



STATE OF MISSISSIPPI CONSTRUCTION LAW COMPENDIUM

Prepared by

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Mississippi is a comparative negligence state. In 1910, Mississippi became the first state to adopt a “pure” form of comparative negligence in a progressive movement aimed at abolishing the harsh doctrine of contributory negligence. Act of April 16, 1910, ch. 135, 1910 Miss. Laws 125 (codified as amended at MISS. CODE ANN. § 11-7-15 (Rev. 2004)); see also Coho Resources, Inc. v. Chapman, 913 So. 2d 899 (Miss. 2005) (finding Mississippi to be a pure comparative negligence state). Unlike the “modified” system, the “pure” system allows a contributorily negligent plaintiff to recover even though his or her negligence exceeds that of the defendant. However, the plaintiff’s recovery is reduced by the proportion of negligence attributable to that particular plaintiff. Natchez & S.R. Co. v. Crawford, 55 So. 596 (Miss. 1911).

As to situations with more than one (1) tortfeasor, Mississippi law imposes several liability, with an exception for those cases where one or more tortfeasors engage in a conspiracy. MISS. CODE ANN. § 85-5-7 provides:

(2) Except as otherwise provided in subsection (4) of this section, in any civil action based on fault, the liability for damages caused by two (2) or more persons shall be several only, and not joint and several and a joint tort-feasor shall be liable only for the amount of damages allocated to him in direct proportion to his percentage of fault. In assessing percentages of fault an employer and the employer's employee or a principal and the principal's agent shall be considered as one (1) defendant when the liability of such employer or principal has been caused by the wrongful or negligent act or omission of the employee or agent.

* * *

(4) Joint and several liability shall be imposed on all who consciously and deliberately pursue a common plan or design to commit a tortious act, or actively take part in it. Any person held jointly and severally liable under this section shall have a right of contribution from his fellow defendants acting in concert.

I. Breach of Contract

Typically, a breach of contract claim can be asserted by the buyer against the general contractor, as well as by the general contractor against its subcontractors. A breach of a construction contract in Mississippi is subject to a six-year statute of limitations. MISS. CODE ANN. § 15-1-41 (1972). The limitation period begins to run upon the occupancy or acceptance of the building or improvement by the owner-buyer. McMichael v. Nu-way Steel & Supply, Inc., 563 So. 2d 1371 (Miss. 1990). However, acceptance of a subcontractor’s work by a contractor is not sufficient. There must be acceptance of the work or occupancy of the building by the owner-buyer. Id. Accordingly, if acceptance and occupancy are delayed due to a dispute between contractor and owner, the contractor’s liability will extend for the duration of the dispute.

The Mississippi Supreme Court has acknowledged that between a contractor and owner of a new house, “there is an implied warranty that the home was built in a workmanlike manner and is suitable for habitation.” Parker v. Thornton, 596 So. 2d 854, 857 (Miss. 1992) (citations omitted). Furthermore, “[a]ccompanying every contract is a common law duty to perform with care, skill, and reasonable experience, and a negligent failure to observe any of these conditions is a tort as well as a breach of contract.” George B. Gilmore Co. v. Garrett, 582 So. 2d 387, 391 (Miss. 1991) (quoting Davis v. Anderson, 501 S.W.2d 459, 462 (Tex. Civ. App. 1973)).

II. Negligence

Generally, an injury incurred due to negligent construction may give rise to an action for breach of a contractor’s common law duty to care, or negligence. An action for negligence in construction could be based upon the contractor’s poor workmanship, supervision, or design.

To establish a claim for negligence under Mississippi law, a plaintiff must prove (1) existence of a duty on part of the defendant to conform to a specific standard of conduct, (2) breach of that duty, (3) breach of the duty was the proximate cause of the plaintiff’s injury, and (4) damages to the plaintiff resulting from the breach. Donald v. Amoco Prod. Co., 735 So. 2d 161 (Miss. 1999). In other words, the plaintiff must show “failure to take such reasonable care as should be taken by experienced and prudent men.” Daniels v. Morgan & Lindsey, Inc., 198 So. 2d 579, 585 (Miss. 1967). The plaintiff has the burden to prove liability on a claim of negligence by a preponderance of the evidence. Jones v. Jones, 760 So. 2d 828 (Miss. Ct. App. 2000).

A. Duty of Care

The duty of care is commonly stated as the duty that each individual owes to other people. The Mississippi Supreme Court has defined the duty of care as follows:

Requisite care remains always that degree of care commensurate with appreciable danger appraised in terms of ordinary prudence and interpreted in the light of the attendant circumstances...Although the expression and the basis of the rule remain fixed, its flexibility permits accommodation to each particular case. The area of factual doubt with which juries should be allowed to function is circumscribed within a circle of which care is the axis and reasonableness is the radius.

McWilliams v. City of Pascagoula, 657 So. 2d 1110, 1111 (Miss. 1995).

All persons must act as a reasonable and prudent person would act under the same or similar circumstances. Hankins Lumber Co. v. Moore, 774 So. 2d 459, 464 (Miss. Ct. App. 2000). As the

degree of danger increases, the required degree of care increases. Shurley v. Hoskins, 271 So. 2d 439, 444 (Miss. 1973).

B. Breach of Duty

Once it is established there is a duty owed by the defendant to a particular plaintiff as a matter of law, then, unless there is no material issue of fact to be decided by the fact-finder, the jury must determine if the defendant breached his duty to the plaintiff. Once sufficient evidence is presented in a negligence case, even if the evidence is slight, whether a breach of duty occurred is an issue to be decided by the finder of fact. Warren v. Pinnix, 241 So. 2d 662, 663 (Miss. 1970).

C. Causation

Causation can be one of the most difficult elements to establish and is usually a question of fact to be determined by the jury. Hankins Lumber Co., 774 So. 2d at 464-65. By the time the issue of proximate cause is relevant to liability, a breach of duty owed must already be established. It is the plaintiff's burden to prove that it is more likely than not that the breach of duty caused the injury or damages sustained. Delahoussaye v. Mary Mahoney's Inc., 783 So. 2d 666 (Miss. 2001). "Negligence of itself is not sufficient to permit a recovery because of injuries sustained by another. The injury must have been caused by the negligence complained of." Pargas of Taylorsville, Inc. v. Craft, 249 So. 2d 403, 406 (Miss. 1971).

D. Damages

The final element which must be proven by the plaintiff to prevail on a claim of negligence is that he or she suffered damage or injury as a result of the negligent conduct. Lyle v. Mladinich, 584 So. 2d 397, 399 (Miss. 1991). Without the presence of any damage or injury, a claim based on negligence must fail. Century 21 Deep South Properties, Ltd. v. Corson, 612 So. 2d 359 (Miss. 1992). In Mississippi, there is no fixed rule for determining damages. Each case must be decided on the facts and the amount of the damage award is left in large part to the discretion of the jury. Kinnard v. Martin, 223 So. 2d 300, 302-03 (Miss. 1969).

III. Breach of Warranty

In construction cases, plaintiffs typically assert causes of action for breach of warranty. A claim for breach of warranty can be based on express warranty provisions contained in the contract between the owner and the general contractor and/or warranties implied by law.

Mississippi law imposes upon a contractor a duty to construct all projects in a workmanlike manner, free from defects. This warranty cannot be contracted away. MISS. CODE ANN. § 11-7-18 (1994). This warranty of workmanship is implied by law into every construction contract between a contractor and an owner. Keyes v. Guy Bailey Homes, Inc., 439 So. 2d 670 (Miss. 1983). Pursuant to this warranty, a contractor agrees to perform work in accordance with the degree of workmanship normally possessed by those in the construction industry. Mayor and City Council of City of Columbus, Miss. v. Clark-Dietz and Associates-Engineers, Inc., 550 F. Supp. 610 (N.D. Miss. 1982) (citations omitted). The contractor's duty to perform in accordance with industry standards extends not only to the owner-buyer, but to subsequent purchasers. Keyes, 439 So. 2d at 672.

IV. Misrepresentation and Fraud

Under certain circumstances, general contractors can be sued by homeowners under the theory of fraud, suppression, or misrepresentation. In Mississippi, negligent misrepresentations are governed by the "catch-all" three-year statute of limitations. MISS. CODE ANN. § 15-1-49 (1972). A cause of action for deceit accrues on completion of the sale induced by the false representation or on the consummation of fraud. For purposes of establishing jurisdiction, a cause of action for fraud accrues at the location in which the sale was completed or at the location in which the fraud was completed, Black v. Carey Canada, Inc., 791 F. Supp. 1120 (S.D. Miss. 1990). Before one can claim the benefits of fraud, he must clearly allege the facts and circumstances which constituted the fraud and prove, by clear and convincing evidence, the facts and events occurred and that he had been victimized by them. McMahon v. McMahon, 157 So. 2d 494 (Miss. 1963).

To state a claim for fraud under Mississippi law, a plaintiff must allege (1) representation, (2) its falsity, (3) its materiality, (4) speaker's knowledge of its falsity or ignorance of its truth, (5) speaker's intent that it should be acted upon by the plaintiff and in the manner reasonably contemplated, (6) plaintiff's ignorance of its falsity, (7) plaintiff's reliance on its truth, (8) plaintiff's right to rely thereon, and (9) consequent proximate injury. Smith v. Union Nat. Life Ins. Co., 187 F. Supp. 2d 635 (S.D. Miss. 2001) See also Jordan v. Nationwide Tr. Servs., 2014 U.S. Dist. LEXIS 170124 (S.D. Miss. Dec. 9, 2014)..

V. Strict Liability Claims

Under Mississippi law, strict liability will not be found unless the defendant is aware of abnormally dangerous conditions or activities, and has voluntarily engaged in or permitted it. Bolivar v. R & H Oil and Gas Co., Inc., 789 F. Supp. 1374 (S.D. Miss. 1991). Mississippi law requires proof of three elements in order to recover on grounds of strict liability: (1) the plaintiff was injured by the product; (2) the injury resulted from defect in the product which rendered it unreasonably dangerous; and (3) the defect existed at the time it left the hands of the seller-contractor. Additionally, the plaintiff must be able to show not only that the product was defective when it left the seller's hands, but also that the defective product was the proximate cause of the plaintiff's injuries. Clark v. Williamson, 129 F. Supp. 2d 956 (S.D. Miss. 2000).

When determining whether to assign liability in cases involving buildings, building components, and materials, courts look to whether the issue at hand involves improvements/fixtures or products, as defined in Mississippi's Products Liability Act (MPLA). If the case involves an improvement/fixture, and not a "product," liability is not imposed against the manufacturer or seller. See Bragg v. United States, 55 F. Supp. 2d 575 (S.D. Miss. 1999) (finding hangar doors of maintenance building to be fixtures, and not products, under MPLA); Wolfe v. Dal-Tile Corp., 876 F. Supp. 116 (S.D. Miss. 1995) (finding tile floor in restaurant to be improvement to real property, and not product) Hickory Springs Mfg. Co. v. Star Pipe Prods., 991 F. Supp. 2d 778 (N.D. Miss. 2014) (finding a sprinkler system was not an improvement to real property).

VI. Indemnity Claims

Indemnity agreements are contract provisions in which one party to the contract agrees to pay costs incurred by the other party to the contract as a result of the other party being held liable to a third party or having to defend against a claim filed by a third party. MISS. CODE ANN. § 31-5-41 (1972) provides:

With respect to all public or private contracts or agreements, for the construction, alteration, repair or maintenance of buildings, [or] structures...every covenant, promise and/or agreement contained therein to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable.

See also Ramsey v. Georgia-Pacific Corp., 597 F.2d 890 (5th Cir. 1979) (applying Mississippi law). This provision deals expressly with "work dealing with construction" and does not extend beyond the construction context. Illinois Cent. Gulf R. Co. v. International Paper Co., 824 F.2d 403 (5th

Cir. 1987) (applying Mississippi law). However, a “hold harmless” (i.e., indemnity) provision will be enforced as long as a party is not seeking to recover for the party’s own negligence. American Cyanamid Co. v. Campbell Const. Co., 864 F. Supp. 580 (S.D. Miss. 1994).

VII. Statute of Repose/Statute of Limitations

Mississippi has a six (6) year statute of repose, MISS. CODE ANN. § 15-1-41, that provides:

No action may be brought to recover damages for injury to property, real or personal, or for an injury to the person, arising out of any deficiency in the design, planning, supervision or observation of construction, or construction of an improvement to real property...against any person, firm, or corporation...more than six (6) years after the written acceptance or actual occupancy or use, whichever occurs first...

However, in cases involving fraudulent concealment, the statute of repose may be tolled. A party purporting that there has been fraudulent concealment, thus tolling the statute of repose, must show (1) some affirmative act or conduct was done and prevented discovery of a claim, and (2) due diligence was performed by the party to discover it.” Windham v. Latco of Mississippi, Inc., 972 So. 2d 608 (Miss. 2008); see MISS. CODE ANN. § 15-1-41 (1972); MISS. CODE ANN. 15-1-67 (1972). But, application of the statute of repose for actions arising from construction deficiencies is not barred by fraudulent concealment if the fraudulent concealment was known, or with due diligence could have been discovered, within the six-year repose period. Id.

Mississippi also has a “catch-all” three (3) year general statute of limitations applicable to most negligence actions. It provides:

(1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.

(2) In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.

Miss. Code Ann. § 15-1-49.

VIII. Economic Loss Doctrine

The economic loss rule in Mississippi bars recovery for strict liability or negligence for plaintiffs who suffer only economic loss as the result of a defective product. State Farm Mut. Auto. Ins. Co. v. Ford Motor Co., 736 So. 2d 384, 387 (Miss. Ct. App. 1999) (citations omitted). The Mississippi Supreme Court, citing Seely v. White Motor Co., 403 P.2d 145 (Cal. 1965), enumerated three reasons for not allowing recovery in tort when only economic damages are sought to be recovered. “First, tort law would subsume contract, secondly the manufacturer’s exposure would be too greatly expanded, and thirdly the increased costs to the ultimate consumer would be too great.” State Farm Mut. Auto. Ins. Co., 736 So. 2d at 387 (citing Seely, 403 P.2d at 151).

The Court also noted that the economic loss doctrine is consistent with Mississippi’s products liability statute, MISS. CODE ANN. § 11-1-63 (Supp. 1998), which states: “In any action for damages caused by a product except for commercial damage to the product itself...” The Court found the language to mean that “damages caused by the product that adversely affect the product’s monetary value are not within the scope of the act’s coverage, and thus, the product owner would have to seek a remedy in the law of warranty or contract.” State Farm Mut. Auto. Ins. Co., 736 So. 2d at 388.

IX. Recovery for Investigative Costs

There is no statute in Mississippi that specifically allows a plaintiff to recovery for the investigative costs expended by them in determining the cause of the problems with their home/office. Notwithstanding, plaintiffs will typically argue that such costs were consequential damages resulting from the contractor’s failure to construct the building in a workmanlike manner. It would be within the jury’s discretion on whether to allow such damages.

X. Emotional Distress Claims

When a party intentionally conducts itself in a manner which evokes outrage or revulsion and such reaction is reasonably foreseeable, an award for damages for emotional distress is warranted. Cherry Bark Builders v. Wagner, 781 So. 2d 919, 923 (Miss. Ct. App. 2001). In Cherry Bark, where the contractor failed to build a house in accordance with the owner’s chosen plan, the contractor admitted that mistake, the owner was visibly upset throughout the improper construction, the contractor lied to the owner, the owner had to wait months for relief, had to employ and attorney to deal with the settlement, and was faced with having to settle with less than she bargained for, the court held damages for emotional distress were warranted. David W. Mockbee, Construction Law, 278 (Second ed. 2007) (citing Cherry Bark Builders, 781 So. 2d at 923).

XI. Stigma Damages

Stigma damages is another name for diminution in value because of a perceived problem with the property. Mississippi case law does not provide specifically for the claim of stigma damages. There is case law on diminution claims involving negligence claims. Additionally, a stigma claim or diminution in value claim may be a part of contractual damages allowed in a case.

In Mississippi, the proper measure of damages for breach of contract and property damage can be either the reasonable cost of replacement or repairs, or diminution in value. Check Cashers Exp., Inc. v. Crowell, 950So. 2d 1035, 1042 (Miss. Ct. App. 2007) (citing Bell v. First Columbus Nat'l Bank, 493 So. 2d 964, 970 (Miss. 1986)). In Harper v. Hudson, 418 So. 2d 54, 57 (Miss. 1982), the Mississippi Supreme Court applied a before-and-after rule. The Court held:

The general rule is that if there is any remaining value to the damaged property ... then the measure of damages is the difference in the value immediately before the casualty or loss and the value immediately after the damage or injury to the property.

However, the Court has also noted that where injury to property is repairable, the cost of repairs is a proper measure of damages. Teledyne Exploration Co. v. Dickerson, 253 So. 2d 817, 819 (Miss. 1971) (citations omitted).

XII. Economic Waste

Generally, the measure of damages for waste is the difference between the fair market value of the property before and after the waste. Bell, 493 So. 2d at 969. In Bell, the Court adopted a flexible approach in which the mode of recovery and amount of proof must be adapted to the facts of each case. Id. at 970 (quoting Meyer v. Hansen, 373 N.W.2d 392 (N.D. 1985)). Under this approach, the plaintiff can choose to prove *either* reasonable cost of replacement or repairs *or* diminution in value, and as long as the plaintiff will not be unjustly enriched and the defendant does not demonstrate there is a more appropriate measure of damages, the plaintiff will be allowed to recover. Under a construction contract, economic waste generally exists when the cost of replacement or repair is grossly out of proportion to the good to be obtained.

XIII. Delay Damages

An owner's damages due to a delay in completion of construction may take one of two forms: (1) actual damages, or (2) liquidated damages. The owner cannot recover both actual and liquidated damages. If the contract provides for liquidated damages, then such damages are the owner's

sole remedy and the owner cannot claim actual damages following the delay by the contractor simply because at that point it appears that the liquidated damages assessed will not fully compensate the owner. E.g., Cheatham v. Kem Mfg. Corp., 372 So. 2d 1085 (Miss. 1979).

If an owner permits the contractor to continue construction despite the passing of the completion date, the owner waives his right to default the contractor. However, the owner may still recover damages for late completion. E.g., Herbert & Brooner Const. Co. v. Golden, 499 S.W.2d 541 (Mo. 1973).

XIV. Recoverable Damages

A. Direct Damages

Under Mississippi law, the point of an award for damages, whether it is for breach of contract or for a tort, is, so far as possible, to put the victim where he would have been had the breach or tort not taken place. Mississippi Chem. Corp. v. Dresser-Rand Co., 287 F.3d 359 (5th Cir. 2002). A party suffering injury to his property is entitled to no more than restoration to its condition prior to the wrong. In computation of damages, the injured person is to be made whole, complete satisfaction is to be made, or the injured person is to recover the value of the property destroyed, and it is never contemplated that the injured person should realize a profit from the damages sustained. Mississippi Power Co. v. Harrison, 152 So. 2d 892 (Miss. 1963).

Ordinarily, the measure of damages for negligent destruction of property is the value of the property at the time of destruction. Fed. Compress & Warehouse Co. v. Reed, 339 So. 2d 547 (Miss. 1976). Where costs of repairs are relied upon as the measure of damages, the proof must establish (1) that the repairs were necessary as the result of the wrongful act, and (2) that the cost was reasonable. Sims v. Collins, 762 So. 2d 785 (Miss. App. Ct. 2000).

B. Stigma

There are currently no Mississippi cases directly on point as to whether stigma damages are recoverable in construction cases. However, Mississippi courts generally allow damages for diminution in value (See above Section on diminution in value damages).

C. Loss of Use

In conjunction with a claim for defective workmanship, a plaintiff may allege that their home has become uninhabitable, such that they no longer can “use” their home to live. The Mississippi Supreme Court has required proof that the plaintiff was, in fact, required to move out for the specific period of time alleged. See, e.g., Strickland v. Rossini, 589 So.2d 1268, 1275

(Miss.,1991)(denying recovery for loss of use due to termite damage because “there was no proof regarding whether it was even necessary for her to move for a given period of time.”)

D. Punitive Damages

Although punitive damages are generally not recoverable for breach of contract alone, Butler v. Provident Life and Accident Ins. Co., 617 F. Supp. 724 (S.D. Miss. 1985), Mississippi law does recognize that conduct accompanying a breach of contract may rise to the level of an independent tort warranting punitive relief. Vogel v. American Warranty Home Service Corp., 695 F.2d 877,883 (5th Cir. 1983). In College Life Ins. Co. of America v. Byrd, 367 So. 2d 929, 931 (Miss. 1979), the court noted that Mississippi adheres to the rule that a party to a breached contract may be liable for punitive damages where the evidence established a question of fact as to outrageous conduct. Stated differently, punitive damages and attorney’s fees may be awarded when there is a breach of contract “attended by intentional wrong, insult, abuse, or such gross negligence as amounts to an independent tort.” Tideway Oil Programs, Inc. v. Serio, 431 So. 2d 454, 465-66 (Miss. 1983) (overruled on other grounds).

E. Emotional Distress

In Mississippi, when a party intentionally conducts itself in a manner which evokes outrage or revulsion and such reaction is reasonably foreseeable, an award of damages for emotional distress is warranted. Cherry Bark Builders v. Wagner, 781 So. 2d 919, 923 (Miss. Ct. App. 2001); (see above Section X).

F. Attorney’s Fees

MISS. CODE ANN. § 83-58-17(1) (Rev. 2004) states:

If a builder violates any of the provisions of this chapter by failing to perform as required by the warranties provided in this chapter, any affected owner shall have a cause of action against the builder for actual damages, *including attorney fees and court costs*, arising out of the violations.

(Emphasis added).

In Mississippi, unless provided by statute or contract, or unless punitive damages are awarded, attorney fees may not be recovered. Tupelo Redevelopment Agency v. Gray Corp., Inc., 972 So. 2d 495 (Miss. 2007); Hamilton v. Bradford, 502 F. Supp. 822, 836 (S.D. Miss. 1980) (citing Aetna Casualty and Surety Co. v. Steele, 373 So. 2d 797, 801 (Miss. 1979)). However, in Aqua-Culture Technologies, Ltd. v. Holly, 677 So. 2d 171 (Miss. 1996), the Mississippi Supreme Court held the

trial judge has discretion to award attorney's fees even where there is no award of punitive damages.

G. Expert Fees and Costs

In Mississippi, expert fees are not awarded as a matter of costs unless provided for by statutory authority. Miss. R. Civ. P. 54(d); Allred v. Fairchild, 916 So. 2d 529, 532 (Miss. 2005) (quoting Miss. R. Civ. P. 54(d)). The comments to Miss. R. Civ. P. 54(d) state:

...Absent a special statute or rule, or an exceptional exercise of judicial discretion, such items as attorney's fees, travel expenditures, and investigatory expenses will not qualify either as statutory fees or reimbursable costs.

In extreme cases, the Court has upheld the imposition of expert fees against a party as sanctions. See Selleck v. Cockrell Trucking, Inc., 517 So. 2d 558 (Miss. 1987) (upholding an award of expert witness fees against the defendant as sanctions for jury tampering).

XV. Insurance Coverage for Construction Claims

Under Mississippi law, "the duty of the insurer to defend is determined by the allegations of the complaint." Great Northern Nekoosa Corp. v. Aetna Cas. and Sur. Co., 921 F.Supp. 401, 406-07 (N.D.Miss. 1996)(citing Putman v. Insurance Co. of North America, 673 F.Supp. 171, 176 (N.D.Miss.1987)). "In determining whether the duty of the insurer to defend its insured has been triggered, the court must measure the duty by the allegations in the underlying pleadings." Titan Indem. Co. v. City of Brandon, Miss, 27 F.Supp.2d 693, 697 (S.D.Miss. 1997)(citing EEOC v. Southern Publishing Co., 705 F.Supp. 1213, 1215 (S.D.Miss.1988)). "If the underlying pleadings state facts which bring the injury within the coverage of the policy, then the insurer is required to defend." Id. "Conversely, if the pleadings do not state facts which bring the injury within the coverage of the policy, then the opposite is true." Id. The focus of courts is on allegations contained in the four corners of the complaint and *only if* the pleadings state facts bringing the injury within the coverage of the policy must the insurer defend. See Foreman v. Continental Casualty Co., 770 F.2d 487, 489 (5th Cir.1985) (emphasis added); Battisti v. Continental Cas. Co., 406 F.2d 1318, 1321 (5th Cir.1969).

This is the standard despite what the actual facts may later prove to be. See Meng v. Bituminous Casualty Corporation, 626 F. Supp. 1237 (S.D. Miss. 1986) ("Accordingly, the ultimate liability of the insurer is not the criterion for determining the insurer's duty to defend . . . if the factual allegations of the complaint bring the action within coverage of the policy, irrespective of what the actual facts may later prove to be, the insurer is contractually bound to defend its insured.")(citing Preferred Risk Mutual Insurance Company v. Poole, 411 F. Supp. 429

(N.D. Miss. 1976)) See also Nationwide Ins. Co. v. Lexington Relocation Servs., LLC, 2014 U.S. Dist. LEXIS 38308 (N.D. Miss. Mar. 24, 2014)

Accordingly, under Mississippi law, the finding that an insurer failed to investigate a defense to a claim in bad faith requires showing that further investigation would uncover evidence that would have undermined at least the arguable merit of the defense. See Sobley v. Southern Natural Gas Co., 2002 WL 1839986 (5th Cir. 2002). The insured must prove that a proper investigation would easily adduce evidence showing its defenses to be without merit. Mutual Assur., Inc. v. Banks, 113 F.Supp.2d 1020 (S.D. Miss. 2000).

A. Occurrences That Trigger Coverage

Virtually all commercial general liability policies define “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” The Mississippi Supreme Court has held that, for purposes of insurance coverage, the key focus is on “the action [of the insureds] and not [on] whatever unintended damages flowed from that act.” See United States Fidelity & Guaranty Co. v. Omnibank, 812 So. 2d 196 (Miss. 2002); Allstate Ins. Co. v. Moulton, 464 So. 2d 507 (Miss. 1985) See also W.R. Berkley Corp. v. Rea's Country Lane Constr., 140 So. 3d 437 (Miss. Ct. App. 2013); Acadia Ins. Co. v. Hinds County Sch. Dist., 582 Fed. Appx. 384 (5th Cir. Miss. 2014). The focus of the definition of “occurrence” is whether the causative act is “expected or intended” not whether the consequences of the act are “expected or intended.” Gulf Insurance Co. v. Lloyd, 651 F.Supp. 518, 519 (S.D. Miss. 1986); United States Fidelity & Guaranty Co. v. T. K. Stanley, Inc., 764 F.Supp. 81, 83 (S.D. Miss. 1991).

Thus, in order for the causative act to be covered, the act that caused property damage must be either unexpected or unintended from the standpoint of the insured, regardless of whether the consequences resulting therefrom are expected or intended. T. K. Stanley, 764 F.Supp. at 83. Where the resulting damage is a natural consequence of an insured’s intentional conduct, the insured’s action cannot be considered accidental, thereby precluding a finding of an occurrence. See U.S.F.&G. V. B&B Oil Well Serv., 910 F.Supp. 1172, 1182 (S.D. Miss. 1995); Meridian Oil Prod., Inc. v. Hartford Accident & Indem. Co., 27 F.3d 150,152 (5th Cir. 1994); Snydergeneral Corp. v. Continental Ins. Co., 133 F.3d 373, 376-77 (5th Cir. 1998).

The Mississippi Supreme Court has concluded that a claim for “bodily injury” or “property damage” resulting from intentional conduct which causes foreseeable harm is not covered by a Commercial General Liability Insurance Policy, even when the actual injury or damages are greater than expected or intended. USF&G v. Omnibank, 812 So.2d 196 (Miss. 2002). This case involved a borrower’s claims against a lender to recover for forced placement of collateral protection insurance. Construing and reconciling two of its prior opinions addressing the

“occurrence” language in question, the Court concluded that a claim resulting from intentional conduct which caused foreseeable harm was not the result of an “occurrence,” which is required in order to trigger the bodily injury or property damage coverages under Coverage A of a CGL policy, even where the actual injury or damages exceed that which would be expected or intended. This would also apply to homeowner’s liability coverage. An “occurrence” is required to trigger coverage for “bodily injury” or “property damage.”

The Fifth Federal Circuit Court of Appeals has extended this rationale to construction cases, particularly one in which a subcontractor was hired to install waterproofing membrane but did a negligent job, which produced a loss that the insured had to pay to its customer. In a suit seeking recovery against the insurance company for the amounts paid to the customer by the general contractor, the Federal Court held that there was no “occurrence” as that term was defined in the policy, as the insured intended to hire the subcontractor and it was reasonably foreseeable that negligent work by the subcontractor would cause damage. ACS Construction Company, Inc., v. CGU, 332 F.3d 885 (5th Cir. 2003). This case has been followed closely in the U. S. District Court for the Southern District of Mississippi in a number of other subsequent construction and non-construction cases. The inquiry is whether the insured intended the act, not whether the consequences were necessarily intended.

In Fairmont Specialty Ins. Co. v. Smith Poultry & Farm Supply, Inc., 2006 WL 2077584 (S.D. Miss. July 24, 2006), Fairmont insured Smith Poultry & Farm Supply, Inc. (“Smith”) under a standard commercial general liability policy. In 1995, Smith and William White, Jr. (“White”) entered into a written contract for the construction of five commercial chicken houses to be built by Smith (a general contractor) for White (owner). White complained to Smith of defective workmanship and defective materials with specific complaints being strapping, electrical problems, and leaks in the roof. White sued Smith, alleging defective materials and workmanship in the construction of the five chicken houses. White also alleged failure to repair, breach of warranty, and emotional distress. The Fairmont policy defined an “occurrence” as “an accident, including continuous and repeated exposure to substantially the same general harmful conditions.” “Accident” was not defined in the policy, as often it is not in CGL policies. Ultimately, the court held that a claim for defective construction, whether negligent or intentional, is not covered under the “occurrence” definition contained in the policy.

In Acceptance Ins. Co. v. Powe Timber Co., Inc., 219 Fed. Appx. 349 (5th Cir. 2007), Powe was insured by Acceptance pursuant to a standard commercial general liability policy. Powe was sued by more than 1,000 plaintiffs, alleging Powe sold or gave discarded wood chips to the public as firewood, and that Powe failed to warn them of the wood’s toxic properties. An “occurrence” was defined in Acceptance’s policy as an “accident.” Reciting the law, the court explained:

Under Mississippi law, to determine whether an incident constituted a covered occurrence, or accident, the pertinent question is whether the underlying actions

of the insured were intentional. An incident is not an “occurrence,” and is therefore not covered under the policy if “whether prompted by negligence or malice, (1) [the insured]’s acts were committed consciously and deliberately, without the unexpected intervention of any third force, and (2) the likely (and actual) effect of those acts was well within [the insured]’s foresight and anticipation.

Id. (citing Allstate Ins. Co. v. Moulton, 464 So. 2d 507, 509 (Miss. 1985)).

The court found that (1) there was little question that Powe intentionally did not include a warning with the wood chips, although Powe knew the wood had been treated, and (2) since Powe knew the wood had been treated with various chemicals, the resulting injuries were within its foresight. The court found no coverage, since there was no “occurrence.”

In another case, Mendrop v. Shelter Mut. Ins. Co., 2007 WL 4200827 (N.D. Miss. Nov. 26, 2007), Blake and Lynn Mendrop were insured under a homeowner’s policy issued by Shelter. The Mendrops acted as their owner contractors in building the covered dwelling. After living in the home for a brief time, they sold it to William and Sharon Montgomery. The Montgomerys filed suit against the Mendrops, alleging misrepresentations, failure to disclose numerous allegedly defective conditions, and negligent construction of the home. The Mendrops submitted the claim to Shelter, and Shelter denied coverage. The policy defined an “occurrence” as “an accident including injurious exposure to conditions, which results, during the policy term, in bodily injury or property damage.” As to the claim for defective workmanship, the court found that, “a survey of the case law reveals that a majority of courts to address the issue have determined that defective workmanship which results in damages only to the work product is not an occurrence.”

Similar to Mendrop, the defendant in Nationwide Mut. Ins. Co. v. Panther Creek Const. Co., Inc., 2008 WL 886047 (S.D. Miss. Mar. 30, 2008) sought coverage under its standard commercial general liability policy for a claim filed against it for defective workmanship by Kenneth and Donna Lucas. However, citing Moulton, Omnibank, ACS, and Powe, the court reasoned “inasmuch as the Lucases’ claims are based on the defendants’ intentional conduct, this court finds that Nationwide Mutual has no duty to provide a defense on behalf of Panther Creek....”

Finally, in QBE Ins. Corp. v. Brown & Mitchell, Inc., 591 F.3d 439 (5th Cir. Miss. 2009), B&M sought coverage under a standard commercial umbrella liability policy purchased from QBE. Big Warrior Corporation hired B&M to provide engineering services in conjunction with Big Warrior’s installation of a forced main sewer line. One of Big Warrior’s employees was killed while assisting one of B&M’s employees with taking measurements in a trench. After B&M was sued by the deceased’s beneficiaries, QBE filed a declaratory judgment action, seeking a determination that

its policy provided no liability coverage to B&M. Citing all of the previous cases, the court found no “occurrence” since “all of the allegations involve intentional actions and/or inaction, and harm that was foreseeable for such actions and/or inaction.”

B. Bodily Injury

Typical CGL policies define “bodily injury” as “physical injury, sickness, or disease sustained by a person, including death resulting from any of these at any time.” Allegations in a complaint of physical injury generally will constitute a covered injury.

C. Property Damage

“Property damage” is defined as “physical injury to tangible property, including all resulting loss of use of that property” and “loss of use of tangible property that is not physically injured.”

Based on the wording of the insuring agreement and the policy definitions, courts have generally reasoned that pure economic losses from an insured’s alleged breach of contract do not constitute “property damage” as defined in the policy. See State Farm Fire & Cas. Co. v. Brewer, 914 F.Supp. 140 (S.D. Miss. 1996); Snug Harbor, LTD. v. Zurich Ins., 968 F.2d 530 (5th Cir. 1992)(Texas law); Siciliano v. Hudson, 1996 WL 407562 (N.D. Miss. 1996). Under this reasoning, a claim for breach of contract and strictly economic losses would arguably not qualify as “property damage” under the policy definition.

In cases of defective construction alone, there is no “physical injury to tangible property” because the damaged property is limited to the insured’s work itself. In other words, the insured’s work did not *cause* physical injury to tangible property. Instead, the insured’s work *was* the damaged property. Accordingly, where the insured’s work is the only damaged property, there is no “property damage” as that term is defined in the policies.

D. Defective Workmanship

Typically, claims of defective workmanship do not constitute an “occurrence,” i.e., an accident, under commercial general liability policies.” This premise was first recognized in the Mississippi Supreme Court decision of Womack v. Employers Mutual Liability Ins. Co. of Wisconsin, 233 Miss. 110, 101 So.2d 107 (1958), and was later reaffirmed in Moulton and Omnibank. See U.S. Fidelity & Guaranty Co. v. Omnibank, 812 So.2d 196 (Miss. 2002); Allstate Ins. Co. v. Moulton, 464 So.2d 507 (Miss. 1995). The Fifth Circuit Court of Appeals addressed this issue and, in doing so, reaffirmed the holdings of Moulton and Omnibank. See ACS Const. Co., Inc. of Mississippi v.

CGU, 332 F.3d 885 (5th Cir. 2003). See also *Architex Ass'n v. Scottsdale Ins. Co.*, 27 So. 3d 1148 (Miss. 2010).

XVI. Mechanic's Liens

A mechanics' lien commences from the time of making the contract or from the commencement of the work on the ground toward the erection of the building; and if at that time the title of the party contracting is not in such a condition as to be subject to the lien, it will attach to the property upon the completion of the title to it. Ivey v. White, 50 Miss. 142 (1874) (citing Bell v. Cooper, 26 Miss. 650 (Miss. Err. App. 1854)). The Mississippi Supreme Court, in Jones Supply Co. v. Ishee, 163 So. 2d 470, 472 (Miss. 1964), stated "[m]echanics' and materialmen's liens are not recognized at common law nor in equity. They are creatures of and dependent upon statute." Therefore, statutory prerequisites must be strictly complied with for the lienor to gain the benefits offered by the statute. Id. Put differently, law governing mechanics' and materialmen's liens is the product of legislative enactments and parties hold a lien against property only to the extent they have brought themselves within the terms of the statute. Riley Bldg. Supplies, Inc. v. First Citizens Nat'l Bank, 510 So. 2d 506 (Miss. 1987).

On April 11, 2014 Mississippi Code Annotated Sections 85-7-181 through 85-7-185 relating to mechanic and contractor liens were repealed by 2014 Miss. ALS 487 and the legislature enacted Miss. Code Ann. Sections 85-7-401 through 85-7-433. Mississippi Code Annotated Section 85-7-403 provides that contractors, subcontractors and materialmen furnishing material for the improvement of real estate shall each have a special lien on the real estate or other property for which they furnish labor, services or materials. Miss. Code Ann. § 85-7-403. The lien may attach to the real estate of the owner for which the labor, services or materials are furnished if they are furnished at the instance of the owner, design professional or contractor or a subcontractor having direct privity of contract with a contractor, and shall include the value of work done and labor, services or materials furnished. Id. No lien shall exist in favor of any contractor or subcontractor who is not licensed. Id.

In order for a lien to be effective and enforceable, it must meet the following requirements: (1) substantial compliance by the party claiming the lien with the party's contract, subcontract or purchase order for work performed; (2) The filing for record of the claim of lien in the office of the clerk of the chancery court of the county where the property is located within ninety (90) days after the claimant's last work performed. Miss. Code Ann. § 85-7-405. The statute provides a form for the lien and requires that it state its expiration pursuant to Section 85-7-421(1) and a notice to the owner of the property that the owner has the right to contest the lien. Id. Within two business days after the lien is filed the claimant must send a copy of the claim to the property owner. Id.

A payment action for the recovery of the lien amount must be commenced within one hundred eighty (180) days after the lien is filed. Id. A lis pendens notice shall be filed with the commencement of the action with a copy to the owner and contractor. Id.

The court, in its discretion, may award reasonable costs, interest and attorney's fees to the prevailing party in an action against the owner to enforce a lien against the property. Id.

As to single-family residential construction only, as a condition precedent of any right to a special lien under Section 85-7-403 in favor of a subcontractor, materialman or design professional not in privity with the owner, the claimant must provide the owner a pre-lien written notice at least ten (10) days before filing a claim of lien under Section 85-7-405, which can be evidenced by any reliable means of delivery. Miss. Code Ann. § 85-7-409.

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.