IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2017-CA-01306-COA

SWAMPFOX OILFIELD SERVICES, LLC **APPELLANT**

v.

BLACKJACK OIL COMPANY, INC. **APPELLEE**

DATE OF JUDGMENT:	06/26/2017
TRIAL JUDGE:	HON. ANTHONY ALAN MOZINGO
COURT FROM WHICH APPEALED:	MARION COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	F. DOUGLAS MONTAGUE III
ATTORNEY FOR APPELLEE:	JEFFREY TODD WAYCASTER
NATURE OF THE CASE:	CIVIL - CONTRACT
DISPOSITION:	AFFIRMED IN PART; REVERSED AND RENDERED IN PART - 04/09/2019
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

J. WILSON, P.J., FOR THE COURT:

¶1. Blackjack Oil Company had a lease on a previously abandoned oil well in Walthall County. Blackjack contracted with Swampfox Oil Services to attempt to drill the well to a depth of 3400 feet. Swampfox encountered difficulties in the well and eventually lost an expensive drill bit, provided by Blackjack, in the well hole. Swampfox fished for the bit for two days but could not retrieve it, and Blackjack then decided to plug and abandon the hole.

¶2. Swampfox filed suit in the Marion County Circuit Court, alleging that Blackjack failed to make payments required under the parties' contract. Blackjack answered and denied that it owed Swampfox anything. Blackjack also filed a counterclaim for damages for the loss of the well and the cost of having to drill a new well.

¶3. The case proceeded to trial, and the jury returned a verdict in favor of Blackjack on both Swampfox's claim and Blackjack's counterclaim. On the counterclaim, the jury found that Blackjack should recover damages of $10,971.85. After judgment was entered on the jury's verdict, Swampfox filed a motion for judgment notwithstanding the verdict (JNOV) or a new trial, which the trial court denied, and then appealed. On appeal, Swampfox argues (1) that it proved that Blackjack failed to make payments required by the parties' contract; (2) that Blackjack's counterclaim is barred by the contract's consequential damages waiver; and (3) that it is entitled to a new trial based on hearsay testimony from one witness.

¶4. We hold that the verdict in favor of Blackjack on Swampfox's claim was supported by substantial evidence and was not against the overwhelming weight of the evidence; therefore, the judgment in favor of Blackjack on Swampfox's claim is affirmed. However, we agree with Swampfox that Blackjack's counterclaim is barred by the parties' contract; therefore, we reverse and render judgment in favor of Swampfox on the counterclaim. Finally, we hold that the hearsay testimony at issue does not require a new trial. Therefore, the judgment of the circuit court is affirmed in part and reversed and rendered in part.

FACTS AND PROCEDURAL HISTORY

¶5. Blackjack obtained a lease to drill on a previously abandoned oil well in Walthall County. Blackjack reentered the well in November 2014, but its progress stalled around 2269 feet. Blackjack then hired Swampfox to attempt to reach a depth of 3400 feet.

¶6. Representatives from Blackjack and Swampfox negotiated the terms of the parties' contract. They started with an International Association of Drilling Contractors (IADC) form

"Drilling Bid Proposal and Daywork Drilling Contract." However, the parties made significant typed and handwritten changes to the form, and the final contract did not provide for a daily drilling rate, as contemplated by the form. Rather, Swampfox would earn a "flat fee" of $20,000 if it reached the target depth of 3400 feet. At trial, the parties disagreed about the meaning of many provisions of the contract. However, all agreed that the gist of the contract was that Swampfox would attempt to drill the well to the target depth and would primarily use its own equipment. The contract was signed on April 25, 2015.

¶7. In mid-May 2015, Swampfox moved its rig onto the well site. At that point, no one had worked on the well for four months. Swampfox's primary onsite representatives were its owner and president, Richard Thomas, and a contractor/consultant named Tony Hines. Blackjack's onsite representative was Jack Cox.

¶8. Swampfox reached the concrete plug in the well sometime in June. However, they were unable to penetrate the plug, so they asked Blackjack for a stronger polycarbonate diamond cutter bit (PDC bit). Blackjack provided the bit as requested. On June 9, the bit became stuck. Neither Thomas nor Hines was present at the time, but Cox was on site. The Swampfox crew pulled the drill and the bit out, cleaned it, and reentered the hole. The PDC bit then came off in the hole.

¶9. Swampfox fished for the bit for two days but could not retrieve it. On June 11, Hines told Cox that he doubted that the project could be successful. Hines said he would plug and abandon the hole if it were up to him. Cox discussed Hines's recommendation with Blackjack's president, Kevin Wilson. Wilson and Cox agreed that the well should be

plugged and abandoned. Cox notified the State Oil and Gas Board that Blackjack intended to plug and abandon the well. Cox also testified that he orally informed Thomas on June 11 that the hole would be abandoned and that Swampfox and its rig were released. On June 16, Blackjack provided Swampfox written notice of its intent to plug and abandon the well.

¶10. On June 15, Swampfox sent Blackjack an invoice showing total charges of $42,928.40 and a balance due of $21,428.40. The invoice included charges for, inter alia, the rental and use of various equipment, a $1,500 mobilization fee and a $1,500 demobilization fee, four days of "standby" time at $3,000 per day, and a $9,000 "cancellation fee." Swampfox sent additional invoices in July and September, but Blackjack did not pay the invoices.

¶11. In November 2015, Swampfox sued Blackjack in the Marion County Circuit Court. Swampfox sought payment for $86,394.03 in unpaid invoices plus attorney's fees and pre- and post-judgment interest. Blackjack filed an answer and counterclaim. Blackjack's counterclaim sought $168,000 in damages: $32,000 for the lost lease on the well and $136,000 for the cost of drilling a new well.

¶12. The case proceeded to a jury trial. Wes Wagner, Swampfox's CEO, testified that Swampfox and Blackjack negotiated and exchanged several drafts of the contract before the parties finally signed it. Wagner testified confidently about the meaning of various provisions of the contract. However, Wagner admitted that this was the first time that he had ever negotiated a contract of this nature or used an IADC form contract. Wagner testified that he struck through provisions of the form that the parties decided to amend or disregard, and he inserted text in places. He testified that Swampfox and Blackjack agreed on a flat fee

of $20,000 that Swampfox would earn if it reached a target depth of 3400 feet. The contract did not include a daily rate for drilling work.

¶13. As discussed above, on June 11, 2015, Cox orally told Thomas that Blackjack intended to plug and abandon the hole and that Swampfox and its rig were released. Nonetheless, Swampfox's crew allegedly remained onsite on "standby" through June 15. Swampfox claimed that they were waiting for instructions from Blackjack or *written* notice of their release. On June 16, Blackjack gave Swampfox written notice. Swampfox later invoiced Blackjack for $3,000 per day for four days of standby time. Section 4.5 of the contract stated that Swampfox would be paid a "Standby Time Rate" of $3,000 per day for time spent "waiting on orders" from Blackjack. However, Wilson had amended section 4.5 by handwriting in "After 24 Hrs of T.D." At trial, Wagner admitted that this meant that the "Standby Time Rate" applied only after Swampfox reached the target depth ("T.D.") of 3400 feet. There is no dispute that Swampfox never reached target depth.

¶14. Wagner acknowledged that the parties' contract did not provide for a day rate for drilling work until twenty-four hours after Swampfox reached the target depth. Wagner explained that the twenty-four hour provision was to allow Blackjack "one free day" in the event that it chose to bring in another company to complete the work after Swampfox reached the target depth. Wagner claimed that whether the target depth was reached or work stopped for some other reason, the cost of time spent "waiting on orders" was the same. That is why Swampfox invoiced Blackjack $3,000 per day for standby time even though they had not reached target depth.

¶15. Wagner also testified about Exhibit A to the contract, which included a list of equipment, materials, and services that Blackjack was required to provide or pay for. Many of these items were struck through in the final contract. Yet, Wagner claimed that the "practical effect" of the strike-throughs was that the items were "not in the contract explicitly but rather implicitly." Wagner claimed that another provision in the contract required Blackjack to provide anything "not specifically furnished by" Swampfox. According to Wagner, this required Blackjack to pay for even the struck-through items. Some of the struck-through items are the subject of disputed charges in Swampfox's invoices.

¶16. Wagner also testified that Swampfox experienced some "cash flow" problems during their work on the well. Blackjack gave Swampfox a $5,000 "advance" or "prepayment" to allow it to meet payroll and continue drilling.

¶17. Tony Hines testified that Blackjack was responsible for the drilling mud, but Swampfox was responsible for providing mud pumps. They tried two different pumps before renting one that worked. Hines testified that the job proved more difficult than Swampfox anticipated, and Swampfox had to ask Blackjack to provide additional equipment and chemicals. Swampfox lost one drill bit when they hit another drill bit that had been lost in the hole previously. Once they reached the cement plug and could not get through, Swampfox asked Blackjack for the PDC bit.

¶18. Hines was not on site when the PDC bit got stuck. According to Hines, Cox ordered the crew to pull the bit out, remove it and clean it, then reenter the hole. Hines claimed that he instructed the crew not to reenter the hole until he was there, but they went ahead without

him. Soon after Hines arrived, the bit became stuck. They continued drilling until they realized that the PDC bit had come off in the hole. Hines opined that the bit came off because it was not attached tightly enough. He had not been present when it was reattached. After two days of fishing for the bit, Hines recommended to Cox that Blackjack should plug and abandon the hole because it was already deteriorated beyond repair.

¶19. Hines testified that the hole was difficult to drill because it had been inactive for several months before Swampfox became involved. However, the period of inactivity had nothing to do with the bit problems. Hines opined that the ultimate loss of the hole was due to the wrong mud program and the fact that the hole had been open and inactive too long.

¶20. Jack Cox testified that Swampfox was on site from May 9 until June 16. Cox said that Swampfox experienced several days of delays due to issues with their own tools, Blackjack's tools, and the mud. When problems with the mud arose, a mud engineer came and tested the mud. He told Cox that the mud was adequate to reach Blackjack's target depth. Blackjack paid for the engineer. Thomas asked if Swampfox could rent another pump to get through the mud, and Cox agreed to pay for one-third of the cost of the pump himself.

¶21. Cox believed that the PDC bit had "unscrewed itself" in the hole, which can occur when the bit is not attached properly. Cox said that when the bit became stuck the first time, Swampfox's crew removed it from the hole and hammered on it with a sledgehammer. Cox said that using a sledgehammer is not the proper way to attach a drill bit. Cox said that when the bit came off in the hole, it was also because the driller did not shut the power swivel down soon enough and the bit was moving too quickly.

¶22. After Hines and Cox discussed plugging the hole on June 11, Cox spoke with Wilson. Wilson agreed that the hole should be plugged and abandoned. Cox notified the State Oil and Gas Board and received permission to plug and abandon the well. That afternoon, Cox also told Thomas that Blackjack would plug and abandon the well and that Swampfox was released. Cox said that he got "virtually no response" from Thomas.

¶23. Cox testified that, in his opinion, Blackjack should have paid about $2,000 of the charges on the Swampfox invoices. However, he testified that most of Swampfox's charges were excessive or unnecessary. It was undisputed at trial that Blackjack had paid Swampfox the $20,000 flat fee even though Swampfox never reached target depth.[1] Finally, Cox testified that Blackjack's counterclaim and alleged damages of $168,000 were related to the loss of the well, including lease payments and the cost of drilling a new well.

¶24. The jury returned a verdict for Blackjack on both Swampfox's claim and Blackjack's counterclaim. The jury found that Blackjack should recover damages of $10,971.85 on the counterclaim. Swampfox filed a motion for JNOV or a new trial, which was denied, and then appealed. Swampfox makes three arguments on appeal: (1) that the trial court erred by denying its motion for JNOV or a new trial on its claim against Blackjack because it proved that Blackjack breached the parties' contract by failing to pay the disputed invoices; (2) that Blackjack's counterclaim was barred by the contract's waiver of consequential damages; and

[1] Pursuant to the terms of the contract, Blackjack made a "prepayment" to Swampfox of $15,000 at the outset of Swampfox's work. The contract made clear that the prepayment would "be subtracted from the $20,000 flat fee." As discussed above, Blackjack also paid Swampfox an additional $5,000 "prepayment" or "advance" after Swampfox began work. Thus, Blackjack made total prepayments equal to the $20,000 flat fee.

(3) that certain hearsay testimony from Cox was prejudicial.

¶25. We affirm the judgment in favor of Blackjack on Swampfox's claim because the jury's verdict on that claim is supported by substantial evidence and is not against the overwhelming weight of the evidence. However, the judgment in favor of Blackjack on its counterclaim is reversed and rendered because that claim is barred by the consequential damages waiver in the parties' contract. Finally, Swampfox is not entitled to a new trial based on Cox's hearsay testimony, which the trial court properly instructed the jury to disregard. Thus, the judgment is affirmed in part and reversed and rendered in part.

ANALYSIS

I. Swampfox's Breach of Contract Claim

¶26. The denial of a motion for JNOV is reviewed de novo. *DC Gen. Contractors Inc. v. Slay Steel Inc.*, 109 So. 3d 577, 580 (¶7) (Miss. Ct. App. 2013). We must consider the evidence in the light most favorable to the non-moving party and grant that party the benefit of all favorable inferences. *Id.* The moving party is entitled to JNOV only if the evidence so overwhelmingly points in its favor that no reasonable juror could have returned a verdict in favor of the non-moving party. *Id.* However, if there is substantial evidence to support the verdict—i.e., evidence of such quality and weight that reasonable and impartial jurors could reach different conclusions—we must affirm. *Id.*

¶27. In the alternative, a trial judge may order a new trial if he or she believes that the jury's "verdict is against the overwhelming weight of the evidence." *Bobby Kitchens Inc. v. Miss. Ins. Guar. Ass'n*, 560 So. 2d 129, 132 (Miss. 1989). However, "[i]t is the province

of the jury to determine the weight and worth of testimony and credibility of the witness at trial." *Motorola Commc'ns & Elecs. Inc. v. Wilkerson*, 555 So. 2d 713, 723 (Miss. 1989). Therefore, the trial judge and this Court must view the evidence in the light most favorable to the verdict and grant all permissible inferences in favor of upholding the verdict. *Id.* "This Court will reverse a trial judge's denial of a request for new trial only when such denial amounts to a abuse of that judge's discretion." *Bobby Kitchens*, 560 So. 2d at 132.

¶28. On appeal, Swampfox broadly asserts that the contract required Blackjack to pay every charge on the disputed invoices. Therefore, Swampfox argues, this Court should reverse and render judgment in its favor and remand only to determine its damages. However, Swampfox fails to support its broad claims. Although the disputed invoices contain dozens of line items, Swampfox's brief specifically discusses only two types of charges—charges for "standby" time (four days at a rate of $3,000 per day) and mobilization and demobilization fees ($1,500 each). On the evidence presented, reasonable jurors could have found that Blackjack was not required to make any additional payment to Swampfox for those charges.

¶29. Swampfox's CEO, Wagner, admitted that the parties edited the IADC form contract to provide that the "standby" charges would apply only after Swampfox reached the target depth and an additional twenty-four hours had passed. It is undisputed that Swampfox never reached the target depth. Therefore, the contract did not require Blackjack to pay any standby charges.[2]

[2] As discussed above, Blackjack gave Swampfox oral notice that it was released on June 11. However, Swampfox alleged that it remained on "standby" for an additional four

¶30. In an effort to avoid the contract's plain language, Wagner asserted at trial that a "reasonable interpretation" of the contract would be to charge for standby time prior to reaching the target depth because "the effect" of such a delay is the same regardless of when it occurs. However, that simply is not what the contract states. Furthermore, even if we assumed solely for the sake of argument that the contract was ambiguous, the interpretation of a truly ambiguous provision "presents a question of fact for the jury which we review under a substantial evidence/manifest error standard. If the terms of a contract are subject to more than one reasonable interpretation, it is a question properly submitted to the jury." *Royer Homes of Miss. Inc. v. Chandeleur Homes Inc.*, 857 So. 2d 748, 752 (¶8) (Miss. 2003) (citations omitted).

¶31. The mobilization and demobilization fees claimed by Swampfox totaled $3,000. It appears that Blackjack was responsible for these fees under the parties' contract, but reasonable jurors could have found that they were paid. The first disputed invoice that Swampfox sent Blackjack showed total charges of $42,928.40 with a balance due of $21,428.40, which clearly implies that Blackjack had already paid Swampfox $21,500. This presumably reflects Blackjack's "prepayments" of $20,000. *See supra* note 1. It might also reflect prior payment of a $1,500 mobilization fee, although that is not clear from the record. In any event, the invoice indicates that Blackjack was entitled to a credit of $21,500 against any charges that the jury found were valid and owed under the contract. The jury, therefore, could have found that Blackjack had already paid the mobilization and demobilization fees.

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days because the parties' contract required written notice of its termination.

¶32. Finally, Swampfox invoiced Blackjack for various equipment rentals and other materials or services, but the parties' contract indicates that Blackjack was not responsible for many of these items. Exhibit A to the contract lists the categories of equipment, materials, and services that Blackjack was required to provide at its own expense. However, the parties struck through most of the items listed in the form contract, including, for example, "[c]ontract fishing tool services and tool rental." This would suggest that Blackjack was *not* responsible for these items. Nonetheless, Swampfox invoiced Blackjack for such tools and services. At trial, Wagner claimed that the strike-throughs had no "practical effect." He asserted that Blackjack's obligation to pay for the struck-through items was "not in the contract explicitly rather implicitly." It seems unlikely to us that the parties' purposeful deletion of these items from Exhibit A was really intended to have no practical effect. But in any event, Wagner's claim, at best, created an issue of fact for the jury to decide. *Royer Homes*, 857 So. 2d at 752 (¶8). Reasonable jurors could have resolved this issue in favor of Blackjack.

¶33. In summary, reasonable jurors could have found that the parties' contract did not support Swampfox's charges for, inter alia, "standby" time and various equipment rentals. Further, reasonable jurors could have found that the $21,500 paid by Blackjack covered any valid charges contained in the Swampfox invoices. Therefore, as to Swampfox's contract claim, the circuit court did not err by denying Swampfox's motion for JNOV. Nor did the circuit court abuse its discretion by denying a new trial.

II. Blackjack's Counterclaim

A. The Issue on Appeal

¶34. In its counterclaim, Blackjack alleged that it suffered damages due to Swampfox's negligence and the resultant loss of the well. Blackjack alleged that it "suffered loss of leases in the approximate amount of $32,000.00 and the well cost of drilling an offset of $136,000.00, for a total of $168,000.00." Swampfox argued that Blackjack's counterclaim was barred by paragraph 14.14 of the parties' contract, which states:

> Consequential Damages: . . . [E]ach party shall at all times be responsible for and release, protect, defend and indemnify the other party from and against its own special, indirect or consequential damages, and the parties agree that special, indirect, or consequential damages shall be deemed to include (whether special, indirect or consequential under applicable law), without limitation, the following: loss of profit or revenue . . . ; costs and expenses resulting from business interruptions . . . ; loss of or delay in production; loss of or damage to the leasehold; loss of or delay in drilling or operating rights; cost of or loss of use of property, equipment, materials and services . . . . [Blackjack] shall at all times be responsible for and release, protect, defend and indemnify [Swampfox] from and against all claims, demands and causes of action of every kind and character in connection with such special, indirect or consequential damages suffered by [Blackjack].

¶35. Blackjack's appellate brief fails to address this issue or even acknowledge this provision of the parties' contract. Blackjack only vaguely asserts that "evidence was presented upon which a reasonable juror could conclude that Swampfox was liable for the loss of the hole." However, Blackjack's assertion directly conflicts with another provision of the parties' contract. Paragraph 14.7 provides:

> The Hole: In the event the hole should be lost or damaged, [Blackjack] shall be solely responsible for such damage to or loss of the hole, including the casing therein. [Blackjack] shall release [Swampfox] of any liability for damage to or loss of the hole, and shall protect, defend and indemnify [Swampfox] from and against any and all claims, liability, and expense relating to such damage to or loss of the hole.

¶36. An unambiguous contract must be enforced as written. *Epperson v. SOUTHBank*, 93 So. 3d 10, 16 (¶17) (Miss. 2012). Under the parties' contract, Blackjack unambiguously released Swampfox from any liability for, among other things, "loss of or damage to the leasehold," "damage to or loss of the hole," and "any and all claims, liability, and expense relating to such damage to or loss of the hole." These provisions unambiguously waived any claims for the type of damages alleged in Blackjack's counterclaim—loss of the lease and the cost of drilling a new well due to the loss of the original well. Accordingly, we hold that Swampfox is entitled to judgment as a matter of law on Blackjack's counterclaim, and we reverse and render judgment in favor of Swampfox on the counterclaim.

B. The Separate Opinion

¶37. The separate opinion suggests that the waiver of consequential damages in the negotiated contract between these two commercial entities is unconscionable[3] or even violates sections 24 and 25 of the Mississippi Constitution.[4] However, the separate opinion acknowledges that Blackjack has never made such an argument at trial or on appeal. Therefore, this issue is procedurally barred and is not before this Court. *See, e.g.*, *Rosenfelt v. Miss. Dev. Auth.*, 262 So. 3d 511, 519 (¶27) (Miss. 2018) ("[W]e will not act as an

[3] "An unconscionable contract is one such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other." *Smith v. Express Check Advance of Miss. LLC*, 153 So. 3d 601, 607 (¶14) (Miss. 2014) (quotation marks omitted).

[4] Miss. Const. art. 3, § 24 ("All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay."); *id.* § 25 ("No person shall be debarred from prosecuting or defending any civil cause for or against him or herself, before any tribunal in the state, by him or herself, or counsel, or both.").

advocate for one party to an appeal.").

¶38. That said, we are compelled to point out that the concerns raised by the separate opinion have nothing to do with the actual facts of this case. The separate opinion talks about "contracts of adhesion"[5] and "one-sided" contract provisions. But this case involves two commercial entities that extensively negotiated their contract. They started with an IADC contract that is widely used in the drilling industry, and then they made numerous typed and handwritten changes to it. Morever, the waiver of consequential damages in their contract is *not* "one-sided." It is *mutual*.

¶39. "[E]xclusionary clauses limiting incidental and consequential damages in purely commercial transactions are prima facie conscionable and the burden of establishing unconscionability is on the party attacking the clause." 24 Richard A. Lord, *Williston on Contracts* § 64:21 (4th ed. 2007). Such clauses are commonplace in commercial agreements. We are unaware of any authority holding that it is unconscionable, let alone unconstitutional, for two commercial entities to agree to a mutual waiver of consequential damages in the context of a negotiated commercial contract.

III. Cox's Hearsay Testimony

¶40. While testifying about Blackjack's decision to plug and abandon the well, Jack Cox started to testify about a statement allegedly made by "a tool pusher for Swampfox" named Jimmy Davis. Swampfox objected, but its objection was overruled. Cox then testified that

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[5] "A contract of adhesion is an agreement drafted unilaterally by the dominant party and then presented on a 'take-it-or-leave-it' basis to the weaker party who has no real opportunity to bargain about its terms." *Cleveland v. Mann*, 942 So. 2d 108, 116 (¶25) (Miss. 2006) (quotation marks omitted).

Davis said, "Swampfox is already preparing for a lawsuit against Blackjack." During the next break in Cox's testimony, the trial judge stated that Cox should not have been allowed to testify about Davis's out-of-court statement. The judge stated that he would instruct the jury, orally and in writing, to disregard Cox's testimony about Davis's statement. Swampfox agreed, and when the trial resumed, the judge instructed the jurors as follows:

> Mr. Cox stated that a Mr. Davis, a third party who is not in these proceedings, made a statement to him outside of court with regard to some lawsuit. You are to disregard the statement by the witness referring to that third party's statement. I will include this in your jury instructions. . . . [T]here is no proof of the veracity or truth or untruth of that statement, and you are to totally disregard that. It has no probative value in the issues in this case.

In addition, in its final oral and written instructions to the jury, the court reiterated that the jury should disregard Cox's testimony about Davis's statement.

¶41. "Generally speaking, our law presumes that jurors follow the trial judge's instructions, as upon their oaths they are obliged to do so." *Young v. Guild*, 7 So. 3d 251, 263 (¶39) (Miss. 2009) (quoting *Parker v. Jones Cty. Cmty. Hosp.* 549 So. 2d 443, 445 (Miss. 1989)). The trial court's admonition to disregard improper testimony "generally is deemed sufficient to cure any taint," *id.*, and we conclude that the trial judge's curative instruction was sufficient to cure any prejudice in this case. Thus, Cox's testimony was "harmless error" and does not require reversal. *Id.*

¶42. On appeal, Swampfox argues that, in addition to instructing the jurors to disregard Cox's hearsay testimony, the trial judge was obliged to "voir dire . . . each juror individually to ensure that [each juror could] disregard [Cox's hearsay testimony] in reaching a verdict." Appellant's Br. at 14-15 (citing *West Cash & Carry Bldg. Materials v. Palumbo*, 371 So. 2d

873, 877 (Miss. 1979)). However, Swampfox never asked the trial judge to voir dire the jurors individually. Therefore, the argument is waived.[6]

¶43. Moreover, Swampfox's reliance on *Palumbo* is misplaced. In that case, the Supreme Court simply noted that the trial court had voir dired the jury in addition to instructing them to disregard an improper question and answer. *See Palumbo*, 371 So. 2d at 877. The Supreme Court did not state or imply that individual voir dire is always required. Again, we generally presume jurors will follow the trial court's instructions to disregard inadmissible evidence. We see no reason to depart from that general rule in this case.

CONCLUSION

¶44. We affirm the judgment in favor of Blackjack on Swampfox's breach of contract claim, but Swampfox is entitled to judgment as a matter of law on Blackjack's counterclaim. Therefore, neither party shall recover anything from the other.

¶45. **AFFIRMED IN PART; REVERSED AND RENDERED IN PART.**

BARNES, C.J., CARLTON, P.J., GREENLEE, WESTBROOKS, TINDELL, McDONALD AND C. WILSON, JJ., CONCUR. LAWRENCE, J., CONCURS IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION. McCARTY, J., CONCURS IN PART AND IN THE RESULT WITH SEPARATE WRITTEN OPINION, JOINED IN PART BY WESTBROOKS, J.

McCARTY, J., CONCURRING IN PART AND IN RESULT:

¶46. While I agree with the result reached by the majority, I am compelled to write

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[6] *Cf. S. Cent. Bell Tel. Co. v. Parker*, 491 So. 2d 212, 215 (Miss. 1986) ("If the appellants thought they were prejudiced by [a witness's] statement to the extent that it could not be cured by the instruction of the court to disregard the statement, then the appellants should have requested a mistrial. The appellants may not wait until after a verdict has been returned unfavorable to them and then raise the point for the first time on motion for new trial.").

separately due to my concern that limitation of liability clauses have been used to deprive Mississippians of access to the courts. Our Constitution of 1890 mandates that "[a]ll courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, *shall have remedy by due course of law*, and right and justice shall be administered without sale, denial, or delay." Miss. Const. art. 3, § 24 (emphasis added). This portion of our Bill of Rights provides a remedy to all those who have been harmed. Its sister clause keeps the doors to the courthouse open: "No person shall be debarred from prosecuting or defending any civil cause for or against him or herself, before any tribunal in the state, by him or herself, or counsel, or both." Miss. Const. art. 3, § 25.

¶47. When limitation of liability clauses are contained in contracts of adhesion, our Supreme Court has refused to enforce them or other oppressive clauses, finding them substantively unconscionable. *See Pitts v. Watkins*, 905 So. 2d 553, 558 (¶20) (Miss. 2005) (refusing to uphold a limitation of liability clause when "the interaction of the limitation of liability clause with the arbitration clause renders [one party] without a meaningful remedy"); *see also Caplin Enters. Inc. v. Arrington*, 145 So. 3d 608, 616 (¶20) (Miss. 2014) (finding an arbitration clause in a contract was "unreasonably favorable to [one party], oppressive, unconscionable, and unenforceable"); *Covenant Health & Rehab. of Picayune LP v. Estate of Moulds ex rel. Braddock*, 14 So. 3d 695, 703 (¶25) (Miss. 2009) (rejecting as unconscionable an arbitration agreement that radically restricted access to remedies).

¶48. Because these one-sided agreements can restrain one party while freeing another to do as they wish, the Supreme Court has repeatedly declared that "[c]lauses that limit liability

are given strict scrutiny by this Court and are not to be enforced unless the limitation is fairly and honestly negotiated and understood by both parties." *Royer Homes of Miss. Inc. v. Chandeleur Homes Inc.*, 857 So. 2d 748, 754 (¶18) (Miss. 2003); *accord Caplin Enters.*, 145 So. 3d at 615 (¶17). One of the reasons the Supreme Court has repeatedly refused to uphold clauses of this type is when "the substance of the provision eviscerates the contract and its fundamental purpose because the potential damages level is so nominal that it has the practical effect of avoiding almost all responsibility for the professional's negligence." *Caplin Enters.*, 145 So. 3d at 615-16 (¶17).

¶49. The majority ably sorts through the nuance of the contract at hand and how the parties stipulated to waiving certain types of damages. I remain concerned that in this form-contract there are provisions that could be one-sided or oppressive. Nonetheless, as the majority concludes, even though one party sought to have the jury verdict declared void based upon the form language in the contract, the other did not invoke the Bill of Rights in our Constitution or law that demands a more exacting scrutiny of such clauses.

¶50. While we should be mindful of the freedom of parties to contract, including sophisticated parties with complex mutual obligations, we must still safeguard access to the courthouse for all. In this way we continue to honor the mandate that all courts shall be open.

¶51. Therefore, I write separately but concur with the majority's decision.

WESTBROOKS, J., JOINS THIS OPINION IN PART.