IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

GALLAGHER BASSETT SERVICES, INC.

Defendant-Appellant

Supreme Court No. 2007-CA-00585

VS.

Jones County Circuit Court No. 2003-230-CV12

GARY LEE MALONE and NABORS DRILLING, USA

Plaintiffs-Appellees

REPLY BRIEF/CROSS-APPELLEE BRIEF OF GALLAGHER BASSETT SERVICES, INC. DEFENDANT—APPELLANT—CROSS APPELLEE

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ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. STATEMENT OF FACTS

1.1 As noted by Gallagher Bassett in its Appellant's Brief, most of the facts in this case are not in serious dispute. Between the three parties in this case, this Court now has approximately 26 pages of "facts" to review. The following bullet point list is comprised exclusively of facts directly pertinent for a clear understanding of the issues raised by Gallagher Bassett before this Court:[1]

1. July 28, 2000 – Malone slipped and cut his leg at work. V 29: T 271 ln 23-T 272 ln 22.[2]

2. July 28, 2000 – Malone reports injury to his direct supervisor, Bobby Wallace. Bobby Wallace calls his supervisor, Rob Holbrook, to determine how to proceed. V 29: T 272 ln 24-T 273 ln 22.

3. July 28, 2000 – Wallace informs Malone that he is not permitted to seek medical treatment for his leg injury and that they would treat it on the rig. V 29: T 273 ln 3-19.

4. July 28, 2000 – Wallace prepared an incident report wherein he indicated Malone's incident was a first aid only incident. R.E. 15. Malone testified he forced Wallace to prepare the report. V 29: T 272 ln 24-T 274 ln 19. This report was not logged into Nabors' computer system designed to monitor workplace injuries. V 31: T 457 ln 6-16; V 30: T. 442 ln 1- T 443 ln 20.

5. August 7, 2000 – Malone visited his treating physician (Dr. Moak), utilizing his wife's health insurance instead of workers' compensation. V 30: T 345 ln 14- 28.

6. August 7, 2000 – Dr. Moak treated Malone by applying ointment and a bandaid, and released Malone to return to work. V 30: T 323 ln 28-T 324 ln 1. D: Dr. Moak, p. 67 ln 4-12; D: Dr. Moak, p. 67 ln 22-p. 68 ln. 19.

7. August 14, 2000 – Malone had a follow up visit with his treating physician (Dr. Moak). Dr. Moak referred Malone to a specialist, Dr. Barbieri, whom Malone met with on August 16, 2000. V 29: T 277 ln 8-T 281 ln 3.

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[1] Additional facts and specific testimony are cited and/or quoted throughout this brief, as well as Gallagher Bassett's Appellant's Brief. However, the facts set forth in this list are determinative of the issues on appeal to this Court.

[2] The citations will be in the following format: Trial Court Record citations will be "V" followed by the volume number and "p" followed by the page number. Trial Transcript citations will be "V" followed by the volume number; "T" followed by the transcript page number and line. Depositions which were read into the record at trial, will be identified as "D" followed by the deponent's name followed by citation to page and line. Records Excerpts will be cited as "R.E." followed by number.

8. August 14, 2000 – Malone called Wallace at home after hours to inform Wallace that Malone needed surgery on his leg. Wallace referred Malone to Holbrook. V 29: T 277 ln 21-T 281 ln 3.

9. August 16, 2000 – An adjuster for Gallagher Bassett, Deborah Duckett Robichaux, took a statement from Bobby Wallace. This statement was taken after Malone's claim had been summarily denied by Wallace and Holbrook on July 28, 2000. R.E. 17. Gallagher Bassett did not create a claim file after this statement. R.E. 17. Likewise, Nabors did not log Mr. Malone's injury into its computer system designed to track workplace injuries until January 9, 2002. V 30: T 442 ln 1- T 443 ln 17; V 31: T 457 ln 6-16.

10. August 16, 2000 – Malone sought treatment from Dr. Barbieri. Immediately after leaving Dr. Barbieri's office, Malone went to Holbrook's office. According to Malone, Holbrook informed Malone that Nabors would not treat his injury as a workers' compensation claim. V 29: T 279 ln 27 – T 280 ln 23. After meeting with Holbrook, Malone informed his wife that surgery would not be covered by workers' compensation. V 29: T 280 ln 281-T 281 ln 9.

11. August 16, 2000 – Malone requested Nabors allow him to work eight straight hitches so that he could take off for further treatment. V 31: T 596 ln 9-T 597 ln 2; V 32: T 610 ln 11-T 612 ln 2

12. On or about August 16, 2000 – Holbrook informed the safety officer and regional supervisor for Nabors that Malone's surgery was not related to a workplace injury. V 31: T 596 ln 9-T 597 ln 2; V 32: T 611 ln 4-T 612 ln 2.

13. On or about August 16, 2000 – Wallace called Holbrook and then informed Malone that Nabors had granted his request to work eight straight hitches. V 31: T 596 ln 9-T 597 ln 2.

14. October 20, 2000 – Mr. Malone completes the third straight hitch. V 29: T 285 ln 23.

15. October 23, 2000 – Mr. Malone undergoes surgery on his leg. V 29: T 285 ln 26

16. October 23, 2000-January 24, 2001 – Mr. Malone continued to receive medical care for his injury. V 29: T 285 ln 26-T 287 ln 22.

17. January 2001 – Nabors fires Malone for injuries unrelated to work. V 32: T 684 ln 15-22; R. E. 13

18. January 2001 - Jerry Poole took over as the new safety officer for Nabors. Mr. Poole reviewed all workers compensation claims and employees on leave of absence with the outgoing safety coordinator. Malone's injury was not discussed. D: Poole p. 38 ln 21 – p. 40 ln 14.

19. January 24, 2001 – Mr. Malone stepped in a hole at his home and broke his leg. V. 29: T 287, ln 21-26.

20. February 26, 2001 – Mr. Malone applied for Social Security benefits, stating under oath in the application that he had not filed a workers' compensation claim and that he did not plan to do so. R.E. 18.

21. November 2001 – Mr. Malone hired an attorney to represent him in making a workers' compensation claim. V 30: T 353 ln 21-26.

22. November 19, 2001 – Malone contacted the current Nabors' safety officer, Jerry Poole, and informed Mr. Poole that he was making a workers' compensation claim for an injury that occurred in July 2000. During this conversation, Mr. Malone informed Mr. Poole that Bobby Wallace and Rob Holbrook refused to allow Mr. Malone to make a workers' compensation claim. D: Poole p. 29 ln 16- p. 30 ln 21; R.E. 16.

23. November 27, 2001 – Poole prepared a First Report of Injury based on his conversation with Mr. Malone. The report states as follows: "Gary Malone called me today at approximately 8:30 a.m. claiming that injuries he sustained on 7/28/00 while working on Nabors rig #295 have caused him to be off of work since the injury and have required medical treatment (surgery and physical therapy) that he has paid for. Malone claims that the Drilling Supt. (Rob Holbrook) and Rig Manager (Bobby Wallace) asked him not to report the treatment to the district office." First Report of Injury, R.E. 16.

24. November 27, 2001 – Poole faxed a copy of the First Report of Injury to Gallagher Bassett. R.E. 16.

25. December 5, 2001 – Gallagher Bassett opened a claims file for Mr. Malone's injury after receiving the first report of injury. V 33: T 784 ln 15-17.

26. December, 2001 – Malone received a letter from Gallagher Bassett requesting a release for medical records. Malone provided this request to his attorneys. V 30: T 351 ln 28-T 353 ln 20. Instead of providing the records or a signed release, Malone's attorneys filed a Petition to Controvert several months later.

27. January 9, 2002 – For the first time, Nabors logged Malone's work injury into its computer system which is designed to track claims. V 30: T 443 ln 9- T 444 ln 14; V 31: T 457 ln 6-16.

28. July 2002 - Counsel for Malone filed petition to controvert before Mississippi Workers' Compensation Commission. V 30: T 392 ln 13-14.

29. August 19, 2002 – Mr. Malone's leg was amputated. V 30: T 303 ln 2.

30. September 9, 2002 – Gallagher Bassett set Malone's claim for payment of the full indemnity and medical benefits. V 31: T 471 ln 22-T 472 ln 10.

1.2 After an analysis of the facts in this matter, it is clear that Gallagher Bassett did all that could be done in August of 2000. As covered below, Gallagher Bassett could not open

and adjust a claim without assignment by transmittal of a report of injury. Malone's incident was regarded by Nabors as unrelated to work, and to that end the first aid incident report did not even make it into Nabors' computer record of work incidents. Nabors and Malone simply pretended no work injury existed until Malone called Nabors in November, 2001, one year and four months later. Based on conversation with his supervisors at Nabors, Malone himself even admitted at trial that he never filed a workers' compensation claim until after November, 2001. Nabors' failure to treat Malone's injury as a work incident was caused by its employees' motivation to secure company bonuses.

1.3 Regardless of these facts, however, both Malone and Nabors seek to hold Gallagher Bassett liable in this action for failing to adjust a workers' compensation claim that had not been made or assigned to it. For the reasons discussed in detail below, Gallagher Bassett respectfully requests an Order from this Court reversing the judgment in favor of Gary Malone against Gallagher Bassett and the judgment in favor of Nabors Drilling USA against Gallagher Bassett and rendering judgment in favor of Gallagher Bassett on all issues in this case.

II. SUMMARY OF ARGUMENT

2.1 Nabors' fault prohibits recovery on its Cross-Claim under either indemnity or breach of contract. Nabors labels its case against Gallagher Bassett as a "breach of contract" action; however, the record in this case illustrates that Nabors' Cross-Claim is actually one of indemnity. The indemnity claim fails as a matter of law because it does not meet requirements of indemnity in Mississippi where: (a) the jury found that Nabors actively participated in the wrong for which Malone is seeking to recover; and (b) Nabors paid as a volunteer. Assuming, *arguendo,* that this Court analyzes Nabors' Cross-Claim under a breach of contract theory, the jury's allocation of fault to Nabors still precludes recovery. The law is clear that a party's own wrongful conduct, bad faith, or breach of contract precludes its recovery. Therefore, the bad

conduct—or unclean hands—of Nabors bars any potential third party beneficiary breach of contract claim.

2.2 The trial court's denial of Nabors' Motion for Directed Verdict and decision holding Nabors' Motion to Strike Gallagher Bassett's Cross-Claim in abeyance was proper. Nabors contends that the trial court erred by orally denying Nabors' Motion for Directed Verdict because none of the witnesses presented during Malone's case-in-chief offered testimony that would support a finding that Nabors acted in bad faith. Nabors fails to recognize, however, that the overwhelming weight of evidence from Malone himself, offered in Malone's case-in-chief, as outlined above, pointed to Nabors bearing fault for Malone's injuries. Certainly the trial judge was well within his discretion in denying Nabors' Motion for Directed Verdict.

2.3 Furthermore, Nabors is not entitled to an additur under the facts of this case. The trial judge rejected Nabors' request for additur, aptly recognizing that the jury of twelve, who gave their verdict under oath, was one of the most attentive juries he had seen in his thirty-two years of experience. The jury decided that Nabors' bad acts were worthy of 42.5% of the fault in this matter and that Nabors should be awarded an amount less than the total amount they were requesting in its Cross-Claim.

2.4 Malone's claims against Gallagher Bassett are barred by the exclusivity clause in the Mississippi Workers' Compensation Act. In the context of handling of a workers' compensation insurance claim, in order to be actionable, pleading and proof must show the actor acted with both (1) bad faith and (2) intent. Allegations and proof that the insurance carrier and adjuster negligently, carelessly, recklessly, willfully and hazardously failed, refused and neglected to handle the claim are insufficient under Mississippi law. There was certainly no act on the part of Gallagher Bassett showing bad motive in the context of handling a claim or any intentional act by Gallagher Bassett against the rights of Malone. The only party involved who

appeared to have any motive to act with bad faith and/or otherwise acted with any actual intent was Nabors, whose management sought bonuses which would be lost with the commencement of a claim. Because the claims of Malone in the instant case do not involve allegations and proof of both bad faith and an intentional act on the part of Gallagher Bassett in the handling of his claim, the claims are not actionable and should be dismissed with prejudice.

2.5 Concerning the judgment in favor of Malone, Malone cannot recover the portion attributed to Gallagher Bassett for three reasons. First and foremost, according to Mississippi's common law "one satisfaction" rule, double recovery for the same harm is prohibited. Second, *pro tanto* setoff remains viable in this state despite the Legislature's enactment of Miss. Code Ann. § 85-5-7, as this Court follows the long established rule that statutes in derogation of the common law are, as a general rule, strictly construed. Third, this lawsuit was filed on December 5, 2003, meaning that it falls within the narrow window of tort reform—from January 1, 2003, to August 31, 2004—wherein joint tortfeasors with at least 30% fault maintain joint and several liability up to 50% of the plaintiff's recoverable damages. Accordingly, Malone's ability to recover is foreclosed by his settlement of $1,500,000.

2.6 Neither Malone nor Nabors is entitled to punitive damages in this case. In a trial involving bad faith handling of a workers' compensation claim, evidence of egregious conduct is necessary in order to prove the higher standard necessary for a finding of liability in the compensatory phase of the trial. In rejecting punitive damages, Judge Landrum was fully aware of all evidence regarding the allegedly malicious conduct of Gallagher Bassett, as this evidence was presented during the compensatory phase of trial. Based on this evidence, Judge Landrum ultimately held that Gallagher Bassett's conduct was not sufficient to support a claim for punitive damages. The record reflects that Judge Landrum appropriately conducted a second phase of the trial when he allowed argument on the issue of punitive damages. Neither Malone nor Nabors

requested to call any witnesses during the argument allowed by the trial court on punitive damages. Judge Landrum expressed that he had given the punitive damages issue detailed consideration based on his significant experience as a trial judge. He then ultimately determined that, based on the totality of the circumstances and aggregate conduct, Gallagher Bassett's actions were insufficient to support a claim for punitive damages. The record is completely devoid of any further requests or objections by either Nabors or Malone.

2.7 At trial, Judge Landrum carefully considered Nabors' Daubert challenge to tendered expert Johnston and properly determined that Johnston was qualified to testify to a relevant issue in the case—industry standards for third party adjusters—because of his forty years of experience in the field. Specifically, Judge Landrum found that, based on Johnston's background, education and experience, Johnston would provide reliable, credible testimony. While Nabors claims Gallagher Bassett did not timely designate Johnston, a review of the record reveals Gallagher Bassett properly designated Wayne Johnston on July 28, 2005, over one year before trial.

2.8 Malone's one sentence request for a new trial on compensatory damages is insufficient, in light of the conflicting testimony at trial, to demonstrate reversible error in the jury's verdict awarding Malone $106,250 against Gallagher Bassett. The jury in this case deliberated for almost four hours after closing arguments. Clearly, the jury reached its decision in the case after considering all of the evidence.

III. ARGUMENT

A. INTRODUCTION

3.1 Appellees/Cross-Appellants, Nabors Drilling, USA, Inc. ("Nabors") and Gary L. Malone ("Malone"), continue working together to shift the risk of loss in connection with Malone's injuries away from Nabors. From July 28, 2000, when Malone was first injured,

Nabors' management applied pressure to avoid paying for Malone's injury. Every authority from Nabors who was involved with knowledge of Malone's injury testified the injury was not a workers' compensation claim and would not be treated as such. See. *Infra* at ¶ 3.34. Nabors even went so far to terminate Malone when he couldn't return to work after surgery, stating that he sustained a non-work related injury.

3.2 Due to Nabors' pressure on Malone, Malone acquiesced and had his medical care paid for by his group health insurer, never claiming a work injury. This plan succeeded for Nabors because it avoided a workers' compensation claim. It also worked perfectly for Nabors' authorities who controlled the fate of Malone's claim because they were allowed to receive their bonuses paid by Nabors in the case of an injury-free work period. Somehow, Nabors' unorthodox strategy worked. Malone received medical care, including surgery to his leg, extensive therapy and other treatment all paid by his group health insurance. It should be noted that the group health insurance was coverage from Malone's wife's employer, not coverage provided by Nabors. After he was terminated, Malone filed for Social Security disability and, under oath, affirmed that he had neither filed nor had plans to file a workers' compensation claim for his injury.

3.3 As of mid-February, 2001, Nabors had little to worry about in the way of dealing with Malone's injury. In or about November, 2001, something happened that caused Malone to call Nabors and insist on a workers' compensation claim. In fact he called the safety coordinator, Jerry Poole, and told him that he was instructed by Nabors' authorities not to seek workers' compensation so that they could all receive their bonuses. This was the first time the safety coordinator, who is responsible for all injuries on the rigs, had ever heard of an injury to Malone. Poole immediately reported this information, together with a First Report of Injury, to Gallagher Bassett for handling. The Nabors' authorities responsible for pressuring Malone not to

proceed with a workers' compensation claim had succeeded in securing their bonuses, but not yet avoided the cost of the work injury.

3.4 The second stage of the Nabors/Malone saga began when suit was filed by Malone against Nabors and Gallagher Bassett in this case. It was at this point that,Nabors began another attempt at subterfuge. This time Nabors secured Malone's cooperation in trying to avoid the risk of ultimately being out of pocket for Malone's claim through an underhanded and legally disfavored Mary Carter agreement. The Mary Carter agreement was nothing more than an investment of $1,500,000 by Nabors paid to Malone. Nabors secured this investment through an agreement with Malone that the money was paid because of improper and bad faith acts by Gallagher Bassett alone and not Nabors. Nabors secured a return on its $1,500,000 investment by agreement with Malone that the first $250,000 recovered by the Nabors/Malone team from Gallagher Bassett would be repaid to Nabors, and all additional money received from Gallagher Bassett would be split between them on a 50/50 basis. It was the perfect plan.

3.5 Nabors' house of cards tumbled when the jury in Jones County heard this case and determined that, as between Nabors and Malone, the two parties were almost 60% at fault in causing Malone's damages. In this appeal, Nabors attacks the jury's finding as being unsupported by evidence, but, as shown, the outrageous and malicious acts of Nabors' authorities were clearly established by proof. Nabors seeks to avoid being foreclosed from recovery under an indemnity theory as a result of its own active fault by positioning itself as a party to an adjustment contract with Gallagher Bassett. The law, however, also prohibits recovery where a third party beneficiary to a contract, like Nabors, acts with unclean hands by contributing to the damage in an active manner. As shown, Nabors was found 42.5% responsible, and as stated above, the Nabors/Malone team was found almost 60% responsible for Malone's claim.

3.6 Malone is similarly situated. It is Malone's view that recovery should be allowed from Gallagher Bassett in the amount of $250,000 because of a multitude of theories allegedly destroying the law of set off and one satisfaction in Mississippi.[3] As shown below, these theories fail. It is the underhanded Mary Carter agreement which ultimately makes clear that the $1,500,000 was paid for the alleged bad faith of Gallagher Bassett. In that agreement, the Nabors/Malone team stipulated that Nabors had no liability in this case and agreed the damages caused to Malone were the result of Gallagher Bassett's acts. The testimony at trial further bolstered this position, as Nabors' representative testified the money was paid solely because Nabors faced vicarious responsibility for the acts of Gallagher Bassett. The jury disagreed.

3.7 While Mary Carter agreements are recognized in Mississippi, they are unfavored in the law and strictly construed to their terms. According to the terms of the Mary Carter agreement between Nabors and Malone, the amount of $1,500,000 has already been paid on behalf of Gallagher Bassett for its alleged wrongful acts. Accordingly, any judgment against Gallagher Bassett is set off in the amount of $1,500,000.

3.8 As shown in Gallagher Bassett's original brief and in this Reply, in order for the Nabors/Malone team to succeed in this appeal, the jury's findings and apportionment of fault must be disregarded and literally thrown out. Further, the trial court's decisions must be second guessed and set aside.

3.9 The primary issue Malone seeks to have set aside is the decision by Honorable Billy Joe Landrum not to allow the issue of punitive damages to go to the jury. Judge Landrum, however, made this decision after almost two weeks of trial and forty-five minutes of hearing pertaining to the issue. At the conclusion of the trial and the hearing pertaining to the issue,

[3] Malone's argument recognizes the jury assessed Malone's damages at $250,000, but ignores the allocation of 15% fault to Malone and 42.5% fault to Nabors. (See Brief of Appellee/Cross-Appellant, Gary Lee Malone at p. 50.) See also Gallagher Bassett R.E. 21. Malone's argument also ignores the fact that the judgment against Gallagher Bassett in this case is in the amount of $106,250 (42.5% of $250,000).

Judge Landrum called the jury in and asked them if they would return punitive damages against Gallagher Bassett. The jury responded resoundingly in the negative.

3.10 As discussed in more detail below, the findings of the jury and decisions of the court during the trial of this case require reversal of the judgments against Gallagher Bassett and the rendering by this court of a judgment in favor of Gallagher Bassett on all claims.

B. NABORS' CROSS-CLAIM FAILS AS A MATTER OF LAW

3.11 Nabors' fault prohibits recovery on its Cross-Claim under either indemnity or breach of contract. Nabors labels its case against Gallagher Bassett as a "breach of contract" action; however, the record in this case illustrates that Nabors' Cross-Claim is actually one of indemnity. The indemnity claim fails as a matter of law because it does not meet requirements of indemnity in Mississippi where: (a) the jury found that Nabors actively participated in the wrong for which Malone is seeking to recover; and (b) Nabors paid as a volunteer. Assuming, *arguendo,* that this Court analyzes Nabors' Cross-Claim under a breach of contract theory, the law is clear that Nabors' own wrongful conduct, bad faith, and unclean hands also preclude its breach of contract claim.

1. NABORS' CROSS-CLAIM FOR REIMBURSEMENT IS ONE OF INDEMNITY AND NOT BREACH OF CONTRACT

3.12 Nabors erroneously argues that it "did not seek indemnity from Gallagher Bassett, but damages arising from Gallagher Bassett's breach of the Claims Service Agreement."[4] Brief of Appellee/Cross Appellant Nabors Drilling USA, p.42. Despite Nabors' attempt to label this case as a "breach of contract" action, Nabors seeks *reimbursement* of all costs and expenses related to Malone's claim, including the payment made under the Mary Carter agreement. This Court has determined that a breaching party cannot craft his claim as an action for breach of contract to avoid the requirements of indemnity. It has long been held that "where a party

[4] Nabors was not a party to the Claims Service Agreement.

alleges a breach of contract, but the recovery sought is reimbursement, the claim is one of contractual indemnity." Ryan v. EAI Const. Corp., 511 N. E. 2d 1244, 1254 (Ill. Ct. App. 1987); See also Home Ins. Co. v. Atlas, 230 So. 2d 549, 554 (Miss. 1970). Notably, although Nabors desperately sought indemnity at trial, and now on appeal, Nabors now argues that it is not seeking indemnity. Nabors' abrupt change results from Nabors' recognition that it is foreclosed from recovery under indemnity law because of Nabors' active fault found by the jury in this case. As shown below, however, the label does not change the result.

3.13 Courts have long treated breach of contract claims as claims for indemnity where a party seeks to shift a loss from himself to another alleged to be the responsible party. Home Ins. Co., 230 So. 2d at 554. In Home Ins. Co., the Mississippi Supreme Court rejected a party's attempt to couch his claim as a "breach of contract claim" and instead decided the case on indemnity principles. Id. More recently, this Court has defined indemnity as "pertaining 'to liability for loss shifted from one person held legally responsible to another person.'" Brewer Construction Co., Inc. v. David Brewer Inc., 940 So. 2d 921, 930 (Miss. 2006) (quoting Blacks' Law Dictionary, 393 (5th ed. 1983)). Put simply, "[i]ndemnity means . . . to reimburse." Hunter v. Hughes, 100 So. 371, 375 (Miss. 1924). See also General American Life Ins. Co. v. McCraw, 963 So.2d 1111, 1115 (Miss. 2007) (Ultimately, indemnity requires one party to reimburse another entirely for its liability). A review of the facts of indemnity cases decided by the Mississippi Supreme Court makes clear that the instant case is simply an indemnity case disguised as a breach of contract claim. See Home Ins. Co., 230 So. 2d at 554; Hartford Casualty Insurance Co. v. Halliburton Co., 826 So. 2d 1206 (Miss. 2001).

3.14 An Illinois court recognized and enforced the same legal principles at issue here. In Smith v. Clark Equipment Company, an injured employee brought a tort suit against the manufacturer of a defective forklift. 483 N.E. 2d 1006, 1008 (Ill. Ct. App. 1985). The forklift at

issue was leased by the claimant's employer. The forklift manufacturer, not a party to the lease, settled with the employee. Id. The manufacturer then asserted that it was a third party beneficiary of the forklift lease contract and that because the employer had breached the contract by removal of a safety device from the forklift, the employer was liable in breach of contract. Id. The forklift manufacturer argued that it was not seeking indemnity, but instead attempting to enforce the employer's contractual obligations. Id. The court rejected the mischaracterization and determined the manufacturer was actually seeking reimbursement from the employer for the manufacturer's liability. Id. In rejecting the "breach of contract" label, the court held that the cause of action was one for indemnity, defined as "shift[ing] the entire responsibility from one tortfeasor, who has been compelled to pay the loss, to another tortfeasor who is truly culpable" Id. See also United General Title Co.v. Amerititle, 847 N.E. 848, 852 (Ill. Ct. App. 2006).

3.15 As in Smith, Home Ins. Co., and Amerititle, the record in this case illustrates that Nabors' Cross-Claim, whether couched as breach of contract or indemnity, meets the very definition of indemnity. This case was tried by Nabors on the basis of reimbursement where Nabors repeatedly asserted that it was only "responsible" because of Gallagher Bassett's negligence, seeking defense costs, attorneys' fees, and settlements paid as a result of Malone's bad faith suit. Further, Nabors repeatedly asked the jury for indemnity, and the Court so instructed the jury. V: 25 p. 3602-3603.

3.16 Even on appeal, Nabors admits that its claims against Gallagher Bassett arise out of indemnity. Brief of Appellee/Cross Appellant Nabors Drilling USA, p. 11.[5] Nabors Cross-Claim states: Gallagher Bassett "directly caus[ed] Nabors to incur the above-captioned bad faith suit filed by [Malone]" and "[a]s a direct and proximate result of Gallagher Bassett['s] . . . failure

[5] Ironically, on page 11 of its brief, Nabors admits that its claims against Gallagher Bassett arise out of indemnity while simultaneously arguing on page 42 that Nabors does not seek indemnity. Brief of Appellee/Cross Appellant Nabors Drilling, USA at 11, 42.

to investigate . . . Nabors has suffered damages by facing potential liability and incurring defense costs from the instant bad faith lawsuit filed by [Malone]." V 17: p 2488 – V18: p 2494. Furthermore, in the Mary Carter agreement entered by Malone and Nabors prior to trial, Nabors agreed that Gallagher Bassett was solely responsible for the "grossly negligent and reckless conduct" which caused Malone's injuries. R.E. 12; See also V 25: p. 3640. At trial, in Nabors Opening Statements, Nabors' counsel stated:

> So, when Nabors found that out and realized what had happened to Mr. Malone and that he had lost his leg as a result of what Gallagher Bassett had done, Nabors understood that it was responsible for Gallagher Bassett. And we were responsible for Gallagher Bassett. And we were responsible to Mr. Malone for Gallagher Bassett. But Gallagher Bassett is responsible to us . . .[T]hat you'll agree with us that Nabors is entitled to get its money back in this case, including everything it had to pay for compensation benefits . . . .

V 29: T 186-87. At trial, Nabors sought to establish an indemnity claim through the testimony of several witnesses, including Ms. Laura Doerre:

Q: BY MR. SMITH: Was that a term that you – I'll use the word I think is the right word – insisted on as part of this settlement?

A: BY MS. DOERRE: . . . but also that Gallagher Bassett was responsible – had put us in the situation of having this responsibility to Mr. Malone. So it was very important to us that we both still have an opportunity to recover from Gallagher Bassett.

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Q: BY MR. SMITH: Does Nabors have a position of whether he should have had to incur those particular charges [attorneys' fees]?

A: BY MS. DOERRE : Well, if – yes. If Gallagher Bassett had handled the claim properly in the first instance back in August of 2000, then the bad faith claim would have never been made and we never would have had to pay these fees. But having had the bad faith claim filed, we did have to incur them to defend the claim.

See V 32: T 652 ln 11- T662 ln 26.

Additionally, the Court granted Jury Instruction D-33, submitted by Nabors:

> You are instructed that Nabors Drilling USA, L.P. has brought claims against

> Gallagher Bassett Services, Inc. for breach of contract as a third party beneficiary, bad faith handling of a worker's compensation claim, and indemnity.

V. 25: p. 3599. The court also granted Jury Instruction D-34 which was submitted by Nabors:

> When one person is required to pay money which another person in all fairness should pay, then the former may recover indemnity from the latter in the amount which he paid . . . . [T]hen you are to find that Nabors Drilling USA, L.P., is entitled to indemnity for any and all damages shown by a preponderance of the evidence that it would not have incurred but for Gallagher Bassett Services, Inc.'s improper conduct. These damages may include (1) the costs, benefits and penalties associated with Gary Malone's workers compensation claim and (2) the settlement and cost of defense, including attorneys' fees, incurred in defense of both, Gary Malone's bad faith action and Gary Malone's workers' compensation claim against Nabors.

V. 25: p. 3602-3603. Nabors quest for indemnity concluded in its closing argument, where Nabors argued that "we've asked for indemnity" which "is a claim where we didn't do anything wrong." V. 35: T. 956 ln 14-24. Nabors reiterated again that it only settled because of exposure under a theory of vicarious liability:

> Ms. Doerre explained in some detail why we had settled this case . . . . We're entitled to our damages by virtue of breach of contract for [Gallagher Bassett's] bad faith breach of contract. And we're entitled to full indemnity, that is everything we paid. Any one of those supports our damage claim . . . . That is a real amount of money that has been paid by Nabors.

See Nabors' Closing Argument, V. 34: T 956 ln 25- T 957 ln 8. Clearly, throughout the duration of this case, Nabors pled and argued an indemnity claim. Contrary to Nabors' position asserting a "breach of contract" claim, Nabors, in fact, has asserted a claim for indemnity.

3.17 Further, Nabors' attempts to argue that it had both a breach of contract claim and an indemnity claim are also futile. For example, in addition to Nabors' indemnity jury instruction, Nabors also requested and received jury instructions as to breach of contract and bad faith breach of contract. V. 25: p.3601-04. However, the damages requested pursuant to each of these jury instructions are the same—they each seek reimbursement or indemnity damages. In Jury Instruction No. D-33, a breach of contract instruction, Nabors sought "(1) the costs, benefits

and penalties associated with Gary Malone's workers' compensation claim and (2) the settlement and cost of defense, including attorney's fees . . . ." V. 25: p. 3601. In its indemnity instruction, Nabors asks for precisely the same relief: "Nabors Drilling USA, L.P. is entitled to indemnity for any and all damages shown. . . includ[ing] (1) the costs, benefits and penalties associated with Gary Malone's workers' compensation claim and (2) the settlement and cost of defense, including attorneys' fees . . . ." V. 25: p.3602-03. Clearly, in both its indemnity and breach of contract jury instructions, Nabors sought reimbursement of all costs and expenses related to Malone's claim, including all settlements. Accordingly, Nabors' "breach of contract" action is in fact one for indemnity.

2. NABORS' INDEMNITY CLAIM FAILS BECAUSE OF NABORS' PAYMENT AS A VOLUNTEER AND ACTIVE NEGLIGENCE

3.18 Nabors' Cross-Claim for indemnity fails as a matter of law because it does not meet either requirement of indemnity in Mississippi: (a) the jury found that Nabors actively participated in the wrong for which Malone is seeking to recover; and (b) Nabors paid without a legal obligation. Brewer Construction Co., 940 So. 2d at 930; Hartford Casualty Ins. Co., 826 So. 2d at 1216; Home Ins. Co., 230 So. 2d at 551; Bush v. City of Laurel, 215 So. 2d 256 (Miss. 1968); Southwest Miss. Electric Power Ass'n v. Harragill, 182 So. 2d 220 (1966).

a. **Nabors' Active Participation in the Wrong Eliminates Its Action for Indemnity**

3.19 Nabors claims that its liability in this case is solely vicarious; however, Nabors' argument ignores the fact that, based on Nabors' affirmative negligence, the jury disagreed and found Nabors equally at fault in harming Malone. Brief of Appellee/Cross Appellant Nabors Drilling USA, p. 46, 48. The well-established Mississippi rule is that a party cannot recover for indemnity if he actively participated in the wrong. Home Ins. Co., 230 So. 2d at 551. See Adkinson v. Int'l Harvester Co., 975 F.2d 208, 211 (5th Cir. 1992). Adhering to the universal

rule, the Mississippi Supreme Court has held that when "joint tortfeasors [are] *in pari delicto* there can be no recovery by indemnity." Home Ins. Co. 230 So. 2d at 551. See also Ala. Great S. R.R. Co. v. Allied Chem. Corp., 501 F.2d 94, 99-100 (5th Cir. 1974) ("No right of indemnity exists between joint tortfeasors or parties *in pari delicto*, that is where the injury resulted from the concurring negligence of both parties.").

3.20 In Home Ins. Co., an employee was killed by electrocution when machinery he was operating came into contact with a power line. 230 So. 2d at 550. The deceased employee's representative entered into settlement with the power company that failed to inspect the power lines and knew of the dangerous condition. Id. The power company then sought indemnity from the employer based upon the employer's actions in reducing the height of the power lines. Id. at 550-51. The Mississippi Supreme Court held, "where the fault of each is equal in grade and similar in character, the doctrine of implied indemnity is not available since no one should be permitted to base a cause of action on his own wrong." Id. at 551. This Court refused indemnity, holding that the power company had been actively negligent in breaching its duty to inspect and maintain the power lines. Id. at 554. See Adkinson, 975 F.2d at 210 (a component manufacturer's failure to warn amounts to active negligence so as to prelude liability).

3.21 Like Home Ins. Co., Nabors actively harmed Malone. The jury found that both Nabors' and Gallagher Bassett's fault was equal in grade. That finding was based upon facts set out in Gallagher Bassett's original brief. In summary, Nabors failed to acknowledge Malone's incident and injury as a work related claim and refused to treat it as a workers' compensation claim until November, 2001, when Nabors assigned it to Gallagher Bassett for handling. Indeed, Malone testified that, in response to his request for benefits, Nabors' district supervisor, Holbrook, scoffed at his request, telling Malone that Nabors was not going to pay for it. V 30: T 336 ln 4-T 337 ln 8. Further, Malone testified that his supervisor and Holbrook refused to give

him the opportunity to take time off from work. V. 29: T 272 ln 22 – T 274 ln 19. Malone testified that Holbrook specifically told him that they would lose their bonuses, which would be awarded pursuant to Nabors' safety award program, if Malone pursued this claim; therefore, Holbrook was not going to allow Malone to file the claim. Id. V 30: T 336 ln 4-T 337 ln 8. As Holbrook was a top manager in the region Malone worked in, Nabors adopted his testimony as their own. Holbrook testified that Malone's injury was not a workers' compensation injury and that he communicated this to everyone. V. 31: T. 596 ln 19- T. 597 Ln 28. V. 32: T. 610 ln 11-24. V. 32: T. 611 ln 11-T. 613 ln 18. V. 32: T. 617 ln 22 – T. 618 ln 4. In light of this and other evidence, the jury found that Nabors was at fault in causing harm to Malone. Based upon the evidence at trial, pleadings filed in this case, and the jury's verdict, Nabors' Cross-Claim for indemnity against Gallagher Bassett is barred as a matter of law because Nabors actively participated in the wrong to Malone.[6]

b. Nabors Paid as a Volunteer

3.22 Nabors also failed to satisfy the "legal obligation" requirement.[7] In other words, Nabors failed to prove that it (1) was legally liable to Gary Malone for the bad faith of Gallagher Bassett; (2) Nabors paid under compulsion; and (3) Nabors paid a reasonable amount. Hartford Casualty Ins. Co., 826 So. 2d at 1216; Certain Underwriters of Lloyd's of London v. Knostman, 783 So. 2d 694 (Miss. 2001); Keys v. Rehab. Ctrs., Inc., 574 So. 2d 579, 584 (Miss. 1990). Nabors cites no facts whatsoever which give rise to payment based on legal liability or

[6] Furthermore, to the extent Nabors committed intentional torts, it is black letter law that a party cannot seek indemnity from another for its intentional torts. Home Ins. Co., 230 So. 2d at 551. See also Northwestern Mutual Life Ins. Co. v. Babayan, 2004 WL 1902516 (E.D. Pa. 2004) ("Indemnity is . . . unavailable to an intentional tortfeasor because it would permit him to escape liability for his own deliberate acts.").

[7] Nabors' attempt to avoid *Charybdis* (active negligence which would make it a joint tortfeasor), places Nabors into *Scylla* (nonliablity which made it a volunteer). Ala.Great S. R.R., 501 F.2d at 102. See Long-term Care, Inc. v. Jesco, Inc., 560 So. 2d 717, 719 (Miss. 1990) ("If the payment was not voluntary, then it was based upon a failure to remedy or warn concerning a patent defect in the side-walk which is clearly active negligence . . . . The indemnitee was either actively negligent or not negligent at all.").

compulsion. Further, Nabors cites no case law in support of its proposition that Nabors paid under a legal obligation to Malone. See Wolfe v. City of D'Iberville, 799 So. 2d 142, 145 (Miss. Ct. App. 2001) (court not bound to address argument where party fails to cite supporting case law); Alley v. Northern Ins. Co., 926 So. 2d 906, 910 (Miss. 2006); Biddix v. McConnell, 911 So. 2d 468, 477 (Miss. 2005). As a result, Nabors' Cross-Claim for indemnity fails as a matter of law.

3.23 Regarding the first two requirements, Mississippi law is clear that, by denying liability throughout this litigation, Nabors is precluded from now arguing it paid under a legal obligation. In Knostman, prior to any adjudication of fault, Texas Snubbing (an oil driller) settled with various injured plaintiffs after an explosion of a gas well. 783 So. 2d at 696-97. Texas Snubbing, in turn, brought an indemnity claim against Tomlinson (an oil driller). Id. at 697. The Court denied indemnity and held that Texas Snubbing's payment was voluntary based on Texas Snubbing's consistent denial of liability "or any wrongdoing associated with the blowout in previous depositions and court proceedings." Id. at 699. The Knostman Court cited Great Southern Box Company v. Barrett for a similar holding that a party

> cannot assume an inconsistent position in the same proceeding. The [party] cannot be heard to say on the one hand that they were not liable because [another party] was solely responsible for one purpose of the suit, and, without withdrawing or amending that position, say in the same judicial proceeding, for another purpose, that not [the other party] but they were solely responsible for the [injury]. This is not estoppel in the strict sense of the term. It is denominated judicial estoppel which differs from equitable estoppel in that it is not necessary to show the elements of reliance and injury. It is based on the principle that orderliness, regularity and expedition of litigation are essential to a proper judicial inquiry."

Great Southern Box Company v. Barrett, 94 So. 2d 912, 916 (Miss. 1957) (citing 31 C.J.S. Estoppel § 117, p. 378) (emphasis added). See Southwest Miss. Elec. Power Ass'n v. Harragill, 182 So. 2d 220, 222-23 (Miss. 1966) (holding that the allegations of the complaint stated that there was no liability so that the payment was a voluntary one for which there can be no

recovery).

3.24 Similarly, none of the damages Nabors seeks in its Cross-Claim were paid because of legal liability or compulsion of law. Just like Knostman and Barrett, Nabors vehemently denied liability in this case, arguing instead that Gallagher Bassett is solely responsible for Malone's damages. V: 18 p. 2494. Nabors' position in this litigation has been that, "[t]he injury to Malone was caused solely by the active and affirmative failure[s] of Gallagher Bassett . . ." and that "Nabors did not participate in any way with Gallagher Bassett's bad faith handling of this claim." Brief of Appellee/Cross Appellant Nabors Drilling USA, p. 46, 48. Further, Nabors disclaims liability in the Mary Carter agreement, stating that the agreement represented "no admission of fault or liability" and that Gallagher Bassett was solely responsible for the grossly negligent and reckless conduct which caused the injuries to Malone. R.E. 12. Now, on appeal, Nabors argues that it paid under legal obligation. Just as the individuals in Knostman and Barrett were estopped from changing their positions, Nabors cannot now claim responsibility in the "same judicial proceeding" for the sole reason of proving it paid under compulsion when it has vehemently denied responsibility throughout this litigation.

3.25 Further, Nabors cannot prove that it paid under compulsion by claiming that it paid solely for "potential liability" to Malone for the alleged bad faith of Gallagher Bassett. The furthest departure Nabors makes from its denial of liability is to assert that it is entitled to indemnity because Nabors faced "potential" liability. V: 18 p. 2494. For example, throughout this litigation, Nabors has argued that the Mary Carter agreement was entered into as a result of the "potential" liability Nabors had to Malone for bad faith committed by Gallagher Bassett. Mississippi does not allow a cause of action for indemnity when a party makes a payment as a volunteer, paying at that time, for "potential liability."

3.26 Besides proving legal liability and payment under compulsion, Nabors must also

prove that the amount paid in the settlement was reasonable. Nabors settled in the amount of $1,500,000, and the jury found Malone's total amount of damages to equal $250,000. Accordingly, Nabors' settlement was clearly unreasonable. Thus, Nabors also fails the third necessary element of the "legal obligation" theory. The test for "legal obligation" requires proof of all three parts: legal liability, compulsion, and a reasonable payment. Nabors indemnity claim fails as a matter of law because Nabors fails to prove even one much less all three of these elements.

3. EVEN IF THIS COURT WERE TO CONSIDER NABORS' CLAIM AS ONE FOR "BREACH OF CONTRACT," NABORS' WRONGFUL CONDUCT DEFEATS ITS CLAIM

3.27 Assuming, *arguendo,* that this Court analyzes Nabors' Cross-Claim under a breach of contract theory, the jury's allocation of fault to Nabors' precludes recovery. Nabors erroneously states that "Mississippi law does not require that a party be free from fault . . . to recover for breach of contract." Brief of Appellee/Cross Appellant Nabors Drilling USA, p. 45. Nabors then attempts to confuse this Court by citing Doster v. Doster, 853 So. 2d 147 (Miss. Ct. App. 2003), a domestic relations case, and Polk v. Sexton, 613 So. 2d 841, 844 (Miss. 1993), a landlord-tenant case, which make no mention of whether or not fault precludes recovery. Rather, the law is clear that a party's own wrongful conduct, bad faith, or breach of contract precludes its recovery. Estate of Reaves v. Owen, 744 So. 2d 799, 801 (Miss. Ct. App. 1999). "It is one of the oldest maxims of the law that no man shall, in a court of justice, take an advantage which his own wrong as a foundation for that advantage." Estate of Dykes v. Estate of Williams, 864 So. 2d 926, 932 (Miss. 2003). See also Collins v. Collins, 625 So. 2d 786, 789 (Miss. 1993); Patterson v. Koerner, 71 So. 2d 464, 466 (1954); Crabb v. Comer, 200 So. 133, 135 (1941); Professional Beauty Products, Inc. v. Jay, 463 S.W.2d 288 (Tex. Ct. Civ. App. 1970); Langdon v. Progress Laundry & Cleaning Co., 105 S.W.2d 346 (Tex. Ct. Civ. App. 1937).

3.28 Courts consistently hold that a plaintiff cannot avail himself of damages that he himself helped create. As stated in Port Authority of New York v. Honeywell, "the prevailing principle, therefore, . . . is that the contractee cannot recover damages against a contractor if the injuries sustained by the employee were in part caused by the contractee's active negligence." 535 A. 2d 974, 983 (N.J. Super. 1987). In Mayer v. Fairlawn Jewish Center, the plaintiff was injured in a religious center which was undergoing renovations. 186 A.2d 274, 280-81 (N.J. Super. 1962). The plaintiff sued the owner of the center and the construction company performing the renovations. Id. at 276. The owner of the center filed a Cross-Claim against the contractor for "breach of the construction contract . . . [and] seeking recovery for any sum plaintiff might be awarded or collected against the center." Id. The Court explained that if the "owner of the premises was himself guilty of a separate and independent act of negligence which concurs with that of the contractor in producing [plaintiff's] injury, there can be no recovery . . . [under] the contract." Id. at 280-81.

3.29 Under the above cited authorities, Nabors' own wrongful conduct, bad faith, and breach of contract precludes its recovery. The jury found Nabors equally at fault for Malone's damages in this case. The jury verdict form in the case at bar stated:

> "5. Do you find from a preponderance of the evidence that the defendant, Nabors Drilling USA, Inc., was guilty of any fault which proximately caused or contributed to the plaintiff's damages, if any? X Yes __No.

R.E. 21.

> [P]lease state the percentage of fault for the defendant, Nabors Drilling, USA, Inc., as compared to all of the fault which caused the plaintiff's damages, if any, by specifying that percentage here 42.5%.

R.E. 21. As fully briefed above, the jury based its' allocation of fault to Nabors on trial testimony that Nabors had knowledge of Malone's injury, refused to treat it as a workers' compensation claim, failed to assign it to Gallagher Bassett for handling, refused to allow

Malone to file a workers' compensation claim, and fired him claiming the injury was not work related. Malone further testified that Holbrook would not allow Malone to take time off from work or file a claim because Holbrook did not want to lose their bonuses. V 30: T 336 ln 4-T 337 ln 8. Therefore, Nabors' own wrongful conduct, bad faith, and breach of contract undisputedly precludes relief under the above-cited authorities.

3.30 Further, Nabors standing in the alleged breach of contract claim is only as a third party beneficiary. Nabors is not a party to any contract with Gallagher Bassett in this case. The rights of a third party beneficiary are created under equity laws. Therefore, the bad conduct—or unclean hands—of Nabors bars any third party beneficiary breach of contract claim. "In O'Neil v. O'Neil, 551 So. 2d 228, 233 (Miss. 1989), the meaning of this principle [unclean hands] was expounded on: '[t]he meaning of this maxim is to declare that no person as a complaining party can have the aid of a court when his conduct with respect to the transaction in question has been characterized by willful inequity. . . .'" Lane v. Lane, 850 So. 2d 122 (Miss. App. 2002) (citing O'Neil v. O'Neil, 551 So. 2d 228, 233 (Miss. 1989)). A party seeking to recover under a third party beneficiary theory must come to the Court with clean hands. U.S. v. I-12 Garden Apartments, 703 F.2d 900, 903 (5th Cir. 1983). See also Van-Tex, Inc. v. Pierce, 703 F.2d 891, 897-98 (5th Cir. 1983); Walker v. Inter-Americas Ins. Corp., Inc., 2004 WL 1620790, *4 (N.D. Tex. 2004). Nabors, proceeding on an equitable third party beneficiary theory, must "come[ ] into equity . . . with clean hands." New York Football Giants, Inc. v. L.A. Chargers Football Club, 291 F.2d 471 (5th Cir. 1961). See Simmons v. Simmons, 724 So.2d 1054 (Miss. Ct. App. 1998); Bardwell v. White, 762 So.2d 778 (Miss. Ct. App. 2000). The unclean hands doctrine precludes a party with tainted behavior from seeking relief, no matter how improper the other defendant's behavior. *Id.* See also Mursor Builders, Inc. v. Crown Mountain Apartment Assoc., 467 F.Supp. 1316 (D.C. Vir. Is. 1978) (applying the clean hands doctrine to preclude relief

where the third party beneficiary did not act in good faith). Nabors is also precluded from relief under the *in pari delicto* doctrine which states that "[i]n a case of equal or mutual fault . . . the position of the defending party is the better one." Dahl v. Pinter, 787 F.2d 985, 988 (5th Cir. 1986).

3.31 In seeking relief for Gallagher Bassett's alleged breach of contract, Nabors own wrongful conduct precludes the relief sought herein. As stated above, the jury in this case found Nabors and Gallagher Bassett equally at fault for the injuries to Malone. Accordingly, Nabors cannot maintain an action against Gallagher Bassett for breach of contract where Nabors' actions were an equal cause of Malone's injuries. If Nabors is allowed to maintain a breach of contract action, the Court would allow Nabors, on the one hand, to ignore both its obligations to Malone and its contractual covenants with Gallagher Bassett and, on the other, hold Gallagher Bassett to its obligations. This is impermissible as a matter of law. As a result, even if this court were to consider Nabors' Cross-Claim as one sounding in contract, Nabors' "breach of contract" claim fails as a matter of law. In sum, regardless of whether Nabors' Cross-Claim is categorized as a claim for indemnity or as a claim for breach of contract, Nabors is clearly foreclosed from recovery.

C. THE JURY VERDICT FINDING NABORS DRILLING, USA, INC. 42.5% AT FAULT IN THIS CASE IS SUPPORTED BY THE EVIDENCE.

3.32 It is undisputed that, prior to trial, Nabors entered into a Mary Carter agreement with Malone wherein Nabors agreed to pay Malone $1,500,000.[8] It is well-settled law that Mary Carter agreements provide the contracting defendant, such as Nabors, a strong incentive to help the plaintiff recover at a codefendant's expense. McDaniel v. Anheuser-Busch, Inc., 987

[8] "The term 'Mary Carter' agreement comes from Booth v. Mary Carter Pain Co., 202 So. 2d 8, [Fla. Ct. App. 1967] and has been defined . . . as a contract by which one co-defendant secretly agrees with the plaintiff that, if such defendant will proceed to defend himself in court, his own maximum liability will be diminished proportionately by increasing the liability of the other co-defendants." Reichenbach v. Smith, 528 F.2d 1072, 1073 (5th Cir. 1976). R. E. 21.

F.2d 298, 309 (5th Cir. 1993). The Mary Carter agreement in this case was no exception, providing Nabors the right to continue as a party at trial and try to recoup its investment from Gallagher Bassett. R.E. 12. In fact, since this Mary Carter agreement's inception, Nabors became motivated to recover its investment and even profit by taking the first $250,000 recovered from Gallagher Bassett and 50% of the balance. Id. They realigned as a "plaintiff" at trial and working with Malone to shift all blame to Gallagher Bassett despite Nabors' own clear fault. Unfortunately for Nabors, the jury saw through Nabors' strategy and properly found Nabors 42.5% at fault in this case. Importantly, despite Malone and Nabors' attempt to "realign" against Gallagher Bassett pursuant to the Mary Carter agreement, the jury found that the combined actions of Nabors and Malone accounted for 57.5% of the fault in this case, leaving Gallagher Bassett in a minority position with 42.5% of the fault.[9] R. E. 21.

3.33 On pages 16-18 of Nabors' brief, Nabors complains that the jury verdict finding Nabors 42.5% at fault in this case goes against the overwhelming weight of the evidence. Even though Nabors may not agree to the weight the jury placed on certain evidence at trial, there was sufficient evidence adduced at trial, which supported the jury's verdict against Nabors in this case.

3.34 In arguing against the jury's verdict, Nabors neglects to recall the clear and unequivocal evidence submitted to the jury in this case, set out as follows:

(1) **Malone's testimony that Nabors rejected Malone's request to go to a doctor on the date of his injury.** Malone testified that when he reported his injury to his direct supervisor, Bobby Wallace, Mr. Wallace refused to allow Malone to seek medical treatment:

[9] The jury found Nabors 42.5% at fault, Malone 15% at fault and Gallagher Bassett 42.5% at fault in this case. R.E. 21.

Q. When you went to see Mr. Wallace on the day—on the day that you bumped your leg on the job back on July 28th of 2000, you told him you wanted to go to doctor, didn't you?
A. Yes, I did.
Q. And how did he say he was going to treat it?
A. He said he was going to have to call Rob Holbrook first.
Q. And what did he tell you after he talked to Rob Holbrook, Mr. Malone?
A. We going to doctor it on the rig.
Q. Did he let you go to the doctor?
A. No, he did not.
Q. And in fact, you recall that he continued not to let you go to the doctor through the rest of the hitch, didn't he?
A. That's right.
Q. He made you doctor this on the rig?
A. Yes, he did.

V 30: T 329 ln 23- T 330, line 15. Mr. Malone's testimony made it clear that Mr. Wallace and Mr. Holbrook immediately refused to allow Mr. Malone to seek treatment from a doctor.

Q. Now Mr. Wallace got on the stand yesterday and said that he asked you when you came in to see him if you wanted to go to the doctor but that you refused?
A. I didn't refuse him. I asked him could I go to the doctor, and he said he'd have to call Rob Holbrook.
Q. And then he told you, no, you're not going?
A. He said Rob Holbrook said to doctor it on the rig. And that's what we did.

V 30: T 337 ln 14-23.

(2) Malone's testimony that he forced his immediate supervisor Wallace to fill out the accident report. Mr. Malone's testimony made it clear that Nabors did not intend to treat Mr. Malone's injury as a workers' compensation claim. Immediately after the injury, Mr. Malone reported to his supervisor, Bobby Wallace, but Mr. Wallace did not want to fill out the First Report of Injury:

Q. Because you actually made Mr. Wallace fill out that report, didn't you?
A. Yes, I did.
Q. Mr. Wallace didn't do it voluntarily, did he?
A. No, he did not.
Q. You had to push him.
A. He said he had to wait a few days before he filled it out. I said no, we're going to fill it out today.

V 30: T338 ln 8- ln 17.

(3) Malone's testimony that Nabors rejected his request to file a workers' compensation claim. Malone testified that when he asked for surgery and time off to be covered under workers' compensation, Nabors' District Supervisor, Rob Holbrook, scoffed at Malone's request and made clear that Malone's injuries were not work related. V 29: T 279 ln 27- T 280 ln 23. Holbrook told Malone that his injury was instead related to his ongoing underlying medical condition and that Nabors was not going to pay for it. Id. Malone testified that he did not file a workers' compensation claim due to this conversation with Holbrook, stating that "[w]hen I was told it wasn't going to be a lost-time accident [by Holbrook] . . . that's the reason I didn't file for workers comp." Id. Nabors was so adamant that Malone's injury was not work-related that even Malone believed that his injury was not work-related, telling his wife that his surgery would not be covered by workers' compensation and stating in a social security benefit application dated February 2001 that he had no workers' compensation claim. V 29: T 280 ln 28 – T 281 ln 6.

(4) Holbrook's testimony that Malone's injury was not work related. Holbrook testified that in August of 2000, both the safety officer and regional supervisor for Nabors asked if Malone's surgery was related to a work place injury. V 32: T 611 ln 11 – T 613 ln 18. Holbrook unequivocally stated in response that it was not. Id. Further, in response to the question of "what would you have told the *adjuster* if she had called you?"— Holbrook testified that he would have told her the same thing he told the safety officer and regional supervisor— that Malone did not have a workers' compensation claim. V 32: T. 617 ln 22 - T. 618 ln 4. Holbrook's testimony continued where he admitted that even when Nabors terminated Malone in January, 2001, Nabors still did not consider his injury as being work-related. V 32: T 618 ln 8 – T 619 ln 3. R.E. 13.

(5) Malone's testimony that Holbrook and Wallace barred Malone access to filing a workers' compensation claim so that they could receive their "safety bonuses." Malone testified that Wallace and Holbrook informed him that, if Malone made a workers' compensation claim, everyone on the rig would lose their bonuses, which were awarded pursuant to Nabors' safety award program. V 30: T 336 ln 4 – T 337 ln 13. Therefore, Holbrook said he was not going to allow Malone to file the claim. V 30: T 332 ln 6 – 26. On direct examination, Malone described his conversation with Holbrook in detail:

> A. I told Rob Holbrook I wanted Nabors to pay for my accident. I was going to have to have surgery. And he said Nabors wasn't going to pay nothing, it wasn't a lost- time accident. And I said, why wasn't it a lost-time accident. He said it just wasn't, it was an old injury. I asked him why was it an old injury. Old injury is when you cut your arm and have stitches and bust it open. That's an old injury. That wasn't an old injury. I passed seven physicals with that leg and didn't have no problem passing a physical with that leg.
>
> Q. What was Mr. Holbrook's response to that?
>
> A. He said, well, it ain't going to be workers comp and it ain't going to be a lost-time accident.

V 29: T. 280 ln 9 – 23.

(6) Nabors' corporate representative's testimony that she merely "thinks" Nabors sent a First Aid Report of Injury to Gallagher Bassett. Nabors filled out a First Aid Only Incident Report on July 28, 2000, the date of Malone's injury on Nabors' rig. V 29: T 272 ln 24 – T 274 ln 19. Nabors' corporate representative testified that she "*thinks*" they sent Gallagher Bassett this First Aid Only Report. V 32: T. 670 ln 18 – T. 671 ln 2. Gallagher Bassett, however, has no record of ever receiving this First Aid Only Report of Injury. Id. Further, Nabors has no record of ever sending it to Gallagher Bassett. Id. Regardless, Nabors' Corporate Representative and Safety Coordinator both admitted that a First Aid Only Report of Injury should not have been sent to Gallagher Bassett as First Aid Only Reports are not covered.

V 31: T 463 ln 14 – T. 464 ln 10. Rather, only reports which have medical or lost time should be submitted to Gallagher Bassett.

(7) **Wallace's testimony that Malone appeared healed in August 2000.** At trial, Mr. Wallace confirmed that Mr. Malone's leg appeared as if it had healed in August, 2000. R. E. 17. This testimony is in direct contradiction to Mr. Malone's testimony as follows:

> Q. ...Do you remember Mr. Wallace getting on the stand yesterday and we were going through the statement that was taken of Mr. Wallace by Ms. Robichaux? Do you remember that?
> A. Yes.
> Q. And he said that on the 13th of August, he had seen your leg, and he said it was all healed up. That's what he told Ms. Robichaux. Did he see your leg on the 13th of August?
> A. I don't know if he did or not.
> Q. Do you recall on the 13th of August if your leg was healed up?
> A. No, it wasn't healed up on the 13th of August.
>
> ***
>
> Q. Then would Mr. Wallace's [statement] to Ms. Robichaux, that it had all healed up, would that have been an accurate statement? Wouldn't that have been accurate, would it?
> A. No, it would not.

V 30: T 331, line 12- T 332, line 5

(8) Jerry Poole's testimony that Nabors' safety coordinators did not consider Malone to have a work-related injury. Nabors' safety coordinator, Jerry Poole, testified that in November, 2000, just four (4) months after Malone's injury, Nabors changed safety coordinators. As a part of this personnel change, both safety coordinators had a meeting wherein all workers' compensation claims for Nabors were discussed. D: Poole p. 38 ln 21 – p. 40 ln 14. Poole admitted that during this meeting there was no mention of Malone having any injury or workers' compensation claim. Id.

(9) Lankford's testimony that even though Malone's incident occurred in July of 2000, Malone's claim was not logged into Nabors' computer system until November of

2001. Lankford testified that Nabors maintained a computer system which documented all injury-related incidents and workers' compensation claims. V 30: T 441 ln 5 -- T 444 ln 25. Lankford testified that Nabors' standard protocol was to log all such incidents into the system. Id. Nabors failed to log Malone's First Aid Only incident occurring on July 28, 2000, into the system. Id. This is completely consistent with Holbrook's position that the injury was not work related.

3.35 Further, as a part of its reporting system, Nabors had a policy and procedure for changing First Aid Only Reports of Injury into Medical Claim Reports of Injury. V 31: t 464 ln 11-26. It is undisputed that Nabors never changed Malone's First Aid Report of Injury into a medical injury report and, in fact, Nabors provided no proof that any report existed on its computer log or was ever sent to Gallagher Bassett regarding Malone until November of 2001 after Malone decided to call and report the injury.

3.36 Based on this evidence, the jury properly found Nabors' 42.5% at fault for Malone's injury in this case. See Venton v. Beckham, 845 So. 2d 676, 684 (Miss. 2003) (citing Wal-Mart Stores, Inc. v. Johnson, 807 So. 2d 382, 389 (Miss. 2001)) (a jury verdict will only be disturbed on appeal if it is so *contrary* to the overwhelming weight of the evidence that to permit it to stand "would be to sanction an unconscionable injustice").[10] Nabors' argument that there was nothing submitted into evidence that showed fault on the part of Nabors individually and apart from Gallagher Bassett is totally without merit where—in direct opposition to Nabors' argument—all of the evidence, as outlined above, showed Nabors' fault in denying Mr. Malone's claim and not processing and assigning Malone's claim as a workers compensation claim in violation of their duties both to Malone and Gallagher Bassett.

[10] Nabors correctly recognizes that the abuse of discretion standard is applied to a jury verdict challenged as being against the overwhelming weight of the evidence, deferring to the jury's determination of the weight and credibility of witnesses and resolving every permissible inference in Malone's favor. Venton, 845 So. 2d at 684 (citing Wal-Mart Stores, Inc., 807 So. 2d at 389).

3.37 The undisputed facts in this case show that Nabors had ultimate responsibility to determine whether to present workers' compensation claims to Gallagher Bassett. Furthermore, the testimony in this case establishes that Nabors had the sole obligation to determine whether to pay workers' compensation claims made by its employees. V 31: T 459 ln 22 – T 462 ln 21. The evidence supports a finding that Nabors failed to send a report of injury to Gallagher Bassett in 2000. In fact, it is clear that Nabors did not treat Malone's injury as a workers' compensation or other claim in their file in year 2000. Therefore, Nabors did not have the information in their system and did not follow up with Gallagher Bassett concerning this claim because it did not appear in their system.

3.38 It also follows from this evidence that the trial court's denial of Nabors' Motion for Directed Verdict and decision holding Nabors' Motion to Strike Gallagher Bassett's Cross-Claim in abeyance was proper. Nabors contends that the trial court erred by orally denying Nabors' Motion for Directed Verdict because none of the witnesses presented during Malone's case-in-chief offered testimony that that would support a finding that Nabors acted in bad faith. Nabors fails to recognize, however, that the overwhelming weight of evidence from Malone himself, offered in Malone's case-in-chief, as outlined above, pointed to Nabors' bearing fault for Malone's injuries.

3.39 Further, any argument by Nabors that the trial court's decision delaying ruling on Nabors' Motion to Strike Gallagher Bassett's Cross-Claim allowed prejudicial testimony and evidence before the jury is without merit. By the time Gallagher Bassett introduced (1) Wayne Johnston; (2) Jerry Poole; (3) Richard Rideout; and (4) Deborah Robichaux as witnesses, the fault of Nabors had already been clearly established. Judge Landrum was well within his discretion in holding Nabors Motion to Strike Gallagher Bassett's Cross-Claim in abeyance until after trial.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING NABORS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT TO ENTER ADDITUR.

3.40 Nabors is not entitled to any recovery from Gallagher Bassett, much less an additur. The well-established rule in Mississippi is that jury verdicts are not merely advisory and that an additur is allowed only with great caution and in extremely narrow circumstances. Maddox v. Muirhead, 738 So. 2d 742, 744 (Miss. 1999). Rodgers v. Pascagoula Pub. Sch. Dist., 611 So. 2d 942, 945 (Miss. 1992). Smith v. Parkerson Lumber, Inc., 888 So. 2d 1197, 1204 (Miss. Ct. App. 2004) (citing Gibbs v. Banks, 527 So. 2d 658, 659 (Miss. 1988)). See Dorris v. Carr, 330 So. 2d 872, 876 (Miss. 1976) (Judges should use extreme care in deciding "to overthrow verdicts, given by twelve men, on their oaths."). In accordance with this principle, the trial judge rejected Nabors' request for additur in this case, aptly recognizing that the jury of twelve, who gave their verdict under oath, was one of the most attentive juries he had seen in his thirty-two years of experience. T. 1001; R. 3852. Judge Landrum's decision should be looked upon with "much favor and indulgence[,]" as an abuse of discretion standard is to be applied pursuant to Mississippi law. McNair Transport, Inc. v. Crosby, 375 So. 2d 985, 986 (Miss. 1979); Maddox, 738 So. 2d at 743 ("In reviewing the trial court's grant or denial of an additur, this Court's standard of review is limited to an abuse of discretion.").

3.41 Nevertheless, Nabors contends that the jury award of $1,250,000 in this case should be increased because it is against the overwhelming weight of the evidence, a standard defined as an award that "shocks the conscience" because it is "so unreasonable in amount as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous." Teasley v. Buford, 876 So. 2d 1070, 1075 (Miss. Ct. App. 2004) (citing Gaines v. K-Mart Corp., 860 So. 2d 1214, 1220 (Miss. 2003)); Cade v. Walker, 771 So. 2d 403, 407 (Miss. Ct. App. 2000). In no way, however, does the $1,250,000 jury verdict entered at the end of the almost two-week trial of this matter qualify as being beyond all measure, outrageous or so

shocking that it should be increased.

3.42 Nabors argues that the "undisputed" evidence reveals damages in the amount of $2,702,729.66. Nabors, however, fails to recognize one very important fact—the main issue in this case does not pertain to whether Nabors had to pay Malone workers' compensation benefits and defend a bad faith lawsuit. Rather, the issue at the trial of this matter is centered on whether the money paid by Nabors was a result of Gallagher Bassett's, Nabors' or Plaintiff's conduct on which conflicting evidence was presented. Mississippi law is clear that the court defers to the jury on all evidence that is contradicted. Green v. Grant, 641 So. 2d 1203, 1209 (Miss. 1994); Schoppe v. Applied Chemicals Division, 418 So. 2d 883 (Miss. 1982) (conflicting evidence as to the cause of damages is sufficient to uphold a jury's verdict.).

3.43 The Court in Comer v. Gregory held that the jury was entitled to consider all mitigating and extenuating circumstances and to reduce damages accordingly. 365 So. 2d 1212, 1215 (Miss. 1978). This Court has recognized the jury has the right to diminish damages where there is conflicting evidence on the bad acts of the moving party even if such is not plead and no instruction is given authorizing the jury to so diminish damages. Toyota Motor Co. v. Sanford 375 So. 2d 1036, 1038 (Miss. 1979). In Rose v. Clenney, the court rejected additur despite plaintiff's claim of uncontested damages, holding that multiple parties' fault "directly affects the question of what award if any was minimally required." 748 So. 2d 172, 174 (Miss. Ct. App. 1999). See Patterson v. Liberty Associates, 910 So. 2d 1014, 1019 (Miss. 2004) (rejecting plaintiff's claim of undisputed damages where plaintiff did not suffer damages as proximate result of defendant's negligence); Leach v. Leach, 597 So. 2d 1295, 1298-99 (Miss. 1992) (rejected additur, holding jury obviously believed plaintiff was somewhat responsible for own damages); Screws v. Parker, 365 So. 2d 633, 637 (Miss. 1978) (holding jury verdict proper even though it did not fully compensate plaintiff for damages because of presence of plaintiff's

wrongdoing); Dorris v. Carr, 330 So. 2d 872, 876 (Miss. 1976) (credible evidence permitted jury to mitigate damages due to plaintiff's fault); Blizzard v. Fitzsimmons, 10 So. 2d 343, 345 (1942) ("recoverable damages must be reasonably certain in respect to efficient cause from which they precede . . . ."); Wells v. Tru-Mark Grain, Inc., 895 So. 2d 181, 184 (Miss. Ct. App. 2004) (trial judge commenting that "while I might disagree with the jury on the quantum of damages, I also might disagree with the jury on the apportionment of fault or fault at all. And it's just not our system for me to impose my opinion . . . ."); Cassibry v. Schlautman, 816 So. 2d 398 (Miss. Ct. App. 2001) (affirmed denial of additur where plaintiff failed to establish that damages sought were caused by defendant's actions).[11]

3.44 Similarly, the jury verdict on Nabors' Cross-Claim took into consideration Nabors' substantial role in the problems which gave rise to this lawsuit. Gallagher Bassett elicited testimony from Nabors' own witnesses that Nabors, through its employees, including Malone, created the circumstances which resulted in the delay in claim processing, allegedly resulting damage to Malone. See supra ¶¶ 3.34. The jury decided that Nabors' bad acts were worthy of 42.5% of the fault in this matter and that Nabors be awarded an amount less than the total amount they were requesting in its Cross-Claim. R. E. 22, 23, and 24. In viewing the evidence in the light most favorable to Gallagher Bassett, as the non-moving party, who receives the benefit of all favorable inferences, the trial judge properly recognized that Nabors failed to carry its burden to secure an additur.

3.45 Ultimately, "it is the primary province" of the jury, who has the opportunity to see the witnesses and weigh their testimony, to determine the amount of damages to award. Teasley, 876 So. 2d at 1075 (citing Burge v. Spiers, 856 So. 2d 577, 580 (Miss. Ct. App. 2003)); Graham

[11] Nabors' reliance on Kaiser Investments, Inc. v. Linn Agriprises, Inc., 538 So. 2d 409 (Miss. 1989) is misplaced. Kaiser is a case which involved liquidated damages due under a promissory note and is further distinguishable as there were no extenuating or mitigating circumstances as well as no contradictory evidence on the issue of the plaintiff's fault.

v. Walker, 924 So. 2d 557, 560 (Miss. Ct. App. 2005). In the instant case, the jury awarded Nabors $1,250,000 after hearing testimony concerning Nabors' wrongful conduct and decision to enter into a Mary Carter agreement.[12] The jury apparently was unconvinced of Gallagher Bassett's liability as to all of the elements of damages sought by Nabors. Mississippi law is clear that a jury is entitled to disregard certain types of damages even though it might find other damages persuasive. See Smith, 888 So. 2d at 1204; Guillory v. McGee, 922 So. 2d 823, 827 (Miss. Ct. App. 2006) (disregarding plaintiff's witness's testimony on cost of repair but finding other elements of damages valid); Hall v. Manschot, 2008 WL 619114 (D. Az. Mar. 3, 2008) (In a breach of contract action, a "jury was free to accept or reject all or a portion of the various items of expense that the plaintiffs offered as damages" or find that parts of the damages sought were "not fairly attributable to defendants' breach."); Winchell v. Schiff, 193 P.3d 946 (Nev. 2008) (additur not warranted where it was within the province of the jury to reject damages requested in a breach of contract action).[13] However, neither Judge Landrum, this Court, nor any of the parties should play a guessing game as to how this jury calculated its verdict. The jury, who had the opportunity to see the witnesses and weigh their testimony, considered all extenuating and mitigating circumstances as permitted under Mississippi law in arriving at their verdict on Nabors' Cross-Claim and conclusively decided that Nabors bore some responsibility for the injuries to Malone. Comer, 365 So. 2d at 1215. The trial court did not abuse its discretion in denying Nabors' motion for an additur because the verdict was in no way against the

[12] The jury verdict represents a calculated effort by the jury who sent a question to the judge, asking: "Who will pay Gary Malone's future medical expenses, Nabors or Nabors' insurance company?" T. 997.

[13] Nabors seeks damages in the amount of $2,702,729.66. This figure includes alleged damages for Nabors' Mary Carter agreement of $1,500,000, future medical costs of $828,595 and attorneys' fees alleged in the amount of $374,134.66. (Brief pg. #). The jury was free to disregard any one of these amounts based on the evidence. *See* Quinn v. Present Broadwater Hotel, 963 So. 2d 1204 (Miss. Ct. App. 2007). For example, it is entirely possible that the jury disregarded the plaintiff's expert economist's testimony on future damages because her credibility was attacked in Gallagher Bassett's cross-examination. While the record does reflect the accountant needed a calculator to perform simple arithmetic while testifying (V 31: T. 547 ln 26- T 548 ln 11) and that she failed to properly discount Malone's damages for amounts received (V 31: T 546 ln 1 – T. 547 ln 7), the record does not reflect her improper demeanor in front of the jury. This is why appellate courts give deference to jury findings and a trial court's decision to deny a motion for additur.

overwhelming weight of the evidence.

3.46 Ultimately, however, no matter what damages the jury awarded, their finding of Nabors' active fault and unclean hands destroys Nabors right to recover as demonstrated above.

E. GALLAGHER BASSETT'S ACTIONS DID NOT RISE TO THE LEVEL OF AN INTENTIONAL TORT, SO THAT THE EXCLUSIVITY CLAUSE BARS MALONE'S CLAIM.

3.47 In his Brief of Appellee, Malone argues Gallagher Bassett waived this issue. In response, Gallagher Bassett directs this Court to the Motion For Summary Judgment filed by Gallagher Bassett V 14:p. 1981-1984, the Memorandum Brief V 14:p. 1940-1952, and Rebuttal V 18:p. 2637- V: 19 p 2644, in Support of thereof, the oral argument on that motion V 28: T 20 ln – T 41 ln 17, the Court's order denying summary judgment V 19: p. 2695-2701, Gallagher Bassett's motion for directed verdict V 31: T 566 ln 25- T 571 ln 10, Gallagher Bassett's renewed motion for directed verdict V. 32, T. 691, ln 24 – T. 692, ln 5 and the trial transcript argument concerning jury instructions V 33: T 894 ln 25-V34:T 927 ln 3. When Judge Landrum denied Gallagher Bassett's motion for summary judgment, he held Gallagher Bassett subject to a gross negligence standard, rather than an intentional tort standard. Although this Court allows a tort action for bad faith outside of the exclusivity provision of the Act if that bad faith rises to the level of an intentional tort which caused damages separate and distinct from those related to the work place injury, Malone has failed to plead or prove the elements necessary for a claim to overcome the exclusivity bar.

3.48 Mississippi's workers' compensation law replaced traditional negligence actions with a no-fault system of payment to employees and their families for job related injuries. See Stevens v. FMC Corp., 515 So. 2d 928, 932 (Miss. 1987). An employee who desires to pursue workers' compensation benefits may file a Petition to Controvert with the Mississippi Workers' Compensation Commission and compel treatment for work-related injuries. See Procedural Rule

2. See also Taylor v. USF&G, 420 So. 2d 564, 566 (Miss. 1982). Furthermore, the Act provides that penalties may be assessed for late payments. See Miss. Code Ann. §71-3-37 (5) and (6).

3.49 As a matter of Mississippi law, the exclusivity provision of the Mississippi Workers' Compensation Act bars any recovery of damages against an insurance carrier and its representatives, and an employer for failure to pay workers' compensation absent allegations and proof that an intentional tort was committed. Southern Farm Bureau Cas. Ins. Co. v. Holland, 469 So. 2d 56-57 (Miss. 1984). There is no liability for bad faith handling of a workers' compensation claim in connection with conduct which was allegedly negligent, careless, reckless, willful or gross negligence:

> We hold that the majority view permitting action for an independent tort against an insurance carrier in Workers' Compensation cases is in line with the thrust of our recent decisions recognizing that punitive damages are appropriate where an insurance company **intentionally and in bad faith** refuses payment of a legitimate claim in order to prevent insurer from forcing an inadequate settlement.
>
> . . .
>
> 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.**

Holland, 469 So. 2d at 58-59.

3.50 The Supreme Court in Taylor v. USF&G, determined that the exclusivity provision of the Mississippi Workers' Compensation Act barred a claim including the following allegations:

> [the carrier] . . . negligently, carelessly, recklessly, willfully and hazardously, failed, refused and neglected to process legitimate medical claims . . . .

420 So. 2d 564-66 (Miss. 1982). The Taylor court barred the common law tort action arising from those allegations. Id. at 566.

3.51 After Taylor and Holland, the Supreme Court in Luckett v. Mississippi Wood, Inc., held that not only is the insurance company liable for intentional torts, but the employer can also be liable for an intentional tort in connection with failure to pay Mississippi workers' compensation benefits. Luckett v. Mississippi Wood, Inc., 481 So. 2d 288, 291 (1985). Relying upon the analysis of Holland, the Court held that where the plaintiff pleads an intentional tort, it is actionable. Luckett, 481 So. 2d at 291. In Luckett, the pleading was similar to that in Holland with the pleading by including the intentional use of unequal bargaining positions to effectuate a beneficial settlement and economic gain. Luckett, 481 So. 2d at 290.

3.52 In 2004, the Mississippi Court of Appeals in Pilate v. American Federated Ins. Co., followed Holland with the following language:

> . . . the exclusive remedy provision does not bar an injured employee's common law tort action against an insurance carrier for the commission of an **intentional tort** that is independent of the accident compensable under the workers' compensation scheme.

Pilate v. American Federated Ins. Co., 865 So. 2d 387, 391 (Ct. App. 2004) (citing Holland, 469 So. 2d at 58-59. Under Mississippi law, a bad faith insurance suit involving an insurance claim, other than workers' compensation, is actionable upon proof of gross negligence, recklessness and other such negligence based liability as well as intentional torts involving intentional acts by the insurance carrier and adjusters. Bankers Life & Cas. Co. v. Crenshaw, 483 So. 2d 254 (Miss. 1985); Standard Life Ins. Co. of Ind. v. Veal, 354 So. 2d 239 (Miss. 1977). What must be recognized is that in the context of handling of a workers' compensation insurance claim, pleading and proof must show that actor acted both (1) **with bad faith** and (2) **with intent** to be actionable. Holland, 469 So. 2d at 58. See also Stevens, 515 So. 2d 928, 931 (Miss. 1987) (proof to avoid exclusivity clause must amount to "act of intentional behavior designed to bring about the injury"). Allegations and proof that the insurance carrier and adjuster negligently, carelessly, recklessly, willfully and hazardously failed, refused and neglected to handle the claim

are insufficient. Taylor, 420 So. 2d at 564-66. Accordingly, as a matter of law, all claims of Gary Lee Malone in the instant case which do not involve allegations and proof of both bad faith, and an intentional act on the part of Gallagher Bassett in the handling of his claim are not actionable and should be dismissed with prejudice.

3.53 The acts of Gallagher Bassett meet neither the lower standard of insurance bad faith nor intentional act bad faith. The record is clear that in order for Gallagher Bassett to have any authority to open and adjust a claim for Nabors, Nabors must determine that a claim involves medical injury or lost time and forward to Gallagher Bassett a written report of injury. V 31: T 461 ln 5 – T 462 ln 21. The proof is also clear that Malone's first aid incident occurred on July 28, 2000. R. E. 15; V 29: T 271 ln 23 – T 272 ln 22 Nabors has no record that Malone's incident report was anything other than a first aid incident until November, 2001. D: Poole p. 29 ln 16-p. 30 ln 21; R. E. 16. Nabors has no computer record of Malone's incident or claim until November, 2001. Nabors' management personnel told Malone his incident and injury was not covered by workers' compensation. V 30: T 336 ln 4 – T 337 ln 8. Malone treated the incident and injury as a preexisting injury and told his doctor of his chronic problem. V 30: T 345 ln 14- T 345 ln 28. A Gallagher Bassett adjuster took a statement of Bobby Wallace, Malone's immediate supervisor, concerning Malone's incident and injury in August, 2000. R.E. 17. Without a report of injury and assignment from Nabors, that adjuster had no authority to begin a Nabors' claim in the Gallagher Bassett system. V 33: T 783 ln 2-3. Gallagher Bassett would not be paid for claims adjusting without receipt of a report of injury and assignment from Nabors. V 32: T 710 ln 22 – T 711 ln 25. Malone was terminated from his job in late January, 2001 because he could not return to work as a result of a "non-work related injury" - the injury at issue in this case. R.E. 13; V 32: T 684 ln 15 – 22.

3.54 At worst, Gallagher Bassett's acts in this case were a result of poor communication between Gallagher Bassett and Nabors. Nabors adopted the testimony of Rob Holbrook as its own testimony. Holbrook testified that Malone's claim was not a workers' compensation claim.

3.55 Somehow the Gallagher Bassett adjuster received some information concerning the incident involving Malone. The adjuster took a statement. She had no recollection of how she learned of Malone. She did not recall taking the statement. V 33: T 778 ln 11-12. She had no record of receipt of a report of Malone's claim from Nabors assigning the claim until November 2001, over a year after the statement. V 33: T 782 ln 26-27. Without receipt of a report of injury and assignment of a workers' compensation claim, Gallagher Bassett's adjuster had no authority to open and adjust the claim. V 33: T 783 ln 2-3. Nabors also clearly communicated that it did not intend Malone's claim to be treated as a workers' compensation claim for adjustment. V. 31: T. 596 ln 19- T. 597 Ln 28. V. 32: T. 610 ln 11-24. V. 32: T. 611 ln 11-T. 613 ln 18. V. 32: T. 617 ln 22 – T. 618 ln 4. Accordingly, the mistake made by Gallagher Bassett was in taking a statement of Bobby Wallace at all without a receipt of a report of injury and assignment of a claim.

3.56 There was certainly no act on the part of Gallagher Bassett showing bad faith in the context of handling a claim or any intentional act by Gallagher Bassett against the rights of Malone. The only party involved who appeared to have any motive to act with bad faith or with any intentional act was Nabors, whose management sought bonuses which would be lost in the presence of the claim.

F. EVEN IF MALONE COULD ESCAPE THE EXCLUSIVITY CLAUSE, HIS CLAIMS ARE BARRED BY THE "ONE SATISFACTION RULE."

1. Under Mississippi Law, Malone Cannot Recover the Portion of the Judgment Attributed to Gallagher Bassett

3.57 Malone cannot recover the portion of the judgment attributed to Gallagher Bassett for three reasons. First and foremost, according to Mississippi's common law "one satisfaction" rule, double recovery for the same harm is prohibited. City of Jackson v. Estate of Stewart ex rel. Womack, 908 So. 2d 703, 711 (Miss. 2005). Second, *pro tanto* setoff remains viable in this state despite the Legislature's enactment of Miss. Code Ann. § 85-5-7, as "this Court follows the long established rule that statutes in derogation of the common law are, as a general rule, strictly construed[. . . .]" Howard v. Estate of Harper ex rel. Harper, 947 So. 2d 854, 859 (Miss. 2006) (quoting Warren ex rel. Warren v. Glascoe, 880 So.2d 1034, 1037 (Miss. 2004)). Third, this lawsuit was filed on December 5, 2003, meaning that it falls within the narrow window of tort reform—from January 1, 2003, to August 31, 2004—wherein joint tortfeasors with at least 30% fault maintain joint and several liability up to 50% of the plaintiff's recoverable damages. Ware v. Entergy Mississippi, Inc., 887 So. 2d 763, 766-67 (Miss. 2003). According to common law and statute, Malone's ability to recover is foreclosed by his settlement of $1,500,000.

2. Under the Longstanding "One Satisfaction" Rule of Mississippi Tort Law, Malone Cannot Enforce the Jury's Award of Damages Because Doing So Would Result in Double Recovery for the Same Harm

3.58 This Court has repeatedly instructed "that '[t]here can be but one satisfaction of the amount due the plaintiff for his damages . . . . Thus, double recovery for the same harm is not permissible." City of Jackson, 908 So. 2d at 711 (Miss. 2005) (quoting Medlin v. Hazelhurst Emergency Physicians, 889 So. 2d 496, 500-01 (Miss. 2004)); Medley v. Webb, 288 So. 2d 846, 848 (Miss. 1974).

3.59 The plain language of the Mary Carter agreement speaks with an unequivocal voice concerning the intent of both Nabors and Malone. Nabors paid Malone $1,500,000 for harm to Malone allegedly caused by the wrongful conduct of Gallagher Bassett: "The parties have entered this agreement based in part upon **Nabors' recognition of the serious injuries**

suffered by Gary Malone; which the parties, Nabors and Malone, believe were the result of the grossly negligent and reckless conduct of Gallagher Bassett." R.E. 12. Indeed, the plain language of the agreement makes clear that the settlement was for the harm caused by Gallagher Bassett. Mary Carter agreements "promote rather than discourage further litigation [,] . . . skew the trial process, mislead the jury, promote unethical collusion among nominal adversaries, and create the likelihood that a less culpable defendant will be hit with the full judgment." Elbaor v. Smith, 845 S.W. 2d 240, 250 (Tex. 1992). Accordingly, such agreements should be discouraged as a matter of public policy. See Interstate Contracting Corp. v. City of Dallas, 135 S.W. 3d 605, 616 (Tex. 2004) (Mary Carter agreements spur additional, more caustic litigation and distort the true positions of the parties); Franklin v. Guralnick, 477 N.E. 2d 405, 406 (Mass. 1985) (commenting that Mary Carter agreements are disfavored by the law); First General Realty Corp. v. Maryland Cas. Co., 981 S.W. 2d 495, 499 (Tex. App.-Austin 1998) (Mary Carter agreements are disfavored); Cities of Abilene v. Public Utility Com'n of Texas; 854 S.W. 2d 932, 939 (Tex. App.-Austin 1993) (the stated policy disfavoring agreements which promote rather than discourage further litigation should apply).

3.60 Further, throughout the trial of this matter, counsel for Nabors and Holbrook (including their witnesses) made reference to the fact that Nabors did nothing wrong with regard to the workers' compensation claim of Malone and that Nabors only settled the claim because of the wrongful actions of Gallagher Bassett. In fact, Laura Doerre, who appeared at trial as the corporate representative of Nabors in her capacity as assistant general counsel, testified Nabors made the $1,500,000 payment as a result of Nabors' belief that Gallagher Bassett's conduct had caused Malone to sustain damages. V 32: T652 ln 11 – T 662 ln 26. Doerre testified that Nabors made the payment under the belief that it had exposure for these damages through vicarious liability for Gallagher Bassett's actions. Id. This testimony is consistent with the allegations of

Malone and Nabors against Gallagher Bassett in their Mary Carter agreement.

3.61 Accordingly, this Court should simply enforce the plain language of the Mary Carter agreement, leading to the inescapable conclusion that Nabors agreed to pay Malone $1,500,000 as settlement for the specific harm caused by Gallagher Bassett's wrongful conduct. The entire $1,500,000 should therefore be applied to the jury's verdict in favor of Malone against Gallagher Bassett.

3.62 This Court has repeatedly emphasized that "double recovery for the same harm is not permissible." City of Jackson, 908 So. 2d at 711 (quoting Medlin, 889 So. 2d at 500-01); Teasley v. Buford, 876 So. 2d 1070, 1076 (Miss. Ct. App. 2004) (adjusting the jury award to prevent double recovery); Gallagher Bassett v. Jeffcoat, 887 So. 2d 777, 793 (Miss. 2004) (J. Carlson, dissenting opinion) (stating that plaintiff is entitled to only one recovery of damages); Brown v. North Jackson Nissan, Inc., 856 So. 2d 692, 698 (Miss. Ct. App. 2003) (stating injured party is entitled to but one recovery on claim); Turner v. Pickens, 711 So. 2d 891, 893 (Miss. 1998) (applying setoff to prevent double recovery); Robles v. Gollott & Sons Transfer & Storage, Inc., 697 So. 2d 383, 384-85 (Miss. 1997) (adjusting the jury award to prevent double recovery); McBride v. Chevron, 673 So. 2d 372, 380 (Miss. 1996) (applying setoff to prevent double recovery); Garcia v. Coast Electric Power Assoc., 493 So. 2d 380, 385 (Miss. 1986) (stating policy against double recovery); Hunnicut v. Wright, 986 F. 2d 119, 124 (5th Cir. 1993) (applying Mississippi law and stating double recovery is impermissible).

3.63 In the case at bar, Nabors and Malone make much of the fact that many suits illustrating the "one satisfaction" rule involve circumstances where multiple tortfeasors act in concert so that they are jointly and severally liable for the full amount of the judgment.[14]

[14] In fact, the instant case also involves defendants that are jointly and severally liable. Here, however, the joint and several liability is capped at 50% of the plaintiff's recoverable damages. This issue will be discussed more thoroughly infra.

Admittedly, the rule certainly applies in such cases. This Court, however, has also applied the "one satisfaction" rule in a variety of other circumstances. In City of Jackson, the plaintiff sought double recovery for the same harm based on two different causes of action (negligence and breach of contract). 908 So. 2d at 711. There, this Court instructed that a plaintiff cannot recover for "the same damages . . . under two separate theories of recovery." Id. In yet another example, this Court applied the "one satisfaction" rule where a plaintiff was injured in an automobile accident. Medlin, 889 So. 2d at 497. In Medlin, the plaintiff first brought suit against the operator of an eighteen-wheeler who was responsible for the accident. Id. After the trial court rendered a $300,000 verdict for the plaintiff, she brought a second suit alleging medical malpractice involving the treatment she received after her accident. Id. at 498. The trial judge dismissed the plaintiff's second suit based on the "one satisfaction" rule, stating:

> [I]n this particular situation where a jury has determined damages, and those damages have been paid in full, it appears that unless the theory of recovery is based on something other than injuries that she received in the first place, that [full] satisfaction would be in order.... But it appears to me that the equities in this particular situation and the law of the State of Mississippi dictates that when there's been a judgment, that the total amount of the damages has been assessed by a jury and that those damages have been paid and the plaintiff received recovery for those amount of damages, that should extinguish the claim. And I believe in this particular situation, I believe that summary judgment is proper on the [full satisfaction] theory.

Id. at 501. This Court was persuaded by the lower court's sound reasoning, noting that a plaintiff cannot seek double recovery for "the same injuries and damages[.]" Id.

3.64 The instant case is akin to Medlin, because Malone likewise seeks a double recovery for the same injuries and harm. As explained above, the Mary Carter agreement—especially when coupled with the testimony at trial—clearly demonstrates that the specific harm settled was the harm caused by the alleged wrongful conduct of Gallagher Bassett. Indeed, the testimony from trial proves that the only reason Nabors settled with Malone was because of its fear of exposure under a theory of vicarious liability. Thus, even though the parties began the

Mary Carter agreement by explaining that the settlement did not release Gallagher Bassett from liability, because the $1,500,000 settlement far exceeded the ultimate jury award of $250,000, Malone is foreclosed from further recovery for this same harm.

3.65 Furthermore, the Mary Carter agreement itself provides proof that the money Nabors paid to Malone was in satisfaction of Malone's injuries caused by Gallagher Bassett. The language of the Mary Carter agreement states that the first $250,000 that Nabors or Malone recovers from a jury award will be given to Nabors and, thereafter, every dollar recovered will be split between the two parties. It is entirely illogical for Malone and Nabors to agree that (1) the $1,500,000 payment in the Mary Carter agreement was made to Malone solely for harm caused by Gallagher Bassett's wrongful conduct, and (2) that the payment does not apply to damages awarded to Malone against Gallagher Bassett. R.E. 12 at ¶¶ 1, 3 and 4. While the analysis of Nabors' claim for indemnity against Gallagher Bassett is another matter altogether, this much is certain: The harm to Malone caused by the alleged wrongful conduct of Gallagher Bassett has been satisfied.

3. *Pro Tanto* Setoff Remains Viable in Mississippi Despite the Legislature's Derogation of Common Law Rights in Enacting Miss. Code Ann. § 85-5-7

3.66 *Pro tanto* setoff remains viable in this state despite the Legislature's derogation of common law rights through the promulgation of Miss Code Ann. § 85-5-7. With a history deeply rooted in Mississippi law, the right of *pro tanto* credit entitles a co-defendant to a setoff for all money paid by another co-defendant to the plaintiff in settlement. Medlin, 889 So. 2d at 499; Medley, 288 So. 2d at 848; Hunnicut, 986 F. 2d at 124 (applying Mississippi law); Jeffcoat, 887 So. 2d at 793 (J. Carlson, dissenting opinion). Despite the contentions of Nabors and Malone, both the Legislature and this Court for good reason intentionally sidestepped the views expressed in Krieser v. Hobbs, 166 F. 3d 736 (5th Cir. 1999). Indeed, this Court has recently reaffirmed its longstanding maxim "that statutes in derogation of the common law are, as a

general rule, strictly construed[.]" Howard, 947 So. 2d at 859 (quoting Warren, 880 So.2d at 1037). Because the statutory changes to Mississippi's system of joint and several liability do not in any way address setoff, the traditional *pro tanto* method remains unaffected.

a. All Mississippi Authorities Agree That the *Pro Tanto* Method of Setoff Remains the Law in This State

3.67 As evidenced by post-reform case law, the changes to joint and several liability in this state have not affected *pro tanto* setoff. Medlin, 889 So. 2d 496 at 499; Jeffcoat, 887 So. 2d at 792-93 (J. Carlson, dissenting opinion) (quoting Hunnicut, 986 F. 2d at 124-25); Brown, 856 So.2d at 697. In Jeffcoat, Justice Carlson, in a dissenting opinion, noted that "[a]ll of the Mississippi authorities on this point clearly and unequivocally state that where a party settles with one defendant, any remaining defendant receives credit for the settlement received from the released defendant." 887 So. 2d at 792-93. Justice Carlson recognized that under Mississippi's one satisfaction rule, any judgment against the non-settling defendant should be set off by the amount the plaintiff received from the settling defendant for the same claims. Id. at 792-93.

3.68 The instant case is strikingly similar to Jeffcoat. For example, the pleadings against Gallagher Bassett and Nabors are substantially identical. The Complaint in this case was filed against Nabors and Gallagher Bassett as co-defendants and joint tortfeasors. Malone's claims against Nabors and Gallagher Bassett were inextricably intertwined, asserting the same damages attributable to each defendant. Just as in Jeffcoat, a settlement agreement (in this case a Mary Carter agreement) released Nabors from the same claims asserted against Gallagher Bassett. It is clear that any damages asserted by Malone in the Complaint and paid by Nabors in settlement are the same damages asserted in the Complaint and found against Gallagher Bassett at trial. Just as was the case in Jeffcoat, *pro tanto* setoff is appropriate in this case.

b. Neither the Legislature nor this Court Has Adopted *Krieser v. Hobbs*

3.69 In their respective post-trial motions and appellate briefs, both Nabors and

Malone have undertaken considerable efforts to explain the demise of joint and several liability in Mississippi. In doing so, they provide the Court with lengthy explanations of the Fifth Circuit's "Erie guess" in Krieser. 166 F. 3d 736. Writing for the Krieser court, Judge Barksdale opined that the Mississippi Supreme Court, if faced with the decision, would likely eliminate the *pro tanto* mode of setoff between settling and non-settling joint tortfeasors with several liability. Id. at 743. Yet the Krieser opinion wholly fails to address the concepts of indemnity and contribution among tortfeasors, concepts which adequately satisfy the concerns set forth by Judge Barksdale regarding windfall. In the post-Krieser era, this Court or the Mississippi Court of Appeals, has acknowledged the concept of *pro tanto* setoff in at least four different circumstances: Teasley, 876 So. 2d at 1076 (Miss. 2004); Jeffcoat, 887 So. 2d at 793 (dissenting opinion recognizing application of "one satisfaction" rule); Medlin, 889 So. 2d at 499 (Miss. 2004); and Brown, 856 So.2d 692.[15]

c. Because the Legislature, in Enacting Miss. Code Ann. § 85-5-7, Has Created a Statute in Derogation of the Common Law, the Statute Should Be Strictly Construed

3.70 The Legislature has chosen not to alter Mississippi's system of *pro tanto* setoff, and the contention of Nabors and Malone that this Court should adopt the Fifth Circuit's decision in Krieser and limit the *pro tanto* method of setoff to joint and several cases is misguided. It is a well-known principle that "statutes in derogation of the common law are, as a general rule, strictly construed." Howard, 947 So. 2d at 859 (quoting Warren, 880 So. 2d at 1037)). Accordingly, this Court need not expend energy in a Krieser-like analysis of the differing methods of setoff.

3.71 Krieser does not govern this case, and if the law in this state concerning *pro tanto*

[15] In fact, prohibiting pro tanto setoff in circumstances such as the one at bar will likely also encourage unfair leveraging by plaintiffs because the potential for Mary Carter arrangements will force individuals that in actuality bear no fault to settle rather than defend themselves.

setoff is to be changed, the Legislature, having enacted the changes to joint and several liability in the first place, remains in a particularly well-suited position to weigh the policy implications that such a change would have. Because the Legislature chose not to disturb Mississippi's system of *pro tanto* setoff with its changes to § 85-5-7, this Court should apply the general rule that "statutes in derogation of the common law are . . . strictly construed." Warren, 880 So. 2d at 1037. In sum, the *pro tanto* system remains the proper method of determining setoff despite the changes to Mississippi law via tort reform.

4. Joint and Several Liability Applies to 50% of Malone's Recoverable Damages Even With a Krieser Analysis.

3.72 Nabors and Malone have attempted to saddle this Court with the unenviable task of reconciling Mississippi's longstanding rule of "one-satisfaction" and *pro tanto* setoff with the Fifth Circuit's decision in Krieser. Besides the fact that Krieser does not in any way bind this Court, an analysis of Krieser is wholly inapplicable and unneeded for the just disposition of the instant case. However, if this Court adopts the reasoning in Krieser, Gallagher Bassett is still entitled to set-off in this case.

3.73 This lawsuit was filed on December 5, 2003, meaning that it falls within the narrow window of tort reform—from January 1, 2003, to August 31, 2004—wherein joint tortfeasors with at least 30% fault maintain joint and several liability up to 50% of the plaintiff's recoverable economic damages. Accordingly, even if this Court abolished the *pro tanto* system of setoff in cases where co-defendants are severally liable, half of the $212,500 (which is the jury award of $250,000 less the 15% apportioned to Malone) would remain under the joint and several system so that *pro tanto* setoff would still be appropriate in the amount of $106,250.

3.74 According to Mississippi law, the conclusion is inescapable that regardless of how this Court views Mississippi's system of setoff, Malone's award has been satisfied, and double recovery is not allowable under Mississippi law.

G. THE TRIAL COURT CORRECTLY DECIDED THAT THE APPELLEES ARE NOT ENTITLED TO PUNITIVE DAMAGES

3.75 From the outset, it must be recognized that punitive damages are not favored under Mississippi law and are only allowed with great caution, in the most egregious cases, where "the facts are highly unusual and cases extreme." Bradfield v. Schwartz, 936 So. 2d 931, 937 (Miss. 2006); Wise v. Valley Bank, 861 So. 2d 1029, 1034 (Miss. 2003). Even in the rare cases where punitive damages are allowed, Mississippi law provides the trial court, as gatekeeper, with discretion to *initially determine* whether the particular facts of a case merit the submission of punitive damages to the jury. *Id.* See Teasley v. Buford, 876 So. 2d 1070, 1078 (Miss. Ct. App. 2004) (citing Miss. Code Ann. §11-1-65); Gilbert v. Infinity Ins. Co., 769 So. 2d 266 (Miss. Ct. App. 2000); Doe v. Salvation Army, 835 So. 2d 76, 81 (Miss. 2003) (refusal to submit punitive issue to the jury judged against stringent *abuse of discretion* standard); Robinson v. Nat'l Cash Register Co., 808 F.2d 1119, 1126 (5th Cir. 1983) (Trial courts are "vested with wide discretion because [they] have tasted the flavor of litigation and [are] in the best position to make these kinds of determinations."); Blue Cross & Blue Shield of Miss., Inc. v. Campbell, 466 So. 2d 833, 842 (Miss. 1984) (one seeking punitive damages in bad faith case has a *heavy burden*).

3.76 The Appellees cite Bradfield, 936 So. 2d 931 as support that the trial court should have held an evidentiary hearing on punitive damages prior to directing a verdict in favor of Gallagher Bassett. The trial court, however, fully considered all evidence and properly rejected Appellees' request for punitive damages pursuant to Mississippi law. In three primary ways, the record makes clear that Appellees are not entitled to punitive damages: (1) the instant case involves a claim for bad faith, meaning that, in contrast to a bifurcated trial, both Judge Landrum and the jury considered all evidence in the compensatory phase of the trial; (2) the record reflects that Judge Landrum appropriately conducted a second phase of the trial when he allowed

argument on the issue of punitive damages; and (3) by failing to object to Judge Landrum's ruling on punitive damages at the close of arguments, Appellants did not allow Judge Landrum to consider the merits of their objection and thereby waived any potential appeal of this issue.

3.77 First and foremost, Judge Landrum did not violate the clear intent behind MISS. CODE ANN. § 11-1-65. In Hartford Underwriters Ins. Co. v. Williams, this Court advised that "the clear intent of the legislature was to prevent issue confusion and to create a barrier between testimony regarding the fundamental issue of liability and the inflammatory issue of egregious conduct." 936 So. 2d 888, 897 (Miss. 2006). In other words, MISS. CODE ANN. § 11-1-65 is designed to insulate the jury from evidence of gross, reckless, or intentional conduct that might cloud the issue of basic culpability. Williams, 936 So. 2d at 897. Of paramount importance, in a trial involving bad faith handling of a workers' compensation claim, evidence of egregious conduct is necessary in order to prove the higher standard necessary for a finding of culpability. Accordingly, in such cases, the fact finder must hear all the evidence in order to render a verdict. Bifurcation was simply not an issue, and no evidence was deemed inadmissible during the compensatory phase of trial on the basis that it was prejudicial evidence reserved for the punitive damages stage. The facts of the Bradfield case are not analogous to this case because the Bradfield case involved bifurcation of proof between negligence/breach of contract claims and the punitive/bad faith claims.

3.78 Two federal court cases provide further insight regarding the proper construction of Bradfield. In Bridges v. Enterprise Products Company, the plaintiff brought suit under negligence and gross negligence theories where an individual was fatally injured in a pedestrian accident. 2007 WL 2301230, *1 (S.D. Miss. Aug. 7, 2007). The jury found the defendant 100% liable and awarded the plaintiff damages in the amount of $150,000 for loss of income, $6,585 for funeral expenses and $4,000,000 for loss of society and companionship. Id. The trial judge

dismissed the plaintiff's punitive damages claim. The plaintiff argued error based on the Court's failure to hold an evidentiary hearing and submit the issue of punitive damages to the jury. Id. at *3- 4. The Bridges court did "not read Bradfield so broadly" as mandating a duplicative evidentiary hearing where the court had already considered all the evidence:

> Again, having considered the evidence presented in this case, **both at the trial and pre-trial stages**, the Court finds that [the defendant's] alleged conduct was not sufficient to support a claim for punitive damages. As there was no viable claim for punitive damages, the Court finds that it did not err by failing to hold an evidentiary hearing on such non existent claim after the jury returned its verdict awarding compensatory damages.

Bridges, 2007 WL 2301230 at 3- 4 (emphasis added). Similarly, the Court in Barnett v. Skelton Truck Lines astutely recognized that:

> [t]rial courts have often listened to the **entire presentation of evidence** in a case prior to making the decision of whether to submit the punitive damages issue to the jury. What *Bradfield* did was to reaffirm the strict requirements of 11-1-65 regarding the necessity **of bifurcat[ation.]** There has been no change . . . that the trial court remains the gatekeeper which ultimately decides whether the punitive claim is submitted to the jury.

2006 WL 2056632, *4 (S.D. Miss. July 21, 2006) (emphasis added).[16]

3.79 In rejecting punitive damages, Judge Landrum was fully aware of all evidence regarding the allegedly malicious conduct of Gallagher Bassett, as this evidence was presented during the compensatory phase of trial. Based on this evidence, Judge Landrum ultimately held that Gallagher Bassett's conduct was not sufficient to support a claim for punitive damages.[17] Similar to Bridges and Barnett, the trial judge in this case simply and correctly performed his

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[16] See also Prudential Ins. Co. v. Stewart, 969 So. 2d 16, ¶ 29 (Miss. 2007) (J. Carlson, concurring) (suggesting parties may simply rely on record from trial).

[17] This does not mean that a finding of bad faith conduct also automatically necessitates a finding of punitive damages. Nabors wrongfully seeks to equate the standards for bad faith refusal of insurance coverage and punitive damages; however, the punitive damages statute goes farther than the standard for bad faith and requires, at a minimum, gross negligence which evidences a willful, wanton, or reckless disregard for the safety of others. Griffith v. Griffith, 2008 WL5064921, *4 (Miss. Ct. App. 2008). "In the great majority of cases, this Court has held where the insured is not entitled to a directed verdict on his underlying claim, it follows that the bad faith punitive damage issues should not be submitted to the jury." Life & Cas. Ins. Co. of Tenn. v. Bristow, 529 So. 2d 620, 624 (Miss. 1988). It has long been held under Mississippi law that the trial court can enter summary judgment or directed verdict against a punitive damages claim even in a case involving intentional torts. Patterson v. Holleman, 917 So. 2d 125 (Miss. 2005).

function as gatekeeper.

3.80 Second, in keeping with Bradfield, Judge Landrum proceeded with hearing and corresponding second phase of trial, stating:

> [t]here's another phase of this case . . . . And I've got to decide whether or not you're entitled to consider that based on the fact that you have – the only way you can consider punitive damages is if there's been a verdict of compensatory damages.

V 34: T 1002. The court then heard arguments from all parties on the issue of punitive damages. V 34: T 1002 – T 1008. Neither Malone nor Nabors requested to call any witnesses during this argument. After arguments, the trial court reasoned that both Nabors and Malone had been made whole and that all parties involved had contributed to Mr. Malone's injuries. V 34: T 1002-06. Judge Landrum expressed that he had given the punitive damages issue detailed consideration based on his significant experience as a trial judge. V 34: T 1006. He then ultimately determined that, based on the totality of the circumstances and aggregate conduct, Gallagher Bassett's actions were insufficient to support a claim for punitive damages. V 34: T 1006. See Ross-King-Walker, Inc. v. Henson, 672 So. 2d 1188, 1192 (Miss. 1996) (no "precise formula" in deciding to award punitive damages, but "rather must come from the trial judge's life experience"); Bradfield v. Schwartz, 936 So. 2d at 937- 939. Judge Landrum next polled the jury, with ten out of twelve jurors confirming his ruling that punitive damages were unwarranted. V34: T 1006-1008. Despite Appellees' contentions, the trial court held a hearing and corresponding second phase of trial, properly considering and rejecting punitive damages. The Court's ruling denying Appellees' punitive damages claim was not an abuse of discretion in this case.

3.81 Third, by failing to object to Judge Landrum's ruling and providing him an opportunity to rule on the merits of any such objection, the Appellees waived their right to appeal the issue of punitive damages. Malone attempts to mislead and confuse this court by stating: "[b]oth appellees moved for the commencement of an evidentiary hearing before the jury

on the issue of punitive damages." See Appellee's Brief of Malone at 49. The record is completely devoid of any such request by either Nabors or Malone. Since Appellees failed to object, and thereby allow Judge Landrum the opportunity to rule on such an objection, they have waived this issue. See Brown, 856 So. 2d at 692 (waived any right to later complain of the trial court's failure to undertake a punitive damage inquiry, stating that is "the price a litigant pays for failing to promptly raise a perceived error . . . .").

3.82 For the foregoing reasons, any argument by Nabors and Malone that the trial judge committed error in failing to hold an evidentiary hearing must fail. Appellees have no fundamental right to punitive damages under Mississippi law. Brown, 856 So. 2d at 697. The jury verdict for actual damages was intended to make Appellees whole so that any alleged failure of the trial court to inquire into the appropriateness of punitive damages in this case was not in error.

H. GALLAGHER BASSETT HAS NOT WAIVED ANY ISSUES

1. Gallagher Bassett Properly Preserved Its Right to Appeal by Specifically Arguing Against the Legal Sufficiency of the Evidence on Motion for Directed Verdict and by Renewing its Arguments on Motion for Judgment Notwithstanding the Verdict

3.83 Malone argues that "Gallagher Bassett failed to raise, discuss, comment or cite issues in its post trial motion that are now the basis for its appeal." Brief of Appellee, Cross-Appellant, Gary Lee Malone, p. 19. Accordingly, Malone contends that Gallagher Bassett waived its right to appeal certain issues. Malone's contention derives from MISSISSIPPI RULE OF CIVIL PROCEDURE 50(a), which provides that "[a] motion for a directed verdict shall state the specific grounds therefor." Indeed, the Mississippi Supreme Court has stated that "a motion for a JNOV or a directed verdict must set out specific, not general, facts that demonstrate a failure to establish a prima facie case." Harrison v. McMillan, 828 So. 2d 756, 763 (Miss. 2002). The purpose for this rule is that "it gives the opposing party a chance to mend its case and makes the

trial court aware of the moving party's position." Funderburk v. Johnson, 935 So. 2d 1084, 1095 (Miss. Ct. App. 2006).

3.84 In its Motion for Directed Verdict, Gallagher Bassett specifically elaborated upon its belief that the proof before the trial court was legally insufficient to support a verdict. V 31: T 566 ln 25- T 571 ln 10. In this Motion, Gallagher Bassett adopted the arguments presented in both its bench-brief for directed verdict and its Motion for Summary Judgment. Id. In addition, Gallagher Bassett also specifically articulated its arguments concerning the exclusivity clause of workers' compensation. V 31: T 566 ln 25- T 571 ln 10. Gallagher Bassett discussed at length the fact that its handling of the claim was appropriate because a report of injury was never sent to them and that Malone had not put forth proof that was sufficient for a finding of bad faith. Id.

3.85 After the jury rendered its verdict, through its Motion for Judgment Notwithstanding the Verdict as to Malone's claims, Gallagher Bassett (1) renewed its Motion and (2) further argued that setoff was appropriate because of Mississippi's one-satisfaction rule. V26: T 3694; V 26: T 3811. Indeed, Gallagher Bassett fulfilled both the plain language of Mississippi Rule of Civil Procedure 50(a) and the spirit of the specificity requirement: Malone had the opportunity to cure any deficiencies with regard to its proof, and the trial court had the opportunity to consider Gallagher Bassett's arguments. Gallagher Bassett did not waive its right to appeal any issue.

3.86 Nonetheless, despite (1) the plethora of pre-trial motions discussing the issues of this appeal at length and (2) Gallagher Bassett's Motion for Directed Verdict and renewed Motion for Judgment Notwithstanding the Verdict, Malone argues that Nabors somehow waived its right to appeal by not requesting a new trial. Yet the Mississippi Supreme Court has squarely dismissed this argument, explaining "the Mississippi Rule: 'The settled rule in federal courts, contrary to that in many states, is that *a party may assert on appeal any question that has been*

properly raised in the trial court. He is not required to make a motion for a new trial challenging the supposed errors as a prerequisite to appeal.'" Kiddy v. Lipscomb, M.D., 628 So. 2d 1355, 1360 (Miss. 1993) (quoting 11 Wright & Miller, Federal Practice and Procedure, § 2812) (emphasis added). Accordingly, because the issues brought now on appeal have all been properly raised in front of the trial judge throughout the protracted litigation of this suit, Malone's waiver argument must fail.

I. JOHNSTON EXPERT WITNESS

1. Judge Landrum Did Not Abuse His Discretion in Allowing Limited Testimony from Gallagher Bassett's Appropriately Designated and Properly Tendered Expert Witness

3.87 Nabors contends that the trial court erred in multiple ways by allowing Wayne Johnston ("Johnston"), Gallagher Bassett's claims handling expert witness at trial, to testify. First, Nabors contends Judge Landrum abused his discretion in overruling Nabors' Daubert challenge to Johnston's testimony. Second, Nabors submits that Gallagher Bassett's Third Supplemental Response to Interrogatories operated as an attempt to circumvent the MISSISSIPPI RULES OF COURT governing expert designations and that Gallagher Bassett somehow ambushed Nabors through Johnston's limited testimony. Yet both of these arguments are without merit. Indeed, Judge Landrum closely analyzed these issues and decided that limited testimony from Johnston concerning industry standards was appropriate.

2. Judge Landrum Did Not Abuse His Discretion in Overruling Nabors' Daubert challenge to Tendered Expert Wayne Johnston.

3.88 From the outset, as Nabors correctly notes in its Cross-Appeal, the relevant standard of review for this Court is abuse of discretion. University Medical Center v. Martin, 994 So. 2d 740, 745 (Miss. 2008) ("This Court has clearly stated that the acceptance or refusal of expert testimony falls within the sound discretion of the trial court and that this Court will only reverse a trial judge's decision if it was 'arbitrary and clearly erroneous.' This Court has also

stated that '[a] trial judge's decision as to whether a witness is qualified to testify as an expert is given the widest possible discretion.'") (internal citations omitted).

3.89 At trial, Judge Landrum carefully considered Nabors' Daubert challenge to tendered expert Johnston and properly determined that Johnston was qualified to testify to a relevant issue in the case—industry standards for third party adjusters—because of his forty years of experience in the field. V 33: T 880 ln 8 – T 881 ln 26. Because this Court has mandated that Judge Landrum's determination must receive "the widest possible discretion," Nabors faces a high hurdle indeed in satisfying this burden.

3.90 "In Daubert, the Supreme Court stated that a trial judge must ensure that expert testimony is relevant and reliable." University Medical Center, 994 So. 2d at 745. Concerning relevance, "[e]xpert testimony is relevant if it relates to an issue in the case and would be helpful to the trier of fact in making findings." Id. (citing Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579, 591 (1993). Judge Landrum correctly decided that testimony regarding industry standards was relevant, as it obviously relates to the question of whether Gallagher Bassett's handling of Malone's claim was proper and adequate.

3.91 Second, concerning reliability, "[e]xpert testimony is reliable if it is 'derived by the scientific method' and is not merely 'subjective belief or unsupported speculation.'" University Medical Center, 994 So. 2d at 745 (quoting Daubert, 509 U.S. at 590). In University Medical Center, this Court commented extensively on the reliability requirement:

> The Supreme Court in Daubert set out a non-exhaustive list of reliability factors: whether the scientific theory can be tested, whether the theory has been published or reviewed by peers, whether there is a potential or known rate of error, and **whether the theory is generally accepted in the expert's field**. The Supreme Court later clarified that the Daubert factors **should be applied with flexibility and with attention to the specific facts of each case**. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 150-51 (1999). This Court has adopted the Daubert analysis as modified by Kumho Tire.

University Medical Center, 994 So. 2d at 745 (emphasis added). In addition MISSISSIPPI RULE OF EVIDENCE 702 requires that expert testimony must be based on sufficient facts or data, the product of reliable principles and methods, and that the witness must have reliably applied the principles and methods to the facts of the case. Judge Landrum allowed extensive questioning of Johnston to determine the reliability of his testimony. Johnston testified that he possessed over forty years experience in the field and that he has been licensed as an adjuster in Mississippi since this state began issuing such licenses. After careful consideration, Judge Landrum articulated the following ruling: "I find that this man's testimony based on his background, education and the standards that are required under Daubert is reliable or will be reliable testimony, will be credible testimony accepted of the Court based on that." V 33: T 882 ln 1-13.

3.92 Importantly, Judge Landrum carefully warned counsel for Gallagher Bassett to limit questioning to the precise issue of industry standards. V 33: T 880 ln 8-19. The judge likewise warned Nabors' counsel that anything asked on cross-examination which exceeded the bounds of this narrow scope would open the door for broader questioning on re-direct. V 33: T 881 ln 18-25. Judge Landrum vigilantly oversaw the questioning of Johnston, and counsel for Gallagher Bassett carefully adhered to Judge Landrum's mandate. Indeed, the careful consideration that Judge Landrum paid to this issue indicates that, had counsel for Gallagher Bassett exceeded the authority granted by Judge Landrum, repercussions certainly would have been swiftly forthcoming. In his sound discretion, Judge Landrum decided that all questioning was appropriate. Judge Landrum clearly did not abuse his discretion in allowing Johnston's testimony.

3. Gallagher Bassett Properly Designated Expert Witness Wayne Johnston More Than One Year Before Trial

3.93 Nabors contends that Gallagher Bassett's Third Supplemental Response to Interrogatories operated as an attempt to circumvent the MISSISSIPPI RULES OF COURT governing

expert designations and that Gallagher Bassett somehow ambushed Nabors through Johnston's limited testimony.[18] The record, however, clearly belies Nabors' argument on this issue. First, in its Designation of Expert Witnesses, Gallagher Bassett designated Wayne Johnston as one of its expert witness on July 28, 2005, which was more than one year before trial. By Nabors' own admission, the MISSISSIPPI RULES OF COURT only require sixty days notice before trial. V 19: p. 2735-36. Within this designation, Gallagher Bassett specifically denoted that Johnston was "expected to testify that the standard in the industry generally is that Third-Party Claims Administrators and Adjusters open workers' compensation files for adjustment upon receipt of the documentation of the employer's First Report of Injury." Id. Further, the designation stated that Johnston would testify that, according to the industry standards, Gallagher Bassett handled the claims in a timely fashion. Id. Importantly, Gallagher Bassett also disclosed that "[Johnston's] opinions are further based upon his experience as a workers' compensation claims professional since 1966." Id. Second, Gallagher Bassett again apprised Nabors of this exact information in Gallagher Bassett's Supplement to Designation of Expert Witnesses which was filed on June 28, 2006 (sixty-one days before trial) and—as it pertained to Johnston—was identical to Gallagher Bassett's initial designation. As discussed above, Judge Landrum took great care to limit Johnston's testimony to the designation. Johnston was only allowed to testify to industry standards and whether he believed that Gallagher Bassett met these standards. Clearly the scope of Johnston's ultimate testimony at trial, not to mention his expertise,[19] was divulged to Nabors in a timely fashion.

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[18] Nabors also argues that Gallagher Bassett improperly supplemented the scope of expert witness Robert Underdown's possible testimony in its Third Supplemental Responses to Plaintiff Gary Lee Malone's First Set of Interrogatories. Gallagher Bassett disputes this contention, as the supplementation to Underdown's potential testimony served only to clarify the precise testimony that Underdown was prepared to give and did not broaden the initial designation. Yet Gallagher Bassett only called expert witness Johnston to testify at trial. Accordingly, any reference to Robert Underdown is entirely inconsequential because Underdown did not testify at trial.

[19] Nabors also complains that "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

J. IN ADDITION TO DENYING MALONE'S REQUEST FOR A NEW TRIAL ON BOTH COMPENSATORY AND PUNITIVE DAMAGES, THIS COURT SHOULD REVERSE AND RENDER THE JURY'S VERDICT BASED ON PROXIMATE CAUSE

3.94 Almost as an afterthought, Malone spends all of one sentence requesting a new trial on damages alone.[20] Yet it is well settled under Mississippi law that the amount awarded to a Plaintiff in damages is to be left to the sound discretion of the jury. Mississippi State Highway Comm'n v. Antioch, 392 So. 2d 512, 514 (Miss. 1981). A jury's verdict can only be set aside where it is so unreasonable in amount that it is beyond all measure, unreasonable and outrageous. Id. Malone simply asks this Court to require a second trial on damages because he is not satisfied with the amount the jury awarded. The jury in this case deliberated for almost four hours after closing arguments. Clearly, the jury reached its decision in the case after considering all of the evidence.

3.95 Furthermore, as this Court is aware, Malone and Nabors entered a Mary Carter Agreement prior to trial under which Nabors paid $1,500,000. Counsel for Malone and Nabors introduced as an exhibit the settlement and amount and discussed the $1,500.000 payment during voir dire and throughout the case. The jury venire was informed that Malone would be requesting money in addition to the $1,500,000 already paid. Malone and Nabors entered the Mary Carter Agreement under which they both engaged in a trial strategy of letting the jury know of the $1,500,000 payment by Nabors. This was the agreement they made, and this was the agreement upon which they tried this case. They now ask the Court to correct their mistake. The Court properly exercised discretion and allowed the jury to sort out the damages and

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Mississippi." This contention is difficult to reconcile, given (1) the plain language of Gallagher Bassett's Designation of Expert Witnesses on July 28, 2005 (which states that his testimony will be based on his experience as a professional in the field since 1966) and (2) this identical language contained in Gallagher Bassett's Supplement to Designation of Expert Witnesses on June 28, 2006 (filed sixty-one days before trial).

[20] Gallagher Bassett prays that this Court will consider the fact that Malone used only one sentence and cited absolutely no authority to address this argument on cross-appeal. Accordingly, Malone should be estopped from expanding his argument on Reply and thereby depriving Gallagher Bassett with the opportunity to respond.

allocations in this case. The jury made clear in its findings that it awarded Malone no more than $250,000 in damages.

3.96 Finally, the record is rife with further evidence that Malone's injuries were not caused by Gallagher Bassett. This issue is addressed at length in Gallagher Bassett's Appellant's Brief. For the reasons stated therein, Gallagher Bassett respectfully requests this Court reverse the judgment awarded in favor of Gary Lee Malone and render judgment in favor of Gallagher Bassett.

IV. Conclusion

4.1 Gallagher Bassett seeks the following relief from this Court. Gallagher Bassett seeks an Order of this Court reversing the judgments in favor of Gary Malone and Nabors Drilling USA, L.P. against Gallagher Bassett and rendering judgment in favor of Gallagher Bassett on all issues in this case.

Respectfully submitted,

GALLAGHER BASSETT SERVICES, INC.

By: _____
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CERTIFICATE OF SERVICE

I, Michael A. Heilman, do hereby certify that I have this day caused to be served, via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing document to:

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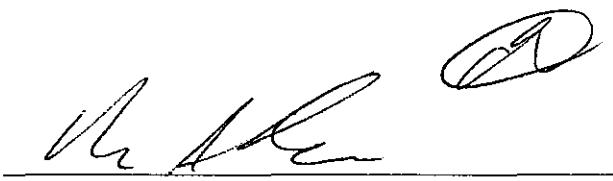
Honorable Billy Joe Landrum
Circuit Court Judge
Post Office Box
Laurel, Mississippi

This the 29th day of February, 2008.

MICHAEL A. HEILMAN

CERTIFICATE OF FILING

I certify that I have deposited the original and four (4) copies of the Appellant Reply/Cross-Appellee's Brief with the Clerk of the Mississippi Supreme Court on the 20th day of February, 2009.



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