

No. 1998-CA-01217

IN THE SUPREME COURT OF MISSISSIPPI

**GENERAL MOTORS ACCEPTANCE CORPORATION
and MIC LIFE INSURANCE CORPORATION,**

Appellants,

v.

**BETTYE HICKS, Individually and as Administratrix
of the Estate of David E. Hicks, deceased,**

Appellee.

**On Appeal From Jones County Circuit Court
No. 95-7-89**

**REPLY BRIEF OF APPELLANT
GENERAL MOTORS ACCEPTANCE CORPORATION**

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ORAL ARGUMENT REQUESTED

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ARGUMENT

This case was filed because appellant MIC Life inadvertently failed to pay Hicks a \$637.99 refund of unearned credit life insurance premiums after informing her that it would do so. Although that failure resulted from nothing more than a clerical error, Hicks used it to support the theory that appellant GMAC concocted an elaborate “scheme” to minimize the payment of such refunds by MIC Life. *See, e.g.*, Tr. 317:9-11 (“[S]omebody in GMAC devised this OLA scheme so that there would be some money that would never be paid back to the customer; did they not?”). Hicks asked the jury to infer the existence of this “scheme” from GMAC’s practice of notifying customers who terminated their retail instalment sale contracts early that they might be entitled to a refund of any unearned premium from the insurer. She contended that GMAC was motivated by a desire to maximize MIC Life’s profits, which she claimed indirectly benefitted GMAC through its corporate relationship to MIC Life.

In this Court, Hicks has dropped her unsubstantiated charges of conspiracy and intentional wrongdoing and now contends principally that GMAC was grossly negligent. Although she concedes that the insurance company, *not GMAC*, was responsible for refunding credit life insurance premiums, Hicks nonetheless claims that it was GMAC’s “fault” that her husband did not receive his refund. But she identifies no legal or factual basis for finding GMAC at fault, simply referring over and over again to GMAC’s practice of sending a notice concerning refunds. *See, e.g.*, Br. 4 (“GMAC has chosen * * * in Mississippi to impose the ‘OLA notice’ procedure. * * * GMAC sends a notice *to the consumer and the dealer* on an undersized piece of paper. * * * It is undisputed that GMAC is the sole instigator of this program.”) (emphasis in original); Br. 6 (“It [is] undisputed that GMAC initiated the OLA notice program * * *.”). But Hicks never explains how, by sending a notice that it was not obligated to send at all, GMAC *reduced* the likelihood that customers would

receive refunds. Nor does she explain how GMAC's voluntary undertaking of this seemingly helpful practice could possibly constitute gross negligence or justify \$5 million in punitive damages.

In place of her previous, unsupported accusations of nefarious intent, Hicks now grounds her defense of the verdicts below on a letter from GMAC's counsel — never considered by the jury — concerning MIC Life's *post-trial* efforts to ensure that all customers entitled to refunds had received them. Through a difficult and time-consuming effort, a third-party administrator for MIC Life compared GMAC records of paid-off retail instalment sale contracts dating back ten years with MIC Life records of credit life insurance premiums, and pieced together a list of 1,354 Mississippi residents who *may* not have received refunds of unearned premiums. Appellee's R.E. 18-19. MIC Life then paid refunds totaling \$226,613.81, including interest, to these individuals. *Id.* Because this information was not considered at trial, it may not be used to support the verdicts — and, in any event, it is totally irrelevant to either GMAC's liability or the proper magnitude of any award of punitive damages against GMAC.

In short, Hicks's brief makes it even more plain that the directed verdicts and the \$5 million punitive award against GMAC rest on nothing but smoke, mirrors, and empty phrases. The judgment against GMAC must be reversed.

I. THE DIRECTED VERDICTS AGAINST GMAC WERE IMPROPER

Perhaps the most stunning aspect of the case below was the fact that the trial court directed verdicts *against* GMAC on breach of fiduciary duty, unjust enrichment, and negligence — informing the jury before it considered punitive liability that GMAC and MIC Life were “equally” liable to Hicks. Tr. 486:7-9. In her brief, Hicks does not even attempt to argue that the evidence against GMAC satisfied the demanding standard for directed verdicts. *See Eselin-Bullock & Assocs., Inc. v. National Gen. Life. Ins. Co.*, 604 So. 2d 236, 239-240 (Miss. 1992). That is not

surprising; the case against GMAC was so insubstantial that there is no credible argument that any reasonable jury could have ruled against GMAC. Indeed, the trial record demanded a directed verdict *for* GMAC.

Hicks frames the issues on appeal (Br. 2) as though she intended to defend only the negligence verdict and to drop her claims for breach of fiduciary duty and unjust enrichment. In the body of her brief, however, she attempts to muster a defense on all three counts. Her arguments fall so far short that they only confirm this Court's obligation to reverse and render judgment for GMAC on all counts.

A. GMAC Owed No Fiduciary Duty To Mr. And Mrs. Hicks

Hicks has no argument that GMAC owed her or her husband a fiduciary duty. She concedes that ordinarily there is no fiduciary relationship between debtor and creditor. She claims, however, that “the relationship transcended that of mere debtor-creditor because those premium funds were entrusted to MIC Life in advance, to be retained and used only as earned.” Br. 6. Hicks does not explain how her husband's payment of an insurance premium to *MIC Life* could possibly impose *on GMAC* the “sever[e] * * * burdens and penalties that are integral to a fiduciary relationship.” *People's Bank & Trust Co. v. Cermack*, 658 So. 2d 1352, 1358 (Miss. 1995). Nor does she point to a single additional fact capable of transforming her arms-length debtor-relationship *with GMAC* into a fiduciary one.

Unable to identify any feature of her relationship with GMAC that would justify the imposition of fiduciary duties under traditional rules, Hicks argues for a special new rule under which the provision of funds used for the purchase of credit life insurance automatically creates broad fiduciary duties. Relying on two decisions of this Court imposing a fiduciary duty in cases involving credit life insurance — *Parnell v. First Sav. & Loan Ass'n*, 336 So. 2d 764 (Miss. 1976),

and *Lowery v. Guaranty Bank & Trust Co.*, 592 So. 2d 79 (Miss. 1991) — Hicks asserts (Br. 8) that a creditor like GMAC is “accountable to the customer not only for the purchase of a credit life policy, but also for the use of the charged premium, and its unconditional return when not used for the purpose intended.”

The cited cases do not support any such rule. In them, the Court found fiduciary duties to exist, not because credit life insurance was involved, but because the circumstances that traditionally give rise to those duties were present. In *Parnell*, the defendant specifically “assumed a contractual obligation to obtain credit life insurance for” the debtor, retained funds for that purpose, and yet failed to obtain the insurance. 336 So. 2d at 768. The Court’s ruling that the bank thus breached a fiduciary duty fell squarely within the general rule that a debtor-creditor relationship can take on a fiduciary character where “the activities of the parties go beyond their operating on their own behalf, and the activities [operate] for the benefit of both,” or “where the parties repose trust in one another.” *Hopewell Enters., Inc. v. Trustmark Nat’l Bank*, 680 So. 2d 812, 816 (Miss. 1996). Furthermore, nothing in the opinion suggests that the bank’s fiduciary duty extended beyond its specific undertaking to procure insurance. Here, GMAC did not undertake to do *anything* for Mr. and Mrs. Hicks with regard to credit life insurance, yet Mrs. Hicks would impose on GMAC duties far broader than those imposed in *Parnell*.

In *Lowery*, the Court examined whether a bank that placed an outstanding loan on hold had a fiduciary duty to inform the borrowers that the credit life insurance they normally took out on their loans would no longer be in force. In finding that there was a genuine issue of material fact as to whether a fiduciary duty existed, the Court pointed to specific evidence that,

because of their history of dealings with Guaranty Bank and because the bank placed the notes on hold until Mr. Lowery could come in to take care of them, the Loweries relied on that relationship and placed trust and confidence in Guaranty Bank to the

point of being less vigilant about the coverage of the credit life insurance than they had been in the past.

592 So. 2d at 85. In contrast, there was no evidence in this case that the Hickses established a special relationship of trust with GMAC.

In fact, no feature of the Hickses' relationship with GMAC gives rise to fiduciary duties under Mississippi law. GMAC merely purchased the retail instalment sale contract between Mr. Hicks and the Hankins dealership (the "Instalment Contract"); the only communication between GMAC and the Hickses that is reflected in the record is GMAC's transmittal of the canceled Instalment Contract and the so-called "OLA notice." Settled principles of Mississippi law, which have been applied consistently to cases involving credit life insurance, thus absolve GMAC of any liability on a fiduciary duty theory. This Court should reject plaintiff's invitation to abandon those principles.

B. GMAC Was Not Unjustly Enriched

Unjust enrichment is a quasi-contractual cause of action that applies "where there is no legal contract but where the person sought to be charged is in possession of money or property which in good conscience or justice he should not retain * * *." *Nicholas v. Deposit Guar. Nat'l Bank*, 182 F.R.D. 226, 234 (S.D. Miss. 1998) (quoting *Milliken & Michaels, Inc. v. Fred Netterville Lumber Co.*, 676 So. 2d 266, 269 (Miss. 1996); see also *Koval v. Koval*, 576 So. 2d 134, 136 (Miss. 1991). As this description of the cause of action suggests, a defendant may not be held liable for unjust enrichment under Mississippi law unless it experiences "an economic benefit." *Omnibank of Mantee v. United S. Bank*, 607 So. 2d 76, 92 (Miss. 1992).

It was undisputed that GMAC did not receive any part of the credit life insurance premium paid by Mr. Hicks. Hicks claims, however, that GMAC benefitted from *MIC Life's* retention of the

unearned premium because its subsidiary owns the stock of MIC Life. This Court, however, has repeatedly upheld the principle that a corporation and its subsidiary are separate legal entities. *See, e.g., Rauch Indus., Inc. v. Poloron Prods. of Mississippi, Inc.*, 362 So. 2d 605, 607 (Miss. 1978). Applying that principle, other courts, including the Fifth Circuit, have expressly found that a parent company is not unjustly enriched by the tortious acts of its subsidiary. *See, e.g., United States v. Dean Van Lines, Inc.*, 531 F.2d 289 (5th Cir. 1976).

Hicks attempts to circumvent this authority by claiming (Br. 15) that GMAC was actively involved in the “refund/notice” process, which she claims “undeniably resulted in a benefit to GMAC.” She misses the point. The central feature of an unjust enrichment claim is not the defendant’s conduct, but the fact that the defendant possesses something of value that justly belongs to the plaintiff. Without piercing the corporate veil, which the law forbids under these circumstances, there is no basis for concluding that GMAC should be held legally responsible for any benefit to MIC Life from MIC Life’s retention of the premium. Thus, whether or not GMAC was actively involved in the conduct at issue, it cannot be held liable for unjust enrichment. GMAC is entitled to judgment on this count.

C. GMAC Was Not Negligent

In our opening brief, we demonstrated that GMAC neither owed nor breached any duty to the Hickses regarding credit life insurance premium refunds, and therefore could not be liable for negligence. *See May v. V.F.W. Post No. 2539*, 577 So. 2d 372, 375 (Miss. 1991) (“a duty and the breach of that duty are essential to a finding of negligence under the traditional or accepted formula”) (internal quotation marks and citation omitted). Hicks concedes (Br. 5) that GMAC was not responsible for refunding unearned credit life insurance premiums; instead, she locates GMAC’s alleged duty in the doctrine that one who attempts to aid a person “in difficulty or peril” and “takes

charge or control of the situation” must act responsibly. Br. 15 (quoting PROSSER ON TORTS § 56 (5th ed. 1984)). Hicks’s attempt to compare GMAC to one who goes to the aid of a drowning person is the ultimate grasping at straws. First, Mr. and Mrs. Hicks were not in difficulty. Second, GMAC did not “take charge and control” of the situation. Finally, GMAC did act responsibly.

The evidence in the record does not support a holding that GMAC “completely controlled MIC’s actions in regard to the refund situation.” Tr. 426:29-427:6. Nor did GMAC even arguably “control” the actions of either the Hickses or the dealer, either of whom could easily have seen to it that the refund was obtained. Responsibility may not so lightly be shifted to GMAC, which indisputably undertook only to send a notice to customers and dealers about the possibility of a premium refund — an undertaking that it fulfilled in this case.^{1/}

Thus, even assuming, as seems unlikely, that this was a case of “difficulty or peril,” the law is clear that the scope of a duty that is voluntarily assumed “is limited by the extent of the undertaking.” *Homer v. Pabst Brewing Co.*, 806 F.2d 119, 121 (7th Cir. 1986) (citation omitted); *see also, e.g., Stacy v. Aetna Cas. & Sur. Co.*, 484 F.2d 289 (5th Cir. 1973) (insurance company performing limited safety inspection did not assume employer’s duty of inspection and was not liable under Mississippi law to employee injured in accident). Because GMAC plainly fulfilled the only duty it may be deemed to have assumed with respect to refunds, neither ordinary nor gross negligence can be established, and GMAC is entitled to judgment as a matter of law. Even if GMAC could somehow be deemed to have assumed a duty, thus creating *a jury question* as to *ordinary* negligence, the evidence could not possibly be found to demonstrate, clearly and

^{1/} In her brief (at 15-17), Hicks quotes extensively from the testimony of Mildred Wilbanks. Contrary to Hicks’ assertion, however, the cited testimony does nothing to advance her argument that GMAC “undertook to ‘take charge and control of the situation’ regarding premium refunds.”

convincingly, the presence of the *gross* negligence required for punitive damages (*see* Section III, *infra*).

II. SERIOUS TRIAL ERRORS ENTITLE GMAC TO A NEW TRIAL

A. Judge Landrum’s Improper Comments Denied GMAC A Fair Trial

We contended in our opening brief (at 24-27), that Judge Landrum’s repeated negative comments on the testimony of defendants’ corporate representatives improperly conveyed to the jury his dim view of their credibility and of defendants’ case, and that this prejudicial misconduct entitles GMAC to a new trial. *See Wirtz v. Switzer*, 586 So. 2d 775, 783 (Miss. 1991) (“[a] trial judge should not in any way * * * communicate to the jury his opinion regarding the value or credibility of the testimony being offered”) (internal quotation marks and citation omitted).

Hicks does not dispute our characterization of what happened at the trial but does defend the judge’s conduct, asserting (Br. 21) that “one of the primary functions of the judge presiding over a trial is to make sure the witnesses testify accurately and honestly.” Not surprisingly, Hicks can muster no authority to support this claim. In fact, when the jury is the factfinder, it is the sole province of the *jury* to make judgments about the credibility of witnesses; that is why judicial comments that go “directly to the [witness’s] credibility” often warrant a new trial. *Fowler v. King*, 254 Miss. 61, 71, 179 So. 2d 800, 805 (1965). Far from “mak[ing] sure” that witnesses testify in a manner that is “accurate[] and honest[],” therefore, the judge must avoid conveying personal opinions about the accuracy of testimony or the honesty of a witness lest the jury, in deference to the judicial office, be unduly swayed in performing its task. *See Young v. Anderson*, 249 Miss. 539, 545, 163 So. 2d 253, 256 (1965) (“It is a matter of common knowledge that jurors * * * are very susceptible to the influence of the judge.”) (internal quotation marks and citation omitted). Judge Landrum’s complete abandonment of this principle resulted in an unfair trial.

B. Evidence Concerning GMAC's Practices In Other States Should Not Have Been Admitted

GMAC objected to the introduction of evidence concerning its practices in states having laws requiring lienholders rather than insurance companies to make refunds of unearned insurance premiums. The trial court allowed the evidence, ruling that, "if * * * it's a state law to do it in one state, you can certainly show that it's negligence not to do it in other states if for no other reason except at common law." Tr. 163:27-164:2. We contended (Br. 27-28) that the evidence was irrelevant to assessing GMAC's conduct in Mississippi, which has *not* enacted such a statute, and that its admission prejudicially suggested that GMAC was at fault for failing to institute that procedure unilaterally in Mississippi.

Hicks responds (Br. 22) that the evidence "was properly admitted to show notice of the problem of unearned refunds * * * and to show whether defendants acted reasonably under the circumstances." We note first that this after-the-fact justification bears no resemblance to the use actually made of the evidence at trial. Counsel for Hicks argued that GMAC's failure to comply in Mississippi with the laws of *other* states, in and of itself, made GMAC a wrongdoer. *See* Tr. 495:20-496:2 ("In Alabama they give it back promptly. Because when you get your pay-off it's figured in the balance. * * * There's no reason they couldn't do that in Mississippi. The only reason they wouldn't do that in Mississippi is because they want to keep the money."); Tr. 499:14-16 ("If their motive was to do right, why aren't the other forty-two states just like the eight states?").

Moreover, the evidence was probative neither of "notice of the problem" nor of the reasonableness of GMAC's conduct. The decision by a small minority of states to shift the obligation to provide unearned premium refunds in the first instance from the insurer (where most states obviously believe it lies) to the creditor cannot possibly constitute "notice" that insurers in

every other state have inadequate procedures. *Mississippi's* insurance statute reflects an express judgment by the legislature here that the obligation to pay refunds of credit life insurance premiums rests with the insurer, *not* the creditor. See MISS. CODE ANN. § 83-53-19 (“the insurer * * * shall be the sole party liable to the debtor for payment of claims or refunds”). The fact that Mississippi and most other states have not found it advisable to impose the refund obligation on the creditor gave GMAC good reason for believing that it was acting properly.^{2/}

The laws of a few states, and GMAC’s procedures there, are also irrelevant to the reasonableness inquiry. “Reasonableness” is a measure of compliance with a duty; and comparing GMAC’s conduct in Mississippi, where the refund obligation rests with the insurer, to its conduct in the few states that impose the obligation on the lienholder shows nothing more than GMAC’s law-abiding character.

C. Improper Testimony About Legal Issues Prejudiced GMAC

We argued (Br. 28-30) that the trial court erred by requiring lay employees of GMAC and MIC Life to testify about legal issues. Mildred Wilbanks, for example, was asked whether GMAC’s conduct violated the Mississippi statute requiring *insurers* promptly to refund unearned insurance premiums. Tr. 354:23-25. Although Wilbanks lacked familiarity with the statute and is not a lawyer, counsel for Hicks exacted an “admission” from her on this point (Tr. 358:3-5) — which he then exploited throughout his closing argument. See, e.g., Tr. 528:16-20 (“Their own witnesses

^{2/} It would not be an unreasonable legislative judgment to conclude that the additional costs associated with imposing the refund duty on the creditor outweigh the benefits of such a regime, or to conclude the opposite, as a few states have done. But which course to choose should be a policy question for the legislative branch, and GMAC would willingly comply, as it has elsewhere, with a legislative decision to impose such a duty on it. But it is neither sensible nor fair to permit such a duty to be retroactively imposed by a single judge, as the directed verdict did here, let alone to punish GMAC for failing to understand that it had any such duty.

* * * said * * * when we keep this money and don't send it back, we break the law.”). Thus, the testimony and its use by counsel for Hicks clearly prejudiced GMAC.

Hicks defends the trial court's decision to allow the testimony by arguing (Br. 23) that “a statute dealing with the precise issue before the court is fair game for questioning.” That statement flatly contradicts the settled rule that witnesses may not opine on legal matters applicable to the case. *See, e.g., KLLM, Inc. v. Fowler*, 589 So. 2d 670, 673 n.3 (Miss. 1991) (witness could not properly respond to questions concerning “the meaning of the Worker's Compensation Law” since “questions regarding the interpretation of the law were for the * * * court”). Given the claim that the Mississippi insurance statute was the source of duties breached by GMAC and MIC Life, it was totally inappropriate for counsel to exact an opinion on its meaning from a witness — particularly a lay witness who professed that she was unfamiliar with the statute.

Hicks next argues (Br. 23) that the questioning could not be prejudicial because “the testimony of Ms. Wilbanks is true.” The conclusion might be sound if the premise were well founded, but in fact the entire line of questioning was based on the erroneous premise that the statute was applicable to GMAC, when instead it describes the *insurer's* obligations with respect to refunds. Ms. Wilbanks' “admission” that GMAC “put a burden on customers with this OLA procedure to make the customers claim their refunds, and that's a burden that is not required by the law” (Tr. 358:3-5) thus was unfairly prejudicial to GMAC. The testimony was especially damaging in light of the court's instruction to the jury that it could award punitive damages if it found that GMAC and/or MIC Life “willfully and deliberately entered into a plan * * * which was contrived to circumvent the laws of the State of Mississippi * * * by requiring an additional burden on the customer in order to receive a refund of unearned premium *which burden was not required by state law* * * *.” RE 61 (emphasis added).

D. Plaintiff's Counsel Repeatedly Made Prejudicial And Unfounded Statements During Closing Arguments

We also assigned as reversible error (Br. 30-31) the numerous damaging statements in counsel's closing argument that had no basis in the evidence before the court. Hicks does not deny the absence of evidence, instead offering three unconvincing defenses of her counsel's conduct.

First, she claims (Br. 23) that "counsel are allowed wide latitude in arguments to the jury." That may be, but "[a] statement by counsel in argument of facts not in evidence is generally regarded as reversible error." *Dixie Ins. Co. v. Mooneyhan*, 684 So. 2d 574, 582 (Miss. 1996). Here, counsel's unfounded statements were plainly designed to provoke antipathy toward the defendants and to suggest to the jury that a huge award was both appropriate and expected. These statements were highly prejudicial to GMAC, and a new trial is the proper remedy.

Second, Hicks claims some kind of waiver by failure to object. This is nonsense. Hicks admits that **GMAC did object** to each of the challenged statements, which surely preserved the issue for GMAC. And as MIC Life pointed out in its opening brief (at 21 n. 8), the court specifically ruled that each defendant would be deemed to join in any objection made by the other. Tr. 165:15-17.^{3/} Thus, GMAC's objections also preserved the issue for MIC Life.

Third, Hicks argues that any prejudice to GMAC was eliminated by the court's generalized instruction to the jury that it should disregard remarks having no basis in the evidence. But if that general instruction were sufficient, then closing arguments would never be restricted by the facts in the record, because the jury could be expected, on its own, to separate the wheat from the chaff.

^{3/} Indeed, that rule is generally followed as a matter of law. Unless the identity of the objector is somehow relevant to the argument raised (which is not the case here), "when one party has made an objection * * *, it should be presumed, unless the contrary appears, that co-parties aligned with him have joined in the objection or offer." *Howard v. Gonzalez*, 658 F.2d 352, 355 (5th Cir. Unit A 1981) (citation omitted).

In truth, counsel's misstatements went uncorrected by the trial court, despite GMAC's objections. All of the offending comments, moreover, were made in plaintiff's rebuttal argument, so that counsel for defendants had no chance to correct them. When combined with other trial errors, counsel's flagrant misconduct warrants a new trial.

III. GMAC DID NOT ENGAGE IN PUNISHABLE CONDUCT

It is our submission that the jury should not have been asked to consider a punitive award against GMAC because there was no evidence whatsoever that GMAC's conduct met Mississippi's standard for imposing punitive damages. Hicks virtually concedes the point. For example:

- ! She does not deny that the punitive damages statute applies and that it required her to prove by clear and convincing evidence that GMAC acted with “[1] actual malice [2] gross negligence which evidences a willful, wanton, or reckless disregard for the safety of others, or [3] committed actual fraud.” MISS. CODE ANN. § 11-1-65(1)(a).
- ! She does not contend that GMAC acted with malice or committed fraud,^{4/} and she apparently concedes that GMAC's conduct did not reflect “willful, wanton, or reckless disregard for the *safety* of others.”

^{4/} Hicks argued strenuously to the jury that punitive damages should be imposed because GMAC engaged in intentional misconduct. *See, e.g.*, Tr. 497:11-12 (“The letter was a scheme so they wouldn't have to give them their money back”); Tr. 499:10-11 (“They contrived to do a plan to get around the law and get around the contract”); Tr. 526:11-16 (“Here's what they did. They said let's make them jump through an extra hoop. Because there is going to be a lot of widow women that isn't going to look and there's going to be a lot more that don't understand, there's going to be some that can't read and there's going to be some that get lost.”). Her implicit concession that this inflammatory theory is not supported by the evidence is more than enough reason to enter judgment on punitive damages for GMAC.

! She neither disputes that Mississippi law precludes the imposition of punitive damages in cases that define new duties nor points to any precedent establishing prior to this case that conduct such as GMAC's was wrongful.

These fundamental points are dispositive. Because no reasonable jury could find that GMAC engaged in punishable conduct, GMAC is entitled to judgment with respect to punitive damages.^{5/}

Even if the Court were to deem inapplicable the rule that punitive damages may not be imposed in cases of first impression *and* were to apply the common law standard for punitive liability rather than the statutory one, GMAC is entitled to judgment, because there was no evidence that reflects "some willful or malicious wrong or the gross and reckless disregard for the rights of others." *Weems v. American Sec. Ins. Co.*, 486 So. 2d 1222, 1227 (Miss. 1986) (citations omitted). In her effort to support the existence of gross negligence by GMAC, Hicks first claims (Br. 17) that "the fact that GMAC was required by the legislatures of eight different states to automatically refund unearned premiums as part of the loan payoff calculations" put GMAC on notice "of a problem with its notice program." That argument is frivolous. As discussed above, the fact that Mississippi has so far declined to adopt the approach of a minority of other states supports the *reasonableness* of GMAC's actions. Moreover, the fact that Mississippi expressly places the refund burden on the insurer means that GMAC had no notice of a duty to do anything different from what it was doing.

^{5/} If the Court concludes that one or more of Hicks's causes of action was tenable but that a verdict should not have been directed against GMAC, there must at least be a new trial on punitive damages even if the Court rejects our argument regarding punitive liability; in Mississippi, as elsewhere, liability on the underlying cause of action is a prerequisite to punitive damages.

Cf. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 576-578 (1996) (BMW could reasonably have interpreted state disclosure thresholds as establishing safe harbor).^{6/}

Second, Hicks argues (Br. 17) that the “magnitude of the problem” supports a finding that GMAC was grossly negligent. At trial, there was no evidence that anyone other than Mr. Hicks had failed to obtain any refund due to them, or that either defendant was aware of any problem with refunds. To support her contention that there was widespread retention of unearned premiums, plaintiff cites two items: a letter from counsel for GMAC and MIC Life describing MIC Life’s efforts to track down and pay refunds to other customers who may not have received refunds (the “Dickinson letter”); and a snippet of the deposition testimony of GMAC employee Cynthia Shackelford, who testified that in no more than 4% of the GMAC loans covered by credit life insurance was MIC the insurer (the “Shackelford testimony”). Hicks contends that this testimony shows that credit life premiums retained by MIC Life were “merely the tip of a very large iceberg.”

Because neither the Dickinson letter nor the Shackelford testimony was in evidence at trial neither may properly be considered by this Court in determining whether the punitive award against GMAC was proper.^{7/} In evaluating a jury verdict on appeal, a court may consider only the evidence

^{6/} At a later point in her brief (at 26 n.14) Hicks cites a comment to the Kansas statute governing refunds of unearned credit life premiums that refers to “apparent deficiencies in the efforts of creditors (particularly assignees),” which she suggests gave GMAC notice that its procedures in Mississippi were inadequate. We note that the comment appears nowhere in the record, and there is no evidence that GMAC was aware of it. Indeed, it is highly doubtful that a comment to a Kansas statute could ever suffice as notice of a duty in Mississippi. Setting those issues aside, the comment cited by Hicks actually has just the opposite effect from that she ascribes to it. It refers to perceived deficiencies in complying with the portion of the Kansas scheme that requires that refunds be made by creditors. In other words, the comment concerns deficiencies in the procedures that Hicks holds out as a model, not deficiencies in the conduct of creditors in states that do not follow the Kansas approach.

^{7/} As MIC Life discusses in detail in its brief (at 10-13), the Dickinson letter was drafted and sent to Hicks’s counsel in connection with another case, and was submitted by him to the trial court six

that was before the jury. *Deer Island Fish & Oyster Co. v. First Nat'l Bank*, 166 Miss. 162, 146 So. 2d 116, 117 (1933); *see also* *McFadden v. Mississippi State Bd. of Med. Licensure*, 735 So. 2d 145, 159-160 (1999) (events occurring after trial are not relevant to issues on appeal), *petition for cert. filed*, 68 U.S.L.W. 3080 (U.S. July 14, 1999) (No. 99-112); *Ditto v. Hinds County*, 665 So. 2d 878, 880 (Miss. 1995) (court of appeals may not act upon or consider matters which do not appear in the record).^{8/} To consider evidence submitted after the factfinding process is over denies the party against whom new evidence is offered an opportunity to counter it and put it in context, in violation of that party's right to due process. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (due process assures a "meaningful opportunity to present a complete defense") (internal quotation marks and citation omitted); *DuPont v. Southern Nat'l Bank*, 771 F.2d 874, 888) (5th Cir. 1985) ("Rendering judgment based only on the evidence of one party offends a litigant's most precious

months *after* the conclusion of the trial. The Shackelford testimony appears nowhere in the certified record on appeal, and is the subject of a motion to strike.

^{8/} Hicks's submission of the Dickinson letter to the trial court while the post-trial motions were pending does not make its consideration by this Court permissible. When deciding post-trial motions, the trial court considers the evidence presented to the jury. *See Jesco, Inc. v. Whitehead*, 451 So. 2d 706, 714 (Miss. 1984); *see also, e.g., Schudel v. General Elec. Co.*, 120 F.3d 991, 995 (9th Cir. 1997) (in considering motion for judgment notwithstanding the verdict, "[t]he record should be taken as it existed when the trial closed"), *cert. denied*, 118 S. Ct. 1561 (1998); *Sumitomo Bank of California v. Product Promotions, Inc.*, 717 F.2d 215, 218 (5th Cir. 1983) ("It was incumbent upon the trial court to consider all of the evidence before the jury, as it was in fact presented to the jury * * *."). That rule applies fully when the court considers a motion seeking remittitur of a punitive damages award. *See* MISS. CODE ANN. §§ 11-1-55, 11-1-65) (affording no right to submit additional evidence supporting punitive award to the trial court when it determines the reasonableness of a punitive damages award or considers a motion for remittitur); *compare* ALA. CODE § 6-11-23(b) (specifically providing that trial court "shall, upon motion of any party, either conduct hearings or receive additional evidence, or both, concerning the amount of punitive damages"). Since the trial court could not properly have considered the Dickinson letter — and it does not appear that it did — this Court may not consider it either. *See A.C. Joyner v. Berman Leasing Co.*, 398 F.2d 875 (5th Cir. 1968) (allegations made in post-trial motion for a new trial did not constitute reviewable evidence).

constitutional right.”); *Carter v. Morehouse Parish Sch. Bd.*, 441 F.2d 380, 382 (5th Cir. 1971) (“A ruling based on evidence which a party has not been allowed to confront or rebut is one which denies due process.”). Even if such an opportunity is afforded in post-trial proceedings or on appeal, it is not an effective substitute for the right to have *the jury* consider the evidence in the first instance.

That is certainly true in this case. GMAC had no notice that either the Dickinson letter or the Shackelford testimony would be used as evidentiary support for the punitive verdict and thus had no occasion to present additional evidence putting them in context. Even if GMAC were given the opportunity to place the evidence in its proper context, it would be impossible to know what effect the evidence would have had on the jury’s verdict. As MIC Life explains in its reply brief (at 11-13), the Dickinson letter does not impugn MIC Life’s conduct; and, for the reasons we discuss below, the jury might properly have viewed the Shackelford testimony as *exonerating* GMAC. Thus, neither the Dickinson letter nor the Shackelford testimony may be used to justify the punitive award against GMAC at this juncture.

In any event, neither the Dickinson letter nor the Shackelford testimony demonstrates, or even supports an inference, that GMAC was grossly negligent. Hicks adduced no evidence that GMAC knew or should have known that MIC Life had *any* problem with wrongful retention of premiums at the time relevant to Hicks’s claims. Absent a showing that GMAC knew about the situation or consciously disregarded red flags, the after-the-fact discovery that a number of customers had not received refunds from MIC Life adds nothing to the equation. Indeed, as discussed in MIC Life’s reply brief (at 12), the fact that a laborious reconciliation of the two companies’ records was necessary to create a list of individuals who *may* not have received their premium refunds confirms the prior *absence* of such information. Moreover, even if the information

in the Dickinson letter did somehow bear on GMAC's conduct, much *more* information would be needed before the Court could evaluate whether it justified a finding of gross negligence. For example, the factfinder would need to know the *total number* of GMAC contracts covered by MIC Life insurance during the ten-year period for which MIC Life's retention of refunds was examined.

The Shackelford testimony is even less indicative of misconduct by GMAC. First of all, *there is no evidence whatsoever* that the insurance companies that provided 96% of the credit life insurance on contracts purchased by GMAC erroneously retained *any* unearned premiums from their customers. Apart from that, the testimony actually *undermines substantially* Hicks's (evidently abandoned) argument that GMAC had any substantial motive to generate retained unearned premiums for MIC Life. The fact that GMAC was *related to* MIC Life was the indispensable linchpin of the case against GMAC. Hicks claimed (without any record support) that the defendants' refund practices were "a scheme or plan * * * that was concocted by GMAC and went along with by MIC Life, their wholly-owned subsidiary once removed, so that they could get around the state statute, and so they could get around the contract * * *." Tr. 410:23-28. She contended (again without record support) that GMAC, as MIC Life's indirect parent, controlled its actions with respect to refunds. *See, e.g.*, Tr. 525:28-29 ("[t]hey blocked * * * their wholly-owned subsidiary from sending the money"); Tr. 532:11-12 ("their child, MIC, their subsidiary, obeyed them just like a child would obey their parents"); Tr. 497:13-14 ("GMAC audits the books of MIC Life. GMAC knows who pays the accounts off."). She argued that GMAC benefitted financially from MIC Life's retention of unearned premiums because its subsidiary owned MIC Life's stock. *See, e.g.*, Tr. 219:6-8; 219:12-14; 250:24-26. She even emphasized the proximity of the two companies' corporate offices. *See, e.g.*, Tr. 497:14-16 ("There's no reason they can't tell the people in the cubicle down the hall or in the same building who has paid their loans off."). The jury's huge

punitive verdict against GMAC (\$30 million) is utterly inexplicable unless it fully accepted these arguments (or improperly relied solely on GMAC's wealth).

As the Shackelford testimony establishes, however, MIC Life provided only a tiny fraction of the credit life insurance on the retail instalment sale contracts purchased by GMAC. There is no conceivable reason why GMAC would seek to avoid the payment of refunds by *wholly unrelated companies* or to concoct a scheme that would indirectly benefit it only 4% of the time. Thus, the Shackelford testimony destroys Hicks's crucial contention that GMAC adopted its refund procedures — which it consistently followed regardless of which company provided the insurance (Tr. 312:5-9) — in order to minimize the payment of refunds by MIC Life. The Shackelford testimony also undermines Hicks's contention that GMAC should be punished because it “totally controlled” the refund process.

In sum, neither the evidence nor the non-record material proffered by Hicks shows that GMAC was grossly negligent or that it did anything else for which it may be punished under Mississippi law. GMAC is thus entitled to judgment with respect to punitive damages.

IV. THE \$5 MILLION PUNITIVE AWARD IS GROSSLY EXCESSIVE

Even if *some* award of punitive damages were allowable, the \$5 million punitive judgment is grossly excessive. As we have argued, such a punishment — which, to our knowledge, is more than three times the largest amount ever upheld by this Court — cannot possibly be described as “reasonable in its amount and rationally related to the purpose to punish what occurred.” MISS. CODE ANN. § 11-1-65(f)(1). Nor is it defensible under *BMW*.

Hicks points to no record evidence that could possibly justify the enormous verdict against GMAC — effectively conceding that the award cannot be sustained on the evidence before the jury. Rather, she relies almost exclusively on the Dickinson letter and the Shackelford testimony. As

discussed above and in MIC Life’s reply brief, reliance upon this non-record “evidence” would be improper. Moreover, the proffered material raises as many questions as it answers, and it is impossible to assess how the jury would have evaluated this evidence had it been introduced at trial and GMAC given the opportunity to put it into context and introduce its own evidence on the point. Even putting these factors aside, however, the newly-offered material does not justify the outlandish \$5 million punishment.

A. The Punitive Damages Verdict Against GMAC Is Grossly Excessive Under Federal Law

In our opening brief, we demonstrated that the punitive award was grossly excessive when measured against the three *BMW* factors. Hicks does not refute that showing.

1. Reprehensibility. We contended that GMAC’s conduct, even if punishable, would rank extremely low on the scale of reprehensibility. Pursuing the classic “inflame the jury, pacify the court” strategy, Hicks does not here renew her accusations of deliberate misconduct but now contends only that GMAC negligently performed duties it assumed with respect to refunds — or, more concretely, that GMAC’s voluntary notice to Mr. Hicks of his refund rights was inadequate. Simply to describe that “failing” is to demonstrate that “none of the aggravating factors associated with particularly reprehensible conduct is present.” *BMW*, 517 U.S. at 576. Thus, GMAC’s conduct “does not establish the high degree of culpability that warrants a substantial punitive damages award.” *Id.* at 580.

Seeking to rebut that showing, Hicks returns to the same factors that she claimed justified a finding that GMAC was grossly negligent; once again, she “direct[s] the Court’s attention to the sheer magnitude of the problem and to the fact that GMAC was clearly on notice, because of the automatic refund requirement of eight states, that improper retention of unearned premiums is a

problem.” Br. 25-26. As discussed above, however, these factors do not show that GMAC’s conduct was “sufficiently reprehensible to give rise to * * * even a modest award of punitive damages.” *BMW*, 517 U.S. at 580. They certainly cannot bear the additional weight of justifying the exorbitant award in this case.

2. The ratio of punitive to actual damages. In our opening brief (at 41-42), we contended that the **7,800:1** ratio of punitive damages to actual damages far exceeds acceptable bounds. Neither of Hicks’s two responses rescues the verdict.

First, Hicks claims (Br. 26-27) that a more modest award would have no deterrent effect and would not have motivated action to track down other consumers who had not received refunds. This is, of course, the rankest speculation; there is no reason to believe that a finding of liability and a modest award — say, ten times the compensatory damages of \$637.99 — would not have the same effect. Even assuming that GMAC and MIC Life were indifferent to MIC Life’s legal obligations and cared only for their own pecuniary interests, the substantial risk of comparable punitive awards to other aggrieved policyholders or, especially, of class action litigation would likely prompt appropriate remedial action. See *BMW*, 517 U.S. at 585 (“In the absence of a history of noncompliance with known statutory requirements, there is no basis for assuming that a more modest sanction would not have been sufficient to motivate full compliance * * *.”). Hicks’s complaint that remedial actions were not initiated until after the trial proves nothing. Until the verdict, **GMAC** surely had no reason to believe that it had *any* responsibility for credit life insurance refunds under Mississippi law. Nor would it have had any reason to think that some refunds were not being made. After all, as the holder of the instalment contract — not the insurance contract — it had no records to show whether and when refunds were being made.

Second, Hicks argues (Br. 27-28) that the punitive award should be measured against the “potential damage” from GMAC’s conduct, which she claims is equal to her estimate of the harm to other Mississippi consumers. As MIC Life explains in its brief (at 16), however, the “potential harm” to be considered is the harm *to the plaintiff* that might have resulted from the specific conduct at issue. Harm to others — either actual or potential — does not come into play when assessing whether a punitive award is excessive. See *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 639-640 (10th Cir. 1996) (“In figuring harm both actual and potential harm may be considered. But it must be harm to these plaintiffs, not to others.”). See also *Mutual Life Ins. Co. v. Estate of Wesson*, 517 So. 2d 521, 532-533 (Miss. 1987) (citing with approval cases that measure excessiveness by comparing the punitive damages to the plaintiff’s compensatory damages).

The evidentiary grounds for Hicks’s position are even weaker. Based on Shackelford’s testimony that MIC Life provided only 4% of the credit life insurance on GMAC’s retail instalment sale contracts, Hicks speculates that various insurance companies withheld a total of \$5.6 million dollars from Mississippi customers. But there is no basis in the record for concluding that any or all of the other insurers with which GMAC dealt retained unearned premiums at the same rate as MIC Life may have.^{9/} These other insurers may have made other arrangements with their dealers or with customers that minimized this number. Even if Hicks’s figures could be proven correct, moreover, there is no way to know how a jury would have evaluated this information; as discussed above, the fact that MIC Life provided only a small fraction of the credit life insurance on the retail instalment sale contracts purchased by GMAC might well have exonerated GMAC in the eyes of

^{9/} As explained in MIC Life’s brief (at 10-11), the figures contained in the Dickinson letter almost surely *overstate* the number of MIC Life customers who failed to receive refunds and the total amount of unearned premiums that it failed to refund.

the jury. Finally, it should be noted that the figures in the Dickinson letter cover a *ten*-year period. The letter does not indicate what portion of the refunds made by MIC Life were to customers who paid off their contracts within the three-year limitations period; there is accordingly no way to extrapolate a figure for all insurers. Because customers who paid off their contracts outside the three-year limitations period no longer had a legally enforceable right to a refund, they should not form a predicate for calculating punitive damages.^{10/}

3. Statutorily established penalties for comparable misconduct. In our opening brief, we demonstrated that the \$5 million punitive award far exceeded the most analogous statutory penalty for comparable misconduct, which was \$5,000. Hicks implicitly concedes that we have correctly identified the most analogous penalty but claims that, before it is compared with the punitive award, that penalty should be multiplied — either by the number of Mississippi customers who were paid refunds after MIC Life’s investigation, or by the twenty-five times greater number of people she claims did not receive refunds from MIC Life and all other insurance companies providing credit life insurance on GMAC’s contracts. The latter figure, of course, is sheer invention; there is no evidence (even post-trial evidence) that a single person other than those identified by MIC Life failed to receive refunds, and, even if there were any, there is no justification for punishing GMAC for such oversights. Moreover, as discussed in MIC Life’s brief, the former number, also, is almost surely inflated.

^{10/} As discussed in MIC Life’s brief (at 17-18), it would be no more appropriate to compare the punitive award to the \$226,613 that MIC Life paid to Mississippi consumers. Even if it were proper to do so, moreover, the resulting 22:1 ratio would far exceed constitutional bounds. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991) (4:1 ratio between punitive damages and actual harm is “close to the line”).

But that is beside the point. This case involves *a single instance* of erroneously retained unearned premiums. GMAC — which is not even subject to the insurance statute at issue — surely did not have constitutionally adequate notice that it could be punished for *one* violation in an amount *1,000 times* more severe than the maximum comparable fine. Under this guidepost as well, therefore, the punitive verdict is grossly excessive.

B. The Punitive Verdict Was The Product of Passion, Bias, Or Prejudice And Must Be Set Aside Or Reduced Under Mississippi Law

Mississippi law requires the reviewing court to reduce a punitive damages award when it is so excessive that it “evinces passion, bias, and prejudice on behalf of the jury so as to shock the conscience of the court.” *Dixie Ins. Co.*, 684 So. 2d at 586. Although the sheer size of the award alone may require a presumption of bias, a punitive award, large or small, is unlawful if improper appeals to the jury’s emotions or prejudice influenced the award. As shown in our opening brief (at 46-48), there are ample reasons to conclude that the punitive verdict against GMAC in this case — *\$30 million* before being remitted — was the result of bias, passion, and prejudice. Under these circumstances, remittitur is not an adequate remedy; a new trial on punitive damages is necessary.

Hicks does not even respond to this argument, and with good reason. Nothing in the trial record can possibly justify the outrageous verdict; her defense of the punitive verdict, such as it is, rests almost entirely on material that never was presented to the jury and the effect of which on an uninflamed jury is impossible to determine. Even if that material otherwise supported the magnitude of the punitive award — and, as we argue above, it does not — logically it cannot rebut an inference that the jury was influenced by improper appeals to its biases. Indeed, the fact that Hicks does not even attempt to defend the principal basis on which she sought punitive damages — her contention that GMAC purposefully schemed to minimize the payment of refunds — supports that inference

by itself. Even if GMAC were not entitled to judgment on punitive damages, therefore, it would at least be entitled to a new trial.

CONCLUSION

For the reasons explained above, this Court should vacate the judgment below and enter judgment in favor of GMAC on all counts. If the Court concludes that a new trial on compensatory damages is warranted, it should nonetheless enter judgment for GMAC on punitive damages. Even if the Court concludes that the directed verdicts were proper and that punitive damages could be defended on this record, it should order a new trial on punitive damages. At a minimum, this Court should order a remittitur of the punitive damages award to a modest multiple of the compensatory damages.

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