2007-CA-00585
Supreme Court

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 Court of Appeals may evaluate possible disqualification or recusal.

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II. STATEMENT OF THE CASE

2.1 This appeal involves an adjuster liability case against an independent adjusting firm for its actions taken in adjusting a workers' compensation claim. The Plaintiff, Gary Lee Malone ("Malone" or "Plaintiff") filed this suit against his employer, Nabors Drilling, USA, Inc. ("Nabors" or "Co-Plaintiff") and Gallagher Bassett Services, Inc. ("Gallagher Bassett") alleging that his claim was handled in "bad faith" causing him damages on December 3, 2003 in Circuit Court of Jones County, Mississippi. R.E.[1] Nabors also filed a cross-claim against Gallagher Bassett seeking indemnity for its damages arising out of Malone's bad faith claim on September 30, 2005. Prior to trial, Malone's workers' compensation claim which had been pending before the Commission was resolved, wherein Nabors agreed to pay all past due amounts, including penalties and interest, and a lump sum payment for Malone's future benefits with the exception of future medicals, which was left open. [R.E. 18 and R. E. 19]. Also prior to trial, Malone and Nabors entered into a Mary Carter Agreement settlement wherein Nabors agreed to pay Malone $1.5 million for the bad faith actions of Gallagher Bassett; however, Nabors reserved the right to continue as an active participant and defendant at the trial of this matter and would further receive reimbursement from Malone for any recovery received from Gallagher Bassett. [R. E. 12]

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

2.2 This appeal arises from a jury trial in the Circuit Court of Jones County, Mississippi, wherein the jury awarded $250,000.00 in actual damages to Malone after assessing that each party was partially liable for Malone's alleged damages. [R.E. 20]. By way of special interrogatory the jury found that Malone was 15% at fault for his own damages, that Nabors was 42.5% at fault for Malone's damages, and likewise Gallagher Bassett was 42.5% at fault for Malone's damages. The jury further rendered a verdict in favor of Nabors and awarded $1,250,000.00 in compensatory damages against Gallagher Bassett. [R.E. 21]. The Court declined to allow a punitive damage stage against Gallagher Bassett. V 7, T 1004-1005. The Court further polled the jury regarding the issues of punitive damages, wherein ten (10) of the (12) jurors responded that they would not have assessed punitive damages against Gallagher Bassett. V 7, T 999-1000.

2.3 Trial began in the instant case on August 21, 2006. On or about September 7, 2006, the jury returned a verdict against Gallagher Bassett as described above. During the course of trial, after the close of Malone's case and Nabor's case, Gallagher Bassett moved for a directed verdict which was denied by the trial court. After entry of judgment, Gallagher Bassett filed a Motion for JNOV and New Trial as to both Malone's claims and Nabors' claims as well as a Motion for Setoff. Each of these motions were denied. On April 11, 2007, Gallagher Bassett timely filed their Notice of Appeal. [R.E. 3]

III. STATEMENT OF THE FACTS

3.1 The Plaintiff in this action filed a bad faith suit against Gallagher Bassett and Nabors alleging that by committing bad faith in the handling of his workers compensation claim, he suffered injuries and damages to include the amputation of hi right leg. The best way to begin this matter is to first look to the result of the jury trial along with the settlements and agreements entered into prior to the trial of this case. Prior to the trial, Malone's workers' compensation

claim which had been pending before the Commission, was resolved. Nabors agreed to pay all past due amounts, including penalties and interest, and a lump sum payment for Malone's future benefits with the exception of future medicals, which was left open. Also prior to trial, Malone and Nabors entered into a Mary Carter Agreement settlement wherein Nabors agreed to pay Malone $1.5 million for the bad faith actions Gallagher Bassett however Nabors reserved the right to continue as an active participant and defendant at the trial of this matter and would further receive reimbursement from Malone for any recovery received from Gallagher Bassett. R.E. 12; V32; T 652 ln 4-23.

3.2 The jury awarded $250,000.00 in actual damages to Malone after assessing that each party was partially at fault for Malone's alleged damages. [R.E. 21] By way of special interrogatory the jury found that Malone was 15% at fault for his own damages, that Nabors was 42.5% at fault for Malone's damages and likewise Gallagher Bassett was 42.5% at fault for Malone's damages. [R.E. 21] The jury further rendered a verdict in favor of Nabors and awarded $1,250,000.00 in compensatory damages against Gallagher Bassett [R.E. 22]. The Court declined to allow a punitive damage stage against Gallagher Bassett. V 34; T 1006 ln 19-1007 ln 1; V 34; T 1007 ln 26-28, 1008 ln 1-10. The Court further polled the jury regarding the issues of punitive damages, wherein ten (10) of the (12) jurors responded that they would not have assessed punitive damages against Gallagher Bassett. Id. It is from this award that Gallagher Bassett is seeking relief.

3.3 This is a factually intensive case, with ample testimony and documentary evidence by all parties. The unusual thing in this case however, is that 90% or more of the facts are not in dispute. Malone was injured when he slipped and bumped his right leg on a beam while working on Nabor's Rig 295 in Jones County, Mississippi on July 28, 2000 wherein the skin broke and first aid was required, however no "medical treatment" was given. V 29: T 271

ln 23- T272 ln 22. Malone went to his supervisor, toolpusher Wallace, and reported the injury, filled out an incident report, signed it, received first aid treatment from Wallace, and returned to work and continued to work the rest of his "hitch" which lasted three (3) more days. V 29; T272 ln 22 – T 274 ln 19 .

3.4 Malone went to his family doctor after this incident as Malone had suffered from an underlying skin/bone disease which was a chronic infectious condition called osteomyelitis. V 29: T 275 ln 2- T 277 ln 18. Malone's treating physician prescribed antibiotics and a follow up appointment. Id. At the follow up appointment Malone's bone was exposed in the wound and Malone was sent to a specialist immediately to assess the situation. Id. The specialist told Malone he would need skin graft surgery. D. Melancon p 31 ln 13- 24. Malone refused to proceed with the surgery immediately as suggested by his doctors because he first wanted to work an extended shift in order to save up money for the time he was going to be off to recover from the surgery. Id.

3.5 Malone testifies that he understood he needed surgery to address the open wound as soon as possible but that he was not told delaying the surgery was risking losing his leg, and in fact that if he had known that his leg was at risk he would not have delayed having the surgery for any reason. V 32, T 340 ln 23 T 340 ln 2; V 30; T 345 ln 24 – 28. It is this eight (8) week work schedule, which "delayed" Malone's surgery that Malone is contending "caused" his amputation. Malone asserts that if Gallagher Bassett had paid him workers compensation benefits, allowing him to proceed immediately with surgery without the necessity of saving up money, he would not have lost his leg. Regardless of the reason, the doctors knew Malone was going to work on an oil rig for two months straight and yet again did not prescribe any special medication or care instructions for the wound of exposed bone. D. Barbieri p 39 ln 9- p 40 ln 4.

3.6 Malone testifies that he went to Nabors corporate office in Laurel and talked to Holbrook, the district supervisor for Nabors to ask for this surgery and time off to be covered under workers' comp. V 29: T 280 ln 1- 23. Malone had filed a workers' compensation claim in the past and received benefits, therefore he understood that he needed to inform his employer that he needed to file his claim based on his work place injury. Malone relates that he told Holbrook he would need surgery but that Holbrook scoffed at his request for workers compensation benefits and told Malone that he would not be allowed to file a workers compensation claim because his injury was related to his ongoing underlying medical condition and that Nabors was not going to pay for it. V 30: T 336 ln 4- T 337 ln 8. Malone further testifies that Holbrook specifically told him that they would all lose their bonuses which would be awarded pursuant to Nabors' safety award program if Malone made this claim therefore he was not going to allow Malone to file the claim. V 30: T 336 ln 4- T 337 ln 8. Holbrook denies that he refused to allow Malone to file a claim for workers compensation and instead testifies that Malone only requested a special work assignment of eight (8) weeks straight in order to take a long leave of absence after his surgery. V31; T595 ln 7-24.

3.7 It is undisputed that in order to obtain this special work assignment, approval was required from the corporate office of Nabors and while receiving this approval, Holbrook made clear that Malone's injuries were not work related. V31: T 596 ln9 – T 597 ln 2.

3.8 Gallagher Bassett was the adjusting firm hired by Nabors' insurance carrier to handle Nabors' workers compensation claims. The dispute arises in this case based on the fact that on August 16, 2000 an adjuster for Gallagher Bassett called the toolpusher of Malone's rig, Wallace, to discuss Malone's injury, however Gallagher Bassett has no record of ever receiving the First Aid Only Report of Injury. R.E. 17. This conversation between the Gallagher Bassett adjuster and Wallace is recorded. Id. Wallace discusses with Gallagher Bassett the events

surrounding the First Aid Only Injury Report and confirms that the injury was minor and necessitated first aid only and had in fact "healed". R.E. 17; R.E. 14.

3.9 Nabors' corporate representatives testify that a First Aid Only Report of Injury should not have been sent to Gallagher Bassett as it is a First Aid Only Report and only claims which have medical or lost time are submitted to Gallagher Bassett to handle. V32; T 638 ln 14-19; V. 32; T 702 ln 19 – 26;V 32;T 706 ln 7-11;D. Poole pg 13; ln 6-13; V32; T 672 ln 10 – 19.

3.10 In the phone conversation between Gallagher Bassett and Wallace he explained that Malone was seeking to have surgery done on that same leg which was injured, however Wallace stated when asked, that he did not know if Malone was "going to" file a claim for workers' compensation, because Malone often had problems with this leg and therefore he was unsure whether the surgery was related to the injury or not. R.E. 17. Wallace told Gallagher Bassett that he had referred Malone to Holbrook, to discuss the matter. Id. Although Malone testified at trial that the reason, ***he did not file*** a workers comp claim, was due to his conversation with Holbrook wherein Holbrook denied Malone access to filing a claim, at trial both Malone and Nabors argued that the conversation between Gallagher Bassett and Holbrook constituted "sufficient knowledge" that Malone had a workers compensation claim and therefore Gallagher Bassett should have initiated a claim investigation. V 29; T 294 ln 1-14; V 30; T 344 ln 26 – T 345 ln 9.

3.11 Nabors had a policy and procedure for changing First Aid Only Reports of Injury into Medical Claim Reports of Injury. D. Poole pg 35; ln 15-25. It is undisputed however, that Malone's First Aid Report of Injury was never changed into a medical injury report and in fact, Nabors has no proof that any report existed on their computer log or was ever sent to Gallagher Bassett regarding Malone until November of 2001. Id. Because Malone knew he would not receive workers compensation benefits claimed all of his ensuing medical care on his family

health insurance plan. Malone then underwent the surgeries and the extensive rehabilitation that followed and ultimately never resumed his job with Nabors. In January of 2001, Malone was terminated by Nabors for being unable to return to work due to a "nonwork related injury". R.E.13. Malone then applied for social security benefits which he received.

3.12 Also, in January of 2001, however, Malone falls and breaks his leg which has just undergone surgery. [V. 29 Tr. 292, ln 17-19] This is a serious break requiring the placement of rods in Malone's leg that unfortunately become severely infected due to Malone's ongoing battle with osteomyelitis. Id. This infection eventually leads to the amputation of Malone's leg on August 19, 2002. [V 29; Tr. 303, ln. 1-2].

3.13 Prior to the loss of his leg, in November of 2001, Malone hires an attorney and contacts Nabors requesting once again that his injuries be covered under workers compensation. When, the Safety Coordinator, Jerry Poole, is contacted by Malone in November of 2001 he immediately sets up a First Report of Injury and sends it to Gallagher Bassett. D. Poole pg 27 ln 15 – 20. Upon receipt of the report, Gallagher Bassett sets up a claim and sends out a letter to Malone asking for his medical information and a Release. Id. Malone then turns this letter over to his attorney who then contacts the adjuster for Gallagher Bassett and requests that all communications on the claim be made directly through him as he is representing Malone. [V 33, T 841 ln – 25]. A petition to controvert is filed by Malone's attorney however the requested medical information is not sent to Gallagher Bassett for over seven (7) months. Id.

3.14 Once the medical records are received and reviewed, however, Gallagher Bassett recommends that Nabors pay Malone's claim. In fact, Malone's claim was deemed compensable by Gallagher Bassett a mere 45 days after receipt of the claim and Malone's medical records in September of 2002. Nabors then accepts the claim and pays Malone in full for his past due

benefits to include penalties and interest. However, Malone has already at this point initiated the present lawsuit alleging that both Nabors and Gallagher Bassett handled his claim in "bad faith."

3.15 After an analysis of the facts in this matter, it is clear that Gallagher Bassett did all that could be done in August of 2000. There is no dispute that Nabors had no record that Malone was seeking to file a workers compensation claim prior to November of 2001. Malone himself even admits that he never filed a workers comp claim. Regardless of these facts however, both Malone and Nabors seek to hold Gallagher Bassett liable in this action for failing to adjust a claim that no one knew existed.

3.16 It is supported by the overwhelming evidence, which is largely undisputed in this matter, that Gallagher Bassett committed no wrong in the handling of Malone's claims, as there existed no "claim" until November of 2001. [V 32; T 677 ln 12 – 22; D. Poole pg 35 ln 15 – 25]. A review of the undisputed facts and law regarding these claims, resolves this issue resoundingly in favor of Gallagher Bassett and therefore this matter should be reversed and rendered.

IV. SUMMARY OF THE ARGUMENT

4.1 This case arises from an underlying workers compensation claim of the Appellant, Gary Lee Malone ("Malone"). Co-Appellant, Nabors Drilling USA, Inc. ("Nabors") was the employer of Malone, while Gallagher Bassett Services, Inc. (Gallagher Bassett), the Appellee, was the adjuster contracted by Nabors' insurance carrier to handle the workers compensation claims assigned to them by Nabors. Malone contends that he had a workers' compensation claim as of August of 2000, however Gallagher Bassett and Nabors both contend they did not have notice of the claims until November of 2001. Malone's claim was ultimately found to be fully compensable and prior to trial, Malone received the benefits owed him.

4.2 Both Nabors and Malone, after reaching a Mary Carter settlement agreement prior to trial, assert that Gallagher Bassett had "sufficient notice" to know that Malone had a claim and that Gallagher Bassett should have conducted a full investigation into that claim in August of 2000. Malone further contends that the amputation of his right leg could have been avoided if Gallagher Basset would have conducted an adequate and proper investigation into his claim in August of 2000. Nabors filed a cross-claim against Gallagher Bassett, asserting bad faith breach of contract which sought indemnity from Gallagher Bassett for the settlement Nabors had entered into with Malone.

4.3 Malone and Nabors' claims file as a matter of law. Malone's claims are barred from being pursued in a tort action as these claims fall under the exclusivity provision of the Workers Compensation Act. Although this Court allows a tort action for bad faith outside of the exclusivity provision of the Act, if that bad faith rises to the level of an intentional tort which caused damages separate and distinct from those related to the work place injury, Malone has failed to plead or prove the elements necessary for a claim to overcome the exclusivity bar. Malone wholly fails to prove, even taking the evidence in the light most favorable to him, that

Gallagher Bassett committed even simple negligence much less bad faith that rises to the level of an intentional tort. At the end of this trial the jury assessed fault among all of the parties, to include the plaintiff evidencing a clear finding that no bad faith was committed by Gallagher Bassett. The Judge presiding in this case further found that punitive damages were not warranted and refused to allow a punitive stage of trial, which is a direct finding by the Judge that the actions of Gallagher Bassett did not rise to the level of misconduct necessary to establish bad faith much less an intentional tort. Further, from the first pleadings through trial, Malone sought only damages arising directly out of and flowing from his work related injury, therefore, Malone has failed to make a claim which can be pursued in tort outside of the Act because he has failed to even claim, much less prove, damages which were separate and distinct from the work related injury.

4.4 Malone's claims also fail because he accepted the penalties assessed for delay under the Act thereby barring his claim under the prohibition of double recovery. His claim also fail due to his failure to reserve his right to pursue this bad faith action when entering into a final comprise of his underlying workers compensation claim.

4.5 Even if Malone were to be able to maintain an action in tort against Gallagher Bassett his claims would still fail because Gallagher Bassett was the proximate cause of the injuries alleged. By Malone's own testimony all of the damages he claims in this case flow from his decision to delay surgery which culminated in a two month delay which he believes led to his eventual amputation. The doctors presented by Malone at this trial further opine that the necessity for amputation arose directly from an infection which was caused during surgeries undergone by Malone due to a leg break which he suffered, more than a year after the original injury occurred. Although the proof presented by Malone's doctors may establish a claim for workers' compensation benefits by relating the original injury to causing the leg to be more

susceptible to a break, the proof does not meet the requirement in tort law because the break and infection were unforeseeable intervening causes that led to the amputation of the leg.

4.6 Even if proximate cause were not an issue, however, the fact that Malone accepted a settlement from Nabors for the alleged bad faith actions of Gallagher Bassett, in the amount of $1.5 million prior to trial, Malone is precluded from accepting a double recovery pursuant to the doctrine of the "one satisfaction" rule. Gallagher Bassett is due a total set off based on this prior recovery. In the settlement agreement, which will be shown is in actuality a "Mary Carter Agreement" wherein Nabors became a Co-Plaintiff with but continued on in the trial as a "defendant", it was agreed and carefully documented that the settlement money paid by Nabors was for the actions of Gallagher Bassett and not Nabors. As such, Malone accepted a recovery for the alleged wrongful actions of Gallagher Bassett and further recovery is precluded due to the one satisfaction rule.

4.7 Nabors' claims against Gallagher Bassett seek indemnity from Gallagher Bassett arising out of Malone's claims against Gallagher Bassett. Because Malone does not maintain a viable cause of action against Gallagher Bassett, Nabors' claims for indemnity necessarily fail. Further, Nabors' payments to Malone were made voluntarily, because no legal obligation existed under which Nabors' could be liable to Malone for Gallagher Bassett's alleged wrongdoing. The payments were not made pursuant to compulsion further the amount paid was unreasonable thereby further mandating that Nabors' claims for indemnity fail. Nabors paid Malone $1.5 million and sought that amount plus all defense costs from Gallagher Bassett in the claim for indemnity. The jury in this case, after almost two weeks of trial assessed fault amongst the parties, finding Nabors and Gallagher Bassett to be equally at fault for Malone's damages in the amount of 42.5% and further found that Malone himself was 15% at fault for his own injuries. The jury then awarded Malone $250,000.00. Therefore, as to Gallagher Bassett, for their alleged

wrongdoing, the jury found that Gallagher Bassett should pay Malone $106,250.00 for his injuries. Given the amount awarded by the jury, Nabors' settlement of $1.5 million was clearly excessive and thereby Nabors is not entitled to indemnity from Gallagher Bassett for the $1.5 million paid via voluntary settlement.

4.8 The Circuit Court was incorrect in its denial of Gallagher Bassett's Motion for Summary Judgment, Motion for Directed Verdict and Motions for Judgment Not Withstanding the Verdict and Motion for Set Off and as such, this Court should reverse and render the decision of the Jones County Circuit Court.

V. ARGUMENT

A. STANDARD OF APPEAL

The standard for review of the denial of a motion for directed verdict and a motion for judgment notwithstanding the verdict are identical. Steele v. Inn of Vicksburg, Inc., 697 So. 2d 373,376 (Miss 1997). The Appellate Courts must consider the evidence in the light most favorable to the appellee, giving the appellee the benefit of all favorable inferences that may be reasonably drawn from the evidence. General Motors Acceptance Corp. v. Bayman, 732 So. 2d 262, 268 (Miss. 1999)(citing Steele, 697 So. 2d at 376). If the facts are so overwhelmingly in favor of the appellant that reasonable jurors could not have arrived at a contrary verdict, this Court must reverse and render. Id.

1. WAS GALLAGHER BASSETT'S HANDLING OF MALONE'S CLAIM PROPER AND ADEQUATE?

5.1 A paramount question throughout each legal argument in this case will be whether or not Gallagher Bassett's handling of Malone's claim was proper and adequate. Did Gallagher Bassett commit bad faith or an intentional tort in adjusting this claim? Did Gallagher Bassett make mistakes or errors which rise to the level of gross negligence, reckless disregard, or even

simple negligence? Did Gallagher Bassett make any mistakes at all which affected the outcome of this claim? As this area of events will arise in each of the following legal arguments it seems best to first analyze, step by step, the handling of this claim by Gallagher Bassett. It is Gallagher Bassett's intent to streamline this brief with this analysis by eliminating the need to continually reiterate the same analysis in each legal argument.

5.2 To begin this section, it is necessary that certain words be defined. As attorneys experienced in this area throughout the trial of this case words such as "claim" were often used relating to how workers compensation claims arise and are assigned between Nabors and Gallagher Bassett. In order to address all issues in this matter, however, it is important to begin with the basic elements of what constitutes a "claim." Fortunately, there is ample testimony from all parties that a "claim," as defined in the relationship of Nabors and Gallagher Bassett, is a work related injury which at minimum required either medical treatment, and therefore medical payments, resulted in lost time from work or "indemnity". V 32;T 683 ln 13-19; V32; T 638 ln 14-19; D. Poole pg 11; ln 2-4(Nabors' safety coordinator testifying its his job to make sure First Reports of Injury are sent to the "comp people if there's a need to have medical.") Until a work related injury reached this level it was not a "claim". Id.; D. Poole pg 13; ln 6-13(Poole testifying that a report of injury needed to be sent to Gallagher Bassett "if they had medical costs...then [the injury] was handled by the comp company to make sure that they were taken care of and bills were paid"). Throughout this brief this definition becomes vitally important as it addresses the central question of when Gallagher Bassett received a "claim" and more importantly, when Malone had a "claim".

5.3 Another important definition is "First Report of Injury". In this case there is agreement among the parties that Gallagher Bassett, in the normal course of business, would receive a "First Report of Injury" from Nabors in order to get the information to set up a "claim".

V. 32; T 702 ln 19 – 26;V 32;T 706 ln 7-11;D. Poole pg 13; ln 6-13. However, there are different forms and definitions of a "First Report of Injury". A "First Report of Injury" at Nabors could be any type of injury from the most minor scratch to the most severe injury requiring hospitalization. Id.; V 32;T 633 ln 12-21. However, Gallagher Bassett only received "First Reports of Injury" when they contained the elements of a "claim" – medical bills and/or lost time. V 32;T 683 ln 13-19; D. Poole pg 13; ln 6-13. Accordingly, when the attorneys and witnesses refer to the fact that a "First Report of Injury" was created or received, it will be necessary to pay attention to the type of report that is being referred to.

5.4 Now that we have the basic terms upon which this matters turns we can move into the analysis of the claim handling itself. As stated previously, although this is a fact intensive case, 90% or more of the facts are not in dispute. Malone was injured when he slipped and bumped his right leg on a beam while working on Nabor's Rig 295 in Jones County, Mississippi on July 28, 2000. V 29: T 271 ln 23- T272 ln 22. This bump caused a skin break and bleeding which required attention. Id. Malone went to his supervisor, toolpusher Wallace, and reported the injury, filled out an incident report, signed it, received first aid treatment from Wallace and returned to work and continued to work the rest of his "hitch" which lasted three (3) more days. V 29; T272 ln 22 – T 274 ln 19 . Thereafter Malone went to his family doctor and was later referred to specialists to treat the injury and ongoing battle he had endured for more than 20 years with his chronic infectious condition called osteomyelitis. V 29: T 275 ln 2- T 277 ln 18.

5.5 This brings us to one of the factual areas hotly contested between Nabors and Malone. Malone testified that he left his doctor's office on August 16, 2000 and went straight to Nabors corporate office in Laurel where he talked to Holbrook, the district supervisor for Nabors. V 29: T 280 ln 1- 23. Malone's version of events relates that he told Holbrook he would need surgery for the injury he received at work and that he wanted to make a workers

compensation claim. Id. According to Malone, Holbrook scoffed at his request for workers compensation benefits and told Malone that he would not be allowed to file a workers compensation claim because his injury was related to his ongoing medical condition and that Nabors was not going to pay for it. Id. Further, Malone testified that Holbrook specifically told him that everyone on the rig and local management would lose their bonuses if Malone made this claim so he was not going to allow Malone to file a workers compensation claim. V 30: T 336 ln 4- T 337 ln 8. Testimony at trial of the Nabors' witnesses confirmed that Nabors had in place a safety bonus award system, wherein if a Rig were to complete a quarter with no injuries, the supervisors, toolpushers, etc. would receive a bonus. V 32 : T 680 ln 20 – T 681 ln 14. As can be imagined, Holbrook vehemently denies that he refused to allow Malone to file a claim for workers compensation and instead testified that Malone came by that day to request a special work assignment of eight (8) weeks straight in order to take a long leave of absence after his surgery. V31; T595 ln 7-24.

5.6 It is doubtful the truth of either version will ever be known to Gallagher Bassett, but it makes little difference which version is true. What is important are the actions taken by both Holbrook and Malone after this conversation on August 16, 2000. We are now turning back to undisputed facts. Holbrook notified the safety officer for Nabors, Bridges, and the regional supervisor Stroud in Houston, Texas, that Malone was seeking to work eight (8) straight hitches in order to have surgery. V31: T 596 ln9 – T 597 ln 2. Holbrook testified that both Bridges and Stroud asked if Malone's surgery was related to a work place injury and Holbrook unequivocally stated that it is not. Id. The extra work schedule is approved. Id. As for Malone, he went hom and told his wife that his surgery would not be covered by workers compensation and that they would have to put it on the family medical insurance. V 29; T 280 ln 28 – T 281 ln 6. He then worked another seven (7) day hitch for Nabors before returning to see the doctor who would later

perform his surgery. V 29; T 276 ln 16 – 26. At this next doctor's appointment it was discussed that the surgery needed to move forward, however Malone insisted on working his eight (8) week hitch prior to scheduling the surgery. V 29; T 279 ln 2 – 7; V 29; T 284 ln 1-6.

5.7 Where does Gallagher Bassett enter all this? The facts are undisputed that on August 16, 2000 an adjuster for Gallagher Bassett called the toolpusher of Malone's rig, Wallace, to discuss Malone's injury. R.E. 17. This conversation was recorded. Id. In this recorded statement it is clear that Gallagher Bassett was notified of Malone's First Aid Only Injury Report. Id. The adjuster, Deborah Robichaux, testified at trial that she had no memory of these events or taking the statement. Taking the facts in the light most favorable to the Plaintiff and Co-Plaintiff, pursuant to the legal standard of review on appeal, we can infer that Robichaux received a copy of the First Aid Only Injury Report and that she was investigating this report. V 33; T 833 ln 20 - 25. In the statement, Wallace discussed with Gallagher Bassett the events surrounding the First Aid Only Injury Report and confirmed three (3) important facts: (1) the injury was minor and necessitated first aid only – no medical care was required; (2) Malone had not missed any work due to the injury and (3) the wound was "healed" as of August 16, 2000. R.E. 17; R.E. 14. It is necessary to pause here and analyze what Gallagher Bassett had as of this time regarding Malone. Assuming the facts in the light most favorable to Malone, Gallagher Bassett has received a First Aid Only Report of Injury, which all parties agree were not supposed to be sent to Gallagher Bassett. V32; T 638 ln 25-27; D. Poole pg 13; ln 6-13. From all three of Nabors' corporate representatives testimony was elicited that the *reason* a First Aid Only Report of Injury was not to be sent to Gallagher Bassett because a First Aid Only Report of Injury could never initiate a *claim*. V32; T 638 ln 14-19; V. 32; T 702 ln 19 – 26;V 32;T 706 ln 7-11;D. Poole pg 13; ln 6-13; V32; T 672 ln 10 – 19. This is why the technical definition of the word "claim" is important in this case. The Plaintiff and Co-Plaintiff argue extensively throughout

this trial that because Gallagher Bassett received a report of injury they then had a "claim". However, it is clear in that argument the terms "claim" and "report of injury" are misconstrued. Once again, as of August 16, 2000 in the light most favorable to Malone, we can infer that Gallagher Bassett had a First Aid Only Report of Injury, but we know by clear testimony that the report was sent in error. Nabors' Safety Coordinator Poole testified that the "First Report of Injury on July 2000 would not have been sent to Gallagher Bassett because it did not require medical treatment. There was no cost tied to this report, it was First Aid only..." D. Poole Pg 34 ln 2-10; pg 35 ln 5- pg 36 ln 7. We can also infer that once Gallagher Bassett initiated follow up of that First Aid Only Report of Injury, the supervisor of Malone, toolpusher Wallace, confirmed that the injury contained in the report remained a non-reportable injury and therefore not a "claim". Wallace confirmed there was no need for medical payments or lost time payments and by doing so Wallace confirmed there was no "claim" because in order to have a "claim" one of the two must exist.

5.8 The phone conversation between Gallagher Bassett and Wallace, however, did not end with the confirmation that the work related First Aid Only Injury was not a claim. Wallace also explained to the adjuster for Gallagher Bassett that Malone was seeking to have surgery done on that same leg. R.E. 17. When discussing the surgery, the adjuster specifically raised the question if it was related to Malone's injury at work and whether or not Malone was "going to file for workers comp?" R.E. 17. Wallace replied that he thought Malone would file a compensation claim, but that given Malone's ongoing problems and pre-existing conditions with that leg, Wallace had referred Malone to Holbrook, the district supervisor, to discuss the matter. Id.

5.9 This phone conversation was held at 10:00 a.m. on August 16, 2000. Id. The same day, Malone testified that he went to Holbrook and requested to file a workers

compensation claim, but that Holbrook refused his request. V 29; T 280 ln 9 – 23.; V 30; T 345 ln 5 – 13; V 30; T 332 ln 15 - 25. The time of day that these two conversations took place is of the utmost importance. Both the Plaintiff and the Co-Plaintiff argue that upon receiving information that Malone required surgery which may or may not be related to his work place injury, coupled with Wallace's statement that he believed Malone was *going to* file a workers compensation claim, Gallagher Basset had received "sufficient notice" to begin an official investigation as if they had received an official notice of claim from Nabors. It is undisputed that the adjuster did not conduct any further official investigation regarding Malone until receipt of assignment of a claim in November of 2001 when Nabors sent the official notice to Gallagher Bassett to set up a claim.

5.10 Why did the Gallagher Bassett adjuster not set up a "claim" in August of 2000? Testimony at trial revealed that the policies and procedures between Gallagher Bassett and Nabors required Gallagher Bassett to set up "claims" upon receipt of a "First Report of Injury" but as stated earlier, only a work place injury which required medical care and/or lost time qualified as a "claim". V. 32; T 702 ln 19 – 26;V 32;T 706 ln 7-11;D. Poole pg 13; ln 6-13. Nabors' corporate representative testified that a First Aid Only Report is not generally sent to Gallagher Bassett and that the "normal procedure is that there is medical treatment before it goes to Gallagher Bassett". V32; T 672 ln 10 – 19. The payment agreement between Nabors and Gallagher Bassett demonstrates fully how set in stone this requirement was that a claim must have either a medical payment and/or a lost time payment, prior to a "claim" being triggered – regardless of how notice was received. V 32; T 710 ln 22 – T 711 ln 3. Gallagher Bassett's corporate representative testified that Gallagher Bassett is paid on a per claim basis, $98.00 per medical only claim and $726.00 per indemnity, or lost time, claim. Id. Pursuant to testimony from the corporate representative of Gallagher Bassett and the adjuster, Gallagher Bassett did not

have authority to set up a "claim" until they received an official Report of Injury which would establish a "claim." ". V. 32; T 702 ln 19 – 26. When asked why a report of injury is important to the assignment of claims, Gallagher Bassett's corporate representative, Rideout testified that "we require substantiation of an assignment." Id. Plaintiff and Co-Plaintiff argue that "sufficient notice" of a claim, no matter how communicated, could begin a "claim". As we are accepting the facts in the form most favorable to the Plaintiff and Co-Plaintiff they need not be argued at this point, although it is clear that notice of a "claim" received via phone call or any in any other manner other than receipt of the official First Report of Injury had to be followed up by Nabors with written confirmation of a "claim" prior to Gallagher Bassett having permission to set up handling the "claim" in the computer system and of course, prior to Gallagher Bassett receiving payment for the "claim". V 32; T 710 ln 22 – T 711 ln 3.

5.11 Turning back to the First Aid Only Report on Malone, testimony is clear that Nabors had a policy and procedure for changing First Aid Only Reports of Injury into Medical Claim Reports of Injury. D. Poole pg 35; ln 15-25. It is undisputed however that Malone's First Aid Report of Injury was never changed into a medical injury report and therefore the documentation which would trigger a "claim" was never prepared by Nabors nor ever received by Gallagher Bassett. Id. It is logical to assume that the Gallagher Basset adjuster was simply waiting to see if this change of Report of Injury would occur – because until this change occurred, no "claim," in the technical sense, existed – not because a report had not been sent and received, but because there were no medical payments and/or lost time shown until and unless this Report of Injury was changed by Nabors to reflect such claim and sent to Gallagher Bassett.

5.12 Nonetheless, the Plaintiff and Co-Plaintiff maintained throughout the trial and included in their jury instructions that Gallagher Bassett could be held responsible for not initiating a claim once they received what the Plaintiff and Co-Plaintiff deemed as "sufficient

notice" that Malone "was going to file a claim" based on surgery he had notified Wallace he needed on his leg. Therefore the question is posed by the Plaintiff and Co-Plaintiff – what would the result have been if Gallagher Basset had conducted an official three (3) point contact within 24 hours as provided for in the policies and procedures between Gallagher Bassett and Nabors as to the investigating of an assigned "claim"?

5.13 Before continuing on, it is necessary to go over the basics of the three (3) point investigation and define what those steps are and why they are set up in this fashion. The three (3) point investigation is to (1) contact the employer; (2) contact the employee; and (3) contact the employee's doctors. V. 32; T 708 ln 14 – 22. The emphasis which needs to be placed on these steps, is that these three (3) steps need to be done in that *exact* order. The employer must be called first, the employee must be called second and so on. This is logical in both the investigative sense as well as the legal sense. In any investigation, the investigator needs to begin with their point of contact, which in this instance would be the employer. However, the investigator of a workers comp claim must especially follow this rule of contacting the employer first because it is the employer who verifies the claim exists and then gives the adjuster/investigator *permission* to contact their employee – and acknowledge that the employee has consented to being contacted regarding this injury and claim. *Permission* is of paramount importance in this arena. As stressed by Nabors corporate representative at this trial, who is also their legal counsel, an employee has a right to privacy, their personnel records and especially their medical information cannot be disseminated unless permission has been given by them with the filing of a "claim". V 32; T 640 ln27 – T 641 ln 14. Likewise an employee must give his permission for anyone to contact his doctors and those doctors must be aware that that permission has been given before they will discuss an employee's private medical information.

5.14 Now that we have established the necessity of the three (3) point contact being conducted in the specified order, we can analyze the assertion posed by the Plaintiff and Co-Plaintiff that Gallagher Bassett should have initiated the three (3) point contact upon "sufficient notice" that Malone might have a "claim". Now the "sufficient notice" received by Gallagher Bassett as argued by the Plaintiff and Co-Plaintiff was received at 10:00 a.m. on August 16, 2000. Wallace stated to the adjuster in that conversation that he had instructed Malone to go and speak with Holbrook to figure out whether or not he could claim his surgery on workers comp, therefore pursuant to the specific mandates of the three (3) point contact, Gallagher Bassett's first contact would have to have been Holbrook. Holbrook was the employer contact with knowledge about the potential "claim", however, the plaintiff and co-plaintiff correctly point out that the Gallagher Bassett did not make this contact with Holbrook. But as pointed out at the beginning of this brief, this is a case of ample factual support and very little dispute as to those facts. We do not have to wonder what the outcome of the contact would have been if conducted by Gallagher Bassett – we know the answer because Holbrook testified to this exact point. When asked, "what would you have told the adjuster if she had called you?" Holbrook responded he would have told her the same thing he told Bridges and Stroud, that Malone did not have a comp claim. V 32; T 611 ln 11 – 17; V 32; T 617 ln 22 – T 618 ln 4; V 31 ; T 599 ln 8 – 15. It is unusual to have a case where the "what ifs" and "should have dones" asserted by the Plaintiff are actually answered, but that is exactly what we have in this case. The Plaintiff and Co-Plaintiff argue that if only Gallagher Bassett would have done the three (3) point contact then Malone would not have had to work eight (8) weeks before he had his surgery and more likely than not would have been able to save his leg. But apparently the Plaintiff and Co-Plaintiff did not listen to the testimony of their own witnesses regarding their assertion. For the sake of argument, even if we concede that the phone call between the adjuster and Wallace equated to

"sufficient notice" that Malone may have a "claim" and that the adjuster then should have conducted the three (3) point contact, we know without question that the results would not have been any different if the three (3) point contact had been initiated. Holbrook, without hesitation, testified that he would have told the adjuster that Malone did not have a workers comp claim. Id. With that information the investigation would have ended. Although the Plaintiff and Co-Plaintiff will most certainly argue that the investigation should have continued on even given Holbrook's testimony - that assertion is nothing short of absurd. There is no dispute that Gallagher Bassett never received the official Report of Injury which would trigger an official "claim", therefore the first contact with the employer would have been to verify that an actual "claim" existed, especially when that first "notice" of the "claim" was verbal and therefore verification of the true existence of a claim was of paramount importance. Given this scenario, the denial by Holbrook that a claim existed would have eliminated anymore activity on this investigation. In fact, with the information the adjuster had, or would have had if she had contacted Holbrook as urged by the Plaintiff and Co-Plaintiff, Gallagher Bassett would have been in direct violation of the policies and procedures in place between them and Nabors if they had set up a "claim". And certainly if they had sought payment for the handling of that claim they would have been reprimanded at the least.

5.15 As of August 16, 2000, when the Plaintiff and Co-Plaintiff contend that Gallagher Basset should have conducted their three (3) point contact investigation within 24 hours the facts would not have only remained unchanged in that no "claim" existed because there was no evidence of any medical payments due and/or lost time payments due, but would have shown further that Gallagher Bassett had no authority to open a claim. Holbrook testified Malone had no claim to pursue.

5.16 This analysis applies not only to eliminate any doubt surrounding the conduct of Gallagher Bassett in the handling of this claim, but equally applies to the defeat the assertion that Malone's payments were improperly delayed. From the above analysis, just as we know there was no "claim" because there existed no medical payments or lost time, we also therefore know that there was nothing "due" to Malone. If no payments are "due" then there can be no claim of "delay" in receiving those payments.

5.17 Because the change to the First Aid Report of Injury was never made to reflect that Malone had reported he required surgery due to his work related injury – or even simply that he had seen his family doctor for follow up care to the injury, neither Nabors nor Gallagher Bassett was required to take action as to Malone's First Aid Only Report of Injury. The dispute as to why Malone's surgery or doctor care was not reported as will remain a dispute between Malone and Holbrook – either Holbrook refused to allow Malone to submit the claim or Malone never requested to submit it – however, regardless of what version is true, the fact remains that since a Report of Injury which did not contain the required elements of a "claim" was not submitted to Gallagher Bassett until November of 2001 any claims of delay or improper conduct in handling the claim are meritless from a simple analysis of the undisputed facts.

5.18 It is anticipated by Gallagher Bassett that the Plaintiff and Co-Plaintiff will seek to argue that the adjuster should have contacted Malone regardless of her contact with Holbrook. However this assertion goes well beyond any realistic expectations for reasonable conduct on the part of an adjuster. Without even venturing into the legal standards for adjusters to adhere to, common sense alone dictates that once an employer clarifies that no claim exists then continuing on to contact the employee would be frivolous and almost certainly frowned upon by the employer. However, once again, because this case contains a deluge of facts we can analyze this somewhat absurd assertion that Gallagher Bassett should have contacted Malone directly

regardless of the fact that there was no indication that a "claim" existed and regardless of the fact that there is no question but that Malone's district supervisor would have eliminated any question as to the existence of a potential "claim." Unlike Holbrook, Malone was never asked directly if he would have told Gallagher Bassett's adjuster he wanted to pursue a workers comp claim if she had contacted him in August of 2000. Therefore we must turn to Malone's actions and his comments to others who pursued this question with him at the time these events occurred.

5.19 Malone testified that he was barred access to his right to file a workers compensation claim by Holbrook was so that Holbrook and Wallace would receive their "safety bonuses". V 30; T 336 ln 4 – 26. However it needs to be stressed that not only would Holbrook and Wallace receive a safety bonus, but every other worker on the rig would also receive a safety bonus if no claims of injuries were reported for that quarter. Id.; V 32; T 356 ln 12 – 20; V 32 : T 680 ln 20 – T 681 ln 14. This includes Malone. Id. Malone testified at trial that he did in fact receive and accept this safety bonus. Id. Can you imagine the pressure Malone must have been under to not file this injury under workers comp? Although Nabors may not have intended for their safety bonus program to encourage its employees to downplay their injuries, hide the true extent of an injury, cover up the cause of injuries and to outright lie, but that is exactly what it encourages and facilitates. The pressure to please your boss as well as your buddies, almost certainly mandates that no one, short of losing a limb, wants to be the one that reports an injury and therefore eliminates the hope for a bonus. Malone was in the position that no injuries had been reported for that quarter which was on the cusp of ending, all of his friends, his bosses and even he would receive a bonus as long as he did not report his injury as anything more than First Aid Only. Regardless of pay grade, a bonus is highly coveted, therefore it is not hard to imagine that Malone was under substantial duress to not report the true nature of his injury. Therefore the question must be posed, would Malone have reported that he wanted to pursue his injury as work

related after his conversation with Holbrook even if Gallagher Bassett would have contacted him? We can never know the true answer, but we do know that Malone accepted his safety bonus with the full knowledge that he was receiving it based on his decision to not report his claim. Malone had filed a workers comp claim in the past and received benefits under it. He knew what he was giving up in order to create the illusion that the rig qualified for its safety bonus award. Would Malone have told Gallagher Bassett that he wanted to file a claim but that Holbrook had told him he could not do so? Once again we can never know the answer to this but we do know that Malone never reported this denial by Holbrook to anyone else until after he contacted an attorney in November of 2001. Malone even had brothers who worked for Nabors, one of which was a toolpusher, the highest ranking man on a rig, and he did not tell them that he had wanted to file a claim but was barred by Holbrook. If Malone would not report this situation to his own brothers, than it is highly doubtful that he would have "ratted" out Holbrook to an adjuster he did not even know.

5.20 What other actions of Malone can we analyze to deduce what he would have reported to Gallagher Bassett if contacted by them in August of 2000? We know that Malone claimed all of his medical care on his family health insurance plan from his first doctor's visit in August of 2000 until the claim was deemed compensable by Gallagher Bassett a mere 45 days after receipt of the claim and Malone's medical records in September of 2002. We know that when Malone applied for social security benefits in February of 2001, which he ultimately received, Malone responded to the question "have you or do you intend to file a workers compensation claim?" with a confident "no". V 30; T 344 ln 26 – T 345 ln 9. When asked by his own counsel why he told social security he had not filed a workers compensation claim and did not intend to file one, Malone stated, "When I was told it wasn't going to be a lost-time accident [by Holbrook]...that's the reason ***I didn't file for workers comp.***" V 29; T 294 ln 1-14;

V 30; T 344 ln 26 – T 345 ln 9 emphasis added. When responding to the question in the social security form Malone was simply being honest – he had not filed a claim for workers comp and further he did not intend to file one. And this reporting all occurred after Nabors terminated Malone in January of 2001 for being "unable to return to work due to a non-work related injury" R.E.13.

5.21 Clearly the overwhelming weight of the evidence demonstrates that Malone told everyone who ever asked him that he was not going to file a claim for his work related injury after his conversation with Holbrook. Therefore, even if we were to follow the path of counsel's assertion that Gallagher Bassett should have contacted Malone in August of 2000 in complete disregard for every policy and procedure related to investigating and setting up a workers comp claim for Nabors, it is well supported by the ample record on this issue that Malone would have denied making a claim for workers compensation benefits.

5.22 After an analysis of the facts in this matter, it is clear that Gallagher Bassett did all that could be done as to Malone's First Aid Only Injury in August of 2000 and thereafter. It is supported by the overwhelming evidence, which is largely undisputed in this matter, that Gallagher Bassett committed no wrong in the handling of Malone's claims, as there existed no "claim" until November of 2001. V 32; T 677 ln 12 – 22; D. Poole pg 35 ln 15 – 25. As stated before, a simple point by point review of the undisputed facts, exploring them in the light most favorable to the Plaintiff and Co-Plaintiff's assertions, resolves this issue even before we explore the legal aspects of this claim which is quite a compelling reason to reverse and render this case.

2. THE EXCLUSIVITY CLAUSE OF THE WORKERS COMPENSATION ACT BARS THIS CLAIM AND AS SUCH THIS MATTER SHOULD BE REVERSED AND RENDERED

5.23 The exclusivity clause of the Workers Compensation Act is found in Miss. Code Ann. § 71-3-9 (2005) and provides that the liability of an employer and his agents to pay compensation benefits to an injured employee shall be exclusive and in place of all other liability

of such employer to the employee. The Legislature enacted the Workers Compensation Act with the exclusivity provision to bar any claims related to a work related injury to proceed outside of the workers compensation arena. Full authority is vested in the workers compensation commission by the Act to adjudicate claims based on a work related injury and no other Court may entertain those claims which are under the exclusive jurisdiction of the workers compensation commission.

5.24 At the outset of an exclusivity question, wherein it is to be determined whether or not the exclusivity clause prevents a case from proceeding in civil court, it is important to clarify exactly what the Plaintiff was alleging and what the Plaintiff was seeking as damages. In this action, the jury was asked to determine if Gallagher Bassett's "bad faith" delay in paying Malone workers compensation benefits caused Malone's injuries to include amputation of his leg. Plaintiff's special interrogatory jury form stated "do you find from a preponderance of the evidence that the defendant, Gallagher Bassett Services, Inc., was guilty of any fault which proximately caused or contributed to the Plaintiff's damages, if any?" R 3234, P's JI P-8. The Jury Instruction P-8 asks the jury if Gallagher Bassett had "any fault" in causing "or contributing" to the Plaintiff's damages. Id. Although "any fault" is never clearly defined, another jury instruction states that in order to find Gallagher Bassett liable the jury is to consider whether Gallagher Bassett breached its duty to properly investigate and adjust Malone's claim once they received "sufficient notice" of the claim. R 3229, P's JI P-4. Throughout the trial, Plaintiff's counsel argued and presented evidence and testimony to establish that due to Gallagher Bassett's failure to properly adjust Malone's workers compensation claim, Malone's right leg was amputated. In opening statements, Malone's counsel argued to the jury "Gary [Malone] is going to prove to you unequivocally that the actions and inactions of Gallagher Bassett directly resulted in the loss of his leg..." T 169 ln 10-13. In closing statement Plaintiff's

counsel is eager to point out in order to qualify for workers compensation that "the only thing Gary [Malone] has to have is a work-related injury..." T 934 ln21-29, T 935 ln1-3. Testimony and arguments were presented throughout this trial to make the assertion that due to Malone's inability to receive workers compensation benefits for the cut he received from an accidental fall while at work, he was required to work an eight (8) week period to save up money prior to receiving needed surgery and that if the surgery had not been delayed those eight (8) weeks, Malone would most likely not have lost his leg. T 271 ln 25- 272 ln 3. In closing, Plaintiff's counsel vividly paints the damages Malone suffered due to the loss of his leg. T 988 ln 11 – 989 ln 12.

5.25 The original claims in this case state that Malone is seeking damages due to the bad faith denial/delay which occurred during his claim for workers compensation benefits. And those damages are the loss of his leg along with the damages which flow from that injury. Id. Without question the allegations in this case are that (1) Malone's workers compensation claim was adjusted/handled improperly or in "bad faith" and that (2) due to this "bad faith" handling of his claim, Malone's work related injury worsened and amputation was the eventual outcome. This brings us to the question of exclusivity. Can the allegations which have been asserted by Malone override the exclusivity clause of the Workers Compensation Act? Has Malone asserted claims and damages which although stem from a workers compensation claim, somehow leap the exclusivity clause and proceed unhindered in civil court? No. That is the direct and simple answer. No. Malone has wholly failed to plead a case wherein the allegations of "bad faith" and damages caused by that "bad faith" override the exclusivity clause of the Workers Compensation Act. As such, Malone's claims fail as a matter of law. The exclusivity clause of the Workers Compensation Act precludes these claims from being brought in circuit court. Because Malone's claims fall under the exclusive jurisdiction of the Workers Compensation Act and have been

fully adjudicated by the workers compensation commission this matter should be reversed and rendered.

a. Only Proof of an Intentional Tort Can Give Rise to Avoidance of the Exclusivity Clause. Gallagher Bassett's Actions do not Rise to the Level of an Intentional Tort and Therefore the Plaintiff's Claims Fail as a Matter of Law

5.26 Although facts surrounding the allegation of "bad faith" have been extensively covered, it is important re-address several significant facts. When reviewing the record in this matter, it is clear that by the time the trial took place the main arrow in the Plaintiff's quiver was that Gallagher Bassett may have had "sufficient notice" that Malone through his employer Nabors, had submitted a workers compensation claim and that because Gallagher Bassett did not initiate a full investigation based upon that "sufficient notice" Gallagher Bassett committed bad faith in the adjustment of Malone's claim. Although the Record clearly shows that the initial Complaint in this matter wholly pointed to Nabors as the party at fault for refusing to allow Malone to submit a claim for workers compensation, after the settlement between Nabors and Malone, the trial was aimed at Gallagher Bassett alone. The Complaint specifically states that Holbrook, the district supervisor for Nabors, was entirely responsible for Malone's injuries as it was Holbrook who refused to allow the workers compensation claim to be filed by Malone ("after learning that his physicians wanted to undertake extensive medical treatment in the immediate future, Plaintiff also returned to defendant, Robert Holbrook, and asked to be given workers compensation benefits and medical coverage, but Robert Holbrook ***immediately*** and cavalierly denied and dismissed those requests, without giving them any meaningful or appropriate consideration whatsoever.")(emphasis added). Despite his counsel's new strategy post settlement with Nabors to place all blame only on Gallagher Bassett, Malone testified truthfully and consistently with the facts laid out in his Complaint. V 29;T 278 ln 14-19, T 280 ln 9-23. Specifically Malone testified at trial that on August 16, 2000 after he learned he would

need extensive surgery on his leg to include a skin graft to cover the exposed bone where the cut was, he went straight to Nabors and spoke with Robert Holbrook as follows:

> A. I told Rob Holbrook I wanted Nabors to pay for my accident. I was going to have to have surgery. And he said Nabors wasn't going to pay nothing, it wasn't a lost-time accident. And I said, why wasn't it a lost-time accident. He said it just wasn't, it was an old injury...That wasn't an old injury. I passed seven physicals with that leg and didn't have no problem passing a physical with that leg.
> Q. What was Mr. Holbrook's response to that?
> A. He said, well, it ain't going to be workers comp and it ain't going to be a lost-time accident. V 30; T 280 ln 9-23.

Nonetheless, specifically ignoring these initial allegations and the testimony of Malone himself that Nabors ***refused to allow him to file a workers compensation claim***, Plaintiff's counsel sought to argue at trial that because in August of 2000 an interview was conducted and recorded between a Gallagher Bassett adjuster and Malone's supervisor regarding Malone's injury, this constitutes "sufficient notice" of a workers compensation claim. This argument was pursued by Plaintiff's counsel even though no official assignment of the claim was given to Gallagher Bassett by Nabors, which was the documented protocol for the adjustment of Nabors' workers compensation claims, until over a year later. In fact its undisputed that the first assignment of the claim to Gallagher Bassett from Nabors was not transmitted until November 21, of 2001. The Plaintiff goes on to argue that Gallagher Bassett had a duty to investigate and adjust the claim based on this "sufficient notice" conversation between the Gallagher Bassett adjuster and Malone's supervisor, although no action was taken by Nabors to facilitate the claim until it was officially assigned by them to Gallagher Bassett in November of 2001. For example, Nabors failed to notify Gallagher Bassett that Malone was seeking extra extended employment shifts because he required time off for surgery in August of 2000 or that, months after the surgery, in February of 2001 Nabors terminated Malone. R.E. 13 This termination was due to the fact that "Gary can not come back to work due to a nonwork related injury." Id. Only Nabors retained and had access to this information which is important and necessary for Gallagher Bassett to

make decision on, however, Nabors has no excuse for not communicating important changes in Malone's employment, or communicate at all regarding a claim for Malone, for over a year. Regardless of the fact that Nabors' own internal documentation system is completely devoid of a workers compensation claim for Malone until November of 2001 when they officially assigned the claim to Gallagher Bassett, the Plaintiff and Co-Plaintiff argue that Gallagher Bassett was responsible for maintaining an investigation of the purported "claim". Ignoring completely the testimony of the Plaintiff himself, the arguments presented at trial were that Gallagher Bassett failed to properly and adequately investigate and adjust Malone's claim. The Plaintiff and Co-Plaintiff argue that from August of 2000 through November of 2001 Gallagher Bassett took no action on Malone's claim and that this conduct constitutes bad faith.

5.27 Once again, to accept the contention that a workers compensation claim was filed by Malone in August of 2000, we must ignore that in February of 2001 when Malone filed for social security benefits and received them, on his application he stated that he had not and was not intending to file a workers compensation claim. V 29; T 294 ln 1-14. When asked by is own counsel why he told social security he had not and was not intending to file a workers compensation claim Malone stated, "When I was told it wasn't going to be a lost-time accident [by Holbrook]...that's the reason ***I didn't file for workers comp.***" Id. emphasis added.

5.28 Recognizing all this controversy over whether or not Gallagher Bassett could have been expected to adjust and investigate a claim that the Plaintiff admits he did not file and the employer admits they did not assign to Gallagher Bassett, it is not surprising that the jury found both Nabors and Malone partially at fault for this entire mess. The jury found that Malone was 15% at fault, and that Nabors and Gallagher Bassett were equally at fault, assessing 42.5% to each. R.E. 21 At the close of this case, the Judge refused to allow the issue of punitive damages to be presented to the jury. The Judge held that given the assessment of damages to all

parties, this was not a punitive damages case. During arguments by Plaintiff's counsel requesting a punitive stage the Judge commented "I think we're wasting our time by submitting all this to the jury on punitive damages." V 34; T 1004 ln 27-29. The Judge then reviewed the jury's verdict and the assessment of fault and made a finding that "there can't be any punitive damages if they assessed any amount to the Plaintiffs...". V 34; T 1005 ln 16-18. In an effort to assure all counsel that the jury had no intention of pursuing punitive damages against Gallagher Bassett the Judge called the jury back in and questioned them on this issue. "Do you feel like...that you would have found that the conduct of Gallagher Bassett here was so egregious that they should be penalized, do you feel like you would have come back with any additional amount in that regard over what you have already given?" V 34; T 1006 ln 19- 1007 ln 1. When asked by the Judge "how many of you feel like you would not have voted for any punitive damages?" by way of show of hands, 10 of the 12 jurors stated they would not have assessed punitive damages against Gallagher Bassett. V 34; T 1007 ln 26-28, 1008 ln 1-10.

5.29 The Mississippi Supreme Court has held that only when a claim for bad faith which rises to the level of an intentional tort, will consideration be given to allowing a claim to circumvent the exclusivity provision of the Act. Southern Farm Bureau Casualty Ins. Co. v. Holland, 469 So. 2d 55, 58 (Miss. 1984); See Also, Pilate v. American Federated Ins. Co., 865 So. 2d 387, 391 (Miss. 2004) After exploring the facts of this case, the question of whether or not an intentional tort was committed by Gallagher Bassett can be answered, confidently in the negative. Under the facts presented at the trial of this matter, it is clear that Gallagher Bassett did not commit an intentional tort or any level of "bad faith" and therefore the exclusivity provision cannot be evaded. Clearly, in a case where the jury found the Plaintiff and Co-Plaintiff at fault and where the Judge refused to allow a punitive stage of the trial, it is evident that no "bad faith" of any kind was committed by Gallagher Bassett, much less an intentional tort.

5.30 Further, in Mississippi Power & Light Company v. Cook the Court made clear that an intentional tort is required in order to overcome the exclusivity provision and that negligence is not enough. 832 So. 2d 474, 484 (Miss. 2002). See also, Luckett v. Mississippi Wood Inc., 481 So. 2d 288 (Miss. 1985)(holding Plaintiff's claim not barred by the exclusivity provision "since it was an action for an independent tort"). In this case, the Plaintiff and Co-Plaintiff have continually argued that Gallagher Basset had "sufficient notice" that Malone had a "claim", however their argument of "sufficient knowledge" is the equivalent of arguing "knew or should have known" which is the standard for negligence. Cook at 484, citing Patton-Tully Transp. Co. v. Douglas, 761 So. 2d 835, 844 (Miss 2000). The Plaintiff and Co-Plaintiff have wholly failed to prove or even assert that Gallagher Bassett had "actual knowledge" that Malone had a "claim" as discussed fully above, therefore, the Plaintiff and Co-Plaintiff are prevented from asserting that any level of intentional tortious conduct was committed by Gallagher Bassett given that they cannot first prove "actual knowledge", a necessary element of their claim. Id.

5.31 In Luckett, the dissent disagreed with overruling the dismissal because although he agreed that the Plaintiff's claim asserted an intentional tort and therefore under Holland would not be barred, the dissent felt the entire case was "waste of time." Luckett at 291. In Luckett, the Plaintiff was injured at work and immediately left for home and never returned to work, however the Plaintiff asserted that the employer and the carrier had actual knowledge of his need for medical and compensation benefits. Id. The dissent argued that the case should remained dismissed because an employer and carrier cannot be liable for bad faith when there is no claim for benefits "filed." Id.

> The employee claims that his employer and insurance carrier acted *in bad faith* by failing to provide him with medical and compensation benefits *even though he had not filed a claim for same*. Contrary to [plaintiff's] argument, there is no obligation on the part of the employer to seek out and pursue claims on behalf of the injured employees. On the contrary it is the employee who must take the initiative. It is the duty of the employee to give notice to the employer and to file a claim...

Luckett at 291.

5.32 As in Luckett, the Plaintiff herein admits he did not file a claim for workers comp benefits, and yet argues that it was the adjuster's duty, above and beyond the employer, to hunt down the reason the claim had not been filed and ensure that the claim was fully investigated regardless of the fact that no claim had been reported by either the employee or the employer. As in Luckett, the Plaintiff wholly fails to bring a viable claim for the intentional tort of bad faith. Being that the Plaintiff and Co-Plaintiff have completely failed to demonstrate any set of facts, even when taken in the light most favorable to the Plaintiffs, which would rise to the level of an intentional tort, this claim is barred by the exclusivity provision of the Act.

b. Has the Pronouncement in *Holland* Begun a Slippery Slope of Actions Which Could Potentially Undermine the Workers Compensation Act?

5.33 The exclusive remedy provision as enacted by the Legislature is clearly intended to bar actions against insurance carriers and others involved in the investigation and adjustment of the workers' compensation claim. Taylor v. United States Fid. & Guar. Co., 420 So. 2d 564 (Miss. 1982). The Mississippi Supreme Court has recognized a limited exception to the exclusivity provision when the insurance carrier or third-party-administrator commits an *intentional tort* against the employee. Southern Farm Bureau Casualty Ins. Co. v. Holland, 469 So. 2d 55, 58 (Miss. 1984); Pilate v. American Federated Ins. Co., 865 So. 2d 387, 391 (Miss. 2004) However, in allowing this limited exception to the exclusivity clause, this Court has urged great caution and encouraged extreme scrutiny when making the determination if the allegations of "bad faith" do in fact rise to the level of an intentional tort. Id. In Taylor, this Court held that "the purpose, spirit and philosophy of the Workmen's Compensation Act is to make the compensation the exclusive remedy of the employee..." Taylor, at 565. The Taylor Court adamantly stressed that the Act does not bar a claimant's claim for bad faith. "Failure of the

employer or carrier to pay benefits...does not leave the claimant without recourse [the Act] provides penalties in such a situation." Id. The fact that a remedy exists under the Act for "bad faith" denial/delay of benefits is essential to understanding this line of cases. It is only in the most limited of circumstances, where there exists no remedy under the Act, that this Court allows a case related to a work place injury, to proceed outside of the workers comp arena.

5.34 In Miller v. McRae's, Inc., this Court was faced with the unusual circumstance of a "wrong without a remedy". 444 So. 2d 368 (Miss. 1984). In Miller, an employee was confronted by the chief of security for her employer and held "captive" while being questioned about her possible involvement in criminal acts during her employment. Id. at 369. The Court quickly recognized that Miller's damages arising from this "willful act" of her Co-employee were not compensable under the Act as the injury must arise from an "accident" and not a "willful act" in order to be compensable. Id. In order to avoid the manifest injustice of creating a "wrong without a remedy" the Court, for the first time since the inception of the Act, carved out an exception to the exclusivity clause and allowed Miller to pursue her claims against her employer in a tort action. Id. By holding that they "carved out an exception" was perhaps the beginning of what has turned out to be mass confusion in this area. The Miller Court did not actually "carve out an exception" but rather held, that under this unusual set of facts, the suit, although between an employer and an employee, was never subject to the Act in the first place – rather than the idea that the plaintiff in Miller found the "loophole" to the exclusivity clause. It is not that the exclusivity clause was circumvented, the exclusivity clause did not apply to begin with. In fact there is no loophole to the exclusivity clause – either a case falls under the Act or it does not. If, as in Miller, there is a "wrong without a remedy" under the Act, then the Act never controlled the case in the first place. And that is the *only* way to avoid the exclusivity provision of the Act.

5.35 In Miller, the Court went through a necessary and helpful evaluation of the importance of upholding the legislative intent behind the strength of the exclusivity clause.

> This type of legislation is generally viewed as a compromise between the interest of labor and business. Because of the exclusive nature of the remedy labor surrenders the right to assert a common law tort action along with the attendant possibility of achieving punitive damages. In exchange it receives assurance that an award is forthcoming. Industry surrenders its...major common law defenses...in exchange it receives the knowledge that there will be no outrageously large judgments awarded to injured employees. The entire system was designed to insure that those injured as a result of their employment would not be reduced to a penniless state...
> Miller at 370.

5.36 This bargained for exchange is the foundation upon which the entire Act was built. Exclusivity was the only "bargaining chip" the laborers had to negotiate with. Without this bargained for exchange, laborers would be in the untenable position of having to bring suit for every injury received at work in order to receive medical care and money for wages lost. By agreeing to forgo the courtroom, laborers gained the ultimate benefit, the very real guarantee of being "taken care of" for every injury, no matter how big or how small. Although this is a variable mountain of assurance upon which the laborer can stand, industry received the only "benefit" that could make this level of worker care possible in the real world. Industry received the guarantee that the laborers could not chase claims against them for punitive damages. Industry would actually be able to afford to finance this "workers compensation program" because they would not constantly be at risk of punitive verdicts but could also avoid legal fees, etc. Likewise, the insurance industry, both carriers and adjusters, were included in this plan so that they could also "afford" to participate. In a plan where the claims are almost always paid, the carriers and adjusters, are able to keep their premiums in check, so that the employers can afford them, because they are not exposed to large verdicts based upon "bad faith" claims. The Legislature had to create a program that worked for everyone, in order to both protect the workers and facilitate business. It would do no good to enact a plan that guaranteed coverage for

the workers, but was so expensive no employer could stay in business if they participated. Hence the strength behind the exclusivity provision. All employers, carriers and adjusters could feel confident that they could pay out on every claim submitted because they would never be subjected to the world of tort litigation, with all its contingent expenses, ever again. Until the Holland decision.

5.37 In Southern Farm Bureau Casualty Insurance Company v. Holland, the Mississippi Supreme Court created a crack in the wall of the Workers Compensation Act. In Holland, the plaintiff had filed a workers compensation claim and received payments thereunder until the carrier, against the recommendation of the doctors, ceased all payments. 469 So. 2d 55 (Miss. 1984). The Court decided that although the Legislature had enacted a penalty for the delay and/or denial of benefits which were owed, that the Legislature could not have possibly considered in that penalty intentional acts of bad faith and therefore the penalties under the Act were not harsh enough. Id. Gallagher Bassett has the utmost respect for this Court and its rulings. However, while urging this Court to accept that this is argued with the utmost respect given to the Holland Court, it is paramount that through this case presently before this Court, it be urged that the Holland decision be revisited and reconsidered. Gallagher Basset, along with all adjusters, carriers and employers in this State are now subject to the very thing the bargained for exchange eliminated, the courtroom – litigation – jury verdicts – attorneys fees!

5.38 When the Legislature enacted the Workers Compensation Act they knew that the exclusivity provision had to be inviolate. They also knew that there had to be a remedy for every wrong which would arise because justice demands that there never be "a wrong for which there is no remedy". Miller at 372. In this instance, the Legislature deemed that the assessment of penalties from 10% - 20%, would fairly address this issue. In Holland, the Court stripped away the power of the Legislature by unilaterally determining that the penalties enacted could not

possibly be harsh enough. Holland at 58. By overriding the decision of the Legislature the Court undermined the very heart of the Act itself. "Punishment" was the sword carried by the laborers and by agreeing to lay down that sword, employers agreed to fully take care of every work related injury without the need for lengthy and expensive litigation. Very little is required of an injured worker to receive benefits and given that the Act has been functioning for over sixty (60) years, this bargained for exchange seems to be working. But only because the employers, carriers and adjusters know that the sword of punishment cannot be used against them, can they afford to continue with this level of liberal application of benefits. The Holland decision has eviscerated that guarantee. As can be seen in the instant case, the employer, carrier and adjuster were sued in a civil tort action, which went to trial wherein all the parties incurred hefty expenses, and ultimately a jury was told about the work place injury and resulting physical impairment received by Malone and asked to assess damages of an unlimited amount against the employer/carrier and adjuster. All of this occurred regardless of the fact that Malone had received his end of the bargained for exchange – Malone received his workers compensation benefits, Malone received an award of attorney's fees and expenses and Malone even received the Legislature's assessed penalties for delay.

5.39 Due to the Holland decision, we are now living in an age where the employers, carriers, and adjusters are expected to live up to their part of the bargain, they are expected to continue to fund and participate in the benefit program for their workers. However, every time a claim is investigated, a worker can assert the magic language of "bad faith" and "intentional tort" and proceed to take up the sword of punishment and wage war.

5.40 In a case out of the Fifth Circuit Court of Appeals, Atkinson v. Gates, McDonald & Company, the Court reviewed this very scenario and came to the same conclusion as is being asserted herein. Several excerpts from the Atkinson case apply to this issue:

> Since the Act itself provides not only for payment of benefits, but also for redress in the event of nonpayment of benefits, and further does not distinguish between good faith and bad faith...the apparent intent of the Act is that the penalty provisions proved the ***exclusive*** remedy for late payment or nonpayment of benefits. (emphasis added).
>
> Surely when the [Act] provides that there shall be a ...penalty on all...payments not made when due...it is likewise inferentially, but nonetheless plainly, also provides that the penalty shall not be *any* different amount...
>
> Such reasoning is especially appropriate in this workers compensation context, for compensation laws are practically always though of as substitutes for, not supplements to, common law. (citing United States v. Demko, 385 U.S. 149 (1966).
>
> We also agree with the...majority of courts [which] have held that workers' compensation statutes, particularly where they address the subject of delayed or withheld compensation benefits, provide the exclusive remedy in that respect. (citing Sample v. Johnson, 771 F.2d 1335, 13345-47 (9th Cir. 1985) and Larson, *Workmen's Compensation Law* § 68.34(c) 1987.

5.41 The Fifth Circuit went on to hold that the danger existed if a tort action were to be allowed to circumvent the exclusivity provision of an Act, that a Plaintiff could transform a simple delay in payments into a tort action by "merely invoking the magic words 'intentional' or 'outrageous conduct'. Atkinson at 814. The Atkinson opinion was rendered in 1988, a mere four (4) years after the Holland decision, however the vision contained in the Atkinson opinion has proven to be true. By invoking the "magic words", Plaintiffs in Mississippi can now circumvent the one inviolate of the Workers Compensation Act, the exclusivity provision.

5.42 It would not be appropriate to assert that the Mississippi Supreme Court in Holland and its progeny intended for every claim stating "bad faith" to rise to the level of circumventing the exclusivity provision. There is another step – one in which the Plaintiff herein failed to accomplish. Not only must the Plaintiff allege that the bad faith committed rose to the level of an intentional tort, the damages claimed must be separate and distinct from the work place injury. However, it is still urged by Gallagher Bassett that this Court reconsider the reasoning behind both the holding in Holland and the Legislature's intent in enacting the exclusivity provision along with penalties for delay. Unlike the Miller situation, where there was

a "wrong without a remedy", the Act itself contains the "remedy" for delay of payments, no matter the level of misconduct behind that delay and therefore the Mississippi Courts should not undermine the clear legislative intent which was to provide the exclusive remedy for delay in payments of workers compensation benefits.

c. Malone Failed to Claim an Injury Which was Separate and Distinct from His Work Related Injury and As Such His Claims are Barred by the Exclusivity Provision of the Workers Compensation Act?

5.43 The Holland decision mandated that in order to circumvent the exclusivity provision of the Act, just as the Court reasoned in Miller, there must be an injury which was separate and distinct from the work place injury caused by the intentional tort of bad faith. Holland at 55 (plaintiff claiming intentional infliction of mental distress during calculated refusal to pay benefits in order to force her into an inadequate settlement). See also, Cook at 481(plaintiff claimed mental and emotional distress arising from being placed under financial duress in order to be forced into a settlement). As in Miller, where the employee was imprisoned by her co-employee and suffered damages arising from that intentional act, the Holland Court reasoned that only if the intentional tort of "bad faith" caused damages which were "separate and distinct" from a work place injury, and therefore not compensable, would there exist a "remedy without a wrong" as addressed in Miller and therefore the tort action could ensue. Holland at 57.

5.44 In this case, Malone filed a claim seeking damages which arose only from his work related injury. As illustrated throughout this brief, Malone's counsel continually argued and presented evidence throughout this trial that Gallagher Bassett's actions with regards to Malone's "claim" caused his leg to be amputated. Further, Malone's counsel continually asserted that as long as the leg amputation was causally related to the bump on his leg when he slipped at work, then his "injuries" as a whole were "compensable". Although Malone's injuries may have been compensable under a workers compensation type review, these damages not only do not

give rise to a claim which can circumvent the exclusivity provision of the Workers Compensation Act, these damages actually bar the claim entirely. Holland and the line of cases that followed, mandated that not only must the bad faith claimed rise to the level of an intentional tort, the injuries alleged must be separate and distinct from the work related injury. Id. This mandate is logical because if the damages are related to the work place injury then the Plaintiff has already received compensation for those injuries, which he cannot recover for twice. Medlin v. Hazelhurst Emergency Physicians, 889 So. 2d 496, 499 (Miss. 2004)(stating there can be no double recovery). Further, work related injuries are compensable and therefore, the Court will not allow a claim in tort wherein the remedy is provided for under the Act – only a "wrong without a remedy" will be allowed to circumvent the exclusivity clause. Holland at 57. As such, Malone's claims do not circumvent the exclusivity provision and are therefore barred from being brought in a tort action, therefore, this matter should be reversed and rendered.

d. Even if Malone's Claims Were Not Barred by the Exclusivity Provision, Because Malone Failed to Reserve His Right to Pursue This Bad Faith Action and Because He has Already Accepted a Recovery On His Claim for Delay, His Claim is Barred .

5.45 Mississippi Power & Light Co., v. Cook, established the rule that in the case where a workers comp claimant does assert the allegations necessary to avoid the exclusivity provision of the Act, that claimant must preserve his right to pursue his bad faith action when he accepts payment on his underlying workers compensation claim. 832 So. 2d 474 (Miss. 2002). In discussing the facts which gave rise to the Plaintiff's claims in Cook, the Court focused on the fact that during the settlement of his claims which were approved by the Commission, Cook specifically "reserved the right to bring a bad faith claim against MP&L." Cook at 478. Malone did not present the entire workers compensation file during the trial of this matter, however, he did attach the Orders of the Commission wherein attorney fees and expenses were approved. Further, representatives for Nabors testified that they had paid all of the workers compensation

benefits due to Malone however the payments for future medicals were left open. It is incumbent upon the Plaintiff to prove that he reserved his right to bring a bad faith claim against Gallagher Bassett when he accepted the full and final payments due him under his workers comp claim by Nabors. Id. Being that no such reservation was made, Malone is barred from asserting these claims and as such this matter should be reversed and rendered.

5.46 Further, Gallagher Bassett would urge this Court to find that a workers comp claimant who accepts the penalties assessed for delay, as Malone did in this case, be barred from pursuing a tort action. The law in Mississippi is that there can be only one recovery for each wrong and therefore when Malone choose to accept the penalties he chose his remedy and should not now be allowed to seek another remedy for the identical wrong. Medlin v. Hazelhurst Emergency Physicians, 889 So. 2d 496, 499 (Miss. 2004).

MALONE'S CLAIMS FAIL AS A MATTER OF LAW, AS GALLAGHER BASSETT WAS NOT THE PROXIMATE CAUSE OF ANY DAMAGES SUFFERED BY MALONE

5.47 Proximate cause is a necessary element in any claim for damages and the Plaintiff has the burden to prove that his injuries were proximately caused by the alleged wrongful acts of the defendant. Glover v. Jackson State Univ., 968 So. 2d 1267, 1276-77 (Miss. 2007). This Court has recently pronounced the definite law on proximate cause in the case Glover v. Jackson State University wherein the Court analyzed the history and development of this requirement and the applicable law as it stands today. Id. As part of proximate cause, the Plaintiff must prove that the actual damages received were foreseeable and occurred in the natural course of events without any intervening cause. Id at 1277(for proximate cause to be established the "but for test" must be passed which is that but for the defendant's negligence, the injury would not have occurred)(citing Gulledge v. Shaw, 880 So. 2d 288, 293 (Miss. 2004)). In defining foreseeability, the court has stated that:

> [A] Plaintiff is not required to prove that the exact injury sustained by the Plaintiff was foreseeable; rather, it is enough to show that the Plaintiff's injuries and damages fall within a particular kind or class of injury or harm which reasonably could be expected to flow from the defendant's negligence.

Glover, 968 So. 2d at 1278.

5.48 This Court has held that the alleged wrongdoing of the defendant must be the "cause in fact" of the Plaintiff's injury, rather than simply one element in a series of events which contributed to an eventual injury. Id. See also, City of Jackson, v. Estate of Stewart ex rel. Womack, 908 So. 2d 703, 706-07 (Miss. 2005). Cause in fact is "that cause which, in the natural and continuous sequence of unbroken events by any efficient intervening cause, produces the injury and without which the injury would not have occurred." Glover at 1278. In Womack, the Court found that although a fall which was sustained by the Plaintiff may have been a foreseeable result of the defendant's alleged wrongdoing, the stroke the Plaintiff suffered after she struck her head in the fall was not foreseeable. Womack at 707. A fall may have been foreseeable and even that the fall would lead to a head injury, but a stroke does not normally flow, in the natural course of events, from every head injury and therefore there were just too many steps and "causes" which intervened, thereby eliminating proximate cause. Id.

5.49 In the case at hand, Malone alleges that the direct cause of his amputation and the ensuing damages related to that amputation, was the failure of Gallagher Bassett to properly handle his purported "claim" for workers compensation benefits, however, as is discussed fully below, even if we take the allegations as true for the sake of argument, the failure to properly handle a workers compensation claim cannot be the proximate cause of the injuries alleged by Malone and as such Malone's case fails as a matter of law.

5.50 The facts are laid out fully above however in summary, Malone was injured when he slipped and bumped his right leg on a beam while working on Nabor's Rig 295 in Jones

County, Mississippi on July 28, 2000. V 29; T 271 ln 23- T272 ln 22. This bump caused a skin break and bleeding which required attention. Id. Malone went to his supervisor, toolpusher Wallace, and reported the injury, filled out an incident report, signed it, received first aid treatment from Wallace and returned to work and continued to work the rest of his "hitch" which lasted three (3) more days. Id. Thereafter Malone went to his family doctor and was later referred to specialists to treat the injury and his ongoing battle with his chronic infectious condition called osteomyelitis.

5.51 Malone had a chronic condition in this leg that flared up from time to time and which he had been dealing with for over 20 years. V 29; T 268 ln 25 – T 269 ln 25. This condition caused Malone to remain very susceptible to infection in that area of his leg. After his leg was injured at work, Malone went to see his family doctor who had treated him for over a decade in the handling of this chronic condition, osteomyelitis. Malone's family doctor placed a band aid on the wound and gave Malone antibiotics to treat the possible flare up of infection due to the osteomyelitis. Malone then returned to work to begin his next "hitch" as scheduled on August 7, 2000. Wallace testifies that during that seven (7) day hitch Malone worked as usual and the wound looked "healed". R.E. 17. Malone went to his follow up appointment with his family doctor on August 16, 2000 wherein his doctor discovered that the bone was showing in the wound and immediately sent Malone to see a specialist. V29; T 283 ln 12 – T 284 ln 6. Malone went to this specialist, Dr. Melancon, who advised Malone that surgery would be required to cover the exposed bone. Id. Malone immediately told the doctor that he could not miss work and was in fact adamant in his refusal to not miss work. Id. Dr. Melancon relayed the need for Malone to have surgery as quickly as possible, however, given that Malone had suffered from osteomyelitis for over a decade, he did not deem the delay to be overly dangerous. D. Barbieri p 37 ln 9- 14. A follow up appointment was made for August 30, 2000 which would be

after Malone's next seven (7) day hitch on the rig was completed in order to discuss in more detail the surgery needed. V 29; T 283 ln 12 -21. Malone submitted to several tests at this time also, however, Malone's doctor did not recommend that Malone should not go to work. D. Barbieri p 18 ln 21- p 19 ln 5. Nor did the doctor prescribe any type of medication or care instructions to prevent the wound from worsening. D. Barbieri p 39 ln 9- p 40 ln 4.

5.52 Malone goes to his follow up appointment after his seven (7) day hitch to see the specialists again on August 30, 2000. D. Barbieri p 32 ln 7 - 17. Malone confers with the doctor who will perform the surgery, Dr. Barbieri, who tells Malone that the surgery will address both the exposed bone and the underlying infection and that he will need three (3) to four (4) months to recover. D. Barbieri p 32 ln 12 - 17. Malone informs Dr. Barbieri that he has arranged to work for an extended period of time in order to be off and that he will not schedule the surgery until these hitches are completed. D. Melancon p 31 ln 13- 24.In an area where some dispute arises in this matter, Malone's doctors testify that they urge Malone to reconsider and that it is critical for him to proceed with the surgery as soon as possible. D. Melancon p 31 ln 13- 24. Malone testifies that he understood he needed surgery to address the open wound as soon as possible but that he was not told that by delaying the surgery he was risking losing his leg, and in fact that if he had known that his leg was at risk he would not have delayed having the surgery for any reason. V 30; T 345 ln 24 – 28. Nonetheless, the doctors knew Malone was going to work on an oil rig for two months straight and yet again did not prescribe any special medication or care instructions for the wound of exposed bone. D. Barbieri p 39 ln 9- p 40 ln 4.

5.53 Once Malone finishes his two months of work, he reports back to the doctors on October 3, 2000 that he is ready to submit to the surgery. D. Barbieri p 41 ln 3- 19. In direct contradiction of their adamant testimony that they urged Malone that the surgery needed to be performed without delay, the surgery was in fact delayed another 20 days in order to "fit"

Malone into their surgery schedule. D. Barbieri p 41 ln 3- 19. However, this delay does seem rather insignificant given that the tests performed on Malone, which included an MRI, in August of 2000 compared to the follow-up tests performed in October of 2000, showed "no significant change in Malone's condition". D. Barbieri p 28 ln 21 – p 29 ln 22. Malone then undergoes the surgeries and the extensive rehabilitation that followed and ultimately never resumes his job with Nabors. In January of 2001, Malone is terminated by Nabors for being unable to return to work due to a "nonwork related injury". R.E.13. Malone then applies for social security benefits which he receives and continues his rehabilitation. In January of 2001, however, Malone falls and breaks his leg which has just undergone the surgery. [V. 29 Tr. 292, ln 17-19] This is an serious break requiring the placement of rods in Malone's leg that unfortunately become severely infected due to Malone's ongoing battle with osteomyelitis. Id. This infection eventually leads to the amputation of Malone's leg on August 19, 2002. [V 29; Tr. 303, ln. 1-2].

5.54 In a step by step review and analysis of the facts surrounding and leading up to Malone's amputation, even applied in the light most favorable to Malone, it is clear that Gallagher Bassett could not have been the proximate cause of the injuries claimed by Malone. The Plaintiff and Co-Plaintiff in this action seem to have confused the requirements to prove that an injury was "work related" and therefore compensable under workers comp with the requirements of true proximate cause. Although Malone's injuries may be "compensable" under workers comp, they could not have been proximately caused by the alleged actions of Gallagher Bassett.

5.55 The Plaintiff and Co-Plaintiff argue that if Malone had not had to work the extra eight (8) hitches prior to having his surgery in order to save up money, he would not have lost his leg. However the facts demonstrate the following: **(1)** If Malone would have been told that he was risking amputation he would not have worked and delayed the surgery. Therefore, Malone's

doctor's failure to communicate the seriousness of the situation was a significant intervening cause of Malone's injuries; **(2)** The tests methodically show that Malone's condition had not changed due to the delay and therefore the eight (8) week delay in conducting the surgery had little to no effect on the eventual outcome. It was the fact that the injury occurred in the first place that spurred the ultimate result coupled with Malone's underlying condition, not any actions of Gallagher Bassett.; and **(3)** The amputation was the direct result of the infection that occurred when Malone required rods to be placed into his bone when he broke his leg. There is no logical way to relate wrongful denial or delay of workers compensation benefits to this leg break and ensuing infection, therefore the Plaintiff has failed to prove proximate cause.

5.56 This Court has recently clarified the law of proximate cause and when applied to Malone's claims it is unequivocal that Malone has failed to prove proximate cause as required and therefore this matter should be reversed and rendered.

3. MALONE FAILED TO MITIGATE HIS DAMAGES AND AS SUCH GALLAGHER BASSETT CANNOT BE HELD LIABLE FOR THOSE DAMAGES

5.57 Under Mississippi law, an injured plaintiff may not recover for damages that he did not take reasonable efforts to avoid or mitigate. Georgia Pacific Corp. v. Armstrong, 451 So. 2d 201, 206 (Miss. 1984). See also, Buras v. Shell Oil Co., 666 F. Supp. 919, 924 (S. D. Miss. 1987) (applying Mississippi law); Pelican Trucking Co. v. Rossetti, 251 Miss. 37, 167 So. 2d 924, 927 (1964). Malone testified that he chose to work the eight (8) week hitch although he was aware that his doctors wanted the surgery completed as quickly as possible. V29; T 283 ln 12 – T 284 ln 6. Forgoing medical treatment is a decision, not a damage. Any injury that flows from the decision to not follow the advice of one's doctor cannot be blamed on another. There was nothing preventing Malone from receiving the necessary medical care. His family health insurance was paying for the care. V29; T 281 ln 5-6. Although Malone may have felt that he

would be financial more secure and perhaps be more at ease with taking the necessary time off, that is not a justifiable reason for not mitigating the risk of injury to himself. The evidence at trial established that Malone told his doctors that he refused to miss work prior to his conversation with Holbrook wherein he was told that he would not be allowed to file for workers compensation benefits. V29; T 283 ln 12 – T 284 ln 6. Further, the evidence demonstrated that even when Malone did not recover from his surgeries as quickly as expected and ultimately lost his job that he and his family were not damaged due to their lack of financial support for a significant amount of time. V31; T 560 ln 4 – 15. As such, it is clear that Malone's decision to work instead of move forward with the surgery as urged by his doctors, was an unnecessary decision. And it was that decision which was the direct proximate cause of Malone's injuries. This was a reason in Taylor that the Mississippi Supreme Court refused to allow any action based on bad faith to rise above the exclusivity bar of the Act. Taylor v. USF&G, 420 So. 2d 564, 566 (Miss. 1982). In Taylor the Court stated that an employee could not claim that he was refused medical care because the carrier would not pay for it. Id. The Taylor Court stated that the Plaintiff "could have obtained the surgery and compelled the carrier to pay for it" and went on to hold that "a little reflection will show that any other rule would be unworkable." Id. Malone was in no way prevented from obtaining surgery other than his own decision. Being that Malone did not attempt to mitigate his damages, Gallagher Bassett cannot be held liable for the damages which flowed from Malone's actions.

4. EVEN IF MALONE COULD PREVAIL ON HIS CLAIMS THEY ARE BARRED BY THE ONE SATISFACTION RULE AND AS SUCH GALLAGHER BASSETT IS ENTITLED TO A SET OFF AS TO THE JURY AWARD FOR MALONE.

5.58 The Jury awarded Malone $250,000.00 after assessing fault amongst the parties as noted above. However, prior to trial Malone had entered into a settlement agreement with Nabors, or more specifically a "Mary Carter" agreement, wherein Nabors agreed to pay Malone

$1.5 million dollars for Malone's damages "caused by Gallagher Bassett" but reserved the right to participate in trial and to collect a portion of any money won by Malone. R.E. 12; V32; T 652 ln 4-23. The agreement states that Nabors denies any wrongdoing on their part, however, since they are vicariously liable for Gallagher Bassett's actions, they will pay $1.5 million dollars to Malone in exchange for the agreement that any monetary award received by Malone would be split between the two. Id. In executing this agreement Malone has fully and finally accepted payment for his claims against Gallagher Basset and cannot now recover twice for the same wrong.

5.59 The Mississippi Supreme Court stated that, "there can be but one satisfaction of the amount due the Plaintiff for his damages." Medlin v. Hazelhurst Emergency Physicians, 889 So. 2d 496, 499 (Miss. 2004); Medley v. Webb, 288 So. 2d 846, 848 (Miss. 1974); Hunnicut v. Wright, 986 F. 2d 119, 124 (5th Cir. 1993) (applying Mississippi law); Gallagher Bassett v. Jeffcoat, 887 So. 2d 777, 793 (Miss. 2004) (J. Carlson, dissenting opinion). Under Mississippi's "one satisfaction rule," Gallagher Bassett is entitled to a setoff, dollar for dollar, for all money paid by Nabors to Malone for settlement in this case. Turner v. Pickens, 711 So. 2d 891, 893 (Miss. 1998); Hunnicut, 986 F.2d at 124-25; McBride v. Chevron, 673 So. 2d 372, 380 (Miss. 1996).

5.60 The Mississippi Supreme Court has long held that, "double recovery for the same harm is not permissible." Medlin, 889 So. 2d at 501 (Miss. 2004); Hunnicut, 986 F.2d at 124 (5th Cir. 1993) ("There can be no double recovery of the amount of damages which one has sustained. . . . [T]he party injured may release or settle with one joint tortfeasor . . . and then sue the other, who is entitled to be given credit for the amount already recovered."); Garcia v. Coast Electric Power Assoc., 493 So. 2d 380, 385 (Miss. 1986) (stating policy against double

recovery). See also, Teasley v. Buford, 876 So. 2d 1070, 1076 (Miss. 2004); Robles v. Gollott & Sons Transfer & Storage, Inc., 697 So. 2d 383, 384-85 (Miss. 1997).

5.61 When this issue was raised in the post trial motions, the Plaintiff and Co-Plaintiff responded by arguing that Miss. Code Ann. § 85-5-7 changed Mississippi law on setoffs when it abolished joint and several liability. Essentially the Plaintiff and Co-Plaintiff argued that since Mississippi law now allowed the courts to apportion fault between defendants, the settlement did not preclude Malone's recovery from Gallagher Bassett. This argument declines to examine one critical aspect of the settlement, however. The settlement money paid by Nabors was not for the wrongs committed by Nabors, or the "portion" of the wrong committed by Nabors, but instead the settlement was directly and only *for the wrongs committed by Gallagher Bassett.* This is the essential element which implicates the law of "one satisfaction" and the prohibition of "double recovery." There is no dispute that a Plaintiff can recover damages from two separate tortfeasors for each of the tortfeasors' own actions or their portion of the wrongdoing, however, a Plaintiff may not recover twice for the wrongful conduct of one tortfeasor.

5.62 In Brown v. North Jackson Nissan, 856 So.2d 692 (Miss. Ct. App. 2003), the Mississippi Court of Appeals held that "there can [] be no doubt that nothing in § 85-5-7 has modified the common law principle that an injured party is entitled to but one recovery on his claim." Brown at 694. Because Nabors settled all of Gallagher's Bassett's "bad faith" prior to trial, Malone is precluded from recovering any amount from Gallagher Bassett. As such the judgment against Gallagher Bassett awarding damages to Malone should be reversed and rendered.

5. NABORS HAS NO RIGHT TO INDEMNITY FROM GALLAGHER BASSETT THEREFORE THE JUDGMENT IN FAVOR OF NABORS SHOULD BE REVERSED AND RENDERED

5.63 Nabors filed a cross-claim in this action seeking indemnity from Gallagher Bassett. Nabors' labeled their claim a "breach of contract claim" however Nabors has actually asserted a claim for indemnity. Where a party alleges a breach of contract, but the recovery sought is "reimbursement for damages assessed," the claim is one of contractual indemnity. Ryan v. EAI Const. Corp., 511 N.E.2d 1244, 1254 (Ill. App. 1987); Ludigen v. John Hancock Mut. Life Ins. Co., 495 N.E.2d 1237 (Ill. App. 1986). A party does not gain a right of indemnity by couching his pleading in terms of breach of warranty or breach of contract. See Chrysler Corp. v. McCarthy, 484 P.2d 1065, 1068 (Ariz. App. 1971). Nabors seeks only reimbursement of damages from "potential liability" and defense costs. In fact, in Nabors' damage instruction to the jury it stated the damages sought were for "reimbursement" of damages associated with the workers compensation claim and bad faith suit. Clearly, this breach of contract claim for reimbursement is really just another name for indemnity. It is undisputed that there did not exist a contract between Gallagher Bassett and Nabors, but that Nabors was a third party beneficiary to the contract between Gallagher Bassett and the workers compensation carrier, under which Gallagher Bassett was to adjust claims for Nabors. Of course, Nabors was self insured for up to $1 million for each claim, therefore, the carrier was rarely if ever involved in this relationship.

5.64 In order to succeed on an indemnity action, the party seeking indemnification must first demonstrate that there is a relationship which would justify indemnity. An obligation to indemnify "may arise from a contractual relation, from an implied contractual relation, or out of liability imposed by law." Hartford Casualty Ins. Co. v. Halliburton Co., 826 So. 2d 1206, 1216 (Miss. 2001). Because there is no written contract between Gallagher Bassett and Nabors, Nabors sought indemnity for liability which was imposed by law or from an "implied contractual relationship." Id. The Mississippi Supreme Court has stated there are "two 'critical' prerequisites of non-contractual indemnity in Mississippi...." which are: (a) the damages the

claimant seeks to shift are imposed upon him as a result of a legal obligation to the injured person; and (b) the party seeking indemnity did not actively or affirmatively participate in the wrong. Id. Nabors' claim for indemnity fails as to both requirements. Nabors cannot demonstrate that it paid pursuant to a legal obligation to Malone and furthermore, the jury found Nabors at fault for the damages sustained by Malone and as such Nabors actively participated in the wrong for which they are seeking indemnification.

(a) Nabors' Active Participation in the Wrong Eliminates Their Action for Indemnity

5.65 Nabors' claim for indemnity against Gallagher Bassett fails because Nabors actively or affirmatively participated in the wrong to Malone. Home Insurance Co. of New York v. Atlas Tank Manufacturing, 230 So. 2d 549, 551 (Miss. 1970). Under Mississippi law, a party cannot recover for indemnity if they actively participated in the wrong. Id. At trial, Malone testified that he was told by his supervisor, Holbrook, that he could not file a workers' compensation claim. The jury's allocation of fault to Nabors was based on the trial testimony that Nabors had knowledge of Malone's claim and refused to allow him to file a workers comp claim or failed to notify Gallagher Bassett properly in order for the claim to proceed. The jury found that Nabors was at fault in causing harm to Malone, along with Gallagher Bassett and Malone himself, therefore it is without dispute that Nabors was an active participant in the wrongs assessed in this case.

5.66 Nabors' Cross-Claim for indemnity against Gallagher Bassett is barred as a matter of law. Hartford Casualty Ins. Co. v. Halliburton Co., 826 So. 2d 1206, 1216 (Miss. 2001). See also, Hartford Accident & Indemnity Co. v. Mitchell Buick-Pontiac and Equipment Co., 479 F.Supp. 345 (N.D. Miss. 1979)(upholding trial courts' dismissal of action where party seeking indemnity was "an active participant in the wrong."). The law of indemnity expressly states that

a party who actively participated in the wrong cannot seek indemnity from another party and therefore Nabors claims for indemnity should be reversed and rendered.

(b) The Damages Nabors Seeks to Recover from Gallagher Bassett Were Not Imposed Upon Them as a Result of a Legal Obligation to Malone and therefore Nabors' Payments were Voluntary.

5.67 As stated above, pursuant to the law of indemnity in Mississippi, the one claiming indemnity must prove that they had a "legal obligation" to pay the damages and therefore has a legal right to recover those damages. Id. To satisfy the "legal obligation" requirement, Nabors had to show:

(1) Nabors was legally liable to Gary Malone;

(2) Nabors paid under compulsion of law; and

(3) The amount Nabors paid was reasonable

Hartford Casualty Ins. Co. v. Halliburton Co., 826 So. 2d 1206 (Miss. 2002) (*citing* Home Ins. Co. v. Atlas Tank Mfg. Co., 230 So. 2d 549, 551 (Miss. 1970); Southwest Miss. Electric Power Ass'n v. Harragill, 182 So. 2d 220 (Miss. 1966)). Nabors' failure to prove these necessary elements of their claim for indemnity is fatal. Nabors' took the position in their post trial motions, that they had a "legal obligation" to pay Malone's workers compensation claims and thus they were "legally liable" to Malone. However, Nabors fails to understand that this case has been brought by circumventing the exclusivity provision of the Workers Compensation Act, and that the "legal obligations" Nabors owed to Malone as to workers compensation benefits were fully adjudicated in the workers compensation proceedings. This matter arises purely from the allegations of intentional misconduct and "bad faith". Throughout this litigation Nabors has also maintained that the Mary Carter Agreement was entered into as a result of the "potential" liability Nabors had to Malone for bad faith committed by Gallagher Bassett. V32; T 652 ln 4-23 . However, under Mississippi law, potential liability is not sufficient to entitle a Plaintiff

seeking indemnity to recover. See Maryland Cas. Co. v. R.H. Lake Agency, Inc., 331 F.Supp. 574 (N.D. Miss). Further, because Mississippi allows a direct action by the intended insured against an independent adjuster for "bad faith," there is no claim in this case that would give rise to liability on Nabors part due to the acts of Gallagher Bassett. Bass v. California Life Insurance Company, 581 So. 2d 1087 (Miss. 1991)(adopting the holding of Dunn v. State Farm & Casualty Company, 711 F.Supp. 1359 (N.D. Miss. 1987).

5.69 Prior to Bass, the law was that an insured had to sue the carrier for the bad faith committed in the adjusting of his claim relying on the legal principle of vicarious liability, because there existed no contractual relationship, and therefore no duty, between the insured and the adjuster. Id. If an insured were to recover on his bad faith claim the carrier would then seek reimbursement pursuant to the contractual obligations with the adjuster. Id. Simply stated, Bass, eliminated the vicarious liability step and allowed the "direct action" against the adjuster. Given that Mississippi allows this direct action for bad faith adjustment there were no claims in this circuit court action wherein Nabors could be held "vicariously liable" for Gallagher Bassett. Regardless of the wording of the settlement agreement, Nabors made a voluntarily payment to Malone and they cannot now seek a recovery from Gallagher Bassett.

5.70 It has been clearly established throughout the arguments in this brief, that Malone does not have any viable claim against Gallagher Bassett whatsoever. Malone's claim is barred by the exclusivity provision of the Workers Compensation Act and even if the exclusivity provision did not apply, the facts amply support that no "bad faith" was committed by Gallagher Bassett in the handling of Malone's claim. Therefore, Nabors' decision to enter into a settlement with Malone was nothing more than a hastily made bad decision. Had Nabors waited for this case to be adjudicated before paying out millions of dollars this issue would not even need to be addressed as Gallagher Bassett is not liable for any amount of damage. Given that none of the

damages Nabors seeks in their Cross-Claim for indemnity were paid by Nabors under pursuant to a "legal obligation", Nabor's Cross-Claim fails as a matter of law and the judgment rendered by the jury should be reversed and rendered.

5.71 The Mississippi Supreme Court held in Southwest Mississippi Electric Power Ass'n v. D.B. Harragill, 182 So. 2d 220, 223 (Miss. 1966):

> The authorities hold that to recover indemnity it is necessary for the Plaintiff to **allege and prove** that he was legally liable to the person injured, and consequently, paid under compulsion. Otherwise ***the payment is a voluntary one for which there can be no recovery***.

(emphasis added). Nabors is not entitled to indemnity as clearly laid out under Mississippi law. See also, Certain Underwriters at Lloyd's of London v. Knostman, 783 So.2d 694, 698 (Miss. 2001); Keys v. Rehabilitation Centers, Inc., 574 So. 2d 579 (Miss. 1990)(Plaintiff seeking indemnity was "entitled to use its own good judgment and effect such settlement . . . as it deemed prudent, provided only that when proceeding to enforce the indemnity agreement it prove that it was [legally] liable and that the amount paid in settlement was reasonable"); Long Term Care, Inc. v. Jesco, Inc., 560 So. 2d 717 (Miss. 1990)(holding no indemnity available to party who settled voluntarily).

5.72 Additionally, the court in Hartford stated that for a plaintiff seeking indemnity, the plaintiff must show that it settled "under compulsion" rather than voluntarily. Hartford Casualty Ins. Co. v. Halliburton Co., 826 So. 2d 1206 (Miss. 2002). Essentially, the reasoning behind the rules of indemnity law exist because the Courts do not want to enforce settlements, through indemnity, upon parties not involved in the creation of those settlements. In essence, if we did not have the rules of law that for indemnity to be valid the payment must have been made after liability is established, parties will end up in the exact situation as before the Court now. The Jury found *all* parties liable in this case, to include the Plaintiff, and then assessed damages in an amount much lower than the anticipated amount Nabors and Malone arrived at. If the law

did not mandate that for indemnity to attach the payments have to be made *after* liability is established, parties could conspire to "settle" for outrageous amounts based on frivolous claims and possibly be allowed to seek indemnity from a third party. The law is clear that only payments made *after* the existence of liability is found, that the party paying for that liability can then seek indemnity. See, Bush v. City of Laurel, 215 So. 2d 256, 260 (Miss. 1968)(holding that a "payment made *after* liability has been established is one made under compulsion.")

5.73 In the settlement agreement between Nabors and Malone, Nabors specifically stated that the agreement represented "no admission of fault or liability." In addition, both Nabors and Malone agreed in the settlement that Gallagher Bassett was solely responsible for the "grossly negligent and reckless conduct" which caused the injuries to Malone. Therefore, Nabors' settlement with Malone was based on a *potential* liability, which made the settlement voluntary.

5.74 Moreover, as mentioned above, the test for indemnification has three parts. Besides proving legal liability and payment under compulsion, the Plaintiff seeking indemnity must also prove that the amount paid in the settlement was *reasonable*. Nabors was found by the jury to be liable for 42.5% of $250,000.00 in damages, which equals $106,250.00. Nabors settled the case for $1.5 million. Thus, their settlement exceeded the actual liability found by the jury by $1.3 million. This amount, on its face, is clearly unreasonable and Nabors thereby fails to prove the third necessary element to recover indemnity. Hartford Casualty Ins. Co. v. Halliburton Co., 826 So. 2d 1206 (Miss. 2002) (citing Home Ins. Co. v. Atlas Tank Mfg. Co., 230 So. 2d 549, 551 (Miss. 1970). Given the unreasonableness of the settlement and the indemnity sought, coupled with the fact that the payment was voluntary, Nabors' action for indemnity fails as a matter of law.

VI. CONCLUSION

6.1 Even when we accept the evidence in the light most favorable to the plaintiff and co-plaintiff, Malone and Nabors' claims file as a matter of law. Malone's claims are barred from being pursued in a tort action as these claims fall under the exclusivity provision of the Workers Compensation Act. Although this Court allows a tort action for bad faith outside of the exclusivity provision of the Act, if that bad faith rises to the level of an intentional tort which caused damages separate and distinct from those related to the work place injury, Malone has failed to plead or prove the elements necessary for a claim to overcome the exclusivity bar. Malone wholly fails to prove that Gallagher Bassett committed even simple negligence much less bad faith that rises to the level of an intentional tort. At the end of this trial the jury assessed fault among all of the parties, to include the plaintiff evidencing a clear finding that no bad faith was committed by Gallagher Bassett. The Judge presiding in this case further found that punitive damages were not warranted and refused to allow a punitive stage of trial, which is a direct finding by the Judge that the actions of Gallagher Bassett did not rise to the level of misconduct necessary to establish bad faith much less an intentional tort. Further, from the first pleadings through trial, Malone sought only damages arising directly out of and flowing from his work related injury, therefore, Malone has failed to make a claim which can be pursued in tort outside of the Act because he has failed to even claim, much less prove, damages which were separate and distinct from the work related injury.

6.2 Malone's claims also fail because he accepted the penalties assessed for delay under the Act thereby barring his claim under the prohibition of double recovery. His claims are further precluded due to his failure to reserve his right to pursue this bad faith action when entering into a final comprise of his underlying workers compensation claim.

6.3 Even if Malone were to be able to maintain an action in tort against Gallagher Bassett his claims would still fail as he cannot prove that Gallagher Bassett was the proximate cause of the injuries alleged. By Malone's own testimony all of the damages he claims in this case flow from his decision to refuse surgery causing a two month delay which led to his eventual amputation. The doctors presented by Malone at this trial further opine that the necessity for amputation arose directly from an infection which was caused during surgeries undergone by Malone due to a leg break which he suffered more than a year after the original injury occurred. Although the proof presented by Malone's doctors may establish a claim for workers' compensation benefits by relating amputation to the original injury as that injury causing the leg to be more susceptible to a break, the proof, however, fails to overcome the legal standard required for proximate cause given that the break and infection were unforeseeable intervening causes that led to the amputation of the leg.

6.4 However, even if proximate cause were not an issue, the fact that Malone accepted a settlement from Nabors *for the bad faith actions of Gallagher Bassett*, in the amount of $1.5 million prior to trial, Malone is precluded from accepting a double recovery pursuant to the doctrine of the "one satisfaction". Gallagher Bassett is due a total set off based on this prior recovery. In the "Mary Carter Agreement", it is carefully laid out that the money paid by Nabors was for the actions of Gallagher Bassett. As such, Malone has already accepted a recovery for the alleged wrongful actions of Gallagher Bassett and his claims are therefore precluded.

6.5 Nabors' claims against Gallagher Bassett seek indemnity from Gallagher Bassett arising out of Malone's claims against Gallagher Bassett. Given that Malone does not maintain a viable cause of action against Gallagher Bassett, Nabors' claims for indemnity necessarily fail. There can be nothing owed to Nabors via indemnity when there is nothing owed to Malone.

6.6 Further, pursuant to the well established law of indemnity, Nabors' claims fail to meet the necessary requirements of a recoverable indemnity action and thus fail as a matter of law. It is clear that Nabors' payments to Malone were made voluntarily, as no legal obligation existed under which Nabors' was liable to Malone for Gallagher Bassett's alleged wrongdoing. The payments were not made pursuant to compulsion and the amount was completely unreasonable thereby further mandating that Nabors' claims for indemnity fail. Nabors paid Malone $1.5 million and sought that amount plus all defense costs from Gallagher Bassett in the claim for indemnity. The jury in this case, after almost two weeks of trial, assessed fault amongst the parties, finding Nabors and Gallagher Bassett to be equally at fault for Malone's damages in the amount of 42.5% and further found that Malone himself was 15% at fault for his own injuries. The jury then awarded Malone $250,000.00. Therefore, as to Gallagher Bassett, for their alleged wrongdoing, the jury found that Gallagher Bassett should pay Malone $106,250.00 for his injuries. Given the amount awarded by the jury, Nabors' settlement of $1.5 million was clearly excessive and thereby Nabors is not entitled to indemnity from Gallagher Bassett for the $1.5 million paid via voluntary settlement.

6.7 Given the above, the circuit court was wrong in its denial of Gallagher Bassett's Motions for Judgment Not Withstanding the Verdict and Motion for Set Off and as such, this Court should reverse and render the decision of the Jones County Circuit Court

Respectfully submitted,

GALLAGHER BASSETT SERVICES, INC.

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CERTIFICATE OF SERVICE

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

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This the 15th day of August, 2008.

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PATRICIA J. KENNEDY