

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO.: 2007-CA-00585

GALLAGHER BASSETT SERVICES, INC.

APPELLANT

VERSUS

**GARY LEE MALONE and
NABORS DRILLING USA, INC.**

APPELLEE

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

REPLY BRIEF OF APPELLEE/CROSS APPELLANT
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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 representatives are made so the Court may evaluate possible disqualification or recusal.

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A handwritten signature in black ink, appearing to read 'R. O. Burson', written over a horizontal line.

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I. STATEMENT OF THE FACTS

The factual and procedural background was thoroughly briefed in Nabors' Appellee/Cross Appellant brief. However, in its reply brief, Gallagher Bassett goes to great lengths to conveniently cite to the Record in an apparent attempt to shift the focus from the relevant facts. Gallagher Bassett's primary theme throughout its reply brief is that it did nothing wrong, because Malone's claim was summarily denied by Wallace and Holbrook, who are Nabors' employees that do not possess the training or authority to deny a workers' compensation claim. Nothing cited by Gallagher Bassett changes the fact that Gallagher Bassett and Gallagher Bassett alone was the entity retained to review Nabors' employee injury claims. (R. 2490, N.R.E. 3). Nothing changes the fact that Gallagher Bassett's employee, Deborah Robichaux, knew of the claim by August 16, 2000 and failed in bad faith to investigate it. (G.B.R.E. 17; G.B.T.E. 26; N.R.E. 8 and 9; T.T. 779-781). Gallagher Bassett's employee did not complete the three-point contact, which would have necessarily involved her contact with Malone's doctor and Malone. Undeniably, Malone and his doctor were in a better position to explain Malone's injury and the compensability of same. (T.T. 281-283; 712-862, Trial Examination of Deborah Robichaux). Instead, Gallagher Bassett's employee, Deborah Robichaux, spoke with a person not likely to understand Malone's medical condition (Wallace, a tool pusher) and stopped there. (T.T. 712-862, Trial Examination of Deborah Robichaux). In fact, it does not make a difference what Nabors' employees' thoughts were regarding Malone's claim, because Nabors' employees were not charged with adjusting claims. Nabors' employees were simply used as part of the investigation process to provide the facts. (T.T. 281-283; 712-862).

Gallagher Bassett was the expert entity retained to adjust claims and obtain the facts from lay witnesses, not rest a decision on lay witnesses' opinions that are not trained medical professionals or versed in the legal requirements of workers' compensation. (R. 2490; N.R.E. 3).

It was then Gallagher Bassett's duty to adjust Malone's claim in accordance with the three point contact procedure. (T.T. 375). Once Gallagher Bassett contacted a Nabors' employee regarding the claim, Nabors was on notice that Gallagher Bassett was adjusting the matter. Otherwise Gallagher Bassett had no reason to speak with Bobby Wallace, a tool pusher, regarding Malone's injury.

The second theme of Gallagher Bassett's reply brief is based on Gallagher Bassett's repeatedly telling this Honorable Court of how well the jury listened and how much time the jury and Judge Landrum took to correctly decide the issues. What is confusing about this proposition is that Gallagher Bassett is seeking to have this Honorable Court overturn the entire verdict. Apparently, Gallagher Bassett believes that the Judge and jury correctly decided the minor issues raised in Nabors' assignment of errors on appeal, but somehow incorrectly decided the entirety of the case against Gallagher Bassett. In other words, Gallagher Bassett would have this Honorable Court believe that Judge Landrum and the jury must have only listened well and correctly applied the law to issues set forth on appeal by Nabors, because when it comes to reversing issues altogether, Gallagher Bassett believes the Judge and jury were entirely wrong with regard to every issue placing liability with Gallagher Bassett.

Gallagher Bassett obligated itself to provide services to Nabors in a "fair and expeditious" and "professional manner . . . in accordance with all applicable laws, statutes, and regulations." (R. 2490, N.R.E. 3). In that regard, despite the information obtained in the recorded statement dated August 16, 2000, and contrary to specific procedures outlined by Gallagher Bassett in its own policies and manuals, Gallagher Bassett and/or its representatives took no further action to investigate Malone's claim until December of 2001. (T.T. 281-283; 712-862, Trial Examination of Deborah Robichaux). More specifically, Gallagher Bassett and/or its representatives failed to follow-up with Malone, Holbrook, and/or any of Malone's treating

physicians until December 2001, which was approximately sixteen (16) months after receiving notice of the claim in August of 2000. (T.T. 281-283; 712-862). The fact is that Gallagher Bassett did not act fairly and expeditiously and in a professional manner taking into consideration the laws, statutes, and regulations.

II. SUMMARY OF THE ARGUMENT

Pursuant to Mississippi Rules of Appellate Procedure 28(c), Nabors is limited in its reply solely to assignments of error set forth in its cross-appeal. Consequently, Nabors abides by that rule and by doing so is not conceding or waiving its opposition to Gallagher Bassett's appellant issues that were briefed in Nabors' original appellee/cross appellant brief. Therefore, Nabors stands by its arguments presented in opposition as found in its appellee/cross appellant brief.

The final judgment entered in favor of Malone against Nabors is not supported by the evidence. In order to justify this verdict against Nabors, Gallagher Bassett relies on Wallace and Holbrook's thoughts that the injury was first aid only and that additional medical treatment was not work-related. However, Gallagher Bassett's plain failure to investigate, analyze, and handle this claim in its expert capacity within even its own standards amounted to bad faith. Wallace and Holbrook were Nabors' employees at the time of the incident and were not trained to investigate and adjust employee worker's compensation claims. Neither Wallace nor Holbrook are trained medical or claim handling professionals. Consequently, their thoughts with regard to Malone's injury and its compensability were of no moment. Gallagher Bassett had notice of the claim within nineteen (19) days of injury, prior to any detriment to Malone, and yet failed to investigate and adjust the claim. Based on these facts, the jury was incorrect in its apportionment of fault to Nabors.

The trial court erred in denying Nabors' Motion for Judgment Notwithstanding the Verdict to Enter Additur. Gallagher Bassett's opposition centers on the assertion that the trial

judge stated that the jury listened well throughout the trial. However, Gallagher Bassett offers nothing other than the assertion that the jury understood and was correct in its decision. More specifically, Gallagher Bassett is unable to demonstrate to this Honorable Court why Nabors' should not receive an Additur, other than the assertion that it believes the jury was correct.

The Trial Court Erred in Overruling Nabors' Objection to Gallagher Bassett's Tendered Expert Witness, Wayne Johnston's, trial testimony. None of Gallagher Bassett's arguments in opposition to Nabors' assignment of error obviates the fact that Wayne Johnston testified as an expert in the insurance adjusting industry, but never reviewed Gallagher Bassett's policies and procedures, among other things. In fact, Johnston acknowledged that he had never been qualified as an expert in the field of insurance adjusting for the purposes of litigation before his testimony in this case. (T.T. 866-867). Furthermore, Johnston acknowledged that he had not reviewed Gallagher Bassett's practices and procedures (T.T. 868-869) and was not relying his opinions on any peer reviewed written articles or studies. (T.T. 869). Under the case at hand, Nabors' Daubert motion was well placed.

Gallagher Bassett improperly expanded the scope of its expert witnesses' testimony in its untimely supplemental responses to Nabors' interrogatories. Gallagher Bassett argues that it simply supplemented discovery and did not alter the content with regard to expert witnesses. That assertion in and of itself begs the question of if no new information was added to the discovery regarding expert witnesses, then Gallagher Bassett would have had no need to supplement these answers. Consequently, the trial court erred in denying Nabors' Motion in Limine to Exclude the discovery responses.

The Trial Court Erred in Holding in Abeyance Until After the Trial Nabors' Motions to Strike Cross-Claim. Gallagher Bassett failed to oppose this argument in its reply brief.

Consequently, Nabors' re-urges and re-asserts all arguments made in its Cross-Appellant brief and moves this court to find in Nabors' favor on this issue.

The Trial Court Erred in its Oral Denial of Nabors' Motion for Directed Verdict Against Gallagher Bassett's Cross-Claim Against Nabors at the Close of Plaintiff's Case. Gallagher Bassett offered merely a mention of this assignment of error combined with this discussion of the allocation of fault argument under section C of its reply brief. Though Gallagher Bassett highlighted this assignment in its Table of Contents of the reply brief, Gallagher Bassett neglected to brief the issue. Consequently, as it did not brief the assignment in opposition, the issue should be determined in Nabors' favor.

III. LAW AND ARGUMENT

A. The Final Judgment Entered in Favor of Malone Against Nabors Is Not Supported By the Evidence.

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

Gallagher Bassett's opposing arguments to Nabors' appeal of the final judgment begin with addressing the Mary Carter agreement entered into between Nabors and Malone. Quite frankly, the Mary Carter agreement has nothing to do with the jury's apportioning 42.5% of fault to Nabors and Gallagher Bassett fails to show any connection. Subsequently, Gallagher Bassett

spends misplaced energy on what happened on the date of injury and who said what. The fact is that nothing regarding immediate treatment of the injury matters because within nineteen (19) days of the incident, Gallagher Bassett had notice of the claim and failed in bad faith to investigate and adjust the claim. Furthermore, the fact of the matter is that a report of injury was filled out on the date of injury.

Gallagher Bassett relies heavily on the thoughts of Wallace and Holbrook as to whether Malone's injury constituted a workers' compensation claim. However, Gallagher Bassett had knowledge, by at least August 16, 2000, of the incident and Gallagher Bassett was the entity charged with determining whether there is a compensable workers' compensation claim or not. If all Gallagher Bassett had to do was rely on the word of Nabors' employees, then it begs the question as to what Gallagher Bassett's role was to be and why it was hired. Yet, Gallagher Bassett never provides an answer as to how it had knowledge of Malone's claim in August of 2000; however, what is clear is that the only plausible conclusion is that Nabors' advised Gallagher Bassett of Malone's injury. Apparently, Nabors did not unilaterally rule the claim as non-compensable, as Gallagher Bassett would have this Honorable Court believe, because Gallagher Bassett knew of the injury in August of 2000.

Next, Gallagher Bassett attempts to make issue that Nabors' corporate representative testified that she "thinks" Nabors sent a First Aid Report of Injury to Gallagher Bassett. That entire argument is meritless. Gallagher Bassett cannot deny it had notice of the Malone's injury in August of 2000 and that someone from Nabors would have had to provide that notice. Therefore, the bottom line remains that Gallagher Bassett had notice of Malone's injury and failed in bad faith to investigate the injury. It does not matter what Nabors' employees believed with regard to Malone's injury. Rather, of importance is that Gallagher Bassett had knowledge of Malone's injury, Malone's need for medical treatment, and in bad faith and with reckless

disregard failed to fulfill its obligation to Nabors and Malone. Gallagher Bassett would have this court believe that Nabors' employees ruled the entire incident as unrelated to work. However, that is clearly not true and irrelevant, as Gallagher Bassett was the entity charged with obtaining the relevant information, making the contact with Malone, making contact with Malone's doctor, and thereafter handling the worker's compensation claim appropriately.

The truth is that Gallagher Bassett had notice of the injury, because there is no other way that Deborah Robichaux would have known to call Wallace to initiate the investigation. Gallagher Bassett's employee, Deborah Robichaux, initiated the three-point contact by speaking with Wallace, but recklessly failed to complete it when she did not speak to Malone or his treating physician and recklessly misplaced the taped statement. While Gallagher Bassett is in the business of adjusting workers' compensation claims and assumed that duty, Gallagher Bassett miserably failed to professionally adjust and investigate this claim. Consequently, Gallagher Bassett's reckless disregard resulted in a man's loss of his leg.

Based on the evidence, it was erroneous for the jury to find Nabors' 42.5% at fault in light of the fact that the entity (Gallagher Bassett) retained to investigate and handle its workers' compensation claims failed to investigate and handle this claim. Nabors clearly submitted Malone's claim to Gallagher Bassett and Gallagher Bassett had notice of the claim, because Gallagher Bassett acted, though woefully inadequately, upon the information in August of 2000.

It is undisputed that on August 16, 2000 or before, someone at Nabors alerted Gallagher Bassett regarding Malone's claim. It is undisputed that Deborah Robichaux, in her capacity as an adjuster for Gallagher Bassett, took a recorded statement of a Nabors' employee on August 16, 2000. It is undisputed that on August 16, 2000 that Deborah Robichaux had in her possession some of Malone's medical records. It is undisputed that Gallagher Bassett did absolutely nothing else with Malone's claim until December of 2001. It is also undisputed that

the jury found in favor of Nabors against Gallagher Bassett. It is further undisputed that the trial court dismissed Gallagher Bassett's cross-claims against Nabors. (T.T. 932). Based on all of this, it is clear that the jury's decision apportioning fault to Nabors was against the great weight of the evidence.

B. The Trial Court Erred in Denying Nabors' Motion for Judgment Notwithstanding the Verdict to Enter Additur.

Under Mississippi law, an additur may be awarded if the court finds 1) that the jury or trier of fact was influenced by bias, prejudice, or passion, or 2) that the damages awarded were contrary to the overwhelming weight of credible evidence. Miss. Code. Ann. § 11-1 55; *Cade v. Walker*, 771 So. 2d 403 (Miss.App. 2000). Moreover, where an award is contrary to the weight of credible evidence, the trial court is permitted to enter an additur as is reasonable under the circumstances. *Bankers Life & Casualty Co. v. Crenshaw*, 483 So. 2d 254, 278 (Miss. 1985). In that regard, the court must accept the evidence which supports the verdict as true. *Nicolaou v. State*, 612 So. 2d 1080, 1083 (Miss. 1992). Finally, "the trial court's denial of a motion for additur or remittitur would be subject to appellate review via an assignment of error ... [that said verdict] was contrary to the substantial weight of the evidence." *Dedeaux v. Pellerin Laundry, Inc.*, 947 So.2d 900, 908-09 (Miss.2007). Bearing that in mind, the jury's verdict was clearly contrary to the substantial weight of the evidence.

Interestingly, Gallagher Bassett's opposition to Nabors' request for additur argues that Nabors is not entitled to any recovery, but on the other hand Gallagher Bassett sets for that the jury was "one of the most attentive juries he [Judge Landrum] had see in his thirty-two years of experience." Consequently, if the jury was so attentive and is therefore correct, then Gallagher Bassett's argument concedes that Nabors is entitled to the amount awarded. Yet, Gallagher Bassett seems to make that argument throughout its reply brief - when it wants something the court was wrong, when Nabors' requests something the court was attentive and correct. Even

further, Gallagher Bassett argues that the issue is whether Nabors is liable for Gallagher Bassett's actions and whether Nabors had liability in this action. However, the jury sheet specifically stated that it found in favor Nabors against Gallagher Bassett. (R. 3769). The jury did not state that it found Nabors contributed to its damages with regard to the Cross-Claim.

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

As stated above, the jury found that Gallagher Bassett breached its contract to adjust Malone's workers' compensation claim, causing Nabors to incur damages that had the claim been properly adjusted the damages would not have been incurred. Despite the fact that Nabors incurred damages in the amount of \$2,702,729.66, the jury awarded Nabors \$1,250,000.00 without explanation. Using Gallagher Bassett's reasoning and assumption that the jury took into account Nabors' supposed liability of 42.5%, which is denied, the award is still low. Total damages awarded was \$1,250,000.00 to Nabors plus \$250,000.00 to Malone equaling \$1,500,000.00; yet, 57.5% (representing a subtraction for Nabors' 42.5% of assigned fault) of Nabors' damages is \$1,554,069.55. Accordingly, Gallagher Bassett's notion is again baseless.

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

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

The trial court erred in overruling Nabors' objection to Wayne Johnston's ("Johnston") testimony as an expert witness. By the 2003 amendment to Mississippi Rules of Evidence 702, the Mississippi Supreme Court adopted the *Daubert* standard and established the "gate keeping responsibility of the trial court to determine whether ... expert testimony is relevant and reliable." *Treasure Bay Corp. v. Ricard*, 967 So.2d 1235, 1241 (Miss. 2007) (quoting Comment, Miss. R. Evid. 702; See also *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)). Thus, "[t]he most important guideline is for the trial judge 'to act as a gatekeeper, ensuring that expert testimony is both relevant and reliable.'" *Bullock v. Lott*, 964 So.2d 1119, 1128 (Miss. 2007) (citing *Poole v. Avara*, 908 So.2d 716, 723 (Miss.2005); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)) (emphasis added). "In determining relevance of an expert's testimony, the trial judge should consider if the testimony will assist the trier of fact." *Id.* (citing *Poole*, 908 So.2d at 723; *Daubert*, 509 U.S. at 591, 113 S.Ct. 2786)).

The trial court has the discretion to determine whether a witness is sufficiently knowledgeable to be considered an expert. *Bass v. Bobo*, 980 So.2d 944, 948 (Miss.App. 2007) (citing *Nunnally v. R.J. Reynolds Tobacco Co.*, 869 So.2d 373, 384(¶ 36) (Miss.2004) (citations omitted)). "The trial judge has the sound discretion to admit or refuse expert testimony; an abuse of discretion standard means the judge's decision will stand unless the discretion he used is found to be arbitrary and clearly erroneous." *Id.* (quoting *Troupe v. McAuley*, 955 So.2d 848, 855(¶ 19) (Miss.2007)).

The framework employed in determining whether particular proffered expert testimony meets the requirements of Mississippi Rule of Evidence 702 necessarily involves the trial court's first determination of whether the expert testimony is relevant. If the trial court finds that the proffered testimony is relevant, then the court next considers whether the proffered testimony is reliable. Each

determination by a trial court regarding the admissibility and reliability of expert testimony is a fact intensive one, and 'requires immersion in the subject matter of the case.'

Id. (citing *Mississippi Transportation Commission v. McLemore*, 863 So.2d 31, 40 (Miss.2003)).

The Mississippi Supreme Court has reminded Mississippi's trial judges of "their solemn gate-keeping responsibilities consistent with *Daubert*, [] amended Rule 702, and *McLemore* and its progeny, whether it be assuring that an expert is confined to offering opinions within his/her areas of expertise or assuring that an expert's testimony is based upon sufficient facts and data, is the product of reliable principles and methods, and is based on the principles and methods having been applied reliably to the facts of the case." *Bullock*, 964 So.2d at 1129 (emphasis added). "An expert's opinion is admissible only if it is founded on data. Talking off the cuff-deploying neither data nor analysis-is not an acceptable methodology." *Glenn v. Overhead Door Corp.*, 935 So.2d 1074, 1079 (Miss.App. 2006) (internal quotation marks and citation omitted).

In this case, Johnston did not have sufficient facts and data to render the expert opinions he did at trial, since he never reviewed Gallagher Bassett's policies and procedures. See *Mariner Health Care, Inc. v. Estate of Edwards ex rel. Turner*, 964 So.2d 1138 (Miss. 2007) ("The trial judge ruled that [the expert] was not familiar enough with [] treatment options to offer an expert opinion. There was no error in partially excluding his testimony.") From a close review of the trial transcript, the trial judge expressed concern over Johnston's testimony:

I don't have a problem with him testifying what the standards are. But so far as him testifying as to whether or not this claim was handled properly, and he hasn't even reviewed what their standards are in regards to knowing whether or not they following it properly. Their own standards, their guidelines, the standards that they set out for themselves, and he hasn't even reviewed them...But if he hadn't even reviewed what the standards the company itself has set up for themselves in regards to adjusting claims, he can't testify in that regard...I mean, both of [Gallagher Bassett's] witnesses, [Gallagher Bassett's] corporate witnesses, have testified as to their standards. And now I'm going to let him get up here and testify it's the standards and he hasn't even reviewed them? (T.T. 877-78).

As stated by the trial judge, “an expert is [presented] to give the jury assistance in understanding technical things.” (T.T. 880). Although the trial judge did not know what more assistance the jury would need when two of Gallagher Bassett’s employees had already testified regarding Gallagher Bassett’s company standards, the trial court allowed Gallagher Bassett to present Johnston as an expert witness on industry standards. *Id.* The reason: the trial judge “hate[d] to go this far and not be able to allow [Gallagher Bassett] to bring forth some kind of expert testimony.” (T.T. 879). Even though the trial judge did not first determine whether Johnston’s testimony was relevant (as required by case law), the trial judge found that Johnston’s testimony would be reliable testimony and would be credible testimony accepted by the court. (T.T. 882).

Johnston’s testimony was not relevant or reliable to the issues because Johnston did not review Gallagher Bassett’s own product standards. (T.T. 869). Johnston acknowledged that he had never been qualified as an expert in the field of insurance adjusting for the purposes of litigation before his testimony in this case. (T.T. 866-867). Furthermore, Johnston acknowledged that he had not reviewed Gallagher Bassett’s practices and procedures (T.T. 868-869) and was not relying his opinions on any peer reviewed written articles or studies. (T.T. 869). Johnston had nothing new to add to the testimony already before the court and his testimony was largely duplicative and based on assumption, speculation, and conjecture. This leads us back to the fact that Johnston’s opinions were not based on sufficient facts and data. Johnston testified that, based upon his knowledge and experience in the field, the TPA must receive a written report of injury in order to open a file. (T.T. 883). Yet, because Johnston had not read Gallagher Bassett’s own product standards, he was not aware that Gallagher Bassett’s policies allow notice other than a written report of injury to constitute notice of a claim. (*See Examination of Rideout*, T.T. 697) (“within six calendar days of receipt of a state employers first report of injury form or other notice from the client, all new claims will be evaluated, reserved, coded and entered into RES FACS.”)

Indeed, not only was Johnston's testimony based on insufficient facts and data, it was further based upon assumption, speculation and conjecture since Johnston himself did not know what comprised Gallagher Bassett's policies and procedures. Additionally, as previously pointed out by Nabors, Johnston conceded that different TPAs have different practices and procedures that they follow with respect to an assignment of adjusting a claim and adjusting a claim. (T.T. 867). After consideration of the voir dire of Johnston and the testimony of Gallagher Bassett's employees at trial, the trial court clearly erred in overruling Nabors' objection to Johnston's testimony as an expert. Consequently, Nabors was highly prejudiced by the trial judge's abuse of discretion, which was "arbitrary and clearly erroneous." Had Johnston been properly excluded, the jury would not have been subjected to the unsupported, prejudicial testimony of Johnston, and the jury would have had nothing before it to find fault on the part of Nabors.

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

The trial court erred in denying Nabors' Motion in Limine to exclude Gallagher Bassett's untimely discovery responses, which was pled in the alternative as a Motion to Strike. "The standard of review regarding the admission or exclusion of evidence is whether the trial court abused its discretion." *Tatum v. Barrentine*, 797 So.2d 223, 230 (Miss. 2001) (citing *Thompson Mach. Commerce Corp. v. Wallace*, 687 So.2d 149, 152 (Miss.1997)). "This Court has laid down no hard and fast rule as to what amounts to seasonable supplementation or amendment of answers." *Id.* at 229 (citing *Eastover Bank for Sav. v. Hall*, 587 So.2d 266, 272 (Miss.1991)). In this case, the predominant concern is whether there would be prejudice to the appellee. *Id.*

Rule 26 of the Mississippi Rules of Civil Procedure provides in part:

(1) A party is under a duty seasonably to supplement that party's response with respect to any question directly addressed to...(B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the testimony.

M.R.C.P. 26(f)(1)(B). Gallagher Bassett supplemented its responses to interrogatories per Rule 26(f)(1)(B) on July 26, 2006, just twenty-eight (28) days prior to trial. The responses were not signed under oath by Gallagher Bassett as required by Rule 33(b)(1) ("Each interrogatory shall be answered separately and fully in writing under oath...").

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

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

26, 2006 discovery responses expanded the content of testimony beyond the timely designation of June 28, 2006. (R. 3074-3088 as compared to 2735-2741).

As set forth by Nabors, Gallagher Bassett's supplementation was a supplemental expert designation in disguise. Because Gallagher Bassett did not timely supplement, the trial court should have granted Nabors' Motion in Limine, and by not doing so, the court abused its discretion. Consequently, the subject matter was prejudicial to Nabors, and it precluded Nabors from properly opposing the additional subject matter. Thus, the trial court erred in denying Nabors' Motion to Strike Gallagher Bassett's Third Supplemental Responses, prejudicing Nabors at trial.

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

Gallagher Bassett did not offer a briefed opposition to this assignment of error. In fact, this assignment is only mentioned in the last paragraph on page 31 of Gallagher Bassett's reply brief. More specifically, Gallagher Bassett dedicates three (3) sentences to the issue and gives no basis to oppose the assignment of error. Consequently, that issue was not briefed on opposition by Gallagher Bassett and should be determined in Nabors' favor.

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

Gallagher Bassett offered no opposition to this assignment of error. In fact, this assignment is merely mentioned in the Table of Contents of Gallagher Bassett's reply brief. However, when one turns to that page number, it is actually argument regarding Nabors Motion for Judgment Notwithstanding the Verdict to Enter Additur. Gallagher Bassett mentions the issue on page five of its brief, but does not offer opposing arguments. Consequently, this issue was not briefed on opposition by Gallagher Bassett and should be determined in Nabors' favor.


IV. CONCLUSION


Based on the above arguments, it is clear that Nabors' Judgment Notwithstanding the Verdict regarding Additur should have been granted. Furthermore, the jury's finding that Nabors was 42.5% at fault was against the great weight of the evidence. Gallagher Bassett, as Nabors' third party administrator, acted in a manner that was reckless and in bad faith. Furthermore, Gallagher Bassett breached the Claim Service Agreement. As such, Nabors requests that this Honorable Court reverse the finding that Nabors was 42.5% at fault, reverse the circuit court's denial of Nabors' JNOV, find that the circuit court was in error in holding Nabors' Motion to Strike Gallagher Bassett's Cross-Claim in abeyance and deny all of Gallagher Bassett's assignment of errors. Nabors further prays that all issues not properly opposed by Gallagher Bassett be rendered in Nabors' favor.

Respectfully submitted, this the 15th day of April, 2009.

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CERTIFICATE OF SERVICE

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

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This 15th day of April, 2009.



RICHARD BURSON

CERTIFICATE OF FILING

I certify that I have deposited the original and three (3) copies of this Reply Brief with the Clerk of the Mississippi Supreme Court on the 15th day of April, 2009.

A handwritten signature in black ink, appearing to be 'RB' with a stylized flourish extending to the right.

RICHARD BURSON