper level management*** of that company" and "was ***dressed very conservatively."*** Appellees admitted Mr. Toth "indicated he could be fair in a case", Appellees nevertheless used their peremptory challenge to strike Mr. Toth. *Id.* Appellees next articulated striking **Juror 19, Sandra Gornati, Caucasian Female** because "Ms. Gornati also ***identified herself as living in Hoover, Alabama"*** and "is the owner of a small business." R.T.E. 204-205 Appellees opined that "owners of small businesses may feel themselves threatened by lawsuits ... so we exercised a peremptory strike." Id.

23** Appellees explained their reasoning for striking ***Juror 24, Scott Lenzie, Caucasian Male as based on the fact that he "works as a computer programmer at BlueCross BlueShield", ***"identified his wife as being a youth director at Saint Mark Methodist Church***" [4] and "because of Mr. Lenzie's wife's affiliation with a religious organization that I don't know what his beliefs are particularly." R.T.E. 207 Appellees further based their striking of Mr. Lenzie on the fact that "***He also identified himself as living in Hoover, which is a more affluent community.*** And for those reasons, we thought he may be less apt to rule for a plaintiff." *Id.*, 205-06

Appellees articulated the reason for striking **Juror 20, Stephen Hanson, Caucasian Male** as being that he attended church with a struck juror, Ms. Myers and also with Mr. Lenzie." Appellees explained their assumption that Mr. Hanson was a "trainer

at a logistics company where he trains over-the-road truck drivers" and "over-the-road truck drivers are often subject to lawsuits seeking very, very high damages. For that reason, I felt he would not be ***24** a favorable plaintiff -- a favorable juror for the Plaintiff." *Id.*, p. 207

Appellees stated that they used a peremptory strike on **Juror 36, Joseph Spota, Caucasian Male** because "he indicated that he was a design or - design engineer of sort working for a contractor, but also worked for the Southern Company." *Id.*, p. 208 Again, Appellees explained their assumption that "given the conservative nature of that company and conservative nature of folks who work there, we felt that he might not be a fair juror for a plaintiff." *Id.* Appellees also expressed their group bias based on the fact that "his wife was a dental assistant. And because of the propensity against medical malpractice-type cases. Ralph tries a lot of medical malpractice cases. We thought that that might, again, prejudice him against the Plaintiff. So we decided to exercise a peremptory challenge." *Id.*

Appellees struck **Juror 26, Denise Lindbergh, Caucasian Female** because she had "concerns as to parental supervision, which would make -- which would perhaps, particularly against my client, Sharon Robertson, prejudice her against that." *Id.*, pp. 208-10 Appellees expressed ***25** concern that "she worked at the Social Security claims office" and admitted that "my experience with Social Security claims offices is they are not quite in the business of denying claims, but they're in the business of denying most claims. And given that, we felt that we should exercise a peremptory challenge." *Id.*

Appellees articulated their reason for striking **Juror 12, Sue Cribbs, Caucasian Female** as being the fact that "Ms. Cribbs also worked for the Social Security claims office, and that gave me some pause as to how she may treat the Plaintiffs in this case. She was also a bit **elderly**, Your Honor, and I don't -- while we do have some other **elderly** jurors on the case, you know, that gives me some concern, any time you have someone **elderly**, their being able to hear and pay attention." *Id.*, pp. 210-211

Appellees based their peremptory strike of **Juror 8, Frank Campbell, Caucasian Male**on the fact "he might have difficulty ruling in this case for the Appellees if there was evidence of them being involved. And for that reason, we thought we should exercise our peremptory challenge." Id., pp. 210-211

***26** Appellees articulated striking **Juror 45, Christopher Williamson, Caucasian Male** because "he indicated he works in Veterans Affairs. He is in the budgeting office there. So that puts him in management. He -- sometimes those people who are number crunchers can be a little bit more demanding in terms of burden of proof than other jurors." *Id.*, p. 212

Appellees repeatedly admitted to the trial court that their peremptory strikes were based on group bias and on disparate treatment of persons, as black jury venire members shared characteristics and traits of the struck white members. *Id.*, pp. 199-212 One of the factors indicating a pretextual strike is disparate treatment of persons with the same or similar characteristic as the challenged juror are not struck. *See Oblander*, 792 So. 2d 1103; *see also, Ex Parte Branch*, 526 So. 2d 609. While the shared characteristics alone would not necessarily be sufficient, in this case, the alarmingly high percentage of struck white jury venire members who shared the same characteristics of black jury members combined with bogus reasons revealed the disparate treatment of a race. C. 4485-90; R.T.E. 178-234 Race-neutral reasons that create a ***27** disparate treatment of a race do not withstand scrutiny. *Sumlin Const. Co., Inc. v. Moore*, 583 So. 2d 1320 (Ala. 1991).

Juror 13, Matthew John Cuthbert, was struck because he was a resident of Hoover, Alabama, in "a relatively affluent neighborhood," and because his wife was on staff at the Homewood Church of Christ. [5] R.T.E. 199 Counsel for the Appellees explained that, from their past experience, "some people in that denomination, have strict beliefs with respect to whether lawsuits should or should not be filed." *Id.* However, striking a venire member from Hoover is nothing more than striking venire members who are Caucasian, because the Hoover neighborhoods falling in the Bessemer Division of Jefferson County are comprised, by a vast majority, by Caucasians. [6] Race-neutral reasons that create a disparate treatment of a race do not withstand scrutiny. *Sumlin Const.*, 583 So. 2d 1320.

Appellees proffered church affiliation as a basis for their peremptory strikes, but the churches considered were only those in the Hoover area. [R.T.E. 199-205] Appellees struck Mr. Cuthbert, Juror 13, because his wife was "on staff" at the Homewood Church of Christ; however, Appellees did not inquire whether Mr. Cuthbert was a member of the Homewood Church of Christ, nor did they inquire whether his religious beliefs, if any, would affect his ability to serve as a juror. Likewise, Scott Lenzie, Juror 24, was struck because he was a Hoover, Alabama resident and because Mr. Lenzie's wife was employed at Saint Mark Methodist Church. Race-neutral reasons that create a disparate treatment of a race do not withstand scrutiny. *Sumlin Const.*, 583 So. 2d 1320. Appellees did not inquire whether Mr. Lenzie or his wife were members of Saint Mark Methodist Church, nor did they inquire whether his religious beliefs, if any, would affect his ability to serve as a juror. "[I]ntuitive judgment or suspicion by [the proponent of the strike] is insufficient to rebut the presumption of discrimination." *Ex Parte Branch*, 526 So. 2d at 623.

Appellees struck Stephen Hanson, Juror 20, because he attended church with two other Caucasian venire members, and because he trained truck drivers at a logistics company. While employment may be a race-neutral reason for striking a potential juror, Appellees must not be allowed to use a bootstrap argument - that Mr. Hanson was struck because he was a member of a church attended by other Caucasian venire members - to satisfy the need to articulate race-neutral reasons for striking a potential juror.

Appellees repeatedly revealed to the trial court that they did not apply the same articulated reasons for striking Caucasian jurors to strike African-American jurors. [R.T.E. 199-225] Specifically, Appellees struck Lori Polk, Juror 31, who is Caucasian, because her husband worked for Progressive Insurance Company, and she worked "in the nursing profession." [R.T.E. 199-202] However, the Appellees did not strike Juror 29, an African-American female employed by Infinity Insurance, nor did the Appellees strike Jurors 5 or 14, who are African-American females employed in the nursing profession. [R.T.E. 224-25] Moreover, this case is not a medical malpractice case, so the "nursing profession" jobs have no bearing on the issues in this case. One of the factors that indicate a pretextual strike is that the reasons given for the strike are not related to the case. *Ex parte Floyd*, 2102 WL 4465562, at *5.

Appellees repeatedly exposed their disparate treatment of Caucasian jurors from African-American jurors, as the reason for excluding Caucasians were not applied to exclude African-American jurors. Appellees struck Juror 41, Brian David Toth, who was Caucasian, because he was "obviously, upper level management" as an employee of the Southern Company and was "dressed very conservatively." [R.T.E. 202-03] However, the Appellees did not strike Juror 11, Mr. Collins, who is an African-American male, well-educated and employed as the manager of the Chick-Fil-A restaurant in Hoover, Alabama. [R.T.E. 218] Moreover, Appellees assumed, without asking, that Mr. Toth would not be able to fairly serve as a juror. Again, "intuitive judgment or suspicion by is insufficient to rebut the presumption of discrimination." *Ex Parte Branch*, 526 So. 2d at 623. Similarly, Scott Lenzie, Juror 24, was struck because he was employed as a computer programmer at BlueCross BlueShield; however, Appellees did not strike from the jury Juror 35, who is an African-American female also employed at BlueCross BlueShield. [R.T.E. 219-20, 325]

Juror 19, Sandra Gornati, was struck because she was a resident of Hoover, Alabama, and she owned a small business. Again, however, the Appellees' use of peremptory strikes to remove Hoover residents guaranteed that they would strike a disproportionate share of Caucasian venire members. Race-neutral reasons that create a disparate treatment of a race do not withstand scrutiny. *Sumlin Const.*, 583 So. 2d 1320.

Juror 36, Joseph Spota, was struck because he was employed by a contractor who performed work for the Southern Company, and because his wife was a dental assistant. Appellees assumed, without asking, that Mr. Spota would not be able to fairly serve as a juror. "[I]ntuitive judgment or suspicion by [the proponent of the strike] is insufficient to rebut the presumption of discrimination." *Ex Parte Branch*, 526 So. 2d at 623. Moreover, this case is not a medical or dental malpractice case, so the fact that Mr. Spota's wife was a dental assistant has no bearing on the issues in this case. One of the factors that indicate a pretextual strike is that the reasons given for the strike are not related to the case. *Oblander*, 792 So. 2d at 1103. Further, Appellees did not strike Jurors 5 or 14, who are African-American females employed in the nursing profession.

Appellees improperly struck Frank Campbell, Juror 8, a Caucasian, because he "express[ed] that he might have some difficulty ruling in this case for Appellee if there was evidence of them being involved." [R.T.E. 211-12] Mr. Campbell also was struck from the jury because "he was quite vocal with one response and volunteered that he did not think that people should drink and drive at any time." [R.T.E. 229-30] Appellees' reasons for striking Mr. Campbell failed to provide a race-neutral reason for the strike, as the majority of the of the venire members agreed that people should not drink alcohol and drive. *Oblander*, 792 So. 2d at 1103. Further, Mr. Campbell was employed by ACIPO, yet Appellees did not strike from the jury Juror 21, Mr. Harris, an African-American male employed by ACIPCO.

The trial court's finding that Appellees' arguments that they struck the above-referenced Caucasian venire members for legitimate race-neutral reasons does not withstand scrutiny. If the trial court allowed just one member to be seated who should not have been seated, a new trial is warranted.

While the trial court recognized, in its Order, that Alabama law is clear that, once the court ordered Appellees to give race-neutral reasons for their strikes, the court will proceed directly to an evaluation of the explanations given. [C. 4694-95] Alabama law requires the trial judge to 'evaluat[e] the evidence and explanations presented' and "determine whether the explanations are sufficient to overcome the presumption of bias." *Ex parte Branch*, 526 So. 2d at 623. The trial court, however, failed to apply established law to the facts, ignored the disparate application of the proffered reasons, and overlooked comparability principles. [C. 4695; R.T.E. 234] Under a comparability analysis, "pretext can be demonstrated by evidence that stricken panel members of one racial group are similarly situated or share the characteristics of a non-stricken panel member of a separate racial group." *United States v. Wynn*, 20 F. Supp. 2d 7, 13 (D.D.C. 1997).

C. The Trial Court's Failure to Apply Established Law to the Facts Mandates a New Trial.

By accepting Appellees' proffered rationale without any meaningful analysis, the trial court failed to apply established law to the facts, thereby violating Appellants' right to a fair trial. [C. 4695; R.T.E. 234] Because the trial court failed to properly apply the law to the facts, the trial court's judgment carries no presumption of correctness, and this Court reviews the application of law to facts *de novo*. *See Ex parte Nettles*, 435 So. 2d at 153; *Ex parte Cash*, 624 So. 2d at 577. Under established law, the trial court erred in concluding that "the peremptories striking white jurors [...] were not pretextual", given the Appellees' implausible reasoning. [C. 4695; R.T.E. 234]

The trial court's denial of Appellants' *Batson* motion was erroneous because, not only did the racial composition of the venire fail to match up with the racial makeup of Jefferson County, but Appellees blatantly described the reasons for certain challenges as being based on group bias and showed disparate treatment of Caucasian jurors. [C. 4695; R.T.E. 234] If just one juror was incorrectly struck, Appellants must receive a new trial. The racial composition of the jury pool - 42 prospective jurors, of which 22 were Caucasian and 20 were African-American - was reflective of the demographics of Jefferson County. The 2010 U.S. Census showed the racial makeup of Jefferson County, Alabama to be 53% Caucasian and 42% African-American. After Appellees' striking of ten (10) Caucasian jurors and three (3) African-American jurors, the composition of the resulting jury of nine (9) African-Americans and five (5) Caucasians was no longer fairly representative of the local demographics. This factor reflects the gross disparity in Appellees' striking of Caucasian jurors for reasons not equally applied to African-American jurors. The only plausible conclusion of the disparate striking of jurors is that Appellees wanted to remove all Caucasian jurors through peremptory strikes and that Appellees' justifications were pretextual. See *Wynn*, 20 F. Supp. 2d at 13.

In relying on the general assertions of Appellees without properly applying the established law of Alabama to the facts, the trial court erred in ruling that Appellees' use of 10 of their 13 peremptory strikes to remove 10 of the 22 Caucasian jurors on the venire, while striking only three of the 20 African-American venire members was race-neutral. A new trial is necessary to protect Appellants' right to a fair trial by an impartial jury.

The trial court failed to apply established law to the facts and, in the alternative, **abused** its discretion in ruling that the reasons given by counsel for Appellees in striking the white venire members were not merely pretextual where Appellees failed to

provide race-neutral reasons for their peremptory strikes of Caucasians from the venire. Appellants are thus entitled to a new trial.

II. The Trial Court's Erroneous Failure to Remit the Punitive Damages Award, Which Is Unconstitutionally Excessive and Based on Bias, Passion and Prejudice, Warrants a New Trial.

A jury's award of punitive damages is considered excessive, as matter of law, if the jury's decision-making process was tainted by bias, passion, prejudice or other improper motive, or where the verdict was beyond that necessary to accomplish society's goals of punishment and deterrence. *Killough v. Jahandarfard,* 578 So.2d 1041 (Ala.1991). This Court has made clear that a punitive-damages award should sting, **but should not destroy a defendant.** *Orkin Exterminating Co., Inc. v. Jeter,* 832 So. 2d 25, 42 (Ala. 2001) (citing *Green Oil Co. v. Hornsby,* 539 So. 2d 218 (Ala. 1989), quoting, in turn, *Ridout's-Brown Service, Inc. v. Holloway,* 397 So. 2d 125, 127-28 (Ala. 1981)) (emphasis supplied). The punitive-damages awards against Appellants in this case are far beyond what is necessary to punish and deter, as the punitive-damages awards have forced Nineteenth Street into bankruptcy and threaten to destroy SBE and Mr. Sabbah. [C. 3256-3284]

The procedure set forth in *Hammond v. City of Gadsden,* 493 So. 2d 1374 (Ala.1986) protects civil defendants in two ways: "First, a requirement of 'reasonableness, of proportionality, of sensible relation between punishment and offense,' and, second, a guarantee of 'not just bare survival, but continued productive economic viability"'; "due process mandates at all times, in all circumstances, and for all defendants, 'fundamental fairness' at the hands of the law." *Industrial Chemical & Fiberglass Corp. v. Chandler,* 547 So.2d 812 (Ala.1988) (*quoting C. Jeffries, A Comment on the Constitutionality of Punitive Damages,* 72 Va.L.Rev. 139, 156, 151-52)).The fundamental question underlying constitutional review of punitive awards for excessiveness is "whether [the] particular award is greater than reasonably necessary to punish and deter." *Pac. Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 22 (1991). When "a more modest punishment for [the defendant's] reprehensible conduct could have satisfied the State's legitimate objectives," then a reviewing court should reduce the award to that amount and "go[] no further." *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408 (2003). In civil cases, it is duty of trial judge to order a new trial when that jury verdict is unjust. *Chavers v. National Sec. Fire & Cas. Co.,* 405 So. 2d 1 (Ala. 1981).

The guideposts set out by the Supreme Court of the United States in *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996), as restated in *State Farm Mutual Automobile Insurance Co. v. Campbell,* 538 U.S. 408, and the factors recognized by this Court in *Green Oil Co. v. Hornsby,* 539 So. 2d 218 (Ala. 1989), and *Hammond v. City of Gadsden,* 493 So. 2d 1374 (Ala. 1986), proves that the punitive-damages awards against Nineteenth Street are excessive. Under a de novo review, this Court reviews a punitive-damages verdict for excessiveness by considering the factors set forth in *Green Oil,* and by looking to see if the verdict is based on bias, passion and prejudice. *See Hammond,* 493 So. 2d 1374.

This Court enumerated seven factors to be considered in a post-verdict review of an award of punitive damages, advising that a punitive-damages award is still subject to review for excessiveness under the original passion and prejudice test. *Green Oil,* 539 So. 2d at 223. To determine whether a punitive-damages verdict is unconstitutionally excessive, the trial judge should consider the following factors: (1) the relationship of the punitive damages award to the harm [7] that has actually occurred and is likely to occur because of the defendant's misconduct (it must be a reasonable relationship); (2) the "reprehensibility of the defendant's conduct"; (3) the profit gained by the defendant because of its misconduct; (4) the defendant's "**financial** position"; (5) "the costs of litigation"; (6) "criminal sanctions." imposed on the defendant [because of the same] conduct"; and (7) "other civil actions against the same defendant, based on the same conduct." *Independent Life and Acc. Ins. Co. v. Harrington,* 658 So. 2d 892, 901-02 (Ala.1994) (citing *Green Oil Co.,* 539 So. 2d at 223-24).

The trial court failed to examine specific facts related to the Appellants under each of these factors and made a conclusory determination not to remit the excessive jury verdict. [C. 4695-98] A proper analysis under the *Hammond/Green Oil* guidelines proves that the trial court's ruling and the underlying verdict are excessive and based on bias, passion, and prejudice, mandating a new trial or remittitur. See *Hammond,* 493 So. 2d 1374.

A. Reprehensibility of Alleged Conduct.

Alabama courts assess the reprehensibility of alleged conduct by considering "[t]he 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 the frequency of similar past conduct." *Orkin,* 832 So. 2d at 41; *Independent Life,* 658 So. 2d at 904. "Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the Defendant's conduct as well as the harm that actually occurred." *Green Oil,* 539 So. 2d at 223; *See also National Ins. Ass'n v. Stockwell,* 829 So. 2d 111, 138 (Ala. 2002). Courts also take into consideration the conduct of the alleged victim. *See Orkin,* 832 So. 2d at 41.

In this case, the allegation that Nineteenth Street sold alcohol to a minor is serious, but does not involve maliciousness or deceit on the part of Nineteenth Street. [C. 393-410, 590-96, 809-18] Brittany Caffee, on the other hand, sought to deceive the seller for the purpose of breaking the law for her and her passengers own gain. [C. 990-98] Although not legally of age to purchase alcohol, Caffee was 19 years old on May 2, 2007 when she allegedly purchased alcohol from a convenience store. *[Id.;* C. 1002-1005] Caffee admitted that she knew she was intoxicated prior to driving that night. *[Id., id.]* The evidence does not prove that Nineteenth Street knowingly sold alcohol to an under-age purchaser.

Courts have specified that malicious acts of violence are on the high end of that spectrum. *Solem v. Helm,* 463 U.S. 277, 292-293 (1983). Placing a known alcoholic in charge of a supertanker falls in the middle of the spectrum. *See In re Exxon Valdez,* 490 F.3d 1066, 1089 (9th Cir. 2006) (per curium), vacated, 128 S. Ct. 2605 (2008)). The alleged conduct in this case does not rise to the level of reprehensibility warranted to justify the enormity of the punitive-damages award, particularly in light of Caffee's deceitful and reckless conduct.

B. No Profit from Alleged Misconduct In Light of Excessive Punitive-Damages Award.

To the extent that Nineteenth Street may have profited from the alleged sale of alcohol, [8] it is clear that the punitive-damages award not only removed any profit, it far exceeded it. This factor, thus, weighs in favor of a finding that the punitive-damages award is excessive. *See Orkin,* 832 So. 2d at 42; *Employees' Benefit Ass'n v. Grissett,* 732 So. 2d 981 (Ala. 1998).

C. Appellants' Financial Position Favors Remittitur.

The trial court failed to take into consideration the **financial** position of Appellants. Alabama law is clear that a punitive-damages award should sting, **but should not destroy a defendant.** *Orkin,* 832 So. 2d at 42 (emphasis supplied). The punitive-damages award against Appellants in this case is far beyond what is necessary to punish and deter, as the punitive-damages awards have forced Nineteenth Street into bankruptcy and threaten to destroy SBE and Mr. Sabbah. [9] [C. 4593]

SBE has a net worth of approximately $25,000.00 and it owns no property that is not subject to a bank lien. [*Id.*] SBE owns three buildings, subject to large mortgages. [C. 4638-39] SBE has a few thousand dollars in its checking accounts. [*Id.*] SBE owns no other assets. SBE does not own any type of stocks, bonds or securities. [C. 4641] SBE owes $1,050,000.00 for mortgage loans on the three properties and the property values for these properties is less than the amount owed. [C. 4642-51] SBE'S net rental income in 2012 was $43,110.00, which barely covered the loan amounts. [C. 4646-51]

Mr. Sabbah has a net worth of approximately $39,000.00. [C. 4593] Mr. Sabbah has approximately $2,500.00 to $3,000.00 in his bank account. [C.4606] Mr. Sabbah does not own any real estate other than his home and does not own any type of stocks, bonds, securities, or other non-real estate assets. [C. 4607] He and his wife'S adjusted gross income in 2012 was $66,399.00, and is used to support a family of five. [C. 4613]

As of March 9, 2014, Mr. Sabbah had a $23,768.30 balance owed to Discovery Bank. [C. 4598, 4658] As of February 10, 2014, Mr. Sabbah owed $88,888.07 on his home mortgage with Wells Fargo. [C. 4598, 4660] The home is worth, at most, approximately $140,000.00. *[Id.]* As of March 2014, Mr. Sabbah owed $6,321.45 on a Mattress Firm credit account with Wells Fargo. [C. 4662]

Mr. Sabbah owes the State of Alabama $24,443.37 in sales tax liabilities for the Woodward Texaco Inc. in Midfield, Alabama. [C. 4664] Mr. Sabbah is in the process of paying this tax liability through a monthly payment plan. [C. 4599, 4608-09]

As of December 23, 2013, Mr. Sabbah owed the IRS a tax liability in the amount of $76,893.14 and had to take a loan out in order to just be able to make a monthly plan to pay it. [C. 4608-09, 4676-83] As of February 18, 2014, Mr. Sabbah owed $13,057.09 to the U.S. Department of Agriculture. [C. 4685] As of February 22, 2014, Mr. Sabbah owed $14,257.74 on a Bank of America Visa credit card. [C. 4687] Appellants have no ability to satisfy the judgments and would destroy both SBE and Mr. Sabbah. Based on this evidence, the trial court erred by denying remittitur of the excessive punitive-damages award.

D. No Criminal Sanction Against Appellants.

The trial court failed to consider the fact that evidence was lacking of any criminal wrongdoing by Nineteenth Street, SBE or Mr. Sabbah or of any criminal sanctions against Appellants for this alleged incident or any other similar conduct. [C. 4695-98] Criminal charges related to this incident were, however, brought against Caffee due to her conduct. The punitive-damages award is not supported by this factor. *Wal-Mart Stores, Inc. v. Goodman,* 789 So. 2d 166, 183 (Ala. 2000).

E. No Other Civil Actions Brought Against Appellants.

The trial court failed to consider the fact that no testimony or evidence presented at trial showed that Nineteenth Street, SBE or Mr. Sabbah were subject to any other civil actions for this alleged misconduct. [C. 4695-98] This factor does not support the punitive-damages award.

Analysis of the *Hammond* / *Green Oil* factors supports a finding that the punitive damages award of $13.5 million is excessive and favors remittitur or a new trial. [C. 3259, 4459] The comparative reprehensibility of Caffee's conduct, the lack of profit in light of the award, and Appellants' **financial** position are factors weighing in favor of finding that the award is excessive.

Rarely have Alabama appellate courts ever affirmed awards equal to that of the $7.5 million verdict for Plaintiff Sharon Robertson, and those cases are highly distinguishable, as such defendants were in much stronger **financial** positions than Appellants, the conduct in those cases was more egregious and reprehensible, and the alleged victim did not have criminal involvement in the resulting injury. See, e.g., *Mack Trucks v. Witherspoon,* 867 So. 2d 307 (Ala. 2003); *Cherokee Electric Cooperative v. Cochran,* 706 So. 2d 118 (Ala. 1997); *General Motors Corporation v. Johnson,* 592 So. 2d 1054 (Ala. 1992).In the General Motors case, the jury award of $15 million was remitted to $7.5 million, as affirmed by this Court. In the *Mack Trucks* case, this Court reduced the $50 million wrongful death verdict to $6 million. In both cases, the truck manufacturers were in significantly better **financial** positions than Appellants here. Further, the conduct in those cases was much more egregious and reprehensible.

In this case, the trial court rendered final judgment in the amount of the jury verdict, which awarded Jennifer Vickery $900,000 in compensatory damages and $3,000,000 in punitive damages. [C. 3256-84, 4456-84] Michael Waldrop was awarded $750,000 in compensatory damages and $3,000,000 in punitive damages. The jury awarded $7,500,000 to Timothy Robertson in punitive damages. Under the guidelines set forth in *Hammond/Green Oil*, these awards are excessive and Appellants are entitled to a new trial or remittur.

The jury's award to Tammy Hardin of $500,000 in punitive damages on her Civil Damages Act claim was based solely on the jury's finding that Nineteenth Street violated such act by selling alcohol to her daughter, Brittany Caffee. [C. 840-48] Under the *Green Oil* factors, the jury's punitive-damages award to Hardin shows clearly that the jury's verdict was motivated by passion and prejudice, making this award subject to remittitur, as Hardin admitted that she knowingly drove the vehicle while intoxicated. Moreover, Hardin suffered no personal injury, nor did she make any claim for personal injury. [C. 840-48] The Civil Damages Act is designed to punish retailers who sell alcohol to minors. See, e.g., *Orkin*, 832 So. 2d at 42; *Ridout's-Brown Service*, 539 So. 2d at 127-28. The Act was not designed to bankrupt such retailers, as these verdicts have done in this case. *Id.* This Court must remit the punitive-damages award under the Civil Damages Act to no more than the Act's $50,000 statutory cap on punitive damages assessed against a small business. See *Ala. Code* (1975) § 6-11-21(b). The trial court erroneously failed to consider the factors recognized under Alabama law relevant to determining the unconstitutionally excessive punitive-damages award, but instead simply signed the proposed Final Judgment drafted by Appellees.

For these reasons, this Court must order a new trial on amount of punitive damages; in the alternative, this Court must reduce the punitive award to a nominal amount.

III. The Trial Court's Order to Disregard the Corporate Existence of Nineteenth Street Must Be Reversed Because the Facts Do Not Support the Findings of Inadequacy of Capital, Fraud, or Alter-Ego, As Required To Pierce The Corporate Veil.

The trial court failed to make any independent and impartial finding of fact, such that the ruling to pierce the corporate veil of Nineteenth Street has no basis and fails. [C. 4456-84] The 29-page proposed order submitted by Appellees and signed by the trial court does not include any of the trial court's independent findings of fact. [C. 4432-4455, 4456-4484] It is a basic principle that the determination of whether to pierce the corporate veil is a highly fact-intensive inquiry "to be determined on a case-by-case basis." *Ex parte AmSouth Bank of Ala.*, 669 So. 2d 154, 156 (Ala. 1995).

The ruling to pierce the corporate veil of Nineteenth Street is erroneously based on objectively incorrect evidence. [C. 4456-84] Without an independent and impartial finding of fact by the trial court, any legal analysis is without merit and reversal of the piercing of the corporate veil of Nineteenth Street is required. *First Health, Inc. v. Blanton*, 585 So. 2d 1331, 1334 (Ala. 1991) *(citing Co-Ex Plastics, Inc. v. Alapak, Inc.*, 536 So. 2d 37 (Ala. 1988); *Alorna Coat Corp. v. Behr*, 408 So. 2d 496 (Ala. 1981)). Because the trial court's ruling to disregard the corporate entity of Nineteenth was based on the improper application of Alabama law to the facts, no presumption of correctness exists as to the trial court's order. *See Heisz*, 93 So. 3d 918; *Bradley*, 101 So. 3d 221.

A. The Final Consolidated Judgment Omits Relevant Facts and Fails to Accurately Reflect the Trial Court's Independent and Impartial Findings.

The trial court's 29-page Final Consolidated Judgment is identical to the 29-page proposed order submitted by Appellees. [C. 4432-4455, 4456-4484] Given the slanted recitations of fact and the blatant omissions of certain key facts, this Order represents the urged position of Appellees, not the findings and opinions of the court. [R.P. 546-726] The Final Consolidated Judgment fails to fully and appropriately reflect the trial court's own findings. *[Id.]* This Court has admonished that "appellate courts must be careful to evaluate a claim that a prepared order drafted by the prevailing party and adopted by the trial court verbatim does not reflect the independent and impartial findings and conclusions of the trial court." *Ex parte Ingram*, 51 So. 3d 1119, 1122-23 (Ala. 2010).

The first and most fundamental requirement of the reviewing court is to determine "that the order and the findings and conclusions in such order are in fact those of the trial court." *Ex parte Ingram*, 51 So.3d at 1122-23. *Cf. United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656 (1964) (expressing disapproval of the 'mechanical' adoption of findings of fact prepared by a party.). Because the Final Consolidated Judgment omits a great number of relevant facts, indicating that the findings are

not those of the trial court, this Order must be rejected and the findings therein must be vacated, with instructions for a new trial. *Id.* Alternatively, a de novo review of the facts mandates reversal of the erroneous legal conclusions, such that this Court must reverse the trial court's piercing of the corporate veil of Nineteenth Street.

B. The Final Consolidated Judgment Fails to Include Key Facts Provided During Trial.

By failing to consider the entirety of the facts, the trial court improperly applied the law to an incomplete set of facts. [C. 3256-3284] The trial court's legal analysis and ruling to disregard the corporate structure of Nineteenth Street must be reversed, as its order contained no independent findings of fact and omitted relevant facts necessary to determine the integrity of the corporate structure under Alabama law. [*Id.*]

1. Substantial Similarity.

Contrary to the facts set forth by the Order drafted by Appellees, which the trial court merely signed, there is no substantial similarity of identity between Mr. Sabbah, Nineteenth Street, and SBE. [C. 4460] The fact that Mr. Sabbah was the shareholder, officer, and director of SBE, as well as the officer and director of Nineteenth Street, is insufficient to establish substantial similarity. [Id.; R.P. 84-85] As an initial matter, the ruling to pierce the corporate veil of Nineteenth Street cannot impose personal liability on Mr. Sabbah, as he was not a shareholder of Nineteenth Street. *Gilbert v. James Russell Motors, Inc.*, 812 So. 2d 1269, 1273 (Ala. Civ. App. 2001) (the corporate veil may be pierced in an appropriate case to impose personal liability upon shareholders for corporate debts.)

Appellees' own forensic accountant Les Alexander testified that there is nothing wrong with one person owning all of the stock in two corporations and being the sole officer, director, shareholder, manager in both corporations. [R.P. 84-85] Likewise, the fact that certain documents for both corporations show the same mailing address as Post Office Box 36661, Birmingham, Alabama, which is also used by Mr. Sabbah, does not warrant the piercing of the corporate veil of Nineteenth Street. [C. 4460] *See, e.g.*, *Duff v. So. Ry. Co.*, 496 So. 2d 760, 762 (Ala. 1986). "The mere fact that an individual or another corporation owns all or a majority of the stock of a corporation does not, of itself, destroy the separate corporate entity." *First Health, Inc. v. Blanton*, 585 So. 2d 1331, 1334 (Ala. 1991) (citing *Messick v. Moring*, 514 So. 2d 892, 894 (Ala. 1987)).

The very purpose of the corporate structure is to protect shareholders and officers from liability arising from the operation of the corporation. *Messick*, 514 So. 2d at 894-95. Under Alabama law, "it is basic that a corporation is a distinct and separate entity from the individuals who compose it as stockholders or who manage it as directors or officers." *Nimbus Technologies, Inc. v. SunnData Products, Inc.*, 484 F.3d 1305, 1308 (11th Cir. 2007) (citing *Cohen v. Williams*, 318 So. 2d 279, 281 (Ala. 1975); *Moore & Handley Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206, 210, 6 So. 41, 43 (1889).

Nineteenth Street and SBE and/or Mr. Sabbah: (1) had separate bank accounts; (2) had separate income tax returns; (3) had separate sales tax returns; (4) had separate payroll tax returns; (5) had separate W-2s; and (6) had separate state business licenses. [R.P. 315, 546-49,553-56, 560-61] Bryan Hirsch, a CPA accredited in business evaluations and certified in **financial** forensics, performed an extensive document review, including, inter alia, the income tax returns for Nineteenth Street, SBE and Mr. Sabbah, bank statements and canceled checks for Nineteenth Street and SBE, Articles of Incorporation for SBE, and IRS documents. [R.P. 536-542] Mr. Hirsch provided expert testimony that these entities were separate entities based on his professional findings that separate bank accounts existed, separate sales tax returns were made, the businesses had separate W-2s and separate business licenses. [R.P. 542-45]

2. SBE Did Not Own or Control Nineteenth Street Prior to February 3, 2007.

The Final Consolidated Judgment set forth inaccurate facts and legal conclusions regarding the ownership and control of Nineteenth Street. [C. 4460] Prior to February 2007, SBE merely leased out the property and acted as the landlord to Nineteenth

Street. [C. 1043-47; R.P. 691-94] Before February 2007, SBE had no shares, management, or interest in Nineteenth Street, nor did SBE have any interest in the business known as Liberty Highway 150 Convenience Store, which later became known as the 14th Street BP. [*Id.; id.*] SBE did not have any ownership of any type in Nineteenth Street prior to February 3, 2007. [*Id.*] Nineteenth Street and SBE maintained separate **financial** books and records. [*Id.*]

Apart from the lease between SBE and Nineteenth Street, no written agreements or contracts existed between SBE and Nineteenth Street. [R.P. 699] In February 2007, SBE acquired all of the shares of Nineteenth Street. [R.P. 691-94] After SBE acquired the shares of Nineteenth Street, the store's name changed from Liberty to BP. [*Id.*] After Yousef Nasser resigned his positions as officer and director of Nineteenth Street, Mr. Sabbah became the sole officer and director of Nineteenth Street. [C. 4598; R.P. 691-99] Because the Final Consolidated Judgment relies on disputed facts and unsupported evidence, the legal conclusions are without merit and must be reversed. [C. 4460-75]

3. Observance of Corporate Formalities.

Contrary to the facts in the Final Consolidated Judgment, as recited by Appellees in their proposed order, the evidence demonstrates observance of corporate formalities. [C. 4463; R.P. 542-46, 560] Even if corporate formalities were not fully observed, Alabama law does not require the shareholders of a corporation to be without fault. “Our supreme court has affirmed a judgment refusing to pierce a corporate veil even though the shareholders had failed to comply with all corporate formalities.” Gilbert, 812 So. 2d at 1274.

4. Accounting Controls & Reconciliation for Transfers Evidenced.

Expert witness Bryan Hirsch testified that the Appellants' legitimate transactions were properly accounted for within each corporate account. [R.P. 542-46]

5. No Proof of Improper Commingling.

The Final Consolidated Judgment's description of intermingling failed to demonstrate that the described transactions were fraudulent. [C. 4467] “Where the law recognizes one-man corporations, it is obvious that the law accepts the fact of domination by one person.” *Econ Marketing, Inc. v. Leisure American Resorts, Inc.*, 664 So. 2d 869 (Ala. 1994); *Ala. Code* (1975) §§ 10-2A-90, 10-2A-58, 10-2A-57. Mere domination cannot be enough for piercing the corporate veil; there must be some evidence indicating that transactions were somehow unfair, fraudulent, or otherwise not legitimate. *Heisz*, 93 So. 3d at 930. The facts simply reflect domination by one person in a one-man corporation, but do not give rise to fraudulent or illegitimate transactions and in no way support piercing the corporate veil of Nineteenth Street. [C. 4467]

6. Insufficient Proof of “Inadequacy of Capital.”

The evidence presented to the trial court conclusively proves adequacy of capital. [R.P. 600-603] Forensic accountants testified that the equity net worth capital of Nineteenth Street on the date of loss was $214,202, far in excess of the $100,000 required by the ABC Board to qualify as fully capitalized. *[Id.*] According to the ABC Board, a vendor must have either $100,000 in assets or $100,000 insurance policy to have adequate capital. [*Id.*] Because Nineteenth Street had capital exceeding the $100,000 requirement, the finding of “inadequacy of capital” is erroneous. [*Id.*]

Notwithstanding the evidence showing that Nineteenth Street was fully capitalized, the fact that a corporation is undercapitalized is not alone sufficient to establish personal liability of shareholders. *Simmons v. Clark Equip. Credit Corp.*, 554 So.2d 398, 400 (Ala.1989)(citing *Co-Ex Plastics, Inc. v. AlaPak, Inc.*, 536 So.2d 37 (Ala. 1988), and *East End Mem'l Ass'n v. Egerman*, 514 So.2d 38 (Ala. 1987)). Rather, “additional compelling facts” are necessary to justify the extraordinary action of piercing the

corporate veil when the argument "inadequacy of capital" is asserted by a plaintiff. *Simmons,* 554 So. 2d 398; Co-Ex Plastics, 536 So. 2d at 39 (absent "additional compelling facts," under-capitalization of a corporation would not justify piercing the corporate veil). The Final Consolidated Judgment ignore facts proving adequacy of capital. [C. 4468-70; R.P. 600-03]

7. No Showing of Illegal, Fraudulent, or Unjust Purpose.

The finding of fraudulent operation is based on incomplete and misstated facts, not reflective of the evidence presented to the trial court. [C. 4470-71] The trial court's conclusion that Mr. Sabbah exercised control over Nineteenth Street is insufficient to warrant piercing of the corporate veil, as there was no evidence that such control was misused or that it resulted in the claimed harm. SBE's ownership of stock of Nineteenth Street and Mr. Sabbah's role as officer and director of Nineteenth Street is a typical business practice in Alabama and does not amount to misuse of control. [C. 4598; R.P. 691-99] As a separate legal entity, "[t]he rights and liabilities of a corporation are distinct from those of its members" and "of the persons who compose it or act for it in exercising its functions." 1 William Meade Fletcher et al., FLETCHER CYC. CORP. § 1 (perm. ed., rev. vol. 2006). "In a closely held corporation, it is not unusual for the majority stockholder to control the entity's operation." *McKissick v. Auto-Owners Ins. Co.,* 429 So. 2d 1030, 1033 (Ala. 1983). Moreover, there is no evidence in this case that Nineteenth Street or SBE were incorporated for any fraudulent purpose, or that Nineteenth Street or SBE were operated in a fraudulent manner. [R.P. 536-48, 560-61] "In the absence of fraud, the corporate structure protects an individual from liability for the actions of the corporation." *Wright v. Alan Mills, Inc.,* 567 So. 2d 1318 (Ala. 1990).

The assertion in the Final Consolidated Judgment that there is "overwhelming evidence of multiple transfers of funds between and among the defendants" does not support a finding of fraud. [C. 4471, R.P. 536-566] Les Alexander, Appellees' expert, testified that separate checking accounts existed and admitted that he did not know where certain withdrawals went or whether transfers were designated for vendor items or other reimbursement. [R.P. 308, 313-19] Forensic accountant Hirsch testified that it is customary for numerous accounts to be listed under a single bank log in, such that there cannot be any assumption of improper commingling. [R.P. 545-47]

The use of the corporate form to shield shareholders from personal liability is not a fraudulent purpose. *Gilbert,* 812 So. 2d at 1274. A legitimate primary purpose of any corporation is to limit the liability of its shareholders. *Chenault v. Jamison,* 578 So. 2d 1059, 1061 (Ala. 1991); *see also Messick,* 514 So. 2d at 894 ("the limitation of personal liability is a valid corporate attribute").

"To establish a fraudulent purpose [...] a plaintiff must show more than just a shareholder's desire to avoid personal liability for the business' debts." *Gilbert,* 812 So. 2d at 1273. Instead, it must be shown that "the corporation is conceived or operated for a fraudulent purpose." Forrest Stephen Latta, Comment, *Disregarding the Entities of Closely Held and Parent Subsidiary Corporate Structures in Alabama,* 12 Cumb. L. Rev. 155, 166 (1981) [C. 4470-71; R.P. 560-61]

C. Application of Controlling Law to Accurate Facts.

Alabama law makes clear that an attempt to reach the assets of shareholders by piercing a "corporate veil" is successful ***only under exceptional circumstances.*** *See M&M Wholesale Florist, Inc. v. Emmons,* 600 So. 2d 998, 999 (Ala. 1992); *Gilbert,* 812 So. 2d at 1273; *cf. Baker v. Raymond International, Inc.,* 656 F.2d 173 (5th Cir. 1981. There is a strong presumption in favor of upholding the corporate veil in Alabama. *M&M Wholesale,* 600 So. 2d at 999; *Gilbert,* 812 So. 2d at 1273. The trial court's failure to properly apply the law to a complete and accurate version of the facts mandates reversal with instructions to recognize the corporate structure of Nineteenth Street. *Heisz,* 93 So. 3d 918; *Ex parte Ingram,* 51 So. 3d at 1122-23; *Bradley,* 101 So. 3d 221.

The trial court's ruling to disregard the corporate structure of Nineteenth Street was in error. The Final Consolidated Judgment is based on incomplete and inaccurate statements of fact, such that it cannot support a finding of any "instrumentality" or "alter

ego" as required by Alabama law. Accordingly, the trial court's piercing of the corporate veil must be reversed with instructions for the trial court to recognize the separate corporate existence of Nineteenth Street.

CONCLUSION

The trial court's Final Judgment and Order should be vacated. This Court should also provide guidance to the trial court to ensure that proper jury selection standards and punitive damages award standards are applied to a new trial. This Court should reverse the trial court's piercing of the corporate veil with instructions to uphold and recognize Nineteenth Street's corporate structure.

Footnotes

1 The claims of Vickery and Waldrop were originally brought by their parents. C. 395-410 Upon reaching majority, Vickery and Waldrop were substituted as party Plaintiffs.

2 Hardin's claim was brought as a cross-claim in the Robertson action. C. 527-34 Caffee, originally a defendant in that action, had been dismissed by Robertson. C.257

3 The reporter's transcript is not consecutively paginated, but is divided into four (4) parts, designated herein as follows: the October 20, 2013 Proceeding R.P. 1-744, the February 4 & 5, 2013 Trial Excerpt R.T.E. 1-237, the February 5, 2013 Trial Excerpt II R.T.E. II 1-18, and the March 14, 2014 Hearing R.H. 1-129.

4 Saint Mark Methodist Church is located in the Hoover area.

5 Based on Appellees' reasoning, anyone who is white and religious or who attends a church in Hoover can never sit as a juror. R.T.E. 199-205

6 According to the 2000 U.S. Census, the racial makeup of Hoover, Alabama, which is situated in Jefferson County and Shelby County, is 87.66% Caucasian and 6.77% African-American.

7 While Alabama's wrongful-death statute provides for only punitive damages, a punitive-damages award in a wrongful death case may nonetheless be compared and evaluated by means of a "proportional evaluation" of the awarded amount, the conduct of a defendant, and the resulting harm. *Boudreaux v. Pettaway*, 108 So. 3d 486, 499 (Ala. 2012).

8 There was no evidence of profit in this case

9 Nineteenth Street is in Chapter 7 Bankruptcy, has no assets and no insurance.