IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2007-CA-00585

GALLAGHER BASSETT SERVICES, INC. **DEFENDANT/APPELLANT**

VERSUS

GARY LEE MALONE AND
NABORS DRILLING, USA **PLAINTIFFS/APPELLEES**

APPEAL FROM THE CIRCUIT COURT
OF JONES COUNTY, NUMBER 2003-230-CV12

BRIEF OF APPELLEE/CROSS-APPELLANT, GARY LEE MALONE

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

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SO CERTIFIED, this the 17th day of November, 2008.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND OTHER RULES

OTHER SOURCES

STATEMENT OF THE ISSUES

I. Whether, by not raising certain issues in its post-trial motions as to Appellee/Cross-Appellant Gary Lee Malone, Appellant, Gallagher Bassett Services, Inc., waived and lost the right to raise those issues on appeal?

II. Whether the particular positions taken in Gallagher Bassett's appeal are without merit?

A. Whether through an application of proper legal standards Gary Lee Malone established a claim for bad faith denial of workers' compensation benefits and medical expenses, so that the jury verdict in his favor was proper and based on abundant and appropriate evidence?

1. Whether the exclusive remedy provision of the Mississippi Workers' Compensation Act is inapplicable, and, whether from a legal standpoint, the principal issue is whether Gallagher Bassett denied benefits or medical care without having a legitimate or arguable reason for doing so, rather than whether it acted with a subjective intent to injure.

2. Whether the bad faith claims asserted in this action by Gary Lee Malone are separate and distinct from his injury at work?

3. Whether the evidence presented by Gary Lee Malone at trial established a claim for bad faith denial of workers' compensation benefits and medical expenses?

B. Whether the claims of Plaintiff, Gary Lee Malone, are not barred by an alleged failure to properly reserve his right to pursue a bad faith action?

C. Whether at trial, Plaintiff, Gary Lee Malone, established proximate causation through clear and direct evidence?

D. Whether any application of the mitigation rule was waived, and whether that doctrine does not otherwise bar or reduce Gary Lee Malone's damages?

E. Whether Gallagher Bassettt is not entitled to settoff?

III. Cross-Appeal

A. Whether the Circuit Court erred in failing to conduct a separate procedure in punitive damages, and the case should be remanded for a new trial on punitive damages only?

B. Whether, in the alternative, the case should be remanded for a new trial on both compensatory and punitive damages only?

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

This civil action was commenced by the filing of the Complaint by the Appellee, Gary Lee Malone, on December 3, 2003. (R. 3). The Complaint named as Defendants Malone's employer Nabors Drilling USA, Inc., ("Nabors") and alleged carrier, National Union Fire Insurance Company of Pittsburgh, P.A., the third-party administrator for Nabors, Gallagher Bassett Services, Inc., and Nabors' employee, Robert Holbrook. The Complaint alleged a bad faith denial of workers' compensation benefits and medical expenses.

On September 30, 2005, Appellee Nabors filed its Cross-Claim against Gallagher Bassett. (R. 2488). On October 14, 2005, Appellee Malone resolved his claims with Appellee Nabors. (GB Ex. 2a). The parties entered into a written agreement, commonly referred to as a Mary Carter Agreement, whereby Nabors paid $1,500,000.00, to Malone and agreed that any sums collected by either party against Gallagher Bassett would be divided with Nabors receiving the first $250,000.00, and thereafter Malone and Nabors dividing any sums equally. (GB Ex. 2a). On November 2, 2005, Gallagher Bassett filed its Cross-Claim against Appellee Nabors. (R. 2508).

The cause came on for trial on Monday, August 28, 2006. At the conclusion of the proof, the jury found for Nabors Drilling USA, LP and assessed damages in the amount of $1,250,000.00, on its Counterclaim filed against Gallagher Basset t Services, Inc. The jury also awarded compensatory damages on behalf of Appellee, Gary Lee Malone, against Gallagher Bassett Services, Inc., and assessed compensatory damages of $250,000.00, and assigned forty-two and one-half percent (42.5%) fault to the Gallagher Bassett Services, Inc. (R. 3611-13). Final Judgments were entered pursuant to the jury's verdict on November 6, 2006. (R. 3682-84).

After the return of the jury verdict, the Appellant Gallagher Bassett filed its Motion for

Setoff. (R. 3620). After entry of Judgment, the Appellant Gallagher Bassett filed its Motion to Enter Judgment Notwithstanding the Verdict on Damages, to Allow a New Trial on Issues of Damages and/or to Grant Alternative, Additional or Other Relief. Nabors and Malone also filed Motions for a JNOV and for a new trial on damages. The Court entered Orders denying all post-trial Motions filed by all parties. (R. 3850-61). All parties filed timely Notices of Appeal and the Gallagher Bassett posted supercedes bond.

B. Statement of Facts[1]

On July 28, 2000, Appellee/Cross-Appellant, Gary Lee Malone, injured his right lower leg while working as a motorman for Nabors Drilling U.S.A., Inc. (T. 271). As Mr. Malone reached to open a valve, he slipped on some wooden boards, and his right leg then collided with an I-beam in a drilling rig's substructure. (T. 272). The resulting impact opened a significant gash over the part of Mr. Malone's right lower leg where a cyst had been removed approximately ten (10) years earlier and infections had also occurred sporadically thereafter, usually at intervals of years. (T. 272). When those infections occurred, they were successfully treated by family practitioners within

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In this case, each of the three parties presented testimony from certain witnesses through depositions. Altogether, depositions were used to present testimony from the following eight (8) individuals: Deborah Duckett Robichaux, Richard M. Rideout, Kenneth Picton, Jamie McPherson, Dr. William E. Moak, Dr. Keith Melancon, Dr. Rocco Barbieri, and Jerry Poole. During the case-in-chief of the plaintiff, Gary Lee Malone, the parties presented certain testimony from the depositions of Dr. William E. Moak, Dr. Keith Melancon, Jamie McPherson. Deborah Duckett Robichaux, Richard M. Rideout, and Kenneth Picton. Later in the trial, they presented certain testimony from the deposition of Dr. Rocco Barbieri in Nabors Drilling USA's case-in-chief, as well as certain testimony from the deposition of Jerry Poole during the case-in-chief of Gallagher Bassett Services, Inc. After the record for this appeal was initially prepared, the trial court entered an order (R.E.2), upon motion of appellee/cross-appellant, Gary Lee Malone (R.E.1), to correct and clarify the presentation of the deposition testimony from the foregoing witnesses that was read to the jury at trial. As a result of that order, the testimony from each of those witnesses was placed in a separate deposition binder. When the binders became part of the record on appeal, they were placed by the court reporter in the box of exhibits, where they are currently located. As a result, in making references in this brief tothe testimony contained in those binders, the appellee/cross-appellant first designates the name of the witness and then the number(s) of the page(s) containing the cited testimony. The pages in the binders for each witness were Bates numbered, because testimony was not always presented in the same order as the original depositions. The portions of the testimony read to the jury were also highlighted with a yellow marker.

relatively short periods of time and without any referrals to specialists. (Moak, 12).

Because the collision with the I-beam broke Mr. Malone's skin and opened a wound, he immediately reported the injury to his toolpusher, Bobby Wallace, and also completed an accident report on a standard Nabors form. (T. 204, 273-274). After that meeting with Mr. Wallace, Mr. Malone applied first aid ointment and bandages to his wound for the duration of his hitch. (T. 274). When his hitch ended, he returned home for approximately a week, where he continued to apply topical ointment and also began taking some unused antibiotics in his medicine cabinet. (T. 275). On August 7, 2000, as he returned to work, Mr. Malone stopped in Richton and saw Dr. W. E. Moak. (T. 275; Moak, 18). Dr. Moak prescribed an oral antibiotic and also advised Mr. Malone to continue applying a topical antibiotic ointment. (Moak, 21).

As soon as Mr. Malone's next hitch ended, he promptly returned to Dr. Moak on August 14, 2000. (T. 276; Moak, 23). At that time, however, Dr. Moak discovered that Mr. Malone's wound had deepened, leaving roughly a centimeter of bone exposed. (Moak, 23). Dr. Moak thus immediately arranged for Mr. Malone to see an orthopedic specialist in Hattiesburg. (Moak, 23). Dr. Moak also told Mr. Malone that because his bone was exposed, he would need a muscle flap and skin covering. (Moak, 23). After seeing Dr. Moak on August 14, Mr. Malone telephoned toolpusher Wallace at his home that evening and advised him of the impending surgery and skin graft. (T. 278; Ex. P-6; GB R.E. 17). During that telephone conversation, Mr. Wallace advised Mr. Malone that if he wanted workers' compensation benefits, he needed to speak with Nabors's manager in Laurel, Rob Holbrook. (T. 209, 278).

Two days later, on August 16, 2000, Mr. Malone met with Rob Holbrook and requested workers' compensation coverage. (T. 280). Earlier that day, Mr. Malone had seen two orthopedic specialists in Hattiesburg, Dr. Keith Melancon and Dr. Rocco Barbieri, and learned that he needed

a series of surgeries and would have to miss a significant amount of work. (T. 283).

Within a short period after Mr. Malone spoke with Mr. Holbrook on August 16, Nabors notified its third-party administrator, Gallagher Bassett Services, Inc., of Mr. Malone's injury at work and of his claim for workers' compensation benefits. (T. 380). At that point, an adjuster for Gallagher Bassett named Deborah Duckett Robichaux received the claim, and she soon telephoned toolpusher Wallace in his office on the rig and questioned him about Mr. Malone's injury and medical condition. (T. 780). At trial, Ms. Robichaux reviewed Gallagher Bassett's telephone records and testified that she placed the call to Mr. Wallace at approximately 10:04 a.m. on August 16, 2000. (Ex. P-9; T. 780). Mr. Wallace also reviewed the same telephone records and agreed that he received a call from Ms. Robichaux on August 16. (Ex. P-9; T. 214-215).

An audiotape and a transcript (Ex. P-6; GB R.E. 17) of Ms. Robichaux's conversation with Mr. Wallace further confirm that is when the call occurred. As that transcript discloses, when Ms. Robichaux began questioning Mr. Wallace, she remarked that she had the "understanding that Mr. Malone will be filing a workers' compensation claim based on a leg injury", and as she then described that injury, she explained that "they said that a few weeks ago he scraped his leg." (Ex. P-6 ; GB R.E. 17; Robichaux, 71-72). In his response, Mr. Wallace specifically stated, "It happened on the 28th." (Ex. P-6; GB R.E. 17; Robichaux, 76). Mr. Wallace then advised Ms. Robichaux of the call he received from Mr. Malone "on the 14th" and indicated that "he just called me on Monday". (Ex. P-6; GB R.E. 17; Robichaux, 78). Therefore, since it is undisputed that Mr. Malone's injury at work occurred on July 28, 2000, and since it is also undisputed that Mr. Malone's call to Mr. Wallace occurred on Monday, August 14, 2000, it is likewise clear that in Ms. Robichaux's discussions with Mr. Wallace occurred two days later on August 16, 2000, just as Ms. Robichaux and Mr. Wallace testified at trial.

There is also a two-page document with Ms. Robichaux's handwritten notes regarding Mr. Malone's claim, and it is actually dated August 16, 2000. (Ex. P-3; GB R.E. 14; Robichaux, 55-56). Clear evidence thus establishes that as of August 16, 2000, Gallagher Bassett's adjuster, Deborah Duckett Robichaux, had not only learned of Mr. Malone's injury at work and of his desire to receive workers' compensation benefits, but had also made detailed notes, contacted toolpusher Wallace, and obtained his recorded statement. Through speaking with Mr. Wallace, Ms. Robichaux additionally learned or confirmed that Mr. Malone had received regular medical treatment for his injury and needed to undergo surgery. (Ex. P-6; GB R.E. 17; Robichaux, 78). Mr. Wallace specifically advised her that Mr. Malone needed a skin graft. *Id.*

Thus, in light of the information that Ms. Robichaux possessed in mid-August, 2000, it would have been readily apparent to her, and she would have clearly been on notice, that there was a workers' compensation claim from Mr. Malone, which she then needed to investigate appropriately. The three principal witnesses for Gallagher Bassett – Richard Rideout, the company's Executive Vice President, Kenneth Picton, the Vice President for Field Services in the Southeast Zone, and Deborah Robichaux, the adjuster handling Mississippi claims – all acknowledged that when an employer like Nabors notifies Gallagher Bassett that an employee has been injured at work and is seeking medical treatment, Gallagher Bassett and its adjusters will then be aware of the presentation of a claim. (Picton, 29-31; Robichaux, 39; Rideout, 39).

In describing when a workers' compensation claim is assigned or presented to Gallagher Bassett, Messrs. Rideout and Picton additionally testified that Gallagher Bassett can accept and handle such a claim before it receives a form or document containing an employer's first report of injury. (Picton, 32-35; Rideout, 28-32). As Mr. Rideout acknowledged, Gallagher Bassett's printed rules and guidelines specifically require a claim's investigation and evaluation to begin upon receipt

of "either a first report of injury ***or other notice***." (Rideout, 24-28; R.E. 3, p. 2.1) (emphasis added). In explaining that particular rule, Mr. Rideout conceded that "notice" given orally through a telephone call can be sufficient, and he noted that as long as Gallagher Bassett receives the pertinent "information from the employer in some fashion, then we will go with that." (Rideout, 31-32). Mr. Picton likewise testified that while the receipt of an employer's First Report of Injury is usually desirable, Gallagher Bassett can still open a file and begin handling a claim without such a form, and Mr. Picton readily acknowledged that is what had happened in this case, when Ms. Robichaux obtained a statement from toolpusher Wallace before she received a First Report of Injury. (Picton, 29-31, 35). Messrs. Picton and Rideout further explained that in those instances where an employer failed to provide a First Report of Injury initially, it then became the responsibility of Gallagher Bassett's adjuster to follow-up with the employer and obtain the report as the processing of the claim continued. (Picton, 36; Rideout, 35-36).

Another witness, Alice Langford, also confirmed that in the course of Nabors' customary dealings with Gallagher Bassett, Gallagher Bassett did not require a form containing an employer's First Report of Injury, before it would recognize the existence of a workers' compensation claim and begin evaluating it. (T. 411-412, 477-478). Ms. Langford is a claims coordinator for John L. Wortham and Son, an insurance broker for Nabors, and she is responsible for monitoring the work of Nabors' third-party administrators. (T. 369-371). In her testimony at trial, Ms. Langford explained that Nabors did not have to submit a First Report of Injury to assign a workers' compensation claim to Gallagher Bassett, and that Gallagher Bassett routinely accepted such claims upon being notified of an employee's injury by telephone. (T. 411, 477-478). Ms. Langford said that in her dealings with Gallagher Bassett, she personally used the telephone to assign such claims several times a year. (T. 412). She also carefully explained why other forms of "notice", such as

"oral notice" by telephone, were useful and necessary, and she confirmed that when a written report of injury was needed for one reason or another, it was the responsibility of Gallagher Bassett's adjuster to follow-up with the employer and to obtain the form in the course of continuing to handle the claim. (T. 411-412, 477-478).

In this case, however, Ms. Robichaux's acquisition of a statement from toolpusher Wallace in August, 2000, provides the most salient and compelling evidenced that Gallagher Bassett would recognize the existence of a workers' compensation claim without first receiving an employer's First Report of Injury. In this regard, Ms. Robichaux testified over and over again that she would never have sought and obtained Mr. Wallace's statement, if a claim had not already been presented to Gallagher Bassett. (Robichaux, 81, 84, 121, 162). She said that without such a claim, there would have been no reason for her to take such a statement from Mr. Wallace or anyone else. (Robichaux, 81, 84, 162), and she emphasized that the statement's acquisition meant that Gallagher Bassett had already received a claim from Mr. Malone. (Robichaux, 121). Mr. Rideout and Ms. Langford also corroborated Ms. Robichaux's testimony on this point. Mr. Rideout said that he had no reason to challenge or dispute that assertion by Ms. Robichaux, and he also acknowledged that under Gallagher Bassett's applicable practices and procedures, statements were only to be taken when it was believed that a claim was being opened. (Rideout, 66-68). For her part, Ms. Langford confirmed that when Ms. Robichaux took Mr. Wallace's statement in August, 2000, it clearly indicated that Nabors had already assigned a claim to Gallagher Bassett. (T. 380).

It is thus clear, from an abundance of evidence, that when Ms. Robichaux obtained a recorded statement from toolpusher Wallace in August, 2000, she had recognized the existence of Mr. Malone's workers' compensation claim and had started taking action to investigate and evaluate it.

At that point, under applicable industry standards and Gallagher Bassett's own rules and guidelines, Ms. Robichaux had a duty to make, within a period of twenty-four (24) hours, a three-point contact, which, if it had been made, would have consisted of 1) a consultation with the employer, 2) an interview with Mr. Malone, and 3) an acquisition of the relevant medical records. (T. 375-376; Robichaux, 39-40; T. 832- 834; Rideout, 72-77). In their testimony at trial, both Ms. Robichaux and Mr. Rideout recognized that an acquisition of the appropriate medical records is especially important in evaluating a worker's compensation claim. Ms. Robichaux agreed that without the necessary medical records, it is impossible to make a meaningful assessment and evaluation. (Robichaux, 41). She also acknowledged that medical records are absolutely essential in evaluating whether an accident at work aggravates a pre-existing condition in a way that make a claim compensable. (Robichaux, 42). Mr. Rideout testified that Gallagher Bassett's adjusters need to obtain all of the medical information that is relevant to a claim, so they can evaluate questions of causation, particularly the question of whether a work injury has aggravated a pre-existing condition. (Rideout, 56-59, 75-76).

As Ms. Robichaux herself explained, therefore, the basic purpose of a three-point contact is to begin investigating a claim and obtaining the information that is needed to evaluate it. (Robichaux, 38-42). Ms. Robichaux also explained that a third-party administrator like Gallahger Bassett evaluates a claim, so it can make a decision on whether the claim should be approved or denied. In making those decisions, however, Ms. Robichaux stated that she did not need Nabors' approval (Robichaux, 37 -38), and Alice Langford explained why that was the case when she testified. Mr. Langford noted that Nabors does not have a facility for handling claims and also lacks employees who are qualified and licensed to adjust claims in Mississippi. (T. 374 -375). For that reason, Nabors retained Gallagher Bassett to process and handle worker's compensation claims,

since it is licensed to adjust those claims in this state. (T. 374-375). Ms. Langford also explained that when Gallagher Bassett assumed that responsibility, it thereby obligated itself to investigate the claims and either accept or deny them. (T. 376). Ms. Robichaux likewise confirmed that the ultimate responsibility for deciding a claim's compensability was held by Gallagher Bassett, rather than Nabors. (Robichaux, 181-182).

It is also clear that if Gallagher Bassett had actually performed a three-point contact in August, 2000, and obtained the relevant medical records at that time, it would have concluded that Mr. Malone's claim was compensable. Mr. Rideout testified that Gallagher Bassett not only admitted that Mr. Malone had experienced an on-the-job injury, but also admitted that his subsequent need for medical treatment was related to his injury at work. (Rideout, 45). Ms. Robichaux then acknowledged that if she had conducted a three-point contact in August, 2000, and otherwise performed a proper investigation, Mr. Malone's claim would have been treated as compensable in August, 2000, as well. (T. 847).

So from a factual standpoint, the problem for Gallagher Bassett in this case is that in August, 2000, it never performed a three-point contact or completed an investigation of Mr. Malone's workers' compensation claim. After Ms. Robichaux interviewed toolpusher Wallace in mid-August 2000, her efforts to investigate Mr. Malone's claim came to a sudden and abrupt halt. She abandoned any further evaluation of his claim and failed to undertake any component of the three-point contact. Once she had spoken with Mr. Wallace, she never followed-up and consulted with Nabors. (Rideout, 72-73). She also failed to contact Mr. Malone and interview him. (T. 833; Rideout, 73-74). Ms. Robichaux additionally failed to determine the names of Mr. Malone's physicians and to obtain the medical records relevant to his claim. (T. 834, 846; Rideout, 75-77).

As Alice Langford noted, because Ms. Robichaux failed to undertake a three-point contact

and to complete an investigation of Mr. Malone's claim in August, 2000, her efforts to evaluate his claim simply amounted to "nothing." (T. 427). In this regard, Ms. Langford explained that even though Ms. Robichaux had a clear duty to continue investigating the claim by contacting Mr. Malone and obtaining the relevant medical records, she instead did absolutely nothing and thereby effectively denied the claim on Gallagher Bassett's behalf. (T. 408).

At trial, Ms. Robichaux attempted to justify her failure to conduct a proper investigation in August, 2000, by claiming that Ms. Langford had instructed her to never open a file and pursue a claim without first receiving from Nabors a First Report of Injury form - the official Mississippi Workers' Compensation form known as a B-3. (T. 782-783). Ms. Langford, however, throughly disputed and dispelled that contention in her testimony (T. 411-412, 477-478), and it is also clear that Ms. Robichaux's assertion in that regard is nothing more than an attempt to defy gravity, since she acknowledged that when she subsequently opened a file on Mr. Malone's claim fifteen (15) months later, after she had received a copy of an accident report from Jerry Poole of Nabors, she did so without having a B-3 or First Report of Injury. (T. 824-826). In addition, when Ms. Robichaux's pre-trial deposition testimony was presented to the jury during Mr. Malone's case-in-chief. She repeatedly testified that she would have never obtained a statement from toolpusher Wallace, unless Gallagher Bassett had already received an assignment of a claim and started to pursue it. (Robichaux, 81, 84, 121, 162). Of equal importance, Gallagher Bassett's other key witnesses, Richard Rideout and Kenneth Picton, also testified through their pre-trial depositions during Mr. Malone's case-in-chief, and both of them acknowledged that Gallagher Bassett did not have to receive any form or document containing a first report of injury, much less a B-3, before it accepted and began handling a worker's compensation claim for either Nabors or one of its other clients. (Picton, 32-35, 76; Rideout, 24-32, 35-38). As Messrs. Rideout and Picton conceded,

Gallagher Bassett's own rules and guidelines specifically require a claim's investigation to begin upon receipt of "other notice", and oral notice can be sufficient. (Picton, 32-35; Rideout, 28-32, 35-38; R.E. 3 p. 2.1).

At trial, however, Mr. Rideout retreated from his earlier position on this factual issue and tried to insist that Gallagher Bassett needed to receive a B-3 or First Report of Injury before it could open a file and handle a claim. (T. 712). But, Mr. Rideout then had to concede that he had never been a party to any discussions with Ms. Langford, and that he thus had no knowledge of the customs and actual practices which Nabors, J.L. Wortham, and Gallagher Bassett followed with regard to presenting and accepting claims over the telephone. (T. 741).

Furthermore, Mr. Rideout, Mr. Picton and Ms. Robichaux all conceded that an employer's failure to initially provide a First Report of Injury was essentially a minor wrinkle in the process of handling a workers' compensation claim. Each of them testified that in those instances where such a failure occurred, Gallagher Basset's adjuster simply had an obligation to follow-up with the employer and obtain the report. (T. 747-748; 752; Picton, 36; Rideout 35-36; T. 808). Alice Langford additionally confirmed that was the appropriate method for addressing any such lapse by Nabors. (T. 411-412, 414, 467, 477, 478). So when all of the pertinent evidence is considered together, it becomes clear that when Gallagher Bassett takes the position that it could not recognize or adjust a workers' compensation claim, without first receiving a B-3 or First Report of Injury from an employer, it is simply exalting a minor detail of the claims handling process to a procedural and substantive significance that is completely unwarranted. If Gallagher Bassett did not have a First Report of Injury, it simply needed to ask the employer to furnish one.

It is also clear that Ms. Robichaux's testimony was riddled with enough inconsistences and contradictions to undermine her credibility to allow the jury to view her cynically. In her pre-trial

testimony, which was read to the jury at trial, Ms. Robichaux insisted that in August, 2000, she never handled any matter relating to Mr. Malone or obtained any statement from toolpusher Wallace. (Robichaux, 60, 63, 68, 77, 162). But when she came to trial, she admitted that she actually obtained the statement from Mr. Wallace on August 16, 2000. (T. 780). Ms. Robichaux also testified in her pre-trial deposition that at the time that she obtained Mr. Wallace's statement, she already had a copy of Nabors' accident report form, but during the trial, she denied that she had a copy of that report at the time she questioned Mr. Wallace. (Robichaux,184; T. 781). Ms. Robichaux additionally vacillated on the amount of authority or control that she had in determining the compensability of a claim. At trial, she said she could not accept or deny a claim without Nabors' permission, but during her pre-trial testimony, she clearly and specifically stated that Nabors' approval was not required. (T. 777-778; Robichaux, 37-38, 181-182).

Consequently, there was plenty of evidence at trial to permit a jury to conclude that Gallagher Bassett's witnesses were not credible, and that Ms. Robichaux herself had no excuse or justification for abandoning the required three-point contact and thereby failing to complete an investigation of Mr. Malone's claim in mid-August, 2000.

By effectively denying the claim at that time, moreover, Gallagher Bassett's actions had a severe and profound impact on Gary Malone. In order to earn more money, so he would then be in a better financial position to miss work for a protracted period, Mr. Malone postponed surgery and then worked eight straight weeks, rather than his normal rotational hitches. (T. 284). His surgery was thus delayed for over seven (7) weeks, and the treatment which he subsequently received failed to eradicate the infection in his leg. (Melancon, 47-50). He then developed intractable osteomyelitis and suffered a series of persistent, recurrent infections in his right lower leg, until that portion of his limb was eventually amputated two years later. (T. 302; Melancon, 40-

42).

At trial, Mr. Malone also established that the delay in his treatment, which resulted from Gallagher Bassett's abandonment and denial of his workers' compensation claim in August, 2000, was the proximate cause of his recurrent infections and eventual amputation. One of Mr. Malone's treating physicians, Dr. Keith Melancon, testified that the delay in treatment proximately caused those complications and problems. (Melancon, 49-50, 67-69).

Following the amputation of Mr. Malone's right lower leg, he necessarily placed greater stress on his surviving left leg and thereby developed a significant amount of arthritis in his left knee. (Melancon, 53-54, 58-59). By the time of trial, moreover, Mr. Malone had undergone eight (8) previous surgeries. He also explained that as he experienced recurring infections in his right leg, and as he then convalesced and recovered from his surgeries, he had to endure a tremendous amount of pain. (T. 287, 291). After he lost his right lower leg and developed arthritis in his left knee, his mobility became limited and problematic. (T. 303, 307-311; Melancon, 63-64). The skin on his residual right limb also remained tender and subject to breaking down and developing rashes, sores, open wounds, infections and other problems. (T. 308, 315-317; Melancon, 60-63). Because of those difficulties, Mr. Malone has to spend significant periods of time in a wheelchair when he is unable to use a prosthesis, and he will need to continue doing so in the future. (Melancon, 64-66).

It was also undisputed that he had been rendered permanently and totally disabled and would never be able to secure gainful employment in the future. (T. 493-496; Melancon, 66). The CPA who testified for Mr. Malone at trial carefully demonstrated that as a result of lost wages exceeding his workers' compensation benefits, lost household services, and future medical expenses, he had experienced actual economic losses ranging from $1,129,000.00 to $1,382,000.00. (T. 539).

It is thus perfectly understandable that during closing arguments, as Gallagher Bassett's counsel commented on the settlement of $1,500,000.00 paid by Nabors , he repeatedly asserted that Mr. Malone deserved it. (T. 985, 986).

SUMMARY OF THE ARGUMENT

All issues raised by Gallagher Bassett as basis for reversal are barred since they were not properly raised in the trial, with only one exception. After Judgment, the appellant filed its Motion for Judgment Notwithstanding the Verdict ("JNOV") which incorporated by reference a previous motion, a Motion for Setoff. (R. 3620). Gallagher Bassett failed to raise, discuss, comment or cite issues in its post trial motion that are now the basis for its appeal. All contested issues of fact have been and there is no basis to challenge any resolution of fact as contrary to the weight of the evidence.

Malone's claims rest on an alleged bad faith denial of workers' compensation benefits and medical treatment. As a result, the gravamen of his suit does not merely arise from an alleged failure to properly adjust a worker's compensation claim, as Gallagher Bassett's brief suggest, it rest, instead, on the assertion that the Gallagher Bassett denied his claim in bad faith without having a legitimate or arguable reason from doing so. In actions involving an alleged bad faith denial of workers' compensation benefit and medical treatment a plaintiff's claims do not arise from- or "on account of"- his injury a work, but from the conduct of the employer and carried in handling claims that follow such an injury. It is well settled that an action for a bad faith denial of workers' compensation benefits presents the type of separate and independent tort which are beyond the purview of the exclusive remedy provision.

A subjective intent to injure is not one of the essential elements of a claim for a bad faith denial of workers' compensation. As long as a defendant acts with gross negligence, with a reckless

disregard for a plaintiff's rights or in a willful or malicious manner, it is appropriate to view such conduct as an intentional tort within the meaning of the Mississippi Supreme Court's decisions.

Once a workers' compensation claim arises, the carrier and any third party administrator have a duty to conduct a proper and adequate investigation. At a minimum, this duty to investigate requires reasonable efforts to obtain all available medical information relevant to a claim. A basic, minimal investigation also requires claims personnel to interview the insured or claimant. An adequate, meaningful investigation cannot occur if the claimant or insured is never consulted. In addition, to having a duty to properly and adequately investigate a claim, carriers and third party administrators also have a duty to advise a claimant of the decision which is made on his claim and to tell him the plain truth at that time. Here, the third-party administrator suddenly terminated the investigation without having an arguable reason for doing so and without advising the claimant of its action, thus breaching the duties to investigate and the duty to notify the claimant of the outcome. This constitutes an actionable denial of the injured employee's claim for benefits.

It is clear that Mississippi case law has never required a workers' compensation claimant who receives benefits through voluntary payments, or after a hearing on the merits, to explicitly reserve any claims for a bad faith denial of benefits. Gallagher Bassett does not cite such a case, and non exits.

At the trial, Malone established proximate causation through clear and direct evidence. Gallagher Bassett has asserted that this delay in treatment was not the proximate cause of Malone's injuries. However, uncontroverted medical evidence provide that the osteomyeltis, the bone infection that ultimately resulted in amputation of Malone's right leg was not present before 2000 and further testified that the delay in the initial irrigation and debridement was the proximate cause or Malone's loss of a reasonable probability of a substantial improvement in his condition. The

medical proof showed that had the irrigation and debridement not been delayed there was only a small chance that Mr. Malone would have lost his leg. In this case there is no issue raised that the jury was improperly instructed or that admissible or prejudicial evidence was admitted. This Court should, under these circumstances, defer to the jury's fact finding since it evaluated and weighed the evidence.

Whether a person has mitigated damages or the reasonableness of a plaintiff's effort to minimize damages is question for the jury or the trier of fact. It is for the jury to determine whether the plaintiff could have lessened his injury by the exercise of ordinary care and at a reasonable expense. The jury in this case considered plaintiff's contribution and assessed fault. This assessment was made pursuant to Gallagher Bassett's submitted jury instruction. Under Mississippi law, the verdict of the jury is to be given great weight.

Gallagher Bassett is not entitled to setoff. The Mary Carter agreement is not double recovery and Gallagher Bassett is not entitled to set off payments made to Malone in settlement. This is true because a non-settling defendant is not entitled under the well established law to a credit for the settlement if the jury has apportioned fault. Where fault has been apportioned between a non-settling defendant and a settling defendant, the non-settling defendant remains liable for the amount of damages allocated to him in direct proportion to his percentage of fault. A non-settling defendant is not entitled to a credit for the amount paid in settlement by another defendant after fault has been apportioned by the jury. Regarding the Mary Carter agreement, in this case the jury knew all the facts concerning the settlement between Malone and Nabors, including the amount paid and sharing agreement. The jury considered the damages and apportioned fault under section 85-5-7.

Regarding the cross-appeal of Malone. The Circuit Court erred in failing to conduct a separate procedure in punitive damages, and the case should be remanded for a new trial on punitive

damages only. Once the jury awarded compensatory damages to both of Malone and Nabors, the trial court was obligated to proceed to a second phase of the trial and to allow a consideration of the issues relating to punitive damages. Malone moved for the commencement of an evidentiary hearing before the jury on the issue of punitive damages. The Trial Court summarily denied Malones' motion, but instead "polled" the jury at the end of the day, at the conclusion of a protracted and hotly contested trial. There is no authority in Mississippi practice for an informal poll of the jury in open court. The Trial Court instructed the jury in the compensatory phase that is could only consider actual damages not in punishment or punitive in nature. The Trial Court failed to commence an evidentiary hearing in the face of a finding by the jury of gross negligence and/or wanton and wreckless disregard of the plaintiff's rights supporting a compensatory award.

ARGUMENT

I. BY NOT RAISING CERTAIN ISSUES IN ITS POST-TRIAL MOTIONS AS TO APPELLEE/CROSS-APPELLANT, GARY LEE MALONE, APPELLANT, GALLAGHER BASSETT, WAIVED AND LOST THE RIGHT TO RAISE THOSE ISSUES ON APPEAL

All issues raised by Gallagher Bassett as basis for reversal are barred since they were not properly raised in the trial court, with only one exception. After Judgment, the Gallagher Bassett filed its Motion for Judgment Notwithstanding the Verdict ("JNOV") on November 16, 2006. (R. 3694). The subject motion was a concise, one page pleading that stated that the appellant incorporated by reference a previous motion, a Motion for Setoff. (R. 3620). Gallagher Bassett failed to raise, discuss, comment or cite issues in its post trial motion that are now the basis for its appeal.

Gallagher Bassett raises one issue in its JNOV but then files a 61 page brief "shotgunning" the Court with unfounded basis for appeal, seeking relief that has been waived.

The singular issue not barred is whether Gallagher Bassett is entitled to a set off for money paid by the co-defendant Nabors to Malone in settlement. (R. 3620). All other basis for relief, issues and error raised by Gallagher Bassett are barred.[2]

In a civil jury case, a post trial-motion for judgment notwithstanding the verdict is necessary for appellate review[3] if the appellant wishes to contend that judgment should have been granted as a matter of law. Miss. R. Civ. P. 50(b); *Miles v. Catchings Clinic*, 601 So. 2d 47, 49 (Miss. 1992); *Harrison v. McMillan*, 828, So. 2d 756, 762-64 (Miss. 2002). A defendant who seeks a directed verdict but fails to renew it in a timely post-trial motion has waived the right to seek judgment as a matter of law on appeal. *See, Miles 601 So. 2d at 49 (citing Mississippi State Highway Comm. v. S.B. Grisham*, 331 So. 2d 925 (Miss. 1976); *T.G. Blackwell Chevrolet Co. v. Eshee*, 261 So. 2d 481 (Miss. 1972); *West Brothers, Inc. v. Barefield*, 124 So. 2d 474 (1960). *Estate of Briscoe*, 255 So. 2d 313, 314 (Miss. 1971)).

In *Miles*, the Mississippi Supreme Court stated: "Miles filed no post-trial motion for judgment notwithstanding the verdict or for a new trial. We have repeatedly held that an assignment of error in this Court—that the evidence did not support the jury's findings—will not be considered by this Court where no timely motion for a new trial was made in the trial court." *Mississippi State Highway Com. v. S.B. Grisham*, 331 So. 2d 925 (Miss. 1976); *T.G. Blackwell Chevrolet Company v. Eshee*, 261 So. 2d 481 (Miss. 1972); *West Brothers, Inc. v. Barefield*, 239 Miss. 530, 124 So. 2d 474 (1960). Also See *Estate of Briscoe*, 255 So. 2d 313,

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[2] In this case, the following issues are barred, since they were not included in Gallagher Bassett's JNOV Motion but still raised on appeal: (1) Was Gallagher Bassett's Handling of Malone's Claim Proper and Adequate, (2) The Exclusivity Clause of the Mississippi Worker's Compensation Act; (3) Proof of Intentional Tort, (4) Bad Faith issues, (5) Proximate Cause issues, (6) Failure of Mitigation, and (7) The One Satisfaction Rule.

[3] Similarly, the U.S. Supreme Court has interpreted the federal rules to require apost-trial motion before sufficiency of the evidence, i.e., judgment as a matter of law, may be argued on appeal. *Unitherm Food Systems, Inc. v. Swift-Eckrich*, 546 U.S. 394; 126 S.Ct. 980; 163 L.Ed.2d 974 (2006).

314 (Miss. 1971). Also, the Mississippi Supreme stated in another case:

> Mississippi appellate practice requires that 'in a civil jury case, a post-trial motion for judgment notwithstanding the verdict is necessary for appellate review if the appellant wishes to contend that judgment should have been granted as a matter of law.' Luther T. Munford, *Mississippi Appellate Practice* § 3.5, at 3-10 (1997). A post-trial motion challenging the sufficiency of the evidence must be field within 10 days after entry of judgment on a jury verdict. M.R.C.P. 50(b); *New Hampshire Ins. Co.* v. *Sid Smith & Assoc., Inc.*, 610 So. 2d 340, 344 (Miss. 1992). M.R.C.P. 50(b) provides the time in which a motion for J.N.O.V. must be procedurally filed.
>
> Here, Julia filed a timely post-trial motion styled as a motion for a new trial. However, McMillan contends that the motion for new trial failed to preserve any specific alleged error regarding the legal sufficiency of the evidence supporting McMillan's verdict in order to support a claim for J.N.O.V. Julia's post-trial motion specifically sought a remittitur or , in the alternative, a new trial on liability and damages. *A motion for J.N.O.V. or a directed verdict must set out specific, not general, facts that demonstrate a failure to establish a prima facie case. Sheffield v. State*, 749 So. 2d 123, 126 (Miss. 1999) (emphasis added).
>
> Therefore, reviewing the post-trial motion for new trial, this Court concludes that Julia is now procedurally barred from requesting this Court to review the legal sufficiency of the evidence on appeal as the Harrisons sought a new trial and not a J.N.O.V.

Harrison v. McMillian, 828 So. 2d 756, 762-65 (Miss. 2002). The facts and law outside the JNOV are procedurally barred by the Mississippi Supreme Court.[4]

In addition, the appellant failed to submit a motion for new trial. Under Mississippi law, an

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[4] The standard of review for a motion for judgment notwithstanding the verdict is as follows:

> [T]he trial court must consider all of the evidence- not just evidence which supports the non-movant's case- in the light most favorable to the party opposed to the motion. The non-movant must also be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so consider point so overwhelmingly in favor of the movant that reasonable men could not have arrived at a contrary verdict, granting the motion is required. On the other hand, if there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied and the jury's verdict allowed to stand.

City of Jackson v. Locklar, 431 So. 2d 475, 478 (Miss. 1983) (see *Paymaster Oil Mill Co. v. Mitchell*, 319 So. 2d 652, 656-57 (Miss. 1975). See also *White v. Yellow Freight Systems, Inc.*, 905 So. 2d 506, 510 (Miss. 2004).

assignment of error in an appellate court that the evidence does not support the jury's finding will not be considered by the appellate court where no timely motion for a new trial is made in the trial court.

Regarding a similar federal procedure situation for omission of a motion for new trial the United States Supreme Court has stated that an assignment of error in an appellate court, the evidence does not support the jury's finding will not be considered by the appellate court where no timely motion for a new trial is made in the trial court:

> This Court has addressed the implications of a party's failure to file a postverdict motion under Rule 50(b) on several occasions and in a variety of procedural contexts. This Court has concluded that, '**[i]n the absence of such a motion' an 'appellate court [is] without power to direct the District Court to enter judgment contrary to the one it had permitted to stand.**' *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 218, 67 S. Ct. 752, 91 L. Ed. 849 (1947). This Court has similarly concluded that a party's failure to file a Rule 50 (b) motion deprives the appellate court of the power to order the entry of judgment in favor of that party where the district court directed the jury's verdict. *Globe Liquor Co. v. San Roman*, 332 U.S. 571;, 68 S. Ct. 246; 92 L. Ed. 177 (1948).

Unitherm Food Systems, Inc. v. Swift-Eckrich, 546 U.S. 394, 126 S.Ct. 980, 987-88, (2006) (emphasis added). Also, it is important to note, that the appellant has complained of a laundry lists errors from the trial court, such as publishing Mary Carter Agreement to the jury. However, it is apparent that many of the subject errors were caused by the appellant at the trial. Moreover, the record is replete with evidence supporting the jury verdict.

In a recent case, the Mississippi Supreme Court has stated that an appellant cannot complain on appeal of alleged errors which he invited or induced:

> We should also note that even Hood would be precluded from raising this assignment of error as its was Hood that created the alleged errors to begin with by informing the jury of all contents of the settlement agreement during voir dire. *See, Brown v. Blackwood*, 697 So. 2d 763 (Miss. 1997) ('One may not complain on review of errors for which he was responsible... an appellant will not be permitted

> to take advantage of errors for the commission for which he was responsible, or which he himself committed, caused, brought about, provoked, participated in, created, or helped to create, or contributed to.') See also *Cummins v. Century 21 Action Realty, Inc.*, 563 So. 2d 1382 (Miss. 1990) (same holding, where trial court denied Cummins's motion in limine pertaining to settlement and Cummins's attorney referred to settlement during voir dire).

Smith v. Payne, 839 So. 2d 482, 486 (Miss. 2002). See also "An appellant cannot complain on appeal of alleged errors which he invited or induced." *Busick v. St. John*, 856 So. 2d 304, 314 (Miss. 2003); ("The appellant cannot complain because of error in its own instruction." *State Highway Comm'n v. Randle,* 180 Miss. 834, 178 So. 486 (1938); *Yazoo v. M.V.R. Co. v. Wade*, 139 So. 403, 404 (1932). Hence, appellant placed the Mary Carter agreement and settlement before the jury and cannot now complain.

The essence of the requirements for motions for new trial and JNOV is to afford the Trial Court an opportunity to cure any alleged error and to give deference to the jury and court that heard and observed the witnesses and proceedings. The trial testimony is extremely important regarding to the appeal, as this case is fact intensive:

> ... this Court must bear in mind the guideline which a trial judge follows in denying or granting a j.n.o.v. or new-trial motion. In so doing, deference will be accorded the judge's determination of whether a jury issue was tendered. Deference will also be accorded the jury's fact-finding because of its position—unlike this Court's—to evaluate and weigh the truthfulness of a witness' testimony.
>
> The demeanor or bearing of voice, the attitude and appearance of the witnesses, all are primarily for inspection and review by the jury. The jury not only has the right and duty to determine the truth or falsity of the witnesses, but also has the right to evaluate and determine what portions of the testimony of any witness it will accept or reject.

American Jackson Life Ins. Co. v. Williams, 566 So. 2d 1172, 1177 (Miss. 1990) (citing *Travelers Indem. Co. v. Rawson,* 222 So. 2d 131, 134 (Miss. 1969); See also *Wells Fargo Armored Serv. Corp.*

v. Turner, 543 So. 2d 154, 157 (Miss. 1989); *Bruner v. University of Southern Miss*, 501 So. 2d 1113, 1116 (Miss. 1987)).

II. THE PARTICULAR POSITIONS TAKEN IN GALLAGHER BASSETT'S APPEAL ARE WITHOUT MERIT

A. Through an Application of Proper Legal Standards, Gary Lee Malone Compellingly Established a Claim for Bad Faith Denial of Workers' Compensation Benefits and Medical Expenses, and the Jury Verdict in His Favor Was Proper and Based on Abundant Evidence

1. The Exclusive Remedy Provision of the Mississippi Workers' Compensation Act is Inapplicable, and, From a Legal Standpoint, the Principal Issue is Whether Gallagher Bassett Denied Benefits or Medical Care Without Having a Legitimate or Arguable Reason for Doing So and Not Whether it Acted With a Subjective Intent to Injure

The appellee's claims rest on an alleged bad faith denial of workers' compensation benefits and medical treatment. As a result, the gravamen of his suit does not merely arise from an alleged failure to properly adjust a workers' compensation claim, as the appellant's brief suggests, it rest, instead, on the assertion that the appellant denied his claims in bad faith without having a legitimate or arguable reason from doing so.

It is clear that for over twenty years, the Mississippi Supreme Court has recognized that the exclusive remedy provision of the Mississippi Workers' Compensation Act does not bar claims for a bad faith denial of workers' compensation benefits and medical treatment. In *Miss. Power & Light Co. v. Cook*, 832 So. 2d 474 (Miss. 2002), the Mississippi Supreme Court expressly reiterated that "the independent tort of bad faith refusal to pay [workers'] compensation is an exception to [the exclusive remedy] provision." *Id.* at 479. In making that holding, the Court cited as supporting authority the following four cases: *Southern Farm Bureau Casualty Ins. Co. v. Holland*, 469 So. 2d

55, 59 (Miss. 1984); *Luckett v. Mississippi Wood, Inc.*, 481 So. 2d 288, 290 (Miss. 1985); *McCain v. Northwestern Nat'l Ins. Co*, 484 So. 2d 1001, 1002 (Miss. 1986); and *Leathers v. Aetna Casualty & Surety Co.*, 500 So. 2d 451, 453 (Miss. 1986).

In the earliest of those four cases, *Holland*, the Court carefully explained that the bar of the exclusive remedy provision is specifically limited, by the precise terms of Miss. Code Ann. Section 71-3-9 (1972), to those claims and causes of action which arise from an employee's **on-the-job injury**. 469 So. 2d at 59. As the language of the statute expressly provides, Section 71-3-9 only shields an employer and carrier from any further "liability... to the employee... **on account of such injury or death**...". *Id.* It does not protect an employer and carrier from separate and independent torts which occur and arise after an employee's work-related injury. *Id.* The Mississippi Supreme Court thus noted in *Cook*, quoting *Peaster v. David New Drilling Co.*, 642 So. 2d 344, 348 (Miss. 1994), that *Holland, Luckett, McCain* and *Leathers* all recognize "exceptions to the exclusivity of the Act but only when based on tortuous conduct subsequent to the work place injury." 832 So. 2d at 479.

In actions involving an alleged bad faith denial of workers' compensation benefit and medical treatment, of course, a plaintiff's claims do not arise from-or **"on account of"**- his injury at work, but from the conduct of the employer and carrier in handling claims for benefits and medical treatment that follow such an injury. For that reason, it is well settled that an action for a bad faith denial of workers' compensation benefits presents the type of separate and independent torts which are beyond the purview of the exclusive remedy provision.

When a claim for a bad faith denial of workers' compensation benefits comes before a circuit court, therefore, the critical issue is not whether the exclusive remedy provision bars such a claim,

as that clearly cannot happen when a separate and independent tort is being presented. Rather, the critical issue facing a circuit court in such as case is whether the defendant's misconduct reaches the level of egregiousness that the independent tort of bad faith requires.

In addressing that issue and determining whether the allegation and evidence are sufficiently egregious to support a bad faith claim, a circuit court is also governed, in cases involving workers' compensation, by exactly the same rules which apply to bad faith denial of other types of insurance, such as health, fire, casualty and accident benefits. *McCain*, 484 So. 2d at 1002. Consequently, in defining the key elements of a bad faith denial of workers' compensation, the courts of Mississippi specify the same test or standards that are applied in other bad faith actions. In its recent decision in *Cook*, for example, the Mississippi Supreme Court noted that in order for a plaintiff to prevail on a claim for a bad faith denial of workers' compensation benefits, he has to present proof of the following essential elements: 1) the absence of "a legitimate or arguable reasons to deny the benefits"; and/or 2) conduct in making the denial which "constitute[s] a willful or malicious wrong in disregard for his rights." 832 So. 2d at 479. In another case involving an alleged bad faith denial of workers' compensation, *Blakeney v. Georgia Pacific Corp.*, 151 F.Supp.2d 736 (S.D. Miss. 2001), the U.S. District Court for the Southern District of Mississippi similarly held that "[i]n order to establish the elements of... [such a] claim, the plaintiff must show: (1) an intentional refusal by the defendant to pay with reasonable promptness the insured's claims; and (2) the absence of any arguable reason for the defendant's refusal to pay with reasonable promptness." 151 F. Supp. 2d at 740. In view of the nature and clear equivalence of the elements of proof identified in *Cook* and *Blakeney*, it is amply apparent that claims for a bad faith denial of workers' compensation benefits

are no different from any other bad faith claim. In each instance, the gravamen of the cause of action is a denial of benefits without a legitimate or arguable reason.

In its brief, the Gallagher Bassett contends that if the Malone is to overcome the bar of the exclusive remedy provision, he has to do more than establish a bad faith denial of benefits. According to the Gallagher Bassett, Malone also has to prove that there was a subjective intent to injure him. Gallagher Bassett thus contends that evidence of gross negligence will not allow Malone to establish a valid, actionable claim, as it would in a bad faith action involving any type of insurance other than workers' compensation.

In claiming that Malone must prove such a subjective intent to injure, and Gallagher Bassett relies on the case of *Miller v. McRae's Inc.*, 444 So. 2d 368 (Miss. 1984). In this case, the Court's principal focus is on a work place injury and the factors which determine whether such an injury is either within or outside the jurisdiction of the Mississippi Workers' Compensation Act. In the context of a suit for a bad faith denial of workers' compensation benefits, therefore, Gallagher Bassett relies on cases that are completely inapposite and do not represent controlling precedent. In *Miller*, the claims asserted by the plaintiff were for harm which **arose directly out of the work place injuries**. In a narrow sense, *Miller* does not actually involve a claim for a bad faith denial of workers' compensation. But in a broader, more general sense, the *Miller* case does not present a claim for tortuous conduct which occurred after, and which was thus separate and independent from, a particular employee's work place injury. For that reason, the issue before the court in this case were not whether there was separate and independent tort which was beyond the purview of the exclusive remedy provision, but whether the nature of the injury fell within, or outside of, the jurisdiction of the Act. Since the Act only applies to injuries which arise from an "accident" or are

"accidental" in nature, the Court had to fashion rules to distinguish an "accidental" injury from an "intentional" injury for purpose of the Act's jurisdiction. In that context, the Court held that a subjective intent to injure is needed to remove a work place injury from the jurisdiction of the Act, and that gross negligence is insufficient for that purpose.

But it is still very clear that those rules do not apply to claims for a bad faith denial of workers' compensation benefits. In a bad faith case, there is a separate and independent tort which does not arise **"on account of"** an employee's work place injury, and, as a result, there is no need to consider whether the tort at issue was "accidental" or "intentional." The cases of the Mississippi Supreme Court which address a bad faith denial of workers' compensation benefits thus represent a separate line of authority, with their own distinct set of rules.

As the foregoing review of those rules discloses, a subjective intent to injure is not one of the essential elements of a claim for a bad faith denial of workers' compensation. It is also clear that pertinent Mississippi case law permits a plaintiff to establish such a claim with evidence of gross negligence. In 1998, Judge Biggers of the U.S. District Court for the Northern District of Mississippi specifically found that under the rules which the Mississippi Supreme Court applies to claims for a bad faith denial of workers' compensation benefits, "the so-called intentional tort exception to the exclusive remedy provision encompasses gross negligence." *Ray v. Travelers Ins. Co.,* 1998 U.S. Dist. LEXIS 11413 (N.D.Miss.1998).

Subsequent decisions by the Mississippi Supreme Court and the Court of Appeals also confirm that Judge Biggers's construction of the law is entirely correct. In the Mississippi Supreme Court's 2002 decision in *Cook,* Justice Smith answered the defendant's arguments by noting that in order for a plaintiff to have a claim for a bad faith denial of workers' compensation, "the denial of

benefits does not have to be willful or malicious, but there may not be an arguable basis to deny the claims." 832 So.2d at 480-481. Two years later, in *Pilate v. Am. Federated Ins. Co.*, 865 So.2d 387 (Miss. Ct. App. 2004), the Court of Appeals of Mississippi also gave the following explanation of the type of misconduct which is needed to establish a claim for a bad faith denial of workers' compensation benefits:

> To determine what type of conduct would justify any award of punitive damages, the Mississippi Supreme Court has held that "if an insurer has a legitimate or an arguable reason for failing to pay a claim, punitive damages will generally not lie." *Id.* (citing *Standard Life Ins. Co. of Ind. v. Veal*, 354 So.2d 239, 248 (Miss. 1977). Thus, if the insurer had a legitimate or arguable reason for not paying the claim, the insurer is deemed to have acted in good faith. On the other hand, if the insurer ***does not have a legitimate or arguable basis for not paying the claim, and acted with willful, malicious, gross negligence, or reckless disregard for the rights of the claimant,*** then punitive damages will lie. ***To resolve the issue before us, we review whether a genuine issue of a material fact was in dispute as to whether the conduct of AmFed or Guillory rose to the requisite level of misconduct.***

Id. At 391. (Emphasis added).

It is thus absolutely clear that when a case presents claims for a bad faith denial of workers' compensation, the controlling issue is whether the defendant made the denial without a legitimate or arguable reason while acting either willfully, maliciously, in a grossly negligent manner or with a reckless disregard for the plaintiff's rights. Contrary to Gallagher Bassett's contention, the controlling issue is not - and never has been– whether the defendant acted with a subjective intent to injure the Plaintiff.

It is likewise clear that the leading Mississippi decisions on this issue–*Luckett* and *Holland*–treat claims for a bad faith denial of workers' compensation benefits as if they were intentional torts. As Judge Biggers carefully explained in *Ray:*

> Under Mississippi law, an insurer's bad faith has been defined as acting with malice, or gross negligence or reckless disregard for the rights of others. *Caldwell*

> *v. Alfa Ins. Co.*, 686 So.2d 1092, 1095 (Miss.1996) (citations omitted). In *Luckett* and *Holland* the court construed claims of bad faith denial of workers' compensation claims as the equivalent of an intentional tort. *Luckett*, 481 So.2d at 289, 291 (bad faith refusal claim "sounding of intentional, tortious conduct"); *Holland,* 469 So.2d at 57, 59 (" the independent and allegedly intentional, tortious conduct of Farm Bureau in refusing to pay benefits owing under the Act without an arguable basis"; the complaint alleged acts committed with "grossness and recklessness").

Id. at 391. (emphasis added)

So in the final analysis, as long as a defendant acts with gross negligence, with a reckless disregard for a plaintiff's rights or in a willful or malicious manner, it is appropriate to view such conduct as an intentional tort within the meaning of the Mississippi Supreme Court's decisions in *Holland* and *Luckett*. This is plainly confirmed by the subsequent holdings in *Ray, Holland* and *Pilate* reviewed above.

2. The Bad Faith Claims Asserted in this Action by Gary Lee Malone are Separate and Distinct From his Injury at Work

Another groundless contention appears on pages 41-42 of Gallagher Bassett's brief, where it maintains that Mr. Malone's claims in this action trigger the bar of the compensation act's exclusive remedy provision, since those claims allegedly rest on an injury that is not separate and distinct from his injury at work. The problem with that contention, however, is that it is both legally and factually inaccurate.

While Gallagher Bassett relies on the *Holland* decision i n making its argument, it completely ignores and distorts *Holland's* actual holding and significance. As the preceding section of this brief carefully explains, *Holland, Luckett, McCain*, and *Leathers* all fall within an exception to the exclusive remedy provision, because the plaintiffs in each of those cases were asserting claims "based on tortious conduct subsequent to the workplace injury." *Peaster*, 642 So.2d at 348.

In Mr. Malone's case, it is also readily apparent that he is asserting claims that rest on tortious conduct which occurred after his injury at work. This lawsuit is about the torts that Gallagher Bassett committed in August, 2000, when it failed to properly process and handle Mr. Malone's claims for workers' compensation benefits, and, by definition, the processing and handling of those claims had to occur after his workplace injury.

In is likewise clear that when Mr. Malone brought an action against Gallagher Bassett for "improper claims handling," he sought damages for injuries that are separate and distinct from his injury at work. The injuries that are the subject of this action are the ones that arose from Gallagher Bassett's failure to investigate Mr. Malone's workers' compensation claims in August, 2000, and the attendant delay that occurred in his medical treatment and receipt of compensation benefits. As a result of that delay, Mr. Malone's initial injury at work worsened significantly and never healed, and he thus sought damages in this action for the injuries which exacerbated and worsened his prior condition. But those are the injuries that arose from Gallagher Bassett's "improper claims handling", and they are clearly separate and distinct.

3. The Evidence Presented by Gary Lee Malone at Trial Compellingly Establishes a Claim for Bad Faith Denial of Workers' Compensation Benefits and Medical Expenses

Once a workers' compensation claim arises, the carrier and any third party administrator have a duty to conduct a proper and adequate investigation. *Liberty Mutual Ins. Co. v. McKneely,* 862 So.2d 530, 534 (Miss. 2004); *Ray*, 1998, WL 433949 at *3. At a minimum, this duty to investigate requires reasonable efforts to obtain all available medical information relevant to a claim. *Life & Casualty Ins. Co. v. Bristow,* 529 So.2d 620, 623 (Miss. 1988); *Bankers Life and Casualty Co. v. Crenshaw,* 483 So.2d 254, 272 (Miss. 1985). A basic, minimal investigation also

requires claims personnel to interview the insured or claimant. *Eichenseer v. Reserve Life Insurance Company*, 682 F.Supp.1355, 1371 (N.D. Miss.1998), *aff'd*, 934 F. 2d 1377, 1393 (5th Cir. 1991) vacated and remanded by *Reserve Life Ins. Co. v. Eichenseer*, 499 U.S. 914; 111 S. Ct. 1298; 113 L.Ed. 2d 233 (1991); *Bankers Life*, 483 So.2d at 270. It is axiomatic that an adequate, meaningful investigation cannot occur if the claimant or insured is never consulted.

Any time such basic steps are omitted, therefore, an investigation cannot even be characterized as "cursory", and it thus rises to a level of egregiousness which creates a bad faith cause of action and permits the imposition of punitive damages. *Eichenseer,* 934 F.2d at 1382-1383, 682 F. Supp. at 1370-1371; *Bankers Life*, 483 So.2d at 270-276. In its opinion in *Eichenseer,* the U.S. District Court for the Northern District of Mississippi gave the following excellent summary of the critical holdings in *Bankers Life* and then analogized those holdings to the facts of Ms. Eichenseer's case against Reserve Life Northern:

> The Mississippi Supreme Court [in *Banker's Life*] affirmed the jury's award of punitive damages, noting that Bankers Life claims officials failed to (a) interview the attending physician personally, (b) obtain a photocopy of the physician's records, (c) obtain photocopies of complete hospital records, including EKG reports, and (d) interview the insured (Crenshaw). The court stated:
>
> There was no interview of Crenshaw, no interview of any of his doctors, and no request for medical records. Instead, relying on the three medical entries Crenshaw sent with his claim, his claim was denied. There is no dispute that these medical documents did not tell the complete story of Crenshaw's problems. It is also clear to this court that what Crenshaw did send was sufficient to *either justify payment of his claim, or at least require Bankers Life to make a full and thorough investigation, interview Crenshaw and his family, look at all of his medical records, and interview his doctors before his claim was denied.*

483 So.2d at 270 (emphasis added).

> As an alternative basis for its decision, the court noted that Bankers Life denied Crenshaw's claim in reliance upon an invalid policy provision; this was likewise deemed sufficient to support an award of punitive damages.
>
> *Bankers Life* is the case most analogous to the one at bar. Reserve Life received an incomplete set of medical records, failed to interview either the plaintiff or her doctors, and declined to submit the matter to in-house medical personnel for review. Like Bankers Life officials, Reserve Life employees told the plaintiff that if she had any further information she could submit it for review. In both cases, the insurer assumed "no responsibility [for] checking the facts further ..."

483 So.2d at 273.

As a result of Reserve Life's grossly inadequate investigation, in which it not only failed to interview Ms. Eichenseer herself, but also failed to obtain all of her medical records, consult with her treating physicians and even request an in-house medical review, Judge Senter of the Northern District concluded that its conduct rose to the level of an independent tort and amounted to bad faith, and he then imposed a significant award of punitive damages. *Eichenseer,* 682 F.Supp.at 1372-1373. On appeal, the Fifth Circuit affirmed Judge Senter's ruling. In doing so, it specifically found that Reserve Life's conduct was so egregious that it could be viewed by a fact finder as constituting either a reckless or an intentional disregard of Ms. Eichenseer's rights. *Eichenseer,* 934 F.2d at 1382.

In addition to having a duty to properly and adequately investigate a claim, carriers and third party administrators also have a duty to advise a claimant of the decision which is made on his claim and to tell him the plain truth at that time. *Bankers Life*, 483 So.2d at 276. For that reason, if an insurer or third party administrator suddenly terminates an investigation of a claim without having an arguable reason for doing so and without advising the claimant of its action, there will be a breach of both the duty to investigate and the duty to notify the claimant of the outcome, and such conduct by a carrier or third party administrator will then constitute an actionable denial of the

injured employee's claim for benefits. *See, e.g., Blue Cross & Blue Shield v. Maas,* 516 So.2d, 495, 496-497 (Miss.1997); *see also Travelers Indem. Co. v. Weatherbee*, 368 So.2d 829, 831-834 (Miss.1969); *Eichenseer*, 682 F. Supp. at 1366, fn.13. In this regard, it is patently obvious that when an investigation of a claim is 1brought to a complete halt and does not go forward in any manner whatsoever, the claim in question has been positively and effectively denied in every meaningful sense, as the Mississippi Supreme Court's decision in *Maas* plainly recognizes.

In light of the holdings in *Bankers Life* and *Eichenseer,* the evidence in this case is more than sufficient to support Mr. Malone's claims for a bad faith denial of workers' compensation benefits and medical treatment. Given the available evidence, Malone proved that Gallagher Bassett's investigation of his workers' compensation claim was so inadequate and incomplete that it rose to a level of egregiousness that established bad faith.

Through the testimony of toolpusher Wallace, an audiotape of the oral statement that Deborah Duckett Robichaux obtained from him, and Ms. Robichaux's own handwritten notes, Mr. Malone, can persuasively demonstrated that no later than August 16, 2000, Ms. Robichaux and Gallagher Bassett had initiated an investigation of his workers' compensation claim. Malone then demonstrated, through his own testimony, the testimony of his treating physicians and the testimony of Richard M. Rideout, Kenneth Picton, Deborah Duckett Robichaux and Beckie M. Dozier, that shortly after that investigation began in mid-August, 2000, Ms. Robichaux and Gallagher Bassett suddenly brought it to a complete halt, without advising him of their action. Mr. Malone further established that at the point in mid-August, 2000, when the investigation abruptly ended, not only had Ms. Robichaux and Gallagher Bassett made no effort to contact and interview him personally, they had also made no effort to obtain any of the medical information relevant to his claim. They

completely failed to request copies of any of his pertinent medical records or to consult with any of his treating physicians. They also failed to seek any in-house or outside medical advice. As a result, there was a clear and deliberate failure to make the contacts and obtain the information required by Gallagher Bassett's own internal policies, and yet, in spite of such obvious omissions, Ms. Robichaux and Gallagher Bassett suddenly terminated their investigation and abandoned Mr. Malone's claim.

This case thus contains all of the elements which made the investigations of the claims in *Bankers Life* and *Eichenseer* so egregiously inadequate. In fact, the misconduct of Ms. Robichaux and Gallagher Bassett in this action is even more offensive than the misconduct of their counterparts in *Bankers Life* and *Eichenseer*. In *Eichenseer*, the insurer at least obtained copies of some of the pertinent medical records, before eventually failing to acquire all of them. And while the insurer in *Bankers Life* failed to secure copies of medical records, it did get an in-house physician to analyze the medical information in the insured's claim forms and then relied on that physician's assessment in denying the claim. The insurers in *Bankers Life* and *Eichenseer* also received and considered at least some information from their insureds, since each of them relied on the contents of its insured's formal written claim. In this case, however, Gallagher Bassett completely failed to obtain copies of any medical records whatsoever, and it also failed to seek any evaluation of the medical information that it received from the employer. Gallagher Bassett even failed to obtain any information from Mr. Malone himself.

Consequently, Gallagher Bassett's investigation of Malone's workers' compensation claim was even more incomplete and inadequate than the investigations in *Bankers Life* and *Eichenseer*, and it is thus readily apparent that Malone presented a cognizable bad faith claim for compensatory

and punitive damages to the Circuit Court. Just as the Fifth Circuit recognized in *Eichenseer*, the type of evidence which exists in this case clearly permitted a jury to find that Gallagher Bassett acted ***with either a reckless or an intentional*** disregard of appellee's rights. 934 F.2d at 1382.

B. The Claims of Gary Lee Malone are Not Barred by his Alleged Failure to Properly Reserve a Right to Pursue a Bad Faith Action

In the argument on pages 42-43 of its brief, Gallagher Bassett implies that in *Mississippi Power & Light Co. v. Cook*, 832 So.2d 474 (Miss. 2002), the Supreme Court of Mississippi held that in every case for a bad faith denial of workers' compensation benefits, a necessary prerequisite for the maintenance of the action is a reservation of the plaintiff's bad faith claims, either through a provision in a settlement or order entered by the Mississippi Workers' Compensation Commission, or through some other means. Gallagher Bassett suggests that as a result of that holding, every workers' compensation claimant must always reserve bad faith claims before he ever accepts any payment of compensation benefits.

But those contentions by Gallagher Bassett are absurd and clearly flawed in a number of respects. First, *Mississippi Power & Light Co.* does not make any of the holdings alleged by Gallagher Bassett. In that case, the Mississippi Supreme Court merely notes that when the plaintiff in that proceeding settled his workers' compensation claims, the order entered by the Mississippi Workers' Compensation Commission recognized that he had reserved his right to assert bad faith claims. But this Court never holds that such a reservation of rights is an essential prerequisite for every bad faith case; instead, it merely observes that such a reservation was made by the particular plaintiff in that case.

It is also clear that in a case like *Mississippi Power & Light Co.*, where a workers'

compensation claimant concludes a settlement of his claims for compensation benefits, such a reservation of rights may actually be desirable. If there is going to be a "final" settlement with the employer and carrier, the entry of a "final" order of dismissal by the Commission, and an execution of a release, it may be appropriate for a claimant to explicitly reserve future bad faith claims. In this case, however, Mr. Malone never entered into any settlement agreement in his workers' compensation action against Nabors and Gallagher Bassett. As Gallagher Bassett's brief notes, Nabors and Gallagher Bassett simply paid Mr. Malone all of the benefits allowed by the Workers' Compensation Act, and he never had to execute a release or confront the entry of a final order. Mr. Malone merely had to obtain authorization for the payment of the attorneys' fees and expenses in his workers' compensation proceeding, and the orders providing that authorization (P-14; GB R.E. 19) and (P-15; GB R.E. 20) plainly disclose that the benefits which he received were paid voluntarily and without a settlement.

It is likewise clear that Mississippi case law has never required a workers' compensation claimant who receives benefits through voluntary payments, or following a hearing on the merits, to explicitly reserve claims for a bad faith denial of benefits. Gallagher Bassett does not cite such a case, and none exists. It is also unnecessary for the Mississippi Supreme Court to create such a rule, because when payments are made voluntarily pursuant to an order from the Mississippi Workers' Compensation Commission, the need for such a reservation does not exist, as no claims have been compromised or released.

Finally, Gallagher Bassett is raising this argument for the first time on appeal. Throughout the proceedings in the trial court, Gallagher Bassett never maintained that Mr. Malone had waived his bad faith claims by failing to reserve them. Gallagher Bassett never raised those claims in its

Motion for Summary Judgment or at any time during the trial. (R. 1981; T. 566, 893, 1008). As a result, that issue cannot be considered in this appeal. Under Mississippi law, it is well settled "that there is a procedural bar to considering issues not first raised at trial." *Crosswhite v. Golmon*, 939 So.2d 831, 833 (Miss. Ct. App. 2006)(*citing Brown v. Thompson*, 927 So.2d 733, 738 (Miss. 2006) and *Scott v. State*, 878 So.2d 933, 963 (Miss. 2004) overruled by *Lynch v. State*, 951 So.2d 549 (Miss. 2007).

C. At Trial Gary Lee Malone Established Proximate Causation Through Clear and Direct Evidence

In the argument on pages 43-48 of its Brief, Gallagher Bassett presents a lengthily, disjointed account of certain aspects of Mr. Malone's medical history, before it eventually contends that the real source of his persistent infections and amputation was not the delay in his treatment but the insertion of metal rods that occurred after he fell and broke his leg in January, 2001. The problem with that contradiction, however, is that there is no medical evidence to support it, and it is also directly contradicted by Dr. Keith Melancon's testimony. In this regard, testimony from the physicians was presented at trial, and none of them claimed that Mr. Malone's osteomyelitis, and the vulnerability to persistent infections that resulted from it, had resolved by the time he broke his leg in January, 2001. In fact, the only medical evidence to address that issue at trial established just the opposite.

Dr. Melancon testified that Mr. Malone's tibial fracture that occurred in January of 2001, was caused by his underlying osteomyelitis. It is thus clear that his osteomyelitis had never resolved; otherwise, it could not have caused or contributed to the fracture. (Melancon, 39-40). Dr. Melancon also explained that because of the delay in the surgical treatment of his injury, Mr. Malone required more aggressive therapy to fight the infection, and that as a result of that therapy,

he subsequently developed a hole in his femur which was the site of the later fracture. (Melancon, 48-49, 38-40).

There can clearly be more than one proximate cause of an injury:

> There may be more than one proximate cause of an injury, 38 Am. Jur., Negligence, Section 63... Moreover, when reasonable minds might differ on the matter, the question of what is the proximate cause of an injury is usually a question for the jury, 65 C.J.S., Negligence, Sec. 264. *American Creosote Works v. Harp*, 60 So. 2d 514 (Miss. 1952). See *also Magers v. Houston*, 174 Miss 860, 165 So. 416 (Miss. 1936), as follows: "If the defendant's negligence is a substantial factor in causing harm to another, then that action is negligent on the part of the actor. If reasonable men have a difference of opinion as to whether or not the negligence of the actor continued as a substantial factor in bringing about the injury, then the question is for the jury. Restatement, Law of Torts, Sec. 434.
>
> If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable. Section 435, Restatement, Law of Torts.

Matthews v. Thompson, 95 So. 2d 438, 447 (Miss. 1957).

In this case there is no issue raised that the jury was improperly instructed or that an admissible or prejudicial evidence was admitted. The appellant had its day in Court, and lost on the issue of proximate cause before a properly instructed jury. This Court should, under these circumstances, defer to the jury's fact finding since it evaluated and weighed the evidence.

D. Any Application of the Mitigation Rule Was Waived, and it Does Not Otherwise Bar or Reduce the Damages of Gary Lee Malone

Gallagher Bassett argues that the Malone failed to mitigate damages and as such Gallagher Bassett cannot be held liable for damages. In favor of this argument, the appellant cites two cases *Taylor v. USF&G*, 420 So. 2d 564, 566 (Miss. 1982) and *Georgia Pacific Corp. v. Armstrong*, 451 So. 2d 201, 206 (Miss. 1984) regarding the mitigation issue. These two cases are clearly

inapplicable. In fact, *Taylor* is not a mitigation situation at all; but rather an aggravation of a preexisting infirmity of a compensable injury. *Armstrong* cited by the Gallagher Bassett, is a riparian issue case regarding an obstruction of a small creek. Obviously, the case at bar is a bad faith denial regarding a bodily injury at a work job site, not a riparian landowner rights case.

Whether a person has mitigated damages or the reasonableness of a plaintiff's effort to minimize damages is a question for the jury or the trier of fact. Stated another way, it is for the jury to determine whether the plaintiff could have lessened his injury by the exercise of ordinary care and at a reasonable expense: "Because it is primarily the province of the jury to determine the amount off damages to be awarded...". *Herring v. Poirrier*, 797 So. 2d 797, 808 (Miss. 2000). The jury has already issued a verdict and the decision regarding mitigation is completed. It is important to note that "The verdict of the jury is to be given great weight." *Busick v. St. John*, 856 So. 2d 304, 307 (Miss. 2003).

An injured party is not required to take extraordinary action, or make extraordinary expenditures to diminish damages caused by the act of another party. *Buras v. Shell Oil Co.*, 666 F. Supp. 919, 924 (S.D. Miss. 1987). In *Buras*, the injured party's actions are considered in the context of the circumstances created by the wrongdoer's action:

> In determining whether the victim's conduct falls within the range of reasonableness, the court must consider that the necessity for decision-making was thrust upon him by the defendant, and judgments made at times of crisis are subject to human error. We do not require 'infallibility or exactness of mathematical formula,'... and will allow the injured party a wide latitude in determining how best to deal with the situation. *See also Hill v. City of Pontotoc*, 993 F. 2d 422, 427 (5th Cir. 1993) ("Whether an injured party has mitigated his damages requires a *factual assessment* of the reasonableness of his conduct.") (emphasis added).
>
> It is true that a duty to mitigate has been applied to the failure of an injured plaintiff to follow recommendation of a doctor, however to follow medical recommendation because of inability to pay has been held to excuse mitigation. The Mississippi

> Supreme Court has long held that "while generally an injured person has the duty to use reasonable care, and to make reasonable effort to prevent or minimize the consequences of the wrong or injury, the rule is one of reason and that, where funds are necessary to meet the situation and the injured person is without the funds, he is excused from this effort."

Lake v. Gautreaux, 893 So. 2d 252, 256 (Miss. Ct. App. 2004) (quoting *Tri-State Transit Co. v. Martin*, 181 Miss. 388, 396, 179 So. 349, 350 (Miss. 1938).

Regarding mitigation and contribution, Mississippi Code Ann. Section 11-7-17 states: "All questions of negligence and contributory negligence shall be for the jury to determine." The Mississippi Supreme Court previously stated: "The jury was entitled to consider all of these mitigating circumstances and to reduce damages accordingly, even though no instruction was given on mitigating circumstances. Mitigating circumstances are closely akin to contributory negligence... Because it in the duty and responsibility of the trial jury, as required by statute (11-7-17) to determine all questions of negligence and contributory negligence, and because by statute (11-7-61) the jury may consider any mitigation or extenuating circumstances in evidence...." *Comer v. R.D. Gregory*, 365 So. 2d 1212, 1214 (Miss. 1978).

The jury in this case considered plaintiff's contribution and assessed fault. This assessment was made pursuant to appellant's submitted jury instruction given by the Court. Whatever complaints appellant has concerning mitigation of damages are answered since mitigation was properly considered by the jury and reflected in the jury's assessment of fault.

E. Gallagher Bassett is Not Entitled to Setoff

Because Gallagher Bassett is requesting a setoff and relying on the one-satisfaction rule, there are two (2) issues which this Court should consider: one is whether Gallagher Bassett is

entitled to a setoff as a result of Mr. Malone's settlement with Nabors; and the other is whether Gallagher Bassett is having to pay twice for the same quantum of damages. As Mr. Malone will carefully establish, Gallagher Bassett is not entitled to a setoff, that a Mary Carter agreement does not produce a double recovery.

As to the question of setoff, this court must consider and resolve the following decisive issue: After the entry of a verdict in which fault is apportioned to settling and non-settling defendants alike, as required by the provisions of Miss. Code Ann §85-5-7 (Supp. 2004), can the damages apportioned to a non-settling defendant be reduced by the amount of another defendant's settlement? As Gallagher Bassett's brief tacitly acknowledges, the Mississippi Supreme Court has never squarely faced and decided that issue. The only court which has done so is the U.S. Court of appeals for the Fifth Circuit. In its 1999 decision in *Krieser v. Hobbs*, 166 F.3d 736 (5th Cir. 1999), the Fifth Circuit carefully considered the exact question present here and concluded that in such a situation, the *pro-tanto* reduction rule is inapplicable, and that a non-settling defendant is not entitled to reduce the damages apportioned to it by the amount of another defendant's settlement.

In its brief, Gallagher Bassett effectively urges this Court to disregard the Fifth Circuit's decision in *Krieser* and to rely instead on the Mississippi Court of Appeal's decision in *Brown v. North Jackson Nissan, Inc.*, 856 So.2d 692 (Miss. App. 2003). But, *Brown* is not on point and involves an entirely different situation. In this regard the liability imposed in *Brown* was entirely joint-and-several. For that reason, the Court of Appeals in *Brown* did not consider or decide whether the *pro-tanto* reduction rule still applies in cases where the imposition of liability is several only. That question is not directly addressed at any point in the *Brown* decision, and the Court of Appeals never makes any attempt to carefully and seriously analyze the legal issues underlying that

question. As a result, the decision in *Brown* is not even close to being directly on point, and any passing comment about the general nature of §85-5-7 is strictly dicta. Because it comes from the Court of Appeals, moreover, the decision in *Brown* also has no precedential value.

Additionally, it is particularly noteworthy that *Brown* never cites or comments on the Fifth Circuit's ruling in *Krieser*. If the Court of Appeals in *Brown* had actually attempted to analyze the question presented in this case, it would have inevitably considered the serious, thorough dissection of the pertinent issues which the Fifth Circuit undertakes in *Krieser*, but it did not do so.

This court is thus urged to read and study *Krieser*. In that decision, the Fifth Circuit presents a persuasive, insightful and carefully reasoned explanation of the rationale for its ruling. As a result of that explanation, it becomes abundantly clear that the Fifth Circuit's analysis is correct, and that in those situations where liability is imposed on multiple defendants severally, a non-settling defendant should not be allowed to reduce the damages apportioned to it by the amount of another defendant's settlement.

In *Krieser*, the Fifth Circuit not only analyzes the applicable statutory language, but it also examines how other jurisdictions have resolved the same question. *Krieser*, 166 F.3d at 743-744. In doing so, the Fifth Circuit concludes that if the Mississippi supreme Court had to face and decide this issue, it "would follow the large number of other courts who have understood legislative limitation of joint-and-several liability to render incompatible a *pro-tanto* credit for non-settling tortfeasors." *Id.* at 743. At the time of the *Krieser* decision, at least 16 other states had departed from prior practice by disallowing such a credit in cases where the imposition of liability is several only. *Id.*

Krieser also carefully explains the two fundamental, interrelated reasons why such a credit

is inappropriate in cases of several liability. The first is that the rationale for such a credit – the avoidance of a double recovery – only applies where liability is joint-and-several. In such a case, each defendant's liability overlaps the obligations of the other defendants, and there is a common assessment of damages. *Id.* Those damages then apply across the board to all defendants, and a *pro-tanto* reduction rule is needed to prevent a "plaintiff from recovering twice from the same assessment of liability." *Id.* In a case where liability is proportional to fault and several only, however, there is no common assessment of damages, and each defendant becomes liable for a separate amount of damages that is proportionate to its own fault. *Id.*

The decision in *Krieser* also goes on to explain why, in the event of a prior settlement with one defendant, another defendant should not be allowed to claim a setoff or credit for the amount of the settlement, so as to thereby limit its liability for the damages that were assessed against it severally and individually. As the Fifth Circuit notes, even without a setoff, a non-settling defendant is only required to pay its share of the damages, and, as a result, it is not harmed and has no basis to complain. *Id.* at 743, 745. In addition, since "[p]laintiff s bear the risk of poor settlements; logic and equity dictate that the benefit of good settlements should also be their." *Id.* at 745. The *Krieser* decision explains that, "[a] contrary rule would (1) give the benefit of an advantageous settlement to the non-settling tortfeasor, rather than to the plaintiff who negotiated th settlement, (2) discourage some defendants from settling in anticipation of acquiring the benefits of the settlements of their co-tortfeasors, and (3) neglect to recognize the fact that settlement dollars are not synonymous with damages but merely a contractual estimate of the settling tortfeasor's liability." *Id.* at 743.

Furthermore, since the Court of Appeals has clearly intimated, through its subsequent

decision in *Teasley v. Buford*, 876 So.2d 1070 (Miss. App.2004), that the new rules on several liability in §85-5-7 are going to supercede and override the prior caselaw that allowed a non-settling defendant to claim a setoff or credit for the amount of a settlement. In *Teasley*, the trial court gave a non-settling defendant a credit for the amount of the plaintiff's settlement with another defendant, and the Court of Appeals then upheld that setoff on appeal. But in doing so, the Court of Appeals added the following cautionary note:

> In this case, no fault was allocated to the settling party, Jenkins. Neither party raises the issue of failure to allocate fault to Jenkins. The parties did not request an allocation at trial. As such, our review is limited to cases that pre-date the adoption of Mississippi Code Annotated Section 85-5-7 (Rev. 1999) which provides that with several exceptions, tort liability is several rather than joint-and-several, meaning that a defendant is liable to the plaintiff for damages only in proportion to his percentage of fault.

Id. at 1077.

The Court of Appeals thus clearly intimates that if the trial in *Teasley* had included an allocation of fault and an imposition of several liability, the setoff question would have been decided differently, since the caselaw that pre-dates the adoption of §85-5-7 would have been inapplicable.

As *Krieser* additionally explains, the decisions cited by Gallagher Bassett in its motion and brief are plainly inapplicable for one or more reasons. *Krieser*, 166 F.3d 742. Most of those cases involve incidents which occurred prior to §85-5-7's adoption, and others – like *Brown* – involve situations in which rules of joint-and-several liability still apply. But the current version of §85-5-7 dictates that liability among joint tortfeasors is several. Under several liability, each party, including settling and non-settling defendants, are liable for damages commiserate with the amount of fault apportioned by the jury. The arguments asserted by Gallagher Bassett are thus misplaced

and should not be applied by this Court under the facts presented. In this case, it is clear that Nabors, Gallagher Bassett, and Mr. Malone all agreed at trial to an allocation of fault, and that the current version of §85-5-7 applies.

Finally, aside from the reasons noted above, this is not a case in which Gallagher Bassett can claim under any circumstances that the denial of a setoff will give Mr. Malone a double recovery. This is because the jury's verdict cannot be construed as representing a double recovery. In returning a verdict of $250,000.00 for Mr. Malone, the jury was clearly finding that he had sustained damages of $250,000.00 over and above the amount of his settlement with Nabors. The jury was fully aware of both the amount and all of the terms of that settlement, but was never instructed to disregard it, since Gallagher Bassett strongly objected to the cautionary instruction proposed by Mr. Malone. As a result, the jury could only deduce or conclude that Mr. Malone's recovery had to be limited to those damages which exceed the amount of his settlement.

In this case, with Mr. Malone seeking damages for his injuries and losses and with Nabors asserting a cross-claim for the amount of its settlement and other damages, Gallagher Bassett might have faced a situation where it was asked to pay twice for some partially overlapping quantum of damages. That is one of the reasons why Mr. Malone proffered Jury Instruction P-18 in the court below. If the jury had been instructed to award both Mr. Malone and Nabors their full damages, without giving any consideration whatsoever to the amount of the settlement, the trial court could have then made appropriate adjustments under the type of procedure approved in *Robles v. Gollott & Sons Transfer & Storage, Inc.*, 697 So.2d 383, 384-85 (Miss. 1997). But Gallagher Bassett objected to that instruction and prevented it from being granted, and the jury was allowed to consider the amount of the prior settlement in awarding damages to Mr. Malone and Nabors.

Ordinarily, of course, Mississippi law does not allow a jury to be advised of the amount of a settlement. The purpose of this rule is to prevent a jury from being improperly influenced by a settlement, since the objective of awarding damages is to provide fair and adequate compensation for all of the injuries and losses suffered by a particular plaintiff. *Whitley v. City of Meridian*, 530 So.2d 1341, 1346 (Miss. 1988). In this case, however, the nature of Nabors' cross-claim made it necessary to advise the jury of the amount and terms of Nabors' settlement with Mr. Malone. Proffered instruction P-18 would have thus instructed the jury to completely disregard the amount of the settlement in awarding damages, in order to prevent the knowledge of the settlement from exercising an improper influence. But because such an instruction was not granted, it is indisputably clear that when the jury returned a verdict for $250,000.0 in Mr. Malone's favor, it was merely awarding a portion of his damages – the portion that exceeded the sum of $1,500,000.00 that he received in settlement from Nabors. In this regard, there is really no other way in which the jury's verdict can be interpreted. If the jury's verdict is not interpreted in that manner, the disparity between Mr. Malone's damages and the amount of the verdict will be so great and disproportionate that it will clearly manifest a miscarriage of justice. *Matkins v. Lee*, 491 So.2d 866, 868 (Miss. 1986).

So when the jury's verdict is reviewed and seen in that light, it is clear that the jury deducted the amount of the settlement in awarding damages to Mr. Malone, and that Gallagher Bassett was not asked to pay twice for the same quantum of damages. But if Gallagher Bassett wishes to contend that was not the case, it is to blame for the Circuit Court's refusal to grant instruction P-18, and it has no basis for an assignment of error.

In a recent case, the Mississippi Supreme Court ruled that an appellant cannot complain on

appeal of alleged errors which he invited or induced:

> We should also note that even Hood would be precluded from raising this assignment of error as it was Hood that created the alleged errors to begin with by informing the jury of all contents of the settlement agreement during voir dire. *See, Brown ex rel. Webb v. Blackwood*, 697 So.2d 763 (Miss. 1997) ('One may not complain on review of errors for which he was responsible ... an appellant will not be permitted to take advantage of errors for the commission for which he was responsible, or which he himself committed, caused, brought about, provoked, participated in, created, or helped to create, or contributed to.') See also *Cummins v. Century 21 Action Realty, Inc.*, 563 So.2d 1382 (Miss. 1990) (same holding, where trial court denied Cummins's motion in limine pertaining to settlement and Cummins's attorney referred to settlement during voir dire).

Smith v. Payne, 839 So.2d 482, 486 (Miss. 2002). See also "An appellant cannot complain on appeal of alleged errors which he invited or induced." *Busick v. St. John*, 856 So.2d 304, 314 (Miss. 2003); ("The appellant cannot complain because of error in its own instruction." *State Highway Comm'n v. Randle*, 180 Miss. 834, 178 So.486, 179 So. 273 (1938); *Yazoo v. M.V.R. v. Wade*, 162 Miss. 699, 139 So. 403, 404 (1932).

III. CROSS-APPEAL OF GARY LEE MALONE

A. The Circuit Court Erred in Failing to Conduct a Separate Hearing For Punitive Damages, and the Case Should be Remanded for a New Trial on Punitive Damages Only

Appropriate grounds for awarding a new trial for punitive damage plainly exist under Mississippi law. Once the jury awarded compensatory damages to both of appellees, Malone and Nabors, the trial court was obligated to proceed to a second phase of the trial and to allow a consideration of the issues relating to punitive damages. Given the Mississippi Supreme Court's holding in *Bradfield v. Schwartz*, 936 So. 2d 931, 938-940 (Miss. 2006), a second phase on punitive damages was imperative and no longer optional. In a very recent case, the Mississippi Supreme Court stated:

> The decision in Bardfield does not stand for the proposition that the trial court should automatically submit the issue of punitive damages to the jury for determination, but only that the trial judge *should commence an evidentiary hearing before the jury on the issue of punitive damages*, and at the conclusion of this evidentiary hearing in the second phase, the trial court has available all of the traditional options for determining whether or not the punitive-damages issue should be submitted to the jury.
>
> 'The jury should be allowed to consider the issue of punitive damages if the trial judge determined under the totality of the circumstances and in light of defendant's aggregate conduct, that a reasonable, hypothetical juror could have identified either malice or gross disregard to the rights of others.' *Paracelsus Health Care Corp. v. Willard*, 754 So. 2d 437, 442 (Miss. 1999).

Causey v. Sanders, 2008 Miss. LEXIS 520 (Miss. 2008) (emphasis added).

At the conclusion of the compensatory phase of the trial, the jury returned awards for both appellees. Both appellees moved for the commencement of an evidentiary hearing before the jury on the issue of punitive damages. The Trial Court summarily denied the appellees' motions, but instead "polled" the jury at the end of the day, at the conclusion of a protracted and hotly contested trial. There is no authority in Mississippi practice for an informal poll of the jury in open court.

Here, the trial Court instructed the jury in the compensatory phase that it could only consider actual damages not in punishment or punitive in nature. In violation of the established procedures set out in the punitive damage statue and articulated by this Court in *Schwartz* and *Causey*, the trial court failed to commence an evidentiary hearing before the jury on the issue of punitive damages, denying appellee's express motions for same. This was in the face of a finding by the jury of gross negligence and/or wanton and wreckless disregard of the plaintiff's rights supporting a compensatory award.

B. If the Verdict on Compensatory Damages is Not Upheld, a New Trial Should be Held on Both Compensatory and Punitive Damages Only

If this Court concludes, for any reason, that it is not sufficiently clear that the damages of $250,000.00 awarded to Mr. Malone were for damages over and above the amount of his settlement with Nabors, or if the Court concludes that Jury Instruction P-18 needed to be granted, in order to direct the jury to completely disregard the amount and terms of the settlement in determining damages, then a new trial should also be granted on compensatory damages as well, so there will then be a new trial on both compensatory and punitive damages only.

CONCLUSION

For the foregoing reasons, the jury's verdict in favor of Appellee, Cross-Appellant, Gary Lee Malone, should be affirmed and amended to permit Mr. Malone to recover the entire sum of $250,000.00, from Appellant, Gallagher Bassett Services, Inc. Mr. Malone should also be granted a new trial on punitive damages only. In the alternative, Mr. Malone should be granted a new trial on both compensatory and punitive damages only. On the issues pertaining to Gallagher Bassett's liability have been waived or otherwise lack merit. The jury's verdict against is based on abundant, appropriate evidence and cannot be disturbed.

This the 17 day of November, 2008.

Respectfully submitted,

GARY LEE MALONE,
PLAINTIFF/APPELLEE

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CERTIFICATE OF SERVICE

I, undersigned attorney of record for the above-named Plaintiff/Appellee, Gary Lee Malone, do hereby certify that I have this day served via U.S. Mail, a true and correct copy of the foregoing pleading to:

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Honorable Billy Joe Landrum
Jones Circuit Court Judge
415 North 5th Avenue
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Trial Court Judge

This the 17th day of August, 2008.

COUNSEL