Case No. 2001-CA-01911

COPY

Supreme Court of Mississippi

WASHINGTON MUTUAL FINANCE GROUP, LLC

Defendant and Appellant,

vs.

GRETA BLACKMON, LOUISE BLUE, et al.,

Plaintiffs and Appellees.

Appellant's Reply Brief

Appeal from a Judgment of the Circuit Court
of Holmes County, Mississippi (No. 98-0026).

The Honorable Jannie Lewis, Circuit Judge

JESS H. DICKINSON (MSBN [redacted])
P.O. Drawer 660
Gulfport, MS 39502

OF COUNSEL:

JAN T. CHILTON
SEVERSON & WERSON
A Professional Corporation
One Embarcadero Center, 26th Floor
San Francisco, CA 94111-3600
Telephone: (415) 398-3344

KATHARINE M. SAMSON ([redacted])
WATKINS LUDLAM WINTER & STENNIS, P.A.
2510 14th Street, Suite 1010
Gulfport, MS 39501
Telephone (228) 864-3094
Facsimile (228) 864-0516

Attorneys for Defendant and Appellant
Washington Mutual Finance Group, LLC

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeal may evaluate possible disqualification or recusal.

1. Defendant and appellant: Washington Mutual Finance Group, LLC.

2. Plaintiffs and appellees: Greta Blackmon, Louise Blue, Glenda Chambers, Annie Clark, Willie Earl Conway, Lillie Harris, Robin Horton, Lindsey Horton, Lorene Jackson, Lizzie Lofton, Jessie McClung, Willie McGee, Lou Waters, Earnest Claiborne, Tina Cross, Alfred Garrett, Percy Mason, Kenneth Hill, Zenester Moore, Mattie Miles, Patrishane Gordon, Janie Mason, and Doris Garrett.

3. Attorneys for defendant and appellant Washington Mutual Finance Group, LLC: Jess H. Dickinson; J. Henry Ros, Katharine M. Samson, Johnny Nelms, Watkins Ludlam Winter & Stennis, P.A.; Jan T. Chilton, Severson & Werson; Angelique White and Mary Brown.

4. Attorneys for plaintiffs and appellees: Edward Blackmon, Jr., Trent Walker, Blackmon & Blackmon, Richard Freese, Leslie McFall, Langston, Sweet & Freese, P.A., Tim K. Goss, Mikel J. Bowers, Capshaw, Goss & Bowers, Don Brock, Jr., Whittington, Brock, Swayze & Dale, and Michael Hartung.

5. Circuit Court Judge: Hon. Jannie Lewis.

6. Washington Mutual Finance Group, LLC is a lower tier subsidiary of corporations owned by Washington Mutual, Inc., a corporation whose shares are publicly traded.

Katharine M. Samson

Attorney of record for Defendant and Appellant Washington Mutual Finance Group, LLC

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I

INTRODUCTION

In its opening brief, appellant Washington Mutual Finance Group, LLC ("City") showed why the judgment in this case must be reversed. The evidence fails to support the finding of liability on any of the four legal theories plaintiffs advanced. The trial court improperly submitted to the jury claims barred by the statute of limitations or based on wrongs allegedly committed by City's assignors. There was no substantial evidence to support either the award of emotional distress or punitive damages, and both sets of awards were excessive, a point confirmed by the United States Supreme Court's recent decision in *State Farm Mut. Auto. Ins. Co. v. Campbell*, __ U.S. __, 123 S.Ct. 1513 (2003) ("*Campbell*"). The jury instructions were fundamentally flawed, and the trial court erroneously admitted a previously undisclosed opinion of plaintiffs' expert on a critical issue—City's net worth.

None of the arguments plaintiffs advance in their Brief of Appellees ("B.A.") suffice to sustain the judgment or redeem the trial court's numerous errors. Moreover, by repeatedly raising arguments and evidence for the first time on appeal, plaintiffs reveal the weakness of the case they presented to the jury.

For the reasons stated below, as well as those mentioned in City's opening brief, the judgment should be reversed.

II

STATEMENT OF FACTS

A. City Followed Standard Business Practices

Try as they might, plaintiffs cannot weave the straightforward facts of this case into a conspiracy to defraud. Instead, when one strips away plaintiffs' epithets, pejoratives, exaggerations, and misstatements, what remains is evidence of a company engaged in standard business practices, attempting by legitimate and time-honored means to sell as much of its products as possible on terms favorable to it.

Among the many standard business practices that plaintiffs try to demonize are the following:

- Buying or accepting assignment of loans and credit sale contracts originated by others.[1]
- Maximizing the company's sales of goods or services.[2]

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[1] Typical of plaintiffs' efforts to anathematize common business practices, they decry the buying or accepting assignment of consumer debt as "entic[ing] financially vulnerable customers," and claim it "increase[s] the debt load of customers." B.A., 7. Buying consumer debt is an everyday feature of the multi-billion dollar secondary market in consumer finance. The customer's debt load is increased when he or she obtains a loan or buys on credit. Assignment of the debt has no impact on the amount the customer owes.

[2] City sells two types of services: loans and credit insurance. As explained in its opening brief, it tries to sell as much as possible of each, attempting to lend each customer "the maximum amount of money for which he or she is qualified" and to sell credit insurance to each customer. A.O.B., 13-15, 17-18; *cf.*, B.A. 7, 9-11.

- "Up-selling" customers.[3]
- Offering goods or services on terms favorable to the seller.[4]
- Motivating sales staff through compensation tied to sales performance.[5]
- Presenting sales staff to customers as trustworthy.[6]
- Soliciting by mail and using puffery.[7]
- Making it easy for the customer to complete the deal.[8]

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[3] Like a car salesman who tries to sell a customer a bigger car or more expensive options than the customer first says he or she wants, City's employees sometimes attempted to up-sell their customers, offering them larger loans or more credit insurance than originally requested.

[4] What plaintiffs stigmatize as "flipping," B.A., 17-18, was simply offering customers additional credit on terms favorable to City—through refinancing prior debt rather than extending a separate, new loan, A.O.B., 15-16. Plaintiffs have yet to show there is anything illegal or untoward in doing so. No one forced them to enter into the new, refinanced loans; they could easily have gone elsewhere if they did not like the terms City offered.

[5] Like most retailers, City motivates its sales staff, its branch managers and other branch employees, to sell more by tying their compensation to their sales production and by giving them quotas or budgets to meet. A.O.B., 15; *cf.*, B.A., 11, 21.

[6] As this Court has observed, "one normally does not enter into a contract with another unless he trusts and has confidence in him ...." *Peoples Bank & Trust Co. v. Cermack*, 658 So.2d 1352, 1358 (Miss. 1995). Realizing this fact, City, like any other retailer, hoped its customers would trust and rely its sales staff. *Cf.*, B.A., 7-8.

[7] City sends direct mail solicitations to existing and former customers, trying to persuade them to obtain additional loans. A.O.B., 14 & n. 16. Plaintiffs repeatedly quote the puffery from those letters—"when we say we are here to help we mean it" and "count on us to do everything we can to help"—as if it proved City agreed to act as its customers' fiduciary or duped them into thinking City was protecting their interests. B.A., 7, 35, 40, 71, 77. In fact, this was standard puffery—so normal that none of plaintiffs testified they read or relied upon it in the slightest. Tina Cross received one of the letters plaintiffs repeatedly quote but did not respond to it. 3 C.T. Ex. 305. Despite their promise to do so,

(Fn. cont'd)

B. If Plaintiffs Bought Insurance They Did Not Want, They Have Only Themselves To Blame

The heart of plaintiffs' case is the claim that they bought credit insurance they neither wanted nor were aware of. In their words, City "sneak[ed] insurance coverage into loan documents without Plaintiffs' knowledge." B.A., 11.

That assertion is belied by the undisputed facts. The amount and nature of any credit insurance plaintiffs purchased was fully disclosed in writing, as was the optional nature of that insurance. *E.g.*, 2 C.T. Ex. 187. Not only did each plaintiff sign the documents containing these disclosures, but each was given a copy of them to take home. *E.g.*, 16 R.T. 633:15-16, 634:24-26, 850:22-28.

If plaintiffs never read those disclosures and thus remained unaware of their credit insurance purchases, they have only themselves to blame. Under Mississippi law, "a person is under an obligation to read a contract before signing it, and will not as a general rule be heard to complain of an oral misrepresentation the error of which would have

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(Fn. cont'd)
14 R.T. 296:29-298:11, plaintiffs never showed that any plaintiff ever received the other solicitation letters they repeatedly quote. *See* pp. 10-12 below.

[8] City often prepared loan documents ahead of time based on information obtained from the borrower by telephone or from the borrower's prior loan file. Loan closings were handled efficiently. It took only a short time to explain the loan's essential terms and to have the borrower initial and sign in the appropriate places on the ten or so sheets comprising the loan papers. Plaintiffs now complain that this was all part of a scheme to "sneak insurance coverage into loan documents without Plaintiffs' knowledge." B.A., 11-13. But at the time of the transactions, plaintiffs viewed the efficiency as a valuable customer service—one they requested and appreciated. *E.g.*, 16 R.T. 631:13-632:1. 632:10-27, 664:27-665:2 (Glenda Chambers). They were busy people who could not take
(Fn. cont'd)

been disclosed by reading the contract." *Stephens v. Equitable Life Assur. Soc.*, __ So.2d __, 2003 WL 1343254 at *4 (Miss. 2003); *Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co.*, 584 So.2d 1254, 1257 (Miss. 1991). None of the various excuses plaintiffs offer—they were poor,[9] not well-educated,[10] rushed,[11] and "trusted" City—suffice to relieve them of that obligation. By contrast, City owed no duty to explain the agreements to plaintiffs orally.

Nor is it true, as plaintiffs suggest, that credit insurance was valueless to them even if they had other life, disability or home insurance. *See* B.A., 13-15. Credit property insurance may provide coverage in instances when homeowners' insurance does not due to a high deductible, low policy limits, or other coverage limitations. 20 R.T. 1297:16-1298:12; 8 C.T. Ex. 1160. Plaintiffs' other insurance paid comparatively small amounts—often $5,000 or less—on the insured's death or disability. *E.g.*, 8 C.T. 1178,

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(Fn. cont'd)
extended leave from work to sit in a loan office awaiting completion of a simple loan transaction.

[9] Though many of plaintiffs were poor, all were adults, able to read, protect their own interests, and fend for themselves. They needed no legal guardians to watch over them. Also, many plaintiffs had extensive experience with small loan transactions like those at issue here. *E.g.*, 18 R.T. 904:4-16, 924:20-23.

[10] "[T]here cannot be two separate departments in the law of contracts, one for the [rich,] educated [and literate] and another for those who are not." *Mixon v. Sovereign Camp, W.O.W.*, 155 Miss. 841, 124 So. 413, 415 (1930).

[11] Though loan closings typically were conducted quickly, City did not prevent plaintiffs from taking longer and reading the documents before signing them. *E.g.*, 16 R.T. 665:22-666:18 (Glenda Chambers), 721:1-19 (Earnest Claiborne); 17 R.T. 786:10-20 (Jessie McClung). Neither did it stop them from reading the copies they took home.

1188; 9 C.T. Ex. 1249, 1280. Credit life or disability insurance would repay the insured's loan thereby protecting his or her estate and the benefits paid under other insurance from the creditor's claim.[12]

C. Plaintiffs Misstate The Evidence

In their brief, plaintiffs repeatedly mis-state, mis-characterize, and exaggerate the testimony and other evidence in this case. It would unduly lengthen this brief to correct each of these errors. There is room here only for a few examples, which must serve as a sufficient warning that "facts" stated in plaintiffs' brief cannot be accepted as true without a careful reading of the portions of the record plaintiffs reference.

Examples of plaintiffs' misstatement of the record abound. Here are a few:

- "Ms. Andrews testified that she kept hidden from her customers the fundamental fact that credit life insurance was not required in order to obtain a loan. [14 RT 419:3-5]." B.A., 10-11. The cited testimony is: "Q. Does a customer have to take that policy out? A. No." 14 R.T. 419:3-5.
- "Shelton testified to the existence of shared goals in every loan transaction by saying that no loan would be entered if it were not in the best interests of each party. [13 RT 192:13-27]." B.A., 18. The cited testimony is:

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[12] In this Court's words, "the inclusion of credit life insurance in a lender-borrower transaction is not for the sole benefit of, nor at the option of the lender. ... [C]redit life insurance is also a very important and vital part of the transaction to the borrower because it offers absolute protection to his estate for the unpaid balance of the debt in the event of his death before payment in full." *Parnell v. First Savings & Loan Ass'n*, 336 So.2d 764, 767-68 (Miss.1976).

> Q. Not asking you to assume anything, sir. Is it a true statement that before you enter into a credit life transaction with a borrower at Washington Mutual, you make sure that it's in the best interest of that borrower? Do y'all do that?
>
> A. Do we take that responsibility?
>
> Q. Yes, sir.
>
> A. Is that what you're asking? No, we do not take the responsibility for making that decision.
>
> Q. You do not take responsibility to make sure it's in the best interest of that borrower to do that, correct? You let them make the decision?
>
> A. That's correct.
>
> Q. All right. Going back to Exhibit 82.

13 R.T. 192:13-27.

- "Shelton admitted that it would be a violation of Washington Mutual policies and assumed duties *if any* [of] the following happened: ... If Washington Mutual entered into any transaction that was not in the customer's best interest. [23 RT 1666:11-13]." B.A., 19. The citation is to a portion of plaintiffs' *closing argument* to the effect that one City witness, Luscko, had said that City could "force people to buy insurance from our companies. Mr. Shelton says can't do that, violation of company policy." 23 R.T. 1666:11-13.[13]

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[13] At B.A., 34, plaintiffs cite the same portion of their closing argument as support for the following statement: "Shelton further admitted to the existence of shared goals in (Fn. cont'd)

- "In addition, Washington Mutual made verbal assurances to some Plaintiffs that it was looking out for their interests. [16 RT 670:26-671:1]." B.A., 35.

  The testimony was:

  > Q. Did you ask for her [Dolly Andrews'] advice on whether or not you should get it?
  >
  > A. Well, I figured she was giving me—because when she said that refinancing the loan would be best, would be in my best interest. And I figured she knew that I was trying to get my payments lowered and try to get my bills maintained, why should she add more to it?

16 R.T. 670:26-671:1.[14]

D. Plaintiffs Improperly Rely On New Theories And Evidence On Appeal

New theories are not permitted on appeal. That rule is well established in Mississippi as elsewhere.

> When the [party's] instructions to the jury present one ground upon which a recovery is sought, and is silent as to another ground, it is too late on appeal to shift to the latter ground. In reviewing a verdict, we are limited to the theory of the case as presented to the jury ....

Williams v. Lumpkin, 169 Miss. 146, 152 So. 842, 844 (1934).[15]

(Fn. cont'd)
every loan transaction by saying, in essence, that no loan would be consummated if it were not in the best interests of each party. [23 RT 1666:11-13]."

[14] At B.A., 40, plaintiffs mischaracterize the same testimony as follows: "In addition, Washington Mutual affirmatively told other Plaintiffs it was there to 'help them;' that it would 'take care of everything;' and that it was looking out for their 'best interests.' [1 CT 79; 12 CT 1675, 1676; 16 RT 653:12-13; 670:26-671:1]."

The rule binds appellees as it does appellants and bars affirmance as well as reversal based on theories first advanced in the appellate court.[16]

Appellees cannot raise new theories on appeal for two principal reasons. First, "we cannot on appeal present to appellant a situation different from that which it was called upon to meet at trial." *Gulf M. & N. R. Co. v. Madden*, 190 Miss. 374, 200 So. 119, 125 (1941). Second, "we are not permitted to conjecture as to what the result might or could have been had the recovery been sought on some other ground." *Picard*, 204 Miss. at 373, 37 So.2d at 568.

Plaintiffs repeatedly violate this fundamental rule of appellate procedure. Among others, their appellee's brief raises the following theories for the first time in this case:

- City owed them a fiduciary duty as their insurance agent. B.A., 29-31; see pp. 22-24 below.
- City had a duty to disclose additional information to correct previous false or misleading statements. B.A., 40; see p. 26 below.
- City owed plaintiffs a duty of care since plaintiffs might foreseeably suffer emotional distress from the economic injuries City's acts supposedly caused. B.A., 53; see p. 34-35.

(Fn. cont'd)

[15] *Accord: Scordino v. Hopeman Bros., Inc.*, 662 So.2d 640, 646 (Miss. 1995); *Rushing v. Edwards*, 244 Miss. 677, 684, 145 So.2d 695, 698 (1962).

[16] *Dobbs-Maynard Co. v. Jumper,* 388 So.2d 879, 883 (Miss. 1980); *Picard v. Waggoner*, 204 Miss. 366, 373, 37 So.2d 567, 568 (1948); *Sumner Stores v. Little*, 187 Miss.

(Fn. cont'd)

- The statute of limitations was tolled by City's fraudulent concealment. B.A., 54; see pp. 35-36 below.
- The punitive damages awarded in this case are reasonable in light of settlements reached in other supposedly similar cases. B.A., 90; see p. 61 below.

None of these new theories may properly be considered on this appeal, and as shown below, even if they are, they do not sustain the judgment. More importantly, the fact that plaintiffs have resorted to new theories on appeal—and particularly so many of them—betrays the weakness of the case they presented in the trial court. Had there been evidentiary and legal support for the theories plaintiffs advanced below, they would have no reason to raise new ones here.

Clinching the point is the fact plaintiffs rely heavily in this Court on evidence that was barely mentioned during trial and never brought to the jury's or trial judge's attention in plaintiffs' argument. The most blatant example of this new evidence on appeal is plaintiff's exhibit 92, 13 C.T. Ex. 1819-1821, three solicitation letters, the first two sent to persons who are not plaintiffs in the case, and the last apparently never sent at all.[17]

(Fn. cont'd)
310, 192 So.2d 857, 861 (1940); *Illinois Central R. Co. v. Sumrall*, 96 Miss. 860, 51 So. 545, 546 (1910).

[17] To further confuse matters, plaintiffs cite this letter as 12 CT 1676. There is no volume 12 of the clerk's transcript; volume 12 is the first volume of the reporter's transcript. It contains no page numbered 1676. Page 1676 does appear in volume 12 of the clerk's transcript of trial exhibits, but that page contains two blank forms of acknowledgment for use in Pennsylvania. That plaintiffs intend to refer to 13 C.T. Ex. 1821 can be seen by their quotation of the phrase "count on us to do everything we can to help," B.A., 7, which appears only in the letter reproduced at 13 C.T. Ex. 1821.

City objected to the introduction of these letters as irrelevant on the ground they were not tied to any plaintiff. 14 R.T. 297:1-23. The exhibit was nevertheless admitted based on plaintiffs' counsel assurance that "our clients will testify that they received these solicitations." 14 R.T. 298:1-4. In fact, no such testimony was ever adduced. Instead, plaintiffs' counsel asked City's witness two questions about the exhibit at the time it was introduced,[18] and, then, never mentioned the exhibit again—in eliciting testimony, in presenting closing argument, or in arguing any legal issue to the trial court during the trial.

Now, on appeal, plaintiffs pluck these letters from their former obscurity and, without any evidence plaintiffs received, let alone read or relied upon them, cite the letters repeatedly as a principal prop for their claims that City owed them a fiduciary duty, made affirmative misrepresentations, and committed outrageous conduct allowing awards of emotional distress damages as well as punitive damages. B.A., 7, 35, 37, 40, 71, 77.

To rely on such "new" evidence is just as improper as to raise new issues on appeal. Doing so asks this Court to usurp the jury's role in finding the relevant facts. As one appellate court explained:

> In a jury trial it is the duty of the jury to determine the true facts from the evidence and to apply the rules of law set forth in the instructions to the true facts to arrive at a verdict. ...
>
> However, we do not believe a lay jury could be reasonably expected to ferret out plaintiffs' theory of recovery unaided by

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[18] The two questions were whether the witness recognized the exhibit as solicitations City sent borrowers and whether it was a common practice for City to send solicitation letters to borrowers. City's witness answered both questions in the affirmative. 14 R.T. 297:4-6, 298:8-11.

> argument. Given the magnitude of the trial, we think plaintiffs had an obligation reasonably to inform the jury in argument about its current theory of the case by identifying the evidence upon which it relied and by connecting that evidence to a theory of liability tendered in the instructions. "The importance of the closing argument increases in almost a direct ratio with the length of the trial and the amount of controversy over the facts. Although the importance of certain testimony may be obvious to an attorney, it does not necessarily follow that it will be obvious to the jury. Especially in long and complicated cases, the nuggets of important facts may, to the layman juror, remain buried in the sands of trivial and conflicting testimony. It is the closing argument that must collect the important facts and expose them to the view of the jury in a logical and unified pattern that they will want to accept and believe. ..."

Richmond v. Dart Industries, Inc., 196 Cal.App.3d 869, 877-78, 242 Cal.Rptr. 184, 188-89 (1987).

Here, the solicitation letters made a cameo appearance on the first day of trial and were off stage for the rest of the performance, never being mentioned again in testimony or argument. Given the length and complexity of the trial, it is unreasonable to expect that the jury could have ferreted out the few snippets plaintiffs now quote repeatedly from these 3 of the more than 3,000 pages of exhibits. For this reason, it is improper to consider this or other similar "sleeper" evidence as supporting the judgment in this case.

III

THE JUDGMENT SHOULD BE REVERSED BASED ON ERRORS IN THE FINDING OF LIABILITY

A. City Breached No Fiduciary Duty

Conceding that, "as a general rule, debtors and creditors are not in a fiduciary relationship,"[19] plaintiffs nevertheless argue that the jury could find that City owed them a fiduciary duty because (a) plaintiffs had "special dealings" with City aside from ordinary loan transactions which imposed a fiduciary duty on City, B.A., 32-39, and (b) City acted as their agent in connection with the purchase of credit insurance, B.A., 30-32.

For the reasons stated below, neither of these arguments supports the trial court's submission of plaintiffs' breach of fiduciary duty claim to the jury or the jury's verdict on this claim.

1. The Standard Of Review Cannot Shelter The Trial Court's Error From Appellate Scrutiny

Having prevailed below, plaintiffs understandably try to hide the trial court's error behind the standard of review. Determining whether a fiduciary relationship exists is a question of fact, they say, and in reviewing the jury's decision on that issue, the Court must consider the evidence in the light most favorable to plaintiffs, giving them the benefit of all reasonable inferences in their favor. B.A., 29.

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[19] *Conner v. First Family Fin. Serv., Inc.*, 2002 WL 31056778 at *6 (N.D. Miss. 2002); accord: *Burgess v. Bankplus,* 830 So.2d 1223, 1227 (Miss. 2002).

True as those bromides may be, they cannot shield this issue from the Court's careful scrutiny, as *AmSouth Bank v. Gupta*, 838 So.2d 205, 216-17 (Miss. 2002) illustrates. There, too, a jury had returned a verdict against the defendant on a breach of fiduciary duty claim. Nevertheless, this Court carefully reviewed the evidence, found it showed that "Gupta had no special dealings with AmSouth aside from his ordinary [loan] transactions," concluded that AmSouth owed Gupta no fiduciary duty, and held it was, therefore, "reversible error to let the [breach of fiduciary duty] issue go to the jury." *Id.*

Here, a similar review of the evidence—even when viewed in the light most favorable to plaintiffs—reveals a similar absence of support, and certainly a lack of "clear and convincing" proof for plaintiffs' claim City owed them a fiduciary duty. Hence, as in *Gupta*, it was reversible error for the trial court to submit the breach of fiduciary duty claim to the jury. The standard of review cannot hide that error or forestall reversal.

2. City Owed Plaintiffs No Fiduciary Duty As Lender

To restate: as a general rule, a lender owes no fiduciary duty to a borrower. *Hopewell Enterprises, Inc. v. Trustmark Nat'l Bank*, 680 So.2d 812, 816 (Miss. 1996). Plaintiffs try to fit within an exception to this general rule, applicable in limited situations, when the lender has stepped outside its normal role.

To sustain that theory, plaintiffs had to present clear and convincing evidence that (1) they and City had "shared goals in each other's commercial activities," (2) that they "place[d] justifiable confidence or trust in [City's] fidelity, and (3) that City "exercise[d] control over [them]." *Gupta*, 838 So.2d at 216.

Plaintiffs' evidence fell far short of this high standard.

a) City And Plaintiffs Did Not Share Goals

Trying to show City shared goals with them, plaintiffs cite a passage from one of City's training manuals to the effect that City's "lending philosophy" is "to lend to each customer the maximum amount of money for which he or she is qualified, keeping in mind that all transactions must be in the customer's and the company's best interest." B.A., 33, *quoting* 12 C.T. Ex. 1699.

This evidence fails to show City "shared goals" with its borrowers. A loan may be in the borrower's best interest because he or she had an immediate need for cash but could repay the loan over time, while the same loan was in City's best interest because it would earn interest income and fees from the loan. The loan benefits both parties, being in the best interest of each, but in different ways for different reasons, not indicating any sharing of goals. As this Court recently observed:

> It is true that both [borrower] and [lender] hoped to profit from the loan, but that is a feature common to every free-market transaction.

Gupta, 838 So.2d at 216.

Furthermore, as stated in City's opening brief, pp. 28-29, neither City's branch personnel nor their customers, the plaintiffs, ever saw the training manual or were aware of the "lending philosophy" it espoused. Plaintiffs admit this fact, B.A., 34 n. 8, but fail

to show how a single sentence in an unread, unknown training manual could prove that City "shared goals" with plaintiffs with regard to the particular loans in dispute here.[20]

b) Plaintiffs Did Not Justifiably Rely On City To Look Out For Their Interests

Almost all consumers will say they "trusted" the businesses with which they dealt, as plaintiffs did in this case. That testimony is *not* enough to prove the second element needed to establish a fiduciary duty. Otherwise, "the mantle of the fiduciary relationship [would effectively extend] over every loan-application transaction" and virtually all other dealings between consumers and businesses. *Gupta,* 838 So.2d at 216.

This Court's cases show that something far more rigorous is required. First, the "trust" must be of a different character than the ordinary trust in the other contracting party's honesty and good faith which is common to all contractual relationships.

> While one normally does not enter into a contract with another unless he trusts and has confidence in him, contract and debt amount to a business and not a fiduciary relationship.

Gupta, 838 So.2d at 216, quoting *Cermack*, 658 So.2d at 1358.

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[20] In addition, the undisputed evidence both from the manual itself and from City's witnesses showed its "lending philosophy" had nothing to do with "shared goals." The lending manual explained that the "lending philosophy" "means that at *every* opportunity, employees should solicit customers to their *maximum credit.*" 12 C.T. Ex. 1699. City's witnesses explained the philosophy as requiring employees to offer City's loans and credit insurance whenever possible, inform customers about those products, and then let customers decide for themselves whether what was offered was in their best interests. 13 R.T. 193:26-195:16, 225:24-227:20; 15 R.T. 491:21-494:12; 20 R.T. 1289:21-1290:27. This undisputed testimony is inconsistent with any notion that City "shared goals" with plaintiffs or agreed to look out for their interests to the detriment of its own in the loan transactions.

To give rise to a fiduciary relationship, the "trust" must be that the other party will act not in its own interests, at arm's-length, as most contracting parties do, but will put aside its own interest and advance the plaintiff's instead.

> [T]here must be something about the relationship between the parties which would justifiably create an expectation on the part of one party that the other was protecting the first party from the occurrence of a particular risk; and, moreover, such justifiable reliance must have necessarily caused the first party to be lulled into a false sense of security so that the first party did not protect his own interest as he might have ordinarily.

Deramus v. Jackson Nat'l Life Ins. Co., 92 F.3d 274, 278 (5th Cir. 1996).

Second, as the just-quoted passage emphasizes, the requisite "trust" must be "justifiable"—a "trust" that the defendant's acts or statements would induce in a reasonable person. The ordinary acts of a creditor in extending a loan do not create such "justifiable" trust.

> Banks, finance, and insurance companies are not eleemosynary institutions. The plaintiffs should have been aware of as much at the outset, before blindly signing documents and failing to read them.

Conner, 2002 WL 31056778 at *7.

Instead, only acts taken outside a lender's normal role can "justifiably" induce the borrower's "trust." *Gupta,* 838 So.2d at 217. Distinguishing *Lowery v. Guaranty Bank &*

Trust Co., 592 So.2d 79 (Miss. 1991), the Court said:

> No genuine issue of material fact as to the existence of a fiduciary relationship arose in *Lowery* from the debtor/creditor relationship itself ("the note"); rather it was the Lowerys' history of dealings with the bank, and the bank's creation of a special arrangement, that instilled trust in Mrs. Lowery that the arrangement would not deviate from the prior one in a manner detrimental to her interests.

Gupta, 838 So.2d at 217.[21]

Plaintiffs' evidence falls far short of proving "justifiable trust" under these applicable legal standards. First, the "trust" to which plaintiffs testified was just the ordinary trust and confidence any contracting party manifests in the other. Ms. Chambers, for example, simply said she "trusted [City's employee] to be honest with me about everything." 16 R.T. 652:7-8. Other plaintiffs repeated the same litany: I trusted them, expected them to be honest, to do what was right and fair, to tell me the important loan terms orally. See A.O.B., 24 n. 27 & testimony there cited. This sort of "trust" does not create a fiduciary relationship; it shows only an ordinary contractual relationship.

Second, City never stepped outside the normal role of a lender. It never did or said anything that could "justifiably" induce plaintiffs to repose in it the required higher level of trust. None of the evidence plaintiffs cite supports their contrary argument. *See* B.A. 34-37.

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[21] The "special arrangement" arose from repeated dealings between the Lowerys and "one bank officer who arguably created the impression that he was willing to bend the rules or make exceptions for the Lowerys' special circumstances, and who failed to tell Mrs. Lowery that these apparent exceptions would not preserve their credit life insurance." *Gupta,* 838 So.2d at 217.

City's "philosophy" encouraged borrowers to place in City's employees only that trust in the other contracting party's honesty that is inherent in every contractual relationship. *Gupta,* 838 So.2d at 216. City's advertising offered only new loan terms or "help" only in making a loan. 3 C.T. 305. In preparing loan documents, City performed a lender's normal function. By doing so efficiently, before borrowers came to sign,[22] City did not assume the severe "burdens and penalties that are integral to a fiduciary relationship." *Cermack,* 658 So.2d at 1358. Nor did City do so by making repeated loans to some plaintiffs. *Conner,* 2002 WL 31056778 at *7 n. 13. A grocer does not become a fiduciary for his customers by selling them milk each week.

Contrary to plaintiffs' assertion, B.A., 36, there was nothing extraordinary about their loan transactions. That they purchased credit insurance in connection with their loans was not unusual, nor did that fact justify any higher level of trust in City:

> [P]laintiffs allege that a fiduciary relationship arose because defendants purported to obtain insurance on plaintiffs' behalf in connection with plaintiffs' respective loans and plaintiffs thus "placed special trust and confidence in their lender" to obtain adequate insurance at a fair price. But this is nothing more than an assertion that plaintiffs trust their lender ... because it was their lender, which is plainly insufficient ... to support finding that a fiduciary relationship existed.

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[22] Plaintiffs now complain they were "rushed ... through the loan process under the guise of 'getting them back to work.' " B.A., 36. But at trial they testified City's efficiency in closing loans was a service they eagerly sought: jobs called; other duties beckoned; they had no time to waste waiting in a loan office. *E.g.,* 16 R.T. 664:22-665:7. As this Court recently observed: "Gupta also trusted AmSouth to expedite his loan as quickly as possible; but don't almost all borrowers wish their loans were processed sooner?" *Gupta,* 838 So.2d at 216.

Strong v. First Family Financial Serv., Inc., 202 F.Supp.2d 536, 542 (S.D. Miss. 2002).

Moreover, plaintiffs did not testify that they "trusted" City for any of the reasons their counsel now urges. None said they were even aware of City's "philosophy" or had read its advertising. They did not swear they "trusted" City because it prepared their loan documents before they came in to sign for the loan.

To the contrary, plaintiffs "trusted" City simply because it was a lender, like any other. *E.g.,* 16 R.T. 696:16-18, 737:14-27; 18 R.T. 931:3-16. Indeed, some plaintiffs never even dealt with City's employees, but testified that they reposed the same "trust" in City's competitor, Easy Finance, or in retail merchants, like Unclaimed Freight. *E.g.,* 17 R.T. 784:18-785:28; 867:21-868:18, 871:18-872:13; 19 R.T. 1116:22-1117:12. To hold City a fiduciary based on such evidence "would effectively extend the mantle of the fiduciary relationship over every [consumer credit] transaction." *Gupta*, 838 So.2d at 216.

c) City Did Not Exercise Overmastering Influence

Trying to satisfy the crucial third part of the fiduciary relationship test—overmastering influence—plaintiffs cite evidence that City had much greater financial resources and sophistication in loan transactions than they did. B.A., 38-39. That is not enough. "[T]he fact that he/she was the lender ... and hence was more knowledgeable than plaintiffs about the details of the transaction ... is not a sufficient predicate for a fiduciary or confidential relationship ...." *Harrison v. Commercial Credit Corp.*, 2002 WL 548281 at *5 (N.D. Miss. 2002). Rather, "this is a feature of every loan ...." *Gupta*, 838 So.2d at 216.

Nor, contrary to plaintiffs' argument, B.A., 38, did City control whether plaintiffs bought credit insurance or the type of credit insurance they paid for. The loan documents clearly disclosed that credit insurance was optional. *E.g.*, 2 C.T. Ex. 187.[23] Even if City initially prepared the loan documents to provide for purchase of credit insurance, plaintiffs could still reject that option, as the loan papers expressly said.

Plaintiffs are even farther off the mark in claiming City exercised overmastering influence because it offered credit insurance only through a limited group of insurers and "controlled whether Plaintiffs could obtain additional loans or would be required to refinance current loans." B.A., 38. A lender or other merchant does not exercise "overmastering influence" by offering only a few products or services for sale or by offering them only on terms it prefers. *See* p. 3 n. 4 above. If plaintiffs wanted loans on other terms or credit insurance from other companies, they were free to deal with City's many competitors.

In short, plaintiffs' evidence was insufficient to establish any of the three portions of the fiduciary duty test.[24] The trial court erred in submitting their breach of fiduciary duty claim to the jury.

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[23] "Credit Life Insurance and Credit Disability Insurance are not required to obtain credit, and will not be provided unless you sign and agree to pay the additional cost." *Id.*

[24] Plaintiffs assert that they do not seek to impose fiduciary duties on every lender, but only to deter "unscrupulous" lenders. B.A., 48-49. But the assertion is belied by paucity of plaintiffs' evidence and the ease and frequency with which other borrowers can and do raise the same "facts" and claims against other consumer lenders.

3. City Did Not Breach Any Fiduciary Duty Owed Plaintiffs As Their Insurance Agent

Realizing the frailty of their fiduciary duty argument based on City's actions as lender, plaintiffs now claim that City owed them a fiduciary duty as their insurance agent. B.A., 30-32. The Court need not and should not consider this contention because it is a new theory presented for the first time on this appeal. It was not argued to the trial court or submitted to the jury.[25]

In accordance with the settled rule barring new theories on appeal (see pp. 8-10 above), plaintiffs should be barred from raising their new insurance-agent fiduciary duty theory now for the first time. That new theory cannot properly save a verdict rendered on the entirely different lender-as-fiduciary theory which plaintiffs presented to the trial court and jury.

Moreover, plaintiffs' new theory is as flawed as the one they presented in the trial court. A lender that charges a borrower for credit insurance is the borrower's agent and fiduciary only for the narrowly limited purpose of obtaining that insurance. The lender must "see that the amount so charged and withheld is actually applied to the purchase of

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[25] The fiduciary duty issue was argued extensively in the trial court without plaintiffs once raising their new theory that City owed them such a duty because it acted as their insurance agent. *See* 12 R.T. 99:15-107:26 (in limine motions), 135:23-29 (opening statement); 20 R.T. 1191:15-1193:6, 1219:14-1220:15, 1226:26-1227:20, 1259:6-17 (non-suit/directed verdict motions); 23 R.T. 1655:26-1656:9 (closing argument). Similarly, the jury instructions, one of which plaintiffs proposed, do not mention defendant's role as insurance agent or purchaser as a factor of any significance in determining whether the defendant owed a fiduciary duty. 9 C.T. 1311, 1312.

such insurance,"[26] "exercise good faith and reasonable diligence to procure insurance on the best terms he can obtain,"[27] ask and accurately record the borrower's answers to any insurance application,[28] and perhaps even advise the borrower of any obviously applicable exclusion from coverage.[29]

But plaintiffs do not claim City violated any of those duties. Here, as in *Strong*, 202 F.Supp.2d at 544 n. 8, "[t]here is no issue ... of ... defendants' failure to procure requested credit life or credit disability coverage; the coverage was procured, and for that matter, is not alleged by plaintiffs to have been offered or procured on terms other than the best terms these defendants could offer."

Moreover, contrary to plaintiffs' assertions, B.A., 31, City did fully disclose, in writing, the terms of the credit insurance it sold. *E.g.*, 2 C.T. Ex. 189, 190, 276-280, 291, 3 C.T. Ex. 299, 310-314. Even if a fiduciary, City had no duty to disclose those terms orally as well. *Strong*, 202 F.Supp.2d at pp. 543-44.

Finally, City even disclosed the fact that it would profit from the sale of the insurance,[30] a fact any reasonable borrower would assume even if not told, *Conner*, 2002 WL

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[26] *Parnell,* 336 So.2d at 767.

[27] *First United Bank v. Reid*, 612 So.2d 1131, 1137 (Miss. 1992).

[28] *Pace v. Financial Security Life of Miss.*, 608 So2d 1135, 1139-40 (Miss. 1992); *Estate of Jackson v. Mississippi Life Ins. Co.*, 755 So.2d 15, 21 (Miss. App. 1999).

[29] *Stewart v. Gulf Guaranty Life Ins. Co.*, 2002 WL 1874826 at *9 (Miss. 2002).

[30] *See* 2 C.T. Ex. 187: "Neither the Creditor nor the Insurer is your broker, agent, or fiduciary for obtaining insurance. You understand that the Creditor and its insurance affiliate anticipate profits from the sale of credit insurance."

31056778 at *7. No case holds that a lender must disclose the exact amount of its commission or other financial participation in credit insurance. Nor can plaintiffs claim any detrimental reliance on failure to reveal that information as they proved neither that they paid an excessive premium nor that they could have bought credit insurance more cheaply elsewhere.

Plaintiffs' new theory fails to support their breach of fiduciary duty claim. The trial court erred in submitting that claim to the jury. The judgment must, therefore, be reversed.

B. Plaintiffs Failed To Prove Their Fraud Claim

The trial court erred in submitting plaintiffs' fraud claim to the jury. A.O.B., 31-38. There was no substantial evidence of affirmative misrepresentation or a duty of disclosure, materiality or justifiable reliance.

Plaintiffs' argue to the contrary without success. *See* B.A., 39-49. Not only are plaintiffs' contentions individually without merit for the reasons stated below, but they also fail collectively because plaintiffs do not show that all required elements of their fraud claim are satisfied with respect to any particular representation or non-disclosure. Instead, they hop from one representation or non-disclosure to another, trying to show that some meet one element of the claim while others satisfy other elements. Fraud cannot be proven in that manner.

1. City Made No Actionable Affirmative Misrepresentation And Owed No Duty Of Disclosure

a) Plaintiffs Have No Claim For Affirmative Misrepresentation

Plaintiffs argue they proved actionable affirmative misrepresentations. B.A., 40. They did not. Lou Waters, Kenneth Hill, and Lizzie Lofton *did* testify that they were falsely told they had to buy credit insurance. *See* A.O.B., 32 n. 38. But that misstatement, if made, was not actionable because it contradicted the written terms of the loan documents those three defendants signed.[31] Further, even if actionable by the three plaintiffs who allegedly heard it, the representation could not support submission of plaintiffs' fraud claim as to the other 20 plaintiffs.

Plaintiffs also point to solicitation letters saying City would "help" plaintiffs or "take care of everything." B.A., 40. Those words are not representations of fact, but "vague and imprecise" opinions or "puffery" that cannot support a fraud claim.[32] Besides

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[31] "Plaintiffs could not reasonably rely on a representation of Defendants contrary to the express language of the contracts which they signed." *Ross v. CitiFinancial, Inc.*, 2002 WL 461567 at *4, 8 (S.D. Miss. 2002); *Howard v. CitiFinancial, Inc.*, 195 F.Supp.2d 811, 820, 822 (S.D. Miss. 2002); *Harrison*, 2002 WL 548281 at *3; *Conner*, 2002 WL 31056778 at *5; *Carter v. Union Security Life Ins. Co.*, 148 F.Supp.2d 734, 737 (S.D. Miss. 2001); *Stephens*, 2003 WL 1343254 at *4; *Gulf Nat'l Bank v. Wallace*, 394 So.2d 864, 866-67 (Miss. 1981); *Harold Allen's Mobile Home Factory Outlet, Inc. v. Early*, 776 So.2d 777, 784 (Ala. 1999).

[32] *Spragins v. Sunburst Bank*, 605 So.2d 777, 780 (Miss. 1992); *White v. Hancock Bank*, 477 So.2d 265, 270 (Miss. 1985); *Thomas v. Mississippi Valley Gas Co.*, 237 Miss. 100, 110, 113 So.2d 535, 538 (1959); *Smith v. Union Nat. Life Ins. Co.*, 187 F.Supp.2d 635, 650 (S.D. Miss. 2001); *Thompson v. Nationwide Mut. Ins. Co.*, 971 F.Supp. 242, 243 (N.D. Miss. 1997).

which there was no proof that plaintiffs actually received the solicitation letters or relied upon them.

b) City Owed No Duty Of Disclosure

Plaintiffs argue that City was their fiduciary and thus owed them a duty of disclosure. B.A., 41. Plaintiffs are wrong for the reasons already discussed in connection with the breach of fiduciary duty claim. A.O.B., 22-31, 33-35; pp. 13-24 above.

Plaintiffs also cite the legal rule that a party has a duty to supply additional information to correct previous false or misleading statements. B.A., 41-42. But plaintiffs cite no prior false or misleading statements by City. Instead, they argue that City had a duty to orally disclose a fact that the loan documents clearly and repeatedly revealed: that plaintiffs were agreeing to buy optional credit insurance.[33] B.A., 42. City owed plaintiffs no duty to disclose that fact orally even if City inserted that term without first asking plaintiffs if they wanted the insurance.[34]

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[33] The credit insurance premiums were shown in separate, clearly labeled boxes on the loan agreement, *e.g.*, 2 C.T. Ex. 185, in the section of the Federal Disclosure Statement labeled "Insurance," and in the itemization of the amount financed on the same statement, *e.g.*, 2 C.T. Ex. 187. In addition, the borrower was given a certificate of insurance, clearly showing the amount and type of coverage purchased. *E.g.*, 2 C.T. Ex. 188.

[34] *Godfrey, Bassett*, 584 So.2d at 1257; *Koenig v. Calcote*, 199 Miss. 435, 448, 25 So.2d 763, 764-65 (1946); *Strong*, 202 F.Supp.2d at 543-44; *Montgomery v. First Family Financial Serv., Inc.*, 2002 WL 31895908 at *5 (S.D. Miss. 2002); *Robinson v. JMIC Life Ins. Co.*, 697 So.2d 461, 462 (Ala. 1997); *Williams v. Norwest Financial Alabama, Inc.*, 723 So.2d 97, 102 (Ala. App. 1998).

Because plaintiffs did not prove either an actionable affirmative misrepresentation or a duty to disclose, their fraud claim fails. There is no need to review materiality or reliance, though City now does so out of an abundance of caution.

2. The Allegedly Actionable Misrepresentations Or Nondisclosures Were Not Material

Plaintiffs first fault City for not having addressed the materiality of the "fact" that City supposedly determined "the desirability and suitability of insurance products without consulting the borrower." B.A., 43. The fault is plaintiffs', not City's, for the supposedly material "fact" was never proven. City did not determine anything for borrowers, but instead left the choice of both loans and insurance to borrowers, as their loan papers fully disclosed in writing. *E.g.,* 2 C.T. Ex. 187.

Next, plaintiffs say City did not argue the non-materiality of its non-disclosure of the additional cost of refinancing as opposed to a second loan, or the limited benefits of credit life insurance. B.A., 43. There was no need to argue this point because plaintiffs never proved City owed a duty to disclose these "facts."

Finally, in what they admit is a stretch, plaintiffs claim that it might be material that branch managers make commissions, branch offices seek profit, and much or most of City's earnings come from insurance sales.[35] B.A., 43. This claim fails for several

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[35] Branch managers do not, in fact, receive commissions. They received annual bonuses based on the branch's meeting its overall sales quota for total loan volume. 13 R.T. 167:17-26; 14 R.T. 313:25-314:27. It is also untrue that City makes a majority of its profits from insurance sales. The only evidence on this point was Shelton's statement that he did not know how much City made from selling insurance but would not be (Fn. cont'd)

reasons. Plaintiffs did not prove City had any duty to disclose any of these facts. *See Ex parte Ford Motor Credit Co.*, 717 So.2d 781, 787 (Ala. 1997). The non-disclosed "facts" are not inherently material, as plaintiffs concede, and plaintiffs cite no evidence to prove materiality. No plaintiff testified he or she assigned them any importance. Even without disclosure, a reasonable borrower would surmise the gist of these "facts" anyway: "Banks, finance, and insurance companies are not eleemosynary institutions." *Conner*, 2002 WL 31056778 at *7. They are in it for the money. They try to earn a profit. Their salesmen are on commission. None of this is news. Besides, as plaintiffs do not claim the premium was excessive, it is immaterial how it was split between seller and insurer. *Baldwin v. Laurel Ford Lincoln-Mercury, Inc.*, 32 F.Supp.2d 894, 900 (S.D. Miss. 1998).

3. Plaintiffs Did Not Prove They Reasonably Relied

Commencing their discussion of reasonable reliance, plaintiffs quote several "when did you stop beating your wife" type questions and answers to the effect that City wanted its customers to trust City employees, even if what they said disagreed with the documentation. B.A., 44-45.

That testimony does not prove plaintiffs' reliance reasonable. In the first place, as already stated, there was evidence of only one oral misstatement made to only three of the 23 plaintiffs. *See* p. 25 above. In the second place, as a matter of law, it is not reasonable

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(Fn. cont'd)
"surprised" to find examples of individual loan transactions in which City made more selling insurance than lending money. 13 R.T. 231:2-13.

to rely on an oral statement that contradicts the terms of a written contract. *See* p. 25 n. 31 above. So the cited testimony is legally irrelevant.

Next, plaintiffs claim that some facts that were not disclosed orally were also not disclosed in writing: that City received commissions and other payments on insurance it sold. B.A., 45. The gist of these facts was disclosed in writing—"You understand that the Creditor and its insurance affiliate anticipate profits from the sale of credit insurance." 2 C.T. Ex. 187. Moreover, plaintiffs never proved City owed any duty to disclose these facts, that they were material or that any plaintiff actually relied on them.

Plaintiffs also try to blame City for their own failure to read their loan documents, citing the rule that a party is excused from reading a contract if lulled into that neglect by fraud or false representations. B.A., 46-48. But plaintiffs cite no evidence of any such fraud or false representation nor any testimony by any plaintiff that he or she relied on any representation in deciding not to read his or her loan papers.[36] *See Howard,* 195 F.Supp.2d at 821. "If the purchaser blindly trusts, where he should not, and closes his eyes where ordinary diligence requires him to see, he is willingly deceived, and the maxim applies, '*volenti non fit injuria*' " ... "because it is the policy of courts not only to discourage fraud but also to discourage negligence and inattention to one's own interest." *Allstate Ins. Co. v. Eskridge*, 823 So.2d 1254, 1265 (Ala. 2001) (citations and internal quotation marks omitted).

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[36] To the contrary, plaintiffs said they did not read the loan documents because they "trusted" City and other lenders. *E.g.*, 16 R.T. 695:13-696:11, 710:14-27; 17 R.T. 776:14-19.

Instead, plaintiffs simply say they were "rushed" through the loan closing and told only where to sign each document. B.A., 47. That is not enough to invoke the legal rule plaintiffs cite.[37] City did nothing to prevent plaintiffs from reading their loan papers either at the loan closings or later after they had taken their copies of the documents home. *E.g.*, 16 R.T. 666:6-14, 670:4-14, 692:21-27, 721:11-722:3; 17 R.T. 745:20-25, 751:6-20, 785:21-786:20. It was plaintiffs' duty to read, not City's obligation to force them to do so. *Tillery v. Security Pacific Financial Serv., Inc.*, 703 So.2d 402, 404-05 (Ala. App. 1997).

Plaintiffs did not prove a case of fraud. The trial court erred in submitting that claim to the jury. The resulting judgment should be reversed.

C. City Did Not Breach Its Duty Of Good Faith

"The implied covenant of good faith concerns the performance of the contract, not the negotiation of terms leading to the agreement." *Hill v. Galaxy Telecom, L.P.*, 176 F.Supp2d 636, 642 (N.D. Miss. 2001); A.O.B., 40-41. Plaintiffs do not deny this principle. Instead, they try to avoid it, asserting that refinancing of loans and compounding of interest—two of their many complaints—"takes place after the formation of the contract." B.A., 50.

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[37] *Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069, 1077 (5th Cir. 2002); *Raesley v. Grand Housing, Inc.*, 105 F.Supp.2d 562, 568-69 (S.D. Miss. 2000); *see First Family Financial Serv., Inc. v. Fairley*, 173 F.Supp.2d 565, 570 (S.D. Miss. 2001); *Smith v. EquiFirst Corp.*, 117 F.Supp.2d 557, 565 & n. 6 (S.D. Miss. 2000).

The evasion cannot succeed for a simple reason: the duty of good faith does not regulate *any* contract negotiations, whether for the first contract, a modification of it, a renewal, or a successor agreement. *Skinner v. USAble Life*, 200 F.Supp.2d 636, 642 (S.D. Miss. 2001). "[T]here is no obligation ... to bargain for a new ***or amended*** contract in good faith."[38]

Refinancing and any concomitant compounding of interest, by definition, requires a new loan agreement or an amendment or modification of an old one. 13 R.T. 291:28-14 R.T. 292:12. The duty of good faith does not apply to the negotiation of that new or modified agreement. A lender owes no duty to offer a new or refinanced loan at all, let alone one on terms favorable to the borrower. *Howard*, 195 F.Supp.2d at 824; *Ross*, 2002 WL 461567 at *8. Even during a contract's performance, "the parties are not prevented from 'protecting their respective economic interests,' "[39] they are even freer to pursue their own interests in negotiating a new or modified agreement. "Nothing prevents a party to a bargain from engaging in hard-nosed dealings, or even from attempting to capture opportunities foregone at the formation of one contract—i.e., the loan agreement—by negotiating another ...."[40]

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[38] *Racine & Laramie, Ltd. v. Department of Parks & Recreation,* 11 Cal.App.4th 1026, 1035, 14 Cal.Rptr.2d 335, 341 (1992) (emphasis added).

[39] *General Motors Acceptance Corp. v. Baymon*, 732 So.2d 262, 269 (Miss. 1999).

[40] *FDIC v. LeBlanc*, 85 F.3d 815, 822 (1st Cir. 1996) (citations omitted); *accord: AccuSoft Corp. v. Palo*, 237 F.3d 31, 45 (1st Cir. 2001); *Bank of New York v. Sasson*, 786 F.Supp. 349, 354 (S.D. N.Y. 1992). Plaintiffs cite *Allen v. City Finance Co.*, 224 B.R. 347, 351 (S.D. Miss. 1998), B.A., 50, but it does not support any contrary rule of law. The court there noted that its job was not to determine how Mississippi courts (Fn. cont'd)

Next, plaintiffs say that even after formation of their loan agreements City breached its duty of good faith by acting "dishonestly" in "refusing" to reveal various facts. B.A., 50. An obvious recasting of plaintiffs' deficient fraud claim, this assertion fails to prove bad faith. The duty of good faith deals with performance, not disclosure. City was duty bound not to deprive plaintiffs of the benefits of their loan and credit insurance agreements, but owed no good faith obligation to disclose allegedly disadvantageous features of those or related agreements to them. *Baldwin*, 32 F.Supp.2d at 899; *4-County Elec. Power Ass'n v. Tennessee Valley Auth.*, 930 F.Supp. 1132, 1142 (S.D. Miss. 1996).

Contrary to plaintiffs' next argument, City did not deprive Jesse McClung and Percy Mason of the benefits of their credit disability policies or "of knowledge of the policies' very existence."[41] B.A., 51. As a matter of law, McClung and Mason are deemed to have knowledge of their credit disability insurance since its existence and terms were clearly disclosed in the loan papers they signed. 5 C.T. Ex. 621-623, 628-630, 633, 635, 637, 639; *Cherry v. Anthony,* 501 So.2d 416, 419 (Miss. 1987). It was their duty to read the loan papers, *Godfrey, Bassett*, 584 So.2d at 1257, not City's to repeat those written disclosures orally.

(Fn. cont'd)
would rule on the claim, but only to decide whether, under a liberal review of Mississippi law, arguable grounds for recovery might exist on the face of the pleading. Obviously, this Court's role and review are entirely different.

[41] Even if this argument were not otherwise flawed, it would only support submission of these two plaintiffs' breach of good faith claim to the jury; submission of the remaining 21 plaintiffs' claims would still be reversible error.

For the same reason, there is no merit to plaintiffs' final argument that City deprived plaintiffs of the peace of mind of knowing they had credit insurance. B.A., 51. City did not deprive plaintiffs of that peace of mind; it fully disclosed the insurance in their loan papers and gave them copies of those papers to take home. *E.g.*, 2 C.T. Ex. 186-190; 16 R.T. 633:15-16, 634:24-26, 650:22-28. Knowledge of those papers' disclosures is imputed to plaintiffs even if they failed to read them. *Stephens*, 2003 WL 1343254 at *4; *Howard,* 195 F.Supp.2d at 820.

None of plaintiffs' arguments succeed. There was no substantial evidence of breach of the duty of good faith. It was reversible error to submit that claim to the jury.

D. Plaintiffs Did Not Prove Their Negligence Claim

In its opening brief, pp. 41-45, City showed that plaintiffs' negligence claim faltered at its first step. City owed plaintiffs no duty of care with respect to any of the conduct plaintiffs alleged was wrongful. In response, plaintiffs offer three arguments in support of a duty of care. B.A., 52-55. None of them has merit, as shown below.

First, contrary to plaintiffs' argument, B.A., 54, City did not "seize[] responsibility for determining which insurance coverages should be purchased by its customers" and thereby assume any duty of care. At most, City prepared loan papers for plaintiffs, providing for their purchase of credit insurance, without first asking plaintiffs if they wanted the insurance. Plaintiffs remained free to accept or reject the insurance thus offered. It

was plaintiffs' decision, not City's. If plaintiffs made that decision unaware because they failed to read the loan papers, it was their negligence, not City's.[42]

Second, plaintiffs claim City owed them a duty of care because they were "unknowledgeable and uncounseled customers ... relying upon the lender's advice." B.A., 54-55. This is just a retooling of plaintiffs' fiduciary duty argument[43] and it fails for the reasons already mentioned. *See* pp. 13-24 above. The courts have repeatedly rejected the notion that a lender owes a borrower a fiduciary duty or duty of care just because the borrower is less financially sophisticated than the lender. *Gupta*, 838 So.2d at 216; *Howard*, 195 F.Supp.2d at 825; *Ross*, 2002 WL 461567 at *11; *Harrison*, 2002 WL 548281 at *6; *Baldwin*, 32 F.Supp.2d at 900.

Third, plaintiffs claim that City owed them a duty of care because they foreseeably suffered emotional distress as a result of the economic injuries City's acts supposedly caused. B.A., 55. The argument turns the law on its head. The fact that plaintiffs' purported emotional distress flowed only from economic injury is an additional reason for

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[42] Plaintiffs also failed to prove City was negligent if it owed them any duty to select credit insurance on their behalf. They never tried to show that the insurance City supposedly chose provided inferior coverage or was too expensive. They just said they would not have chosen to buy the insurance.

[43] That the argument is just plaintiffs' fiduciary duty claim in different clothes is shown by the sole case plaintiffs cite for it: *Hutson v. Wenatchee Fed. Sav. & Loan Ass'n.*, 22 Wash.App. 91, 588 P.2d 1192 (1979). This Court cited *Hutson* as a prime support for its holding in *Lowery*, 592 So.2d at 84-85, that a lender may owe the borrower a fiduciary duty if it steps outside its normal role, as occurred in both *Lowery* and *Hutson*, but not here. Moreover, the duty *Hutson* found was merely to explain an ambiguous term in the loan and credit insurance papers. Plaintiffs point to no such term in their loan papers.

denying them recovery of damages for that distress, assuming plaintiffs otherwise proved a case of liability.[44] But a defendant owes no general duty of care to prevent foreseeable emotional distress. Rest.2d Torts, §313; *Sears, Roebuck & Co. v. Devers*, 405 So.2d 898, 901-02 (Miss. 1981). Plaintiffs conceded as much below, seeking emotional distress damages solely for wanton or willful misconduct that evoked outrage or revulsion, not for mere negligence. 9 C.T. 1317. It is too late to change theories now, and in any event plaintiffs' new theory is legally incorrect.

Plaintiffs did not prove their negligence claim. It was reversible error to submit it to the jury.

E. Plaintiffs Did Not Prove Delayed Discovery; Thus, Many Of Their Claims Are Time-Barred

Plaintiffs begin their discussion of the statute of limitations by arguing they proved fraudulent concealment. B.A., 57. Once again, this is a new theory presented for the first time on appeal and should therefore be disregarded. In the trial court, plaintiffs relied solely on delayed discovery, not fraudulent concealment,[45] to toll the statute of limitations.

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[44] *Ehrlich v. Menezes*, 21 Cal.4th 543, 554-58, 87 Cal.Rptr.2d 886, 893-96, 981 P.2d 978, 985-87 (1999); Rest.2d Torts, §436A; *Adams v. U.S Homecrafters*, 744 So.2d 736, 741-43 (Miss. 1999); *Mississippi Valley Gas Co. v. Estate of Walker*, 725 So.2d 139, 149 (Miss. 1998); *First Nat'l Bank v. Langley*, 314 So.2d 324, 329-39 (Miss. 1975).

[45] Delayed discovery and fraudulent concealment share some elements—e.g., plaintiff's failure to discover his or her claim despite diligence in doing so, *Robinson v. Cobb*, 763 So.2d 883, 887 (Miss. 2000); *First Trust v. First Nat'l Bank of Commerce*, 220 F.3d 331, 336-37 (5th Cir. 2000)—but they are distinct doctrines. To prove fraudulent concealment, for example, a plaintiff must prove the defendant acted in affirmative manner to prevent discovery of the claim. *Reich v. Jesco, Inc.*, 526 So.2d 550, 552 (Miss. 1988). (Fn. cont'd)

The jury was instructed only on delayed discovery. 9 C.T. 1318. That is the only tolling theory properly considered on this appeal.

In any event, plaintiffs cannot benefit from any tolling of the limitations period under either the fraudulent concealment or delayed discovery doctrines for the same reason: plaintiffs could easily have discovered their claims at the time they entered into their loan agreements or at any later time by the slightest diligence—reading their loan agreements.[46] *See* A.O.B., 46-50. In other cases just like this one, the courts have repeatedly held plaintiffs' claims time-barred for precisely this reason.[47] To quote just one of them:

> [N]either the doctrine of fraudulent concealment nor the discovery rule, assuming that either or both might be applicable in this context, can reasonably be found to operate to the plaintiff's benefit since the truth respecting the information which plaintiff contends was misrepresented and the facts which she contends defendants failed to disclose could have been discovered by plaintiff through the exercise of reason-

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(Fn. cont'd)
This is not an element of delayed discovery, and is not found in the instruction given the jury in this case. 9 C.T. 1318.

[46] Contrary to plaintiffs' argument, B.A., 57, 60-61, the limitations issue cannot be shielded from appellate scrutiny here as a question of fact decided by the jury. "Occasionally, the question of whether the suit is barred by the statute of limitations is a question of fact for the jury; however, as with other putative fact questions, the question may be taken away from the jury if reasonable minds could not differ as to the conclusion." *Smith v. Sanders*, 485 So.2d 1051, 1053 (Miss. 1986).

[47] *Agnew v. Washington Mut. Finance Group, LLC*, 2003 WL 344195 at *2-3 (N.D. Miss. 2003); *Howard*, 195 F.Supp.2d at 820-23; *Ross*, 2002 WL 461567 at *4-7; *see also Stephens*, 2003 WL 1343254 at *5-6; *Robinson*, 697 So.2d at 462; *Williams*, 723 So.2d at 102-03.

> able diligence more than three years prior to the date on which she filed suit.[3]

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[3] ...[T]he court would note that in her deposition testimony, ... plaintiff repeatedly stated that she did not read the documents that disclosed the pertinent information concerning the loan (including the fact that credit insurance was included, that credit insurance was not required, the amount of the premium, et cetera) ....

Cooley v. Washington Mut. Finance Group, 2002 WL 1768897 at *1 (S.D. Miss. 2002); *accord: Stephens,* 2003 WL 1343254 at *5-6.

Plaintiffs cite none of these cases. They do not attempt to distinguish them or argue they were wrongly decided. They simply ignore this substantial body of precedent that squarely blocks their effort to toll the limitations period. They do so at their peril, just as their clients ignored the loan papers' disclosures at their peril.

Instead of grappling with the applicable case law, plaintiffs offer a series of excuses for not having read the loan papers: the loan closings occurred quickly; the loan papers were prepared ahead of time; they were told to "sign, sign, sign," and so forth. B.A., 58-59. These excuses do not work. The same allegations were made in the cases cited above; they were found insufficient there; the same conclusion follows here as well.

Moreover, the excuses, at most, explain why plaintiffs failed to read their loan documents at or before the loan closing. None explain why plaintiffs never read the copies of those documents which they took home from the closings. They had years to do so

with no one rushing them or telling them where to sign.[48] When a plaintiff has the means of discovery available, but simply fails to invoke it, the limitations period is not tolled by either delayed discovery or fraudulent concealment.[49]

Plaintiffs next argue that if they had read their loan documents they would still not have discovered their claims—even though they admit the loan papers disclosed the fact that credit insurance was optional.[50] B.A., 61-62. Plaintiffs are wrong. Their principal complaint in this case is that they were sold credit insurance without being told about that

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[48] Plaintiffs' argument that it was not reasonable to expect them "to regularly pull out their loan contracts and scour [them] for hidden purchases," B.A., 61, is foreclosed by the well-settled legal rule that "knowledge of the contents of a [written] contract will be imputed to a contract party even though she did not read the contract before signing it." *Howard,* 195 F.Supp.2d at 820. Anyway, plaintiffs did not need to "scour" the documents or do so "regularly." One quick read through after plaintiffs got home from the loan closing would have sufficed in this case.

[49] *American Bankers' Ins. Co. v. Wells*, 819 So.2d 1196, 1202 (Miss. 2001); *O'Neal Steel, Inc. v. Millette*, 797 So.2d 869, 875 (Miss. 2001); *Womble v. Singing River Hospital*, 618 So.2d 1252, 1266 (Miss. 1993); *First Trust*, 220 F.3d at 338; *Howard v. Sun Oil Co.* 404 F.2d 596, 601 (5th Cir. 1968); *Rainwater v. Lamar Life Ins. Co.*, 207 F.Supp.2d 561, 567 (S.D. Miss. 2002).

[50] Plaintiffs try to minimize the impact of their admission by claiming the disclosure was "a single sentence in small type." B.A., 59. It was not. The type was no smaller than the rest of the type on the Federal Disclosure Statement. It was plainly legible. It was not a single sentence. The document first states: "Credit Life Insurance and Credit Disability Insurance are not required to obtain credit and will not be provided unless you sign and agree to pay the additional cost." 2 C.T. 187. This is followed by a second sentence: "I/we elect the insurance option checked:" after which are a series of check boxes for particular credit insurance products. *Id.* Finally, the borrower signed on a line marked "Borrower's Signature for Optional Credit Insurance." *Id.* A borrower had to try hard to avoid seeing the word "Optional" on the line he or she signed, even if he or she signed in a hurry.

insurance or its optional nature. Both the fact that they purchased insurance[51] and the fact that it was optional were clearly disclosed on the face of the loan papers. *E.g.*, 2 C.T. 187. By reading those papers, plaintiffs would have discovered their claim: i.e., their injury (the amount they were charged for credit insurance) and the cause of that injury (the fact they were not told that the insurance was optional).

Plaintiffs cannot escape this conclusion by claiming they relied on contrary oral representations by City employees. B.A., 58 n. 14. In the first place, except for Lou Waters, Kenneth Hill and Lizzie Lofton, none of plaintiffs claim they heard, much less relied upon, any contrary oral representations. *See* p. 25 above. In the second place, "[w]here, as here, the terms of a contract are made available to a contracting party, any reliance on alleged [oral] misrepresentations of those terms is, as a matter of law, unreasonable"—no matter how much one or both parties wish, or act as if, the rule were otherwise. *Howard*, 195 F.Supp.2d at 820.

Nor can plaintiffs escape the limitations bar by claiming that the loan papers did not disclose every single fact on which they now base their claims. B.A., 57, 62. The limitations clock begins to run when the plaintiff knows he or she has a claim; that is, when he or she knows of the injury and its wrongful cause. *Smith,* 485 So.2d at 1052-53.

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[51] Plaintiffs argue even if they had read their loan papers they would not have realized that the statement that credit insurance was optional applied to them because they "were unaware they had been charged for insurance in the first place." B.A., 60. The argument is fallacious. The same document that disclosed the optional nature of the insurance also disclosed the exact amount plaintiffs were charged for the insurance, thus clearly showing the relevance of the optional-nature disclosure to plaintiffs' loans. *E.g.*, 2 C.T. 187.

The plaintiff cannot wait until he or she has amassed all the evidence to support the claim or uncovered every possible subsidiary wrong to be alleged against the defendant.[52] *Stevens v. Lake*, 615 So.2d 1177, 1182 (Miss. 1993) (limitations period began in 1979 even though plaintiff did not discover one of three principal bases for suit until 1988). Otherwise, any plaintiff could wait forever, relying upon discovery in a late-filed suit to turn up some fact or claim, no matter how minor, of which he or she was previously unaware, to justify delayed-discovery tolling of the limitations period.

The trial court erred in denying City's motions for summary judgment, non-suit, judgment notwithstanding the verdict and new trial with respect to plaintiffs' claims arising from loan transactions consummated before January 1995. This error requires reversal of the judgment as to all plaintiffs other than Louise Blue, Glenda Chambers, and Tina Cross, the only three who complained only about loans closed after that date.

F. City Was Improperly Held Liable For Its Assignors' Alleged Wrong-Doing

In its opening brief, City showed that it was improperly held liable for frauds and other wrongs allegedly committed by Easy Finance and other lenders or merchants who assigned their loans or credit sales to City. A.O.B., 50-53.

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[52] "A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." *Jolly v. Eli Lilly & Co.*, 44 Cal.3th 1103, 1111, 245 Cal.Rptr.2d 658, 662, 751 P.2d 923, 928 (1988).

Tacitly conceding that an assignee cannot, generally, be held liable for the assignor's torts,[53] plaintiffs now argue that City was not held liable for its assignors' wrongs but only for its own breach of fiduciary duty in continuing to collect payments on the assigned contract without investigating to see if the assignor had committed some wrong in originating the loan or credit sale. B.A., 64-66.

This argument is erroneous. As already shown, City was not a fiduciary of any of its own borrowers. A.O.B., 22-31; pp. 13-24 above. Even less was it the fiduciary of a plaintiff who borrowed or purchased from someone else. Such a plaintiff could not have reposed any trust or confidence in City in entering into the transaction—as City played no role in its origination. City did not become a fiduciary simply by accepting assignment of the contract and collecting payments under it.[54] There is no authority, and plaintiffs cite none, holding an assignee assumes any fiduciary duty under such circumstances.[55]

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[53] Below, plaintiffs argued (and the trial court ruled) that, as assignee, City stepped into the shoes of its assignor and assumed whatever liabilities the assignor might have. 12 R.T. 111:27-112:23. In their appellate brief, plaintiffs have wisely not attempted to repeat or support that clearly erroneous contention.

[54] Contrary to plaintiffs' argument, accepting payments under the assigned contracts did not make City plaintiffs' insurance agent even if the payments included sum attributable to credit insurance premiums. If anything, accepting premium payments makes one the agent of the insurance company, not the agent of the insured borrower. *American Cas. Co. v. Whitehead*, 206 So.2d 838, 841-42 (Miss. 1968).

[55] The only authority plaintiffs cite in this section of their brief, B.A., 65, is *Jackson v. South Holland Dodge, Inc.*, 197 Ill.2d 39, 48-49, 51-52, 54, 755 N.E.2d 462, 468-69, 470-72 (2001). That decision involved an assignee's liability under 15 U.S.C. §1641(a) (a portion of the federal Truth-in-Lending Act), the FTC Holder Rule, and Illinois' Consumer Fraud Act. None of those acts are in issue here; *Jackson* is inapposite.

Nor was City under any duty to examine or review assigned loans to "analyze any misrepresentations or problems" with them. B.A., 66. The law imposes no such duty. Plaintiffs cite no case or statute imposing such a duty on an assignee. The testimony they misquote does not support their proposition either.[56] As stated before, the law places on the borrower the obligation to read his or her contracts and know what they contain. *Godfrey, Bassett*, 584 So.2d at 1257. By contrast, a contract's assignee has no duty to read the contract and tell the borrower what it contains.[57]

Plaintiffs' claim that City breached a duty of good faith owed in connection with assigned loans and credit sales is even further off the mark. B.A., 67. Assuming *arguendo* that an assignee owes a duty of good faith, City did nothing to deprive plaintiffs of the benefits of the assigned contracts. Plaintiffs had already received the goods or money for which they contracted by the time City acquired the contract. City did nothing to prevent them from receiving the benefits of any credit insurance they had purchased.

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[56] Asked if City ever checked assigned loans to see if values listed for collateral (hence, also property insurance premiums) were overstated, City's witness, Shelton, testified: "I wouldn't think we did that on specific accounts. I don't believe you would make that analysis until we did some business with the customer directly in our office." 13 R.T. 268:22-269:5. This testimony clearly does not support plaintiffs' notion that City was under a duty to review an assigned contract to determine what insurance was purchased, what the assignor had orally told the customer about it, and whether the customer fully understood his or her rights.

[57] Even if City owed some duty to warn Jessie McClung that he had disability insurance coverage under an assigned loan, its failure to reveal that fact to a single plaintiff plainly would not permit other plaintiffs to pursue claims based on other assigned loans or credit sales.

Plaintiffs next argue that even if evidence of assignors' wrongs was improperly admitted, the jury was limited to considering only City's conduct and not its assignors' because several of plaintiffs' formula jury instructions named the defendant (e.g., "[i]f you find defendant City Finance made material representations..."). B.A., 67. Not so. It would require a preternaturally astute juror to read that limitation into the language plaintiffs cite. Any juror who did so would be left to wonder why so many plaintiffs had been allowed to testify about how they had supposedly been done wrong by City's assignors.[58]

Plaintiffs finally contend that City cannot claim error as to some plaintiffs who introduced evidence of assigned contracts because City did not name them specifically in moving to exclude evidence before trial or in moving for directed verdicts. B.A., 68-69. Again, plaintiffs cite no authority for their argument. To preserve the issue for appeal, City was only required to raise it clearly and obtain a ruling in the trial court. *Journey v. Long*, 585 So.2d 1268, 1271 (Miss. 1991). Here, City did far more than that. It raised the assignee liability issue by motion for summary judgment (4 C.T. 586), motion in limine (7 C.T. 923, 935-36, 994-95; 12 R.T. 109:27-112:8), motion to exclude evidence (9 C.T. 1238), motion for directed verdict (20 R.T. 1211:14-1213:2), and motion for judgment notwithstanding the verdict (10 C.T. 1355, 1370). Each time the trial court denied City's motion. (7 C.T. 982-83; 11 C.T. 1549-50; 12 R.T. 112:22-26; 20 R.T. 1285:4-17.)

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[58] *E.g.*, 17 R.T. 864:18-23, 867:21-868:6, 870:13-872:28, 874:13-25 (Cross: Unclaimed Freight); 19 R.T. 1100:22-1101:13, 1104:27-1105:15 (Gordon: Easy Finance); 19 R.T. 1109:1-1111:9 (Hill: Otasco); *see also* 23 R.T. 1662:11-1663:16 (closing argument).

Plaintiffs do not—and could not—suggest that the trial court would have ruled any differently had City named other individual plaintiffs in some or all of these motions.

City adequately preserved the assignee liability issue for appeal as to all 18 plaintiffs who introduced evidence of loans or credit sales assigned to City. *See* A.O.B., 53 n. 67 & App. 1. For the reasons stated at A.O.B., 53, the judgment in favor of each of these plaintiffs must be reversed.

IV

THE JUDGMENT SHOULD BE REVERSED FOR ERRORS IN ASSESSING DAMAGES

A. The Awards Of Emotional Distress Damages Must Be Reversed

As shown in City's opening brief, pp. 53-68, the Court should reverse the compensatory damage awards to all plaintiffs.

Substantial amounts of emotional distress damages were awarded to all, other than the six whose awards were remitted on denial of the new trial motion.[59] Those awards are unsupported by substantial evidence in two respects: City's conduct was not outrageous; and plaintiffs suffered no compensable emotional distress. Even if the evidence

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[59] In denying City's motion for a new trial, the trial court remitted compensatory damages awarded Doris Garrett, Patrishane Gordon, Kenneth Hill, Janie Mason, Mattie Miles, and Zenester Moore to the sums plaintiffs' expert calculated as their economic losses, disallowing them any award for emotional distress. 11 R.T. 1549-50. As remitted, these compensatory damage awards are not excessive but should reversed for the reasons addressed in the preceding portions of the brief. The punitive damages awarded these six plaintiffs should also be reversed for the reasons stated at pages 53-65 below.

supported some award for emotional distress, the jury's award of up to $250,000 per plaintiff in this case was clearly excessive.

1. Plaintiffs Failed To Prove City's Conduct Outrageous Or Revolting

To recover emotional distress damages in this case, plaintiffs had to satisfy Mississippi's "very high" "standard for intentional infliction of emotional distress." *Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 476 (5th Cir. 2002). They had to prove City's conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." B.A., 71, *quoting Pegues v. Emerson Elec. Co.,* 913 F.Supp. 976, 982 (N.D. Miss. 1996).

Plaintiffs' evidence failed to satisfy this high standard of proof. *See* A.O.B., 55-58. City did not cause or threaten to cause plaintiffs any physical harm. It did not insult them, invade their privacy or engage in any other conduct that made any immediate impression on their emotions. To the contrary, plaintiffs acknowledged that City employees treated them politely and were nice to deal with.[60] There were no ugly confronta-

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[60] *E.g.,* 15 R.T. 607:9-609:27, 16 R.T. 643:10-21, 699:8-11.

tions.[61] No plaintiff claimed he or she was forced onto public assistance or compelled to undergo any other embarrassment as a result of City's conduct.[62]

Even considered in the light most favorable to plaintiffs, all that the evidence showed was a delayed reaction of distress allegedly suffered years after the event when plaintiffs were told by their lawyers that City had cheated plaintiffs out of comparatively small sums years before.

Contrary to plaintiffs' argument, B.A., 71-72, there was no evidence of any scheme to "sneak" insurance products into plaintiffs' loans. The insurance policies, their optional nature, and their cost were all prominently disclosed in writing to each of the plaintiffs. City owed no duty to explain those facts orally as well. Instead, knowledge of the contents of those written disclosures is imputed to plaintiffs as a matter of law even if they failed to read their loan papers.[63] *Cherry,* 501 So.2d at 419. If City committed any wrong at all in not orally explaining what it clearly revealed in print, that wrong surely did not rise to the level of conduct so "outrageous in character" as to "go beyond all possible bounds of decency" or be regarded as "atrocious" or "utterly intolerable." *See Pescia v.*

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[61] *Compare Gamble v. Dollar General Corp.*, 2002 WL 1767536 at *5-6 (Miss. 2002); *Whitten v. Cox*, 799 So.2d 1, 10 (Miss. 2000); *Lyons v. Zale Jewelry Co.*, 246 Miss. 139, 143, 150 So.2d 154, 155 (1963).

[62] *Compare Stewart*, 2002 WL 1874826 at *6.

[63] The true facts about the cost of refinancing were also disclosed to plaintiffs in writing, and thus plaintiffs' complaints about so-called "flipping" are without merit for the same reason. *See* B.A., 72. Likewise, plaintiffs have yet to articulate any theory which would make City's affiliates' reinsurance of the credit insurance risks wrongful, let alone "outrageous." *Id.*

Auburn Ford-Lincoln Mercury, Inc., 68 F.Supp.2d 1269, 1279 (M.D. Ala. 1999) (dealer not liable for emotional distress despite failure to disclose, as required, that retail installment contract was contingent on approval by finance company).

Nor is this case comparable to *Cherry Bark Builders v. Wagner*, 781 So.2d 919, 923-24 (Miss. App. 2001), on which plaintiffs rely. B.A., 69-70. In *Cherry Bark*, a builder inverted the plans for plaintiffs' house and instead of correcting the problem, lied to plaintiff, claiming there was no problem and then falsely blaming it all on the city.[64] Plaintiff was immediately and "visibly upset" by these events and could get no relief for months.[65] *Id.* at 923.

Here, by contrast, there were no blatant lies. At worst, City failed to tell plaintiffs orally what it disclosed to them in writing. Plaintiffs were not upset, visibly or otherwise, until years later, when their attorneys told them they should be. In short, plaintiffs failed to prove City's conduct met the high standard necessary to support an award of damages for intentional infliction of emotional distress.

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[64] "In the case *sub judice*, the builder on more than one occasion assured Wagner that the house was being constructed correctly, even though Wagner pointed out that it was not. Also, the builder blatantly lied to Wagner about the reason the plan was not flipped, blaming the City when it had played no role in the home construction. We find that it was certainly foreseeable that these flagrant manifestations would evoke outrage on Wagner's part ...." *Cherry Bark Builders,* 781 So.2d at 924.

[65] *Cherry Bark Builders* is perhaps best explained by the fact that the emotional distress damages award was minimal. The entire judgment was for $10,000, and that sum included $7,700 or more for unjust enrichment. 781 So.2d at 922. The Court of Appeals understandably strove mightily to uphold such a small verdict in the face of a clear wrong rather than require a retrial in such a small case. There is no similar need to stretch the law here.

2. Plaintiffs Failed To Prove They Suffered Compensable Emotional Distress

In its opening brief, City showed that plaintiffs failed to present sufficient evidence that they had suffered any actual emotional distress of such severity as to support an award of damages. A.O.B., 59-63.

In their brief, B.A., 73-74, plaintiffs do not argue that they presented any evidence of actual or severe emotional distress. Instead, they argue that no such proof is required because they supposedly proved a case of intentional infliction of emotional distress.

Plaintiffs are wrong. Their quotation from *Adams*, 744 So.2d at 743 does not support their argument. *See* B.A., 73. It states that in cases of intentional infliction of emotional distress "no further proof of ***physical*** injury" is required. *Id.* (emphasis added). City never contended that plaintiffs had to prove *physical* injury; only that they had to prove they suffered actual and severe *emotional* distress.

This Court has repeatedly held that proof the plaintiff suffered actual and severe emotional distress is required even in cases of intentional infliction of emotional distress. In *Wong v. Stripling*, 700 So.2d 296, 307 (Miss. 1997), this Court clearly stated and applied that rule:

> Although it is strongly questionable whether or not the behavior of which Dr. Wong complains is sufficiently outrageous and extreme ..., the adverse summary judgment was clearly proper because Dr. Wong failed to set forth any proof of injury, which is a necessary element of such a claim. It is axiomatic that in addition to suffering conduct that is outrageous or repulsive, this tort also requires proof of injury, i.e., that the conduct in question caused *actual mental distress.*

In *Morrison v. Means*, 680 So.2d 803, 807 (Miss. 1996), the Court applied the same rule, stating that even if it found Morrison's conduct sufficiently outrageous to sustain an award for intentional infliction of emotional distress, Means' testimony that he had lost some sleep and felt cheated and done wrong was insufficient to support even an award of $3,543 in damages for mental anguish. *Accord: Burroughs v. FFP Operating Partners, LP*, 28 F.3d 543, 549 (5th Cir. 1994) (applying Miss. law); *Parikh v. United Artists Theatre Circuit, Inc.*, 934 F.Supp. 760, 765 (S.D. Miss. 1996) (same).

In *Harbin v. Jennings*, 734 So.2d 269, 273-74 (Miss. App. 1999), the Court of Appeals explained the rule at even greater length. It held that upon proof of intentionally outrageous conduct, the plaintiff is entitled to recover nominal damages, but to sustain an award of actual damages, the plaintiff must prove she suffered actual and severe mental distress—sleeplessness, periods of irritability, and inability to maintain a standard body weight did not suffice.

Gamble, 2002 WL 1767536 at *4-6 represents no break with this unanimous line of authority. It cites *Morrison* repeatedly and discusses *Harbin* approvingly. Though Gamble's evidence of actual emotional distress was thin,[66] it still was far more substantial than that which plaintiffs offered in this case. Gamble at least testified she suffered

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[66] Indeed, it was so thin that three members of the court dissented on this point, stating that "[t]he standard has not dropped so low" that "any plaintiff who gets on the stand and says I had trouble sleeping, and by the way, I now have headaches, too, is entitled to damages for mental anguish." *Gamble,* 2002 WL 1767536 at *10 (Smith, P.J., dissenting).

severe headaches which her doctors told her were stress-related, and they occurred shortly after her extremely embarrassing confrontation with defendants. *Id.* at *6.

No similar testimony was offered here. No plaintiff complained of headaches or any other serious mental symptom. Only a couple even said they had lost sleep. They rest just said they felt "bad" or "cheated" when their lawyers told them, years after the events. *See* A.O.B. 60-62 & nn. 75-78.

This case illustrates why a plaintiff may not recover more than nominal damages, even in a case of intentional infliction, without proof of actual and severe mental distress. Without such proof, emotional distress damages can be measured only by "[t]he nature of the act itself." *Gamble,* 2002 WL 1767536 at *4. Assessed on that basis, emotional distress damages do not compensate the plaintiff for harm actually suffered but rather form a first layer of punitive damages. Those damages are duplicated by the "real" punitive damage award. *See Campbell,* 123 S.Ct. at 1525. Also, by increasing the amount of supposed compensatory damages, the "emotional distress" damage award raises the ceiling on the amount of allowable "real" punitive damages. So, instead of being punished once for its outrageous conduct, the defendant is punished many times over. The law rightly does not permit such an unjust result even in a case of outrageous conduct.[67] *See* pp. 58-60 below.

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[67] Given the strong policy reasons supporting the rule, it is no surprise that Mississippi's neighbors likewise require proof of actual and severe mental distress, even in cases of intentional infliction. *Grantham v. Vanderzyl,* 802 So.2d 1077, 1081 (Ala. 2001); *Johnson v. Wal-Mart Stores, Inc.*, 987 F.Supp. 1398, 1404-05 (M.D. Ala. 1997) (applying Ala. law); *Smith v. Amedisys, Inc.*, 298 F.3d 434, 449-50 (5th Cir. 2002) (Fn. cont'd)

Since plaintiffs presented no substantial evidence that they suffered any actual or severe emotional distress, the trial court erred in submitting their claims for emotional distress damages to the jury and in denying City's post-trial motions attacking the compensatory damage awards. Those awards must be reversed as they are not supported by substantial evidence.

3. The Emotional Distress Awards Are Excessive

Assuming *arguendo* that plaintiffs' evidence was substantial enough to allow *an* award of emotional distress damages, the evidence is at most barely sufficient for that purpose and does not warrant or support the large amounts awarded in this case for emotional distress. The jury awards of $40,000 to $250,000 were vastly excessive for plaintiffs testified that, at worst, they felt "bad" and "cheated" years after the event.

As already shown, the awards in this case are far greater than verdicts in cases involving much more egregious conduct and far more compelling evidence of actual and severe mental distress. A.O.B., 64-68. Though, as plaintiffs point out, B.A., 75-76, the Court affirmed the awards in the cited cases, they show the range of compensation appropriately awarded in far more severe cases and provide a standard against which the awards in this case should be compared.

(Fn. cont'd)
(applying La. law); *White v. Monsanto Co.*, 585 So.2d 1205, 1209-10 (La. 1991); *Huckabay v. Moore*, 142 F.3d 233, 241-42 (5th Cir. 1998) (applying Tex. Law); *Twyman v. Twyman*, 855 S.W.2d 619, 621-22 (Tex. 1993).

Moreover, the awards in this case fare no better in comparison with cases in which emotional distress awards have been reversed as excessive. In *Vadie v. Mississippi State University*, 218 F.3d 365, 377 (5th Cir. 2000), for example, a professor was the victim of discrimination and retaliation. He testified the experience "destroyed me. It totally ruined me, and I became sick, totally ill, physically, mentally, and everything. I took many doctors, many pills. I did not know what to do, where to go, what to say. I did not know whether it was nighttime or daytime. I could not sleep for months at a time. Headache, nausea. Still I am under severe doctor surveillance because of what they have done to me ...." *Id.* That testimony was certainly far more compelling than anything plaintiffs offered in this case, and the discrimination and retaliation the professor suffered was a far more devastating wrong than anything plaintiffs alleged here. Yet, the Fifth Circuit reversed the jury's $290,000 verdict, concluding that "an award greater than $10,000 would be excessive." *Id.*

The Fifth Circuit is not alone. The Alabama Supreme Court has dealt with the same issue, repeatedly reversing judgments for emotional distress damages based on evidence similar to that offered by the plaintiffs in this case, unless the plaintiffs in those cases accepted remittiturs to amounts of $15,000 or less. *Acceptance Ins. Co. v. Brown*, 832 So.2d 1, 22-23 (Ala. 2001); *Kmart v. Kyles*, 723 So.2d 572, 578-579 (Ala. 1998); *see also Foster v. Life Ins. Co. of Georgia*, 656 So.2d 333, 337 (Ala. 1994).

Finally, contrary to plaintiffs' argument, B.A., 75, this Court's recent decision in *Stewart*, 2002 WL 1874826 at *5-6 does not support plaintiffs' notion that emotional distress verdicts of this size, based on so little evidence, can withstand appellate scrutiny. As

this Court carefully pointed out in *Stewart*, its narrow scope of review was dictated by the fact that the trial court had *not* ordered a new trial, subject to a remittitur, but had instead granted a partial judgment notwithstanding the verdict. *Id.* at *5. For this reason, the Court decided only that there was substantial evidence to support the jury's award of *some* emotional distress damages.[68] It did not decide whether the jury's award was excessive.[69] *Id.*, at 6.

By any proper measure, the jury awarded excessive emotional distress damages in this case. The compensatory damage awards should be reversed. Reversal of compensatory damages will also dictate reversal of the punitive damage awards. *Poullard v. Turner*, 298 F.3d 421, 423-24 (5th Cir. 2002).

B. The Punitive Damages Awards Should Be Reversed

Punitive damages were improperly awarded in this case. City's conduct did not warrant submission of the issue to the jury at all, and it certainly did not justify the monstrous punitive damage awards assessed by the jury. *See* A.O.B., 69-86. Plaintiffs' arguments to the contrary, B.A., 77-95, are without merit, as shown briefly below.

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[68] Even on that issue, *Stewart* is distinguishable, as the plaintiff there offered far more substantial evidence of emotional distress than did any plaintiff in this case. Along with his own and his wife's testimony to anxiety, crying spells, and difficulties eating and sleeping, Stewart offered his doctor's testimony that Stewart was "severely depressed, extremely anxious, and suffer[ing] from stress-induced obsessive compulsive disorder" for which the doctor had prescribed anti-depressants for more than 17 months. *Id.* at *6.

[69] The dissent disagreed with the majority on this very point, urging that the award was excessive and should not be sustained despite the trial court's procedural error in granting a partial JNOV rather than a new trial subject to a remittitur. *Id.* at *13-15 (Pittman, C.J., dissenting).

1. City's Conduct Did Not Warrant Any Punitive Damage Award

Punitive damages are allowed only in the most egregious cases when the defendant's actions have been extreme. *Paracelsus Health Care Corp. v. Willard*, 754 So2d 437, 442 (Miss. 2000). Here, City did not come close to such an extreme transgression—assuming its acts were wrongful at all. *See* A.O.B. 69-71.

Arguing to the contrary, plaintiffs conjure up a plot to dupe unsophisticated customers into buying credit insurance they did not need or want "and about which they were given no information." B.A., 77. The evidence does not support this fairy tale. It is undisputed that plaintiffs were given ample written disclosures about credit insurance at the time they signed for it—and they were given copies of those disclosures to take home with them. As to 20 of the 23 plaintiffs,[70] City's only misdeed, if it was one, lay in not repeating orally what was disclosed in writing.[71]

That was not egregious conduct warranting the imposition of punitive damages. The trial court erred in denying City's non-suit and post-trial motions on this ground. The punitive damage awards should be reversed in toto.

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[70] As previously mentioned, three plaintiffs claim they were told orally that credit insurance was mandatory. *See* A.O.B., 32 n. 38. Even if that misstatement was made and could be relied upon despite clear, contemporaneous written disclosures to the contrary, it could not possibly justify the award of punitive damages to the other 20 plaintiffs who were told no such thing.

[71] Plaintiffs also point to City's affiliate's receipt of 96% of the premium through its reinsurance agreements and to City's refinancing ("flipping") of loans. B.A., 77-78. But plaintiffs do not bother to explain how either is wrongful, let alone so heinous as to justify imposition of punitive damages.

2. The Punitive Damage Awards Are Excessive, Violating Federal Constitutional Limits

This Court reviews the punitive damages awards *de novo* to determine whether they meet federal constitutional standards, considering three factors: reprehensibility, ratio of harm to punitive damages, and ratio of punitive damages to comparable criminal sanctions. *MIC Life Ins. Co. v. Hicks*, 825 So.2d 616, 622 (Miss. 2002) ("*Hicks*"); *Campbell*, 123 S.Ct. 1513.

So examined, particularly in light of *Campbell*, the punitive damage awards in this case are excessive, *see* A.O.B., 71-78.

a) City's Conduct Was Not Reprehensible

For reasons already discussed at length, City's conduct was not wrongful at all, or if wrongful, not so reprehensible as to warrant a large award of punitive damages. *See* A.O.B., 72-76. City's conduct neither caused nor threatened physical harm, as plaintiffs concede. B.A., 80. Here, as in *Campbell*, 123 S.Ct. at 1524-25, "[t]he harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries"—all factors that weigh heavily against a high punitive damage award.

The fact that much of City's clientele was poor does not warrant a larger punitive damage award. *Cf.*, B.A., 84. Contrary to plaintiffs' argument, *id.*, there is no evidence to suggest City treated its more affluent or knowledgeable customers differently.[72] As any

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[72] City's rebuttal witnesses were no more affluent or knowledgeable than some of plaintiffs, like Earnest Claiborne, a college graduate and analyst for Wells Fargo Home (Fn. cont'd)

business dealing with consumers, City applied its business practices consistently to all, and should not now be punished more severely just because it dealt with many customers in the same manner. *Cf.*, B.A., 84-85.

Nor did City engage in any trickery or deceit, as plaintiffs charge. B.A., 85-86. As pointed out before, all the pertinent loan terms were clearly and contemporaneously disclosed in writing.[73] The other allegedly fraudulent acts of which plaintiffs complain were not shown to be wrongful or harmful.[74]

b) Punitive Damages Were Not Reasonably Related To Actual Harm

In its opening brief, City showed that even under the then-extant case law, the punitive damage awards in this case greatly exceeded constitutionally permissible ratios. *See* A.O.B., 73-76. Under the new constitutional limits, more narrowly and more precisely drawn by the United States Supreme Court in *Campbell*, 123 S.Ct. at 1524-25, the punitive damages awarded in this case are even more clearly out of line.

(Fn. cont'd)
Mortgage or Tina Cross, a college graduate with a business administration degree, who works for the Department of Human Services.

[73] Again, the three instances of alleged oral misstatements that credit insurance was required and three purported attempts to physically keep plaintiffs from reading documents they were signing cannot justify punitive damages at all or in large amounts to the many other plaintiffs who were affected by neither alleged wrong.

[74] If City employees signed as witnesses to transactions they did not witness, no one was shown to have been harmed. B.A., 86. City's affiliates' reinsurance contracts were not a matter City had any duty to reveal, and in any case, plaintiffs gave up any claim that the insurance premiums they paid were "inflated" as they now assert. *Compare* B.A., 86 *with* 20 R.T. 1221:17-28.

In *Campbell,* the high court "decline[d] again to impose a bright-line ratio which a punitive damages award cannot exceed," but nevertheless made it clear that only in truly extraordinary cases may punitive damages constitutionally exceed nine times the compensatory damages.

> ... [I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. ...
>
> ... [R]atios greater than those we have previously upheld may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages." The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.

Campbell, 123 S.Ct. at p. 1524.

The punitive damage awards in this case far exceed the constitutional limit thus drawn. Compared with the economic harm caused, the punitive damage awards are patently excessive. The average ratio of punitive damages to economic harm is 4,202:1, ranging from 1,143:1 (for Lou Waters) to 33,523:1 (for Louise Blue). *See* A.O.B., 74 & App. 2. These ratios are far higher than ratios this Court held to be "absolutely beyond excessive"[75]—indeed, so high that even plaintiffs make no effort to justify them. *Hicks*,

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[75] Ratios of actual harm to punitive damages may *slightly* exceed nine to one in cases where compensatory damages are low, injury is hard to detect or its monetary value is difficult to determine. *Campbell*, 123 S.Ct. at 1524; B.A., 91. But even with all those factors are present, this Court reversed the punitive damage award in *Hicks*, finding the 1,567:1 ratio in that case excessive. *A fortiori*, those "enhancement" factors cannot justify the even higher ratios in this case.

825 So.2d at 623; *Dixie Ins. Co. v. Mooneyhan*, 684 So.2d 574, 587 (Miss. 1996); *see* B.A., 90-93.

The punitive damage awards in this case fare no better when considered in light of the total compensatory awards, including emotional distress damages. Though the ratios decline to an average of "only" 26:1 (punitive damages to total compensatory damages) with a low of 12:1 (for Janie Mason) and a high of 75:1 (for Tina Cross), *see* A.O.B., App. 2, they still exceed constitutionally permissible limits.

Since the total compensatory damage awards were "substantial," ranging from a low of $40,000 (for Tina Cross) to a high of $250,000 (for Lindsey Horton and Lou Waters), *see* A.O.B., App. 2, a lower ratio of punitive to actual damages is constitutionally mandated. "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Campbell*, 123 S.Ct. at p. 1524. Obviously, ratios of from 12:1 to 75:1 far exceed the 1:1 ratio that *Campbell* suggests as the outermost limit of due process in a case like this.

Also, as *Campbell* also points out, even lower ratios are dictated when emotional distress damages comprise a large portion of the compensatory award because emotional distress damages already contain a punitive element.

> The compensatory damages for the injury suffered here, moreover, likely were based on a component which was duplicated in the punitive award. Much of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element. *See* Restate-

> ment (Second) of Torts § 908, Comment c, p. 466 (1977) ("In many cases in which compensatory damages include an amount for emotional distress ... there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both.")

Campbell, 123 S.Ct. at 1525.

In this case, even if the emotional distress damage awards were not themselves erroneous, *see* A.O.B., 53-68; pp. 44-53 above, they could not justify more than a 1:1 ratio of punitive damages because, as was true in *Campbell*, the emotional distress awards here plainly include a substantial punitive element.

Plaintiffs acknowledge they presented no evidence of actual or severe emotional distress. *See* p. 48 above. They try to justify the emotional distress damage awards as being based on—and punishing City for—"the nature of the act itself, rather than the seriousness of the consequences." B.A., 73. If so, the emotional distress damage awards are no measure of "the actual harm inflicted on the plaintiff." *Hicks*, 825 So.2d at 622. Rather, they are punishment, pure and simple.

It is already impermissible double punishment to award punitive damages for the same conduct for which primarily punitive emotional distress damages have been awarded. The due process violation becomes particularly apparent when the size of the first punishment (emotional distress damages) is offered as justification for increasing the size of the second punishment (punitive damages).

This Court has never affirmed a punitive damage award under such circumstances. Though, before *Campbell*, it approved awards which bore a higher ratio to damages that

truly compensated for real harm suffered, *see* B.A., 91-93, it has never permitted such a piling of one punitive award upon another as occurred here. *Campbell* holds that such a pyramiding of penalties transgresses the constitutional limit.

c) The Punitive Damage Awards Greatly Exceed Comparable Civil Or Criminal Penalties

"Under the third guidepost, *Gore*[76] mandates that we compare the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." *Hicks*, 825 So.2d at 623; *but see Campbell*, 123 S.Ct. at 1526.

In its opening brief, City showed that the punitive damage awards in this case are 300 times the maximum civil penalty and 3,000 times the maximum criminal penalty otherwise permitted under Mississippi law for the conduct plaintiffs allege. A.O.B., 77-78, citing Miss. Code Ann. §§ 75-24-5, 75-24-19.

Plaintiffs do not directly address this point in their brief. They cite no statute permitting higher civil or criminal penalties than those City has mentioned. They do not try to argue that punitive damages that are 300 or 3,000 times the amount the legislature judged an appropriate sanction, sufficient to deter future misconduct, could pass constitutional muster.[77] They ignore this issue for the same reason they ignore so many other

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[76] *BWM of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996).

[77] Plaintiffs do try to minimize the importance of this comparison, stating that the statutes City cites "are intended to cover a range of conduct [some of it] much less predatory and injurious than Defendant's actions and omissions here." B.A., 93. The statutes may prohibit a range of conduct, but City has referenced the *maximum* civil and criminal penalties, sanctions imposed only for the most egregious violations.

points raised in City's opening brief: City is right. Plaintiffs have no convincing counter-argument.

Instead, plaintiffs argue that City must have had notice that large punitive damage awards could be entered against it because its arbitration agreement limits punitive damages to ten times actual damages or $250,000. B.A., 93-94. This argument is irrelevant. *Gore* mandates a comparison with what the legislature has judged sufficient punishment, not a comparison with damage limits parties privately agree upon. *See Hicks,* 825 So.2d at 623. Further, no meaningful comparison can be made with City's contractual limitation of damages since the arbitration clause covers all types of disputes, not just the sort of claims plaintiffs bring in this case.

Next, plaintiffs refer to settlements in other actions as allegedly showing that "lending practices akin to [City's] are viewed as unacceptable ...." B.A., 94-95. The comparison is irrelevant to the constitutional analysis mandated by *Gore*. Also, there is nothing in the record regarding the settlements plaintiffs cite; hence, it is improper to refer to them. There is no indication what practices led to the settlements in those cases. If the settlements prove anything, it is that the punitive damage awards here are vastly excessive.[78]

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[78] The Citigroup settlement that plaintiffs reference, for example, provides a $215 million redress fund to remedy wrongs allegedly done more than 2 million borrowers, resulting in a per capita benefit of less than $200. *Morales v. Citigroup, Inc.*, Coord. Proc. No. 4197 (Cal. Super. Ct., San Francisco County, Nov. 13, 2002) (order preliminarily approving class action settlement, p. 3); *FTC v. Associates First Capital Corp.*, No. 1:01-CV-00606 (N.D. Ga., Sept. 24, 2002) (order preliminarily approving stipulated final judgment, p. 12).

Finally, plaintiffs argue that higher punitive damage awards are justified because the statutory penalties did not deter City from acting as it did. B.A., 95. This argument could be made in any case and would, if allowed, nullify *Gore's* third factor. Also, by that reasoning, the death penalty is too light a punishment since it clearly does not deter all murders.

Judged *de novo* in light of the three constitutionally mandated factors, the punitive damage awards in this case are clearly excessive and should be reversed.

3. The Punitive Damage Awards Are Excessive Under Mississippi Statutory And Common Law Standards

For the reasons stated in City's opening brief, pp. 78-86, the punitive damages awards in this case are also excessive under Miss. Code Ann. § 11-1-65(1)(f) and under Mississippi common law.

In addition to the constitutional factors already discussed, the statute permits consideration of the defendant's financial condition as well as, in mitigation, the existence of other awards against the defendant. A.O.B., 78-79. Mississippi common law also permits consideration of whether such high awards are needed to punish the defendant and deter it and others from similar conduct in the future. A.O.B., 85. As explained in City's opening brief, these additional factors do not support the outsized punitive damage awards in this case. A.O.B., 80-86. Plaintiffs' arguments to the contrary are unavailing for the reasons stated below.[79]

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[79] In arguing these issues, plaintiffs repeatedly cite and heavily rely on the lead opinion in *American Income Life Ins. Co. v. Hollins*, 830 So.2d 1230 (Miss. 2002). B.A., (Fn. cont'd)

a) City's Financial Condition Does Not Justify The Large Punitive Damage Awards

Contrary to plaintiffs' argument, B.A., 87-90, punitive damages are not a wealth tax. An otherwise excessive punitive damage award cannot be justified on the ground that it constitutes only a small fraction of the defendant's net worth. *Campbell*, 123 S.Ct. at 1525; *Gore*, 517 U.S. at 585, 116 S.Ct. at 1604. The defendant's financial condition is properly considered to assure that punitive damages sting, but do not kill, not to justify outsized exactions against large corporations.

Here, the punitive damage awards here go far beyond sting. Cumulatively, they amount to 12.4% of City's net worth as calculated by plaintiffs' own expert.[80] This Court has never approved punitive damages constituting such a high percentage of a defendant's net worth. Other courts have held that an award in excess of 10% of net worth "crosses the line from punishment to destruction."[81] *BMW of North America, Inc. v. Gore*, 701 So.2d 507, 514 (Ala. 1997).

(Fn. cont'd)
76-78, 83. In doing so, plaintiffs err. Only four justices joined in that opinion. The tie-breaking fifth justice concurred in the result only and not in the opinion. Since a majority of all sitting justices did not concur in the lead opinion, it is not precedent or authority for any proposition. *Buffington v. State*, 824 So.2d 576, 580 (Miss. 2002); *Churchill v. Pearl River Dev. Dist.*, 619 So.2d 900, 904 (Miss. 1996).

[80] As shown in City's opening brief and reiterated below, this opinion was improperly admitted. A.O.B., 93-98; pp. 71-75 below.

[81] That one California intermediate court once affirmed a higher award in a case the defendant permitted to go to judgment by default hardly provides a convincing argument for allowing such excessive awards in this state. *See* B.A., 89, *citing Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal.App.3d 381, 202 Cal.Rptr. 204 (1984).

This case well illustrates that point. In the wake of this judgment, City has closed all its loan offices in Mississippi,[82] while remaining the target of suits by hundreds of other borrowers only too anxious to swear that they, too, did not read their contracts, were not warned orally, and did not, at least in hindsight, wish to buy the credit insurance they signed for.[83] If only a small fraction of these borrowers won verdicts approaching the gargantuan sums the jury gave these plaintiffs, City's net worth would be wiped out many times over.

To be sure, 10% may not be a rigid ceiling. *See* B.A., 89. Other factors might justify exceeding that percentage in another case. But here, for the reasons already discussed, the punitive damage awards are excessive when measured by the other applicable factors. That the awards represent an excessive proportion of City's net worth merely confirms what analysis of the other applicable factors reveals: the awards are too high.

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[82] *See* Brian Collins, *Washington Mutual Suspending All Lending in Mississippi?*, Origination News, Sept. 27, 2002, p. 10, reprinted at 2002 WL 11568229; *Lawsuits Push WaMu Out of Mississippi*, Nat'l Mortgage News, Sept. 16, 2002, p. 2, reprinted at 2002 WL 8160375.

[83] Plaintiffs' allegations are much like the post-claim underwriting that this Court has rightly condemned. *See Lewis v. Equity Nat'l Life Ins. Co.*, 637 So.2d 183, 188-89 (Miss. 1994). Plaintiffs obtain credit insurance, are protected against risk for its full term, but then claim years later, when the risk has not occurred and the policy has long since expired, that they never wanted the coverage to begin with and would not have purchased it if only someone had told them about it orally. These claims are easily made and virtually impossible to refute since no employee who closed hundreds of loans over the course of many years could truthfully say he or she recalled any single loan closing.

b) The Multiple Punitive Damage Awards Exceed The Amount Needed To Punish And Deter

The final factor under Mississippi common law is the amount needed to punish the defendant and deter it and others. The final statutory factor—considered only in mitigation—is the existence of other civil awards against the defendant. Plaintiffs treat these two factors together. B.A., 81-83. Their sole argument is that the outsized punitive damages awards are necessary because City's management did not, itself, investigate plaintiffs' claims before or during trial despite its knowledge of those claims and their seriousness. *Id.*

Plaintiffs cite no authority for the novel proposition that punitive damages may be increased because a defendant chose not to investigate the plaintiff's charges before rendition of judgment. Punitive damages are to punish wrongful conduct and deter others from engaging in that conduct—not to encourage defendants to investigate plaintiffs' claims before trial.

Furthermore, City's management did not investigate plaintiffs' claims because it hired attorneys to do so for it. 12 R.T. 201:20-202:16, 204:17-25. Counsel were more skilled at the task; they can employ civil discovery to ferret out the facts; and what they do is shielded from the other side's view by the attorney-client and work product privileges. In directing its attorneys to perform the investigation for it, City showed no recalcitrance, just common sense when confronted by a large lawsuit.

None of plaintiffs' arguments can justify the punitive damage awards in this case. They are excessive under state as well as federal standards and should be reversed.

V

THE JUDGMENT SHOULD BE REVERSED BASED ON PROCEDURAL ERRORS

A. The Trial Court Erred In Giving Plaintiffs' Proposed Instructions On Their Four Claims

In its opening brief, City showed that the trial court erred in giving plaintiffs' proposed instructions P-10, P-11, P-12, and P-17 which improperly defined the elements of their four causes of action. A.O.B., 86-92. The instructions were erroneous because (a) they adopted the form that this Court condemned in *Baymon*, 732 So.2d at 273-74, (b) they omitted key elements of each claim, and (c) they conflicted with the defendants' jury instructions which the trial court also gave on the same subjects.

None of the array of arguments plaintiffs raise to the contrary in their brief, B.A., 91-97, can properly avoid reversal for this error, as shown below.

1. City Did Not Waive The Instructional Error

Plaintiffs first argue that City waived this issue by failing to object to plaintiffs' instructions as required by Miss. R. Civ. P. 51(b)(3). B.A., 95-96.

They are wrong. During the jury instruction conference in the trial court, City objected at length to the four instructions at issue on this appeal. 22 R.T. 1559:5-1563:2 (objection to P-10), 1565:21-1568:3 (objection to P-11), 1570:25-1572:13 (objection to P-12), 1574:4-25 (objection to P-17). After the court indicated it would give plaintiffs'

instructions anyway, with various changes,[84] 22 R.T. 1565:12-19, 1572:24-1573:1, 1575:7-8, 1599:4-1607:18, City reiterated its objections, 22 R.T. 1613:5-12. City restated its objections to these instructions a third time in its motion for a new trial and judgment notwithstanding the verdict. 10 C.T. 1358 ¶13, 1361-62 ¶32, 1367 ¶62; *see Ducker v. Moore*, 680 So.2d 808, 810 (Miss. 1996).

"[I]t can hardly be said that [City] waived its right to object before this Court" when City made its objections clear both before and after the verdict, as just noted, and by its directed verdict motion, in limine motion, summary judgment motion, and by proposing its own, legally correct instructions on exactly the same issues *Wal-Mart Stores, Inc. v. Frierson*, 818 So.2d 1135, 1139 (Miss. 2002). The trial court was well aware of City's objections. It rejected them several times over. Further objection would have been futile.[85]

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[84] Plaintiffs quote some of the discussion about these changes in an effort to prove that City never objected or even acquiesced in the instructions. B.A., 99. That is not what happened. Instead, City presented its objections to plaintiffs' instructions the prior afternoon. 22 R.T. 1559:5-1563:2, 1565:21-1568:3, 1570:25-1572:13, 1574:4-25. The trial court overruled those objections, saying it would give plaintiffs' instructions anyway. 22 R.T. 1565:12-19, 1572:24-1573:1, 1575:7-8. Then, the next morning the trial court made minor editorial changes to plaintiffs' instructions. 22 R.T. 1599:4-1607:18. City assented to those small changes, which was all that was up for discussion that morning, the trial court having already indicated it would not hear reargument of the objections presented the prior afternoon. 22 R.T. 1550:4-18. At the end of that discussion, City reiterated that it stood by the objections it had made the prior afternoon. 22 R.T. 1613:5-12.

[85] Without so naming its holding, *Frierson* appears to adopt the "futility" exception that all federal courts of appeals recognize to Fed.R.Civ.P. 51, which Miss. R. Civ. P. 51(b)(3) copies verbatim. 9 Moore's Federal Practice, §51.12[2][a], p. 51-41 (3rd ed. 1997). Under that exception, "[a] litigant is excused from complying with the strict (Fn. cont'd)

2. Plaintiffs' Four Instructions Were Legally Improper

As shown in City's opening brief, plaintiffs' four instructions were legally erroneous, first, in closely following the form that this Court found improper in *Baymon,* 732 So.2d at 273-74. A.O.B., 87-89. Plaintiffs contend otherwise claiming the penultimate sentence of their instruction differs significantly from the wording of the final sentence of the *Baymon* instruction. B.A., 98. A side-by-side comparison shows highlights those differences (shown here in bold italics):

Plaintiffs' Instruction P-10	***Baymon* Instruction**
If you find ***by a preponderance of the evidence*** that by such acts [defendant] did not act in good faith and fair dealing with a plaintiff ***and such acts caused injury, if any***, you must return a verdict in favor of ***that*** plaintiff.	... and if you ***further*** find that by such acts [defendant] did not act in good faith and deal fairly with Plaintiff, you must return a verdict in favor of Plaintiff. *Baymon,* 732 So.2d at 274.

As one can easily see, plaintiffs' instruction differs from the *Baymon* instruction in only three respects: it deletes the word "further," and adds "preponderance of the evidence" and "caused injury." These small changes do not address, let alone cure, the error this Court found in the *Baymon* instruction. Both the instruction given here and that

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(Fn. cont'd)
objection requirement of Rule 51 if the district court is aware of the party's position and it is plain that further objection would be futile." *Id.*, at pp. 51-40.2 to 51-41; *Ecolab, Inc. v. Paraclipse, Inc.*, 285 F.3d 1362, 1370 (Fed. Cir. 2002); *Ross v. Garner Printing Co.*, 285 F.3d 1106, 1111-12 (8th Cir. 2002); *Gulliford v. Pierce County*, 136 F.3d 1345, 1348 (9th Cir. 1998). The purpose of Rule 51 is to "allow the trial court an opportunity to cure any defects in the instructions before sending the jury to deliberate"; hence, no particular formality is required so long as the trial court is informed of the potential error and given the chance to correct it. *Medforms, Inc. v. Healthcare Management Solutions, Inc.*, 290 F.3d 98, 112 (2d Cir. 2002). This Court should apply the same principle here.

condemned in *Baymon* "suggest[ed] that [the defendant] had in fact committed all the acts alleged, and that the only issue for the jury to decide was whether such actions breached the duty of good faith and fair dealing." *Baymon*, 732 So.2d at 274. Plaintiffs' instructions in this case continued to do so despite the three small word changes to which plaintiffs point in their brief.

Nor was *Baymon* error the sole flaw in these instructions. *See* A.O.B., 89-90. Each of them told the jury it "must" return a plaintiffs' verdict upon finding that the evidence established less than all elements of the claim. For example, the fraud instruction told the jury to return a plaintiff's verdict without finding that the plaintiff was ignorant of the falsity of the alleged misrepresentation or that the plaintiff reasonably or justifiably relied upon it. 9 C.T. 1282. The other instructions' similar omissions are detailed in City's opening brief. A.O.B., 90 n. 95.

Plaintiffs' brief is utterly silent about these errors in their instructions. They make no effort to show that the instructions are legally proper. They apparently hope that, like a cuttlefish, the error will disappear from the Court's view in a cloud of ink. It cannot. The error is too blatant.

3. Plaintiffs' Instructions Conflicted With City's

City's opening brief also points out that the trial court followed an improper procedure in giving conflicting instructions, never attempting to resolve the differences between the instructions submitted by the opposing parties, but simply giving both sets. A.O.B., 90-92.

Unquestionably, it is error to give inconsistent or conflicting jury instructions. This Court has said so many times. *Strickland v. Rossini*, 589 So.2d 1268, 1273 (Miss. 1991); *Payne v. Rain Forest Nurseries, Inc.*, 540 So.2d 35, 40-41 (Miss. 1989); and cases cited at A.O.B., 90-92. That legal principle applies here even if the facts differ from those of the cases in which this Court previously applied that rule. *Cf.* B.A., 100 n. 28.

Nor can the differing instructions be passed off as simply presenting the parties' different "theories of the case." B.A., 96, 100. It is not a "theory of the case" that fraud can be proven without the elements of ignorance of falsity or reasonable reliance. It is just legal error.

Unlike *Sumrall v. Mississippi Power Co.*, 693 So.2d 359, 364 (Miss. 1997), plaintiffs' instructions here did not correctly set forth a general rule to which City's instructions added an exception.[86] *Cf.*, B.A., 98. Both sets of instructions in this case dealt with the same general rule: the elements of plaintiffs' causes of action. City's instructions properly listed all elements; plaintiffs' instructions directed the jury to return a plaintiffs' verdict upon finding only a few of those elements. The two were in irreconcilable conflict.

This conflict cannot be excused on the ground that the instructions, taken as a whole, were correct. *See* B.A., 97, 100-101. When instructions conflict, as they do here,

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[86] *Rials v. Duckworth*, 822 So.2d 283, 286 (Miss. 2002) is likewise distinguishable. There, the challenged instructions were legally correct and no conflicting instructions were given. Here, plaintiffs' instructions were legally erroneous and conflicted directly with City's legally correct instructions on the same issues.

the jury cannot take them as a whole. The very vice of the conflict is that it forces the jury to choose between the conflicting instructions, applying one and not the other. If the "taken as a whole" rubric worked in such situations, this Court would never reverse for conflict in instructions. *Strickland,* 589 So.2d at 1273; *Payne*, 540 So.2d at 40-41; and the cases cited at A.O.B., 90-92 tell a different story. The Court should follow those decisions and reverse the judgment here due to the patent error and conflict in the critical instructions on plaintiffs' four causes of action.

B. The Trial Court Abused Its Discretion In Admitting Glover's Undisclosed Expert Opinion

The six pages plaintiffs devote to the task fail to justify the trial court's admission of Dr. Glover's new opinion regarding City's net worth. *See* B.A., 101-107. A simple review of the *undisputed* facts shows why.

First, it is undisputed that plaintiffs did not properly disclose Glover's new opinion before trial. To be sure, plaintiffs did disclose Glover's identity, her area of expertise and the fact she would testify about net worth. B.A., 103. But that falls far short of a party's disclosure obligations under Miss. R. Civ. P. 26(b)(4). *Nichols v. Tubb*, 609 So.2d 277, 384-85 (Miss. 1992).

Second, it is undisputed that at her deposition, Glover gave only two opinions regarding net worth, and both pertained to corporations other than City or its successor, Washington Mutual Finance Group, LLC. 10 C.T. 1414:4-1415:10, 1420:3-25. Both opinions were based on Washington Mutual, Inc.'s most recent 10-K. 10 C.T. 1418:4-13, 1434:2-20, 1436:21-1437:8, 1441:19-25; 21 C.T. Ex. 3124-3126, 3132.

Third, it is undisputed that at trial Glover testified to a third, completely different opinion. It concerned City's successor's net worth, not some other company's. 23 R.T. 1779:3-13. And it was based on City's financial statements for 1997-2000, not on any 10-K. 23 R.T. 1779:15-28, 1783:3-15. The only things this opinion shared with the opinions Glover disclosed at her deposition were the words "net worth."[87]

Fourth, it is undisputed that plaintiffs did not disclose Glover's new opinion before trial in the manner required by Miss. R. Civ. P. 26(b)(4) and (f)(1)(B). Plaintiffs do not even try to claim they did. The only hint they gave before trial of Glover's changed opinion lay in four pages, comprehensible only to an accountant, which Glover used at trial to illustrate her new opinion.[88] 21 C.T. Ex. 3128-3131. Far from calling City's attention to those pages or Glover's changed opinion, plaintiffs purposefully obscured them—first, by simply producing them as four pages amongst more than a thousand pages of trial exhibits produced on the eve of trial, and second, by concealing those pages in the

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[87] Contrary to plaintiffs' assertion, B.A., 103, City does not argue that Glover "should have been limited to the literal content of her deposition testimony" and not be allowed to make "slight modifications to her analysis" based on new data. It contends, instead, that she should not have been allowed to testify, as she in fact did, to a completely different opinion about a different company based on different evidence and a different method of computation.

[88] In their brief, plaintiffs also quote a passage from the pre-trial hearing in which they promised not to introduce testimony regarding the net worth of any company other than City. B.A., 103-104, citing 12 R.T. 116:7-117:24. The passage proves City's argument, not plaintiffs'. That was a perfect opportunity to state clearly that Glover had come up with a new opinion regarding City's net worth—particularly since City's counsel pointed out that in deposition Glover had testified only about other companies' net worth. 12 R.T. 117:3-8. Instead of doing so, plaintiffs counsel only agreed not to present irrele-
(Fn. cont'd)

middle of Exhibit 160, carefully bookended by the work papers that Glover had produced at her deposition.[89]

Fifth, it is undisputed that when plaintiffs finally did disclose Glover's new opinion clearly—on the last day of a three-week trial, after the jury had returned its verdict on the compensatory phase of the trial, and in response to City's motion to exclude Glover's testimony—City immediately objected on the ground that the new opinion had not been properly disclosed, 23 R.T. 1744:5-1750:8, and objected again on the same ground after Glover had been permitted to testify to her new opinion, 24 R.T. 1789:11-16, 1791:13-1792:13.

These undisputed facts show beyond any question that plaintiffs violated Miss. R. Civ. P. 26 by not disclosing "the substance of every fact and every opinion" they expected Glover to state. As the trial court found, Glover's new opinion "was not provided to the defendant." 24 R.T. 1796:12-13.

Plaintiffs offer no excuse for sandbagging City in this manner. Instead, they just argue their misdeed should go unpunished. But if this blatant violation of rule 26 goes

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(Fn. cont'd)
vant evidence about other companies, purposefully leaving City in the dark as to how plaintiffs intended to prove its net worth.

[89] Only by the most painstaking, page-by-page review, could City have discovered plaintiffs' surreptitious insertion of the four new pages. City's counsel were not that suspicious. They did not find the needle plaintiffs had so carefully hidden in the haystack, and objected to Exhibit 160 on other grounds, not realizing that concealed within it lay the clue to Glover's new opinion. Plaintiffs make much of this fact. B.A., 106. But it does not aid them. The duty to disclose the new opinion in a meaningful manner lay on them. It was not City's responsibility to ferret it out.

unrectified, the rule will be nullified. Why would any party disclose expert opinions when sandbagging an opponent brings great rewards and no punishment?

Further, none of the reasons advanced for withholding sanctions bears scrutiny. As already shown, the trial court's two reasons do not. Exhibit 160 did not properly disclose—indeed, it purposefully concealed—the new opinion. *See* A.O.B., 96 n. 99. That Glover's new opinion was based on data City supplied does not lessen the prejudice. Not having been forewarned, City had no rebuttal expert and was unprepared to cross-examine. *See* A.O.B., 97.

Contrary to plaintiffs' assertion, B.A., 106-107, City did object immediately when plaintiffs first disclosed Glover's new opinion, 23 R.T. 1748:7-1750:8, and it suggested the only remedy then possible—not admitting new opinion in evidence, *id.* City's cross-examination of Glover was, indeed, perfunctory, as plaintiffs note. B.A., 106. It was because plaintiffs' sandbagging left City unprepared to deal with the new opinion:

> Before an attorney can even hope to deal on cross-examination with an unfavorable expert opinion he must have some idea of the bases of that opinion and the data relied upon. If the attorney is required to await examination at trial to get this information, he often will have too little time to recognize and expose vulnerable spots in the testimony.

Smith v. Ford Motor Co., 626 F.2d 784, 794 (10th Cir. 1980).

Finally, Glover's new opinion was especially prejudicial as it is the only evidence of net worth in the case. *See* B.A., 107. Because plaintiffs did not disclose, before trial, that they had any proper evidence on the issue, City did not prepare and was unable to present any rebuttal to Glover's new opinion. Plaintiffs bore the burden of proof on the

issue. They concealed their only evidence regarding it. City had no reason to prepare a response and thus was caught totally off-guard when plaintiffs suddenly revealed their new expert opinion on the last day of trial.

The trial court plainly abused its discretion in permitting Glover to state her new, undisclosed opinion. That error was prejudicial. It requires reversal of the punitive damage portion of the judgment.

VI

CONCLUSION

For the reasons stated above and in City's opening brief, the Court should reverse the judgment and direct entry of judgment in City's favor, or in the alternative, reverse for a new trial, with or without giving plaintiffs the alternative of accepting a substantial remittitur of emotional distress damages and punitive damages.

Dated: May 23, 2003.

SEVERSON & WERSON,
A PROFESSIONAL CORPORATION
WATKINS LUDLAM WINTER & STENNIS, P.A.
JESS H. DICKINSON

By Katharine M. Samson
Katharine M. Samson

Attorneys for Defendant and Appellant
Washington Mutual Finance Group, LLC

CERTIFICATE OF SERVICE

I, Katharine M. Samson, hereby certify that I have this date mailed, by United States mail, sufficient postage affixed, a true and correct copy of the above and foregoing document to the following:

Edward Blackmon, Jr. Esq.
Blackmon, Blackmon & Evans
901 E. Peace Street
Canton, MS 39046

H. Donald Brock, Jr., Esq.
Whittington, Brock, Swayze & Dale
P.O. Box 941
Greenwood, MS 38935-0941

Michael Hartung, Esq.
120 North Congress Street, Suite 500
Jackson, MS 39201

Richard Freese, Esq.
2900 Hwy 280
Morgan Keegan Center, Suite 240
Birmingham, AL 35223

Tim Goss, Esq.
Stephanie M. Daughdrill, Esq.
Capshaw, Goss & Bowers, L.L.P.
3031 Allen, Suite 200
Dallas, Texas 75204

Hon. Jannie M. Lewis
Circuit Court Judge
P.O. Box 149
Lexington, MS 39095

SO CERTIFIED, this the 23rd day of May, 2003.

Katharine M. Samson