

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO.: 2007-CA-00585

GALLAGHER BASSETT SERVICES, INC.

APPELLANT

VERSUS

GARY LEE MALONE and
NABORS DRILLING USA, INC.

APPELLEE

Appeal from the Circuit Court of Jones County, Mississippi, Second Judicial District
Circuit Court No. 2003-230-CV12

BRIEF OF APPELLEE/CROSS APPELLANT
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STATEMENT REGARDING ORAL ARGUMENT

Appellee/Cross Appellant, Nabors Drilling USA, LP requests oral argument.

I. STATEMENT OF THE ISSUES

A. Nabors' Cross-Appellant Issues

1. The Trial Court erred in denying Nabors Drilling USA's Motion for Judgment Notwithstanding the Verdict to Enter Additur.
2. The Trial Court erred in overruling Nabors' objection to Gallagher Bassett's tendered expert witness, Wayne Johnston's, trial testimony.
3. The final judgment entered in favor of Malone against Nabors was against the overwhelming weight of the evidence.
4. The Trial Court erred in holding in abeyance until after the trial Nabors' Motion to Strike Gallagher Bassett's Cross-Action.
5. The Trial Court erred in denying the Motion in Limine to Exclude Gallagher Bassett's Supplemental Responses to Nabors Drilling USA and Robert Holbrook's Interrogatories, in the Alternative Motion to Strike.
6. The Trial Court erred in its oral denial of Nabors' Motion for Directed Verdict against Gallagher Bassett's Cross-Claim against Nabors at the close of Plaintiff's case.

B. Nabors' Appellee Issues

7. Gallagher Bassett's handling of Malone's claim was improper and inadequate.
8. Malone's claims are not barred by the Exclusivity Clause of the Workers' Compensation Act with regard to Gallagher Bassett.
9. Gallagher Bassett was the proximate cause of damages suffered by Malone.
10. Any failure to mitigate damages on Malone's part does not absolve Gallagher Bassett from liability.
11. Malone's claims are not barred by the "one satisfaction" rule and Gallagher Bassett is not entitled to a set off.

12. Gallagher Bassett is liable to Nabors for breach of contract, not indemnity of Malone's claim as asserted by Gallagher Bassett.

II. STATEMENT OF THE CASE

A. Procedural History

On December 3, 2003, Plaintiff, Gary Malone, filed a lawsuit alleging bad faith for the alleged denial of workers' compensation benefits against several defendants, including Nabors Drilling USA, L.P., which was improperly named as Nabors Drilling USA, Inc. (hereinafter "Nabors"), Robert Holbrook, and Gallagher Bassett Services, Inc. (hereinafter "Gallagher Bassett"), in a lawsuit titled *Gary Lee Malone v. Nabors Drilling USA, Inc. and National Union Fire Insurance Company of Pittsburgh, PA, Gallagher Bassett Services, Inc., Robert Holbrook, individually and as employee and/or agent of Nabors Drilling USA, Inc., National Union Fire Insurance Company of Pittsburgh, PA, and Gallagher Bassett Services, Inc., and John Doe 1-25*. (R. 3). In his Complaint, Gary Malone (hereinafter "Malone") alleged that on or about July 28, 2000, while in the course and scope of his employment with Nabors, he "slipped on some wooden boards in a manner which caused his right leg to collide with a steel I-beam and to sustain certain injuries." (R. 3).

In response to Malone's Complaint, Nabors and Holbrook filed an Answer with affirmative defenses. (R.137). Nabors subsequently filed a Cross-Claim against Gallagher Bassett. (R. 2488). In its Cross-Claim, Nabors alleged that Gallagher Bassett and Nabors were parties to a contract whereby Gallagher Bassett, as third party administrator, was to manage and adjust workers' compensation claims and benefits on behalf of Nabors. (R. 2490, N.R.E. 3). More specifically, Gallagher Bassett entered into a Claims Service Agreement ("the Contract") with Continental Casualty Company for the sole benefit of the Nabors' account. (R. 2490, N.R.E. 3). In the Contract, Gallagher Bassett agrees to hand claims in a "fair and expeditious" and "professional manner . . . in accordance with all applicable laws, statutes, and regulations."

(R. 2490, N.R.E. 3). In that regard, Nabors was the third party beneficiary of a contract between Gallagher Bassett and CNA, Nabors' workers' compensation insurer. (R. 2490). Nabors further alleged that Gallagher Bassett both failed to perform pursuant to the contract and was grossly negligent. (R. 2490). Nabors requested compensatory damages in the amount of all costs and attorney's fees associated with the defense of Malone's bad faith claim, any and all settlement paid by or verdict amounts rendered against Nabors resulting from Malone's bad faith claim, and punitive damages for both the gross mishandling of Malone's claim and Gallagher Bassett's breach of contract. (R. 2494). More specifically, Gallagher Bassett arbitrarily and capriciously refused to admit compensability after an incomplete investigation into Plaintiff's claim and failed to properly or adequately inform and/or apprise Nabors about the claim management or handling, all in breach of its contractual duties to Nabors. (R. 2488-2495). Even further, Gallagher Bassett ignored its duty to initiate Plaintiff's workers' compensation claim when it failed to follow-up with Plaintiff regarding the "necessary paperwork" to be completed by Gallagher Bassett and as required by the Mississippi Workers' Compensation Commission to file a workers' compensation claim in Mississippi. (R. 239). In that regard, Gallagher Bassett further failed in its duty to promptly and reasonably investigate Malone's claim by failing to follow-up with Malone regarding necessary documentation until July of 2002. (R. 239).

Subsequent to Nabors' Cross-Claim against it, Gallagher Bassett, in turn, filed a Cross-Claim against Nabors. (R. 2508). In its Cross-Claim, Gallagher Bassett requested contribution and indemnity from Nabors. (R. 2510). Gallagher Bassett generally alleged that Nabors breached the contract. (R. 2510). Gallagher Bassett requested punitive damages against Nabors. (R. 2511).

On October 14, 2005, Malone and Nabors reached an Agreement for Resolution of Claims (“the Agreement”) with respect to the claims of Malone against Nabors only. (See G.B.R.E.¹ 12; G.B.T.E. GB-2; N.R.E. 10). The Agreement specifically stated that it was to resolve all claims between Malone and Nabors and all claims against Gallagher Bassett were specifically reserved by both Nabors and Malone. (See G.B.R.E. 12; G.B.T.E. GB-2; N.R.E. 10). Nowhere in the agreement was it stated that the settlement reached was paid on behalf of Gallagher Bassett or for the resolution of claims made against Gallagher Bassett. (See G.B.R.E. 12; G.B.T.E. GB-2).

The trial of all claims commenced on August 21, 2006. At the close of arguments, the trial judge dismissed Gallagher Bassett’s cross-claim against Nabors. (T.T. 913). The jury found in favor of Nabors against Gallagher Bassett and awarded damages in the amount of \$1,250,000.00. (R. 3611). Furthermore, the jury found in favor of Malone against Nabors and Gallagher Bassett determining that Malone was 15% at fault, Nabors was 42.5% at fault, and Gallagher Bassett was 42.5% at fault. (R. 3613-3614). The jury awarded Malone damages in the amount of \$250,000.00. (R. 3615). The jury found no liability on the part of Holbrook.

Subsequent to the jury’s verdict, several post-trial motions were filed. Gallagher Bassett, Nabors and Malone all noticed appeals that are now pending before this Honorable Court. (R. 3865, 3870, 3876, 3930).

B. Factual Background

Nabors in an oil and gas drilling company that provides its services in a number of states. It does not purport to have any expertise in the handling of compensation claims, which may arise in any given state. (T.T. 646). As such, Nabors obtained workers’ compensation insurance

¹ Citations throughout this brief will adhere to the following format: R = Record; G.B.R.E. = Gallagher Bassett Record Excerpt; G.B.T.E. = Gallagher Bassett Trial Exhibit; T.T. = Trial Transcript; N.R.E. = Nabors’ Record Excerpt; N.T.E. = Nabors’ Trial Exhibit; M.T.E. = Malone Trial Exhibit).

through the CNA Insurance Companies (“CNA”). (T.T. 643). CNA entered into the Claims Service Agreement with Gallagher Bassett by virtue of which Gallagher Bassett bound itself to provide adjusting services for the benefit of Nabors. (R. 2490, N.R.E. 3). Gallagher Bassett further obligated itself to provide those services in a “fair and expeditious” and “professional manner . . . in accordance with all applicable laws, statutes, and regulations.” (R. 2490, N.R.E. 3). In fact, Gallagher Bassett had written company policies that required upon notice of the compensation claim, Gallagher Bassett was obligated to contact the injured worker, the employer, and the treating physician. (T.T. 375; N.R.E. 7).

On July 28, 2000, Malone was working with a crew from Nabors when he slipped on wooden boards causing his right leg to bump into a steel I-beam resulting in a slight laceration. (R. 5; 2490). Plaintiff reported the injury to his immediate supervisor, Bobby Wallace, a tool-pusher for Nabors. (R. 2490-2491). Wallace completed an Incident Report and submitted the Incident Report to Robert Holbrook, who forwarded the report to the appropriate safety personnel in accordance with Nabors’ guidelines. (R. 230-231; 246). On or about August 16, 2000, Deborah Robichaux, an employee and representative of Gallagher Bassett, took the tape recorded statement of Bobby Wallace regarding Malone’s alleged accident and injury. (G.B.R.E. 17; G.B.T.E. 26; N.R.E. 8 and 9). In the tape recorded statement of Bobby Wallace, Robichaux is heard discussing the “claim” made by Malone and discussing Malone’s “pre-existing injuries.” (G.B.R.E. 17; G.B.T.E. 26). Despite its own written policies and contractual obligations, Gallagher Bassett failed to contact Malone or any of his treating physicians in conformance with its own guidelines. (T.T. 813, ll. 15-20). In fact, Robichaux continuously denied that she even took Wallace’s tape recorded statement until she was confronted with the

phone records for her line at Gallagher Bassett evidencing the phone call to Wallace on August 16, 2000. (T.T. 779-781).

Despite the information obtained in the recorded statement dated August 16, 2000 and contrary to specific procedures outlined by Gallagher Bassett in its own policies and manuals, Gallagher Bassett and/or its representatives took no further action to investigate Malone's claim until December of 2001. (T.T. 281-283; 712-862, Trial Examination of Deborah Robichaux). More specifically, Gallagher Bassett and/or its representatives failed to follow-up with Malone, Holbrook, and/or any of Malone's treating physicians until that December 2001 follow-up correspondence, which was approximately sixteen (16) months after receiving notice of the claim. (T.T. 281-283; 712-862).

Malone set forth at trial, through his own testimony and that of his medical experts among other things, that the delay in medical treatment, arising from Gallagher Bassett's failure to provide medical benefits to which Malone was entitled, occasioned his medical problems and, ultimately, the loss of his leg. Gallagher Bassett's failure to investigate and properly adjust Malone's workers' compensation claim, in breach of the Contract with CAN and in which Nabors was a named third party beneficiary, despite having notice of the injury, delayed Malone's access to timely medical treatment. Nabors, as the employer, had a duty to provide benefits to Malone. Gallagher Bassett's breach of its contractual obligations and its grossly negligent handling of the claim resulted in Nabors suffering damages. In fact, Alice Lankford's trial testimony clearly set forth that Nabors would have paid Malone's claim. (T.T. 409). Those damages include \$1,500,000.00 in settlement with Malone (T.T. 358); \$828,595.00 in future medical payments (T.T. 545, 547; 655-656); and \$374,134.66 in legal fees and court costs to defend the claims brought by Malone against Nabors. (T.T. 664).

Based on the above facts, Nabors now sets forth its appeal and cross appeal, as well as its opposition to Gallagher Bassett's appellant brief.

III. SUMMARY OF THE ARGUMENT

Nabors first issue on appeal is that the trial court erred in denying Nabors' Motion for Judgment Notwithstanding the Verdict to Enter Additur. Additur is appropriate when the award is "contrary to the overwhelming weight of the credible evidence." Miss.Code Ann. § 11-1-55 (Rev. 2002). The jury awarded Nabors the sum of \$1,250,000.00 based on its Cross-Claim against Gallagher Bassett. (R. 3611). However, Nabors set forth at trial that based on Gallagher Bassett's gross negligence and breach of contract in the adjusting of Malone's claim that it suffered damages in the total amount of \$2,702,729.66. (T.T. 358, 545, 547, 654-656). Gallagher Bassett did not deny or contradict the amount of the settlement, medical expenses, or legal costs incurred or to be incurred by Nabors. Consequently, since the jury found in favor of Nabors against Gallagher Bassett, it was against the great and uncontroverted weight of the evidence for it to award \$1,250,000.00 rather than the entire \$2,702,729.66.

Next, the trial court erred in overruling Nabors' objection to Gallagher Bassett's expert witness, Wayne Johnston's, trial testimony. Wayne Johnston was called to testify as an expert in the field of third party adjusting or also known as TPA. (T.T. 863-881). Johnston acknowledged that he had never been qualified as an expert in the field of insurance adjusting for the purposes of litigation before his testimony in this case. (T.T. 866-867). Furthermore, Johnston acknowledged that he had not reviewed Gallagher Bassett's practices and procedures (T.T. 868-869) and was not relying his opinions on any peer reviewed written articles or studies. (T.T. 869). Consequently, Johnston had nothing new to add to the testimony already before the court and his testimony was largely duplicative and based on unqualified assumption, speculation, and conjecture. The court's

allowing of this testimony was confusing to the jury and highly prejudicial against Nabors. This leads to the next issue that the judgments entered against Nabors in favor of Malone were against the overwhelming weight of the evidence.

The jury found in Nabors' favor based on Nabors' Cross-Claim against Gallagher Bassett. In other words, the jury determined that Gallagher Bassett breached its contractual obligations to Nabors and grossly and negligently handled Malone's claim; yet, the jury found Nabors equally at fault with Gallagher Bassett assigning 42.5% of the fault to each party respectively. (R. 3613-3614). The jury's assignment of equal fault between Nabors and Gallagher Bassett goes against the overwhelming weight of the evidence and the finding that Gallagher Bassett operated in a grossly negligent manner in adjusting this claim. In other words, it is against common reasoning that the jury could find that Gallagher Bassett breached its contract in favor of Nabors and then find that Nabors is liable to Malone for bad faith.

Thirdly, the trial court erred in holding in abeyance until after the trial Nabors' Motion to Strike Cross-Action. (T.T. 913, ll. 13-25). By deferring judgment on Nabors' Motion to Strike Gallagher Bassett's Cross-Action, the trial court allowed testimony and evidence to go before the jury that was unnecessary, confusing and irrelevant. Consequently, it is likely that the jury was affected by testimony and evidence set forth by Gallagher Bassett against Nabors. Such testimony and evidence should have never been considered by the jury.

The trial court erred in denying Nabors' Motion in Limine to Exclude, or in the alternative Motion to Strike, Gallagher Bassett's Supplemental Responses to Nabors' and Robert Holbrook's Interrogatories. Gallagher Bassett, approximately thirty-two (32) days prior to trial, supplemented its discovery responses to Nabors' and Robert Holbrook's Interrogatories. Most significantly, Gallagher Bassett's discovery responses were in reality an effort to further

designate the subject matter of the proposed testimony of Wayne Johnson and Robert E. Underdown. This was done as an apparent effort to avoid Miss.R. Civ.P. 4.04 which provides in pertinent part: "Absent special circumstances the court will not allow testimony at trial of an expert witness who was not designated as an expert witness to all attorneys of record at least sixty days before trial." Furthermore, the proper designation of expert witnesses is governed under Miss. R. Civ. P. Rule 26(b)(4)(A)(i), which requires that, upon request from the opposing party, a party must disclose not only the name of his expert witnesses, but the party also must "state the subject matter on which the expert is expected to testify, and state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." Read together, an expert must be appropriately designated as defined in Miss. R. Civ. P. 26(b)(4)(A)(i) sixty days before trial. Gallagher Bassett failed to properly designate its proposed expert and the trial court erred in allowing supplemental discovery responses to serve as a means to circumvent Miss.R. Civ.P. 26(b)(4)(A)(i) and Rule 4.04. Nabors was prejudiced because testimony was allowed at trial that should have been excluded because it was not properly and timely disclosed.

Lastly, the trial court erred when it denied Nabors' Motion for Directed Verdict against Gallagher Bassett's Cross-Claim. Nabors moved for directed verdict at the close of Malone's case (T.T. 571), at the close of its own case (T.T. 633), and at the close of Gallagher Bassett's case (T.T. 912). The circuit court improperly denied Nabors' motions for directed verdict and in doing so, allowed Gallagher Bassett to proceed with its case against Nabors. Had Nabors' motions for directed verdict been granted, the trial judge would have then ruled on Nabors' Motion to Strike Gallagher Bassett's Cross-Claim (which was eventually granted) at the time of the directed verdict and the jury would have never heard the testimony and evidence set forth against Nabors by Gallagher Bassett.

Gallagher Bassett, in its first issue on appeal, wrongly argues that it properly and adequately handled Malone's claim. Gallagher Bassett admittedly had notice of the claim in August of 2000, as Deborah Robichaux (Gallagher Bassett's employee) took the recorded statement of a Nabors' employee. (T.T. 281-283; 712-862 Trial Examination of Deborah Robichaux). Furthermore, Robichaux testified that she would not have taken the statement had the matter not been assigned to her for handling. (T.T. 712-862, Trial Examination of Deborah Robichaux). Consequently, Gallagher Bassett's failure to process this claim for over a year, which ultimately led to Malone losing his leg, was nothing short of grossly negligent and committed with complete disregard of Malone's rights and was in breach of Gallagher Bassett's contractual obligations to Nabors.

Gallagher Bassett also incorrectly sets forth that the Exclusivity Clause of the Workers' Compensation Act bars Malone's claim with regard to it. There is an exception to the Exclusivity Clause. More specifically, when a defendant is charged with the bad faith denial of workers' compensation benefits, the Exclusivity Clause is inapplicable. See *Mississippi Power & Light Co. v. Cook*, 832 So.2d 474 (Miss. 2002). Malone proved Gallagher Bassett was in bad faith in the handling of his claim and consequently, the Exclusivity Clause is inapplicable. Gallagher Bassett incorrectly sets forth in brief that Malone must allege an intentional tort. Rather, a third party administrator or adjuster may be found liable for its work in the adjustment of an insured's claim on the basis that the administrator or adjuster's actions are grossly negligent, malicious, or exhibit a reckless disregard for the rights of the insured. *Gallagher Bassett Services, Inc. v. Jeffcoat*, 887 So.2d 777, 784 (Miss. 2004) (citing *Bass v. California Life Insurance Co.*, 581 So.2d 1087 (Miss. 1991)). Therefore, Gallagher Bassett's argument fails and Malone's claims were proper.

Next, Gallagher Bassett erroneously argues that Malone's claims fail because Gallagher Bassett was not the proximate cause of Malone's damages. It was established that workers'

compensation benefits were denied and not investigated by Gallagher Bassett in August of 2000. The medical evidence established that the eight week delay in Malone receiving treatment for his leg because he had to continue working was the proximate cause of his amputation. Consequently, Malone sued Gallagher Bassett for damages arising from Gallagher Bassett's bad faith handling of his claim. It is clear that Gallagher Bassett was grossly negligent in the handling of the claim causing Malone and Nabors to suffer substantial damages.

Gallagher Bassett also wrongly argues that it is not liable due to the fact that Malone allegedly failed to mitigate his damages. This argument is seriously flawed. It is undisputed that Gallagher Bassett received notice of Malone's claim in August of 2000. (T.T. 235, 380, 780). Beyond taking the statement of one Nabors' employee, Gallagher Bassett did absolutely nothing else for over a year. (T.T. 817, ll. 19-22). Gallagher Bassett has failed to point towards what Malone should have or could have done to mitigate his damages. Gallagher Bassett failed to timely adjust Malone's claim, which failure caused Malone damages.

Malone's claims also are not barred by the "one satisfaction" rule, as Gallagher Bassett argues. Nabors settlement with Malone was not on behalf of Gallagher Bassett. That is quite to the contrary, there is nothing in the settlement agreement that states it was on behalf of Gallagher Bassett. (See G.B.R.E. 12; G.B.T.E. GB-2; N.R.E. 10). Consequently, Gallagher Bassett's argument regarding the "one satisfaction" rule must fail.

Nabors has a right to recover its damages from Gallagher Bassett. Gallagher Bassett breached its contract to perform the duties of a third party administrator on behalf of Nabors. More specifically, had Gallagher Bassett not handled Malone's claim with reckless disregard and in such a grossly negligent fashion, Nabors would not have incurred the cost and expense of defending

Malone's claims of bad faith. Therefore, Nabors recourse against Gallagher Bassett for damages sustained due to Gallagher Bassett's breach of contract is appropriate.

In this brief, Nabors deals first with its issues on appeal and subsequently answers Gallagher Bassett's arguments.

IV. LAW AND ARGUMENT

A. **The Trial Court Erred in Denying Nabors Drilling USA, L.P.'s Motion for Judgment Notwithstanding the Verdict to Enter Additur.**

In post-trial pleadings, Nabors filed a Motion for Judgment Notwithstanding the Verdict to Enter an Additur. (R. 3727). The trial court subsequently denied that motion. (R. 3852). Under Mississippi law, an additur may be awarded if the court finds 1) that the jury or trier of fact was influenced by bias, prejudice, or passion, or 2) that the damages awarded were contrary to the overwhelming weight of credible evidence. Miss. Code. Ann. § 11-1 55; *Cade v. Walker*, 771 So. 2d 403 (Miss.App. 2000). Moreover, where an award is contrary to the weight of credible evidence, the trial court is permitted to enter an additur as is reasonable under the circumstances. *Bankers Life & Casualty Co. v. Crenshaw*, 483 So. 2d 254, 278 (Miss. 1985). In that regard, the court must accept the evidence which supports the verdict as true. *Nicolaou v. State*, 612 So. 2d 1080, 1083 (Miss. 1992). The standard of review upon which the denial of an additur must be reviewed by the appellate court is abuse of discretion. *Colville v. Davidson*, 934 So.2d 1028 (Miss.App. 2006).

Additurs should be set in an amount that when added to the original verdict, the verdict is no longer contrary to the overwhelming weight of the evidence. *Odom v. Roberts*, 606 So. 2d 114 (Miss. 1992). Nabors' claims against Gallagher Bassett arise out of indemnity and breach of contract. To recover more than nominal damages, proof of actual damages resulting from a breach of contract must be established. *Anchor Coatings, Inc. v. Marine Industrial Residential*

Insulation, Inc., 490 So. 2d 1210, 1219 (Miss. 1986). Further, an additur is appropriate where the jury fails to award actual proven damages that are not contradicted at trial. *Mississippi Transportation Commission v. SCI, Inc.*, 717 So. 2d 332, 339 (Miss. 1998). Where the evidence clearly shows an entitlement to damages, any verdict less than the proven amount is erroneous. *Kaiser Investments, Inc. v. Linn Agriprises, Inc.*, 538 So. 2d 409, 412-13 (Miss. 1989).

In *Kaiser*, the plaintiff and the defendant entered into a lease agreement whereby the plaintiff would provide a tract of farmland and crop financing for the defendant. *Id.* at 411. Prior to the 1982 and 1983 seasons, the plaintiff financed defendant's operation in the amount of \$253,000.00 and \$20,000.00. *Id.* The defendant, however, only repaid \$208,000.00. *Id.* The plaintiff then filed suit against defendant seeking the amount due on the promissory notes and interest and attorneys' fees totaling \$98,072.34. *Id.* at 412. After a trial on the merits, the jury awarded plaintiff \$45,000.00 and the plaintiff filed a motion for additur. *Id.* The trial court denied the motion for additur and the plaintiff appealed. *Id.* The Mississippi Supreme Court overturned the trial court's denial of additur and increased the plaintiff's damage award to \$98,072.34. *Id.* The undisputed evidence demonstrated that the defendant signed notes totaling \$253,000.00, of which \$208,000.00 was repaid. *Id.* at 413. The evidence further demonstrated that the plaintiff's interest and attorney's fees calculated according to the terms of the notes totaled \$53,072.34. *Id.* The court held that the plaintiff was entitled to judgment for the full amount of the unpaid balance, including all interest and attorney's fees, and that the jury should have been "peremptorily instructed accordingly." *Id.* at 413.

In the instant matter, Nabors filed a Cross-Claim against Gallagher Bassett alleging breach of contract. Specifically, Nabors alleged that Gallagher Bassett failed to adjust Malone's workers' compensation claim pursuant to the Claim Service Agreement, which resulted in

damages to Nabors. At trial, Nabors submitted undisputed evidence that it paid Malone \$1,500,000.00. (T.T. 358). The undisputed trial evidence also set forth that Nabors is responsible for Malone's future medicals and that those costs are \$828,595.00. (T.T. 545; 547; 655-656). Additionally, Nabors submitted, through the testimony of Laura Doerre, undisputed evidence that it incurred \$374,134.66 in attorney's fees in defense of the bad faith claim. (T.T. 664). Gallagher Bassett offered no evidence to refute this testimony.

Because the jury found in favor of Nabors against Gallagher Bassett, this court must accept the evidence which supports the jury's verdict as true. *Nicolaou*, 612 So. 2d at 1083. Specifically, the jury found that Gallagher Bassett breached its contract to adjust Malone's workers' compensation claim, causing Nabors to incur damages that had the claim been properly adjusted the damages would not have been incurred. Despite the fact that Nabors incurred damages in the amount of \$2,702,729.66, the jury awarded Nabors \$1,250,000.00 without explanation. As was the case in *Kaiser*, the jury committed error when it rendered a verdict less than the proven amount of damages incurred and ignored the overwhelming weight of the undisputed evidence.

Nabors is entitled to be placed in the position it would have been had Gallagher Bassett not breached the contract. Therefore, Nabors is entitled to an additur of \$1,452,729.66 for a total award of \$2,702,729.66. Consequently, Nabors requests that this court reverse the circuit court's decision and grant Nabors' judgment notwithstanding the verdict with regard to additur.

B. The Trial Court Erred in Overruling Nabors' Objection to Gallagher Bassett's Tendered Expert Witness, Wayne Johnston's, trial testimony.

The trial court erred in overruling Nabors' objection to Gallagher Bassett's expert witness, Wayne Johnston's, trial testimony. Wayne Johnston was called to testify as an expert in the field of third party adjusting or also known as TPA. (T.T. 863-881). Johnston acknowledged that he had

never been qualified as an expert in the field of insurance adjusting for the purposes of litigation before his testimony in this case. (T.T. 866-867). Furthermore, Johnston acknowledged that he had not reviewed Gallagher Bassett's practices and procedures (T.T. 868-869) and was not relying his opinions on any peer reviewed written articles or studies. (T.T. 869). Johnston had nothing new to add to the testimony already before the court and his testimony was largely duplicative and based on assumption, speculation, and conjecture. Consequently, Nabors objected to this testimony and the trial court overruled that objection. (R. 870). The relevant standard of review for this court is abuse of discretion. *Palmer v. Volkswagen of America, Inc.*, 904 So.2d 1077 (Miss. 2005).

Rule 702 of the Mississippi Rules of Evidence states that:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Mississippi courts have held that for expert testimony to be admissible it must be relevant and reliable. *Mississippi Transportation Comm'n v. McLemore*, 863 So.2d 31 (Miss. 2003); *Dedeaux Utility Co. v. City of Gulfport*, 938 So.2d 838 (Miss. 2006). Johnston's testimony was neither relevant or reliable. Johnston was offered as an expert in this matter under Rule 702.

Most importantly, Johnston's testimony was not based on sufficient facts or data. Johnston testified that he has never been qualified as an expert in court. (T.T. 866-867). Furthermore, Johnston testified that he did not review Gallagher Bassett's policies and procedures and was not familiar with Gallagher Bassett's specific procedures. (T.T. 868-869). Consequently, it was impossible for him to testify that Gallagher Bassett met its standards if he had not even read those standards. In that regard, Johnston admitted that third party administrators (TPA's) have different policies and procedures that they follow. (T.T. 867).

Johnston readily admitted that his testimony was not based on any written study or peer reviewed article. (T.T. 869). Johnston was basically put on the stand and testified that Gallagher Bassett met industry standards; yet, Johnston was unable to point to what practice policies that Gallagher Bassett studied and what peer review or journal was relied upon to set forth industry standards.

Even the trial court acknowledged concern that Johnston had not reviewed Gallagher Bassett's standards prior to testifying and found that issue to be troubling. (T.T. 874). Prejudicially, the trial court allowed Johnston to testify to industry standards, which was duplicative of Richard Rideout's testimony, because the court hated "to go this far in a trial and not be able to allow them to bring forth some kind of expert testimony." (T.T. 879-880). Yet, allowing Gallagher Bassett to put forth this testimony was highly prejudicial to Nabors. More specifically, Johnston's testimony, which was characterized as expert for the jury, was the only purportedly non-biased testimony that set forth that Gallagher Bassett performed in an acceptable manner. Had this unreliable testimony been refused by the court, there would have been nothing before the jury setting forth that Gallagher Bassett met industry standards. In that regard, Johnston's testimony did nothing but create confusion for the jury. In other words, while the jury heard voluminous testimony as to Gallagher Bassett's failure to handle Malone's claim based on the three point investigation and its own procedures, an expert came in and testified that Gallagher Bassett performed acceptably. It would be a different situation had Johnston's testimony been based on his review of Gallagher Bassett's practice manual or peer studies regarding industry standards. However, Johnston's testimony was mere conjecture and was misleading.

Lastly, the testimony was not the product of reliable principles and methods. Johnston's testimony specifically prejudiced Nabors to the extent that he testified to general industry

standards, but there was never a foundation laid that there are, in fact, industry standards and what basis he relied upon in testifying that there are industry standards. In fact, Johnston was very clear that he had neither relied on any peer reviewed materials nor reviewed any data to support his testimony. (T.T. 869). It was ascertained that Johnston was not familiar with Gallagher Bassett's standards and that its standards likely differed from those of Johnston's employer.

Based on the above, the trial court erred in allowing Johnston's testimony, as the testimony failed to meet the standards of Rule 702 and was duplicative of the testimony offered by Richard Rideout. In that regard, Nabors was greatly prejudiced by this abuse of discretion. Nabors submits that had Johnston's testimony been properly excluded, that the jury would have had nothing before it to find fault on the part of Nabors. This leads to Nabors' argument that the final judgment on Malone's claims was against the overwhelming weight of the evidence.

C. The Final Judgment Entered in Favor of Malone Against Nabors Was Against the Overwhelming Weight of the Evidence.

As previously discussed above, the jury found in Nabors' favor based on Nabors' Cross-Claim against Gallagher Bassett. (R. 3611; T.T. 999). In other words, the jury determined that Gallagher Bassett's handling of Malone's claim was gross negligence and/or showed a complete disregard for Malone's rights. Moreover, the trial court dismissed Gallagher Bassett's cross-claim against Nabors. (T.T. 913). Yet, the jury found Nabors equally at fault with Gallagher Bassett with regard to Malone's claims assigning 42.5% of the fault to both Nabors and Gallagher Bassett. (R. 3613-3614). The jury's assignment equal fault between Nabors and Gallagher Bassett goes against the overwhelming weight of the evidence and the finding that Gallagher Bassett breached its contract with Nabors and operated in a grossly negligent manner.

The applicable standard of review is set for in *Venton v. Beckham*, 845 So.2d 676 (Miss. 2003)(citing *Wal-Mart Stores, Inc. v. Johnson*, 807 So.2d 382 (Miss. 2001), which states that “[w]here an appellant challenges a jury verdict as being against the overwhelming weight of the evidence...this Court will show great deference to the jury verdict by resolving all conflicts in the evidence and every permissible inference from the evidence in the appellee’s favor.” Consequently, the appropriate standard of review is abuse of discretion. *Id.*

While this court is to look to the conflict in the evidence, this case presents an unusual situation where there is not a notable conflict in the evidence. It is agreed that Malone filled out an accident report on July 28, 2000. It is undisputed that Deborah Robichaux, in her capacity as an adjuster for Gallagher Bassett, took a recorded statement of a Nabors employee on August 16, 2000. It is undisputed that on August 16, 2000 that Deborah Robichaux had in her possession some of Malone’s medical records. It is undisputed that Gallagher Bassett did absolutely nothing else with Malone’s claim until December of 2001. It is also undisputed that the jury found in favor of Nabors against Gallagher Bassett. It is further undisputed that the trial court dismissed Gallagher Bassett’s cross-claims against Nabors. (T.T. 932).

At the trial of this matter, Nabors readily admitted that it could be vicariously liable for some of Gallagher Bassett’s actions. (T.T. 925, ll. 10-12). However, there was nothing submitted into evidence that showed fault on the part of Nabors individually and separate and apart from Gallagher Bassett. Even further, there was no evidence presented to show that Nabors was equally at fault with Gallagher Bassett with regard to Malone’s damages. As set forth at trial, Holbrook was the Nabors employee in supervisory capacity and was a named defendant in this lawsuit; yet, the jury made no finding of liability against Holbrook, the man acting on behalf of Nabors. If Holbrook had no liability, then it begs the question how Nabors

could be found liable since its supervisor employee was not. Therefore, the jury's verdict assessing Nabors with 42.5% of the fault of Malone's claims is against the overwhelming weight of the evidence.

D. The Trial Court Erred in Holding in Abeyance Until After the Trial Nabors' Motions to Strike Cross-Claim.

Nabors filed a Motion to Strike Gallagher Bassett's Cross-Claim against it. (R. 2619). However, the trial court held in abeyance until after the trial Nabors' Motion to Strike Cross-Action. (R. 3933; T.T. 913, ll. 13-25). By deferring judgment on Nabors' Motion to Strike Gallagher Bassett's Cross-Action, the trial court allowed testimony and evidence to go before the jury that was unnecessary and prejudicial to Nabors. Consequently, the jury was affected by testimony and evidence set forth by Gallagher Bassett against Nabors. Such testimony and evidence should have never been considered by the jury, as the trial court should have granted Nabors' motion prior to trial.

During Gallagher Bassett's presentation of evidence at trial, it set forth the expert testimony of Wayne Johnston, along with the testimony of Jerry Poole, Richard Rideout and Deborah Robichaux. Much of the testimony was directed at Nabors. Had the trial judge granted Nabors' Motion to Strike the Gallagher Bassett's Cross-Claim prior to trial, much of the testimony directed at Nabors would not have been relevant or allowed. In fact, there was no new evidence offered at trial and it was error to hold the motion in abeyance exposing the jury to testimony and evidence that was otherwise irrelevant and potentially confusing. For example, Wayne Johnston's testimony was highly prejudicial, as discussed above, because it was based on unsubstantiated and untested opinions. Furthermore, Johnston admittedly was unfamiliar the Contract in this case and with Gallagher Bassett's product standards guidelines. As such,

allowing the testimony to go forward without ruling on the Motion to Strike first prejudiced Nabors resulting in the jury finding Nabors 42.5% at fault for Malone's damages.

E. The Trial Court Erred in Denying the Motion in Limine to Exclude Gallagher Bassett's Supplemental Responses to Nabors Drilling USA and Robert Holbrook's Interrogatories, in the Alternative Motion to Strike.

Nabors filed a Motion in Limine to Exclude Gallagher Bassett's Supplemental Responses to Nabors Interrogatories or in the Alternative, a Motion to Strike. The trial court denied this motion. Pursuant to the Mississippi Rules of Court, Rule 4.04 provides in pertinent part: "Absent special circumstances the court will not allow testimony at trial of an expert witness who was not designated as an expert witness to all attorneys of record at least sixty days before trial." The proper designation of expert witnesses is governed under Miss. R. Civ. P. Rule 26(b)(4)(A)(i), which requires that, upon request from the opposing party, a party must disclose not only the name of his expert witnesses, but he also must "state the subject matter on which the expert is expected to testify, and state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." Read together, an expert must be appropriately designated as defined in Miss. R. Civ. P. Rule 26(b)(4)(A)(i) at least sixty (60) days before trial. The purpose of this, and other Rules of Civil Procedure, is to prevent trial by ambush and to assure that cases are decided on their merits, not the fact that one party calls a surprise witness and catches the other party off guard. *Harris v. General Host Corp.*, 503 So.2d 795, 796 (Miss. 1986).

In conformance with Miss. R. Civ. P. Rule 26(b)(4)(A)(i), all expert designations were due sixty days before trial. The trial was set for and began on August 28, 2006. (See T.T. cover page). In fact, on June 28, 2006, Gallagher Bassett submitted its Supplement to Designation of Expert Witnesses designating the following proffered experts: Wayne Johnson; Leonard B. Melvin, Jr.; Ken Lefoldt; Georgia C. Boutwell, RN, BSN; and Robert E. Underdown. (R. 2735). On July 26,

2006, only thirty-three (33) days before trial, Gallagher Bassett submitted Supplemental Discovery Responses, adding anticipated areas of testimony to the designations of Wayne Johnson and Robert E. Underdown, which contained areas of designation not submitted in its Designation of Expert Witnesses or supplement thereto. (R. 3074).

In its Third Supplemental Response to Interrogatories, served on July 26, 2006, Gallagher Bassett for the first time sets forth that Wayne Johnston's testimony will be based upon his "many years of experience as a workers' compensation professional in Mississippi." (R. 3080). Subsequently and as part of the July 26, 2006 discovery supplements, Record pages 3081 to 3084 outline testimony that Wayne Johnston is expected to provide; unfairly, this is the first time that Nabors has been put on notice. More specifically, Gallagher Bassett set forth that Johnston would testify to specifics with regard to Deborah Robichaux's actions and inactions; the manner in which Gallagher Bassett handled Malone's claim and the assignment thereof; the handling of a telephone call received from Malone's legal counsel; the appropriateness of Nabors' role in this situation; among several other areas. (R. 3081-3084 as compared to 2735).

In the July 26, 2006 supplemental discovery responses, Gallagher Bassett also provided new information regarding areas of testimony for Robert Underdown, which had not been previously provided to Nabors. (R. 3084-3087 as compared to 2739-2740). More specifically, in the July 26, 2006 discovery responses, Gallagher Bassett expounded upon the area that Underdown would testify to with regard to Nabors' alleged duties to Malone for this claim. (R. 3085). Furthermore, Gallagher Bassett expanded Underdown's area of testimony to include Deborah Robichaux's statement taken from Bobby Wallace in connection with Malone's injury and whether or not that statement was taken with authority. (R. 3085). Additionally, Gallagher Bassett, through these discovery responses, also provided that Underdown would testify to employer's duties who were in

a large deductible program. (R. 3085). The specificity provided by Gallagher Bassett in the July 26, 2006 discovery responses expanded the content of testimony beyond the timely designation of June 28, 2006. (R. 3074-3088 as compared to 2735-2741).

Though the Supplemental Responses are captioned as a “discovery” pleading, the clear purpose was to further designate and specify the subject matter of the proposed testimony of Wayne Johnson and Robert E. Underdown after the sixty (60) day deadline. Because these Supplemental Discovery Responses are in reality Gallagher Bassett’s second supplement to expert designation and were submitted twenty-eight (28) days after the sixty day deadline, the subject matter should have been excluded as it was prejudicial and precluded Nabors from properly opposing the additional subject matter. Consequently, the trial court erred in denying Nabors’ Motion to Strike these responses and such error had a prejudicial effect.

F. The Trial Court Erred in its Oral Denial of Nabors’ Motion for Directed Verdict Against Gallagher Bassett’s Cross-Claim Against Nabors at the Close of Plaintiff’s Case.

The trial court erred when it denied Nabors’ Motion for Directed Verdict at the close of Malone’s case. Nabors moved for directed verdict at the close of Malone’s case (T.T. 571), at the close of its own case (T.T. 633), and at the close of Gallagher Bassett’s case (T.T. 912). The circuit court improperly denied Nabors’ motions for directed verdict against Gallagher Bassett as well and in doing so, allowed Gallagher Bassett to proceed with its case against Nabors. Had Nabors’ motions for directed verdict been granted, the trial judge would have then ruled on Nabors’ Motion to Strike Gallagher Bassett’s Cross-Claim (which was eventually granted) at the time of the directed verdict and the jury would have never heard the testimony and evidence set forth against Nabors by Gallagher Bassett. More specifically, had the trial court granted Nabors’ motion for directed verdict at the close of Malone’s case, essentially ruling that Malone’s claims against Nabors were

dismissed, then Gallagher Bassett's cross-claim would have died at that point prior to prejudicial evidence being introduced against Nabors.

At trial, Gary Malone put on six (6) witnesses, excluding medical testimony. Those witnesses were as follows: Bobby Wallace, Malone's direct supervisor and to whom Malone first reported his accident; Gary Malone; Alice Lankford, a claims manager for John Wortham & Associates, Nabors' insurance broker; Charles Tingle, a vocational rehabilitator; Annette Turner, a certified public accountant; and Patricia Malone, Gary Malone's wife. None of these people offered testimony that Nabors did not alert Gallagher Bassett to Malone's injury in early August of 2000. None of these individuals offered evidence that Nabors failed to provide information to Gallagher Bassett in order for Gallagher Bassett to handle the claim. At the close of Malone's case, there was nothing in the record to refute the fact that was established - that Gallagher Bassett had knowledge of the injury and took Wallace's statement on August 16, 2000. (T.T. 215).

Rule 50(a) of the Mississippi Rules of Civil Procedure provides for the right to move for a directed verdict. A directed verdict is used to remove questions from the jury when there exists no factual questions to resolve. *Entergy Mississippi, Inc. v. Bolden*, 854 So.2d 1051 (Miss. 2003). Even further, a directed verdict is proper if any verdict other than the one directed would be erroneous as a matter of law. *Murray Envelope Corp. v. Atlas Envelope Corp.*, 851 So.2d 426 (Miss.Ct.App. 2003). In other words, a directed verdict is used to test the legal sufficiency of plaintiff's case. *Patton-Tully Transportation Co. v. Douglas*, 761 So.2d 835 (Miss. 2000). Bearing this in mind, Malone had to put on evidence to maintain his action for bad faith against Nabors. There was nothing introduced that would support a finding that Nabors acted in bad faith with regard to adjusting Nabors workers' compensation claim. As previously stated, what

was set forth was that Gallagher Bassett had knowledge of the injury on August 16, 2000, when Robichaux took Wallace's statement, and failed to do anything further until late 2001.

Taking the evidence into account, had the trial court granted Nabors' directed verdict at the close of Malone's case, the court would have then been required to deal with Nabors' Motion to Strike Gallagher Bassett's Cross-Claim as that cross-claim was based on Malone's claim. If Malone's claim no longer existed against Nabors, then Gallagher Bassett's claim against Nabors would necessarily fail, as it eventually did. Therefore, based on the above, the trial court erred in denying Nabors' motion for directed verdict at the close of Malone's case.

G. Gallagher Bassett's Handling of Malone's Claim was Improper and Inadequate.

Throughout its brief, Gallagher Bassett continuously sets forth that in order to escape the Exclusivity Clause, Malone was required to set forth that Gallagher Bassett committed an intentional tort. That is incorrect. Malone merely had to set forth that the administrator or adjuster's actions, in this case Gallagher Bassett's, were grossly negligent, malicious, or exhibit a reckless disregard for the rights of the insured. *Gallagher Bassett Services, Inc. v. Jeffcoat*, 887 So.2d 777, 784 (Miss. 2004) (citing *Bass v. California Life Insurance Co.*, 581 So.2d 1087 (Miss. 1991)). When looked at under the standard set forth in *Gallagher Bassett Services, Inc. v. Jeffcoat*, Gallagher Bassett's handling of Malone's claim was clearly improper and inadequate.

Gallagher Bassett's basic defense throughout this case has been that while it may have known about Malone's injuries, it did not have receipt of a "claim." The facts of the case completely contradict that notion. It is undisputed that Malone reported an on the job injury on July 28, 2000. (R. 5; 2490). It is also undisputed that Gallagher Bassett had knowledge of Malone's injury on August 16, 2000 when Deborah Robichaux took the recorded statement of Bobby Wallace, a Nabors' employee and Malone's immediate supervisor, regarding Malone's

injuries. (G.B.R.E. 17; G.B.T.E. 26). In fact, Robichaux admitted that “bad faith does not get any worse than this.” (N.R.E. 6). Furthermore, the trial testimony is undisputed that Ms. Robichaux would not have taken Wallace’s statement had Gallagher Bassett not received the claim. (T.T. 380, ll. 22-26). Furthermore, Ms. Robichaux testified that on August 16, 2000, when she took Wallace’s statement, that she the report and had medical information. (T.T. 830-831). It is also undisputed that when Gallagher Bassett receives notice of a claim, its adjusters are to complete a “three point” investigation, which requires the adjuster to speak with the claimant, the employer, and the medical provider. (T.T. 375). In is further undisputed that in August of 2000 through December of 2001, Ms. Robichaux only spoke with one employee of Nabors and failed to complete the rest of the investigation. (T.T. 281-283; 380-381; 712-862).

Interestingly, in Gallagher Bassett’s appellant brief on page 14, it is stated that “there is ample testimony from all parties that a ‘claim,’ as defined in the relationship of Nabors and Gallagher Bassett, is a work related injury which at a minimum required either medical treatment, and therefore medical payments, resulted in lost time from work or ‘indemnity.’” Bearing in mind the definition of “claim” that Gallagher Bassett sets forth, in the statement taken by Robichaux of Wallace on August 16, 2000, Wallace clearly advises that Malone told him that he needed a skin graft. (G.B.R.E. 17). While Wallace provided his opinion of how workers’ compensation works, Robichaux was the adjuster and the knowledgeable individual charged with making determinations and investigating the claim. Even after being told about the incident and the fact Malone needed a skin graft in the precise place that he was cut, Robichaux did absolutely nothing further to investigate this claim. Hence, in August of 2000, Robichaux had enough information to constitute a claim as defined by Gallagher Bassett even by its own admission.

Gallagher Bassett attempts to shift the blame for Robichaux's failure to conduct the three point investigation and initiate the claim adjustment to the opinions of Holbrook and Wallace. However, Holbrook and Wallace were lay employees of Nabors and not charged with the responsibility to determine what was a compensable workers' compensation injury. Nothing can overcome the fact that Robichaux, the licensed and purportedly experienced adjuster, had full knowledge of the events and did nothing to speak with Malone or his medical providers in order to form a knowledgeable opinion in August of 2000. Furthermore, nothing can overcome the fact that Robichaux had knowledge of the event and the resources to complete the investigation, but rather than complete the investigation or determine if the claim was compensable she put Wallace's statement in a desk drawer and completely ignored the matter in a grossly negligent manner and, at the absolute least, displaying a reckless disregard for Malone's rights and Gallagher Bassett's legal and contractual obligations.

Gallagher Bassett also asserts that Nabors and/or Malone had to give permission for Malone to be contacted; this "requirement" appears nowhere in the law, in any contract, or in the policies of Gallagher Bassett. Malone completed the First Report of Injury advising of his injury. Gallagher Bassett had this information. Furthermore, Robichaux does not appear to have ever asked Nabors for permission to contact Malone. Gallagher Bassett repeatedly seeks to place the burden on lay employees and the claimant to know Gallagher Bassett's procedures, rather than Gallagher Bassett asking the correct questions to the correct individuals. In that regard, Gallagher Bassett argues that after Robichaux spoke with Wallace, a tool pusher, that she could determine that no claim existed. It is completely ridiculous for Gallagher Bassett to rely upon the hearsay statement and the understanding of an employee, who is not charged with the duties of adjusting compensation claims, to tell an experienced workers' compensation adjuster when

there is a claim. Robichaux was to ascertain the facts as Wallace knew them. If Wallace, Nabors tool pusher, could determine whether Malone had, a workers' compensation claim or not, Gallagher Bassett's involvement would not be needed. Gallagher Bassett was hired to obtain the facts and make a determination based on the facts, not disregard the facts based on a layperson's unqualified conjecture. Robichaux's grossly negligent failure to contact Malone or Malone's physician falls so far below the legal standard of care, and Gallagher Bassett's contractual duty that Gallagher Bassett's attempts to deny this border on the incredible.

Even further, the circuit court erred in not allowing for an evidentiary hearing and permitting Malone's claim of punitive damages to go before the jury. "Mississippi law recognizes a claim of bad faith refusal of insurance coverage, and a corresponding chance to recover punitive damages, if a plaintiff can prove that (1) there was no arguable or legitimate reason to deny coverage and (2) the insurer acted willfully, maliciously, or with gross and reckless disregard for the insured's rights." *McLendon v. Wal-Mart Stores, Inc.*, 521 F.Supp.2d 561, 565 (S.D.Miss. 2007) (citing *Liberty Mutual Ins. Co. v. McKneely*, 862 So.2d 530, 533 (Miss.2003)). Mississippi places a duty on insurers to properly investigate the claims of its policyholders. *McLendon* at 565. A proper investigation means obtaining all medical information relevant to a policyholder's claim. *Id.* In this case, it is clear Gallagher Bassett did not properly investigate Malone's claim and did not timely obtain the medical information relevant to his claim. Thus, as Malone proved bad faith and the jury awarded Malone compensatory damages, the circuit court erred in not allowing an evidentiary hearing on the punitive damage issue and thereafter submitting the issue to the jury.

In *Bradfield*, the Mississippi Supreme Court held that if compensatory damages are awarded, then the court promptly begin the punitive damages phase of trial. *Bradfield v.*

Schwartz, 936 So. 2d 931, 940 (Miss. 2006). Recently, the Mississippi Supreme Court recently clarified this ruling, whereby it held "...that the trial judge should commence an evidentiary hearing before the jury on the issue of punitive damages, and at the conclusion of this evidentiary hearing in the second phase, the trial court has available all of the traditional options for determining whether or not the punitive-damages issue should be submitted to the jury." *Causey vs. Sanders*, No. 2006-CA-01697-SCT. In this case, the jury awarded Malone compensatory damages. As such, the trial judge should have held an evidentiary hearing to determine if a plaintiff produced evidence sufficient to warrant punitive damages. *Id.*

In the case at hand, when Malone moved for the issue of punitive damages to be submitted to the jury, the circuit court erred in not holding the appropriate evidentiary hearing. The trial judge reasoned, "Well, there can't be any punitive damages if they assessed any amount to the plaintiffs. All right. I should have looked at that. You can't give punitive damages if they assessed any of the fault to the plaintiff." (T.T.1005, Lines 16-22.) This jury awarded Malone compensatory damages and clearly found Gallagher Bassett in bad faith. The trial court's consideration of the allocation of fault as a bar to the punitive damage instruction and to an evidentiary hearing was reversible error.

Based on the above, it is clear that Gallagher Bassett grossly failed to fulfill its legal and contractual obligations and punitive damages should have been assessed against Gallagher Bassett. Consequently, Gallagher Bassett was in bad faith as it acted with gross negligence and a reckless disregard for Malone's rights.

H. Malone's Claims Are Not Barred by the Exclusivity Clause of the Workers' Compensation Act with Regard to Gallagher Bassett.

Gallagher Bassett argues that "[t]he exclusivity clause of the Workers Compensation Act bars [Plaintiff's] claim and as such this matter should be reversed and rendered." (See

Appellant's Brief, pg. 27). Nevertheless, it is well settled in Mississippi that where a defendant is charged with bad faith denial of workers' compensation benefits or medical treatment, the exclusive remedy provision of the Mississippi Workers' Compensation Act is inapplicable. *Gallagher Bassett Services, Inc. v. Jeffcoat*, 887 So.2d 777, 784 (Miss. 2004) (citing *Bass v. California Life Insurance Co.*, 581 So.2d 1087 (Miss. 1991)). In this case, Malone's suit does not merely arise from an alleged failure to properly adjust a workers' compensation claim, as Gallagher Bassett asserts, but instead it rests on the assertion that Gallagher Bassett denied Malone's claims in bad faith and without having a legitimate or arguable reason for doing so.

The exclusive remedy provision of the Mississippi Workers' Compensation Act provides in part:

The liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer to the employee...except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee...may elect to claim compensation under this chapter, or to maintain an action at law for damages on account of such injury or death...

Miss. Code Ann. § 71-3-9. However, for over two decades, the Mississippi Supreme Court has recognized that the exclusivity remedy provision does not bar claims for a bad faith denial of workers' compensation benefits and medical treatment.

- 1. It is not an intentional tort that may give rise to avoidance of the Exclusivity Clause, but rather conduct which is grossly negligent, malicious, or demonstrates reckless disregard for the rights of the insured will also result in avoidance of the Exclusivity Clause.**

Gallagher Bassett misleadingly sets forth that "only proof of intentional tort can give rise to avoidance of the Exclusivity Clause." (See Gallagher Bassett's brief, p. 30). The Mississippi Supreme Court has expressly reiterated that "the independent tort of bad faith refusal to pay [workers'] compensation benefits is an exception to [the exclusive remedy] provision." *Mississippi Power & Light Co. v. Cook*, 832 So.2d 474, 479 (Miss. 2002). In so holding, the

Mississippi Supreme Court cited the following supporting authority: *Southern Farm Bureau Cas. Ins. Co. v. Holland*, 469 So.2d 55, 59 (Miss. 1984), *Lockett v. Mississippi Wood Inc.*, 481 So.2d 288, 290 (Miss. 1985), *McCain v. Northwestern Nat. Ins. Co.*, 484 So.2d 1001, 1002 (Miss. 1986), and *Leathers v. Aetna Cas. & Sur. Co.*, 500 So.2d 451, 453 (Miss. 1986). In citing these cases, the Court in *Cook* stated that “[a]ll of these cases ‘recognized exceptions to the exclusivity of the Act but only when based on tortious conduct *subsequent* to the work place injury.’” *Id.* (quoting *Peaster v. David New Drilling Co.*, 642 So.2d 344, 348 (Miss. 1994) (emphasis added)).

In *Southern Farm Bureau Cas. Ins. Co. v. Holland*, the earliest of the four cases cited by *Cook*, the Court recognized that the Mississippi legislature “has the authority to provide that in any event the injured worker’s exclusive remedy against the carrier is compensation,” but is has not done so. 469 So.2d at 59. As such, the exclusive remedy provision is specifically limited by the precise terms of Miss. Code Ann. §71-3-9 to those claims and causes of action which arise from an employee’s on-the-job injury. *Id.* Thus, “the exclusivity provision of the Workers’ Compensation Act does not bar an action by the employee against the insurance carrier for the commission of an intentional tort. The independent tort is not compensable under [the Act] and to extend immunity to compensation carriers for a separate injury to workers goes far beyond the intent of the act.” *Id.*

In *Lockett v. Mississippi Wood Inc.*, the Mississippi Supreme Court extended the ruling in “*Holland* to include a bad faith refusal action against the employer, as well as the carrier.” 481 So.2d at 290. *McCain v. Northwestern Nat. Ins. Co.* reaffirmed the holdings of *Holland* and *Lockett.*, 484 So.2d at 1001. The Court in *Leathers v. Aetna Cas. & Sur. Co.*, in citing *Holland*,

Luckett, and *McCain*, also held that charges of bad faith, malice and an intentional tort are exceptions to the exclusivity provision. 500 So.2d at 453.

In actions involving bad faith denial of workers' compensation benefits, the plaintiff's claims do not arise from his injury at work, but rather from the conduct of the employer and/or carrier in handling claims for benefits and medical treatment that flow from the work-related injury. It is for that reason that it is well settled that an action for a bad faith denial of workers' compensation benefits presents the type of separate and independent tort, which is beyond the purview of the exclusive remedy provision. Thus, when a claim for bad faith denial of workers' compensation benefits comes before a circuit court in Mississippi, the critical issue is not whether the exclusivity provision bars the claim, but rather, whether the defendant's conduct or misconduct reaches the requisite level of egregiousness of the independent tort of bad faith.

In determining whether a bad faith claim may be supported, a circuit court is governed by the application of the concept to other types of insurance such as health, fire, casualty, and accident benefits. *McCain*, 484 So.2d at 1002. As a consequence, the courts of Mississippi, in defining the key elements of a bad faith denial of workers' compensation benefits, specify the same tests or standards that are applied in other insurance bad faith actions. For example, the Mississippi Supreme Court in *Cook* noted that in order for a plaintiff to prevail on a bad faith denial of workers' compensation benefits claim, the following elements of proof are essential: 1) the absence of "a legitimate or arguable reason to deny the benefits"; and/or 2) conduct in making the denial which "constitute[s] a willful or malicious wrong in disregard for his rights." 832 So.2d at 479. See also *Blakeney v. Georgia Pacific Corp.*, 151 F.Supp.2d 736, 740 (S.D.Miss. 2001). Thus, it is apparent that the claims for a bad faith denial of workers' compensation benefits are premised on the misconduct which is no different from any other bad

faith insurance claim, i.e. whether the denial of benefits was without a legitimate or arguable reason.

In addition to the above, the United States District Court for the Northern District of Mississippi specifically found that under the rules which the Mississippi Supreme Court applies to claims for a bad faith denial of workers' compensation benefits, "the so-called intentional tort exception to the exclusive remedy provision encompasses gross negligence." *Ray v. Travelers Ins. Co.*, 1998 WL 433949 at 2 (N.D.Miss. 1998). Subsequent decisions by the Mississippi Supreme Court and the Mississippi Court of Appeals have confirmed the construction of the law found in *Ray*. For example, the *Cook* Court noted that in order for a plaintiff to have a claim for bad faith denial of workers' compensation benefits, "the denial of benefits does not have to be willful or malicious, but there may not be an arguable basis to deny the claims." 832 So.2d at 480-81.

The Court in *Pilate v. American Federated Ins. Co.*, 865 So.2d 387 (Miss.App. 2004) provided the following explanation of the type of misconduct which is needed to establish a claim for bad faith denial of a workers' compensation claim:

To determine what type of misconduct will justify any award of punitive damages, the Mississippi Supreme Court has held that "if an insurer has a legitimate or an arguable reason for failing to pay a claim, punitive damages will generally not lie." Thus, if the insurer had a legitimate or arguable reason for not paying a claim, the insurer is deemed to have acted in good faith. On the other hand, if the insurer did not have a legitimate or arguable basis for not paying the claim and acted with willful, malicious, gross negligence, or reckless disregard for the rights of the claimant, then punitive damages will lie.

Id. at 391 (citations omitted). An appropriate investigation requires an insurer to obtain all available medical information relevant to the claim and to interview all employees or individuals who have knowledge relevant to the claim. *Id.* at 394 (citing *Lewis v. Equity Nat. Life Ins. Co.*,

637 So.2d 183, 187 (Miss. 1994). Consequently, the absence of such investigation is grossly negligent.

Indeed, the Mississippi Supreme Court in *Liberty Mut. Ins. Co. v. McKneely* enunciated that, “in a bad faith claim against an insurer, the plaintiff must show that the insurer lacked an arguable or legitimate basis for denying the claim, or that the insurer committed a willful or malicious wrong, or acted with gross and reckless disregard for the insured’s rights.” 862 So.2d 530, 533 (Miss. 2003) (citing *State Farm Mut. Auto. Ins. Co. v. Grimes*, 722 So.2d 637, 641 (Miss.1998) (citing *Life & Cas. Ins. Co. of Tennessee v. Bristow*, 529 So.2d 620, 622 (Miss.1988)); *Sessoms v. Allstate Ins. Co.*, 634 So.2d 516, 519 (Miss.1994); *Mut. Life Ins. Co. v. Estate of Wesson*, 517 So.2d 521, 527 (Miss.1987)).

Once a workers’ compensation claim arises, the carrier and any third party administrator have a duty to conduct a proper and adequate investigation of the circumstances surrounding the claim. *McKneely*, 862 So.2d at 534 (citing *Bankers Life & Casualty Co. v. Crenshaw*, 483 So.2d 254, 276 (Miss.1985)). At a minimum, this duty to investigate requires reasonable efforts to obtain all available medical information relevant to a claim. *Bristow*, 529 So.2d at 623 (citing *Crenshaw*, 483 So.2d at 272). It goes without saying that an adequate, meaningful investigation cannot occur if the claimant or insured is never consulted. Insurers and third party administrators “further [have a] duty, after an adequate investigation and a realistic evaluation of the claim, to tell the insured, its customer, the plain truth. And, if the insurance company cannot give its insured a valid reason for denying the claim, it has a final duty to promptly honor it.” *Crenshaw*, 483 So.2d at 276.

Based on the foregoing, it is clear that when the plaintiff presents a claim for bad faith denial of a workers’ compensation claim, the controlling issue is whether the defendant acted

without a legitimate or arguable basis for the denial and in a willful, malicious, grossly negligent manner or with a reckless disregard for the rights of the plaintiff. Gallagher Bassett wishes to contend that an intentional tort is required. Yet, the Mississippi Supreme Court has already visited such an issue wherein Gallagher Bassett was a defendant:

Such an entity may be held independently liable for its work on a claim if and only if its acts amount to any one of the following familiar types of conduct: gross negligence, malice, or reckless disregard for the rights of the insured. We will now analyze the voluminous record here in light of this standard to determine whether Gallagher was grossly negligent, malicious, or exhibited reckless disregard for Jeffcoat's rights.

Gallagher Bassett Services, Inc. v. Jeffcoat, 887 So.2d 777, 784 (Miss. 2004).

It is sufficient that a defendant act with gross negligence, with a reckless disregard for a plaintiff's rights, or in a willful or malicious manner, to view such conduct as an exception to the exclusive remedy provisions of the compensation act and an "intentional" tort within the meaning of the *Holland* and *Lockett* decisions. Therefore, Gallagher Bassett's argument is fatally flawed.

2. *Holland* has not begun a slippery slope of actions, which could potentially undermine the Workers' Compensation Act.

Gallagher Bassett seeks to have this Court revisit and reconsider its prior holdings on this issue, principally, the *Holland* decision. (See Appellant's Brief, pg. 38). Gallagher Bassett begins its argument by citing *Taylor v. U. S. Fidelity & Guaranty Co.* for the proposition that the "[l]egislature clearly intended to bar actions against insurance carriers and other involved in the investigation and adjustment of the workers' compensation claim." 420 So.2d 564 (Miss. 1982). *Id.* at 25. Yet, the Court in *Taylor* "[could] not say that the legislators, in codifying 'Exclusiveness of Liability' in §71-3-9, *supra*, intended to allow a tort action such as the one

asserted here by the plaintiff.” 420 So.2d at 566 (emphasis added). *Holland* was distinguished from *Taylor* as follows:

A review of the *Taylor* record discloses without question that the pleading sounds in negligence. No intentional tort is alleged, as is present in the allegation of this case. The rule in *Taylor* is accordingly limited to cases where the injured worker attempts to sue the carrier for negligent refusal to pay.

Holland, 469 So.2d at 57. Such is not the case here where Malone’s claim was for bad faith denial of workers’ compensation benefits.

In support of its position, Gallagher Bassett relies at length on *Miller v. McRae’s, Inc.*, 444 So.2d 368 (Miss. 1984). Specifically, Gallagher Bassett argues that the *only* way to avoid the exclusivity provision of the Act is if there is a “wrong without a remedy” under the Act since the “Act never controlled the case in the first place.” (See Appellant’s Brief, pg. 36). In *Miller*, however, the Court’s principal focus was on a work place injury and the factors which determine whether such an injury is either within or outside the jurisdiction of the Mississippi Workers’ Compensation Act. *Miller* is completely inapposite and does not represent controlling precedent. In a narrow sense, *Miller* does not involve a claim for a bad faith denial of workers’ compensation benefits; in a broader sense, it also does not present a claim for tortious conduct which occurred *after* the plaintiff’s workplace injury: a claim for tortious conduct *after* the workplace injury is thus a separate and independent tort.

What is important about *Miller* is that “the *only* test articulated in *Miller* is *whether the injury is compensable under the act*. The Court’s entire discussion in that case, from which we later articulated a two-part test, was an effort to answer that sole question--compensability of the injury. A close reading of *Miller* reveals that the first prong of the test is not a separate requirement as we later interpreted it to be. Rather, the first prong is merely part of the inquiry

into whether the injury is, in fact, compensable.” *Newell v. Southern Jitney Jungle Co.*, 830 So.2d 621, 624 (Miss. 2002) (emphasis in original).

It is clear that *Miller* does not apply to claims for bad faith denial of workers’ compensation benefits, especially in light of the cases cited hereinabove. In bad faith cases, there is a separate and independent tort which does not arise on account of an employee’s workplace injury, but rather as a separate tort subsequent to the workplace injury. As a result, there is no need to consider whether the tort was accidental or intentional. The Mississippi Supreme Court cases which address a bad faith denial of workers’ compensation benefits, therefore, represent a separate line of authority with their own distinct set of rules.

Next, Gallagher Bassett argues that the analysis used by the Fifth Circuit Court of Appeals in *Atkinson v. Gates, McDonald & Co.*, 838 F.2d 808 (5th Cir. 1988) should be followed in this case. However, the scenario in *Atkinson* is different from this scenario. As an initial matter, *Atkinson* involved the exclusivity provision of the Longshore and Harbor Workers’ Compensation Act (LHWCA), as extended by the Nonappropriated Fund Instrumentalities Act. The Fifth Circuit Court of Appeals agreed with the District Court “that the that the exclusivity provisions of both the Nonappropriated Fund Instrumentalities Act and the LHWCA, coupled with the penalty provision of section 914(e) of the LHWCA, operate to bar Atkinson’s claims.” 838 F.2d at 809-10 (citations and footnotes omitted). Importantly, the court stated that “the scheme of the LHWCA is that the employer is absolutely required to pay compensation promptly on notice of injury and in the absence of a timely written controversion.” *Id.* at 810. Further, “Congress [] did not enact any legislation to modify the employer’s absolute, unfettered right under the LHWCA to controvert compensation claims, nor did it change the penalty structure of section 14 of the LWHCA; rather, it confined its actions in respect to these concerns to enacting

the new [] section 31(c) and increasing the penalties provided in section 38.” *Id.* at 811 (citing 33 U.S.C. §§ 931(c) & 938).

The Court in *Atkinson* held that “the LHWCA is plainly preemptive of any state law claim for intentional or bad faith wrongful refusal to pay benefits due under the Act, and this is true even in the absence of any expressly preemptive language.” *Id.* at 812. Such “plain preemption” has not been found in the Mississippi Workers’ Compensation Act’s exclusivity provision. Conversely, the *Holland* Court explicitly opined:

This is a question of statutory construction. **The legislature of this state has the authority to provide that in any event the injured worker's exclusive remedy against the carrier is compensation. We hold today that it has not done so.** Section 71-3-9, the exclusiveness of remedy provision, covers only “liability ... to the employee ... on account of such injury or death,” The liability sought here to be imposed upon Farm Bureau does not arise out of the injury suffered by Ms. Holland on October 6, 1977. It derives from the independent and allegedly intentional, tortious conduct of Farm Bureau in refusing to pay benefits owing under the Act without an arguable basis therefor.

We hold, therefore, that the exclusivity provision of the Workers' Compensation Act does not bar an action by the employee against the insurance carrier for the commission of an intentional tort. The independent tort is not compensable under our Workers' Compensation Act and to extend immunity to compensation carriers for a separate injury to workers goes far beyond the intent of the act.

Holland, 469 So.2d at 59 (emphasis added). Accordingly, Gallagher Bassett’s arguments should be dismissed, as clearly *Holland* did not begin a slippery slope.

3. Malone’s injury was separate and distinct from his work related injury.

Gallagher Bassett continues to make circular arguments regarding Malone’s injuries. On the one hand, Gallagher Bassett argues that Malone’s injuries were not separate and distinct from the work related injuries. On the other hand, Gallagher Bassett argues that Malone’s injuries were exacerbated by waiting eight (8) weeks to have surgery. Gallagher Bassett relies heavily on the *Miller* case, which, as noted above, is inopposite. 444 So.2d 368 (Miss. 1984). *Miller*

simply sets forth the proposition that an employee has a right to bring a tort action against his/her employer, outside of workers' compensation, for intentional and willful torts. *Id.* The premise set forth in *Miller* has no place in this argument.

Malone clearly set forth at trial, and the jury found, that as a result of Gallagher Bassett's grossly negligent handling of his claim, his medical treatment was delayed, he suffered extensively, and ultimately lost his leg. The *Holland* court does not set forth that the injury must be separate and distinct as Gallagher Bassett represents. The *Holland* court simply holds that bad faith actions are separate and distinct from workers' compensation and the exclusivity clause does not apply. 469 So.2d 55.

Gallagher Bassett's arguments are again erroneous. Consequently, Malone's claims for bad faith were properly before the jury.

4. Malone did not fail to reserve his right to pursue his action against Gallagher Bassett.

Malone was not required to reserve his rights to bring a bad faith action against Gallagher Bassett. Gallagher Bassett relies on the case of *Mississippi Power & Light Co. v. Cook* for the notion that a workers' compensation claimant must preserve his right to pursue his bad faith action when he accepts payment on his underlying workers' compensation claim. 832 So.2d 474 (Miss. 2002). However, that is completely opposite to what the court held. In fact, the court held that the claimant did not have to exhaust his rights in the compensation system because the claim of bad faith is separate and apart from the workers' compensation act. *Id.* Therefore, Gallagher Bassett's arguments are unfounded as the court in *Cook* found that a claimant can pursue a bad faith claim at any point because it is a separate claim.

I. Gallagher Bassett's gross negligence was the Proximate Cause of Damages Suffered by Malone.

Gallagher Bassett relies on the case of *Glover v. Jackson State Univ.* as setting forth the premise that proximate cause is a necessary element in any claim for damages. 968 So.2d 1267 (Miss. 2007). Once again, Gallagher Bassett's broad generalization of the court's holding in *Glover* is misleading. The *Glover* court precisely held that "to recover for injuries in a negligence claim, a plaintiff must prove that the defendant was negligent, and that such negligence was the proximate cause, or a proximate contributory cause, of the injuries." *Id.* at 1276. Gallagher Bassett argues that Malone had to prove that there was no causes, other than Gallagher Bassett's misconduct which contributed to his injury, which position is directly against the holding of *Glover*, as the *Glover* court provided for the "proximate contributory cause." *Id.* The *Glover* court did clarify precedent by stating that a plaintiff must show "but for" the defendant's actions there would not have been the same damage.

The medical testimony offered at trial by Drs. Melancon and Moak clearly set forth that the delay in medical treatment caused the loss of Malone's leg. Once again, Gallagher Bassett's reasoning is unfounded and its representation of the law is misleading and overly broad. Therefore, this argument necessarily fails.

J. Any Failure to Mitigate Damages on Malone's Part Does Not Absolve Gallagher Bassett from Liability.

Throughout its brief, Gallagher Bassett makes conflicting arguments. The first argument is that Malone did not suffer damages that were separate and distinct from the work related injuries. However, Gallagher Bassett now argues that Malone failed to mitigate his bad faith damages. In this section of the of Gallagher Bassett's argument, it sets forth that Malone's injuries arise from postponing his surgery in order to work an eight (8) week shift. It is clear

from the trial transcript that this was done so that Malone could save money to support his family while recovering from surgery. Gallagher Bassett's argument is basically that Malone should have gotten the surgery sooner, regardless of the financial hardship this would cause and that his failure to visit this hardship on his family exonerates Gallagher Bassett. However, either approach would have caused damages. Had Malone gone forward with surgery and not worked the eight week shift, he would have had economic damage claims beyond what was set forth at trial. At the time Malone made the decision to delay surgery, no one advised him that delaying surgery would eventually result in the loss of his leg. Consequently, it is clear that Malone, at the time the decision was made, was mitigating his damages.

Gallagher Bassett also sets forth that "forgoing medical treatment is a decision, not a damage." That is completely out of context, especially when discussing mitigation of damages. Mitigating damages has everything to do with decisions and the consequences of those decisions. Therefore, Gallagher Bassett's contentions are misplaced.

K. Malone's Claims are not Barred by the "One Satisfaction" Rule and Gallagher Bassett is not Entitled to a Set Off.

Malone's claims are not barred by the "one satisfaction" rule. Where fault has been apportioned between a non-settling defendant and a settling defendant, the non-settling defendant remains liable for the amount of damages allocated to him in direct proportion to his percentage of fault. Miss. Code Ann. § 85-5-7. Under Mississippi law, liability for damages caused by two or more persons shall be several only. Miss. Code Ann. § 85-5-7; *Narkeeta Timber Co., Inc. v. Jenkins*, 777 So. 2d 39 (Miss. 2001). Moreover, a non-settling defendant is not entitled to a credit for the amount paid in settlement by another defendant after fault has been apportioned by the jury. *Krieser v. Hobbs*, 166 F.3d 736, 738 (5th Cir. 1999), applying Mississippi law. Thus,

the law does not allow the non-settling defendant to escape fault by the mere fact that another defendant has settled.

Generally, a joint tortfeasor is not subject to joint liability, but is liable for the damages apportioned by the trier of fact. *Krieser*, 166 F.3d at 741. This is true even in cases where fault is apportioned between settling defendants and non-settling defendants.

Applying Mississippi law pursuant to *Erie*, the United States Court of Appeals for the Fifth Circuit analyzed whether a non-settling defendant was entitled to a credit for the amount paid to plaintiff by a settling defendant. *Krieser*, 166 F.3d at 736. In *Krieser*, plaintiff brought a wrongful death action against a hospital and doctor. *Id.* at 738. On the third day of trial, the doctor settled with the plaintiff for \$650,000.00, leaving only the hospital as a defendant. *Id.* The jury returned a verdict in favor of the plaintiff and against the hospital and doctor in the amount of \$200,000.00. *Id.* Both the hospital and the doctor were found to be fifty percent at fault. *Id.* The hospital claimed it was entitled to a *pro tanto* credit in the amount of \$650,000.00, representing the settlement amount paid by the doctor to the plaintiff. *Id.* 739. The hospital relied on the “one-satisfaction” rule asserting that plaintiff was barred from recovering more than the total damages awarded. *Id.* However, the plaintiff argued that the Mississippi statute 85-5-7 eradicated the “one-satisfaction” rule. *Id.*

The court held that the hospital was not entitled to a setoff for the settlement amount paid to the plaintiff by the doctor. *Id.* at 743. The court reasoned that setoffs and the “one-satisfaction” rule exist to prevent the plaintiff from recovering twice from the **same** assessment of liability. *Id.* at 743, *emphasis added*. Mississippi’s rule of *pro tanto* reduction was based on pre-tort reform and rooted in joint and several liability. *Id.* at 742. The court went on to recognize,

where liability is not joint and several, and each defendant bears liability for damages **only proportionate** to his own fault, there **is no** assessment of liability for damages common to the settling defendants. Accordingly, the settlement has an entirely separate basis from the apportioned damages, and the one-recovery rule does not apply. *Id.* at 743.

Applying the above reasoning, the court pointed out that the defendants were joint tortfeasors subject to several liability. *Id.* at 741. Moreover, the plaintiff did not receive a double recovery, but obtained \$650,000.00 in settlement and was awarded \$200,000.00. *Id.* at 744. As explained by the court, “plaintiff’s good fortune in striking a favorable bargain with one defendant gives [the] other defendants no claim to pay less than their proportionate share of the total loss.” *Id.* at 745. Additionally, Mississippi’s public policy favored finding that a defendant whose negligence was found to have proximately caused an injury should not be allowed to escape liability by the fortuity that a co-defendant has settled prior to trial. *Id.*, citing, *McBride v. Chevron U.S.A.*, 673 So. 2d 372, 374 (Miss. 1996).

As discussed in this brief, Nabors and Malone settled prior to trial. With the knowledge of the settlement amount, the jury awarded Malone an additional \$250,000.00, not intended to operate as double recovery. In so doing, the jury apportioned fault to Gallagher Bassett, Nabors, and the Plaintiff. As was the case in *Kriesler*, the settlement had an entirely separate basis than the apportionment of liability. Gallagher Bassett cannot now seek to avoid liability for its negligence; because, Nabors settled with Malone prior to trial.

Malone’s claims also are not barred by the “one satisfaction” rule, as Gallagher Bassett argues. Nabors settlement with Malone was not on behalf of Gallagher Bassett. That is quite to the contrary, as there is nothing in the settlement agreement that states it was on behalf of Gallagher Bassett. (See G.B.R.E. 12; G.B.T.E. GB-2; N.R.E. 10). Nabors reserves the right to fully adopt the

arguments made by Malone in his appellee brief in opposition to Gallagher Bassett's assertions. Consequently, Gallagher Bassett's argument regarding the "one satisfaction" rule must fail.

L. Gallagher Bassett is Liable to Nabors for Breach of Contract, Not Indemnity of Malone's Claim as asserted by Gallagher Bassett.

Gallagher Bassett erroneously argues that Nabors has no right to indemnification against it. Yet, Nabors did not seek indemnity from Gallagher Bassett, but rather Nabors sought damages arising from Gallagher Bassett's breach of the Claim Service Agreement. (See N.R.E. 1). More specifically, Nabors filed a Cross Claim against Gallagher Bassett claiming that Gallagher Bassett breached its contract and that Gallagher Bassett is liable for damages which amounted to the expenses that Nabors incurred as a result of Gallagher Bassett's bad faith handling of Malone's claim. While Gallagher Bassett looks to the Illinois and Arizona state courts in support of its contentions (See p. 52 of Gallagher Bassett's brief), one does not need to look any further than Mississippi law.

Nabors sued based on Gallagher Bassett's breach of the Claim Service Agreement entered into between Continental Casualty Company and Gallagher Bassett for the express benefit of Nabors. (N.T.E. 19; N.R.E. 1). More specifically, Nabors filed suit for Gallagher Bassett's breach of the agreement for "fair and expeditious claims handling, done in a professional manner and in accordance with all applicable laws, statutes, and regulations." (N.T.E. 19; N.R.E. 1). Consequently, Nabors' cross-claim set forth that Gallagher Bassett breached the contract, as to which Nabors was a third party beneficiary, and is liable for all damages sustained by Nabors as a result of that breach. In fact, the jury agreed with Nabors that Gallagher Bassett breached that contract and awarded damages based on that breach.

As Malone's employer, Nabors had certain non-delegable legal obligations under Mississippi's workers' compensation laws. Specifically, Nabors owed Malone, an employee

injured while in the course and scope of his employment, a duty to provide medical care and workers' compensation benefits. Nabors, which does not hold itself out as an expert in Mississippi workers' compensation law, procured insurance for its liabilities from CNA. Gallagher Bassett entered into a Claims Service Agreement with CNA in which Gallagher Bassett contractually obligated itself to investigate claims and determine compensability. Gallagher Bassett accepted that obligation and was paid for its services. Nabors was the third party beneficiary of the contract between Gallagher Bassett and CNA, under which Gallagher Bassett was to manage and adjust Mississippi workers' compensation claims as a third-party administrator for Nabors, including claims for workers' compensation benefits, such as that filed by Plaintiff. (N.T.E. 19; N.R.E. 1). Gallagher Bassett specifically contractually obligated itself to provide "fair and expeditious claims handling, done in a professional manner and in accordance with all applicable laws, statutes, and regulations." Nabors only prayed for what it vicariously owed to Malone based on the bad faith claim and expenses arising from the defense as a result of Gallagher Bassett's bad faith against Nabors. In other words, but for Gallagher Bassett's breach of its duties under the contract, there would be no claim for bad faith against Nabors. Even further, as the jury found no wrong doing on the part of Holbrook, Nabors' supervisor and named defendant in this action, it goes against reason that there can be any liability on the part of Nabors. In other words, if Nabors' employee did nothing wrong, Nabors should not have been found liable.

Nabors set forth in its cross-claim that Gallagher Bassett breached its contractual obligations. Specifically, Nabors' cross-claim against Gallagher Bassett states:

Nabors affirmatively contends that Gallagher Bassett did not fulfill its contractual duties and/or responsibilities, and failed to properly manage and adjust the workers' compensation claim filed by Plaintiff, directly causing Nabors to incur the above-captioned bad faith suit filed by Plaintiff.

Nabors incurred damages because of Gallagher Bassett's breach and failure to adequately investigate and adjust Malone's workers' compensation claim. Moreover, Nabors put forth evidence at trial, which the jury ultimately found convincing, that Gallagher Bassett owed Nabors a contractual duty to adjust Malone's workers' compensation claim and failed to fulfill that duty. In that regard, all Nabors ever prayed for was for the damages incurred as a result of Gallagher Bassett's breach.

The elements of a breach of contract action are: (1) the existence of a valid and binding contract; (2) that the defendant has broken, or breached it; and (3) that the plaintiff has been thereby damaged monetarily. *Favre Property Management, LLC v. Cinque Bambini*, 863 So. 2d 1037, 1044 (Miss.App. 2004); *Warwick v. Matheney*, 603 So. 2d 330, 336 (Miss.1992). As such, Nabors sets forth that it was the third party beneficiary of the Claim Service Agreement established between Continental Casualty Company and Gallagher Bassett for the express and stated benefit of Nabors. (N.R.E. 1). Mississippi courts have consistently held that "[i]n order for the third person beneficiary to have a cause of action, the contracts between the original parties must have been entered into for his benefit, or at least such benefit must be the direct result of the performance within the contemplation of the parties as shown by its terms." *Rein v. Benchmark Constr. Co.*, 865 So.2d 1134, 1146 (Miss.2004) (citation omitted). Thus, the third party beneficiary analysis does not need to go further as the Claim Service Agreement specifically states that it was entered into to secure "fair and expeditious claims handling" for Nabors. (N.R.E. 1).

The verdict awarded in favor of Nabors was intended to put Nabors in the position it was in prior to Gallagher Bassett's breach of contract. *A & F Properties, LLC v. Lake Caroline, Inc.*, 775 So. 2d 1276, 1281 (Miss.App. 2000). It is well established that when a person has been

injured by a breach of contract, he is entitled to be justly compensated and is to be made whole by the trial court. *Doster v. Doster*, 853 So. 2d 147 (Miss.App. 2003); *Polk v. Sexton*, 613 So. 2d 841, 844 (Miss.1993). A breaching party is liable for damages resulting from the breach. *University of Southern Mississippi v. Williams*, 891 So. 2d 160, 176 (Miss. 2004). All Nabors prayed for was damages it sustained as a result of Gallagher Bassett's breach of the Claims Service Agreement.

Following trial on the merits and based on the evidence presented, the jury found that Gallagher Bassett breached its contractual obligations to properly and timely adjust Malone's workers' compensation claim on behalf of Nabors. Moreover, the trial court dismissed Gallagher Bassett's cross-claim against Nabors for breach of contract based on Nabors Motion to Strike Gallagher Bassett's Cross-Claim. The evidence at trial established that Nabors provided Gallagher Bassett with notice of Malone's work-related injury and workers' compensation claim no later than August 16, 2000. Thereafter, Gallagher Bassett took the recorded statement of Malone's supervisor at Nabors. However, Gallagher Bassett failed to undertake any other investigation of Malone's workers' compensation claim.

Despite Gallagher Bassett's attempts to mislead and confuse this Court, Nabors has alleged and proved a valid and separate cause of action against Gallagher Bassett for breach of contract. The jury's erroneous allocation of fault to Nabors does not preclude Nabors' recovery on a separate breach of contract claim. Moreover, Mississippi law does not require that a party be free from fault, which fault is expressly denied, to recover for breach of contract. *Doster v. Doster*, 853 So. 2d 147 (Miss.App. 2003); *Polk v. Sexton*, 613 So. 2d 841, 844 (Miss.1993). Thus, in conformity with the overwhelming and undisputed evidence presented at trial and the law of Mississippi, the jury's verdict in favor of Nabors, against Gallagher Bassett for breach of

contract is proper, and must not be altered, except as to add to the amount of the award as set forth above.

While Nabors clearly alleged breach of contract and the jury agreed with Nabors' allegations, out of an abundance of caution, Nabors sets forth argument in opposition to Gallagher Bassett's defenses based on indemnity. Common law indemnity is available based on three scenarios: 1) cases involving vicarious liability, 2) cases where indemnitee has failed to discover the condition that caused the initial injury and, 3) cases where both indemnitee and indemnitor have breached a duty, as between themselves, the indemnitor has agreed to perform. *Long Term Care, Inc. v. Jesco, Inc.*, 560 So. 2d 717, 719-720 (Miss. 1990). Nabors established entitlement to indemnity from Gallagher Bassett because Gallagher Bassett breached its duty to manage and adjust Malone's workers' compensation claim on behalf of Nabors. The court has held "that the two 'critical' prerequisites of non-contractual implied indemnity in Mississippi are: (1) The damages which the claimant seeks to shift are imposed upon him as a result of some legal obligation to the injured person; and (2) it must appear that the claimant did not actively or affirmatively participate in the wrong." *Hartford Casualty Ins. Co. v. Halliburton Co.*, 826 So. 2d 1206, 1216 (Miss. 2001.) Consequently, Nabors sought damages arising from Gallagher Bassett's breach of the Claims Service Agreement and all damages stemming from that breach; yet, Nabors prevails even on indemnity, contrary to Gallagher Bassett's arguments.

Nabors prevails on indemnity because Nabors' liability in this matter is vicarious. While it had the duty to provide medical benefits to Malone, Nabors relied on the expertise of Gallagher Bassett with respect to whether such benefits were owed. Gallagher Bassett's gross negligence and breach of contract left Nabors liable for Malone's damages solely because of the misconduct of Gallagher Bassett. The arguments of Gallagher Bassett notwithstanding, the

evidence established that Gallagher Bassett's failure to advise Nabors of the compensability of Malone's injury was the cause of Nabors' failure to pay benefits. Put quite simply, Nabors relied on Gallagher Bassett and no other entity or individual with respect to decisions as to compensability of an injury under Mississippi compensation law. Therefore, Gallagher Bassett's misconduct resulted in Nabors' liability.

1. Nabors Did Not Actively Participate In the Wrong In Order To Eliminate Indemnification.

Gallagher Bassett alleges that because the jury found Nabors 42.5% at fault for Malone's injuries, Nabors committed an "intentional act of bad faith with specific intent to harm." This is an erroneous and misleading statement. As an initial point, Nabors takes exception to the jury's allocation of fault to Nabors. Specifically, no evidence was put forth at trial to prove that Nabors committed an intentional act² of bad faith with specific intent to harm Malone. Furthermore, the jury was not instructed on the legal requirements to find Nabors liable for the harm caused to Malone. Moreover, it was undisputed at trial that Nabors reported Malone's work-related accident and injury to Gallagher Bassett no later than August 16, 2000. Thereafter, Gallagher Bassett was contractually obligated to investigate and adjust Malone's workers' compensation claim. Thus, any fault allocated to Nabors should be reversed.

Despite the jury's clearly erroneous allocation of fault to Nabors, it cannot be inferred from the finding that Nabors was 42.5% at fault that Nabors committed an intentional tort with specific intent to harm Malone, as purported by Gallagher Bassett. As noted above, the uncontested evidence presented at trial established that Nabors reported Malone's accident and need for medical care to Gallagher Bassett by August 16, 2000. As previously stated, the jury's

² While Nabors sets forth that the appropriate standard to determine bad faith is gross negligence, maliciousness, or a disregard for the rights of another, Gallagher Bassett continuously sets forth throughout its brief that the standard is "intentional act of bad faith." Therefore, for the purposes of opposing Gallagher Bassett's arguments, Nabors uses Gallagher Bassett's reasoning.

lack of finding liability on the part of Holbrook goes directly towards Nabors position, i.e. if Nabors employee did not commit any wrongdoing then how could Nabors be found liable. The uncontroverted expert medical testimony established that any delay between the time of the accident and August 16, 2000, did not cause Malone's damages. There is no support in the record for Gallagher Bassett's attempt to interpret the unsupported, uninstructed jury verdict to mean that Nabors committed an intentional bad faith act with specific intent to harm Malone or than any act of Nabors caused any harm to Malone.

Even further, Nabors did not actively or affirmatively participate in the injury to Malone. See *Hartford Casualty Ins. Co.*, 826 So. 2d at 1216. The injury to Malone was caused solely by the active and affirmative failure of Gallagher Bassett to follow its own written guidelines and procedures in the adjustment of Malone's workers' compensation claim and its failure to advise Nabors of the compensability of the claim. There was no discussion between Robichaux and anyone at Nabors with respect to her gross failures. Nabors did not participate in any way with Gallagher Bassett's bad faith handling of this claim. The facts at trial established that Nabors notified Gallagher Bassett of Malone's work-related injury, need for medical treatment and potential workers' compensation claim on or before August 16, 2000. On August 16, 2000, Deborah Robichaux, an adjustor at Gallagher Bassett, took the recorded statement of toolpusher Bobby Wallace regarding Malone's accident and potential workers' compensation claim. In his recorded statement, Wallace explained that Malone had slipped at work and cut his leg against a steel beam. Additionally, he told Robichaux that Malone needed to undergo a surgical procedure to the area of his leg that he cut at work. Nonetheless, Robichaux did not contact Malone or his treating physician to investigate the accident or medical causation. In accordance with Gallagher Bassett's own policies, it was charged with the duty to initiate "three-point contact." Three-point

contact requires the adjustor assigned to a claim to contact the claimant, the claimant's medical providers and any witnesses. (N.R.E. 2). As discussed, Robichaux contacted Malone's supervisor at Nabors, but failed to contact Malone or his treating physician. As of August 16, 2000, Gallagher Bassett was charged with the obligation to adjust and handle Malone's workers' compensation claim. Nabors had fulfilled any obligation it had by providing its third-party administrator with notice of a work-related injury and the workers' compensation claim.

As shown above, Nabors contracted out the responsibility of the claim's handling and investigation of claims such as those of Malone. The verdict rendered by the jury, although allocating fault to Nabors and Gallagher Bassett, did not state that Nabors actively or affirmatively participated in the bad faith of Gallagher Bassett. Again, as stated by Nabors throughout trial and admitted by Gallagher Bassett in its Motion for JNOV, Nabors owed certain statutory obligations to Malone under Mississippi law. Nabors' liability was by virtue of its legal obligations to Malone and Gallagher Bassett's complete failure to perform its contractual duties.

2. The Damages Paid In Settlement were Imposed Upon Nabors.

Gallagher Bassett asserts that the damages incurred by Nabors were not imposed upon it by a legal obligation to Malone. In direct contradiction, Gallagher Bassett stated in its brief that "[t]he jury's allocation of fault to Nabors was based on the trial testimony that Nabors had knowledge of Malone's claim and failed to provide him **statutory workers' compensation benefits.**" As explained above and confirmed by Gallagher Bassett, Nabors had a duty to provide workers' compensation benefits to Malone. Despite the fact that Gallagher Bassett contractually undertook the obligation to determine compensability and administer the delivery of benefits, Nabors remained ultimately liable for the failure to provide medical treatment and compensation benefits. The evidence at trial established that Gallagher Bassett breached its

contractual obligations to adequately and timely investigate and adjust Malone's workers' compensation claim on behalf of Nabors. As a direct result of this breach, Nabors was liable to Malone for \$1,500,000.00, an amount well below the economic loss and medical costs incurred by Malone. Therefore, the amounts paid to Malone, and/or incurred by Nabors in defense of the bad faith claim, were imposed as a result of a legal obligation owed by Nabors to Malone and reasonably paid by Nabors under the premises.

The trial testimony clearly shows that in arriving at the \$1.5 million sum, Nabors considered Malone's past and future lost wages, past and future medical expenses, other expenses, pain and suffering, and punitive damages. (T.T. 653). Even further, Malone's wage losses and future prosthetic costs were clearly set forth at trial by Annette Turner, a certified public accountant. (T.T. 535-539).

In summary, Nabors claims were clearly based on breach of contract. Based on the above discussion, it is clear that Gallagher Bassett is attempting to change Nabors' cause of action to suit its own cause. However, that is clearly against the pleadings of this case and the findings of the jury and the trial court. Therefore, Gallagher Bassett's argument fails.

V. CONCLUSION

Based on the above arguments, it is clear that Nabors' Judgment Notwithstanding the Verdict regarding Additur should have been granted. Furthermore, the jury's finding that Nabors was 42.5% at fault was against the great weight of the evidence. Gallagher Bassett, as Nabors' third party administrator, acted in a manner that was grossly negligent and without regard for Malone's rights causing Nabors to be sued for bad faith. Furthermore, Gallagher Bassett breached the Claim Service Agreement. As such, Nabors requests that this Honorable Court reverse the finding that Nabors was 42.5% at fault, reverse the circuit court's denial of Nabors'

JNOV, find that the circuit court was in error in holding Nabors' Motion to Strike Gallagher Bassett's Cross-Claim in abeyance and deny all of Gallagher Bassett's assignment of errors.

Respectfully submitted, this the 14th day of November, 2008.

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CERTIFICATE OF SERVICE

I, Richard Burson, one of the counsels for Nabors Drilling USA, LP, do hereby certify that I have this day provided by U.S. Mail postage pre-paid, a true and correct copy of the above and foregoing document to:

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