IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 92-CA-00554 COA

TAMARA MAY ESTES **APPELLANT**

v.

DAN WEBB, SHUTTLEWORTH, SMITH AND WEBB, LTD. AND ALLSTATE INSURANCE COMPANY **APPELLEES**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	02/05/92
TRIAL JUDGE:	HON. FRANK G. VOLLOR
COURT FROM WHICH APPEALED:	LEE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	ROY O. PARKER, JR.
ATTORNEYS FOR APPELLEES:	W.O. LUCKETT, JR. (WEBB AND SHUTTLEWORTH, SMITH AND WEBB, LTD.) JIMMIE B. REYNOLDS, JR. (ALLSTATE) WILLIAM C. GRIFFIN (ALLSTATE) KEITH BALL (ALLSTATE)
NATURE OF THE CASE:	CIVIL - OTHER
TRIAL COURT DISPOSITION:	DIRECTED VERDICT IN FAVOR OF ALLSTATE AND JURY VERDICT IN FAVOR OF DAN WEBB AND FIRM
DISPOSITION:	REVERSED AND REMANDED -2/10/98
MOTION FOR REHEARING FILED:	2/24/98
CERTIORARI FILED:	
MANDATE ISSUED:	

EN BANC.

KING, J, FOR THE COURT:

Tamara Estes has appealed an adverse verdict rendered in the Circuit Court of Lee County. Estes

filed suit against Dan Webb, Shuttleworth, Smith and Webb, Ltd., Allstate Insurance Company and North Mississippi Medical Center[(1)], seeking damages for abuse of process and invasion of privacy, as a result of Dan Webb having obtained Estes's medical records from North Mississippi Medical Center by subpoena duces tecum and disseminated them without her authority.

The trial court directed a verdict for Allstate, and the jury returned a verdict in favor of Webb and his law firm.

From this adverse judgment, Estes has appealed assigning some 31 errors. However, we shall only address six of them.

Those six are as follows:

> **1. The Court erred in permitting the jury to consider whether the admission forms of Tamara May Estes were waivers or authorizations for release of medical information.**
>
> **2. The Court erred in overruling Plaintiff's Motion in Limine to keep the defendants from offering any testimony or evidence that David Butts waived the medical privilege for Tamara May Estes by David Butts' not objecting to Dan Webb's allegation that he informed David Butts that he was going to subpoena the records of Tamara May Estes.**
>
> **3. The Court erred in permitting the jury to consider whether an abuse of process had been committed and whether damages flowed from the abuse as the Court had already ruled that Plaintiff had met her burden of proof regarding these aspects as a matter of law.**
>
> **4. The Court erred in granting a peremptory instruction or summary judgment for Allstate Insurance Company.**
>
> **5. The Court erred in allowing the financial statement of Dan Webb to be entered into evidence stating that there was a $10,000 liability as a deductible for the errors and omissions insurance policy, but no assets were listed on his financial statement for the benefits from the policy.**
>
> **6. The Court erred in not including the errors and omissions professional insurance policy in the amount of one million dollars of Dan Webb as a part of his net worth or to show his ability to pay, in order for the jury to be able to assess an appropriate amount as punitive damages in the event the jury decided to assess punitive damages against Defendant Webb.**

Finding merit in these arguments, we reverse and render as to all remaining defendants on the issue of liability and remand for a determination of damages, consistent with this opinion.

I

FACTS

Estes, age seventeen, was a passenger in a vehicle driven by Raymond Griffin, Jr. on March 17, 1990, when that vehicle collided with a vehicle driven by Dennis Tucker. The negligence of Griffin, in

straying over the center line, was the apparent cause of this collision.

Estes, who was seriously injured, was taken to North Mississippi Medical Center, where she was admitted and treated. As a part of the admissions process, relatives of Estes signed the standard admission forms. These forms included language authorizing release of medical information to designated insurers and "any other insurer or agency concerned with the payment of my hospital charges". These forms contained space in which Estes could have designated either an insurer or other entity responsible for her hospital bill. There were no insurers designated on these forms. Nor did Estes designate on the forms anyone else concerned with the payment of her hospital bills. Tucker, represented by attorneys William Catledge and John Fox, filed suit against Raymond Griffin, Jr., Raymond Griffin, Sr., and Griffin Motor Company. That action was Cause 8963, in the Circuit Court of Chickasaw County. Allstate, Griffin's liability insurance carrier, assigned this case to the Defendant, Dan Webb, and his law firm to defend.

Estes did not file suit, but asserted a claim against Raymond Griffin, for injuries sustained in the same collision of March 17, 1990. This was the same collision out of which Tucker was seeking damages in Cause number 8963 , in the Circuit Court of Chickasaw County.

Estes was represented in her claim by Roy Parker and Associates and David Butts.

Estes's attorney had some direct discussion with Allstate claims adjusters about the resolution of her claim. As a part of these efforts at settlement, the pertinent portions of Estes's hospital records were provided directly to Allstate on June 7, 1992. Deleted from those records sent to Allstate by Estes's attorney were findings and statements regarding drug use by Estes.

These efforts at resolution were unsuccessful. At some point, Allstate had also requested that Dan Webb and his law firm begin looking at Estes's claim.

Allstate provided Dan Webb with a copy of the medical records received from Estes. However, saying they were not clear, Webb contacted David Butts and requested another copy. Butts declined to provide a copy, saying the records had been given to Allstate, and Webb should get a copy from Allstate.

When Butts declined to provide Webb with another copy of Estes's hospital record, Webb indicated he would cause a subpoena to be issued for these records. Butts did not indicate any agreement or objection to this statement by Webb.

On July 9, 1990, Dan Webb, in Cause Number 8963, in the Circuit Court of Chickasaw County, styled Dennis Tucker v. Raymond Griffin, Jr. Raymond Griffin, Sr., and Griffin Motors, caused a subpoena duces tecum, to be issued to the North Mississippi Medical Center, directing that it provide to Dan Webb:

> "Any and all records pertaining to the treatment and care of Tamara Mae Estes, Tammy Estes, 3204 Meadowview Drive, Tupelo, Mississippi 38801, date of birth 05/06/72 including but not limited to, doctors' and nurses' and progress notes, orders for lab tests and x-rays and results thereof, bills for treatment provided and payments made and by whom, and any other records pertaining to the treatment of Tamara Mae Estes."

North Mississippi Medical Center, in compliance with this subpoena duces tecum, gathered and submitted to Dan Webb its medical records on Tamara Mae Estes. Included in these records were references to drug use by Estes, which Attorney Butts had deleted from the records given to Allstate.

On August 1, 1990, the deposition of Tamara Estes was taken by the Dan Webb law firm. That deposition was taken in Cause Number 8963, then pending in the Circuit Court of Chickasaw County, and styled Dennis Tucker v. Raymond Griffin, Jr., Raymond Griffin, Sr., and Griffin Motors, Inc.

At the August 1, 1990 deposition of Tamara Estes, she and her attorney learned for the first time that the Webb law firm had in fact subpoenaed her medical records. Estes was questioned about these records, which were then attached as an exhibit to her deposition, by the Webb law firm.

Attorney William Catledge, attorney for Tucker, Bradford Henry (Webb law firm), Dennis Voge, James Johnstone, attorneys for the various defendants, and the court reporter from Magnolia Court Reporting were present at Estes's deposition.

The completed deposition and the attached exhibits, were made a part of the public case file in Cause Number, 8963 in the Circuit Court of Chickasaw County, styled Dennis Tucker v. Raymond Griffin, Jr. Raymond Griffin, Sr., and Griffin Motors, Inc.

As a result of these actions Tamara Estes filed the present action against Dan Webb, Shuttleworth, Smith and Webb. Ltd. (the Webb law firm), and Allstate Insurance Company seeking damages for abuse of process and invasion of privacy.

II

ANALYSIS

1. THE COURT ERRED IN PERMITTING THE JURY TO CONSIDER WHETHER THE ADMISSION FORMS OF TAMARA ESTES WERE WAIVERS OR AUTHORIZATIONS FOR RELEASE OF MEDICAL INFORMATION.

2. THE COURT ERRED IN OVERRULING PLAINTIFF'S MOTION IN LIMINE TO KEEP THE DEFENDANT FROM OFFERING ANY TESTIMONY OR EVIDENCE THAT DAVID BUTTS WAIVED THE MEDICAL PRIVILEGE FOR TAMARA MAY ESTES BY DAVID BUTTS' NOT OBJECTING TO DAN WEBB'S ALLEGATION THAT HE INFORMED DAVID BUTTS THAT HE WAS GOING TO SUBPOENA THE RECORDS OF TAMARA MAY ESTES.

Assignment of errors one and two both address the alleged waiver of the medical privilege and will be addressed together.

The defendants advanced the following theories of defense in this action: (1) defendants suggested that the general authorization, signed upon hospital admission, which allowed information to be given to one's health insurance carrier, or other persons responsible for payment of the bill, was sufficiently broad to include Allstate and its agents, (2) defendants suggested that by previously providing an edited copy of her medical records, Estes waived her right to claim a medical privilege, and (3)

defendants suggested that the failure of Estes's attorney to respond to Webb's remark about issuing a subpoena for the medical records was a waiver of the medical privilege.

The trial court rejected defendant's assertion that by providing Allstate an edited copy of her medical record, Estes waived her medical privilege. However, the trial court did instruct and allow the jury to consider (1) whether the general authorization signed upon hospital admission was a sufficiently broad waiver to include Allstate and (2) whether the failure of Estes's attorney to respond to a suggestion by Webb that he would subpoena the medical records was a waiver. This was error and demands that this matter be reversed.

The clear intent of the admissions authorization was to identify whether there was a personal health insurance carrier, or similar institution, to cover Estes's bill or whether Estes and her parents were to be held directly responsible for the obligation. It was not intended to, nor does it address, third parties (Allstate), who may have some tenuous and speculative obligation based upon questions of liability insurance. The tenuous and speculative nature of this alleged obligation is demonstrated by the great length to which Allstate went to discredit Estes, and in the process either totally defeat, or significantly diminish her claim. There is nothing to indicate that the parties intended this admission authorization to be given such a broad scope. Where the agreement on its face is clear and unambiguous and does not demonstrate an intent by the parties, Estes and North Mississippi Medical Center, to embrace the expansive construction suggested by Allstate, this Court will not so expand it. ***Hoerner v. First Nat'l Bank of Jackson*, 254 So. 2d 754, 759 (Miss. 1971).** Nor will this Court suffer Allstate, a stranger to that agreement, to broaden its scope.

Nor is there any basis in fact or law to require that Butts respond and affirmatively object to the subpoena of Estes's medical records by Webb. This is especially true when Butts made it clear to Webb that he had sent to Allstate the records which he wished Allstate to have.

Had the trial court properly denied the instructions, the plaintiff could, and should, have been granted a peremptory instruction on the invasion of privacy claim.

III

3. THE COURT ERRED IN PERMITTING THE JURY TO CONSIDER WHETHER AN ABUSE OF PROCESS HAD BEEN COMMITTED AND WHETHER DAMAGES FLOWED FROM THE ABUSE AS THE COURT HAD ALREADY RULED THAT PLAINTIFF HAD MET HER BURDEN OF PROOF REGARDING THESE ASPECTS AS A MATTER OF LAW.

ABUSE OF PROCESS

"The action of abuse of process consists in the misuse or misapplication of a legal process to *accomplish some purpose not warranted* or commanded by the writ. It is the malicious perversion of a regularly issued civil or criminal process, for a purpose and *to obtain a result not* lawfully warranted or *properly attainable thereby* . . . ." ***State of Mississippi For The Use And Benefit of J.C. Foster, et al. v. Turner et al.*, 319 So.2d 233, 236 (Miss. 1975)**(emphasis added).

Webb knew that a subpoena could only be issued in a matter presently pending in court. He knew

that there was no case pending in which Estes was a party, in which a subpoena could be obtained. This understanding was acknowledged by Webb in a letter to Joan Vines of Allstate, dated May 10, 1990, wherein he stated an intent to subpoena all of Estes's records in the Tucker case and use them against Estes.

Webb deliberately set out by stealth to obtain these records in a cause to which Estes was not a party. The sole purpose in obtaining these records by stealth was to discredit Estes. This fact is established by Webb's letter, dated May 10, 1990, directed to Joan Vines of Allstate, where the following statements are found:

> "We have asked our surveillance person to do surveillance work as to Tammy Estes to determine her use of drugs, alcohol, and her general background that will aid us in defending that potential lawsuit." (page 5 of the letter of May 10, 1990.)

In describing action taken in Tucker v. Griffin, Webb stated, "To this date, we have had our surveillance officers working on this matter, primarily devoting the investigator time to finding all relevant information possible on potential claimant Tammy Estes." (page 10 of the letter of may 10, 1990.)

In describing actions which he intended to take in Tucker v. Griffin, Webb stated:

> Also continue to collect background information on Tammy Estes and her family due to the fact that it is apparent that she is going to have a claim filed on her behalf . . . .
>
> . . . .
>
> 5. Subpoena all records available on Tammy Estes in this case.(page 11 of the letter dated May 10, 1990.)

Webb knew that because of the medical privilege, he could not lawfully obtain Estes's medical records without her consent, a consent which he did not have.

Notwithstanding this, Webb made a studied decision not to tell Estes that a subpoena duces tecum had been issued for her medical records. The rather disingenuous reason given for this failure to notify Estes, is that she was not a party, and under MRCP 5, only parties are entitled to notice.

Rule 45(d) MRCP,"Protection of persons subject to subpoenas", while not controlling, is a useful point of reference on this issue. **Rule 45(d)(1)(A)(ii)** states, "On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it... requires disclosure of privileged or other protected matters and no exception or waiver applies...."

Inherent in the requirement of timely filing is notice of the existence of the subpoena. Where one finds after the fact that privileged information has been released under a subpoena, there is little protection which can be afforded to him by the court.

Webb made a deliberate decision not to inform Estes of the actual subpoena for her medical records. The only reason for such covert activity would be to obtain those records without the knowledge of Estes or an opportunity for her to object.

In addition to the medical records obtained from North Mississippi Medical Center, Webb used this same type of covert activity to obtain Estes's medical records from (1) Dr. Walter Eckman, (2) Dr. Thomas McDonald, and (3) Dr. Thomas K. Billups. Webb also by stealth subpoena obtained the school and employment records of Estes.

All of these subpoenas were issued in a case to which Estes was not a party, and could and should be considered as egregious conduct by Webb. Given such egregious conduct Estes should have been given a peremptory instruction on invasion of privacy and an appropriate award of damages.

Having found no waiver of the medical privilege, we hold that the issuance of a subpoena duces tecum for Estes's medical records, in a case to which she was not a party was an abuse of process. While it is true that the subpoena duces tecum is a proper manner to request documents, requesting the issuance of a subpoena duces tecum for an individual's medical records,in a case to which that individual is not a party, when that individual has declined to waive the medical privilege, is a knowing and intentional perversion of lawful process, i.e. abuse of process, for which damages, can and should be awarded.

Given these facts the trial judge was correct in holding that Estes had carried her burden of proof on the abuse of process claim. Having so found, Estes was entitled to a peremptory instruction on this matter, and to have the jury only decide what damages she was entitled to receive.

DAMAGES

That this state allows recovery of damages for infliction of emotional distress is a well settled matter. In ***Sears, Roebuck & Co. v. Devers,* 405 So. 2d 899, 902 (1981)**, our supreme court observed, "Where there is something about the defendant's conduct which evokes outrage or revulsion, done intentionally, or even unintentionally yet the results being reasonably foreseeable-Courts can in certain circumstances comfortably assess damages for mental and emotional stress even though there has been no physical injury. *In such instance, it is the nature of the act itself-as opposed to the consequences which gives impetus to legal redress.*" (emphasis added). ***See also Wirtz v. Switzer,* 586 So. 2d 775 (Miss 1991).**

Mississippi recognizes several theories upon which damages for invasion of privacy may be sought; (1)" portrayal of plaintiff in a false light . . . ; (2) appropriation of plaintiff's likeness and unpermitted use, . . . ; and (3) public disclosure of private facts . . . ." *Young v. Jackson, et al 572 So. 2d 378, 381 (Miss 1990).* See also ***Deaton v. Delta Democrat Publishing Company,* 326 So. 2d 471 (Miss 1976).**

To find a defendant liable for invasion of privacy by publication of a private fact, the information must (1) be offensive to a reasonable person and (2) " not of legitimate concern to the public." ***Young,* 572 So.2d at 382.** Clearly the revelation that a private person may have used drugs is both offensive and not a matter of legitimate concern to the public.

In its consideration of damages for this invasion of privacy, the jury should have been allowed to consider publication of this private information, the effects of that publication, as well as the manner in which this information was obtained.

Where the conduct publicizing private information is particularly outrageous no other injury is required. ***Morrison v. Means,* 680 So. 2d 803, 806 (Miss 1996).**

We hold that the manner in which this information was obtained was particularly egregious, and without more, would support an award of damages.

4. THE COURT ERRED IN GRANTING A PEREMPTORY INSTRUCTION OR SUMMARY JUDGMENT FOR ALLSTATE INSURANCE COMPANY

Allstate employed the law firm of Shuttleworth, Smith and Webb, Ltd. to represent it in the Tucker lawsuit and the potential lawsuit of Estes. The attorney client relationship, is one of agent and principle respectively. ***Restatement (Second) of Agency* § 15 (1984 App.).**

Under our law, the principle is liable for those acts of the agent which (1) are within the agents authority or (2) are done with the knowledge of the principle. ***McPherson v. McLendon,* 221 So. 2d 75, 78 (Miss. 1969).**

In the present case, the actions taken by Webb were within the scope of his authority and were known to Allstate. This fact is established by Webb's letter to Joan Vines of Allstate, dated May 10, 1990, referred to earlier in this opinion.

That letter conveyed to Allstate, with great clarity what Webb had done, and what Webb intended to do regarding Estes and her potential claim. The record is devoid of evidence indicating any effort by Allstate to prevent or even discourage these actions by Webb.

We therefore hold that Allstate is bound and liable for the torts of its agent.

5. THE COURT ERRED IN ALLOWING THE FINANCIAL STATEMENT OF DAN WEBB TO BE ENTERED INTO EVIDENCE STATING THAT THERE WAS A $10,000.00 LIABILITY AS A DEDUCTIBLE FOR THE ERRORS AND OMISSIONS INSURANCE POLICY, BUT NO ASSETS WERE LISTED ON HIS FINANCIAL STATEMENT FOR THE BENEFITS FROM THE POLICY.

6. THE COURT ERRED IN NOT INCLUDING THE ERRORS AND OMISSION PROFESSIONAL INSURANCE POLICY IN THE AMOUNT OF ONE MILLION DOLLARS OF DAN WEBB AS A PART OF HIS NET WORTH OR TO SHOW HIS ABILITY TO PAY, IN ORDER FOR THE JURY TO BE ABLE TO ASSESS AN APPROPRIATE AMOUNT AS PUNITIVE DAMAGES IN THE EVENT THE JURY DECIDED TO ASSESS PUNITIVE DAMAGES AGAINST DAN WEBB.

Because these issues are inextricably intertwined, they are addressed together.

In submitting the issue of punitive damages to the jury, the court allowed Webb to introduce a financial statement which included a liability of $10,000. This sum was the deductible amount of his professional liability insurance policy. By allowing this liability, Webb was able to decrease his net worth by $10,000.

The professional liability policy of which this was the deductible, has a $1,000,000 limit. While

submitting to the jury information on the policy deductible, the trial court refused to allow the jury to consider the benefits of that policy.

Punitive damages are intended to punish a wrongdoer. ***Standard Life Ins. Co. of Indiana v. Veal*, 354 So. 2d 239 (Miss. 1977).** They are not intended to destroy, the person against whom they are awarded. ***T.C.L., Inc. v. Lacoste*, 431 So. 2d 918 (Miss. 1983).** It is for these reasons, that awards of punitive damages should be based upon an actual statement of the defendant's worth.

Ordinarily, our courts have not allowed evidence of liability insurance to be introduced. ***See Snowden v. Skipper*, 93 So. 2d 834, 839 (Miss. 1957)** ("This Court, in a long line of decisions, has held that the disclosure by plaintiff's examination that the defendant is covered by liability insurance is condemned and constitutes reversible error."). However, where through the insistence of the defendant, he seeks the benefits of a portion of the insurance contract and places the same before the jury, fundamental fairness requires that the plaintiff be allowed to have the jurors consider the remaining information in the insurance contract.

In the present case, Webb wished the jury to be informed of the deductible of the liability policy, but not the limits of liability. He cannot have it both ways.

Upon remand, the trial court is directed to either exclude from Webb's liability the $10,000 deductible, or to include amount his assets the $1,000.000 policy limits.

THE JUDGMENT OF THE LEE COUNTY CIRCUIT COURT IN FAVOR OF ALLSTATE AND DAN WEBB IS REVERSED AND RENDERED AS TO LIABILITY AND REMANDED AS TO DAMAGES. COSTS ARE ASSESSED TO THE APPELLEES.

BRIDGES, C.J., DIAZ, HERRING, AND PAYNE, JJ., CONCUR. MCMILLIN, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY THOMAS, P.J., COLEMAN, AND SOUTHWICK, JJ. HINKEBEIN, J., NOT PARTICIPATING.

McMILLIN, P.J., DISSENTING:

I dissent. Even assuming, for sake of argument, that Estes proved a case of abuse of process and a resulting invasion of her privacy, it is my opinion that she proved no compensable injury. On that basis, the jury was correct in returning a defendant's verdict. Estes's sole claim for damages was for mental anguish due to the humiliation of having her involvement with drugs -- a private and embarrassing matter -- wrongfully published to third parties. The only proven publication of her drug-related behavior occurred at a deposition attended by five attorneys, a court reporter, Estes, and her father. Estes put on no evidence that she did, in fact, suffer any anguish over this disclosure. She could say only that the disclosure "affected" her. Her father, who was present at the deposition, was asked, "And was anybody upset when you left the deposition?" He answered, "Well, no, sir." He was also asked if his daughter made any complaint to him when they left the deposition and responded that she did not. Her sister, who resided in the home with Estes, was asked about possible injury to her sister.

> Q. And all the time that you lived with Tammy, you didn't hear any complaints, problems, or

anything about medical records or who had them or didn't have them. Isn't that correct?

A. To my knowledge, yes, sir, that is, but like I said, we do lead our own separate lives and do our own things and, when we are together, you know, we don't discuss medical problems and that sort of thing.

I think the majority misreads the holding in ***Morrison v. Means,* 680 So. 2d 803 (Miss. 1996)**. The majority seems to say that, where the offensive conduct is sufficiently outrageous, compensable mental anguish may be presumed even in the absence of proof. The case does not say that. In fact, the case is one affirming the denial of mental anguish damages, and says that

[e]ven if this Court were to find Morrison's conduct to be of such a nature to meet the standard set by our precedent [for the award of mental anguish damages], there is not enough evidence presented to support the claim of mental anguish as a result of the conduct due to a lack of an injury.

Id.* at 806-7**. Morrison's proof of injury was that the defendant's wrongful conduct had "affected me emotionally in that I have not been able to sleep many nights because I feel like I've been done wrong." ***Id.* at 807**. The supreme court said that this evidence "offered in support of this claim [is] hardly enough evidence to support a verdict . . . ." ***Id. In the recent case of *Wong v. Stripling*, the supreme court upheld a grant of summary judgment in a case where the plaintiff sought damages solely for emotional distress. The court said that the plaintiff "failed to set forth any proof of injury, which is a necessary element of such a claim." ***Wong v. Stripling,* 700 So. 2d 296, 307 (Miss. 1997)**. Justice Banks, writing for the court, said that "[i]t is axiomatic that in addition to suffering conduct that is outrageous or repulsive, this tort also requires proof of injury, i.e., that the conduct in question caused *actual mental distress.* ***Id***. (emphasis in original).

There is even less evidence in the record to support an award of damages for mental anguish in this case than there was in either *Morrison v. Means* or *Wong v. Stripling*.

Proof of compensable damage is a prerequisite of entitlement to recovery for which the plaintiff bore the burden of proof. It is not essentially different from the burden she bore in regard to any other necessary element of her claim. ***Scott County Co-Op v. Brown,* 187 So. 2d 321, 326 (Miss. 1966).** A tort claimant is not given a second chance to prove an essential element of the case if an appellate court determines the evidence on the point was insufficient in the first instance. There is no principled reason to apply a different standard to proof of damages. Having failed to present any evidence that would support an award of actual damages, Estes is not entitled to dust up her evidence and see if she can do a better job the second time. We should affirm.

THOMAS, P.J., COLEMAN, AND SOUTHWICK, JJ., JOIN THIS SEPARATE OPINION.

1. The Supreme Court earlier disposed of the cause against North Mississippi Medical Center, and it is not present before this court.