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

REPLY BRIEF OF APPELLEE/CROSS-APPELLANT, GARY LEE MALONE

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

The appellee/cross-appellant, Gary Lee Malone, hereby respectfully submits that oral argument will assist the Court in construing the parties' arguments and in reaching a just decision in this case.

REBUTTAL ARGUMENTS

A. The Jury's Finding that Gallagher Bassett Is Liable to Mr. Malone Must Stand, As It Is Fully Supported by the Law and Facts, No Ground for Reversal Exists, and Gallagher Bassett Has Waived Any Contention to the Contrary.

1. Gallagher Bassett Has Waived Any Right to Contend that Mr. Malone's Claims Must Fail as a Matter of Law and Should Not Have Been Resolved by a Jury

In paragraph 3.47 of Gallagher Bassett's Reply Brief, it argues that it has not waived the right to contend that Mr. Malone's claims must fail as a matter of law. As Mr. Malone will demonstrate, however, Gallagher Bassett did waive that issue. The waiver occurred when Gallagher Bassett failed to raise and include the issue in its post-trial motion.

In Mr. Malone's original brief, he carefully establishes that if a party wishes to argue on appeal that certain claims should have been dismissed by the trial court as a matter of law, then that party must also raise the same issue in a post-trial motion in order to prevent waiver. (Brief of Appellee/Cross-Appellant, Malone pp. 20-21). In this case, however, it is undisputed that in Gallagher Bassett's post-trial motion, it merely raised a setoff issue. (R. 3694). It did not raise any of the issues required for renewing its motion for summary judgment or its motion for directed verdict. As a result, Gallagher Bassett completely waived any right which it may have otherwise had to seek judgment as a matter of law on appeal. Miss.R.Civ.P. 50(b); *Miles v. Catchings Clinic*, 601 So.2d 47, 49 (Miss. 1992)(citing *Mississippi State Highway Comm. v. S.B. Grisham*, 31 So.2d 925 (Miss. 1976) ; *T.G. Blackwell Chevrolet Co. v. Eshee*, 261 So.2d 481 (Miss. 1972); *Estate of Briscoe*, 255 So.2d 313, 314 (Miss. 1971); and *West Brothers, Inc. v. Barefield*, 124 So.2d 474 (Miss. 1960).

In an attempt to avoid waiver, Gallagher Bassett notes in paragraph 3.47 of its Reply Brief that the trial court ruled on its motion for summary judgment, as well as its motion for directed verdict, and that the court also addressed the nature of the applicable legal standards

during a jury instruction conference. But Gallagher Bassett's problem is that it cannot contend that it filed a post-trial motion, in which it renewed its earlier request for a dismissal of Mr. Malone's claims as a matter of law. Such a contention is completely missing from Gallagher Bassett's Reply Brief, because a basis for it does not exist. Gallagher Bassett's post-trial motion clearly failed to raise those issues. Therefore, from the standpoint of Gallagher Bassett's appellate rights, the fact that it raised those issues in a motion for summary judgment and a motion for a directed verdict is immaterial. The failure to raise them in a post-trial motion is what produces a waiver.

In its Reply Brief, Gallagher Bassett relies on *Kiddy v. Lipscomb, M.D.*, 628 So.2d 1355 (Miss. 1993), to argue against a waiver, but that case has no application to a waiver of relief that is sought as a matter of law. *Kiddy* involves a motion for a new trial, rather than a motion for a jnov, and it addresses disputed evidentiary rulings, rather than issues raised in a motion for summary judgment or a motion for directed verdict.

2. Refutation of Gallagher Bassett's Arguments on the Element of Intent and the Exclusive Remedy Provision

On pages 36-40 of Gallagher Bassett's Reply Brief, it rehashes several of the prior arguments through which it previously attempted to challenge the jury's finding that Gallagher Bassett made an actionable, bad faith denial of Mr. Malone's claims for workers' compensation benefits. The problems with those arguments, however – aside from the fact that Gallagher Bassett has waived the issues to which they pertain – is that they are plainly incorrect.

In this regard, Gallagher Bassett continues to erroneously maintain that when a plaintiff is asserting a claim for a bad faith denial of workers' compensation benefits, the elements of proof are different and more onerous than those which apply to a bad faith denial of other types of insurance. (Reply Brief of GB p. 38). According to Gallagher Bassett, some element of intent

must be established in a bad faith case involving workers' compensation coverage, even though cases involving health, fire, or casualty policies merely require proof of gross negligence or recklessness. *Id.*

The first flaw in Gallagher Bassett's argument, however, is the contention that different standards and rules apply to bad faith actions involving workers' compensation coverage. In one of the earliest reported decisions involving a bad faith claim against a workers' compensation carrier, *McCain v. Northwestern Nat'l Ins.*, 484 So.2d 1001, 1002 (Miss. 1986), the Mississippi Supreme Court specifically held, "The same rules applicable to health, fire, casualty, accident, and other insurance policies are likewise applicable to workers' compensation insurance carriers." The Mississippi Supreme Court has thus recognized that in bad faith cases involving a denial of workers' compensation benefits, the elements of a cause of action are no different from the ones which apply to other types of insurance. Consequently, if a bad faith claim for a denial of health or casualty benefits can rest on gross negligence or recklessness, then so can a claim for a denial of workers' compensation benefits.

As Gallagher Bassett correctly notes, though, there are some cases, particularly this Court's early decisions in *Southern Farm Bureau Casualty Ins. Co. v. Holland*, 469 So.2d 55 (Miss. 1984) and *Luckett v. Mississippi Wood, Inc.*, 481 So.2d 288 (Miss. 1985), in which a need for an independent intentional tort is mentioned. What Gallagher Bassett ignores and fails to acknowledge, however, is the way in which this and other courts have actually interpreted and applied any such requirement for an intentional tort. As this Court is well aware, the concept of "intent" has different meanings in different legal contexts. In the context of a claim for a bad faith denial of workers' compensation benefits, the interpretation given to that concept is that it merely requires a showing of gross negligence or recklessness, which is all that is required in any other bad faith action.

Over the past ten years, that fact has been recognized in the decisions of several Mississippi courts. In *Ray v. Travelers Ins. Co.*, 1998 U.S. Dist. LEXIS 11413 (N.D. Miss. 1998), Judge Biggers of the U.S. District Court for the Northern District of Mississippi specifically found that under the rules that 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." In this Court's 2002 decision in *Mississippi Power & Light Co. v. Cook*, 832 So.2d 474, 480-481 (Miss. 2002), 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." Two years later, in *Pilate v. Am. Federated Ins. Co.*, 865 So.2d 387, 391 (Miss. Ct. App. 2004), the Court of Appeals of Mississippi held that in order to establish a basis for punitive damages in a case resting on a bad faith denial of workers' compensation benefits, a plaintiff has to prove that an insurer or third-party administrator "does not have a legitimate or arguable basis for not paying the claim, and acted with willful, malicious, ***gross negligence, or a reckless disregard for the rights of the claimant***...." (Emphasis added).

In paragraph 3.52 of its Reply Brief, Gallagher Bassett presents a quotation from *Pilate*, in which the Court of Appeals notes, through a citation to *Holland*, that the exclusive remedy provision of the workers' compensation act does not bar a common law tort action for the commission of an independent intentional tort. Gallagher Bassett, however, then fails to acknowledge that *Pilate* also explains that such a cause of action can be established through proof that an insurer or third-party administrator "***acted with ... gross negligence, or a reckless disregard for the rights of the claimant*** ...." (Emphasis added).

On pages 37-38 of its Reply Brief, moreover, Gallagher Bassett repeatedly relies on this Court's 1982 decision in *Taylor v. USF&G*, 420 So.2d 564 (Miss. 1992). The reliance on *Taylor,* however, is completely misplaced. At the time of the *Taylor* decision, this Court had not yet recognized that bad faith claims can be asserted for a denial of workers' compensation benefits, and, for that reason, it had not started to mold or fashion the legal standards and rules that would govern such actions. That process began with the adoption of *Holland* in 1984, and at the time this Court subsequently reached its decision in *McCain* in 1986, it recognized that bad faith claims for a denial of workers' compensation benefits are governed by the same rules as other bad faith actions. This Court will also recall that in the mid-1980s, the standards governing bad faith actions were still in a state of mild flux and were not fully formed. But the applicable rules were clear when *Ray, Cook*, and *Pilate* were decided between 1998 and 2004.

Gallagher Bassett also continues to mistakenly contend that the exclusive remedy provision of the workers' compensation act has some bearing on this Court's analysis. That contention is completely flawed and incorrect, however. As Mr. Malone carefully explains in his original brief, the mere fact that a bad faith claim does not arise from or "on account of" a workplace injury makes it an "independent" tort and thereby removes it from the purview of any provision of the workers' compensation act, including the exclusive remedy provision. (Brief of Appellee/Cross-Appellant, Malone pp. 24-28). For the same reason, it is also clear that since a bad faith claim arises from an "independent" tort, a party asserting such a claim does not have to establish a subjective intent to injure, or any other type of intent, in order to avoid the exclusive remedy provision. *Id.* at 27-30. In this regard, the existence of an "independent" tort, by itself, completely removes the claim from the purview of the workers' compensation act. For that reason, cases like *Miller v. McRae's, Inc.*, 444 So.2d 368 (Miss. 1984), are completely inapplicable, because they involve workplace injuries, rather than an "independent" tort, and a

subjective intent to injure is thus required to avoid the jurisdiction of the workers' compensation act..

It also appears that in Gallagher Bassett's reply brief, it is no longer contending that a plaintiff like Mr. Malone must prove a subjective intent to injure on the part of Gallagher Bassett. It appears instead that Gallagher Bassett is contending that Mr. Malone must establish that Gallagher Bassett intended to take the actions that resulted in a denial of the claim.

In addition, the facts adduced at trial by Mr. Malone are so egregious that he can establish a bad faith claim against Gallagher Bassett with gross negligence, recklessness, or intent. As Mr. Malone carefully explained in his initial brief, when the Fifth Circuit affirmed Judge Senter's decision in *Eichenseer v. Reserve Life Insurance Co.*, 682 F.Supp. 1355 (N.D. Miss. 1998), *aff'd* 934 F.2d 1377, 1382 (5th Cir. 1991), it found that because Reserve Life had conducted a 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, its actions were so egregious that they could be viewed by a factfinder as constituting either a reckless or an intentional disregard of Ms. Eichenseer's rights. (Brief of Appellee/Cross-Appellant, Malone pp. 31-33).

In this case, of course, all of the same elements are present, as Mr. Malone explained in great detail in the Statement of Facts in his original brief. (Brief of Appellee/Cross-Appellant, Malone pp. 9-14). That explanation discloses that after Gallagher Bassett's adjuster obtained a recorded statement from Mr. Malone's toolpusher and recognized the existence of the workers' compensation claim, she then abandoned any further evaluation of the claim and failed to undertake any component of the required three-point contact. She failed to contact Mr. Malone and to interview him. She also failed to determine the names of Mr. Malone's physicians and to

obtain the medical records relevant to his claim, and she also further failed to follow-up and consult with Nabors.

It is likewise clear that the alleged facts that Gallagher Bassett reviews on pages 39-40 of its Reply Brief constitute an incomplete, misleading, and one-sided account of the evidence produced at trial. In this regard, if the Court will review the Statement of Facts in Mr. Malone's original brief, it will find a highly detailed refutation of Gallagher Bassett's pitiful contention that it could not proceed, or recognize a claim that needed to be investigated, unless it first received a written, first report of injury from Nabors. (Brief of Appellee/Cross-Appellant, Malone pp. 9-11). The Court will also find a refutation of Gallagher Bassett's contention that until November, 2001, it believed that Mr. Malone had only sustained a first aide injury. At trial, it was undisputed that when Gallagher Bassett's adjuster, Deborah Duckett Robicheaux, spoke with Mr. Malone's toolpusher on August 16, 2000, she either learned or confirmed that Mr. Malone had received regular medical treatment for his injury and needed to undergo surgery. *Id.* Mr. Malone's prior Statement of Facts additionally explains how Ms. Robicheaux's credibility was completely undermined and destroyed during the trial. *Id.* at 10-12.

The jury's finding that Gallagher Bassett is liable to Mr. Malone must thus stand. That finding is fully supported by the law and facts, and it cannot be reversed and set aside, either as a matter of law or for any other reason.

B. Contrary to Gallagher Bassett's Contention, the Trial Court Did Not Conduct a Separate Bifurcated Trial on the Claims for Punitive Damages, and, for that Reason, Plaintiff, Gary Lee Malone, Must Be Granted a New Trial in Which His Claims for Punitive Damages Are Fully and Appropriately Addressed in an Evidentiary Hearing.

Of all the strained, incredible assertions in Gallagher Bassett's Reply Brief, the most strained and incredible of all maybe its assertion that the trial court actually conducted, in accordance

with the requirements of Mississippi law, a "bifurcated", "second phase" of the trial on the various claims for punitive damages.

Under the applicable Mississippi statute and controlling caselaw, the trial court should have commenced an evidentiary hearing on the claims for punitive damages after the compensatory phase of the trial ended. The following statutory standard dictates when a "second phase" on claims for punitive damages should be undertaken:

> (c) If, but only if, an award of compensatory damages has been made against a party, the court shall promptly commence an evidentiary hearing to determine whether punitive damages may be considered by the same trier of fact.
>
> (d) The court shall determine whether the issue of punitive damages may be submitted to the trier of fact; and, if so, the trier of fact shall determine whether to award punitive damages and in what amount.

Miss. Code Ann. §11-1-65(1)(c) and (d).

In the case of *Bradfield v. Schwartz*, 936 So.2d 931 (Miss. 2006), the Mississippi Supreme Court further delineated the prerequisites for such a "second phase" of a trial.

> ***If the jury awards compensatory damages, then an evidentiary hearing is conducted in the presence of the jury.*** **At the close of this second phase of the trial, via an appropriate motion for a directed verdict, the judge, as gatekeeper, then ultimately decides whether the issue of punitive damages should be submitted to the trier-of-fact (jury).** If the judge, from the record, should determine, as a matter of law, that the jury should not be allowed to consider the issue of punitive damages, a directed verdict shall be entered in favor of the defendant on the issue of punitive damages, and the case will end. If, on the other hand, the judge should allow the issue of punitive damages to be considered by the jury, then the jury, upon being properly instructed by the judge on the punitive damages issue, may decide to award punitive damages, and if so, in what amount, or the jury may decide not to award punitive damages.

Id at 939. (Emphasis added).

In the case of *Causey v. Sanders*, 2008 Miss. LEXIS 520 (Miss. 2008), the Mississippi Supreme Court also stated that the trial judge must commence an evidentiary hearing before the jury on the issue of punitive damages:

> ...**the *trial* judge should commence an evidentiary hearing before the jury on the issues 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.

Id. at 407. (Emphasis added).

In this case, the trial court did not commence an evidentiary hearing before the jury on the issue of punitive damages. In fact, the trial court declined to conduct such a hearing in violation of the established procedures which were set out in the punitive damages statute and later articulated by this Court in *Schwartz* and *Causey*.

It is very interesting that in its briefs, Gallagher Bassett does not address the binding and extremely recent procedures set out in the *Causey* case. In fact, the trial transcript shows that the trial court and the parties had a *conference* or *discussion,* in which the attorneys for Mr. Malone and Nabors asked the trial court to undertake a "punitive damages" phase of the trial. (T. 1002-1006). But after that *conference* or *discussion*, the trial court refused to commence any evidentiary hearing before the jury, and it is clear that such a *conference* of *discussion* does not equate to an evidentiary hearing on punitive damage before a jury, which is what Mississippi law clearly requires at that juncture.

The trial court also decided that because the jury assessed fault to the plaintiff (15%), punitive damages were completely and totally barred. (T. 1005). But there is no Mississippi case or statute that bars punitive damage when a plaintiff is assessed a portion of fault by a jury, and Gallagher Bassett has not presented any citation of authority – a statute, a case, or anything else – to support the position taken by the trial court.

It is also clear that a rule barring punitive damages in a case in which a plaintiff is assessed some degree of fault by a jury would be extremely inequitable and unjust. In an action involving a motor vehicle accident, for example, if one motorist is assessed fault of 15% for

slightly speeding, while another motorist is assessed fault of 90% for driving recklessly and being badly intoxicated, there can be no justification for preventing punitive damages from being assessed against the dr unk driver, since all of the standards for such an award have been satisfied.

Furthermore, in the case of *Paracelsus Health Care Corp. v. Willard,* 754 So.2d 437 (Miss. 1999), the Mississippi Supreme Court specifically noted:

> 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 disregards to the rights of others.

Id. at 442.

In this case, it is clear that Gallagher Bassett acted with malice or with gross disregard for the rights of Mr. Malone. Therefore, an evidentiary hearing on punitive damages was compulsory in the trial court, and Mr. Malone should be granted a new trial on punitive damages, so those claims can be presented in a proper manner through an evidentiary hearing before a jury.

C. **If the Verdict on Compensatory Damages Is Not Upheld, Mr. Malone Should Be Granted A New Trial On Compensatory Damages As Well**

In Mr. Malone's original brief, he carefully demonstrated that Gallagher Bassett is not entitled to a setoff as a result of his settlement with Nabors, and that Gallagher Basset also cannot establish that he experienced a double recovery. (Brief of Appellee/Cross-Appellant, Malone pp. 41-48). In connection therewith, Mr. Malone maintained that the award of compensatory damages in his favor should be upheld, as long as this Court also recognizes that when the jury returned a verdict for $250,000.00 in Mr. Malone's favor, it was simultaneously deducting – and giving Gallagher Bassett a credit for – the sum of $1,500,000.00 that Mr. Malone received in settlement from Nabors. *Id.* at 45-47.

But as Mr. Malone also noted, unless the jury's verdict is interpreted in that manner, the disparity between his 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).

Therefore, if this Court does not accept that interpretation of the jury's verdict, 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 Mr. Malone is also entitled to a new trial on compensatory damages, in order to avoid a miscarriage of justice.

Finally, Gallagher Bassett's claim that joint and several liability applies to 50% of Mr. Malone's recovery is completely misplaced. Only a plaintiff can seek to rely on that provision in the former statute, and in this case there is no evidence that either defendant is judgment proof, or that the need for such reliance may even arise. It is also clear that the 50% provision of the former statute does not disturb in any way the basic statutory requirement that several liability – and only several liability – should be determined in the first instance.

CONCLUSION

For the foregoing reasons, the jury's verdict in favor of Appellee/Cross-Appellant, Gary Lee Malone, should be affirmed as to liability and compensatory damages, and Mr. Malone should then 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.

Respectfully submitted,

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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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This the 15th day of April, 2009.

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