

IN THE SUPREME COURT OF MISSISSIPPI

UNITED AMERICAN INSURANCE COMPANY

APPELLANT

VS.

CASE NO. 2005-CA-0048-SCT

NATALIE MERRILL

APPELLEE

**APPELLEE, NATALIE MERRILL'S RESPONSE IN OPPOSITION TO
APPELLANT'S MOTION FOR REHEARING**

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TO APPELLANT'S MOTION FOR REHEARING**

COMES NOW, the Appellee, NATALIE MERRILL, by and through undersigned counsel of record, and files this Response in Opposition to Appellant's Motion for Rehearing, as follows:

**The Issues Raised In United's Motion For Rehearing Were Not Raised
In The Appeal, And Are Barred From Reconsideration**

1. The law in Mississippi has long recognized a bar to consideration of issues not presented on appeal in the context of a Motion for Rehearing:

The purpose of a Petition for Rehearing is not to allow counsel to add assignments of error which, for whatever reason, were not included in the appellant's original brief to this court. Judicial economy dictates that we consider only those assignments of error set forth in the original brief. The purpose of the petition for rehearing is to allow the parties to point out the "points of law or fact which in the opinion of the petitioner this Court has overlooked or misapprehended" (citation omitted) **We cannot misapprehend or overlook that which is not presented for our review.**

MST, Inc. vs. Miss. Chemical Corporation, 610 So.2d 299, 304 (Miss. 1992) (emphasis added) see also *Brandau vs. State*, 662 So.2d 1051, 1053 (Miss. 1995). "A rehearing does not encompass a new set of arguments; therefore, it [is improper] to raise a new legal or factual argument in [petitioner's] motion for rehearing." *White vs. State*, 761 So.2d 221, ¶ 22 (Miss. Ct. App. 2000). As this Court recognized in its Opinion, the Record is clear that United did not raise the constitutional issue presented in its Motion for Rehearing, nor any constitutional challenge to the amount of the punitive damages verdict rendered against it, in its Brief, Reply Brief, nor Oral

Argument before this Court. *United American Ins. Co. vs. Merrill*, No. 2005-CA-0048-SCT, ¶¶ 33, 112. Accordingly, no such issue could have been “misapprehended or overlooked” by this Honorable Court, and United’s Motion for Rehearing should be DENIED; without discussion of the constitutional issues raised, for the first time, therein.

2. United’s Motion is nothing more than a “back door” attempt to “preserve” issues not raised in the proceedings below, for presentation to the United States Supreme Court. United fails to cite to this Court any authority or facts justifying this Court’s consideration of the constitutional issues urged by United, for the first time, in its Motion for Rehearing. Tellingly, the case-law proffered by United as support for this Court’s consideration of the constitutional issue presented for the first time in United’s Motion for Rehearing addresses the United States Supreme Court’s ability to address issues not raised by the petitioner on appeal – not *this Court’s* ability to do so. (See *Raley vs. Ohio*, 360 U.S. 423, 436-37 (1959); *Jenkins vs. Georgia*, 418 U.S. 153, 157 (1974); and *Ocala Star-Banner Co. vs. Damron*, 401 U.S. 295, 299 n.3 (1971)). Each of those cases stands for the proposition that, where a State Supreme Court “reaches and decides” a constitutional issue, notwithstanding the appellant’s failure to present the issue for appeal, such issue may properly be considered by the United States Supreme Court. See, eg. *Jenkins vs. Georgia*, 418 U.S. 153, 157 (1974).

3. Obviously, United does not believe the single paragraph in this Court’s opinion addressing the amount of the punitive damages verdict in terms of its reasonableness to the amount of harm to the plaintiff (¶ 115) is sufficient to demonstrate this Court “reached and decided” the un-argued constitutional issue – for the purposes of preserving it for the United States Supreme Court’s consideration. Accordingly, United is seeking to have this Court “reach and decide” the issue, in the context of consideration of the issue raised for the first time in

United's Motion for Rehearing, so that the matter may be "preserved" for attempted certification to the United States Supreme Court.

4. In any event, the United States Supreme Court cases cited by United do not constitute authority overcoming the longstanding bar to *this Court* deciding issues, in the context of a Motion for Rehearing, that were not "set forth in the original brief" (see *MST, Inc*, 610 So.2d at 304). In fact, the only authority offered by United that would provide an avenue for this Court to consider the issues raised, for the first time, in United's Motion for Rehearing is *Hays Finance Co. vs. Bailey*, 56 So.2d 76 (Miss. 1952), cited by United in footnote 3 of its Motion. *Hays* merely asserts, forty (40) years before this Court clearly enunciated the bar to considering issues on petition for rehearing that were not presented in the petitioner's brief, that

... new points, made and presented for the first time on a suggestion of error, will not be considered unless an exceptional reason is shown

Hays, at 76. United has not presented this Court with *any* evidence suggesting the presence of "exceptional" circumstances allowing this Court to consider the amount of the punitive damages verdict, where United did not present any argument or evidence on that issue in its briefs and argument to this Court.

5. If anything, the Record in this case demonstrates the absolute lack of "exceptional" circumstances justifying this Court's consideration of issues presented, for the first time, in United's Petition for Rehearing:

a. *Philip Morris USA vs. Williams*, 127 S.Ct. 1057 (2007), which United argues constitutes a "fundamental change" in the law, was rendered on February 20, 2007. United requested, and was granted additional time to file its Reply Brief in this cause, and ultimately filed its Reply Brief on March 14, 2007, more than three weeks after the *Williams* opinion was published. Although this Court can take Judicial Notice that United States Supreme

Court decisions addressing the constitutionality of punitive damages generate much discussion among the Bar when they are rendered, United made no effort to address the “*Williams* issue” in its Reply Brief.

b. Oral Argument in this case was not conducted until June 5, 2007 – almost four (4) months after *Williams* was published. Again, United failed to invoke *Williams*; or to make any argument whatsoever about the amount of punitive damages awarded to the Plaintiff during oral argument, despite being expressly asked if it wanted to do so by this Court. Rather, United maintained its only argument regarding punitive damages was the issue of whether the question of punitive damages should have been presented to the Jury.

c. Contrary to United’s allegations of a “fundamental change” in the law, United States Supreme Court precedent regarding the amount of punitive damages that may be rendered, and the effect of evidence about harm and/or potential harm to others, existed long before United filed its Notice of Appeal on January 5, 2005, and its initial Brief on September 29, 2006. By way of limited example, the United States Supreme Court issued its opinion in *BMW vs. Gore*, 517 U.S. 559, on May 20, 1996. Therein, the United States Supreme Court noted Dr. Gore requested a \$4,000,000 punitive damages award “to provide an appropriate penalty for selling approximately 1,000 cars for more than they were worth,” and held that the \$4,000,000 punitive damages award rendered by the Jury was an improper sanction for injuries committed against other individuals in other States. *BMW* at 564, 565 and 572. Despite longstanding precedent addressing the amount and constitutionality of punitive damages awards that may be based on harm to others, United failed to present any issues in this regard in its designation of the issues, Briefs, or oral argument.

d. The “*Williams* issue” is but another rung in a long established line of United

States Supreme Court Opinions, following *BMW*, that address the amount, and constitutionality of punitive damages awards (see also *State Farm Mut. Aut. Ins. Co. vs. Campbell*, 538 U.S. 408 (2003)). The simple fact is, United failed to raise *any* of the established constitutional criteria governing the amount of punitive damages which can be rendered, nor any challenge whatsoever to the amount of punitive damages rendered against it, as assignments of error in its Briefs or oral argument to this Court.

e. The pre-existing precedent for the challenge United argues it was prohibited from asserting as an assignment of error due to the timing of the *Williams* opinion is evident from a review of *Williams* itself. The Court in *Williams* noted that Philip Morris attempted to have the Trial Court instruct the Jury that it “could not seek to punish Philip Morris for injury to other persons not before the Court”, and that Philip Morris assigned as error the Trial Court’s failure to grant the proffered instruction. *Williams*, 127 S.Ct. at 1061. United failed to offer any such instruction at Trial, however, or to make any similar assignment of error in its appeal. In fact, United failed to assign as alleged error on appeal the Court’s giving, or failure to give, *any* of the punitive damages instructions given to the Jury by the Trial Court.

f. United’s own Motion for Rehearing acknowledges the issues it is now trying to raise, for the first time, were not “unknown” to United at the time it sought and briefed its appeal. Citing closing argument of Counsel for Plaintiff about the reprehensibility of United’s conduct, United alerted this Court to the fact the Record reflects

United’s trial counsel promptly objected to this appeal to nonparty injuries, *see id.* at 932-33, but the trial judge declined to do anything other than to instruct Merrill’s lawyer to “[b]e careful.” *Id.*

(see pp. 6-7 of United’s Motion). United’s admission it perceived error, during the Trial of this matter, regarding the Jury’s consideration of evidence related to potential injury to non-

parties conclusively establishes that United recognized this issue as potential error, but chose not to assert same as a basis for appeal.

6. Finally, United made absolutely no effort to utilize the procedural tools addressing how a party can alert this Court to “supplemental authorities”. Rule 28(j) of the Mississippi Rules of Appellate Procedure provides the mechanism for alerting the Court to newly rendered, “pertinent and significant authorities”. This Court’s Opinion was not handed down until September 6, 2007, almost seven (7) months after the United States Supreme Court’s *Williams* Opinion was published; however, United never filed a Rule 28(j) Citation to Supplemental Authorities.

7. United’s Motion for rehearing impermissibly seeks to present issues not raised by United in its Briefs, in oral argument, nor in a timely Motion to Supplement the Record made in accordance with the Mississippi Rules of Appellate Procedure. Pursuant to Mississippi law, United is thus prohibited from raising those issues at this juncture, and United has not provided any evidence of “exceptional” circumstances that would warrant an exception to this long standing rule of law and procedure. United’s Motion for Rehearing should be DENIED in its entirety, with no discussion of the constitutional issues raised therein.

**Even If The Issues Addressed In United’s Motion
Were Properly Before This Court, United’s Motion Should Be Denied**

8. Subject to and without waiving her argument that the issues raised in United’s Motion are not properly before this Court, and may not be considered by this Court; Merrill would show that, in any event, the punitive damages verdict against United complies with the constitutional limitations enunciated by the United States Supreme Court. Contrary to United’s newly raised allegations, the Record in this case contains no evidence supporting, much less mandating a conclusion that “the \$900,000 punitive damages award entered rests, at least in part, on allegations of injuries to non-parties”, as alleged by United.

9. In *Williams*, the United States Supreme Court found error in the Trial Court's refusal to grant an instruction that the members of the Jury "are not to punish the defendant for the impact of alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims . . .", paired with the Jury's return of a punitive damages verdict that was 100 times the compensatory damages awarded to the Plaintiff, constituted grounds for vacating the Trial Court's judgment and remanding the issue for further consideration in light of constitutional constraints. *Williams*, S.Ct. at 1061. In the case at bar, no similar instruction was proffered by United, and the punitive damages verdict awarded by the Jury was less than 2 times the amount of the compensatory damages awarded by the Jury. *United American Ins. Co. vs. Merrill*, No. 2005-CA-0048-SCT, ¶ 23.

10. The punitive damages jury instructions given by the Trial Court included a specific instruction, proffered by United, that the amount of punitive damages, if any, "must be reasonably related to the actual damages sustained by Plaintiff Natalie Merrill" (Instruction DUA-15; R, Vol. 18, 2670). Clearly, the amount of the Jury's punitive damages verdict, which was less than 5 times the amount of actual damages awarded to Mrs. Merrill after remittitur, and affirmed by this Honorable Court, was "reasonably related to the actual damages sustained by" Merrill. See Merrill, No. 2005-CA-0048-SCT, ¶ 115. As noted above, United failed to submit any of the punitive damages instructions given, or refused, by the Trial Court as assignments of error in its Briefs or oral argument to this Court.

11. United asserts in its Motion that it "objected repeatedly [to] evidence of 'other claims'" during the Trial of this matter. The Record is clear, however, that United did not address *any* of these assignments of error in the Brief it filed with this Court, despite the fact it devoted five (5) pages of its Brief to alleged "errors in evidentiary rulings". (See Brief of the Appellant, pp. 38-

43). Accordingly, none of the “factual assertions” regarding evidence of “other claims” set forth in United’s Motion may be considered in the context of this Motion for Rehearing. *White vs. State*, 761 So.2d 221, ¶ 22 (Miss. Ct. App. 2000).

12. Ultimately, United concedes, as it must, that evidence of “other claims”, or “conduct to others” *is permissible* to demonstrate reprehensibility. The United States Supreme Court in *Williams* confirmed that

While evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk to the general public, and so was particularly reprehensible, a jury may not go further and use a punitive damages verdict to punish a defendant directly for harm to others.

The Record in this case clearly demonstrates that the Jury acted within these confines. The Jury was instructed by the Trial Court, in an instruction submitted by United, that

In setting the amount of punitive damages, you are to consider the nature and degree of reprehensibility of the defendant’s wrongdoing, including factors such as whether the harm caused was merely economic as opposed to physical, whether the target of the conduct had financial vulnerability, the amount of harm caused, **whether the conduct involved repeated actions** or was an isolated incident, and whether the harm was caused maliciously, intentionally, or inadvertently.

(Instruction DUA-20; R, Vol. 18, 2672-2675, 2675) (emphasis added). United’s own instruction instructed the Jury to consider the reprehensibility of its conduct, and that they could consider whether the conduct involved “repeated actions” as part of its consideration! This instruction, combined with DUA-15’s admonition that the amount of punitive damages “must be reasonably related to the actual damages sustained by Plaintiff Natalie Merrill” (R, Vol. 18, 2670), and the fact the Jury’s punitive damages award was less than 2 times the amount of compensatory damages awarded to the Plaintiff by the Jury, clearly demonstrate the Jury’s punitive damages award was well within the constitutional confines established by the United States Supreme Court.

Conclusion


13. United's Motion for Rehearing seeks to raise issues, for the first time, that were not presented by United as part of its appeal. Accordingly, they are not proper for consideration by this Court in a "rehearing" of the facts and legal issues considered as part of United's appeal. United's Motion for Rehearing should be DENIED, without addressing the constitutional arguments made therein.

14. Even if this Court were to determine circumstances warrant excusing United from the bar to consideration of the constitutional issues presented, for the first time, in United's Motion for Rehearing, United's Motion should be DENIED. The Record in this cause establishes the Jury was properly instructed on the parameters of what it could consider, and the limitations on the relationship of any punitive damages award to the harm actually sustained by the Plaintiff. Additionally, the Record demonstrates the amount of the punitive damages verdict does not violate any constitutional constraints enunciated by the United States Supreme Court, but that it was reasonably related to the amount of harm actually suffered by the Plaintiff, and to the degree of reprehensibility of United's conduct.

WHEREFORE, PREMISES CONSIDERED, Appellee, Natalie Merrill, respectfully requests this Honorable Court enter an Order DENYING United's Motion for Rehearing, and granting any and all additional relief deemed appropriate by this Honorable Court, including assessing all costs of these proceedings to United.

Respectfully submitted,
NATALIE MERRILL, Appellee

By: 

Christopher C. Van Cleave, MSB # 

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CERTIFICATE OF SERVICE

I, undersigned counsel, do hereby certify that I have this day served, via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing Appellee's Response in Opposition to Motion for Rehearing to the following:

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Respectfully submitted, this, the 17th day of October, 2007.

NATADIE MERRILL, Appellee

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