IN THE SUPREME COURT OF MISSISSIPPI

KATHERINE L. BUCHANAN	**APPELLANT**
v.	**CAUSE NO. 2006-CA-01375**
AMERISTAR CASINO VICKSBURG, INC.	**APPELLEE**

On Appeal from the Circuit Court of Warren County, Mississippi
Honorable Frank G. Vollor, Presiding

BRIEF OF APPELLEE AMERISTAR CASINO VICKSBURG, INC.

ORAL ARGUMENT IS NOT REQUESTED

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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 Appeals may evaluate possible disqualification or recusal.

I. Estate of Katherine L. Buchanan

II. David M. Sessums, Esq., and the law firm of Varner, Parker & Sessums, P.A.

III. Ameristar Casinos, Inc.

IV. Ameristar Casino Vicksburg, Inc.

V. Robert P. Thompson, Esq., and the law firm of Copeland Cook Taylor & Bush, P.A.

VI. Paul Kelly Loyocano, Esq.

VII. Herbert C. Ehrhardt, Esq., Bethany Brantley Johnson, Esq., and the law firm of Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

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STATEMENT OF THE CASE

On March 8, 1997, the now-deceased Plaintiff-Appellant, Katherine Buchanan,[1] told her employer, Defendant-Appellee Ameristar Casino Vicksburg, Inc. ("Ameristar"), she had injured her knee while on duty that day. (R. 27; ARE Vol. I, Tab 2).[2] At that time, Ameristar was insured under a workers' compensation insurance policy issued by Legion Insurance Company ("Legion"). (R. 117-164; ARE Vol. I, Tab 3). Legion had contracted with a third party administrator, GAB Robins North America, Inc. ("GAB"), to provide claims handling services for claims asserted by Ameristar employees, including the claim made by Katherine Buchanan. (R. 165-187; ARE Vol. I, Tab 4).

Based on conflicting witness statements and a surveillance videotape which did not substantiate Buchanan's claimed injury as she described it, Ameristar, Legion and GAB agreed that Buchanan's workers' compensation claim should be denied. (R. Env. 1, Ex. D-10; ARE Vol. II, Tab 18, Ex. D-10). As a result, Buchanan filed a Petition to Controvert with the Mississippi Workers' Compensation Commission ("MWCC") on March 26, 1997. *Id.* GAB hired William A. Patterson, a lawyer with the firm of Wilkins Stephens & Tipton, P.A.,[3] to advise GAB, Legion and Ameristar on Buchanan's claim. (R. Env. 1, Ex. D-14; ARE Vol. II, Tab 18, Ex. D-14).

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[1]As indicated in the previously filed Suggestion of Death, Ms. Buchanan is now deceased and none of her heirs have appeared in this matter.

[2]Appellee's Record Excerpts (two volumes) are being filed contemporaneously with Appellee's Brief. Pursuant to M.R.A.P. 28(e), references will be made to both the record itself and to Appellee's Record Excerpts. For clarification, Ameristar will use the following notations for these references:
Supreme Court Record Vols. 1-4 (which contain consecutively numbered pages): R. __.
Supreme Court Record Vol. 5 (transcript): R. Vol. 5, p. __.
Supreme Court Record Envelopes 1 and 2 (exhibits from trial): R. Env. ___, Ex. __.
Appellee's Record Excerpts: ARE Vol. __, Tab ___, p. ___.

[3] During the time period at issue, the firm's name was McCoy, Wilkins, Stephens & Tipton, P.A.

Buchanan's workers' compensation claim went before a MWCC administrative law judge on November 30, 1998, and the ALJ rendered her decision on December 15, 1998, that Buchanan's injury was compensable. (R. Env. 1, Ex. P-39; ARE Vol. II, Tab 18, Ex. P-39). As permitted under MWCC rules, that initial decision was appealed by the employer/carrier in early 1999. (R. Env. 1, Ex. D-75; ARE Vol. II, Tab 18, Ex. D-75). Buchanan immediately began threatening a bad faith lawsuit if the appeal was not dropped. *Id.* In December 1999, Ameristar withdrew the pending appeal, and GAB ultimately paid Buchanan all workers' compensation benefits due her from March 8, 1997 forward, with interest. (R. Env. 1, Ex. D-85; ARE Vol. II, Tab 18, Ex. D-85).

Those underlying facts are the basis for Buchanan's instant lawsuit. Buchanan initially sued Ameristar and Legion on May 27, 1999, asserting bad faith denial/delay of workers' compensation benefits, and demanding $1,500,000 in compensatory damages and $20,000,000 in punitive damages. (R. 26-32; ARE Vol. I, Tab 2). Some time later, Buchanan amended her lawsuit to add GAB as a defendant, claiming that GAB, Legion and Ameristar acted in concert to intentionally harm Buchanan. (R. 242; ARE Vol. I, Tab 5). Thereafter, Buchanan amended her lawsuit yet again to add still another defendant, Ameristar Casinos, Inc. ("ACI"). (R. 283; ARE Vol. I, Tab 7). By this time, Buchanan's demand had increased to $2,500,000 in actual damages and $30,000,000 in punitive damages. *Id.* ACI, the corporate parent Ameristar was later dismissed on its summary judgment motion. (R. 332; ARE Vol. I, Tab 8).[4] Legion was later declared insolvent, so the case proceeded to trial on April 10, 2006, against Ameristar and GAB as defendants.

At the close of the Plaintiff's case-in-chief, GAB moved for a directed verdict in its favor. Plaintiff did not oppose the motion, thereby consenting to GAB's dismissal.

During the trial, the parties introduced numerous exhibits to establish the various roles played by Legion, GAB and Mr. Patterson, the attorney hired by GAB to defend against Buchanan's claims, in the decisions concerning payment of Buchanan's workers' compensation claim. (R. Env. 1; ARE Vol. II, Tab 18, Exs. D-10, D-14, D-15, D-22, D-24, D-27, D-32, D-34, D-39, D-40, D-67, D-75, D-82 and D-85). In addition, the jury heard live testimony from two GAB adjusters who were involved in handling Buchanan's claims as well as Mr. Patterson. (R. Vol. 5, pp. 100-01; ARE Vol. II, Tab 23, pp. 100-01). Bill Patterson testified as to his advice to GAB, Legion and Ameristar, including his opinion that their decision to deny Buchanan's claim had been based on arguable and legitimate reasons, not bad faith. (R. Env. 1, Ex. D-82; ARE Vol. II, Tab 18, Ex. D-82). The jury also watched, more than once, the surveillance videotape showing Buchanan before, during and after she suffered her knee injury at work, with no outward sign of any pain, grimace or injury at any time during the period she claimed she had been injured. (R. Env. 2, D-99).[5]

During the jury charge conference, Ameristar's counsel requested that a nominal damages instruction be given based on the scant evidence of actual damages that had been admitted. The circuit court agreed to include three choices on the jury verdict form – for the defendant; for the plaintiff for nominal damages; or for the plaintiff in some other amount. (R. Vol. 5, pp. 25-28; ARE Vol. II, Tab 19). Armed with hearing six days of testimonial evidence and having more than fifty exhibits, the jury retired for deliberations to determine whether to award damages to Buchanan against the **sole remaining defendant**, Ameristar.

The jury returned a verdict in Buchanan's favor on April 18, 2006, assessing her actual damages at $30,000. (R. 333; ARE Vol. I, Tab 9). That amount, of course, is astronomically less

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[4] This Court affirmed ACI's dismissal in Buchanan's separate appeal of that judgment in *Buchanan v. Ameristar et al,* 2005-CA-01924-SCT, on March 15, 2007.

[5] D-99 is a DVD copy of the surveillance videotape which was shown to the jury during trial.

than the $2,500,000 that Buchanan asked for in actual damages. Under the jury instructions given at the liability stage, the verdict was based on a finding that Ameristar lacked a justifiable or arguable reason to deny Buchanan's claim for workers' compensation benefits. (R. 333; ARE Vol. I, Tab 9).

The following day, the jury returned for the punitive damages phase of the trial. Buchanan chose to incorporate all evidence introduced during the liability phase of the trial, to offer a stipulation as to Ameristar's net worth, and then rest without calling any live witnesses or offering any additional evidence. (R. Vol. 5, p. 56; ARE Vol. II, Tab 20). Ameristar called one live witness, Kelvin G. Mays, who testified as to Ameristar's numerical data regarding workers' compensation claims. Mays relied on Excel spreadsheets that he had prepared and testified as to the number of workers' compensation claims made per year (1994 – 2003), the number of those claims in which Ameristar denied compensability, and the total amount of money paid out by or on behalf of Ameristar on those claims. (R. Vol. 5, pp. 63-84; ARE Vol. II, Tab 21). His testimony was that during those years, Buchanan's claim was the only claim that Ameristar had initially denied as to compensability. *Id.*

Mays' testimony was the only evidence presented during the punitive damages phase of the trial. Based on Buchanan's request to incorporate all other evidence into the punitive phase, however, the jury was instructed that it was to consider **all** testimony and evidence it had heard and received throughout the trial in reaching its verdict. (R. Vol. 5, p. 56; ARE Vol. II, Tab 20). The circuit court sent all exhibits from the liability phase to the jury room during the jury's deliberations on the punitive damages verdict, at Buchanan's request. (R. Vol. 5, p. 104-105; ARE Vol. II, Tab 25).

Shortly after receiving jury instructions and retiring to the jury room, the jury returned a verdict for the defendant, Ameristar, on the issue of punitive damages. The Judgment reflecting

the $30,000 actual damages verdict in Buchanan's favor and the defense verdict on punitive damages was entered on April 21, 2007. (R. 333; ARE Vol. I, Tab 9). Within ten (10) days, as required by Miss. R. Civ. P. 59, Buchanan filed a Motion for New Trial, or in the Alternative, for JNOV. On April 28, 2007, Buchanan filed a Revised Motion for New Trial, but declined to make any effort to schedule a hearing to bring that motion before Judge Vollor.

Instead, Buchanan's counsel participated in the deposition of another of his clients, Deborah Russell. Mr. Sessums was representing Russell in an unrelated workers' compensation action against Ameristar arising out of an injury Russell received in 2005. (R. 450-451; ARE Vol. I, Tab 12). That deposition was conducted on July 6, 2006, and within days of that deposition, Buchanan filed a "Supplement" to her Motion for New Trial, relying on information her attorney obtained in the unrelated case as additional "evidence" warranting a new trial. (R. 421-441; ARE Vol. I, Tab 11). With that "supplement" attached, Buchanan promptly brought her motion for new trial before Judge Vollor within a week of filing the "supplement." (R. Vol. 5, p. 111; ARE Vol. II, Tab 26). On July 25, 2007, the Circuit Court denied Buchanan's Motion for New Trial, and this appeal followed. (R. 452; ARE Vol. II, Tab 13).

At the time this appeal was filed, Buchanan designated the following records as necessary for her appeal: "[a]ll clerk papers, trial transcripts, and exhibits filed, taken or offered in this case" and estimated that the costs relating to her designated record were $100.00. (R. 454, 457; ARE Vol. II, Tab 14). Buchanan later amended her designation, but continued to include the following records, *inter alia,* as necessary for her appeal: "a transcript of the trial of this case beginning on April 10, 2006" and all exhibits offered, received, or excluded from evidence at trial. (R. 459; ARE Vol. II, Tab 15). Ameristar made a cross-designation of some additional documents, and Buchanan promptly moved the circuit court for an order requiring Ameristar to pay expenses for its own designation. (R. 470; ARE Vol. II, Tab 17). Ameristar was ordered to –

and did -- pay costs associated with its own designation, but Buchanan remained responsible for costs of her designation. Somewhat inexplicably, and for reasons which are unclear, Buchanan later amended her designation to include only the transcript from the punitive damages phase of trial.[6] This decision, for whatever reason, was an intentional choice by Buchanan to exclude the testimony presented during the liability phase from the record on appeal. This limited designation now leaves this Court in the impossible position of deciding whether the punitive damages verdict is "against the overwhelming weight of the evidence," when it has only a minute part of the evidence considered by the jury as the appellate record.

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[6] It is possible that the reason for the amended designation was to reduce Buchanan's costs in taking the appeal. The cost of transcribing only the limited testimony during the brief punitive damages phase of trial cost $950. (R. 475). Although it is not part of the record, the court reporters and clerk's office estimated that the costs of transcribing the entire 8-day trial would run into the $30,000 range, a number that is certainly reasonable based on the cost of $2.00/page. Those costs, however, must be borne by an appellant in order to make a complete appellate record.

SUMMARY OF THE ARGUMENT

The testimony which Buchanan chose to ignore for purposes of this appeal occurred over a period of six days during the liability phase of this trial. During that six-day period, at the close of Buchanan's case in chief, one of the defendants – GAB -- was voluntarily dismissed. The fact that GAB was involved in the lawsuit as a defendant in the first place clearly established to the jury that Ameristar was not acting **on its own** in regard to Buchanan's workers' compensation claim. Under the jury instructions given, the $30,000 liability verdict against Ameristar established one thing only: the jury found that Ameristar lacked a justifiable or arguable reason to deny or delay payment of **Buchanan's** claim for workers' compensation benefits. The verdict established no more and no less; it did not establish that the jury found Ameristar to be the only entity at fault and it did not establish that the jury found Ameristar's procedure of handling claims in general was inappropriate. It established only that the jury believed Buchanan should be awarded $30,000 for the emotional distress she suffered due to the denial and delay of payment of her workers' compensation benefits.

During the punitive damages phase, Ameristar introduced evidence to show that it did not have a pattern of contesting workers' compensation claims by illustrating the large number of claims that were made during the time period of 1994 – 2003 and the minute number of claims that were denied during that same time period. Because punitive damages are designed to punish the defendant and deter similar conduct in the future, rather than to compensate the specific plaintiff for her own harm, such evidence was appropriately introduced during the punitive damages phase.

Moreover, contrary to Buchanan's claims, the evidence submitted was not "perjured" or false. Buchanan knew for several years prior to the trial that Kelvin G. Mays was expected to provide trial testimony on these very numbers. In fact, Ameristar provided Buchanan's counsel

with copies of the spreadsheets containing the claims information in October 2003, specifically identifying the yearly charts as defense exhibits. (R. 400). Moreover, Ameristar submitted an affidavit from Kelvin G. Mays in support of its summary judgment motion, filed on March 8, 2006, which specifically outlined the number of claims made, paid and/or denied between 1996 and 1998, the years before and after Buchanan's injury. (R. 334, 347-348; ARE Vol. I, Tab 10). Mays' testimony at trial in April 2006 certainly should have come as no surprise to Buchanan. His testimony was relevant and was properly admitted at trial.

Despite having knowledge of these charts and the affidavit testimony previously given by Mr. Mays, as well as having knowledge that Ameristar intended to introduce such evidence at trial, Buchanan made no effort to depose Mr. Mays prior to trial. Within a week of the trial's conclusion, however, Buchanan's counsel obtained information from the Mississippi Workers' Compensation Commission which he now claims proves that Mays' trial testimony was perjured and "false." The information obtained indicates that there were five workers' compensation claims filed by Ameristar employees during the time period of 1994 – 2003 in which a B-52 was filed. Buchanan argues that this directly contradicts Mays' testimony that Buchanan's claim was the only claim during that same time period in which Ameristar denied the compensability of a claim.

As an initial matter, the "supplemental" records submitted by Buchanan do not establish that Mays' testimony was false. Those documents simply illustrate that in a few instances, third party administrators, such as GAB, decided to contest particular elements of workers' compensation claims, not that Ameristar "denied" the claims. There is a big difference between these two propositions, and Buchanan has not established by clear and convincing evidence that the testimony was actually perjured. Further, Buchanan fails to establish that she is entitled to a new trial on the issue of punitive damages based on Mays' testimony, even if it is incorrect, in

that there is insufficient evidence to establish the requirements of Rule 60(b) to warrant setting aside a judgment.

Finally, Buchanan wrongly asserts that the punitive damages verdict, in favor of Ameristar, was necessarily based "solely" on the testimony of Mays, and thus against the overwhelming weight of the evidence. Buchanan forgets that all evidence introduced during the entire trial was incorporated by reference into the punitive damages phase of trial, and for that reason, it is quite unclear what evidence the jury relied upon in rendering its defense verdict. In this context, Buchanan's decision to not make the trial testimony part of the record on appeal is both perplexing and suspect since such decisions are usually made with self-interest in mind. The verdict rendered was well within the discretion of the jury and should not be set aside.

ARGUMENT

I. Buchanan's failure to designate all evidence taken during trial, including the transcript containing the testimony of all live witnesses, warrants dismissal of this appeal.

All of Buchanan's claims are based on the premise that Mays' testimony – and Mays' testimony only – resulted in the defense verdict on punitive damages. First, Buchanan incorrectly argues that Mays should not have been allowed to testify, and if so, punitive damages would have been automatic, just a determination of how much. Then, Buchanan argues that Mays' told lies on the stand, and a new trial is warranted for that reason because that is "obviously" what led to the defense verdict. (Buchanan's Brief, p. 27). Finally, Buchanan argues, in general, that the defense verdict was against the overwhelming weight of the "evidence."

Unfortunately, this Court has no way to determine what evidence the jury considered in reaching its verdict because the only evidence Buchanan designated for this Court's review is one small piece of it – the 30-minute testimony of Kelvin Mays. Buchanan's counsel specifically requested and received an instruction from the trial court to "incorporate the testimony" that the jury had previously heard during the actual trial: "the Court is going to . . . incorporate all of the evidence that you've previously heard in the last five – six days into this proceeding right now...." (R. Vol. 5, p. 56; ARE Vol. II, Tab 20). Indeed, the record reflects that the jury actually had and reviewed trial exhibits during its deliberations regarding punitive damages. As Buchanan's counsel himself stated in regard to a question as to whether the exhibits should be sent back with the jury during the punitive damages deliberations: "It's all evidence. I think it goes back." (R. Vol. 5, p. 105; ARE Vol. II, Tab 25). Further, Buchanan's counsel specifically referred to testimony given by a number of witnesses during the liability

phase when making his closing argument on punitive damages. (R. Vol. 5, pp. 84-97; ARE Vol. II, Tab 22).

Despite the fact that the jury clearly considered evidence presented during both the liability and punitive damages phases of the trial, Buchanan designated only the transcript of the punitive damages phase of the trial to be included in the record on appeal. This designation is clearly insufficient to permit this Court to rule on her appeal.

Under the Mississippi Rules of Appellate Procedure, an appellant who argues "that a finding or conclusion is unsupported by the evidence or is contrary to the evidence . . . shall include in the record a transcript of all evidence relevant to such finding or conclusion." MISS. R. APP. P. 10(b)(2). Indeed, this Court has affirmed lower court's decisions based on an appellant's failure to comply with this rule. *See Robinson v. Lee*, 821 So. 2d 129, 131 (Miss. Ct. App. 2001) (affirming trial court because the appellate court was "unable to evaluate the propriety of the trial court's decision because the record on appeal does not provide us with any testimony or evidence . . . ."); *Smoot v. State*, 780 So. 2d 660, 664 (Miss. Ct. App. 2001) (noting that the "record is not adequate to support [appellant's] claims").

Accordingly, because this Court does not have a sufficient record to review, it is impossible for this Court to determine whether the jury's verdict was against the overwhelming weight of the evidence. Unless the Court knows what evidence the jury heard, the Court also cannot speculate as to whether Mays' testimony (regardless of its truth or falsity) had any bearing on the jury's verdict. For this reason alone, Buchanan's appeal should be dismissed.

II. The trial court did not abuse its discretion in permitting Kelvin Mays to testify during the punitive damages phase of the trial.

Buchanan argues that Ameristar should not have been permitted to adduce testimony from Kelvin Mays during the punitive damages phase of trial. Ameristar had not been permitted to put on evidence relating to its historical workers' compensation data during the liability phase,

but the circuit court overruled Buchanan's renewed objection to that type of evidence during the punitive damages phase. (R. Vol. 5, p. 51-52; ARE Vol. II, Tab 20).

On direct examination, Mays testified as to the number of claims made and claims paid/denied between 1996 and 2003. He testified that during that time period, there were 1,332 workers' compensation claims made, and there was only one claim on which Ameristar denied compensability. (R. Vol. 5, pp. 63-64; ARE Vol. II, Tab 21). Implying that Ameristar was "hiding the ball" with regard to the number of claims during 1994 and 1995, Buchanan inquired into the numbers for those years during cross-examination. (R. Vol. 5, pp. 65-67; ARE Vol. II, Tab 21). Buchanan's counsel badgered Mays about why he didn't have data from those two years with him:

Q: Do you know why you were not asked to look at the 1994 figures?

A: Really, I think we were looking at – I was just going by what the attorneys requested, and we were looking at a year – the year of the incident, a year before and a year after.

Q: My question to you is, do you know why – did anybody tell you why you were not asked to look at the 1994 figures?

A: No, sir.

* * *

Q: Did you look at the 1995 figures or not?

A: Yes, sir.

Q: You did?

A: Yes, sir.

Q: Do you have those in front of the jury today?

A: I don't think I have them with me, no.

* * *

Q: Mr. Mays, we got four lawyers now representing Ameristar. Did anybody tell

you why you weren't supposed to bring the 1995 figures either?

A: No, sir.

* * *

Q: Okay. Thank you. Now, and you don't know why they told you, don't use '94; don't bring '95, and start with '96? You don't know the answer to that question?

A: No, sir, but I –

Q: I don't want you to guess. Do you know the answer or not?

A: No, sir.

(R. Vol. 5, pp. 65-67; ARE Vol. II, Tab 21, pp. 65-67).

On redirect, Ameristar refreshed Mr. Mays' recollection as to the workers' compensation claims data from 1994 and 1995 by showing him the Excel spreadsheets that he had long before prepared. Mays went on to testify that including those two years in the figures resulted in another 608 claims made, none of which Ameristar denied. (R. Vol. 5, pp. 78-79; ARE Vol. II, Tab 21, pp. 78-79). With those years added to the mix, the total of claims made were 1,940, and Mays testified that of those 1,940 claims, Ameristar had initially denied only one of them as to compensability – that of Buchanan.

It must be noted that Buchanan had been provided the numbers and Excel spreadsheets upon which Mays relied (from 1994 – 2003) long before trial. In fact, the Excel spreadsheets were provided to Buchanan's counsel in October 2003, and were specifically identified as trial exhibits. (R. 400). Buchanan's counsel's surprise at that testimony is somewhat curious since those records had been supplied to him years earlier.

Buchanan next argues that Mays' testimony was not "relevant" and should have been excluded.[7] Mays' testimony was very relevant, but to fully understand the relevance, it is

[7]Notably, all three cases cited by Buchanan for the proposition that Ameristar should not have been allowed to put on evidence of other workers' compensation claims are in the context of slip-and-fall and

necessary to review the context in which the testimony was offered.

During the liability phase, Buchanan introduced into evidence a letter dated January 5, 1999, from William A. Patterson, the attorney representing GAB, Legion and Ameristar in the workers' compensation proceedings. In that letter, Patterson recounted the outcome of the initial hearing before the administrative law judge of the MWCC. (R. Env. 1, Ex. P-43; ARE Vol. II, Tab 18, Ex. P-43). Buchanan introduced this as her "smoking gun," relying heavily on **Patterson's** comment in the letter that "[c]ertain employees may think twice before filing a claim due to the fact that Ameristar did not pay benefits to Ms. Buchanan just because she claimed she was hurt on the job." Buchanan's entire trial theme was that Ameristar had tried to "make an example" of her in order to decrease the number of claims made by injured employees.

On direct examination, Patterson admitted to the jury that the statements included in that letter regarding the effects of contesting questionable claims were **entirely his own opinions** and did not reflect the policy of Ameristar. Ameristar adduced corroborating testimony from its witnesses, as well as GAB witnesses, that those statements were not indicative of any policy of Ameristar. (R. Vol. 5, pp. 100-101; ARE Vol. II, Tab 22, pp. 100-101). As mentioned earlier, Ameristar had not been permitted during the liability phase to introduce evidence as to other workers' compensation claims received, paid and/or denied during the time period surrounding Buchanan's injury to corroborate Patterson's testimony that it was never Ameristar's policy to deny valid workers' compensation claims filed by its employees. Mays testimony did that, and was certainly appropriate evidence for the jury to hear in determining whether Ameristar needed to be punished to deter similar conduct in the future.

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train-crossing cases. (*Yoste v. Wal-Mart Stores, Inc.*, 822 So. 2d 935 (Miss. 2002); *Sawyer v. Illinois Central Gulf Railroad Co.*, 606 So. 2d 1069 (Miss. 1992); *Gaines v. K-Mart Corp.*, 860 So. 2d 1214 (Miss. 2003)). In each of the cases cited, the issue was whether the plaintiff could introduce, under MISS. R. EVID. 404(b), evidence of prior accidents to establish that the existence of a dangerous condition and/or the defendant's knowledge of such a condition. That concept has no application to these facts.

Buchanan argues that her case "should have been decided on the facts of her case and not on the basis of other employee's [sic] cases." (Buchanan's Brief, p. 22). While that is true as to the liability phase of trial, it is overly simplistic and incorrect as to the punitive damages phase. Because the primary purpose of punitive damages is to punish the wrongdoer and deter similar misconduct in the future, rather than to make the plaintiff whole for some specific wrongdoing, the trial court properly permitted Ameristar to put on the only type of evidence available to refute the "make an example" trial theme which Buchanan unsuccessfully tried to pin on Ameristar. Ameristar introduced evidence to show that it clearly did not agree with any implication in Patterson's letter of "making an example" of Buchanan by establishing that it had received and paid hundreds of workers' compensation claims filed by employees both before and after Buchanan's injury in March 1997. This information was clearly relevant to the issue of whether Ameristar was "making an example" of Buchanan.

In fact, Buchanan specifically cross-examined Mays about the contents of Patterson's letter, asking about the potential cost-savings that would come from a decrease in workers' compensation claims and implying that saving money was the motivation behind denying Buchanan's claim. (R. Vol. 5, pp. 70-71, 75-77; ARE Vol. II, Tab 21). The following testimony was given on that issue:

Q: . . . every time somebody makes a claim it costs Ameristar money, doesn't it?

A. Yes. I could – yes, uh-huh. Yes.

Q. Any particular reason you find that heard or reluctant to agree with that?

A. When you say costs us money, I guess it would cost – cost money for medical expenses, a person going to – to the physician.

Q. Right.

A. But –

* * *

A. I think it would cost more money, you know, for the team member to go to the doctor, but that's not the way we look at it. I mean, if a team member comes to us and let's us know they're injured on the job, we – we would want that team member to get treatment. You know, that goes in with our philosophy.

* * *

Q. So Ameristar would be interested in finding a way to cut down on this bundle of money and save money, wouldn't they?

A. Yes. And we – and we do look at ways like that, from safety training, various safety training, lifting exercises, various ways to actually lower your claims. I think any company tries to lower their workers' compensation claims.

(R. Vol. 5, pp. 70-71, 75-77; ARE Vol. II, Tab 21).

The punitive damages statute itself makes clear that certain evidence will be admissible during a punitive phase that is not admissible during the liability phase. Evidence which does not pertain to compensating the plaintiff but only pertains to proof that a punitive damages award is or is not appropriate should not be heard by the jury until liability has been determined. *Bradfield v. Schwartz*, 936 So. 2d 931 (Miss. 2006). In *Bradfield*, a lawsuit involving a claim against a law firm, this Court noted that while the evidence presented during the liability phase would be evidence directly related to Bradfield's claim against Schwartz, that the punitive damage phase would permit much broader evidence to be put before the jury, such as "the conduct of Schwartz & Associates in light of the standards of ethics and professionalism that control a firm, and the lawyers within the firm, in the practice of law in this State." *Id.* at 939.

Such is the case here; the evidence adduced through Mays did not pertain to compensating Buchanan, but rather to whether punitive damages were appropriate. The evidence adduced from Mays by Buchanan's own counsel clearly addressed Ameristar's corporate philosophy toward handling workers' compensation claims, which included getting treatment for injured workers as well as internal training and safety classes that are designed

specifically to keep its workforce healthier and safer.

When reviewing a trial court's decision to allow or disallow evidence, this Court applies an abuse of discretion standard. *Webb v. Braswell*, 930 So. 2d 387, 396-97 (Miss. 2006). The trial court did not abuse its discretion in permitting the testimony of Kelvin Mays during the punitive damages phase of trial.

Buchanan's counsel's memory lapse as to the workers' compensation data and Kelvin Mays is not the basis for a new trial. During a bench conference immediately preceding the punitive damages phase of trial, Buchanan's counsel had questioned whether Mays had ever been disclosed during discovery after Ameristar indicated that it would call Mays as a witness during the punitive damages phase. (R. Vol. 5, pp. 51-52; ARE Vol. II, Tab 20). Mays had, of course, been previously identified on several occasions. Mays had been identified as a potential witness early on in discovery responses and had been specifically included as a potential witness in the pretrial order. (R. Vol. 5, p. 125; ARE Vol. II, Tab 26). Moreover, Ameristar submitted an affidavit from Kelvin Mays in support of its summary judgment motion, filed on March 8, 2006, which specifically outlined the number of claims made, paid and/or denied between 1996 and 1998, the years before and after Buchanan's injury. (R. 334, 347-348; ARE Vol. I, Tab 10). Buchanan was certainly on notice that Mays was expected to testify in accordance with his affidavit; in other words, that between 1996 and 1998, Buchanan's claim was the *only* workers' compensation claim in which compensability of the underlying alleged injury was initially denied by Ameristar.[8]

Buchanan had the records containing the information Mays testified to at trial for almost three years. Buchanan and her counsel had every opportunity to investigate the accuracy of those records if they deemed them questionable, and then cross-examine Mays on his testimony.

Buchanan's failure to do so then does not warrant a new trial now. As the trial court noted in denying Buchanan's motion for new trial, "[t]he records were produced in 2003. There was ample opportunity to cross-examine him." (R. Vol. 5, p. 125; ARE Vol. II, Tab 26). The trial court's denial of the motion for new trial was not an abuse of discretion.

III. The trial court did not abuse its discretion is denying Buchanan's motion for new trial under Miss. R. Civ. P. 60(b).

Buchanan claims that the circuit court should have granted her motion for a new trial under Miss. R. Civ. Pro 60(b). The pertinent provisions of Rule 60(b) are set forth below:

> **(b) Mistakes; Inadvertence; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) fraud, misrepresentation, or other misconduct of an adverse party;
>
> * * *
>
> (3) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b).

Neither of these provisions warrants a new trial.

a. There was no fraud, misrepresentation or misconduct by an adverse party sufficient to warrant a new trial under Rule 60(b)(1).

Buchanan claims that Mays presented perjured testimony to the jury, warranting a new trial. To obtain a new trial under Rule 60(b)(1), the moving party must "establish by clear and convincing evidence (1) that the adverse party engaged in fraud or other misconduct and (2) that this misconduct prevented the moving party from fully and fairly presenting his case." *Moore v. Jacobs*, 752 So. 2d 1013 (Miss. 1999). In *Moore*, the Supreme Court addressed a claim of perjury by a party and concluded that claims of perjury as a basis for a new trial generally fall

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[8] Undoubtedly, if the statistics were the reverse, and showed that 99% of all claims had been denied, Buchanan would be arguing about just how relevant those statistics were.

under Rule 60(b)(1).[9] The Court noted that the allegations involved perjury by a single witness only, where there was no clear and convincing proof that perjury had in fact occurred. *Id.* at 1016-17. Under those facts, no new trial was warranted.

On the other hand, in *Tirouda v. State*, 919 So. 2d 211 (Miss. Ct. App. 2005), this Court analyzed Rule 60(b)(1) claims under far different circumstances. In *Tirouda*, a case involving an adoption, this Court found that every witness who testified had given perjured testimony and that their perjury had been shown by clear and convincing evidence. Under those circumstances, this Court granted a new trial, but specifically acknowledged that under Mississippi law, "perjury of a single witness is not sufficient to trigger relief for fraud upon the court." *Id.* at 216. Clearly, *Tirouda* is inapplicable to the instant case as there is only one witness who is alleged to have given perjured testimony. The fact that the perjury is by a single witness in and of itself precludes application of Rule 60(b)(1) as a vehicle for relief.

Perjury, by its very nature, impliedly requires that the falsification be the result of a knowing, intentional misrepresentation. *See Shaw v. Shaw*, 2007 WL 2917180, at *2 (Miss. Ct. App. Oct. 9, 2007) ("Allegations of perjury are in the nature of claims of *fraud against a party* to a proceeding . . . .") (emphasis in original). Indeed, in the criminal context, "one of the elements of the crime is that the defendant knew his statement was false when he made it." *Ford v. State*, 956 So. 2d 301, 309 (Miss. Ct. App. 2006) (citations omitted).; Miss.Code Ann. § 97-9-59. In this case, Buchanan has not established by clear and convincing evidence that Mays' testimony was perjured.

Mays testified that of the 1,332 workers' compensation claims made against Ameristar between 1996 and 2003, "Ameristar denied "compensability" on "only one." (R. Vol. 5, p. 64;

[9] Buchanan incorrectly states that there are no Mississippi civil cases on point dealing with perjury, and cites non-binding authority from other jurisdictions to support her claims. There are, in fact, a number of Mississippi cases which are binding on the issues before the Court.

ARE Vol. II, Tab 21, p. 64). Upon further questioning by Buchanan, Mays referred to claims asserted in 1994 and 1995, and testified that of those additional 608 claims, "none" were denied by Ameristar. (R. Vol. 5, pp. 79-80; ARE Vol. II, Tab 21, p. 79-80).

Buchanan now contends that Mays' testimony was perjured because those numbers were wrong. To "prove" this claim, Buchanan relies on five documents that her lawyer obtained from the Mississippi Workers' Compensation Commission on **April 26**, one week after the trial concluded. Buchanan claims that these records clearly prove that there were five other claims denied during the relevant time period, rendering Mays' testimony "perjury."[10] While Buchanan could perhaps have used this information in cross-examining Mays at trial, the records fall far short of proving perjury by clear and convincing evidence. As indicated in the documents, one employee's claim (Garrison, 1995) was invalidated based on his post-accident positive drug screen (automatically disqualifying him from workers' compensation benefits). That was clearly not a decision by Ameristar to "deny" the compensability of an employee's claim. The second instance cited as "perjury" (Robinson, 1997) involved GAB's contest of the necessity of a surgery scheduled several months after the injury, not a denial of compensability by Ameristar. For the three remaining employees identified by Buchanan, the documents make clear on their face that it was **GAB or a subsequent claims consultant** who completed the forms disputing benefits, **NOT AMERISTAR.** These records do not show any intent to deceive, much less commit fraud or perjury by Mays. In fact, this testimony is entirely consistent with Mays' March 8, 2006, affidavit, submitted in support of Ameristar's Motion for Summary Judgment and provided to Buchanan at that time. (R. 334, 347-348; ARE Vol. I, Tab

[10] Buchanan also claims that she has newly discovered evidence – deposition testimony of one Deborah Russell taken in July 2006 -- that warrants a new trial. Russell, a former Ameristar employee, was injured in **2005**, and her workers' compensation claim was disputed in some manner. While the facts regarding Russell's claim might have been useful for Buchanan's attorney to question Mays about during trial, it

10). As related therein, Mays had examined Ameristar records to determine "the number of workers' compensation claims that were initially denied by Ameristar or its carrier."

Buchanan had all this information readily available to her during trial, and if Mays' testimony was in any way confusing, Buchanan could certainly have cleared up these points during the punitive damage phase of the trial. Buchanan had every reason to expect Mays to testify at trial, and had every reason to expect that Mays would testify in accordance with his sworn affidavit and to the data provided in the Excel spreadsheets which had been provided to Buchanan in October 2003, designated as defense exhibits.

The case of *Iuka Guar. Bank v. Beard*, 658 So. 2d 1367 (Miss. 1995), is relevant to this issue. In *Beard*, the Supreme Court found no abuse of discretion where the trial court denied a new trial request on grounds of perjury. In that case, the trial court found that the information at issue was "equally available to Iuka before the trial" and the bank was "free to cross-examine [the defendant] had they bothered to read this document before trial." The same is true here. First, there is no evidence that Mays gave perjured testimony. Moreover, there is certainly no evidence that Buchanan did not have the ability to obtain the very information she presents here to cross-examine Mays at the time of trial. There is no factual or legal basis for relief.

b. There was no newly discovered evidence sufficient to warrant a new trial under Rule 60(b)(3).

Under Rule 60(b)(3), the newly discovered evidence provision, a new trial will be granted only when five factors are established:

> (1) the evidence was discovered following the trial;
> (2) due diligence on the part of the movant to discover the new evidence is shown or may be inferred;
> (3) the evidence is not merely cumulative or impeaching;
> (4) the evidence is material;
> (5) the evidence is such that a new trial would probably produce a new result.

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has no bearing on this issue of "perjury," as his testimony covered claims between 1994 and 2003, and would in no way have encompassed Russell's claim.

Moore v. Jacobs, 752 So. 2d at 1015 (¶ 18) (quoting Ag Pro, Inc. v. Sakraida, 512 F.2d 141, 143 (5th Cir. 1975)). As this Court has held, "[n]ewly discovered evidence must be evidence in existence of which a party was excusably ignorant." *January v. Barnes*, 621 So. 2d 915, 920 (Miss. 1992).

Buchanan essentially concedes that she is not entitled to a new trial under this provision, tacitly admitting that her attorney did not use due diligence (arguing for application of Rule 60(b)(1) where there is no "due diligence" requirement.") That is but one reason that Rule 60(b)(3) does not provide Buchanan with relief.

In addition to the lack of diligence on the part of counsel, the alleged "newly discovered" evidence is nothing more than possible impeachment material at best. This very issue was recently addressed by this Court in *Cuffee v. Wal-Mart Stores, Inc.*, 2007 WL 2421734 (Miss. Ct. App. Aug. 28, 2007). In *Cuffee*, the plaintiff moved for a new trial after learning during a post-trial deposition that a key witness had provided false testimony during trial. This Court recognized that although the post-trial admission constituted "newly discovered evidence," it was not of sufficient gravity to warrant a new trial. In other words, the newly discovery evidence was merely "impeaching." Accordingly, the newly discovered evidence did not warrant a new trial under Rule 60(b)(3).

Further, Buchanan cannot establish that the newly discovered evidence is material or such that would likely produce a different result. Even if we were to consider these other five cases as being "denied" by Ameristar, which on the face of the documents is patently absurd, no new trial is warranted. The point of the evidence was the "example" Ameristar was giving to its employees, and whether Ameristar needed to be punished to avoid wrongful denial of compensability in the future. The testimony was that there was only 1 of 1,940 claims that were denied during the 9-year period. Even assuming that Mays' testimony was slightly inaccurate,

which Ameristar disputes, the number would still indicate that there were only 6 of 1,940 claims denied during the 9-year period. There is no significant difference between what Mays testified to – that 99.9% of claims made were not contested as to compensability -- and what Buchanan now claims is fact – that 99.7% of claims made were uncontested by Ameristar. This is insufficient to warrant a new trial.[11]

When reviewing a grant or denial of a Rule 60(b) motion, the appellate court will only reverse the ruling of a lower court upon the finding of **abuse of discretion**. *City of Jackson v. Jackson Oaks L.P.*, 860 So. 2d 309, 311 (¶ 6) (Miss. 2003) (citing Briney v. U.S. Fid. & Guar. Co., 714 So. 2d 962, 966 (¶ 13) (Miss. 1998)). There has been no abuse of discretion here.

IV. The jury's defense verdict on the issue of punitive damages was not against the overwhelming weight of the evidence.

Buchanan argues that because the jury had already returned a verdict against Ameristar, finding that Ameristar had lacked a justifiable or arguable basis for denying/delaying payment of Buchanan's benefits, the jury was mandated to also assess punitive damages. In fact, Buchanan argues that had Mays not testified during the punitive damages phase, there would be "no evidence at all to support the jury's verdict on the issue of punitive damages." (Buchanan's Brief, p. 28). In other words, it appears that Buchanan's argument is that if there had been no additional testimony presented to the jury during the punitive damages phase, a punitive damages award would have been automatic.

This argument has no foundation whatsoever. It is well settled in this state that an award of punitive damages is **never** automatic. *Doe v. Salvation Army,* 835 So. 2d 76, 81 (¶ 17) (Miss.

[11] Similarly, to the extent Buchanan is claiming that her newly discovered evidence from the July 2006 deposition of Deborah Russell warrants a new trial, it is clear that the facts of Russell's case are unrelated in time, place and facts to Buchanan's claim, and Russell's claim is not material to the case before this Court. Russell's claim, based on an injury in 2005, would not have even been included in the numbers Mays testified to. His testimony covered claims made between 1994 and 2003 only.

2003). If it were, there would be no reason for Miss. Code Ann. § 11-1-65, requiring a bifurcated trial with a separate evidentiary hearing for punitive damages, to even exist.

Moreover, regardless of Mays' testimony, the jury had ample evidence on which to consider whether an additional assessment of punitive damages against Ameristar was warranted under the facts presented. As previously noted, Buchanan's counsel specifically asked the circuit court to incorporate all evidence, including testimonial evidence, introduced during the liability phase of the trial. (R. Vol. 5, p. 56; ARE Vol. II, Tab 20). This Court has recognized such a request to be an acceptable procedure in bifurcated punitive damages trials of permitting the jury, "without hearing or receiving any repetitious testimony or evidence, to have before it all the evidence presented during the first phase of the trial." *Prudential Ins. Co. of Am. v. Stewart*, 2007 WL 2792502, at *8 (Miss. Sept. 27, 2007) (Carlson, J., specially concurring). Then, after the trial judge has granted "the incorporation of evidence" request, the parties "may or may not elect to present additional evidence." *Id.*

That is exactly what occurred in this case. Buchanan asked that all evidence be incorporated from the first phase of the trial – a request which necessarily included the evidence indicating that Ameristar was not acting alone in the actions pertaining to Buchanan's workers' compensation claim – and then chose not to present additional evidence. Buchanan argues that Mays' testimony was the "sole basis" on which the jury declined to assess punitive damages. Had Buchanan appropriately designated **all** evidence received during the liability and punitive damages phases in this appellate record, all of which was before the jury when determining the punitive damages issue, the record would have been quite clear that there was **ample** evidence, with or without Mays' testimony, to support its verdict on punitive damages. Buchanan's failure to designate the entire trial transcript on appeal makes it impossible for this Court now to determine what evidence was before the jury and what was not. For that reason, Buchanan has

effectively waived any argument that the verdict was against the overwhelming weight of the evidence. Nonetheless, Buchanan did designate various exhibits from the trial in the appellate record, and those exhibits reveal that the jury had information before it the jury could have construed as implicating GAB, Legion and/or Bill Patterson as responsible for Buchanan's claims handling.

Second, Buchanan argues that because Mays' testimony was the "only thing" different between the actual and punitive damage phases of trial, it is "obvious" that the jury relied solely on Mays' testimony in reaching its verdict.

This argument, however, overlooks one important issue: the purpose of an award of punitive damages. According to the punitive damages statute, Miss. Code Ann. § 11-1-65(1)(e), the "primary purpose of punitive damages is to punish the wrongdoer and deter similar misconduct in the future by the defendant and others while the purpose of compensatory damages is to make the plaintiff whole," and the jury must be instructed as to that distinction. Buchanan's counsel reiterated this point to the jury during his closing argument in the punitive phase, repeatedly acknowledging that the purpose of a punitive damage award is to not only punish, but deter similar misconduct in the future:

> Katherine is not here today, and I told her not to be here today. And the reason for that is, yesterday was about Katherine and her actual damages. . . Today is about Ameristar, okay? The focus today – you consider what you considered, but the focus today is on Ameristar. . . . You've already awarded what you feel would compensate Katherine. Today we talk about Ameristar. . . .
> * * *
> And ya'll know this is coming. Their motivation, I think this is the biggie here. Sure, if you deny one claim, okay. She only makes 12 grand a year, and it's just a knee. But, look, if we can make an example out of her – ya'll know I'm going to get that thing behind me. It's almost irresistible to me. If we can make an example out of her, the other folks are going to see what we did to her, and it's going to have an effect on other folks and they will be reluctant to file their own claims.
> * * *
> This part about deterring the wrongful acts is really what bothers me. If they'll do it to Katherine, unless you deter them, you give them reason to be deterred, I think

that's a problem.

(R. Vol. 5, pp. 84-96; ARE Vol. II, Tab 22).

Furthermore, the statute expressly provides that the jury, upon being properly instructed by the judge on the punitive damages issue, may decide to award punitive damages, **and if so, in what amount**, or the jury may decide not to award punitive damages. In this case, the jury was correctly instructed on the issue of punitive damage awards, and the jury declined to render a punitive damage award.

As provided in the last paragraph of the punitive damages statute, "[n]othing in this section shall be construed as creating a right to an award of punitive damages." MISS. CODE ANN. § 11-1-65(4). The very language of the statute itself makes clear that there are cases where punitive damages are not appropriate, and that determination is left solely within the discretion of the jury. It may be that the jury did not believe Ameristar needed to be punished, or it might be that the jury believed the true culprit was the non-present defendant, Legion Insurance Company, or the dismissed GAB, but just wanted to compensate Buchanan personally and rendered the $30,000 compensatory award on that basis. For all we know, the jury could have reached that $30,000 by just awarding Buchanan an amount equivalent to 2½ years of pay for the time she wasn't working due to her injury. The fact is that no one knows what the jury considered in making its determination to reject punitive damages, but there was certainly a wealth of evidence on which it could rely in doing so. This is the true reason Buchanan chose to make nothing but Mays' testimony and the trial exhibits part of the record on appeal.

It is also noteworthy that while the punitive damages statute specifically instructs trial court judges to review and reduce, if necessary, punitive damage awards, the statute does not envision a trial judge increasing or imposing an award when none was made by the jury in the first place. Under Mississippi law, this Court has long recognized that "[a]wards fixed by jury

determination are not merely advisory and will not under the general rule be set aside unless so unreasonable in amount as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous." *Rodgers v. Pascagoula Pub. Sch. Dist.*, 611 So. 2d 942, 945 (Miss. 1992). By the same token, measurement of the appropriate amount of punitive damages, even if the amount is zero, is a matter solely committed to the jury's fettered discretion. *See, e.g., Mut. Life Ins. Co. of N.Y. v. Estate of Wesson*, 517 So. 2d 521, 540 (Miss. 1987) (punitive damages "awards are most properly submitted to the 'discretion, sound judgment and combined wisdom of jurors drawn indiscriminately from every walk of life.'") (Anderson, J., dissenting). Of utmost significance, a jury verdict will not be disturbed simply because it seems "too high" or "too low." *Bankers Life & Cas. Co. v. Crenshaw*, 483 So. 2d 254, 278 (Miss. 1985) (citing Toyota Motor Co., Ltd. v. Sanford, 375 So. 2d 1036, 1037 (Miss. 1979)).

It is well settled that Mississippi law does not favor punitive damages; they are considered an extraordinary remedy and are allowed with caution and within narrow limits. *Bradfield v. Schwartz*, 936 So.2d 931 (Miss. 2006); *Life & Cas. Ins. Co. of Tenn. v. Bristow*, 529 So. 2d 620, 622 (Miss. 1988). Punitive damages are only appropriate in the most egregious cases. *Paracelsus Health Care Corp. v. Willard,* 754 So. 2d 437, 442 (Miss. 1999) (citations omitted). This Court has only allowed punitive damages where the facts are highly unusual and the cases extreme. *South Cent. Bell v. Epps,* 509 So. 2d 886, 892 (Miss. 1987). *See also Aqua-Culture Techs., Ltd. v. Holly,* 677 So. 2d 171, 184 (Miss. 1996).

In this case, the jury had ample evidence on which to rely in refusing to grant this extraordinary remedy. This was not a case where the facts were highly unusual. This was not a case where the defendant's conduct was egregious. The jury used its common sense and all the evidence before it to reach its decision. The lower court was correct in not second-guessing the jury's verdict on punitive damages.

CONCLUSION

A 12-person jury sat through a seven-day trial last April and determined that Katherine Buchanan should be awarded $30,000 to compensate her for damages she sustained as a result of the denial and delay in payment of her workers' compensation claim. That same jury, relying on the same evidence plus additional testimony of one witness, determined that Ameristar should not be "punished" or "deterred" based on its actions in dealing with Katherine Buchanan's claim, and returned a verdict for Ameristar on the punitive damages issue. Considering the fact that punitive damages are an extraordinary remedy, reserved for the most egregious cases, it is perfectly logical that a jury who awarded Buchanan only $30,000 to begin with would come back with a defense verdict on punitive damages. The record on appeal does not establish any reversible error, and Ameristar requests that this Court affirm the lower court's ruling denying Buchanan's motion for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day mailed, via United States mail, postage prepaid, a true and correct copy of the above and foregoing Appellee's Brief on the following:

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I further certify that I have, on this day, deposited in the U.S. Mail the original and four copies of the foregoing Appellee's Brief, addressed to the Clerk of the Supreme Court, at:

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This, the 11th day of October, 2007.

BETHANY BRANTLEY JOHNSON